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UDK: 341.231.14:341.645(4-672EU)

Рад примљен: 30.06.2015.

Рад прихваћен: 03.12.2015.

## **CONCEPT OF INDIRECT DISCRIMINATION UNDER ARTICLE 14 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS**

**Abstract:** *The concept of indirect discrimination is developed in internal law of many countries, as well as in EU law. The related legal development in the EU influenced the European Court of Human Rights to add a new meaning to Article 14 of the European Convention on Human Rights. In the last decade, the Court has started to interpret Article 14 as a legal basis for the prohibition of indirect discrimination. Some judgments of the Court show that the concept, as applied by the Court, brings remarkable legal potentials for further transformation of European societies in direction of better inclusion of marginalized groups.*

**Key words:** *Indirect discrimination, European Convention on Human Rights.*

### **1. Introduction**

Uniform or convergent national practices in 47 Contracting Parties, which are relevant for the application of the European Convention on Human Rights (hereinafter: the ECHR or the Convention), are a means used by the European Court of Human Rights (hereinafter: the ECtHR or the Court) for the interpretation of the Convention. The concept of indirect discrimination has become widespread through national legal systems of majority or even all 47 Contracting Parties. The EU contributed a lot to the development of the concept. A progress in the development and spreading of the concept influenced the ECtHR to add a new meaning to Article 14 of the ECHR.

The first big change of Article 14 of the Convention was made by Protocol No. 12 extending a scope of the application of Article 14 to all rights established by the law. In Contracting Parties, who accepted the Protocol, Article 14 is not only

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Views expressed in this article do not necessarily reflect the position of the Ministry.

subsidiary provision to other provisions of the ECHR, as it is originally foreseen by the Article, but produces its effects to all other domestic provisions and legal acts.<sup>1</sup> The second big change of Article 14 is coming through the introduction of the concept of indirect discrimination. It has started in the last decade (Etinski, 2013: 26). The two changes are not taking place without difficulties. In spite of all efforts of the Council of Europe, a small number of Parties accepted Protocol No. 12.<sup>2</sup> The process of induction of the concept of indirect discrimination is not running without uncertainties.

The concept of indirect discrimination in EU law has been a “source of inspiration” for the ECtHR regarding the new interpretation of Article 14. This paper will first provide a brief review of emergence and development of the concept in EU law. Then, it will focus on presentation and analysis of two cases of the ECtHR, *D.H. and Others v. the Czech Republic* and *Oršuš and Others v. Croatia*, which demonstrate some uncertainties concerning the concept. The Grand Chamber found indirect discrimination in the first case. Several months later, the Chamber of the ECtHR found that the facts of the second case, which were comparable to *D.H. and Others* but not without some differences, did not reveal discrimination. The Grand Chamber adjudged by a single prevalence vote (9:8) that it was the case of indirect discrimination. Obviously, some judges of the ECtHR did not share the same understanding of indirect discrimination. The paper will end by consideration of the potentials of the concept.

## 2. Brief review of emergence and development of the concept in EU law

The *Sotgiu* case<sup>3</sup> was among the first cases that illustrate the emergence of the concept of indirect discrimination in EC law. (For the cases that preceded *Sotgiu* see Tobler, 2005: 103, 107.) In its Observations, submitted in the case, the Commission of the EC characterized a difference in treatment, based on a residence in another Member State, as *hidden* or *indirect* discrimination on the grounds of nationality.<sup>4</sup> The Commission rejected a *purely theoretical* interpretation of the concepts of discrimination and nationality and required interpretation *on the basis of factual criteria*. According to the Commission, if foreigners are affected

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1 Protocol No. 12 was adopted in Rome on 4 November 2000 and entered into force on 1 April 2005. <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=8&DF=15/05/2015&CL=ENG>

2 18 Parties ratified the Protocol. <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=8&DF=15/05/2015&CL=ENG>

3 Case 152/73 *Sotgiu v. Deutsche Bundespost*, Judgment of 12 February 1974

4 *Ibid.*, ECR 1974, 160

by difference not based on nationality it *may in fact conceal discrimination*.<sup>5</sup> The European Court of Justice accepted that view and said that prohibitions of discrimination on the grounds of nationality in Community law “*forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by applying other distinguishing criteria, lead in fact to the same result.*”<sup>6</sup>

The European Court of Justice inaugurated the concept of indirect discrimination to overcome a limit of the fixed and exclusive ground of discrimination – nationality. If a different treatment is not based on nationality but on another criterion, if it affects exclusively or disproportionately foreign nationals without objective justification, it is a case of covered or indirect discrimination.<sup>7</sup> (See systematic overview of spreading of the concept through Community law in the practice of the European Court of Justice in Tobler, 2005: 101.)

Having been conceived by the European Court of Justice, the concept of indirect discrimination was further developed by the EC and EU anti-discriminatory legislation. The Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions makes a distinction between direct and indirect discrimination.<sup>8</sup> (See further development in Etinski, Krstić, 2009: 97-103.) Later, EU anti-discriminatory directives developed a legislative definition of indirect discrimination.<sup>9</sup> Article 2 (2) of Council Directive 2000/43/EC provides:

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5 *Ibid.*

6 *Ibid.*, 164, para 11

7 See, for example, Case C-279/93, *Finanzamt Köln-Altstadt v Roland Schumacker*, Judgment of 14 February 1995, para.26, Case C-398/92, *Mund & Fester v Hatrex Internationaal Transport*, Judgment of 10 February 1994, para. 14, In Case C-329/05, *Finanzamt Dinslaken v Gerold Meindl*, Judgment of 25 January, 2007, para. 21, Case C-383/05, *Raffaële Talotta v Etat belge*, Judgment of 22 March 2007, para. 17, *Contse SA, Vivisol Srl, Oxigen Salud SA v Instituto Nacional de Gestion Sanitaria (Ingesa), formerly Instituto Nacional de la Salud (Insalud)*, para. 36, Case C-258/04, *Office national de l'emploi v Ioannis Ioannidis*, Judgment of 15 September 2005, para. 26.

8 Article 2 (1) of Directive reads: *For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.* OJ L 039, 14/02/1976 p. 40 - 42, as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 (OJ 2002 L 269, p. 15)

9 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. OJ L 180, 19. 07. 2000, p. 22 – 26. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. OJ L 303, 02.12.2000, p. 16 – 22. Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services. OJ L 373, 21.12.2004, p. 37 – 43. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006

*“1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin. 2. For the purposes of paragraph 1: (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin; (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”*

Such model of definition was used in other EU anti-discrimination directives. A different, disadvantaged treatment is not based on the grounds explicitly forbidden in EU law – nationality, sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The different treatment, including legal acts or practice, is based on some other apparently neutral criterion. The criterion is *apparently* neutral since different treatment, based on such a criterion, negatively affects the members of the protected groups: foreign nationals, members of a sex group, members of racial, ethnic or religious group, etc. In reality, it means that the criterion is not neutral.

In the framework of EU anti-discrimination law, applicability of the concept of direct and indirect discrimination is limited to grounds and fields determined by EU provisions. The broadest scope of applicability is foreseen for prohibition of discrimination on grounds of nationality. According to Article 18 of the Treaty on the Functioning of the European Union and Article 21 (2) of the Charter on the Fundamental Rights of the European Union, the scope of applicability of general prohibition of discrimination on the grounds of nationality covers the scope of applicability of founding treaties. Prohibition of discrimination on grounds of race or ethnic origin, as provided by Article 3 of Directive 2000/43/EC, has the second broadest scope of applicability, including employment, occupation, social protection, social security, healthcare, social advantages, education, access to and supply of goods and services. The scope of applicability of prohibition of discrimination on grounds of sex, as established by Directives 2004/113/EC and 2006/54/EC, amounts to matters concerning employment, occupation, access to and supply of goods and services. Prohibition of discrimination on the grounds of religion or belief, disability, age, sexual orientation, as envisaged in Article 3 of Directive 2000/78/EC, is applicable to matters related to employment and occupation.

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on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204, 26.7.2006, p. 23–36.

The concept of indirect discrimination is not an exclusive invention of EU law. In US law, a similar idea appeared in a bit different terminology – *disparate impact*. The landmark case of disparate impact was *Griggs v. Duke Power Company*, where the employer masked discrimination by apparently neutral employment criterion which affected disproportionately Afro-Americans (Morris, 1995: 199-228, Defeis, 2004: 84, 85, Ellis, 2004: 91, Gardner, 2005: 355.). The Human Rights Committee applies the concept of indirect discrimination as a variant of discrimination prohibited by Article 26 of the International Covenant on Civil and Political Rights.<sup>10</sup>

### 3. The birth of the concept in the practice of the ECtHR

#### 3.1. *D.H. and Others v. the Czech Republic*

Although some announcement came earlier in the practice of the ECtHR, the concept was finely applied in the case *D.H. and Others v. the Czech Republic*.<sup>11</sup> The Czech Republic had a tradition of special schools for children with “mental deficiencies.”<sup>12</sup> According to the School Act of 1984, the educational psychology centers tested a child’s intellectual capacity.<sup>13</sup> If the result was not satisfactory, the centre would recommended to the head teacher to send the child to a special school and the child would be enrolled, upon consent of the child’s guardian, in the special school.<sup>14</sup> A special school education radically diminished prospects for secondary education and positioned pupils on the track of social marginalization. The majority of pupils of the special school were children of Roma minority. The applicants were Romany children, who claimed, in the application of April 2000, that they were victims of racial and ethnic discrimination in respect to the right to education.<sup>15</sup> In the judgment of 2006, the Chamber of the ECtHR held,

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10 In *Althammer*: “The Committee recalls that a violation of article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate. However, such indirect discrimination can only be said to be based on the grounds enumerated in Article 26 of the Covenant if the detrimental effects of a rule or decision exclusively or disproportionately affect persons having a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, rules or decisions with such an impact do not amount to discrimination if they are based on objective and reasonable grounds.” *Rupert Althammer et al. v. Austria*, Comm. No. 998/2001, Views adopted on 8 August 2003, para 10.2.

11 *D.H. and Others v. the Czech Republic* (App. No. 57325/00), Judgment 13 November 2007

12 *Ibid.* para 15

13 *Ibid.*, para 16

14 *Ibid.*

15 *Ibid.*, para 3

by six votes to one, that there was no discrimination in respect to the right to education. A year later, in the judgment of 2007, the Grand Chamber of the Court found that the applicants were discriminated against in respect to the right to education. Comparison of the two judgments of the ECtHR might be helpful for understanding the Court's concept of indirect discrimination.

The Chamber observes *that the rules governing children's placement in special schools do not refer to the pupils' ethnic origin, but pursue the legitimate aim of adapting the education system to the needs and aptitudes or disabilities of the children. Since these are not legal concepts, it is only right that experts in educational psychology should be responsible for identifying them.*<sup>16</sup> The Chamber explains that the margin of appreciation in education allows Parties to establish *different types of school for children with difficulties.*<sup>17</sup> It found that different treatment of children was objectively justified by different learning abilities.<sup>18</sup> The Chamber referred to an unsuccessful replacement of one of the applicants from special to ordinary school, where she had poor results due to *frequent absences, a lack of motivation and a lack of encouragement from the family.*<sup>19</sup> It is interesting that the Chamber noted this fact, which contravened the main thesis on insufficient intellectual ability, but the Chamber did not attribute any importance to the fact. The Chamber attributed considerable importance to justification of different treatment to consent and, sometimes, even requests of parents, whose children were placed in special schools.<sup>20</sup>

The issues of indirect discrimination were tackled in related proceedings. In the proceedings before the Constitutional Court of the Czech Republic, the applicants complained of *de facto* racial discrimination, alleging violations of Article 3, 14 the ECHR and Article 2 of Protocol 1.<sup>21</sup> In the proceedings before the ECtHR they argued that the statistical huge disproportion in participation of Romany children in special schools disclosed practice of racial segregation and that the statistics could not be possible to explain in racial neutral way.<sup>22</sup> According to the applicants, the poor results of testing Roma children were a consequence of the fact that tests were not adapted to particular cultural environment of Roma

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16 *D.H. and Others v. the Czech Republic* (App. No. 57325/00), Judgment of 7 February 2006, para 49

17 *Ibid.*, para 47

18 *Ibid.*, paras 49, 50

19 *Ibid.*, para 49

20 *Ibid.*, paras 50, 51

21 *Ibid.*, para 15

22 *Ibid.* para 39

children rather than their insufficient learning abilities.<sup>23</sup> The interveners in the proceedings before the ECtHR, Human Rights Watch and Interights, exposed the concept of indirect discrimination.<sup>24</sup> They referred to the antidiscrimination directives of the European Communities as well as to judicial practice in various States and invited the Court to introduce the conception of indirect discrimination in the framework of the Council of Europe.<sup>25</sup> The Chamber admitted that a policy or general measure affecting disproportionately a group of people was an indication of discrimination *even if it not specifically aimed or directed at that group*.<sup>26</sup> However, referring to *Hugh Jordan*, the Chamber repeated that statistics alone was not sufficient to disclose discrimination.<sup>27</sup> The Chamber concludes:

*...while acknowledging that these statistics disclose figures that are worrying and that the general situation in the Czech Republic concerning the education of Roma children is by no means perfect, the Court cannot in the circumstances find that the measures taken against the applicants were discriminatory.*<sup>28</sup>

Contrary to that finding, the Grand Chamber observes that *the evidence submitted by the applicants can be regarded as sufficiently reliable and significant to give rise to a strong presumption of indirect discrimination*.<sup>29</sup> By thirteen votes to four, the Grand Chamber adjudged that the Czech Republic was responsible for a violation of Article 14 read in conjunction with Article 2 of Protocol No. 1.

The Chamber and the Grand Chamber had before them the same facts and the same law. The fact that Roma children were disproportionately participating in special schools was without doubt.<sup>30</sup> In the report submitted by the Czech Republic under Article 25(1) of the Framework Convention for the Protection of National Minorities, the Czech Government admitted that *Romany children with average or above-average intellect are often placed in such schools on the basis of results of psychological tests (this happens always with the consent of the parents). These tests are conceived for the majority population and do not take Romany specifics into consideration. Work is being done on restructuring these tests.*<sup>31</sup>

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23 *Ibid.*, para 39

24 *Ibid.*, para 43

25 *Ibid.*, para 43

26 *Ibid.*, para 46

27 *Ibid.*

28 *Ibid.* para 52

29 *D.H. and Others v. the Czech Republic*, 2007, para 195

30 *D.H. and Others v. the Czech Republic*, 2006, para 26, Judgment 2007, para 192

31 *Ibid.*, para 26

The both judicial bodies of the ECtHR were familiar with relevant legal development in the EU concerning antidiscrimination directives. The interpretation of the law by the two judicial bodies was not substantially different. The Chamber accepted implicitly that Article 14 of the ECHR included a conception of indirect discrimination. The application of the law was different. The application of the law implies legal evaluation of facts, evaluation of legal relevance of facts. The Chamber erred in application of the law. It underestimated legal importance and relevance of certain facts.

The Grand Chamber attached a great importance to statistics. Given that the ECtHR has already attributed a great importance to official statistics in *Hoogdijk* and *Zarb Adami*,<sup>32</sup> the Grand Chamber states that:

*... when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the prima facie evidence the applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence.*<sup>33</sup>

The Grand Chamber finds that statistical data in the case *give rise to a strong presumption of indirect discrimination* and therefore the burden of proof was shifted to the Government.<sup>34</sup> The Government was expected to give objective and reasonable justification that would exclude discrimination. It is a common element of the Court's definition of discrimination that *a difference in treatment is discriminatory if "it has no objective and reasonable justification.*<sup>35</sup> The Government should have explained *the difference in treatment between Roma children and non-Roma children by the need to adapt the education system to the capacity of children with special needs.*<sup>36</sup> Insufficient intellectual capacity of Roma children, established by psychological tests, was justification offered by the Government.<sup>37</sup> But, the Grand Chamber stressed that the psychological tests were not adapted to specific culture of Roma children, for which reason they produced false results classifying Roma children of average and above-the-average intellectual capacities as with learning disabilities.<sup>38</sup> The Grand Chamber concluded that *at the very least, there is a danger that the tests were biased and that the results were not analyzed in the light of the particularities and special characteristics of the Roma children who sat*

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32 *D.H. and Others v. the Czech Republic*, 2007, para 187

33 *Ibid.*, para 188

34 *Ibid.*, para 195

35 *Ibid.*, para 196

36 *Ibid.*, para 197

37 *Ibid.*, para 197

38 *Ibid.*, paras 199, 200

*them. In these circumstances, the tests in question cannot serve as justification for the impugned difference in treatment.*<sup>39</sup> Consent of parents was also rejected as justification.<sup>40</sup> The Grand Chamber did not exclude a possibility that individuals might waive a right, guaranteed by the Convention, by informed consent, but concluded that consent of parents was not informed.<sup>41</sup> The Grand Chamber has reached an important conclusion:

*... since it has been established that the relevant legislation as applied in practice at the material time had a disproportionately prejudicial effect on the Roma community, the Court considers that the applicants as members of that community necessarily suffered the same discriminatory treatment. Accordingly, it does not need to examine their individual cases.*<sup>42</sup>

### **3.2. Oršuš and Others v. Croatia**

A great majority of Roma children, including the applicants, were separated in Roma-only classes in some Croatian villages in Međimurje County in the period between 1996 and 2004.<sup>43</sup> The reason for separation was their poor knowledge of Croatian language. The knowledge of Croatian language of Roma children was tested and unsatisfactory results directed children to Roma-only classes.<sup>44</sup> In April 2002, the applicants initiated judicial proceedings at the local court against the schools, the State and Međimurje County, claiming that they were victims of racial discrimination.<sup>45</sup> They alleged that the teaching in Roma-only classes was significantly reduced in comparison to the regular curriculum.<sup>46</sup> The applicants submitted a psychological study of effects of the segregated education asserting that such education *produced emotional and psychological harm in Roma children, in terms of lower self-esteem and self-respect and problems in the development of their identity.*<sup>47</sup> The defendants denied the allegation explaining that the exclusive reason for separation was poor knowledge of Croatian language, which was an obstacle for children to successfully participate in mixed

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39 *Ibid.*, para 201

40 *Ibid.*, para 202

41 *Ibid.*, para 203

42 *Ibid.*, para 209

43 *Oršuš and Others v. Croatia* (App. No. 15766/03), Judgment of 17 July 2008, paras 5- 19

44 *Ibid.*

45 *Ibid.*, para 21

46 *Ibid.*

47 *Ibid.*, para 22

classes.<sup>48</sup> The local court dismissed the claims as non-grounded.<sup>49</sup> The appeal court confirmed the judgment of the first-instance court.<sup>50</sup> In February 2007 the Constitutional Court dismissed the applicants' complaint.<sup>51</sup> The Constitutional Court found that the placement of Roma pupils in Roma-only classes *pursued the legitimate aim of necessary adjustment of the elementary educational system to the skills and needs of the complainants, where the decisive factor was their lack of knowledge or inadequate knowledge of Croatian, the language used to teach in schools. The separate classes were not established for the purpose of racial segregation in enrolment in the first year of elementary school but as a means of providing children with supplementary tuition in the Croatian language and eliminating the consequences of prior social deprivation.*<sup>52</sup>

The Constitutional Court further said: *The complainants further complain of a violation of their right to education on the ground that the teaching organised in those classes was more reduced in volume and in scope than the Curriculum for Elementary Schools adopted by the Ministry of Education and Sport on 16 June 1999. They consider that 'their placement in Roma-only classes with an inferior curriculum stigmatises them as being different, stupid, intellectually inferior and children who need to be separated from normal children in order not to be a bad influence on them. Owing to their significantly reduced and simplified school curriculum their prospects of higher education or enrolment in high schools as well as their employment options or chances of advancement are slimmer (...)*'

*After considering the entire case-file, the Constitutional Court has found that the above allegations are unfounded. The case-file, including the first-instance judgment ..., shows that the allegations of an inferior curriculum in Roma-only classes are not accurate. The Constitutional Court has no reason to question the facts as established by the competent court.*<sup>53</sup>

The Chamber compared this case with *D.H. and Others v. the Czech Republic* and found they were not comparable.<sup>54</sup> According to the Chamber, the two measures - separation of children on the basis of intellectual capacity and on the basis of knowledge of language *differ significantly in their nature and severity.*<sup>55</sup> The Chamber further stated that in *D.H. and Others* the Court found that different treatment

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48 *Ibid.*, paras 23, 24

49 *Ibid.*, para 25

50 *Ibid.*, para 27

51 *Ibid.*, para 29

52 *Ibid.*, para 29

53 *Ibid.*, para 29

54 *Ibid.*, para 65

55 *Ibid.*, para 65

was based on race, which required the strictest investigation of justification, while a different treatment based on the knowledge of a language, like in this case, left a broader margin of appreciation.<sup>56</sup> Separation of children on the basis of intellectual capacity was a nationwide practice in the Czech Republic, while the separation on the basis of knowledge of language in the Republic of Croatia was limited to a single region.<sup>57</sup> The Chamber was unanimous that it was not a case of discrimination.

By nine votes to eight, the Grand Chamber adjudged that Croatia was responsible for violation of Article 14 of the Convention in conjunction with Article 2 of Protocol No. 1.<sup>58</sup> The Grand Chamber agreed with the Chamber that statistics in this case did not suffice to prove indirect discrimination.<sup>59</sup> In just one of the schools, a majority of Roma children was separated in Roma-only classes.<sup>60</sup> But, the Grand Chamber stated that indirect discrimination might be proved without statistical evidence.<sup>61</sup> The Grand Chamber referred to reports of impartial international bodies according to which transfer of Roma pupils from Roma-only classes to mixed classes faced opposition of non-Roma parents.<sup>62</sup> The Grand Chamber did not deny that separation of pupils due to an inadequate knowledge of language might be justified by need of additional activities to satisfy their specific needs.<sup>63</sup> *However, the Grand Chamber continues, when such a measure disproportionately or even, as in the present case, exclusively, affects members of a specific ethnic group, then appropriate safeguards have to be put in place.*<sup>64</sup> Then, the Grand Chamber carefully examined relevant circumstance of the case. The legal basis for separation of children was not clear.<sup>65</sup> The tests used for measuring knowledge of language were not specially designed for that purpose.<sup>66</sup> The tests were prepared for measuring psycho-physical abilities of children, not evaluating their knowledge of the Croatian language in particular.<sup>67</sup> The Grand Chamber referred to some inconsistencies in the Government's explanation.

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56 *Ibid.*, para 66

57 *Ibid.*, para 66

58 *Oršuš and Others v. Croatia* (App. No. 15766/03), Judgment of 16 March 2010

59 *Ibid.*, para 152

60 *Ibid.*, para 152, Oršuš, 2008, para 29

61 *Ibid.*, para 153

62 *Ibid.*, para 154

63 *Ibid.*, para 157

64 *Ibid.*, para 157

65 *Ibid.*, para 158

66 *Ibid.*, para 159

67 *Ibid.*, para 160

Two applicants were enrolled in the mixed class at the first grade and, after two years, they were moved to Roma-only class.<sup>68</sup> The reason for their transfer to Roma-only class remained unclear. If it were insufficient knowledge of language, it would be obvious at the beginning. If the reason was absence of progress in their schooling, the problem could not be addressed by their removal to Roma-only class.<sup>69</sup> The explanation of the Government, that at time of enrolling of the two applicants in the school, there was no Roma-only class in the school, was not accepted since the problem of inadequate knowledge of language had not been properly addressed.<sup>70</sup> The explanation of the Government regarding the curriculum provided in Roma-only classes was not clear, consistent and convincing. The Grand Chamber was unclear whether the curriculum provided in Roma-only classes was the same as the standard curriculum in the mixed classes, reduced by 30% or adapted to the needs of Roma children.<sup>71</sup> If the curriculum was reduced by 30%, the Grand Chamber did not understand how the reduction served to overcome the language problem.<sup>72</sup> It could be overcome by providing an additional intensive course of Croatian language. The Grand Chamber stated:

*Since, as indicated by the Government, teaching in the schools in question was in Croatian only, the State in addition had the obligation to take appropriate positive measures to assist the applicants in acquiring the necessary language skills in the shortest time possible, notably by means of special language lessons, so that they could be quickly integrated into mixed classes.*<sup>73</sup>

Croatian schools provided some Croatian language courses but that was inconsistent and ineffective. It was ineffective since it did not result in replacement of children from Roma-only classes to the mixed classes.<sup>74</sup> There was no prescribed and transparent monitoring procedure to record a progress in learning Croatian language.<sup>75</sup> The Council of Europe bodies reported *the poor school attendance of Roma children and their high drop-out rate* in Croatia.<sup>76</sup> Concerning that issue, the Grand Chamber has established a high standard of the obligation to implement positive measures:

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68 *Ibid.*, para 161

69 *Ibid.*, para 161

70 *Ibid.*, para 162

71 *Ibid.*, paras 163, 164

72 *Ibid.*, para 165

73 *Ibid.*, para 165

74 *Ibid.*, paras 167-171

75 *Ibid.*, para 175

76 *Oršuš*, 2010, para 176

*While the Croatian authorities cannot be held to be the only ones responsible for the fact that so many pupils failed to complete primary education or to attain an adequate level of language proficiency, such a high drop-out rate of Roma pupils in Međimurje County called for the implementation of positive measures in order, inter alia, to raise awareness of the importance of education among the Roma population and to assist the applicants with any difficulties they encountered in following the school curriculum. Therefore, some additional steps were needed in order to address these problems, such as active and structured involvement on the part of the relevant social services. However, according to the Government, the social services had been informed of the pupil's poor attendance only in the case of the fifth applicant. No precise information was provided on any follow-up.<sup>77</sup>*

### **3.3. Analysis of the two cases**

*D. H and Others and Oršuš and Others* have shown that the conception of indirect discrimination was born in practice of the ECtHR under Article 14 of the Convention. It came as a result of evolutive interpretation of Article 14 of the Convention. The Grand Chamber did not use a term “evolutive” interpretation, but the fact that the Grand Chamber changed judgment of Chambers in the two cases is a sign that interpretation of Article 14 of the ECHR has changed. Besides, it happened in time when the concept of indirect discrimination has become mature and developed as a concept in EU law. The concept was incorporated in domestic law of a vast majority (if not all) Contracting Parties to the ECHR. This development must have been taken into account by the ECtHR in interpretation of Article 14 of the Convention. The Grand Chamber explored relevant Community law and practice related to indirect discrimination.<sup>78</sup> Its definition of indirect discrimination was inspired by the definition in EU anti discrimination directives.

The comparison of the two cases reveals the concept of indirect discrimination as an open and flexible concept escaping strict legal formalities, as now exists in the practice of the ECtHR. Indirect discrimination is a variant of discrimination. The ECtHR defines indirect discrimination as *a general policy or measure which is apparently neutral but has disproportionately prejudicial effects on persons or groups of persons who ... are identifiable only on the basis of an ethnic criterion, may be considered discriminatory notwithstanding that it is not specifically aimed at that group... unless that measure is objectively justified by a legitimate aim and the means of achieving that aim are appropriate, necessary and proportionate.*<sup>79</sup>

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77 *Ibid.*, para 177

78 *D.H. and Others*, 2007, paras 81-91

79 *Oršuš*, 2010, para 150

In these two and some other cases,<sup>80</sup> the ECtHR extended protection against indirect discrimination to an ethnic group, but in other cases the protected individuals were members of sex group.<sup>81</sup>

A difference in treatment, which is detrimental to members of the affected group, is a common element of all sorts of discrimination. In the analyzed cases, the Court consideration was not limited exclusively to suffering of the applicants, but the Court allocated decisive weight to suffering of all members of the group. (See about the importance of the fact in *Bernard, Hepple*, 568.) Another general element of all sorts of discrimination is that members of the affected group are distinguishable by their common personal characteristic (status).<sup>82</sup> Concerning an “*objective and reasonable justification*” of different treatment as an element which excludes discrimination,<sup>83</sup> in *D. H and Others*,<sup>84</sup> the Grand Chamber states that different treatment based exclusively or to a decisive extent on a person’s ethnic origin cannot be objectively justified in “*contemporary democratic society built on the principles of pluralism and respect for different cultures*”. However, in *Oršuš and Others*,<sup>85</sup> the Grand Chamber is of the opinion that “*very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of ethnic origin as compatible with the Convention.*” These judicial observations were made in cases of indirect discrimination, but the observations refer to direct discrimination. In EU anti-discrimination directives, an *objective and reasonable justification* is textually expressed as an element of the definition of indirect-discrimination. It does

80 *Sampanis et autres c. Grèce* (Req. No. 32526/05) Arrêt 5 juin 2008, *Horváth and Kiss v. Hungary* (App. no. 11146/11) Judgment of 29 January 2013

81 *Hoogendijk v. The Netherlands* (App. no. 58641/00) Decision as to the admissibility of 6 January 2005, *Opuz v. Turkey* (App. no. 33401/02) Judgment of 9 June 2009

82 *Kjeldsen, Busk Madsen and Pedersen*, (App. no. 5095/71; 5920/72; 5926/72), Judgment of 7 December 1976, para. 56.

83 *D.H. and Others*, 196, *Oršuš*, 2010, para 156. *Marckx v. Belgium*, Judgment of 13 June 1979, para. 33; *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, (App. no. 9214/80; 9473/81; 9474/81) Judgment of 28 May 1985, para. 72; *McMichael v. the United Kingdom*, (App. no. 16424/90) Judgment of 24 February 1995, para. 97; *Gaygusuz v. Austria*, (App. no. 17371/90) Judgment of 16 September 1996, para. 42; *Hoffmann v. Germany*, (Application no. 34045/96), Judgment of 11 October 2001, para. 55; *Moldovan and Others v. Romania*, (Apps nos. 41138/98 and 64320/01), Judgment of 12 July 2005, para.137.

*Thlimmenos v. Greece*, (App. no. 34369/97), Judgment of 6 April 2000, para 44; *Beard v. the United Kingdom*, (App. no. 24882/94), Judgment of 18 January 2001, para. 132; *Chapman v. the United Kingdom*, (App. no. 27238/95), Judgment of 18 January 2001, para. 129.

84 *D.H. and Others*, 2007, para 176, *Sampanis et autres*, *op. cit.*, para 69, *Horváth and Kiss*, *op. cit.*, para 101.

85 *Oršuš*, 2010, para 149.

not mean that EU anti-discrimination directives treat all differences based on forbidden grounds as cases of direct discrimination. They provide that some cases of different treatment based on forbidden grounds do not constitute discrimination. The excluded cases are numbered in an exhaustive way and all other differences based on forbidden grounds make direct discrimination. It means that an *objective and reasonable justification* is the general element of direct and indirect discrimination, as they are defined by EU anti-discrimination directives in respect of all grounds, including racial or ethnic grounds. Equally, it is an element of definition of all sorts of discrimination under Article 14 of the ECHR. The Respondent State is expected to justify a different treatment. That obligation is stressed especially in the concept of indirect discrimination: *Where an applicant produces prima facie evidence that the effect of a measure or practice is discriminatory, the burden of proof will shift on to the respondent State, to whom it falls to show that the difference in treatment is not discriminatory.*<sup>86</sup>

A positive obligation of a Contracting Party concerning discrimination has also been recognized by the Court as a general element of all sorts of discrimination under Article 14 of the ECHR. In *Nachova and Others*,<sup>87</sup> the ECtHR found that Bulgaria was responsible for a breach of Article 14 in conjunction with Article 2 of the ECHR, since the Government had failed to investigate a possible racist motive of killing two Roma military fugitives. It was a case of direct discrimination. However, the two analyzed cases of indirect discrimination, especially *Oršuš and Others*, show the great importance which the ECtHR attributes to the obligation to take positive measures in a context of indirect discrimination.

A distinguished characteristic of indirect discrimination, common to the concept in all different jurisdictions, is that indirect discrimination is a hidden discrimination, veiled by apparently neutral criterion of a difference. The ECtHR speaks about a *general policy or measure which is apparently neutral*. EU anti-discrimination directives use the terms: *apparently neutral provision, criterion or practice*. Both terminologies should have the same meaning – difference of treatment based on apparently neutral criterion (ground, status) which disproportionately and adversely affects in persons which share a common characteristic.

#### **4. Concluding remarks: Potentials of the concept of indirect discrimination under Article 14 of the ECHR**

The duality of discrimination, i.e. its classification into direct and indirect discrimination, has become universally accepted. (Is there, however, something in between? See in Forshaw, Pilgerstorfer, 2008: 347-364). It is recognized in

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<sup>86</sup> *D.H. and Others*, 2007, paras 180, 189, *Oršuš*, 2010, para 150

<sup>87</sup> *Nachova and Others v. Bulgaria* (App. Nos. 43577/98 and 43579/98) Judgment of 6 July 2005

US law and EU law, in law of European countries as well as by the Human Rights Committee. As noted by Christa Tobler, the reason for such a development is that '*substance prevails over form*' (Tobler, 2008: 24). Openness and flexibility of the concept serves that purpose. High formalities might turn the concept of discrimination into its reverse.

The concept of indirect discrimination was used by the ECtHR for the protection of vulnerable racial and other groups. The purpose is to facilitate processes of inclusion of members of vulnerable groups in the society (Collins, 2003: 16-43) and to stop recycling their social marginalization.

If *Zarb Adami*<sup>88</sup> might be classified as a case of indirect discrimination, then the case shows that the concept might be used beyond the mentioned purpose for achieving other purposes, such as greater fairness in distribution of social duties between sexes. In that case *the law and/or the domestic practice exempted persons of the female sex from jury service whereas, de facto, men were not offered this exemption.*<sup>89</sup>

In EU countries, the concept of indirect discrimination under Article 14 extends the field of the applicability beyond matters covered by EU antidiscrimination directives. It is especially the case with EU members that accepted Protocol No. 12.

The ECtHR has underscored the importance of the obligation of Contracting Parties to take positive measures against *de facto* situations of indirect discrimination, which is a great potential for further development in direction of inclusive societies.

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88 *Zarb Adami v. Malta* (App. no. 17209/02) Judgment of 26 June 2006

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## **НОВИ КОНЦЕПТ ПОСРЕДНЕ ДИСКРИМИНАЦИЈЕ ПРЕМА ЧЛАНУ 14. ЕВРОПСКЕ КОНВЕНЦИЈЕ О ЉУДСКИМ ПРАВИМА**

### **Резиме**

Европски суд за људска права је изградио концепт посредне дискриминације релативно недавно. У пресуди ДХ и други против Чешке (2007), Европски суд за људска права је експлицитно истакао да: “се докази подносица представке могу сматрати довољно поузданим и значајним за потврђивање претпоставке о постојању посредне дискриминације”. Концепт прикривене или посредне дискриминације је први пут употребио Европски суд правде у случају *Sotgiu против Deutsche Bundespost* (1974), да би превазишао ограничења забране дискриминације по основу националне припадности. Када другачији третман није заснована на националној основи али има несразмеран утицај на положај страних држављана, ради се о случају прикривене дискриминације. У каснијем периоду, концепт посредне дискриминације је коришћен за заштиту угрожених/осетљивих група у анти-дискриминационом праву Европске уније. Будући да члан 14. Европске конвенције о људским правима садржи отворену листу правних основа за дискриминацију, Европски суд за људска права се не може суочити са проблемом какав је постојао у случају *Sotgiu*. Међутим, Европски суд за људска права је исправно закључио да посредна дискриминација такође постоји уколико се различит третман заснива на критеријуму који се не односи искључиво на чланове заштићене групе али има несразмеран утицај на положај чланова групе. Европски суд за људска права развио је концепт посредне дискриминације под утицајем анти-дискриминационог права ЕУ, чија је заједничка сврха заштита осетљивих група.

**Кључне речи:** посредна дискриминација, забрана дискриминације, члан 14 Европске конвенције о људским правима, судска пракса Европског суда за људска права.