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From Hajdúhadház to Strasbourg: Article 14 of the European Convention on Human Rights in the jurisprudence of the European Court of Human Rights, with special regard to Roma educational cases

1. Discrimination in international law

In Montesquieu's view *"In the state of nature, indeed, all men are born equal, but they cannot continue in this equality. Society makes them lose it, and they recover it only by the protection of the laws."*[2] It can be stated that non-discrimination as a basic principle of society is a relatively modern construct[3], classical and mediaeval societies were not based on the principle of real equality.[4] However, the idea of equality, as the fundamental principle of antidiscrimination appeared in the philosophical writings since Aristotle. In different theories, the idea of justice changes depending on the element of justice emphasized by the respective philosopher (thus, there is distributive justice, formal justice or procedural justice). The ideas of equality and justice require a state to refrain from negative discrimination in its measures, that is, to handle legal subjects in the same situation equally and those in different situations differently. Indeed, certain legal subjects although members of the society were many times deprived of the enjoyment of certain rights on a lawful ground, so the idea of equality does not mean total (or formal) equality.

A classic statement of the principle of equality in international law is found in the dissenting opinion of Judge Tanaka in the *South West Africa case*: *"The principle of equality before the law does not mean … absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means … relative equality, namely the principle to treat equally what are equal and unequally what are unequal… To treat unequal matters differently according to their inequality is not only permitted but required."*[5]

There are a number of types of conduct that are prohibited by international discriminational law. Direct discrimination is based on the idea of formal equality. It may be defined as less favourable or detrimental treatment of an individual or group of individuals on the basis of a prohibited characteristic or ground such as race, sex or disability. In the case of indirect discrimination a practice, rule, requirement or condition is neutral on its face but impacts disproportionately upon

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[2] Montesquieu, *The Spirit of Laws,* Book VIII, Chapter III.
[3] The basic concept of equality is the Aristotelian notion that likes should be treated alike. The power of this formulation derives from the even more elementary notion, that fairness requires consistent treatment.
[4] For example, for centuries it was openly asserted that women were not 'like' men and therefore deserved fewer rights. The same apparent logic was used to deny rights to black people, slaves, etc.
[5] ICJ, *South West Africa Case*, ICJ Reports, 1966, 4.

particular groups, unless that practice, rule, requirement or condition is justified. Prohibition of indirect discrimination requires a state to take account of relevant differences between groups.[6] The European Court of Human Rights has made clear that, although neither the European Convention on Human Rights, nor the Court use the term *"indirect discrimination"*, the Convention covers it in substance.[7] Segregation is often categorized as a particularly blatant form of direct racial discrimination under national and international laws. Segregation is often treated as direct discrimination in cases of equal treatment because it often excludes a vulnerable minority from opportunities that are available to others.[8] One of the best well known modern examples of racial segregation is the 1954 decision of the U. S. Supreme Court in *Brown case*, in which the Supreme Court ruled that the *"separate but equal"* doctrine violated the Equal Protection clause of the Fourteenth Amendment of the U. S. Constitution.[9] In Eastern Europe, Roma people often suffer segregation in education, housing and access to public services.

As far as the European Convention on Human Rights concerns, Article 14 is the central provision[10] of the Convention concerning equality: *"The enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground…"* This article is almost a restatement of Article 2 of the Universal Declaration of Human Rights. Article 14 can not be invoked on its own but only *"in conjunction with"* other substantive rights incorporated into the Convention, meanwhile the list of banned criteria is open to eventual additions. This is expressed in a double way: firstly discrimination is banned *"on any ground such as…",* and secondly the long list ends with the formulation *"other status."*[11] The European Court of Human Rights provided a clear statement of the accessory nature of the provision: *"Article 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not necessarily presuppose a breach of those provisions – and to this extent it has autonomous meaning – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter."*[12] It means that a measure which in itself is in conformity with the requirements of a substantive article enshrining the right or freedom in question may nevertheless infringe Article 14 when read in conjunction with it for the reason that it is of a discriminatory nature.[13]

There is a significant difference between the English and the French text of the Convention concerning discrimination, and both of them are equally authentic. In spite of the very general wording of the French version *("sans distinction aucune"),* Article 14 does not forbid all kinds of difference in treatment in the exercise of the rights and freedoms recognized. In its practice the

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[6] Kitching, Kevin (ed.), *Non-Discrimination in International Law. A Handbook for Practitioners. Interights,* London, 2005, 21-22.
[7] ECHR, *Hugh Jordan v. the United Kingdom,* Application No. 24746/94, Judgment of 4 May 2001, para. 154.
[8] Kitching 180.
[9] U. S. Supreme Court, *Brown v. Board of Education,* 347 U. S. 483 (1954)
[10] The principle of equality could be found in Article 1, which grants the rights and freedom set forth in this Convention to „all men".
[11] Szemesi, Sándor, *The relationship between the right to life and the prohibition of discrimination in the practice of the European Court of Human Rights - with special respect to Central-Eastern-Europe*, In: Süli-Zakar István, Horga Ioan (eds.), *Regional Development in the Romanian-Hungarian Cross-Border Space – From National to European Perspective*, Debrecen, 2006, 287.
[12] ECHR, *Rasmussen v. Denmark*, Application No. 8777/79, Judgment of 28 November 1984, para. 29.
[13] Ovey, Clare, White, Robin C. A., *Jacobs & White The European Convention on Human Rights,* Oxford University Press, 2006, 415.

European Court of Human Rights follows the more restrictive text of the English version *("without discrimination")*. For example, according to the French version complete equality of treatment should be guaranteed without regard to the different situations and problems, which call for different legal solutions too. It is obvious, that such a theoretical interpretation cannot be accepted.[14] Protocol No. 12. attached to this Convention applies a new approach: *„The enjoyment of rights and freedoms set forth by law shall be secured without discrimination"*. In other words, this Protocol prohibits unlawful differential treatment concerning the enjoyment of any right set forth either in national law (including legislative measures, as well as rights granted by common law rules), or in international law. It is interesting that there is no new ground of discrimination in this Protocol, both treaties list the following pretexts of differentiation: sex, race, colour, language, religion, political and other opinion, national or social origin, association with a national minority, property, birth and other status. In the last few years the Court accepted "age" or "sexuality" as a new possible ground on the basis of the "other status" mentioned in the Convention. Still, in experts' opinion it was not necessary to incorporate to the Protocol a new ground of discrimination, because this is not an exhaustive enumeration.[15] And, a new "incorporated ground" would be "stronger" than other new "outside or non-incorporated grounds", which would be an unwarranted *a contrario* interpretation.

2. Methodology of the European Court of Human Rights in discrimination cases

In practice, the Court appears to ask a number of questions in addressing complaints of discrimination as follows:

(1) Does the complaint of discrimination fall within the sphere of a protected right?
As stated above this Article has no independent existence, since it has effect solely in relation to *"the enjoyment of the rights and freedoms"* safeguarded by the other provisions of the Convention and its Protocols. But, it is not necessary to breach one or more of these other provisions, it is enough that the facts at issue fall within the ambit of one or more articles of the Convention.[16] In one case, an Irish loyalist prisoner complained that he was the victim of discrimination in that he was not segregated from British loyalist prisoners, whereas such segregation existed in other prisons in Northern Ireland. The European Commission on Human Rights ruled the application inadmissible, because the Convention contained no right of detention under segregated conditions.[17] The prohibition of discrimination in Article 14 cannot be extended to areas not covered by the substantive rights recognized in the Convention and its protocols, albeit the Court

[14] ECHR*, Belgian Linguistic case (Case relating to certain aspects of the laws on the use of languages in education in Belgium)*, Application Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, Judgment of 23 July 1968, para. 10. of Section 1B.
[15] *Explanatory Report to Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, para. 20.
[16] ECHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Application no. 9214/80; 9473/81; 9474/81, Judgment of 28 May 1985. para. 71.
[17] ECHR, *Dudgeon v. the United Kingdom*, Application No. 7526/76, Judgment of 22 October 1981.

generally takes a broad brush approach as to whether a claim falls within the ambit of one or more of the substantive articles.[18]

(2) Is there a violation of the substantive provision?
In the first years of its existence the Court at first examined whether there has been a violation of the substantive provision, and if a violation was found, the Court did not consider separately the case in the light of Article 14. This approach addresses a criticism which could be leveled at some early decisions of the Court where clear inequality of treatment had been ignored to the detriment of the development of the case law on the prohibition of discrimination.[19] Nowadays the Court has a new approach: it usually holds that it is not necessary to examine the applicant's complaint under Article 14, but if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case, Article 14 is considered by the Court in merits.[20]

(3) Is there different treatment?
The practice of the Court is that it is for the applicant to show that there has been a difference of treatment, but that it is then for the respondent Government to show that the difference in treatment can be justified.[21] Article 14 safeguards persons who are *"placed in analogous situations"* against discriminatory differences of treatment. The applicant will need to identify the group which is treated differently.[22] This will involve considerations of whether the situations are comparable. The starting point is to consider whether applicants can show that they have been treated less favourably than the comparator group by reason of the characteristics identified. However, Article 14 also applies in cases of indirect discrimination. This occurs there the same requirement applies to both groups, but where a significant number of one group is unable to comply with the requirement. In *Belgian Linguistic case* the Court indicated that the existence of discrimination might relate to the effects of State measures also.[23]

(4) Does the treatment pursue a legitimate aim?
A difference of treatment is discriminatory if it *"has no objective or reasonable justification"*, that is, if it does to pursue a *"legitimate aim"*.[24] In asserting a legitimate aim for differential treatment, the respondent State must not only show the nature of the legitimate aim it is pursuing, but must also show by convincing evidence the link between the legitimate aim pursued and the differential treatment challenged by the applicant.[25] In addition to the requirement that the measure pursues a legitimate aim, a difference of treatment will be discriminatory of there is no *"reasonable relationship*

[18] Opsahl, Torkel*, Law and Equality. Selected Articles on Human Rights*, Ad Notam Gyldendal, Oslo, 1996, 184.
[19] Ovey, White 421.
[20] ECHR *Dudgeon judgment*, para. 67.
[21] ECHR, *Chassagnou and others v. France*, Application Nos. 25088/94, 28331/95, 28443/95, Judgment of 29 April 1999, paras. 91 and 92.
[22] ECHR, *Lithgow and others v. the United Kingdom*, Application nos. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81, judgment of 8 July 1986, para. 177.
[23] ECHR, *Belgian Linguistic case*, para. 10 of Section 1B.
[24] ECHR, *Lithgow judgment*, para. 177.
[25] ECHR, *Larkos v. Cyprus*, Application No. 29515/95, Judgment of 18 February 1999, para. 31.

of proportionality between the means employed and the aim sought to be realized".[26] However, the Court has not adopted a more detailed formulation of what constitutes proportionality or a lack of it.[27]

(5) Does the difference of treatment go beyond a state's margin of appreciation?
The final question asked by the Court relates to the State's margin of appreciation. The States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of this margin of appreciation will vary according to the circumstances, the subject matter and its background.[28] The State has little room for choice where the discrimination is based on sex, race, nationality, religion, legitimacy of children, and sexual orientation (so-called "suspect" grounds). However, in matters of, for example, housing policy designed to ensure an adequate supply of housing for the poorer section of the community, there will be a wide margin.[29]

3. The burden of proof in discrimination cases

In civil cases the general rule is that each party bears the burden of proving the facts it alleges and from which it expects favourable legal consequences. In discrimination cases, the claimant bears the burden of proving the discriminatory treatment or impact alleged. As far as the practice of the European Court of Human Rights is concerned, the standard of *"beyond reasonable doubt"*[30] as the highest standard of proof is applied in every case. In many cases the Court found itself unable to state a violation of Article 14 because the supporting evidence acknowledged by the Court as *"serious arguments"* was not able to meet its standard of proof.[31] In my standpoint instead of *"beyond reasonable doubt"* the Court should apply the standard of *"balance of probabilities"* in discrimination cases, which means that the Court needs to believe that the complainant's claim is *"more likely than not"* to be true.[32] In *Nachova case* the Grand Chamber of the Court declared that in certain circumstances, where the events lie wholly, or in large part, within the exclusive knowledge of the authorities, the burden of proof may be regarded as resting on the authorities to provide a satisfactory explanation.[33] However, using this standard the Court divides the protection contained in Article 14 into a substantive and procedural aspect, finding a violation of the procedural aspect and no violation of the substantive aspect.[34] Indeed, in indirect discrimination cases this proving mechanism could create a totally hopeless situation for complainants, unless

[26] ECHR *Lithgow judgment*, para. 177.
[27] Ovey, White 428.
[28] ECHR, *Inze v. Austria*, Application No. 8695/79, Judgment of 28 October 1987. para. 41.
[29] ECHR, *Gillow v. the United Kingdom*, Application No. 9063/80, Judgment of 24 November 1986, para. 66.
[30] ECHR, *Velikova v. Bulgaria*, Application No. 41488/98, Judgment of 18 May 2000, para. 94.
[31] Kitching 123.
[32] ECHR, *Veznedarogule v. Turkey*, Application No. 342357/96, Judgment of 11 April 2000, partly dissenting opinion of Judge Bonello, paras. 9-10.
[33] ECHR, *Nachova and others v. Bulgaria*, Application Nos. 43577/98, 43579/98, Grand Chamber Judgment of 6 July 2005, para. 157.
[34] Petrova, Dimitrina, *Nachova and the Syncretic Stage in Interpreting Discrimination in Strasbourg Jurisprudence,* Roma Rights Quarterly, 2-3/2006, 95.

the Court accepts statistical evidences, taking into consideration that statistical differences in themselves do not constitute indirect discrimination, they may indicate the presence of a problem only. If an applicant can statistically demonstrate patterns of discriminatory impact or disadvantage, and rationally connect these patterns to a facially neutral policy or practice, the Court may consider this sufficient evidence to place the burden of proof to the respondent state, i.e. the state shall prove that the statistical difference is insignificant or objectively justified.[35] As far as this objective and reasonable justification concerns, the Court emphasized the importance of both objective goals and a relationship of proportionality in *Belgian Linguistic case*: *"The existence of such [an objective and reasonable] justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 … is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized."*[36]

4. The special status of Roma in Europe

Roma constitute Europe's most excluded and marginalized ethnic group. Significant segments of the Romani community live mired in poverty or extreme poverty. Substandard living conditions ensure exposure to a range of contagious diseases. Adequate health care and adequate schooling are frequently unavailable, and where available, they are frequently racially segregated. In addition, Roma have in recent years frequently endured physical attacks as racism has once again become acceptable in European societies, and as movements with explicitly racist agenda have grown, often with "Gypsies" as a named target group.[37] Josephine Verspaget, a Rapporteur for the Council of Europe, highlighted the position of disadvantage common to most Roma: *"The position of many groups of Gypsies can be compared to the situation in the third world: little education, bad housing, bad hygienic situation, high birth rate, high infant morality, no knowledge or means to improve the situation, low life expectancy… If nothing is done the situation for most Gypsies will only worsen in the next generation."*[38] The problem of anti-Roma prejudice and discrimination while more acutely felt in Central and Eastern Europe, is by no means confined to this region. It could be stated that Roma are generally not treated differently because of rules, regulations or laws (although in some cases they may be). By far the most frequent form of discrimination is the kind not set out in law, but rather arising from the coalescing of different peoples, in a situation of very disproportionate power, distributed along the axis white/non-white.[39]

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[35] Kitching 127.
[36] ECHR, *Belgian Linguistic case,* para 10. of Section 1B.
[37] Cahn, Claude, *Roma Rights, Racial Discrimination and ESC Rights*, http://www.coe.int/t/dg3/romatravellers/Documentation/discrimination/RomaESC_en.asp (date of download: 27 April 2008.)
[38] *Parliamentary Assembly of the Council of Europe Report on Gypsies in Europe,* Adopted on 11 January 1993, Doc. 6733, at para. 29.
[39] Cahn, *Claude, D. H. and Others v. Czech Republic: Establishing Council of Europe System Anti-Discrimination Law in Economic and Social Rights Areas*, http://upr-info.org/IMG/pdf/COHRE_CZE_add1.pdf, 5. (date of download: 27 April 2008.)

5. D. H. and others versus Czech Republic case

The segregation of Romani children in special schools was common policy in Central European socialist states, and has persisted into the democratic era. This segregation was not grounded in racial distinctions, but rather in distinctions in intelligence and school competencies based on "standardized" testing. Between 1996 and 1999, the eighteen applicants, all Romani children born between 1985 and 1991, were placed in "special schools" in the eastern Czech town of Ostrava. "Special schools" were designed, according to the relevant domestic legislation, for children suffering from mental disability and were thus outside the ordinary schooling system. Under the law, the decision to place a child in a special school was taken by the head teacher on the basis of the results of tests measuring the child's intellectual capacity carried out in an educational psychological centre, and required the consent of the child's legal representative. Children's representatives were sent letters informing them of the decision to place their child in a special school and of their right to appeal the decision. All the parents of the applicants had consented to the placement of their children in special schools and, in the case of two of the applicants, had explicitly requested it. There were no possibilities to the children for their transfer back to the normal system, because within 6 months in the special school system, children slipped significantly back behind children in standard schools. This means that these children faced extremely diminished life chances. The lawsuit was brought by the European Roma Rights Centre on behalf of the above mentioned 18 Roma children, stating that this policy of the Czech Republic could be determined as segregation based on race, alleging a violation of Article 14 (non-discrimination provision) in conjunction with Article 2 of Protocol No. 1. (the right to education). As the statistical data stated:

- more than half of the Roma child population was schooled in remedial special schools;
- more than half of the pupils of remedial special schools was Roma;
- any randomly chosen Roma child was more than 27 times more likely to be placed in schools for the learning disabled than a similarly situated non-Roma child;
- even where Romani children managed to avoid placement in remedial special schooling, they were most often schooled in substandard and predominantly Romani urban "ghetto" schools. Romani children in regular primary education in Ostrava (i.e. in 70 standard primary schools) were heavily concentrated in 3 primary schools;
- 32 of 70 primary schools in Ostrava had not a single Romani pupil, and as a result 16.722 non-Romani children attended school every day without a single Romani classmate.[40]

It is interesting that in *Nachova case* the Court refused the acceptance of statistical evidence, but in. *D. H. and others case* it seems that it probably could accept it. The Czech government argued that it was for the applicants to establish a difference in treatment and, further, to show *"beyond reasonable doubt"* that any difference was due to the racial origins of the applicants, and according to the government, they had not done so. The applicants argued that the above mentioned evidence constituted prima facie evidence of racial segregation, and the burden of proof shifted to the respondent state to provide *"satisfactory and convincing explanation"* for the disparity. On the basis of its previous case-law, the Chamber had held that there had been no violation of Article 14 of the

[40] Cahn 2.

Convention, read in conjunction with Article 2 of Protocol No. 1. However, the Grand Chamber drew a different conclusion from the events of the case because of the following reasons. The evidence submitted by the applicants could be regarded as sufficiently reliable and significant to give rise to a strong presumption of indirect discrimination so that the burden of proof shifted to the Government to show that the difference in the impact of the legislation was the result of objective factors unrelated to ethnic origin.[41] The Court accepted that the Czech Republic's decision to retain the special-school system had been motivated by the desire to find a solution for children with special educational needs. However, the channeling of Roma children to special schools for the mentally-retarded was often "quasi-automatic". Since it had been established that the relevant Czech legislation at the relevant time had had a disproportionately prejudicial effect on the Roma community, the applicants as members of that community had necessarily suffered the same discriminatory treatment.

6. D. H. and others versus Hungary case?

The Court's judgment in *D. H. and others case* is important first and foremost because it sets out unequivocally that racial segregation in education is banned in Council of Europe Member States. It is interesting that there was a case similar to *D. H. and others* before the High Court of Debrecen in December 2007, and the Hungarian court has resolved the case in contrary to the European Court of Human Rights' judgment. As the statistical evidence showed 54 % of the pupils of the elementary school of Hajdúhadház (a city in Hajdú-Bihar county with a significant Roma population) had Roma origin. The elementary school had three differently equipped buildings, and it seemed to be obvious that the rate of Roma pupils in the building was significantly different in such a way that in the well-equipped building of the school only 28 % Roma pupils were placed, whilst this rate in the ill-equipped buildings were 86 % and 96 %. In other words, only a few non-Roma children were placed in the ill-equipped buildings of the elementary school, whilst 46 % of the school's pupils were not Roma. According to the High Court of Debrecen, it was not proved that the head of the school had taken any measures for changing the ethnicity of the classes, this was an undersigned result, and for this reason there was not any segregation in the elementary school, just only discrimination, because of the differently equipped buildings.[42] In my standpoint the judgment of the High Court of Debrecen contains disputable statements. It is true that direct discrimination may be defined as expressly less favourable treatment of an individual or a group, but indirect discrimination can be established by a practice neutral on its face but discriminative in fact. The High Court of Debrecen should have reversed the burden of proof, and on the basis of the above mentioned significant statistical evidence the head of the elementary school should have demonstrated why this situation and measures did not realize indirect discrimination. It may be assumed that in some circumstances an indirect discrimination would not be substantiated in this case, for instance if this situation was due to the behaviour of non-Roma parents because they decided not to give their children to

[41] ECHR, *D.H. and others v. Czech Republic*, Application No. 57325/00, Grand Chamber judgment of 13 November 2007, para. 195.
[42] Debreceni Ítélőtábla (High Court of Debrecen) Pf. I. 20.361/2007/8., judgment of 13 December 2007.

classes where most of the pupils are Roma, what happened in Jászladány[43] several years ago.[44] By all means, I hope that these cases call the governments' attention to the special status of Roma population in all fields of life, including education as well.

[43] In Jászladány a private elite school for ethnic Hungarians was established in 2003, and the establishment of the private school led to racially segregated educational system in the town, where 30 % of the population are Roma.
[44] See the standpoint of Jenő Kaltenbach (Parliamentary Commissioner for the Rights of National and Ethnic Minorities at that time) http://www.okm.gov.hu/main.php?folderID=1089&articleID=2200&ctag=articlelist&iid=1 (date of download: 27 April 2008.)