



**RIGHT OF ROMA TO EDUCATION:
EQUAL ACCESS BY LAW AND REALITY
IN CENTRAL AND EASTERN EUROPE**

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EXECUTIVE SUMMARY

The thesis analyzes the coherence between the obligations undertaken by Hungary and Russia according to the international and national law on education and their fulfillment with regard to Roma in practice. It is primarily aimed at the evaluation of the observance of the non-discrimination provisions in the field of education by the countries concerned. For this purpose, the right to education is demonstrated in its dimensions as one of the fundamental human rights, as a minority right and in conjunction with the ban of discrimination. The scope of equal access to education is examined on the basis of international and domestic legislation as well as significant research on the topic. The thesis further focuses on the real conditions Roma children obtain education in through dealing with main violations of their right to study on equal basis with other pupils. It is illustrated by cases occurred in Russia and Hungary and the court decisions on them (if any); then recent practice of the European Court of Human Rights is considered in comparison with domestic jurisprudence. To overcome discrimination against Roma in education, some measures are already taken in the European countries as the thesis also shows, though they have to be developed through performance of recommendations given by international and national human rights agencies. It is finally concluded that successful achievement of equal access to education for Roma in Russia requires combination of courts' findings and exchange of positive practices to be implemented by state authorities and educational institutions.

Introduction

Today the 2005-2015 Decade of Roma Inclusion is in its middle, and numerous programs for Roma integration into society of the European countries they are living in have been implemented. However, in the field of education further coordinated effort is needed, since Roma are still far from the majority population in their schooling opportunities. What are the major differences in the realization of equal access of Roma to education in the countries of Central and Eastern Europe, in the member states of the European Union and non-members though parties to the 1950 European Convention on Human Rights and Fundamental Freedoms, in the countries which joined the Decade of Roma Inclusion and which did not, the countries where Roma National plan was adopted and those where it was not? How the equality in educational process for Roma was addressed on the regional level by the European Court of Human Rights? And, the most important, which positive practices can be applied to improve the conditions of education of Roma where it is necessary?

To answer these questions, a comparative research of Hungary and Russia on legal regulation of the right to education and on the case studies related, including those of the European Court, was held. The thesis made an attempt to evaluate the gap between equal access of everyone to education provided by law and the real situation faced by Romani students in practice in the jurisdictions concerned. For this purpose, legal and alternative ways to bridge the gap were tackled.

The previous research regarding the topic of this thesis is considerable, though it still does not fully overlap all the issues discussed in the paper. Theoretical framework of the right to education taken together with the guarantee of non-discrimination derives from the fundamental principles of human rights as proclaimed by International Covenants, Universal Declaration of Human Rights and other international and regional treaties with exhaustive comments thereto and research thereupon. However, the concept of equality particularly in the

field of education, did not stay a firm model once appeared, but developed according to the challenges of the time. Thus it was reflected in recent EU Directives, the newly adopted Declaration of Principles on Equality and other documents, where non-discrimination became an independent right to be protected. Right to education has developed into more than a social right as was laid down in the Covenants. These tendencies underline the crucial meaning of education in human life at present days.

Status of minorities has always been a debatable question among lawyers and researchers. In spite of this rights of minorities are specially protected under international, regional and domestic norms because of their disadvantaged position in most of cases. The right of minorities to education was formulated taking into account their ethnic, linguistic and cultural characteristics.

Roma is the largest minority in Europe, but at the same time a vulnerable one. A large amount of research was completed on Roma, especially in the recent decade, when the problems of this ethnic group received attention of intergovernmental organizations, NGOs and authorities of all levels. Violations of their right to education became an object of monitoring, reports and recommendations of respective bodies.

Facts of inequality in education Roma are subject to are widely known to European society. In Hungary, for example, these cases were made public and sometimes properly responded, as it follows from various reports and other materials on the issue. The decisions of the European Court of Human Rights, at first stage, on *D.H. v. Czech Republic*, later on *Sampanis v. Greece* and finally, this year, on *Orsus v. Croatia* – condemned segregation against Roma in schools all over Europe. Now the precedents are the lesson for all countries which fail to provide equal access to education for Roma.

However, in Russia neither access of Roma to education is well-researched nor the public is familiar with its violations. Because of huge territory and numerous problems of

human rights to be solved, added to marginalized and insecure position of Roma in the state the issue of obtaining education by Roma being actual for concrete localities where Roma settlements exist was not paid necessary attention. The cases of violations of Roma children's rights at school often resemble those occurred in Central Europe, but unfortunately are rarely addressed. After mentioning the problems of equal access of Roma to education in reports on the rights of this group in general, an up-to-date report on the discrimination of Roma to education was recently published.

As it was noted, the obstacles of equal access of Roma to education are more or less common for the countries of the region considered. Already existing European practice shall be obviously a great support for Russian lawyers who never dealt with this sort of assistance. Roma rarely apply to the legal aid, and they are not always aware of the fact of violation suffered by the child at school, as it happened in *D.H.* But as it will be stated in this thesis, the right to education is not merely a right, but an obligation, to be performed by parents, school personnel, and the state itself. Therefore, legal means jointly with other instruments summarized below should be applied to improve the situation by all stakeholders including Roma families.

Cases involving the right of Roma to education are new for Russian lawyers, because the practice is in the stage of its creation now. It is essential for them to know not only domestic law, but international and regional norms and jurisprudence of the European Court of Human Rights, since Russia is under the Court's jurisdiction and its judgments, especially those of Grand Chamber, are of great importance for further protection of the rights of Roma applicants. The Court's findings together with positive steps widely implemented in Central European countries, on the example of Hungary, have all grounds to be implied for the best interests of Roma students in Russia.

CHAPTER 1. LITERATURE REVIEW

1.1. Theoretical Framework: Key Definitions

The Principle of Non-discrimination

Non-discrimination is the well-established principle of fundamental human rights, among them, the right to education.

In the book “Minorities in International law” Gaetano Pentassuglia sets forth the historical background and implication of the principle of non-discrimination, *inter alia*, towards minorities.

The principle of non-discrimination is stated in the UN Charter (a.1, para.3, a.55 (c)) and Universal Declaration of Human Rights (hereinafter – UDHR) (a.2).¹ The principal international treaties contain anti-discrimination clauses: 1966 International Covenants on Civil and Political Rights (hereinafter – ICCPR) and on Economic, Social and Cultural Rights (hereinafter – ICESCR), International Convention on the Elimination of All Forms of Racial Discrimination (1965) (hereinafter – CERD), UN Convention on the Rights of the Child (1989) (hereinafter - CRC), European Convention of Human Rights and Fundamental Freedoms (1950) (hereinafter – ECHR) and others.²

Art.2(1) of the ICCPR declares the obligation of each State Party “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.³

The prohibition of discrimination is a part of customary international law that was proven in numerous cases of the International Court of Justice (hereinafter – the ICJ) and sometimes is recognized as a peremptory norm of international law - *jus cogens*.⁴

¹ Gaetano Pentassuglia, *Minorities in International Law. An Introductory Study*. Council of Europe, 2002, p.86

² *Ibid.*; Rhona Smith, *Textbook on International Human Rights*, Oxford University Press, 2005, p.184

³ 1966 International Covenant on Civil and Political Rights, a.2(1)

⁴ *Ibid.*; Report of International Law Commission; 53rd session (UN Doc. A/56/10, Supp.10, 2001), p.208.

As the Human Rights Committee (hereinafter – HRC) defined in its General Comment No.18 (1989), discrimination means “any distinction, exclusion, restriction or preference which is based on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and obligations”.⁵

While art.2 of the ICCPR obliges States Parties to protect the rights of the persons on their territory without any distinction, art.26 contains provision prohibiting discrimination under the law and in fact as an autonomous right.⁶

The protection from discrimination includes defense from state and private actors.⁷

Pentassuglia states that “in international human rights law equality and non-discrimination constitute “twin” components of a unitary concept”⁸ and include abstention from negative distinction on any ground and positive discrimination.⁹

Some authors as Mark Bell examine non-discrimination together with the concept of equality, since non-discrimination is an expression of equality, which can be formal or substantial. Mark Bell in his articles defines these types of equality as “legal articulation”¹⁰ of the non-discrimination principle. Formal equality means prohibition of direct discrimination in the legislation.¹¹ Substantive equality is intended to provide equal opportunities for all groups of people and represents a group-oriented approach.¹² The concept of non-discrimination can be found in the EU Charter of Fundamental Rights and relevant Directives

⁵ General Comment No.18, Non-discrimination, 1989, para.7

⁶ *Ibid.*, para.12

⁷ Gaetano Pentassuglia, *Supra note 1*, p.89; Bruce Abramson, Article 2. The Right of Non-Discrimination, in: A. Alen, J. Vande and others (Eds.). *A Commentary on the UN Convention on the rights of the Child*, Martinus Nijhoff Publishers, Leiden, 2008, p.103

⁸ Gaetano Pentassuglia, *Supra note 1*, p.89

⁹ *Ibid.*

¹⁰ Mark Bell, The Right to Equality and Non-Discrimination, in: Tamara K. Harvey and Jeff Kenner (Eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights – a Legal Perspective*, Oxford, 2003, p.92.

¹¹ Mark Bell, *Racism and Equality in the European Union*. Oxford, 2008, p.28

¹² Mark Bell, *Supra note 10*, p.94

of EU.¹³

Bell stresses that the application of the non-discrimination principle may depend on the justifications allowed, though it is difficult to justify different treatment on such grounds as race, nationality or sex, according to the practice of the European Court of Human Rights (hereinafter – the ECtHR).¹⁴

Michael Banton considers that different treatment is justifiable in cases known as affirmative action in the US or positive action in the UK, which are intended to compensate the rights for certain groups, such as women or African Americans.¹⁵ Otherwise, if the person is treated less favorably because of one's belonging to the disadvantaged group, the evidence of such inequality must be submitted in the court.¹⁶

In conformity with the observations of the HRC, the distinction in treatment should have a legitimate aim (protection of the rights of others, public safety, national security, etc.), and the measures taken must be proportionate to that aim;¹⁷ only in this case the difference will not be considered discriminatory. A proportionality and reasonableness test is applied to find a justification in certain case.¹⁸

Non-discrimination is one of the principles forming the core of the human rights based approach (HRBA), and it signifies that the protection of vulnerable groups is a priority.¹⁹

Non-discrimination as a principle of HRBA contains obligation for the state and third parties to treat everyone on equal basis.²⁰ In the view of O'Flaherty a lot of attention is often

¹³ *Ibid.*, p.97

¹⁴ *Ibid.*, p.93

¹⁵ Michael Banton, Discrimination Entails Comparison, in: Titia Loenen and Peter R. Rodriguez (Eds.), *Non-Discrimination Law. Comparative Perspectives*. Kluwer Law International, 1999, p.109.

¹⁶ *Ibid.*, p.110

¹⁷ General Comment No.18, *Supra note 5*, para.13

¹⁸ Bruce Abramson, *Supra note 7*, p.60

¹⁹ Patrick Twomey, Human Rights-Based Approaches to Development, in: Balderin, Mashood, McCorquodale, Robert. *Economic, Social and Cultural Rights in Action*. Oxford University Press, 2007, p.50.

²⁰ Michael O'Flaherty, Towards Integration of UN Human Rights Treaty Body Recommendations, in Balderin, Mashood, Robert McCorquodale, *Economic, Social and Cultural Rights in Action*. Oxford University Press, 2007, p.35

paid to tiny groups for the fulfillment of this principle.²¹

Martin McEwen outlines the purposes of anti-discrimination legislation, which may be divided into 3 groups:

- 1) Formal remedies for those suffering from discrimination by the state or individuals;
- 2) Promotion of preventive measures against discrimination through legislation;
- 3) Combating social, political and other factors which cause discrimination and racial disadvantage.²²

MacEwen proposes a notion of *structural disadvantage*, which is a factor linked to other factors as disadvantage invoked by lack of education, training, skills or language and expressed in the absence of authorities' support.²³ Structural disadvantage is interrelated with indirect discrimination and institutional discrimination when the government failed to provide appropriate remedy where it is necessary.²⁴

Under the terms of the EU Directive EC/2000/43 known as Racial Equality Directive (hereinafter – the RED) the principle of equal treatment means prohibition of “direct or indirect discrimination based on racial or ethnic origin”.²⁵ *Indirect discrimination* according to this act is constituted where “apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”.²⁶

Direct discrimination is found in the situation “where one person is treated less favorably than another is, has been or would be treated in a comparable situation on grounds

²¹ *Ibid.*, p.38

²² Martin MacEwen, Comparative Non-Discrimination Law: an Overview, in Titia Loenen and Peter R. Rodriguez (Eds.), *Non-Discrimination Law. Comparative Perspectives*. Kluwer Law International, 1999, p.427

²³ *Ibid.*, p.429

²⁴ *Ibid.*

²⁵ Council Directive 2000/43/EC of 29 June 2000, Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, a.2 para.1

²⁶ *Ibid.*, a.2 para.2(b)

of racial or ethnic origin”.²⁷

The newly adopted Declaration of Principles on Equality states a universal right thereto.²⁸ Equal dignity of each human being is recognized and laid down as an unalienable part of a fair society.²⁹ Definition of *substantive equality* adopted by the Declaration overlaps a wider content than that implemented before: its view includes the right to full and effective equality in compliance with the capabilities of each person.³⁰ Therefore, the right to equality consists of “the right to recognition of the equal worth”, “equality before the law” and its protection, equal treatment and equal participation in any area of civil life.³¹ Notably, this right is meant as a free-standing right which can be violated while the breach of the related right is not found and there is no expressed link between discrimination and other rights proclaimed by law.³²

Affirmative action is distinguished from positive discrimination, because while the latter provides sanctions to cease discrimination (as in case with quotas in education, housing or employment in the US), the former is intended to facilitate education, training and work experience in order to assist the members of minority groups to achieve the legal status of majority in the society.³³ For the purposes of the RED, which operates the notion of *positive action*, it is understood as “maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin”.³⁴ The 2008 Declaration of Principles on Equality defines positive action as a part of equal treatment rather than exception thereto.³⁵

²⁷ *Ibid.*, a.2 para.2(a)

²⁸ The Declaration of Principles on Equality: A Contribution to International Human Rights, 2008, Commentary by Dimitrina Petrova, Executive Director, The Equal Rights Trust, p.29, available online at <http://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20cropped%2016%20Oct%20dimitrina%20comment.pdf> (last accessed on 11th August, 2010)

²⁹ *Ibid.*, p.29-31

³⁰ Martin MacEwen, *Ibid.*, p.430

³¹ The Declaration of Principles on Equality, *Supra* note 28, p.30

³² *Ibid.*, p.32-33

³³ Martin MacEwen, *Supra* note 22, p.431

³⁴ Council Directive 2000/43/EC of 29 June 2000, *Supra* note 25, a.5

³⁵ The Declaration of Principles on Equality, *Supra* note 28, p.32

The non-discrimination principle is particularly important for the representatives of different social groups, such as national minorities, women, children, older or disabled people.

As regards children, this group may be subject to age discrimination, as it was constituted by the European Children's Network (Euronet), which claimed that young age was a ground for discrimination against the children.³⁶ Bell emphasizes that while other groups of the society can represent themselves, the adults are called upon to guarantee the rights of the children and to present their interests.³⁷

Bruce Abramson in his commentary to the UN Convention on the Rights of the Child analyzes the right to non-discrimination in general and with regard to children. The author underlines, that the right to non-discrimination works in conjunction with other, substantive rights, as an umbrella right.³⁸

Some substantive rights contain built-in anti-discrimination clauses, which are typically formulated as "without any discrimination as to race", for example the right of children to protection.³⁹ Such clauses are helpful in enforcement of the right to non-discrimination.

There are equality provisions in the international human rights treaties which forbid certain types of discrimination.⁴⁰

The right of non-discrimination consists of three *elements*:

- 1) The prohibition of differential treatment on forbidden grounds (race, sex, etc.);
- 2) The prohibition of impairment of the rights-holder's enjoyment of the rights;
- 3) Protected interests (substantive rights).⁴¹

The right of non-discrimination has three *functions*:

- 1) Prevents offences to human dignity;

³⁶ Mark Bell, *Supra note 10*, p.104.

³⁷ *Ibid.*, p.105

³⁸ Bruce Abramson, *Supra note 7*, p.7

³⁹ ICCPR, *Supra note 3*, a.24(1)

⁴⁰ Bruce Abramson, *Supra note 7*, p.12

⁴¹ *Ibid.*, p.29

- 2) A trump to politics (prevention of discriminatory laws);
- 3) Affirms the moral norm of non-discrimination.⁴²

Freedom from discrimination is an absolute right. The UN General Assembly declared that no justification can exist for racial discrimination.⁴³

Abramson distinguishes the following notions:

- 1) ***De jure discrimination*** – differential treatment imposed by law;
De facto discrimination – discriminatory practice by state agents' own initiative.⁴⁴

2) ***Direct discrimination*** – treating one person less favorably than another person on the ground of race (or sex, etc.);

Indirect discrimination –

- (a) An apparently neutral provision
- (b) That puts members of one race (or sex, etc.) at a disadvantage in comparison to members of another race (or sex, etc.), and
- (c) That cannot be objectively justified by having a legitimate aim, and by using a means that is appropriate and necessary for achieving that aim – these definitions were adopted by the author from the EU Directives 2002/73/EC and 2000/43/EC.⁴⁵

Structural discrimination – is a term closely connected to indirect discrimination, originally it stood for *de facto* discrimination. Nowadays, Abramson claims, while indirect discrimination is a legal notion, other terms represent abstract definitions, when the actors and actions are unidentified, such as systemic discrimination or institutional racism.⁴⁶

The “***purpose and effect***” clause was established in the CERD and CEDAW definitions and represents the two ways of impairing the rights. This definition is not referred to direct and indirect discrimination, because in the most of cases of indirect discrimination

⁴² *Ibid.*, p.39

⁴³ 1965 International Convention on the Elimination of All Forms of Racial Discrimination, Preamble.

⁴⁴ Bruce Abramson, *Supra note 7*, p.51

⁴⁵ Council Directive 2002/73/EC, a.1, OJ, L269; Council Directive 2000/43/EC, a.2 (2), OJ, L180.

⁴⁶ Bruce Abramson, *Supra note 7*, p.70

there is no intention to discrimination.⁴⁷ However these definitions are interrelated since they may contain separate components of each other.⁴⁸

Affirmative action may be non-discriminatory and discriminatory, whereby the latter “uses race, sex, etc. discrimination as the means for reaching policy objectives”.⁴⁹

Now there are various shapes of both kinds of affirmative action - quotas and bonuses, and different terms are used for them, such as positive action, special measures and positive discrimination.⁵⁰ Affirmative action is necessary when prohibition of discrimination alone is not enough to assist the disadvantaged group in compensating their unbalance in the society to the conditions of the majority.

According to the international anti-discrimination norms (a.2 (1) of ICCPR, a.2 (1) of CRC) discriminatory affirmative action must be forbidden, since it violates the absolute right to non-discrimination. Non-discriminatory affirmative action, *a contrario*, is not only lawful; it is a duty of a state.⁵¹

Segregation, i.e. separation of certain ethnic or racial groups represents a particular pattern of direct discrimination. It will be discriminatory when it meets two principal characteristics: 1) the distinction is made without the consent of segregated persons; 2) the quality of services, living conditions, etc. of segregated people is lower than that of others.⁵² The practices of segregation are usually accompanied by a generally hostile attitude towards discriminated persons.⁵³

Segregation is condemned by international human rights instruments. The CERD prohibits segregation and apartheid in a.3,⁵⁴ and the UN Committee on the Elimination of

⁴⁷ *Ibid.*, p.72

⁴⁸ *Ibid.*, p.73

⁴⁹ *Ibid.*, p.75

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, p.80

⁵² Dimitrina Petrova, From segregated to integrated education of the Roma in Europe, in *Separate and Unequal*, Budapest, Public Initiative Law Institute, 2004, p.24

⁵³ *Ibid.*

⁵⁴ CERD, *Supra* note 43, a.3

Racial Discrimination in its Recommendation obliges the states “to eradicate all practices of this nature”.⁵⁵ The Committee emphasizes that segregation may not necessarily be dependent of the intention of the state, but may be “a result of the actions of private persons”.⁵⁶

Segregation is a grave violation of human dignity and constitutes inhuman and degrading treatment due to the level of its severity.⁵⁷ Segregation in education is a sufficiently severe form of discrimination. Thus, Romani pupils subject to this kind of segregation had suffered serious educational, emotional and psychological harm which had caused, ‘*inter alia*’, stigmatization and denial of the benefits of a multicultural educational environment.⁵⁸ The European Court of Human Rights stated that discrimination on the basis of race may amount to degrading treatment.⁵⁹

As regards other jurisdictions, The US Supreme Court condemned segregation of minority children in the crucial case of *Brown v. Board of Education* (1954), stressing that such separation “solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to be undone”.⁶⁰

The acute contemporary form of segregation which demands legal action concerns Roma settlements in European countries. Despite their isolated lifestyle, they cannot be denied the rights guaranteed by national and international law. However, the Roma are still suffering segregation practices in housing and especially in education.

National minorities

⁵⁵General Recommendation No.19: Racial segregation and apartheid (a.3), from 18 May 1995

⁵⁶ *Ibid.*

⁵⁷ 1950 European Convention of Human Rights and Fundamental Freedoms, a.3; Anita Danko, Segregation as a Violation of Human Dignity, Roma Education Fund Magazine, Issue No.1, Dec/2007, p.31

⁵⁸ Anita Danko, *Supra* note 57.

⁵⁹ *East African Asians v. UK*, 3 EHRR 76 (1973), para.196; Stigmata, Segregated Schooling of Roma in Central and Eastern Europe, a survey of patterns of segregated education of Roma in Bulgaria, the Czech Republic, Hungary, Romania, and Slovakia. Report of European Roma Rights Centre, 2004, available online at <http://www.errc.org/db/00/04/m00000004.pdf> (last accessed on 10th October 2010), p.18-19; Robert Kushen, Segregated Schools under International Law, in *Separate and Unequal*, Budapest, Public Initiative Law Institute, 2004, p.141

⁶⁰ *Brown v. Board of Education*, 347 U.S. 483 (1954)

Prohibition of discrimination is closely related to the protection of minorities as was pointed out by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities.⁶¹ However, minority protection is wider than special measures for disadvantaged groups.⁶² The special measures are “intended to remedy the structural imbalance between minorities and majorities”⁶³ for the preservation of the integrity of the former.

It is essential to distinguish minority rights and non-discrimination rights. The first must be independent of the second; minorities are entitled to the special rights guaranteed only for these certain groups regardless of whether or not they are subject to discriminatory treatment.⁶⁴

The first provisions on religious and racial equality were included in the League of Nations Covenant, but concerned only the situation of minorities in a few member states. Ultimately, the proposals on minority rights did not enter into force. The transition from the “special system of minority guarantees to a universal system of human rights protection”⁶⁵ occurred in the framework of the UN.

There is no universally accepted definition of national minority in international human rights law. However, specific criteria have been elaborated to identify minorities even before the emergence of the UN. The Permanent Court of International Justice in the *Minority Schools in Albania* case emphasized the purpose of the treaties for the protection of minorities to secure groups which differ from the majority population by their race, religion or language and preserve their special features.⁶⁶ Neither the UN Charter nor UDHR introduced the notion of national minorities due to their orientation towards individual human rights and universal approach.⁶⁷

⁶¹ Gaetano Pentassuglia, *Supra* note 1, p.90

⁶² *Ibid.*, p.91

⁶³ *Ibid.*

⁶⁴ *Ibid.*, p. 93

⁶⁵ *Ibid.*, p.85

⁶⁶ *Minority School in Albania* case, PCIJ, Advisory Opinion of 6 April, 1935, Series A/B No. 64, Text in Hudson, World Court Reports, vol.3 (1938), pp.484-512 at 499, 496

⁶⁷ Steven Wheatley, *Democracy, Minorities and International Law*, Cambridge University Press, 2005, p.10

International Covenants guaranteed to everyone the rights contained therein without discrimination on any ground,⁶⁸ and their provisions protect national minorities by direct wording, as a.27 of the ICCPR or through interpretation of relevant articles, as for example, a.15 of the ICESCR, establishing the right to cultural life⁶⁹ and some others.⁷⁰

Article 27 of the ICCPR became an innovation in human rights law and after being repeated in other international instruments⁷¹ can be recognized a rule of general international law;⁷² sometimes it is even referred to as a peremptory norm of general international law.⁷³ This article sets forth that the States shall not deny the right of their ethnic, religious or linguistic minorities “to enjoy their own culture, to profess and practice their own religion, or to use their own language”.⁷⁴ The right is considered as “additional to all other rights” stated by the Covenant.⁷⁵

But who should be considered minorities for the purpose of the given article? The practice based on individual complaints filed in accordance with the Optional Protocol No.1 to the Covenant does not give a clear answer.⁷⁶ Two notions were suggested by Francesco Capotorti and Jules Deschenes, which have the following common criteria of national minorities:

2. Numerical minority;
3. Non-dominant position of the members;
4. Citizenship of the state;
5. Differences from the rest of the population expressed in language, religion or

⁶⁸ ICCPR, a.2(1), 1966 International Covenant on Economic, Social and Cultural Rights, a.2(2)

⁶⁹ Steven Wheatley, *Supra note 67*, p.11; Roger O’Keefe, The Right to Take Part in Cultural Life Under Article 15 of the ICESCR (1998) 47 International and Comparative Law Quarterly, 904, 916-17

⁷⁰ ICCPR, a.18(1), 19(2), 18(4)

⁷¹ 1989 UN Convention on the Rights of the Child, a.30; GA Res.47/135, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992), a.2(1)

⁷² Steven Wheatley, *Supra note 67*, p.15; *see also* Yoram Dinstein, Collective Human Rights of Minorities (1976) 25 International and Comparative Law Quarterly 102, p.118

⁷³ Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, 31 ILM 1488 (1992), Opinion No.1, para.1(e)

⁷⁴ ICCPR, a.27

⁷⁵ Human Rights Committee, General Comment No.23, Rights of Minorities (Article 27), 1994, p.158, para.1

⁷⁶ Steven Wheatley, *Supra note 67*, p.17

ethnicity/culture;

6. Collective desire to preserve and maintain the group identity, different from the majority population.⁷⁷

Since the principle of non-discrimination requires states to treat all people under their jurisdiction without any distinction, some states may claim that they do not discriminate against any national group; therefore, they don't have minorities.⁷⁸ Hence, non-dominance cannot be a relevant factor when defining minorities.⁷⁹ Numerical size is not crucial – all groups which do not belong to the majority population may be recognized as such (less than 50% of the population). Considering all these factors, and the fact that minorities claim respect of their difference apart from equality, there may be determined the decisive condition – “distinct cultural identity of the group”, which distinguishes “a minority for the purposes of Article 27”.⁸⁰

As regards citizenship, the wording of a.27 appears to be restrictive, limiting its application to the state's citizens. However, neither the interpretation of the ICCPR, nor the object and purpose of the Covenant deny the protection guaranteed by this provision in respect of non-citizens.⁸¹

Common culture is the key characteristic which defines the difference of the minority group from the rest of the population. Culture serves as a basis for the religious, ethnic and language differentiation.⁸²

For the purposes of the art.27 of the ICCPR minorities are groups which are willing to maintain their specific features. According to international law assimilation of the members of minority groups can be realized only with their consent.⁸³ However, integration policies of

⁷⁷ *Ibid.*, p.18-19

⁷⁸ Human Rights Committee, General Comment No.23, *Supra note 75*, para.4

⁷⁹ Steven Wheatley, *Supra note 67*, p.23

⁸⁰ *Ibid.*, p.22-23

⁸¹ *Ibid.*, p.25; Human Rights Committee, General Comment No.23, *Supra note 75*, para.5.1; Human Rights Committee, General Comment No.15, The position of aliens under the Covenant, 1986, para.7

⁸² Steven Wheatley, *Supra note 67*, p.28

⁸³ *Ibid.*, p.29

the state are recognized and promoted at the present moment; the integration practice permits each national group to contribute to and share the common heritage⁸⁴ and may be a form of positive action discussed above.

The Framework Convention for the Protection of National Minorities adopted in 1995 by the Council of Europe, contains no definition of “national minority”. This document is based on a “pragmatic approach”, provided that “at this stage, it is impossible to arrive at a definition capable of mustering general support of all Council of Europe member States”.⁸⁵ This omission permits each Member State to define which minorities exist on their territory.⁸⁶ The Convention has the main purpose to create a legal ground regulating as civil and political, as socio-economic and cultural rights, to solve ethnic minority tensions in the post-Communist countries of Central and Eastern Europe.⁸⁷

Minority Rights Group International has elaborated its working definition of minorities: it focuses the activity on “non-dominant ethnic, religious and linguistic communities, who may not necessarily be numerical minorities”.⁸⁸

The authors bring attention to the problems caused by the absence of a generally-accepted notion of minorities;⁸⁹ however, the scope of application of minority rights to certain groups is understood in practically uniform manner that makes it possible to exercise the protection of target groups.

Rights protected by art.27 of the Covenant are individual rights belonging to each member of a minority group, not to the minority as a collectivity.⁹⁰ While the collective

⁸⁴ *Ibid.*

⁸⁵ 1995 Framework Convention for the Protection of National Minorities, Explanatory report, Strasbourg, 1995, para.12

⁸⁶ Perry Keller, Re-thinking Ethnic and Cultural Rights in Europe, Oxford Journal of Legal Studies, Vol.18, No.1 (spring, 1998), p.31; *Gorzelik and others v. Poland (2004)*, Grand Chamber Judgment, para.70

⁸⁷ Perry Keller, *Supra note* 86, p.30

⁸⁸ This definition is based on the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, 1992.

⁸⁹ John Packer, Response: making international law matter in preventing ethnic conflict: a practitioner's perspective 32 New York University Journal of International Law & Politics 715, Spring 2000, p.721; Miriam J. Aukerman, Definitions and justifications: Minority and Indigenous Rights in a Central/ East European context, Human Rights Quarterly, Vol.22, No.4 (Nov.2000), p.2000

⁹⁰ Human Rights Committee, General Comment No.23, *Supra note* 75, para.3.1; *Lovelace v. Canada*,

interest is protected by the ICCPR, the existence of the group is the precondition for exercise of the individual rights granted to its members.⁹¹

The Roma

The Roma population in Europe constitutes at least 8 million people, around 70% of which live in the countries of Central and Eastern Europe.⁹²

Researchers state that the Roma's ancestors left the territory of today's India in the 9th-10th centuries as a “result of Muslim attacks in areas they inhabited”.⁹³ They appeared in Central and Western Europe in the 14th and 15th centuries after Turks invasion in the Balkans.⁹⁴

Unfortunately, in 20th century, when law on the national minorities emerged, Roma issue in Central and Eastern Europe was considered not as an issue of minority rights, but as a social problem, which was solved by force: in the Soviet Union the nomadic way of life was declared a crime under the 1956 Decree;⁹⁵ in Hungary the 1961 Decree negated the minority rights approach and any steps to develop Romani language and culture as segregating and harmful for integration.⁹⁶

At the present day representatives of the Roma minority (regardless of its internal diversity) actively claim cultural recognition and equal rights at the international level in the framework of human rights networks and organizations like UN.⁹⁷ However, the majority of the Roma population still needs legal aid in realization of their basic rights.

Communication No.24/1977, UN Doc. CCPR/C/13/D/24/1977, 30 July 1981, para.17; *Kitok v. Sweden*, Communication No.197/1985, UN Doc. CCPR/C/33/D/197/1985, 30 July 1981, para.9.8; Gaetano Pentassuglia, *Introduction, in Mechanisms for the Implementation of Minority Rights*, Council of Europe Publishing, 2004, p.11

⁹¹Gaetano Pentassuglia, *Supra note 90, Ibid.*

⁹² Fact sheets on Hungary, Ministry of Foreign Affairs, Budapest, 2004, p.1

⁹³ *Ibid.*

⁹⁴ *Ibid.*, p.2

⁹⁵ Decree of the Presidium of the Supreme Soviet of USSR No. 450 of 5 October, 1956 “On Engaging Vagrant Gypsies in Labour.”

⁹⁶ Fact Sheets on Hungary, *Supra note 92*, p.4

⁹⁷ Tracy Smith, Recognizing Difference: the Romani “Gypsy” Child Socialization and Education Process, British Journal of Sociology of Education, June 1997, Vol.18, Issue 2 in Csaba Fenyes and others, Eds., *The Roma Education Resource Book*, Eds., Budapest, 1999, p.7

There is a great diversity of multiple groups within Romani community in Russia. The Roma minority is not homogenous, in spite of the general term Gypsy (*tsigane* in Russian) accepted since the Soviet period for official use.⁹⁸ Various groups differ by their origin and social organization. The following are represented in the regions of Russia: “the *Russian Roma* (and *Latvian, Estonian, Lithuanian* and *Polish Roma*, close to them in language and culture), the *Kelderari*⁹⁹ (or *Kotlyari*), the *Magyars* (*immigrants from Trans-Carpatia*) and the *Luli* or *Mugat* (*immigrants from Central Asia*) in the North-West”, in other parts – Crimean Roma, Servi, Kishinevzi, Plazshuni, Lovari, and Vlachi are present as well.¹⁰⁰

Official data estimate the total number of Roma in Russia as approximately 500 000, though they are not reliable.¹⁰¹ The largest ethnic groups within the Roma in Russia are the Russian Roma, the most integrated into the social life, and the Kelderari group; the latter constitutes 30% of the Roma population in Russia.¹⁰²

Kelderari Roma are the most noticeable Roma group, due to their traditional lifestyle, expressed in compact settling in self-built houses, specific appearance and occupation, preserved by this minority for ages.¹⁰³ However, it is often the Kelderari Roma who suffer various types of discrimination in the enjoyment of their social rights. Poverty, illiteracy and isolation make the Kelderari more vulnerable to discrimination by the authorities and sometimes even by other Roma groups.¹⁰⁴ Therefore, usually the Kelderari Roma are meant when discussing problems of access to housing, education, health care and other social rights, and in particular, the problem of segregation.

The number of Roma population in Hungary may be assessed under the following

⁹⁸ Forced Evictions and the Right to Housing of Roma in Russia. Report by FIDH and ADC Memorial, No.501/2, July 2008, p.8

⁹⁹ Their ethnonym probably originates in the Romanian word for pot or cauldron: ‘caldar’, *Supra note 20*

¹⁰⁰ *Supra note 98*.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ Stephania Kulaeva, Segregation and Discrimination of Kelderary Roma in Russia, IPF Draft Policy Paper, 2006, <http://www.policy.hu/kelderari/IPFDraftKulaeva.htm> (last accessed 20th March, 2010)

¹⁰⁴ *Ibid.*

data:

	<i>Total Population (official) (millions)</i>	<i>Roma Population (official)</i>	<i>Roma Population (estimated)</i>
Hungary (2008)	10,1	189, 984 1,9%	550,000-600,000 5,69% ¹⁰⁵

The Roma (*cigány* in Hungarian) are the largest minority in Hungary. While the numbers submitted by well-informed estimates highly exceed official statistics, some Roma leaders claim that the number of Roma in Hungary is about 800,000.¹⁰⁶ The representatives of this ethnic group live in 2000 of 3200 Hungarian settlements, mostly in villages and economically depressed counties.¹⁰⁷

Among Hungarian Roma diverse groups can also be classified, depending on their language, culture and history. They can be classified into three groups: Romungro, Vlachs or Beas Gypsies.¹⁰⁸ The main difficulties, suffered by Roma in this state, remain poverty, unemployment, which has increased during the transition period, and various forms of discrimination.¹⁰⁹

Therefore, today the Roma represent the largest, but at the same time one of the most vulnerable minorities of Europe, which are still denied equal access to social rights, particularly, through segregation in educational processes.

1.2. The Definition of the Right to Education

The right to education, primarily considered to be a cultural right, is firmly related to

¹⁰⁵ International Comparative Data Set on Roma Education – 2008, http://www.soros.org/initiatives/esp/articles_publications/publications/monitoring_20061218/table_2008.pdf (last accessed 22th March 2010)

¹⁰⁶ Advancing Education of Roma in Hungary, Country Assessment and the Roma Education Fund's Strategic Directions, 2007, p.14

¹⁰⁷ *Ibid.*

¹⁰⁸ Fact Sheets on Hungary, *Supra* note 92, p.3; Advancing Education of Roma in Hungary, *Supra* note 106, p.21

¹⁰⁹ Fact Sheets on Hungary, *Supra* note 92, p.15

other human rights, containing elements of each.¹¹⁰ Manfred Nowak points out, that the right to education serves as a “precondition for the exercise of other human rights”, since the right to vote or freedom of assembly, for example, cannot be exercised without certain level of education.¹¹¹ Consequently, the right to education is a ground for the “access to adequate standard of living”.¹¹²

Economic and social rights, such as the right to work, the right to health, housing and food, and the right to take part in cultural life are not possible to be realized without achieving some minimum level of education.¹¹³ When the citizens of the state effectively enjoy their right to education, they, including marginalized groups, have an opportunity to take active part in all fields of life¹¹⁴ and thus contribute to its development.¹¹⁵ Therefore, being an empowering right, “education benefits societies as well as individuals”.¹¹⁶ Moreover, education empowers a person to claim one’s rights against the state.¹¹⁷

The scope of purposes of education determined by international instruments is broad. The UDHR proclaims that education should be aimed at the full development of human personality and strengthening of human rights,¹¹⁸ promotion of “understanding, tolerance and friendship among all nations, racial or religious groups... and maintenance of peace”.¹¹⁹ Other documents further define the goal of education as eradication of illiteracy¹²⁰ and recognition

¹¹⁰ Manfred Nowak, The Right to Education, in Economic, Social and Cultural Rights, in Asbjorn Eide, Catarina Krause and Allan Rosas (Eds.), *Textbook*, Martinus Nijhoff Publishers, Dordrecht, Netherlands, 1995. P.189; Rhona Smith, *Supra note 2*, p.311

¹¹¹ Manfred Nowak, *Supra note 110*; Denied a future? International Legislation Handbook, Save the Children, 2001, p.12, 16; Fons Coomans, In Search of the Core Content of the Right to Education, in Audrey Chapman and Sage Russel (Eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Intersentia, 2002, p.219; Commentary on Education under the Framework Convention for the Protection of National Minorities, Advisory Committee on the FCNM, Strasbourg, 2 March 2006, ACFC/25DOC(2006)002, p.7

¹¹² Denied a future? International Legislation Handbook, *Supra note 111*

¹¹³ Manfred Nowak, *Supra note 110*

¹¹⁴ Denied a Future? The Right to Education of Roma / Gypsy and Traveller Children in Europe, Summary. Save the Children, 2001, p.26

¹¹⁵ Rhona Smith, *Supra note 2*, p.313

¹¹⁶ CESCR General Comment 13, The Right to Education. Article 13. E/C.12/99/10

¹¹⁷ Fons Coomans, *Supra note 111*, p.219

¹¹⁸ UDHR, a.26(2)

¹¹⁹ UDHR, a.26(2), ICESCR, a.13(1), CERD, a.7, CRC, a.29(1), African Charter on Human and Peoples’ Rights, a.17(3), European Social Charter, a.13(2), Protocol to American Convention of Human Rights

¹²⁰ Arab Charter on Human Rights, a.34

of morals and traditional values.¹²¹

In the ICESCR General Comment the UN Committee on the Economic, Social and Cultural Rights (hereinafter – the CESCR) emphasizes the “vital role” of education in “empowering women, safeguarding children from... exploitation, promoting human rights and democracy, protecting the environment and controlling population growth”.¹²²

The international instruments, reflecting the broad consensus on the issue, demonstrate the two major directions of the educational objectives: the development of personality (personal objective) and the quality of social relations deriving thereof (social objective).¹²³ The close link between these objectives is related to cultural identity of the person, which is protected and developed in the course of implementation of the right to education.¹²⁴

Manfred Nowak names the following aims of education universally recognized and introduced at the Vienna World Conference on Human Rights: to enable a human being to develop freely one’s personality and dignity and to participate actively in the free society with respect for other civilizations, cultures and religions; to develop respect for the parents, values of one’s country and environment, as well as for human rights and maintenance of peace.¹²⁵ The CRC added to this list the respect for other civilizations and indigenous people.¹²⁶

The generation of rights where the right to education belongs is an issue of numerous discussions. As guaranteed by the ICESCR and other documents, it is a social and therefore, second generation right, however some scholars claim it to be a cultural right.¹²⁷ This kind of rights is based on the positive state action (social aspect);¹²⁸ as regards education, there is a

¹²¹ African Charter on Human and Peoples’ Rights, a.17(3)

¹²² CESCR General Comment 13, *Supra note 116*

¹²³ Denied a future? International Legislation Handbook, *Supra note 111*

¹²⁴ *Ibid.*

¹²⁵ Manfred Nowak, *Supra note 110*, p.195; *See also* Manfred Nowak (ed.), World Conference on Human Rights, The Contribution of NGOs. Reports and Documents, 1994, p.168

¹²⁶ CRC, a.29(1)

¹²⁷ Manfred Nowak, *Supra note 125*, p.196

¹²⁸ Fons Coomans, *Supra note 111*, p.220

duty of the state to maintain the schooling system and provide access to it without discrimination.¹²⁹

Education is one of the few human rights with a universally acknowledged corresponding obligation of the beneficiaries to exercise this right according to the principle of compulsory primary education.¹³⁰ While the form of education is left for the parents to choose, there is no choice for parents or guardians whether to avail the child for education or not.¹³¹

The right to education also may be referred to the first generation of rights, since it entails negative obligation of the state¹³² (freedom aspect),¹³³ namely, not to deny the right to anyone¹³⁴ that means equal access to school, and not to interfere in the liberty of parents to choose the form of education.¹³⁵ Thus, this aspect is expressed in freedom to choose (the form of education,¹³⁶ the language of instruction)¹³⁷ and freedom to establish (private educational institutions).

Nowak links education with the solidarity rights of the third generation of human rights.¹³⁸ It is supposed to “promote and encourage international cooperation... in particular for the elimination of illiteracy throughout the world” and facilitating access to knowledge, that will contribute to realization of the collective right to development.¹³⁹

Education can be defined as a process where three actors participate: the person providing education (the teacher, the parents), the person receiving education (the child, the student) and those who are “legally responsible for the one who receives education”, - all of

¹²⁹ *Ibid.*

¹³⁰ Fons Coomans, *Supra note* 111, p.197; ICESCR, a.14; General Comment No.11 Plans of Action for Primary Education, (a.14): 10/05/99, E/C.12/1999/4, para.6

¹³¹ Rhona Smith, *Supra note* 2, p.315; General Comment No.11, *Supra note* 130

¹³² Manfred Nowak, *Supra note* 125

¹³³ Fons Coomans, *Supra note* 111, p.220

¹³⁴ 1950 European Convention on Human Rights and Fundamental Freedoms, Protocol No.1, a.2

¹³⁵ ICCPR, a.18(4), ICESCR, a.13(3).

¹³⁶ ICESCR, a.13(3)

¹³⁷ *Belgian Linguistic Case* (1968), Judgment of the European Court of Human Rights, Series A, vol.6, at 31; ICESCR, a.13(4)

¹³⁸ Manfred Nowak, *Supra note* 125, p.198

¹³⁹ *Ibid.*

them have corresponding rights and duties.¹⁴⁰

Fons Coomans proposes six core elements of the right to education. They include:

- 1) Access to education on a non-discriminatory basis, regardless of the ground of distinction;¹⁴¹
- 2) The right to enjoy free and compulsory education;¹⁴²
- 3) Special facilities for persons with an educational deficit, i.e. street and working children, migrants or disabled persons;¹⁴³
- 4) Quality of education, assessed with the results of students' tests, teachers qualifications, availability of schooling materials and others;¹⁴⁴
- 5) Free choice of education – without intrusion of state or third parties, with regard to private institutions and education on the basis of the family's religious convictions;¹⁴⁵
- 6) The right to be educated in the language of one's own choice, '*inter alia*', minority language.¹⁴⁶

Positive obligations of the state with regard to the right to education can be classified as follows:

- the obligation "to respect" – relates to the freedom dimension of the right and requires the state not to act contrary to the liberty to choose and the liberty to establish, "to respect individual freedoms without interference",¹⁴⁷

- the obligation "to protect" – means the state's duty to guarantee the enjoyment of rights among private persons and groups, to combat violations by third parties, i.e. to perform its positive action;¹⁴⁸

¹⁴⁰ *Ibid.*, p.190

¹⁴¹ Fons Coomans, *Supra note 111*, p.225;

¹⁴² *Ibid.*

¹⁴³ *Ibid.*, p.229

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ Fons Coomans, *Supra note 111*, p.230

¹⁴⁷ *Ibid.*, p.243

¹⁴⁸ *Ibid.*

- the obligation “to fulfill” – signifies the requirement for the state to make education available and accessible for everyone and take steps for the maintenance of this accessibility (legislation, policy measures and material support).¹⁴⁹

The state’s obligations are also classified into the obligations of conduct and obligations of result. For example, the duty of progressive implementation of free compulsory education is that of result, while the obligation to protect the right to education from breaches by third persons is an obligation of conduct.¹⁵⁰

The CESCR outlines the minimum core obligations in its Comment No.13 in respect of education:

“to ensure the right of access to public educational institutions and programs on a non-discriminatory basis; to ensure that education conforms to the objectives set out in article 13 (1); to provide primary education for all in accordance with article 13 (2) (a); to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education; and to ensure free choice of education without interference from the State or third parties, subject to conformity with "minimum educational standards" (art. 13 (3) and (4))”.¹⁵¹

Therefore, the core elements of the state in the field of education embody its core positive and negative obligation therein.¹⁵² Other obligations as regards secondary and higher education or vocational guidance and training relate to the peripheral elements of the right to education, and therefore, are not minimum ones.

The UN CESCR has introduced the 4-A scheme for education to comply with the international obligations of states – it should be available, accessible (physically, economically and without discrimination), acceptable (relevant, culturally appropriate and of good quality) and adaptable (to diverse social and cultural conditions).¹⁵³

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*, p.227

¹⁵¹ General Comment No.13, *Supra note* 116, para.57

¹⁵² Fons Coomans, *Supra note* 111, p.231

¹⁵³ General Comment No.13, *Supra note* 116, para.6; Rhona Smith, *Supra note* 2, p.317; Chloe Wallace, Jo Shaw, Education, Multiculturalism and the Charter of Fundamental Rights of the EU, in T. Hervey and J. Kenner, *Economic and Social Rights under the Charter of Fundamental Rights of the EU*, Oxford, 2003, p.238; Commentary on Education under the Framework Convention for the Protection of National Minorities, Advisory Committee on the FCNM, *Supra note* 111, p.27-28

The notion of the right to education in its broad sense was suggested by the UNESCO representative while drafting a.13 of the ICESCR, which defines it as: “The right to access to the knowledge and training which are necessary to full development as an individual and as a citizen”. That is why there is a strong nexus between the right to education and human dignity;¹⁵⁴ consequently any denial of this right infringes the child’s dignity, and affects enjoyment of other human rights.¹⁵⁵ This term reflects mainly the social aspect of the right to education;¹⁵⁶ however, this notion refers to the purpose of education and may be used in the context of the protection of human rights.

¹⁵⁴ Rhona Smith, *Supra note 2*, p.311

¹⁵⁵ Rhona Smith, *Supra note 2*, p.313; Denied a future? International Legislation Handbook, *Supra note 111*, p.12

¹⁵⁶ Fons Coomans, *Supra note 111*, p.221

CHAPTER 2. THE RIGHT OF ROMA TO EDUCATION IN INTERNATIONAL AND DOMESTIC LAW

2.1. Implementation of the Right to Education in the System of Fundamental Rights

2.1.1. Right to Education as a Substantive Human Right

As it was stated above, the right to education is principally regarded as a part of social and cultural as well as civil and political rights.¹⁵⁷ In this context, it signifies an opportunity of every individual to have equal access to the state education system. The duty of the state is to establish such system that would be accessible to all, without distinction, and free of charge, at least, primary education structures.¹⁵⁸

Free education is considered in different aspects: the negative forbids enrollment fees, the others regard the teaching itself, '*inter alia*', free textbooks and materials, or some intrinsic measures like transportation of children to school.¹⁵⁹

Free and compulsory primary education provided without discrimination by any ground is the core of the legal norms establishing given right in fundamental international human rights treaties.

The UDHR stated the right to education in art.26, creating a basis for further legislation on this issue. It reads in paragraph.1: "Everyone has the right to education. Education shall be free, at least in the elementary and 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".¹⁶⁰ This article also entitles parents with a "prior right to choose the kind of education" for their

¹⁵⁷ Denied a future? International Legislation Handbook, *Supra note* 111, p.13; General Comment No.11 Plans of Action for Primary Education, *Supra note* 130

¹⁵⁸ Denied a future? International Legislation Handbook, *Supra note* 130, p.14

¹⁵⁹ *Ibid.*, p.14

¹⁶⁰ UDHR, a.26 (1)

children.¹⁶¹

While the Declaration is not legally binding, the ICESCR in a.13 explicitly proclaims the right to education and corresponding obligations of the state.¹⁶² The right to education is guaranteed to everyone. For its full realization the States Parties recognize that:

“(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved”.¹⁶³

The Covenant further guarantees liberty of parents to choose education for their children¹⁶⁴ and non-interference with the freedom of persons to establish educational institutions in accordance with minimum standards “as may be laid down by the state”.¹⁶⁵

Free education, at least at primary level is mentioned in ICESCR and in further international treaties.¹⁶⁶ States are responsible for the performance of this obligation and thus they cannot waive their responsibility by “giving more room to the private sector or stimulating public-private partnership for financing educational infrastructure” that will constitute a breach of the obligation undertaken.¹⁶⁷

The Human Rights Committee (hereinafter – the HRC) has decided that if parents do

¹⁶¹ UDHR, a.26 (3)

¹⁶² ICESCR, a.13 (1)

¹⁶³ ICESCR, a.13(2)

¹⁶⁴ ICESCR, a.13 (3)

¹⁶⁵ ICESCR, a.13 (4)

¹⁶⁶ Rhona Smith, *Supra note 2*, p.311-312; General Comment No.11 Plans of Action for Primary Education, *Supra note 130*

¹⁶⁷ Fons Coomans, *Supra note 111*, p.228

not avail their children of the free state educational system, they cannot then claim discrimination on the ground of no-provision of additional benefits by the state.¹⁶⁸

General Comment No.3 of the CESCR sets the minimum essential levels of each right in the Covenant to be satisfied by the states.¹⁶⁹ The Committee points out that “depriving a significant number of people of the most basic forms of education is a '*prima facie*' violation” of the rights guaranteed by the ICESCR, especially with regard to primary education.¹⁷⁰

The 1989 UN Convention on the Rights of the Child (hereinafter – CRC) establishes the right to education in a.28, and obliges the states to implement it progressively, in particular:

- “(a) Make primary education compulsory and available free to all;
- (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
- (d) Make educational and vocational information and guidance available and accessible to all children;
- (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.”¹⁷¹

The CRC stipulates that any administrative measures shall not impair human dignity of the child¹⁷² that was omitted by other international documents. This norm principally relates to the ban of corporal punishment at school.¹⁷³ The CRC pays attention to such important is-

¹⁶⁸ Rhona Smith, *Supra note 2*, p.312; *Carl Henrik Blom v. Sweden*, Communication No. 191/1985, U.N. Doc. CCPR/C/OP/2 at 216 (1990)

¹⁶⁹ General Comment No.3, The Nature of States parties Obligations (a.2 para.1 of the Covenant), 14/12/1990, para.10

¹⁷⁰ Fons Coomans, *Supra note 111*, p.236;

¹⁷¹ CRC, a.28 (1)

¹⁷² CRC, a.28 (2); Rhona Smith, *Supra note 2*, p.313

¹⁷³ Fons Coomans, *Supra note 111*, p.224

sues as protection of children from economic exploitation,¹⁷⁴ regular school attendance and the reduction of dropout rates.¹⁷⁵

The CRC Committee outlines four general principles of the Convention:

1. non-discrimination;
1. best interests of the child;
2. life-survival- and –development;
3. respect for the views of the child (a.2,3,6,12).¹⁷⁶

The concept of the “best interests of the child” is the core principle “underlying the CRC”.¹⁷⁷ The norms of CRC are less strict than those of ICESCR, being mostly directed to the progressive realization of rights contained therein.¹⁷⁸

Among the Millennium Development Goals (MDGs) formulated upon “the lessons of four decades of United Nations efforts”, UN names achievement of universal primary education as a goal 2.¹⁷⁹

The child should not only be discriminated by authorities in the access to school, but by his/ her parents as well: the prevention of the child from obtaining education by parents may amount to discriminatory treatment.¹⁸⁰

Since 1998 the Human Rights Council appoints a Special Rapporteur on the Right to Education - an independent expert within the UN system, who examines and reports on a country situation on this issue.¹⁸¹ The mandate of the Special Rapporteur was extended by the 2008 Resolution of Human Rights Council on the Right to Education. It includes collection of

¹⁷⁴ CRC, a.32(1)

¹⁷⁵ CRC, a.28(1)

¹⁷⁶ Bruce Abramson, *Supra note 7*, p.64

¹⁷⁷ Fons Coomans, *Supra note 111*, p.223

¹⁷⁸ *Ibid.*, p.224

¹⁷⁹ The MDGs: Are we on track? UN Chronicle, XLIV (01.12.2007)

<http://www.un.org/wcm/content/site/chronicle/lang/en/home/archive/issues2007> (last accessed on 7th April 2010)

¹⁸⁰ Bruce Abramson, *Supra note 7*, p.104; Manfred Nowak, *Supra note 110*, p.205

¹⁸¹ Special Rapporteur on the Right to Education. Introduction, <http://www2.ohchr.org/english/issues/education/rapporteur/index.htm> (last accessed on 8th April 2010)

information from all possible sources related to the implementation of the right to education, strengthening international cooperation for this aim as among countries, as among UN bodies, and intensifying efforts for the elimination of the obstacles for the enjoyment of the right to education.¹⁸²

In the framework of the Council of Europe the right to education received its binding legal force in the Article 2 of the First Protocol to the ECHR, which reads:

“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.”¹⁸³

The article is applicable to all forms of education provided in the state, though its main focus is on primary education.¹⁸⁴ The first sentence of the article, as it was stated by the European Court of Human Rights in the Belgian Linguistic case, protects the following rights:

- 3) “the right of access to educational institutions;
- 4) the right to an effective education;
- 5) the right to official recognition of the studies a student has successfully completed”.¹⁸⁵

These rights are not absolute; they can be regulated by the state but only to the extent that will “not injure the substance of the right” and in compliance with the resources of community and needs of its members.¹⁸⁶

In spite of its negative formulation, article 2 enshrines the right to education, since the “object of the Protocol lies in the collective enforcement of rights and freedoms”.¹⁸⁷ It doesn’t follow from the article that the States have no positive obligation to ensure respect for

¹⁸² Denied a future? International Legislation Handbook, *Supra note* 111, p.28; Human Rights Council Resolution, A/HRC/8/L.5, (12 June 2008), para.9; Special Rapporteur on the Right to Education. Overview of the Mandate. <http://www2.ohchr.org/english/issues/education/rapporteur/overview.htm> (last accessed on 8th April 2010)

¹⁸³ Protocol 1 to ECHR, art.2

¹⁸⁴ Denied a future? International Legislation Handbook, *Supra note* 111, p.35

¹⁸⁵ *Ibid.*

¹⁸⁶ *Inhabitants of Les Fourons v. Belgium*, Part 2, Section B, para.134

¹⁸⁷ *Belgian Linguistic case*, *Supra note* 137, para.3; Alcidia Mouncheboeuf, *Minority Rights Jurisprudence Digest*, Council of Europe Publishing, 2006, p.236

this right.¹⁸⁸ The aim of this provision is not to require the states “to establish at their own expense, or to subsidize, education of any particular type”: it is presumed that the educational systems already exist therein. Therefore, their duty is to guarantee to persons subject to their jurisdiction the right “to avail themselves of the means of instruction existing at a given time”.¹⁸⁹ Once the system of education is established, the right of access to this system without discrimination then emerges.¹⁹⁰

The extent of these means is not determined by the Convention, but left to the discretion of the state, which is entitled to regulate them without injuring the substance of the right, as it was said above. However, some judges, like Judge Wold in his dissenting opinion, considered this question dangerous, because the court in his view should not deal with the internal political issues.¹⁹¹

The second sentence of art.2 must be read together with the first sentence. It sets forth a protection against indoctrination by the state or teachers and administrative measures which could contradict the parents’ convictions.¹⁹²

The control mechanism established by the ECHR is the individual communication system.¹⁹³ When applying to the European Court, the complainant may refer to a.14, which prohibits discriminatory treatment with regard to education, but only in conjunction with the substantial right, stated in a.2 of the Protocol 1. The 12th Protocol adopted in 2000 extends the scope of the Convention concerning the principle of non-discrimination.¹⁹⁴ Unlike a.14 the provisions of this Protocol are free-standing articles, which can be referred to in case of discrimination related to any right despite of its mentioning in the text of ECHR.¹⁹⁵

¹⁸⁸ Preparatory work, Docs. CM/WP VI (51) 7, p.4, and AS/JA (3) 13, p.4; *Belgian Linguistic case*, *Supra note* 137, para.3

¹⁸⁹ *Inhabitants of Les Fourons v. Belgium*, Part 2, Section B, para.132; Rhona Smith, *Supra note* 2, p.312

¹⁹⁰ Robert Kushen, *Supra note* 59, p.138

¹⁹¹ Dissenting opinion of Judge Wold, *Inhabitants of Les Fourons v. Belgium*, *Supra note* 186.

¹⁹² Denied a future? International Legislation Handbook, *Supra note* 111, p.35

¹⁹³ *Ibid.*, p.35

¹⁹⁴ *Ibid.*, p.36

¹⁹⁵ *Ibid.*

The EU Charter on Fundamental Rights (hereinafter – the Charter) sets forth the principle of free compulsory education in a.14, that means free attendance of school for each child in compulsory education.¹⁹⁶ The Charter determines the guarantees of accessibility narrowly; while it entitles everyone with access to education, the scope of equal access is limited, especially non-compulsory education.¹⁹⁷ With regard to people who were permanently excluded from the labor market due to low level of education, this approach may be dangerous,¹⁹⁸ putting them at the risk of unemployment.

The Revised European Social Charter in Article 17 (2) requires State Parties to provide children and young people with ‘a free primary and secondary education’ and moreover, “to encourage regular attendance at schools”.¹⁹⁹ The young persons, subject to compulsory education shall not be employed if the work may harm their educational process.²⁰⁰ A.30 of the Charter calls the states for taking measures to provide access of people in the situation of social exclusion or poverty to education:²⁰¹ this norm directly affects marginalized Roma population.

2.1.2. Right to Education and Minorities

Minority groups do not always have equal opportunities to obtain education at different levels as the majority population. Various obstacles such as farness of schools from the communities, language barrier and discriminatory practices sufficiently limit access of minorities to education. Therefore, the positive measures of the state are necessary to make

¹⁹⁶ Draft Charter of Fundamental Rights of the European Union, CHARTE 4473/00, Brussels, 11 October 2000, a.14, Explanation, para.1

¹⁹⁷ Chloe Wallace and Jo Shaw, *Supra note* 153, p.236

¹⁹⁸ *Ibid.*, p.236-237

¹⁹⁹ Commentary on Education under the Framework Convention for the Protection of National Minorities, Advisory Committee on the FCNM, *Supra note* 111, p.28; 1996 European Social Charter (Revised), a.17 (2)

²⁰⁰ 1996 European Social Charter (Revised), a.7(3)

²⁰¹ 1996 European Social Charter (Revised), a.30(a)

the access to education for minority groups the same as for the rest of the population.²⁰² Moreover, enjoyment of the right to education for minorities is a tool of strengthening their cultural identity and heritage.²⁰³ The rights of minorities, concerning their identity and heritage should be respected in education.²⁰⁴

To overcome language difficulties the children belonging to minorities should be taught both their native and the official language, under the sponsorship of the state.²⁰⁵ The knowledge of the official language indeed is a precondition for successful integration of minorities into the social life.²⁰⁶ However, the parents have the right to choose the type of education for their children according to their religious and language preferences and in accordance with rules of international law.²⁰⁷

The 1992 Declaration on Rights of Persons belonging to National, Ethnic, Religious and Linguistic Minorities (hereinafter – the Declaration) is the only document adopted within UN system, which separately addresses the rights of minorities.²⁰⁸ As regards education, it focuses on the rights relating the language of minority groups, namely “to learn their mother tongue or to have instruction in their mother tongue” with support of state measures.²⁰⁹

The UN Human Rights Council created in 2006 has established the Forum on Minority Issues in its structure in 2007. The Forum shall “identify and analyze best practices, challenges, opportunities and initiatives for the further implementation of the Declaration”.²¹⁰

²⁰² Stephen A. Hansen, *The Right to Take Part in Cultural Life: Toward Defining Minimum Core Obligations*, in Audrey Chapman and Sage Russel (Eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Insentia, 2002, p.296; Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen 1990, a.31

²⁰³ Fons Coomans, *Supra note* 111, p.220

²⁰⁴ *Ibid.*, p.226-227

²⁰⁵ Stephen A. Hansen, *Supra note* 202; The OSCE Hague Recommendations Regarding the Education Rights of National Minorities and Explanatory Report (1996), Explanatory Note, General Introduction, available online at http://www.osce.org/documents/hcnm/1996/10/2700_en.pdf (last accessed on 25th April 2010)

²⁰⁶ FCNM and the Explanatory Report, *Supra note* 85, para.78

²⁰⁷ ICESCR, a.13

²⁰⁸ Denied a future? International Legislation Handbook, *Supra note* 111, p.22

²⁰⁹ Declaration on Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities, Adopted by General Assembly Resolution 47/135 of 18 December 1992, a.4 (3)

²¹⁰ Forum on Minority Issues, 2nd Session 12 and 13 November 2009, available online at <http://www2.ohchr.org/english/bodies/hrcouncil/minority/forum.htm> (last accessed on 24th April 2010)

On the European level the right of minorities to education is stated in the ECHR, 1992 European Charter for Regional or Minority Languages (hereinafter – the Charter) and 1995 Framework Convention for the Protection of National Minorities (hereinafter – the FCPNM).

Being ratified by just nine states, including Hungary,²¹¹ the Charter is not generally recognized in Europe. However, it contains important norms directed to the preservation of minority languages and promotion of their use in public life.²¹² In relation to education it obliges the Parties to make available education of all types and at all levels, at least in part, in the minority languages.²¹³

The FCPNM proclaims mostly provisions of progressive realization - '*inter alia*', those regarding education.²¹⁴ Article 12 reads: “The Parties undertake to promote equal opportunities for access to education at all levels for persons belonging to national minorities”.²¹⁵ States have an obligation to take measures for the accumulation and promotion of the “knowledge of culture, history, language and religion of their minorities and of the majority”, by providing teachers’ training, access to textbooks and other facilities.²¹⁶ Minorities are entitled to establish their private educational institutions by their own resources and in compliance with the teaching standards of the national educational system, as it is stated for the compulsory schooling.²¹⁷ In these institutions they can use their own language as “indispensable to enable the minority to enjoy the same treatment as the majority, not only in law, but also in fact”, as it was emphasized by the PCIJ.²¹⁸

²¹¹ Status of ratification of major international and regional instruments relevant to minority and indigenous rights as of October 2006, available online at <http://www.minorityrights.org/556/which-countries-have-ratified-international-statements/which-countries-have-ratified-international-statements.html> (last accessed on 27th April 2010)

²¹² 1992 European Charter for Regional or Minority Languages, a.7

²¹³ *Ibid.*, a.8

²¹⁴ Denied a future? International Legislation Handbook, *Supra* note 111, p.39

²¹⁵ 1995 Framework Convention for the Protection of National Minorities, a.12

²¹⁶ *Ibid.*, a.12

²¹⁷ *Ibid.*, a.13; FCNM and the Explanatory Report, *Supra* note 85, Commentary on the Provisions of the Framework Convention, p.21, para.72

²¹⁸ *Minority Schools in Albania*, PCIJ, Advisory Opinion of 6 Apr. 1935, Series A/B No.64, para.484-512

The Advisory Committee encourages states to promote further effective equality, as a “general principle” of FCNM.²¹⁹ The Committee emphasizes the significance of equality and “equal standards in education, access and inclusion... curricular reviews and resource allocation to minority education” under a.12 of FCNM²²⁰ for the promotion of “equal opportunities for access to education at all levels” for the members of minority groups.²²¹

The right of persons belonging to minorities to learn the mother tongue shall also be ensured by the state “as far as possible”,²²² though this right is left to the broad discretion of the state subject to its financial and administrative conditions.²²³ Therefore, some affirmative steps are required from the states to prevent discrimination and provide equal access to school.²²⁴

Full and effective equality of minorities in education is considered by Advisory Committee an important tool for integration and elimination of discrimination; for this purpose the states should compensate unequal position of minorities in access to education and resources.²²⁵ The Committee stresses that the situation with the access of minorities to education depends on several factors: anti-discrimination laws or their absence, relevant case-law, discriminatory practices expressed in placing the children into separate and sometimes special schools for mentally disabled or denying the admission to school.²²⁶

For the promotion of equal access to education the Committee considers necessary the following institutional and legal measures:

- “- constitutional and legal guarantees of the right to education at all levels;
- minority education strategies to ensure equal access to quality education;
- specialized structures for minority education within state educational authorities;

²¹⁹ Duncan Wilson, Educational Rights and National Minorities, *International Journal on Minority and Group Rights* 10: 315–379, 2004, p.319

²²⁰ *Ibid.*

²²¹ FCNM and the Explanatory Report, *Supra note* 85, p.21, para.71

²²² 1995 Framework Convention for the Protection of National Minorities, a.14

²²³ Denied a future? International Legislation Handbook, *Supra note* 111, p.40

²²⁴ Robert Kushen, *Supra note* 59, p.138

²²⁵ Commentary on Education under the Framework Convention for the Protection of National Minorities, *Supra note* 111, p.30

²²⁶ *Ibid.*, p.30

- supervision of schools;
- minorities participation in decision-making in the educational sphere.”²²⁷

The Parliamentary Assembly of the Council of Europe in its Recommendation No.1492 (2001) condemned the denial of the existence of minorities in the Council of Europe (hereinafter – CoE) member states.²²⁸ It also stressed that migrants should not be excluded from any term “minority”.²²⁹ This Recommendation called the Committee of Ministers upon drafting an Additional Protocol to the ECHR on the rights of national minorities, an Additional Protocol to the FCPNM and creating a position for dealing with minority issues at the office of the High Commissioner for Human Rights of the CoE.²³⁰

The Parliamentary Assembly in its recommendations emphasized the importance of removing the obstacles for minorities in access to higher education;²³¹ it further proposed the strategy for the CoE member states to organize education of Roma and enclosed guiding principles for education policy for Roma – taking into consideration diversity of Roma population in Europe and need to introduce Roma history, language and culture in the teaching materials.²³²

Minority rights are not directly mentioned in the ECHR, but are secured as on the basis of general human rights, as through the provision of a.14, prohibiting discrimination on any ground, '*inter alia*', “association with a national minority”.²³³ Therefore, the rights, stated in the ECHR can be claimed by national minorities, in particular those, concerning their language, religion and culture.²³⁴

With the recognition of the right of national minorities to receive education in their

²²⁷ *Ibid.*, p.33

²²⁸ Council of Europe Parliamentary Assembly Recommendation No.1492 (2001), para.2

²²⁹ *Ibid.*, para.11

²³⁰ *Ibid.*, para.12(x), (xi), (xii)

²³¹ Council of Europe Parliamentary Assembly Recommendation No.1353 (1998), para.6

²³² Council of Europe Parliamentary Assembly Recommendation No.R (2000) 4, Appendix, para.1, 9

²³³ ECHR, a.14; Fernand de Varennes, *Using the European Court of Human Rights to Protect the Rights of Minorities*. Chapter 4, Mechanisms for the Implementation of Minority Rights, Council of Europe Publishing, 2004, p.87

²³⁴ Fernand de Varennes, *Supra* note 233.

native language the state is not precluded from the obligation to guarantee the education in the official language to everyone. Minorities should not be denied the learning of the official state language that will give them opportunity to realize the right to work and full scope of other rights for active participation in the life of society.²³⁵

In the framework of the Organization for Security and Co-operation in Europe (hereinafter – OSCE) various documents on minority and Roma issues were adopted to be taken into consideration by the states when drafting their national policy, including the right to education.²³⁶

The OSCE High Commissioner on National Minorities, Knut Vollebaek, underlined at the Conference on Roma in 2008 that education, housing and employment are of particular importance for offering more opportunities and securing equal rights in the OSCE countries.²³⁷

Minority rights, including the right to education, may be protected by the provisions against discrimination, which may be found in numerous international legal instruments²³⁸ to be discussed further.

2.1.3. The Prohibition of Discrimination in Education

In practice the right to education means access of everyone to the existing public educational institutions on equal basis, regardless of race, sex, language, ethnic origin or other grounds.²³⁹

Discrimination in education is prohibited by all the documents containing provisions

²³⁵ *Ibid.*, p.99

²³⁶ Denied a future? International Legislation Handbook, *Supra note* 111, p.52; Press release, Report: Discrimination and exclusion are fundamental features of the Roma experience, 7 April, 2000, available online at http://www.osce.org/hcnm/item_1_4504.html (last accessed 19th April 2010)

²³⁷ Press release, Roma in Europe miss out on security and prosperity, says OSCE High Commissioner on National Minorities, 25 April, 2008, available online at http://www.osce.org/hcnm/item_1_30847.html (last accessed on 19th April 2010)

²³⁸ Denied a future? International Legislation Handbook, *Supra note* 111, p.23

²³⁹ Fons Coomans, *Supra note* 111, p.225

on the right to education, since one of the conditions of its realization is equal access thereto. However, some international instruments have prohibition of discrimination as a main objective; they are 1965 International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter – CERD) and 1960 UNESCO Convention against Discrimination in Education (hereinafter – CDE).

The Committee on the Elimination of Racial Discrimination (hereinafter – the Committee) obliges the states to eliminate discrimination in all fields of life, including education.²⁴⁰ It sets forth the system of periodic state reports and individual communications.²⁴¹ In spite of the fact, that the decisions of CERD are not binding, NGOs and lawyers “are encouraged to make use of this mechanism” to protect human right more effectively.²⁴²

At the 57th session in 2000 the CERD adopted Recommendations regarding Roma, where it described measures to be taken by states in the field of education. The CERD, particularly, called the states upon supporting the inclusion in the school system of all Roma children,²⁴³ active cooperation with their parents and communities,²⁴⁴ to prevent and avoid the segregation and racial harassment of Roma students²⁴⁵ and others.²⁴⁶

The Committee in its General Recommendation No.14 points out a broad interpretation of the CERD for the purpose of prohibition not only overt, but facially neutral conduct, that has “an unjustifiable disparate impact upon a group distinguished by race” or other ground.²⁴⁷

The Committee several times expressed its concern about segregation of Roma in

²⁴⁰ CERD, a.1 (1)

²⁴¹ CERD, a.9, 14

²⁴² Denied a future? International Legislation Handbook, *Supra note* 111, p.19

²⁴³ General Recommendation No.27: Discrimination Against Roma, 16/08/2000, para.17

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid.*, para.18, 20

²⁴⁶ *Ibid.*, para.17-26

²⁴⁷ General Recommendation No.14: Definition of Discrimination (a.2 para.1), Document No.A/48/18, 42th Session, 1993, para.2

education, for example, in Croatia or Czech Republic.²⁴⁸ Other UN bodies – Secretary General and Human Rights Committee also were concerned about the segregation of Roma in education and other spheres.²⁴⁹

The CDE is the only instrument which prohibits discrimination in education on the ground of race;²⁵⁰ it is aimed to the abolition of segregation and to the promotion of equality for everyone in this area.²⁵¹ Its art.1 outlines the patterns of discrimination in education:

- “(a) ...depriving any person or group of persons of access to education of any type or at any level;
- (b) ...limiting any person or group of persons to education of an inferior standard;
- (c) ...establishing or maintaining separate educational systems or institutions for persons or groups of persons; or
- (d) ... inflicting on any person or group of persons conditions which are incompatible with the dignity of man”.²⁵²

Under the terms of the CDE, “education” signifies “all types and levels of education, and includes access to education, the standard and quality of education, and the conditions under which it is given”.²⁵³ The CDE requires the states to “develop and apply national policy” directed at the promotion of “equality of opportunity and treatment in the matter of education”.²⁵⁴ These policies shall serve the following purposes:

- “(a) To make primary education free and compulsory; make secondary education in its different forms generally available and accessible to all; make higher education equally accessible to all on the basis of individual capacity; assure compliance by all with the obligation to attend school prescribed by law;
- (b) To ensure that the standards of education are equivalent in all public educational institutions of the same level, and that the conditions relating to the quality of the education provided are also equivalent;
- (c) To encourage and intensify by appropriate methods the education of persons who have not received any primary education or who have not completed the entire primary education course and the continuation of their education on the basis of individual capacity;
- (d) To provide training for the teaching profession without discrimination.”²⁵⁵

²⁴⁸ CERD/C/60/CO/4, para.11, 2002; CERD/C/304/Add.109, 1 May 2001

²⁴⁹ Robert Kushen, *Supra note 59*, p.142

²⁵⁰ *Ibid.*, p.137

²⁵¹ Denied a future? International Legislation Handbook, *Supra note 111*, p.31; UNESCO CDE, a.4

²⁵² UNESCO CDE, a.1(1)

²⁵³ UNESCO CDE, a.1(2)

²⁵⁴ UNESCO CDE, a.4

²⁵⁵ UNESCO CDE, a.4

Certain normative standards which are generally accepted in treaty law represent minimum standards to be achieved by the state. For the right to education these standards are: first, “right to access to public educational institutions in a non-discriminatory way”; second, “respect for free choice of education (public or private)”; third, right to establish educational institutions, '*inter alia*', for minorities, “outside the system of public education” and finally, “the requirement that the purposes of educational policy in a given State must be consistent with the principles of pluralism and respect for human rights”.²⁵⁶

The State Parties to the Convention send periodic reports to the General Conference of UNESCO.²⁵⁷ The Committee on the Conventions and Recommendations of the Executive Board of UNESCO examines individual communications submitted in cases of violations.²⁵⁸ The Committee resolves the disputes by the means of international co-operation and dialogue, but not acting as an international tribunal.²⁵⁹

The Secretary General in 2001 stressed that separate educational system is admissible only under the rules laid down in CDE and should be subject to a very strict scrutiny; this type of education shall be voluntary and of equivalent quality of education provided.²⁶⁰

The General comment to the ICESCR states that the right to education must be “accessible to all, including the most vulnerable groups, in law and in fact, without discrimination”.²⁶¹

The European Commission against Racism and Intolerance in its annual report in 2008 underlined the greater public awareness in this year “of the discrimination and social exclusion faced by Roma and Travellers in many areas including housing, education and

²⁵⁶ UNESCO CDE, a.5(1)

²⁵⁷ Denied a future? International Legislation Handbook, *Supra note* 111, p.33

²⁵⁸ *Ibid.*, p.32-33; 104 EX/Decision 3.3 of the Executive Board of UNESCO (1978), para.18

²⁵⁹ Denied a future? International Legislation Handbook, *Supra note* 111, p.33

²⁶⁰ UNESCO CDE, a.2; Rhona Smith, *Supra note* 2, p.313

²⁶¹ CESCR General Comment No.13, *Supra note* 116, para.6 (b)

employment”.²⁶² Already in its general policy recommendation No.3, published in 1998, ECRI called the states for vigorously combating “all forms of school segregation towards Roma children” and ensuring “the effective enjoyment of equal access to education”.²⁶³

Segregated schooling is prohibited by the provisions on non-discrimination and under the principle of equal access to education. Segregated education is “inherently substandard and thus violates the right to education itself”.²⁶⁴

The only case when the existence of segregated schools is justified is their establishment by the request of Romani families,²⁶⁵ provided that these schools meet state standards in education, mentioned above, otherwise they must be prohibited.²⁶⁶ It is difficult to provide integrated school placement not based on the residence, which is “discriminatory in effect”, since Roma experience segregation in other related areas like housing.²⁶⁷

Segregation of schoolchildren, as in the case of Roma may exist in different patterns, which vary by type and extent of human rights violations of the children concerned. The authors mark the following types of segregation at school, namely with regard to Roma, the most frequent victims of this violation:

(d) “Special” schools or classes, which represent institutions for mentally disabled students, but admit disproportionately high number of Roma pupils just because they hardly follow the mainstream schools’ program;

(e) Separated classes for Roma in mainstream schools or ghetto schools for Roma in their compact settlements, as a rule substandard.²⁶⁸

²⁶² Annual Report on ECRI's Activities covering the period from 1 January to 31 December, 2008, CRI (2009) 21, Strasbourg, May, 2009, para.7

²⁶³ ECRI General Policy Recommendation No. 3 on Combating Racism and Intolerance against Roma/Gypsies, CRI (98) 29 Rev., 6 March 1998

²⁶⁴ Robert Kushen, *Supra note 59*, p.138

²⁶⁵ *Ibid.*, p.135

²⁶⁶ CDE, a.1 (b)

²⁶⁷ Robert Kushen, *Supra note 59*, p.135

²⁶⁸ Commentary on Education under the Framework Convention for the Protection of National Minorities, Advisory Committee on the FCNM, *Supra note 111*, p.17; Dimitrina Petrova, *Supra note 52*, p.24; Robert Kushen, *Supra note 59*, p.4

The schools and classes of this type formally do not differ from ordinary public schools, but in practice they offer education of lower quality and maintain isolation of Roma within their communities.²⁶⁹ Segregation can also be classified in those of inter-school type (separate ghetto schools or schools for mentally handicapped children), intra-school (separate classes), intra-class (separate curriculum of different standards within the class) and, additionally, individual segregation (“alleged home schooling”).²⁷⁰

The Advisory Committee does not have uniform point of view for the phenomena of special schools: while in some cases it amounts to segregation, in other cases it is justified as a measure for the preserving the minority’s identity and culture and by the request of the group itself.²⁷¹ It has “to serve the best interests of the child” and provide the general standard of education.²⁷² In other cases subject to the Committee’s critique,²⁷³ separated education entails “risk placing the children concerned at a disadvantage and harming the implementation of Article 12 and the principle of intercultural dialogue contained in Article 6 of the FCNM”.²⁷⁴

Robert Kushen proposes classification of the treaties’ provisions on segregation into four categories:

- 4) Explicit prohibition of segregation in education;
- 5) Guarantees related to education '*per se*';
- 6) General guarantees related to non-discrimination to be read together with provisions on non-segregation;
- 7) Discrimination that amounts to inhuman treatment.²⁷⁵

²⁶⁹ Dimitrina Petrova, *Supra* note 52, p.26

²⁷⁰ Lilla Farkas, Segregation of Roma Children in Education, Addressing Structural Discrimination through the Racial Equality Directive, European Commission, 2007, p.12

²⁷¹ Commentary on Education under the Framework Convention for the Protection of National Minorities, *Supra* note 111, p.17

²⁷² Lilla Farkas, *Supra* note 270, p.29

²⁷³ Commentary on Education under the Framework Convention for the Protection of National Minorities, *Supra* note 111, p.21

²⁷⁴ *Ibid.*, p.17

²⁷⁵ Robert Kushen, *Supra* note 59, p.136

Kushen argues, that de facto segregation caused by segregated housing jointly with other factors may constitute a system of “maintained” separate educational systems and therefore, contrary to a.1 of the CDE.²⁷⁶ Bearing in mind the CERD General Recommendation No.14 on the indirect discrimination, school enrollment based on residence may constitute discriminatory act if it is aimed at isolation of Roma in substandard schools.²⁷⁷

In the European Union (EU) the Directive 2000/43/EC, known as Race Equality Directive (RED), prohibits “direct or indirect discrimination based on ... racial or ethnic origin”,²⁷⁸ including that in education.²⁷⁹ The RED is a “major legal instrument to combat discrimination in the EU”,²⁸⁰ it requires the states to adopt domestic anti-discrimination laws and to implement them through the relevant bodies.²⁸¹ The RED is focused on “structural discrimination”, i.e. both physical segregation and institutional discrimination, based on racial or ethnic origin, which include “inequality of opportunity and a restriction of choice”.²⁸² The authorities may be held liable for the maintenance of segregated schooling as well, ‘*inter alia*’ for failure in providing access to mainstream schools.²⁸³

In accordance with the a.3 (1(g)), “within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to... education”,²⁸⁴ that covers all kinds and levels of education.²⁸⁵

To state segregation under the RED, the disproportionate placement of Roma children in comparison to non-Roma should be demonstrated. The evidence of less favorable

²⁷⁶ *Ibid.*, p.137

²⁷⁷ *Ibid.*, p.139

²⁷⁸ Council Directive 2000/43/EC of 29 June 2000, *Supra note 25*, a.1

²⁷⁹ *Ibid.*, a.3(g)

²⁸⁰ Lilla Farkas, *Supra note 270*, p.9

²⁸¹ Maxine Sleeper, A Brief Overview: European Legislative Framework for Anti-Discrimination Policies, in *Separate and Unequal*, Budapest, 2004, p.60

²⁸² Lilla Farkas, *Supra note 270*

²⁸³ *Ibid.*, p.30

²⁸⁴ Council Directive 2000/43/EC, *Supra note 25*, a.3 (1(g))

²⁸⁵ Lilla Farkas, *Supra note 270*, p.25

treatment of Roma is necessary as well.²⁸⁶ Parental consent for separate education “cannot be generally a legitimate justification” for segregation under the RED since it is not acceptable for direct discrimination; though the issue of consent requires a very strict scrutiny.²⁸⁷

Under the ECHR the norm on prohibition of discrimination (a.14) may be referred to in conjunction with the substantive article, likewise, a.2 of the Protocol 1, protecting the right to education. Additional Protocol 12, lays down independent right to non-discrimination which can be challenged separately provided the non-exhaustive list of the grounds of discrimination.²⁸⁸

In the framework of the 2005-2015 Decade of Roma Inclusion by initiative of the World Bank, Open Society Institute and the governments of eight countries of Central and Eastern Europe, including Hungary, the Roma Education Fund was formed. Its objective is to support development and application of national plans to improve performance and educational status of Roma in the region.²⁸⁹

A number of practitioners and scholars have an opinion that “the prohibition of segregation in education is developing into customary norm” that will be binding for all states.²⁹⁰ However, this view did not gain general recognition yet.

To summarize the above points, the fundamental elements of the right of education are considered the international standards in the field of education, which include the following norms: a.26 of the UDHR, a.13 of the ICESCR, a.18 of the ICCPR, a.28-29 of the CRC, a.10 of the CEDAW, UNESCO CDE, a.2 of the Protocol 1 to the ECHR and General comments No.11 and 13 to the ICESCR.²⁹¹

²⁸⁶ *Ibid.*, p.27

²⁸⁷ *Ibid.*

²⁸⁸ Maxine Sleeper, *Supra note 281*, p.61

²⁸⁹ 2005-2015: the Decade of Roma Inclusion, in *Separate and Unequal*, Budapest, 2004, p.63

²⁹⁰ Robert Kushen, *Supra note 59*, p.143

²⁹¹ Special Rapporteur on the Right to Education, International Standards, <http://www2.ohchr.org/english/issues/education/rapporteur/standards.htm> (last accessed on 4th April 2010)

With regard to the minorities the right to education is explicitly guaranteed by the FCNM, however, the relevant provisions are entrenched in the mentioned international instruments, such as well as in the Revised European Social Charter.²⁹²

“Equal access to education and equal opportunities within the educational system” are named as one of the fundamental principles of the enjoyment of the right to education.²⁹³ This statement is justified, since education is an empowerment tool, which gives an opportunity to actively participate in the political, social and cultural life. Therefore, the state cannot deny equal access to education for vulnerable groups as Roma in order not to prevent them from enjoying other human rights in their countries.²⁹⁴

2.2. Equal Access of Roma to Education by National Law of Russia and Hungary and its Enforcement

2.2.1. Anti-discrimination Provisions

Both Russia and Hungary are parties to the fundamental international treaties regarding the right to education and prohibition of discrimination described in the previous section. They have undertaken obligations by the ECHR and European Social Charter (revised) as members of the Council of Europe;²⁹⁵ Hungary, being an EU member, also has duties laid down in EU legal instruments.²⁹⁶

The Hungarian anti-discrimination legal norms are concentrated in the 2003 Act CXXV on Equal Treatment and the Promotion of Equal Opportunities (hereinafter – the Act)

²⁹² Commentary on Education under the Framework Convention for the Protection of National Minorities, *Supra note* 111, p.6

²⁹³ *Ibid.*, p.6

²⁹⁴ Manfred Nowak, *Supra note* 110, p.202

²⁹⁵ Ratification of International Human Rights Treaties, available online at <http://www1.umn.edu/humanrts/research/ratification-index.html> (last accessed on 3rd May 2010), Member States of the Council of Europe and the European Social Charter, available online at http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview_en.asp (last accessed on 3rd May 2010)

²⁹⁶ Monitoring of Equal Access to Quality Education for Roma: State of ratification for relevant international standards, http://www.eumap.org/topics/minority/reports/roma_education/recommended/standards/standards.pdf (last accesses on 3rd May 2010)

and the Civil Code.

The Civil Code proclaims that “the right to equal treatment is a civil right and victims of discrimination may sue it in civil courts”.²⁹⁷

The Act recognizes equal dignity of everyone; it lays down principle of equal treatment²⁹⁸ and declares all forms of direct or indirect discrimination contrary to this principle.²⁹⁹ The Act further sets forth the duty of the state to guarantee equal opportunities for everyone under its jurisdiction and provides legal aid for victims of discrimination.³⁰⁰ The burden of proof of discrimination should be shared between the claimant and the respondent in civil and administrative cases, but the claimant should be provided with an advantage.³⁰¹ The Act mentions 19 grounds of discrimination – race, ethnic origin etc.; it is applicable to public and private persons³⁰² and covers all spheres, including education.³⁰³

The Equal Treatment Authority established under the Act is an independent organization, which has a task “to receive and deal with individual and public complaints about unequal treatment and to implement the principles of equality and non-discrimination”.³⁰⁴ The Authority assumes that there is no entrenched experience in investigating segregation and this problem can hardly be solved through administrative means, however, the proceedings stating responsibility of decision-makers may have effect.³⁰⁵

Compliant to a.32/B of the Constitution Parliament chooses Ombudsmen, who

²⁹⁷ Advancing Roma Education in Hungary, *Supra note* 106, p.20

²⁹⁸ Act CXXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, Preamble, a.1

²⁹⁹ Act CXXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, a.7(1)

³⁰⁰ Advancing Roma Education in Hungary, *Supra note* 106, p.20

³⁰¹ ECRI Report on Hungary, Council of Europe, 2009, *Supra note* 263, p.30; Position No. 10.007/1/2006 TT of the Advisory Board of Equal Treatment on the division of the burden of proof, January 13, 2006, para.30; Act CXXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, a.19 (1,2)

³⁰² Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council”, Report of the Independent Expert on Minority Issues, Addendum, Mission to Hungary, A/HRC/4/9/Add.2, 2007, para.14

³⁰³ Act CXXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, a.14,27; Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council”, *Ibid.*, para.15

³⁰⁴ About the Authority, available online at http://www.egyenlobanasmod.hu/index.php?g=ebh_aboutEN.htm (last accessed on 5th May 2010); Government Decree 362/2004 (XII.26), on the Equal Treatment Authority and the Detailed Rules of its Procedure

³⁰⁵ Appendix to Report Nr. 3381-1/2006, http://www.egyenlobanasmod.hu/index.php?g=EBH-jelentes06_EN.htm (last accessed on the 30th October 2010)

“investigate violations of constitutional rights” and takes measures for the protection.³⁰⁶ At present moment there are four ombudsmen in Hungary, '*inter alia*', Ombudsman for Civil Rights and Ombudsman for the Rights of National and Ethnic Minorities.³⁰⁷

In 2006 the Ministry of Social Affairs and Labor established a Department of Roma Integration which has a key role in the promotion of equality for Roma.³⁰⁸ Under the Government Decree 2058/2008 (V.14.) on the Establishment of an Inter-ministerial Committee on Roma Affairs, the position of a prime ministerial commissioner was set up to coordinate the state duties related to Roma issues.³⁰⁹ A Directorate-General for Equal Opportunities was established within the Ministry of Education and culture in 2006 with the purpose to enforce Roma integration.³¹⁰

The New Hungary Development Plan drafted for 2009-2010 is supposed to give effect to the “principle of equal opportunities” with regard to disadvantaged groups, '*inter alia*', in education.³¹¹ In 2007 the Strategic Plan of the Decade of Roma Inclusion Program was elaborated for enforcement of equal treatment, among other, in education.³¹²

In conformity with the position of Advisory Board at the Equal Treatment Authority (2007), segregation based on ethnicity can only be justified if: the separated education is arranged in lawful manner and is optional; the quality of education is not lower than that in schools for the majority children; the objective and the timetable of minority group reasons segregation; otherwise, segregation is illegal.³¹³

The Equal Treatment Authority closely cooperates with the Educational Authority to

³⁰⁶ Advancing Roma Education in Hungary, *Supra note* 106, p.21

³⁰⁷ *Ibid.*, p.21

³⁰⁸ Third Report Submitted by Hungary Pursuant to a.25 para.1 of the FCNM, ACFC/SR/III(2009)007, p.11

³⁰⁹ *Ibid.*

³¹⁰ *Ibid.*

³¹¹ Third Report Submitted by Hungary Pursuant to a.25 para.1 of the FCNM, *Supra note* 308, p.19

³¹² *Ibid.*, p.29

³¹³ Equal Treatment Authority Advisory Board Viewpoints of Meeting 23 March 2007, The Requirement of Equal Treatment in Public Education; Third Report Submitted by Hungary Pursuant to a.25 para.1 of the FCNM, *Ibid.*, p.28

find and eliminate segregation at schools.³¹⁴ Numerous programs and policies have been adopted to deal with these issues, but “the results are minimal” and a great improvement is not achieved yet.³¹⁵

In Russia there is no uniform legal basis addressing non-discrimination issues,³¹⁶ nor a definition of discrimination,³¹⁷ though anti-discrimination clauses are incorporated in different legal acts.³¹⁸ The 1993 Constitution states in a.19:

“2. The State guarantees the equality of human and civil rights and freedoms regardless of sex, race, ethnic background, language, origin ... place of residence... Any restraint upon human rights on social, racial, ethnic, linguistic or religious grounds is prohibited.”³¹⁹

Only the 2003 Amendment to the Criminal Code of the Russian Federation, modifying a.136 thereof, determines discrimination as “violation of the rights, freedoms and legitimate interests of persons and citizens on the basis of sex, race, ethnicity, language, origin, wealth or official status, place of residence, attitude towards religion, beliefs or membership of a voluntary association or social group”, but does not contain notion of racial discrimination.³²⁰

The 2001 Labor Code of the Russian Federation has its own definition of discrimination which means “establishing of any limitation of the employee’s rights not determined by his/her working skills by the employer or providing any advantage, if only

³¹⁴ Third Report Submitted by Hungary Pursuant to a.25 para.1 of the FCNM, *Supra note* 308, p.28

³¹⁵ Anita Novak, ENAR Shadow Report, Racism in Hungary, International Law Research and Human Rights Monitoring Centre, 2007, p.17; ECRI Report on Hungary, Council of Europe, 2009, *Supra note* 263, para.30; Position No. 10.007/1/2006 TT, *Supra note* 301, para.79

³¹⁶ Compliance of the Russian Federation with the Convention on the Elimination of All Forms of Racial Discrimination, NGO Report to the UN CERD, 2007, para.54

³¹⁷ Compliance of the Russian Federation with the Convention on the Elimination of All Forms of Racial Discrimination, *Supra note* 316, para.52,54,55

³¹⁸ Committee on the Elimination of Racial Discrimination, Nineteenth periodic reports of States parties due in 2006, Addendum, Russian Federation, CERD/C/RUS/19, 23 October 2006, para.14

³¹⁹ 1993 Constitution of the Russian Federation, a.19(2)

³²⁰ Committee on the Elimination of Racial Discrimination, Nineteenth periodic reports of States parties due in 2006, Addendum, Russian Federation, *Supra note* 318, para.22

these limitations are not defined by the requirements for given position stated by federal law or by the special state protection of people in need of advanced social and legal protection.”³²¹

A.26 of the Constitution protects the right of everyone to use the native language and freedom to choose one’s language of communication, education or creative expression,³²² at first stage, considering national minorities. This provision is developed in the 1992 Law of Education of the Russian Federation,³²³ but it still has lack of implementation mechanism and is not adjusted to the needs of national minorities of Russia.³²⁴ Therefore, Roma language is not applied in the educational process at schools.

Though the Constitution guarantees protection of the rights belonging to national minorities and “small indigenous peoples,”³²⁵ the legislation contains no notion of minorities.³²⁶ Protection of minorities falls within obligations of the federal and provincial authorities.³²⁷ The Federal Law ‘On Guarantees of Rights of Numerically Small Indigenous Peoples’ was adopted in 1999.³²⁸ The Law provides some positive measures towards numerically small indigenous peoples in various spheres: land usage, employment, tax payment, access to natural resources, and others.³²⁹

There is no special organ, enshrined to counteract discrimination, so the cases concerning this violation are considered jointly with other cases on human rights breaches by the Public Prosecutor Office, Courts and Ombudsmen and some agencies on special issues such as employment.³³⁰

³²¹ 2001 Labor Code of the Russian Federation, a.3; You are subject to discrimination at work [Вы подвергаетесь дискриминации на работе], para.1, available online at <http://trudprava.ru/index.php?id=1424> (last accessed 10th June 2010)

³²² 1993 Constitution of the Russian Federation, a.26(2)

³²³ The Law on Education of the Russian Federation No. 3266-1 of 10 July 1992, a.6 para.2

³²⁴ Report: “The Problem of Discrimination and Violation of Roma Children's Rights in Schools of the Russian Federation.” Eds. Olga Abramenko and Stephania Kulaeva. Saint Petersburg, 2009, p.11

³²⁵ 1993 Constitution, a.69, 71

³²⁶ Compliance of the Russian Federation with the Convention on the Elimination of All Forms of Racial Discrimination, NGO Report to the UN CERD, 2007, para.188

³²⁷ 1993 Constitution, a.71(c), 72 (b)

³²⁸ Compliance of the Russian Federation with the Convention on the Elimination of All Forms of Racial Discrimination, *Supra note 326*

³²⁹ *Ibid.*

³³⁰ *Ibid.*

Therefore, comparing Hungarian and Russian provisions on non-discrimination, one can see two different approaches to their guaranteeing. While both countries prohibit discrimination on the similar grounds with regards to all social relations, as provided by the international human rights treaties to which Hungary and Russia are parties, the form of incorporation of non-discrimination principle in the national legislation is not the same. In Hungarian law anti-discrimination provisions emerged earlier, partly due to the obligations of the EU member state. They are established in a separate act, where definition of discrimination and its patterns can be found. State organs dealing with discrimination, particularly with regard to Roma are specially designed. Like in Russia, anti-discrimination clause is included in the principal law on education. In Russian law there is no universal definition of discrimination, nor that of national minorities. Legislative acts on Roma issues, a uniform anti-discrimination document and organ aimed at combating discrimination are also absent. Non-discrimination clauses are incorporated in different laws, including that on education.

2.2.2. Domestic Law of Hungary and Russia on Education

The Hungarian 1993 Public Education Act (hereinafter – PEA) further develops the provisions of the Act on Equal Treatment against discrimination in education.³³¹ The PEA contains definitions of direct and indirect discrimination and segregation and prohibits them;³³² it also introduces the definition of special educational needs.³³³ The available place for every child in state education is guaranteed by the PEA.³³⁴ The number of ‘private students’ subject to home education is reduced by the changes to the PEA, that hopefully will lead to involvement of Roma children to regular school education, who were more possibly

³³¹ Advancing Roma Education in Hungary, *Supra* note 106, p.20

³³² Act LXXIX (1993), a.4, 84

³³³ Act LXXIX (1993), a.30; Third Report Submitted by Hungary, *Supra* note 308, p.27

³³⁴ Act LXXIX (1993), a.66

declared private students than non-Roma persons.³³⁵

The notaries are entitled to ensure that private schools function in legal manner and to bring the application before the court in case of parents' or NGO's claim or "to suspend the budgetary support" of the school concerned. If the violations continue, the notary may "revoke the license of the school and strike it out of the registry".³³⁶

The Center of Monitoring and Examination in Public Education (OKÉV) "has the right to investigate cases of discrimination" at schools and set a fine.³³⁷

The changes to the PEA in recent years were aimed at the assistance to the disadvantaged groups, particularly Roma.³³⁸ In 2003 it was decided to reserve places for disadvantaged children in the kindergartens by the parents' request.³³⁹ This novelty is important because only small percent of Roma children is enrolled in the system of kindergarten education.³⁴⁰ From 2004 Parliament approval the students of primary school cannot be made to repeat the same year of studies unless they frequently missed the classes. This norm did not prove its efficiency, since it doesn't help students in continuing their education and maintains the risk of drop out through stigmatizing disadvantaged students.³⁴¹ According to the present edition of the PEA, the pupil is obliged to repeat a year only by the parents' consent.³⁴²

In 2006 the PEA was modified in order to guarantee the places in schools for disadvantaged students, who need to enter the school located beyond their district but within the municipality they reside in (transfer students).³⁴³ These children should receive places in

³³⁵ Viktoria Mohacsi, Government Initiatives: Hungary's School Integration Program, in *Separate and Unequal*, Budapest, 2004, p.252; Act LXXIX (1993), a.7; ECRI Report on Hungary, Council of Europe, 2009, para.99

³³⁶ Advancing Roma Education in Hungary, *Supra note* 106., p.21

³³⁷ *Ibid.*, p.21

³³⁸ *Ibid.*, p.34

³³⁹ Act LXXIX (1993), para.65; Advancing Roma Education in Hungary, *Supra note* 106, p.34; Viktoria Mohacsi, *Supra note* 335, p.251

³⁴⁰ Viktoria Mohacsi, *Supra note* 335, p.251

³⁴¹ Advancing Roma Education in Hungary, *Supra note* 106, p.34

³⁴² Third Report Submitted by Hungary, *Supra note* 308, p.27

³⁴³ Advancing Roma Education in Hungary, *Supra note* 106, p.35

respective school without a lottery organized for other transfer students.³⁴⁴

The most recent amendments to the PEA “permit to disclose indirect discrimination. The compulsory school age was set at 18 years.³⁴⁵

The Ministry of Education has been implementing a governmental program for decreasing the disproportional placement of Roma in special classes for mentally retarded, among other, through integrating “slightly disabled” children to mainstream classes.³⁴⁶ The Ministry establishes a stringent procedure to ensure that the child is eligible to a special curriculum, which lasts for extended period and is decided by experts (the Rehabilitation Expert Committees Examining Learning Skills), as stated by the Ministerial Decree 14/1994 (VI.24).³⁴⁷

The changes to Ministerial Decree (11/1994.MKM) of 2003-2004 were directed to the integration of Roma children in mainstream schools through preparatory training programs. The Decree provides guidance for schools which chose to implement given program.³⁴⁸

In 2008 the Parliament passed Act XLIII for the inclusion of Romani and Beash languages into the use in different levels of education.³⁴⁹

The national legislation of Russia enshrines specific provisions protecting equality in acts regulating various issues, particularly those concerning social rights.³⁵⁰ At the same time, the Constitution reads in a.15(4), that international treaties, to which Russia is a party, have a priority over national rules, if there is a contradiction between them.³⁵¹ Since in the domestic Law on Education the applicability of international legal provisions concerning education is

³⁴⁴ *Ibid.*

³⁴⁵ Third Report Submitted by Hungary *Supra* note 308, p.27

³⁴⁶ Viktoria Mohacsi, *Supra* note 335, p.248-249; Act XXVI of 1998

³⁴⁷ *Ibid.*, p.250

³⁴⁸ Advancing Roma Education in Hungary, *Supra* note 106, p.35; Third Report Submitted by Hungary, *Supra* note 308, p.27

³⁴⁹ Third Report Submitted by Hungary, *Supra* note 308, p.22

³⁵⁰ Committee on the Elimination of Racial Discrimination, Nineteenth periodic reports of States parties due in 2006, Addendum, Russian Federation, CERD/C/RUS/19, 23 October 2006

³⁵¹ 1993 Constitution of the Russian Federation, a.15(4)

emphasized,³⁵² the educational rights will fall within the scope of the constitutional rule.

The Constitution of the Russian Federation guarantees the right of everyone to education, stipulating that “the general accessibility of and free preschool, basic general and secondary vocational education in state or municipal educational institutions and at enterprises shall be guaranteed and that basic general education shall be obligatory.”³⁵³ Under the formal education the Russian legislation means “system of implementing primary general, basic general and secondary education”, which forms three stages of education.³⁵⁴

The Law on Education of the Russian Federation (No. 3266-1 of 10 July 1992) (hereinafter – the Law), similarly with other legal instruments, prohibits discrimination in education: in accordance with article 5 of the Law, Russian citizens “are guaranteed the opportunity to receive an education irrespective of sex, race, ethnic background, language, origin, place of residence, attitude to religion, beliefs, social status, wealth or official position”.³⁵⁵ The Law details the norms enshrined in the Constitution.

Therefore, the education in Russia shall be free and compulsory to all without any distinction and in accordance with the opportunities of educational system, shall be provided in the native language of the students.³⁵⁶ According to laws, there must be a free choice of the language of education to the extent provided by the educational system.³⁵⁷ Educational institutions where these rights can be realized should be established in necessary number.³⁵⁸

National minorities who do not have their territorial autonomy should be supported by the state in teaching their own language and studying in it.³⁵⁹ Ethnic cultural autonomy – a

³⁵² Law on Education of the Russian Federation No. 3266-1 of 10 July 1992, Preamble

³⁵³ 1993 Constitution of the Russian Federation, a.43; Report: “The Problem of Discrimination and Violation of Roma Children's Rights in Schools of the Russian Federation.”, *Supra note 324*, p.7

³⁵⁴ Report: “The Problem of Discrimination and Violation of Roma Children's Rights in Schools of the Russian Federation.” *Supra note 324*, p.7

³⁵⁵ Law on Education of the Russian Federation No. 3266-1 of 10 July 1992, a.5

³⁵⁶ Law on Education, a.5 para.1,2,3

³⁵⁷ Federal Law of 17 June 1996 No.74-FZ “On the Ethnic Cultural autonomy”, a.10; Law of the Russian Federation of 25 October 1991 No.1807-1 “On the Languages of Peoples in the Russian Federation”, a.10

³⁵⁸ Law of the Russian Federation of 25 October 1991 No.1807-1 “On the Languages of Peoples in the Russian Federation”, a.9 para.2

³⁵⁹ *Ibid.*, a.9 para.5

minority NGO – may create non-governmental institutions, elaborate education programs for schooling in their language.³⁶⁰

The rights related to education were further promoted in the acts of the Ministry of Education and Science of the Russian Federation (hereinafter – the Ministry), which have binding force for all schools and authorities: the Letter of the Ministry from 21 March 2003 No.03-51-57IN/13-03 “Recommendations on the Organization of Entrance into First Grade” (hereinafter – Recommendations) and the Letter of the Federal Service on Supervision in Education and Science from 24 July 2006 No.01-678/07-01 “On the Right of Children to Education in the Russian Federation” (hereinafter – the Letter).³⁶¹

Recommendations propose, among other, following conditions for the admission of children to the first grade: it is realized on the ground of parent’s application by the founder of a school; it cannot be held on a competitive basis; it does not depend on the child preparedness; the school may refuse to admit the child only if there are no available places in the institution, and thus shall inform parents on the availability of other schools in the territory and “ensure the enrollment of children into first grade”; it is carried out upon the application of parents with the child’s medical card and the certificate of residence enclosed.³⁶²

The Letter, referring to the a.2 of the Protocol 1 to the ECHR and to the Law, emphasizes, that every child has the right to education regardless of the place of residence and the absence of the registration at the place of residence cannot be a ground for denial of admission to an educational institution.³⁶³

However, the administration of DPEA may regulate the enrollment of students, including admission of children older than eight to the first grade and decision on the

³⁶⁰ Federal Law of 17 June 1996 No.74-FZ “On the ethnic cultural autonomy”, a.11

³⁶¹ Report: “The Problem of Discrimination and Violation of Roma Children's Rights in Schools of the Russian Federation.” *Supra note* 324, p.10

³⁶² Letter of the Ministry from 21 March 2003 No.03-51-57IN/13-03 “Recommendations on the Organization of Entrance into First Grade”

³⁶³ Letter of the Federal Service on Supervision in Education and Science from 24 July 2006 No.01-678/07-01 “On the Right of Children to Education in the Russian Federation”

occupancy.³⁶⁴ For the adults who do not have education the system of evening schools is established, but only people with primary level of education can obtain the secondary there, and the classes of primary education may be arranged at the discretion of a school.³⁶⁵ Unfortunately, only minority of schools uses this option.³⁶⁶

The Ministry, being a federal executive body, carries out control over education in the state; at the provincial level the supervision is exercised by the subordinate bodies of the Ministry, and at the local level District Public Education Authorities (hereinafter – DPEA) are established.³⁶⁷ The respective bodies of the subject of Federation are responsible for creation, financing, licensing and accreditation of educational institutions as well as for evaluating teachers.³⁶⁸

DPEA are founders of public schools, while in the case of private school this function belongs to a private entity.³⁶⁹ The Law authorizes schools with independence in choosing a system and rules of evaluating students, curriculum of instruction and organization of the educational process.³⁷⁰

The role of DPEA is the most significant in making decisions related to the educational process in a school despite the broad scope of autonomy given to schools by legislation.³⁷¹ Under the Standard Statute on Institutions of General Education approved by Decree of the Government of the Russian Federation on 19 March 2001, No.196 (hereinafter – Standard Statute), which, '*inter alia*', reiterates provisions of the Law on independence in choosing grading system, etc., the school is entitled “to make independent decisions on...

³⁶⁴ Letter of the Ministry from 21 March 2003 No.03-51-57IN/13-03, *Supra note* 362; Report: “The Problem of Discrimination and Violation of Roma Children's Rights in Schools of the Russian Federation.” *Supra note* 324, p.11

³⁶⁵ Standard Statute on Evening (Shift) Institutions of General Education, confirmed by Decree of the Government of the Russian Federation from 3 November 1994 No.1237, para.15

³⁶⁶ Report: “The Problem of Discrimination and Violation of Roma Children's Rights in Schools of the Russian Federation.” *Supra note* 324, p.11

³⁶⁷ *Ibid.*, p.9

³⁶⁸ Law on Education, a.28.1

³⁶⁹ *Ibid.*, a.33

³⁷⁰ Law on Education, a.32

³⁷¹ Report: “The Problem of Discrimination and Violation of Roma Children's Rights in Schools of the Russian Federation.” *Supra note* 324, p.9-10

evaluating student mastery”, to define on the “conditional promotion” of the student to the next year or on the request of parents’ consent to place the student into a compensatory education class or to home education.³⁷² The school is also authorized to decide on the “number and occupancy of classes” of schools located in villages compliant to the needs of the population.³⁷³ The Standard Statute further establishes that “rules for accepting citizens” into schools are determined by the founder and stated in the charter of the educational institution.³⁷⁴ However, the rules on transferring students between the classes of the same year and to the next year of education are not indicated.³⁷⁵

Though schools are provided with capacity to define rules of admission of the children, their transfer from class to class, evaluation and decision on the placement to compensatory class,³⁷⁶ the founder of the institution, i.e. the municipal executive body responsible for education, has the power to give directions for their activities.³⁷⁷ In practice this leads to the interference of the organ with the school matters that may concern admission and education of particular students as in case of Roma children.³⁷⁸ Moreover, unlike schools, the education authorities do not bear responsibility for the unlawful decisions made in schools under their control.³⁷⁹

Hence, the overall compulsory and free public education (including secondary school) is guaranteed in Hungary and Russia; public and private educational institutions are recognized. Under the law, minority languages, including Roma language, can be used in education; however, in Russia the concept of such use is not elaborated. In Hungary special organs and their units supervise education, monitor segregation, provide support for Roma

³⁷² Standard Statute on Institutions of General Education approved by Decree of the Government of the Russian Federation on 19 March 2001, No.196, para.51

³⁷³ *Ibid.*, para.27

³⁷⁴ *Ibid.*, para.45

³⁷⁵ Report: “The Problem of Discrimination and Violation of Roma Children's Rights in Schools of the Russian Federation.” *Supra* note 324, p.8

³⁷⁶ *Ibid.*

³⁷⁷ *Ibid.*, p.9

³⁷⁸ *Ibid.*, p.8-9

³⁷⁹ *Ibid.*, p.10

students and other disadvantaged children, while in Russia administration of education is concentrated in the Ministry of Education and Science. Generally, administration system of education in Russia causes negative effects to the availability and accessibility of schools, depending on local authorities. Hungary, having more experience in the protection of the rights of Roma, adopted acts which secure equal access of children to education and outlaw segregation; in Russia all issues regarding education are regulated by the Law on Education and acts of the Ministry and there are no specialized documents on the rights of Roma to education.

CHAPTER 3. CASE STUDY ON THE ACCESS OF ROMA TO EDUCATION IN THE JURISPRUDENCE OF HUNGARY, RUSSIA AND THE EUROPEAN COURT OF HUMAN RIGHTS

Segregation is recognized the fundamental reason of the lack of equal access to education for Roma.³⁸⁰ The European Monitoring Center on Racism and Xenophobia (EUMC) distinguishes the following main types of segregation, according to which cases on violation of access to education can be classified:

1. Intra-school segregation – establishment of separate classes for Roma within mainstream schools, including those in separate buildings or with separate, generally inferior curriculum;
2. Intra-class segregation – use of different education standards in the same class;
3. Inter-school segregation – social disadvantage, entrance exams or tuition fees in ordinary schools, isolated location of Roma communities and ethnically biased psychological tests lead to placement of Roma children in separate schools: for students with learning disabilities or for Roma children living in the local community.³⁸¹ Unfortunately, all these types may be found in the case-law of both states analyzed.

3.1. Segregation in Special Schools or Classes

As noted by UNICEF, potentially inclusive measures towards children belonging to ethnic minorities in education become exclusionary in practice – Roma children are placed into ethnically homogenous schools or classes or segregated into institutions for mentally

³⁸⁰ Rumyan Russinov, Desegregation of Romani Education: Challenges and Successes, in *Separate and Unequal*, Budapest, 2004, p.16

³⁸¹ European Commission. July, 2007. Segregation of Romani Children in Education: Addressing structural discrimination through the Race Equality Directive, p.10. Available online at: http://ec.europa.eu/employment_social/fundamental_rights/policy/aneval/legnet_en.htm (last accessed on 1st August 2010)

disabled students.³⁸²

In Hungary placement of Roma students into special schools is explained by “socialization defects in the family and the insufficient kindergarten attendance”, which is an obstacle for Roma to study on equal level with other children.³⁸³ Therefore, they need special methods and tools provided by remedial classes that in fact make them unable to catch up with others.³⁸⁴ Besides special classes there are so-called “catch-up” or remedial classes, where Roma children are placed for schooling assistance but usually they cannot join their peers afterward. “Private classes” exist for children who are considered to have disciplinary problems, and their parents are insisted to transfer children there from regular classes.³⁸⁵ The child of “Roma parentage” is at risk to be automatically placed in the class of this kind, as Hungarian Minority Ombudsman stated.³⁸⁶

In the mid-2000s Roma students constituted 60% of the special schools' student body – their over-representation is obvious.³⁸⁷ Since these children have no opportunity to join mainstream class, it is impossible for them to compete in the labor market in the future, nor to socialize in the environment. The students leave special schools being stigmatized.³⁸⁸

The schools can give to the child a status of a private student, therefore, leaving him or her out of school in case if its authorities consider the child to have some physical or developmental disability. The Romani parents are often coerced to accept the private student's status for the child, including in the case of illness or behavior problems.³⁸⁹ In fact, these pupils are abandoned by the teachers, so that their private education loses its sense, as it

³⁸² Innocenti Social Monitor 2009, Child Well-being at a Crossroads: Evolving Challenges in Central and Eastern Europe and the Commonwealth of Independent States, UNICEF 2009, p.91

³⁸³ Advancing Roma Education in Hungary, *Supra note* 106, p.45

³⁸⁴ *Ibid.*, p.45

³⁸⁵ James A. Goldston and Ivan Ivanov, Combating Segregation in Education through Litigation: Reflections on the Experience to Date, in *Separate and Unequal*, *Supra note* 383, p.147; Stigmata: Segregated Schooling of Roma in Central and Eastern Europe, *Supra note* 59, p.11; Equal Access to Quality Education for Roma, Hungary (from vol.1), Open Society Institute, EU Monitoring and Advocacy Program, Education Support Program, Roma Participation Program, Monitoring Report, 2007, p.218

³⁸⁶ Viktoria Mohacsi, *Supra note* 335, p.241

³⁸⁷ *Ibid.*, p.242

³⁸⁸ *Ibid.*, p.248

³⁸⁹ Stigmata: Segregated Schooling of Roma in Central and Eastern Europe, *Supra note* 59, p.81

follows from the ERRC surveys on Roma parents and children. Racial harassment at school is one more reason for Romani families to transfer the child to home education. Like remedial classes, private education from temporary measure becomes permanent status of the Roma in educational process,³⁹⁰ which does not let them catch up with the peers and hence, contributes to their social exclusion.

In accordance with the study of the Advisory Committee on the Framework Convention, the formula used in the European countries, including Hungary, for enrolling children in special schools is that such enrollment “should take place only when it is absolutely necessary and always on the basis of consistent, objective and comprehensive tests”; in Hungary this formula is extended to guarantee that these tests “avoid the pitfalls of culturally biased testing”.³⁹¹

Meanwhile non-Roma children are placed in special schools after they had several chances to stay in a mainstream school, Roma pupils are transferred there immediately, as the ERRC research found.³⁹² It also testifies the poor awareness of Roma parents about what the special schools are and what consequences they entail. A Romani mother claimed to the ERRC that her son having graduated from the special school could not continue his education without having an idea about the nature of remedial education.³⁹³ According to the Hungarian Parliamentary Commissioner on National and Ethnic Minorities, language characteristics of Roma are not taken into account while evaluating the skills of the children³⁹⁴ that leads to biased decisions on their educational abilities. Nor bilingual specialists or interpreters are involved in such cases.³⁹⁵

In 1997 the Tiszavasvari case was examined by the Hungarian courts. As to the facts, 250 Roma students of the primary school in Tiszavasvari were assigned to segregated classes:

³⁹⁰ *Ibid.*, p.82

³⁹¹ Duncan Wilson, *Supra note 219*, p.333, para.5.5.3

³⁹² Stigmata: Segregated Schooling of Roma in Central and Eastern Europe, *Supra note 59*, p.40

³⁹³ *Ibid.*, p.47

³⁹⁴ *Ibid.*, p.53

³⁹⁵ *Ibid.*, p.53

for mildly mentally disabled children and for Roma-only classes. The construction for Roma classes was separated from the main school building and was not equipped and repaired for schooling purposes. The students were not allowed to enter the schools gymnasium and cafeteria for non-Roma children. As a result, the Roma applicants challenged violation of anti-discrimination provisions in Hungarian law and the Court confirmed the fact of a violation, having assigned a compensation for every child.³⁹⁶ This case paved the way to desegregation process in Hungary, though it will take years to overcome the problem.³⁹⁷

The case of Jaszladany shows the example of ethnic segregation leading to the “segregation by abilities”.³⁹⁸ In given case the local authorities of Jaszladany village decided to build a separate school for children of lower educational abilities, most of whom were Roma. The percentage of less talented students was higher among Roma just because they represented a minority in the village.³⁹⁹

In Onod, Hungary, Roma pupils were placed in special classes as in primary as in secondary school on the ground of a suggestion that they are not able to catch up in higher grades after having attended remedial classes.⁴⁰⁰ However, to evaluate the child's consistency with educational program requirements the medical examination is necessary; though the school authorities failed to provide it.⁴⁰¹

Compliant to the Russian legislation classes of compensatory education may be opened in a mainstream school upon the consent of the founder and the children are transferred there on the basis of internal testing jointly with the educational authorities.⁴⁰² Special classes for handicapped children may be opened in mainstream schools as well.

³⁹⁶ James A. Goldston and Ivan Ivanov, *Supra note 385*, p.149

³⁹⁷ *Ibid.*, p.152, 163

³⁹⁸ Gabor Kertesi, Gabor Kezdi, Segregation in the Primary School System in Hungary: Causes and Consequences, available online at http://www.romaeducationfund.hu/publications/index.php?RomaEduF_=e64fb7f4b399a6f573bd37bb797310d4&menu_grp=4&id=31 (last accessed on 12th October 2010)

³⁹⁹ *Ibid.*

⁴⁰⁰ Equal Access to Quality Education for Roma, Hungary (from vol.1), *Supra note 385*, p.261

⁴⁰¹ *Ibid.*, p.263

⁴⁰² Standard Statute, *Supra note 372*, point 29

Transfer of the students is carried out upon the parents consent and according to the results of testing held by Psychological-Medical-Pedagogical Commission.⁴⁰³

In the school No.66 of Tula the Roma children had their right to education violated by refusal of admission to secondary school; on the contrary, all Roma students were assigned to the compensatory education class organized in this school. Compensatory classes for Roma were formed within each grade regardless of age of the students (with the difference of more than five years) and permitted class size. Roma children were placed to these classes automatically from the moment of enrollment to school.⁴⁰⁴ The procedure of admission was contrary to the legal norm set forth by the Russian Ministry of Education which requires medical examination and parental consent to register the child in the compensatory class.⁴⁰⁵ Parents did not sign any applications to register their children in given classes; nor did they receive any information on the rules of the registration or specificity and consequences of education in compensatory classes.⁴⁰⁶

Psychological-pedagogical commission has to exercise examinations of the children twice a year with a parental consent to decide on their promotion to the next grade and give recommendations concerning education. However, no documents were found to confirm these obligatory procedures, and proper parental consent was not obtained – some parental signatures were falsified.⁴⁰⁷

Though compensatory education classes are temporary measure and the students are to be transferred to the mainstream class in an outcome of this measure, no Roma child was transferred thereto, nor was non-Roma child assigned to the compensatory class. The Roma nevertheless spent years in these classes, their only form of education. Moreover, if there were

⁴⁰³ *Ibid.*, point 30

⁴⁰⁴ Report: “The Problem of Discrimination and Violation of Roma Children's Rights in Schools of the Russian Federation.” *Supra note 324*, p.16

⁴⁰⁵ Model Statute on Compensatory Education Classes in Institutions of General Educations, confirmed by the Order of the Ministry of Education of the Russian Federation of 8 September 1992 No.333

⁴⁰⁶ Report: “The Problem of Discrimination and Violation of Roma Children's Rights in Schools of the Russian Federation.” *Supra note 324*, p.17

⁴⁰⁷ *Ibid.*

not enough students to form a grade for Roma each year, the children remained in one and the same grade. Other measures than classes of this kind were never offered to Roma students regardless of their compulsory character if compensatory education does not have effect.⁴⁰⁸

Violations in the educational process in given classes also took place. Classes of compensatory education are characterized by supplementary conditions for learning program such as additional lessons with teachers and psychologists. School No.66 neither did provide these benefits for children, nor did it have sufficient standard conditions to teach Roma children – in violation of law they studied in the afternoon shift and were kept out of the school community, many courses from basic program (for example, English) were not taught and those, which were, did not meet educational standards.⁴⁰⁹

The teachers did not hide their degrading attitude towards Roma families, and the officials responsible for testing held it in a superficial fashion, ignoring individuality of every child.⁴¹⁰

In March, 2009 four Roma families filed a complaint to the district court; at each stage legal proceedings ended up discontinued, and the case was dismissed. Judicial fee was required by the judge despite of the provision of law stating that in the cases related to child's right this fee is not assessed.⁴¹¹ In December, 2009 an application to the ECtHR was submitted concerning violation of Protocol 1, a.2 (Right to Education) in conjunction with a.14 of the ECHR (Right to Non-Discrimination), a.8 (Right to Respect for Private and Family Life) and a.13 (Right to Effective Remedy) of the ECHR.⁴¹²

In Chudovo settlement (Novgorod Province) a special remedial school admits Roma children enrolled in two Roma classes attended by around 20 students. Decisions on the

⁴⁰⁸ *Ibid.*, p.18

⁴⁰⁹ *Ibid.*

⁴¹⁰ *Ibid.*, p.19

⁴¹¹ Federal Law "On Basic Guarantees of the Rights of the Child in the Russian Federation" of 24 July 1998 No.124-FZ

⁴¹² Report: "The Problem of Discrimination and Violation of Roma Children's Rights in Schools of the Russian Federation." *Supra note 324*, p.20

admissions to this school are taken by the State Educational Institution “Center for Psychological-Medical-Sociological Guidance” and medical criteria are taken into account. As regards Roma, poor families enroll their children to this school due to disadvantaged situation – children are provided with free food, material support and general attention to students.⁴¹³

The European Court of Human Rights (hereinafter – the Court) has decided on segregation of Roma children in special schools in its landmark judgment *D.H. v. Czech Republic* (Ostrava case). On the 13th November 2007 the Grand Chamber stated that segregation practice towards Roma in education presented a violation of a.14 of ECHR taken in conjunction with a.2 of Protocol 1 protecting the right to education. This decision became an outcome of an eight year litigation held by the parents of 18 Roma children from Ostrava placed into schools for mentally disabled and their representatives – European Roma Rights Center lawyers and local attorneys. The judgment indicated on the discriminatory character of education system even in the absence of specific discriminatory acts by any concrete persons.⁴¹⁴

In the final judgment the arguments of *amicus brief* by the Step by Step Association, the Roma Education Fund and the European Early Childhood Research Association were used. These organizations mentioned “the inappropriateness and ineffectiveness” of placing children into special institutions and of the testing applied not only for learning of Roma students, but for social inequality as well.⁴¹⁵ Therefore, use of Interveners' reports allowed the Court to see not only the case of individual discrimination, but systemic segregation.⁴¹⁶

The European legal NGOs – Minority Rights Group International, the European

⁴¹³ *Ibid.*, p.27

⁴¹⁴ Alexandre Marc, A Major Breakthrough for the Integration of Roma Children in Education Systems in Europe: The Europe's Court of Human Rights Judgment on the Ostrava Case, Magazine of Roma Education Fund, Issue 1, A School for All, December 2007, p.17

⁴¹⁵ Alexandre Marc, *Supra note* 414.

⁴¹⁶ Jennifer Devroye, The Case of D.H. and Others v. the Czech Republic, 7 Northwestern University Journal of International Human Rights 81, Spring, 2009, p.88

Network Against Racism and European Roma Information Office – also sent their Written comments to the ECtHR compliant to the Rules of Court. The organizations reiterated the negative effect of special schools on the future education and employment of the Roma.⁴¹⁷ They questioned the reliability of the tests used and the parental consent given, stressing that not real mental disability, but cultural and language differences backed the placement of Roma children in the given classes.⁴¹⁸

Statistics demonstrated that a Roma child in Ostrava was 27 times more likely sent to the special school than a non-Roma child. The main questions before the Court were whether such difference represented indirect discrimination and whether it should rely on the statistical evidence while ruling on the case.⁴¹⁹

The applicants were placed in special schools according to results of the testing carried out by a psychologist; the decision on the placement was taken by the principal teacher upon the parental consent. The procedure was formally in compliance with legal norms.⁴²⁰ Domestic courts dismissed the complaint, where the applicants referred to the lower quality of education in special schools and requested the segregation practice be ceased and their right to education restored.⁴²¹

In their application to the ECtHR the Roma families asserted that statistical evidence indicating on segregation practice at special schools requires the burden of proof to be shifted to the respondent Government for justification.⁴²² However, the Chamber took a narrow approach considering the facts of the case: it did not accept the argument that statistics could prove discrimination alone; it underlined that special schools catered all children regardless of

⁴¹⁷ Written Comments by Minority Rights Group International, the European Network Against Racism and European Roma Information Office, App.No.57325/00, *D.H. v. Czech Republic*, p.6

⁴¹⁸ *Ibid.*, p.5-6

⁴¹⁹ Gemma Hobcraft, Roma Children and Education in the Czech Republic: *D.H. v. Czech Republic*: Opening the Door to Indirect Discrimination Findings in Strasbourg? *European Human Rights Law Review*, Issue 2, 2008, p.246; Lilla Farkas, The Scene After Battle: What is the Victory in *D.H.* Worth and Where to Go From Here? *Roma Rights Journal*, No.1 2008, p.53

⁴²⁰ Gemma Hobcraft, *Supra note* 419, p.247

⁴²¹ *Ibid.*, p.248

⁴²² *D.H.*, Second Chamber Decision, February 7, 2006, at [37]

their ethnic group, and it concluded that the “climate of mistrust” the Roma applicants faced could not amount to discrimination. The Chamber stated that the Government acted within its margin of appreciation and had a legitimate aim to adapt the system of education to the disabilities of the children.⁴²³

The Grand Chamber accepted the applicants' argument that the case was about indirect discrimination and that the statistical evidence from regional and international sources was essential and could not be denied by the respondent state. Therefore, it was for the Government to justify the existence of this differential treatment and, given that tests or parental consent cannot be relied on for justification, the Grand Chamber found the Government responsible for violation of a.14 taken together with the right to education.⁴²⁴ Czech Republic exceeded its margin of appreciation, the Grand Chamber stated.⁴²⁵

As Strupek notes, the Court does not give a notion of segregation, however, it expresses its concern about segregation practices in education system of Council of Europe states. The term “indirect discrimination” used throughout the case indicates on the absence of intent, which is usually connected to segregation.⁴²⁶

Devroye stresses that the Court, while issuing this landmark decision, did not give a mandate to Czech government to make changes in the national anti-discrimination law, however, the critique of Czech legislation made the government to review the law, namely, the Schools Act.⁴²⁷ Thus the decision could not guarantee effective protection from violations found.⁴²⁸

Statistics were considered by the Grand Chamber sufficient to create a “rebuttable

⁴²³ *D.H. v. Czech Republic*, Grand Chamber (App.No.57325/00), decision of November 13, 2007 at [48], [49], [52]; Gemma Hobcraft, *Supra note* 419, p.248-249

⁴²⁴ Gemma Hobcraft, *Supra note* 419, p.255

⁴²⁵ Jennifer Devroye, *Supra note* 416, p.92

⁴²⁶ David Strupek, Before and After the Ostrava Case: Lessons for Anti-Discrimination Law and Litigation in the Czech Republic, *Roma Rights Journal*, No.1, 2008, p.46

⁴²⁷ Jennifer Devroye, *Supra note* 416, p.88

⁴²⁸ *Ibid.*, p.97

presumption that the effect of a measure or practice is discriminatory”⁴²⁹ and thus to shift the burden of proof to the Government. Intent was recognized not necessary element of discriminatory practice to prove the latter: though expressed in neutral terms, the legal provisions had negative impact on Roma disproportionately higher than on non-Roma.⁴³⁰ The concept of indirect discrimination was applied in the case, while direct intention was impossible to prove.⁴³¹ In *D.H.* the reliability of statistics was not questioned, but even if it was, it would have caused the burden of proof to shift to the respondent state, as it is accepted in the European Court of Justice case law.⁴³²

As regards tests, the Grand Chamber distinguished the following reasons why they could not justify degrading difference in treatment: first, the tests did not take into account Roma characteristics; second, there was no proper psychological and pedagogical assessment of the children placed into special schools that showed their ethnic origin to be the real criteria of their enrollment; third, there was a threat of bias because the tests were not designed consistent to the characteristics of Roma.⁴³³ These tests were “the primary source of discrimination’ against Roma children.”⁴³⁴ Under the terms of the RED if the testing ignores characteristics of the group, thus it is not based on neutral criteria and amounts to direct discrimination, *i.e.* not subject to justification.⁴³⁵

To analyze the issue of parental consent the Grand Chamber scrutinized the concept of a waiver of rights, which may be applied “in full knowledge of facts”⁴³⁶ and “without constraint”.⁴³⁷ ‘*A contrario*’ in *D.H.* there are no grounds to give a waiver of rights, first, because the parents due to their disadvantaged position were not able to weigh up all the

⁴²⁹ Gemma Hobcraft, *Supra note 419*, p.255; Jennifer Devroye, *Supra note 416*, p.91

⁴³⁰ *D.H. v. Czech Republic*, *Supra note 423* at [193]; David Strupek, *Supra note 426*, p.42

⁴³¹ *Ibid.*

⁴³² *Ibid.*, p.45

⁴³³ *D.H. v. Czech Republic*, *Supra note 423* at [200], [201]; Gemma Hobcraft, *Supra note 419*, p.256; David Strupek, *Supra note 426*, p.43

⁴³⁴ Lilla Farkas, *Supra note 419*, p.55

⁴³⁵ *Ibid.*, p.59

⁴³⁶ *Pfeifer and Plankl v. Austria* (1992) 14 E.H.R.R. 692

⁴³⁷ *Deweert v. Belgium* (1980) 2 E.H.R.R. 439

consequences of their consent, and second, because the document the parents had signed to give their consent did not explain differences between curriculum in mainstream and special schools or any possible alternatives for their children.⁴³⁸ The consent of parents was also determined by degrading attitude and harassment usually faced by Roma children who attended an ordinary school being a minority there.⁴³⁹ Therefore, the Grand Chamber clearly affirmed that “no waiver of right not to be subjected to racial discrimination can be accepted, as it would be counter to an important public interest”.⁴⁴⁰ Since direct discrimination cannot be justified under the RED, parental consent cannot be used for justification.⁴⁴¹

Lilla Farkas claims that the outcome of *D.H.* is essential for the community law firmly recognized within the Council of Europe with regard to Roma minority.⁴⁴² She also brings attention to the *D.H.* litigation as a successful example of '*actio popularis*' application, which may be used for challenging system issues when interests, especially economic and social rights, of groups are at stake and at the same time permits to avoid victimization.⁴⁴³ '*Actio popularis*' can have the most fruitful implementation in the countries which transposed the RED, '*inter alia*', Hungary and in particular fields including education.⁴⁴⁴

Hence, *D.H.* demonstrated a purposive interpretation of a.14 of the ECHR developing the jurisprudence of the Court to the international standards.⁴⁴⁵ This decision gave a significant impact to the doctrine of indirect discrimination, made remarkable conclusions on shift of the burden of proof and use of statistical evidence, '*inter alia*', their role in the proportionality test.⁴⁴⁶ It was emphasized that the case of Czech Republic is not the one of the kind but typical for European countries.⁴⁴⁷ So, the impact was given to all legal systems under

⁴³⁸ Gemma Hobcraft, *Supra note 419*, p.257; *D.H. v. Czech Republic*, *Supra note 423* at [203]

⁴³⁹ Gemma Hobcraft, *Supra note 419*, p.257

⁴⁴⁰ *D.H. v. Czech Republic*, *Supra note 423* at [204]

⁴⁴¹ Lilla Farkas, *Supra note 419*, p.60

⁴⁴² *Ibid.*, p.51-52

⁴⁴³ *Ibid.*, p.62-63

⁴⁴⁴ *Ibid.*, p.64

⁴⁴⁵ Gemma Hobcraft, *Supra note 419*, p.259

⁴⁴⁶ *Ibid.*, p.259-260

⁴⁴⁷ Lilla Farkas, *Supra note 419*, p.54

the Court's jurisdiction, though there is no guidance provided to eliminate segregation.⁴⁴⁸

However, practice of segregation into special schools in Czech Republic is still widespread despite of the legislative abolition of the special schools system.⁴⁴⁹ Special schools were renamed to practical schools while the curriculum was not affected, and Roma children are still overrepresented there.⁴⁵⁰ The Romani parents are still poorly informed on their choices in education of the children that is testified by little advancement of integration programs.⁴⁵¹ The problem persists with collection of statistics⁴⁵² and positive measures towards children from disadvantaged social backgrounds.⁴⁵³

Romani children, as in Hungary, as in Russia are at great risk to be automatically enrolled in remedial classes for the mentally disabled, while disability is confused with language and cultural difference and social disadvantage. Assignment to special classes is realized with violations of legal norms, namely, parental consent is often not valid and temporary by law special education becomes a permanent measure in reality. Testing process ignores individuality of every child. Roma are frequently unaware of the consequences of being taught in special schools, though after school they have no opportunity of further education and employment with this background. While in Hungary there is some positive case practice concerning special education (Tiszavasvari case), still work on desegregation is needed. In Russia court practice is remote, that is complicated by the lack of legislation and public awareness of the problem. Practice of the ECtHR, as D.H. case showed, should trigger positive changes in the CEE countries, at first, for Roma applicants who attempt to protect their rights on the European level.

⁴⁴⁸ Jennifer Devroye, *Supra note 416*, p.99-100

⁴⁴⁹ Alexandre Marc, *Supra note 414*, p.17; David Strupek, *Supra note 426*, p.48

⁴⁵⁰ Communication on General Measures Needed for the Implementation of *D.H. and others v. the Czech Republic*, Roma Rights, No.1, 2008, p.7

⁴⁵¹ *Ibid.*, p.8, 11

⁴⁵² *Ibid.*, p.12; David Strupek, *Supra note 426*, p.45-46

⁴⁵³ Communication on General Measures Needed for the Implementation of *D.H. and others v. the Czech Republic*, *Supra note 450*, p.16

3.2. Segregation in Roma-only Classes in Mainstream Schools

In many cases enrollment of Roma children to Roma-only classes within mainstream schools or Roma-only schools (intra-school and inter-school types of segregation) occurs with support of school authorities and local governments and is formally based on the “free choice” of schools by Roma families. This tendency is strong in Hungary due to highly decentralized education system of the country.⁴⁵⁴ Since school administrations are interested in a large number of students and at the same time in the prevention of emigration of non-Roma children, they establish segregated classes for Roma within schools characterized by lower quality of education.⁴⁵⁵

Minority Rights Group International, the European Network Against Racism and European Roma Information Office express their concern of low enrollment and attendance rates of Roma in mainstream schools, that is mainly caused by economic disadvantage of this group – poverty and unemployment, and geographical distance between Roma settlements and schools.⁴⁵⁶

Sometimes implementation of legal norms on national minorities is expressed in separation of Roma from others: hence, classes for Roma aimed at helping them to catch-up with peers fail to exercise their initial function but merely segregate Roma from non-Roma.⁴⁵⁷

In the city of Hajduhadhaz, Hungary, segregation practice was disclosed in 2007 in two schools where Roma children were separated in other than the main school building with substandard physical conditions.⁴⁵⁸ The first instance court though constituted segregation, ordered the local government to publish their apologize; on the appeal stage Debrecen Appeal

⁴⁵⁴ Alexandre Marc, The Case for Integrated Education of Roma in Europe, Magazine of Roma Education Fund, Issue 1, A School for All, December 2007, p.19-20

⁴⁵⁵ Advancing Roma Education in Hungary, *Supra note* 106, p.45

⁴⁵⁶ Written Comments by Minority Rights Group International, the European Network Against Racism and European Roma Information Office, *Supra note* 417, p.8

⁴⁵⁷ Savelina Danova, Patterns of Segregation of Roma in Education in Central and Eastern Europe, in *Separate and Unequal*, Budapest, 2004, p.8

⁴⁵⁸ Stigmata: Segregated Schooling of Roma in Central and Eastern Europe, *Supra note* 59, p.74

Court not only reiterated finding of segregation but ruled to stop it.⁴⁵⁹ Consistent to the RED the courts were authorized to address structural problems through their decisions and NGOs – to bring ‘*actio popularis*’ complaints.⁴⁶⁰

In 2004 the Budapest Court of Appeal found local authorities and a school in Tiszatarjan responsible for failure to provide Romani pupils with proper educational standards. Without any legal or medical ground Roma children were taught in separate classes with inferior academic curricular. The Court though decided that the applicants had the right to compensation.⁴⁶¹

The interviews held by ERRC in Kolmo, Baranya county in Hungary, showed that teachers consider Romani children lack “socialization development” unlike other children. The classes are divided into 3 categories – for weak, good and advanced pupils respectively. The Roma are usually placed into weak classes regardless of their knowledge, as Romani parents state.⁴⁶²

In Szomolya, Borsod-Abaúj-Zemplén county, the teacher constitutes, that Romani children need to be taught elementary things concerning behavior and basic school program, which are already known to non-Romani students. Therefore, the Roma were immediately assigned to the classes for less talented children are deprived of the opportunity to learn foreign language or study in the computer lab.⁴⁶³ Sometimes Roma children are accused with stealing things of their classmates only by prejudice; this causes their stigmatization and prevents them from studying in given class.⁴⁶⁴

Because of the large autonomy given to schools in Russia, separate Roma classes are often created under the local internal acts of schools and regulated by the schools

⁴⁵⁹ Lilla Farkas, *Supra note 419*, p.60-61

⁴⁶⁰ *Ibid.*, p.62

⁴⁶¹ European Commission on Racism and Intolerance, Report on Hungary, *Supra note 381*, p.29, para.87

⁴⁶² Stigmata: Segregated Schooling of Roma in Central and Eastern Europe, *Supra note 59*, p.64

⁴⁶³ *Ibid.*, p.65-66; Equal Access to Quality Education for Roma, Hungary (from vol.1), *Supra note 385*, p.218

⁴⁶⁴ Stigmata: Segregated Schooling of Roma in Central and Eastern Europe, *Supra note 59*, p.66

themselves.⁴⁶⁵ It is within the schools' discretion that the Roma classes are often located in separate buildings or constructions used for workshops, boiler rooms, but not for educational purposes.⁴⁶⁶

In the settlement of Nizhnie Oselki, near St. Petersburg (Vsevolozhsky District, Leningrad Province) a well-equipped school exists where approximately one hundred majority children study within 20 classes lead by 20 teachers. In a small structure nearby used for industrial purposes 3-4 teachers provide education for 108 Roma children out of 500 school-age children residing in the local compact settlement (as for 2008-2009 school year), who are divided into 6 grades. Roma students study separately, even those who enter the main building for some lessons. The school administration explains separation by sanitary norms: Roma children do not have change footwear, clean clothes, the problem of lice persists. Though the authorities do not oppose formally the transfer of Roma to mainstream classes, in practice there was one precedent when a Roma girl attended a majority class during one month. Due to adaptation problems without any assistance to overcome them she had to come back to the Roma class upon the recommendation of the teachers “in the interests of the child”.⁴⁶⁷

The number of students in the Roma classes exceeds the permitted norm. The Roma class provides education of such a low quality that it is impossible for children to catch up and integrate in the future with their peers, to promote to the secondary school. Meanwhile, there are too few students to form separate secondary classes for Roma. Separate classes lack several courses from the school program, children do not receive homework there and cannot take textbooks home; teachers do not require them to come to classes on time. The Principal of the school Mrs. Galakova acknowledges that teachers “alter the program”.⁴⁶⁸

⁴⁶⁵ Report: “The Problem of Discrimination and Violation of Roma Children's Rights in Schools of the Russian Federation.” *Supra* note 324, p.20

⁴⁶⁶ *Ibid.*

⁴⁶⁷ *Ibid.*, p.21

⁴⁶⁸ *Ibid.*, p.22

Unfortunately, educational authorities of the district are not only aware of this situation but consider it normal and the only way to teach Roma children thus supporting discriminatory practice.⁴⁶⁹

In other cases all Roma children are placed in one class regardless of their age and duration of attendance of this class, and as a result, cannot even read and write. In Nizhnie Vyazovye (Zelenodolsky District, Republic of Tatarstan) 13 Roma students (out of 60 children of school age living in the local Roma settlement) are registered in the village school. A classroom is arranged for them, where one teacher leads all lessons divided into programs for each primary grade. As the school principal Mrs. Salakheeva points out, due to small number of students it is impossible to organize classes of each grade for them, and to integrate them into mainstream classes is neither possible because Roma students and other students' parents oppose it. Three cases of integration of Roma in the secondary school were not successful and the students returned to the Roma class, not able to adapt in the majority environment.⁴⁷⁰

Roma parents noting poor education of their children obtained for years in the Roma class, do not support separate schooling. Children complain for lack of some courses (English) and total separation from their peers of other ethnicity: Roma are taught in the afternoon shift unlike the rest students, they are not allowed to leave the classroom during the breaks and even go to the school bathroom. The attitude of the majority of teachers and children they estimate as negative.⁴⁷¹

Upon the request of Anti-discrimination Center “Memorial” in 2009, the District Board of Education carried out a vote among Roma parents, according to which they unanimously approved the segregated class.⁴⁷²

Practice of segregated Roma classes is widespread throughout Russia, and similar

⁴⁶⁹ *Ibid.*

⁴⁷⁰ *Ibid.*, p.22-23

⁴⁷¹ *Ibid.*, p.23

⁴⁷² *Ibid.*

situation exists in Yekaterinburg, Yaroslavl, Bataysk (Rostov Province) and Arsaki (Vladimir Province). In some regions after Roma-only classes were negated by students' parents, no alternative was offered and the children completely quit school, as occurred in Pashino (Novosibirsk Province), Irkutsk and Krasnoyarsk. In settlements like Novaya Bykovka (Vladimir Province), Pirochi (Moscow Province) and many others Roma children have never attended school.⁴⁷³

As an impact of *D.H.*, the case of *Sampanis v. Greece* was unanimously decided in favor of the applicant by the Chamber of the ECtHR. The Court held Greece responsible for a violation of the right to education of Roma children, who were segregated into separate special classes of primary education with inferior physical conditions. This case was complicated by the involvement of Greek authorities (school and the Ministry of Education) which prevented Roma pupils from studying during academic year.⁴⁷⁴ In *Sampanis* the Court stressed the obligatory character of primary education.⁴⁷⁵ The Court reaffirmed the position recognized in international law, which considers the right to education not only a social right but a duty as well, including individual's duty to attend school and state's duty to provide education.⁴⁷⁶ Reasonable accommodation is required when concerning vulnerable groups of population such as Roma; therefore, the Court claimed enrollment to school should be carried out regardless of birth certificates of the children admitted.⁴⁷⁷

It was emphasized by the Court that integration into school is essential “for integration into the local society as a whole”, noting the protests of non-Roma parents against the inclusion of Roma children.⁴⁷⁸ The Court further stipulated that there must be “reasonable objective” to place children into separate special classes⁴⁷⁹ but did not indicate this form of

⁴⁷³ *Ibid.*, p.24-25

⁴⁷⁴ Lilla Farkas, *Supra note* 419, p.61

⁴⁷⁵ *Sampanis v. Greece*, (Application No.32526/05), Judgment of 5 June, 2008, para.66

⁴⁷⁶ Lilla Farkas, *Supra note* 419, p.62

⁴⁷⁷ *Sampanis v. Greece*, *Supra note* 475, para.86-87

⁴⁷⁸ Lilla Farkas, *Supra note* 419, p.62

⁴⁷⁹ *Ibid.*

discrimination as most severe and enabling the justification.⁴⁸⁰ There was no justification for the State in failing to waive formalities for Roma children as representatives of a vulnerable group.⁴⁸¹

The effect of indirect discrimination was proven in *Sampanis* according to the following points: Greek legal and political system admitted existence of separate schooling for Roma; the official of the local government initiated opposition for enrollment of Roma to the local school; finally, the majority population expressed their disagreement with integration of Roma in a racist manner.⁴⁸²

The parental consent referred to by Greece, was received under pressure suffered by Romani families from the protests of local population, and the attack on the Romani school building.⁴⁸³ Therefore, it was not accepted by the Court as a proper justification of discriminatory treatment.

The issue of separate education of Roma was further raised in the case *Orsus v. Croatia* decided by the ECtHR Grand Chamber in March, 2010. The facts describe schooling of Romani students in Roma-only classes, which provided education program of lower quality than that in the mainstream classes – this practice was found in the villages of Macinec and Podturen in the county of Medimurje, Croatia. 60% of Romani children in the county were assigned to separate Roma classes.⁴⁸⁴ Roma children were more likely to be enrolled in separate classes than non-Roma and less likely to finish primary schools as statistics showed.⁴⁸⁵

The applicants claimed in the national court that segregation caused serious educational, psychological and emotional harm, though the court rejected the complaint

⁴⁸⁰ *Sampanis v. Greece*, *Supra* note 475, para.88-91

⁴⁸¹ Rory O'Connell, Commentary: Substantive Equality in the European Court of Human Rights, 107 Michigan Law Review First Impressions 129, March 2009, p.131

⁴⁸² *Ibid.*

⁴⁸³ *Ibid.*, p.132-133

⁴⁸⁴ James A. Goldston and Ivan Ivanov, *Supra* note 385, p.161

⁴⁸⁵ Anita Danko, The European Court of Human Rights Missed the Opportunity to Recognize that Segregation in Education Can Also Take Place in Mainstream Schools, Roma Rights Journal, No.1, 2008, p.75

reasoning that separate education was introduced due to the Croatian language difficulties of the Roma.⁴⁸⁶

Fifteen Romani families submitted an application to the ECtHR regarding violation of several articles of the Convention: a.3 (prohibition of degrading treatment), a.14 (right to non-discrimination) taken together with a.2 of Protocol 1 (right to education), a.6 (right to fair trial) and a.13 (right to an effective remedy). However, the Chamber referred to the margin of appreciation enjoyed by Croatia and failed to constitute violations of the rights mentioned above. The applicants emphasized that teaching in separate classes was not temporary measure for the Roma, anti-Romani protests of non-Roma parents were widely publicized and that the students were placed in the environment of harassment.⁴⁸⁷

In the proceedings within Grand Chamber the intervening organizations – Greek Helsinki Monitor, Slovak government and Interights – claimed that desegregation strategies of educational system will be more helpful to solve language problem of Roma pupils and that the principle of integrated education may be derived from only in an extraordinary situation.⁴⁸⁸ Therefore, the main question raised by the Grand Chamber was “whether adequate steps were taken by the school authorities to ensure the applicants' speedy progress in acquiring an adequate command of Croatian and, once this was achieved, their immediate integration in mixed classes”.⁴⁸⁹

The Court noted that statistics in the present case cannot be a '*prima facie*' evidence of the discriminatory practices, since the percentage of schoolchildren did not demonstrate automatic placement of Roma in separate classes.⁴⁹⁰ Though separation applied only to Roma on the ground of their poor Croatian language skills serves as a proof of different treatment

⁴⁸⁶ *Ibid.*, p.75

⁴⁸⁷ *Ibid.*, p.78-79

⁴⁸⁸ *Oršuš and others v. Croatia*, (Application no. 15766/03), Grand Chamber Judgment, 16 March 2010, p.49-50, para.141-142

⁴⁸⁹ *Ibid.*, p.50, para.145

⁴⁹⁰ *Ibid.*, p.53, para.152

here.⁴⁹¹ Hence, the Court found that the measures in question were implemented towards members of one ethnic group, but were they justified by a legitimate aim?

There was a violation of a.14 taken together with a.2 of the Protocol No.1 to the ECHR constituted by the Court. The Respondent State therefore failed to provide safeguards for Roma children disproportionately affected by the measure. There was no evidence that pupils of other groups with lack of command in Croatian language were subject to similar measures.⁴⁹² Tests applied for assignment of the children to separate classes were not specially designed for this purpose taking into account characteristics of Roma students.⁴⁹³ Any programs to compensate inadequate knowledge of Croatian language were not applied for Roma children at schools concerned; curriculum in Roma-only classes also did not address this problem.⁴⁹⁴ Additional classes of Croatian alone could not assist Roma pupils to catch up.⁴⁹⁵ In spite of temporary character of separate classes, the applicants spent years there without an opportunity of transfer to mixed classes; objectivity of this stay was impossible to verify due to the absence of monitoring mechanisms.⁴⁹⁶ Positive measures to reduce drop-rate and encourage attendance by Roma were not taken, nor were parents involved in any way.⁴⁹⁷

Thus, the Court ruled that Croatian authorities in pursuit of legitimate aim of “adapting the education system to the specific needs of the children”⁴⁹⁸ overstepped their margin of appreciation, and proportionality between the aim and the means used was not observed.⁴⁹⁹

Problems of separate education of Roma, including teaching in separate buildings or inappropriate constructions, substandard education program, lack of awareness of the right to

⁴⁹¹ *Ibid.*, p.53, para.153

⁴⁹² *Ibid.*, p.57, para.158

⁴⁹³ *Ibid.*, p.57, para.159-160

⁴⁹⁴ *Ibid.*, p.58, para.162-163

⁴⁹⁵ *Ibid.*, p.60, para.171

⁴⁹⁶ *Ibid.*, p.61, para.175

⁴⁹⁷ *Ibid.*, p.61, para.177-178

⁴⁹⁸ *Ibid.*, p.57, para.157

⁴⁹⁹ *Ibid.*, p.63, para.184

education typical for teachers and Roma themselves – characterize education system of Russia and Hungary. In Hungary there are some positive court decisions which secured rights of Roma students to study in integrated classes. ECtHR practice demonstrates that equal access of Roma education is violated in different European countries in similar way: this gives to lawyers assisting Roma useful knowledge to be used at national level. The important reason of leaving Roma in separate classes is lack of adaptation assistance, which is crucial in initiating the integration process.

3.3. “Ghetto” Schools

Existence of ghetto schools is probably the most important challenge for the future Europe since their number is permanently increasing.⁵⁰⁰ Migration of non-Roma out of the territory and out of school leads to growth of the proportion of Roma students.⁵⁰¹ Refusal to accept Roma students in ordinary schools and residential isolation of Romani settlements are the factors of ghettoization of Roma community schools. The quality of education in these schools is inferior to that in regular ones, though there is no distinction legally made.⁵⁰² The infrastructure and maintenance of Romani schools is also of lower quality to compare with other institutions.⁵⁰³ Three authorized European human rights NGOs - Minority Rights Group International, the European Network Against Racism and European Roma Information Office, recognized existence of ghetto schools a “direct violation of international law”.⁵⁰⁴

In the Miscolc case the Hungarian local court ruled the Roma-only school to be closed down as contrary to the civil right to equal treatment embedded in the Hungarian legislation, namely the Civil Code. The children were transferred to the elite school located

⁵⁰⁰ Alexandre Marc, *Supra note 454*, p.20

⁵⁰¹ Advancing Roma Education in Hungary, *Supra note 106*, p.11

⁵⁰² Savelina Danova, *Supra note 457*, p.8-9

⁵⁰³ European Commission on Racism and Intolerance, Report on Hungary, *Supra note 381*, para.92

⁵⁰⁴ Written Comments by Minority Rights Group International, the European Network Against Racism and European Roma Information Office, *Supra note 417*, p.7

nearby.⁵⁰⁵ Segregation was found as long-lasting practice of separating Roma and majority children.⁵⁰⁶

In Russia ghetto schools are usually organized at the initiative of the communities themselves in private homes or in the buildings belonging to the state property. The main disadvantages of these schools are isolation, insufficient quality of education, lack of space and teachers and problem of promoting students to secondary school.⁵⁰⁷

In Kalinichi (Tambov Province) 64 Roma children (for 2008-2009 school year) studied in the primary school situated in the settlement. The school is a former home acquired by district administration and not suitable for education. There is no equipment for classes and the building is dangerous to stay in, in rainy weather the roof leaks, fire and technical safety requirements are not met. A number of courses of the school program are not taught, including physical education, due to the absence of gym. Roma children, who attend secondary school in the neighboring village of Kuzmino-Gat, are poorly prepared, as teachers state.⁵⁰⁸

In Chudovo (Novgorod Province) the Roma community activists built a house to organize primary school for local children there. Later it was licensed and recognized a municipal school. In accordance with sanitary norms the school cannot enroll all the children from the settlement, therefore, not every child has access to education. Students in four grades attend school in two shifts. There is an opportunity to continue education in the secondary school of Syabrenitsy located not far from Chudovo. But problems with personal documents and age of students often prevent them from doing so. To the present moment only one Roma student from Chudovo settlement has graduated from the secondary school in 2010.⁵⁰⁹

⁵⁰⁵ Advancing Roma Education in Hungary, *Supra note* 106, p.20

⁵⁰⁶ Lilla Farkas, *Supra note* 419, p.53; European Commission on Racism and Intolerance, Report on Hungary, *Supra note* 381, p.30, para.91

⁵⁰⁷ Report: "The Problem of Discrimination and Violation of Roma Children's Rights in Schools of the Russian Federation." *Supra note* 324, p.25

⁵⁰⁸ *Ibid.*, p.25-26

⁵⁰⁹ *Ibid.*, p.26-27

In Russia access of Roma to education is often complicated by the lack of personal documents, citizenship or registration at the place of residence of their parents; girls are more rarely sent to school; families' poverty does not permit them to provide children with necessary supplies. Finally, general discrimination of Roma reflects on all areas of life including education.⁵¹⁰

Therefore, territorial isolation of Roma causes their isolation in other aspects, including education. Treatment of non-Roma neighbors and authorities contribute to isolated schooling of Roma. While in some cases Roma communities try to organize their own schools themselves, as mainly happens in Russia, in others non-Roma population avoids studying with Roma. However, in Hungary the court stated a violation of access to education for Roma in the Miscolc case. In Russia the applications from the parents of ghetto schoolchildren were not noticed till the present time. In all cases it is evident: quality of such schooling is much lower than the standards established. Hence, Roma should be informed on the opportunities beyond their ghetto school and offered better conditions for education.

⁵¹⁰*Ibid.*, p.30

CHAPTER 4. POSITIVE ACTION FOR IMPROVING EQUAL ACCESS OF ROMA TO EDUCATION AND RECOMMENDATIONS

4.1. Positive Practices

In accordance with the DecadeWatch monitoring, the Decade of Roma Inclusion 2005-2015 Hungary is the first among the states parties to develop a progressive policy on inclusion of Roma and desegregation.⁵¹¹ Generally, Hungary is characterized by a clear commitment to the Decade goals and strong interaction between stakeholders of inclusion process: political structures, Roma and non-Roma human rights NGOs and other civil society organizations. The systemic realization of initiatives resulted in a number of positive tendencies such as: low drop out level, mainly in the secondary school, facilitating the access to education for Roma. There are free textbooks provided, social assistance and support from the state budget and EU funds.⁵¹² The research shows that the number of Roma attending schools has been constantly increasing for the recent 15 years; however, the indicators of segregation are also high.⁵¹³

Hungary is actively cooperating with Roma Education Fund (hereinafter – REF). In particular, REF supports several desegregation projects launched in Hungarian towns. The national program for the promotion of equality and desegregation at schools was started in 2002 and among crucial decisions taken in its framework is establishment of a National Educational Integration Network to develop cooperation among given schools.⁵¹⁴ The REF supports activities with regard to any stage of education; projects aimed at the integration of

⁵¹¹ Christian Bodewig and Iulius Rostas, The DecadeWatch and Progress Made in Inclusive Education for Roma Children in the Decade of Roma Inclusion Countries, Magazine of Roma Education Fund, Issue 1, A School for All, December 2007, p.62

⁵¹² Advancing Roma Education in Hungary, *Supra note* 106, p.48

⁵¹³ EU Monitoring and Advocacy Program (EUMAP), Country Report: Hungary, Open Society Institute, 2007, p.15

⁵¹⁴ Desegregation is a Local Issue in Hungary's Decentralized Schools, Magazine of Roma Education Fund, Ibid., p.44

Roma, independent evaluation of the results achieved and further policy development.⁵¹⁵

In 2003-2004 desegregation program was actively supported by the Hungarian government, through the activities of the Commissioner for the Integration of Roma and Disadvantaged Children. Romani representatives were appointed in the Ministry of Education.⁵¹⁶

In Hodmezovasarhely the local self-government adopted the Public Educational Concept in 2006, aimed at integration of disadvantaged children. Funded by the REF, multiple activities were undertaken, '*inter alia*', reorganization of 11 local schools for the balanced representation of Roma students. Primary ghetto schools were closed and Roma children were transferred to other, mainstream schools. Best teachers were determined and trained, a community-based learning center was established to realize meetings for parents and information campaigns, bus services were organized for children who live in the outskirts of the town and finally, the consultations with the stakeholders from other places were initiated to distribute positive practice.⁵¹⁷

In the bigger town, Szeged, segregation problem was addressed partly by the pedagogical faculty of the local university, which provided assistance in training and preparing teachers for work with disadvantaged children and their parents. Ghetto schools were closed in 2007. This gave social and academic benefit both to teachers and students, improved school climate and strengthened cooperation between each other and with other stakeholders.⁵¹⁸

There are some steps done on the level of tertiary education: the programs launched in 2005 provide disadvantaged students with free university or college courses funded by the state. The admission requirements for these students are equal to those set for abiturients who

⁵¹⁵ 2005-2015: The Decade of Roma Inclusion, *Supra note 289*, p.68

⁵¹⁶ Julius Rostas and Mona Nicoara, Advocacy Strategies to Combat Segregation, in *Separate and Unequal*, Budapest, 2004, p.125

⁵¹⁷ Desegregation is a Local Issue in Hungary's Decentralized Schools, *Supra note 514*, p.44-45

⁵¹⁸ *Ibid.*, p.45-46

pay full tuition.⁵¹⁹

However, the process of integration of Roma remains slow and not visible enough, stipulates research of the National Network of Educational Integration (OOIH).⁵²⁰

The OOIH is occupied with coordination of educational activities, such as Step by Step Program, “Information and Communication Technologies in elementary schools” and some methods designed to individual needs. The Network developed the system of partner schools, which support each other on integration programs through exchange of methodologies, information and other professional experience.⁵²¹

The program aimed at elimination of practice of classifying Roma children as mentally disabled was introduced in 2003 in Hungary. Its implementation resulted in reassessment of 2100 Roma and socially disadvantaged children recognized as mentally disabled by independent medical experts; in 2004 11% of these children were transferred into mainstream classes.⁵²² Romani teaching assistants and early childhood programs were introduced.⁵²³ However, among the problems of this program lack of monitoring mechanism should be noticed.⁵²⁴

Later, in the framework of New Hungary Development Plan, from 2008 onwards a new assessment instrument, which functions with regard to socio-cultural differences, has been put in practice (WISC-IV) to be used by rehabilitation commissions.⁵²⁵ However, after these efforts European Commission on Racism and Intolerance (hereinafter - ECRI) still stresses that a little effect was achieved and further work is needed.⁵²⁶

⁵¹⁹ Advancing Roma Education in Hungary, *Supra note* 106, p.35

⁵²⁰ EU Monitoring and Advocacy Program (EUMAP), *Supra note* 513, p.16

⁵²¹ Viktoria Mohacsi, *Supra note* 335, p.244-245; European Commission on Racism and Intolerance, Report on Hungary, Fourth monitoring cycle, CRI(2009)3, p.29, para.88; Gabor Kezdi, Eva Suranyi, A Successful School Integration Program, An Evaluation of the Hungarian National Government's School Integration Program, Roma Education Fund, 2005-2007, p.15

⁵²² European Commission on Racism and Intolerance, *Supra note* 521, p.27-28, para.78

⁵²³ Angela Kocze and Dawn Tankersley, Strategies to Promote the Successful Integration of Romani Students in the School System, in *Separate and Unequal*, Budapest, 2004, p.306-307

⁵²⁴ Equal Access to Quality Education for Roma, Hungary (from vol.1), *Supra note* 385, p.221

⁵²⁵ European Commission on Racism and Intolerance, *Supra note* 521, p.28, para.79

⁵²⁶ *Ibid.*, p.28, para.82

Integration programs were called upon change the methods of schooling from teacher-centered to child-centered, individually tailored, taking into account differences in the literacy of the children and language traditions of the Romani families.⁵²⁷ It should be noted that the majority language is a foreign language for Roma students. The Program made an attempt to combine children experience obtained in their families and communities with school program of reading, writing, etc. to facilitate the education process and strengthen their self-confidence in the school environment.⁵²⁸

Creation of a dialogue between Romani families and schools was one of the principal goals of the Step by Step Program. In its framework community values were incorporated in the teaching practice, the children were encouraged to do research about their community life and folklore to apply it in the classroom. '*Inter alia*', Romani oral history – proverbs, stories and others, -were collected and used for language classes.⁵²⁹ These methods are especially valuable in the multicultural classes.

The role of teaching assistance was sometimes misused, though for the purposes of the Program, *i.e.* successful integration of Roma students. The assistant should be recognized an equal partner, who can provide aid on any schooling problem, not someone who does other work. The activity of a teaching assistant should not be lowered to services for Roma families, but be valued as an input to teaching process and bridging the gap between the school and the community.⁵³⁰

The National Development Plan's Human resources Development Operational Program (HRDOP) has elaborated a measure to guarantee equal educational opportunities for disadvantaged children, including Roma and is aimed at integration of these students, desegregation and overcoming of disadvantages.⁵³¹ The Program is realized in two steps: first,

⁵²⁷ *Ibid.*, p.308-309

⁵²⁸ *Ibid.*, p.310

⁵²⁹ *Ibid.*, p.315-316

⁵³⁰ *Ibid.*, p.317-318

⁵³¹ Viktoria Mohacsi, *Supra note 335*, p.247

training of teachers, local decision-makers and other persons involved in the education of target groups; second, implementation of programs in concrete institutions. The second includes designing methodologies, both curricular and extracurricular, evaluation, workshops and seminars and improving multicultural communication.⁵³²

Hence, the results of the Step by Step Program demonstrated that grades and behavior of Romani students were better in the mixed classrooms with mainstream curricular and where teaching assistants paid attention to all children in the class.⁵³³

As regards kindergarten education, since 2003 in Hungary some positive measures were implemented, including state support of kindergartens, support of parents in obtaining clothes and other supplies for their children and provision of free meals.⁵³⁴

The Hungarian NGO Jászsági Polgárjogi Szervezet (JPS) visited 40 Roma rural communities in 2008-2009 with the purpose of awareness rising among Roma families on the role of education, monitoring of segregation cases and bridge communities and local authorities.⁵³⁵

The National Centre for the Assessment of Public Education and Exams (NCAPEE) maintains constant mutual consultations with state bodies responsible for desegregation. It holds investigations according to the Equal Treatment Act, acting as an expert in cases concerning discrimination in education.⁵³⁶

⁵³² *Ibid.*, p.248

⁵³³ Angela Kocze and Dawn Tankersley, *Supra note 523*, p.319

⁵³⁴ European Commission on Racism and Intolerance, *Supra note 521*, p.32, para.102

⁵³⁵ European Network Against Racism Shadow Report 2007, Racism in Hungary, Anita Novak, International Law Research and Human Rights Monitoring Centre, p.19

⁵³⁶ Appendix to Report No. 3381-1/2006, Report on the activities of the Equal Treatment Authority and the experiences of the implementation of Act Nr. 125 of 2003 on equal treatment and the promotion of equal opportunities (July 2006), available online at: http://www.egyenlobanasmod.hu/index.php?g=EBH-jelentes06_EN.htm (last accessed on 30th October 2010)

Though Russian schools accepting Roma children face many problems – language difficulties, poverty and often lack of documents of the students, some of them demonstrate successful examples of teaching Roma children without violating their rights.⁵³⁷

In the school No.30 of Ryazan Roma are enrolled upon the submission of the certificate of health only. School actively involves parents in educational process and encourages Romani families to study. A free preparatory class functions in the school as well.⁵³⁸

In Penza school No.9 there are as mixed as compensatory classes where pupils with poor knowledge of Russian may overcome their language difficulties, because the general program does not take into account needs of non-Russian speaking children.⁵³⁹

School located near compact Roma settlement in Volgograd provides assistance to Roma children in order to integrate them into secondary school; teachers are creative in elaborating methods of teaching bilingual pupils. In 2009 an ABC and a workbook were published for these children by the school teachers.⁵⁴⁰

In Astrakhan school No.71 attempts to enroll children whose age exceeds the norm established, though it is rarely possible. Integrated classes exist there, and preparatory classes are aimed at assisting children who is going to enter the school. Work of a speech therapist and psychologist provides support of children in various situations and analyze data received.⁵⁴¹

Authorities of the evening school No.71 in Lipetsk firmly cooperate with the local Roma community. Numerous children studying there can use a free school bus, enjoy social and pedagogical services and individually-based assistance plan. Material assistance is also

⁵³⁷ Report: “The Problem of Discrimination and Violation of Roma Children's Rights in Schools of the Russian Federation.” *Supra note 324*, p.30

⁵³⁸ *Ibid.*, p.31

⁵³⁹ *Ibid.*

⁵⁴⁰ *Ibid.*

⁵⁴¹ *Ibid.*

provided where possible. In the evening school only Roma obtain primary education, so they cannot have an integrated class there, but at the same time they can receive a profession when graduated from the secondary school there, that may solve their employment problem.⁵⁴²

When the case of school No.66 of Tula, mentioned in the Chapter 3, was pending, it brought much attention of the media and public authorities to the problem of the segregated Roma class. As a result, students from this class were assigned to the fifth grade to study together with other children. School administration undertook questioning of Roma children whether they agree to remain in the compensatory class. The children gave their consent, but the opinion of their parents was not obtained.⁵⁴³

Therefore, the aims of positive measures applied in Russia and Hungary are the same and include desegregation of separate Roma schools and classes, integration of Roma students and prevention of their misplacement into special school, i.e. full protection of their equality in education. However, methods and level of awareness is different in the states: while in Hungary significant measures are taken by the government and the issue of Roma right to education is raised to the national level, funded by national and international organizations and authorities and serious experience was gained in this field, in Russia the problem is not well-known to majority population and ways of its solution have local character, so the initiative of improving the access of Roma to education belongs to teachers, school directors or local officials who are the most familiar with problems of Roma in education.

4.2. Policy Recommendations

The Council of Europe in its recommendation named education “a key area of action in the countries that have elaborated national strategies for the improvement of the situation of

⁵⁴² *Ibid.*, p.32

⁵⁴³ *Ibid.*, p.20

Roma”.⁵⁴⁴ It recommended the governments of the member states to “elaborate, disseminate and implement education policies focusing on ensuring non-discriminatory access to quality education for Roma children”⁵⁴⁵ and to guarantee effective acceptance in school for these children. The Council of Europe calls upon the states to monitor and evaluate realization of given recommendation and to notify the Steering Committee on Education on its results.⁵⁴⁶ While implementing the recommendations national authorities should take into account cultural and linguistic characteristics of Roma, their needs and nomadic lifestyle (if any) and base the policies on the principles of the rights of the child and minority rights.⁵⁴⁷

To implement integration strategies an all-inclusive desegregation action should affect as Romani families, as schools, as state structures and non-governmental actors.⁵⁴⁸ Governments, NGOs, media and international organizations all have their important roles in this process. All participants should not only imply changes but support each other and cooperate.⁵⁴⁹ While governments mainly provide resources for implementing the programs, make assessments of their results and create legislative basis for them, media and NGOs are responsible for raising public awareness on the issue, secure equal opportunities for the beneficiaries and support governmental initiatives. Intergovernmental organizations in their turn remind states of their obligations related to the right to education and carry out monitoring of best practices and dissemination thereof.⁵⁵⁰ All participants should have

⁵⁴⁴ Recommendation CM/Rec(2009)4 of the Committee of Ministers to Member States on the Education of Roma and Travellers in Europe (Adopted by the Committee of Ministers on 17 June 2009 at the 1061st meeting of the Ministers’ Deputies), p.4, para.1, available online at http://www.coe.int/t/dghl/monitoring/minorities/6_Resources/PDF_Res_Rec_ACFC_30sept09_en.pdf (last accessed 1st November 2010)

⁵⁴⁵ *Ibid.*

⁵⁴⁶ *Ibid.*

⁵⁴⁷ *Ibid.*, Appendix, p.5

⁵⁴⁸ Rumyan Russinov, *Supra note* 380, p.19

⁵⁴⁹ Denied a Future? The Right to Education of Roma / Gypsy and Traveller Children in Europe, *Supra note* 114, p.42; European Commission against Racism and Intolerance, ECRI General Policy Recommendation No.10, *Supra note* 263, p.5; Recommendation CM/Rec(2009)4, *Supra note* 544, Appendix, para.7; Report: “The Problem of Discrimination and Violation of Roma Children’s Rights in Schools of the Russian Federation.” *Supra note* 324, p.32

⁵⁵⁰ Denied a Future? The Right to Education of Roma, *Supra note* 549, p.43-45

available international and national exchange of positive practices.⁵⁵¹

The EU Agency for Fundamental Rights stresses that Member States should guarantee equal access to full compulsory education to all people on their territory regardless of their administrative status. For these purpose they are recommended to facilitate school registration process.⁵⁵²

The first recommendation given by supervising organs and NGOs is to discontinue segregated education of Roma in special schools or classes and give them opportunity to enjoy benefits of mainstream schooling.⁵⁵³ For this purpose it is strongly recommended to review and amend the tests used for the placement of pupils into special schools in accordance with the best interests of the child and involving the parents concerned.⁵⁵⁴ ECRI recommends to Hungarian authorities to implement further the WISC-IV system and to monitor very carefully whether the child is eligible for special school, '*inter alia*', with possible amendment of the Public Education Act, in part of teaching children with “mild disability” in mainstream classes.⁵⁵⁵

To tackle segregation effectively, anti-discrimination law should be developed and detailed, especially the sanctions for discriminatory acts.⁵⁵⁶ Roma students should have access on equal basis with others to education at each stage, including the higher.⁵⁵⁷ Clear definition, ban and establishing monitoring mechanisms of segregation will protect Roma children, including non-citizens.⁵⁵⁸

The international organizations should exercise their pressure on the domestic

⁵⁵¹ Recommendation CM/Rec(2009)4, *Supra note 544*, Appendix, para.22-26

⁵⁵² Comparative Report - The Situation of Roma EU Citizens Moving to and Settling in Other EU Member States, Conference edition, The EU Agency for Fundamental Rights, November 2009, p.78

⁵⁵³ Duncan Wilson, *Supra note 219*, p.369; Recommendation CM/Rec(2009)4, *Supra note 544*, Appendix, para.5

⁵⁵⁴ Communication on General Measures Needed for the Implementation of *D.H. and others v. the Czech Republic*, *Supra note 450*, p.21-22; Written Comments by Minority Rights Group International, the European Network Against Racism and European Roma Information Office, *Supra note 417*, p.6

⁵⁵⁵ European Commission on Racism and Intolerance, Report on Hungary, *Supra note 521*, p.29, para.83

⁵⁵⁶ Viktoria Mohacsi, *Supra note 335*, p.253

⁵⁵⁷ Recommendation CM/Rec(2009)4, *Supra note 544*, p.5-6

⁵⁵⁸ Report: “The Problem of Discrimination and Violation of Roma Children's Rights in Schools of the Russian Federation.” *Supra note 324*, p.33

decision-making bodies: this has been successfully performed, for example, by the European Roma Rights Centre, which implemented advocacy efforts by several cases at international level.⁵⁵⁹ International bodies of the UN structure should also be involved; first of all treaty bodies such as UN Committee on the Rights of the Child (CRC) and the UN Committee on the Elimination of All Forms of Racial Discrimination (CERD), which monitor the observance of respective international treaties.

Minority Rights Group International, the European Network Against Racism and European Roma Information Office underline the necessity of positive measures in language and social skills training for Roma children incorporated in integration programs.⁵⁶⁰ Russian human rights activists propose improving of methodologies for teaching Russian as a foreign language more effectively and introduction of supplementary Russian language classes for bilingual children.⁵⁶¹

On the local level small projects realized within specific territory or by concrete organization may promote desegregation through permanent assistance to Roma stakeholders on routine but important issues.⁵⁶²

To prevent non-disabled children from being placed into special schools the tests used for the assignment of children to these schools should comply with strict medical diagnostic criteria. The decision on the placement of the child into a special school should be open to review within a year and each year until the 12-year age of the student.⁵⁶³ Transfer of Roma children from special to mainstream schools and their integration should be ensured.⁵⁶⁴ Misplacement of Roma children to special classes should be immediately addressed and

⁵⁵⁹ Iulius Rostas and Mona Nicoara, *Supra note 516*, p.118; Report: "The Problem of Discrimination and Violation of Roma Children's Rights in Schools of the Russian Federation." *Supra note 324*, p.35

⁵⁶⁰ Written Comments by Minority Rights Group International, the European Network Against Racism and European Roma Information Office, *Supra note 417*, p.6

⁵⁶¹ Report: "The Problem of Discrimination and Violation of Roma Children's Rights in Schools of the Russian Federation." *Supra note 324*, p.34

⁵⁶² Iulius Rostas and Mona Nicoara, *Supra note 516*, p.122

⁵⁶³ Viktoria Mohacsi, *Supra note 335*, p.250

⁵⁶⁴ *Ibid.*, p.253

prevented to a maximum extent, backed by reliable identification of children with special needs, who still have an opportunity to catch up in a mainstream class.⁵⁶⁵

Pre-school education

In the countries of Central and Eastern Europe the attendance of pre-school institutions by Roma children is still low. Meanwhile, the promotion of pre-primary education for every child is considered by UNICEF a “key component of any strategy to integrate Roma children into the general school system”.⁵⁶⁶ There are still serious enrollment barriers in kindergartens for Roma children expressed in absence of places, overcrowding and lack of transportation, especially in the small villages.⁵⁶⁷

It is recognized that children who had early education are more successful at school and less likely to attend special institutions. The European NGOs call governments upon providing socially disadvantaged children with two years of free pre-school education, including that in form of part-day play groups or other sorts of support.⁵⁶⁸ ECRI notes, that access to kindergartens should be further improved, including teachers' skills and awareness of social and cultural background of the children and financial support to parents.⁵⁶⁹ Minority Rights Group International, the European Network Against Racism and European Roma Information Office emphasize the importance of pre-school classes in the integration and socialization of Roma in the educational process.⁵⁷⁰ Council of Europe encourages states to promote equal access for Roma to pre-school education and measures of support for Roma families enjoying this right.⁵⁷¹

⁵⁶⁵ Equal Access to Quality Education for Roma, Hungary (from vol.1), *Supra note* 385, p.192; Report: “The Problem of Discrimination and Violation of Roma Children's Rights in Schools of the Russian Federation.” *Supra note* 324, p.34

⁵⁶⁶ Innocenti Social Monitor 2009, *Supra note* 382, p.92

⁵⁶⁷ Advancing Roma Education in Hungary, *Supra note* 106, p.48; EU Monitoring and Advocacy Program (EUMAP), *Supra note* 513, p.16

⁵⁶⁸ Communication on General Measures Needed for the Implementation of *D.H. and others v. the Czech Republic*, *Supra note* 450, p.22

⁵⁶⁹ European Commission on Racism and Intolerance, *Supra note* 521, p.33, para.104-105

⁵⁷⁰ Written Comments by Minority Rights Group International, the European Network Against Racism and European Roma Information Office, *Supra note* 417, p.6

⁵⁷¹ Recommendation CM/Rec(2009)4, *Supra note* 544, para.10

Hungarian government received recommendations from EU Monitoring and Advocacy Program (EUMAP) concerning pre-school education. The Ministry of Education was recommended to increase the number of free spaces in pre-school institutions and ensure attendance from the earliest possible age.⁵⁷² Russian human rights NGOs emphasize the importance of funding pre-school by state and municipalities.⁵⁷³

Need for monitoring.

Integration process should be guaranteed by developed multilevel system of monitoring for quality of education. Thorough attention should be paid to the children from disadvantaged backgrounds such as Roma.⁵⁷⁴ Since the Hungarian education system is decentralized, effective monitoring is necessary to ensure implementation of policies by local authorities and create a national monitoring system to ensure the prohibition of segregation.⁵⁷⁵ Educational institutions are maintained by local governments; hence, thorough evaluation shall follow each reform once implemented.⁵⁷⁶ Since no solution was suggested to create an effective mechanism to monitor implementation of integration projects, this should be elaborated by the central Government as soon as possible.⁵⁷⁷

Attention should be given to pupils assigned to private education (at home), monitoring should reveal the cases of unlawful registering of Roma children as private students.⁵⁷⁸ Implementation of desegregation policies, namely process of enrollment in special schools, should be constantly and independently assesses and monitored, with involvement of Roma representatives, as Council of Europe insists.⁵⁷⁹

⁵⁷² Equal Access to Quality Education for Roma, Hungary (from vol.1), *Supra note* 385, p.191

⁵⁷³ Report: "The Problem of Discrimination and Violation of Roma Children's Rights in Schools of the Russian Federation." *Supra note* 324, p.33

⁵⁷⁴ Communication on General Measures Needed for the Implementation of *D.H. and others v. the Czech Republic*, *Supra note* 450, p.23; European Commission on Racism and Intolerance, *Supra note* 521, p.30, para.90

⁵⁷⁵ European Commission on Racism and Intolerance, *Supra note* 521, p.31, para.95

⁵⁷⁶ Advancing Roma Education in Hungary, *Supra note* 106, p.49; Desegregation is a Local Issue in Hungary's Decentralized Schools, *Supra note* 514, p.43

⁵⁷⁷ EU Monitoring and Advocacy Program (EUMAP), *Supra note* 513, p.16; ECRI General Policy Recommendation No.10, *Supra note* 263, p.7

⁵⁷⁸ European Commission on Racism and Intolerance, *Supra note* 521, p.32, para.100

⁵⁷⁹ Recommendation CM/Rec(2009)4, *Supra note* 544, Appendix, para.6; Equal Access to Quality Education for Roma, Hungary (from vol.1), *Supra note* 385, p.192

Empowerment of Roma students and parents is necessary to make them able to express their interests. Respect of parents is the first condition to help them successfully cooperate with school personnel.⁵⁸⁰ For this purpose Save the Children suggests involvement of Roma families and whole communities in developing practices at schools through consultation, with particular attention to illiterate families to find out the barriers for the school attendance and to establish the connection between communities and schools. To tackle racist bullying and abuse of Roma children all school community must elaborate and implement effective measures.⁵⁸¹

Integrated education is considered a tool to counteract poverty and consequently, combat discrimination. Studying with peers of different socio-economic backgrounds will help Roma pupils to correct social differences and will motivate them to continue education and to seek employment; it also will keep level of learning high.⁵⁸² Roma students transferred to integrated classes should be supported further to facilitate their adaptation and to make their integration effective.⁵⁸³ Alexandre Marc underlines, that not only reference to human rights is essential in addressing issues of discrimination, but the fact that poverty and segregation at school are sources of structural discrimination of Roma.⁵⁸⁴

Integrated education provides equal support of all children and necessary tutoring for the disadvantaged, curriculum and pedagogical methods adequate for multicultural environment and work with parents.⁵⁸⁵ Romani parents should be motivated and empowered to discuss educational opportunities of their children with school directors and teachers and to insist on quality education provided by law.⁵⁸⁶ Adults, including parents should be given an

⁵⁸⁰ Angela Kocze and Dawn Tankersley, *Supra note 523*, p.311; Report: "The Problem of Discrimination and Violation of Roma Children's Rights in Schools of the Russian Federation." *Supra note 324*, p.34

⁵⁸¹ Denied a Future? The Right to Education of Roma, *Supra note 114*, p.46-47

⁵⁸² Alexandre Marc, *Supra note 454*, p.18

⁵⁸³ Rumyan Russinov, *Supra note 380*, p.19-20

⁵⁸⁴ Alexandre Marc, *Supra note 454*, p.20

⁵⁸⁵ Alexandre Marc, *Ibid.*; Communication on General Measures Needed for the Implementation of *D.H. and others v. the Czech Republic*, *Supra note 450*, p.23

⁵⁸⁶ David Strupek, *Supra note 426*, p.49; Recommendation CM/Rec(2009)4, *Supra note 544*, Appendix, para.14

opportunity to catch up education they need.⁵⁸⁷ Introducing Romani teaching assistants is an effective tool to support communities and facilitate relations with school officials and majority population.⁵⁸⁸ Romani girls and women are in special need to be involved in the educational process.⁵⁸⁹

Kosz and Tankersley emphasize the role of child-centered methodologies and new kinds of activities directed to establishment of the link between teaching team and communities. The constant interaction between Romani families and majority population may help to avoid the problems for both sides.⁵⁹⁰

Teachers should be well-trained for work in a multicultural environment and familiar with anti-discrimination standards.⁵⁹¹ School authorities should make these trainings available for the teachers in various forms; the trainings should have status of officially recognized programs.⁵⁹² Teachers should be provided with support of assistants and mediators, including Roma representatives.⁵⁹³ Council of Europe proposes inclusion of Roma history and culture to the school curriculum, at first stage for Roma children; intercultural and diversity learning should be paid attention to prevent and combat prejudice against Roma.⁵⁹⁴

Collection of **ethnically disaggregated data** was undertaken already by the REF in several studies. Further activity in this area is needed to demonstrate advantages of integrated education and to evaluate the efforts on eliminating segregation at schools.⁵⁹⁵ The European

⁵⁸⁷ Viktoria Mohacsi, *Supra note 335*, p.253; Report: "The Problem of Discrimination and Violation of Roma Children's Rights in Schools of the Russian Federation." *Supra note 324*, p.34

⁵⁸⁸ Communication on General Measures Needed for the Implementation of *D.H. and others v. the Czech Republic*, *Supra note 450*, p.23; Recommendation CM/Rec(2009)4, *Supra note 544*, Appendix, para.15; Equal Access to Quality Education for Roma, Hungary (from vol.1), *Supra note 385*, p.194

⁵⁸⁹ European Network Against Racism Shadow Report 2007, *Supra note 535*, p.17

⁵⁹⁰ Angela Kocze and Dawn Tankersley, *Supra note 523*, p.320

⁵⁹¹ ECRI General Policy Recommendation No.10, *Supra note 263*, p.7; Equal Access to Quality Education for Roma, Hungary (from vol.1), *Supra note 385*, p.194

⁵⁹² Recommendation CM/Rec(2009)4, *Supra note 544*, Appendix, para.19; Report: "The Problem of Discrimination and Violation of Roma Children's Rights in Schools of the Russian Federation." *Supra note 324*, p.34

⁵⁹³ Recommendation CM/Rec(2009)4, *Supra note 544*, Appendix, para.20; Equal Access to Quality Education for Roma, Hungary (from vol.1), *Supra note 385*, p.194; Report: "The Problem of Discrimination and Violation of Roma Children's Rights in Schools of the Russian Federation." *Supra note 324*.

⁵⁹⁴ Recommendation CM/Rec(2009)4, *Supra note 544*, Appendix, para.16-18; Equal Access to Quality Education for Roma, Hungary (from vol.1), *Supra note 385*, p.194

⁵⁹⁵ Alexandre Marc, *Supra note 454*, p.20

organizations emphasize that data should be “voluntary provided”, especially information concerning language and ethnicity given with the consent of parents.⁵⁹⁶ To facilitate the task this kind of data may be identified by third parties observers.⁵⁹⁷ Data should be disaggregated by school, grade, gender, school type and comprised in the special database (Education Management Information System). Collection of data obviously requires cooperation of governments with Roma communities for more effective research and assessment.⁵⁹⁸

Goldston and Ivanov give some recommendation for lawyers involved in litigation concerning equal access to school. They underline the importance of above mentioned data to be an essential source of evidence in the court. The legislation applied should embrace obligatory principles recognized internationally or regionally; if there are no concrete provisions, then norms protecting human dignity or banning discrimination should be used. Collective complaints may be joined by a common claim of applicants. The lawyers should understand the nature of segregation and the link between isolated residence and school separation of Roma. Litigation as an unalienable part of desegregation plan should be based on the close cooperation of lawyers with Roma communities and familiarity with both international and domestic legal instruments.⁵⁹⁹

European Commission against Racism and Intolerance (ECRI) recommends to the states' governments to compile information on the education of Roma, '*inter alia*', attendance, drop-out and progress rates, which is necessary for elaborating the best policies in this field.⁶⁰⁰

EUMAP recommends to Hungary collection of related data and its compilation in central database, maintaining monitoring and making these data public.⁶⁰¹

⁵⁹⁶ Communication on General Measures Needed for the Implementation of *D.H. and others v. the Czech Republic*, *Supra note* 450, p.21; David Strupek, *Supra note* 426, p.45

⁵⁹⁷ David Strupek, *Supra note* 426, p.46

⁵⁹⁸ Communication on General Measures Needed for the Implementation of *D.H. and others v. the Czech Republic*, *Supra note* 450, p.21; Report: “The Problem of Discrimination and Violation of Roma Children's Rights in Schools of the Russian Federation.” *Supra note* 324, p.34

⁵⁹⁹ James A. Goldston and Ivan Ivanov, *Supra note* 385, p.164-167

⁶⁰⁰ ECRI General Policy Recommendation No.10, *Supra note* 263, p.5

⁶⁰¹ Equal Access to Quality Education for Roma, Hungary (from vol.1), *Supra note* 385, p.190

The Russian education authorities are recommended by NGO Anti-discrimination Centre Memorial to fund inclusive educational programs, to pay special attention to schools situated in Roma communities, not to leave children who have lack of any documents out of school and to reduce the number of students in classes for ensuring the quality of education.⁶⁰² In general, an overall national plan on Roma, including education issues, is needed in the state and joining the “Decade of Roma Inclusion” is considered a necessary positive step.⁶⁰³

Hence, recommendations for governments are common in their purposes: to provide full realization of the right of Roma children to education on equal basis. Both in Hungary in Russia systematization of data, well-trained human resources and funding are needed to achieve complete desegregation of schools. As political will, as constant involvement of Roma are required to meet the needs and secure the rights of the students. Availability of education from the early age is crucial to guarantee this right and motivates Romani children not to refuse of it later on. In Russia measures are urgently needed on the state level, and the problem of Roma pupils should be paid attention by all related authorities. In Hungary many programs are implemented though their results should be constantly evaluated on a centralized basis to maintain their effectiveness. Equal treatment in education should be guaranteed at all levels, from participation of Roma families in school events to legislative provisions making them able to defend their right to education.

⁶⁰² Report: “The Problem of Discrimination and Violation of Roma Children's Rights in Schools of the Russian Federation.” *Supra note* 324, p.34

⁶⁰³ *Ibid.*

Conclusion

Roma are still in the center of various researches, programs of support and debates on how to protect their rights best. However, the achievements of the present day – national plans of action and inclusive policies of the EU countries, landmark decisions of the European Court of Human Rights and joint strategies of different specialists – lawyers, pedagogues and social workers, - need further development, elaboration of implementing mechanisms and thorough evaluation. To the more extent this concerns Eastern European countries, mainly Russia, where strategies already existing in Europe should be adapted and updated.

The major difficulties for the realization of equal access of Roma to education in the countries of Central and Eastern Europe, keeping in mind the states described in this thesis, can be outlined as following. In Hungary the number of positive initiatives adopted towards education of Roma is one of the most significant in the region. They include as legislative measures and membership in related international associations, as projects directly aimed at changing the status of Roma children in educational institutions. However, these measures require improvement of realization mechanisms to become facts not only documents. For this purpose they need to be appropriately monitored by a well-established system and the effect of measures taken should be constantly evaluated.

In Russia legislation on minorities and non-discrimination should be paid attention, the mechanisms of its enforcement should be defined to meet international standards. Programs on the national level on Roma inclusion in educational process will be an asset. Public awareness campaigns are necessary both to overlap Roma and non-Roma population, because the problem of equal access to education and undermining its meaning can be similar for other ethnic minorities in the country. All stakeholders should be legally enlightened on their rights: Roma - to be able to protect the right to education guaranteed them by the state and international treaties and to value this right; persons assisting Roma – to provide their

clients with more effective aid, to achieve firm results of their activities and to overcome problems of work with this sort of cases; school personnel and state or local officials - to prevent violations of the right of Roma to education and combat them.

Therefore, to make equal access of Roma to education function not only in legal acts, but in real life, combined efforts are essential: first, to adapt the law for actual conditions of Roma and second, to consolidate action of different actors for the implementation, monitoring and evaluation thereof, supplemented by extra-legal steps aimed at integration of Roma children and Roma communities.

Particularly, references to the rulings of the ECtHR enrich the lawyers' arguments when litigating the right to education in courts. The lack of practice on such cases in Russia should not prevent them from doing so but to encourage them and Roma applicants to create this practice. Cooperation of school personnel with Roma families, introducing teaching assistants and new methodologies of bilingual education or early childhood programs, are important. However, the most vital measure to be taken immediately is simple admission of a child to school regardless of his or her residence status, documents, language skills or material conditions, not to mention ethnic origin or belonging to minority – that is what equal access to education in reality means.

Successful education is a pre-condition for future realization of other fundamental rights, i.e. employment, political, economic and social rights, and moreover, permits one to learn about what his or her rights are and how they can be defended. For Romani persons, especially women, this is a great empowerment tool which can be applied from the pre-school age.

Hence, providing equal access to education for Roma can be a strong means for this group to combat their isolation, poverty and marginalization and to become active participants of the social life.

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