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Segregation in education and a duty of desegregation under the ECHR

Merel Vrancken*

Abstract

In recent case law on Roma segregation in education, the European Court of Human Rights further develops its approach towards segregation in education and shifts its focus to desegregation. This evolution in the Court's case law is important both for furthering the rights of Roma and equality in education. This article addresses two key questions concerning segregation in education on which the recent cases provide guidance. The first question concerns what situations of segregation can be considered '*de facto* discrimination'. The Court's interpretation of this term has shifted from it explaining the concept of indirect discrimination to an interpretation that has the potential to address systemic issues such as that of segregation in education. Secondly, this article addresses to what extent a duty of desegregation exists. In the case law on Roma segregation in education, the Court's focus has recently shifted towards desegregation measures. It has ordered states to ensure the end of segregation in schools, where appropriate desegregation measures swiftly need to be implemented. In contrast to this detailed duty of collective desegregation, an approach towards a possible duty of individual desegregation is lacking. By shedding light on the prohibition of segregation in education and the duty of desegregation under the ECHR, the paper aims to highlight evolutions and hiatuses in the ECtHR's case law concerning Roma segregation in education and thereby contribute to strengthening the rights of Roma pupils to equality in education.

Roma segregation in education: facts and figures

The right to education is an indispensable human right and a precondition for the enjoyment of other rights.¹ The Committee on Economic, Social and Cultural Rights describes it as an empowerment right and "the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in the communities".² This reflects the educational ideal of meritocracy, towards which European countries and the majority of the world strive. Meritocracy can only advance where a talented and diligent pupil is able to achieve their aspirations.³ Under this ideal, education has the potential to level the playing field for all children

* Hasselt University.

¹ *General comment No 13 to the Covenant on Economic, Social and Cultural Rights: The right to education (art 13) of 1999* (Council of Europe 1999), para 1; Noam Peleg, "Marginalisation by the Court: The Case of Roma Children and the European Court of Human Rights" (2018) 18 HRLRev 111, 126.

² *General comment No 13 to the Covenant on Economic, Social and Cultural Rights: The right to education (art 13) of 1999* (Council of Europe 1999), para 1.

³ Sarah Ganty, "The Constitutional Politics of Merit" in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Research Handbooks in Law and Politics series, Edward Elgar 2023) 485–89.

regardless of their background, compensating for disadvantages children encounter in their home environment.⁴

However, in reality, Roma children do not benefit from such an equalizing education system. They face high levels of segregation in education across the Council of Europe member states. These segregation levels accompany low levels of Roma enrolment at school: of the low proportion of Roma pupils who actually attend school, a high number is educated in segregated schools or classes.⁵ Although education is not the only domain in which Roma face discrimination, segregation in education adds to the low quality of education and fewer chances Roma pupils receive in later life.⁶ The blatant inequality in education faced by Roma children persists throughout their adult lives. It creates and perpetuates the cycle of disadvantage that Roma face and keeps Roma children's lived reality far removed from the ideal of education as an equalising empowerment right.⁷

The reality of Roma segregation

Segregation in education is a systemic issue across many Council of Europe (CoE) countries. A study on Roma in twelve EU member states concluded that more than 50% of Roma children aged 6-15 are educated in schools where the majority of other pupils are Roma.⁸ When also taking into account that 12% of Roma children in these countries are not in school at all⁹ and that above the age of 18 many Roma pupils drop out of school without reaching the level of upper secondary education,¹⁰ figures on Roma education in these countries are disastrous. This has been the Roma's plight for a long time. Different organisations have been documenting Roma segregation for decades, although the data remain fragmented due to states' failure to collect them.¹¹ Breaking down these numbers, it becomes clear that segregation¹² rates are highest in Slovakia, Bulgaria, Croatia, Spain, Czechia, Hungary, Romania and North Macedonia, with rates above 40%, and lowest in Italy, Portugal and Serbia, with rates between 2

⁴ Julie Ringelheim, "La Discrimination Dans l'accès à l'éducation: Les Leçons de La Jurisprudence de La Cour Européenne Des Droits de l'homme" (2016) RevTrimDrH 77, 78; *General comment No 13 to the Covenant on Economic, Social and Cultural Rights: The right to education (art 13) of 1999* (Council of Europe 1999).

⁵ Fundamental Rights Agency, "Roma in 10 European Countries - Main Results" (Publications Office of the European Union 2023) 38.

⁶ See Lilla Farkas, "Report on Discrimination of Roma Children in Education" (European Commission 2014).

⁷ Kalina Arabadjieva, "Challenging the School Segregation of Roma Children in Central and Eastern Europe" (2016) 20 IJHR 33, 35; See also *X and others v Albania* Nos 73548/17 and 45521/19 (European Court of Human Rights 31 May 2022), para 84.

⁸ Fundamental Rights Agency (fn. 5) 38.

⁹ *ibid* 65.

¹⁰ 71% of Roma aged between 18 and 24 leave school before reaching this level, compared to only some 10% of young people from the general population. *ibid* 38.

¹¹ Arabadjieva (fn. 7) 34; Amnesty International and European Roma Rights Centre, "A Lesson in Discrimination: Segregation of Romani Children in Primary Education in Slovakia" (European Roma Rights Centre 2017) 14; Helen O'Nions, "Divide and Teach: Educational Inequality and the Roma" (2010) 14 IJHR 464, 471-72; Andrea Óhidy and Katalin R. Forray, *Lifelong Learning and the Roma Minority in Central and Eastern Europe* (Emerald Publishing Limited 2019); Savelina Danova, "Patterns of Segregation of Roma in Education in Central and Eastern Europe" in Edwin Rekosh and Maxine Sleeper (eds), *Separate and Unequal: Combating Discrimination against Roma in Education* (Public Interest Law Initiative, Columbia University 2004); European Roma Rights Centre, "Barriers to the Education of Roma in Europe: A position paper by the European Roma Rights Center" (European Roma Rights Centre 2002).

¹² Where segregation is measured as the percentage of children who attend schools where all or most pupils are Roma.

and 13%.¹³ In other CoE countries the issue of Roma segregation in education has also been documented. For instance, monitoring reports on Finland, Greece, Moldova and Russia mention the existence of Roma-only classes or de facto segregated schools.¹⁴ In Greece, Roma are excluded from education by denying their enrolment in majority schools. In other situations, Roma children's presence in class is tolerated, but these Roma pupils do not participate in the educational process. The impact that these practices have on these individual pupils both in terms of psychological harm and educational attainment should not be neglected.¹⁵

These numbers and facts describe segregation of Roma in mainstream schools. In addition to that type of segregation, Roma are disproportionately educated in special schools with reduced curricula designed for pupils with special educational needs.¹⁶ Data on overrepresentation of Roma children in special education are scarce, but the CoE Commissioner for Human Rights has reported that in some countries the chances of Roma children being enrolled in a special school are 27 times higher than for non-Roma children.¹⁷ Children taught in such special schools do not usually obtain a recognised diploma and have limited access to secondary and higher education.¹⁸

The consequences Roma children face

Segregation in separate classes, schools or in special schools, almost always goes hand in hand with inferior quality of education.¹⁹ Children in Roma-only schools or classes usually receive substandard education due to a lack of resources, resulting in ill-equipped school buildings, insufficient qualitative teaching materials and a shortage of (supporting) teachers.²⁰ In addition, many teachers in these settings are not qualified. As a consequence, school dropout rates among Roma are high, hampering these pupils' future opportunities.²¹

¹³ Fundamental Rights Agency (fn. 5) 39.

¹⁴ E/C12/FIN/CO/7 (8 March 2021), para 46; *ECRI report on Greece Sixth monitoring cycle of 2022* European Commission against Racism and Intolerance CRI(2022)28 (Council of Europe European Commission against Racism and Intolerance 2022), para 94; E/C12/RUS/CO/6 (6 October 2017), para 57, (d); *Fourth Opinion on Moldova (Article 12) of 2016* Advisory Committee on the Framework Convention for the Protection of National Minorities (Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities 2016), para 77.

¹⁵ Panagiota Gkofa, "Lifelong Learning for Roma in European Countries: The Greek Case" in Andrea Óhidy and Katalin R Forray (eds), *Lifelong Learning and the Roma Minority in Western and Southern Europe* (Emerald Publishing Limited 2020) 52–53.

¹⁶ Amnesty International and European Roma Rights Centre (fn. 11); Iryna Ulasiuk, "To Segregate or Not to Segregate? Educational Rights of the Roma Children in the Case Law of the European Court of Human Rights" (EUI 2014), 1–2; O'Nions (fn. 11) 469.

¹⁷ Council of Europe Commissioner for Human Rights, "Fighting School Segregation in Europe through Inclusive Education: Position Paper" (Council of Europe 2017) 8, with reference to *DH and others v the Czech Republic* No. 57325/00 (European Court of Human Rights (GC) 13 November 2007).

¹⁸ Council of Europe Commissioner for Human Rights (fn. 17) 8; Sina Van den Bogaert, *Segregation of Roma Children in Education: Addressing Structural Discrimination through the Framework Convention for the Protection of National Minorities and the Racial Equality Directive 2000/43/EC* (Brill | Nijhoff 2019) 34–35.

¹⁹ See, for instance, Amnesty International and European Roma Rights Centre (fn. 11); European Roma Rights Centre (fn. 11).

²⁰ European Roma Rights Centre (fn. 11) 23–25.

²¹ Council of Europe Commissioner for Human Rights (fn. 17) 13–14; O'Nions (fn. 11) 465. For a country-by-country overview of these figures, see Andrea Óhidy and Katalin R Forray (fn. 11); Andrea Óhidy and Katalin R Forray, *Lifelong Learning and the Roma Minority in Western and Southern Europe* (Emerald Publishing Limited 2020).

Even apart from the inferior quality, the fact that Roma children are educated largely separate from the mainstream community is troublesome. Due to separate education and the resulting lack of intercultural contact, the marginalisation of Roma is reinforced. In addition, social cohesion is weakened, resulting in less tolerance for diversity, a lack of respect for religious and cultural differences and a high amount of prejudice against Roma.²² Segregation reinforces and produces stigma. Lastly, teacher expectations of Roma pupils are lower, which in turn results in poor educational outcomes.²³ Due to segregation, all these children are disadvantaged, even before reaching adulthood. Education then functions to perpetuate and reinforce this cycle of disadvantage instead of eradicating it by granting children equal chances.

Indirect discrimination and segregation

Segregation in education violates the European Convention on Human Rights (ECHR). The European Court of Human Rights (ECtHR) has repeatedly found the segregation of Roma children in education to be contrary to the prohibition of discrimination (read together with the right to education). In the first segregation case, *D.H. and Others v. the Czech Republic*, the ECtHR recognised the concept of indirect discrimination under the Convention. The subsequent cases helped to further develop this concept. Indeed, in the case of *D.H.*, the Grand Chamber tacitly recognised that the standards on discrimination used up until that point were insufficiently tailored to the specific situation of segregated education.²⁴

Nevertheless, considering segregation as indirect discrimination does not sit well with the respective concepts. Although indirect discrimination has successfully and convincingly been used to condemn these situations of segregation, segregation is different from indirect discrimination and does not follow quite the same principles, as will be demonstrated in this section.

The Roma segregation in education case law of the European Court of Human Rights has been analysed by numerous commentators already. This article's addition to this scholarship is dual. First, a number of recent cases have been added to the case law. The cases on Roma segregation in education have reached the Court in two 'clusters':²⁵ the first was between 2007 and 2013, starting with the case of *D.H. and Others v. the Czech Republic* and ending with the case of *Lavida and Others v. Greece*. These have been comprehensively analysed and commented.²⁶ In these cases, the Court largely focused on

²² Council of Europe Commissioner for Human Rights (fn. 17) 14; Arabadjieva (fn. 7) 35; Per Kornhall and German Bender, "School Segregation in Sweden: Evidence from the Local Level" (NESET 2019) 6.

²³ Amnesty International and European Roma Rights Centre (fn. 11) 7, 14, 50; Van den Bogaert (fn. 18) 36, 46–47.

²⁴ *DH* (fn. 17), paras 183–195.

²⁵ The fact that the cases have appeared in two clusters may be explained by the priority policy adopted by the ECtHR in dealing with cases between 2012 and 2021, as was kindly pointed out by Paul Lemmens, former Belgian Judge at the Court (between 2012 and 2021).

²⁶ O'Nions (fn. 11); Ringelheim (fn. 4); Roberta Medda-Windischer, "Dismantling Segregating Education and the European Court of Human Rights. *D.H. and Others vs. Czech Republic: Towards an Inclusive Education?*" in *European Yearbook of Minority Issues* (Brill | Nijhoff, 2010) 19; Zsuzsanna Nyitray, "The European Court of Human Rights' Jurisprudence Regarding the Segregation of Roma Schoolchildren: A Children's Rights Perspective" in Ton Liefwaard and Julia Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child* (Leiden, Brill | Nijhoff 2017); Peleg (fn. 1); Laura Cashman, "New Label No Progress: Institutional Racism and the Persistent Segregation of Romani Students in the Czech Republic" (2017) 20 REE

determining whether and when the situations of segregation it had before it constituted a violation of the Convention. As will be indicated, the last case of this cluster, *Lavida and Others v. Greece*, exhibits some traits that distinguish it from the earlier cases. However, at that point in time, it was not yet clear whether the new perspective taken in this case showed an evolution in the Court's reasoning or should be considered an anomaly.

Currently, a second cluster has emerged: the Court has handed down judgment in three cases on Roma segregation in 2022-2023. With the three most recent judgments, the Court has significantly clarified its stance on segregation and taken a new focus, namely that of desegregation. In examining these recent cases and scrutinising the Court's evolving approach to segregation, this article therefore contributes to existing scholarship. Second, the positive obligation to take desegregation measures has been the subject of the ECtHR's latest case law on Roma segregation in education. This is a new evolution in the Court's case law, which will be the subject matter of the second part of this article. This can be contrasted to the US, where the Supreme Court's judgments have engaged with desegregation measures since the 1950s.²⁷ Many commentators of the US Supreme Court have focused on state obligations concerning desegregation.²⁸ Up until now, a similar perspective to the ECtHR case law could hardly be afforded as the Court refrained from explicitly requiring desegregation measures. The second cluster of case law changed this, and the seeds for this change could already be found in the case of *Lavida and Others v. Greece*.

The cases: what segregation?

The first cluster of cases before the Court concerned situations of Roma segregation into separate schools, separate classes and into special schools designed for pupils with disabilities. In *D.H. and Others v. the Czech Republic* and *Horváth and Kiss v. Hungary*, the Court condemned the overrepresentation of Roma pupils in special education.²⁹ In *Sampanis and Others v. Greece*, Roma were placed into separate preparatory classes in a different building. There was no adequate system of evaluation of these children's capacities and none of these children had been integrated into the mainstream classes. Therefore, the Court was not convinced that these were actually preparatory classes. Instead of receiving extra support, these children had been condemned to separate education of inferior quality.³⁰ In *Oršuš and Others v. Croatia*, the applicants argued that Roma children were overrepresented in the lower grades of primary school. The Court did not find a violation of Article 14

595; Kristen Barnes, "Adjudicating Equality: Antidiscrimination Education Jurisprudence in the European Court of Human Rights" (2017) 33 Harv J. Race & Ethnicity 13.

²⁷ *Brown v Board of Education of Topeka* 349 US 294 (US Supreme Court 1955).

²⁸ See, for instance, Jim Hilbert, "Restoring the Promise of Brown: Using State Constitutional Law to Challenge School Segregation" (2017) 46 JL & Educ 1; Erica Frankenberg and Kendra Taylor, "De Facto Segregation: Tracing a Legal Basis for Contemporary Inequality" (2018) 47 JL & Educ 189. Bowman and Nantl took a comparative perspective between the US and the EU, focusing on whether after D.H. desegregation actually happened and the ECtHR's lack of enforcement powers (Kristi Bowman and Jiri Nantl, "Liability and Remedies for School Segregation in the United States and the European Union" (2014) IJELP 133).

²⁹ *DH* (fn. 17); *Horváth and Kiss v Hungary* No. 11146/11 (European Court of Human Rights 29 January 2013).

³⁰ *Sampanis and Others v Greece* No. 32526/05 (European Court of Human Rights 5 June 2008).

of the ECHR taken together with Article 2 of the First Protocol to the ECHR (P1) in this respect, but did find one in respect of their placement into separate classes on the basis of insufficient command of the Croatian language for similar reasons as in *Sampani*.³¹ Lastly, in the cases of *Sampani and Others v. Greece* and *Lavida and Others v. Greece*, the applicants attended a Roma-only school. In *Sampani* this was combined with education of a lower quality, while in *Lavida* there was no difference in the level of educational programme between the school in question and other schools. In both cases the competent authorities had recognised that a problem of segregation in the schools existed, but the situation had not been solved. The Court found a violation of Article 14 in conjunction with Article 2 P1 in both instances.³²

In the more recent cases of *X and Others v. Albania* and *Elmazova and Others v. North Macedonia*, a situation of overrepresentation of Roma pupils in certain schools existed. In *X and Others*, the applicants' school was composed of at least 89% pupils of the Roma and Egyptian minorities.³³ In *Elmazova*, 83.5% of the concerned school's pupils were Roma, while 95.1% of a nearby school's pupils were ethnic Macedonians.³⁴ In both cases the schools were part of the normal school system and did not follow a different curriculum than other schools. In addition, it was twice established that the authorities had not intended to segregate Roma pupils. Nevertheless, the Court found that these situations violated the prohibition of discrimination.³⁵

In *Elmazova and Others v. North Macedonia*, the applicants also alleged that in another school, where 64-67% of all first-grade pupils were Roma, segregation existed. Similarly to the decision in *Oršuš*, the Court did not accept the argument that this overrepresentation amounted to discriminatory treatment under the Convention, as there was no "general policy to automatically place Roma pupils in separate classes in the school at issue".³⁶ However, at the same time, one of the three first-grade classes was Roma-only. The size of this class was below the minimum threshold of class size set by law and the school acknowledged the existence of segregation. As a consequence, this situation of a Roma-only class amounted to discrimination under the Convention.³⁷

Finally, in the case of *Szolcsán v. Hungary*, the applicant's school was almost exclusively attended by Roma children even though Roma comprised only some 4% of the population of that region. In addition, the school curriculum was of a poor quality. The local municipality had recognised that the school was

³¹ *Oršuš and Others v Croatia* No. 15766/03 (European Court of Human Rights (GC) 16 March 2010).

³² *Sampani and Others v Greece* No. 59608/09 (European Court of Human Rights 11 December 2012); *Lavida and Others v Greece* No. 7973/10 (European Court of Human Rights 30 May 2013).

³³ *X and others v Albania* (fn. 7), para 3.

³⁴ *Elmazova and Others v North Macedonia* Nos 11811/20 and 13550/20 (European Court of Human Rights 13 December 2022), para 7.

³⁵ *X and others v Albania* (fn. 7); *Elmazova and Others v North Macedonia* (fn. 32).

³⁶ *Elmazova and Others v North Macedonia* (fn. 32), para 75.

³⁷ *ibid* paras 76-79.

racially segregated and had adopted a resolution to desegregate but without adopting any concrete desegregation plan. Again, the Court found a violation of the Convention.³⁸

Segregation as inherently unequal

The second cluster of cases, consisting of *X and Others*, *Elmazova* and *Szolcsán*, has clarified a number of questions that had remained open after the first cluster. Indeed, the earlier judgments before 2014,³⁹ did not provide clear guidelines on when and in what instances segregation would amount to discrimination. Only in *Lavida*, the last case of that earlier period, was segregation condemned as such by the Court.

In these earlier cases, the use of the word ‘segregation’ by the Court remained uncertain. It was not clear whether the Court had actually recognised ‘segregation’ as a human rights problem or whether it was simply describing a situation that may violate the prohibition of discrimination under the Convention. Commentators have noted that the Court, in the cases before *Lavida*, seemed to avoid labelling cases of segregated education as such.⁴⁰ It spoke of ‘segregation’ when quoting or rephrasing the parties’ arguments, but not when giving its own analysis of the situation at hand.⁴¹ This changed with *Lavida*, where the Court mentions that the competent authorities officially recognised the existence of segregation and failed to take the proposed desegregation measures.⁴² While some uncertainty remained after *Lavida*, the judgments of *X and Others*, *Elmazova* and *Szolcsán* have confirmed and cemented this approach. The Court has recognised segregation as a specific form of discrimination, requiring an objective justification for a situation of segregation.⁴³ Explicitly naming the existing situations as ‘segregation’ and considering it as a specific form of discrimination has led to substantial development of the concept in the more recent Strasbourg jurisprudence.

At the heart of this concept’s development is the Court’s clarification of what is problematic about segregated education in light of the Convention. Until the case of *Lavida*, the Court had consistently required proof of a further negative effect, aside from the separation of the pupils.⁴⁴ As a consequence, throughout the earlier judgments ambiguity remained: was it the fact that the pupils were separated, the inferior quality of education, or both? Several scholars highlighted that this lack of clarity was

³⁸ *Szolcsán v Hungary* No. 24408/16 (European Court of Human Rights 30 March 2023).

³⁹ Namely those of 2007 (*D.H.*), 2008 (*Sampanis*), 2010 (*Oršuš*), 2012 (*Sampani*) and 2013 (*Horváth and Kiss* and, to some extent, *Lavida*).

⁴⁰ Peleg (fn. 1) 126; Morag Goodwin, “Taking on Racial Segregation: The European Court of Human Rights at a Brown V. Board of Education Moment?” (2009) 3 RMThemis 115, 118 and 124.

⁴¹ Where the ECtHR did make mention of “segregation”, it did so by referring to other sources speaking of segregation, to historical segregation instead of a current instance of segregation or a lack of positive action in a failure to take “antisegregationist measures”. (*DH* (fn. 17), para 198; *Sampanis* (fn. 28), para 92; *Sampani* (fn. 30), para 98; *Horváth and Kiss* (fn. 27), paras 113 and 127.)

⁴² *Lavida* (fn. 30), paras 67, 69, 72-73 and 79.

⁴³ *Elmazova and Others v North Macedonia* (fn. 32), paras 73 and 78; *Szolcsán v Hungary* (fn. 36), paras 54-55 and 57.

⁴⁴ E.g. special education of a lower quality in *D.H.* and *Horváth and Kiss*, a reduced curriculum in *Oršuš*, paras 163-164; stigmatisation in *Sampanis*, para 92; inferior material conditions of the school in *Sampani*, paras 94-97 (*DH* (fn. 17), para 207; *Oršuš* (fn. 29), paras 94-97; *Horváth and Kiss* (fn. 27), para 127; *Sampanis* (fn. 28), para 92; *Sampani* (fn. 30), paras 94-97.)

problematic, especially where the implementation of the judgment at the national level was concerned.⁴⁵ National authorities were confused about the exact requirements following from the judgments. This is clearly evident in the case of *Elmazova*, where a judgment by the Constitutional Court of North Macedonia stated that “there was no evidence that Roma pupils in the “segregated” classes had been treated differently in comparison with pupils in the mixed classes, namely that they had obtained an inferior education”.⁴⁶ This national Court had interpreted the ECtHR’s case law as only prohibiting segregated education when the quality of education of the segregated pupils was inferior.

From the more recent judgments, it can be deduced that lower educational quality is *not* a precondition for segregation to be contrary to the convention. The fact of separation itself (full separation or, in some cases, overrepresentation) suffices to create a presumption of discrimination and requires separation to be objectively justified. In addition, where education is of inferior quality it will also amount to discrimination unless it can be objectively justified. With these judgments, the Court has finally pointed to the “*inherent* nature of segregation as a violation of fundamental rights”.⁴⁷

Unintentional, de facto segregation

Since the case of *D.H.*, the Court has consistently repeated that “discrimination that is potentially contrary to the Convention may result from a *de facto* situation” and that it “does not necessarily require discriminatory intent”.⁴⁸ This sentence is in reference to the principle of indirect discrimination, which was introduced in the case of *D.H.*⁴⁹ Medda-Windischer explains that in the case of *D.H.*, the ECtHR affirmed that when an (apparently) neutral rule “*in fact* affects a clearly higher percentage of members of one group than members of a comparative group, it is for the respondent government to show that this is the result of objective factors unrelated to any discrimination.”⁵⁰ For indirect discrimination, a possible intention to discriminate is irrelevant: what counts is the actual effect of any given measure or policy.⁵¹ She concludes that “[t]he task of the court was thus to establish whether a neutral act had placed a particular group at a significant disadvantage.”⁵² This view of indirect discrimination is widely shared. It explains the view adopted by the Strasbourg judges that discrimination may arise from a *de facto* situation without any discriminatory intent. Indeed the earlier decisions on indirect discrimination adopted the same approach.

⁴⁵ Arabadjieva (fn. 7) 37–38; Peleg (fn. 1) 126; Ringelheim (fn. 4) 85.

⁴⁶ *Elmazova and Others v North Macedonia* (fn. 32), para 13.

⁴⁷ Arabadjieva (fn. 7) 38.

⁴⁸ *DH* (fn. 17), paras 175 and 184; *X and others v Albania* (fn. 7), para 83; *Elmazova and Others v North Macedonia* (fn. 32), para 68; *Szolcsán v Hungary* (fn. 36), para 48.

⁴⁹ Ringelheim (fn. 4) 79–80 and 85; Lilla Farkas, “The Scene After Battle: What is the Victory in D.H. Worth and Where to Go From Here?” [2008] *Roma Rights Quarterly* 51, 58; Medda-Windischer (fn. 24) 31–32; Rory O’Connell, “Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR” (2009) 29 *Legal Stud* 211, 220–21.

⁵⁰ Medda-Windischer (fn. 24) 32, emphasis added.

⁵¹ *ibid* 31; Ringelheim (fn. 4) 79; Goodwin (fn. 37) 120.

⁵² Medda-Windischer (fn. 24) 31.

In the case of *D.H.*, the *de facto* situation of segregation was indirectly created by the relevant authorities, by setting up a non-Roma-sensitive intellectual capacity test that determined whether a pupil would be enrolled in special education.⁵³ Similarly, in the case of *Horváth and Kiss*, the applicants had been placed in a special school.⁵⁴ In *Sampanis and Oršuš*, remedial classes had been created by the schools for Roma pupils.⁵⁵ Lastly, in *Sampani*, the separate Roma-only school had been created.⁵⁶ These situations were found by the Court to be ‘*de facto* situations’ of discrimination. However, they were called so not because of the fact that they just ‘happened to exist’, as this is not the case: they were created by state action. The Court seems to have considered them *de facto* situations because in these cases they were the *indirect* consequence of state action.

In the above-mentioned cases, there was no ‘intention to discriminate’. There may have even been benevolent intentions on the part of the authorities, wishing to provide Roma children a safe space from discriminatory attitudes by the majority population or to remedy a lack of knowledge and skills. At the same time, in each of these cases, a measure was introduced that clearly⁵⁷ led to the separation of the pupils, although this separation was only indirectly on the basis of race. To rephrase Medda-Windischer, the Court established that a neutral *act* had placed the Roma children at a significant disadvantage. Conscious separation was in these cases considered a neutral act.⁵⁸

In the subsequent cases, the European Court further developed its approach. In the case of *X and Others v Albania*, the segregation was a consequence of a free school meals programme that led to the overrepresentation of Roma and Egyptian pupils.⁵⁹ Although the reason for the overrepresentation can clearly be traced back to the free school meals programme, the link between the act on the part of the authorities and the separation of pupils is significantly more indirect than in the previously mentioned cases, where in every instance a measure of separation (which did not necessarily aim to disadvantage the concerned students) was introduced. In the case of *X and Others v Albania*, the free school meals programme was set up as a measure of social policy to convince more socioeconomically disadvantaged children to attend school. Nevertheless, as a *de facto* situation of segregation was created, authorities were under a positive obligation to take action against this discrimination.

In the case of *Elmazova*, it was established that the segregation was a consequence of the non-Roma parents’ opposition to enrolling their children in the ‘Roma school’. In practice, the result was that virtually no non-Roma children were enrolled there.⁶⁰ The regulatory framework which allowed for transfers between schools had the effect of segregating Roma pupils from ethnic majority pupils. As in

⁵³ *DH* (fn. 17), paras 197-201.

⁵⁴ *Horváth and Kiss* (fn. 27), para 6.

⁵⁵ *Sampanis* (fn. 28), para 24; *Oršuš* (fn. 29), paras 12 and 17.

⁵⁶ *Sampani* (fn. 30), paras 7-16.

⁵⁷ One could even say directly.

⁵⁸ As indicated earlier, in subsection B, this approach changed in later cases.

⁵⁹ *X and others v Albania* (fn. 7), paras 3 and 84.

⁶⁰ *Elmazova and Others v North Macedonia* (fn. 32), para 72.

X and Others, the reason for segregation can be traced back to the regulatory framework, but this act or measure only very indirectly created the separation – and would not have created any separation if prejudice from the majority population against Roma had not existed.

In the cases of *Lavida* and *Szolcsán*, it is not clear from the judgments what created the situations of segregation. The Court does not try to establish which neutral act had placed the Roma children at a significant disadvantage. It simply holds that the children had been significantly disadvantaged due to their separation, and, in *Szolcsán*, from the poor quality of the curriculum.⁶¹ The segregation existed and, although recognising the problem, the authorities had failed to take sufficient measures to desegregate. This was sufficient for the Court to find a violation of the prohibition of discrimination. The contrast with the first cluster of cases is considerable: in each of those earlier cases, the state had introduced a measure of segregation. In the cases of *Szolcsán* and *Lavida*, no act, measure or policy was identified to have led to the segregation.

It is apparent that the principle now adopted by the Court, that discrimination may also arise from a *de facto* situation, without the need to show discriminatory intention, has further reach than was originally envisaged in the scholarship. Discrimination, potentially contrary to the Convention, may result from state inaction where segregation has arisen, even though the state had no involvement. This finding highlights the differences between indirect discrimination and segregation. While indirect discrimination requires a (neutral) act with prejudicial effects, according to the case law, segregation requires no act whatsoever and a simple separation is an indication of, ‘prejudicial effects’ – be it full separation or overrepresentation. This evolution of the Strasbourg jurisprudence has the potential to address structural discrimination in a society.⁶²

The case law of the ECtHR has clearly undergone an evolution, during which the Strasbourg Court has gradually accepted segregation to be a human rights issue and broadened its approach towards it. An opposite evolution can be discerned in the case law of the Supreme Court of the United States. In the seminal constitutional case of *Brown v. Board of Education*, handed down in 1954, the US Supreme Court recognised that segregation deprived people of the equal protection of the laws guaranteed by the US Constitution’s Fourteenth Amendment and held that segregation was inherently unequal.⁶³ In this single judgment on segregation in education, it immediately recognised two aspects that took the European Court of Human Rights some time to accept: first, that segregation is a legal concept which undermines equality and second, that the fact of segregation, in and of itself, is problematic. No additional negative consequences (e.g. in the form of a reduced curriculum) need to be present to find a violation of the equal protection clause. Almost seventy years before the ECtHR would come to terms

⁶¹ *Lavida* (fn. 30); *Szolcsán v Hungary* (fn. 36).

⁶² Which is what some scholars explicitly expressed hope for in their analysis of the case law, see Arabadjieva (fn. 7) 41–42; Barnes (fn. 24) 54–56.

⁶³ *Brown v Board of Education of Topeka* 347 US 483, 495 (US Supreme Court 1954).

with these ideas, the US Supreme Court had already recognised them. It is, however, necessary to also point to an important difference here. When *Brown v. Board of Education* was handed down in the US, racial segregation had been mandated by the state. This was not the case in any of the Roma segregation cases which appeared before the ECtHR.

In the early years of (de)segregation cases before the US Supreme Court, even if segregation could not be traced back to some legally mandated segregation, schools and districts were allowed –though not compelled– to take desegregation measures. Over time, this view altered. For example, in *Swann v. Charlotte Mecklenburg* and *Keyes v. School District No. 1*, the Supreme Court clarified that only when segregation was legally mandated and intentional, would a compelling state interest to remedy segregation exist.⁶⁴ As a next step, starting with *Miliken v. Bradley*, the Court became hesitant about remedying what it calls “racial imbalance” in schools.⁶⁵ With *Parents Involved in Community Schools v. Seattle School District No. 1*, it definitively closed the door on voluntary desegregation measures to remedy *de facto* segregation, holding that “the Constitution is not violated by racial imbalance in the schools, without more” and that plans “directed only to racial balance [are] illegitimate”.⁶⁶ As clearly rephrased by Rothstein, the Supreme Court held that desegregation efforts “are impermissible if students are racially isolated, not as the result of government policy but because of societal discrimination”.⁶⁷ This disappointing evolution stands in stark contrast with the current approach of the European Court of Human Rights, which *requires* a state to take desegregation measures when *de facto* segregation exists.

A duty of desegregation

While the previous section focused on what segregation is and when it violates the Convention, the next section focuses on remedies, more specifically in the form of a duty to take desegregation measures. Unlike the US Supreme Court in *Brown v. Board of Education*, which immediately required school districts to remedy segregation and take desegregation measures “with all deliberate speed”,⁶⁸ the European Court of Human Rights, as outlined above, has only recently turned its attention from analysing when segregation was discriminatory under the Convention to remedying the segregation itself.

⁶⁴ Bowman and Nantl (fn. 26) 137; *Swann v Charlotte-Mecklenburg Board of Education* 402 US 1 (US Supreme Court 1971); *Keyes v School District No 1, Denver, Colorado* 413 US 189 (Supreme Court of the United States 1973).

⁶⁵ Gary Orfield and Erica Frankenberg, “Brown at 60: Great Progress, a Long Retreat and an Uncertain Future” (The Civil Rights Project, 2014) 4; Martha Minow, *In Brown’s Wake: Legacies of America’s Educational Landmark* (Oxford: OUP 2010) 23–24; *Milliken v Bradley* 418 US 717 (US Supreme Court 1974); Hilbert (fn. 26) 10–14.

⁶⁶ *Parents Involved in Community Schools v Seattle School District No 1* 551 US 701, 2752 and 2755 (US Supreme Court 2007); Hilbert (fn. 26) 16–19.

⁶⁷ Richard Rothstein, “The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods: A Constitutional Insult” (2015) 7 Race Soc Probl 21, 23–24.

⁶⁸ *Brown II* (fn. 25).

The evolution towards desegregation

Commentators have noted the Strasbourg Court's apparent hesitancy to require states to take action to tackle segregation.⁶⁹ The Court formulated no specific positive obligations to address the segregation faced by the children in the first five segregation cases.⁷⁰ Even in the case of *Lavida*, where the Court found that the Convention had been violated in part due to the "renouncing of effective anti-segregationist measures", the Court remained very vague concerning the state's obligations under the Convention to rectify this discriminatory situation.⁷¹ In fact, none of the changes made by the domestic authorities while implementing the *D.H.* case, including the explicit prohibition of segregation in national legislation, resulted in a reduction of segregation.⁷² Smekal and Sipulova observe that, aside from establishing a violation of the Convention, the Court "did not provide much advice about when it would have been satisfied with reforms of the system causing the violations".⁷³ This last comment goes hand in hand with criticism about the failure of the Court in these earlier cases to be clear on what segregation is and when it is contrary to the prohibition of discrimination. It was partially remedied by the evolution in the Court's jurisprudence highlighted above, which clarified these questions.

The ECtHR's hesitancy towards requiring desegregation entirely disappeared in the most recent cases. In *X and Others*, *Elmazova* and *Szolcsán*, the Court shifted its attention from the question of whether certain situations of segregation were discriminatory, to remedying this segregation. Where segregation has been found to exist, the ECtHR has established a positive obligation on part of the state authorities to take measures to desegregate. This positive obligation is geared towards correcting the applicants' factual inequality by avoiding the "perpetuation of the discrimination" that resulted from their segregation and "thereby breaking their circle of marginalization and allowing them to live as equal citizens from the early stages of their life".⁷⁴ In *X and Others*, the Court clarified that this obligation requires the swift implementation of appropriate desegregation measures.⁷⁵ In stating this, it underscores two essential aspects of desegregation measures: they need to be appropriate and no time should be wasted in their implementation.⁷⁶ Under Article 46 of the ECHR, the Court requires the state to ensure that the measures to be taken "ensure the end of the discrimination of Roma and Egyptian pupils" at the

⁶⁹ Arlan Fuller and others, "Strategies and Tactics to Combat Segregation of Roma Children in Schools" (FXB Center for Health and Human Rights Harvard University 2015) 116; O'Nions (fn. 11) 464; Hubert Smekal and Katarina Sipulova, "DH v Czech Republic Six Years Later: On the Power of an International Human Rights Court to Push through Systemic Change" (2014) 32 NQHR 288, 321; Jack Greenberg, "Report on Roma Education Today: From Slavery to Segregation and Beyond" (2010) 110 Colum LRev 919, 939–43.

⁷⁰ O'Nions (fn. 11) 464; Fuller and others (fn. 64) 116; Arabadjieva (fn. 7) 39.

⁷¹ *Lavida* (fn. 30), paras 73 and 82.

⁷² Smekal and Sipulova (fn. 64) 305–09.

⁷³ Smekal and Sipulova (fn. 64) 321.

⁷⁴ *Elmazova and Others v North Macedonia* (fn. 32), para 74; *X and others v Albania* (fn. 7), para 84.

⁷⁵ *X and others v Albania* (fn. 7), para 87.

⁷⁶ See also Merel Vrancken, "Breaking the 'Circle of Marginalisation' through Desegregation Measures: *X and Others v. Albania*" (*Strasbourg Observers*, 2022) <<https://strasbourgobservers.com/2022/07/01/breaking-the-circle-of-marginalisation-through-desegregation-measures-x-and-others-v-albania/>> [Accessed 20 March 2023].

concerned school.⁷⁷ Indicating the measures to be taken in order to comply with the judgments in *Elmazova* and *Szolcsán*, the ECtHR moreover adds that “inclusive education is the most appropriate means of guaranteeing the fundamental principles of universality and non-discrimination in the exercise of the right to education”.⁷⁸ In the judgment in *Szolcsán*, the Court finally adds that, in addition to ending the segregation at the concerned schools, Hungary is required, more generally, to “develop a policy against segregation in education and take steps to eliminate it as recommended by ECRI”.⁷⁹

Swift, appropriate measures ensuring the end of segregation

In these judgments, the Court not only introduces a positive obligation to take desegregation measures, but also provides guidance to the member states on what this entails and, importantly, when the positive obligation will have been fulfilled. The first aspect of guidance given by the Court is its statement that desegregation measures need to be swift. In this regard, it held in the case of *X and Others* that delays of almost one and a half and four years in their implementation were “incompatible with the time sensitivity of a situation where children were segregated”.⁸⁰ This was even truer as the envisaged measures were likely to have immediately a beneficial effect on the children concerned.⁸¹

The second aspect of guidance is that the desegregation measures need to be appropriate. In its standard meaning, appropriate means that the measures need to be geared towards a specific goal (of desegregation) and be suitable to achieve that goal. In this respect, the Court has held that “it is not for the Court to indicate the specific measures to be undertaken to remedy a school segregation situation”.⁸² At the same time, in the various judgments, the Court has mentioned specific examples of possible measures to tackle segregation. In the case of *Lavida*, the Court gives some examples of anti-segregationist measures such as sending Roma children to mixed classes in other schools in the neighbourhood or redrawing the school district map.⁸³ In the case of *X and Others*, it suggests as a possible measure that the food support programme that existed in the segregated school (and which had created the overrepresentation of Roma and Egyptian pupils in that school) could be extended to four additional schools in the area. Another recommendation was to merge the concerned school with three other schools.⁸⁴ In both of these cases, the Court suggested measures that had already been considered at the national level as examples of possible desegregation measures. It is not certain whether these measures were evidence-based or had been subject to research at the national level. In addition, it is not

⁷⁷ *X and others v Albania* (fn. 7), para 96. In the same vein, see *Elmazova and Others v North Macedonia* (fn. 32), para 89; *Szolcsán v Hungary* (fn. 36), para 69.

⁷⁸ *Elmazova and Others v North Macedonia* (fn. 32), para 89; *Szolcsán v Hungary* (fn. 36), para 69.

⁷⁹ *Szolcsán v Hungary* (fn. 36), para 69.

⁸⁰ *X and others v Albania* (fn. 7), para 84.

⁸¹ *ibid*, para 85.

⁸² *ibid*, para 86.

⁸³ *Lavida* (fn. 30), para 72.

⁸⁴ *X and others v Albania* (fn. 7), para 85.

clear whether (and if so, how) the Court has any way of assessing the appropriateness of the measures suggested.⁸⁵

In these cases, the Strasbourg Court takes an overly simplistic approach towards suggesting possible “appropriate” discrimination measures.⁸⁶ The issue of segregation is a complex one and, as the US experience illustrates, desegregation cannot be achieved by implementing simple, straightforward measures. Explaining the lack of effectiveness of desegregation measures in achieving desegregation in the US, Bowman and Nantl highlight that educational segregation is an extremely complicated issue and fully embracing reform is necessary to eradicate it. In contrast to the European situation, the US Supreme Court has largely limited the possible impact of its decisions by requiring proof of intent on the part of state actors, in order to find segregation unconstitutional, and limiting the range of desegregation measures that may be imposed by courts.⁸⁷ The difficulties posed by segregation and the need for encompassing reform has also been recognised at the Council of Europe. The Council of Europe Commissioner for Human Rights states that “the complexity of this problem demands not only a reform of the education system, but also the implementation of profound, long-term, effective measures aimed at combating institutionalised anti-Gypsyism, poverty and social exclusion, as well as at overcoming the resistance to change by various stakeholders”.⁸⁸ Luckily, throughout the years experts have researched desegregation measures in order to determine what works.⁸⁹ For instance, Fuller et al. have examined desegregation strategies and tactics in European countries and highlighted effective initiatives in their report.⁹⁰ The experience from the US also provides valuable lessons on effective means to tackle desegregation.⁹¹

Notwithstanding the complexity, possible appropriate desegregation measures were also mentioned by the Court in the case of *Elmazova*, which followed the case of *X and Others*. It held that measures could have been taken by the authorities to “correct the imbalance in the ethnic composition of the two schools in question, or to redistrict the school district map”.⁹² This mention of measures can nonetheless be distinguished from that of earlier cases. In this case, the Court reiterates measures that had repeatedly been recommended by the national Ombudsman. When determining what action the state should take

⁸⁵ Vrancken (fn. 72). However, in respect of one of the mentioned measures, the Court did have some way of determining its appropriateness. The measure proposed in *X and Others* to merge the school with three other non-segregated schools in the region had already been implemented elsewhere in the country. In that situation, they had also provided transportation for the pupils. Still, the judgment makes no mention of whether and to what extent these measures had actually solved the situation of segregation in the school concerned or whether the problem of segregation had just been moved elsewhere. (*X and others v Albania* (fn. 7), para 86.).

⁸⁶ See also Merel Vrancken, “Beating Brown v. Board of Education? Overrepresentation and Desegregation Measures in *Elmazova* and *Others v. North Macedonia*” (*Strasbourg Observers*, 2023) <<https://strasbourgobservers.com/2023/02/07/beating-brown-v-board-of-education-overrepresentation-and-desegregation-measures-in-elmazova-and-others-v-north-macedonia/>> [Accessed 20 March 2023].

⁸⁷ Bowman and Nantl (fn. 26); Hilbert (fn. 26).

⁸⁸ Commissioner for Human Rights, “Report by Nils Muižnieks Commissioner for Human Rights of the Council of Europe Following His Visit to the Czech Republic from 12 to 15 November 2012” (2013), para 60. See also Farkas (fn. 6) 46.

⁸⁹ See, among others, Council of Europe Commissioner for Human Rights (fn. 17) 19 ff.

⁹⁰ Fuller and others (fn. 64).

⁹¹ See Bowman and Nantl (fn. 26); Greenberg (fn. 64).

⁹² *Elmazova and Others v North Macedonia* (fn. 32), para 74.

in order to comply with the judgment under Article 46 of the ECHR, the Court referred to recommendations by the European Commission against Racism and Intolerance and the national Commission for Prevention and Protection against Discrimination and the Ombudsman.⁹³ This approach has the advantage of relegating the question of appropriate measures to an expert body. Combining these institutions' expert knowledge may ensure the quality and effectiveness of future desegregation measures by the state. Hopefully, this will lead to progress concerning desegregation being achieved in practice, in contrast with the evidence concerning the lack of progress made with implementation of the Court's earlier judgments.⁹⁴

In one last aspect of guidance, the Court has clearly held and consistently repeated that the obligation of desegregation on the member states is only fulfilled when they *ensure the end of the segregation* of the pupils concerned. This formulation points to an obligation of result on the state: it should not only take measures aimed at desegregation, but it can only put an end to this effort once these pupils are no longer receiving segregated education. This is a far-reaching obligation, but one that seems opportune given the previous failure of the Court's judgments to achieve systemic change. It remains to be seen when the Court will be satisfied that the segregation of the concerned pupils has ended. Some practical guidance is provided in the case of *X and Others* where the Court was of the opinion that a merger of the segregated school with three other schools "could have contributed to the creation of schools where the ratio between Roma/Egyptian and other pupils was reasonably proportional to the city-wide ratio for elementary schools".⁹⁵ Segregation, which in this case took the form of overrepresentation of Roma and Egyptian pupils in a certain school, would thus be solved when a proportionate number of Roma and Egyptian pupils would be enrolled in that school. A comparison of the school's ratio of Roma/Egyptian pupils with the city-wide ratio determines what is proportionate. This approach is very much in line with social scientists' approach in determining whether or not segregation in schools exist and has the advantage of enabling a fairly objective way⁹⁶ of measuring progress achieved by desegregation measures and determining when segregation has come to an end.⁹⁷ However, this guidance is not useful for determining when segregation of pupils into Roma-only classes or into special education has ended.⁹⁸

⁹³ *ibid*, para 89. Also in *Szolcsán*, the Court referred to recommendations by the European Commission against Racism and Intolerance (*Szolcsán v Hungary* (fn. 36), para 69).

⁹⁴ *Arabadjieva* (fn. 7) 35.

⁹⁵ *X and others v Albania* (fn. 7), para 86.

⁹⁶ Although this method of determination of segregation is also not entirely objective: a researcher can still determine with which area it will compare the school's ratio (e.g. town, district, province). This decision will have an important impact on the ratio that will be established.

⁹⁷ See, for instance, see Sjoerd Karsten, "School Segregation" in OECD (ed), *Equal opportunities? The Labour Market integration of the Children of Immigrants* (Paris: OECD publishing 2010) 195; Paul Hanselman and Jeremy E Fiel, "School Opportunity Hoarding? Racial Segregation and Access to High Growth Schools" (2017) 95 *Social Forces* 1077, 1085; Jeremy E Fiel and Yongjun Zhang, "Three Dimensions of Change in School Segregation: A Grade-Period-Cohort Analysis" (2018) 55 *Demography* 33, 40; David R James and Karl E Taeuber, "Measures of Segregation" (1985) 15 *Sociological Methodology* 1, 15.

⁹⁸ Although in this last case a similar approach could be used, namely requiring that the ratio of Roma pupils in special education is proportionate to the ratio of majority pupils in this type of education compared with their proportion in the country.

In the cases of *X and Others* and *Elmazova*, the Court held that segregation must come to an end in the schools that had been the subject of the litigation. In the *Szolcsán*, it added that Hungary was required, more generally, to “develop a policy against segregation in education and take steps to eliminate it as recommended by ECRI”.⁹⁹ The obligation the Court imposed on the state to eradicate segregation was therefore not limited solely to the school that had been the subject of the litigation, but applied to the entirety of the country. In his commentary of the judgment, Leisure argues that this strong stance against segregation in Hungary is warranted, especially in light of the “sobering statistics” presented by the third-party intervener that 45% of Roma children in Hungary attend Roma-only schools or classes.¹⁰⁰ To this it can be added that the situation had been condemned by the Court ten years earlier in the case of *Horváth and Kiss* and it was clear that almost no progress had been made to resolve the issue. This contributes to the justification of the Court’s resolute approach. In addition, the state-wide obligation that is imposed in the current judgment is less far-reaching than the obligation imposed with respect to the school at hand. At the school, the state authorities must “ensure the end of the segregation”. At the level of the entire country, the obligation is limited to *developing a policy* against segregation and *taking steps* to eliminate it. The obligation concerning the eradication of segregation throughout the entire country is thus one of means, not of result.

In creating a duty of desegregation, the ECtHR gave guidance concerning such desegregation measures in at least three respects. It clarified that appropriate desegregation measures must be taken swiftly by the state and that they must ensure the end of the segregation of the pupils concerned. Its approach towards the principle that the measures need to be implemented swiftly is not well developed. The idea of swift implementation of measures can be contrasted with the reality that actual desegregation will take time. Yet it is precisely this aspect that demands a requirement that desegregation measures are swiftly implemented, as it is the only possibility for achieving desegregation within a reasonable time frame. Also, in the context of certain individual schools, there may be some evident short-term measures that can be taken to improve substantially the children’s situations and reduce the segregation. Concerning the appropriateness of the measures, the Court’s approach has developed in the right direction, pointing to expert bodies for the determination of concrete desegregation measures. Finally, the obligation to ensure the end of segregation is far-reaching. Both the obligation of result and the country-wide obligation of means that was imposed on Hungary can be explained with reference to the failure of the earlier judgments to achieve meaningful progress concerning (de)segregation. Time will tell whether this new approach has the desired consequences, but on this occasion, the Court did not

⁹⁹ *Szolcsán v Hungary* (fn. 36), para 69.

¹⁰⁰ Patrick Leisure, “Avoiding the Perpetuation of Discrimination in Education: Individual Positive Measures versus Broad Anti-Segregation Policy in *Szolcsán v. Hungary*” (*Strasbourg Observers*, 2023) <<https://strasbourgobservers.com/2023/05/17/avoiding-the-perpetuation-of-discrimination-in-education-individual-positive-measures-versus-broad-anti-segregation-policy-in-szolcsan-v-hungary/>> [Accessed 14 September 2023]. See also *Szolcsán v Hungary* (fn. 36), para 42.

leave anything to be desired in formulating the duty of desegregation. Taking all aspects together, this new approach—evidently has the potential to redress the structural segregation of Roma in education.

A duty of individual desegregation?

The duty of desegregation discussed in the previous section can be seen as a duty of collective desegregation: the state has a positive obligation to take measures to end segregation in a school or in the schools in a certain area. The duty is therefore geared at a collectivity. However, one may also imagine measures to be required to end the segregation of an individual pupil. This question was raised in the case of *Szolcsán*.

In *Szolcsán*, the applicant attended a school that was almost exclusively attended by Roma children. He requested to be transferred to another school, where he argued he would receive a more suitable education. This request for transfer was rejected by the other school's headmaster, who had the discretion to decide whether to admit children who lived outside the catchment area.¹⁰¹ As one of two arguments for criticising this lack of transfer, the applicant claimed that his "request for transfer had also been the most effective way for him to access inclusive education and thus avoid the negative effects of segregation as of year two of primary school".¹⁰² He added that collective desegregation measures would not result in his immediate access to inclusive education. He moreover included facts showing that court judgments ordering desegregation of Roma children were not being implemented.¹⁰³ In the judgment, the Court recognised that he received segregated education in the school he attended. However, when considering the refusal of the transfer, the ECtHR only engaged with the applicant's argument that transfer to another school had been refused for discriminatory reasons, namely because of his Roma ethnic origin.¹⁰⁴

Especially in light of the failure by a state to take steps to reform structurally the education system in order to resolve the systemic issue of segregation in education, it would be sensible to require that state to afford individual redress where possible.¹⁰⁵ This is especially true as individual reparations are part of the ECtHR's core task.¹⁰⁶ As the applicant argued, an individual measure such as a transfer was his only way of receiving inclusive education and thus avoiding the negative effects of segregation. In education, children's development is at issue. Basic education is by definition limited to a certain number of years at school which are extremely important for the child's later life. Especially when it concerns education, therefore, it is essential to afford a remedy that provides a speedy solution. An individual measure would make certain that the child is free from segregation during their period of basic education, whereas implementing time-consuming collective measures, may be too late for the

¹⁰¹ *Szolcsán v Hungary* (fn. 36), paras 5-16.

¹⁰² *ibid*, para 27.

¹⁰³ *ibid* paras 28 and 36.

¹⁰⁴ *ibid* paras 49-51.

¹⁰⁵ In the same vein, see third-party intervener Rosa Parks Foundation's argument: *ibid*, para 44.

¹⁰⁶ Janneke Gerards, *General Principles of the European Convention on Human Rights* (Cambridge: Cambridge University Press 2019) 9.

individual applicant. An individual measure is likely to be the only option that effectively benefits the pupil complaining about the segregation.

In light of these arguments, it is astonishing that the Court did not engage with the applicant's arguments concerning an individual desegregation measure. Considering the evolutions that have been described in the Court's case law concerning segregation, it would seem only natural to extend the state's positive obligation to require both collective desegregation measures, and if requested, individual remedies against segregation. Nonetheless, the conclusion that can be reached based on the current judgment concerning individual desegregation measures is, as Leisure argues, that while transfer could be an individual remedy for segregation, the Hungarian authorities did not have an obligation to accept a request for transfer.¹⁰⁷ Nor were they under any positive obligation to enable school transfer as an individual remedy for segregation.

At the same time, it is possible to wonder about the efficacy of a (positive) duty of individual desegregation for solving the systemic issue of segregation. Emphasis has been on collective measures to tackle segregation at a higher level,¹⁰⁸ which is what is most needed. It could be argued that providing individual relief may distract a state from addressing the real issue: especially when it concerns a positive duty on the state instead of a reactive one, where a state must enable, for instance, a transfer to another school only when it has been asked. As segregation is a complex issue to solve, one may argue that all attention should focus on providing structural solutions for this problem. However, such an argument should not tilt the scales in favour of not allowing individual redress for the systemic issue of segregation. Although there may be risks, individual remedies should be available in addition to collective remedies, especially as this concerns young children and their future. The negative consequences of segregation sketched above make it clear that for each of these pupils subject to segregation, an individual remedy could make a life-changing difference.

Conclusion

The European Court of Human Rights has recently clearly stepped up against segregation. This situation, which disadvantages children at the outset of their lives, can no longer remain unremedied. By clarifying that segregation, in the form of full separation or overrepresentation, needs to be objectively justified, even in the absence of inferior quality of education, the Court has taken a major step forward in its protection of the vulnerable Roma-minority. In addition, where a situation of segregation exists, the state has a positive obligation to take appropriate measures swiftly to ensure the end of segregation. This is a strong duty of collective desegregation which will hopefully finally create real progress in the fight against segregation. The only aspect still missing in the ECtHR's approach, is a duty of individual

¹⁰⁷ Leisure (fn. 95).

¹⁰⁸ E.g. Fuller and others (fn. 64); Council of Europe Commissioner for Human Rights (fn. 17).

desegregation. This would be a natural remedy under the ECHR, but a case in which the Court clarifies whether such a duty exists and what it would entail, remains to be heard.

In developing its case law on Roma segregation in education, the Court has introduced a strongly worded and potentially effective remedy against their structural discrimination. The fact that the Court does not shy away from the complex issue of structural discrimination, and instead extensively engages with it and requires real progress, may be a hopeful sign also for other victims of structural discrimination. These cases could be a first step towards a European Court of Human Rights that does not only consider individual, seemingly incidental instances of (in)direct discrimination, but which instead recognise the structural issues behind those ‘incidents’ and require states to address those structures to create a more equal society for all.