

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

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¶1 The case of *D.H. and Others v. the Czech Republic* (“*D.H. and Others*”) examined whether the disproportionately high placement of Roma students in schools for the learning disabled (“special schools”) in the Czech Republic was a violation of their right, under article 2 of Protocol 1 read in conjunction with Article 14 of the European Convention on Human Rights (“European Convention”), to be free from racial discrimination in the realm of education.¹ The final judgment of the Grand Chamber (“GC”) of the European Court of Human Rights (“ECHR”) was issued on November 13, 2007. The case is a landmark decision for the ECHR in three ways.² It is the first time the court has considered a nationwide pattern of discrimination. Additionally, it is the first time the ECHR has recognized by name the principle of indirect discrimination. Finally, the opinion clarifies that, in cases where a policy has a discriminatory impact, the existence of discriminatory intent is not relevant. With its finding of indirect discrimination as a violation of the European Convention, the verdict in *D.H. and Others* has already proven to be an important tool in the campaign by the European Commission to compel the Czech Republic and other countries to pass legislation making indirect discrimination illegal.

¶2 The plaintiffs in *D.H. and Others* were eighteen Roma students, born between 1985 and 1999, who were placed in special schools in the Ostrava region of the Czech Republic. A complaint was first filed on their behalf in the Czech Constitutional Court by attorneys from the European Roma Rights Centre (“ERRC”) and local attorneys.³ Plaintiffs’ counsel argued that the plaintiffs had been placed in special schools on account of their race and without any objective justification. The plaintiffs sought the reversal of their placement in the remedial schools and an order by the Constitutional Court that the schools office of Ostrava provide them with compensatory schooling to return them to their *status quo ante*.⁴

¶3 On October 20, 1999, the Constitutional Court dismissed the case. Two bases were given for this decision. The Court dismissed the case in part because thirteen of the eighteen applicants had failed to exhaust the school system’s appeal process for special school placement and, therefore, did not have grounds for a petition to the court. The

¹ *D.H. and Others v. the Czech Republic*, App. No. 57325/00, 47 EUR. H.R. REP. 3 (2008), available at <http://cmiskp.echr.coe.int/tkp197/viewhbk.asp?skin=hudoc-en&action=html&table=F69A27FD8FB86142BF01C1166DEA398649&key=66048&highlight> [hereinafter *D.H. and Others* Grand Chamber Final Judgment].

² Kimberly Ashton, *Standing for Equality: U.S. Lawyer Wins Groundbreaking Discrimination Case for Romany Students*, PRAGUE POST, Nov. 21, 2007.

³ *D.H. and Others v. the Czech Republic*, App. No.57325/00 (Twelfth Section decision on admissibility) (2005), <http://www.errc.org/db/01/4E/m0000014E.doc> [hereinafter *D.H. and Others* Decision on Admissibility].

⁴ *Id.* ¶ 3.

Constitutional Court also claimed a lack of competency to hear the case, because no legal provision had been interpreted or applied in an unconstitutional manner.⁵

¶4 In 2000, the plaintiffs filed a complaint with the ECHR alleging their special school placement violated articles 3,⁶ 6⁷ and 14 (read in conjunction with Article 2 of Protocol no. 1)⁸ of the European Convention. In 2005, the twelfth chamber of the ECHR dismissed all arguments in the complaint except those arising under Article 14 combined with Article 2 of Protocol 1. In 2006, the Second Section of the ECHR found that in the case of *D.H. and Others* there had been no violation of Article 14 of the European Convention. There was one dissenting opinion, and six in favor of dismissal.

¶5 In his concurrence, Judge Costa of France noted that the Grand Chamber might be “better placed than a Chamber” to find that Article 14 had been violated, because the existing case law did not support such a finding.⁹ The lone dissenting voice, Judge Barreto, pointed to the lack of informed consent by the parents, as well as a misapplication of the margin of appreciation, to allow for action that further disadvantaged a minority group (as opposed to affirmative action to improve their position).¹⁰ The applicants, pursuant to rule 73 of the Rules of the Court, filed an appeal to the 2006 Second Chamber decision with the Grand Chamber. They were supported in their appeal by the European Roma Rights Center. The final judgment of the Grand Chamber (“GC”) in the case of *D.H. and Others v. the Czech Republic* was issued on November 13, 2007, finding in favor of the plaintiffs.

¶6 The first section of this case note will provide some context for the case with an overview of the relevant legal and historical background of discrimination against Roma in Eastern European (“EEC”) countries generally,¹¹ and the Czech Republic specifically. The second section will examine the GC’s opinion in *D.H. and Others*. The third section

⁵ *Id.* ¶ 4.

⁶ Article 3 of the Convention reads: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950, 213 U.N.T.S. 222 (*entered into force* Sept. 3, 1953) [hereinafter European Convention].

⁷ Article 6 of the Convention concerns the right to a fair trial. *Id.* art. 6. The applicants asserted the authorities who placed them in special schools did so without the requisite procedural safeguards required under Article 6. *D.H. and Others* Decision on Admissibility, *supra* note 3, at 7.

⁸ Article 14 of the Convention reads: “The enjoyment of the rights and liberties recognised by (...) Convention is to be ensured with no distinction whatsoever, based in particular on sex, race, colour, language, religion, political or any other opinions, national or social origin, the fact of being part of a national minority, wealth, birth, or any other situation.” European Convention, *supra* note 6, art. 14. Article 2 of Protocol no. 1 reads: “No-one may be refused the right to education. The State, in the exercise of the functions it assumes in the area of education and instruction, shall respect the right of parents to have this education and training provided in a manner that conforms to their religious and philosophical convictions.” Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Mar. 20, 1952, 213 U.N.T.S. 262 (*entered into force* May 18, 1954).

⁹ *D.H. and Others v. the Czech Republic*, App. No. 57325/00, ¶ 7 of Judge Costa concurrence (Second Section judgment) (2006), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=D.H.%20%7C%20Others%20%7C%20Czech%20%7C%20Republic&sessionid=5283217&skin=hudoc-en> [hereinafter *D.H. and Others* Second Section Judgment].

¹⁰ *Id.* at 22, ¶ 4.

¹¹ Though this article is focused on the EEC, it is important to note that anti-Roma sentiment is not unique to Eastern Europe by any means. For example, after World War II, the governments of Norway, Sweden and Switzerland implemented programs to force an end to the communal ways of their Roma citizens. These programs included the forced sterilization of Roma men and women, as well as the systemic removal of Roma children into the care of the state. DIRECTORATE-GENERAL FOR EMPLOYMENT AND SOCIAL AFFAIRS, EUR. COMM’N, THE SITUATION OF THE ROMA IN AN ENLARGED EUROPEAN UNION 8 (2004).

of this case note will consider the ramifications and likely impact of the opinion in *D.H. and Others*.

I. THE LEGAL AND HISTORICAL BACKDROP

A. *The Roma in Europe*

¶7 The Roma people¹² are the largest, fastest growing, and poorest minority group in Europe. They are likely the descendants of a caste of migrant Indian artisans called the Dom. They arrived in Europe sometime as early as the 6th Century and as late as the 10th Century, and today they constitute a diverse diaspora across Europe. Traditionally, they have been migratory craftspeople and traders.¹³ They have been persecuted and scapegoated by governments ranging from the Byzantine Empire to the Third Reich.¹⁴

¶8 Official attempts to force the assimilation of the Roma with various local populations in Europe have existed almost as long as there have been Roma in Europe. Such attempts have been largely unsuccessful.¹⁵ Under Communism, however, the lifestyles of the Roma of Eastern Europe were significantly altered. They were forced to settle and to abandon their traditional occupations, to work at conventional, low level jobs, and to integrate into the broader economy (a process referred to under Communism as *proletarianisation*).¹⁶

¶9 Whatever economic and social stability proletarianisation afforded the Roma promptly deteriorated with the fall of Communism. The loss of state subsidized housing, free medical care, and guaranteed employment provided under Communism was a major blow to many Roma who were no longer protected from racial discrimination by a socialist state.¹⁷ In 1991, for example, one study of attitudes in three EEC countries found that 78% of respondents had a negative attitude towards the Roma.¹⁸ Roma were blamed for the chaos and perceived rise in crime rate following the collapse of Communism.¹⁹

B. *Desegregation and the Law in EEC Countries*

¶10 Beginning in the 1990s, Europe began focusing on achieving greater racial equality through minority rights regimes. Most minority rights regimes rely on monitoring

¹² Formerly called Gypsies, the Roma (also “Romani” and “Romany”) “lack a clearly defined common culture, language or religion.” Istvan Pogany, *Minority Rights and the Roma of Central and Eastern Europe*, 6 HUM.RTS. L. REV. 1, 4 (2006). What every Romani society does have is “a similar concept of gaje, or non-Romani individuals. All Romani societies hold gaje to be unclean and untrustworthy and encourage Roma to avoid unnecessary contact with gaje.” Matthew D. Marden, *Return to Europe? The Czech Republic and the EU’s Influence on its Treatment of Roma*, 37 VAND J. TRANSNAT’L L. 1181, 1186 (2004).

¹³ ISABEL FONSECA, BURY ME STANDING: THE GYPSIES AND THEIR JOURNEY 96-98 (1995).

¹⁴ DIRECTORATE-GENERAL, *supra* note 11, at 7- 8.

¹⁵ FONSECA, *supra* note 13, at 235.

¹⁶ Pogany, *supra* note 12, at 13.

¹⁷ Zoltan D. Barany, *Living on the Edge: the East European Roma in Postcommunist Politics and Societies*, 53 SLAVIC REV 321, 321, 327 (1994).

¹⁸ *Id.* at 329.

¹⁹ DIRECTORATE-GENERAL, *supra* note 11, at 9.

mechanisms to enforce rights and affirm the principle of non-discrimination.²⁰ The protections offered by minority rights regimes have proven, by most estimations, ineffective in protecting the rights of Roma citizens in the EEC.

¶11 Istvan Pogany argues that the focus of minority rights regimes such as European Charter for Regional or Minority Languages on the protection and preservation of cultural and linguistic features of minority populations has failed to address the needs of Roma people to gain basic access and parity in education, housing, and employment.²¹ The kind of cultural preservation envisioned by minority rights regimes, Pogany points out, may be largely irrelevant to the significant segment of EEC Roma whose connections to traditional lifestyles and Romani dialects were severed by Communist era integration programs.²² Tom Allen has argued that “[a]s currently conceived, minority rights are also of limited help in securing far-reaching improvements in the educational performance of Roma children, perhaps the key to transforming the prospects of Roma in the CEE states.”²³

¶12 Indeed, the Achilles heel of current minority rights regimes is that the principle of non-discrimination they promote is not enforceable by any judicial body.²⁴ The absence of anti-discrimination laws in EEC countries has made it impossible for Roma to use litigation to secure in Czech courts their right to be free from discrimination in the realm of education. The failure of the plaintiffs in *D.H. and Others* to have their case heard in the Czech Constitutional Court seems to indicate a need for laws recognizing indirect discrimination. Recognition of indirect discrimination is required under paragraph 15 of the EU Race Equality Directive.²⁵ In 2000, the European Union (“EU”) adopted the Race Equality Directive requiring member states and EEC countries seeking admission into the EU to achieve racial equality.²⁶

¶13 The Czech Republic was supposed to have integrated the Race Equality Directive through the passage of anti-discrimination laws by its EU ascension in 2004. As of December 10, 2007, however, anti-discrimination legislation had only just passed the lower house of Czech parliament.²⁷ Article 2 of the Race Equality Directive defines indirect discrimination as existing “where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and

²⁰ Pogany, *supra* note 12, at 7.

²¹ *Id.* at 15.

²² *Id.* at 16.

²³ Tom Allen, *Restitution and Transnational Justice in the European Court of Human Rights*, 13 COLUM. J. EUR. L. 1, 22 (2006).

²⁴ Pogany, *supra* note 12, at 7.

²⁵ The preamble of the Race Equality Directive states that “[t]he appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence.” Council Directive 2000/43/EC, 2000 O.J. (L 180) 22 [hereinafter Race Equality Directive].

²⁶ *Id.*

²⁷ Minister says Czechs avert sanctions for anti-discrimination law, FIN. TIMES LTD., Dec. 10, 2007, at 1, available at Westlaw at 12/10/07 CZECHNEWSA 00:00:00.

necessary.”²⁸ The “apparently neutral” practice in the Czech school segregation was the testing procedure used to place Roma students in special schools.

¶14 Though the Czech Republic has passed laws and implemented programs aimed at improving the lives of its Roma citizens, problems with the implementation of these programs at the local level makes it clear that litigation remains an essential strategy for securing Roma rights in the Czech Republic. In their 2005 report, the Advisory Committee emphasized that local implementation is a problem in the Czech Republic. They noted that, when it came to implementation of national policies on the protection of minorities, “[i]n spite of some laudable initiatives taken at local level, particularly to improve the situation of Roma and dialogue with this community, many local authorities show only limited interest in protecting minorities.”²⁹

C. *Roma in the Czech Republic*

¶15 In Czechoslovakia, the Act on Settlement of Permanently Traveling Individuals was passed in 1958. Though most Czech Roma were not migratory, the Act legalized forced relocation of Roma settlements. Under the 1965 Resolution on Measures Solving the Questions of the Gypsy Inhabitants, “unwelcome concentrations of Gypsies” were targeted for forced relocation. Under Communism, the Czech Roma were looked at not as a minority, but as maladjusted Czechoslovakians.³⁰

¶16 Today, Roma are a legally recognized minority in the Czech Republic. A report published by the Czech Council of National minorities in 2005 stated that “their number, according to qualified estimates, is put at approximately 200,000.”³¹ However, only 11,746 Roma identified themselves as such in the 2001 national census.³² According to a 1999 European Commission report, Romani unemployment in the Czech Republic at that time may have been as high as 90%, though at that time the Czech Republic enjoyed the lowest overall unemployment rate in Europe – 2.7%.³³

D. *“Special Schools” in the Czech Republic*

¶17 Though they make up only about 2% of the population of the Czech Republic, Roma children account for at least 50% of students enrolled in special schools. The practice of placing Roma children in schools for the mentally retarded began in the Czech Republic in 1945.³⁴ The Czech Republic is not the only country to route Roma pupils into schools for the learning disabled. It is a form of segregation also employed in Bulgaria, Hungary, and Slovakia. However, an April 2000 report by the OSCE’s High

²⁸ Race Equality Directive, *supra*, note 25, at art. 2.

²⁹ Council of Europe, Secretariat of the Framework Convention for the Prot. of Nat’l Minorities, Advisory Comm. on the Framework Convention for the Prot. of Nat’l Minorities, *Second Opinion on the Czech Republic Adopted on 24 February 2005*, ¶ 9, ACFC/INF/OP/II(2005)002 (October 26, 2005), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=44158d684>.

³⁰ EUROPEAN MONITORING CENTRE ON RACISM AND XENOPHOBIA, REPORT ON THE SITUATION OF MINORITY EDUCATION IN THE CZECH REPUBLIC 17 (2004).

³¹ *Id.* at 22.

³² *Id.*

³³ Rick Fawn, *Czech Attitudes Towards the Roma: ‘Expecting More of Havel’s Country?’*, 53 EUR.-ASIA STUD. 1193, 1197 (2001).

³⁴ RAXEN NATIONAL FOCAL POINT, EUROPEAN MONITORING CENTRE ON RACISM AND XENOPHOBIA, REPORT ON THE SITUATION OF MINORITY EDUCATION IN THE CZECH REPUBLIC 16 (2004).

Commissioner for National Minorities found the practice was worst in the Czech Republic.³⁵ The special schools are ostensibly established to meet the educational needs of children with learning disabilities or mental handicaps, but in some areas such schools enroll primarily Roma pupils. Opponents of the placement of Roma children in special schools point out that the tests used to determine placement do not take into account the educational background of Roma children (such as a lack of preschool), some of the children's inability to speak much or any Czech³⁶, and the fact that the testing situation may be foreign to them.

¶18 Parental consent for the special school placements is obtained, though not always in writing, and an appeals process exists that is seldom invoked. Roma parents consent to the placement of their children in special schools out of a mix of apathy about education, failure on the part of school officials to disclose that a special school education will not prepare their child for entry into mainstream secondary schools, and fear that their children will be unwelcome in majority-Czech schools. Educational officials emphasize the positive when they seek consent for the placements by framing them as an opportunity for the child to be around other Roma children and receive extra attention. In 2000, the Czech government's commissioner on minority rights observed that, "[t]he Roma like to put their children in special schools, because they know it's not as demanding as other schools..."³⁷

E. Relevant Domestic Law: The Czech "Schools Act"

¶19 The special school placements complained of in *D.H. and Others* took place between 1996 and 1999. At that time, the law governing schools in the Czech Republic was Law no. 29/1984, under which students who completed their elementary education at special schools were unable to go on to secondary schools. Also in effect at the time the events complained of in *D.H. and Others* took place was Decree no. 127/1997 on specialized schools, which laid out in Article 7 the procedure by which children could be placed in special schools.³⁸

¶20 The Schools Act was amended in 2000, so that the law in effect today imposes no statutory barriers to secondary school education on students who complete their primary school education at a special school. Yet, as a member of the Council for Human Rights pointed out in 2000, "in practice there is really very little change because the (special school) students have no chance of making it into the secondary school by passing the

³⁵ Fawn, *supra* note 32, at 1201.

³⁶ The majority of Roma in the Czech Republic are Slovak Roma, forcefully relocated to the Czech part of Czechoslovakia under Communism. 95% of Czech Roma were exterminated by the Nazis.

³⁷ Douglas Herbert, *Gypsy Children Fill Czech Special Schools*, CNN.COM, Sept. 27, 2000, <http://edition.cnn.com/2000/WORLD/europe/09/26/czech.school/index.html> (last visited Jan. 5, 2009).

³⁸ "Article 7 stipulated that the decision to enrol or place a child or pupil in, *inter alia*, a special school was to be taken by the head teacher, provided that the child's or pupil's parents or legal guardian consented. The head teacher was entitled to consult sources such as the parents or legal guardian, the school attended by the pupil, educational psychology and child guidance centres, hospitals or clinics, authorities with responsibility for family and child welfare and health centres. The educational psychology and child guidance centre was responsible for assembling all the documents required to reach a decision and required to make a recommendation to the head teacher regarding the type of school." *D.H. and Others* Grand Chamber Final Judgment, *supra* note 1, ¶ 23.

entrance exam.”³⁹ The Schools Act was amended by legislation again in 2004⁴⁰ in an attempt to reserve special schools for mentally disabled students only.

¶21 A 2006 Report by the European Network Against Racism highlighted some problems with the 2004 legislation that contributed to its lack of impact.⁴¹ They pointed to a lack of “implementing regulations requiring school officials to desegregate schools,” as well as an absence of “effective control mechanisms to monitor racial segregation.”⁴² The European Roma Rights Centre and Vájemné Soužití⁴³ pointed out in a report to the UN in 2006⁴⁴ that the 2004 Schools Act, though it guarantees equal access to education regardless of race, fails to elaborate “specific obligations of specific subjects.”⁴⁵

¶22 Indeed, according to a 2006 report by the European Union Minority Counsel, the changes in the law governing Roma education have had little measurable impact. The report determined that the placement of Roma in special schools for the handicapped remained a problem in the Czech Republic, as well as in Hungary and Slovakia.⁴⁶ The failure of the 2004 changes to the Schools Act to have much impact may be because, though governed by a national law, educational change rests largely in the control of municipalities and individual school directors.⁴⁷

F. Roma Rights Litigation

¶23 Though there is no unified Roma rights movement in Europe,⁴⁸ most Roma rights organizations⁴⁹ pursue a test case litigation strategy in domestic and international courts to secure greater legal protection for their constituents. The organization representing the plaintiffs in *D.H. and Others*, the European Roma Rights Centre (“ERRC”), coordinates with other Roma rights groups and has consultative status with Council of Europe as well as the Economic and Social Council of the United Nations.⁵⁰ In addition to the Czech

³⁹ Douglas Herbert, *supra* note 37.

⁴⁰ Law No. 561/2004 Coll., on pre-school, primary, middle, higher technical and other education (the 2004 “Schools Act”).

⁴¹ GWENDOLYN ALBERT, EUR. NETWORK AGAINST RACISM [ENAR], ENAR SHADOW REPORT 2006: RACISM IN THE CZECH REPUBLIC 11 (2006), http://www.enar-eu.org/Page_Generale.asp?DocID=15294&la=1&langue=EN.

⁴² *Id.*

⁴³ Vájemné Soužití (which translates as “Life Together”) is a Roma-Czech NGO active in the Ostrava region. See <http://www.vzajemnesouziti.cz/en/> (last visited Jan. 5, 2009).

⁴⁴ EUR. ROMA RTS. CENTRE & VÁJEMNÉ SOUŽITÍ, SUBMISSION TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE CONCERNING IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR) IN THE CZECH REPUBLIC, (2007) http://www2.ohchr.org/english/bodies/hrc/docs/ngos/cohre_cz.pdf.

⁴⁵ EUR. ROMA RTS. CENTRE, WRITTEN COMMENTS OF THE EUROPEAN ROMA RIGHTS CENTRE AND VZÁJEMNÉ SOUŽITÍ CONCERNING THE CZECH REPUBLIC FOR CONSIDERATION BY THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION AT ITS 70TH SESSION 18-21 (2006).

⁴⁶ EUR. MONITORING CENTRE ON RACISM AND XENOPHOBIA, EUR. UNION AGENCY FOR FUNDAMENTAL RTS., ROMA AND TRAVELERS IN PUBLIC EDUCATION: AN OVERVIEW OF THE SITUATION IN EU MEMBER STATES 8 (2006), http://fra.europa.eu/fra/material/pub/ROMA/roma_report.pdf.

⁴⁷ Fawn, *supra* note 33, at 1208.

⁴⁸ Otto Pohl, *Gypsies Gain a Legal Tool in Rights Fight*, N.Y. TIMES, May 7, 2006, at 114.

⁴⁹ For example, the Bulgarian Roma rights organization, the Romani Baht Foundation, won a school segregation case in October of 2005 in a Bulgarian court for the Sofia district, and planned on pursuing 50 more school segregation cases the next year. Otto Pohl, *Roma Turn to Courts in Rights Battle: New Strategy Draws on U.S. Blacks' Fight*, INT. HERALD TRIB., May 8, 2006, at 3.

⁵⁰ What is the European Roma Rights Centre?, http://www.errc.org/About_index.php (last visited Jan. 5,

Republic, the ERRC is pursuing school desegregation cases in Bulgaria, Croatia, and Hungary.⁵¹

¶24 Part of the ERRC's strategy for combating anti-Roma racism and ending human rights abuses of Roma is to select "primarily those cases which have the potential to change the existing legal practices, through liberal and far-reaching judicial interpretation, as well as to trigger comprehensive reform of the relevant legislation."⁵² A specific kind of legislative reform the ERRC is seeking is the translation of the EU Race Equality Directive into national law.⁵³ Given that the Czech Republic had not yet implemented the Race Equality Directive in 1999, when the ERRC began representing the plaintiffs in *D.H. and Others* in their case before the Czech Constitutional Court, it would seem that part of what the ERRC was trying to accomplish with this case was to draw attention to that failure.

II. THE GRAND CHAMBER'S JUDGMENT IN *D.H. AND OTHERS*

¶25 The importance of the Court's opinion in *D.H. and Others* arises from three factors. First, in its consideration of a wide array of reports by Interveners⁵⁴ on patterns of discrimination against the Roma, the court shifts its focus from the violations of the individual applicant's rights to systemic discrimination. Second, in its opinion in *D.H. and Others*, the ECHR recognizes by name the principle of indirect discrimination for the first time. Third, this opinion is important for its clarification of how evidence of discriminatory impact should be treated.

¶26 However, the GC missed an opportunity to have a greater impact on the segregation of Roma students in the Czech Republic by failing to critique the applicable national law (the Schools Act, as discussed on pages 9 and 10) and failing to give the Committee of Ministers a mandate to require specific changes to the Schools Act or adoption of a national anti-discrimination law. Nonetheless, in the months following the November 13, 2007 decision, pressure on the Czech legislature to pass an antidiscrimination law to bring the Czech Republic into compliance with the EU Race Equality Directive has increased, and the once stalled bill seems close to passage.

A. Admissibility

¶27 The judgment opens with a consideration of the admissibility of the case in response to an assertion by the Czech Republic that the plaintiffs had failed to exhaust the available domestic remedies. This issue was considered by the Second Chamber, but the

2009).

⁵¹ *Id.*

⁵² ERRC Legal Activities, http://www.errc.org/Litigation_index.php (last visited Feb. 1, 2008).

⁵³ "In view of the significance of the EU Race Equality Directive, the ERRC will continue to build test cases in current EU member states and in the accession countries. We plan to target both the countries that have already transposed the Directive as well as those that have either failed to do so or have adopted inadequate domestic legislation. We believe that this will provide us with a unique opportunity to test in practice the "direct effect" of the EU Race Equality Directive and indeed the domestic courts' understanding of the new concepts introduced in this instrument." ERRC legal defense work with a focus on anti-discrimination litigation, http://www.errc.org/Casesumm_index.php (last visited Feb. 1, 2008).

⁵⁴ "Interveners" are third parties who make submissions to the court, not unlike the American system of *amicus curiae* submissions.

Grand Chamber points out they may make a *de novo* review of issues relating to admissibility. In this case, the Grand Chamber determined it was not just discretionary but necessary that they assess whether domestic remedies had been exhausted.⁵⁵ The determination hinges on whether or not an effective remedy was available, and it is the burden of the government claiming non-exhaustion to show one existed.

¶28 The Czech Republic based their assertion of non-exhaustion on three factors. First, they pointed out that none of the students had exercised their right to appeal through the school system’s appeal mechanism at the time of the placement. Second, six of the plaintiffs had failed to lodge appeals to the Czech Constitutional Court. Third, the government pointed out that only five of the plaintiffs actually contested the legitimacy of their placements in special schools – i.e., only five argued that they did not, in fact, belong in remedial programs.

¶29 The Grand Chamber dismissed all three of the Czech Government’s arguments for a finding of inadmissibility on the basis of non-exhaustion. As to the fact that none of the plaintiffs had appealed through the school system at the time of their placement, the Grand Chamber pointed out that the Constitutional Court itself had “decided to disregard that omission” and that therefore “it would be unduly formalistic to require the applicants to exercise a remedy which even the highest court of the country concerned had not obliged them to use.”⁵⁶ In response to the second asserted basis for non-exhaustion – that only five of the thirteen plaintiffs had brought cases in the Constitutional Court – the court reasoned that, because the Constitutional Court had “confined itself to verifying the competent authorities’ interpretation and application of the relevant statutory provisions without regard to their impact”, the individual facts of thirteen more cases would not have induced a different ruling.⁵⁷ In its rejection of the Czech government’s third argument for non-exhaustion – that, of the six who took their cases to the Constitutional Court, only five asserted they did not belong in the special schools – the court again pointed to the insubstantial analysis of the Constitutional Court as having rendered such distinctions immaterial. In summation, the court found itself unsatisfied that the Constitutional Court of the Czech Republic had afforded the applicants – both those who had brought their claims and those who hadn’t – an effective remedy with a reasonable prospect of success.⁵⁸

B. Evaluation of Second Chamber decision in D.H. and Others.

¶30 Next, the Grand Chamber reviewed the basis of the Second Chamber’s decision. They noted that the lower Chamber had considered that the special schools had not been established only for Roma children. The Grand Chamber also noted that the Second Chamber had determined that the plaintiffs hadn’t successfully rebutted the legitimacy of the school experts’ recommendations as to their placement.

¶31 The Court then reviewed the arguments of the applicants in favor of overturning the Second Chamber’s decision. The applicants argued that the Second Chamber’s consideration of *whom* the special schools had been designed for was an erroneous consideration of intent in an indirect discrimination case. They asked the court for a

⁵⁵ *D.H. and Others* Grand Chamber Final Judgment, *supra* note 1, ¶ 112.

⁵⁶ *Id.* ¶ 118.

⁵⁷ *Id.* ¶ 121.

⁵⁸ *Id.* ¶¶ 115, 122.

“clear ruling that intent was not necessary to prove discrimination under Article 14.”⁵⁹ They also asked for clarification of the use of statistical evidence in Article 14 cases, asserting the Second Chamber’s finding was not in accordance with the ruling in *Hoogendijk v. the Netherlands*. In the *Hoogendijk* case, the Court had indicated statistics alone could be enough to shift the burden to the respondents to “provide an objective explanation of the differential treatment.”⁶⁰ The applicants also argued that the consent of the parents had been given undue weight by the Second Chamber and that the right not to be discriminated against in education was so fundamental that a parent could not be deemed to have waived it on behalf of their child.⁶¹

¶32 The Grand Chamber then reviewed the response by the Czech Government to the claims of the applicants. The government argued that the data submitted by the applicants to show the disproportionate placement of Roma children in special schools was not reliable. They also asserted that the testing procedure was racially neutral and cautioned the Grand Chamber that it lacked the qualifications necessary to make determinations about so specialized a field and, therefore, should “exercise a degree of restraint.” The government claimed the parental consent made the placements not instances of governmental action, but action on the part of the parents. Finally, the Czech government argued that the special schools were consistent with the Convention’s principle of non-discrimination, because they aimed for “the adaptation of the education process to the capacity of children with specific educational needs.” In an echo of the American Supreme Court’s finding in *Plessy v. Ferguson*⁶² that racially segregated facilities could be “separate but equal,” the Czech Government claimed the special schools are separate but “not inferior.” To negate claims by the applicants that special schools were responsible for applicants’ failure to find employment after graduation, the Government asserted that this was not the fault of their education, but was instead a reflection of widespread unemployment in the Ostrava region.⁶³

¶33 The Czech Government made little concession in its answer to the applicants’ claims. Only in the case of the ninth applicant did the government concede that the reasons for special school placement may have been “on the borderline between learning difficulties and a socio-cultural disadvantaged environment.”⁶⁴ They also claimed that the Schools Act of 2004 had changed the system by integrating “modified educational programme” classes into mainstream primary schools. They asserted that special schools were no longer being misused.

¶34 In reaching their judgment, the Grand Chamber relied on input from various Interveners.⁶⁵ The submission of the Minority Rights Group International, the European Network against Racism and the European Roma Information Office demonstrated that the special schools do offer an inferior education to Roma children with the following concrete example: children in special schools are not expected to know the Czech alphabet or numbers up to ten until their third or fourth school year. The International Step by Step Association, the Roma Education Fund and the European Early Childhood

⁵⁹ *Id.* ¶ 132.

⁶⁰ *Id.* ¶ 137.

⁶¹ *Id.* ¶ 142.

⁶² 163 U.S. 537 (1896).

⁶³ *D.H. and Others* Grand Chamber Final Judgment, *supra* note 1, ¶¶ 148-58.

⁶⁴ *Id.* ¶ 152.

⁶⁵ *See supra* note 52.

Education Research Association brought to the court's attention the fact that the assessments of Roma children by the Ostrava school systems did not take into account the language or culture of the children, their prior learning experiences, or their unfamiliarity with the testing situation.⁶⁶

C. The "Legal Analysis" Section of *D.H. and Others*

¶35 The Court then assessed the appeal of the lower Chamber's decision in the case of *D.H. and Others*. They began with a survey of the main principles applicable to the case. They pointed out that, although Article 14 does not preclude differential treatment to protect inequalities, a general policy with disproportionately prejudicial effects on a particular group "may be considered discriminatory notwithstanding that it is not specifically aimed at that group." The court stated that differential treatment on the basis of ethnicity is a form of racism. They affirmed the principle that minority cultures should be protected.⁶⁷

1. Making a Prima Facie Case of Discrimination

¶36 On the issue of whether statistics alone can make a prima facie case to shift the burden to the respondent state, the court wrote that, as to "prima facie evidence capable of shifting the burden of proof," there are no "pre-determined formulae for its assessment." However, this qualification was only to say that statistics don't necessarily always make a prima facie case. The court went on to affirm the ruling in *Hoogendijk* that statistical evidence as to the effects of a rule neutral on its face *can* shift the burden to respondent.⁶⁸

¶37 The Grand Chamber noted that Council Directive 97/80/EC and 2000/43/EC stipulate that a violation of the principle of equal treatment may be established "by any means, including on the basis of statistical evidence." The statistical evidence submitted and at issue in this case was a survey that the plaintiffs had sent around to head teachers in the Ostrava region. The survey asked the head teachers to give their best estimates of rates of Roma placement in special schools. The Czech Republic attacked the applicants' survey as a source of statistical evidence and argued it was too flawed to conclusively establish anything.⁶⁹

¶38 The Court pointed out that, though imperfect, the results of the survey did not depart significantly from figures conceded to by the Czech Government itself and confirmed by the reports of independent bodies. The government had admitted that more than half of the students in special schools were Roma. The Czech government had even conceded (in a different venue) the fact that at some special schools 80-90% of the students were Roma. On the issue of parental consent, the Grand Chamber wrote that they were not satisfied the parents' consent had been informed consent. They also agreed with the applicants' argument that a right to be free of discrimination in the educational sphere was a right so fundamental it could not be waived by the parents.⁷⁰

⁶⁶ *D.H. and Others* Grand Chamber Final Judgment, *supra* note 1, ¶¶ 165-68.

⁶⁷ *Id.* ¶¶ 175-81.

⁶⁸ *Id.* ¶¶ 178-80.

⁶⁹ *Id.* ¶¶ 187-90.

⁷⁰ *Id.* ¶¶ 191-204.

¶39 The court found that the relevant provisions of the Schools Act had a different effect on Roma children than non-Roma children and “resulted in statistically disproportionate numbers of placements of the former in special schools.” They found that schooling arrangements for Roma children were “not attended by safeguards...that would ensure that, in the exercise of its margin of appreciation in the education sphere, the State took into account their special needs as members of a disadvantaged class.”⁷¹

¶40 The court determined the Czech Republic was not within its margin of appreciation in its statutory promulgation of the special school system, because the system was not proportional to the aim it was supposed to achieve. They noted that a kind of strict scrutiny will be applied to the fit between means and ends in cases of racial or ethnic discrimination. The lack of proportionality in this case was between the psychological test results and the placements they were supposed to justify. The psychological test results did not amount to an objective and reasonable justification for the special school placements under the purposes of Article 14 of the Convention, and, therefore, a violation of Article 14 had taken place.⁷² The Chamber, in effect, did not buy the Czech government’s rationale that – when it came to discriminating against Roma pupils - the test made them do it.

2. ECHR Treatment of Indirect Discrimination in *D.H. and Others*

¶41 The ECHR laid the foundation for its holding that intent is not an issue in cases of indirect discrimination in the case of *Nachova and Others v. Bulgaria* (“*Nachova*”).⁷³ *Nachova* was the first ECHR case to find a violation of Article 14 in conjunction with Article 2.⁷⁴ The *Nachova* case was also a Roma rights case, and it constituted the first finding by the Grand Chamber of a violation of Article 14’s principle of non-discrimination. The issue in the *Nachova* case was whether discriminatory intent could be discerned in the killing of a Roma man by a police officer whom a neighbor reported had shouted “damn Gypsies” while firing an automatic weapon into the man’s chest.⁷⁵

¶42 In *Nachova*, the Grand Chamber began laying the groundwork for its ruling in *D.H. and Others*. The Chamber pointed out that in “the legal systems of many countries proof of the discriminatory effect of a policy or decision will dispense with the need to prove intent in respect of alleged discrimination in employment or the provision of services.” The court in *Nachova* pointed out that intent could not be an issue in cases involving racially motivated acts of violence, because “such an approach would amount to requiring the respondent Government to prove the absence of a particular subjective attitude on the part of the person concerned.” In *Nachova*, the ECHR found a violation of Article 14, read in conjunction with Article 2, in the failure of the police in their investigation of the shooting to look into “the existence of a possible link between racist attitudes and an act of violence” in the case.⁷⁶

⁷¹ *Id.* ¶¶ 193-207.

⁷² *Id.* ¶ 199.

⁷³ *Nachova and Others v. Bulgaria*, Apps. Nos. 43577/98 & 43579/98, Eur. Ct. H.R. (2005), available at <http://www.echr.coe.int/echr> [hereinafter *Nachova*].

⁷⁴ *Recent Cases: International Law - - Human Rights - - European Court of Human Rights Finds Bulgaria Liable for Failure to Investigate Racially Motivated Killings*, 119 HARV. L. REV. 1907 (2006).

⁷⁵ *Nachova*, *supra* note 73, ¶ 153.

⁷⁶ *Id.* ¶¶ 161-171.

¶43 The GC in *D.H. and Others* also points to its decision in the case of *Hoogendijk v. the Netherlands*,⁷⁷ an ECHR (First Section) admissibility decision from 2005 in which a woman whose disability income benefits had been withdrawn charged that the establishment of a minimum pre-disability income requirement in order to receive disability benefits resulted in indirect discrimination against women. The applicant asserted this discrimination resulted in a violation of Article 14, read in conjunction with the property rights established by Article 1 of Protocol 1, because of the impact it had on women who had become disabled, as she had, at a point in time when few women earned income.

¶44 The Court in *Hoogendijk* held that the statistical evidence the applicant presented was sufficient to shift the burden to the government to provide an explanation for the disparate impact on men and women of the relevant amendment to their social insurance law. The Court underscored that statistical evidence was not “automatically sufficient for disclosing a practice which could be classified as discriminatory under Article 14 of the Convention,” but that it could be sufficient to shift the burden to the respondent to refute a claim of indirect discrimination.⁷⁸

¶45 The Court proceeded with a caution in *Hoogendijk* that the Grand Chamber dispensed with in *D.H. and Others*. In *Hoogendijk*, after holding both that the burden had shifted to the government and that the government had not submitted any objective factors for the minimum income level, the court then stepped in and supplied some objective reasons on behalf of the government. The objective reasons the Court offered on behalf of the Government to meet its burden were largely to do with controlling spending. The Court then ruled that the complained of change to the social insurance law was not in violation of Article 14.⁷⁹ The decision was burden shifting with training wheels. In *D.H. and Others*, the Grand Chamber took off the training wheels and did not step in to meet the burden where the Government failed to provide objective reasons for its special school system.

¶46 The Court in *D.H. and Others* also cited to the 2006 final judgment in the case of *Zarb Adami v. Malta*⁸⁰ for an example of the Court relying *inter alia* “on statistical evidence of disproportionate effect.”⁸¹ *Adami v. Malta* was a case in which a man who, between 1971 and 2005, was called for jury duty four times. After serving the first three times as juror and foreman in criminal cases, the man did not show up the fourth time and refused to pay the fine. He asserted discriminatory treatment in the jury service laws, because Malta women were largely exempted from jury duty. The applicant offered statistical evidence that, between 1992 and 1997, only 3.05% of jurors had been women. The applicant’s arguments of discrimination had been rejected by Malta’s Civil Court and then Constitutional Court on grounds much like those on which the Czech Constitutional court dismissed the case of *D.H. and Others* – that the law governing the practice was facially neutral.⁸²

⁷⁷ *Hoogendijk v. the Netherlands* (dec.), App. No. 58461/00 (2005).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Zarb Adami v. Malta*, App. No. 17209/02 (2006) [hereinafter *Adami*].

⁸¹ *D.H. and Others* Grand Chamber Final Judgment, *supra* note 1, ¶ 137.

⁸² *Adami*, *supra* note 80, ¶¶ 17-20.

- ¶47 The ECHR in its decision reviewed the basis of the decision of the Maltese Constitutional Court. The Constitutional Court had found that women were exempted from service not by the law, but by the legitimate and lawful jury selection practices of judges and lawyers. The applicant argued that jury duty was a “normal civic obligation” within the meaning of Article 4 § 3(d) of the Convention which, read in conjunction with article 14 of the Convention, should be imposed without regard for gender.⁸³
- ¶48 The Court in *Zarb Adami* pointed out that it was the ultimate arbiter of human rights and that it would determine the margin of differential treatment it would allow member states. Such a margin would be determined on the basis of “the changing conditions in Contracting States” and in response to “any emerging consensus as to the standards to be achieved.” The decision is unclear on the sufficiency of statistical evidence to make a prima facie showing of indirect discrimination. After noting that they “had held in previous cases that statistics are not by themselves sufficient to disclose a practice which could be classified as discriminatory,” with no fanfare or mention of burden shifting, the Court shifts the burden to the Maltese government to provide reasonable and objective explanations for the *de facto* situation of discrimination.⁸⁴
- ¶49 The Court in *Zarb Adami* rejected the government explanation of the gender gap in jury service as only constituting an “explanation of the mechanisms which had led to the difference in treatment complained of.” The practice was found to be a violation of Article 14.⁸⁵

3. Clarifying the Relevance of Intent in Discrimination Cases

- ¶50 In *D.H. and Others*, the GC highlighted community practice to legitimate its narrowing of the margin of appreciation for national legal systems’ recognition of disparate impact as proof of discrimination. Under the heading “Community Law and Practice” the Court cited Article 2 § 2 of Council Directive 97/80/EC of December 15, 1997, Article 4 § 1 of the same on burden of proof, and Preambles of Council Directive 2000/43/EC of June 29, 2000 and 2000/78/EC of November 27, 2000. The relevant Community law shows the development of indirect discrimination from a gender discrimination to a racial discrimination standard. The cited laws include burden shifts to respondents to show that a measure was necessary and can be justified by non-discriminatory aims. The Preambles announce that national legal practices may permit “indirect discrimination to be established by any means including on the basis of statistical evidence.”⁸⁶
- ¶51 The court bolsters its case for disparate impact evidence’s sufficiency to shift the burden in cases of indirect discrimination by citing to House of Lords and Supreme Court cases. The case of *Regina v. Immigration Officer at Prague Airport and Another* concerned a practice by British immigration officials of “pre-screening” passengers flying from Prague to the U.K. Though no policy was written out to establish the practice, British officials would keep Roma passengers from boarding flights to England. This practice was a reflection of the British government’s efforts to stem the tide of

⁸³ *Id.* ¶ 22.

⁸⁴ *Id.* ¶¶ 74-76.

⁸⁵ *Id.* ¶ 82.

⁸⁶ *D.H. and Others* Grand Chamber Final Judgment, *supra* note 1, ¶ 83.

Roma immigration in the early 1990s, when Roma were leaving the Czech Republic en masse. Though the House of Lords found the practice of the officials at the Prague Airport to be a case of direct discrimination, they also laid out the parameters of indirect discrimination in dicta. In *D.H. and Others*, the GC included a lengthy excerpt from the Baroness Hale of Richmond’s judgment, which defined indirect discrimination as the use of a requirement or condition which members of one sex or racial group “are much less likely to be able to meet than members of another” and “which cannot be justified independently of the sex or race of those involved.”⁸⁷

¶52 The Grand Chamber cites to the U.S.⁸⁸ Supreme Court case of *Griggs v. Duke Power Co*⁸⁹ for an explanation of the immateriality of intent in cases of indirect discrimination. In *Griggs*, the plaintiffs were suing a power plant that required high school diplomas or the passing of an aptitude test. The requirement had the effect of barring most African Americans from employment. The opinion, excerpted at length, states that “if, as here, an employment practice that operates to exclude Negroes cannot be shown to be related to job performance, it is prohibited, notwithstanding the employer’s lack of discriminatory intent.”⁹⁰

D. The Verdict and Remedies in *D.H. and Others*

¶53 The applicants sought individual remedies for themselves and collective remedies for all Roma students in the Czech Republic. The applicants cited to the cases of *Broniowski v. Poland*⁹¹ and *Hutten-Czapska v. Poland*⁹² for the proposition that individuals may request the redress of wrongs suffered by an entire group of people if they also suffered the wrong and are a member of that group. They asked that hindrances be removed to the enjoyment of rights by the Roma people.⁹³

¶54 For themselves, they sought a remedy of 22,000 Euros each for non-pecuniary damages, including emotional harm. They also sought a return to their status quo ante through the provision of compensatory lessons by the Ostrava Education Authority and Minister of Education. The government argued in response that there was no causal link between the emotional suffering the plaintiffs sought a remedy for and a violation of the Charter, and that 22,000 Euros was an excessive award for non-pecuniary damages.⁹⁴

¶55 The ECHR has the power to award largely declaratory relief. Judgments establish that a violation of the European Convention has occurred, and “it is for the respondent State to choose the necessary measures to comply with it.”⁹⁵ The implementation of these

⁸⁷ *Id.* ¶ 105.

⁸⁸ In light of the Court’s reference to American discrimination jurisprudence, it is worth noting that one of the three lawyers who tried the case before the ECHR was an American, James Goldston. Kimberly Ashton, *Standing for Equality: U.S. Lawyer Wins Groundbreaking Discrimination Case for Romany Students*, PRAGUE POST, Nov. 21, 2007.

⁸⁹ 401 U.S. 424 (1971).

⁹⁰ *D.H. and Others* Grand Chamber Final Judgment, *supra* note 1, ¶ 107.

⁹¹ *Broniowski v. Poland*, App. No. 31443/96, § 189, ECHR 2004-V (GC).

⁹² *Hutten-Czapska v. Poland*, App. No. 35014/97, §§235-237, ECHR 2006 (GC).

⁹³ *D.H. and Others* Grand Chamber Final Judgment, *supra* note 1, ¶ 214.

⁹⁴ *Id.* ¶¶ 213-215.

⁹⁵ Valerio Colandrea, *On the Power of the European Court of Human Rights to Order Specific Non-Monetary Measures: Some Remarks in Light of Assanidz, Broniowski and Sejdic Cases*, 7 HUM. RTS. L. REV. 396, 397 (2007).

measures is subject to the control of the Committee of Ministers.⁹⁶ Under Article 13 of the European Convention, states must give an “effective remedy” for rights violations.⁹⁷ Remedies must be “reasonably speedy” and “effective in both law and practice.”⁹⁸

¶156 Beyond ruling that a violation of the applicants’ rights had occurred, the Grand Chamber awarded scant remedy to the applicants. Siding with the Czech Government, they held that 22,000 Euros per applicant would be an excessive award of damages, because they could not “speculate on what the outcome of the situation complained of by the applicants would have been had they not been placed in special schools.” Instead, the applicants were each awarded 4,000 Euros for their suffering.⁹⁹

¶157 In his dissent, Judge Borrego Borrego argued that the Grand Chamber had “dispense[d] with an examination of the individual applicants” in its rush to evaluate the “overall social context.”¹⁰⁰ The individual applicants did, after the issues of exhaustion of remedies and informed consent were dispensed with at the beginning of the Grand Chamber’s opinion, fade from consideration. The opinion is focused more on the systemic abuse of Roma human rights that the special school system represents than it is on the violations of the rights of the actual parties. The remedies awarded by the court confirm that the individual applicants are less the beneficiaries of their verdict than future generations. For example, the compensatory lessons sought by the applicants (which they had sought from the time they brought their case before the Czech Constitutional Court) are simply not awarded. In fact, they are not even discussed by the Grand Chamber in its opinion.

¶158 In its verdict, the Grand Chamber passed up an opportunity to address with specificity the deficiencies in the Schools Act. Instead, the Grand Chamber did not mandate any specific changes in the law of the Czech Republic. They provided two reasons for this. First, the Chamber pointed out that the relevant law had already been amended to eradicate the parts in conflict with the Convention. Second, they noted the Committee of Ministers had “recently made recommendations to the member States on the education of Roma/Gypsy children in Europe.” This observation seems to say a change in the Schools Act, supervised by the Committee of Ministers, would not “put an end to the violation found by the Court and to redress so far as possible the effects.”¹⁰¹ In failing to call for a change to the Czech legal order, the GC passed up the opportunity to ask the Committee of Ministers to push harder for the passage of national anti-discrimination legislation in compliance with the EU Race Equality Directive, as well as the opportunity to require that the deficiencies in the existing Schools Act be addressed.¹⁰²

¶159 It would have been within the powers of the Grand Chamber to give the Committee of Ministers specific instructions regarding changes to be encouraged in the domestic legal order. Though it has long been the practice of the ECHR to issue largely declaratory verdicts, in 2004 the Committee of Ministers asked the ECHR to “as far as

⁹⁶ *Id.*

⁹⁷ MICHAEL D. GOLDHABER, A PEOPLE’S HISTORY OF THE EUROPEAN COURT OF HUMAN RIGHTS 133 (2007).

⁹⁸ *Id.*

⁹⁹ *D.H. and Others* Grand Chamber Final Judgment, *supra* note 1, ¶ 217.

¹⁰⁰ *D.H. and Others* Grand Chamber Final Judgment, *supra* note 1, ¶¶ 5, 7 (Borrego Borrego dissent).

¹⁰¹ *D.H. and Others* Grand Chamber Final Judgment, *supra* note 1, ¶ 216.

¹⁰² See *supra* notes 40 and 43.

possible, [...] identify, in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments.”¹⁰³ Though it is far beyond the scope of this comment to consider with any real depth the ways in which D.H. and Others may be comparable to U.S. Supreme Court school desegregation cases, such a comparison is a useful jumping off point for noting that the verdict in D.H. and Others fails in the area of particularity. It is as if the ECHR is ordering the Czech Republic to desegregate its school system, as the U.S. Supreme Court did in *Brown v. Board of Education*, “with all deliberate speed.”¹⁰⁴ In other words, the failure to acknowledge that the Czech laws – though perhaps not to blame for school segregation – do not protect Roma from discrimination, makes this a landmark decision without teeth.

¶160 By failing to direct the Committee of Ministers to oversee changes in the existing Schools Act and press for the passage of an anti-discrimination law, the Grand Chamber seemed ultimately to ignore the chilling evidence it cited to earlier in its opinion. The court turned its back on the fact that, even with the existing Schools Act amended to not discriminate against Roma children on its face, and even with measures to shrink the special school system, de facto special schools were still operating after the 2004 changes – just under different names. The European Roma Rights Centre Reports of 2005 and 2006 reported that the Schools Act of 2004 had little effect. The Chamber summarized the Centre’s findings as being that “in many cases special schools had simply been renamed ‘remedial schools’ or ‘practical schools’ without any substantial change in the composition of their teaching staff or the content of their curriculum.”¹⁰⁵

¶161 Such deep entrenchment of systemic segregation of Roma children would seem to recommend more aggressive, affirmative measures against it.¹⁰⁶ Aggressive measures could come in the form of domestic litigation on behalf of Roma children. Yet, as of November 13, 2007, the Czech Republic did not have an anti-discrimination law in place under which Roma could litigate for equal access to education. Since joining the European Union in 2004, the Czech Republic has failed to adopt as legislation several European Union initiatives addressing fundamental Convention Rights. At the end of 2006, the Republic had not implemented the EU Race Directive.¹⁰⁷ The adoption of the Race Directive was a condition of the Czech Republic’s ascension to the EU.¹⁰⁸ In its 2006 Shadow Report on the Czech Republic, the European Network Against Racism stated that “[t]he year 2006 saw a worsening of the situation in the Czech Republic with regard to racism in general and against the Romani minority in particular.”¹⁰⁹

¹⁰³ Committee of Ministers Res. (2004)3, 12 May 2004, DH Res (2004)3.

¹⁰⁴ *Brown v. Board of Education of Topeka*, 349 U.S. 294, 301 (1955).

¹⁰⁵ *D.H. and Others* Grand Chamber Final Judgment, *supra* note 1, ¶ 145.

¹⁰⁶ According to Milena Adamova, a project coordinator for a one-year survey of Czech Romanies on their experiences of discrimination, none of the 691 Romanies out of 970 the project interviewed who complained of discrimination in employment, housing, and education had taken their cases to court. Adamova observed “it was difficult for Romanies to defend themselves because the Czech Republic had no antidiscrimination law...” *Two-thirds of Czech Romanies felt discriminated against – project*, FIN. TIMES LTD., Jan. 30, 2008, at 1, available at Westlaw at 1/30/08 CZECHNEWSA 00:00:00.

¹⁰⁷ GWENDOLYN ALBERT, *supra* note 41, at 4.

¹⁰⁸ *Id.* at 5.

¹⁰⁹ *Id.*

¶62 The failure of local implementation of national initiatives for improving the situation of minorities in the Czech Republic is evident from the 2005 Council of National Minorities (“CNM”)¹¹⁰ *Report on the Situation of National Minorities in the Czech Republic in 2004*, which reported that implementation of national initiatives to improve the situation of the Roma was not a priority at the local level. The CNM report documents some of the failure of localities to comply with national initiatives affecting the Roma. For its report on the compliance of 249 municipalities required by Act No. 128/2000 to set up committees on national minorities, the CNM contacted the municipalities with a questionnaire on their progress in setting up the committees. Sixty-six did not reply, and 61 reported they had not set up committees. In the report, answers provided by some of the municipalities were included (in English translations).

¶63 The questionnaire sought information on whether committees had been set up, who was on them, what they did, and how well they interacted with other organizations. In the answers included in the CNM report, there is little mention of Roma membership on committees, but there is frequent mention of Polish and Slovak participation. Overt anti-Roma sentiment is also evident in some of the answers. The town of Nová Ves reported “[t]he high number of members in [Roma minority] households and their temperament complicate mutual relations with fellow inhabitants in the municipality and in the buildings where they live. The municipality hopes that the establishment of the committee will improve cooperation.”¹¹¹ The town of Nové Město pod Smrkem notes its “Committee for the Roma Minority” reported no activities and issued no written reports “mainly because of lack of initiative on the part of the Roma minority.”¹¹²

¶64 The anti-Roma sentiment reflected in some of the CNM questionnaire answers is a reflection of the general Czech attitude towards the Roma. For example, in a recent survey of secondary school students in the Czech Republic conducted by the NMS agency, almost 50% said the state should establish special schools for Romani, and one third were in favor of expelling the Roma from the Czech Republic.¹¹³ There have been assertions made that the ECHR itself is not immune from racist attitudes towards the Roma, particularly on the part of Judges from EEC countries. For example, in another ECHR case¹¹⁴ involving the rights of a Roma applicant, only one out of the 7 judges from EEC countries voted along with the majority West Europeans in favor of a finding that a Roma woman’s rights were violated.¹¹⁵

¹¹⁰ The Council of National Minorities is a governmental advisory body that is a holdover from the Communist era.

¹¹¹ COUNCIL OF THE GOV’T FOR NAT’L MINORITIES, OFFICE OF THE GOV’T OF THE CZECH REP., REPORT ON THE SITUATION OF NATIONAL MINORITIES IN THE CZECH REPUBLIC IN 2004 67 (2005).

¹¹² *Id.* at 76. Also worth noting are the supposed highlights of programs for Roma. The town of Vintřov reported “[c]ooperation is good, especially the organization of Roma entertainment in the local cultural facility, for minimum hire expense.” *Id.* at 77. Reporting on activities organized for minorities, the town of Orlová described “a trip to a multiplex cinema in Ostrava for [Roma] children from problem families, who are kept under constant surveillance.” *Id.* at 79. The Roma children of Orlová were also treated to “tobogganing on plastic bags” *Id.*

¹¹³ *Most of young Czechs intolerant of Romanies, prisoners – poll*, FIN. TIMES LTD., Dec. 17, 2007, at 1, available at Westlaw at 12/17/07 CZECHNEWSA 00:00:00.

¹¹⁴ *Chapman v. U.K.*, App. No. 27238/95 (GC). Also worth noting are the nationalities of the judges who dissented in *D.H. and Others*: Judge Borrego Borrego (Spain), Judge Sikuta (Slovakia), Judge Jungwiert (Czech Republic), and Judge Zupancic (Slovenia).

¹¹⁵ Lilla Farkas, *Knocking at the Gate: The ECHR and Hungarian Roma*, EUMAP, May 2, 2002, <http://www.eumap.org/journal/features/2002/may02/echrandhunroma>.

¶165 Some evidence of subscription to the view that the Roma are largely to blame for their circumstances can be seen in the GC reasoning on how great an amount to award in damages. In *D.H. and Others*, the Czech government argued that the actions of the applicants (not participating fully in the programs of job placement centers, dropping out of school), rather than the inferior education they received at special schools, were the proximal cause of their joblessness. The GC seems to give some credence to the Government's implications that the applicants probably wouldn't have made much of *any* educational opportunities they were given. In the section of the Judgment on the awarding of only 4,000 Euros in damages instead of the requested 22,000 Euros, the Court circumvented accusing the applicants of inherent laziness and instead waxed philosophical in observing that "[the] court cannot speculate on what the outcome of the situation complained of by the applicants would have been had they not been placed in special schools."¹¹⁶

III. RAMIFICATIONS AND LIKELY IMPACT OF THE FINAL JUDGMENT IN *D.H. AND OTHERS*

¶166 The impact of the GC's final judgment in the case of *D.H. and Others* will be felt beyond the Czech Republic. According to one report, "[t]he legislation in all member states of the Council of Europe, which administers the court, will have to be revised to ensure that Roma children do not suffer from discrimination in schooling."¹¹⁷ Though, technically, the decision is binding only on the Czech Republic, James Goldston notes that, as a practical matter, the Grand Chamber "expects, and governments would be well-advised, to heed the guidance that it is providing."¹¹⁸ This begs the question: what guidance does the Court provide countries that segregate Roma students? Even Goldston, who represented the applicants in *D.H. and Others*, recognizes that one possible outcome of the ruling, from the standpoint of Roma students, is "nothing."¹¹⁹

¶167 And yet, despite weaknesses in the verdict's direction on how the laws of the Czech Republic might be changed to dismantle school segregation, the decision in *D.H. and Others* has had an immediate and profound impact on the Czech Republic. In the days following the final decision in *D.H. and Others*, the pressure applied by the European Commission on the Czech Republic and Slovakia to transpose the EU Race Equality Directive into national legislation was tangible. On November 15, two days after the rendering of the final judgment in *D.H. and Others*, the European Commission called on the Czech Republic and Slovakia to take measures preventing future discrimination against Romani children in education.¹²⁰ The European Commission did so in reaction to the finding in *D.H. and Others*.¹²¹ The Minorities and Human Rights Minister of the Czech Republic, Džamila Stehliková, said she expects parliament to pass an anti-discrimination bill in 2008.¹²²

¹¹⁶ *D.H. and Others* Grand Chamber Final Judgment, *supra* note 1, ¶ 217.

¹¹⁷ *EU officials appeal the Czech, Slovak governments to end discrimination of Roma*, AP, INT'L HERALD TRIB., Nov. 15, 2007, <http://www.iht.com/articles/ap/2007/11/15/europe/EU-GEN-EU-Roma-Discrimination.php>.

¹¹⁸ Ashton, *supra* note 2.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *D.H. and Others* Grand Chamber Final Judgment, *supra* note 1, ¶ 14.

¹²² *Minister says Czechs avert sanctions for anti-discrimination law*, FIN. TIMES LTD., Dec. 10, 2007, at 1,

¶68 Beyond its impact on Roma access to education in the Czech Republic, James Goldston (now of the Open Society Justice Initiative) predicts the verdict in *D.H. and Others* will lead other European states to better look after the education of minority children and points to the Turkish minority in Germany and Algerians in France as examples of other groups for whom the decision may have ramifications. Goldston also has predicted the decision “will benefit the most the Czech society as a whole, Romanies, Czechs as well as other citizens and foreigners who have a permanent residence in this country. It also contributes to our integration into the EU.”¹²³ There can be no doubt the ability to show discrimination through disparate impact evidence at the level of national courts will be a valuable litigation tool for more minority groups than just the Roma.

¶69 *D.H. and Others* is also likely to compel national constitutional courts across Europe to examine *de facto* situations of discrimination, rather than simply analyzing whether a law was facially neutral and being followed to the letter (as the Czech Constitutional Court did in dismissing the applicants’ case in 1999). Though the adoption of the idea of indirect discrimination into civil law systems will likely occur only in fits and starts until there are national laws supporting it, constitutional courts are now on notice that the time has come to follow the Grand Chamber’s indirect discrimination jurisprudence. Hopefully, more constitutional courts in EEC countries will demand government officials offer reasonable and objective explanations for policies that have disparate impacts on minorities.

IV. CONCLUSION

¶70 Though the decision in *D.H. and Others* is binding only on the Czech Republic, in the months following the decision it has become clear that it is having an immediate and tangible effect on legal systems throughout Europe. The European Roma Rights Centre has scored a major victory in its campaign to ensure the transposition of the EU Race Equality Directive into national legal systems. By announcing the existence of indirect discrimination, the Court has spurred renewed interest and focus in Europe on applying pressure to countries that have failed to make indirect discrimination illegal. The verdict’s failure is its lack of specificity in advising the Committee of Ministers *how* countries with special school systems could begin to dismantle them through changes in their laws.

¶71 Even though it would appear the Czech Republic is at last on the verge of passing national anti-discrimination legislation, the flaws in the Schools Act remain unacknowledged by the ECHR. The GC’s decision would have had a greater impact on Roma students in the Czech Republic if the Court had advised the Committee of Ministers to supervise the amendment of the Schools Act to create accountability and oversight. The GC erred in concluding that the amended Schools Act is adequate legislation. The Schools Act, as amended in 2004, allows individual school directors to retain discretionary control over Roma student placement. Given the evidence of deeply entrenched anti-Roma sentiment in the Czech Republic, and problems with

available at Westlaw at 12/10/07 CZECHNEWSA 00:00:00.

¹²³ *Czech press survey*, FIN. TIMES LTD., Nov. 16, 2007, at 1-2, available at Westlaw at 11/16/07 CZECHNEWSA 00:00:00.

implementation at the local level of national directives, this is an overbroad margin of appreciation.