DH v CZECH REPUBLIC SIX YEARS LATER: ON THE POWER OF AN INTERNATIONAL HUMAN RIGHTS COURT TO PUSH THROUGH SYSTEMIC CHANGE

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Abstract

The European Court of Human Rights (ECtHR) is often portrayed as the most developed regional human rights court, one which wields the power to influence practices in its Member States. In 2007, the Grand Chamber of the Court issued a famous ruling in the case DH v Czech Republic, which condemned discrimination of Roma children in education. The problem criticized in the DH case is of a systemic character; in order to comply with the ECtHR's judgment, the Czech Republic would have to change its whole system of primary education. In our article, we discuss the ability of an international human rights body to push through a significant change in one of its Contracting Parties. We seek to draw more general propositions from the case study of DH v Czech Republic which can be tested by further studies – we try to identify factors and circumstances which support or hinder an international human rights court in its effort of pushing through a systemic change.

Keywords: Czech Republic, discrimination, European Court of Human Rights, judgment implementation, right to education, Roma, special schools

Mots-clés: Cour européenne des droits de l'homme, discrimination, droit à l'éducation, la mise en œuvre d'un arrêt, la République tchèque, les écoles spéciales, Roma

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1. INTRODUCTION

The academic and public debate on the political power of courts has been active, especially in the United States, for many decades.[1] Courts, particularly supreme or constitutional, have successfully challenged practices which they perceived as contravening constitutional rights. These courts have been proven to be particularly important in multilevel polities (typically federations) when trying to impose a single norm on all of their constitutive parts. Many authors have criticized activist courts, which lack direct democratic legitimation from the people,[2] but so far the discussion has been predominantly led within State boundaries. However, with the rise of international courts, endowed with the authority to rule on the legality of State practices, the time might be ripe for inclusion of their activities into the debate. In our study, we seek to address the problem of implementation of an international court's judgment by a Member State in a complicated case which requires, in order to comply with the judgment, far-reaching changes to its domestic practices.

The European Court of Human Rights (ECtHR) is often portrayed as the most developed and effective regional human rights court,[3] one which wields the power to significantly influence practices in Member States. In 2007, the Grand Chamber of the Court issued a famous ruling in the case *DH v Czech Republic*[4] which condemned discrimination of Roma children in education. The ruling has attracted considerable attention throughout Europe due to its novelty and because of the prevalence of the phenomenon of discrimination of Roma in various European countries. More than six years on, the question of the discrimination of Roma children in Czech schools and the correct implementation of the judgment is continuing to be an issue – and a highly controversial one.

The problem criticized in the *DH* case is of a systemic character; in order to fully comply with the ECtHR's judgment, the Czech Republic would likely have to modify its entire system of primary education. It is also worth noting that on its way to the final judgment, the ECtHR contested the judgment of the Czech Constitutional Court, which expressed some reservations towards the system of primary education, but did not find it unconstitutional overall. As indicated, we seek to discuss the ability of an international human rights body to push through a significant change in one of its Member States. The article is therefore divided

1 For an excellent overview of the field see Keith E. Whittington, R. Daniel Kelemen and Gregory A. Caldeira (eds), *The Oxford Handbook of Law and Politics* (OUP 2008).

2 Probably the most used term for this strand of courts' critique is 'counter majoritarian difficulty', elaborated presumably first by Alexander Bickel in his book *The Least Dangerous Branch* (Bobbs-Merrill Educational Publishing 1962).

3 This view is shared across all the books dealing with regional human rights' protection mechanisms; see, for example, Henry Steiner and Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (3rd edn, OUP, 2007) 933.

4 *DH and Others v Czech Republic* App no 57325/00 (GC ECtHR, 13 November 2007).

into three main parts. First, after a short introduction in which we provide contextual information on the recently emerged idea of the ECtHR perceived as a constitutional court, and on the specificities of the situation of Roma in the Czech Republic (Sections 2 and 3), we summarize the whole *DH* saga in three courtrooms – the Czech Constitutional Court, the Second Section of the ECtHR, and finally the Grand Chamber of the ECtHR – and identify the key systemic problems perceived by the ECtHR in the Czech educational system (Section 4). The second part of the article is then focused on the implementation of the judgment in the Czech Republic. We present information on the state of play (discrimination in education against Roma children) six years after the judgment (Section 5). We determine the key actors involved in the implementation of the ECtHR's judgments, both on the national (various branches of government, domestic NGOs and interest groups) and the international level (Council of Europe, international NGOs), and trace how they have pursued their strategies in order to induce the Czech Republic to comply. Finally, the last part of the article (Section 6) follows the interplay between the aforementioned actors and responsible Czech authorities (especially the Ministry of Education, but also national courts and the Office of the Public Defender of Rights).

The inferences are based on data which were collected from the official materials of various bodies (reports, judgments, and so on), interviews with stakeholders and from secondary sources. The single-case study builds on a deep comprehension of the issue which enables drawing "the whole picture," with understanding who the main actors are, what their main motivations are, and why they hold them. We proceed with a presentation of the interactions and views of the relevant actors on selected issues – their preferences concerning the education of Roma children; the means of how to achieve them; and main allies and opponents in the endeavour. The article draws more general propositions from the case of *DH v Czech Republic* which can be tested by further studies. We try to establish under what circumstances the ECtHR is capable of pushing through systemic change and which powers are typically opposed to these efforts. In other words, we attempt to determine which conditions contribute to timely compliance with the Court's judgments, and conversely, which factors inhibit the introduction of ideas by European judges into practice. We do not perceive the identified conditions in terms of 'necessity' and 'sufficiency'; our claim follows from the fact that the Czech Republic belongs to a broad family of European liberal democracies which share basic principles of functioning. When factors identified as detrimental to the implementation of the judgment exist in such a standard case as the Czech Republic, we can expect that their presence in similar cases (that is in any European liberal democracy) will also complicate introducing an ECtHR judgment requiring a systemic change of practice on the national level.

2. INTERNATIONAL COURTS AND THEIR INFLUENCE ON DOMESTIC CHANGE

We draw inspiration from Feeley and Rubin's work[5] dealing with federal polities where one or more states carry such practices or policies which are considered reprehensible or dysfunctional by the national government (for example, conditions in prisons in some Southern states in the US). The scenario appears as follows: there exists no detailed central regulation on the level of the polity and the state legislature is unwilling to change the practice/policy. If the critics fail in pushing for a change in the state setting, either using legislative or adjudicative means, they can resort to litigation at the level of the federation. A supreme (constitutional) court may issue a ruling condemning the local practice/policy and thus help in standardizing practices at the subnational level (minimally by determining what is unacceptable). Such a scenario resembles the situation in the case of discrimination of Roma children in their right to education in the Czech Republic. The practice/policy is deemed deplorable on the subsystem level, and both the legislative and judiciary means which the complainants deployed nationally have proved unsuccessful. Therefore, the complainants turn to the judiciary on the system level (that is ECtHR); utilizing the ruling of the ECtHR, the complainants then try to influence the criticized domestic practice.

Such a perception of the ECtHR is not completely novel; even in 2003, Steven Greer wrote about 'constitutionalizing adjudication' and was joined by Wojciech Sadurski and Alec Stone Sweet, who directly argued that the ECtHR is a 'constitutional court'.[6] Such a qualification of an international judicial body which sometimes surpasses its strictly interpretative role of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and acts rather as a policymaker[7] logically raises concerns about its democratic legitimacy. However, we do not intend to participate in the burgeoning debate[8] and rather focus on the use of the international human rights body in order to push for a change in a variety of national settings.

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5 Malcolm Feeley and Edward Rubin, *Judicial Policy Making and the Modern State. How the Courts Reformed America's Prisons* (1st edn, CUP 1999).

6 Steven Greer, 'Constitutionalizing Adjudication under the European Convention on Human Rights' (2003) 23 *Oxford Journal of Legal Studies* 405; Wojciech Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments' (2009) 9 *Human Rights Law Review* 397; Alec Stone Sweet, 'On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court' (2009) <works.bepress.com/alec_stone_sweet/33/> accessed 7 April 2014; Alec Stone Sweet, 'Constitutionalism, Legal Pluralism, and International Regimes' (2009) 16 *Indiana Journal of Global Legal Studies* 621.

7 On the distinction between judicial interpretation and policymaking, see Feeley and Rubin (n 5).

8 See for example Michael O'Boyle, 'The Future of the European Court of Human Rights' (2011) 12 *German Law Journal* 1862; Joseph Weiler, 'The Geology of International Law: Governance, Democracy and Legitimacy' (2004) 64 *Heidelberg Journal of International Law* 547; Joshua Jackson, 'Broniowski v Poland: A Recipe for Increased Legitimacy of the European Court of Human Rights as a Supranational Constitutional Court' (2006) 39 *Connecticut Law Review* 759; Tom Barkhuysen

The models of reception of the Convention into the national laws differ throughout Europe according to the inclination of particular State Parties to monist or dualist conception of the relationship between national and international law. While most of the parties choose the inclusion of the Convention between the regular laws and constitutions,[9] some recognize the Convention as being of the same power as their constitutional provisions (Austria), or, on the other hand, as standing on the same level as ordinary laws and statutes (Germany, or United Kingdom before the introduction of Human Rights Act in 1998). The Czech Republic stands between the two groups with Articles 1 (2) and 10 of the Constitution and its interpretation given by the Constitutional Court[10] categorizing the Convention within the broad conception of constitutional order. States are expected to conform not only to that ECtHR's judgments in individual cases in which they are parties, but also to the whole of the ECtHR's jurisprudence as an obligation arising from a binding international treaty.[11] Embracing the concept of compliance with the Convention and the ECtHR's case law as an attribute of all liberal democratic societies, we try to uncover the impact of the ECtHR's judgment on the national policy and behaviour of State actors.

The impact of the ECtHR's case law has been broadly studied and its successes reported. One of the first and more complex comparative endeavours, by Drzemczewski (1983), concluded that the ECtHR and the ECtHR's jurisprudence helped to bring

and Michiel van Emmerik, 'Legitimacy of European Court of Human Rights Judgments: Procedural Aspects' in Nick Huls and Jacco Bomhoff and Maurice Adams (eds), *The Legitimacy of Highest Courts' Rulings* (TMC Asser Press 2009) 437–449; Jean-Paul Costa, 'On the Legitimacy of the European Court of Human Rights' Judgments' (2011) 7 *European Constitutional Law Review* 173; Andreas Follesdal, 'The Legitimacy of International Human Rights Review: The Case of European Court of Human Rights' (2009) 40 *Journal of Social Philosophy* 595; Andreas Follesdal, 'Why the European Court of Human Rights Might Be Democratically Legitimate: A Modest Defense' (2009) 27 *Nordisk Tidsskrift for Mennenskerettigheter* 289; Mattias Kumm. "The Legitimacy of International Law: A Constitutionalist Framework of Analysis" (2004) 15 *The European Journal of International Law* 907. Critical voices of the ECtHR's jurisprudence are especially heard from the United Kingdom, see Francis Mann, 'The United Kingdom' in Conor Gearty (eds), *European Civil Liberties and the European Convention on Human Rights* (Kluwer Law International 1997) 68 (labelling some judgments as almost grotesque); David Davis and Jack Straw, 'We must defy Strasbourg on prisoner votes' *The Telegraph* (London, 24 May 2012), <www.telegraph.co.uk/news/uknews/law-and-order/9287633/We-must-defy-Strasbourg-on-prisoner-votes.html#> accessed 7 April 2014. For a description of the debate in the UK, see Alice Donald and Jane Gordon and Philip Leach, 'The UK and the European Court of Human Rights' (Equality and Human Rights Commission, Research report 83, 2012) 91; and a revealing analysis in Basak Çali and Anne Koch and Nicola Bruch, 'The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights' (2013) 35 *Human Rights Quarterly* 955.

9 Kostas Chryssogonos, 'Zur Inkorporation der Europäischen Menschenrechtskonvention in den nationalen Rechtsordnung der Mitgliedstaaten' (2001) 36 *Europarecht* 49.

10 See judgment of the Czech Constitutional Court No Pl ÚS 36/01 (25 June 2002).

11 For more on the interpretation of the binding character of the jurisprudence see for example Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (OUP 2008).

considerable advances in human rights protection in States concerned.[12] A later and more comprehensive volume edited by Keller and Stone Sweet came to similar conclusions and assigned great and multifaceted importance to the activities of the Court. At the same time, the authors pointed to variations among Member States concerning the level and scope of the ECtHR's impact and awareness of the public and lawyers about the ECHR system.[13] The most recent social-scientific evidence of the profound effects of ECtHR judgments on national practice has been shown by Helfer and Voeten in the sensitive issue area of LGBT rights.[14]

3. THE ROMA IN THE CZECH REPUBLIC – BRIEF OVERVIEW

This section seeks to briefly address some problems and data which concern the uneasy coexistence of Roma and the majority population. According to the last official census in 2011, the Czech Republic has a total population of 10,562,214 people, with only 5199 persons defining themselves as 'Roma'. Reporting of nationality has been a decreasing trend; with more than 2.7 million people choosing not to report their nationality in the most recent census. Whereas, the 2001 census brought more precise data on nationality, because only about 220,000 respondents did not report it. The Czech population is largely homogeneous, with Czechs, Moravians, and Silesians (that is inhabitants of Czech lands) forming approximately 95 percent of the entire population. The largest minority claims Slovak nationality, followed by Poles, Germans, Ukrainians, Vietnamese, and Roma. In 2001, about 12,000 respondents claimed Roma nationality,[15] but numbers are estimated to be much higher than the official data state – between 200,000 and 250,000.[16] While the cohabitation of the majority population and other ethnic or national minorities remains quite peaceful, relations with Roma have been tense for a longer time. According to surveys, over the long term data remain quite stable – around 42 percent evaluate coexistence with Roma as rather bad and 40 percent even as very bad, while only 13 percent as rather good and mere 1 percent as very good.[17] Respondents generally acknowledged that Roma faced a worse situation searching for a job and being included in public life. The clear majority of respondents (70 percent) evaluated the performance

12 Andrew Drzemczewski, *European Human Rights Convention in Domestic Law. A Comparative Study* (first published 1983, OUP 1998).

13 Hellen Keller and Alec Stone Sweet (n 11).

14 Laurence Helfer and Erik Voeten, 'International courts as agents of legal change: evidence from LGBT rights in Europe' (2014) 68 *International Organization* 77.

15 The data come from the official censuses in years 2001 and 2011 <www.scitani.cz> accessed 7 April 2014.

16 See, *DH and Others v Czech Republic* (n 4) 4, DO of Judge Jungwiert.

17 Jan Červenka, 'Romové a soužití s nimi očima české veřejnosti: duben 2012' (Centrum pro výzkum veřejného mínění Sociologický ústav AV ČR 2012) <cvvm.soc.cas.cz/media/com_form2content/documents/c1/a6826/f3/ov120514.pdf> accessed 7 April 2014.

of the Czech government in dealing with 'the Roma issue' as unsatisfactory, while local administration received a more positive assessment.[18] Over 80 percent of respondents did not want Roma as their neighbours.[19] In a survey asking respondents directly about attitudes towards minorities, respondents showed an evident tendency concerning expectations towards minorities – almost 60 percent thought that foreigners should conform to local culture as much as possible.[20] It is clear from the short selection of data that relations between the majority and Roma population have been problematic for a long time and that no government policy has brought about improvement.[21]

In his dissenting opinion, Judge Jungwiert pointed to possible roots of the attitude towards the Roma. The Czech Roma were almost totally exterminated by Nazis during the Second World War, but were replaced by successive waves of tens of thousands of Roma from Slovakia, Hungary and Romania, the vast majority of whom were illiterate, completely uprooted and did not speak Czech.[22] The generally hostile atmosphere towards the Roma is fuelled by the tabloid press, which often stereotypes the Roma as rent defaulters, thieves, or violent criminals who deliberately avoid employment.[23] Densely Roma-inhabited neighbourhoods often lack hygienic standards, with the non-Roma population moving out, thus leading to 'ghettoization'. According to a 2009 report by the Council of Europe's European Commission against Racism and Intolerance (ECRI), in many Roma localities, 90 percent or more of the potentially active members of the population are unemployed.[24] Other events which have caught international attention include the cases of sterilized Roma women without their full and informed consent, which probably happened even after the end of communist rule; the 'wall' on Matiční Street in the north Bohemian city of Ústí nad Labem dividing the street into parts where 'whites' and Roma lived; or the instances of mass emigration of Roma to Canada. Moreover, the latest concluding observations by the Committee on the Elimination of Racial Discrimination (CERD) stated concerns on the persisting police ill-treatment and misconduct towards the Roma.[25]

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18 Ibid.

19 STEM, 'Naši občané se čím dál více otevírají soužití s Vietnamci a Číňany' (STEM 2011) <www.stem.cz/clanek/2195> accessed 7 April 2014.

20 Klára Procházková, 'Vztah k jiným národnostem I' (Centrum pro výzkum veřejného mínění Sociologický ústav AV ČR 2006) <www.cvvm.cas.cz/upl/zpravy/100637s_ov70108.pdf> accessed 7 April 2014.

21 On the other hand, no similar data illustrating the position and feelings of Roma population towards the majority is available.

22 See *DH and Others v Czech Republic* (n 4) 4, DO of Judge Jungwiert.

23 Commissioner for Human Rights, 'Human Rights of Roma and Travellers in Europe' (Council of Europe Publications 2012) 52 <www.coe.int/t/commissioner/source/prems/prems79611_GBR_CouvHumanRightsOfRoma_WEB.pdf> accessed 7 April 2014.

24 ECRI, 'Report on the Czech Republic (fourth monitoring cycle)' (Council of Europe, ECRI 2009) <www.coe.int/t/dghl/monitoring/ecri/country-by-country/czech_republic/CZE-CbC-IV-2009–030-ENG.pdf> accessed 7 April 2014.

25 Committee on the Elimination of Racial Discrimination, 'Concluding Observations of the Committee on the Elimination of Racial Discrimination: Czech Republic' (UN Committee on the

On the other hand, many NGOs and a rather lively civic scene organize activities promoting and encouraging better relations between the Roma and the majority population. Additionally, State administration has incorporated special bodies to deal with Roma issues, such as the Council on Roma Minority Affairs in the Office of the Government. A 2012 national report submitted under the Universal Periodic Review to the UN Human Rights Council acknowledged several positive measures to counter discrimination towards the Roma, especially the Roma Integration Policy Concept for 2011–2013, focusing on crime prevention, minority policing for the Police of the Czech Republic, support of Roma employment, and so on.[26]

To sum up, the relationship between the majority population and the Roma minority remains uneasy, and the atmosphere of mutual dislike and distrust persists, but the animosity fortunately does not reach violent levels. The Roma are disproportionally represented in economically weaker layers of society and regularly portrayed as misusing social assistance or committing crimes, which only perpetuates intolerant attitudes towards them. Czech governments have not tackled the problem with bold action so far.

4. THE *DH* SAGA IN COURTROOMS

The case of *DH and Others* has been dealt with by three judicial bodies and has spanned more than eight years. It could have been much longer, had the case followed the usual domestic requirement of exhaustion of remedies, but the Czech Constitutional Court accepted the case even in the absence of previous actions to the lower courts due to its significance, which went far beyond the personal interests of the applicants. The case concerned the largely disproportionate placement of Roma pupils to 'special schools' compared to the majority population. Special schools were intended for children with learning disabilities and followed a less demanding curriculum, which made it harder for their graduates to continue afterwards with higher education. The applicants, Roma pupils placed in special schools, filed a complaint before the Constitutional Court in June 1999 arguing that the practice of placements in special schools had led to discrimination in education and *de facto* racial segregation. The placements in special schools were allegedly executed on the basis of race, which amounted to a violation of constitutionally guaranteed rights of thousands of Roma children. The applicants' statistics pointed out that in Ostrava, Roma pupils formed less than 5 percent of the total number of pupils, but more than 50 percent of the population of special schools, where the children received inferior education that prevented them from obtaining

Elimination of Racial Discrimination 'CERD' 2007) <www.refworld.org/docid/46484d2d2.html> accessed 20 July 2014.

26 Human Rights Council, 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Czech Republic' (Human Rights Council HRC 2012) 6–10 <ap.ohchr.org/documents/alldocs.aspx?doc_id=20680> accessed 20 July 2014.

a secondary education other than in a vocational training centre (and later a good job). Moreover, by attending special schools, the children psychically suffered from labels such as 'stupid' or 'retarded'. The applicants further criticized the methods of psychological examination which reportedly were not standardized for Roma. Additionally, consent by the pupils' parents, necessary for placement in a special school, was deficient, because they had not been fully informed about the consequences.

The Constitutional Court dismissed the complaint, partly on the ground that it was 'manifestly ill-founded' and partly because it had no jurisdiction to hear it.[27] The Court declared that in cases of constitutional complaints it was only empowered to issue individual legal acts and assess particular circumstances of cases, not the overall social or cultural context. The Constitutional Court found that procedurally all the cases were without faults – all placements were carried out on the basis of psychological examinations and recommendations and with parental consent. Decisions written in the appropriate form were issued by the head teachers and included instructions on the right to appeal, which had been exercised in none of the cases. The pupils had been regularly assessed and in some cases a transfer to an ordinary primary school was recommended. Apparently, the Constitutional Court felt some unease, as is documented by the last sentence of the reasoning in which the Court invited the competent authorities to give careful and effective consideration to the applicants' proposals. Nevertheless, in the case itself, the Court deferred to judicial restraint – it was not up to the Court to deal with the issue.

The application by 18 Czech nationals, represented by an international team of lawyers, was lodged with the ECtHR in April 2000. It took the Second Section of the Court six years to issue the judgment, which had not found any violation of Article 14 of the ECHR (the right not to be discriminated), taken together with Article 2 of the Protocol No. 1 (the right to education).[28] The Court used various sources to assess the situation, specifically reports from ECRI and reports by the Czech Republic pursuant to the Framework Convention for the Protection of National Minorities, which pointed to shortcomings in dealing with the education of Roma children. The ECtHR followed the line of reasoning of the Czech Constitutional Court to a large extent when it acknowledged that a problem existed, but that its task was to examine individual applications and not to assess the overall social context.[29] The Court acknowledged the severity of dilemma the States face when dealing with pupils with special needs, and held that the setting and planning of the curriculum fell within the competence of States.[30] States should therefore enjoy a margin of appreciation

27 See Decision of the Czech Constitutional Court No I ÚS 279/99 (20 October 1999).

28 *DH and Others v Czech Republic* App no 57325/00 (ECtHR, 7 February 2006).

29 Ibid. [45].

30 The case law of the ECtHR regarding the Roma population is based upon the knowledge that Roma have become a vulnerable minority prone to discriminatory treatment; therefore, they are in need of higher level of protection (see *Chapman v the United Kingdom* App no 27238/95 (ECtHR, 18 January 2001) or *Connors v the United Kingdom* App no 66746/01 (ECtHR, 27 May 2004). However, in

and 'cannot be prohibited from setting up different types of schools for children with difficulties or implementing special educational programmes to respond to special needs'.[31] The Court appreciated Czech efforts and found the system pursuing the legitimate aim of adapting to the needs and aptitudes or disabilities of children.[32] The Court concluded by saying that although the statistics were worrying and the situation was far from perfect, it could not find that applicants' placements were the results of racial prejudice.[33]

Despite a clear majority verdict in the Chamber judgment (six to one),[34] the Grand Chamber of the ECtHR accepted the case for re-examination. The applicants opposed the test which the ECtHR Chamber had used for deciding whether there had been discrimination, calling it 'obscure and contradictory'.[35] Allegedly, the Chamber erroneously required applicants to prove discriminatory *intent* on the part of the Czech authorities, while they merely showed that the practice had been segregation in *effect*. Therefore, the applicants demanded that the burden of proof be shifted to the government, when the existence of a disproportionate impact had been established.[36]

The Czech government responded by pointing out that the submitted statistical information was not sufficiently conclusive, because no official information on the ethnic origin of the pupils existed. Even assuming that the data was reliable, the indirect discrimination that resulted was not completely incompatible with the Convention, but could have been justified as it pursued a legitimate aim (that is, the adaptation of the education process to the capacity of the children with specific educational needs).

The Grand Chamber inferred from its previous case law[37] and from the precedent of the European Court of Justice that when there is a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden shifts to the respondent State.[38] The Grand Chamber admitted that the submitted statistics may not be entirely

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general terms the prohibition of discrimination respects the margin of appreciation of the Member States: the ECtHR has repeatedly held that Article 14 does not preclude the different treatment of groups in order to correct factual inequalities between them as far as they do not establish a *de facto* discriminatory situation (see *Zarb Adami v Malta* App no 17209/02 (ECtHR, 20 June 2006).

31 See, *DH and Others v Czech Republic* (n 28) 47.

32 Ibid. [48].

33 Ibid. [52].

34 Judge Cabral Barreto disagreed with the majority and issued a dissenting opinion.

35 See, *DH and Others v Czech Republic* (n 4) 129.

36 Ibid. [129–131]. The applicants specified that a Roma child was more than 27 times more likely than a non-Roma child to be assigned to a special school, see para 134.

37 The long-established ECtHR jurisprudence defines discrimination as treating persons in similar situations differently, without objective and reasonable justification (see *Willis v United Kingdom* App no 36042/97 (ECtHR, 11 June 2002) and *Okpisz v Germany* App no 59140/00 (ECtHR, 25 October 2005). The condemnation of racial discrimination as inhuman and degrading treatment (Article 3 of the Convention) goes back to the early 1970s. However, the first case declaring the existence of indirect discrimination came only in 2001 (see *Hugh Jordan v United Kingdom* App no 24746/94 (ECtHR, 4 May 2001).

38 Once the applicant shows a clear difference in treatment, it is up to the government (defendant) to prove that this different treatment had been justified. The shift of the burden of proof has been long

reliable; however, the Grand Chamber also felt the statistics revealed a dominant trend that had been confirmed both by the respondent State and the independent supervisory bodies.[39] The burden of proof therefore shifted to the government, which was required to show that the difference in the impact of the legislation was the result of objective factors unrelated to ethnic origin.[40] The Grand Chamber then discussed the government's justification based on the need to adapt the education system to the capacity of children with special needs. The Grand Chamber expressed its concern about the less rigorous curriculum followed in the special schools and about the tests used to assess the children's learning abilities. Although the Grand Chamber acknowledged that it is not its role to judge the validity of such tests, in fact, it did so and declared them potentially biased, and therefore unfit to serve as a justification for the impugned difference in treatment. In a controversial part of the judgment, the Grand Chamber discussed the objection of the government that for the placement to a special school, the consent of parents had been mandatory (and in some cases, parents even requested the placement to the special school). The Grand Chamber expressed its doubt concerning capabilities of the parents of the Roma children to weigh all the aspects and consequences of their consent.[41] Additionally, in the conclusion, the Grand Chamber conceded that unlike some European States facing similar difficulties, the Czech Republic sought to tackle the problem. However, it still had not provided the schooling arrangements for Roma children with sufficient safeguards which would take into account their special needs as members of a disadvantaged group, meaning that the Czech Republic had not passed the proportionality test. The Grand Chamber refused to examine individual cases of the applicants; it was enough that they were members of the Roma community which suffered discriminatory treatment.[42] Consequently, the Grand Chamber declared that the Czech Republic had violated the applicants' rights not to be discriminated, read in conjunction with the right to education.[43] The Czech Republic was ordered to pay each of the applicants 4,000 Euro for non-pecuniary damage they suffered as a result of the humiliation and

recognized by the European Court of Justice when dealing with the prohibition of discrimination in European directives (see for example Case 170/84 *Bilka-Kaufhaus* [1986] ECR 01607). However, the ECtHR only joined the practice in 2004, in the case of *Nachova and Others v Bulgaria* App nos 43577/98 and 43579/98 (ECtHR, 6 July 2005).

39 The use of statistics as a means of proving the existent discriminatory practice crucial for the shift of the burden had not been looked upon very positively until the *Hoogendijk v the Netherlands* App no 58641/00 (ECtHR, 6 January 2005), even though statistics were permitted only on the ground of their undisputed and official character. It is rather peculiar that the ECtHR was willing to build its main argument upon the statistics of somewhat dubious character.

40 *DH and Others v Czech Republic* (n 4) 185-195.

41 Ibid. [197]-[204].

42 It is not the aim of the article to criticize the judgment, but this part of the argumentation belongs to the least convincing. The ECtHR shifts from its usual business of the search for an individual justice to the more sensitive branch of judicial decision-making, that is, policy making.

43 *DH and others v Czech Republic* (n 4) 205-210.

frustration caused by the indirect discrimination, and jointly, to all the applicants 10,000 Euro for costs and expenses.

The verdict provoked a heated debate on the Strasbourg Court and four judges presented unusually harsh dissenting opinions which reinforced each other. The most vocal dissenting opinion was produced by the Czech judge on the Grand Chamber, Karel Jungwiert.[44] He criticized the historical overview which the majority included in the judgment as inaccurate and incomplete. Jungwiert further condemned the fact that a number of recommendations and reports cited in the judgment were vague, and especially because they were published only after the period with which the instant case was concerned. On the other hand, the Grand Chamber failed to include other relevant documents, which found that only 30 to 40 percent of gypsy or traveller children attended school with any regularity in the EC States at the end of 1980s. The Czech Republic, by contrast, managed to arrange for almost 100 percent school attendance levels. The procedural safeguards (parental consent, recommendations of the educational psychology centres, the right of appeal, and an opportunity to transfer back to an ordinary primary school) were sufficient enough, even though the system as such led to unequal results. But at least it achieved a positive aim: to get children to attend school. Jungwiert concluded that the majority had taken an illogical approach when it found that the Czech Republic, which had tried to address the problem, was in violation of the Convention rights, while calling the countries in which half of all Roma children lack any education, as having 'difficulties'.[45] Jungwiert was joined in his conclusion by Judge Zupančič who characterized the finding as bordering 'on the absurd'.[46] Judge Šikuta moreover challenged the validity of an inference of the racial prejudice on the basis of questionable statistical evidence. He further added that the difference in treatment was in fact between children attending ordinary schools and those attending special schools, regardless of their ethnicity.[47] Judge Borrego Borrego questioned the role which the Court took in the case when it assessed the overall social context rather than the individual application. He noted that none of the applicants or their parents attended the hearing and probably had never met their representatives from London and New York and added: '[t]he hearing room of the Grand Chamber had become an ivory tower, divorced from the life and problems of the minor applicants and their parents, a place where those in attendance could display their superiority over the absentees'.[48] The Spanish judge sharply denounced the Grand Chamber when it questioned the capacity of Roma parents to perform their parental duty.[49]

Courageous judgments usually come at a price of disrupting the unity of the Court. The individual objections of dissenting judges surely point out relevant shortcomings

44 *DH and Others v Czech Republic* (n 4), DO of Judge Jungwiert.

45 Ibid. [1–16].

46 Ibid., DO of Judge Zupančič.

47 Ibid., DO of Judge Šikuta.

48 Ibid., DO of Judge Borrego Borrego.

49 Ibid.

in the argumentation of the Court, but the majority opted for a strong message in a bold move to address the unsatisfactory situation of the education of Roma children, even at the expense of overall coherence of the judgment.

The reactions on the *DH* judgment among the legal public have been mixed. Leading Czech legal experts, especially of a younger generation, comprising academics, judges, practising barristers, and government lawyers, regularly discuss new developments on the blog *Jiné právo* [Different Law].[50] The opinions were both positive and negative towards the judgment, with a slight prevalence of critical views. Participants in the discussion particularly disliked the Grand Chamber's reasoning that by statistically showing discrimination of Roma children this automatically led to violation of applicants' rights, without reviewing individual cases. Moreover, while acknowledging the need to address the inadequate conditions for education the Roma children faced in special schools, some experts pointed to the artificial character of bringing the whole case-saga before the international court, because the applicants were reportedly approached by NGOs that were purposefully searching for suitable plaintiffs. A critique of the Court overstepping its role appeared occasionally, but more radical attacks questioning the legitimacy of the ECtHR as such have not occurred. Similarly, the media reported the decision without hype.

The ground-breaking *DH* judgment was followed by several other cases dealing with the indirect discrimination in treatment of Roma children in primary schools: *Sampanis and Others v Greece*,[51] *Orsus and Others v Croatia*,[52] *Sampani and Others v Greece*,[53] and finally, *Horváth and Kiss v Hungary*.[54] In all these cases, the respective governments were found to be in breach of the prohibition of discrimination by disregarding the vulnerability of Roma minority and permitting the existence of the Roma children segregation in education. While the ECtHR has agreed that States cannot be prohibited from setting up separate classes or different types of schools for children with difficulties, which may help them in acquiring the necessary knowledge for the fulfilment of educational requirements, it stresses that governments must ensure that these steps do not lead to direct or indirect discrimination.[55] The cases bring up two important points with relevance to the *DH* case. First, it seems that the use of statistics for the burden of proof reversal is becoming standard in the ECtHR's case law, making accurate and reliable statistical data on the ethnic composition of primary schools all the more important. Second, in so far the last case concerning discrimination in education, *Horváth and Kiss v Hungary*, the Court reinforced the positive obligation on the part of the government to prevent the long-term violation

50 Michal Bobek, 'Ostravo, Ostravo' *Jiné právo* (2007) <jinepravo.blogspot.com/2007/11/ostravo-ostravo.html> accessed 7 April 2014.

51 *Sampanis and Others v Greece* App no 32526/05 (ECtHR, 5 June 2008).

52 *Orsus and Others v Croatia* App no 15766/03 (ECtHR, 16 March 2010).

53 *Sampani and Others v Greece* App no 59608/09 (ECtHR, 11 December 2012).

54 *Horváth and Kiss v Hungary* App no 11146/11 (ECtHR, 29 January 2013).

55 *Zarb Adami v Malta* App no 17209/02 (ECtHR, 20 June 2006).

of human rights in the system of public education. According to the ECtHR 'the State has specific positive obligations to avoid the perpetuation of past discrimination or discriminative practices disguised in allegedly neutral tests', and has to demonstrate that these tests mirror the learning capabilities of children in a fair and objective way.[56]

5. IMPLEMENTATION OF THE *DH* CASE IN THE CZECH REPUBLIC

In the following section, we identify groups of actors in a multi-level game working for and against the implementation of the *DH* judgment and subsequently reveal the deficiencies in the system of implementation of ECtHR judgments. Fundamentally, the implementation falls in the government's responsibility, while the Council of Europe (COE), specifically the Committee of Ministers, exercises supervision.

Steven Greer calls the execution of ECtHR judgments 'the Achilles heel of the entire Convention system',[57] because the COE does not have many possibilities how to compel a State to implement an ECtHR judgment. The utmost threats – of suspending voting rights or even expelling a State from the COE – are reserved for the most serious situations. Generally, the States are expected to end the violation, not repeat it, and make reparations (the payment of the just satisfaction, and/or the adoption of general and/or individual non-pecuniary measures). Especially in the last ten years, the COE has put more emphasis on the execution of judgments and their supervision, which also translates into higher elaboration of the process and inclusiveness of other COE bodies.[58] In cases of problems with execution of a judgment, the Committee of Ministers previously issued interim resolutions; these have been increasingly replaced or supplemented by less formalized memoranda.[59] Since the mid-1990s, the ECtHR itself has become more willing to use the documents directly to identify structural shortcomings in national practice.[60]

It is claimed that ECtHR judgments concerning the Roma have the worst track record of implementation.[61] In addition to the Czech Republic, three other States have faced criticism by the Committee of Ministers due to the unsuccessful executions of

56 See *Horváth and Kiss v Hungary* (n 54) 116.

57 Steven Greer, *The European Convention on Human Rights. Achievements, Problems and Prospects* (CUP 2006) 155.

58 Elisabeth Lambert Abdelgawad, 'The Execution of the Judgments of the European Court of Human Rights: Towards a Non-coercive and Participatory Model of Accountability' (2009) 69 Heidelberg Journal of International Law 472, 491.

59 Ibid. [501]–[505].

60 Greer (n 57) 159–160.

61 Constantin Cojocariu, 'Improving the Effectiveness of the Implementation of Strasbourg Court judgments in Light of Ongoing Reform Discussions' (2010) Roma Rights <www.errc.org/roma-rights-journal/roma-rights-1–2010-implementation-of-judgments/3613/1> accessed 7 April 2014. For more on the implementation of case law on the Roma, see also Crina Elena Morteanu, *The Impact of the Jurisprudence of the European Court of Human Rights on Roma Rights* (Central

cases on the discrimination against Roma children in primary education. In *Orsus and Others v Croatia*, the ECtHR stated discrimination of Roma children had occurred due to the lack of reasonable justification for their placement in Roma-only classes (allegedly based on their inadequate command of the Croatian language).[62] Apart from the just satisfaction claimed by the applicants, the Committee invited Croatian authorities to abolish Roma-only classes and integrate the children into mainstream education, and to address the problems of very poor school attendance and the high drop-out rate of Roma pupils from schools.[63] While the Committee acknowledged a number of measures the Croatian authorities had been taking in order to raise the language competence of Roma children, it also pointed out that the problem was of a complex character and required comprehensive action of different stakeholders (State, local authorities, parents, society).[64] The case therefore remains under standard supervision by the Committee.

The Greek *Sampani* and *Sampanis* cases dealt with discrimination of Roma children due to the failure of authorities to enrol and provide schooling for Roma children, who were placed in special preparatory classes (which the Court considered to be of discriminatory character).[65] The execution of the first case (*Sampanis*) was successfully completed in 2011 after several complex reforms of educational system (introduction of preparatory classes, education of adults, special mediators fluent in Romani introduced in order to assist Roma families with education of children, and so on).[66] The second case (*Sampani*) is still under enhanced supervision, and as of July 2014, no report of the Committee of Ministers is available. Similarly, the decision against Hungary in *Horváth and Kiss* (assignment of applicants into remedial school for children with mental disabilities due to their Roma origin) has not yet been executed.[67] However, the case is still quite recent with initial reports and an action plan on the part of the government delivered only in January 2014.

European University, Department of Legal Studies 2009) <www.etd.ceu.hu/2010/morteanu_crina-elena.pdf> accessed 7 April 2014.

62 See *Orsus and Others v Croatia* (n 52).

63 Council of Europe (Ministers' Deputies Information document by Committee of Ministers) 'Supervision of the execution of the judgment in the Case of Orsus and other against Croatia' (2 November 2011) CM/Inf/DH (2011) 46 <https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Inf/DH%282011%2946&Language=lanEnglish> accessed 7 April 2014.

64 Council of Europe (Committee of Ministers), 'Pending cases: current state of execution: Case against Croatia' App No 15766/03' (1136th meeting, 6–8 March 2012) <www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp> accessed 7 April 2014.

65 See *Sampanis and Others v Greece* (n 51) and *Sampani and Others v Greece* (n 53).

66 Council of Europe (Resolution by Committee of Ministers), 'Execution of the judgment of the European Court of Human Rights' (1120th meeting, 14 September 2011) CM/ResDH (2011) 119 <https://wcd.coe.int/ViewDoc.jsp?id=1832325&Site=COE#P3325_192701> accessed 7 April 2014.

67 Council of Europe (Committee of Ministers), 'Pending cases: current state of execution: Horvath and Kiss v Hungary' App No 11146/11' (1193rd meeting, 4–6 March 2014) <www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=Horvath+and+Kiss> accessed 18 July 2014.

In the *DH* case, the Court lauded the efforts of the Czech government when dealing with the uneasy integration of Roma population into society,[68] but emphasized that even these actions and measures, regardless of the motivation of their legitimate aims and how necessary these measures were, must honour the principles and rights protected by the Convention. The Committee of Ministers' guidelines for implementation of the judgment clearly instructed the Czech government on the enrolment tests (which ought to be based on criteria unrelated to ethnic origin) and parental consent (placement in separate classes should be allowed only on the basis of fully informed parental consent, which does not lead to a waiver of the right not to be discriminated). However, the crucial point, the existence of separated education itself, remained formulated in very wide and general terms stating just the necessity to ultimately aim for overall inclusion into the mainstream system.[69]

The implementation of ECtHR judgments which have met some resistance from a country found in violation of the Convention usually involves a high variety of actors. The subjects participating in the implementation ordinarily come from international, national and subnational levels. They can be both of governmental and non-governmental nature, personally affected or just generally interested, directly or non-directly dealing with the implementation and supporting or opposing the ECtHR's judgment. Numerous combinations of these characteristics create a complicated matrix of players with distinct motivations, logics, goals and instruments available, which we have tried through our close observation to make some sense from. First, we briefly outline actors involved in the implementation in the *DH* judgment and then analyse their behaviour and impact more closely.

At the international level, institutions of the COE monitor the implementation of judgments, with the Committee of Ministers being the main supervisory body, and make use of the reports of the COE Human Rights Commissioner, the ECRI and international (IOs) and non-governmental organisations (NGOs). At the national level, governments are responsible for the implementation, while in practice the implementation splits among several departments according to the area of policy. In the *DH* case, the task of elimination of the discriminatory practice in education remained with the Ministry of Education, under the monitoring of the Ministry of Justice. The Ministry of Foreign Affairs can be involved too as a guarantor and the 'face' of international commitments. The actors overseeing the change at the governmental level (that is the internal actors) are the Czech School Inspection (a public office collecting data for the Ministry of Education) and the Governmental Commissioner for Human Rights with the Council for Human Rights (a governmental advisory body). These two bodies are tasked with providing internal domestic control,

68 See *DH and Others v Czech Republic* (n 28) 198.

69 Council of Europe (Ministers' Deputies Information Documents by Committee of Ministers), 'Supervision of the execution of the judgments in the case of DH and Others against Czech Republic, judgment of 13/11/2007 (GC)' (24 November 2010) CM/Inf/DH(2010)47<wcd.coe.int> accessed 7 April 2014.

observation and advice on the successful implementation of judgments. Apart from the executive level, a strong influence might be felt from the Office of the Public Defender of Rights (Ombudsman). NGOs provide information in both directions between the government and 'stakeholders' and monitor the compliance of the state with judgments. By 'stakeholders', we are referring to a big amorphous group of various stakeholders in the education policy – Roma children and their parents, schoolmasters and educators in mainstream schools, and psychologists, schoolmasters and educators in practical schools. The primary arena for the stakeholders of educational policy is the national setting; they want their preferences fulfilled irrespective of international concerns. On the other hand, governmental actors also consider the international arena, because non-compliance with judgments brings reputational costs. Therefore, those actors pushing for implementation of the judgment can play the international card and involve sympathetic international (both governmental and nongovernmental) actors. To simplify the basic map of actors – the governments and the relevant ministries are responsible for the implementation of the judgments. Their efforts are controlled from within the executive by the School Inspection and Human Rights Commissioner ('internal domestic control'). Outside the executive, the Ombudsman, NGOs, courts,[70] and, indirectly, stakeholders as well, exert 'external domestic control'.

5.1. IMPLEMENTATION AND THE NATIONAL LEVEL

To implement the *DH* judgment, the Czech Republic is expected to substantially reform its primary education system. Nevertheless, six years on, the reform of the educational system is still deemed inadequate and discriminatory treatment of Roma children persists. We describe the changes passed so far and discuss under what circumstances the ECtHR is able to push through a systemic change such as a substantial reform of the educational system.

5.1.1. National Implementing Bodies

Before an examination of the legislative changes in the area of inclusive education, we reiterate that while the government is the addressee of the COE's recommendations and assumes the overall responsibility for the judgments' implementation, the desired changes are executed by the specialized ministries whose interests and positions do not have to be necessarily consistent.

The very first attempt to introduce inclusive education[71] and eliminate the overrepresentation of Roma children in special schools actually came before the Grand Chamber's *DH* judgment. Act no 561/2004 Col. (The School Act, in effect

70 Courts stand slightly apart from the main structure of domestic external control actors, as their potential influence depends directly on the activity of plaintiffs (*nemo iudex sine actore principle*).

71 Inclusive education means education of all children in one system. ECtHR sees inclusive education as the most effective form of the integration of Roma children into the mainstream population.

from 1 January 2005) established a new categorization of schools which involved the termination of special schools and the creation of schools or classes for children with specific needs (practical schools). This step was clearly motivated by an attempt to deprive the special schools of many prejudices and mocking labels developed through the years and intended to facilitate the future integration of pupils with specific needs into the regular education system.[72] However, the reform never achieved inclusive education, as the special schools were merely renamed to practical schools or primary schools with the possibility to adjust the curricula to meet the needs of the pupils. The ethnic composition of the pupils remained the same and the roots of the problem with Roma discrimination were not removed.

The government's report on the general measures for the execution of the *DH* judgment[73] identified the main problem in the disputable practice of the enrolment of Roma children into practical (earlier special) schools. The report suggested that the information given to the parents was very often incomplete;[74] therefore, the new legislation tightened up the conditions laid upon the enrolment procedure: parental consent had to be presented in writing and include proper instruction for the parents (informed consent), featuring information on the differences between the standard and practical schools. However, comprehensive monitoring of the information given to the parents was absent, which made the whole process non-transparent, especially considering that over 60 percent of pupils in the observed schools were enrolled directly on the request of their parents. Another part of the enrolment procedure, the reports of the school counselling facilities, considerably differed in quality and only very seldom took into account different cultural and social backgrounds of children. Transfers between practical and standard schools have not occurred and the headmasters partly blamed parents who showed very little interest in regular assessment of children and in 38,7 percent of cases openly opposed their reintegration.[75]

All in all, the ECtHR's judgment was followed by a period of only cosmetic changes until March 2010, when the government adopted the National Action Plan of Inclusive Education (NAPIE), a strategic document that was designed to adopt a framework for key changes in education, including preschool education, social inclusion of ethnic groups, and reforms in the system's financing. In spring 2010, the Ministry of Education in cooperation with academics and NGOs established a specialized working group for the preparation and implementation of NAPIE. Unfortunately, the

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72 Chamber of Deputies, 'Explanatory report to Act No 561/2004 Coll <www.psp.cz/sqw/text/tiskt.sqw?O=4&CT=602&CT1=0> accessed 7 April 2014; Czech School Inspection: 'Annual Report 2010/2011' (December 2011) <www.csicr.cz/getattachment/87d8dca8–405c-45c6-ab14–0957aa91cae0> accessed 7 April 2014.

73 Government of the Czech Republic, 'Zpráva o obecných opatřeních k výkonu rozsudku Evropského soudu pro lidská práva ve věci č. 57325/00: DH a ostatní proti České republice' (16 March 2009).

74 Ibid.

75 Ibid. As followed from our interviews with NGOs, the Roma parents have several motives for refusal of the transfer to standard schools, especially generally low interest in educational system, but also fear of ostracism of their children in mainstream schools.

group appeared dysfunctional due to political reasons very closely linked with the personnel occupying the ministerial post.[76] While the former ministers Ondřej Liška (2007–2009) and Miroslava Kopicová (2009–2010) had been praised for attempts to address the judgment, the work on the NAPIE became paralysed after the appointment of the government of Petr Nečas. The new Minister of Education after July 2010, Josef Dobeš, terminated the work of the ministerial department dealing with inclusive education.[77] The working group had only two meetings, the second in January 2011, which appeared more as a charade than a serious meeting.[78] Accordingly, the COE Committee of Ministers criticized the lack of communication on the part of Czech Ministry of Education. In June 2011, more than half of the external experts involved in the NAPIE quit their positions in protest over the disinterested approach of the Ministry.[79] Changes came only after the appointment of the new minister Petr Fiala (May 2012–July 2013).

In November 2012, the Ministry of Education finally issued a new action plan which set obligatory monitoring of the placement of Roma students to schools and evaluation of the curricula and promised to revise the scheme of preparatory classes, which were heavily criticized as ineffective.[80] The trigger of the reforms may be seen in light of further personnel changes at the Ministry, as well as in the pressure of many emerging evaluation reports created by different monitoring and nongovernmental bodies in the lead up to the fifth anniversary of the *DH* judgment.

The Ministry of Education under new leadership has finally begun responding both to the domestic and international pressure hurting the reputation of the Czech Republic. The ultimate goal of the new action plans is more inclusive education, exactly in line with the COE's demands. Unfortunately, these efforts are not welcomed, nor understood by many stakeholders in the educational system – by teachers, headmasters or parents. At the beginning of 2013, over 70,000 parents, teachers and other employees of the elementary practical schools signed a petition for the preservation of practical elementary schools, claiming they were not petitioning against inclusion as a whole, but against the proposed strategy. The petitioners

76 Council of Europe (n 64); Council of Europe, 'Pending cases: current state of execution: Case DH v the Czech Republic' (17 April 2012) <www.coe.int> accessed 7 April 2014.

77 František Valeš and Selma Muhič Dizdarevič, '*Stínová* zpráva: Rasismus a diskriminace v České republice', European Network Against Racism <enar.helcom.cz> accessed 7 April 2014. The shadow report of the European Network Against Racism points out that Minister Dobeš's counsel Ladislav Bátora, president of the initiative DOST ('Enough'), a far-right group opposing the abolishment of discrimination, used to be a candidate for the far-right National Party. The appointment of Bátora to the function of the head of the Personnel Department of the Ministry of Education was heavily criticized.

78 Ibid.

79 Council of Europe, 'Pending cases: current state of execution – Case *DH v the Czech Republic*, status: 17 April 2012' <www.coe.int/t/dghl/monitoring/execution/> accessed 7 April 2014.

80 The preparatory classes consisted mostly of only Roma pupils; as a result the model of the inclusive education was not upheld. Moreover, as attendance had not been mandatory, most of the children ceased the participation by the first semester.

expressed deep concerns about the governmental 'Strategy in the Fight against Social Exclusion', which aimed to abolish the practical schools, and pointed out the lack of personal and economic resources needed for proper integration of Roma children.[81] The Ministry consequently moderated its bold stance and for the time refused any systemic changes and instead is going to work on reforms within the current system.

5.1.2. Overseeing the Implementation – Internal Domestic Control

Two governmental bodies participate in monitoring the reform progress. The Czech School Inspection as a specialized administrative monitoring body in the field of education and the Government Council for Human Rights, an advisory body to the government, which monitors the fulfilment of the Czech Republic's international human rights commitments and issues evaluation reports on the situation of human rights in the country. The last National Report, for the years 2008–2012, was highly optimistic as regards the implementation of the *DH* case, praising the NAPIE project without any critical remarks concerning its actual functionality.[82] For a very long time, one of the main strains in the implementation of effective measures has been the absence of reliable data on the composition of pupils at practical schools. Therefore, in 2009, the government finally started to prepare the work on official statistics and monitoring reports. In cooperation with NGOs, the government issued two studies dealing with educational opportunities of Roma pupils (which confirmed the disproportionate number of Roma children in practical schools) and a quantitative study on transfers of the children from practical to the mainstream schools.[83] Another round of monitoring the practical schools and the implementation of the new School Act was led by the Czech School Inspection, which again identified severe problems in the placement of Roma children and in their chances for future inclusion in the mainstream educational system.[84]

According to the 2010 Report of the Czech School Inspection, the number of practical schools in the academic year 2009/2010 decreased to one-third compared to the number of special schools in 2004/2005. Curricula, school attendance and proper evaluation of the pupils with specific needs were still at very low level in practical schools, having a significantly negative impact on the ability of the Roma children to

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81 Jana Smetanová, 'Petice proti rušení praktických škol' (Petice24.com, 1 October 2012) <www.petice24.com/petice_proti_rueni_praktickych_kol.> accessed 7 April 2014.

82 Government of the Czech Republic, 'National Report of the Czech Republic for the second cycle of the universal periodic evaluation 2008–2012' 5, para. 20 <www.vlada.cz/assets/ppov/rlp/dokumenty/zpravy-plneni-mezin-umluv/UPR-zprava.pdf> accessed 7 April 2014.

83 Lydia Gall and Robert Kushen, 'What Happened to the Promise of DH?' *Roma Rights*, 26 July 2010 <www.errc.org/roma-rights-journal/roma-rights-1–2010-implementation-of-judgments/3613/5> accessed 7 April 2014.

84 Czech School Inspection, 'Thematic Report of the Czech School Inspection' (no 8302/2010-I/1-CSI, March 2010) <www.csicr.cz/getattachment/6e4232be-1c17–4ff8-ac72–763a23569109> accessed 7 April 2014.

integrate into the mainstream educational system. Overall, the visited schools also had a rather low level of properly qualified teachers.

5.1.3. Overseeing the Implementation – External Domestic Control

Further attempts to produce reliable statistics came from the Office of the Czech Ombudsman in 2010 and 2012. The Office of the Ombudsman, although generally considered a rather weak institution due to its limited jurisdiction, can contribute significantly to facilitation of the implementation process[85] by playing the role of mediator between the public interest protected by administrative authorities and the rights of individuals. In April 2010, in a response to the Czech School Inspection, the Ombudsman held that the overrepresentation of Roma children in the group of children with mental disorders found by the Inspection (according to the Inspection findings, one third of these children were Roma) amounted to discriminatory treatment.[86] The research itself was highly unpopular among primary and practical schools whose teachers often boycotted researchers and refused to provide them with information on pupils' ethnicity.[87] A refusal to cooperate with the Ombudsman's Office was also demonstrated in the latest survey, published in June 2012, suggesting the existence of strong resistance of headmasters to changes in the education system.

Research focused on the ethnic composition of the pupils of former special schools, that is on pupils educated in programs with easier curricula tailored to the needs of children with mild mental disabilities.[88] The research confirmed the persisting discriminatory practice: 32 percent of pupils in practical schools were of Roma origin. The research attracted large expert and media attention, but also harsh words from headmasters, teachers and school psychologists for its 'controversial' methodology.[89] In any case, the Office of the Ombudsman played an important role, as its research

85 Open Society Justice Initiative, *From Rights to Remedies. Structures and Strategies for Implementing International Human Rights Decisions* (Open Society Foundations 2013) 99.

86 Veřejný ochránce práv, 'Stanovisko veřejného ochránce práv k podezření na diskriminaci romských dětí a žáků: z tématické kontrolní činnosti České školní inspekce na základních školách praktických' (20 April 2010).

87 Tracey Gurd, 'Litany of Failure: Pressure Mounts for Education Reform in Czech Republic' (Open Society Foundation, 6 March 2012) <www.opensocietyfoundations.org/voices/litany-of-failure-pressure-mounts-for-education-reform-in-czech-republic> accessed 20 July 2014.

88 That is in current practical schools and in some of the primary schools with lower curricula. Interestingly, the impulse for the research came from the School Inspection which asked the Ombudsman for the evaluation of the Inspection's 2010 findings on the ethnic composition and determination whether the results might be considered discriminatory.

89 Collection of the data concerning ethnicity was performed by the method of empirical identification according to indirect criteria by a neutral party: the employees of the Ombudsman Office were visiting schools and identifying Roma children according to the criteria generally accepted in society as typical for Roma community. Even though this method is rarely used in ethnic data researches, the use of a more popular self-identification was out of question due to the already mentioned unwillingness of Roma people to publicly identify themselves with Roma ethnicity. For more, see Veřejný ochránce práv, 'Popis metody a výsledky výzkumu etnického složení žáků

provided empirical evidence that the government had failed to execute the decision.[90] However, as will be shown in the next section, the Office did not manage to mediate among the opposing interests, nor did it persuade teachers, headmasters and parents about the importance of getting accurate information on the ethnic composition of classes.

Activities of national NGOs[91] provide another important source of external domestic control. NGOs harshly criticized the Ministry of Education under Minister Dobeš for its passivity and trivialization of the problem.[92] Nonetheless, similar criticism has been directed towards headmasters, who often oppose changes towards more inclusive education.[93] NGOs' opinions on reforms remained mixed, because changes had not gone much further than formal renaming of the special schools to practical schools.[94]

5.1.4. The Judiciary

Given the persisting situation of widespread discrimination of Roma children confirmed not only by the ECtHR and other European bodies, but also by national authorities, one might expect a flood of litigation from discontented parents of Roma pupils placed in practical schools. The courts could come into play in the last instance as guardians of rights of the Roma minority, but only after actions from plaintiffs who, apparently, do not feel the need to come before courts with complaints. The inclusion of the judiciary among the relevant actors implementing the *DH* case is limited by the lack of the actual motivation of Roma parents to bring actions before the courts. The passivity of Roma parents was also pointed out during the proceedings both before the Czech Constitutional Court and the ECtHR. Not only had the plaintiffs not exhausted all remedies at the national level, but they initiated the proceedings largely thanks to the NGOs promoting the rights of minorities who contacted them.

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bývalých zvláštních škol v ČR v roce 2011/2012' (2012) <http://cosiv.cz/files/materialy/cesky/Vyzkum_skoly-metoda.pdf> accessed 7 April 2014.

90 Open Society Justice Initiative, *From Rights to Remedies. Structures and Strategies for Implementing International Human Rights Decisions* (n 85) 100.

91 In particular, NGOs dealing with the Roma rights and discrimination in education: Liga lidských práv, IQ Roma servis, Romea, ROMODROM, Česká odborná společnost pro inkluzivní vzdělávání, Amnesty International, Roma Education Fund, Evropské centrum pro romské záležitosti.

92 Amnesty International, European Roma Rights Centre, 'Five more years of injustice: Segregated education for Roma in the Czech Republic' (November 2012) <www.romea.cz/dokumenty/081112_Czech-Roma_-_report.pdf> accessed 7 April 2014.

93 Concluding remarks based on interviews with representatives from NGOs and the Ministry.

94 See for example Amnesty International, 'Czech Republic must eliminate second-rate education for Roma' (13 January 2010) <www.amnesty.org/en/news-and-updates/report/czech-republic-must-eliminate-second-rate-education-for-roma-20100113> accessed 7 April 2014; or European Commission against Racism and Intolerance, 'ECRI Report on the Czech Republic, fourth monitoring cycle' (15 September 2009) <www.coe.int/t/dghl/monitoring/ecri/country-by-country/czech_republic/CZE-CbC-IV-2009–030-ENG.pdf> accessed 7 April 2014.

We approached all the higher courts in the Czech Republic to share their experiences with actions against decisions about the placement of children in practical schools, as well as about the compensation for damages caused by segregation in education. Surprisingly (or perhaps not), after six years, such actions are still very rare.[95] The regional court in Ostrava reported that it has never faced such an action, which is quite startling considering the fact that the applicants in the *DH* case came from the Ostrava region and the practical schools here have one of the highest proportions of Roma children. Moreover, the *DH* doctrine is not followed very closely in those few judgments we have at our disposal. Contrary to the finding of the Grand Chamber in *DH*, the Prague City Court in its decision of 10 August 2010 held that the plaintiff was obliged to bear the burden of proof and to submit clear evidence of the discriminatory character of his placement in a practical or special school.[96] Only in December of 2012 did the Supreme Court work with the *DH* judgment and discrimination in the education for the first time,[97] and refused the application of the ECtHR's conclusions on the Czech educational system as in breach of the principle of individuality.[98]

We suspect that national courts would feel considerable unease when implementing the *DH* principles in their case law. Even if we assume that national judges are familiar with the ECtHR case law, the traditional method of ruling on rights in the individual case would presumably prevent a majority of judges from taking bolder interpretations. The *DH* judgment is based mostly on the general assessment of the Czech educational policy and not on the discriminatory character of the decisions by headmasters of primary schools in individual cases. Therefore, in a situation when the national judge is faced with a similar case, which on its own does not show evident features of discriminatory treatment (or even is not discriminatory at its core), the chances of implementing the *DH* doctrine are extremely slim. In other words, while for a Czech judge evidence of malpractice in an individual case is required, for Strasbourg judges it would be enough that an individual belongs to a discriminated group. But such a logical shortcut collides with the traditional interpretative canon in the Czech Republic. Therefore, the burden of implementation of the *DH* judgment rests with the executive and legislative branches, rather than with the judiciary.

95 To some degree the low interest of Roma parents may be caused by late implementation of the Anti-Discrimination Act which came into force only in 2009. Representatives of several NGOs noted that up until then, any claim on discriminatory treatment relied just on the case law of the ECtHR and the Court of Justice of the EU. The Czech legal system generally does not work with the doctrine of judicial precedent, therefore such cases face great difficulties in pushing through.

96 Lydia Gall and Robert Kushen, 'What Happened to the Promise of DH?' (n 83).

97 Supreme Court 13 December 2012 judgment No 30 Cdo 4277/2010.

98 It is worth noting that under Czech legal doctrine, the courts are obliged to follow the general findings of the ECtHR's case law. The courts may depart from the ECtHR's interpretation of the Convention only in duly reasoned and well-founded cases where the individual circumstances differentiate the case from the constant ECtHR's jurisprudence so significantly that any other result would lead to infringement of the principles of justice. Otherwise, the failure of the courts to implement the ECtHR's case law constitutes a breach of the international commitments of the Czech Republic.

5.2. EXTERNAL SUPERVISION OVER IMPLEMENTATION

5.2.1. Council of Europe – The Committee of Ministers

The Committee of Ministers is the COE body responsible for the monitoring of the execution of ECtHR judgments. If the ECtHR finds the State in breach of the Convention, the State is obliged to abide by the judgment, to pay required just satisfaction and implement all measures necessary for its effective implementation. The decision of what provisions would fall under the category of 'general measures' is upon the State. Under Article 46, paragraph 2 of the Convention, the Committee supervises the implementation of individual (rehabilitation) and general measures (prevention of similar future violations). The Committee intervenes and advises the State on the measures only after the ECtHR concludes that the State failed to comply with its findings and requirements of the Convention. The role of the Committee in the execution of judgments, which often require deep, complex and systemic changes in domestic policies, is of utmost importance. However, its position has been criticized for its lack of enforcement capabilities, the overflow of cases, and a very lenient approach.[99] The Brighton Declaration of 2012 acknowledged the ever-increasing number of judgments and violations disclosing a systemic issue at the national level, and called for the strengthening of the Committee's capacity.[100] Both the procedure of ensuring effective supervision of the execution of judgments and domestic capacities for the execution of foreign judgments should be refined.

In the *DH* case, individual measures were considered to be out of the question because all the applicants were no longer in the compulsory schooling system and just satisfaction had been already granted.[101] However, the general measures are still in effect. The Committee of Ministers welcomed the NAPIE plan from 2010 as a key framework for the reform. During its 1115th meeting in June 2011, the Committee called upon the Czech government to provide detailed information on the current state of implementation of the NAPIE plan, a timetable of future steps and results achieved for the next school year.[102] The information was submitted by the government after more than one year. After a satisfactory Communication from the Czech authorities on the Anti-Discrimination Act (which came into force in 2009 after several years of impasse) and a few minor legislative changes in autumn

99 Philip Leach, 'The Effectiveness of the Committee of Ministers in Supervising the Enforcement of Judgments of The European Court of Human Rights' (2006) 3 *PL* 443, 449.

100 High Level Conference on the Future of the European Court of Human Rights, 'Brighton Declaration' (19 April 2012) <hub.coe.int/20120419-brighton-declaration> accessed 7 April 2014.

101 However, in *Horváth and Kiss v Hungary* App no 11146/11 (ECtHR, 29 January 2013) the ECtHR recently recommended introduction of adult education for the victims of discrimination.

102 Ministers' Deputies, 'Annotated agenda and decisions adopted' (CM/Del/dec(2011)115, 1115th meeting (DH) 7–8 June 2011) <wcd.coe.int> accessed 7 April 2014.

2011,[103] the Committee resumed in June 2012. The Committee welcomed the Czech authorities' commitment to monitoring of the situation, but at the same time referred to the Ombudsman Office survey which found the proportion of Roma children in non-standard education system as unchanged. The Committee further criticized the Government for not submitting the information on the continuation of the NAPIE.[104] The last annual report of the Committee for 2012 noted the adopted action plans; however, the Committee also invited the Czech authorities to monitor the changes in the (still highly) disproportionate percentage of Roma children in practical schools and required continued regular submission of information.[105]

5.2.2. Council of Europe – Other Supervisory Bodies

Reports of the Committee of Ministers rely, in addition to the reports of the respondent governments, on research and reports of other COE's monitoring bodies, mainly the Commissioner for Human Rights and the ECRI, both of whom have found minor legislative changes insufficient. For example, the report of the Commissioner for Human Rights, Thomas Hammarberg, noted that approximately 30 percent of Czech Roma children were still (as of March 2011) placed in special schools for children with mental disabilities compared with only 2 percent of non-Roma children.[106] Similar data may be found in the OECD report of January 2012, which noted that the placement of Roma children in practical schools was still very high.[107] The Commissioner welcomed the adoption of the NAPIE, but stated that despite several legislative amendments, hardly any positive changes can be seen in practice. The Commissioner positively evaluated the plan of inclusive classes in kindergartens, but sternly criticized the downsizing of personnel and resignations of several officials at the Department of Special Education and Equal Opportunities in the Ministry

103 Council of Europe, 'Pending cases: current state of execution: Case DH v the Czech Republic' (n 76); Council of Europe, 'Communication from the Czech authorities in the case of DH and Others against Czech Republic (App No 57.25/000): Information about the National Plan of Inclusive Education: Rule 8 2 a of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements' (Dh-DD(2010)584E, 19 November 2010) <wcd.coe.int> accessed 7 April 2014; Council of Europe, 'Note of the Government of the Czech Republic on the general measures related to the execution of the judgment of the European Court of Human Rights in case no 57325/00: *DH and Others v the Czech Republic*: Information about the national Plan of Inclusive Education' (DH-DD(2010)584E, 19 November 2011) <wcd.coe.int> accessed 7 April 2014.

104 Council of Europe, 'Pending cases: current state of execution: Case DH v the Czech Republic' (n 76).

105 Committee of Ministers, 'Supervision of the execution of judgments and decisions of the European Court of Human Rights' (2012) <www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2012_en.pdf > accessed 20 July 2014.

106 Council of Europe, Commissioner for Human Rights, 'Human rights of Roma and Travellers in Europe' (n 23).

107 Paulo Santiago and others, 'Czech Republic: OECD Reviews of Evaluation and Assessment in Education' (OECD Publishing 2012) <www.oecd.org/dataoecd/33/47/49479976.pdf> accessed 7 April 2014.

of Education, which he identified as a body carrying crucial responsibility in the implementation of the *DH* judgment.[108]

The ECRI, an expert body monitoring the standard of protection against discrimination of individuals and minorities, urged the Czech authorities 'to transfer substantial numbers of children from specialised primary schools to ordinary education' and introduce regular monitoring and supervision.[109] Furthermore, the ECRI emphasized that every year of education lost due to the severely constricted curriculum is vital for the children and pointed out the recently publicized successes of Roma children previously placed in Czech practical schools in the UK mainstream educational system.[110]

6. PERCEPTIONS OF INVOLVED ACTORS CONCERNING DISCRIMINATION IN EDUCATION

Based on the data gathered for mapping attitudes and preferences of various actors involved in the process of the *DH* implementation – interviews, reports, speeches and secondary sources – we can now observe some repeating patterns in their responses. It seems that the 'stakeholders' of the current education system (encompassing parents of Roma and non-Roma children,[111] headmasters of elementary schools, headmasters of non-'mainstream' elementary schools, special education teachers and/or elementary school teachers) prefer the status quo. For all the aforementioned stakeholders, the present situation is familiar and provides them with some advantages, while any upheaval would destabilize the equilibrium and bring uncertainties. We do not suggest that such a scenario is true in every case –there exist schools and projects promoting the inclusion of Roma children in mainstream education. However, the prevailing attitudes of the broad coalition of stakeholders – based on the obtainable official data and interviews we conducted – appear to be only slowly progressing towards a more inclusive approach. The status quo is preferred both by diffuse interests (the broad public with negative attitudes towards Roma and parents of schoolchildren) and by specific interests (headmasters and educators), while the change-camp includes

108 Council of Europe, Commissioner for Human Rights, 'Report by Thomas Hammarberg' (following his visit of the Czech Republic from 17 to 19 November 2010) (Strasbourg, 3 March 2011) (CommDH(2011)3) <https://wcd.coe.int/ViewDoc.jsp?id=1754217> accessed 7 April 2014.

109 ECRI, 'ECRI Conclusions of the Implementation of the Recommendations in Respect of the Czech Republic Subject to Interim Follow-up' (23 March 2012) <www.coe.int/t/dghl/monitoring/ecri/> accessed 7 April 2014.

110 Equality, 'From Segregation to Inclusion: Roma Pupils in the United Kingdom: A pilot research project' (Equality, November 2011) <http://equality.uk.com/Education.html> accessed 7 April 2014.

111 The main subject influenced by the implementation of the ECtHR's judgment, children, is not included in our model, because their interests are represented only by the stakeholders as we defined them. Children themselves do not participate in the domestic political process.

specific interests (progressive educators, human rights bodies in the administration, and NGOs) which are often perceived as excessively unconventional, or even anti-systemic, forces. Our sample certainly cannot stand the test of representativeness as we interviewed persons from NGOs; the Ministry of Foreign Affairs; the Ministry of Education; the Office of the Public Defender of Rights; the Government Commissioner for Human Rights; the Agency for Inclusion; and a well-known barrister pursuing human rights cases.[112]

Due to the prevailing tensions between the majority and Roma minority, 'majority' parents do not want their children attending a school with many Roma children. Cases of such parents taking their children out of schools with mixed classes, leading to *de facto* segregation, have also been reported. For this reason, headmasters are reluctant to admit more Roma pupils, because they fear the outflow of 'majority children'. Educators in elementary schools experience problems when dealing with a different temperament and level of skills (both social and academic) of Roma children, and therefore they do not protest when Roma children do not attend their classes. Moreover, educators feel that official authorities do not understand the specifics of the educational system. They are convinced that inclusive education is based on positive discrimination, which would harm the 'majority' children and cause the overall quality of education to deteriorate.[113] For people involved in special education (both headmasters and educators), preserving the status quo means preserving their subsistence. They stand united and well organized, endowed with the legitimacy of practitioners who "know", and deplore other views as just theoretical statements. They are deeply critical of NGOs in particular, and the atmosphere among stakeholders in education is very hostile. The most sensitive is the case of Roma parents who are said to often support transfer of their children to non-mainstream elementary schools. A generally low level of awareness of the problematic situation thus persists even within the discriminated community itself, which does not protect itself through lawsuits. But even if they did, results are uncertain, because Czech courts generally do not support the notion of indirect discrimination on the grounds of ethnicity in the education system.[114]

112 Due to the sensitivity of the issue and the level of openness they demonstrated, some of them wished to stay anonymous, thus the scarce referencing to sources in the following section. We have interviewed at least one representative from every group of stakeholders. When interviewing workers at the ministries, we have talked directly to the person responsible for the issue.

113 Jana Smetanová, *Petice pro zachování praktických základních ŝkol* (public hearing at the Senate of the Czech Republic, 21 March 2013) stenographic report <www.senat.cz> accessed 7 April 2014.

114 Interestingly, in neighbouring Slovakia, the courts are more prone to find discrimination in segregated education. They do so even without any direct international judicial pressure as there has been no decision against the Slovak Republic. Paradoxically, the government stands on the opposite side and promotes segregated schooling of Roma children in boarding schools.

Figure 1. Positions of the involved actors

Actor	Goal	Means	Limits of Given Actor	Actor's Perception of Drawbacks in Implementation
Ombudsman	Equal access to education	Limit the number of practical schools	Low powers; high opposition from schoolmasters and educators of special schools	Bad cooperation with governmental bodies, lack of overall communication, media disinformation, strong opposition from pro-status-quo forces
Ministry of Education (MinEd)	Implementation of *DH* as far as needed	Piecemeal changes	High personnel fluctuation; implementation not on the list of top priorities	Pressure from special educators, lack of finances
Ministry of Foreign Affairs (MFA)	Implementation of the *DH* judgment	Voicing international pressure	So far non-active	Limited cooperation with MinEd due to personnel instability
Governmental specialized bodies	Fragmentation of specialised schools according to the specific needs of pupils, inclusion of children with mild disabilities	Inclusive kindergartens to prepare children for primary education	Personnel problems	Money; conservative environment in education unwelcoming of deeper changes
Czech Human Rights Commissioner	Equal access to education	International pressure; obligatory kindergartens	Low powers; high opposition from schoolmasters and educators of special schools	Lack of data and money; rigid position of headmasters
NGOs	One-track system of education	Individualised education; special schooling as a rare exemption	Limited influence in ministries; deep mistrust from opposing forces	Uncooperative and generally poor performance of MinEd; hostile environment

The Ministry of Education is the main actor in the public administration responsible for the education policy, and hence also for the problem of discrimination in education. Furthermore, the interviewed actors and the COE bodies unanimously identified the Ministry of Education as the main addressee of the *DH* findings. Ministers of education change quite quickly (and their close co-workers with them) which makes the environment highly unstable. Interviewees from the Ministry found the main problem in the fact that the issue has never become a real long-lasting priority of the Ministry. The

Ministry has been preoccupied for a longer time with the delicate issue of introducing tuition fees in public universities, a unified version of secondary school-leaving exams, and lately with scandals concerning the mismanagement of EU funds. The Ministry itself suffers from a high fluctuation of employees dealing with the issue of integration, which has negative consequences for their seniority (and thus influence) and expertise. The staff comprises many graduates of pedagogical schools and/or former teachers and special education teachers who, to a large extent, accept the current system and highly value the Czech school of special pedagogy.[115] Another problem lies in the lack of the cross-field expertise: the contact and discussion on the *DH* judgment and its meaning between the pedagogical employees responsible for the transformation of educational system and legal experts seems to be insufficient. Teachers and special education teachers tend to disagree with the concept of indirect discrimination as voiced in the *DH* judgment and sometimes misinterpret its findings, which brings us back to the supposed lack of clarity and unnecessary complexity of the ECtHR's findings. Lastly, the education system as a whole suffers from deep underinvestment, making, for example, the employment of specialized education teachers at primary schools unsustainable.

The Ministry seems to respond mainly to internal pressures of strong organized groups of special education teachers and headmasters, rather than to pressure of subjects that are not deemed 'internal' to the education system, including, *inter alia*, NGOs, the Ombudsman or the Government Commissioner for Human Rights. Opposing ideas on the education system are perceived as threats from competing domestic interests. But exactly here opens the window of opportunity for the argumentation with a judgment from an international court. Such a judgment cannot be viewed as competition to established stakeholders and does not appear as easily delegitimizing. The actors supporting inclusive education praise the *DH* judgment as one of the very few arguments to which the Ministry of Education listens and which can be used as an impetus for change. This was clearly illustrated in the March 2013 parliamentary hearing where Minister of Education Fiala based his argumentation and defence of a new upcoming strategy on international pressure from the COE. However, so far the judgment has not proved as an instrument powerful enough to induce a far-reaching reform, although the critique based on façade reforms and then small piece-meal changes has steadily increased and created more pressure on the Ministry to act. Officially, in inter-ministry relations, the Ministry of Education cooperates with the Ministry of Justice's Agent for the Representation of the Government before the ECtHR, who transmits requirements from the COE Committee of Ministers. The Office of the Agent is a body of legal experts focusing on representation of the Czech Republic; it can inform governmental authorities about mounting international pressure, but does not exert pressure itself. Such a role can be performed especially by the Ministry of Foreign Affairs, which is

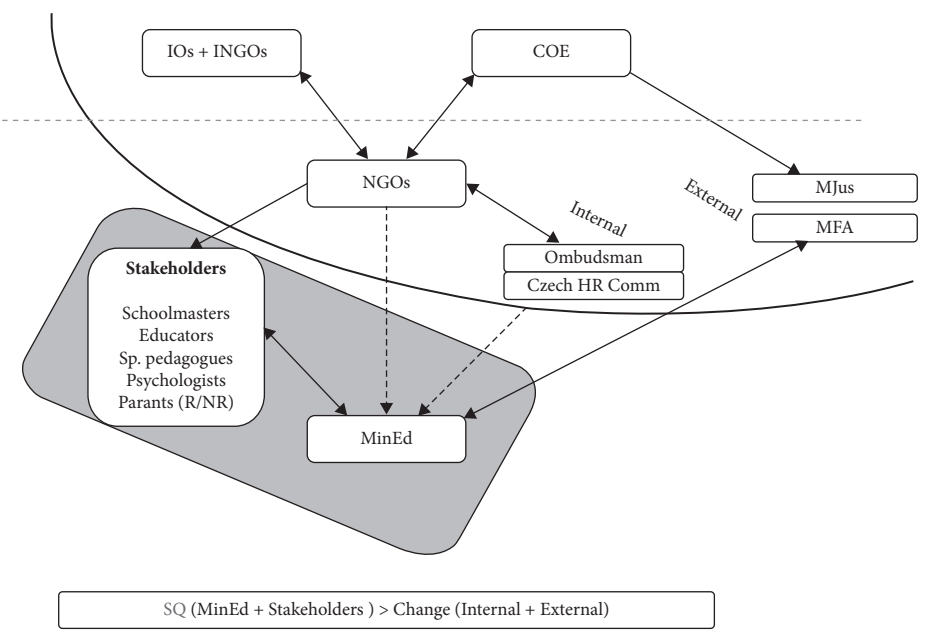
[115] Critics point to a high degree of traditionalism of Czech pedagogical faculties and a slow permeability of fresh ideas, such as the idea of inclusive education. The educators are strongly convinced of the suitability of the Czech special education system and criticize the *DH* ruling based on their lifelong experiences and conviction.

well aware of the rising criticism. But so far, the Ministry of Foreign Affairs has not used its political clout and has not raised the issue at the highest political level.

The status quo reflects the situation when the Ministry of Education seeks to comply both with the stable preferences of stakeholders of the education system (against deeper changes) while trying to accommodate slowly rising international pressure requiring bolder reforms. The internally[116] involved actors trying to upset the current balance has not been capable of inducing changes going beyond smaller reforms. The Ministry of Education has not been under a greater pressure from governmental actors wholly outside the system of education, for example from the Ministry of Foreign Affairs. So far, the official international pressure on the Ministry of Education is channelled through the Agent of the Government for Representing before the ECtHR which is an expert professional, not political body.

Formally, the situation of persisting status quo over the push for a change can be expressed in the following way:

Figure 2. Actors influencing the implementation of the DH judgment[117]



116 Here, by using the 'internal' we mean acting inside the segment of public administration dealing with human rights and education policy.

117 Legend: lines represent level of communication between the actors. Direct lines represent targeted communication, two-way lines communication reflected by actors. The most efficient communication line flows between the Ombudsman and NGOs, which are actively cooperating. The dashed line represents one-way pressure without any response from the targeted actor. MinEd (Ministry of Education), MJus (Ministry of Justice), MFA (Ministry of Foreign Affairs), Parents R/NR (Parents Roma/non-Roma).

The Ministry of Education and the stakeholders have acted as proponents of the preservation of the current status quo (SQ). Other actors are trying to push through changes, each of them with different motivations. Communication by the Ministry of Justice and by the Ministry of Foreign Affairs with the Ministry of Education remains weak. NGOs, the Ombudsman and the Czech Human Rights Commissioner exert pressure on the Ministry of Education; however, the interaction has been mostly one-way, without an appropriate debate. The best communication may be seen between the NGOs and the Ombudsman; however, they have no means of how to enforce their proposals at the governmental level (see Figure 2). One of the most distinct factors of the network of relations is the lack of effective communication between the actors, both at the national and international level. The Ministry of Education and the Czech Human Rights Commissioner, when working on a new Strategy against Social Exclusion, have not properly consulted headmasters and educators or psychologists, who feel disconnected both from the new conception and from the COE's demands. Various misinterpretations further spoil already tense relations.[118] The quality of communication fares no better on the international level; the COE's bodies usually rely mainly on opinions which conform to theirs and do not persuasively refute doubts of opponents (that is stakeholders in our case).

The change of the relational sign in the equation [SQ (MinEd + Stakeholders) > Change (Internal and External)] can be brought by various means. The drive towards a more inclusive approach and reform is steadily taking place. However, the system as such has not been changed. Given the highly probable invariability of stakeholders' preferences, change induced from the status quo side can be expected rather from installation of a strong personality to the Ministry of Education who would support new ideas in education and push hard for more inclusive education. Otherwise, the broad employee base of the Ministry of Education seems to be deeply convinced about the benefits of the Czech special schooling system. The coalition between the Ministry and 'stakeholders' remains barely penetrable; the persuasion for a change in opinion requires a minister who would make more inclusive education a top priority and succeed in disturbing the current general mind-set, which is suspicious of the idea of inclusive education.

Also on the side of 'Pressure for Change' camp, the 'Internal' part (the Ombudsman and the Government Commissioner for Human Rights) seems to be constantly pressing for reform, without expectation for any room for greater effort. In other words, the public administration bodies pushing for a more inclusive approach, together with NGOs, can hardly do more. Also, the international NGOs and the COE, as well as its subsidiary bodies like the ECRI, regularly report on the inadequate implementation of the *DH* judgment. That is why any change induced from actors outside the status quo camp can be expected rather from an actor not involved in the usual business of haggling over the education system. The main push factor would be

118 Public hearing at the Senate of the Czech Republic, 'Petice pro zachování praktických základních škol' (21 March 2013) stenographic report <www.senat.cz> accessed 7 April 2014.

external pressure, channelled through the Ministry of Foreign Affairs, which does not perceive the situation as so shaming for the Czech Republic that the Ministry would feel the urge to step in and directly intervene for a change. But the Ministry of Foreign Affairs might take action once it learns that the reputational costs are too high for the Czech Republic.

7. CONCLUDING DISCUSSION

The article has sought to examine the power of an international court to influence domestic practice and the factors which encourage and discourage changes in national policies necessary for meeting the Court's expectations concerning implementation of its judgments. We studied how the Czech administration dealt with the issue of alleged Roma discrimination in education, mapped positions of national and international, governmental and non-governmental actors, and compared to what extent their preferences were fulfilled. More than six years after the *DH and Others v Czech Republic* judgment, studies indicate that a disproportionately high presence of Roma children in non-mainstream education persists. The COE Committee of Ministers, the body entrusted with supervisory powers over the execution of the ECtHR's judgments, noted approvingly the proposed changes, but declared that considerable progress remained to be achieved.[119]

The article contributes to the discussion on the power of international courts to influence national practices through identification of domestic and external factors which have influenced the degree of implementation of one famous ECtHR judgment. Our findings are mixed at best. A judgment requiring far-reaching changes in a national policy needs favourable conditions for implementation; its authority as a judgment does not suffice on its own. On the other hand, the judgment proved essential in legitimatizing the opinions criticizing special schooling and has helped the network of NGOs and pro-human rights bodies within the public administration to voice their objections and more openly push for a change.

First, reforms of primary schooling, which also dealt with better inclusion of Roma children, were pending prior to the judgment of the Grand Chamber, that is, independently of the intervention of the supranational judicial body. Second, the power of the *DH* judgment has not been tested in judicial practice often. Domestic courts have not been flooded by a wave of complaints by Roma children, despite the fact that the ECtHR basically held that every Roma child educated outside a regular primary school has been a victim of discrimination. Czech legal university education and judicial practice tend to follow a more conservative textual legal interpretation

[119] Council of Europe, Committee of Ministers, 'Supervision of the execution of judgments and decisions of the European Court of Human Rights, Annual Report, 2011' (April 2012) 93, <www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2011_en.pdf> accessed 7 April 2014.

and notions of the concept of indirect discrimination (and the use of statistics) are not internalized and broadly accepted in the Czech Republic.[120] As documented by statistics concerning the tense relations of the majority population and the Roma, it is obvious that the majority population takes very negative stance towards the Roma, and any foreign 'instructions' how to deal with this minority are viewed with suspicion. Consequently, there does not appear any widespread popular pressure to implement such a judgment. Moreover, the most-read tabloid press does not contribute to improvement of the situation, with often biased reporting focusing on Roma as perpetrators of crime and abusers of social assistance. The Roma issue does not rank among the priorities of political contestation and parties do not come forward with elaborated strategies on how to tackle the problems. It seems that the only domestic forces next to specialized pro-human rights bodies (the Ombudsman and the Government Commissioner for Human Rights) pushing for implementation are NGOs, but their budgetary and personal capacities are limited. It is also worth mentioning that NGOs intervening in the ECtHR proceedings were larger transnational networks, rather than truly national grassroots organizations.

Moreover, the Ministry of Education, which holds primary responsibility for dealing with the issue of discrimination in education, has focused on different major projects in recent years. NGO representatives have also pointed to the low level of acceptance of the idea of inclusive education and the prevalence of vested interests and traditionalism of almost all groups dealing with education. The interviewed representatives of NGOs stressed that reference to the *DH* judgment is one of few tools helping to push the State administration for reforms, or at least to discuss them. Still, the reforms are not of a systemic, but rather of a piecemeal, character. Besides, education policy is one of the few last national bastions of sovereignty of European States integrated in the EU. EU powers are only supporting; therefore, the cumulative effect of both the EU (with its more efficient instruments) and the COE is absent.

Concerning the external structural context, as shown on the overview of the case law of the ECtHR, the Czech Republic does not stand as the only country dealing with the problem of discrimination in education. The situation is, as such, not one in which 'the whole of Europe is shocked by Czech backwardness'; rather, there exists no Europe-wide consensus on how to deal with the education of children with special needs (if we first accept that there are such needs). Moreover, various countries, including influential ones such as France or Italy, have experienced their own problems with the Roma minority, and therefore the Roma do not enjoy any particularly strong support among European public as a whole which could exert pressure on uncooperative countries.

Another problem lies in the judgment itself which attracted not only positive, but also critical evaluation that seems to be prevalent in the Czech Republic. Moreover, the

120 David Strupek, 'Before and After the Ostrava Case: Lessons for Anti-Discrimination Law and Litigation in the Czech Republic' (2008) 1 *Roma Rights Journal* 41, 46.

Court found the situation in the Czech Republic as violating the Convention rights, but did not provide much advice about when it would have been satisfied with reforms of the system causing the violations. Is it the system of special (practical) schools as such (which probably continues to be discriminatory in effect) which is disliked by the Court and which would require a change of the whole system? Or can the Court be satisfied with changes in the present system? A clear answer, and consequently a clear objection, is missing, which hampers certainty and predictability.

More general lessons learned from the *DH* judgment can be summed up in the following way. The judgments of the international human rights courts such as the ECtHR work as an important strategic tool which helps to push for reforms. However, in order to achieve full implementation of the judgment, the existence of other beneficial circumstances is indispensable. Our detailed study rather enables the identification of factors which worsen prospects for a smooth implementation of the Strasbourg Court judgments. First, the international environs matter. The more States share the same or similar problems, the less pressure there is from the international level for a change, because reputation costs of continuing the practice are not so high.[121] Second, the overall national context matters. In the atmosphere of popular antipathy towards Roma, it is easier to maintain a status quo which separates Roma from the rest of society. Third, domestic professional interests matter. In addition to the dispersed and non-concentrated anti-Roma sentiments of the wide public, the vested interests of stakeholders which make their living on the current special education system strongly oppose any changes to the status quo. The pro-status-quo attitude remains prevalent also among the larger community of professionals working in the field of education. The subjects backing opposing views are perceived as threats and any discussion between both camps becomes highly difficult in such a hostile atmosphere. Fourth, personalities and politics matter. When a strong individual makes the introduction of an unpopular measure her priority, change is possible. Otherwise, when the issue does not stand as a priority and when the responsible person is not politically strong enough, only slower piecemeal progress emerges.

And the last point – the quality of the judgment matters. When the ruling of the international court holds substantially a very important finding, but remains disputable as far as its persuasiveness and argumentative coherence is concerned, then prospects for a quick and smooth implementation diminish. Moreover, when the Court leaves an open space for doubt about what is already considered as conforming to the judgment, its power for change is again muted, because it is convenient for the national authorities to present every little change as decisive progress. The absence of clear criteria specifying when the situation moves from a non-satisfactory state of implementation to satisfactory reduces the power of the international judgment to induce a domestic change.

121 This also means that the Ministry of Foreign Affairs does not feel the need to push the Ministry of Education directly to reforms.