

The Right to Education for Roma Children under the European Convention on Human Rights

Ida Elisabeth Koch*

1. Introduction

Although she was a lawyer, and a very good one, Katarina Tomaševski took her point of departure in facts, and she was painfully aware that the law and the real facts often do not correspond. That may be because the law is not implemented properly or because the law simply does not cover everything that happens in real life. Katarina covered law and facts in a variety of ways and as a UN Special Rapporteur on the right to education she took her point of departure in the fact that millions of children throughout the world, particularly girls, are not given the opportunity to acquire adequate primary education. Moreover, when it comes to the law she did not recognise the traditional separation of rights in various generations,¹ nor did she operate in her work with the distinction between positive and negative rights or any other categorisation for that matter.² However, she did indeed subscribe to the idea of human rights as *indivisible, interrelated and interdependent* as it has been repeated time and again since the adoption of modern human rights.³ In her work as UN Special Rapporteur on the right to education she applied a holistic approach to human rights protection and emphasised the cross-cutting character of human rights. She followed case law closely from domestic, regional and international monitoring bodies until the day she died in 2006.

Much has happened since, and I am happy to say that later events would often have pleased her. She would have enjoyed reading and commenting on several of the decisions made in the period from 2007–2010 by the European Court of Human Rights (ECtHR), and the main purpose of this article is to update her on the most recent developments in the practice of the Court.

2. The Cross-cutting Character of Human Rights

When asking why a holistic approach to human rights in general is necessary, the right to education might be one of the best illustrations. Not only is the right to education a human right in itself. The right to education also has an important role to play as a linkage and as a key to the unlocking of other human rights – economic, social and cultural as well as civil and political ones. Katarina realised that education is an indispensable means of realising human rights in general,⁴ and she was

* Guest Professor, Lund University, Sweden.

¹ Civil and political rights are often referred to as *first generation rights*, economic, social and cultural rights as *second generation rights*, whereas the right to development and other solidarity rights are referred to as *third generation rights*, cf. e.g. A. Eide and A. Rosas in A. Eide *et al.* (eds.) *Economic, Social and Cultural Rights – A Textbook* (Martinus Nijhoff Publ., The Hague, 2001) p. 4 with reference to Karel Vasak.

² I do not recall that I have seen her refer to the tripartite obligation, to *respect*, to *protect* and to *fulfil*, cf. e.g. *The Right to Food as a Human Right*, UN doc. E/CN.4/Sub.2/1987/23, July 1987, and A. Eide, 'Realization of Social and Economic Rights and the Minimum Threshold Approach', 10:1–2 *Human Rights Law Journal* (1989) pp. 36–51.

³ The principle of indivisibility, interrelation and interdependence is formulated in the following way in resolution 543 (VI), Draft Covenant on Human Rights and Draft Measures of Implementation: "Whereas the General Assembly affirmed, in its resolution 421 (V) of 4 December 1950 that 'the enjoyment of civic and political freedoms and of economic, social and cultural rights are interconnected and interdependent', and that 'when deprived of economic, social and cultural rights, man does not represent the human person whom the Universal Declaration regards as the ideal of the free man.' [...]" See also e.g. Vienna Declaration and Programme of Action, 1993, Section 1, para. 5.

⁴ Cf. CESCR General Comment No. 13, The right to education (Art. 13), 1999, para. 1.

no doubt aware of the following quotation from the famous American judgment, *Brown v. Board of Education*, which is very much to the point:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.⁵

Free and compulsory education until a certain age functions as a protective measure against economic exploitation of children either by parents or by employers. Hence, a fixed minimum age for admission to employment corresponding to the age for the completion of compulsory education is likely to support other endeavours to protect children against child labour and trafficking. Not only does education protect children from entering the labour market at too early an age. An increasing number of jobs require skills and knowledge, and education increases the opportunities of obtaining a well-paid job, this again having a number of consequences *e.g.* for social security and old-age security.

The link between education and health has likewise been emphasised on several occasions. In recent years focus has been attached to the importance of information about how to protect oneself against HIV-infection, but the linkage between the right to education and the right to health is of a much more general character. Article 24(2)(e) of the Convention on the Rights of the Child (CRC) lists education as an appropriate measure to ensure the popularisation of existing knowledge on nutrition, advantages of breast-feeding, hygiene, environmental sanitation and prevention of accidents.

The impact of education is not only on economic, social and cultural rights but reaches into the sphere of civil and political rights. Most conspicuous is the impact of education on participation rights in general. Education has an impact on the full enjoyment of the right to vote and for political representation and is therefore of vital importance for the development and for the functioning of democracy. Illiterate persons are rarely – if ever – elected to political bodies, and the elected representatives often belong to the best-educated part of the population. Furthermore, a minimum level of education including literacy is necessary for the seeking and receiving of information and for the freedom of expression, assembly and association. These rights have little substance and meaning for the illiterate.

Finally, illiterate persons and persons without basic education make up a regrettably large percentage of the prison population thereby proving the intimate link between the right to education and the right to personal liberty.

The understanding of these interlinks between the right to education and a variety of other human rights was the basis for Katarina's work on educational matters.

3. The 4-A Scheme

Katarina could not satisfy herself with information that a certain amount of children receive primary education. She would require educational facilities to live up to certain demands with regard to quantity and quality and not settle with less. To Katarina it would not be satisfactory that a young girl in principle can attend school two hours every second day far away from her home in an

⁵ *Brown v. Board of Education*, 347 U.S. 483 (1954).

overcrowded classroom and be taught by a badly qualified teacher who can only provide pupils with old and outdated school material if any at all.

Thus, when functioning as the UN Special Rapporteur on the right to education, Katarina considered some of the elements which make up the core content of the right to education as stipulated in Articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Taking her point of departure in the Covenant she identified and structured the 4-A scheme denoting the four essential features that primary school should exhibit, namely *availability, accessibility, acceptability* and *adaptability*.⁶

The first obligation, *availability*, of the state is “to ensure that primary schools are available for all school children”.⁷ *Accessibility* is an obligation which relates to ensuring access to available public schools, “most importantly in accordance with the existing prohibition of discrimination”.⁸ *Acceptability* relates to the contents of educational curricula, textbooks and teaching methods which have to be not only relevant but also culturally appropriate, whereas *adaptability* requires that the best interest of the child is always given prominence.⁹ Education must be flexible in the sense that it can adapt to changing needs of the students within their differing social and cultural contexts. Finally, the overriding principle of non-discrimination has relevance to all four obligations and, furthermore, cuts across the categorisation of human rights in civil and political rights and socio-economic rights.¹⁰

Thus, the right to education as such seems to escape categorisation. The cross-cutting nature of the right to education explains the difficulties as to the classifying of the right to education as a first, second or third generation right.¹¹ Most often, the right to education is classified as a second generation right, although it is disputed whether it belongs in the sub-category of economic, social or cultural rights. The assignment of the right to education to the category of economic, social and cultural rights is due to the fact that *the full realisation* of the right to education requires active and resource-demanding state action.¹² However, as Katarina rightly emphasized, the prohibition against discrimination “is not subject to progressive realization but has to be secured immediately and fully”.¹³

Also, the right to education can easily be described as a classical freedom right obliging the state to refrain from interferences in choices as regards education because of religious and philosophical convictions. This respect of the liberty of parents fits most naturally into the category of first generation rights. The fact that the right to education has links also with third generation rights, however, is pointed out by, among others, Manfred Nowak¹⁴ – who refers to provisions in the ICESCR and the CRC obliging States to co-operate within the field of education.¹⁵ In this co-operation particular account must be taken of the needs of developing countries.

Accordingly, the right to education *is* in fact included in human rights conventions belonging to all categories, and the fact that the right to education is justiciable has been proven in numerous decisions from judicial bodies throughout the world.¹⁶ That counts for domestic judicial bodies and

⁶ UN doc. E/CN.4/1999/49, para. 50.

⁷ *Ibid.*, para. 51.

⁸ *Ibid.*, para. 57.

⁹ *Ibid.*, para. 70.

¹⁰ *Ibid.*, para. 57.

¹¹ Cf. K. Vasak, ‘A 30-year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights’, *Unesco Courier*, November 1977, pp. 29–30.

¹² UN doc. E/CN.4/1999/49, para. 57.

¹³ Statement by the Special Rapporteur on the right to education, Commission on Human Rights, 8 April 1999.

¹⁴ Cf. M. Nowak, ‘The Right to Education’, in Eide *et al.*, *supra* note 1, pp. 252 *et seq.*

¹⁵ Cf. ICESCR Article 15(4) and CRC Article 28(3).

¹⁶ The notion of *justiciability* implies that the right in question can perform an adequate legal basis for the solution of a

also regional and international bodies monitoring what is traditionally considered economic, social and cultural rights as well as civil and political rights.

4. The Right to Education under the European Convention on Human Rights

The right to education is specifically protected by Article 2 of Protocol No. 1 to the European Convention on Human Rights (ECHR) although the ECHR is traditionally considered a convention for the protection of civil and political rights. The provision runs as follows:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Article 2 of Protocol No. 1 contains a primary right to education and a secondary right to be educated in accordance with parental convictions. However, as the ECtHR has pointed out on a number of occasions, “Article 2 [...] constitutes a whole that is dominated by its first sentence. The right set out in the second sentence of Article 2 [...] is an adjunct of this fundamental right to education”,¹⁷ a statement which reflects a holistic perspective on human rights protection.

Case law on the phrase “no person shall be denied the right to education” is not overwhelming but enough cases have been decided to say something *positive* about the normative content of the provision. And positive it is, as well as negative although the preparatory works show that the negative formulation was eventually preferred instead of the original drafting “every person has the right to education”.¹⁸

In fact, the Court has held from the outset in the *Belgian Linguistic* case that the phrase includes positive obligations on States,¹⁹ and subsequent case law upholds and develops this perception. There is a *substance* of the right to education and the requirements with regard to *availability, accessibility, acceptability* and *adaptability* are in fact applicable to Article 2 of Protocol No. 1. There is indeed a strong case for reading *some* substance into the right to education, *cf. e.g. Cyprus v. Turkey* about the positive right of Greek-Cypriot children to receive secondary school education in Greek language in the northern (Turkish) part of Cyprus.²⁰ Moreover, one can argue that it makes limited sense to talk about *e.g.* a prohibition to discriminate if there is nothing or little to be distributed. There must necessarily be some substance.

Moreover, in *Timishev v. Russia*, about the denial of the right to education of migrant children whose father had no registered residence and no migrant’s card, the Court held as follows on the right to education:

This right is also to be found in similar terms in other international instruments such as the Universal Declaration of Human Rights (Article 26), the International Covenant on Economic, Social and Cultural Rights (Article 13), the International Convention on the Elimination of All Forms of Racial Discrimination (Article 5(e)(v)), and the Convention on the Rights of the Child (Article 28). There is no doubt that the right to education guarantees access to elementary education which is of primordial importance for a child’s development.²¹

concrete legal dispute.

¹⁷ *Cf. e.g. Campbell and Cosans v. the United Kingdom*, Judgment of 25 February 1982, para. 40.

¹⁸ *The British Yearbook of International Law*, pp. 362 *et seq.* and *Collected Version of the “Travaux Préparatoires” of the European Convention on Human Rights*, Vol VII, pp. 201 *et seq.* and 208 *et seq.*

¹⁹ *C.f. Case relating to certain aspects of the laws on the use of languages in education in Belgium, (The Belgium Linguistic Case)*, Judgment of 23 July 1968, B. Interpretation adopted by the Court, para. 3.

²⁰ *Cyprus v. Turkey*, Judgment of 10 May 2001.

²¹ *Timishev v. Russia*, Judgment of 13 December 2005, para. 64, emphasis added.

The statement is interesting as it seems as if the Court recognises that the legal content of Article 2 of Protocol No. 1 is similar to *e.g.* Article 13 of the ICESCR. Against that background it is not surprising that the Court concluded that the applicant's children's exclusion from school was incompatible with the requirements of Article 2 of Protocol No. 1.

The first sentence of Article 2 of Protocol No. 1 "no person shall be denied the right to education" in itself seems to include a prohibition against discrimination. However, Article 2 of Protocol No. 1 in conjunction with Article 14 constitutes a strong prohibition against discrimination or to use Katarina's terminology a requirement with regard to *accessibility*.

Case law is too sparse to conclude anything on the issue as to when the Court in discrimination cases bases its conclusions solely on the first sentence of Article 2 of Protocol No. 1 and when the Court finds it most appropriate to include also Article 14. The partial violence in the *Belgium Linguistic* case referred to above was based on both provisions; however, the other cases mentioned above were based solely on Article 2 of Protocol No. 1 thus uncovering to a greater extent the *substantial* content of the first sentence of that provision, *c.f.* in particular *Timishev v. Russia* with its reference to *e.g.* Article 13 of the ICESCR.

5. Roma Children and the Rights to Education under the ECHR

The ECtHR has dealt with the issue of Roma children and their right to education at least in three cases since 2006.

In *D. H. and Others v. the Czech Republic*²² the applicants – all of Roma origin – claimed that they had been discriminated against in the enjoyment of their right to education on account of their race, colour, association with a national minority and their ethnic origin in that they were placed in special schools following a more basic curriculum than ordinary schools. According to reports referred to by the applicants, Roma pupils made up to between 80 and 90 per cent of the total number of pupils in some special schools.

The arguments of the Court and the parties were based on Article 2 of Protocol No. 1 in conjunction with Article 14. The applicants held as follows:

The difference in treatment consisted of being placed in special schools without justification, where they received a substantially inferior education to that provided in ordinary schools, with the result that they were denied *access* to secondary education other than in vocation training centres. They were victims of racial segregation and had thus suffered psychological damage as a result of being branded 'stupid' or 'retarded'.²³

Statistics showed that a disproportionately large amount of Roma children were placed in special schools and concern was raised by Council of Europe (CoE) monitoring bodies such as European Commission against Racism and Intolerance (ECRI). Thus, it was argued that the requirement with regard to *accessibility* was not fulfilled. This gave rise to the following Statement of the Court sitting as a Chamber:

The Court notes that the applicants' complaint under Article 14 of the Convention, taken together with Article 2 of Protocol No. 1, is based on a number of serious arguments. It also notes that several organisations, including Council of Europe bodies, have expressed concern about the arrangements whereby Roma children living in the Czech Republic are placed in special schools and about the difficulties they have in gaining *access* to ordinary schools. The Court points out, however, that its role is different from that of the aforementioned

²² *D. H. and Others v. the Czech Republic* (Chamber Judgment) of 7 February 2006, and Grand Chamber Judgment of 23 November 2007.

²³ *D. H. and Others v. the Czech Republic*, Judgment of 7 February 2006.

bodies and that, like the Czech Constitutional Court, it is *not its task to assess the overall social context*. Its sole task in the instant case is to examine the *individual* applications before it and to establish on the basis of the relevant facts whether the reason for the applicants' placement in the special schools was their ethnic or racial origin.²⁴

The Court acknowledged that statistics disclosed figures that are worrying and that the general situation in the Czech Republic concerning the education of Roma children was by no means perfect. However, statistics was not the Court's main focus and the role of the parents was drawn to attention in the following way.

It should also be borne in mind that, in their capacity as the applicants' lawful representatives, the applicants' parents failed to take any action, despite receiving a clear written decision informing them of their children's placement in a special school; indeed, in some instances it was the parents who asked for their children to be placed or to remain in a special school.

[...]

As to the applicants' argument that the parental consent was not "informed" [...] the Court notes that it was the parents' responsibility, as part of their natural duty to ensure that their children receive an education, to find out about the educational opportunities offered by the State, to make sure they knew the date they gave their consent to their children's placement in a particular school and, if necessary, to make an appropriate challenge to the decision ordering the placement if it was issued without their consent.²⁵

The Court went on as follows:

Although the applicants may have lacked information about the national education system or found themselves in a climate of mistrust, the concrete evidence before the Court in the present case does not enable it to conclude that the applicants' placement or, in some instances, continued placement, in special schools was the result of racial prejudice, as they have alleged.²⁶

Accordingly, the Court did not find that a violation of Article 14 of the Convention, taken together with Article 2 of Protocol No. 1, had been established.

The Grand Chamber, however, took a different approach. With regard to the general question of statistics as proof, the Court referred to recent case law in which the Court relied extensively on statistics produced by the parties to establish a difference in treatment between two groups (men and women) in similar situations.²⁷

Thus, in the *Hoogendijk* decision the Court stated: "[W]here an applicant is able to show, on the basis of undisputed official statistics, the existence of a prima facie indication that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex. If the onus of demonstrating that a difference in impact for men and women is not in practice discriminatory does not shift to the respondent Government, it will be in practice extremely difficult for applicants to prove indirect discrimination."²⁸

With regard to statistical evidence the Court also referred to case law from the European Court of Justice, domestic courts and monitoring bodies of the United Nations.²⁹ In these circumstances, the Court considered that "when it comes to assessing the impact of a measure or practice on an

²⁴ *Ibid.*, para. 45, emphasis added.

²⁵ *Ibid.*, paras. 50 and 51.

²⁶ *Ibid.*, para. 52.

²⁷ *D. H. and Others v. the Czech Republic*, Grand Chamber Judgment of 13 November 2007, para. 180.

²⁸ *Ibid.*

²⁹ *Ibid.*, para. 187.

individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the prima facie evidence the applicant is required to produce”.³⁰

The Grand Chamber found that the evidence submitted by the applicants showed that the number of Roma children in special schools was disproportionately high and that Roma pupils formed a majority of the pupils in special schools. Therefore, the Court went on to assess whether the difference in treatment was reasonably and objectively justified.

The government argued that the placement of Roma children in special schools was motivated by a desire to find a solution for children with special educational needs and that tests were carried out prior to placement. However, based on the doubts presented by various independent bodies such as ECRI the Court found that there was danger that the tests were biased and that the results were not analysed in the light of the particularities and special characteristics of the Roma children who sat them. ECRI had noted that the channelling of Roma children to special schools for mentally-retarded children was reportedly often “quasi-automatic” and needed to be examined to ensure that any testing used was “fair” and that the true abilities of each child were “properly evaluated” while the Council of Europe Commissioner for Human Rights had reported that Roma children were frequently placed in classes for children with special needs “without an adequate psychological or pedagogical assessment, the real criteria clearly being their ethnic origin”. In those circumstances the tests in question could not serve as a justification for the impugned difference in treatment.³¹

With regard to the issue of parental consent the Court put aside the arguments of the government and added that such consent would amount to a waiver of the right not to be discriminated against and that such waiver would run counter to the public interest.³² On this basis the Court concluded that the schooling arrangements for Roma children

were not attended by safeguards [...] that would ensure that, in the exercise of its margin of appreciation in the education sphere, the State took into account their special needs as members of a disadvantaged class [...]. Furthermore, as a result of the arrangements the applicants were placed in schools for children with mental disabilities where a more basic curriculum was followed than in ordinary schools and where they were isolated from pupils from the wider population. As a result, they received an education which compounded their difficulties and compromised their subsequent personal development instead of tackling their real problems or helping them to integrate into the ordinary schools and develop the skills that would facilitate life among the majority population. Indeed, the Government have implicitly admitted that job opportunities are more limited for pupils from special schools.³³

The citation illustrates the Grand Chamber’s acceptance of the connection between the right to education and other human rights. The Grand Chamber continued as follows:

In these circumstances and while recognizing the efforts made by the Czech authorities to ensure that Roma children receive schooling, the Court is not satisfied that the difference in treatment between Roma children and non-Roma children was objectively and reasonably justified and that there existed a reasonable relationship of proportionality between the means used and the aim pursued.³⁴

The Court concluded that it had been established that the relevant legislation as applied in practice at the material time had a disproportionately prejudicial effect on the Roma community. Therefore, the Court considered that the applicants as members of that community necessarily suffered the same discriminatory treatment. Accordingly, it was not necessary to examine their individual cases. Consequently, there had been a violation of Article 14 of the Convention, read in conjunction with

³⁰ *Ibid.*, para. 188.

³¹ *Ibid.*, para. 200–201.

³² *Ibid.*, para. 204.

³³ *Ibid.* para. 207.

³⁴ *Ibid.* para. 208.

Article 2 of Protocol No. 1, as regards each of the applicants.

The decision is remarkable as the Court's general approach resembles that of other CoE monitoring bodies such as the European Committee on Social Rights monitoring the Revised European Social Charter (RESC). That Committee has in several cases also on the basis of statistics declared a certain state of facts in non-compliance with the Charter's provisions on education and child labour.³⁵ Thus, from having an entirely individual approach the Court has taken upon itself also a more general monitoring function resembling that of monitoring bodies basing their conclusions primarily on reporting from states.

*Sampanis and Others v. Greece*³⁶ concerned the authorities' failure to provide schooling for a number of Roma children and the case illustrates all the A's in Katarina's 4-A scheme, *availability, accessibility, acceptability and adaptability*. In *Sampanis* it was not disputed that the children in question had missed the entire school year 2004–2005 and that in 2005 the children in question had received education in special classes for Roma children in an annex to the ordinary school building.

There was some uncertainty with regard to what exactly happened in 2004 when the children missed education, but the Court took for a fact that the Roma children's parents had explicitly expressed to the competent school authority their wish to enrol their children. Moreover, incidents of a racist nature took place in front of the school provoked by the parents of non-Roma children. Considering the Roma community's vulnerability, which made it necessary to pay particular attention to their needs, the Court found that the school authorities should have recognised the particularity of the case and facilitated the enrolment of the children.

With regard to the special preparatory classes the objective was for the pupils concerned to attain the right level so that they could be transferred to ordinary classes in due course. However, the children were not transferred and there seemed to be no suitable system for assessing the capacities of children with learning needs. The Court noted that the setting up of such a system would have given the applicants the feeling that their children had not been placed in preparatory classes for reasons of segregation.

The Court concluded that, in spite of the authorities' willingness to educate Roma children, the conditions of school enrolment and the children's placement in separate classes in a separate annex to the main school building resulted in discrimination. There had accordingly been a violation of Article 14 taken in conjunction with Article 2 of Protocol No. 1.

In the case *Orsus and Others v. Croatia* the applicants – all of Roma origin – were segregated in Roma-only classes, and they claimed that the Roma-only curriculum had 30 per cent less content than the official national curriculum. The Croatian government, however, argued that the children were placed in separate classes due to their inadequate knowledge of Croatian language and in a Chamber judgment the Court held, unanimously, that there had been no violation of Article 2 of Protocol No. 1 alone or taken in conjunction with Article 14.³⁷ The case was referred to the Grand Chamber and sitting as a Grand Chamber the Court – on a nine to eight vote – took a different position.³⁸

The Court saw the case as primarily raising an issue of discrimination. With regard to the issue of whether there was a difference in treatment, the Court emphasised that the case was to be distinguished from the other two cases concerning Roma pupils mentioned above in particular regarding the relevance of the statistics which could have a bearing on whether there was *prima*

³⁵ Cf. e.g. Complaint No. 10/1998 by the *International Commission of Jurists against Portugal*, decision of 9 September 1999, and Complaint No. 13/2000 by *Autism Europe against France*, decision of 4 November 2003.

³⁶ *Sampanis and Others v. Greece*, Judgement of 6 June 2006, available in French only.

³⁷ *Orsus and Others v. Croatia*, Judgment of 17 July 2008.

³⁸ *Orsus and Others v. Croatia*, Judgment of 16 March 2010.

facie evidence of discrimination and consequently on the burden of proof.³⁹ Thus, it was not a general policy to automatically place Roma children in separate classes. However, the Court noted that the measure of placing children in separate classes on the basis of their insufficient command of the Croatian language was applied only in respect of Roma children in the schools in question. Therefore, the Court found that the measure clearly represented a difference in treatment⁴⁰ and called for an answer from the state to show that the practice in question was objectively justified by a legitimate aim and that the means of achieving that aim were appropriate, necessary and proportionate.

The Court went on by noting that temporary placement of children in a separate class due to the lack of adequate knowledge of the language of instruction is not automatically contrary to Article 14 but emphasised that appropriate safeguards would have to be put in place.⁴¹ In that connection the Court noted that the practice had not been applied in respect of any other pupils lacking an adequate command of the Croatian language. Therefore the measures could not be seen as part of a common and general practice designed to address the problems of children without adequate knowledge of the language of instruction⁴² and furthermore no specific testing of the applicants' command of the Croatian language had taken place. Moreover, the Court paid attention to the fact that the curriculum taught in Roma classes was reduced by 30 per cent and did not consider that an appropriate way to address the applicants' alleged lack of proficiency in Croatian.⁴³

The Court emphasised that the placement of the applicants in Roma-only classes could be seen as pursuing a legitimate aim "only if it served the purpose of bringing their command of the Croatian language up to an adequate level and then securing their immediate transfer to a mixed class".⁴⁴ However, no programme was established for addressing the special needs of Roma children, and the Court found that "[t]he lack of a prescribed and transparent monitoring procedure left a lot of room for arbitrariness".⁴⁵ The Court, furthermore, found that some additional steps were needed in order to address problems with regard to poor school attendance and drop-out.⁴⁶

With regard to the issue of parental consent, the Court referred to its position in the case *D. H. and Others v. the Czech Republic*⁴⁷ referred to above and went on to state as follows:

The facts of the instant case indicate that the schooling arrangements for Roma children were not sufficiently attended by safeguards that would ensure that, in the exercise of its margin of appreciation in the education sphere, the State had sufficient regard to their special needs as members of a disadvantaged group [...]. Furthermore, as a result of the arrangements the applicants were placed in separate classes where an adapted curriculum was followed, though its exact content remains unclear. Owing to the lack of transparency and clear criteria as regards transfer to mixed classes, the applicants stayed in Roma-only classes for substantial periods of time, sometimes even during their entire primary schooling.⁴⁸

On this basis the Court concluded that the placement of the applicants in Roma-only classes had no objective and reasonable justification. Accordingly, there had been a violation of Article 14 in conjunction with Article 2 of Protocol No. 1.

It needs to be mentioned that the Court reached its decision with a nine to eight vote and that the

³⁹ *Ibid.*, para 152.

⁴⁰ *Ibid.*, para. 153.

⁴¹ *Ibid.*, para. 157.

⁴² *Ibid.*, para. 158.

⁴³ *Ibid.*, para. 165.

⁴⁴ *Ibid.*, para. 172.

⁴⁵ *Ibid.*, para. 175.

⁴⁶ *Ibid.*, para. 177.

⁴⁷ *Ibid.*, paras. 178–179.

⁴⁸ *Ibid.*, para. 182.

dissenting judges pointed to the wide margin of appreciation that states should enjoy in matters belonging to the sphere of social policy. In rather strong language the dissenting judges criticised the decision of the majority and stressed the importance for the Court not to overstep its role. The precedent value of the decision is therefore uncertain. However, it is worth noticing that the Grand Chamber's majority chose to emphasise the fact that the case also concerned the issue of cultural diversity; *cf.* the following passage:

While the case at issue concerns the individual situation of the fourteen applicants, the Court nevertheless cannot ignore that the applicants are members of the Roma minority. Therefore, in its further analysis the Court shall take into account the specific position of the Roma population. As the Court has noted in previous cases that as a result of their history, the Roma have become a specific type of disadvantaged and vulnerable minority [...]. They therefore require special protection. As is attested by the activities of numerous European and international organisations and the recommendations of the Council of Europe bodies, this protection also extends to the sphere of education.

[...]

Lastly, as noted in previous cases, the vulnerable position of Roma/Gypsies means that special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases (see *Chapman v. the United Kingdom* [GC], no. 27238/95, § 96, ECHR 2001-I, and *Connors v. the United Kingdom*, no. 66746/01, § 84, 27 May 2004). In *Chapman*, the Court also observed that there could be said to be an emerging international consensus amongst the Member States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community [...].⁴⁹

In the cases referred to (*Connors* and *Chapman*), however, the Court “was not persuaded” that there was a right of Roma people to acquire planning permission to live in their own caravans on their own land. Therefore, the Grand Chamber's decision in *Orsus and Others v. Croatia* may constitute an improvement in the Court's acceptance of cultural diversity and the interests of minorities.

At least the decision stands until further, and in conclusion one can say that that the three cases *D. H. and Others v. the Czech Republic*, *Sampanis and Others v. Greece* and *Orsus and Others v. Croatia* all include Katarina's 4-A scheme in that the judgments require that primary schools are *available* to all and also *accessible* to Roma children. Education for Roma children should also be *acceptable* in the sense that the schooling is qualified and finally the education must be *adaptable* in the sense that it becomes able to take care of children with special needs coming from different cultural and social backgrounds.

6. Concluding Observations

The right to education under the ECHR was born essentially as a parental right with strong negative components, but it has undergone a transformation into something more positive than was originally intended. The interest of the child has gradually come more into focus. The contemporary interpretation of the Court would take into consideration the fact that the conception of the rights of children *vis-à-vis* the rights of parents has changed dramatically since the adoption of the Convention, and that the *natural right of the father*⁵⁰ – which was invoked during the drafting of Protocol No. 1 – is no longer in focus. The adoption and ratification of the CRC by all CoE Member States⁵¹ has undoubtedly had an impact on human rights interpretation in general, and also on the interpretation of the Court.⁵² Moreover, the Court has in fact repeatedly held that Article 2 of

⁴⁹ *Ibid.*, paras. 147–148.

⁵⁰ Preparatory work on Article 2 of the Protocol to the Convention, CoE, CDH (67) 2, p. 188, Mr. Boggiano Pico, Italy.

⁵¹ The CRC has been ratified by all UN Member States with the US and Somalia as the only exceptions.

⁵² *Cf. e.g.* the case *Costello-Roberts v. the United Kingdom*. In this case the Court applied the CRC as a legal source in

Protocol No. 1 is dominated by its first sentence, and it would presumably be possible to give more substance to this conception if or when the occasion arises.

Moreover, even though the RESC has entered into force, many CoE Member States have not yet ratified this convention, and children in these countries would not enjoy a regional protection of their rights as regards education, if some minimum core rights could not be read into the ECHR. Remembering *Timishev v. Russia* with its reference to the ICESCR and CRC it would in many ways be absurd if the relatively more affluent CoE Member States were not to protect their citizens at a level equal to that of the global treaties covering a variety of countries – some of which are indeed poorer than even the least developed CoE countries.

The reluctance as regards the undertaking of positive obligations as it was presented during the drafting of Protocol No. 1 should of course be taken into consideration. However, it should be recalled that positive obligations are in fact incumbent on the very same Member States on the basis of the ICESCR and the CRC.

At least one can say that the original drafters of Protocol No. 1 in another and contemporary context have distanced themselves from the original negative, parents-oriented perception of the right to education. Against this background one might argue that it would be inconsistent with the dynamic (hermeneutic) style of interpretation if the Court were to cling to preparatory works from the middle of the last century.⁵³

Moreover, there is nothing in the wording of the ECHR that prevents an interpretation pointing to a more positive content of its provisions, and remembering the hermeneutic doctrine *understanding is always application*,⁵⁴ one can claim that the ECHR has only been challenged to a limited degree. In the future the Court will be challenged by other needs and other demands from Roma people and people in general, and all one can say for now is that law seems to be unfinished; it will develop step by step in the encounter with new facts, and the three cases referred to made up such steps.

its interpretation of the ECHR and underlined the importance of a contextual interpretation, *cf.* paras. 27 and 35.

⁵³ *Cf.* I. E. Koch, *Human Rights as Indivisible Rights – The Protection of Socio-Economic Demands under the European Convention on Human Rights* (Martinus Nijhoff Publishers, 2009).

⁵⁴ H. G. Gadamer, *Truth and Methods*, 2nd revised edition (1989) p. 309.