

Arrest the Precedent! Segregated Schooling in Contemporary Europe¹

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*"[...] the prerequisite cases compellingly demonstrate that races are socially constructed. More importantly, they evidence the centrality of law in that construction. Law is one of the most powerful mechanisms by which any society creates, defines and regulates itself. Its centrality in the constitution of society is especially pronounced in highly legalized and bureaucratized late-industrial democracies [...] It follows, then, that to say race is socially constructed is to conclude that race is at least partially legally produced [...]" (Lopez, Ian F Haney. 1996. *White By Law*. New York University Press, pp. 9-10)*

*"To cite but one recent example of wide reference to such sources, the Grand Chamber's decision in *D.H. v Czech Republic* made extensive reference to provisions of the International Covenant on Civil and Political Rights, of the International Convention on the Elimination of All Forms of Racial Discrimination and of the Convention on the Rights of the Child, as well as citing General Comments by the UN Human Rights Committee on non-discrimination and a relevant decision by the Committee on an individual communication against the same State party. The Court also referred to General Recommendations of the Committee on the Elimination of Racial Discrimination on the definition of discrimination, on racial segregation and apartheid, and on discrimination against Roma. I find this open and generous approach exemplary as it recognizes the commonality of rights problems, as well as the inter-connectedness of regional and international regimes." (Louise Arbour United Nations High Commissioner for Human Rights, at the Opening of the Judicial Year 2008 of the European Court of Human Rights, Strasbourg, 25 January 2008)*

THIS article aims to explicate the social and political impact of the unprecedented European Court of Human Rights groundbreaking ruling of November 2007 in *D.H. and Others v. the Czech Republic* (popularly referred to as "the Ostrava case"). The ruling was groundbreaking in legal terms due to the fact that it was the first time the court had ruled substantively on an Article 14 (prohibition of discrimination) case thereby establishing a hither-to-now unheard of precedence in European legal culture. Whilst the legal merits of the case are worthy of mention, I will leave it to others in this journal to articulate

them. My intention here is to focus solely on the social and political ramifications of the ruling and its putative broader impact on society beyond the boundaries of legal institutions and culture. Suffice to say that the ruling has provided the basis for social change in many European countries, adding greater impetus to the efforts of civic minded organisations and individuals pursuing social justice and equality for Romani people across Europe.³

Historically, courts have played a crucial role in determining the social mores, ethical codes, fabric and contours of mainstream society. This has been

¹ Title inspired by the 1990 song "Arrest the President" by the artist Intelligent Hoodlum.

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³ The ruling can potentially have an impact in the Member States of the Council of Europe who have signed and ratified the European Convention on Human Rights.

done in a combination of ways which combined legal antecedents with social, common sense values and norms. Generally, the balance between the two spheres of social and political tends to remain **even with slight anomalies and imperfections addressed accordingly**. Whenever the delicate equilibrium between the spheres is challenged, the courts takes precedence in solving the problem and the intervention of the US Supreme Court in electoral dispute over the 2000 US Presidential election results attests to the primacy of the court in these situations. Simply put then, the role of the courts has been that of arbiter whenever the realms of political and social order and living come into conflict, contradict or contrast one another.

This fact has long been recognised by socially aware actors interested in progressive social change. This acknowledgment was accompanied by the realisation that social, nay, political change could not be achieved without a strong imperative from courts compelling action from the responsible authorities. This fact is evinced by the speech given at the recently held European Union Roma Summit by the Hungarian businessman, philanthropist and founder of the Open Society Institute, Mr George Soros, who stated that the role of the European Court's judgment in the Ostrava case represented a major development along the road to social justice for Europe's many Romani communities. The fact that Mr Soros' speech was made at the European Commission indicated the political significance of the ruling where he intimated that the ruling should act as a boon to assist Europe's political institutions to initiate the necessary policy developments aimed at fundamentally addressing the continued marginalisation of Roma in European Union countries and beyond.

Bearing this in mind then, the European Court of Human Rights decision in the Ostrava case has struck a potentially critical blow to many apologist accounts that have explained away the continued segregation of Romani communities in many European countries. These accounts

have tended to crystallise around contemporary political arrangements such as devolved power or decentralisation and local political autonomy which claim that despite the avowed political will from centralised political institutions of the state professing the desire to integrate Romani communities into mainstream, social, political and civil life, decentralisation meant that it is left to local political entities to implement policy devolved from aforesaid centralised political institutions. Therefore, the onus for implementing the progressive social packages or programmes for Roma inclusion resided with local political and administrative entities and it is they who should be blamed for the non-implementation of these programmes and therefore, the continued social exclusion of Roma.

The ruling also provides a platform for the efforts of well intentioned Romani and non-Romani activists alarmed at the very poor standard of education Romani children receive *en masse* in European societies. Until now, these efforts have been frustrated and subsequently constrained by the lack of enforcement of progressive policies (due to local resistance or reluctance) aimed at mainstreaming Romani children in education and thereby improving the standard and quality of education these Romani children received. The lack of enforcement meant that there was little material assistance for Romani children and these practitioners were reduced to trying to ensure that Romani children received quality education in whichever school they attended. Invariably, the places where the majority of Romani children received their education were in so-called "ghetto schools", i.e., schools that were situated in the local ghetto or "*Mahala*" where the children and their families resided – I will elucidate the parameters of this phenomenon more concisely below. Their efforts, in view of the lack of political attempts to enforce centralised progressive policy, perversely supported the system of segregated schooling since, in some cases, they ensured that the children at least received a meaningful education and were taught the basic skills that would assist them in their lives.⁴ This in turn gives credence

⁴ *This point is based upon a number of experiences I have had over the past seven years with wonderful people who were horrified by the fact that so many Romani children attend school but did not get basic training and often finished schooling semi-literate and numerate. In many cases, such as Ukraine or Slovakia, many children left school either completely illiterate or with such basic literary and writing*

to the latent modern day version of the “separate but equal” doctrine which is implicit in many European societies today.⁵ The parallel with post slavery America here is not an insignificant thing. In fact, it is a stain on the moral fibres of contemporary Europe and one we should all be ashamed of. Whilst the American version of segregation has been rightly abhorred by all who have a modicum of humanity and justice, the current situation regarding Romani children taking place before our very eyes has drawn a muted response from mainstream European societies and in many cases, has been explained away as either “pathological”, “cultural”, “congenital” or “mental disability/retardedness”; all of which alluding to something beyond our control. Having mentioned the antecedences that help to contextualise the current discussion, I will now turn to them in greater detail below.

Wilful blindness? The myth of natural processes

“...whenever you segregate a minority, you inevitably discriminate against that minority...”⁶

The insidiously virulent practice of segregated schooling in Central and Eastern Europe has presented huge challenges to those of us promoting the equal rights of Romani communities in Europe. Although there is never any explicit policy by governments to segregate Romani children, it is pretty obvious that their lack of action to desegregate schools should be viewed as an act of complicity. The air of *fait accompli* is palpable to many who expressed concern at the alarming numbers of

Romani children sequestered into ghetto schools, segregated classes, in-class segregation, i.e., separated from their non-Romani peers within the same classroom, and other forms of *de facto* segregation. The most pernicious manifestation of segregated schooling is that of special schools (schools allegedly for children with mental or learning difficulties) and it is this form of schooling that the Ostrava case directly addresses. This contemporary manifestation of the phenomenon of segregated schooling faced by Romani children is perhaps more disgraceful because we have had the historical antecedents of segregation in the US and Apartheid in South Africa dismantled by global public and political abhorrence to them and yet there seems little political will to contend with the manifold problems posed by the marginalised Romani communities across Europe.

One major factor behind the somewhat laconic political reaction to segregated schooling is the notion that the exclusion of the Romani communities in Europe is a legitimated consequence of “natural segregation”. This notion is based upon the premise that groups (social, racial, ethnic or class) cluster together due to shared values, ambitions, cultures and practices and that this is an accepted given in modern massified, urban societies. This is partially true but only explains epiphenomenal patterns of group affiliation in modern European societies. Historically, Segregation first came into public recognition in the immediate aftermath of the Civil War in the US in 1866. This was a “natural” result of system of Slavery that was previously in place at the time. As is currently the case with European Romani communities, there were no explicit or

skills and it was a disgrace on local authorities that such a thing was allowed to occur. In particular, I am alluding to Anna Koptova, a passionate Romani advocate from Slovakia who has struggled to improve the quality of education Romani children receive in Kosice and the surrounding district for many years. The ruling should give her a platform for some leverage with both the national and local educational authorities to mainstream Romani children’s education.

⁵ *The separate but equal doctrine underpinned the racist forms of segregation in the United States of America in the immediate aftermath of the Civil War and was famously reinforced in the 1896 landmark ruling of the US Supreme Court (163 U.S. 537) Plessy Vs Ferguson, which ruled that the segregated provision of public services (railroad trains) was justifiable so long as the services provided were of equal quality. For the court, the idea of segregation based on classifications was legal as long as facilities were of equal quality. However, Southern state governments refused to provide blacks with genuinely equal facilities and resources in the years after the Plessy decision. The states not only separated races but, in actuality, ensured differences in quality. In January 1896, Homer Plessy pleaded guilty to the violation and paid the fine.*

⁶ *Transcript of the documentary on Martin Luther King entitled “Citizen King”. Available online at: <http://www.pbs.org/wgbh/amex/mlk/filmmore/pt.html>.*

overt policies that separated peoples along lines of race, etc., but informal practices that congealed into “Jim Crow” laws. The continued separation of the races in the US at the time generated its own dynamic of social order which became normalised and created its own set of normatives and social and cultural “fields” and “capital” internalised and understood by both racial groups, and I would contend that this is the same with Romani and non-Romani communities in Europe today.

According to proponents of the “natural patterns” of separation/distinction theory, Segregation is driven by legitimate [rational] economic factors as opposed to illegitimate [irrational] racial or ethnic ones. This is misleading as it overlooks the inherent disparity congealed along racial and ethnic lines that determine the range of choices peoples from these groups have or are denied. Deep seated discrimination against Romani communities in contemporary European societies restrict the economic development of the group and retard any attempts at progress thereby confining them to a limited range of “choices” like segregated schooling that actually hinder any chances for economic development and upward mobility.⁷

This point is borne out in the axiomatic work of Samuel Bowles and Rajiv Sethi where they stress:

“Group differences in economic success may persist across generations in the absence of discrimination against the less affluent group because racial segregation of friendship networks, mentoring relationships, neighbourhoods, workplaces and schools places the less affluent group at a disadvantage in acquiring the things – contacts, information, cognitive skills, behavioural attributes – that contribute to economic success [...]”⁸

⁷ During a fact finding research trip to Moldova in November 2007, I was told by a number of Romani parents that they sent their children to the “Roma School” because they were safe there, could practice Romani culture and because the teachers liked them. They also stressed that since they were chronically impoverished, school meals that were provided there was a major help for them relieving them of some of the burden of having to feed their children during the day.

⁸ Bowles, Samuel and Rajiv Sethi. “Social Segregation and the Dynamics of Group Inequality”. In *Working Papers 2006-02*. University of Massachusetts Amherst; Department of Economics, p. 2.

⁹ I have drawn reference to this in an earlier article in the edition of *Roma Rights on extreme poverty from 2002*. Available online at: <http://www.errc.org/cikk.php?cikk=754>.

This view echoes the work of legendary social analyst and critic, the late Pierre Bourdieu who uncovered similar patterns in his 1979 work *Distinctions*. There he presents the concept of “*Habitus*” which he describes as a repository of internalised and embodied social practices and habits that governs our life choices and strategies.⁹ Recapitulation of his theory is useful for us here since it affords us an insight into the realms of social behaviour that are concealed by patterns of social interaction and strategies that elude conventional observation. By embracing Bourdieu’s analytical concept of *Habitus*, we are allowed to posit questions about social factors that defy understanding. Questions like:

1. Why do Romani parents continue to send their children to “schools” that fail to provide them with the basic skills needed to maintain a decent life in the future?
2. Why do educational “experts” continue to stress that the current system of segregated schooling is fine and unproblematic?
3. Why do policy makers continue to promote the lie that there is no discrimination against Romani children in the educational system?
4. Why do these same policy makers claim that Romani parents and children *want* to attend these schools when it is obviously a lop sided and unrepresentative opinion?
5. Perhaps most importantly, why do segregation and segregated schools continue in our midst and yet the general public is not appalled by this and compelling political leaders to address the problem. Is our collective moral compass broken? Is Segregation in Europe not as bad as the previous examples in America and South Africa?
6. *Why?!!*

I am not holding my breath for answers to the questions above. However, I will say this: Segregated schools are not, as popularly perceived and generally argued by government agencies, a naturally occurring phenomenon. Many of the arguments presented to explain contemporary patterns of segregated schooling in both the US and Europe promulgate the “fact” that social groups (whether this is based on Class or Race) tend to gravitate towards each other thereby creating a form of spatial segregation which is nominally a natural, normal thing. Whilst there may be some truth in this rationalisation, this does not excuse let alone explain the preponderance of ethnic and racial segregation of schools in contemporary European societies. That individuals have a “choice” as to where they live is only one part of a complex set of issues here. This line of argument of natural social alignments is undermined by the fact that the State has an obligation and positive duty to ensure equal access to quality education which renders individual agency in terms of choice where they live, etc., redundant when it comes to explaining the phenomenon of segregated education. Therefore, the practice of wealthier non-Romani parents opting out of the public school system does not explain why many underprivileged Romani children end up in poorly resourced segregated schools. The truth of the matter is that these schools are an amplification of the deep seated symptoms of a racially/ethnically divided society, and social policies and structures reflect these divisions.

The social formations argumentation is inherently flawed and limited and can only provide a snapshot of a particular form of social affiliation and structuration. Let’s face it, when it comes to the situation of Roma in contemporary Europe, the “Class” card is always trumped by the “Race/Ethnic” card. Always!! Continued promulgation of the idea that segregated schooling is a corollary of natural patterns of social, class, race/ethnic segregation in wider society implies a kind of Darwinian

hierarchy which tacitly justifies the continued marginalisation of Romani children and their families and communities in Europe today.

Culpability or responsibility

“Politics, polished tricks, makes me sick, ready to flip...”¹⁰

Taking the above into consideration then, it would be wholly wrong to conclude that segregation of Romani communities was a legitimate modern development aligned to social group affiliation and formation as proffered by various state officials and representatives. From the ongoing analysis above, it is patently clear that the practice of segregated schooling is caused by a confluence of historical, racial and political determinants that shape the manifestations of marginalisation and discrimination that Romani communities face. It is precisely because of cycles of causality like this that courts (the Judiciary) play a fundamental arbitration role. Perusal of court interventions in the past show that it is the judiciary that establishes substantive conclusions in cases of social/political dispute. The courts perform a moderating and tempering role in these matters, albeit in some cases, in a tangential and non linear fashion.¹¹ It is widely understood and accepted that the political executive branch of the State assumes responsibility for social wealth distribution in a fair and equitable fashion. It is also responsible for providing equal opportunities for all of its citizens (including in some cases, immigrant communities). Failure to do so also means that the State is therefore culpable for any infraction, abrogation or violation of fundamental rights (such as education, housing healthcare and employment) and when violations occur, it is the responsibility of the court to intervene to protect the sanctity of these rights.

The ERRC is currently formulating a referral to the ECtHR Grand chamber in another case

¹⁰ Lyrics from the song “Arrest the President” by the artist Intelligent Hoodlum.

¹¹ The Ostrava ruling was proffered by the Grand Chamber of the European Court of Human Rights after an appeal by the applicants.

of segregated schooling in Croatia popularly referred to as the “Orsus case”. Whilst the merits of the case will be laid out and fought over in the court, the social impact of the decision will have seismic ramifications for contemporary Croatian and European society. Let’s hope that at the end

of the day, the European Court of Human Rights will rectify a huge social ill that befalls many Romani communities. The judiciary is the last resort for these unfortunate peoples and it is my hope that the courts, as in the Ostrava case, will provide succour for the Romani applicants.