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SUBSTANTIVE EQUALITY IN THE EUROPEAN COURT OF HUMAN RIGHTS?

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The European Court of Human Rights (“ECtHR”) has a distinguished track record. Established under the European Convention on Human Rights 1950 (“ECHR”), it was the world’s first international human rights court. It decides thousands of cases every year, and its opinions are cited worldwide. For most of its history, the Court’s jurisprudence on equality was uninspiring, as it was based on a formal conception of equality. In recent years, however, the ECtHR has begun to give equality more substantive content.

ECtHR’s weak equality jurisprudence resulted from the limitations of ECHR, judicial procedure, and a formal conception of equality. Article 14 of ECHR only applies in respect to the enjoyment of Convention rights: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground” Procedurally, only alleged victims can bring complaints (apart from states), and they must first exhaust domestic remedies in the member state. Furthermore, as an evidentiary matter, the ECtHR has been reluctant to draw inferences of discrimination from statistics. By far the most limiting factor, though, was the ECtHR’s *formal* notion of discrimination, which focused on direct discrimination. The Court has had difficulty with cases involving covert discrimination or disparate impact discrimination (indirect discrimination).

During the last decade, however, the ECtHR started to develop a substantive conception of equality. In contrast to formal equality, a substantive conception takes into account how victims experience the reality of discrimination. The central question is not whether the law makes distinctions, nor whether the state is motivated by prejudice, but whether the *effect* of the law is to perpetuate disadvantage, discrimination, exclusion, or oppression. A substantive equality doctrine responds to the effects of structural inequality where it is not possible to identify a specific “wrongdoer” who causes the discrimination.

I. THE DEVELOPING SUBSTANTIVE EQUALITY JURISPRUDENCE

Some of the most important developments of substantive equality jurisprudence have come in cases dealing with discrimination in education (a

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right under Article 2 of the First Protocol to the ECHR). Throughout Europe, nomadic communities such as Roma, Travellers, and Sinti, have experienced educational discrimination and disadvantage. Indeed, according to the Council of Europe Commissioner for Human Rights, Alvaro Gil-Robles, “segregation in education . . . is a common feature in many Council of Europe member states.”

In *DH v. Czech Republic*, the ECtHR addressed “special schools” in the Czech Republic for pupils with mental “deficiencies.” The children in these schools were disproportionately of Roma origin—a Roma child was 27 times more likely to be sent to a special school than a non-Roma student. In *Oršuš v. Croatia*, the Court dealt with Croatian schools that had established classes exclusively for Roma students due to their difficulties with the Croat language. Finally, in *Sampanis v. Greece*, the Court dealt with segregated preparatory classes as a result of protests from non-Roma parents. Finding a violation of Article 14 in both *DH* and *Sampanis*, the ECtHR decisions in these cases demonstrate a more substantive conception of equality. This is especially true of the landmark decision of *DH*, which was decided by the Grand Chamber (the most solemn formation of the ECtHR).

These cases are interesting both procedurally and substantively. They show a pragmatic attitude toward the requirement that an applicant exhaust domestic remedies. The Grand Chamber in *DH* stressed that this obligation must be interpreted flexibly, taking account of both the general context in the State and the circumstances of the applicant. Accordingly, the Court required the state to prove that the domestic remedies were, in practice, available and effective. Also of interest was the role played by representative organizations in these cases. In each case, the applicants were represented by nongovernmental organizations (“NGOs”) and their legal advisers. These NGOs included groups with records of public interest litigation, such as the European Roma Rights Centre (“ERRC”). The Grand Chamber in *DH* was also willing to hear from eight NGOs as third party interveners. This flexibility was welcome for several reasons: Without the backing of an NGO, individual victims may lack the resources to mount a complex legal challenge and may be more easily subject to pressure. Further, human rights cases often raise issues that go beyond the isolated facts of an individual complaint, and hearing from interveners allows for wider considerations to be taken on board.

It is also welcome that *DH* interpreted the ECHR in light of developments in equality law in other jurisdictions. The European Union, U.N. bodies, the U.S. Supreme Court (in *Griggs v. Duke Power*), and other national courts have adopted a systematic approach to indirect discrimination. The Grand Chamber’s interpretation of its previous case law brought it in line with these European and international precedents. The Grand Chamber ruled that once an applicant demonstrated a discriminatory effect, the burden switched to the State to justify its actions under the Court’s justification test. Contrary to the initial Chamber ruling in *DH*, the Grand Chamber held that it was not necessary to prove any intention to discriminate in indirect discrimination cases.

II. PROVING DISCRIMINATORY EFFECT

In *DH*, statistical evidence indicated that Roma children were far more likely than other children to be placed in special schools. The Grand Chamber followed E.U. and international precedents in holding that “reliable and significant” statistics could be used to prove a discriminatory effect (though such effect also could be proved without statistics). The Grand Chamber also used other sources to understand the background. Lacking the resources to carry out its own fact-finding investigation, the Court relied on reports by non-judicial institutions, such as the Commissioner for Human Rights, the European Commission against Racism and Intolerance (“ECRI”), and the Advisory Committee of the Framework Convention on National Minorities, to conclude that there was evidence of discriminatory effect.

In *Sampanis*, the ECtHR concluded that the applicant had adduced enough evidence to justify a strong presumption that there was discrimination. This evidence included a local official’s call for an informal meeting to oppose the registration of Roma pupils. Also, Greek law and policy tolerated the possibility of separate education for Roma students. Most strikingly, there was racist opposition from non-Roma locals to the inclusion of Roma children. These facts justified a presumption that there was covert racial discrimination in the case.

Once the applicant proves a discriminatory effect, the burden switches to the State to justify its policy by proving that it is necessary to achieve a legitimate aim. This is the ECtHR’s justification test. The Grand Chamber in *DH* stressed that in cases of racial discrimination justification must be “interpreted as strictly as possible.” In *DH*, the State failed to justify its policies. The Czech government argued that the decision to place the Roma children in special schools was based on their performance in psychological tests. The Grand Chamber, drawing on reports from the ECRI, the Advisory Committee of the Framework Committee on National Minorities, and the Commissioner for Human Rights, observed that these tests were not reliably objective because they were based on the experiences of the majority Czech population and made no allowance for cultural differences. Further, the Czech policies lacked satisfactory safeguards—particularly to ensure that the specificity of the Roma culture was respected. In *Sampanis*, the State failed to offer a convincing explanation to justify the special treatment of the Roma children. The ECtHR rejected the State’s arguments that the children had not satisfied all the formalities for joining the regular school. In view of the vulnerable position of the Roma, the ECtHR held that local officials should have waived certain formalities to ensure Roma children received education.

Of the three cases, the Government only successfully justified discriminatory treatment in *Oršuš*. The ECtHR accepted that the applicant children had difficulties with the Croat language. The classes were preparatory in nature, run in mainstream schools, and students could transfer to regular classes when ready. In most of the schools, the majority of Roma were in

mixed classes, and most of the applicants were eventually transferred to mainstream classes. This case has now been referred to the Grand Chamber.

In *DH* and *Sampanis*, the governments argued that the parents' consent to the placements had satisfied the justification test. Yet in *DH*, the Grand Chamber concluded that one could never waive the right not to be subject to racial discrimination. In reaching this conclusion, the Grand Chamber doubted the genuineness of the parents' consent. The parents belonged to a "disadvantaged" and "often poorly educated" community. There was no evidence that they were presented with any detailed information about options or the effects of their choice, and further, they had been given a choice between sending their children to special schools or to mainstream schools where they "risked isolation and ostracism." Though one dissenting judge castigated the majority for being patronizing in its attitude to the parents, these seem good reasons to regard the consent as inadequate.

The absence of meaningful consent was even more apparent in *Sampanis*. Here, the parents agreed to a separate (prefabricated) building for their children, but this consent was given under the pressure of demonstrations by large numbers of local parents who objected to the Roma children joining the mainstream school. Police were called in to assure order, and at one point, the building for the Roma children was attacked. The Court was skeptical of the value of consent in these circumstances.

III. THE BREAKTHROUGH AND LOOKING FORWARD

These cases, particularly *DH*, are a breakthrough for a more substantive model of equality in Strasbourg and are also a welcome provision of clear rules on indirect discrimination under Article 14. Yet these developments leave some questions to be explored, and there remain inadequacies in the ECHR framework for the protection of human rights. Delay is an endemic problem. The children in *DH* were in special schools from 1996–1999, and they lodged a complaint in the ECtHR in 2000. The Chamber decision came down in 2006 and the Grand Chamber decision a year later. By the time the Chamber decided the case, the Czech Republic had already introduced legislation abolishing the special schools. Ironically, in *Oršuš*, the ECtHR censured Croatia for the failure to provide a speedy trial of the issues in the Constitutional Court; the delay in that case was four years. Delays are especially regrettable given the importance of these years in children's education. The Council of Europe ("COE") and the ECtHR are acutely aware of delay caused by the ECtHR's backlog of cases, and unfortunately, one state (Russia) has made no effort to ratify a protocol reforming the ECtHR and its procedures.

Decisions of the ECtHR may fail to address the wider reality on the ground. A dissenting judge in *DH* noted that the Court dealt with one specific issue in the Czech Republic while passing over the more serious problem of hundreds of thousands (perhaps millions) of Roma children in Europe who would not receive any formal education. The majority's decision would do nothing to assist these young Roma. Further, States do not

always (and sometimes cannot) implement ECtHR decisions quickly. Looking at the Czech response to *DH*, the ERRC reported that despite some progress, Roma children were still disproportionately sent to non-mainstream schools. Local opposition and bureaucratic inertia (or resistance) may be difficult to overcome. In the *Sampanis* case, following the attack on the separate school buildings for the Roma, it took five months to replace the buildings, and even then the replacements were not operational. As the initial special building was a prefabricated structure, it is not easy to see why replacing it was so difficult. Eventually, the Roma students were transferred to a new, specially created school.

There are limits to the value of judicial activity, as these facts suggest. Importantly, the COE includes several non-judicial mechanisms. The COE Committee of Ministers monitors the implementation of ECtHR decisions, while several institutions mentioned above monitor the general situation regarding minority rights and racism in the member states. These mechanisms lack the power to impose sanctions on recalcitrant states (apart from the theoretical threat of expulsion from the COE), but they can highlight problems of implementation and apply moral suasion.

IV. CONCLUSION

Article 14 jurisprudence has evolved from a formal to a more substantive model of equality despite these worries about delay, implementation, and the capacity of courts to deal with wider structural problems. The Court is now more open to adopting a substantive equality perspective that stresses the need to protect vulnerable and disadvantaged minorities.