



Comparative analysis of the impact of ECHR and EU legislation of school segregation of Roma children in the Czech Republic and Slovakia

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Executive Summary

The aim of the research is to examine and compare the impact of the European Court of Human Rights and EU legislation on the de-segregation of Roma children in primary education in the Czech Republic and Slovakia. While both countries are member of the EU and have similar legislation and educational system, the Czech Republic was the subject of the ECHR ruling *D.H. and Others v. the Czech Republic*, while Slovakia was not. Both countries have adopted new amendments to their School Acts in 2015 as a reaction to infringement procedures started by the European Commission for breaching anti-discrimination legislation.

Because of the *D.H.* judgment, the Czech Republic's steps towards de-segregation were monitored by the Committee of Ministers, which is responsible for the execution of judgments. The monitoring system obliges the state to periodically submit a report on its progress and allows civil society to be engaged in critically assessing the state's reforms. In Slovakia, such monitoring is lacking, and thus, the country also lacks overview of the taken measures. Even though the *D.H.* judgment is not perfect, it represents a major step toward de-segregation, and ten years after the judgment, there is a visible change in the Czech educational system. Besides, the *D.H.* judgment became a precedent not only in international jurisprudence, but also at the national level in domestic courts.

The amendments of the School Acts in the Czech Republic and Slovakia are supposed to tackle the problem of segregation of Roma children in primary education and lead to inclusive education. Nevertheless, most of the measures are only formal measures, with some exceptions. The Czech Republic has adopted measures that have a higher potential to solve the current situation than those adopted by Slovakia. The Czech Ministry of Education strongly promotes inclusive policies towards children with mild mental disabilities and children from socially disadvantaged

environments. While there is an ongoing debate within the educational field about financial allocations, diagnostic of the children and preparedness of the system for inclusion, the Ministry put all effort to allocate sufficient financial resources. Although the negotiation regarding the budget mostly failed, the inclusive measures are still in progress.

Slovakia adopted mostly formal measures, usually in the form of financial incentives for schools to enroll children with special educational needs into mainstream education. The research showed that the diagnostic centers are overburdened and the quality of assessment will probably decrease. There is no intention from the government to structurally tackle this problem and recently, education in general is not a priority focus in the government's policy.

Both countries' systems and current amendments tackle the segregation only in the system of special schooling, while the question of segregated Roma schools and classes remains unaddressed. In the same way, the reforms omit to define segregation.

There might be a need for additional judgments in the field of de-segregation of Roma children, and the implementation of judgements should be taken seriously. Segregation should also be defined in order to take more targeted action and eradicate it in all its forms. It would be recommended to transform the system of special schooling into counselling and advisory centers. State budgets should allocate more financial resources to special pedagogical staff and tools as well as focus on intensive capacity building for pedagogues. The capacities of diagnostic centers must be enlarged and school inspection should receive more competence to secure impartial and sufficient monitoring. Most importantly, researched showed that the most efficient way of fighting segregation is the development of early childhood education and care. Therefore, states should increase and improve the number of ECEC facilities and train professionals adequately.

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List of Abbreviations

CJEU	Court of Justice of the European Union
CFNM	Framework Convention for the Protection of National Minorities
CFREU	Charter of the Fundamental Rights of the European Union
CMMD	Child/Children with mild mental disabilities
CoE	Council of Europe
CoM	Council of Ministers of the Council of Europe
CPPCP	Center of Pedagogical-Psychological Counseling and Prevention
CRC	UN Convention on the Rights of the Child
CSDE	Child/Children from socially disadvantaged environment
ECEC	Early Childhood Education and Care
EC	European Commission
ECHR	European Court of Human Rights
ECRI	European Commission against Racism and Intolerance
EP	European Parliament
FRA	European Union Agency for Fundamental Rights
OECD	Organization for Economic Co-operation and Development
RED	Racial Equality Directive 2000/43/EC
UNDP	United Nations Development Programme

Introduction

Segregation of Roma children in primary education is still present in many Central European countries. The Czech Republic and Slovakia have common history, the same system of government, a similar demographic composition, as well as a similar organization of their educational systems. They also approach the education of Roma children in the same manner. As a consequence of their discriminatory practices, both countries were subjected to an infringement procedure initiated by the European Commission, respectively in 2014 and 2015, for breaching European Union law by discriminating against Roma children in education. This unequal treatment of children through systematic placement to special school facilities based on inadequate and biased diagnostic, or placement to separated classes or facilities because they come from disadvantaged social environments or because of their Roma ethnicity is degrading to each child, violates their rights and dignity, and has significant consequences in their future and on society as a whole.

This thesis's topic was motivated by the author's affiliation with the Roma community and strong interest in anti-discriminatory policies and education of children coming from socially disadvantaged environments. These topics remain highly relevant nowadays, and keeping the discussion open and society informed will help fight indifference and inequalities, and improve these children's access to their rights.

The aim of the thesis is to provide a comparative analysis of the current situation of segregation of Roma children within the Czech and Slovak educational systems, and to see how international instruments and standards – specifically in the European Court of Human Rights and the European Union – influence the situation.

The judgment of *D.H. and Others v. the Czech Republic* of the European Court of Human Rights, which ruled that the placement of Roma children in special school facilities is discriminatory, is almost ten years old. After a decade, it is thus the right moment to reevaluate the judgment and its real impact on the Czech Republic in comparison with the Slovak Republic. Moreover, European Union's policies on non-discrimination, and the recent infringement procedures launched against both countries are also highly relevant. New Amendments to their national School Acts were adopted and came into force in September 2016, which need to be critically assessed in order to discover their impact on the situation of Roma children. In order to achieve this research, a variety of sources will be used, including court judgments, legislation at the EU and national levels, regional human rights instruments, and interview with professionals in the field of education and Roma rights.

The thesis consists of four chapters. The first chapter will give an overview of the situation of Roma children in the Czech and Slovak educational systems, explain the consequences of segregation, and examine relevant national and regional legislation – both from the EU and the Council of Europe. The second chapter will look at the role of the European Court of Human Rights in fighting school segregation of Roma children, and will critically analyze the landmark case of *D.H. and others v. the Czech Republic*. On this basis, the third chapter will critically compare the current situation of school segregation of Roma children in the Czech Republic and Slovakia, and will assess the impact of both the EU legislation and the European Court of Human Rights' judgments on school segregation of Roma children in the two countries. Finally, the fourth chapter will formulate recommendation and conclusions on the way forward.

Chapter 1 – A Background on Roma Children and Education

Section 1.1. The Vulnerability of Roma Children

A) Discrimination against the Roma Community in Europe

The Roma¹ community is the biggest minority in Europe. It is estimated that around 12 million Roma live across Europe. This diverse group differs from a state's majority population in terms of language, culture and traditions, occupation and way of living. The perception of the majority towards the Roma community is well captured by this quote: “[n]otwithstanding being so different the Roma community is generalized, stigmatized and connected with all possible “evil” like crime, drugs, prostitution, etc.”² Such stereotypes and scapegoating causes this minority to face constant discrimination.

After the fall of the Berlin Wall and the spread of democracy in Europe, the situation of the Roma community actually worsened. Unemployment, inadequate living conditions or social exclusion became the everyday struggle for many Roma in Central and Eastern Europe.³ These problems have persisted until today, and together with discrimination, shifted a significant part of the Roma community to the position of “second class citizens”. This group “is being segregated and discriminated against at the highest level within every sphere”⁴ from education, to unequal

¹ In this work “[t]he term “Roma” [is used in the same way as it is] used at the Council of Europe [documents and] refers to Roma, Sinti, Kale and related groups in Europe, including Travellers and the Eastern groups (Dom and Lom), and covers the wide diversity of the groups concerned, including persons who identify themselves as Gypsies.” Ad Hoc Committee of Experts on Roma Issues (CAHROM), *Thematic Report of the Group of Experts on Inclusive Pre-School Education for Roma Children*, CAHROM (2015) 6 49, 1 (Council of Europe), Jun. 25, 2015, at 49.

² Ekaterina Batueva, *The Roma Minority in the Czech Republic: Scapegoats of Modern History?*, 4 ECUM. REV. SIBIU REV. ECUMENICA SIBIU 429, 430 (2012).

³ *Id.* at 431.

⁴ *Id.*

treatment in public services, to the direct separation of some Roma communities' dwellings from other residences by concrete walls.⁵

B) Discrimination at School: School Segregation of Roma Children

Roma children experience numerous difficulties and discrimination, particularly in the educational sector. The survey on the Situation of Roma in 11 Member States conducted by the European Union Agency for Fundamental Rights (hereinafter "FRA") in 2014 describes "... three major inter-related education problems: low preschool attendance, a high risk of segregated schooling compounded by prejudice and discrimination, high drop-out rates before completing secondary education and low literacy rates."⁶ All of these problems need special attention, and urgent and genuine measures have to be adopted.

Education is one of the fields where discrimination, through the practice of segregation of Roma pupils, is highly visible and harmful. Segregation is an act when a particular group, based on its gender, race or ethnic origin,⁷ is separated from the majority population in some public places, for instance services, education or transportation.⁸ This work concretely focuses on ethnical or racial segregation of Roma children in primary education in the Czech and Slovak educational system.

This separation and wrongful practices provoke many negative consequences and accordingly, they violate basic human rights and freedoms of children. These children are not treated equally and they cannot access fully their right to education.⁹ Segregation goes hand by hand with reduced

⁵ *Id.*

⁶ EDUCATION: THE SITUATION OF ROMA IN 11 EU MEMBER STATES 11 (European Union Agency for Fundamental Rights ed., Roma survey - data in focus, Publ. Off. of the Europ. Union 2014).

⁷ This is list not exhaustive.

⁸ Karen A. Kallio, *School Desegregation*, RES. START. EDUC. ONLINE ED. (2015).

⁹ Iulius Rostas & Joanna Kostka, *Structural Dimensions of Roma School Desegregation Policies in Central and Eastern Europe*, 13 EUR. EDUC. RES. J. 268, 272 (Symposium Journals, 2014).

curriculum or lack of quality in education. Comparing the mixed or majority children classes, the segregated Roma classes receive a lower education.¹⁰ At the same time, it enhances stereotypes, hatred and double standards.¹¹ Children are vulnerable part of society and discrimination through segregation in education causes significant harm to each child.

Many political initiatives for Roma inclusion were established, such as the Decade of Roma Inclusion¹² or the EU Framework for National Roma Integration Strategies.¹³ Their results often have not reached expectations. Reports of the Decade of Roma Inclusion explained that most of the policies tackling inclusion and desegregation were ineffective or even were not implemented.¹⁴ The European Parliament report – Measure to promote the situation of Roma EU citizens in the European Union¹⁵ – emphasizes that de-segregation and inclusive measures are undeveloped and need to be “correctly assessed.”¹⁶

Ineffective policies and lack of political will maintain the status quo. What can be often seen is “pervasive tension between governing objectives and on-the-ground realities.”¹⁷ Rostas and Kostka explain that one of the main reasons of failure of de-segregatory policies is that the measures do not take into consideration the socio-economic situation of Roma and the discrimination that the community faces.¹⁸ Secondly, segregation as such is many times refuted or turned against the Roma community. Rostas and Kostka explain that the stereotypes surrounding the Roma

¹⁰ ALBERT IULIUS ROSTAS, *TEN YEARS AFTER : A HISTORY OF ROMA SCHOOL DESEGREGATION IN CENTRAL AND EASTERN EUROPE* 13 (Budapest : New York : Roma Education Fund, CEU Press, 2012. 2012).

¹¹ Rostas & Kostka, *supra* note 9, at 269.

¹² More information about the Decade of Roma Inclusion can be found at: <http://www.romadecade.org/>.

¹³ More information about the Framework can be found at: http://ec.europa.eu/justice/discrimination/roma/eu-framework/index_en.htm.

¹⁴ Rostas & Kostka, *supra* note 9, at 270.

¹⁵ European Parliament, *Measures to Promote the Situation of Roma EU Citizens in the European Union* (2011).

¹⁶ *Id.* at 31.

¹⁷ Rostas & Kostka, *supra* note 9, at 270.

¹⁸ *Id.*

Community “ha[ve] distracted attention from the role of the state and its apparatus in facilitating socio-economic inequalities”.¹⁹ The arguments of the majority, such as that the Roma are not interested in education, or that they have low morals or a different perspective on the role of education, only enhance the existing stigma. Consequently, these prejudices discourage the society from supporting inclusive practices and the politicians turn a blind eye on this issue. Thus, the Roma community has become a scapegoat for the segregation of their own children.²⁰

In this field, immediate and innovative changes through the law and teaching methods, and inclusive policies are required. Policies trying to simply integrate Roma children into the existing mainstream educational system are insufficient, because the system does not contain sufficient inclusive measures.²¹

School segregation can be found in three forms:

- “Special school segregation” - In this form, Roma children are placed to schools with a curriculum for children with mental disabilities (mild and severe). The main reason for this is the misdiagnosis of the pupils through tests that do not reflect the cultural and social differences of a particular marginalized and segregated community.²² Additionally, sometimes pupils who pass the test with average results or reach the minimum requirements are still placed in the special schools.²³

¹⁹ *Id.* at 273.

²⁰ *Id.*

²¹ *Id.*

²² Kalina Arabadjieva, *Challenging the School Segregation of Roma Children in Central and Eastern Europe*, 20 INT. J. HUM. RIGHTS 33, 34 (2016).

²³ The World Health Organization assessed 70 IQ points as a minimum standard to not be placed to the “special education system.” With this regards, it was found that less than the half (49%) of the children had result under 70 points. The rest were qualified as normal, yet attended “special classes” (12% with average intellect and 38,7% of cases of the edge of 70 points). *J.S. v the Highest Court*, No. III. ÚS 1136/13, slip op. ¶ 25 (Constitutional Court of the Czech Republic (Ústavní soud České Republiky) Aug. 12, 2015).

- Classroom segregation – Children are placed in separated classes within a regular school in order to reach the same level as ‘ordinary’ students because of their social status, intellectual or language disabilities.²⁴
- The last form of segregation is the phenomenon of separated schools or schools where Roma children form a majority. There are several reasons behind the existence of separated schools or classes. Firstly, it can cause by the location of schools.²⁵ These schools are situated close to the segregated Roma settlements and receive mostly settlements’ children. Secondly, in some school, because of a higher number of Roma students and prejudices against Roma, non-Roma parents often withdraw their children from schools and place to school with lower attendance of Roma children. This phenomenon is called “white flight”.²⁶

C) Consequences of the Segregatory Practices

Racial or ethnic segregation does not occur only in Europe, but on other continents as well, such as the American continent. The U.S. society experienced serious segregation of minority children in education. The fact-finding report “Mid-century White House Conference on Children and Youth,” prepared by the U.S. Federal Security Agency in 1950 which was summarized in the work of Clark and others,²⁷ precisely describes the consequences of minority segregation in education. These findings can be generally applied in case of any segregation of minorities in education.²⁸

²⁴ Arabadjieva, *supra* note 22, at 34.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Kenneth B. Clark et al., *The Effects of Segregation and the Consequences of Desegregation A (September 1952) Social Science Statement in the Brown v. Board of Education of Topeka Supreme Court Case*, 59 AM. PSYCHOL. 495 (Washington DC, 2004).

²⁸ *Id.*

The report explains that when children from a segregated minority are separated, they quickly observe that those from whom they are kept apart are treated better in society, and they immediately develop²⁹ “feelings of inferiority and a sense of personal humiliation”.³⁰ Children also become “confused about ... personal worth”.³¹ These reactions also depend on more aspects such as socio-economic background of parents or guardians, intelligence, talent, or the minority a child belongs to.³² Segregation of minority children has serious consequences on “lowering personal ambitions..., morale ..., [or] educational aspirations.”³³

How does the segregation affect a society? The report says that “segregation imposes upon individuals a distort sense of social reality.”³⁴ Particularly, it restrains communications and interaction between Roma community and the majority population in the European case. This subsequently causes growing misunderstanding and increases “mutual suspicious, distrust and hostility.”³⁵

Many Roma communities’ children can fall to the category of children from lower socio-economic group.³⁶ According to Rostas and Kostka, the segregated Roma children are generally restrained from full exercise of the right to education,³⁷ and the segregation is followed by a lower level of education.³⁸ These practices “reinforce the vicious circle of poverty and exclusion”³⁹ and reinforce

²⁹ *Id.* at 495.

³⁰ *Id.* at 496.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 497.

³⁵ *Id.*

³⁶ John Benneth, *Roma Early Childhood Inclusion - Overview Report* (Open Society Foundations, Roma Education Fund and Unicef 2012) 27.

³⁷ Rostas & Kostka, *supra* note 9, at 272.

³⁸ *Id.* at 269.

³⁹ *Id.*

stereotypes towards the Roma community.⁴⁰ Rostas and Kostka add that school segregation has an impact on a country's economy. It lowers the results of a country's performance in education in international monitoring.⁴¹ Last but not least, it affects the life and future of thousands of Roma families in Europe.⁴²

The Czech Constitutional Court in the case of *J.S. v the Highest Court* explains negative aspects of the segregation of children in primary education. If the “segregatory” placement happens based on a child's ethnicity (in this case Roma ethnicity) regardless of that child's actual mental capacity, it means that these children, without a relevant reason, do not obtain an education with the qualitatively same curriculum as children in mainstream education. As a consequence, the segregated children are highly disadvantaged to continue further studies, and they often develop a negative outlook on working and social life. The second problem is the way these children perceive themselves and how they are perceived by others. Like Rostas and Kostka, the Czech Constitutional Court argues that segregation can enhance stereotypes against the community and categorize Roma as inferior, unequal and always requiring a special and simplified approach. Last but not least, in the case of “special schools”, the fact that children attended such school outwardly identifies them as mentally disabled, regardless of the real reason for this placement. The fact that the decision about the placement was issued by a state organ following a professional assessment of the health condition of a child makes the attempt to refute such claim even harder.⁴³ Such segregation measures in education cause significant harm for each child and does not reflect current inclusive policies and legislation in the Czech Republic. What is required is:

⁴⁰ *Id.* at 272.

⁴¹ *Id.* at 269.

⁴² *Id.*

⁴³ *J.S. v the Highest Court*, No. III. ÚS 1136/13, slip op. ¶ 36 (Constitutional Court of the Czech Republic (Ústavní soud České Republiky) Aug. 12, 2015).

“[h]igh quality, inclusive and mainstream education [that] is ... crucial to the full development of the child and to overall societal development. Education equips children and young adults with the necessary skills to enter the labor market and contribute to general social cohesion. This ... [signifies] why the right to education is enshrined in international conventions and EU documents.”⁴⁴

Segregated schooling already raised the attention of the Council of Europe ten years ago. Even before the first case regarding school segregation, *D.H. and Others v the Czech Republic*,⁴⁵ was ruled by the European Court of Human Rights (hereinafter “ECHR”) in 2007, the Commissioner for Human Rights of the Council of Europe (hereinafter “CHR”) Mr. Alvaro Gil-Robles in his Final Report in 2006 already mentioned the problems resulting from the segregation of Roma children. CHR explains the negative consequences of segregation. In particular, he states that:

“[b]eing subjected to special schools or classes often means that these children follow a curriculum inferior to those of mainstream classes, which diminishes their opportunities for further education and for finding employment in the future. The automatic placement of Roma children in classes for children with special needs is likely to increase the stigma by labeling the Roma children as less intelligent and less capable. At the same time, segregated education denies both the Roma and non-Roma children the chance to know each other and to learn to live as equal citizens. It excludes Roma children from mainstream society at the very beginning of their lives, increasing the risk of their being caught in the vicious circle of marginalization.”⁴⁶

⁴⁴ EDUCATION, *supra* note 6, at 8.

⁴⁵ *D.H. and Others v. Czech Republic*, No. Application 57325/00 (ECHR Nov. 13, 2007) [hereinafter *D.H. and Others v. Czech Republic*, No. Application 57325/00 (ECHR Nov. 13, 2007)].

⁴⁶ Commissioner for Human Rights, *Final Report on the Human Rights Situation of the Roma, Sinti and Travellers in Europe* ¶ 46 (CommDH(2006)1, Council of Europe), Feb. 15, 2006.

Ten years after this report, the segregation still persists in Central Eastern European states and causes the same concerns as in 2006 without any particular changes.

Segregatory practices were considered as discriminatory by the jurisprudence on the national and international level. The ECHR in its judgments claimed that such practices are not in line with the European Convention on Human Rights. The case of *D.H. and others v. the Czech Republic* (2007) ruled the placement of Roma children into special school system as indirect discrimination.⁴⁷ In another ECHR judgment of *Oršus and Others v. Croatia* (2010), the Grand Chamber found that the separation of Roma and non-Roma children within one educational institution⁴⁸ because of their language deficiencies⁴⁹ was a discriminatory practice.⁵⁰ The case *D.H. and Others v. the Czech Republic* is critically assessed in the second chapter of this work.

In the same manner, the European Union found segregation discriminatory. In 2015 and 2016 the European Parliament (hereinafter “EP”) started an unprecedented infringement procedure against the Czech Republic, Slovakia⁵¹ and Hungary⁵² for non-compliance with the Charter of Fundamental Rights of the European Union and the Race Equality Directive (2000/43/EC) and the EP required the states to take necessary measures.⁵³

⁴⁷ *D.H. and Others v. Czech Republic*, No. Application 57325/00, slip op. ¶¶ 207–10 (ECHR Nov. 13, 2007)

⁴⁸ *Oršuš and Others v. Croatia*, No. Application 15766/03, slip op. ¶ 113 (ECHR Mar. 16, 2010).

⁴⁹ *Id.* ¶ 115.

⁵⁰ *Id.* ¶ 184.

⁵¹ Amnesty International, *Slovakia is the Second Member State to Be Subject of an Infringement Procedure for Breach of EU Anti-Discrimination Law*, EUR 72/1777/2015 Apr. 29, 2015.

⁵² European Commission, Press release - May Infringements' package: key decisions – Commission requests HUNGARY to put an end to the discrimination of Roma children in education (May 26, 2016), http://europa.eu/rapid/press-release_MEMO-16-1823_en.htm.

⁵³ Amnesty International, *supra* note 51.

Section 1.2 School Systems and Segregation in the Czech Republic and Slovakia

This thesis focuses particularly on two countries with a common history, a similar language, and good relations: the Czech Republic and Slovakia. They are also similar in the way they treat many Roma pupils in elementary education. They are excellent examples to illustrate segregation in primary education because all three forms of segregation appear in both countries. The situation in education is explained in a short analysis later in this part.

Both countries are part of the European Union and the Council of Europe. They have also ratified numerous international treaties focusing on the protection of minorities, anti-discrimination and equal treatment or the right to education. For instance, the UN Convention on the Rights of the Child (hereinafter “CRC”) in its Article 28 stipulates that “States Parties recognize the right of the child to education and with a view to achieving this right progressively and on the basis of equal opportunity...”⁵⁴ Although both states have ratified relevant international conventions, are supposed to transpose relevant EU directives into their national legislation, and are obliged to respect and implement decisions of international and regional courts, segregation still continues.

Segregation practices appear within school systems that are governed by law. Both the Czech Republic and Slovakia have developed school systems, yet huge discrepancies in education performance and attendance between non-Roma and Roma children can be observed.

⁵⁴ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3

A) The School System of the Czech Republic

According to the Act of pre-primary, primary, high, vocational and other education (the School Act) ⁵⁵ (hereinafter “Czech School Act”), the Czech educational system consists of primary schools, elementary schools and high schools (gymnasia, technical secondary schools, practical/vocational secondary school) ...⁵⁶ The Czech school system also recognizes the education of children with special educational needs⁵⁷ and offers supportive measures or practical classes or schools.⁵⁸ Education is compulsory for nine years, also called basic education. It consists of two stages. The first stage is six years long (primary education) and the second three years long (lower secondary education). ⁵⁹ Municipalities are responsible for these first two stages of education. There are approximately 6,000 municipalities and it causes huge administrative fragmentation.⁶⁰

The special schooling system in the Czech Republic went through significant transformation. When the first case of the Roma children segregation was brought to the ECHR, the measure of the placement into special school had discriminatory character. In the report submitted by the Czech Republic pursuant to Article 25, paragraph 1 of the Framework Convention for the Protection of National Minorities, the government explained that the special schooling system was established for children with intellectual deficiencies or learning difficulties.”⁶¹ Nevertheless, as the Czech Republic in the report explains, “[Roma] children with average or above intellect are

⁵⁵ Act No. 561/2004 Coll. of 24 September 2004 on pre-primary, primary, high, vocational and other education (School Act).

⁵⁶ *Id.*, § 7 (3).

⁵⁷ *Id.*, § 16.

⁵⁸ *Id.*, § 16, 16a, 16b.

⁵⁹ Shewbridge, C., et al., *OECD Reviews of School Resources: Czech Republic 2016* (OECD Reviews of School Resources, OECD Publishing 2016) 17.

⁶⁰ *Id.*

⁶¹ Czech Republic, *Report Submitted by the Czech Republic pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minority*, ACFC/SR(1999)006 43, 29 (Council of Europe), Apr. 1, 1999, at 43.

often placed in such schools on the basis of the results of psychological tests (this happens with the consent of parents).”⁶² The report said that some special schools were predominantly Roma (80-90% of Roma children).⁶³

Currently, under the pressure of the international community, the Czech Republic amended the new Amendment⁶⁴ of the Czech School Act. The amendment sets up a more inclusive approach and offers supportive measures to children who, due to their health conditions, cultural background, or other conditions, require special educational needs.⁶⁵ The amendment clarified that only children with severe mental, learning, and physical disabilities can be placed to a special school or classes.⁶⁶

The Roma community in the Czech education

The situation with the lack of ethnically sensitive data is problematic not only in the Czech Republic, but also in other EU countries including Slovakia.⁶⁷ The official data from the Census 2011 provided by the Czech Statistical Office showed that the Republic has only 13,000 Roma citizens, which represents only 0,13% of the whole population.⁶⁸ According to research the number is much higher, from 150,000 to 400,000 citizens.⁶⁹ The Gabal and Višek report from 2010 and the study of Tomáš Sirovátka indicated that the size of the Roma population is between 200,000

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Act No. 82/2015 Coll. of 19 March 2015 that amends the Act No. 561/2004 Coll. of 24 September 2004 on pre-primary, primary, high, vocational and other education (School Act).

⁶⁵ Act No. 561/2004 (School Act), *supra* note 55, § 16 (2).

⁶⁶ *Id.*, § 16 (9).

⁶⁷ Batueva, *supra* note 2, at 431.

⁶⁸ Czech Statistical Office, *National Census – Census of people, house and flats 2011*, ČES. STAT. ÚŘ. (2011), <https://www.czso.cz/csu/sldb>.

⁶⁹ Ad Hoc Committee of Experts on Roma Issues (CAHROM), *supra* note 1, at 7.

and 250,000 citizens.⁷⁰ Sirovátka's study also mentioned that 30% of Roma citizens are below 15 years.⁷¹ According to the EU-MIDIS survey from 2009, 83% of Roma faced discrimination, which was the highest number among the EU countries at that time.⁷² The newest Eurobarometer focusing on "Discrimination in the EU in 2015" showed that only 29% of Czech people can imagine working with a Roma person.⁷³

Between 23rd September and 2nd October 2015, the Czech School Inspection provided extensive research of Roma students in the Czech elementary education.⁷⁴ The findings are the following: there are 29,024 Roma students in elementary schooling, which represents 3,4% of all students.⁷⁵ The alarming numbers of Roma students are in the educational program for children with mild mental disabilities. According to the inspection, 4539 (out of 14,810) children in the program are Roma. It represents 30,6% of all children in this program.⁷⁶ The special classes or schools are attended at 9,7% by Roma students.⁷⁷ There is a huge discrepancy between Roma and non-Roma, when Roma represents only 1,4 – 2,8% of the whole population (approximately 150 - 300 thousand

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Ad Hoc Committee of Experts on Roma Issues (CAHROM), *Thematic Report by the CAHROM Thematic Group of Experts on Inclusive Education for Roma Children as Opposed to Special Schools*, CAHROM (2012)18 75, 7 (Council of Europe), Nov. 29, 2012, at 75.

⁷³ European Commission, *Special Eurobarometer 437 "Discrimination in the EU in 2015,"* Special Eurobarometer 437 Oct. 2015 22.

⁷⁴ Czech School Inspection, *Tematická správa - Žáci vzdělávání v jednotlivých vzdělávacích programech základního vzdělávání*, ČSIG-3922/15-G2 Nov. 2015 3. Available at: <http://www.romea.cz/dokumenty/TZ-Zaci-vzdelavani-v-jednotlivych-vzdelavacich-programech-ZV.pdf>.

⁷⁵ *Id.* at 6.

⁷⁶ *Id.*

⁷⁷ *Id.*

of Roma).⁷⁸ The proportion of Roma students in the mainstream education decreased from 10,3 in 2008 % to 9,5% in 2014.⁷⁹

According to the Roma Inclusion Index 2015,⁸⁰ the Czech Republic has improved Roma education in different areas.⁸¹ The Index claims that there are “remarkable results particularly in literacy and tertiary education.”⁸² Nevertheless, segregation of Roma children is still present.⁸³ According to the FRA, early school leaving rate average in the country was 5,5% in 2014, but taking into consideration only Roma students, their school leaving rate was 72% in 2014.⁸⁴

One of the general problems that affects Roma children is insufficient number of kindergartens that would secure early childhood education and care. It was shown that only 26% of Roma children aged 4 attended kindergartens.⁸⁵ A legislation making participation in early childhood education and care compulsory in 2017/18 could thus have a positive impact.⁸⁶

The policies that will tackle the inequalities that appears in the Czech education system are not only the school amendments but also the adoption of the Action Plan for Inclusive Education 2016-

⁷⁸ Public Defender of Rights [of the Czech Republic], *Survey of the Public Defender of Rights on Ethnicity of Pupils in Former Special Schools* (2012) 10.

⁷⁹ Česká Tisková Kancelář - Czech News Agency, *Rada Evropy: V Česku je stále příliš mnoho romských dětí ve “zvláštních školách,”* ROMEA.CZ (Mar. 12, 2015), <http://www.romea.cz/cz/zpravodajstvi/domaci/rada-evropy-v-cesku-je-stale-prilis-mnoho-romskych-deti-ve-zvlastnich-skolach>.

⁸⁰ The Decade of Roma Inclusion 2005-2015 is an “unprecedented political commitment” by eleven European countries. (Decade of Roma Inclusion 2005-2015, *Decade in Brief*, available at: <http://www.romadecade.org/about-the-decade-decade-in-brief>.) Governments of the states engaged that they “will work towards eliminating discrimination and closing gaps between Roma and the rest of society, as identified in [the] Decade Action Plans.” (Decade of Roma Inclusion Secretariat Foundation, *Roma Inclusion Index 2015* Sept. 2015 7.) The governments prioritized four main areas (education, employment, health and housing) and three cross-cutting areas (non-discrimination, gender equality and poverty reduction).(*Id.*)

⁸¹ Decade of Roma Inclusion Secretariat Foundation, *supra* note 80, at 40.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ European Commission - Directorate-General for Education and Culture, *Education and Training Monitor 2015: Czech Republic* (2015) 4.

⁸⁵ *Id.*

⁸⁶ *Id.* at 5.

2018⁸⁷ and the Roma Integration Strategy. Both set up similar main goals. They target problems such as the high number of early education leaving rates, the number of “practical schools”, and promote inclusive education, equality, an increase in the number of education assistants, and a better monitoring of Roma in education.⁸⁸ In addition, the Czech Republic also adopted ... “a revised comprehensive Long-term Plan on Education and the Educational System [...] for 2015-2020.”⁸⁹ It focuses on activities that would reduce existing inequalities or encourage the best teachers and professionals in the field to be engaged in the challenging facilities.⁹⁰

B) The School System of the Slovak Republic

According to the Act on Education (School Act) and on Changing and Supplementing Certain Law (hereinafter “Slovak School Act”),⁹¹ the school system in Slovakia consists of maternity schools, elementary schools, gymnasias, secondary schools, conservatoriums, schools for children and students with special educational needs, elementary art schools and language schools.⁹² Elementary or basic education is divided into two stages.⁹³ The first stage is “primary” education. Between 1st and 4th grade, that children start at the age of six or seven.⁹⁴ The second stage is called “lower secondary education” and takes an additional five years to complete.⁹⁵ Slovakia has ten years of compulsory education.⁹⁶

⁸⁷ *Id.* at 3.

⁸⁸ *Id.* at 4.

⁸⁹ *Id.* at 6.

⁹⁰ *Id.*

⁹¹ Act No. 245/2008 Coll. of 2 July 2008 on Education (Schools Act) and on Changing and Supplementing Certain Laws.

⁹² *Id.*, §27 (2).

⁹³ *Id.*, §16 (3).

⁹⁴ *Id.*, §16 (3) a).

⁹⁵ *Id.*, §16 (3) b).

⁹⁶ *Id.*, §19 (1).

The administration of maternity and elementary schools is divided between self-governing municipalities (138 cities and 2933 municipalities⁹⁷), districts and counties that are administrative regions of the country.⁹⁸ There is a huge decentralization in the Slovak education system.⁹⁹ The Slovak School Inspection is responsible for the monitoring.¹⁰⁰

Demographically there was a huge drop in the number of children attending elementary schooling between year 2003 and 2015. There were 721,093 children in the state and private elementary schools in 1990, while in 2015 there were only 427,418 children.¹⁰¹

The Slovak School Act in its beginning explains the main principles and objectives of Slovak education. The main goals include principles such as: “equal approach to the education with attention to the educational need of an individual...”¹⁰² or “preparation for responsible life in free society in the spirit of understanding of mutual understanding and tolerance, [...], friendship between nations, national and ethnical groups and religious tolerance.”¹⁰³ Nevertheless, Slovakia has received criticism from national and international bodies because of the treatment of Roma children in the education and for high inequalities between Roma and non-Roma students. The Public Defender of Rights in Slovakia claims that there is a huge inequality between the participation of Roma and non-Roma children in the special education. In her report from 2014 explained that such children practically do not have any option to continue in secondary

⁹⁷ Office of the Government of the Slovak Republic, Slovensko | Úrad vlády SR, <http://www.vlada.gov.sk/slovensko/>.

⁹⁸ Act No. 596/2003 Coll. of 5 November 2003 on School administration in education and school self-governance

⁹⁹ Santiago, P. et al., *OECD Reviews of School Resources: Slovak Republic 2015* (OECD Reviews of School Resources, OECD Publishing 216A) 41.

¹⁰⁰ *Id.*

¹⁰¹ Edita Zacharová a kolektív., *Spríevodca nešťátnymi školami a školskými zariadeniami - regionálne školstvo 1990 - 2015* (Centrum vedecko-technických informácií SR, Odbor metodiky a tvorby informácií školstva), Mar. 2016 18.

¹⁰² Act No. 245/2008 Schools Act, *supra* note 91, §3 (c).

¹⁰³ *Id.*, §3 (j).

education.¹⁰⁴ The World Bank report from 2012 explains that Slovakia has the biggest proportion of segregated children in pre-primary education in the region – 48%.¹⁰⁵ At the same time, Roma children living in deep poverty do not have access to learning tools and books and face “higher risk of malnutrition.”¹⁰⁶ The OECD report from 2015 reviewing Slovak school resources demonstrates that “by 2009, about 68% of Roma men and 77% of Roma women had completed at most lower secondary education, compared to an average of 4% and 7% for the overall [Slovak] population respectively.”¹⁰⁷

The Roma community in Slovak education

The population of the Slovak Republic is approximately 5,4 million.¹⁰⁸ According to the Slovak Statistical Office, the Roma population consists of approximately 100,000 members. However, according to the UNDP Atlas of Roma communities, the Roma minority consist of 402,000 members¹⁰⁹ which is 7-8% of the whole Slovak population. Many Roma communities within Slovakia face constant social exclusion. For instance, Roma unemployment is estimated on 73% and 37% of them are long-term unemployed in.¹¹⁰ Discrimination against Roma is also prevalent in Slovakia. The Eurobarometer’s results are more positive than in Czech Republic, yet only 41% of the majority population could imagine working with a Roma person.¹¹¹

¹⁰⁴ The Office of the Public Defender of Rights, *The Impact of Testing of the School Eligibility on the Fundamental Rights of the Child from a Non-Challenging Environment with a Cultural, Social, Language Barrier, Mainly from the Roma National Minority* (Public Defender of Rights), Jul. 2014 5.

¹⁰⁵ World Bank, *Diagnostics and Policy Advice on the Integration of Roma in the Slovak Republic*, 72985v1 204, 81 (World Bank), Sept. 9, 2012, at 204.

¹⁰⁶ *Id.* at 82.

¹⁰⁷ Santiago, P. et al., *supra* note 99, at 41.

¹⁰⁸ Statistical Office of the Slovak Republic, National population to 31 March 2015, www.statistics.sk.

¹⁰⁹ UNDP Europe and the CIS, *Atlas of Roma Communities in Slovakia 2013* (United Nations Development Program 2014) 16.

¹¹⁰ European Commission, *Country Report Slovakia 2016 - Commission Staff Working Document*, SWD(2016) 93 final 21 Feb. 26, 2016.

¹¹¹ European Commission, *supra* note 73, at 22.

The participation in early childhood education and care (hereinafter “ECEC”) was low, around 77,5% in 2013. The Roma children participation was even lower, only 28%.¹¹² According to the World Bank (2012), only one children out of five attends pre-primary education. It is estimated that approximately 21,000¹¹³ Roma children did not attend ECEC in 2011.¹¹⁴ This is partly caused by the low number of facilities.¹¹⁵ Recently, the government started a new project that has already created 5,000 facilities.¹¹⁶ As was mentioned, the education in Slovakia is compulsory. The early school leaving rate is generally very low, at 6,7%, which is one of the lowest percentage in the EU.¹¹⁷ In the case of Roma children, the results are alarming. The Country Report Slovakia 2016 states that around 83% of Roma children leave school before they finish primary or secondary education.¹¹⁸

According to the Roma Inclusion Index 2015, more than half of Roma children in primary education have been placed to special schools or classes or into segregated schools or classes.¹¹⁹ The Slovak national court ruled in 2012 that segregation of Roma children in separated classes is discriminatory. In the case of *Poradňa v. Elementary school with kindergarten Šarišské Michalany*, the County Court Prešov, Slovakia strongly rejected the practices of segregation and called for the inclusive measures.¹²⁰ Although, the Slovak Republic did not take significant measures. There have been some projects, for instance, projects under the European Social Funds,

¹¹² European Commission, *supra* note 110, at 26.

¹¹³ With estimated population 320,000.

¹¹⁴ World Bank, *supra* note 105, at 78.

¹¹⁵ European Commission - Directorate-General for Education and Culture, *Education and Training Monitor 2015: Slovakia* (2015) 5.

¹¹⁶ European Commission, *supra* note 110, at 26.

¹¹⁷ European Commission - Directorate-General for Education and Culture, *supra* note 115, at 2.

¹¹⁸ European Commission, *supra* note 110, at 26.

¹¹⁹ Decade of Roma Inclusion Secretariat Foundation, *supra* note 76, at 65.

¹²⁰ County Court Prešov, *Poradňa pre občianske a ľudské práva v. Základná škola s materskou školou Šarišské Michalany (Appeal Proceeding)*, Application No. 20Co 125-126/2012, 20 December 2012.

such as the project PRINED. PRINED had the main aim to enhance inclusive environment in pre-primary and primary education to avoid and secure children from unjust placement into special education.¹²¹ The project had a restricted budget and could cover only a specific number of institutions,¹²² and was active only for a short period.¹²³

Section 1.3. Legislative Framework

A) Right to Education and Anti-discrimination Legislation in the Czech Republic and Slovakia

The Czech Republic and Slovakia have broad and developed system of legislation that contain anti-discriminatory provision, secure right to education and promote equality. The most relevant provisions in this case are Constitutions, Anti-Discriminatory Acts and School Acts.

The Czech Constitution through its Bill of Fundamental Rights and Freedoms in Article 3 guarantees non-discrimination saying “the fundamental rights and freedoms are guaranteed to every one without exception of race,..., national or social origin, affiliation to national or ethnic group, ...”.¹²⁴ The Czech Republic also transposed the anti-discriminatory law of the European Union (will be discussed in Section 1.3. B) of this work) into its legal system, particularly adopted Anti-Discrimination Act.¹²⁵ This act in particular expresses that it prohibits discrimination “with respect to access to and provision of education.”¹²⁶ The Czech School Acts in its main principles

¹²¹ Matúš Řadušovský, *Základné informácie o projekte PRINED*, PROJ. INKLUZÍVNEJ EDUKÁCIE - PRINED, <http://www.prined.sk/o-projekte/zakladne-informacie>.

¹²² *Id.*

¹²³ Metodicko-pedagogické centrum, Projekty ESF | Metodicko-pedagogické centrum, <http://www.mpc-edu.sk/projekty>.

¹²⁴ Constitutional Act No. 2/1993 Coll. of 16 December 1992 on the Bill of Fundamental Rights and Freedoms, (Bill of Fundamental Rights and Freedoms), *Art. 3, para.1*.

¹²⁵ Act No. 198/2009 Coll. of 23 April 2008 on equal treatment and on the legal means of protection against discrimination and on amendment to some laws (the Anti-Discrimination Act).

¹²⁶ *Id.*, Section 1, § 1 i).

also rejects discrimination on the similar grounds as the Constitutional Bill of Rights,¹²⁷ and it promotes respect, solidarity and understanding.¹²⁸

In the Czech Republic, the right to education is anchored in the Bill of Fundamental Rights and Freedoms under Article 33.¹²⁹ The Article says “[e]veryone has the right to education. School attendance is compulsory and it is enacted by law.”¹³⁰ In addition, the Article guarantees “free education in elementary and high schools, and based on capacity of a citizen and option of society it also provides free university education.”¹³¹

The Slovak Constitution contains a nondiscrimination clause with a similar formulation. It reads: “[f]undamental rights and freedoms are guaranteed on the territory of the Slovak Republic to all without exception of ..., race,..., national or social origin, affiliation to national or ethnic group,... No one shall be harmed, favored or disadvantaged based on any of these grounds.”¹³² Slovakia also transposed the EU law into own legislation. It adopted similar act so-called Antidiscrimination Act that says “[i]n conformity with the principle of equal treatment, discrimination on the ground of sex, racial, national or ethnic origin shall be prohibited [...] in education.”¹³³ The Slovak School Act in its principles “forbids all form of discrimination, in particular segregation”¹³⁴ and it focuses on “preparation for responsible life in free society in the spirit of understanding, respect [...] and] friendship between nations, national and ethnic groups.”¹³⁵

¹²⁷ Act No. 561/2004 (School Act), *supra* note 55, § 1 (a)

¹²⁸ *Id.*, § 1 c)

¹²⁹ Constitutional Act No. 2/1993 (Bill of Fundamental Rights and Freedoms), *supra* note 124, Article 33.

¹³⁰ *Id.*, Article 33, para. 1.

¹³¹ *Id.*, Article 33, para. 2.

¹³² Act No. 460/1992 Coll of 1 September 1992 on the Constitution of the Slovak Republic, Art. 12, para. 1

¹³³ Act No. 365/2004 Coll. of 20 May 2004 on Equal Treatment in Certain Areas and protection against Discrimination, amending and supplementing certain other laws (Antidiscrimination Act), §5 (1).

¹³⁴ Act No. 245/2008 Schools Act, *supra* note 91, §3 (d).

¹³⁵ *Id.*, §3 (j).

The right to education is anchored in Article 42 of the Constitution. The article guarantees the right to education¹³⁶ and that the state provides free elementary and secondary education, and with some exceptions also university education.¹³⁷

Constitutional laws in both countries theoretically secure access to education. It forbids discrimination and unequal treatment on many grounds, including nationality or ethnicity. This is an example where law and reality do not correspond. Despite the legislation, segregation of Roma pupils still occurs.

The International community is highly concern about the practices that occur in Roma education. In this case, the most important role is played by the European Court on Human Rights with its jurisdiction, and by the European Union with its binding Directive focusing on non-discrimination and equal access to right to education. How do they secure the right to equal education?

B) European Anti-discrimination Law

The European Union and the Council of Europe are two main actors in the development of anti-discrimination law on the European continent. They also play a relevant role in desegregation of Roma children in education. Even though they have a different structure, history, and partially vary in their membership, they both have developed anti-discriminatory frameworks and promoted equality through legislation or case-law.

¹³⁶ Act No. 460/1992 (Constitution of the Slovak Republic), *supra* note 132, Art. 42, para 1.

¹³⁷ *Id.*, Art. 42, para. 2.

Generally, anti-discriminatory legislation covers many protected grounds. The following section describe anti-discrimination frameworks of the European Union and the Council of Europe that is relevant for the segregation of Roma children in primary education.

European Union Anti-discrimination framework

The EU Anti-discrimination law currently consists of a huge number of provisions protecting different groups of citizens from unequal treatment.¹³⁸ This section focuses on the relevant EU anti-discrimination legislation protecting against discrimination on the ground of race or ethnicity.

The most relevant legislation is the Racial Equality Directive 2000/43/EC (hereinafter “RED”) that “implements the principle of equal treatment between person irrespective of racial or ethnic origin.”¹³⁹ RED works close with the Employment Equality Directive, Gender Equality Directive and Gender Equality Directive on Goods and Services.¹⁴⁰ Under RED, direct and indirect discrimination on the ground of race and ethnic origin is prohibited.¹⁴¹ RED describes direct and indirect discrimination as:

“a) Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;¹⁴²

b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a

¹³⁸ SARAH HAVERKORT-SPEEKENBRINK, *EUROPEAN NON-DISCRIMINATION LAW : A COMPARISON OF EU LAW AND THE ECHR IN THE FIELD OF NON-DISCRIMINATION AND FREEDOM OF RELIGION IN PUBLIC EMPLOYMENT WITH AN EMPHASIS ON THE ISLAMIC HEADSCARF ISSUE* 30 (Cambridge ; Antwerp : Intersentia, 2012).

¹³⁹ European Commission, Press release - The Race Equality Directive (Jun. 27, 2007), http://europa.eu/rapid/press-release_MEMO-07-257_en.htm?locale=en.

¹⁴⁰ European Union Agency for Fundamental Rights, *The Racial Equality Directive: Application and Challenges* (2012) 9.

¹⁴¹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] O.J. L180, Art. 1, Art. 2 para 1.

¹⁴² *Id.*, Art. 2 para 2(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.”¹⁴³

Direct and indirect discrimination in this thesis will be understood in the light of this definition.

At the same time, RED “does not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.”¹⁴⁴ The scope of the Directive covers the public as well the private sector.¹⁴⁵ In addition, it obliges Member States to create bodies for the promotion of equal treatment.¹⁴⁶ Member States have to ensure compliance with the Directive, in particular, they “shall take necessary measures to ensure that any laws, regulation and administrative provision contrary to the principle of equal treatment are abolished.”¹⁴⁷

If there is a doubt that a Member State does not comply with the EU legislation, the European Commission sends a formal notice and starts the so-called ‘infringement procedure’. The Member State submits its observations and takes appropriate measures to comply with the legislation in the period set by the European Commission. If the MS failed to fulfill its obligations¹⁴⁸, the European Commission “may bring the matter before the Court of Justice of the European Union.”¹⁴⁹ In the proceeding, the CJEU examines the “failure to fulfill [the Member State’s] obligation to notify measures transposing a directive adopted under a legislative procedure,”¹⁵⁰ and it can impose

¹⁴³ *Id.*, Art. 2 para 2(b).

¹⁴⁴ *Id.*, Art. 6.

¹⁴⁵ *Id.*, Art. 1 para 3(g).

¹⁴⁶ *Id.*, Art. 13.

¹⁴⁷ *Id.*, Art. 14 (a).

¹⁴⁸ Consolidated version of the Treaty on the Functioning of the European Union Art. 258, [2012] O.J. C326/160.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*, Art. 260 para 3, [2012] O.J. C326/161.

“lump sum or penalty payment.”¹⁵¹ RED has direct effect on the Member States. It has “expressive and purposive interpretation”¹⁵² and offers a narrower Margin of Appreciation.¹⁵³

Another important document is the Charter of Fundamental Rights of the European Union. The Charter promotes equality¹⁵⁴ and forbids discrimination on the ground “of ethnic or social origin, [...], language, [... or] membership to national minority.”¹⁵⁵ Furthermore, it is important to highlight that Article 19 of the TFEU “confers power on the Union to adopt legislative acts, including harmonization of the Member States’ laws and regulations to combat [...] discrimination”¹⁵⁶ on the ground of “[...] social or ethnic origin.”¹⁵⁷

Equality and the principle of non-discrimination are ones of the fundamental values of human rights. What is the actual position of the ECJ in the field of human rights? Lenaerts claims that one of the functions of the Court “is the incorporation of fundamental rights into the EU legal order as general principles of EU law.”¹⁵⁸ Here, Waele and Vleuten argue that regarding human rights, the Court does not behave anymore as an equal partner with national courts, but rather takes a position of “supreme court” within the European Union.¹⁵⁹

¹⁵¹ *Id.*

¹⁵² Arabadjieva, *supra* note 22, at 43.

¹⁵³ *Id.*

¹⁵⁴ Charter of Fundamental Rights of the European Union, Art. 20, [2007] O.J. C303/01, at 6.

¹⁵⁵ *Id.*, Art. 21, at 7.

¹⁵⁶ Explanations to the Charter of Fundamental Rights, *Explanation on Article 21 – Non-discrimination*, [2007] O.J. C303/02, at 24.

¹⁵⁷ Consolidated version of the Treaty on the Functioning of the European Union Art. 19 para 1, [2012] O.J. C326/56.

¹⁵⁸ MAURICE ADAMS & HENRI CLEMENS FERDINAND JOZEF ALEXANDER DE WAELE, *JUDGING EUROPE’S JUDGES : THE LEGITIMACY OF THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE 15* (Oxford : Hart, 2013).

¹⁵⁹ De Waele & van der Vleuten, *supra* note 3, at 640.

All European Union Member States are also members of the Council of Europe and are parties to the European Convention on Human Rights.¹⁶⁰ Article 14 ECHR on non-discrimination guarantees the enjoyment of the rights listed in the Convention without discrimination.¹⁶¹ The list of the prohibited grounds of Article 14 is not exhaustive,¹⁶² meaning that grounds not mention in the article are also protected. The article is not free-standing¹⁶³ and it has to be applied “in conjunction with another substantive right.”¹⁶⁴ The Convention protects mostly civil and political rights, yet it covers also some socio-economic rights¹⁶⁵, such as right to education.¹⁶⁶

The Convention allows differentiated treatment. However, such treatment has to be “reasonable and justif[ied]”¹⁶⁷ and “pursue a legitimate aim or [have] a reasonable relationship of proportionality between the means employed and the aim sought to be realized.”¹⁶⁸ The respondent state will have to present “very weighty reasons”¹⁶⁹ to defend the difference in treatment. It also depends on which suspected ground such different treatment relies on.¹⁷⁰ Some suspected ground narrow the margin of appreciation, for instance, race or ethnic¹⁷¹ origin create a narrow margin of

¹⁶⁰ European Communities, *The Prohibition of Discrimination under European Human Rights Law* (Directorate-General for Justice, European Commission 2011) 14.

¹⁶¹ Council of Europe, European Convention for Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Art. 14.

¹⁶² European Communities, *supra* note 160, at 15.

¹⁶³ *Id.* at 14.

¹⁶⁴ Council of Europe and European Union Agency for Fundamental Rights, *Handbook on European Non-Discrimination Law* (2010) 60.

¹⁶⁵ *Id.* at 61.

¹⁶⁶ Council of Europe, Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, ETS No. 9, Art. 2.

¹⁶⁷ European Communities, *supra* note 160, at 15.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 16.

¹⁷¹ *Id.* at 17.

appreciation and for the justification of differential treatment the respondent state has to present “particularly weighty reasons.”¹⁷²

Considering the discrimination on the ground of race or ethnic origin, the ECHR describes this discrimination as a “particularly egregious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction.”¹⁷³ The ECHR recognizes also two types of discriminations, direct and indirect. The direct discrimination is defined similarly as in RED.¹⁷⁴ However, indirect discrimination is interpreted more extensively by the ECHR:

a) a neutral provision or measure “appears to be particular disadvantageous to the member of a certain category, if the provision creating the disadvantage is not objectively and reasonably justified;”¹⁷⁵

b) an applied general measure “affects a disproportionately high number of members of particular category, unless the measure resulting in such a disparate impact is objectively and reasonably justified;”¹⁷⁶

c) “the author of general measures has without objective and reasonable justification failed to treat differently a specific individuals or category by providing for an exception to the application of the general rules.”¹⁷⁷

¹⁷² *Id.* at 16.

¹⁷³ *Id.* at 19.

¹⁷⁴ *Id.* at 21–23.

¹⁷⁵ *Id.* at 23.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

Thus, it can be seen that the ECHR developed the scope of Article 14 and besides direct discrimination it also identifies different forms of indirect discrimination.

Besides Article 14, the Council of Europe offers another anti-discriminatory provision under the ECHR. Protocol No. 12 to the European Convention of Human Rights was “opened for signature on 4 November 2000.”¹⁷⁸ This protocol generally prohibits discrimination on the grounds such as “..., race, colour, language, [...] national or social origin, association with a national minority...”¹⁷⁹ This free-standing protocol prescribes to national governments that “[n]o one shall be discriminated against any public authority on any grounds mentioned in paragraph 1.”¹⁸⁰ Like Article 14 of the ECHR, it contains a non-exhaustive list of protected grounds. Generally, Protocol No. 12 represents higher protection than Article 14 because it does not require another violation in conjunction with it.¹⁸¹ However, Protocol No. 12 is applicable only to the respondent states which have ratified it. The Czech Republic and Slovakia did not ratify this Protocol.¹⁸²

C) The Right to Education

The right to equal education is “an empowerment right”,¹⁸³ and falls into the category of economic, social and cultural rights. This right is linked to the exercise of many other economic, social and cultural rights and civil and political rights.¹⁸⁴ It is also a pre-conditional right: if an individual does not have sufficient knowledge, trainings or skills, it is an enormous barrier to fully socialize,

¹⁷⁸ *Id.* at 36.

¹⁷⁹ Council of Europe, *Protocol 12 to the European Convention for the Protection of Human Rights and Fundamental Rights*, 4 November 2000, ETS No. 177, Art. 1 para 1.

¹⁸⁰ *Id.*, Art. 1 para 2.

¹⁸¹ European Communities, *supra* note 160, at 37.

¹⁸² Council of Europe - Treaty Office, *Chart of signatures and ratifications of Treaty 177*, TREATY OFF., <https://www.coe.int/web/conventions/full-list>.

¹⁸³ EU Network of Independent Experts on Fundamental Rights, *The Commentary of the Charter of Fundamental Rights of the European Union*, Commentary Jun. 2016 141.

¹⁸⁴ Ida Elisabeth Koch et al., *The Right to Education for Roma Children under the European Convention on Human Rights*, in -LINE FESTSCHR. HONOUR KATARINA TOMAŠEVSKI 1 (2011).

find a job and contribute to a society.¹⁸⁵ This is highly visible in many Roma communities, where a high unemployment rate is not only caused by an insufficient number of work positions on the labor market, but because individuals mostly lack proper education and skills.

Education is also a condition for the exercise of many civil and political rights, for instance, participation in civil and political life. Koch explains that education “has impact on the full enjoyment of the right to vote and for political participation”.¹⁸⁶ Consequently, the right to education is relevant and important for the functioning of democracy. Koch argues that an illiterate person is seldom elected as representative.¹⁸⁷ This can be seen in many Central Eastern European countries, where Roma political participation is very low. Rights related to association, assembly or expression and their exercise are also conditioned by a minimum literacy.

Education plays an important role not only in the life of a child, but has impact on the community and the whole society. It creates an environment for the development of an individual’s skills and self-realization. At the same time, it creates the precondition for a democratic society because it provides knowledge on how to exercise civil and political rights.¹⁸⁸

The European Convention on Human Rights on the right to education

The right to education is anchored in Article 2 of Protocol No. 1 of the European Convention of Human Rights.¹⁸⁹ The right to education under the ECHR guarantees “an individual right to

¹⁸⁵ EU Network of Independent Experts on Fundamental Rights, *supra* note 183, at 141.

¹⁸⁶ Koch et al., *supra* note 184, at 2.

¹⁸⁷ *Id.*

¹⁸⁸ J.S. v the Highest Court, No. III. ÚS 1136/13, slip op. ¶ 32 (Constitutional Court of the Czech Republic (Ústavní soud České Republiky) Aug. 12, 2015).

¹⁸⁹ Council of Europe, 20 March 1952, *supra* note 179, Art. 2.

education”¹⁹⁰ and the “right to parents to have their children educated in conformity with their religious and philosophical conviction.”¹⁹¹

The negative aspect of the right prohibits the contracting party to restrain access to the right to education.¹⁹² An individual has a “right to educational institution at a given time.”¹⁹³ At the same time the contracting party has to “guarantee equal access to educational facilities.”¹⁹⁴ The positive aspect of the right obliges the contracting party to establish “at least a minimum educational facilities.”¹⁹⁵ However, this right is not an absolute right and therefore, the Convention allows a certain margin of appreciation.¹⁹⁶

The interpretation of the article does not provide guidelines on the language education should be provided in. The Guide to Article 2 of Protocol No. 1 explain that “[i]t would be meaningless if it did not imply in favour of its beneficiaries.”¹⁹⁷

The right to education in EU Law

The right to education is anchored in Article 14 of the Charter of Fundamental Rights and Freedoms of the European Union.¹⁹⁸ Comparing this article with Article 2 of Protocol No. 1 of

¹⁹⁰ European Court of Human Rights, *Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights - Right to Education* Dec. 2015 5.

¹⁹¹ *Id.*

¹⁹² EU Network of Independent Experts on Fundamental Rights, *supra* note 183, at 141.

¹⁹³ European Court of Human Rights, *supra* note 190, at 6.

¹⁹⁴ EU Network of Independent Experts on Fundamental Rights, *supra* note 183, at 142.

¹⁹⁵ *Id.*

¹⁹⁶ European Court of Human Rights, *supra* note 190, at 5.

¹⁹⁷ *Id.* at 7.

¹⁹⁸ “Article 14: Right to education:

1. Everyone has the right to education and to have access to vocational and continuing training.
2. This right includes the possibility to receive free compulsory education.
3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and

ECHR, it also contains negative obligations¹⁹⁹ such as the “right to education”. The Charter adds that the Member States shall secure “the right to have access to vocational and continuing training.”²⁰⁰ It also includes positive obligations through “the possibility to receive free compulsory education”²⁰¹ Regarding the comparison of these two documents, Article 2 of Protocol No.1 ECHR served as a major source for the establishment of Article 14 CFREU.²⁰²

What is important to highlight in the case of segregation, according to Winkler, is that “a positive obligation can be derived ... from the right to equal access to education, in other words, from a prohibition of discrimination”.²⁰³ In that case, the CFREU provides the positive obligation to secure equal access to education through Articles 20 (Equality before the law)²⁰⁴ and 21 (Non-discrimination).²⁰⁵ Consequently, “the Right to Education can be seen as a specific right of non-discrimination which is a concrete expression of the general right to equality...”.²⁰⁶

Section 1.4. Conclusion

The Roma community is the biggest minority in Europe, and it faces discrimination and segregation in many areas of everyday life. Roma children are not spared, as they suffer from discrimination in education, under the form of special school segregation, classroom segregation,

pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.”

European Union, *Charter of Fundamental Rights of the European Union*, C 326/391 OFF. J. EUR. COMMUNITIES ¶ 14 (2000).

¹⁹⁹ Roland Winkler, *Right to Education according to Article 14 of the Charter of Fundamental Rights of the European Union, The [Article]*, INT. J. EDUC. LAW POLICY 60, 62 (2005).

²⁰⁰ *Id.* at 60.

²⁰¹ *Id.*

²⁰² *Id.* at 62.

²⁰³ *Id.*

²⁰⁴ “Article 20:Equality before the law: Everyone is equal before the law.” European Union, *supra* note 198, para. 20.

²⁰⁵ See paragraph 21 of the Charter of Fundamental Rights of the European Union.

²⁰⁶ Winkler, *supra* note 199, at 62.

or school segregation. Their separation from majority children at school because of their ethnicity has negative consequences on their right to equal education, as they follow a reduced curriculum, which also limits their future opportunities. Segregation can also affect their sense of self-worth and stigmatizes them as less intelligent. Moreover, this separation limits interaction between the majority population and Roma communities, and helps to reinforce stereotypes against Roma, as well as poverty and social exclusion. In turn, because of these stereotypes, inclusive and desegregation policies are rarely supported by the majority population, and they have mostly been ineffective, if not inexistent.

The Czech Republic and Slovakia are two countries with large Roma communities. In both countries, Roma children are disproportionately represented in special schools.

In the Czech Republic, the School Act has been amended to provide for a more inclusive system. Recent policies target, *inter alia*, the early school leaving rates, inclusion, practical schools, an increase in the number of educational assistants, and a better monitoring of Roma children in education.

In Slovakia, the School Act stipulates that equality is an aim of Slovak education, but there is in reality high inequalities between Roma and non-Roma students. Kindergarten attendance rates and early school leaving rates of Roma children are concerning. The number of Roma student in special schools or classes or segregated schools or classes is high. The Slovak Republic has not taken significant measures to remedy the issue.

Both countries ensure the right to education and non-discrimination in their national constitutions. They both transposed the EU non-discriminatory legislation into domestic law, and respect the European Convention on Human Rights of the Council of Europe. The EU law, particularly the

RED, directly forbids direct and indirect discrimination in education and offers compliance measures under the form of infringement procedures. The ECHR through its case law specifies, for example, that discrimination can happen not only through some specific acts, but also through (long-term) systematic practice. The ECHR guarantees to individuals the right to access education and obliges states to establish educational facilities. The EU adds that a Member State should secure the equal access to education. Despite all of these provisions, segregation is still ongoing.

Chapter 2 – The ECHR and Its Relevance in Fighting School Segregation

The segregation of Roma children is a widespread phenomenon in Central and Eastern Europe. The Czech Republic or Slovakia are not the only countries to breach the law with such practices. Countries like Hungary or Romania receive the same criticism. For instance, the European Commission recently launched an infringement procedure against Hungary for school segregation of Roma children.²⁰⁷ There have been numerous recommendations from the international community and the NGO sector to end such practices. One of the most significant step towards desegregation was done by the European Court of Human Rights (ECtHR). The court set new precedents that became crucial in promoting desegregation policies and legislation.

In the following section, the work focuses on the examination of the major and first case under the European Court of Human Rights (hereinafter “ECHR”) related to the segregation of Roma children – D.H. and Others v. the Czech Republic (2006,2007). This chapter examines the judgments in the following way. Firstly, it looks at the background and facts of the case. Secondly, it examines the Chamber decision (2006), its results and critical assessment. Thirdly, the work presents the assessment of the D.H. judgment by the Grand Chamber (2007). It compares the Grand Chamber conclusion with the result of the Chamber judgment. After the conclusion, most importantly, the Chapter focuses on the critical analysis of the positive and negative aspects in the Grand Chamber D.H. judgment.

²⁰⁷ European Commission, *supra* note 52.

Section 2.1. The Case of *D.H. and Others v. the Czech Republic*

In *D.H. and Others v. the Czech Republic*, the ECtHR ruled for the first time that the practice of segregating Roma children in education is an act of indirect discrimination. Timewise, it has been a decade since the decision was ruled and it is now possible to evaluate its impact in the long-term. This chapter focuses on the first and major ECHR's case related to segregation of Roma children – the case of *D.H. and Others v. the Czech Republic*. It will examine the Chamber decision and the overruling decision of the ECtHR Grand Chamber. This will help to highlight the negative and positive aspects of the judgment and the significance of this case.

A) Background of the Case

Why did the first case of the ECtHR focusing on Roma children segregation come from the Czech Republic? Everything started when the European Roma Right Center (hereinafter ERRC) decided to choose the Czech Republic as the main state for litigation. The ERRC legal director James Goldstone explained the reason behind this choice: the Czech Republic as “one of the most enlightened and wealthiest of the Central and Eastern Europe countries”²⁰⁸ faced educational challenges such as school segregation of Roma children. The third largest city of the country, Ostrava, was experiencing a high number of Roma pupils placed in special schools. In particular, 56% of all Roma pupils were placed to special schools compared to only 1.8% of non-Roma pupils.²⁰⁹ Roma children represented only 2.26% of the number of children attending primary

²⁰⁸ Roberta Medda-Windischer, *Dismantling Segregating Education and the European Court of Human Rights - D.H. and Others vs. Czech Republic: Towards an Inclusive Education [Article]*, EUR. YEARB. MINOR. ISSUES 19, 20 (2007).

²⁰⁹ *Id.*

education in the city.²¹⁰ Roma children were 27 times overrepresented in the special school in Ostrava than the non-Roma children.²¹¹

For a better understanding of the background of the case, special schools were a category within the school system, which were created for the education of children with mental disabilities or for those who are unable to attend “ordinary schools.” These schools were established and maintained under the School Act (Law no. 29/1984)²¹² that was replaced by the School Act in 2004²¹³ that will be discussed in the third chapter of this work. A child was placed to a special school based on a test that measured its intellectual capacity and based on the parent’s or guardian’s consent.²¹⁴

There were problems with both the consent and the testing with regards to the Roma community. The tests were not adapted for children coming from Roma communities and did not reflect the cultural or language differences. According to various opinions of professionals in the field or “the national report submitted by the Czech Republic (1999) pursuant to Article 25 §1 of the Framework Convention for the Protection of National Minorities,”²¹⁵ such psychological testing did not consider Roma cultural and linguistic specificities, but it was standardized for Czech children from the majority population.²¹⁶ In the second report from 2005, it was observed that the testing went through revisions. However, even after the revision took into account minority

²¹⁰ *Id.*

²¹¹ *Id.* at 21.

²¹² *D.H. and Others v. Czech Republic*, No. Application 57325/00, slip op. ¶ 16 (ECHR Nov. 13, 2007).

²¹³ Act No. 561/2004 Coll. of 24 September 2004 on pre-primary, primary, high, vocational and other education (School Act).

²¹⁴ *D.H. and Others v. Czech Republic*, ¶ 16.

²¹⁵ *Id.* ¶ 41.

²¹⁶ *Id.* ¶¶ 40–41.

specificities, it did not impact the number of Roma children in special schools, because the number was still high.²¹⁷

The consent of Roma parents was influenced by many factors and mostly did not reflect the best interest of the child. Firstly, many parents came from a disadvantaged socio-economic background and did not fully understand the importance of the consent. Some of the parents did not even have any interest in education. Secondly, the parents were not aware of the consequences of the attendance of special school and the quality of education that is provided there. Thirdly, those parents who experienced abuses from the majority wanted to avoid such situations. Hence, they placed their kids to the environment that was predominantly attended by Roma children.²¹⁸

Thus, due to the great difficulties faced by Roma children in the Czech Republic, the ERRC started the litigation of the case *D.H. and Others v. The Czech Republic* in the ECtHR.

B) The ECtHR Chamber Judgment in *D.H. and Others v. The Czech Republic*

The Grand Chamber judgment was preceded by the Chamber judgment that was considered as the one of the main set-backs in anti-discrimination jurisdiction of ECHR. This part consists of the case background, the parties' submissions and the Chamber decision. After, it critically analyses the ruling and it examines the failure of the ECHR's Chamber decision to target the discrimination of Roma, in particular, Roma children in elementary education.

Facts

In 1999, eighteen applicants from Ostrava were arguing that their placement to so-called 'special schools', established primarily for children with mental disabilities, was based on their ethnicity,

²¹⁷ *Id.* ¶ 41.

²¹⁸ *Id.* ¶ 47.

not on their mental capacity. After their case failed at the local level, where the local authorities claimed that the decision of placement was done following all the prerequisites, they turned to the Constitutional Court. The institution dismissed the application. The Constitutional Court argued, firstly, that the placement has been done in accordance with legal provisions.²¹⁹ Secondly, despite the “persuasiveness” of the applicants’ argument,... the Court [is] not competent to consider evidence purporting to demonstrate a practice of pattern of racial discrimination, but... only... the circumstances of individual cases.”²²⁰

Even though the case was logged in the ECHR on 18 April 2000, it reached the Chamber’s room in 2006. In March 2005 the case was considered admissible.²²¹ While the Czech government rejected all claims, the applicants brought arguments where they provided relevant data of the high percentage of Roma pupils placed in ‘special schools’, the lack of objectivity of the psychological testing of children and the defection of the parents’ consent lacking a sufficient explanation.²²²

The parties’ submissions and the Court’s assessment

The Government of the Czech Republic in its submission briefly rejected the applicants’ claims. It argued that the applicants did not submit any “evidence to show beyond reasonable ground” that the contracting party was discriminating the Roma children based on their ethnic origin.²²³ They explained that the decision of placement was conducted via a “proper procedure”²²⁴. The ethnic origin of the children did not play any role in the placement and it was followed by the parents’

²¹⁹ Morag Goodwin, *D.H. and Others v. Czech Republic: A Major Set-Back for the Development of Non-Discrimination Norms in Europe [Notes]*, GER. LAW J. 421, 421–22 (2006).

²²⁰ *Id.* at 422.

²²¹ *D.H. and Others v. Czech Republic*, ¶ 5.

²²² Goodwin, *supra* note 219, at 423–25.

²²³ *D.H. and Others v. Czech Republic*, No. Application 57325/00, slip op. ¶ 33 (ECHR Feb. 7, 2006) [hereinafter *D.H. and Others v. Czech Republic*, No. Application 57325/00 (ECHR Feb. 7, 2006)].

²²⁴ *Id.* ¶ 34.

consent. The placement was based only on a “psychological examination by an expert that was geared towards establishing the child’s true mental capacity and personal characteristics.”²²⁵ According to the contracting party, the examination showed that each applicant suffered from “a degree of mental retardation.”²²⁶

The applicants claimed the violation of article 14 of the European Convention on Human Rights in conjunction with Article 2 of the Protocol No. 1 of the Convention.²²⁷ The allegation were based on the different treatment of Roma children in Ostrava’s educational system. The applicants claimed that their children were placed to special schools “without justification, where they received a substantially inferior education.”²²⁸ Those children not only received insufficient education, but also “suffered psychological damage” and were labeled by their peers as “stupid or retarded” without objective examination.²²⁹

The applicant argued that there was an indirect discrimination of the Roma children by the contracting party. The placement as a measure could represent a neutral practice, but it had negative impact particularly on the Roma community. Therefore, the burden of proof should be switched to the contracting party. It has to prove that the measure was reasonable and objectively justified and pursued legitimate aim.²³⁰ According to the applicants, “neither an insufficient command of the Czech language, nor a difference in socio-economic status, nor parental consent could constitute reasonable and objective justification”.²³¹

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* ¶ 32.

²²⁸ *Id.* ¶ 36.

²²⁹ *Id.*

²³⁰ *Id.* ¶¶ 37–38.

²³¹ *Id.* ¶ 38.

The applicant also pointed out that the placement measures were not racially neutral due to the high number of Roma children in the institution. They criticized the objectivity of the testing procedures as well as the professionalism of psychologists. According to the applicants, the tests were biased because they were established for the Czech-majority population speaking the Czech language. The tests did not consider the cultural differences of Roma community and the socio-economic background of the children. Therefore, the tests could not bring objective results.²³²

Before the court assessment, it also listed sources that were taken into account. One of the most important one, describing the situation in the special schooling by the Czech government is “the report submitted by the Czech Republic pursuant to Article 25 §1 of the Framework Convention for the Protection of National Minorities on 1 April 1999.”²³³ It says, quoting the report:

“Romany children with average or above-average intellect are often placed in such schools on the basis of results of psychological tests (this happens always with the consent of the parents). These tests are conceived for the majority population and do not take Romany specifics into consideration.”²³⁴

After 6 years of waiting the Court finally decided, yet its decision did not have the expected results for the applicants.²³⁵

According to the Chamber, the ECHR case-law “establishes that discrimination means treating differently, without an objective and reasonable justification, person in relevantly similar situation.”²³⁶ The Chamber accepted that the system of special schooling is “not ... an ideal

²³² *Id.* ¶ 39.

²³³ *Id.* ¶ 26.

²³⁴ Czech Republic, *supra* note 61, at 29.

²³⁵ Medda-Windischer, *supra* note 208, at 22.

²³⁶ *D.H. and Others v. Czech Republic*, ¶ 44.

solution.”²³⁷ However, the contracting parties have a “margin of appreciation in the education sphere.”²³⁸ The Court agreed that the state should be allowed to establish different types of schools that will reflect different needs of children. The Court explained that the system of special schooling was established to accommodate the children with learning disabilities and to give them an opportunity to obtain basic education, not to separate the Roma children from non-Roma.²³⁹

According to the Chamber, the placement measures “pursued the legitimate aim of adapting the education system to the needs and aptitudes or disabilities of the children.”²⁴⁰ The Court also rejected the applicants’ claim regarding testing. It explained that educational psychology is provided on the professional level by experts following the rules of conduct. In addition, there is no legal alternative to this testing system. Examination of the tests would go beyond the scope of the examination of the Court.²⁴¹

The Chamber rejected the arguments regarding the parents’ consent and the statistics provided by the applicants. The Court did not examine the capability of parents to understand such consent or their socio-economic situation. Instead, it claimed that it is “the parents’ responsibility, as part of their natural duty to ensure that their children receive an education.”²⁴² Parents should be able to find different educational opportunity for their children, as well “to challenge ... the decision ordering the placement if it was issued without their consent.”²⁴³

²³⁷ *Id.* ¶ 47.

²³⁸ *Id.*

²³⁹ *Id.* ¶¶ 47–48.

²⁴⁰ *Id.* ¶ 49.

²⁴¹ *Id.*

²⁴² *Id.* ¶ 51.

²⁴³ *Id.*

Therefore, the Court did not find the violation of Article 14 in conjunction with Article 2 of the Protocol No. 1 of the Convention.²⁴⁴

Criticism of the Chamber judgment

The D.H. Chamber decision was a missed opportunity for the development of anti-discrimination law under the ECHR. Even though the Chamber found the schooling system partially problematic, it did not rule a violation of the Convention with regards to three relevant factors in this case: the aim of special schools, testing by professional psychologists and the parents' responsibility regarding the consent.²⁴⁵

Many authors, as well as Judge Cabral Barreto in his dissenting opinion, strongly criticize the judgment. Morag Goodwin, in her work *D.H and Others v. Czech Republic: a major set-back for the development of non-discrimination norms in Europe*, negatively assesses the Court decision. She claims that the Chamber ignored the relevance of the report of the Framework Convention for the Protection of National Minorities on 1 April 1999 and did not take into consideration the statistics, which had a significant value for proving indirect discrimination. She illustrates the existence of indirect discrimination in the D.H. case referring to the case of *Griggs v. Duke Power Co.* before the US Supreme Court in 1971. The concept of indirect discrimination has its origins in this case. The concept of indirect discrimination explains that a neutral provision that does not have an intention to discriminate, or actually cause harm to some particular group. The applicants claim was not to show that the Czech Republic discriminate against Roma children, yet such placement measures have negative consequences on the Roma community.²⁴⁶ Furthermore, the

²⁴⁴ *Id.* ¶ 53.

²⁴⁵ Goodwin, *supra* note 219, at 423–25.

²⁴⁶ *Id.* at 425–26.

Court did not take into account the background of the community. Negative socio-economic factors have a significant impact on parents' literacy and understanding, and consequently the perception of the consent that they gave.²⁴⁷ Goodwin says that "the Court gave itself little room for a broader understanding of the claims brought before [it]."²⁴⁸

Similarly, according to Medda-Windischer²⁴⁹, the Court did not consider the relevance of statistics provided by the applicants. She disagrees with the Court's perspective that the consent of parents was proper and no problematic.²⁵⁰ She explains that the Court assessed the consent of the Roma parents "based on a comparative perspective based on the average majority person."²⁵¹ In the same manner as Morag, she argues that the Court did not take into consideration any cultural or socio-economic background of the Roma parents.

Judge Cabral Barreto referred to this problem in his dissenting opinion in the judgment. He said that the "comparative perspective" omitted to realize that the parent from the majority usually know their rights and are capable to "make informed decision by their own" as well as they do not face prejudicial pressure from the authorities.²⁵² Another problem for the Judge was the Court assessment of the government report from 1999 under Article 25 §1 of the Framework Convention or the Protection of National Minorities. The report clearly expressed that Roma children are often placed to the special school due to the psychological testing that does not take into account Roma specificities.²⁵³

²⁴⁷ *Id.* at 426–27.

²⁴⁸ *Id.* at 427.

²⁴⁹ Medda-Windischer, *supra* note 208.

²⁵⁰ *Id.* at 22–23.

²⁵¹ *Id.* at 24.

²⁵² *Id.*

²⁵³ D.H. and Others v. Czech Republic - Dissenting opinion of judge Cabral Barreto, No. Application no. 57325/00, slip op. ¶ 2 (ECHR Feb. 7, 2006).

The ECtHR Chamber's judgment mirrored the negative decisions taken at the national level, and failed to take into account essential elements of the case that could prove indirect discrimination.

C) The ECtHR Grand Chamber Judgment of *D.H. and Others v. the Czech Republic*

The Grand Chamber looked on the *D.H.* case from different perspective than judges from the Chamber. In the following part, the work describes the approach of the Grand Chamber assessment of the case and highlights the differences between these two decisions. The, it examines positives and negatives of the Grand Chamber judgment under the ECHR.

The applicants were not satisfied with the judgment of the Chamber and on May 2006 they requested the referral of the case to the Grand Chamber of the ECHR.²⁵⁴ Such referral is possible in accordance with Articles 43 of the Convention.²⁵⁵ In this case, “[t]he Grand Chamber granted their request on July 2006.”²⁵⁶

The *D.H.* judgment represents the cornerstone in the desegregation in the European continent. It overruled the Chamber's decision by a vote of 13 to 4 claiming that the measures imposed on Roma pupils had negative effect, are very prejudicial, disproportionate and discriminatory. The Court found the violation of Article 14 of the Convention in conjunction with Article 2 of Protocol No. 1.²⁵⁷

²⁵⁴ *D.H. and Others v. Czech Republic*, No. Application 57325/00, slip op. at 7 (ECHR Nov. 13, 2007).

²⁵⁵ Council of Europe (14 Nov. 1950), *supra* note 161, Art. 43.

²⁵⁶ *D.H. and Others v. Czech Republic*, ¶ 7.

²⁵⁷ *Medda-Windischer*, *supra* note 208, at 25–26.

Assessment of the D.H. case

This case is significant for several reasons, and one of them is that the Court perceived the Roma community as a minority that requires special attention. Taking into consideration the growing consensus and the cultural and historical background of Roma community, the Grand Chamber in the D.H. judgment considered the Roma as a “disadvantaged and vulnerable minority”, deserving special attention.²⁵⁸ The Court considered recommendation and reports of international organizations, in particular the UN bodies, such as the United Nations Human Rights Committee²⁵⁹ or the Committee of the Elimination of Racial Discrimination²⁶⁰, and of the Council of Europe bodies, such as the Committee of Ministers²⁶¹, the Parliamentary Assembly²⁶², The European Commission against Racism and Intolerance (hereinafter “ECRI”)²⁶³, or the Framework Convention for the Protection of National Minorities²⁶⁴. All of these bodies clearly criticized the existing segregation practices²⁶⁵ and called for inclusive or anti-discriminatory approach.²⁶⁶

In the case assessment, right from the beginning, the Grand Chamber explained that the case-law of the ECHR recognizes direct as well as indirect discrimination (see *Hugh Jordam, Hoogendijk*

²⁵⁸ *D.H. and Others v. Czech Republic*, ¶¶ 181–82.

²⁵⁹ *Id.* ¶ 93.

²⁶⁰ *Id.* ¶ 96.

²⁶¹ *Id.* ¶ 51.

²⁶² *Id.* ¶ 56.

²⁶³ *Id.* ¶ 59.

²⁶⁴ *Id.* ¶¶ 66–76.

²⁶⁵ For instance, the Parliamentary assembly in its Recommendation No. 1557(2002) on the legal situation of Roma in Europe called for stopping such practices. It said that is necessary to “eradicate all practices of segregate schooling for Romany children, particularly that of routing Romany Children or classes for mentally disabled.” *Id.* ¶ 58. The Committee of the Elimination of Racial Discrimination in its General Recommendation No. 27 of 16 August 2000, express that the practices causing Roma segregation have to be avoided. *Id.* ¶ 98. It recommended “to prevent and avoid as much as possible the segregation of Roma students, ... to endeavor to raise the quality education...” *Id.*

²⁶⁶ The Parliamentary assembly of the Council of Europe in the same recommendation mentioned above called for the “develop[ment] and implement[ing of] positive action and preferential treatment for the socially deprived strata, including Roma as a socially disadvantaged community, in the field of education...” *D.H. and Others v. Czech Republic*, ¶ 58.

or *Zarb Adami*).²⁶⁷ The Chamber judgment overlooked this case-law. Furthermore, under the ECHR, ethnic discrimination is understood as a form of racial discrimination. Such discrimination “in view of its perilous consequences requires from authorities special vigilance and vigorous reaction.”²⁶⁸

According to the Grand Chamber, in the case of discrimination, the applicant has to show *prima facie* evidence. If the applicant successfully presents evidence, the burden of proof will be shifted to the contracting party.²⁶⁹ Although, the ECHR in the *Hoogendij v. the Netherlands* case, focused on the different grounds of discrimination, it described what the *prima facie* evidence is. It says:

“[W]here an applicant is able to show, on the basis of undisputed official statistics, the existence of a *prima facie* indication that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex. If the onus of demonstrating that a difference in impact for men and women is not in practice discriminatory does not shift to the respondent Government, it will be in practice extremely difficult for applicants to prove indirect discrimination”.²⁷⁰

The Court accepted that if the measure is defined in neutral terms but has “disproportionately prejudicial effects”,²⁷¹ and subsequently causes different treatment, it can indirectly discriminate. To strengthen its argument and the existence of such practice anchored in legislation, the Court recalled the provision of the European Union Council Directives 97/80/EC and 2000/43/EC that

²⁶⁷ *Id.* ¶ 175.

²⁶⁸ *Id.* ¶ 176.

²⁶⁹ *Id.* ¶¶ 177–78.

²⁷⁰ *Id.* ¶ 180.

²⁷¹ *Id.* ¶ 184.

defines and prohibits indirect discrimination.²⁷² Then, the Grand Chamber went even further and took a more activist approach. It looked at the case-law of the Court of Justice of the European Union and its application of the Council Directives. The Court observed that statistical evidence can serve as a sufficient mean for an applicant to show discrimination. In this case, the national authorities should “take such evidence into account where it is valid and significant.”²⁷³ While the Chamber in the *D.H.* judgment had ignored the statistics provided by the applicant, the Grand Chamber found them sufficient as proof of potential indirect discrimination and shifted the burden of proof to the Czech Republic.

In the dissenting opinion of judge Cabral Barreto in the Chamber judgment, it is interesting to observe that he appreciated that the Czech Republic harmonized its legislation with the 2000/43 EC Council directive²⁷⁴, the so-called Racial Equality Directive, but did not raise the point that the Czech Republic in that moment breaches the European Union legislation for the indirect discrimination of Roma children through the segregation practices. This resulted to the unprecedented infringement procedure issued by the European Commission against the Czech Republic ten years after, in 2015. The recent situation in the Czech Republic is discussed in Chapter 3 of this work.

Getting back to the indirect discrimination, once it is shown that there is a difference in treatment, the respondent state has to show that such measure is objective and reasonably justified, that it pursues a legitimate aim and that “there is “a reasonable relationship of proportionality” between the means employed and the aim sought to be realized.”²⁷⁵ If the respondent state fails to prove

²⁷² *Id.*

²⁷³ *Id.* ¶ 187.

²⁷⁴ *D.H. and Others v. Czech Republic* - Dissenting opinion of judge Cabral Barreto, slip op. ¶ 1 (ECHR Feb. 7, 2006).

²⁷⁵ *D.H. and Others v. Czech Republic*, ¶ 196.

these prerequisites of the measure, it constitutes a discriminatory practice. If there is a difference in treatment on the ground of ethnic origin, it narrows the margin of appreciation of the respondent state. It means that “the notion of objective and reasonable justification must be interpreted as strictly as possible.”²⁷⁶

On the one hand, in the D.H. case the Grand Chamber, with some discomfort, accepted that the existence of special schools’ systems is a solution for children with mental disability to attend educational facilities.²⁷⁷ On the other hand, the placement measures to the special schools could not be justified as proportionate toward children from the Roma community. In particular, the Court “decide[d] that the result of the test carried out at the material time were not capable of constituting objective and reasonable justification for the purpose of Article 14 of the convention.”²⁷⁸

The arguments of the Court are the following. Firstly, the Roma children were tested in the same conditions as majority children regardless of their ethnic origin.²⁷⁹ The Court took a similar approach than the critiques of the Chamber judgment that claimed that the tests did not take into account Roma specificities. Secondly, the Court considered the arguments of the Council of Europe and external bodies. According to the Advisory Committee on the Framework Convention for the Protection of National Minorities, the Czech language deficiencies of the Roma children were many times considered as a proper reason for the special school placement. Roma children often placed to the special school system without proper testing, the Council of Europe

²⁷⁶ *Id.*

²⁷⁷ *Id.* ¶ 198.

²⁷⁸ *Id.* ¶ 199.

²⁷⁹ *Id.* ¶ 200.

Commissioner for Human Rights claimed.²⁸⁰ Thirdly, the test were biased towards Roma community. They were created for the Czech majority children and did not reflect the language and cultural differences of Roma children. Hence, such testing could not bring objective results.²⁸¹

In the Grand Chamber opinion, the consent of the Roma parents did not meet the requirement of informed consent. When the Court considered their socio-economic background, their education, and how they assessed the consequences of the special education, it concluded that such consent did not have the features of the informed consent. In addition, it was observed that Roma parents, which had already experienced discrimination of Roma in the mainstream education, considered the special school as a better environment because of the predominance of Roma children in these schools.²⁸²

According to the Grand Chamber, the Czech Republic did not pass the margin of appreciation test. In this case there were no adequate safeguards for the placement practice. The respondent state did not take into account the specific needs of the community. It would rather let Roma children attend the special schools with a different curriculum, than placing them into a program that would “tackle their real problems or help them to integrate into ordinary schools.”²⁸³ To sum up, the Czech Republic did not prove that the placement measures toward Roma children were objective and reasonably justifies and they pursued legitimate aim.²⁸⁴ These measures had “a disproportionately prejudicial effect... [and]... the applicants as a member of [the Roma] community necessarily suffered the ... discriminatory treatment.”²⁸⁵

²⁸⁰ *Id.*

²⁸¹ *Id.* ¶ 201.

²⁸² *Id.* ¶¶ 202–3.

²⁸³ *Id.* ¶ 207.

²⁸⁴ *Id.* ¶ 208.

²⁸⁵ *Id.* ¶ 209.

To compare the judgment from 2006 and 2007, it can be said that there were two different courts deciding the case. The Grand Chamber considered the statistical evidence as sufficient means to shift the burden of proof to the contracting party, while the Chamber rejected it. While the Chamber expressed that the examination of the test would go beyond the ECHR competence, the Grand Chamber looked at their objectivity and took into account sources of international organizations and the Council of Europe bodies that argued that this testing was “biased and that the results were not analyzed in the light of the particularities and special characteristics of the Roma children who sat them.”²⁸⁶ Similarly, it looked at the explanation of the principle of indirect discrimination. Besides, its interpretation of the ECHR case-law, the Grand Chamber went further and looked at the European Union legislation that binds the Czech Republic and how this legislation applies. While the Chamber show reluctance to find the violation of the Convention and it signifies the setback in anti-discrimination law development, the Grand Chamber judgment signifies one of the first European de-segregatory trumps for Roma children and the whole society.

Section 2.2 Features of the Judgments

Why is this decision considered as the cornerstone in the desegregation of Roma children and why is it that important? The judgment usually only praised, and its negative features are often overlooked. Therefore, this part of the chapter explains, not only its positive results, but it also sheds the light on some of its negative characteristics.

²⁸⁶ *Id.* ¶ 201.

A) Positive Features

The Grand Chamber's judgment brings a progressive and modern approach in desegregation policies towards minorities, particularly towards Roma. It took more than seven years to bring justice to the applicants, and change the environment, not only in the Czech Republic, but also in other contracting parties. The ECHR clearly showed that such practices are not in line with the ECHR Convention and that they violate basic human right standards. The practices indirectly discriminate towards Roma children because they were treated equally as non-Roma children in not comparable situation.

The judgment has many positive features and all of them have their own significance. The ECtHR considered the history and situation of the Roma Community, and explained that there is a need for an "special consideration [for Roma community] needs and their different lifestyle."²⁸⁷ Following the growing international consensus in the protection of minorities²⁸⁸, it defined the Roma community as a vulnerable and disadvantaged community and requires special protection.²⁸⁹ The Court also highlighted that the community needs special protection that shall be extended also to the area of education.²⁹⁰

The Court took into consideration many different aspect and sources. Besides the growing international consensus in the protection of minorities, it evaluated many documents submitted by various CoM bodies. In particular, it took into consideration the reports ECRI,²⁹¹ the CFNM

²⁸⁷ *Id.* ¶ 181.

²⁸⁸ *Id.*

²⁸⁹ Medda-Windischer, *supra* note 208, at 26.

²⁹⁰ *D.H. and Others v. Czech Republic*, ¶ 182.

²⁹¹ *Id.* ¶¶ 59–65.

Advisory Committee²⁹² or the Commissioner for Human Rights.²⁹³ Their reports became one of the basis for the argumentation of the judgment. After examining the Council of Europe recommendations and reports, it went further and looked at the law and practice of the European Union.

The Grand Chamber in the D.H. judgment is in line with the law of the European Union.²⁹⁴ In particular, in its assessment it used the Council Directive 97/80/EC and the Racial Equality Directive 2000/43/EC (RED).²⁹⁵ The RED was already explained in the first chapter of this work and will play a significant role in establishing unprecedented infringement procedure regarding Roma segregation against the Czech Republic, Slovakia and Hungary. The ECHR in the D.H. judgment supported its view with the EU law²⁹⁶ and it confirmed the concept of indirect discrimination on the ground of ethnicity/race. In particular, the ECHR recognizes that discrimination can happen not only through some specific acts, but also through (long-term) systematic practice.²⁹⁷ In addition, the ECHR determinate that if there is a different “treatment ... based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible.”²⁹⁸

The statistics provided by the applicants played a highly important role. The evidence showed that even if the placement measures were neutral, it disproportionately targeted Roma children. As it was mentioned in the *Hoogendijk v. the Netherlands*²⁹⁹, once there is an assumption suggested by

²⁹² *Id.* ¶¶ 68–76.

²⁹³ *Id.* ¶¶ 77–80.

²⁹⁴ Medda-Windischer, *supra* note 208, at 26.

²⁹⁵ *D.H. and Others v. Czech Republic*, ¶¶ 81–83.

²⁹⁶ *Id.* ¶ 184.

²⁹⁷ Arabadjieva, *supra* note 22, at 37.

²⁹⁸ *D.H. and Others v. Czech Republic*, ¶ 196.

²⁹⁹ See: *Hoogendijk v. the Netherlands*, Application No. 58461/00, decision on the admissibility (ECHR, 6 January 2005).

relevant evidence that there is indirect discrimination, it “would shift the burden of proof rebutting it to the respondent government.”³⁰⁰ In the D.H. judgment, the Court claimed that under the consideration of the applicants’ evidence, it can establish “*a prima facie* case of discrimination,”³⁰¹ and it shifted the responsibility to the government.³⁰²

The D.H. judgment clearly condemns practices of separate schooling of Roma children.³⁰³ Although, the Grand Chamber did not literary expressed that such practices are called segregation.³⁰⁴ The ECHR expressed that the placement measures are not in accordance with the Convention because the difference of treatment in the placement in elementary schooling system of the Roma children “was [no] objectively and reasonably justified.”³⁰⁵ The ECHR in its conclusion also criticized that the Czech Republic did not apply any inclusive policies.³⁰⁶

It can be assumed that the D.H. judgment also developed the scope of Article 2 of Protocol No. 1 of the Convention. Looking at the argumentation of the judgment there is not only a duty for individuals to attend a schooling system. There is also a positive obligation for a state to³⁰⁷ “reasonably accommodate specific ... needs [of a particular community] in public education.”³⁰⁸ On this point, it would be needed to examine whether the Court have implied these assumptions in other judgments.

³⁰⁰ Medda-Windischer, *supra* note 208, at 32.

³⁰¹ *D.H. and Others v. Czech Republic*, ¶ 195.

³⁰² *Id.*

³⁰³ Medda-Windischer, *supra* note 208, at 26.

³⁰⁴ Arabadjieva, *supra* note 22, at 37.

³⁰⁵ Helen O’Nions, *Different and Unequal: The Educational Segregation of Roma Pupils in Europe*, 21 INTERCULT. EDUC. 1, ¶ 208 (2010).

³⁰⁶ *D.H. and Others v. Czech Republic*, ¶ 207.

³⁰⁷ Medda-Windischer, *supra* note 208, at 26–30.

³⁰⁸ *Id.* at 30.

Last but not least, the ECHR through the *D.H. and Others v. the Czech Republic* extended its anti-discrimination case-law and set up a new precedent. It has affected further ECHR decisions regarding Roma children segregation such as *Oršuš v. Croatia* (2011),³⁰⁹ *Sampani v. Greece* (2012)³¹⁰ or *Horváth and Kiss v. Hungary* (2013).³¹¹

B) Negative Features

The negative side of the *D.H.* judgment starts with the critical view on the European Court of Human Rights itself. Considering current judgment, the following problems rises: the backlog of the ECHR³¹², the satisfaction or reparation of the applicants³¹³, and the subsidiarity of the ECHR.³¹⁴

The backlog of the ECHR is one of the current challenges. On 31 August 2016, there were 76 600 applications pending before the judicial formation.³¹⁵ In 2015, the ECHR decided 45 576 applications³¹⁶ (this covers a “judgment or decision, or by being struck out of the list”³¹⁷). The number of applications had its impact also on the *D.H.* judgment. The case was logged to the ECHR in 2000³¹⁸ and the first decision, regarding the admissibility, came in 2005³¹⁹, the Chamber decision in 2006³²⁰ and the Grand Chamber decision on 17 January 2007³²¹. Even though, “the minority rights have assumed a more prominent place in the [ECHR’s] docket”³²², it took almost

³⁰⁹ *Oršuš and Others v. Croatia*, No. Application 15766/03 (ECHR Mar. 16, 2010).

³¹⁰ *Sampani and Others v. Greece*, No. Application 59608/09 (ECHR Dec. 11, 2012).

³¹¹ *Horváth and Kiss v. Hungary*, No. Application 11146/11 (ECHR Apr. 29, 2013).

³¹² *Arabadjieva*, *supra* note 22, at 40.

³¹³ *Id.* at 39.

³¹⁴ *Id.*

³¹⁵ European Court of Human Rights, Statistics 1/1 – 31/8/2016 (Compared to the Same Period 2015).

³¹⁶ European Court of Human Rights, *In Fact & Figures 2015* (Public Relations Unit of the European Court of Human Rights), Mar. 2016 6.

³¹⁷ *Id.*

³¹⁸ *D.H. and Others v. Czech Republic*, No. Application 57325/00, slip op. ¶ 1 (ECHR Nov. 13, 2007).

³¹⁹ *Id.* ¶ 5.

³²⁰ *Id.* ¶ 6.

³²¹ *Id.* ¶ 10.

³²² DAVID C. BALUARTE, FROM JUDGMENT TO JUSTICE: IMPLEMENTING INTERNATIONAL AND REGIONAL HUMAN RIGHTS DECISIONS 38 (Open Society Foundations 2010).

ten years since the initial complaint was logged at the national level.³²³ Not only that the applicants' children were not children anymore (children were placed to special schools between 1996 and 1999)³²⁴, but the Czech Republic was able to amend the new School Act³²⁵, which changed the system of special education.³²⁶ Although the Grand Chamber put the new School Act as the relevant sources³²⁷ in the case assessment, the feedback of the ECHR was not adopted to the current national legislative framework.³²⁸ Otherwise, the ECHR might be more constructive with the guidelines for national authorities.³²⁹

The Grand Chamber in the D.H. judgment did not consider the individual cases of the applicants and awarded them only just satisfaction. In the Grand Chamber's conclusion, it explained that all "applicants as member of [the Roma] community necessarily suffered the same discriminatory treatment."³³⁰ This was sufficient for the Grand Chamber to omit individual examination.³³¹ As a result, this is hard to transform into individual rights protection at the national level.³³² Arabadjieva argues that "the impact of the ECHR relies heavily on the extent to which judgments are applied by national courts, which will primarily be dealing with individuals complaints."³³³

The remedies of the D.H. judgment did not reflect the age of the applicants' children (since the first lawsuit was in 1999) and their further education.³³⁴ All of them were close to adulthood when

³²³ Arabadjieva, *supra* note 22, at 40.

³²⁴ *D.H. and Others v. Czech Republic*, ¶ 19.

³²⁵ Act No. 82/2015 amending Act No. 561/2004 (Czech School Act), *supra* note 64.

³²⁶ *D.H. and Others v. Czech Republic*, at 40.

³²⁷ *Id.* ¶ 29.

³²⁸ Arabadjieva, *supra* note 22, at 40.

³²⁹ *Id.*

³³⁰ *D.H. and Others v. Czech Republic*, ¶ 209.

³³¹ *Id.*

³³² Arabadjieva, *supra* note 22, at 39.

³³³ *Id.*

³³⁴ William S. New & Michael S. Merry, *Solving the "Gypsy Problem": D.H. and Others v. the Czech Republic*, COMP. EDUC. REV., no. 3, 2010, at 393.

the Grand Chamber decision came out. How do they see the decision of the ECHR? According to plaintiffs, the decision did not offer reparation that would help to solve their situation. One of the plaintiffs expressed that on the one hand, they are happy winning the case, on the other hand “instead of offering us additional education, they blindfolded us with money”³³⁵ The ECHR in the D.H decision granted amount of EUR 4,000 to each applicant for a non-pecuniary damage, yet it rejected their original claim of EUR 20,000 for each applicant as excessive.³³⁶ The Grand Chamber admitted, even though the Roma children experienced “humiliation and frustration caused by the indirect discrimination”³³⁷, the ECHR does not have a form of “sufficient redress”³³⁸ for such violation. What kind of reparation does the ECHR actually offer?

The European Convention on Human Rights in Article 41 says that if there is a violation of the Convention and the respondent state does not offer full reparation, “the Court shall, if necessary afford just satisfaction to the injured party.”³³⁹ The just satisfaction has to be necessary and just.³⁴⁰ There are three kinds of just satisfaction reparation: “pecuniary damage, non-pecuniary damage, and cost and expenses.”³⁴¹ In the D.H. judgment the ECHR awarded non-pecuniary damage³⁴² and the cost and expenses.³⁴³ In the case of a non-pecuniary damage, the ECHR does not have a precise calculation. It considers the claim of non-pecuniary damage of an applicant and the suffering, for instance, mental or physical suffering, and consequently, it awards the amount that is necessary

³³⁵ Romea.cz, *Roma who won lawsuit against Czech Republic still can't find jobs*, ROMEA.CZ (Jun. 11, 2014), <http://www.romea.cz/en/news/czech/roma-who-won-lawsuit-against-czech-republic-still-can-t-find-jobs>.

³³⁶ *D.H. and Others v. Czech Republic*, ¶ 217.

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ Council of Europe (14 Nov. 1950), *supra* note 161, Art. 41.

³⁴⁰ European Court of Human Rights - Registry of the Court, *Rules of Court* 67, 60 Sept. 19, 2016, at 67.

³⁴¹ *Id.* at 61.

³⁴² *D.H. and Others v. Czech Republic*, ¶ 217.

³⁴³ *Id.* ¶ 220.

and just.³⁴⁴ Conversely, according to the D.H. judgment applicants, the lack of education and their ethnicity are the main factors that restrain them from integration, thus money was not the solution.³⁴⁵

The last part of the general criticism is the subsidiarity of the ECHR,³⁴⁶ and related with it, the compliance with the judgment. An individual application can be applied only when an applicant exhausted all domestic remedies.³⁴⁷ Article 1 of the Convention reads that “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”³⁴⁸ That means that the responding state, in this case the Czech Republic, is responsible for the “implementation and enforcing”³⁴⁹ the rights and freedoms guaranteed by the Convention. Subsidiarity is explained further in the Convention. Article 35 § 1 explains that the national institutions are responsible to solving the problem on national level and if the violation continues after the exhaustion of all domestic remedies, the applicant can turn to the ECHR.³⁵⁰

The exception was established by Protocol 11 of the ECHR Convention, which says that the ECHR is a “permanent, full-time court with compulsory jurisdiction over all member states to which aggrieved individuals enjoy direct access.”³⁵¹ Whether the respondent state is in compliance with a judgment is supervised by the Committee of Ministers (hereinafter “CoM”).³⁵² The Committee

³⁴⁴ European Court of Human Rights - Registry of the Court, *supra* note 340, at 61.

³⁴⁵ *Romea.cz*, *supra* note 335.

³⁴⁶ *Arabadjieva*, *supra* note 22, at 39.

³⁴⁷ Council of Europe (14 Nov. 1950), *supra* note 161, Art. 35.

³⁴⁸ *Id.*, Art. 1.

³⁴⁹ Alastair Mowbray, *Subsidiarity and the European Convention on Human Rights [Article]*, HUM. RIGHTS LAW REV. 313, 319 (2015).

³⁵⁰ *Id.*

³⁵¹ Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT. LAW 125, 126 (2008).

³⁵² BALUARTE, *supra* note 322, at 39.

of Ministers looks over just satisfaction payments, individual and general measures that have not been mentioned³⁵³ yet.³⁵⁴

In general, the ECHR Convention in Article 46 say that a judgment is transmitted to the CoM.³⁵⁵ The CoM invites the respondent state and informs about the obligation that has to be taken.³⁵⁶ The respondent state is obliged to accept and undertake the redress.³⁵⁷ The compliance with just satisfaction and individual measures is “placed on the agenda of each human rights meeting of the [CoM].”³⁵⁸ Regarding general measures, another rule applies. The D.H. judgment have occupied the CoM agenda significantly. Since 9 September 2009, when the first communication with the Czech authorities was published, there were sixteen additional communications with the responding state and twenty with NGOs to September 2016.³⁵⁹ This work does not have the intention to examine each of them. However, this part criticizes the subsidiarity of the ECHR, the communications serve as the monitoring of the implementation of the judgment and it has also positive aspects. Those can be seen in the third Chapter of this work where the communication can show the progress that have been done.

³⁵³ Individual measures are taken in order to ends the violation that was caused by the respondent state and measures that put an injured party to the same position before the actual violation happened. *Id.* General measures are those, which were “adopted preventing new violations similar to that or those found or putting an end to continuing violations.” Committee of Ministers of the Council of Europe, Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, Rule 6, para. 2.b.ii. (May 10, 2006), https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d7e18.

³⁵⁴ BALUARTE, *supra* note 322, at 39.

³⁵⁵ Council of Europe (14 Nov. 1950), *supra* note 161, Art. 46, para 2.

³⁵⁶ Committee of Ministers of the Council of Europe, *supra* note 353, para. 1.

³⁵⁷ Council of Europe (14 Nov. 1950), *supra* note 161, Art. 46, para 1.

³⁵⁸ Committee of Ministers of the Council of Europe, *supra* note 196, Rule 7, para. 1.

³⁵⁹ Department for the Execution of Judgments & of the European Court of Human Rights, Czech Republic - Execution of Judgments - Submissions, <http://www.coe.int/en/web/execution/submissions-czech-republic>.

A next problem that comes with the decision and the Convention itself is that Article 14 is not free-standing.³⁶⁰ In the case of segregation, it has to be in conjunction with Article 2 of Protocol No. 1 of the Convention.³⁶¹ ECHR contains also free standing anti-discriminatory provision – Protocol No. 12 of the Convention, which was mentioned in the first Chapter. Nevertheless, this protocol was ratified only by 19 of 47 Council of Europe Member States. The Czech Republic did not ratify the Protocol No. 12 of the Convention.³⁶²

What are the other particular minuses of the D.H. judgment? Not to mention the negative ruling of the Chamber judgment, the Grand Chamber judgment did not come up with any guidelines on how to tackle the problem of the segregation of Roma children in the special education.³⁶³ On the one hand, the ECHR rejected the placement measure, defining them as discriminatory.³⁶⁴ On the other hand, it did not specify which steps should be taken to end such practices. It vaguely suggests that the responding state has “a duty of reasonably accommodation of [the special need of children from different background] or even a duty of affirmative action.”³⁶⁵ In the conclusion of the D.H. judgment the Grand Chamber explain that the placement requires more procedural safeguard to be in line with the ECHR Convention, yet the definition of these safeguards fall into margin of appreciation of the respondent state.³⁶⁶ It can be assumed that the ECHR prefers that the policies of inclusive education will be applied, yet it does not give any guidelines to the national courts or

³⁶⁰ European Communities, *supra* note 160, at 14.

³⁶¹ Arabadjieva, *supra* note 22, at 39.

³⁶² Council of Europe, *Chart of signatures and ratifications of Treaty 177 - Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, TREATY OFF. (Apr. 1, 2016), <http://www.coe.int/web/conventions/full-list>.

³⁶³ Medda-Windischer, *supra* note 208, at 46.

³⁶⁴ D.H. and Others v. Czech Republic, No. Application 57325/00, slip op. ¶ 209 (ECHR Nov. 13, 2007).

³⁶⁵ Medda-Windischer, *supra* note 208, at 46.

³⁶⁶ D.H. and Others v. Czech Republic, ¶ 206.

authorities on how to tackle this problems and it also leaves the margin of appreciation to the respondent state.

The Grand Chamber omitted to use the expression “segregation” per se.³⁶⁷ As Abaradijeva explains, the court failed to make the distinction “between discrimination [caused] by the lower quality of education provided to Roma [children] through inferior facilities or curricula and the inherent nature of segregation as a violation of fundamental rights.”³⁶⁸ According to Abaradijeva, the missing definition can let the respondent state segregate Roma children, as long as the quality of education will be equal or higher in comparison with a mainstream education..³⁶⁹

When the definition of segregation is omitted, the practices is considered as discriminatory practices.³⁷⁰ The ECHR in the D.H. judgment examination mentioned the report of the Commissioner for Human Rights (Mr. Alvaro Gil-Robles³⁷¹).³⁷² The Commissioner explains that the measures were introduced with good intention in order to create options for children with insufficient knowledge of, for instance, language skills, to catch-up with their peers. Lack of knowledge is often caused by the low attendance of pre-school system by Roma children. It is true that some response was necessary, yet systematic measures separating Roma children in classes with insufficient curriculum was not accordance with international and national law. The measures with good intentions turned into prohibited practices.³⁷³ The Commissioner in this case recommends practices avoiding, he said per se “segregation”, and rather put emphasis on pre-

³⁶⁷ Arabadijeva, *supra* note 22, at 37.

³⁶⁸ *Id.* at 37–38.

³⁶⁹ *Id.* at 38.

³⁷⁰ *Id.*

³⁷¹ Mr. Álvaro Gil-Robles (15 October 1999 – 13 March 2006) was the first Commissioner for Human Rights. – Commissioner for Human Rights, *Previous Commissioners*, <https://www.coe.int/en/web/commissioner/previous-commissioners>.

³⁷² *Oršuš and Others v. Croatia*, No. Application 15766/03, slip op. ¶¶ 77–80 (ECHR Mar. 16, 2010).

³⁷³ *D.H. and Others v. Czech Republic*, No. Application 57325/00, slip op. ¶ 79 (ECHR Nov. 13, 2007).

school attendance,³⁷⁴ “in-school educational and linguistic support as well as the provisions of school assistants to work alongside teachers.”³⁷⁵

Moreover, the ECHR stereotyped and generalized the Roma community in the D.H. judgment. The Court imposed a negative label on the Roma Community as a disadvantaged and vulnerable group.³⁷⁶ While it is clear that there is a necessity to take adequate steps against marginalization of some particular Roma communities within states, the definition in the D.H. judgment seems to put each Roma into same “box”.

Such criticism can change the perception of the D.H. judgment. For most of the negative outcomes, they do not result from a problem with the decision itself, but the structural limitations of the European Court of Human Rights. On the one hand, the Grand Chamber could not influence the backlog of the ECHR, its subsidiarity with the national courts or the reparations that are offered. On the other hand, the D.H. judgment should have focused on the examination of individual cases, expressed that such practices are “segregatory practices”, and could have provided clearer guidelines on how to tackle the issue at the national level.

Section 2.3. Conclusion

At the time of the application, the system of special schools was part of the Czech school system. The applicants argued that Roma children are often placed to special schools because of inadequate testing which does not reflect the cultural and social background of children, and due to a lack of parental consent because the parents do not understand the consequences of special schooling. In 2006, the Chamber in the case of D.H. and others v. the Czech Republic ruled that the respondent

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ Medda-Windischer, *supra* note 208, at 38.

state did not breach the ECHR. The Chamber with some discomfort admitted that the system of special schooling is necessary to secure the right to education for children with disabilities. It rejected the arguments regarding the testing, parents' consent, and did not consider the statistics as sufficient means to switch the burden of proof against the Czech Republic. The case was reopened in 2007, when the Grand Chamber overruled the previous judgment.

The Grand Chamber decision brought new wind into European anti-discrimination law. The judgment represented a new precedent and its interpretation is now used by national courts in the cases of segregation of Roma children in education.

It bears positive as well as negative features. On the one hand, the judgment is in line with EU legislation, use statistics as evidence that are able to switch the burden of proof to the respondent state, looks at reports and recommendations from other Council of Europe bodies, and expresses that measures such as the testing in the case of D.H. are not objectively justified and are discriminatory. On the other hand, the ECHR has structural deficiencies such as a huge backlog of cases, the principle of subsidiarity, or the monitoring of the compliance with the judgment, which may slow its progress on de-segregation and the implementation of the judgement. The D.H. judgment also strongly generalized against Roma community labeling it as vulnerable and disadvantaged minority, omitting to express that the placement was segregation and leaving the solution to the margin of appreciation of the respondent state.

The D.H. judgment affected not only the jurisprudence of the ECHR, but it has impacted also national case-law and legislation. While this chapter examined the relevance and specificities of the case, the third chapter analyzes the recent legislative amendments in the Czech Republic and Slovakia. The Czech legislation and policies were influenced by the D.H. judgment. In the Slovak

Republic, the domestic courts implemented the argumentation of the ECHR and it consequently led to de-segregation judgments, such as the case of *Poradňa v. Elementary school with the kindergarten Šarišské Michaľany*. Therefore, it is interesting to analyze the impact of the D.H. judgment specifically in relation to the Czech Republic and Slovakia.

Chapter 3 - Comparative Analysis of the Czech Republic and Slovakia

This chapter analyzes the new Czech and Slovak reforms in education instigated by the ECHR and the European Union. The first two sections of the chapter analyze the recent amendments, policies and partially the case-law that were adopted in the Czech Republic and Slovakia to tackle the problem of segregation of Roma children in primary education. Both countries have been influenced by the ECHR jurisprudence and the law of the European Union. The last section of the chapter comparatively analyses the approach and results of both countries.

The analysis of the countries' situation is realized through different sources. The monitoring system of the compliance with the D.H. judgment offers a proper overview of the amendments done by the Czech Republic since 2009. The new amendment of the School Act describes the changes that came into force on 1 September 2016. The Czech School Inspection and the Program "Systematic support of inclusive education in the Czech Republic" offer precise numbers on children in the school system and the perception of pedagogues. Interviews with the Ministry for the media clarify the intentions behind the reform and the budget allocated to it.

In the case of Slovakia, the sources will be different. The Slovak Republic has not established sufficient monitoring that would give a complete and accurate overview of the current situation. In 2015 and 2016, Slovakia did not produce many relevant reports that would be sufficient for the examination. Civil society, particularly the NGO sector, is the most active actor. Therefore, interviews with relevant professionals in the field were conducted for the purpose of this work. Another relevant actor is the judiciary, in particular, through the judgments of the District and County Court of Prešov in the case *Poradňa v. Elementary school with the kindergarten Šarišské Michaľany* ruled in 2012.

Section 3.1 The Current Situation in the Czech Republic

A) Council of Europe Monitoring of the D.H. judgment

The D.H. judgment rejected the practices of placing Roma children into special education, called for ending this violation and through the Convention system, established monitoring of the compliance with the judgment. The ECHR Convention in Article 46 explains that the Committee of Ministers, as one of the bodies of the Council of Europe, “is responsible for the execution of the judgments.”³⁷⁷

On 9 April 2009, the Czech Republic submitted the first communication on the compliance with the D.H. judgment. In the first communication, the responding state demonstrated steps that were taken to comply with the judgment. Some measures were adopted before the judgment was ruled, such as the new School Act No. 561/2004, which replaced or renamed³⁷⁸ the so-called “special” schools as “practical” schools.³⁷⁹ The communication presented preventive measures,³⁸⁰ as well as planned measures that will tackle problems concerning the education of Roma children.³⁸¹ The Czech Republic planned to run precise surveys about “special” education and about the numbers of children with special educational needs, develop the National Action plan of Inclusive Education and improve ECEC (early childhood education and care) for Roma children.³⁸²

³⁷⁷ Council of Europe (14 Nov. 1950), *supra* note 161, Art. 46..

³⁷⁸ Ad Hoc Committee of Experts on Roma Issues (CAHROM), *supra* note 1, at 19.

³⁷⁹ Council of Europe, *Report of the Government of the Czech Republic on general measures related to the execution of the judgment of the European Court of Human Rights in case no. 57325/00 – D.H. and Others v. the Czech Republic*, 9 April 2009, at 1, Available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168059655c>.

³⁸⁰ *Id.*, 4-5.

³⁸¹ *Id.*, 5.

³⁸² *Id.*, 6.

The Committee of Ministers and NGOs were constantly monitoring the progress and the implementation of the judgment. Amnesty International (hereinafter “AI”) has been monitoring the situation of Roma children in Czech education since 2006.³⁸³ In its document ‘Must Try Harder’ (2015), AI highlights that the number of Roma children in classes for children with mild mental disabilities (hereinafter “CMMD”) are significantly high and disproportionate compared to the number of non-Roma children. Even though the number of Roma children in “special classes” decreased, from 35% in 2012, to 32,4% in 2014,³⁸⁴ to 30,6% (4539 students) in 2015, the number is still alarming.³⁸⁵

The following part briefly lists measures taken since the D.H. judgment was adopted. Due to the monitoring system of the CoM and periodical communications, it is easier to find out measures that the Republic adopted.³⁸⁶ Starting in 2010, the Czech Republic adopted the National Action Plan for Inclusive Education, which did not sufficiently target the problem of segregation practices.³⁸⁷ In 2011, the Decrees on Education of Pupils with Special Needs were adopted. It consisted of the amendments of two acts, which focused on safeguards for children’s placement into special education, parents’ consent with such placement, and counselling offered to families and children’s guardians.³⁸⁸ In the same year, the Czech Republic introduced the Strategy for Combating Social Exclusion 2011-2015.³⁸⁹ The Strategy, besides many other fields, also targeted

³⁸³ Amnesty International, *MUST TRY HARDER - Ethnic Discrimination of Romani Children in Czech Schools*, EUR 71/1353/2015 (Amnesty International Ltd 2015) 9.

³⁸⁴ *Id.* at 14.

³⁸⁵ Czech School Inspection, *supra* note 74, at 6.

³⁸⁶ In the report of the Amnesty International – MUST TRY HARDER – the organization in the description of background of the Czech situation and timeline of adopted measures uses sources that were submitted as the communication to CoM. See, for instance, pages 14 or 17 of Amnesty International, *supra* note 383, at 9.

³⁸⁷ *Id.* at 16–17.

³⁸⁸ *Id.* at 17.

³⁸⁹ *Id.*

“the exclusion of Roma in education.”³⁹⁰ However, the Strategy as well as the Action Plan (2010) “remained largely unfunded and unimplemented.”³⁹¹

The list of measures and policies continues with the Consolidated Action Plan for the Implementation of the D.H. Judgment.³⁹² The Plan was adopted because of the criticism of the CoM. The CoM on its 1144th meeting criticized the absence of monitoring results, and five years after the D.H. judgment’s ruling, the Czech Republic had not presented concrete results and measures.³⁹³ Thus, the Committee of Ministers “called on the authorities to provide a consolidated action plan based on a clear medium and short-term strategy, with a timetable and budget for the implementation.”³⁹⁴ According to AI, the Plan that was adopted as a result of the criticism did not fulfill the promises.³⁹⁵ In February 2015, the Plan was replaced by the Revised Action Plan for the Execution of the D.H. Judgment. The Revised Plan sets ambitious goals, such as advanced monitoring of the work of psychological and pedagogical centers, mandatory attendance of ECEC for children in the year before they start compulsory education, the abolition of special education for CMMD and their inclusion in mainstream education.³⁹⁶ It is assumed that the year of compulsory ECEC will come into force in the school year 2017/2018.³⁹⁷

The most recent decision of the Committee of Ministers, with regards to the period during which this thesis was written, was the 1259th meeting on 7-8 June 2016. On the one hand, the CoM

³⁹⁰ *Id.*

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ Council of Europe – Committee of Ministers – Department for the execution of judgment of the European Court of Human Rights, *Decisions adopted – Compilation 2010-2014*, 1144th meeting from 4-6 June 2012, para. 2-3, at 206, Available at:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168059dda8>.

³⁹⁴ *Id.*, para 3, at 206.

³⁹⁵ Amnesty International, *supra* note 383, at 18.

³⁹⁶ *Id.*

³⁹⁷ Ad Hoc Committee of Experts on Roma Issues (CAHROM), *supra* note 1, at 20.

expressed its appreciation for ongoing reform.³⁹⁸ On the other hand, it encouraged the faster implementation of the reform, the allocation of sufficient “financial and human resources”³⁹⁹ and cooperation with “NGOs and national human rights institutions.”⁴⁰⁰ The Committee asked the Republic to inform it about the ongoing reform and its implementation by 10 February 2017.⁴⁰¹

The monitoring system of the CoM on the execution of ECHR judgments has its relevance. Although the implementation of the judgment takes many years, the monitoring obliges the respondent state to periodically submit its progress.⁴⁰² Furthermore, the communication is not restricted only to the respondent states, and NGOs or state institutions such as the Public Defender of Rights can submit their reports.⁴⁰³ All communications, as well as the decisions of the CoM are available to the public.

B) Infringement Procedure and the Situation in the Czech Republic

Before the Revised Action Plan was adopted, the European Commission took steps against the Czech Republic. On 25 September 2014, the EC started an infringement procedure under Article 258 of TFEU against the Czech Republic for non-compliance with EU legislation. The letter of

³⁹⁸ Council of Europe – Committee of Ministers – Department for the execution of judgment of the European Court of Human Rights, *Decisions adopted – Compilation 2014-2016*, 1259th meeting from 7-8 June 2016, para. 1, at 133, Available at:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806aab8b>.

³⁹⁹ *Id.*, para. 3, at 133.

⁴⁰⁰ *Id.*, para. 4, at 133.

⁴⁰¹ *Id.*, para. 5, at 133.

⁴⁰² Committee of Ministers of the Council of Europe, *supra* note 352, rule 8-9.

⁴⁰³ Department for the Execution of Judgments & of the European Court of Human Rights, *supra* note 359.

formal notice explained that the Czech Republic was not in “conformity with Directive 2000/43/EC⁴⁰⁴ on Racial Equality – Discrimination of Roma children in Education.”⁴⁰⁵

In March 2015,⁴⁰⁶ the Republic immediately adopted Amendment to the School Acts,⁴⁰⁷ which contained provisions supporting the inclusion of children with special educational needs into the mainstream educational system.⁴⁰⁸ The provisions of the amendment came into force on different dates.⁴⁰⁹ The section focusing on inclusion of CMMD and CSDE came into force on 1 September 2016.⁴¹⁰ In September 2015 another amendment to the School Acts was adopted focusing on the introduction of a compulsory year of pre-school education.⁴¹¹

Shortly after the EC’s infringement procedure, the adoption of the Revised Action Plan and the amendment of the School Act, AI published a report about the situation of Roma in Czech Education.⁴¹² The Secretary General of AI Salil Shetty claimed that the system is based on “pure racism.”⁴¹³ The representatives in the Czech Government were not unified in their view on the report. While the Minister of Education, Mr. Chládek, rejected the existence of discriminatory

⁴⁰⁴ Council Directive 2000/43/EC of 29 June 2000 (RED), *supra* note 141.

⁴⁰⁵ European Commission – Infringement decision, *Infringement No. 20142174 – Czech Republic*, 25 September 2014, Available at: http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?lang_code=en.

⁴⁰⁶ Amnesty International, Czech Republic: Systematic discrimination against Romani children in schools (Apr. 23, 2015), <https://www.amnesty.org/en/press-releases/2015/04/czech-republic-systematic-discrimination-against-romani-children-in-schools/>.

⁴⁰⁷ Act No. 82/2015 (Amendment of the Czech School Act.), *supra* note 64.

⁴⁰⁸ Act No. 561/2004 (Czech School Act), *supra* note 55, § 16, 16a, 16b.

⁴⁰⁹ Act No. 82/2015 (Amendment of the Czech School Act.), *supra* note 64, Article VII.

⁴¹⁰ *Id.*

⁴¹¹ Amnesty International, *AMNESTY INTERNATIONAL REPORT 2015/16: The State of the World’s Human Rights* (Amnesty International Ltd Peter Benenson House, London 2016) 134–35.

⁴¹² For more information, see the document available here:

<https://www.amnesty.org/en/documents/eur71/1353/2015/en/>.

⁴¹³ Česká Tisková Kancelář - Czech News Agency and František Bikár, *Amnesty International: Diskriminace romských dětí trvá desítky let, nastal čas ji ukončit*, ROMEA.CZ (Apr. 23, 2015), <http://www.romea.cz/cz/zpravodajstvi/domaci/amnesty-international-diskriminace-romskych-deti-trva-desitky-let-nastal-cas-ji-ukoncit>.

practices, the Minister for Human Rights, Equal Opportunities and Legislation Jiří Dienstbier agreed with AI and called for adequate measures.⁴¹⁴

The positive change came in May 2015, when the Prime Minister dismissed the Minister of Education Marcel Chládek.⁴¹⁵ His position was taken by Kateřina Valachová who has a strong engagement for human rights.⁴¹⁶ The new Minister promotes inclusive education and de-segregation in special education. At the same time, she surrounds herself with professionals in the field.⁴¹⁷

In the summer 2015, the new Minister of Education Kateřina Valachová already proved her engagement in anti-discriminatory policies. She confirmed the repeal of the reduced teaching curriculum for CMMD.⁴¹⁸ According to the Minister Valachová, it is an important step toward inclusive education and in the fight against discrimination of Roma children in elementary education. The approach of the Ministry of Education was welcomed by EU institutions as well as by NGOs at the national level.⁴¹⁹

⁴¹⁴ *Id.*

⁴¹⁵ Česká Tisková Kancelář - Czech News Agency, *Premiér Sobotka navrhne odvolání ministra školství Chládky*, ROMEA.CZ (May 28, 2015), <http://www.romea.cz/cz/zpravodajstvi/domaci/premier-sobotka-navrhne-odvolani-ministra-skolstvi-chladka>.

⁴¹⁶ Česká Tisková Kancelář - Czech News Agency and Michal Komárek, *Novou ministryní školství bude Kateřina Valachová*, ROMEA.CZ (Jun. 4, 2015), <http://www.romea.cz/cz/zpravodajstvi/domaci/misto-chladka-by-mela-byt-novou-ministryni-skolstvi-zrejme-valachova>.

⁴¹⁷ Another positive change happened when in November 2015, Jarmila Balažová, expert for Roma issue, a former member of many commissions such as the Government Council for National Minorities, a co-founder of ROMEA Association and an editor in chief of *Romano Voďi*, became a spokeswoman of the Ministry of Education. Zdeněk Ryšavý, *Jarmila Balážová bude novou mluvčí ministerstva školství*, ROMEA.CZ (Oct. 30, 2015), <http://www.romea.cz/cz/zpravodajstvi/domaci/jarmila-balazova-bude-novou-mluvci-ministerstva-skolstvi>.

⁴¹⁸ Michal Komárek, *Ministryně školství trvá na zrušení osnov pro lehce mentálně postižené děti*, ROMEA.CZ (Jul. 3, 2015), <http://www.romea.cz/cz/zpravodajstvi/domaci/ministryne-skolstvi-trva-na-zruseni-osnov-pro-lehce-mentalne-postizene-deti>.

⁴¹⁹ *Id.*

C) Compliance with the EU Legislation?

The legislative amendment came into force in January 2016 and September 2016.⁴²⁰ The amendment defines who are children with special educational needs, supportive measures for those children, revision of the placement to the classes with children with disabilities and free-cost pre-primary education or preparatory classes.

The crucial changes of the amendment are that CMMD, which many Roma children were diagnosed with, will be educated in the mainstream education. The system will provide personal and technical support in the classes, such as a teaching assistants. This part of the amendment is important for the compliance with the Racial Equality Directive “because its aim is to promote equal access to mainstream education of Roma children,”⁴²¹ as it has been pursued by the D.H. judgment.⁴²² After the amendment, the Ministry of Education adopted a catalogue of supporting measures⁴²³ and it established an expert group that will “supervise, support and assess the implementation of the measures and their quality.”⁴²⁴ The new reform is planning to allocate 167 million EUR for inclusive measures.⁴²⁵

The amendment defines who is a child or student with special educational needs. It explains that these students require additional supportive measures to reach⁴²⁶ “educational opportunities for the enjoyment or exercise of their rights on an equal basis with others.”⁴²⁷ Supportive measures are

⁴²⁰ Act No. 82/2015 (Amendment of the Czech School Act.), *supra* note 64, Article VII

⁴²¹ David Záhumenský, *Amendment to the School Act*, News Report 2, 1 (European network of legal experts in gender equality and non-discrimination), May 28, 2015, at 2.

⁴²² *Id.*

⁴²³ Tomáš Sirovátka, *Czech Republic Takes New Measures to Improve the Inclusion of Roma Children in Mainstream Education*, ESPN Flash Report 2016/27 (European Social Policy Network), Jun. 2016 1.

⁴²⁴ *Id.*

⁴²⁵ *Id.*

⁴²⁶ Act No. 82/2015 (Amendment of the Czech School Act.), *supra* note 64, § 16 (1).

⁴²⁷ David Záhumenský, *supra* note 421, at 1.

certain adjustment in educational provisions reflecting a health condition, cultural background or other life conditions of a child or student.⁴²⁸ It means that children with mild mental disabilities and children from socially disadvantaged environment fall into this group. The supportive measures are listed in §16 (2) of the School Act.⁴²⁹ The amendment defines that separated classes, and groups or units with special curriculum can be created only for children with serious mental, physical, oral and hearing disabilities, serious behavioral problems or autism. Such placement must be preceded by a recommendation from the pedagogically-diagnostic center and a parent's or guardian's consent.⁴³⁰

The amendment now provides free pre-primary education for one year. If the child enters kindergarten for the first time in the last year before the child's compulsory primary education must begin, that year is provided for free.⁴³¹ In addition, the schools established by the state, county or municipality set up preparatory classes within elementary schools for free. A child can attend only one year of such a class.⁴³²

For the implementation of the amendment, the Czech Republic possesses relevant data that show the number of students falling under the definition of a child or student with special educational needs. In November 2015, the Czech School Inspection published a document examining the primary educational programs.⁴³³ The Inspection in the opening of the thematic report describes that the inspection was done in accordance with the purpose of "Action Plan from 2011 for the execution of D.H. and other judgment of the European Court of Human Rights in connection with

⁴²⁸ Act No. 82/2015 (Amendment of the Czech School Act.), *supra* note 64, § 16 (1).

⁴²⁹ *Id.*, § 16 (2).

⁴³⁰ *Id.*, § 16 (9).

⁴³¹ *Id.*, § 55.

⁴³² Act No. 561/2004 (Czech School Act), *supra* note 55, § 123 (2).

⁴³³ For more information visit the website of the Czech School Inspection. The document is available at: <https://portal.csicr.cz/Clanek/544> [Accessed on 31 October 2016].

the requirements⁴³⁴ of the European Commission”,⁴³⁵ with the aim to identify the numbers of Roma students⁴³⁶ in the Czech educational system.⁴³⁷ Secondly, the inspection also researched the impediments in assessing the individual needs of students or specific forms of support for Roma students. The research was done through a questionnaire that was answered by school directors, and through consultations with class teachers, pedagogues and educational consultants.⁴³⁸

The total number of all students for the academic year 2015/16 in the primary education was 878,649 students in 4098 schools.⁴³⁹ The number of Roma students in primary education is 34,191, which is 3,9% of all students.⁴⁴⁰ The number of students following the curriculum designed for CMMD (found in the Czech documents under the acronym LMP) is 14,810, among which 4,539 Roma students - 30,6%.⁴⁴¹

The second part of the inspection showed that the biggest impediment in the assessment of individual needs of students was the lack of sufficient financial resources for specialized personal capacities (72,7%).⁴⁴² It was followed by the insufficient material capacities for school operation (40,7%), lack of financial resources for other supportive and compensatory measures (39,7%), insufficient co-operation with parents or parents’ unwillingness (38,4%), legislation and

⁴³⁴ In September 2015, Romea.cz informed about the meeting of the Minister of Education and Commissioner for Justice, Consumers and Gender Equality. The Commissioner announced that the EC would like to see statistical number for the new academic year (2015/16) with particular regards to Roma students. Česká Tisková Kancelář - Czech News Agency, *Evropská komise bude chtít konkrétní statistiky k integraci znevýhodněných dětí do českých škol*, ROMEA.CZ (Sept. 21, 2015), <http://www.romea.cz/cz/zpravodajstvi/domaci/evropska-komise-bude-chtit-konkretni-statistiky-k-integraci-znevychodnenych-deti-do-ceskych-skol>.

⁴³⁵ Czech School Inspection, *supra* note 74, at 3.

⁴³⁶ In the methodology, the Inspection uses a key for the identification: “As a Roma person is considered that who claims him/herself as Roma or who is perceived as Roma by others (based on real/veritable and supposed (anthropological, cultural or social) indicators).” *Id.* at 4.

⁴³⁷ *Id.* at 3.

⁴³⁸ *Id.* at 1.

⁴³⁹ *Id.* at 6.

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

⁴⁴² *Id.* at 7.

administration (34,1%), high number of students in classes (32,2%) or insufficient methodological preparation of teacher and their professional preparedness (29,7%).⁴⁴³ The Inspection also indicates the use of specific form of support⁴⁴⁴ for Roma students. Only 38,8% of schools with at least one Roma students use this kind of specific forms of support.⁴⁴⁵

These results should be used as a basis for reflection towards the adoption of new inclusive measures. The Republic knows the precise number of students that require special teaching assistance or equipment. At the same time, the research showed that there are not sufficient material and personal capacities, weak cooperation with parents or missing methodology. Furthermore, if the measures are applied they target only a bit more than 1/3 of Roma children. These issues mostly concern the pedagogical community in the Czech Republic and it is very important that the amendment and further reforms will reflect these findings.

The current Ministry of Education, Youth and Sports, Mrs. Valachová, in an interview for the regional newspapers “Deník”, explained the intention behind the amendment. Firstly, the new law does not have the intention to “abolish “practical schools.”⁴⁴⁶ The main purpose is to “support inclusive education of children and adjust right to each kid for material and personal support in elementary education.”⁴⁴⁷ The amendment should not be perceived that it helps only to integration of Roma children or only to CMMD. These groups of students are not only exclusive groups of the inclusion. Secondly, for schools that are located only in socially excluded localities and are

⁴⁴³ *Id.*

⁴⁴⁴ These specific forms of supports are, for instance, individualization in teaching, cooperation with the Department of Social-legal Protection of Children and NGOs, individual study plan or teaching assistants in classes. More forms and their use can be found on page 8 of the Inspection’s document. *Id.* at 8.

⁴⁴⁵ *Id.*

⁴⁴⁶ Kateřina Perknerová, *Společné vzdělávání. Výzva pro učitele i rodiče*, DENÍK.CZ (Oct. 21, 2015), http://www.denik.cz/z_domova/spolecne-vzdelavani-vyzva-pro-ucitele-i-rodice-20151021.html.

⁴⁴⁷ *Id.*

visited only or mostly by Roma children, the amendment does not represent any significant change. From 1 September 2016, these schools will not be closed and the children will not attend any neighboring schools. The Minister explain “that it was not the intention of the amendment, and we are not social engineers.”⁴⁴⁸ Although the reform is a step towards further inclusive education.⁴⁴⁹

The amendment has the positive intention to change the situation of approximately 15,000 CSDE and CMMD.⁴⁵⁰ However, this amendment does not focus on de-segregation of all Roma students nation-wide, and it faces strong criticism from a part of the pedagogical society.

D) Welcomed or Unwelcomed Inclusion?

The repeal of reduced curriculum and the introduction of inclusion measures have their constant opponents. The Association of Special Pedagogues of the Czech Republic, with its 70 thousand signs on a petition in 2015,⁴⁵¹ asked for maintenance the curriculum and special school system. In the same manner, the Teacher’s Professional Association criticized “precipitate inclusion” and the unpreparedness of the system. The Minister claims that maintenance of the current curriculum is unacceptable and also the abolition of the special classes for CMMD is one of the obligations, which the Czech Republic signed for.⁴⁵² In the interview for Deník.cz the Minister explained that the reform modify the education of CMMD. It does not lead to the abolishment of “practical (or special)” schools or classes because they will still provide education for children with serious disabilities.⁴⁵³

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.*

⁴⁵⁰ Czech School Inspection, *supra* note 74, at 6.

⁴⁵¹ Michal Komárek, *supra* note 418.

⁴⁵² *Id.*

⁴⁵³ Kateřina Perknerová, *supra* note 446.

Jiří Pilař, the chairman of the Association of Special Pedagogues, in his open letter from March 2016, claims that the inclusion can endanger the whole educational system. He highlights that the Czech Republic has the best results within the monitored countries (countries such as France, Italy, Greece or Poland) regarding the number of Roma students attending high schools (30% compared to 15% average) or Roma employment (40% compared to 10-20% of other monitored countries).⁴⁵⁴ The Chairman attempts to establish the link between the Ministry of Education and “mercenary” NGOs and the unprofessional and unaware approach of both groups regarding the situation in special schools. Pilař tries to convince that the Czech educational system does not have a discriminatory approach and educates everyone without distinction.⁴⁵⁵

Almost a year before the Chairman response, the Project “Systematic support of inclusive education in the Czech Republic” (Systémová podpora inkluzivního vzdělávání v ČR) in April and May 2015 conducted a research focusing on the position of teachers on inclusive education. It contains approximately 4,000 responses containing also around 1,200 responses from heads of schools.⁴⁵⁶ The research focused on the analysis of the views of the teachers and directors of schools on the upcoming (at the time of that research) reform. On the question whether the reform will help children with special educational needs, 46,4% of respondents answered yes or mostly yes, while 33% answered the opposite. The rest did not know how to answer the question.⁴⁵⁷

⁴⁵⁴ Jiří Pilař, *Předseda ASP: Inkluze pomůže jen některým*, ASOC. SPECIÁLNÍCH PEDAGOGŮ ČR (Mar. 12, 2016), <http://www.aspcr.cz/asociace-specialnich-pedagogu-cr/2016-03-12-predseda-asp-inkluzie-pomuze-jen-nekterym.html>.

⁴⁵⁵ *Id.*

⁴⁵⁶ Systémová Podpora Inkluzivního Vzdělávání v ČR, *Postoje a Potřeby Poegagogické Veřejnosti ve vztahu k Implementaci Podporných Opatření Podle Nové Školské Legislativy*, CZ.1.7./1.2.00/43.0003 (Univerzita Palackého v Olomouci 2015) 14.

⁴⁵⁷ *Id.* at 122–23.

The research showed that the new reform will not be sufficient for helping CSDE. Many of interviewees did not know how to answer whether it will bring some positive changes for CSDE.⁴⁵⁸ Generally, “pedagogues were open to accept children from socially disadvantaged environment.”⁴⁵⁹ What is interesting in this case is that teachers and directors from special schools were more willing to accept those children.⁴⁶⁰ However, the reform openly expresses that those children cannot be placed to such facilities.⁴⁶¹ Generally, the research shows that teachers and directors from special education were mostly opposed to inclusive education. One of the reason can be the intensive media coverage that misinterpreted the purpose of the amendment.⁴⁶² The research also showed that more than the half of respondents (53,5%) claimed that the system is ready for education of CMMD. Only 16,8% of respondents confronted the readiness of the system. However, if the teachers were ready to accept those students, they expected bigger support from the state. In this case, the new amendment to the Schools Act is supposed to allocate more money from the state budget and improved measures such as teaching assistants and communication with parents.⁴⁶³

The Czech Education Minister Valachová, in her interview for Deník.cz in 2015, said that there will be 1 billion Czech Crowns (approximately 37 million EUR) allocated for the reform.⁴⁶⁴ The situation was different in the summer 2016. The Minister in the interview for Tiscali.cz explained that the reform did not go “hand by hand with the financial allocation” for the reform. The full

⁴⁵⁸ *Id.* at 125–26.

⁴⁵⁹ Česká Tisková Kancelář - Czech News Agency, *Učitelé podle výzkumu podporují společné vzdělávání všech dětí*, ROMEA.CZ (Aug. 26, 2015), <http://www.romea.cz/cz/zpravodajstvi/domaci/ucitele-podle-vyzkumu-podporuji-spolecne-vzdelavani-vsech-deti>.

⁴⁶⁰ Systémová Podpora Inkluzivního Vzdělávání v ČR, *supra* note 456, at 132–33.

⁴⁶¹ Act No. 82/2015 (Amendment of the Czech School Act.), *supra* note 64, § 16 (1).

⁴⁶² Systémová Podpora Inkluzivního Vzdělávání v ČR, *supra* note 456, at 123.

⁴⁶³ Česká Tisková Kancelář - Czech News Agency, *supra* note 459.

⁴⁶⁴ Kateřina Perknerová, *supra* note 446.

budget for the whole educational tools amended by the reform the Ministry of Education, Youth and Sport will be received in 2019. Until that time, there are going to be negotiations regarding the funds for teaching assistants.⁴⁶⁵ Additionally, the Ministry plans to use the Ministry's reserves, if it is required, for supportive measures for children with special educational needs.⁴⁶⁶

The reform has a potential to change the current situation of the CMMD and those who come from a socially disadvantaged environment. On the one hand, there is the will on the side of the Minister to promote inclusive policies, even though this faces a strong criticism from the side of special school pedagogues and media. On the other hand, the financial allocation was postponed and taking into consideration the opinion of pedagogues, the reform is costly and the system is financially not ready for such changes. One positive point is that the pedagogues and professionals in the field are open to work with CMMD and CSDE.

Besides the problem discussed above, the international community also raised attention to and is concerned about other issues appearing in the education of Roma children. For instance, the United Nation Committee on the Elimination of Racial Discrimination, in its Concluding Observation on the Czech Republic in 2015,⁴⁶⁷ in addition to concerns about the huge number of Roma children in special education, expresses great concern regarding “white flight”, the low number of Roma pupils in pre-school education and high school education, the failure of the country to comply with the D.H. judgment, the insufficient resources for previous inclusive policies, such as NAPIE,⁴⁶⁸

⁴⁶⁵ Martin Bach, *Dala bych si horší dvojku, říká ministryně školství Kateřina Valachová*, TISCALI.CZ (Aug. 7, 2016), <http://zpravy.tiscali.cz/dala-bych-si-horsi-dvojku-rika-ministryne-skolstvi-katerina-valachova-282051>.

⁴⁶⁶ The BUSINESS SOIRÉE, Kateřina Valachová – Rozhovor o změnách ve školství (May 17, 2016), <http://tbss.cz/katerina-valachova-rozhovor-o-zmenach-ve-skolstvi-2016-05>.

⁴⁶⁷ UN Committee on the Elimination of Racial Discrimination (CERD), *Concluding observations on the tenth and eleventh periodic reports of the Czech Republic (Advanced unedited version)*, CERD/C/CZE/CO/10-11, (29 August 2015), available at: http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/CZE/CERD_C_CZE_CO_10-11_21520_E.pdf.

⁴⁶⁸ National Action Plan on Inclusive Education (2010).

and the insufficient incorporation of “the concept of inclusive education as a guiding principle in legislation and policies, including the amendment to the School Act.”⁴⁶⁹

As Minister Valachová explained, “we are not social engineers” ,⁴⁷⁰ and for schools that are located in socially excluded localities and are visited only or mostly by Roma children, the amendment does not represent a significant change.⁴⁷¹ The Amendment is a step forward, but it only targets segregation in special schools, and not in the entire elementary education system.

Section 3.2. The Current Situation in Slovakia

The first chapter showed that Slovakia faces the same problems than the Czech Republic. Looking at the data, comparing the number of Roma population (400,000)⁴⁷² and the whole population of Slovakia (5,4 million),⁴⁷³ the discrepancy between Roma and non-Roma population is even higher. According to Nils Muižnieks, “the Slovak education system is one of the most unfair system in Europe”⁴⁷⁴ that discriminates the most those who are affected by social marginalization, poverty or language barrier.⁴⁷⁵

The following section consist of three parts. Firstly, it highlights a very positive judgment at the national level – *Poradňa v. Elementary school with kindergarten Šarišské Michal’any*. Secondly, it describes the report of the Public Defender of the Rights in Slovakia on the education of children from socially disadvantaged environment. Thirdly, it focuses on the steps of the EC against the

⁴⁶⁹ UN Committee on the Elimination of Racial Discrimination (CERD), *supra* note 467.

⁴⁷⁰ Kateřina Perknerová, *supra* note 446.

⁴⁷¹ *Id.*

⁴⁷² UNDP Europe and the CIS, *supra* note 109, at 16.

⁴⁷³ Statistical Office of the Slovak Republic, National population to 31 March 2015, Available at: www.statistics.sk/.

⁴⁷⁴ Nils Muižnieks, *Report Following His Visit to the Slovak Republic from 15 to 19 June 2015*, CommDH(2015)21 30, ¶ 83 (Commissioner for Human Rights of the Council of Europe), Oct. 13, 2015, at 30.

⁴⁷⁵ *Id.* at 83.

Slovakia. As a consequence of these steps, the country adopted the Amendment of the School Act that is described and analyzed in this section, in particular through interviews with professionals in the field.

A) National De-segregatory Judgment and the Infringement Procedure Against the Slovak Republic

Šarišské Michal'any case

In Slovakia, Roma children are victims of the practice of placement of children into the special school system. However, in the following case, the form segregation concerned is where Roma children are separated from non-Roma children in mainstream schooling.

The case was registered on 28 June 2010 at the regional Court of Prešov by the NGO Poradňa pre občianske a ľudské práva (the Center for Civil and Political Rights)⁴⁷⁶ against the Elementary school with kindergarten Šarišské Michal'any. The case was decided by a single judge, Judge Vorobelová, on 20 December 2011. The applicant explained that the school segregated the Roma children in its facility which led to discriminatory treatment.⁴⁷⁷

In the school year 2008/2009, 406 students attended the school, and the year after 400 students, among which 222 were Roma. In the school year 2009/2010, the school did not establish any special class, but it established two zero-grade classes – classes preceding the first year of compulsory education and designed to put students at level to be able to follow the first class curriculum.⁴⁷⁸ All these establishments were in accordance with the School Act. According to Poradňa, in the school year 2009/2010, most of the Roma children were placed to Roma-only

⁴⁷⁶ More information about the Center available here: <https://www.poradna-prava.sk/en/>.

⁴⁷⁷ Regional Court Prešov, *Poradňa pre občianske a ľudské práva v. Základná škola s materskou školou Šarišské Michal'any*, Application No. 25C 133/10 – 229, 20 December 2011, at 1.

⁴⁷⁸ *Id.*, 2.

classes starting from 1st to 7th grade. Zero-grade classes or special classes were always separated on a different floor of the school and were only attended by Roma students.⁴⁷⁹

The school for its defense claimed that most of Roma children were coming from a socially disadvantaged environment and they needed a special attention. These children did not have the same learning habits as non-Roma children and they learned slower than non-Roma children.⁴⁸⁰ In addition, the school presented parents' consents that agreed with such placement.⁴⁸¹

The reasoning of the Court was innovative and partially influenced by the ECHR jurisprudence. The Court interpreted national and international legislation focusing on anti-discriminatory provisions that Slovakia amended since its existence. It was explained that the burden of proof was switched to the opponent party and the school had to justify its differential treatment.⁴⁸² The Court explained that when there is a differential treatment based on racial or ethnic origin, a "strict scrutiny"⁴⁸³ has to be applied to such measure. Such principle "is also applied by the European Court of Human Rights."⁴⁸⁴ The District Court continued by stating that "the differential treatment is discriminatory when there is no objective and reasonable justification, and it does not pursue a legitimate aim and there is no proportionality between the applied measure and its purpose."⁴⁸⁵

The judge continued with the interpretation of the Slovak Anti-discrimination act,⁴⁸⁶ the anti-discriminatory provision of the Constitution and the School Act,⁴⁸⁷ as well as listed international

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.*, at 4.

⁴⁸² *Id.*, at 4-5.

⁴⁸³ *Id.*, at 5.

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.*

⁴⁸⁶ Act No. 365/2004 Coll. (Antidiscrimination Act), *supra* note 133.

⁴⁸⁷ Regional Court Prešov, Application No. 25C 133/10, *supra* note at 477, at 5-7.

treaties that the Slovak Republic ratified, such as the United Nation Convention for the Elimination of Racial Discrimination.⁴⁸⁸ The Court highlighted that the School Act in §3 (b) expressly stipulates that “the education according to this School Act, ... forbids discrimination and especially segregation.”⁴⁸⁹

The Court explained that the school’s intention of providing an individual approach to CSDE, who had bigger problems to follow the curriculum, was not in accordance with the national legislation and international human rights legislation. Additionally, the parents’ consent cannot waive the rights or “excuse” the unlawful treatment of the defendant.⁴⁹⁰

The Court concluded that the school discriminated Roma children through segregatory practices on the ground of their ethnicity. The school was asked to mix-up the Roma and non-Roma children, and bring the unlawful practices to an end within a period of 30 days and publish it in the Teacher Newspapers.⁴⁹¹

The respondent appealed to the County Court, which ruled this judgment final on 20 December 2012.

The Court of Appeal Decision (County Court Prešov)

The appeal court in this case was the County Court of Prešov, which consisted of three judges. The Appeal Court accepted the appeal request of the respondent considering the period given to the respondent to comply with the judgment (30 days since the judgment is published).⁴⁹²

⁴⁸⁸ *Id.*, at 7.

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.*, at 10.

⁴⁹¹ *Id.*, at 1-2.

⁴⁹² County Court Prešov, *Poradňa pre občianske a ľudské práva v. Základná škola s materskou školou Šarišské Michaľany (Appeal Proceeding)*, Application No. 20Co 125-126/2012, 20 December 2012, at 12.

The defendant extensively explained the situation in the school. Consequently, the Court claimed that “the defendant proved discrimination through the facts, which assume that there was a breach of equal treatment.”⁴⁹³ In particular, the defendant claimed that classes were intentionally separating Roma and non-Roma children because the children got along better, it avoided conflicts and the Roma children were slower in learning the curriculum.⁴⁹⁴

The Appeal Court criticized the approach of the school and highlighted the importance of an inclusive education. The school was blamed for “hindering inclusive approach and sustaining status quo that was already criticized in the society.”⁴⁹⁵ Additionally, such treatment probably fostered tension between Roma and non-Roma populations. The Appeal Court, in the same way as the Regional Court, rejected the parents’ consent as sufficient waiver of the right.⁴⁹⁶ The segregation practices were labeled as “undignified situation that simplify the problematic situation of the school.”⁴⁹⁷ Furthermore, the Appeal Court called for inclusive education and described its importance.

The Appeal Court changes the previous judgment on 20. 12. 2012 only regarding the period of compliance with the judgment and the publicity of the repaired situation. Firstly, the school was obliged to end unlawful practices starting from the beginning of the new school year. Secondly, the school was not required to publish such change.⁴⁹⁸

⁴⁹³ *Id.*, at 12.

⁴⁹⁴ *Id.*

⁴⁹⁵ *Id.*

⁴⁹⁶ *Id.*, at 13.

⁴⁹⁷ *Id.*, at 13.

⁴⁹⁸ *Id.*, at 1-2.

The judgment set a positive national precedent towards Roma children de-segregation and it has innovative aspects such as the interpretation and formulation of the ECHR or naming segregation as an undignified practice, and promoting inclusion.

Continuation of segregation and the intervention of the European Commission

The Public Defender of Rights published in 2015 a report focusing on the diagnostic of children from socially disadvantaged environments, particularly Roma children.⁴⁹⁹ An important resource for the report and its research was the D.H. judgment of the ECHR. In the report, Ombudswoman Mrs. Dubovcová explains that “the placement of a student into the category of special classes or schools already pre-determinates the destiny of children and the content of the curriculum he/she receives.”⁵⁰⁰

The report claims that the examination and diagnosis of CSDE, especially Roma children, is not in accordance with Slovak legislation. The centers in charge of the diagnosis basically do not consider the specificities of CSDE. In the case of Roma children, the psychologists did not take into account the cultural, social and language⁵⁰¹ barriers. It was observed that tests instructions are often translated by parents or siblings.⁵⁰² According to the Ombudswoman, the diagnostic centers discriminated against Roma children because without objective and reasonable justifications, they did not treat children in different situation differently.⁵⁰³

⁴⁹⁹ The Office of the Public Defender of Rights, *supra* note 104.

⁵⁰⁰ *Id.* at 5.

⁵⁰¹ Many Roma children from SDE know to speak only Romani language until the time when they are testing. They do not have an opportunity learn Slovak, when they do not attend pre-primary education.

⁵⁰² The Office of the Public Defender of Rights, *supra* note 104, at 13.

⁵⁰³ *Id.* at 14.

The International Community was highly concerned about the situation of Roma Children in the Slovak educational system. The EC, a few months after launching an infringement procedure against the Czech Republic, started an infringement procedure against Slovakia. The letter of formal notice from 29 April 2015 says that the Slovak Republic “was not in conformity with Directive 2000/43/EC on Racial Equality – Discrimination of Roma children in education.”⁵⁰⁴

According to Lajčáková, the infringement procedure established under the TFEU §257... has a higher impact on national policies than, for instance, the UN Human Rights bodies procedures, because the Member State can be penalized by the CJEU. Another coercing measure for compliance are structural funds that can be limited or stopped until the member state eliminates the unlawful practices.⁵⁰⁵

The European Commission explained that the non-compliance with the RED was caused because the Slovak Republic “has disproportionately high number of Roma children in special education and secondly, Roma children often appeared on the edge of society due to practices in mainstream education, such as segregated classes or schools.”⁵⁰⁶ The Slovak Republic in its response criticized the research that were elaborated by national and international bodies. The Slovak response rejected the finding of the Public Defender of Rights, the EU FRA and the UNDP because they argued that they did not reflect the real situation in Slovak education.⁵⁰⁷ The Slovak representatives did not accept the accusation of segregation, and they claimed that if there is a higher number of Roma children in special schools, it is the fault of their parents and of the high proportion of

⁵⁰⁴ European Commission – Infringement decision, *Infringement No. 20152025 - Slovakia*, 24 April 2015, Available at: http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?lang_code=en.

⁵⁰⁵ Jarmila Lajčáková, *Na Základe Šetrenia Výsledkov Európskej Komisie Sme Pripustili Existenciu Problému Segregácie vo Vzdelávaní. Zostáva Ho Riešiť.*, 5 MENŠINOVÁ POLIT. NA SLOV. 4, 1 (2016).

⁵⁰⁶ *Id.* at 2.

⁵⁰⁷ *Id.*

inbreeding appearing in Roma communities.⁵⁰⁸ Nevertheless, the Republic adopted an amendment of the School Act that is supposed to limit the placement of Roma children into special education.

B) The New Amendment of the School Act

The most important change brought by the Amendment⁵⁰⁹ is the transformation of §107 of the Act focusing on the education of children from socially disadvantaged environments.⁵¹⁰ A child and student from a socially disadvantaged environment cannot be placed to a special school,⁵¹¹ and has to be placed into mainstream education.⁵¹² Exceptionally, they can be placed in zero-grade classes, but only with the parents' consent. Children can attend the zero-grade class for one year at most.⁵¹³

The Ministry of Education can pay a financial allocation to schools for each CSDE. The allocation is offered only when a CSED is placed to a normal, not to a special class.⁵¹⁴ This source can be used, for instance, for the salary of a teaching assistant or teacher for CSDE,⁵¹⁵ for didactic and learning tools⁵¹⁶ or students' activities.⁵¹⁷ The amount of the allocation is set by the Ministry.⁵¹⁸ Currently, the amount of the financial allocation for a CSDE for the year 2016 is 109,0 EUR per

⁵⁰⁸ *Id.* at 3.

⁵⁰⁹ Act No. 188/2015 of 30 June 2015 that amends the Act No. 245/2008 Coll. of 2 July 2008 on Education (Schools Act) and on Changing and Supplementing Certain Laws.

⁵¹⁰ According to the Slovak School Act, a child or a student from socially disadvantaged environment is understood "a child or student in environment, which is, considering social, family, economic and cultural conditions, insufficient in the development of mental, will, emotional features of a child or student, it does not support his/her socialization and does not offer sufficient amount of appropriate stimulus for the development of his/her personality." - Act No. 245/2008 Coll. (Slovak School Act), *supra* note 91, § 2 (p).

⁵¹¹ *Id.*, § 107 (2).

⁵¹² *Id.*, § 107 (3).

⁵¹³ *Id.*, § 107 (3) a).

⁵¹⁴ *Id.*, § 107 (4).

⁵¹⁵ *Id.*, § 107 (4) a).

⁵¹⁶ *Id.*, § 107 (4) b).

⁵¹⁷ *Id.*, § 107 (4) c).

⁵¹⁸ *Id.*, § 107 (5).

year.⁵¹⁹ Additionally, §35 of the amended School Act requires schools to provide statistical data that shows the number of students with special educational needs that receive special treatment.⁵²⁰

The amendment added new competencies to the School Inspection. Article II of the Amendment says that the Inspection controls⁵²¹ whether the facilities provide education in line with the aim and principles of education⁵²² set in the School Act.⁵²³ The School Act lists in §3 the principle of Slovak education and it explicitly “forbids any kind of discrimination, especially segregation.”⁵²⁴ However, the Act does not specify the meaning of segregation for the purpose of the Act.

The Centers of Pedagogical-Psychological Counselling and Prevention⁵²⁵ (hereinafter “CPPCP”), and the Centers of Special-Pedagogical Counseling are responsible for the diagnostic and pedagogical-psychological counseling of children.⁵²⁶ The Amendment stipulates that a school receives a financial allocation for CSDE only when the CPPCP diagnoses the child with the status of CSDE. Moreover, the Centers also inform schools about what they should focus on in the educational process to secure the best development of a child. This should be provided in the best interest of the child in order to secure him or her the best individual learning conditions.⁵²⁷ If there are reasonable doubts that the education of a child or student is not in the best interest of that child, the Ministry of Education examines the pedagogical documentations and releases the official

⁵¹⁹ Ministry of Education, Science, Research and Sport of the Slovak Republic, *Výška príspevku na rok 2016*, Available at: <https://www.minedu.sk/prispevok-na-rok-2016/>.

⁵²⁰ Act No. 245/2008 Coll. (Slovak School Act), *supra* note 91.

⁵²¹ The School Inspection is administered through Act No. 596/2003 (School Administration Act), *supra* note 98, §12-13a.

⁵²² *Id.*, §13 (13) a).

⁵²³ Act No. 245/2008 Coll. (Slovak School Act), *supra* note 91. § 3.

⁵²⁴ *Id.*, §3 d).

⁵²⁵ *Id.*, §130 (2) a).

⁵²⁶ *Id.*, §130 (2) b).

⁵²⁷ Ministry of Education, Science, Research and Sport of the Slovak Republic, *Sociálne znevýhodnené prostredie – príspevok*, Available at: <https://www.minedu.sk/socialne-znevychodnene-prostredie-prispevok/>.

statement, which is sent to the parents or guardians of a child, the CPPCP, the school director and to the School Inspection.⁵²⁸

The most important provisions came into force on 1 September 2016.⁵²⁹ For this reason, the evaluation of their effectiveness on the long-term could not be done at the time this thesis was written (25 November 2016).

C) Analysis of the Amendment and Its Effects

For the purpose of the thesis, the analysis of the Amendment was done through research consisting of interviews with professionals coming from the governmental and NGO sectors, diplomacy and the educational sector mostly focusing on Roma education and the phenomenon of segregation.

The research consists of eight interviews. The interviewees were asked to answer six questions regarding the Amendment of the School Act, the current situation of Roma children in Slovak education, and share their recommendations that should be apply in the current situation. The interviewees are following persons: Igor André⁵³⁰ (28 October 2016), Stanislav Daniel⁵³¹ (30

⁵²⁸ Act No. 245/2008 Coll. (Slovak School Act), *supra* note 91, § 130 (6).

⁵²⁹ Act No. 188/2015 (Amendment of the Slovak School Act), *supra* note 509, Article VIII.

⁵³⁰ **Igor André** is interested in the systematic aspect in the field of regional educational system with a specific focus on children and students from economically disadvantaged environments (marginalized Roma communities). In 2011-2013, Mr. André worked as a coordinator for the area of education in the Office of the plenipotentiary of the Slovak Government for Roma Communities, where he participated in the preparation of the Revised National Action Plan of the Decade of Roma Inclusion 2005-2015 for the period of 2011-2015, and the Strategy of the Slovak Republic for Roma Integration up to 2020. In 2013, he joined the newly established NGO eduRoma, where he fully participated in the creation of an inclusive educational model in the elementary school in Šarišské Michaľany. In 2014-2016, Mr. André worked as a teacher in an elementary school in Nálepkovo under the program “Teach for Slovakia.” Since October 2016, he runs the realization of the action plans for municipalities in the district of Kežmarok within the Program to support the less developed districts in Slovakia.

⁵³¹ **Stanislav Daniel** “is a Roma rights activist, advocate, researcher and trainer from Slovakia. His previous work experience includes the Roma Education Fund, Office for Democratic Institutions and Human Rights at the OSCE, European Roma Right Center and the OSF Bratislava. His research advocacy activities have focused primarily on education, but also include housing, a state response to racially motivated violence, and freedom of movement. He is a Board Member of European Roma Grassroots Organizations (ERGO) Network.” International Step by Step Association, *Stanislav Daniel - ISSA - A Learning Community of Early Childhood Experts*, ISSA, <http://www.issa.nl/content/stanislav-daniel>. Available at: <http://www.issa.nl/content/stanislav-daniel>.

October 2016), Jarmila Lajčáková⁵³² (06 November 2016), Jozef Miškolci⁵³³ (02 November 2016) and Lucia Kováčová⁵³⁴ (02 November 2016). The following section consists of the critical assessment of the Amendment based on findings of the research.

The interviewees agree that the new Amendment is a positive step forward and brings positive points. Nevertheless, there are numerous provisions that were considered as negative or ineffective.

Daniel welcomes the Amendment of the School Acts because of the new obligation for schools to provide statistical data about the number of children that receive special educational needs

⁵³² **Jarmila Lajčáková** studied sociology and law at the Comenius University, and at the Faculty of law of the University of Toronto, where she has earned her Master in Laws (LLM) in 2002 and her Doctorate of Juridical Science (SJD) in 2007. Her doctoral thesis, entitled 'Ethnocultural Justice for the Roma in Slovakia', introduces a theory of national minority rights based on a contextual understanding of ethnocultural justice as well as an institutional proposal of a personal cultural autonomy that can advance both cultural and socio-economic empowerment of the Roma. Jarmila has joined the Centre for the Research of Ethnicity and Culture in 2007. She has been leading Minority Policy in Slovakia programme, which has recently evolved into an initiative called Slovakia for All [Slovensko pre všetkých]. Jarmila is interested both in theory and practice of minority rights and non-discrimination, in particular regarding the Roma. She considers the first affirmative action program in Slovakia for Romani students in partnership with the University of Economics that she has helped to develop and implement as her most notable accomplishment. She is the author of numerous academic and public policy studies. Center for the Research of Ethnicity and Culture, *Jarmila Lajčáková – CVEK*, CVEK, <http://cvek.sk/en/jarmila-lajcakova-2/>. Available at: <http://cvek.sk/en/jarmila-lajcakova-2/>.

⁵³³ **Jozef Miškolci** received his PhD in Education at the University of Sydney in 2014. In his dissertation he focused on the topic of inclusive education and distribution of school leadership in primary education in Slovakia and Australia. He received his Masters in gender studies at Central European University. Currently, Jozef Miškolci works for the Slovak Government Institute where he analyzes inclusive education, and compares educational systems, educational policies and gender equality in Education. Slovak Governance Institute, *SGL - Inštitút pre dobre spravovanú spoločnosť / Jozef Miškolci*, SGI, <http://www.governance.sk/index.php?id=2118>. Available at: <http://www.governance.sk/index.php?id=2118>.

⁵³⁴ **Lucia Kováčová** has been working at the Slovak Government Institute (SGI) since July 2014. She graduated in Political Science and Public Policy at Comenius University in Bratislava and she received her M.A. in Public Policy from the Central European University in Budapest with a specialization in equality and social justice. She worked as an intern for several Slovak and international organizations, such as CVEK and Milan Šimečka Foundation and the World Bank, where she focused mainly on minority inclusion issues. In 2014, she was a recipient of the grant of Think Tank Young Professional Development Programme supporting early-stage researchers. In the SGI she worked on two projects on political communication and hate speech in terms of Roma inclusion, and research in segregation of the Roma in Slovak educational system (Mapping Study on Education (de-)segregation in Slovakia). Ms. Kováčová is interested mainly in education and employment policies, especially in the context of inclusion of ethnic minorities.

measures.⁵³⁵ Furthermore, he finds positive that the School Inspection's acquired new competencies. However, the legislation omitted to define what segregation is.⁵³⁶ Miškolci and Lajčáková also welcome the broader competencies of the Inspection.⁵³⁷ Miškolci explains that the School Inspection is a state organ established by law and it can do only what the law prescribes it to do.⁵³⁸ Miškolci and André appreciate that a financial allocation is given to a school only in cases where a child is placed to a normal class. This can lead to more children being placed in normal classes rather than in special ones. Very important is also the provision that forbids the placement of children diagnosed as CSDE to special classes or schools.⁵³⁹ All these changes are welcomed, yet, generally, most of the interviewees claim that the amendment of the School Act tackles the problem of segregation of Roma children in Slovak primary education only formally (or superficially).

Lajčáková strongly rejects the effectiveness of amendment except for the new competencies of the Inspection, and explains that “the amendment that was adopted by the Ministry of Education does not eliminate the roots of segregation and therefore, it will not have any effect on the current situation.”⁵⁴⁰

André focuses his analysis only on the impact of the amendment of the School Act on the CSDE. He lists problematic parts in the new provision. Firstly, the status of CSDE is examined by the CPPCP. He explains that the Center is already undersized and in practice does not have the

⁵³⁵ Stanislav Daniel, Personal Interview (30. October 2016), q. 2.

⁵³⁶ *Id.*, q. 3.

⁵³⁷ Jarmila Lajčáková, Personal Interview, (6. November 2016), q. 2.

⁵³⁸ Jozef Miškolci, Personal Interview, (02 November 2016), q. 1.

⁵³⁹ Igor André, Personal Interview, (28 October 2016), q. 2. and Jozef Miškolci, *supra* note 538, q. 1.

⁵⁴⁰ Jarmila Lajčáková, *supra* note 537, q. 1.

capacity to examine all children that have the status of a socially disadvantaged child.⁵⁴¹ Miškolci adds that based on a discussion with the deputy of the director of the one of the CPPCPs, the Amendment only extended the competencies and duties of the CPPCPs, yet it did not allocate additional financial or personal resources for it.⁵⁴² Consequently, many schools will not receive the financial benefits that should be allocated for the children from socially disadvantaged environments. Consequently, the schools will not be able to afford all material and personal capacities that are offered by the School Act,⁵⁴³ such as the salaries of teaching assistant, school trips, creation of so-called special (compensatory) classes, didactical and teaching equipment in classrooms or motivation salaries for teachers.⁵⁴⁴

Secondly, the School Act allows the creation of smaller classes in case the number of CSDE in a school is 80%⁵⁴⁵ or higher. Generally, schools have a problem to reach this percentage. Additionally, as was mentioned, the CPPCP does not have the capacity to diagnose each child. Therefore, the CSDE will be deprived from attending smaller classes where they could receive additional attention from teachers and an individualized approach.⁵⁴⁶ On the opposite, however, Miškolci does not think that the smaller classes are always a guarantee of higher quality of education.⁵⁴⁷ Thirdly, if there is a big number of Roma students at school (more than 50%), the school will create “Roma” classes anyway, whether the classes are smaller or bigger.⁵⁴⁸ Miškolci

⁵⁴¹ The status of the CPPCP was established by the Pedagogically-organizational instructions for the academic year 2016/2017 (Pegagogicko-organizované pokyny na školský rok 2016/2017). In particular, “[e]xamination of school capability of children that have their belated development base on socially disadvantaged environment where they come from, is provided by CPPCP.” Ministry of Education, Sport, Science and Research of the Slovak Republic, *Pedagogically-organizational instructions for the academic year 2016/2017*, 2016–11850/9969:1–100A (2016) 39.

⁵⁴² Jozef Miškolci, *supra* note 538, q. 1.

⁵⁴³ Igor André, *supra* note 539, q. 1.

⁵⁴⁴ Act No. 245/2008 Coll. (Slovak School Act), *supra* note 91, § 107 (4).

⁵⁴⁵ Igor André, *supra* note 539, q. 1.

⁵⁴⁶ *Id.*

⁵⁴⁷ Jozef Miškolci, *supra* note 538, q. 1.

⁵⁴⁸ Igor André, *supra* note 539, q. 1.

explains that there is no provision that would not allow to schools create Roma-only classes.⁵⁴⁹ As Daniel mentioned, the School Act does not define what segregation is⁵⁵⁰ and therefore such classes might not be considered as unlawful.

Miškolci added a very important point regarding the continuing segregation in Slovakia. On the one hand, as André and Miškolci explain, the financial incentive to integrate children into normal classes can lead to less Roma children attending special classes or education.⁵⁵¹ On the other hand, schools always find a way to separate Roma children. Miškolci explains that the School Act offers the possibility to establish classes with specializations. It means that schools can create sport, language, or practical classes, or other specializations. In reality, Roma children usually end up in “practical” classes and non-Roma children are put to classes with other specializations.⁵⁵²

Kováčová describes the lack of understanding and prejudices that appear in Slovak education. Many teachers set a lower workload for Roma children because they expect that they will not perform well enough. She explains that in practice, it happens that teachers, in particular in special classes, give simpler topics and tasks to students, because they expect that those children will finish their education with a vocational training at best.⁵⁵³ Secondly, many teachers and directors do not understand the “bigger picture” of the situation of many children from disadvantaged environment. When a student chooses a vocational school as a high school instead of, for instance, a gymnasium, even though the student has a good result, teachers do not understand such choice. They do not

⁵⁴⁹ Jozef Miškolci, *supra* note 538, q. 1.

⁵⁵⁰ Stanislav Daniel, *supra* note 535, q. 3.

⁵⁵¹ Igor André, *supra* note 539, q. 2. and Jozef Miškolci, *supra* note 538, q. 1.

⁵⁵² Jozef Miškolci, *supra* note 538, q. 3.

⁵⁵³ Lucia Kováčová, Personal Interview, (02 November 2016), q. 2

see that the school is, for instance, closer to the home of the student, is cheaper and attended by more Roma, making Roma students feel more comfortable and not inferior.⁵⁵⁴

Lajčáková argues that there is also a problem with the pedagogues and the heads of schools. In her opinion, the Ministry of Education, its leadership and section of the regional education believe that segregated education is good. There is a paradigm based on which, “the bad performance of a student is the problem of the student.”⁵⁵⁵ Such paradigm does not take into account the cultural barriers which Roma children have to face every day in the access to education.⁵⁵⁶ Lajčáková explains that on the practical level, the segregation is supported by many regulations and measures. Firstly, there is the existence of a parallel special schooling system. Secondly, the financing of the education, the creation of the classes with specialization - as was already explained by Miškolci – can also reinforce segregation. Thirdly, donations for food, the reimbursement of travel tickets, or financing of teaching assistants are also factors.⁵⁵⁷ Lajčáková claims that “the regulations in these areas only rationalize the creation of school for Roma children from socially disadvantages environment.”⁵⁵⁸

On whether there is a political will in Slovakia to change this situation, the answers were mostly negative. Lajčáková expressed that has never seen any political will regarding this question.⁵⁵⁹ Daniel and André agree and add that the “missing political will is an enormous barrier through the whole political spectrum.”⁵⁶⁰ Daniel illustrates the negative position of state representatives through the statement of the secretary of the Ministry of Education, Lucia Nicholsonová, who

⁵⁵⁴ *Id.*

⁵⁵⁵ Jarmila Lajčáková, *supra* note 537, q. 4.

⁵⁵⁶ *Id.*

⁵⁵⁷ *Id.*

⁵⁵⁸ *Id.*

⁵⁵⁹ *Id.*, q. 5.

⁵⁶⁰ Stanislav Daniel, *supra* note 535, q. 5, And Igor André, *supra* note 539, q. 5.

called the judgment of the County Court of Prešov in the case of *Poradňa v. Elementary school with Kindergarten Šarišské Michaľany* as “ridiculous.”⁵⁶¹ André explains the situation more particularly. He states that politicians at the national level do not want to engage with this question. The inclusive policies are costly and their advocacy would lead to loss of voters’ support. This position is reflected by county and municipality policy. Local authorities do not want to go against the “public opinion of their voters and they often share the common anti-Roma sentiments.”⁵⁶² School directors have to be “exceptional leaders if they want to go against the national and local politicians’ will.”⁵⁶³

Miškolci and Kováčová agree with this opinion partially. They do not claim that there is no political will at all. They explain that the government’s policy focus reflect the “most problematic issues” in the Slovak society. According to the research conducted by “the European Analytic Center” (Európske analytické centrum) in 2015, Slovaks actually do not consider the situation of education to be the most problematic issue in the country. The question of Slovak education ended in 10th position.⁵⁶⁴ Topics like unemployment, nepotism, corruption or high taxes were the most problematic ones. According to Kováčová, the current political parties only reflect the needs of the citizens. If there were attempts from the side of the Ministry of Education to be more inclusive, it failed on the dialogue with the Ministry of Finance⁵⁶⁵

⁵⁶¹ Ján Glovičko, *Nicholsonová: Oddelovanie rómskych detí chápem*, SME DOMOV (Jan. 12, 2012), <http://domov.sme.sk/c/6214393/nicholsonova-oddelovanie-romskych-deti-chapem.html>.

⁵⁶² Igor André, *supra* note 539, q. 5.

⁵⁶³ *Id.*

⁵⁶⁴ Slovenská tlačová agentúra, *Prieskum: Slovákov najviac trápi nezamestnanosť*, PRAVDA.SK (Oct. 16, 2015), <http://spravy.pravda.sk/domace/clanok/370944-prieskum-slovakov-najviac-trapi-nezamestnanost/>.

⁵⁶⁵ Jozef Miškolci, *supra* note 538, q. 5, and Lucia Kováčová, *supra* note 553, q. 2.

Moving away from the national opinion, the last Concluding Observation of the UN Human Rights Committee on 17 and 18 October 2016⁵⁶⁶ criticized Slovakia for the treatment of Roma women, problematic education and discrimination. Even though the Committee welcomes the Amendment of the School Act and the attempt to develop de-segregatory policies,⁵⁶⁷ the Committee expresses its concerns that:

“Roma children continue to suffer from de facto segregation in the State party’s school system, being taught in Roma-only classes or attending classes in separate school pavilions, and often being provided with inferior education and; the number of Roma children placed in schools for children with mild disabilities continues to be disproportionately high.”⁵⁶⁸

There is an attempt from the side of the Slovak Ministry of Education, Research, Science and Sport to adopt some measures. However, taking into consideration the response of the interviewees or the Concluding Observations of the UN Human Rights Committee, Slovakia did not take a proper, meaningful step towards de-segregation of Roma children in primary education. These measures added some new competencies to the School Inspection and provided financial incentive for schools to place children with mild mental disabilities in normal classes. Nevertheless, the Amendment does not prohibit the creation of separated Roma classes, does not define segregation, and even though it adds more competencies to CPPCP, it does not provide additional resources and consequently the Center would not be able to provide quality assessment.

⁵⁶⁶ United Nations Human Rights Council, The Concluding Observations of the Un Human Rights Council - CCPR/C/SVK/CO/4, 31 October 2016, Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fSVK%2fCO%2f4&Lang=en.

⁵⁶⁷ United Nations Human Rights Council, The Concluding Observations of the Un Human Rights Council - CCPR/C/SVK/CO/4, 31 October 2016, para. 18.

⁵⁶⁸ *Id.*

Section 3.3. Comparison of the Czech Republic and Slovakia

Both countries have similar administrative organization of schooling, funding or psychological diagnostic of children before compulsory education.

The Czech School Inspection provides detailed data about children in the educational system, also with regards to their ethnicity. Thus, the Amendment and the future reform can adequately indicate the proper budget and reflect the needs of children with special educational needs, and introduce inclusive education effectively. Such precise data are not available in Slovakia. One of the reasons is that Slovakia still struggles with the collection of ethnic sensitive data. In addition, a huge proportion of the Roma community in Slovakia is marginalized and lives in segregated areas.⁵⁶⁹

The D.H. judgment highlighted the alarming situation of Roma children in special education. It set up a monitoring system of compliance and created pressure to adopt measures leading to de-segregation in the Czech Republic. Through monitoring, it can be seen that a variety of strategies were adopted in the Czech Republic. These strategies mostly did not target the problem sufficiently and it was reflected through the decision of the CoM, which always provided a critical assessment of the submitted results. In the case of CoM monitoring system, the civil society was also engaged and could share its critical view on the state policies.

Compared to the Czech Republic, Slovakia lacks such monitoring, not only as a means of pressure to adopt proper reform, but also to have a precise overview of what has changed in the case of Roma segregation. Through the monitoring, a positive but slow transformation can be observed between 2007 and 2016 in the Czech Republic.

⁵⁶⁹ UNDP Europe and the CIS, *supra* note 109, at 78.

Nevertheless, the ECHR had its own influence at the Slovak national level. In the case of Šarišské Michaľany, the District Court decided to use the D.H. judgment as an interpretation tool. In addition, the national court openly stated that practices conducted by the school were discriminatory and qualified them as segregation. The Court labeled the practice as undignified. The national court also proposed to solve the problem of segregation through mixing Roma and non-Roma students.

A similar approach was taken by both countries after the initiation of unprecedented infringement procedures for breaching the RED through the segregation of Roma children. The amendment of the School Act in the Czech Republic experienced high media coverage and huge criticism from the side of the Czech special pedagogues and special school directors. The misinterpretation of the amendment led to the understanding that all special schools will be abolished. However, the system of special schools will be still available for children with medium and serious disabilities, while CMMD and CSDE will be placed into mainstream primary education. Approximately 15,000 children should be targeted by the amendment. Currently, there are no precise data of the enrollment of these children available.

In Slovakia, the media did not pay much attention to the new reform, and there are no approximate data on how many children are targeted by the Amendment. CSDE cannot be placed in the special classes and CMMD can, but the schools will likely not receive additional financial contribution for these children – an incentive that could have led to more placement of Roma children in regular primary school classes.

Both systems do not prohibit the creation of Roma-only classes and do not explicitly explain what segregation is. None of these two countries allocated sufficient money for the implementation of

the reform and inclusive education. In the case of the Czech Republic, the effort of the Ministry of Education should be appreciated. A sufficient amount of money was allocated for the year 2019, and the Ministry announced that financial reserves from the Ministry of Education will be used. In Slovakia, education is currently not a primary or popular focus for policy, and therefore the Ministry of Finance will probably not allocate enough resources for the development of inclusive education. The Slovak system offers 109 EUR for each diagnosed CSDE who attends regular primary education. The Slovak Ministry of Education is able to pay for each child but it is questionable whether the CPPCP is able to diagnose each child properly and whether the amount of money will be enough to cover all costs of special personal and tools.

Extensive research in the Czech Republic clearly showed what teachers require the most, and how they perceive the new amendment and inclusive education. Teachers also do not believe that the system is financially ready for inclusive policies. Teachers would welcome all CSDE or CMMD, but they lack professional capacities and tools that they cannot afford.

In Slovakia, it can be concluded that many teachers do not have the experience of inclusive education. Even though they believe that they provide quality education in the best interest of a child, they do not see the “bigger picture” of the situation of the Roma community and the impact of segregation. Intensive trainings of pedagogues are required, as well as national measures promoting special pedagogues and teaching assistants within primary education. Based on research, it can be seen that the Slovak School Act amendment attempts to solve the segregation of Roma children in special and primary education only superficially and does not tackle the problem systematically.

Section 3.4. Conclusion

Both countries took steps toward more inclusive education for Roma children in the recent years. However, there are differences between the Czech Republic and Slovakia.

The Czech Republic recently adopted measures that do not seem to have just a formal character. Although the real impact of the most recent amendment cannot be measured yet, there is visible political will from the Ministry of Education to fulfil the international obligations towards desegregation in the special/practical education. Nevertheless, the question of segregated Roma primary school or classes is still not answered. Through the monitoring of the compliance with the judgments of the ECHR, established under the Committee of Ministers of the CoE, there is a visible impact of the D.H judgment on the legislation and consequently the segregation of Roma children in the system of special education in the Czech Republic. However, even though the result of the D.H. judgment is indisputable, almost 10 years after the judgment the EC started an infringement procedure against the Czech Republic for breaching EU legislation. It will be important to observe whether in the school years 2016/17 and 2017/18 the Czech Republic will reach a satisfactory result through the current inclusive policies, or whether additional steps will be required.

Slovakia, according to the examination, tackles the problem of segregation of Roma children in the system of special education only formally. The competences of the Inspection were broadened. Financial contribution is allocated for CMMD attending primary school classes and for each child diagnosed as CSDE. Is this financial contribution sufficient to cover the cost of special pedagogues and special teaching tools? Will the CPPCP be able to properly examine each child without additional resource? Is there sufficient control mechanism established? These are some of the concerns regarding the current amendment. Additionally, the existing status quo and the reluctance

of the government to tackle this problem do not help to improve the current situation. Slovakia, compared to the Czech Republic, might be missing its own ‘D.H. and others v. the Slovak Republic’. In the near future, it will be necessary to measure the real impact of the Amendment in the school years 2016/17 and 2017/18, and the Slovak School Inspection should play a main role in this. Secondly, steps taken by the EC towards Slovakia, and whether it will use Article 258 of the TFEU to take the state before the CJEU for breaching RED, will be crucial for the situation of Roma children in Slovakia.⁵⁷⁰

⁵⁷⁰ Consolidated version of the Treaty on the Functioning of the European Union, *supra* note 148, Art. 258.

Chapter 4 - Recommendations and Conclusions

Based on the findings of precedent chapters, the following chapter formulates recommendations and highlights good practices that can serve as guidance for further de-segregatory policies or actions in the Czech Republic and Slovakia.

Section 4.1. International level

The case of *D.H. and Others v. the Czech Republic* through its formulation “brought the jurisprudence of the Strasbourg Convention in line with EU standards as reflected in the EU Race Equality Directive and the most recent international and national legislation.”⁵⁷¹

It is an innovative judgment that described the placement of Roma children into special educational system as a form of indirect discrimination and rejected such practices. The ECtHR explained that the intent to discriminate is not necessary. Additionally, the data presented by the applicants were considered as sufficient evidence to switch the burden of proof to the respondent state. The *D.H.* judgment promotes equal access to education and explains that the Roma community, due to its turbulent history and current situation, is considered as a vulnerable group that requires special protection. This judgment is also an example when “the judiciary can play a fundamental role in identifying problems concerning not only civil and political rights but also economic and social rights.”⁵⁷²

The ECHR explained that the state should take adequate and positive measures to secure equal education for all children. However, the Court did not specify what is understood under “positive

⁵⁷¹ Medda-Windischer, *supra* note 208, at 52–53.

⁵⁷² *Id.* at 55.

measures,” and gave a margin of appreciation to the respondent state. Other Council of Europe bodies such as the European Committee of Social Rights and the Parliamentary Assembly are more progressive in formulating concrete positive measures.⁵⁷³

In the D.H. judgment case examination, the Court took into consideration the documents produced by the Commissioner of Human Rights, the Parliamentary Assembly, and ECRI. These bodies should continue in their work and also “improve their own working methods, in addition to developing increasingly formalized synergies in their respective monitoring rules, particularly regarding judgments revealing the existence of systematic problems,”⁵⁷⁴ such as discrimination and segregation of Roma children in education.

To enhance anti-discriminatory protection under the ECHR, Protocol No. 12 of the European Convention on Human Rights should be ratified and come into force in both the Czech Republic and Slovakia.

It is recommended to enhance “the use and awareness of the CoM’s recommendations.”⁵⁷⁵ As it can be also seen in the D.H judgment case, numerous communications have been submitted since the ruling came out.⁵⁷⁶ It was generally criticized that the CoM “is not well equipped to supervise the real effects of norms enacted and depends to a great extent on information submitted by the respondent state.”⁵⁷⁷ These submissions are often “unclear and incomplete.”⁵⁷⁸ At the same time many NGOs and NHRI, which are able to submit such communications, do not know about such option. Therefore, workshops and seminars should be organized for civil society. More actors

⁵⁷³ *Id.* at 54.

⁵⁷⁴ BALUARTE, *supra* note 322, at 56.

⁵⁷⁵ *Id.* at 58.

⁵⁷⁶ Department for the Execution of Judgments & of the European Court of Human Rights, *supra* note 359.

⁵⁷⁷ BALUARTE, *supra* note 322, at 58.

⁵⁷⁸ *Id.*

submitting communications will help better scrutinize the compliance with the judgment and the CoM will be able to take more adequate steps towards respondent states.⁵⁷⁹

Taking into consideration the ECHR and the RED, they have both important influences with certain limitations. Arabadjieva explains that the ECHR plays an important role in imposing positive measures⁵⁸⁰ yet as could be observed in the D.H. judgment, the positive measures remained unspecified and were left to the margin of appreciation of the respondent state.⁵⁸¹ In comparison with the RED, Article 5 of the Directive encourages a Member State to take positive measures, but it does not impose them as legal obligations.⁵⁸² In the same manner, “there is no legal basis for the CJEU to impose such obligation.”⁵⁸³ Therefore, the RED alone “is not sufficient to address a deeply embedded structural problem such as school segregation.”⁵⁸⁴ On the other hand, it might be interesting to highlight Lajčáková’s point that the violation of EU legislation, for instance, the violation of the RED, can lead to the EC limiting the structural funds flowing to the national economy.⁵⁸⁵ This can be an effective incentive for states to be in line with EU legislation. Such incentives do not exist at the ECHR level.

Both the ECHR and EU systems are positive and bring progress in de-segregation of Roma children. At the same time, they do have limitations, such as their dependency on “enforcement through individual litigation [...that is problematic] for marginalized groups that face cultural, educational and economic barriers to participation in formal enforcement mechanism.”⁵⁸⁶ Taking

⁵⁷⁹ *Id.* at 58–59.

⁵⁸⁰ Arabadjieva, *supra* note 22, at 47.

⁵⁸¹ D.H. and Others v. Czech Republic, No. Application 57325/00, slip op. ¶ 216 (ECHR Nov. 13, 2007).

⁵⁸² Arabadjieva, *supra* note 22, at 47.

⁵⁸³ *Id.*

⁵⁸⁴ *Id.*

⁵⁸⁵ Jarmila Lajčáková, *supra* note 504, at 1.

⁵⁸⁶ Arabadjieva, *supra* note 22, at 47.

into consideration the constant discrimination of the Roma community, the fact that the RED was transposed into MS legislations and that only one case of Roma (Belov) discrimination was held at the CJEU⁵⁸⁷ might be a sign of some problems.

It can be concluded through Arabadjieva explanation that “the RED is appealing for eliminating identifiable practices in particular schools, but the ECHR may be more attractive for tackling deeply embedded structural problems and seeking long-term solution.”⁵⁸⁸

Section 4.2. National Level

While the ECHR in the D.H. judgment did not define guidelines on how to tackle segregation of Roma children in elementary school, Slovak national courts (district court and county court as an appeal court) in the case of Šarišské Michal’any were more innovative. In this case, the first instance court (district court)⁵⁸⁹ as well as the appeal court (county court) decided to mix up Roma and non-Roma classes.⁵⁹⁰ The Court also defined segregation as an “undignified situation” for Roma children.⁵⁹¹ Additionally, and very positively, in the case of Šarišské Michal’any the Court explained the positive aspect of inclusive education and interpreted many treaties connected to the right to education and non-discrimination. Although it is positive that the court presented a solution, not everyone could agree that it is the right solution. On the one hand, this proactive approach can be seen as a positive step towards desegregation. D.H. judgment was, for instance, criticized by Medda-Windisher for not giving any guidelines for the respondent state and for

⁵⁸⁷ *Id.*

⁵⁸⁸ *Id.* at 48.

⁵⁸⁹ Regional Court Prešov, Application No. 25C 133/10 – 229, *supra* note 477, at 1.

⁵⁹⁰ County Court Prešov, Application No. 20Co 125-126/2012, *supra* note 492, at 1.

⁵⁹¹ *Id.*, at 13.

leaving it to its discretion,⁵⁹² as well as for not defining segregation per se.⁵⁹³ On the other hand, it is questionable whether the judges are capable and qualified enough to solve the situation through their judgment. Miškolci explains that the decision of Šarišské Michaľany to mix up the children was not the best choice.⁵⁹⁴ As it can be seen further in this chapter, the implementation took more effort than the court might have expected.

Promotion and understanding of inclusive education is one of the main steps towards desegregation in the Czech Republic and Slovakia. The County Court of Prešov in Slovakia explains that the aim of education is the full integration of a child into social, economic and cultural life.⁵⁹⁵ Inclusive education is “a system of education that respects the personality of children and their character.”⁵⁹⁶ It offers to children visiting normal schools an individualized care. Inclusive schools are “cultural, edifying, preventive and family centers and they should play an important role in the life of students.”⁵⁹⁷ Inclusive classes help children to naturally learn to be sensitive and react positively to others’ differences. Experiencing such differences give to children a real view about the diverse society they will live in as adults.⁵⁹⁸ At the same time, schools focusing on inclusive education help to address and resolve tabooed topics such as discrimination, segregation or racism, and they encourage tolerance, respect and mutual understanding. Furthermore, it leads especially CSDE to higher independence and improve their potential chances on the labor market and it consequently benefits the state economy.⁵⁹⁹

⁵⁹² Medda-Windischer, *supra* note 208, at 46.

⁵⁹³ *Id.*

⁵⁹⁴ Jozef Miškolci, *supra* note 538, q. 5.

⁵⁹⁵ County Court Prešov, Application No. 20Co 125-126/2012, *supra* note 492, at 14.

⁵⁹⁶ *Id.*

⁵⁹⁷ *Id.*, at 15.

⁵⁹⁸ *Id.*, at 14-15.

⁵⁹⁹ *Id.*, at 15.

The Šarišské Michal'any judgment triggered the involvement of many activists towards change of the school situation. The judgment ruled that the elementary school in municipality Šarišské Michal'any was segregating Roma children. A special initiative, an NGO called eduRoma⁶⁰⁰, was created in 2013 in Slovakia (after the Prešov County Court judgment in December 2012) as a reaction to the unwillingness of the state institutions to help the school in de-segregation.⁶⁰¹ The Ministry of Education, Science, Research and Sport avoided to react and guide the school after the decision.⁶⁰² EduRoma explains its approaches and strategies that were used in the elimination of segregation of Roma children in the elementary school. Such strategies can be used elsewhere in Slovakia or the Czech Republic, indeed, with necessary modifications to reflect the particularities of certain schools and communities.

EduRoma established communication and negotiations at various levels and achieved particular results:

- a) Work with the local communities. The NGO monthly called and facilitated the so-called Commission for Inclusive Education. The Commission was created by representatives of the municipalities from which children attended the school, representatives of the school and parents, field social workers and community workers and the Church.⁶⁰³ Through the Commission, EduRoma showed to the local authorities that even with state unwillingness, they are able to solve many issues without engagement of the state or higher financial resources.⁶⁰⁴ The Commission achieved:

⁶⁰⁰ More information about organization eduRoma can be found at: <http://www.eduroma.sk/en/home-2/>.

⁶⁰¹ United Nations Development Programme, *Od Segregácie k Inkluzívnemu Vzdelávaniu - Prípady Školy v Šarišských Michal'anoch* (2014) 5.

⁶⁰² *Id.* at 39.

⁶⁰³ *Id.* at 38.

⁶⁰⁴ *Id.* at 39.

- a. Secured one additional bus connection between Ostrovany⁶⁰⁵ and Šarišské Michaľany in afternoons. Thus, the children from Ostrovany could attend extracurricular activities at school.⁶⁰⁶
- b. Abolishment of informed consent that was a burden in the process of de-segregation of Roma students.⁶⁰⁷
- b) Cooperation with the teaching staff. Teachers from Šarišské Michaľany school were mostly resistant to the result of the judgment. They did not want to admit that their teaching and professional approach was connected with segregatory practices. They usually pointed out a problematic system, particularly the failure of the social and educational legislation. Therefore, eduRoma organized meetings with pedagogical experts who explained the importance of an inclusive education and the positive impact of new teaching tools, methods and the presence of assistants. The experts recognized that many teachers suffered from a “burn-out syndrome” and required numerous trainings.⁶⁰⁸
- c) Cooperation with students and volunteers;⁶⁰⁹
- d) Cooperation with state institutions.⁶¹⁰

The importance of the ECHR jurisprudence, national judgments or national inclusive policies is indisputable to fight segregation of Roma children at school. The work of eduRoma shows that without the constant work of activists in Šarišské Michaľany, the result of the judgment might have been different. Thus, there is not only a need for more judgments like D.H. or Šarišské

⁶⁰⁵ Many Roma children from Ostrovany are enrolled in the school of Šarišské Michaľany

⁶⁰⁶ United Nations Development Programme, *supra* note 601, at 39–42.

⁶⁰⁷ *Id.* at 42–43.

⁶⁰⁸ *Id.* at 43–44.

⁶⁰⁹ *Id.* at 45.

⁶¹⁰ *Id.* at 47.

Michal any judgments when policies fail, but these decisions have to be transformed into the concrete implementation of projects on the ground. EduRoma's establishment and activities should serve as a perfect example that the judgment does not immediately change the situation of Roma children in schools and classes. Therefore, the inclusive policies should rationally reflect an implementation plan with a clear budget and time-table, and a list of all relevant actors to involve. Also, better collection of data on national level including ethnic data is required to better size the issue.⁶¹¹ Daniel adds that any inclusive policies, whether they are on national or local level should always follow⁶¹² the 10 Common Basic Principles of Roma Inclusion.⁶¹³

It is also important to bear in mind that many teachers do not have experience with new teaching tools, methods or teaching a class with an additional person (for instance, a teaching assistant).⁶¹⁴ This was found by eduRoma activities and the research of the Czech School Inspection on the impediments in the assessment of individual needs of students, where 29,7% respondents claimed that there is insufficient methodological preparation of teachers.⁶¹⁵ Therefore, the Amendments in both countries should reflect not only the needs of students but also focus on the development of pedagogical staff through lifelong learning. The OECD explains that inclusive education "requires major changes both in the professional competences and the attitudes of mainstream teachers."⁶¹⁶ Otherwise, the tools offered by the Amendments, such as counselling centers, compensatory tools, individual educational plan or teaching assistants,⁶¹⁷ will not sufficiently help to solve the current situation and will not foster inclusive education. Kováčová also recommends to focus on changing

⁶¹¹ Nils Muižnieks, *supra* note 474, para. 113.

⁶¹² Stanislav Daniel, *supra* note 535, q. 6.

⁶¹³ For Diversity. Against Discrimination., Vademecum - The 10 Common Basic Principles on Roma Inclusion (Publication Office of the European Union).

⁶¹⁴ Jozef Miškolci, *supra* note 538, q. 4., and Lucia Kováčová, *supra* note 553, q. 4.

⁶¹⁵ Czech School Inspection, *supra* note 74, at 7.

⁶¹⁶ Santiago, P. et al., *supra* note 99, at 26.

⁶¹⁷ Act No. 561/2004 (Czech School Act), *supra* note 55, § 16 (2) a-i).

curricula in pedagogical faculties, because in the current system the students - and future teachers - are not prepared to teach in a class with special pedagogues or teaching assistants.⁶¹⁸

Miškolci and Kováčová call not only for adequate tools but also for a raise in teachers' salaries. Kováčová explains that the salaries are not sufficient, especially for teachers living in the developed parts of the countries where living costs are significantly higher. The Czech School Inspection also finds that 72,7% of respondents consider the lack of financial resources for specialized personal capacities to be the biggest impediment in the assessment of individual needs of students.⁶¹⁹ OECD explains that both the Czech Republic⁶²⁰ and Slovakia⁶²¹ should improve the position of the teaching profession as well as make this employment more attractive for well qualified teachers and professionals.⁶²²

What should not be omitted is the cooperation and work with parents. The states should launch campaigns with the involvement of civil society and raise awareness of parents to the importance of ECEC⁶²³ and as well as the importance of inclusive education. The Ad Hoc Committee of Experts on Roma Issue (hereinafter "CAHROM") and Kováčová explain that the parents often enroll their children to special/practical schools because children will not experience discrimination there as they would in primary schools, or because special/practical schools provide free meals.⁶²⁴ The campaigns should explain the long-term effect of this placement on the future of the child and provide a positive vision of education.

⁶¹⁸ Lucia Kováčová, *supra* note 553, q. 6.

⁶¹⁹ Czech School Inspection, *supra* note 74, at 7.

⁶²⁰ Shewbridge, C., et al., *supra* note 59, at 29.

⁶²¹ Santiago, P. et al., *supra* note 99, at 26.

⁶²² *Id.*

⁶²³ Ad Hoc Committee of Experts on Roma Issues (CAHROM), *supra* note 1, at 38.

⁶²⁴ *Id.* and Lucia Kováčová, *supra* note 553, q. 4.

A) Improvement of the Early Childhood Education and Care

All actors in this field agree that the most helpful step toward inclusive policies and de-segregation is the improvement of Early Childhood Education and Care. Nobel prize laureate James Heckman argues that “investing in disadvantaged young children is a rare public policy with no equity-efficiency trade off.”⁶²⁵

The OECD highlights that there is a need to improve the ECEC system in the Czech Republic and Slovakia. For the Czech Republic, it recommends to transfer money directly from state budget to municipalities “who are responsible for managing and financing that educational level.”⁶²⁶ However huge decentralization of the system might complicate the situation.⁶²⁷ In the case of Slovakia, more ECEC’s facilities should be developed because the current number of such facilities is not sufficient for the number of children. Additionally, the kindergartens should be free of charge from the earliest possible age, especially for children coming from a socially disadvantaged environment.⁶²⁸ The Roma Early Childhood Inclusion Report 2012 explains that for CSDE, the ECEC should be secured for free at least two years before their compulsory education starts.⁶²⁹

According to André, the best solution on the current situation is the “*massive investment into the early childhood education and care*,”⁶³⁰ particularly focusing on children from CSDE above three years old. If CSDE are not involved in ECEC from an early age, then “*we will always only*

⁶²⁵ World Bank, *supra* note 105, at 77.

⁶²⁶ Shewbridge, C., et al., *supra* note 59, at 27.

⁶²⁷ *Id.*

⁶²⁸ Santiago, P. et al., *supra* note 99, at 26.

⁶²⁹ John Benneth, *supra* note 36, at 71.

⁶³⁰ Igor André, *supra* note 539, q. 2.

*extinguish and dampen “huge fires”, that we did not realize in the age of 0 to 6.”*⁶³¹ Most of the interviewees agree with such statement. He continues by saying that ECEC is the best prevention against segregation of Roma children. In the last five years, Slovakia did not do much in this field. For instance, it obstructed some existing projects. He appreciates the action of the previous plenipotentiary Mr. Pollák for the project of new maternity schools. Even though the maternity schools were built close to Roma settlements, they still offer some socialization for CSDE and make a big step towards the de-segregation of Roma children in primary education.⁶³²

The World Bank report from 2012 focusing on Slovakia showed that the Roma children between age of four and six coming from a socially disadvantaged environment and attending kindergartens “have higher cognitive outcomes.”⁶³³ The report explains that these children recognize more easily the letters and numbers, read simple words and understand basics of the majority language. Additionally, as André explained, the children enrolled in kindergartens are less likely to be placed in special, practical or zero classes and “have also significantly better later life outcomes.”⁶³⁴

ECEC would also improve the situation of many children in socially disadvantaged communities and locations. The World Bank report showed that households in segregated and marginalized areas do not contain books or educational tools and toys that are important for the cognitive development of a child. In the case of Slovakia, the numbers were alarming; as the report showed that household in the marginalized localities in Slovakia had only one book available for children.⁶³⁵

⁶³¹ Igor André, *supra* note 539, q. 2.

⁶³² *Id.*, q. 3.

⁶³³ World Bank, *supra* note 105, at 78.

⁶³⁴ *Id.*

⁶³⁵ *Id.* at 82.

The Roma Early Childhood Inclusion Report from 2012 explains steps that should be taken into consideration for the provision of ECEC, especially in marginalized locations and communities:

- a) Secure the quality of the facilities and employed staff;
- b) Substantial investment must be provided;
- c) Considering the establishment of day-long kindergartens;
- d) Creation of a friendly environment where Roma children will not face discrimination and would not feel inferior;⁶³⁶
- e) The teaching staff should be capable of understanding the needs of a child. Particularly, pedagogues should “understand the child’s own perspective and incorporate them into kindergarten’s communication and interplay with the child.”⁶³⁷ Basically, staff should “focus on the world of the child and respect the natural learning strategies of children.”⁶³⁸

In addition to these steps, the kindergartens, especially in marginalized locations, should expand their services. Such services should consist of free snacks and cooked meals, medical check-ups and providing basic hygiene services.⁶³⁹

B) Recommendations for the Czech Republic

The Czech Republic did a very positive step in making the ECEC compulsory for children in their last year before the start of compulsory education. However, the Czech Republic should now consider canceling the provision establishing “practical/preparatory or zero-grade classes.” CAHROM experts are concerned that compulsory ECEC and the zero-grade classes would overlap

⁶³⁶ John Benneth, *supra* note 36, at 70.

⁶³⁷ *Id.*

⁶³⁸ *Id.* at 71.

⁶³⁹ *Id.*

and duplicate their purpose because they have similar objectives and that many Roma children can be enrolled into both.⁶⁴⁰ There is a risk that children following the compulsory ECEC might be discriminate against and be placed to zero-grade classes even though they would have sufficient knowledge to follow the first grade curriculum. Therefore, CAHROM experts call for the gradual abolition of zero-grade classes, and if not, for safeguards that prevent misuse of this system.⁶⁴¹

The Czech School Inspection provide statistically effective data. However, its scope should be broadened. Generally, the OECD calls for new evaluation criteria.⁶⁴² Particularly, the CSI should provide “supervision of the work of socio-pedagogical staff and psychological centers.”⁶⁴³ Additionally, the CSI should also provide statistics on the children enrolled in ECEC, especially on Roma children and consequently on the number of Roma children attending zero-grade classes.⁶⁴⁴

The OECD welcomes the Amendment of the Czech School Act. The Czech Republic should carefully approach the diagnosis of children with special educational needs (according to the Amendment) and should focus on the following points:

- a) The teaching staff and the special pedagogues should be familiarized with the special educational tools assigned to the children with special educational needs and their grading system. At the same time, the Ministry of Education should provide campaigns and lectures focusing on capacity building on this topic.⁶⁴⁵

⁶⁴⁰ Ad Hoc Committee of Experts on Roma Issues (CAHROM), *supra* note 1, at 36.

⁶⁴¹ *Id.*

⁶⁴² Shewbridge, C., et al., *supra* note 59, at 26.

⁶⁴³ Ad Hoc Committee of Experts on Roma Issues (CAHROM), *supra* note 1, at 37.

⁶⁴⁴ *Id.*

⁶⁴⁵ Shewbridge, C., et al., *supra* note 59, at 27.

- b) A platform for information sharing has to be established. Furthermore, the collaboration between diagnostic centers should be provided, as well as an “exchange of feedback on [the] experience with implementing [the Amendment’s categorization].⁶⁴⁶
- c) School leadership should provide the monitoring of the application of teaching tools and the pedagogues should have the capacity to work with children with special education need to secure the best interest of children.⁶⁴⁷

These steps might be challenging from the position of the teachers. A huge proportion of pedagogues do not think that the system will be able to financially handle such inclusion and many of the teachers need additional training to be able to work with those children.

C) Recommendation for the Slovak Republic

According to Lajčáková, Slovak education, in order to be inclusive for CSDE and CMMD, should adopt numerous measures taking into account the content of education, methods of teaching, preparation of teachers and financing in education.⁶⁴⁸ She does not mention any positive example in the Slovak education system. She highlights the experience of private British and American schools in Slovakia, which are able to teach children in different “school grades” within one class. These schools use for instance, methods focusing on integration, so-called cooperative learning. However, these schools have different financing, and the possibility of applying their model to the Slovak public education system would be limited.⁶⁴⁹

⁶⁴⁶ *Id.*

⁶⁴⁷ *Id.*

⁶⁴⁸ Jarmila Lajčáková, *supra* note 537, q. 6

⁶⁴⁹ *Id.*

The 2014 report of the Public Defender of Rights in Slovakia called especially for the improvement of diagnostic practices. Although the new amendment of the School Act changed some competencies of CPPCP, the recommendations from 2014 are still relevant. The Ombudswoman stated that the diagnostic centers should always take into consideration the environment children come from.⁶⁵⁰ The diagnostic centers should systematically re-diagnostic children placed into zero-grade classes. The report explains that there should be precise and consistent monitoring of the system of diagnostic of 5-6 years old children and of the diagnostic of children finishing zero-grades.⁶⁵¹

The report also recommends to develop extracurricular activities programs that would also target CSDE.⁶⁵² Similarly, André explains that the state should invest more into the full-time education through the support of personnel capacities such as teachers' assistants, school psychologists, social workers and special pedagogues. He highlights that extracurricular activities have to be provided by different personnel that the teaching staff not to overburden teachers. The Commissioner for Human Rights of the CoE calls for the employment of more Roma mediators and teaching assistants coming from the Roma communities.⁶⁵³ Roma mediators and assistants can be also involved in after-school activities.

André, Miškolci and Kováčová agree - and it is also applicable in the Czech Republic because of the decentralization of the school system⁶⁵⁴ - that when municipalities and city mayors understand the need of CSDE and tackle the situation of marginalized communities, the situation will change. All three interviewees bring forward as a good practice example the municipality of Spišský Hrhov

⁶⁵⁰ The Office of the Public Defender of Rights, *supra* note 104, at 16.

⁶⁵¹ *Id.*

⁶⁵² *Id.*

⁶⁵³ Nils Muižnieks, *supra* note 473, para. 111.

⁶⁵⁴ Shewbridge, C., et al., *supra* note 59, at 17.

in Slovakia.⁶⁵⁵ Here, the mayor of the village tackles the problems of marginalized and socially disadvantages population holistic manner. The promotion of better hygiene and employment of the parents led to the higher attendance of children at school. The establishment of the village pedagogical-psychological counselling center and logopedic center resulted in only few children being diagnosed as CMMD.⁶⁵⁶ Not only the mayor but also the OECD were concerned that many children were misdiagnosed because of special schools' pedagogues, directors and pedagogical centers might have the "attraction of additional funding"⁶⁵⁷ in the special education. As a result of the mayor's efforts, in 2007 the EC awarded the European Enterprise awards for the most entrepreneurial region in Europe; in particular, it received the "Responsible Entrepreneurship Award" for "[helping to] find employment for vulnerable groups, especially those such as the Roma facing discrimination."⁶⁵⁸ In 2016, the village received the European Roma Spirit Award and one of the juries, Ethel Broods, expressed that the village can be an example for the whole Europe."⁶⁵⁹ The decentralization of the system⁶⁶⁰ gives more space for municipalities to individually approach the situation in the elementary schooling. While the state system can draft general policies, it is not able to reflect all specifics of each municipality. The municipality of Spišský Hrhov is an example of how the education of CSDE can be improved not only through inclusive education policies, but by solving the basic needs of the marginalized community holistically

⁶⁵⁵ Igor André, *supra* note 539, q. 6., Jozef Miškolci, *supra* note 538, q. 6, Lucia Kováčová, *supra* note 553, q. 6.

⁶⁵⁶ Jana Tomalová, *Európska komisia ocenila Spišský Hrhov mimoriadnou cenou*, PODTATR. NOV. (Jul. 26, 2016), <http://www.podtatranske-noviny.sk/2016/07/europska-komisia-ocenila-spissky-hrhov-mimoriadnou-cenou/>.

⁶⁵⁷ Santiago, P. et al., *supra* note 99, at 26.

⁶⁵⁸ European Commission, Press release - 2007 European Enterprise Awards: 48 nominees for the most entrepreneurial region in Europe (Oct. 24, 2007), http://europa.eu/rapid/press-release_MEMO-07-425_en.htm.

⁶⁵⁹ Roma Spirit, First year of the European Roma Spirit Award 2016 knows its Laureates – European Roma Spirit Award (Oct. 13, 2016), <http://www.romaspirit.eu/prvy-rocnik-medzinarodneho-ocenia-european-roma-spirit-award-pozna-svojich-laureatov/>.

⁶⁶⁰ Santiago, P. et al., *supra* note 99, at 41.

The OECD recommends to restructure the “special schooling system”, which would rather serve as a supporting education branch of the system. In particular, the special schools will have a position of methodological centers, they would provide professional counselling to teachers and support elementary and high schools in questions concerning special educational needs of students and special educational tools.⁶⁶¹

Section 4.3. Conclusion

These recommendations, conclusion and examples of good practices do not encompass all the complex solutions needed to address the issue of segregation of Roma children in primary education in the Czech Republic and Slovakia. The complexity of the problem requires the interplay of relevant actors at the international, national and local levels, and the involvement of civil society as well as the majority population and Roma communities.

The Council of Europe bodies as well as the European Union legislation represent satisfying international protection against many forms of discrimination. It is appreciated to see the cooperation of bodies within the Council of Europe and the interpretative methods of the European Court of Human Rights. The RED might show its whole potential if the EC is ready to take states before the CJEU for judgments on non-compliance. In any case, there is still space for improvement. Particularly, the enforcement mechanisms for compliance with judgments and legislation should be enhanced. ECHR should focus on developing of the interpretation of the judgments, for instance, by avoiding generalization towards minorities - particularly labelling the whole Roma community as vulnerable and requiring special attention - or and by clearly calling problems of placement of Roma children into special facilities segregation. Moreover, it should

⁶⁶¹ *Id.* at 28.

promote the adoption of instruments such as Protocol No.12 of the European Convention on Human Rights.

International as well national judgments showed that their implementation on the ground is not an easy task. In the case of the Czech Republic, from 2007 to 2016 the country went through a significant transformation of the educational system, yet the segregation is still present. In Slovakia, the case of Šarišské Michaľany proved that without permanent work of Roma rights activists, the ruling would have been barely transposed into practice. Thus, the school systems might not need more judgments, but rather the engagement of civil society, mediators and social workers with schools and municipalities. Awareness raising campaigns about the competences and options of the municipalities should be developed.

Each actor in the field, whether it is the Commission for Human Rights, OECD, CAHROM or interviewees, agree that the most important step in fighting segregation in primary education is the improvement of early childhood education and care. Better funding, extending, developing and improving the facilities is required. The care provided in these facilities has to be professional and take into consideration the personality of each child as well as his or her cultural and economic background. As André said, as long as the states will not focus on the ECEC development and children will not be involved in ECEC from an early age, then *“we will always only extinguish and dampen “huge fires”, that we did not realize in the age of 0 to 6”*⁶⁶²

The amendments of the School Acts did not abolish the special/practical school or classes for children with medium and severe disabilities. Both countries' educational systems also provide so-called zero-grade classes where segregation might continue. Therefore, it is recommended to

⁶⁶² Igor André, *supra* note 539, q. 2.

enhance the competencies of School Inspections and secure their effectiveness and impartiality.

The legislation at the national level should define what segregation is and consider transforming the system of special education.

Conclusion

Any kind of segregation is inhuman and undignified, and reminds us of practices in South Africa or the U.S. that were strongly condemned at the international level. The current situation of the Roma community might not be perceived with such intensity, but considering all existing legal instruments and protection in Europe, the discrimination that the Roma community experiences is unacceptable and violates numerous human rights and freedoms. Segregation in the form of school segregation of Roma children in the Czech Republic and Slovakia is still present nowadays. The separation of these children in special schooling systems, or in separated primary schools or classes because of their ethnicity has negative consequences on their right to equal education, their self-worth and future opportunities. Such treatment also enhances already existing stereotypes against Roma, poverty and social exclusion.

The Council of Europe and the European Union play an important role in desegregation. The ECtHR ruled the first judgment, *D.H. and Other v. the Czech Republic* (2007), that stated that placement of Roma children into special school systems without adequate testing and parents' consent was not objectively justified and thus, was discriminatory. The judgment was welcomed, yet at the same time it received certain criticisms due to the length of the trial, and the fact that the Court avoided to specify what positive measures the state should take and to define what segregation is.

Despite the judgment's deficiencies, in the Czech Republic it initiated faster adoption of desegregatory policies concerning the placement of Roma children with mild mental disabilities and children from social disadvantaged environment into the Czech system of special schooling. The monitoring of the Committee of Ministers guarantees that the state has to periodically submit

reports on its progress. At the same time the civil society is welcome to engage in the reporting and improve the scrutiny of the state's situation.

While Slovakia never came under the scrutiny of the ECHR for the segregation of Roma children in education, and therefore lacks such strong monitoring of its progress, the D.H. judgment had its impact at the Slovak national level. A national court in the case of *Poradňa v. Elementary School with kindergarten Šarišské Michaľany* included the D.H. judgment in its interpretation and stated that the separation of Roma children from non-Roma children within one school is segregation per se and such treatment is undignified towards Roma children. Despite this decision, the current situation of Roma children in Slovakia as well as in the Czech Republic worry the European Commission.

The European Union's Racial Equality Directive recently served as the ground for an unprecedented infringement procedure launched by the EC against both countries. The countries promptly responded by amending their School Acts. They mostly focused on the integration of children with mild mental disabilities and children from socially disadvantaged environment into mainstream schooling. However, the examination showed that there is a difference between the Czech and Slovak reforms.

The measures adopted by the Czech Republic might be effective and lead to an inclusive schooling system for children that have been segregated in the system of special schooling. Despite the ongoing discussion between pedagogues and the question of financial resources that should be allocated for the implementation of the reform, there is a strong willingness from the Ministry of Education to promote inclusive policies toward these groups of children. The amendment does not exclusively target Roma children, but the provisions protect them from the discriminatory

placement that they often faced. It is now necessary to measure the effectiveness of the amendment and to cooperate with pedagogues in primary and special education. What is concerning is that the amendment targets only children in special education and ongoing segregation in mainstream primary education remains unchanged.

Research in Slovakia showed huge deficiencies in the system even after the adoption of the amendment. On the one hand the amendment broadened the competences of the School Inspection in monitoring the diagnosis of children and offers financial incentive to schools for the placement of children with mild mental disabilities in mainstream primary education. On the other hand, the reform overburdened the diagnostic centers and there is a concern that the quality of diagnoses will decrease. The reform does not target teachers' formation and professional approach to children with special educational need. In addition, the reform does not prohibit the creation of Roma-only classes and, like in the Czech Republic, does not change the situation of segregated Roma schools and classes.

Based on the research, it is recommended for both countries to consider the abolition or the deep transformation of the special school system. They should also focus on the formation of the pedagogues and promote special educational tools. Both countries should enhance the competences of school inspections and secure their impartiality. Most importantly, the research shows that the states should primarily focus on early childhood education and care from the earliest age possible. Such facilities should mainly target children from socially disadvantaged environment and take into consideration their individual needs as well cultural and economic background.

It can be concluded that the ECHR as well as EU play an important role in initiating de-segregatory measures at the domestic level. On the other hand, it very much depends on the state and the will of the government to tackle this problem structurally. Judgments such as *D.H. and Others* or the national case of Šarišské Michaľany elementary school represents effective steps towards desegregation. As the research showed, their implementation was burdensome. In the case of Šarišské Michaľany, the implementation was supported mainly by civil society.

Civil society also plays an important role in de-segregation in the Czech Republic and Slovakia, but it is not a panacea. Without the involvement and willingness of the state, the problem of segregation of Roma children cannot be solved. Therefore, all relevant actors have to be engaged in discussions, cooperation, sharing experience, and most importantly, they all must have an honest intention to create inclusive education for current and future generations, from which not only Roma but all children in the Czech Republic and Slovakia will benefit.

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