MASTER'S THESIS IN INTERNATIONAL HUMAN RIGHTS LAW

Gabriella Szilagyi-Krenner

EVIDENTIARY STANDARDS OF THE EUROPEAN COURT OF HUMAN RIGHTS – PROVING INDIRECT DISCRIMINATION BASED ON ASSOCIATION WITH A NATIONAL MINORITY

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Author: Gabriella Szilágyi-Krenner
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Abstract:

This study examines the evidentiary standards of the European Court of Human Rights in cases concerning indirect discrimination based on association with a national minority. Evidentiary matters play a significant role in human rights law adjudication, however, neither the European Convention on Human Rights, nor the Rules of the Court contains rules regarding the standard of proof and the evaluation of evidence. Therefore, the Court created its own operational method and enjoys a wide-range freedom in assessing a case and determining if a violation of a Convention right occurred.

As the European Court of Human Rights articulated, it considers any applicable international law while interpreting the Convention, and it regularly refers to various regional instruments. This thesis analyses the European framework for non-discrimination in order to establish the elements of indirect discrimination. With the aid of the elements of indirect discrimination, the thesis discusses the allocation of the burden of proof and the standard of proof as applied by the Court.

The standard of proof of the Court is "beyond reasonable doubt", as it has been articulated in several judgments by the Court. However, the Court also stated that it applies this standard in adaptively, and the standard is not used with the same rigorousness as it is used in criminal proceedings.

The thesis argues that the absence of clearly articulated scope of the standard of proof in proceedings before the Court enables arbitrary judgments. The thesis uses the cases *D.H. and others v. the Czech Republic* and *Oršuš and others v. Croatia* to demonstrate the inconsistencies of the Court's interpretation of its own standard of proof.

This study concludes that the Court needs to pronounce a lower standard as a principle in cases of indirect discrimination, to avoid interpretational discrepancies and conflicting judgments based on similar facts, as it happened in the cases mentioned. A clearly defined standard of proof would undoubtedly enhance protection of the rights of members of vulnerable minorities. Simultaneously, it would ensure consistent decisions, thus encouraging the States to comply with their obligations under the Convention and correct the substantive or procedural deficiencies.

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1. Introduction

1.1. Background of the Research and Research Question

Discriminatory practices are becoming increasingly covert. While individual adjudication is an effective tool in combatting these practices and protecting the rights of the persons, proving indirect discrimination can be extremely difficult. Hence, evidentiary matters have a significant role in human rights law adjudication. Well defined evidentiary standards and procedures provide more effective protection to the victims of discrimination and increase legal certainty.[1]

According to the legal maxim *onus probandi actori incumbit*, the burden of proof lies on the applicant. However, applicants alleging discrimination are often in a disadvantaged position, and proving that a legal regulation, a state policy or practice is discriminatory towards a certain group can prove particularly difficult. To ease this burden, the European Court of Human Rights, in its judgment in the case *Horváth and Kiss v. Hungary*, articulated that *"[w]here an applicant alleging indirect discrimination establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden of proof shifts to the respondent State."*[2]

Once the complainant has established facts from which a difference in treatment can be presumed, the onus is on the respondent State to prove that the difference in treatment was not discriminatory, because it had an objective and reasonable justification. As the Court noted, *"no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures"*[3]. Based on this statement, the shift of the burden of proof seems to be the decisive factor of the outcome of an indirect ethnic discrimination case.

The Rules of the European Court of Human Rights sets out the procedure to be followed for applications under Article 34 of the ECHR. The applicant alleging violation of his rights must, in his application, submit statements of the facts, alleged violations and relevant arguments.[4]

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[1] *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems*. By Juliane Kokott. The Hague, London, Boston: Kluwer Law International, 1998, p.137.
[2] *Horváth and Kiss v. Hungary*, application no. 11146/11, Judgment (Merits and Just Satisfaction), Court (Second Section), 29 January 2013, para. 108.
[3] *Timishev v. Russia*, para. 58.
[4] Rules of the Court, Rule 47 1 (e)-(f)

The Court, during the proceedings, can request additional factual information, documents or other information which it considers to be relevant.[5] However, in the absence of any procedural barriers of the admissibility of evidence and assessment formulae, the Court has a wide range of freedom in evaluating the evidence submitted by the applicant(s) and the respondent.[6] This can result in ambiguity regarding the evidence and the degree of proof required to establish a rebuttable presumption and, consequently, shift the burden of proof to the respondent state.

For instance, in cases of alleged segregation in primary education, statistics are often the only available proof of the discriminatory effect of certain measures or practices. However, while the Court accepted statistics submitted as evidence in several such cases, it has not consistently found statistical evidence sufficient to establish a rebuttable presumption[7]. In the landmark case *D.H. and others*, where applicants of Roma background alleged that they have been placed to "special schools" based on their ethnicity, the Chamber did not find a violation of Article 14. The case was referred to the Grand Chamber, which -based on the same factual evidence- found that the practice of the Czech Republic had a significantly prejudiced effect on Roma pupils and that the *de facto* situation amounted to indirect discrimination[8]. The application in *Oršuš and others v. Croatia* had a similar outcome. After assessing the evidence before it, the Chamber did not find itself convinced that the applicants were victims of indirect discrimination based on their association with a national minority. The Chamber – unanimously – did not find a violation of Article 14, however, the case was referred to the Grand Chamber for further consideration, that concluded that the practice in question was discriminatory. The decision was concluded with nine votes to eight.

In *D.H. and others* the Chamber and the Grand Chamber approached the evaluation of evidence differently. The Chamber was focused on the facts of the individual applications, stressing that "*while acknowledging that these statistics disclose figures that are worrying […], 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"*.[9] The Grand Chamber, however, went beyond the facts of the

[5] Ibid. Rule 49 3(a)
[6] *D.H. and others v. The Czech Republic*, application no. 57325/00, Judgment (Merits and Just Satisfaction), Court (Grand Chamber), 13 November 2007, para. 178.
[7] *Oršuš and others v. Croatia*, application no. 15766/03, Judgment (Merits and Just Satisfaction), Court (Grand Chamber), 16 March 2010, Para. 152.
[8] *D.H. and others v. The Czech Republic*, application no. 57325/00, Judgment (Merits and Just Satisfaction), Court (Grand Chamber), 13 November 2007
[9] *D.H. and others*, Second Section judgment, para. 52.

individual case, and concluded that because it has been established that the practice of the placement in "special schools" had a disproportionate effect on the Roma community in the Czech Republic, the applicants as members of this community '*necessarily suffered the same discriminatory treatment*'[10]. Therefore, the Grand Chamber did not find it necessary to examine the applicants' individual cases.

The Court expressed in several cases that its standard of proof is "beyond reasonable doubt". However, it also stated that the standard differs from the classic criminal law standard and that the specificity of the case, the Convention right invoked, and the nature of allegations must be considered when allocating the burden of proof and deciding on the standard of proof.[11]

The ambiguity surrounding the evidentiary standards in indirect discrimination cases requires clarification of the legal framework and its interpretation by the Court. Therefore, the purpose of this thesis is to identify, describe and analyse the evidentiary standards of the European Court of Human Rights. The questions to be answered are: *How is the burden of proof allocated and what is the level of persuasion required in cases concerning indirect discrimination based on the association with a national minority under the European framework?*

1.2. Methods and Sources of the Research

To answer the research questions, the thesis follows a doctrinal legal analysis. The aim of the research is to analyse the evidentiary practices of the European Court of Human Rights. The thesis studies the European legal framework on the prohibition of discrimination. The analysis in the second chapter is focused on establishing the definition and the elements of indirect discrimination. The purpose of the chapter is to determine the factual elements that require proving in a case of indirect ethnic discrimination. Moreover, it provides an examination of the rules regarding collection and admissibility of evidence in the proceedings before the European Court of Human Rights. The main documents studied are the European Convention on Human Rights, the Rules of the Court and its Annex, the European Social Charter, the Framework Convention for the Protection of National Minorities, the European Union's Charter of Fundamental Rights and European Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. The third chapter discusses the allocation of the burden of proof. It examines the principles underlying the allocation in general, and the arguments considering the shared burden of proof in cases

[10] *D.H. and others v. Czech Republic*, Grand Chamber judgment, para. 209.
[11] *Husayn (Abu Zubaydah) v. Poland*, para. 394.

concerning indirect discrimination. The fourth chapter studies the standard of proof applied by the Court. The aim of the chapter is to provide an assessment of the evidentiary practice of the Court to reveal inconsistencies in the interpretation of its own standard of proof. The chapter examines the evidentiary value of the submissions of the parties, reports of supervisory bodies and statistical data in proceedings before the Court based on individual applications under Article 34. In order to obtain a more in-depth analysis, a thorough examination of the evidentiary practices of the Court is provided, with the aid of selected key cases. Finally, the fifth chapter presents a summary and the conclusion of the findings and offers recommendations for the development of rules and practices.

The thesis focuses on the evidentiary matters of human rights litigation, more precisely, the evidentiary practice of the European Court of Human Rights in cases of indirect discrimination based on association with a national minority; therefore, the discussion is limited to the technical issues of proving violation of Article 14 or Article 2 of Protocol 12. While the analysis touches upon the issues of the margin of appreciation, and the objective and reasonable justification for differential treatment, these concepts are examined from an evidentiary viewpoint to establish their effect on the burden of proof and the standard of proof. Consequently, the scope of these concepts is not discussed.

Furthermore, while the cases examined have all alleged violation of Article 14 in conjunction with a substantive Article, the scope of the substantive rights and the evidentiary matters with regards to proving the violation of them are not examined.[12]

The European Court of Human Rights stated that while interpreting the Convention, any applicable rules of international law, especially if related to the protection of human rights must be considered.[13] However, due to the limits of this thesis, the discussion is focussed on the European framework.

[12] All of the cases examined in this thesis alleged violation of the right to education under Article 2 of Protocol 1. While the examination of the scope of the Article could provide valuable insight as to the evidentiary standards of the Court, issues regarding the Article are mentioned only when it is necessary to explain the process and difficulties of proving indirect discrimination, or more precisely, segregation based on a neutral rule. For example, the States' margin of appreciation when establishing their educational system, adapting it to their societal needs and deciding on the curriculum to be followed has an implication of the allocation of the burden of proof. The issue is discussed further in Chapter 4.

[13] Handbook on European Non-Discrimination Law, p. 25.

2. Legal Framework Governing Evidentiary Standards of the European Court of Human Rights

2.1. The Concept of Discrimination

2.1.1. Legal Framework of the Council of Europe

The European legal framework for non-discrimination contains extensive legislation under the Council of Europe and the European Union. For the purposes of this thesis, the most significant document is the European Convention on Human Rights. However, the European Court of Human Rights articulated that while interpreting the Convention, any applicable rules of international law must be considered, especially the ones referring to the protection of human rights.[14] Therefore, this chapter provides an introduction of the European non-discrimination legislation. The aim is to define the scope of the prohibition, the elements of discrimination and the connection of the regulations to the Court's practice.

The European Convention on Human Rights

The European Convention on Human Rights (ECHR or Convention) prohibits discrimination on the ground of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. The Convention contains two articles regarding the prohibition of discrimination, Article 14 and Article 1 of Protocol 12.

The scope of Article 14 is limited to the '*enjoyment of the rights and freedoms set forth in this Convention*'.[15] It is a subsidiary right; therefore, the Court only examines a case under Article 14 in conjunction with a substantive right. However, the subsidiarity of the Article does not mean complete reliance of a violation of a substantive right. According to the Explanatory Report, Article 14 has a relative autonomy, with certain procedural consequences.[16] The Court may examine the alleged violation of a substantive Article first, and then separately the alleged violation of Article 14 in conjunction with the substantive Article.[17] Another approach of the Court is to examine the substantive Article in conjunction of Article 14, and not to examine the substantive Article separately after finding a violation of Article 14.[18]

[14] Handbook on European Non-Discrimination Law, p. 25.
[15] ECHR, Art. 14.
[16] *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention*, Council of Europe/European Court of Human Rights, 202, p. 7.
[17] Ibid, p. 7.
[18] Ibid, p. 7.

Moreover, the Court has adopted a broad interpretation of the nature of subsidiarity. First, it does not require a violation of a substantive right in order to examine a claim under Article 14. Second, it is possible to examine a claim even if the issue in the complaint does not 'relate to a specific entitlement granted by the ECHR. In such cases, it was sufficient that the facts of the case broadly relate to issues that are protected under the ECHR.'[19]

Furthermore, the Court, in order to extend the scope of the protection of the right not to be discriminated against, is willing to treat some discriminatory acts as 'in and of themselves, amounting to inhuman or degrading treatment under Article 3, or as violations of the right to respect for private and family life under Article 8.'[20] While the Court adopted a broad interpretation of the nature of Article 14, an application will still be rejected as manifestly ill-founded if it fails to specify the substantive right.[21] Therefore, the extension of the protection with the general prohibition of discrimination was a much-needed safeguard for the individual's right to equal treatment.

Article 1 of Protocol 12 provides the general prohibition of discrimination[22], regarding the 'enjoyment of any right set forth by law'.[23] It extends the scope of the right not to be discriminated against

> i. in the enjoyment of any right specifically granted to an individual under national law;
>
> ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
>
> iii. by a public authority in the exercise of discretionary power (for example, granting certain subsidies);
>
> iv. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).[24]

Protocol 12 entered into force in 2005, there is relatively few cases decided under the general prohibition of discrimination. The Court reinstated that while Protocol 12 extends the scope of

[19] Handbook on European Non-Discrimination Law, p. 30.
[20] Rory O'Connell, 'Cinderella comes to the Ball: Article 14 and the right to non-discrimination in the ECHR' (2009) 29 (2) Legal Studies: The Journal of the Society of Legal Scholars 211-229, p. 6.
[21] Ibid. p.8.
[22] The Article reads as follows: 1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.
[23] ECHR, Protocol 12, Article 1
[24] Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4 November.2000, para. 22.

Article 14, the meaning of the term discrimination was meant to be identical to Article 14, therefore it did not find it necessary to depart from the well-established concept of discrimination.[25]

Both Article 14 and Protocol 12 provide an open structure of the grounds of discrimination. The focus of the thesis is discrimination based on association with a national minority, therefore the grounds of discrimination will not be further discussed. What requires further examination is the concept of discrimination, the burden of proof and what constitutes objective and reasonable justification, as neither of the articles elaborate on these issues.

The open structure of the Articles required the Court to establish the analytical framework of the prohibition of discrimination.[26] The first instrumental decision was the 1968 *Belgian linguistics case*, where the Court laid out the concept of discrimination.[27] The first element is that a difference in treatment must exist, and there must be a comparator in analogous or relevantly similar situation. Once the difference in treatment has been established, the Court applies the objective justification test.[28] The aim of the test is to decide if the difference in treatment serves an objective and reasonable purpose: there is a legitimate aim and the means employed are proportionate to this aim:

> It is not, however, impossible that the application of the legal provisions in issue might lead, in individual cases, to results which put in question the existence of a reasonable

[25] For further information on the interpretation see: *Zornić v. Bosnia and Herzegovina*, para. 27 and *Baralija v. Bosnia and Herzegovina*, para. 46. The interpretation of Article 1 of Protocol 12 in the context of the burden of proof and the standard of proof is discussed in Chapter 2 and Chapter 3 of this thesis.

[26] *Non-discrimination Under Article 14 ECHR: the Burden of Proof*, Oddný Mjöll Arnardóttir, p. 14.

[27] The issue was discussed in para. 4 of the Belgian linguistics decision: "The Commission, referring to "contemporary theory" and to its own decisions is of the opinion that the Convention does not prohibit the establishment of *legitimate "differentiation*" in the enjoyment of the rights and freedoms guaranteed: an "extensive interpretation" based on the French text of Article 14 (art. 14) ("sans distinction aucune"), "would lead to absurd results". Article 14 (art. 14) condemns only "discrimination", and the Commission makes a point of stating precisely how it understands this word. In its opinion a State does not discriminate if it limits itself to conferring an "advantage", a "privilege" or a "favour" on a particular group or individual which it denies to others. *The question of a possible discrimination arises only if the difference in treatment in issue amounts to a "hardship" inflicted on certain people* (emphasis added).

[28] *Belgian linguistics case*, para. 10: 'the Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 (art. 14) is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.'

> relationship of proportionality between the means employed and the objective aimed at, to such an extent as to constitute discrimination. [29]

The conventional focus of the Court was direct discrimination, cases where the differential treatment was explicit. The reluctance to accept indirect discrimination cases may be explained by the Court's declared standard of proof, "beyond reasonable doubt". Such a high standard cannot be satisfied with statistical inferences or presumptions.[30] However, the Court is increasingly willing to decide on applications alleging indirect discrimination.

The concept has been examined by the Court in *Hugh Jordan*, where it provided a definition of indirect discrimination: "[w]here a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group".[31]

The Court also referred to the ECRI General Policy Recommendation no. 7, according to which indirect racial discrimination

> shall mean cases where an *apparently neutral factor* such as a provision, criterion or practice cannot be as easily complied with by, or *disadvantages ... persons belonging to a group* designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification. This latter would be the case if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.[32]

According to these definitions, when an indirect discrimination claim is made to the Court, what needs to be proved is that there is a neutral provision or a *de facto* situation, that puts persons of a racial or ethnic origin at a *particular disadvantage*, there is a comparator in a *relevantly similar situation*, and that provision *is not objectively justified* by a legitimate aim.

The neutral provision, criterion or practice is applied to everybody, but disadvantages significantly a "protected group". Therefore, indirect discrimination differs from direct discrimination in that the latter requires differential treatment, while the former requires similar treatment with differential effects.[33] A good indicator of a differential effect is statistical data,

[29] *Belgian linguistics case*, para. 42.
[30] Rory O'Connell, *'Cinderella comes to the Ball: Article 14 and the right to non-discrimination in the ECHR'* (2009) 29 (2) Legal Studies: The Journal of the Society of Legal Scholars 211-229, p. 10.
[31] *Hugh Jordan v. the United Kingdom*, para. 154.
[32] ECRI General Policy Recommendation No. 7, para. 1 (c) (emphasis added)
[33] Handbook on European Non-Discrimination Law, p. 56.

which is often used as evidence in cases of indirect discrimination. The evidentiary value of statistics in proving indirect discrimination is discussed further in Chapter 4.

The last element of an indirect discrimination claim is the comparator: a group that is advantaged by the contested measure, compared to the "protected group".[34] While in some cases, the comparator is easy to identify, when, for example, comparing men to women, disabled persons to non-disabled persons, homosexual couples to heterosexual couples, in other cases it might be challenging. In *D.H. and others*, Judge Šikuta argued that instead of comparing Roma children attending special schools to non-Roma children attending ordinary schools, the comparator group should be non-Roma children attending the same special schools as Roma children.[35] While the majority of the Grand Chamber did not agree with this concept, this argument shows the difficulties when it comes to establishing the comparator in a *relevantly similar situation*.

As stated in *Hugh Jordan*, the rule, policy or measure is not required to be aimed at the "protected group", clarifying that an indirectly discriminatory practice does not require discriminatory intent.[36] The Handbook on European Non-Discrimination Law also discusses that racial prejudice or the intention to discriminate is irrelevant from the perspective of indirect discrimination.[37]

The question whether discriminatory intent has to be proved by the applicant alleging violation of the right to non-discrimination arose in *D.H. and others*. The significance of the aim of the neutral rule, policy or measure is discussed further in the context of the standard of proof.

The European Social Charter

The European Social Charter is the Council of Europe's main human rights instrument regarding social and economic rights. It guarantees rights related to employment, housing,

[34] Handbook on European Non-Discrimination Law, pp. 57-58.
[35] *D.H. and others, Grand Chamber*, Dissenting opinion of Judge Šikuta: 'I found no legal or factual ground in the instant case for the conclusion that Roma children attending special school were treated less favourably than non-Roma children attending the same special school. It is not acceptable to conclude that only Roma children attending special schools were discriminated against in comparison to non-Roma children (or all children) attending ordinary schools, since these two groups of children are not "persons in [an] otherwise similar situation". It is also not acceptable to conclude this because both "groups" had the same conditions of access and attended both types of school: non-Roma children were attending special schools and, at the same time, Roma children were attending ordinary schools solely on the basis of the results achieved by passing the psychological test, which test was the same for all children regardless of their race.'
[36] *D.H. and others, Grand Chamber*, para. 194.
[37] Handbook on European Non-Discrimination Law, pp. 239-240.

health, education, social protection and welfare. The 1961 Charter included a reference to non-discrimination in its Preamble: 'the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin'.[38] In 1996, the Council of Europe adopted the revised Social Charter, and added a separate article that prohibits discrimination. The list of the grounds is more extensive than the grounds in the Preamble, however, it is not an exhaustive list.[39]

Article E of the ESC establishes the right not to be discriminated against. [40] The wording of the article is identical to Article 14 of ECHR. The scope of the prohibition of discrimination is limited to the enjoyment of the rights enshrined in the Charter. It provides protection from discrimination on 'any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status'. The article does not elaborate further on the concept of discrimination.

However, in its decision on the collective complaint by the International Association Autism-Europe, the European Committee of Social Rights considered that that Article E had been inserted to the Charter to 'help secure the equal effective enjoyment of all the rights concerned regardless of difference'.[41] The Committee interpreted the scope of Article E, and concluded that it does not only prohibit direct discrimination, but also all forms of indirect discrimination, such as 'failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all'.[42]

Framework Convention for the Protection of National Minorities

In 1995, the Council of Europe adopted the Framework Convention for the Protection of National Minorities, to promote 'effective protection of national minorities and of the rights and freedoms of persons belonging to those minorities.'[43] Article 4 of the Framework Convention prohibits discrimination based on belonging to a national minority, and it defines the States' positive obligations in order to guarantee equality (emphasis added):

[38] European Social Charter 1961, Preamble
[39] Explanatory report to the European Social Charter (revised), para. 136.
[40] European Social Charter (revised), Art. E.
[41] Collective complaint n°13/2002, para. 51.
[42] Collective complaint n°13/2002, para. 52.
[43] Framework Convention for the Protection of National Minorities, Preamble

> 1. The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited.
>
> 2. The Parties undertake to adopt, where necessary, adequate measures in order to *promote*, in all areas of economic, social, political and cultural life, *full and effective equality* between persons belonging to a national minority and those belonging to the majority. In this respect, they *shall take due account of the specific conditions of the persons belonging to national minorities*.
>
> 3. The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination.[44]

Article 4(2) describes that States are obligated to adopt measures that promote equality. According to the Advisory Committee, special attention should be paid to the most disadvantaged segments of society, and the targeted measures must take into consideration the 'various manifestations of multiple discrimination that may be experienced, including those arising from factors that are unrelated to the national minority background such as age, gender, sexual orientation and lifestyle markers'.[45]

The principle of positive differentiation, considering the specific conditions of people belonging to national minorities has also been articulated by the European Court of Human Rights. In the *Thlimmenos v. Greece* decision, the Court elaborated the concept of discrimination, stating that the "right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different"[46]. The State, therefore, has a positive obligation to treat persons differently in situations where similar treatment would have a discriminatory effect.

Furthermore, as it is discussed in the following chapters, in *D.H. and others* and *Oršuš and others*, the Court elaborated on the implications of the failure to take the specificities of members of a national minority into consideration when applying a neutral rule or measure to them.

The Council of Europe instruments stipulate the framework of non-discrimination, providing the prohibition of discrimination, elaborating on the "protected ground" and stipulating the obligations of the States in this regard. The scope of discrimination and some procedural

[44] Framework Convention for the Protection of National Minorities, Article 4.
[45] Advisory Committee on the Framework Convention for the Protection of National Minorities: *The Framework Convention: a key tool to managing diversity through minority rights*, para. 66.
[46] *Thlimennos v. Greece*, para. 44.

matters are specified further in European Union instruments. As mentioned before, the European Court of Human Rights considers all relevant international and regional law during the interpretation of the Convention, therefore these instruments are discussed in the next subchapter.

2. 1. 2. The Framework of the European Union

The non-discrimination principle is one of the fundamental values of the European Union, and according to Article 10 of the Treaty of the Functioning of the EU, the aim of the Union is to combat discrimination based on sex, racial or ethnic origin, religion or belief, age, disability or sexual orientation.[47] This principle is further elaborated in various sources of EU legislation. Moreover, Article 13 of the Treaty establishing the European Community affords the right to the Council to take appropriate action to 'combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.[48]

European Union Charter of Fundamental Rights

The Charter of Fundamental Rights has been incorporated into the European Union's constitutional law, when the Treaty of Lisbon granted legal force to it.[49] The Charter provides protection of fundamental rights, and it has a close relationship with the European Convention of Human Rights. Article 6 of the Treaty on the European Union guarantees the legally binding nature of the Charter, declares the accession of the European Union to the ECHR and it states that the fundamental rights ensured by the Charter and the ECHR form the general principles of the European Union's law.[50] Moreover, the European Court of Human Rights consistently refers to the Charter's provision, thus improving the level of protection of the Convention rights.[51]

The Charter, under the chapter 'Equality', makes a distinction between equality before the law and the prohibition of discrimination. Article 20 articulates the basic principle of the EU law, that is '[e]veryone is equal before the law.'[52] Article 21 contains the prohibition of

[47] Treaty on the Functioning of the European Union, Art. 10.
[48] Treaty establishing the European Communities, Art. 13.
[49] The Charter of Fundamental Rights: History and Prospects of Post-Lisbon Europe. David Anderson Q.C. and Cian C. Murphy. European University Institute of Florence, Department of Law. Working Paper. 2011/08, p. 7.
[50] Treaty on European Union, Article 6.
[51] The Charter of Fundamental Rights: History and Prospects of Post-Lisbon Europe. David Anderson Q.C. and Cian C. Murphy. European University Institute of Florence, Department of Law. Working Paper. 2011/08, pp. 18-19.
[52] European Union Charter of Fundamental Rights, Article 20.

discrimination based on 'any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation'[53].

The concept of discrimination is further elaborated by Council Directives implementing equal treatment between persons irrespective of racial or ethnic origin[54], establishing a general framework for equal treatment in employment and occupation[55], and implementing the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation[56]. These directives contain definitions of direct and indirect discrimination, and regulations on the allocation of the burden of proof in discrimination cases. Due to the similar wordings and consequent similar interpretation of the directives regarding these issues, for the purposes of this thesis, only the racial and ethnic equality directive is examined further.

Council Directive 2000/43/EC

Council Directive 2000/43/EC implements the principle of equal treatment between persons irrespective of racial or ethnic origin. While providing the general prohibition of discrimination and restating the principle of equality before the law, the Directive defines the concept of discrimination. It differentiates between direct and indirect discrimination based on racial or ethnic origin.[57] The scope of the Directive, however, is limited, as it does not cover differences in treatment based on nationality.[58]

According to Article 2 §1, direct discrimination occurs when 'one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin'.[59] The definition includes a comparator, meaning that when alleging discrimination, the less favourable treatment must be established with persons in similar situation. According to the definition provided by the directive, the comparator needs to be suitable: persons in relevantly similar situations, with the main difference between the applicant and the persons in similar situation is the protected ground.[60] The Handbook on European Non-

[53] European Union Charter of Fundamental Rights, Article 21.
[54] Council Directive 2000/43/EC
[55] Council Directive 2000/78/EC
[56] Council Directive 2006/54/EC
[57] Council Directive 2000/43/EC, article 2 §1.
[58] Council Directive 2000/43/EC, Preamble, para. 13.
[59] Council Directive 2000/43/EC, article 2 §2(a)
[60] Handbook on European Non-Discrimination Law, pp. 44-45.

Discrimination Law adds that the comparator is not an abstract concept, it 'should be assessed in light of the aim of the contested measure'.[61]

The Directive also provides a definition of indirect discrimination:

> an *apparently neutral* provision, criterion or practice would put persons of a racial or ethnic origin at a *particular disadvantage compared with other persons*, unless that provision, criterion or practice is *objectively justified* by a legitimate aim and the means of achieving that aim are appropriate and necessary.[62]

Not only does the Directive provide definitions for both direct and indirect discrimination, it also contains rules as to the value of statistical evidence and the shared burden of proof in indirect racial discrimination cases.[63] Both paragraph 21 and Article 8 of the Directive provides that during the assessment of an indirect discrimination claim, the burden of proof is distributed between the parties in a manner that when the applicant alleging violation of his rights provides evidence to establish a rebuttable presumption that the respondent violated his right to non-discrimination, the burden to prove that there has been no violation of the principle of equal treatment shifts to the respondent.[64] Furthermore, the Directive explicitly allows for statistical evidence to be used to establish indirect discrimination.[65] These concepts are discussed further in the following chapters of the thesis.

After establishing the concept of indirect discrimination and the elements that require proving during the proceedings before the Court, the next part of this chapter examines the framework of the collection and admissibility of evidence in Court proceedings.

2.2. Framework for the Collection and Admissibility of Evidence

The European Court of Human Rights is a unique judicial body, compared to domestic courts and international criminal tribunals with statutory rules regarding evidentiary and procedural

[61] Handbook on European Non-Discrimination Law, p. 47.
[62] Council Directive 2000/43/EC, article 2 §2(b) (emphasis added)
[63] Council Directive 2000/43/EC, Preamble paras. 15, 21, 22
[64] Council Directive 2000/43/EC, Preamble para. 21 and Article 8.
[65] Council Directive 2000/43/EC, Preamble para. 15: The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence.

matters. The ECtHR creates its own rules[66], therefore enjoys large-scale freedom in the admissibility, collection and evaluation of evidence.

Examining the regulation of the collection and admissibility of evidence requires an explanation of the role of the Court in the proceedings. There are two types of procedures, the inquisitorial and the adversarial, though none of them exists in the pure form. In the inquisitorial (or investigatory) procedure – as its name suggests – courts are actively involved in fact-finding. The adversarial system, however, limits the courts' role to decide whether the facts of the case are supported by conclusive evidence presented by the parties.[67]

Looking at the Convention and the Rules of the Court[68], it is clear that the regulation suggests that the Court follows an inquisitorial procedure[69]. Article 38 of the ECHR stipulates that the collection of the relevant evidence is a joint effort of all parties and the Court:

> The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.[70]

This principle is further underlined in the case of *Ireland v. the United Kingdom*, where the court reinstated that it examines all the material submitted to it, from all sources and if necessary, it obtains material *proprio motu*.[71]

Therefore, according to Article 38, there are two ways to establish the facts of a case. The Court, on one hand, examines the submissions from all parties. On the other hand, when the Court considers it necessary, it conducts *proprio motu* investigation. Rule A2 of the Annex to the Rules of the Court sets out the obligations of the parties during this procedure: '[t]he applicant and any Contracting Party concerned shall assist the Court as necessary in implementing any investigative measures'[72]. The precise rules of the investigation and the

[66] Article 25 (d) of the European Convention on Human Rights provides that adopting the Rules of the Court is one of the tasks of the Plenary Court.
[67] Limitations Clauses, Evidence, and the Burden of Proof in the European Court of Human Rights, T. Jeremy Gunn, p. 203.
[68] Annex to the Rules of the Court, Rules A1-A8.
[69] Kokott also concluded that the procedures before international tribunals generally have an investigatory/inquisitory structure. Human rights proceedings, similarly, are also investigatory due to their "attempt to compensate for the subordinate position of the individual, as compared with the state, in human rights actions". *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems*. Juliane Kokott. The Hague, London, Boston: Kluwer Law International, 1998, p. 194.
[70] ECHR, Article 38.
[71] *Ireland v. the United Kingdom*, para. 160.
[72] Annex to the Rules of the Court, Rule A2

obligations of the parties are well defined in the Annex. However, due to the fact that in indirect discrimination cases the Court primarily relies on documentary evidence submitted by the parties and rarely exercises its investigatory powers, the focus of this chapter is the source of submitted documentary evidence.[73]

The extensive reliance on existing documentary evidence can be explained by the subsidiary nature of the Court.[74] Article 1 of ECHR sets out that the States are obliged to implement the Convention guarantees.[75] Moreover, the admissibility criterion of exhaustion of domestic remedies allows the national authorities to address any complaints before the Court examines the matter.[76] The shared responsibility and the subsidiary character of the Court is highlighted in the Brighton Declaration:

> The States Parties and the Court share responsibility for realising the effective implementation of the Convention, underpinned by the *fundamental principle of subsidiari*ty. The Convention was concluded on the basis, inter alia, of the sovereign equality of States. States Parties must respect the rights and freedoms guaranteed by the Convention and must effectively resolve violations at the national level. The Court acts as a safeguard for violations that have not been remedied at the national level.[77]

In addition, according to the doctrine of the fourth-instance rule, the Court's jurisdiction is limited to confirm that the domestic provisions have been interpreted and applied correctly.[78] The Court also articulated in *Rocha v. the United Kingdom*, that it has a subsidiary role to the domestic proceedings:

> Where, moreover, the superior national courts have analysed in a comprehensive and convincing manner the precise nature of the impugned restriction, on the basis of the relevant Convention case-law and principles drawn therefrom, this Court would need strong reasons to differ from the conclusion reached by those courts by substituting its own views for those of the national courts on a question of interpretation of domestic law […].[79]

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[73] The Explanatory Report to Protocol 14 of the Convention, states that the proceedings of the Court in principle have an adversarial character: the '*new procedure […] preserves the adversarial character of proceedings and the principle of judicial and collegiate decision-making on the merits.*'[73] Paragraph 73 of the report reinstates that the Court has a principle of 'adversarial proceedings'. This can probably be explained with the fact that the Court, in most cases, relies on the documentary evidence submitted by the parties.

[74] Sabino Cassese: *Ruling indirectly - Judicial subsidiarity in the ECtHR:* 'Subsidiarity has been used to distribute functions along a vertical line, between the centre and the periphery. In this context, the main purpose of subsidiarity is to allocate functions so that centralisation can be avoided, and to ensure an efficient allocation of power. […] The purpose [of the use of subsidiarity in Protocol No. 15] is not to allocate functions, but to check the uniformity of the application of supranational principles and rules in national contexts.', pp. 7-8.

[75] European Convention on Human Rights, Art. 1

[76] ECHR, Art. 35. (1)

[77] Brighton Declaration, para. 3.

[78] Seminar to mark the official opening of the judicial year, Background paper, 30 January 2015, para. 12.

[79] *Rocha v. the United Kingdom*, para 120.

While the subsidiary role of the Court is clearly articulated by the Convention and the Court itself, looking at the judgments in cases of indirect discrimination, especially when they concern a vulnerable national minority, it is evident that the Grand Chamber of the Court does not refrain from overturning Chamber decisions, even when the conclusions in the Chamber judgments are similar to superior national courts.

Sources of evidence

As indicated before, the Court's primary source of evidence is the submission of the parties. The applicant, when alleging violation of the Convention, must present his arguments and evidence supporting his claims. The content of the application is governed by the Rules of the Court, that requires the applicant to provide a concise and legible statement of the facts of the case, the alleged violation of the Convention and the supporting arguments, and a concise and legible statement confirming his compliance with the admissibility criteria.[80] These statements must be sufficient to enable the Court to establish the scope and nature of the application.[81] Furthermore, Rule 47 obliges the applicant to submit documentary evidence supporting his claim: documents relating to the measures or decision complained of, documents and decisions showing that the applicant complied with the exhaustion of domestic remedies requirement and the time-limit, documents relating to any other international investigation or settlement.[82]

The Court assesses admissibility of the application based on the facts, arguments and supporting evidence presented in the application. The admissibility assessment of the application is effectively a preliminary test on merits. Therefore, the applicant must submit a convincing argument disclosing a *prima facie* case, otherwise the application may be dismissed as manifestly ill-founded.[83] Due to this rule, and the suggestion that the Court acts as a fourth-instance judicial body, the facts of the cases are usually well established by the time the application reaches the Court.

However, in some cases the Court requires additional information from the parties. The most common way of the Court exercising its investigatory power is when it requests evidence from a party. During both the admissibility procedure, and after the admission of an application, the

[80] Rules of the Court, Rule 47, 1(e)-(g)
[81] Rules of the Court, Rule 47, 2
[82] Rules of the Court, Rule 47, 3.1 (a)-(c)
[83] Mačkić, Jasmina. *Proving Discriminatory Violence at the European Court of Human Rights*, 2018, p.100.

Court may request the parties to submit further evidence and observations. According to Rule 54, the Chamber may

> (a) request the parties to submit any factual information, documents or other material considered by the Chamber or its President to be relevant;
>
> (b) give notice of the application or part of the application to the respondent Contracting Party and invite that Party to submit written observations thereon and, upon receipt thereof, invite the applicant to submit observations in reply;
>
> (c) invite the parties to submit further observations in writing.[84]

All parties have the obligation to participate effectively in the proceedings. Rule 44C of the Rules of the Court provides the following: '[w]here a party fails to adduce evidence or provide information requested by the Court or to divulge relevant information of its own motion or otherwise fails to participate effectively in the proceedings, the Court may draw such inferences as it deems appropriate'. [85]

When examining a case, the Court may also rely on documents produced by external actors, given that these documents can assist establishing the facts of the case or provide relevant information.[86] The generally used documents are reports and observations of competent international bodies in the Council of Europe. In indirect discrimination cases, the Court often refers to general recommendations of the European Commission against Racism and Intolerance. Furthermore, observations of intergovernmental bodies outside the Council of Europe may also be used by the Court.

In addition to the acceptance of documents produced by external actors, Article 36 of ECHR and Rule 44 of the Rules of the Court allows for third-party interventions in any individual proceedings before the Court. The permission of intervention must be requested from the President of the Chamber. The permission, after it is granted, defines the conditions of the intervention: it specifies the maximum length of written submission, sets time-limits for lodging submissions, and it defines the conditions regarding the matters that can be covered in the submissions.[87] Typically, the submissions comment on the general state of human rights or

[84] Rules of the Court, Rule 54, 2
[85] Rules of the Court, Rule 44C (1).
[86] Mačkić, Jasmina. *Proving Discriminatory Violence at the European Court of Human Rights*, BRILL, 2018, p. 91.
[87] Mačkić, p. 115.

specific issues of the law in a country. A firm rule is that the submission may be partly or fully refused if it comments on the facts or the merits of the case. [88]

Article 36 of ECHR allows for three types of intervention. It grants the right to submit written comments and take part of hearings to any State party, to which the applicant is a national.[89] The second type of intervention is when the President of the Court invites States parties to the Convention, or any persons concerned to submit written observations and take part of the hearings.[90] This type of intervention can be further divided to three categories: intervention by governments with specific interest in the subject matter; intervention by people who are directly implicated in the facts of the case; intervention by NGOs with expert knowledge or particular experience in the subject matter.[91] The third type of intervention allowed by the ECHR is the right of the Council of Europe Commissioner for Human Rights to submit written comments and take part in hearings in any case of the Court.[92]

For the purposes of this thesis, the most important types of third-party interventions are of the NGOs' and the Commissioner's for Human Rights, as the Court's judgments in indirect discrimination cases cite reports from both of these sources.

NGOs are capable of providing valuable information on the status of human rights in countries. The Court has a long tradition to use documentation produced by NGOs to understand relevant human rights issues in a member State. NGOs also appeared as applicants and functioned as both representatives of applicants and third-party interveners before the Court. Furthermore, they assisted the Court to interpret the scope and meaning of certain provisions, and they also provided comparative legal analysis and practical information on various legal issues.[93]

The Commissioner for Human Rights is an independent and impartial non-judicial institution that promotes education in, awareness of and respect for human rights.[94] The Commissioner's responsibilities include assisting the Member States in the promotion and protection of human rights and in the prevention of violations of these rights. In carrying out this function, the Commissioner cooperates with national institutions to develop an effective system to protect

[88] Mačkić, p. 115.
[89] ECHR, Art. 36 § 1
[90] ECHR, Art. 36 § 2
[91] Mačkić, p.116.
[92] ECHR, Art. 36 §3
[93] Mačkić, p. 120.
[94] Resolution (99) 50 on the Council of Europe Commissioner for Human Rights (adopted by the Committee of Ministers on 7 May 1999 at its 104th Session), art. 1-2.

human rights, performs country visits and draws up country reports evaluating the human rights situation and offering recommendations for improvement where necessary. These activities enable him to determine the existence of systematic human rights issues, therefore he is competent to provide information to the Court on systematic or structural weaknesses.[95]

As mentioned before, the Court rarely conducts fact-findings or investigation, so it relies on information submitted by the parties or third-party interveners. In the chapters below, during the discussion on the cases of alleged indirect discrimination in conjunction with the right to education, the importance of the documents produced by independent supervisory bodies, national and international NGOs and other organisations is demonstrated.

After establishing the elements that need proving in a discrimination claim, and the sources of evidence in proceedings before the Court, the next chapter examines the burden of proof in cases of alleged indirect discrimination based on association with a national minority.

[95] Mačkić, Jasmina. *Proving Discriminatory Violence at the European Court of Human Rights*, BRILL, 2018, p. 118.

3. The Burden of Proof under the European Convention of Human Rights

3.1. The Principles of the Allocation of the Burden of Proof

The burden of proof comprises of two obligations: the burden to provide evidence and the burden of persuasion. [96] The burden to come forward with evidence can be characterised as the "objective burden of proof" or "evidential burden of proof", while the burden of persuasion is a "subjective" or "legal" burden of proof.[97] As discussed above, based on the Convention, the Court has the power to conduct investigations, and fact-finding missions.[98] However, given the fact that the proceedings before the Court require the applicant(s) to exhaust all available domestic remedies, the facts of the cases are generally well established when the application alleging violation of a Convention right is submitted to the Court. Therefore, in the context of this thesis, burden of proof refers to the burden of persuasion.

It is the author's view that in order to analyse the burden of proof in the proceedings before the European Court of Human Rights and the standard of proof of the Court, it is important to clarify the role of the Court in this context. Article 19 of the Convention states that the purpose of the Court is to 'ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto'.[99] In its review of the individual applications submitted to it, the Court's classical approach is to conduct a full review on the merits of the case and applies the margin of appreciation to decide on the strictness of its review.[100]

Protocol 15 amending the ECHR states that the Court has a supervisory function, emphasising its subsidiary role in the protection of human rights:

> the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and

[96] *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems*. Juliane Kokott. The Hague, London, Boston: Kluwer Law International, 1998, p. 177
[97] *Ibid*, 1998, p. 150.
[98] Article 38: The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.
[99] Article 19 of ECHR
[100] Arnardóttir, Oddný Mjöll. *The Brighton Aftermath and the Changing Role of the European Court of Human Rights.* Journal of International Dispute Settlement, Issue 9. 2018, p.228.

> the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights […][101]

The explanatory report to Protocol 15 explains that the reason behind the restatement of the subsidiary role of the Court is 'to enhance the transparency and accessibility of these characteristics of the Convention system'.[102] It also emphasises the primary role of the States to implement the Convention, where the Court has a supervisory function limited by the margin of appreciation.[103]

During the Brighton Conferences, it has been suggested that the Court's role should be reviewed. The idea was that the Court would be "constitutionalised", meaning that in its supervisory role it would not examine all individual cases.[104] Instead, the focus would be on important key cases, where the Court would concentrate on 'serious or widespread violations, systemic and structural problems, and important questions of interpretation and application of the Convention'[105] In the author's view, the reform of the Court in this direction would ensure better protection of the Convention rights, especially in cases of indirect racial discrimination. As it is demonstrated in the next chapter of this thesis, addressing complex structural problems regarding covert discrimination of national minorities is difficult within the scope of individual application.

While the notion to "constitutionalise" was rejected, and the Court continues to examine applications in its traditional role, from the analysis of the standard of proof, and the decisions in *D.H. and others* and *Oršuš and others*, it can be concluded that the Court is not completely reluctant to examine systemic and structural issues through individual applications.

Examining the burden of proof requires to establish the main principles of the concept. According to the legal maxim *onus probandi actori incumbit*, the burden of proof lies on the applicant. This principle originates from civil law proceedings, where the party bringing forward a claim bears the burden to provide convincing evidence supporting his claim.[106] The approach is similar in international human rights law adjudication.

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[101] Additional Protocol no. 15 Amending the ECHR, Art. 1.
[102] Explanatory Report to Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms Strasbourg, 24.VI.2013, Art. 1, (7)
[103] Ibid. Art. 1 (9)
[104] The Brighton Aftermath and the Changing Role of the ECtHR, p. 226.
[105] Brighton Declaration (n 3) para. 33
[106] Christopher Roberts: *Reversing the burden of proof before human rights bodies*. The International Journal of Human Rights, 2021, p. 3.

This principle is based on the presumption of compliance. The Vienna Convention on the Law of Treaties contains the statement that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'.[107] Moreover, Article 1 of the European Convention on Human Rights contains the general obligation of the States Parties to secure the rights and freedoms defined in the Convention.[108] Therefore, the presumption is that states comply with their legal obligations.[109] Consequently, the principle *affirmanti incumbit probatio* means that the applicant alleging discrimination on the basis of association with a national minority in breach of Article 14 of the Convention or Article 1 of Protocol 12 bears the burden to prove that the State was not in compliance with the Convention.[110]

The principle that the burden of proof in proceedings before the European Court of Human Rights is essentially placed on the applicant can be derived from Article 35 of the Convention[111]. The article regulates the admissibility of the individual applications. When submitting a claim to the Court alleging violation of a Convention right, the applicant has to provide evidence that he exhausted all available domestic remedies, the application is submitted within the 6-month limit and that the claim is substantiated.[112] As discussed in the previous chapter, the admissibility criteria suggests that when the application is submitted to the Court, the facts of the case have to be established, as the applicant is required to provide sufficient information and evidence together with the application.[113] Failing to satisfy this requirement will lead to the inadmissibility of the application as manifestly ill-founded.[114] This obligation to have a *prima facie* case established already in the admissibility assessment suggests that the Court, as a general rule, applies the principle *affirmanti incumbit probatio*.

However, in *Merabishvili v. Georgia*, the Court noted that 'as a general rule, the burden of proof is not borne by one or the other party because the Court examines all material before it irrespective of its origin'.[115] This statement confirms the principle laid down in Article 38, that the Court examines each case together with the representatives of the parties, and if necessary, it conducts investigation *proprio motu*.[116] The Court also articulated in *Timurtaş v. Turkey*, that

[107] Vienna Convention on the Law of Treaties, Article 26.
[108] ECHR, Article 1.
[109]Reversing the burden of proof before human rights bodies, Christopher Roberts, p. 31
[110] *Ibid*. p.36.
[111] ECHR, Article 35.
[112] ECHR, Article 35.
[113] Rules of the Court, Rule 47.
[114] ECHR, Article 35. §3(a)
[115] *Merabishvili v. Georgia*, para. 311.
[116] ECHR, Art. 38

'Convention proceedings do not in all cases lend themselves to rigorous application of the principle of *affirmanti incumbit probatio* (he who alleges something must prove that allegation)'.[117]

The difficulty of allocating the burden of proof lies in the nature of the proceedings before the Court. In a case filed under Article 34, the parties are the individual alleging violation of his Convention rights, and the respondent State. This causes an imbalance in power, as the access to evidence might be significantly limited for the individual applicant.[118] The Human Rights Committee formulated that '[w]ith regard to the burden of proof, this cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information.'[119] Consequently, the allocation of the burden of proof in proceedings under Article 34 reflects the purpose of the European Court of Human Rights, that is to assure that States comply with their obligations under the Convention and refrain from violations of the substantive rights. [120]

The Convention does not provide explicit guidance on the allocation of the burden of proof. The Court, acting in its supervisory function, decides on who bears the burden to prove facts on a case-to-case basis. The considerations behind the allocation are related closely to the margin of appreciation. The margin of appreciation is in practice a balancing of interests, between the sovereignty of States regarding the implementation of the Convention, and the protection of the rights enshrined in the Convention.[121] A wide margin essentially signals the reliance on the States' due diligence with regards to the implementation of the Convention rights and the establishment of an effective control mechanism. In cases where the Court applies a wide margin of appreciation, the burden of proof is placed on the applicant to prove that the State is at fault in guaranteeing his Convention rights. On the other hand, a narrow margin of appreciation means that the burden of proof lies on the State.[122]

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[117] *Timurtaş v. Turkey*, para. 66.
[118]Christopher Roberts: *Reversing the burden of proof before human rights bodies*. The International Journal of Human Rights, 2021, p. 6.
[119] Bleier Lewenhoff v. Uru., Comm. 30/1978, U.N. Doc. A/37/40, at 130 (HRC 1982), para. 13.3
[120] Christopher Roberts: *Reversing the burden of proof before human rights bodies*. The International Journal of Human Rights, 2021, p. 7..
[121] Arnardóttir, Oddný Mjöll. *Non-discrimination Under Article 14 ECHR: the Burden of Proof.* 51 Scandinavian Studies in Law 13-39. 2007, p. 18.
[122] *Ibid*, p. 19.

3.2. Sharing the Burden of Proof in Cases of Indirect Discrimination

In cases of alleged indirect discrimination, the allocation of the burden of proof may be the decisive factor of the outcome of the case. In international litigation, the allocation of the burden of proof is intended to help ensure that a decision is reached, even in cases where evidence is unclear or uncertain. [123] In this context, it is important to note that while the European Court of Human rights follows the principle the applicant has to substantiate his claims, international adjudication operates on the basis that a court is expected to know the law, therefore, only relevant facts of the case require proving.[124]

Proving discrimination, especially indirect discrimination can be difficult. As mentioned before, due to the imbalance of power between the parties, applicants often do not have or have only limited access to evidence. The rules on the burden of proof therefore must be adapted to ensure protection of the Convention right. The Court formulated its principle regarding the allocation of the burden of proof in the *Husayn* judgment: 'the level of persuasion necessary for reaching a particular conclusion and, in this connection, the *distribution of the burden of proof,* are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake.'[125]

This principle suggests that the allocation of the burden of proof will be decided on a case-to-case basis, considering all circumstances. This is in line with the balancing between the interests at stake.

While the Convention itself does not provide guidance on the burden of proof, there is extensive legislation in the European Union regarding the allocation in cases of discrimination. As mentioned before, Council Directive 2000/43/EC provides the following on the burden of proof:

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[123] This principle is rooted in the unique position of international courts, especially of the European Court of Human Rights. The ECtHR cannot leave a case undecided (prohibition of *non-liquet*), therefore, referring back to Lord Hoffmann's words: "If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened". Hence, the burden of proof can be a decisive factor. See: Kokott, p. 157, and Foster, Caroline E. *Burden of Proof in International Courts and Tribunals*. Australian Year Book of International Law Vol. 29, issue 1, 2010. p. 3.

[124], Foster, Caroline E. *Burden of Proof in International Courts and Tribunals*. Australian Year Book of International Law Vol. 29, issue 1, 2010. p. 81.

[125] *Husayn (Abu Zubaydah) v. Poland*, para. 394. (emphasis added)

> […] when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.[126]

When the applicant alleging indirect discrimination can establish a *prima facie* case, the burden of proof must shift to the respondent State. Once the complainant has established facts from which a difference in treatment can be presumed, the onus is on the respondent State to prove that the difference in treatment was not discriminatory, because it had an objective and reasonable justification.

As discussed in the second chapter of the thesis, the facts that need to be established when claiming indirect discrimination under the Convention is that the applicant, as a result of a seemingly neutral provision or practice, was placed in a significantly disadvantaged position compared to persons in an analogous or relevantly similar situation. It is for the Court to determine the point at which such facts have been established. The rationale behind this departure from the traditional legal proceedings lies in the nature of discrimination cases and the lack of transparency that usually surrounds them, creating a challenge for the victims to obtain sufficient evidence to prove the offence.[127]

The principle of shifting the burden of proof to the respondent in cases of alleged indirect discrimination acts as a safeguard of the Convention rights of the applicant. The Court's primary role, as discussed before, is to protect the rights enshrined in the Convention and to act as a fourth-instance tribunal in cases of breach of those rights. The Convention prescribes positive obligations for the States to respect and secure the rights and freedoms defined in the Convention.

In alleged discrimination cases, sharing the burden to proof that a violation occurred is in line with the principle formulated by the Court in *Husayn,* that the rules of the distribution of the burden is linked to the nature of the allegations, the Convention right at stake and the specificity of the facts[128]. Indirect discrimination is difficult to prove, especially because of the nature of the violations. One of the main elements of indirect discrimination based on association with a national minority is the existence of a seemingly neutral provision, practice or policy that

[126] Council Directive 2000/43/EC, Art. 8 §1.
[127] *Strategic litigation of race discrimination in Europe: from principles to practice. A manual on the theory and practice of strategic litigation with particular reference to the EC race directive*. Budapest, European Roma Rights Center, 2004., p. 25.
[128] *Husayn (Abu Zubaydah) v. Poland*, para. 394

significantly disadvantages persons belonging to that minority, compared to persons in a relevantly similar situation.

In the discussion of the shared burden of proof, it is important to establish which party needs to prove the different elements of indirect discrimination. The elements are a) an apparently neutral rule, policy or practice that applies to everybody, b) that has a disproportionately prejudicial effect on a "protected group", and c) there is a comparator in a relevantly similar situation.[129] The difficulty of proving indirect discrimination lies in the fact that the applicant has to prove a disproportionate effect of the rule, policy or practice, as opposed to direct discrimination, where the element that needs proving is the different treatment.[130]

The applicant, when claiming indirect discrimination, has to establish that the provision, practice or policy had a disproportionate effect on him, and that the reason for this effect is that he belongs to the national minority. Often, evidence to prove this effect is not at the applicant's disposal, or the evidence available is sufficient only to establish a presumption of the indirect discrimination, for example statistical data and reports by independent supervisory bodies. In order to provide the applicant the protection of the right to non-discrimination, when he – with the aid of statistical evidence, factual evidence and independent supervisory reports - establishes a presumption of indirect discrimination, the burden of proof shifts to the respondent State.

The shift of the burden of proof means that the respondent State has to provide evidence that the provision, policy or practice is not discriminatory. The elements of indirect discrimination provide guidance on what the respondent State has to establish to disprove the claims of the applicant. There are two ways to prove that the respondent State is not in breach of the Convention: the respondent can prove that the applicant is not in a relevantly similar or comparable situation to the comparator, or that the application of the neutral rule, policy or practice and the consequent disproportionate effect is not based on a protected ground, but it has another objective reason.[131] The respondent State, therefore, has to prove that there is no causal link between the disproportionate effect and the applicant's ethnicity, or that even

[129] Arnardóttir, Oddný Mjöll. *Non-discrimination Under Article 14 ECHR: the Burden of Proof.* 51 Scandinavian Studies in Law 13-39. 2007, pp. 21-23.
[130] Handbook of European Non-Discrimination Law, p. 56
[131] *Ibid,* p.232.

though there is a link, the different treatment is serving a legitimate aim and the measures applied are in proportion with that aim.[132]

To understand the application of the principle *affirmanti incumbit probatio* and the necessity of the shared burden, three cases are discussed in this chapter. All cases concerned children belonging to the Roma minority, placed in special schools or separate classes during their primary education.

In *D.H. and others v. the Czech Republic*, the applicants were attending special schools based on the recommendation of their paediatrician or their school's head teacher, after being evaluated by educational psychology and child guidance centres, and with the consent of their parents or legal guardians. The applicants alleged that their placement in special schools was based on the fact that they belong to the Roma minority, and that the practice of placing children in these schools based on a standardised test had a significantly disproportionate effect on Roma children. The applicants provided statistical data to prove this effect. The Grand Chamber of the Court, based on the statistical data, the school files of the children, and the reports of independent supervisory bodies found that the applicants established the presumption of indirect discrimination. Consequently, the Grand Chamber shifted the burden of proof to the respondent State. The State had to prove that the difference in treatment – the placement of a disproportionately large number of Roma children in special schools – had an objective and reasonable justification. The Grand Chamber underlined that in cases where the difference in treatment is based on colour, race or ethnic origin, the 'the notion of objective and reasonable justification must be interpreted as strictly as possible'.[133]

In *Oršuš and others v. Croatia*, the applicants had been placed to separate, Roma-only classes. The reason for the placement, according to the respondent State, was their insufficient command of the Croatian language. The applicants claimed that the curriculum of these classes was reduced, and that there was no special programme addressing the needs of Roma pupils to reach the adequate language proficiency. Moreover, the lack of transparent monitoring of their improvement and the possibility of automatic transfer to mixed classes once the adequate command of Croatian language is reached gave rise to the presumption of indirect discrimination. The applicants submitted statistical data as evidence, however, the Grand Chamber found that the figures did not suffice to establish a *prima facie* case. Nevertheless, as

[132] Ibid, pp. 232-233.
[133] *D.H. and others*, Grand Chamber, para. 196.

it has been articulated before by the Court, indirect discrimination may be proved without statistical evidence.[134] The Grand Chamber found the fact that the measure of placing children in separate classes based on their insufficient command of the Croatian language was applied exclusively to Roma children.[135] Therefore, the Grand Chamber shifted the burden of proof to the respondent State, that had to show that the practice was objectively justified.

The case *Horváth and Kiss v. Hungary* concerned two Roma applicants who were diagnosed with mental disabilities, and consequently enrolled in a remedial school. The Court, after evaluating the evidence submitted by the parties, concluded that the applicants were able to establish a *prima facie* case of indirect discrimination based on statistical evidence of the overrepresentation of Roma children in remedial schools, reports from independent supervisory bodies pointing out that a significantly large number of children from the Roma minority are misdiagnosed with mental disabilities based on their socio-economic disadvantages or cultural differences. Moreover, the Court found that the tests employed to assess the applicants' learning abilities or difficulties were 'at least' culturally biased and did not consider the 'particularities and special characteristics of the Roma applicants.'[136] Therefore, the burden of proof shifted to the respondent State to prove that the treatment of the Roma children was not discriminatory.

Both *D.H. and others v. Czech Republic* and *Oršuš and others v. Croatia* originated in Chamber decisions and were referred to the Grand Chamber. In both cases, the Chamber did not find violations of Article 14. In *D.H. and others*, the Chamber did not find the evidence presented by the applicants and third-party interveners sufficient to establish *prima facie* that the respondent State violated the applicants' rights to non-discrimination based on association with a national minority. The Chamber found that the applicants did not discharge their burden to establish a rebuttable presumption, therefore, the burden of proof did not shift to the respondent State.[137]

In *Oršuš and others,* the Chamber found that while *prima facie* it would appear that the practice of placing Roma children in separate classes is a discriminatory practice, the aim of the regulation was to 'correct factual inequalities' between Roma and non-Roma children.[138]

[134] *D.H. and others*, Grand Chamber, para. 188.
[135] *Oršuš and others*, Grand Chamber, para. 121.
[136] *Horváth and Kiss*, para. 121.
[137] *D.H. and others*, Second Section, para. 52.
[138] *Oršuš and others*, First Section, para. 63

According to the Chamber, States enjoy a margin of appreciation in the sphere of education to correct these inequalities, therefore, the pupils' inadequate command of the Croatian language justified their placement in separate classes with a reduced curriculum.[139]

As mentioned before, both Chamber judgments were overturned by the Grand Chamber, that found violation of Article 14 in conjunction with Article 1 of Protocol 2. The Grand Chamber judgments, however, met with criticism in the dissenting opinions. The critique was based on the fact that the Grand Chamber, when interpreting the scope of the protection afforded by the ECHR and when assessing the evidence submitted by the parties, went beyond the facts of the individual cases.

In the dissenting opinion of *Oršuš and others*, the Judges noted that the judgment was more about the general situation of the Roma population in Croatia, and that the majority viewed the case as 'a means of further developing the notion of indirect discrimination in the Court's jurisprudence.'[140] The Judges also criticised the majority for altering the focus and the scope of the case beyond the claims by the applicants.[141]

The Grand Chamber's decision in the *D.H. and others* case has also been critiqued. In the decision, the Court established that its role is not to assess the overall situation of the Roma minority, but to examine the individual case before it, yet it also came to the conclusion that because the legislation in question had a disproportionate effect on the Roma community, and the applicants are members of this community, they necessarily suffered the same discriminatory treatment. Judge Borrego Borrego, in his dissenting opinion, considered this approach a departure from the role of the Court.[142]

As demonstrated in this chapter, the purpose of the principle of sharing the burden of proof between the applicant is to afford protection to the individuals who are alleging violation of their Convention rights. The difficulties with regards to the allocation originate from subsidiary role of the Court with a supervisory jurisdiction. In this role, the Court has to balance the interests of the parties: the States' margin of appreciation and the individual's rights under the Convention. Sharing the burden of proof is in line with the principle of the presumption of compliance, as the applicant has to establish *prima facie* that the respondent state was in breach

[139] *Oršuš and others*, First Section, para. 68.
[140] *Oršuš and others*, Grand Chamber judgment, Dissention opinion, para. 15.
[141] *Ibid*.
[142] *D.H. and others*, Grand Chamber decision, Dissenting opinion of Judge Borrego Borrego

of his obligations under the Convention. It also takes into account the imbalance of power between the parties. As it is articulated in the Convention, the Court examines the cases together with the representatives of all parties.[143] This provision means that while the burden to establish a *prima facie* case of indirect discrimination lies on the applicant, the Court considers all evidence submitted to it. Therefore, the burden to provide evidence to substantiate his claim does not lie solely on the applicant.

The next chapter examines the standard of proof of the European Court of Human Rights and analyses the evidentiary value of the material submitted by the parties and third-party interveners.

[143] ECHR, Article 38.

4. Standards of Proof in Human Rights Adjudication

4.1. Standard of Proof in the Interpretation of the European Court of Human Rights

In the discussion of the evidentiary standards of the Court, the two key concepts that need to be distinguished are the 'burden of proof' and 'standard of proof'. As discussed before, burden of proof places the onus on one party to do the proving, while standard of proof refers to a degree of satisfaction to which the tribunal must be persuaded of that proof.[144] In legal proceedings, different standards of proof are used: preponderance of the evidence, clear and convincing evidence and proof beyond reasonable doubt. Preponderance is the lowest standard, primarily used in civil proceedings, and it means that it is more likely than not that the facts are as that which one of the parties claim.[145] The clear and convincing evidence standard requires that the evidence show that it is highly probable or probably certain that the thing alleged has occurred. The highest standard of proof is "beyond reasonable doubt", used primarily in criminal proceedings, meaning that the evidence presented, and the arguments put forward by a party are so convincing that they must be approved as facts.[146]

The connection between standard of proof and burden of proof is well demonstrated by Lord Hoffman. According to him, the law operates in a binary system, meaning that

> "[i]f a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. (…) The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened."[147].

The European Court of Human Rights articulated in numerous decisions that it has adopted the standard of proof "beyond reasonable doubt" in assessing evidence, that is, it requires that the facts of the case are established with such a degree of certainty that they can be approved as

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[144]Bicknell, Christine. *Uncertain Certainty?: Making Sense of the European Court of Human Rights' Standard of Proof*. International Human Rights Law Review. 30 November 2019, p. 4.

[145] https://www.hg.org/legal-articles/different-standards-of-proof-6363

[146] "reasonable doubt" is defined by the dictionary as 'doubt especially about the guilt of a criminal defendant that arises or remains upon fair and thorough consideration of the evidence or lack thereof'. The interpretation of the term 'reasonable doubt' had been clarified by the European Commission in the Greek case: 'doubt for which reasons can be given drawn from the facts presented.' See: "Reasonable doubt." *Merriam-Webster.com Legal Dictionary*, Merriam-Webster, https://www.merriam-webster.com/legal/reasonable%20doubt. Accessed 24 Jun. 2021. While the interpretation of the concept would provide for an interesting discussion, for the purposes of this thesis it will not be further analysed.

[147] Opinions of the Lords of Appeal for Judgment in the Cause In re B (Children) (FC), para. 2. https://publications.parliament.uk/pa/ld200708/ldjudgmt/jd080611/child-1.htm

facts. [148] This standard was formulated in the *Ireland* decision: "the Court adopts the standard of proof 'beyond reasonable doubt' but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact"[149]. The Court, however, underlined that the purpose of its adopted standard is different from the criminal law standard or domestic civil proceedings, and it is not interpreted as having the same high degree of probability.[150] While the requirement of such a high standard in Court proceedings can be beneficial in order to assure that a well-founded decision is reached, lowering the standard might promote more effective protection to the Convention rights. As the established case law suggests that the Court does, in fact, applies less-demanding standards of proof, for example in cases of alleged discrimination.

Moreover, the fact that the Court is willing to accept inferences and presumptions of facts also indicates that the Court does not apply the "beyond reasonable doubt" strictly. The power imbalance between the parties, and the States' control of evidence in certain cases explains this departure from the strict interpretation of the "beyond reasonable doubt" principle. The Court has also emphasized that its purpose is to examine alleged violations of the Convention rights, in order to afford protection to these rights. Given the fact that the rights protected by the Convention are different in nature, the Court adopted a flexible interpretation of the principle of "beyond reasonable doubt":

> "It notes in this connection that in assessing evidence, *the Court has adopted the standard of proof "beyond reasonable doubt*". However, it has never been its purpose to borrow the approach of the national legal systems that use that standard. Its role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to *ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention* – conditions its approach to the issues of evidence and proof. In the proceedings before the Court, there *are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment*. It adopts the conclusions that are, in its view, supported by the *free evaluation of all evidence, including such inferences* as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted *presumptions of fact*. Moreover, the *level of persuasion* necessary for reaching a particular conclusion and, in this connection, the distribution of the burden

[148] The legal rules governing the proceedings before the ECtHR are found in the Convention and the Rules of Court. Article 25 (d) of the Convention pronounces that the "plenary Court shall adopt the rules of the Court".
[149] *Ireland v. the United Kingdom*, para. 161.
[150] Bicknell, Christine. *Uncertain Certainty?: Making Sense of the European Court of Human Rights' Standard of Proof*. International Human Rights Law Review. 30 November 2019, p.2.

> of proof are intrinsically *linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake*."[151]

Looking at this interpretation of its standard of proof as it is formulated in *Nachova*, it is clear that the Court applies the "beyond reasonable doubt" standard adaptively. As mentioned before, the Court also emphasized that its role is not rule on criminal guilt or civil liability, but it is to ensure that States are complying with their obligations under the Convention.

The difference between the application of the standard of proof in criminal cases and international human rights law adjudication can be demonstrated with a reference to the proceedings at the International Criminal Court. The Rome Statute prescribes that the onus is on the Prosecutor to prove the guilt of the accused.[152] In addition to declaring the burden of proof, it also defines the standard of proof: '[i]n order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.'[153] Even though the ICC has also been accused of applying the standard inconsistently, in some cases requiring the facts of the case to be proven to near certainty,[154] the reason for a strict definition of the standard and burden of proof is clear. The ICC has to establish criminal guilt of the accused based on the principle 'innocent until proven guilty'[155].

In proceedings before the European Court of Human Rights, the standard is applied in a flexible way, due to the reason that the status of the parties and the role of the Court differs from the ICC proceedings. The Court, when assessing an individual application under Article 34 has to establish whether the respondent State violated its obligations under the Convention. As mentioned before, the Court has a subsidiary role in guaranteeing the protection of the rights enshrined in the Convention. Moreover, as the States have the primary obligation to secure the rights and freedoms prescribed by the Convention, they enjoy a certain margin of appreciation.[156] The Court has a 'supervisory jurisdiction', that is, it acts as a fourth-instance tribunal in cases of alleged violations of the Convention.[157]

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[151] *Nachova and others*, para. 147
[152] The Rome Statute of the International Criminal Court, Art. 66 §2
[153] Rome Statute, Art. 66 §3
[154] Utkarsh, Krishna. *ICC's Struggle with the Evidentiary Standard of Proof Beyond Reasonable Doubt*. http://cilj.co.uk/2021/02/22/iccs-struggle-with-the-evidentiary-standard-of-proof-beyond-reasonable-doubt/
[155] The Rome Statute of the International Criminal Court, Art. 66 §1
[156] Arnardóttir: *The Brighton Aftermath and the Changing Role of the ECtHR*, p. 225.
[157] The fourth-instance jurisdiction is a doctrine under the substantive subsidiarity function of the Court, meaning that 'the Court considers that it has only limited jurisdiction to verify that domestic law has been correctly interpreted and applied and that it is not its function to take the place of the national courts, its role being rather to ensure that the decisions of those courts are not flawed by arbitrariness or otherwise manifestly unreasonable'.

The supervisory role and the principle of subsidiarity is also articulated in the concept of the presumption of compliance. As discussed in the previous chapter, the presumption of compliance means that it has to be presumed that a State is fulfilling its obligations under the Convention. Therefore, it has been argued that the Court's procedural system ought to be reconsidered, and a two-tiered review system would enhance the Court's subsidiary function. The two tiers suggested were the 'procedural review' and 'substantial review'.[158] During the procedural review, the State's legislative or judicial procedure would be assessed to establish whether it is capable of providing sufficient protection to the Convention rights. The substantial review then would assess the merits of the case after it has been concluded that the domestic mechanism has significant deficiencies.[159] However, the Court rejected this notion, and continues to examine individual cases on the merits.

The Court, during the assessment of an individual application, does not require that each individual fact of the case is proved "beyond reasonable doubt". Its role is to establish whether there has been a violation of the relevant Convention right.[160] This approach is a clear departure from the strict "beyond reasonable doubt" principle. Moreover, the willingness to make inferences, presumptions and use circumstantial evidence suggests a lower standard of proof.

The fact that the Court also stated that "the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake"[161], also indicates that the Court created its own conception of the proof "beyond reasonable doubt".

Given the fact that the Convention is a living instrument, that should be interpreted as such, it is the author's view that the Court's approach to the evaluation of evidence and the adaptable use of "beyond reasonable doubt" is justified.[162] Especially in indirect discrimination cases,

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European Court of Human Rights. *Seminar to mark the official opening of the judicial year*, Background paper. 30 January 2015

[158]Oddný Mjöll Arnardóttir, *The "procedural turn" under the European Convention on Human Rights and presumptions of Convention compliance,* International Journal of Constitutional Law, Volume 15, Issue 1, 1 January 2017, Pages 9–35, p. 10.

[159] Arnardóttir.*The "procedural turn" under the European Convention on Human Right*s, p. 10.

[160] Bicknell, Christine. *Uncertain Certainty?: Making Sense of the European Court of Human Rights' Standard of Proof*. International Human Rights Law Review. 30 November 2019, p. 39

[161] *Nachova and others*, para. 147.

[162] The Court pronounced the 'living instrument' doctrine in 1978 in *Tyrer v. United Kingdom*: 'The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions.' Para. 31. Arguably, there are negative and positive consequences of the dynamic interpretation doctrine. The negative aspect is that the Court pronounced that a

where the access to evidence by the applicants are difficult, it is reasonable to allow the use of inferences, circumstantial evidence and presumptions. Nevertheless, while avoiding the rigid interpretation of the standard has its advantages, a consistent approach from the Court is necessary to increase legal certainty and to effectively safeguard the rights under Article 14 and Protocol 12.

4.2. Evidence in the proceedings of the European Court of Human Rights

4.2.1. Evidence submitted by the parties

After clarifying the elements of indirect discrimination, the rules of evidentiary material in the proceedings before the Court and the pronounced standard of proof of the Court, this subchapter studies the evidence parties submitted in indirect discrimination cases. The aim of the analysis is to study the application of the standard of proof "beyond reasonable doubt" in the practice of the Court.

To organise and analyse the evidentiary material, this part of the thesis focuses on three cases of the Court, *D.H. and others v. the Czech Republic*, *Oršuš and others v. Croatia* and *Horváth and Kiss v. Hungary*. These cases concerned applicants of Roma origin alleging discrimination in violation of Article 14 of ECHR in conjunction with Article 2 of Protocol 1.

In *D.H and others*, the applicants submitted that they have been victims of indirect discrimination when they were placed in special schools directly or after a period of ordinary primary schools. These special schools have been established to cater for the special needs of children with learning disabilities. The recommendation of the placement in these schools came from a paediatrician or the head teacher of the school where the pupil attended. The children were placed in these special schools after being evaluated by educational psychology and child guidance centres and obtaining consent from the parents or legal guardian.[163]

The applicants argued that the test performed during the evaluation had not been adapted to their needs, therefore resulted in placing a significant number of Roma children in special schools. Moreover, due to the reduced curriculum and the insufficient monitoring of the

number of Convention concepts have autonomous interpretation, meaning that the definitions are not based on domestic law. A positive aspect of the dynamic interpretation is the evolvement of the margin of appreciation doctrine. The Court interprets the consensus about controversial issues between contracting States as a factor that narrows the margin of appreciation. Hence, the dynamic interpretation affects procedural issues alongside the interpretation of substantive concepts. See: Letsas, George, The ECHR as a Living Instrument: Its Meaning and its Legitimacy (March 14, 2012). Available at SSRN: https://ssrn.com/abstract=2021836, pp. 5-6.

[163] *D.H. and others*, Grand Chamber, paras. 19-22.

children's performance and educational development, they had limited opportunities to transfer to an ordinary primary school, and consequently, attend secondary education. The applicants argued that this practice disproportionately affected them as members of the Roma minority, in comparison to non-Roma children, and asked the Court to find that the Czech Republic violated their right not to be discriminated.[164]

For the purpose of this thesis, the significance of the case lies in the fact that the Chamber and the Grand Chamber came to the opposite conclusion based on the evidence submitted by the parties. Examination of the material and the evidentiary value the Court assigned to it helps to identify the issues and inconsistencies in the Courts practice and the interpretation of its standard of proof.

An important issue that needs to be restated is the role of the Court and the scope of the individual application. In *Husayn (Abu Zubaydah) v. Poland*, the Court stated that

> [i]ts role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to *ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention* – conditions its approach to the issues of evidence and proof.[165]

As discussed before, the Court's role is subsidiary, and it has been further formulated in the *Husayn* judgment, stating that the Court must 'be cautious in taking on the role of a first-instance tribunal of fact'.[166]

The procedure before the Court in assessing a case can be characterized by two approaches. The first approach is that the Court, while fulfilling its function as a subsidiary supervisor, examines the individual case based on the facts established by the parties. The objective of this approach is to identify deficiencies in the respondent State's legislation implementing the Convention. It also reviews the complaint mechanism and the remedies offered by the State in case an individual alleges violation of his right not to be discriminated against. While this approach prevents the Court to assume the role of a first-instance tribunal and to overstep the scope of the individual application and the claims made by the applicants, it also hinders the effective protection of the right to non-discrimination.[167]

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[164] *Ibid*, para. 135.
[165] *Husayn (Abu Zubaydah) v. Poland*, para. 394. (emphasis added)
[166] *Husayn (Abu Zubaydah) v. Poland*, para. 393.
[167] Oddný Mjöll Arnardóttir, *The "procedural turn" under the European Convention on Human Rights and presumptions of Convention compliance,* International Journal of Constitutional Law, Volume 15, Issue 1, 1 January 2017, Pages 9–35, pp. 11-12.

The second approach is that the Court examines the case within the overall societal context, and draws inferences based on the evidence submitted to it. The more general approach to the review of an application allows the Court review whether a State is in compliance with its obligations under the Convention. Moreover, it enables the Court to identify systematic deficiencies in the implementation of the Convention.

The Court formulated that '[d]iscrimination on account of, *inter alia*, a person's ethnic origin is a form of racial discrimination. Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction'.[168] As indirect discrimination, by definition, is couched in neutral terms, the Court is necessarily required to look beyond the facts of the individual case to reveal a discriminatory practice.

In *D.H. and others*, the Court's role was to determine whether the *de facto* situation of the applicants amounted to indirect discrimination in violation of the Convention. More precisely, the fact to be established was whether the applicants were 'treated less favourably than non-Roma children in a comparable situation and that this amounted in their case to indirect discrimination'.[169]

The evidence submitted by the parties included school files of the applicants showing the procedure that had been followed during the decision of their placement in special schools; decisions from the domestic procedures, including a constitutional complaint; information of the applicants' educational progress; statistical data revealing the proportion of Roma children in regular and special primary schools; and reports by various international supervisory bodies and NGOs.

The case was examined by the Chamber that followed the fourth-instance principle, and concluded its judgment based on the evidence establishing the facts concerning the applicants. It considered the procedure of the evaluation of the children, the guarantees in place, the aim of the establishment of the special schools and the fact that the States enjoy a margin of appreciation when adapting the educational system to address the special needs and aptitudes or disabilities of the children.[170]

[168] *D.H. and others*, Grand Chamber, para. 176.
[169] *D.H. and others*, Grand Chamber, para. 183.
[170] *D.H. and others*, Second Section, paras. 44-53.

The Court noted that the tests were carried out by professionals in educational psychology, and the proper procedure had been followed. Moreover, the decisions of the placement in special schools was based on statutory grounds. Further, there were specific guarantees in place, such as the requirement of the consent of the parents or legal guardians, delivering the written decision of the placement to the parents or legal guardians, and providing information on the right to appeal against the decision. In addition to these guarantees, some of the applicants, after their enrolment in special education, received written notices from the school authorities informing them of a possible transfer to ordinary schools. After successful aptitude tests, four of the applicants completed the transfer.[171]

The Chamber found these facts convincing enough to establish that the placements in special schools was not based on ethnic grounds. However, as discussed in the second chapter, indirect discrimination' shall mean cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages [...] persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin'[172]

Statistical data submitted by the applicants showed that Roma children were over-represented in special schools in Ostrava.[173] ECRI reports revealed that racial segregation is a persisting issue in the Czech Republic, and there is a general intolerance and negative attitude towards people of Roma origin. Reports by the Czech Republic drawn up pursuant to Article 25 § 1 of the Framework Convention for the Protection of National Minorities points out that the psychological test used by the educational centres are standardised, disregarding the disadvantaged sociocultural background and the poor command of the Czech language of Roma children. This was confirmed by the Czech Government.[174] The report also noted that 80-90% of Roma children are placed in special schools. Third-party interveners Human Rights Watch and Interights both submitted that statistical evidence has a crucial role in revealing indirect discriminatory practices and assessed together with the facts of the instant case, they are sufficient to establish a *prima facie* case[175].

The Chamber, however, while acknowledged that the statistics reveal "worrying figures", decided to examine the case from the perspective of the individual application. In the words of

[171] *D.H. and others*, Second Section, paras. 49-50.
[172] ECRI General Policy Recommendation No. 7, para. 1 (c)
[173] *D.H. and others*, Second Section, para. 39.
[174] *D.H. and others*, Second Section, para. 26.
[175] *D.H. and others*, Second Section, para. 43.

Judge Costa, '[i]n the present case, the Court had to determine whether the decision to place or retain the 18 applicants in "special schools" was a result of "racist" attitudes. Were they victims of systematic segregation and, therefore, discrimination based on "race" or (more specifically) their association with a national minority, contrary to Article 14, or not?'[176]

During its assessment of the case, the Chamber emphasised the margin of appreciation States enjoy in order to adapt their educational system to provide primary education to pupils with special educational needs.[177] The Chamber concluded that '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'.[178]

The Chamber clearly applied the strict "beyond reasonable doubt" standard when, in order to shift the burden of proof, it required the applicants to prove that the State had a discriminatory intent.[179] The fact that the Chamber required proof of the racial prejudice signals the inconsistency of the Court's approach regarding ethnic discrimination. The Chamber also observed that the rules regarding the placement of children in "special schools" does not refer to ethnic origin.[180] Previously, the Grand Chamber concluded in *Nachova and others* that 'where it is alleged – as here – that a violent act was motivated by racial prejudice, such an approach would amount to requiring the respondent Government to prove the absence of a particular subjective attitude on the part of the person concerned'.[181] Applying this interpretation analogously to the situation of the Roma children in the Czech Republic, the Chamber ought to have concluded that the requirement to prove that the measures were applied to Roma children with a racially prejudicial attitude is nearly impossible.

The fact that the Chamber applied the strict "beyond reasonable doubt" standard can be further confirmed from its argument. First, the Chamber acknowledged the reports of independent supervisory bodies, and their concerns about the situation of the Roma minority in the Czech Republic, but decided not to assign evidentiary value to the findings of the documents, and

[176] *D.H. and others*, Second Section Judgment, Concurring opinion of Judge Costa
[177] *D.H. and others*, Second Section, para. 47.
[178] *D.H. and others*, Second Section, para. 52.
[179] *Ibid.*
[180] *D.H. and others*, Second Section, para. 49.
[181] *Nachova and others*, para. 157. Note that in *Nachova*, the Grand Chamber used the argument of the near impossibility to prove a subjective racially biased attitude to refuse to shift the burden of proof to the respondent State.

assessed the case based on the facts established by the applicant and the respondent State.[182] Second, the Chamber itself noted that assessing whether a measure has a discriminatory effect on a group does not require it to be specifically aimed or directed at that group, however, it still refused to shift the burden of proof to the respondent State due to the fact that the applicants were unable to prove that the measure was aimed at them (the rule did not refer to ethnic origin).[183] Third, the Chamber applied a wide margin of appreciation when it stated that the choice of the educational system and the planning of the curriculum in different schools fall within the competence of the respondent State.[184] Fourth, the Chamber considered that the placement of the Roma children in "special schools" was a result of examination by qualified professionals, and it stated that the findings of these experts must be accepted as facts, as the applicants 'have not succeeded in refuting the aforementioned experts' findings that the applicants' learning disabilities were such as to prevent them from following the ordinary primary school curriculum'.[185] The Chamber added that it cannot be expected from the respondent State to prove that the psychologists, while carrying out the tests, had not adopted a 'particular subjective attitude'.[186] Finally, the Chamber placed the primary responsibility regarding the choice of education on the parents, and noted that the applicants' parents gave their consent to their children's placement in "special schools" and they did not contest the decision or appealed against it.[187] Therefore, the Chamber concluded that while the parents of the applicants might have lacked information regarding the educational system and the consequences of the reduced curriculum in the "special schools" and there might have been a "climate of mistrust", it was not convinced, based on the facts of the individual case that the reason for the placement in special schools was the result of racial prejudice.[188]

While the Grand Chamber, in its landmark decision, overturned the decision of the Chamber, the argument put forward by the Second Section raises some concerns regarding the standard of proof applied by the Court. When the standard of proof is formulated vaguely, its interpretation leaves room for arbitrary decisions. In *D. H. and others*, the applicants put forward the argument that the "beyond reasonable doubt" must be applied differently than in

[182] *D.H. and others*, Secon Section, para. 45.
[183] *D.H. and others*, Second Section, para. 46.
[184] *D.H. and others*, Second Section, para. 47.
[185] *D.H and others*, Second Section, para. 49.
[186] *D.H. and others*, Second Section, para. 49.
[187] *D.H. and others*, Second Section, para. 51.
[188] *D. H. and others*, Second Section, para. 52.

criminal law.[189] Furthermore, the applicants raised the argument that the Court formulated in *Nachova* that 'discrimination did not have to be intentional and that a measure could be found to be discriminatory on the basis of evidence of its impact (disproportionately harmful effects on a particular group) even if it did not specifically target that group'.[190] The Chamber, however, disregarded these arguments, and using the strict standard of proof "beyond reasonable doubt" found that the Czech Republic did not violate the applicants' right to non-discrimination under Article 14 of the Convention.

As mentioned before, the case was referred to the Grand Chamber which came to the opposite conclusion based on the same facts and evidence in front of it. The Grand Chamber reiterated the Court's main principles applied during the assessment of an individual application: the concept of indirect discrimination, the shared burden of proof, the freedom of the admissibility and evaluation of evidence, the adaptive interpretation of the standard of proof, the acceptance of inferences and presumptions, and the role of statistics in proving indirect discrimination.[191] The concept of indirect discrimination, the allocation of the burden of proof and the standard of proof has been discussed in this thesis in the previous chapters. For the purposes of this thesis, however, the examination of inferences, presumptions and the role of statistics are also of crucial importance. Therefore, the following subchapters analyses the evidentiary value of reports of independent supervisory bodies and documents produced by NGOs. Furthermore, it examines the significance of statistical inferences in the procedure of proving indirect discrimination..

4.2.2. Reports of Supervisory Bodies

The Grand Chamber noted in *D.H. and others* that 'as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority'.[192] Due to this fact, the Grand Chamber assigned significant weight to the reports of independent supervisory bodies and data adduced by NGOs. After stating that the strict standard of proof "beyond reasonable doubt" has to be lowered in cases of alleged indirect discrimination, it was also established that due to the history of the Roma minority in Europe, the case cannot be examined without taking the general societal situation of the Roma into account. [193]

[189] *D. H. and others*, Second Section, para. 37.
[190] *D. H. and others*, Second Section, para. 37.
[191] *D. H. and others*, Grand Chamber, paras. 175-181.
[192] *D.H. and others*, Grand Chamber, para. 182.
[193] *D.H. and others*, Grand Chamber, para. 182.

During the assessment of the case, the Grand Chamber relied heavily on inferences drawn from the document submitted by third-party interveners. The importance of these documents and findings are shown in the arguments of the Second Section and the Grand Chamber. Had the Second Section assigned evidentiary value to these documents, the outcome of the procedure before the Chamber would have been different. As it was established already by the Second Section, the difference in treatment did not originate from the wordings of the statutory provisions.[194] Therefore, without placing the domestic legislation in to context, it would be extremely difficult to establish that the statutory regulation regarding the placement of children in "special schools" had a prejudicial effect on children of Roma ethnicity.

As it was discussed in the second chapter, the Court has a long tradition in relying on documents produced by NGOs, as these documents can provide valuable insights on the situation of human rights in a State in general and elaborated examination in specific issue. Moreover, the analyses of the NGOs can assist the Court in the interpretation of domestic legal rules.

In *D.H. and others*, the decisive argument was based on inferences drawn from reports of the Czech authorities submitted in accordance with Article 25 § 1 of the Framework Convention for the Protection of National Minorities, Advisory Committee on the Framework Convention, ECRI and European Monitoring Centre on Racism and Xenophobia.[195] The Grand Chamber concluded based on the facts of the case established by the applicant and the respondent State, and the reports of these bodies revealing a dominant trend regarding the education of Roma children in the Czech Republic that

> it has been established that the relevant legislation as applied in practice at the material time had a disproportionately prejudicial effect on the Roma community, the Court considers that the applicants as members of that community necessarily suffered the same discriminatory treatment. Accordingly, it does not need to examine their individual cases.[196]

Due to the fact that the reliance on facts beyond the scope of the individual application was severely criticised in the dissenting opinions[197], it is of crucial importance to analyse what are

[194] D.H. and others, Grand Chamber, para. 185.
[195] D.H. and others, Grand Chamber, para. 192.
[196] D. H. and others, Grand Chamber, para. 209.
[197] "4. The approach:
After noting the concerns of various organisations about the realities of the Roma's situation, the Chamber stated: "*The Court points out, however, that its role is different from that of the aforementioned 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* ..." (§ 45).

the facts that the Grand Chamber considered necessary to determine whether the respondent State violated the applicants' rights under Article 14 of the Convention.

The general situation regarding the education of the Roma minority has already been concerning in 1997, according to the European Commission against Racism and Intolerance[198]. The issue of channelling Roma children to "special schools" established for the education of mentally retarded children has already been raised in 2000 by ECRI[199].

The importance of the reports by supervisory bodies and the findings therein can be well-demonstrated by looking at the argument the Government of the Czech Republic presented.

1. A neutrally formulated rule

The Government argued that the both the Schools Act 1984 and the Decree no. 127/1997 on specialised schools, the legislation in force at the material time, referred only to children with mental disabilities preventing them from following the curricula in ordinary primary schools.[200] The Government also emphasised that 'race, colour or association with a national minority had not played a determining role in the applicants' education'.[201] Furthermore, the Government pointed out that the applicants did not provide sufficient evidence to the contrary. Without reference to the societal context, the history of the Roma minority in the Czech Republic, and reference to the concept of indirect discrimination it has to be concluded that the rule on the "special schools" does not have a discriminatory intent, but it is a tool to address special educational needs of children with mental or learning disabilities. If the analysis of the application assesses only the facts of the specific case, the conclusion is similar to what the Second Section concluded.

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5. Yet the Grand Chamber does the exact opposite. In contradiction with the role which all judicial bodies assume, the entire judgment is devoted to assessing the overall social context – from the first page ("historical background") to the last paragraph, including a review of the "Council of Europe sources" (fourteen pages), "Community law and practice" (five pages), United Nations materials (seven pages) and "other sources" (three pages, which, curiously, with the exception of the reference to the European Monitoring Centre, are taken exclusively from the Anglo-American system, that is, the House of Lords and the United States Supreme Court). Thus, to cite but one example, the Court states at the start of paragraph 182: "*The Court notes that as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority*." Is it the Court's role to be doing this?" – Dissenting Opinion of Judge Borrego Borrego, paras. 4-5., *D. H. and others*, Grand Chamber

[198] European Commission Against Racism and Intolerance. *First report on Czech Republic*. Adopted on September 1997, Published on 25 September 1997, pp. 7-8.

[199] European Commission Against Racism and Intolerance. *Second report on the Czech Republic*. Adopted on 18 June 1999, Published on 21 March 2000, p. 13, para. 32.

[200] *D.H. and others*,Grand Chamber, paras. 30 and 34-36.

[201] *D.H. and others*, Grand Chamber, para. 147.

However, the report provided by European Commission against Racism and Intolerance noted the following:

> although systematic segregation of Roma children no longer existed as educational policy segregation was practised by schools and educational authorities in a number of different, *mostly indirect, ways*, sometimes as the *unintended effect of policies and practices* and sometimes as a result of residential segregation. Schools and educational authorities may, for example, segregate pupils on the basis of a perception of "their different needs" and/or as a response to behavioural issues and learning difficulties. The latter could also lead to the frequent placement of Roma pupils in special schools for mentally handicapped children, which was still a worrying phenomenon in member States of the European Union like Hungary, Slovakia and the *Czech Republic*.[202]

Moreover, as it has been established and discussed in this thesis, the scope of the Convention includes not only direct discrimination, but also indirect discrimination. The concept of indirect discrimination includes the element of a seemingly neutral rule, policy or practice that has a significantly disproportionate effect on persons compared to persons in relevantly similar situation.[203]

Given the fact that several supervisory bodies produced reports on the worrying situation that Roma children are segregated based on perceived learning disabilities, it can be concluded, even "beyond reasonable doubt" that the practice of the placement of these children was generally applied in the Czech Republic.[204]

2. Psychological tests applied objectively

The Government argued that the children were thoroughly evaluated with the aid of personalised pedagogical and psychological tests carried out by educational psychology centres before their placement in "special schools".[205] Moreover, the Government argued that as a result of the tests, among the 18 applicants, the learning difficulties were diagnosed in all of

[202] D.H. and others, Grand Chamber, para. 104. See also the report published in May 2006 by the European Monitoring Centre on Racism and Xenophobia: Roma and Travellers in Public Education - An overview of the situation in the EU Member States, pp. 46-49. (emphasis added)
[203] Council Directive 2000/43/EC, article 2 §2(b)
[204] For further information on the *de facto* segregation of Roma children in primary education, see: Council of Europe: Commissioner for Human Rights, *Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on the Human Rights Situation of the Roma, Sinti, and Travellers in Europe*, 15 February 2006, CommDH(2006)1; *Second periodic report on measures taken to give effect to the principles set out in the Framework Convention for the Protection of National Minorities under Article 25, paragraph 2 of the Convention*; Advisory Committee on the Framework Convention for the Protection of National Minorities - Opinion on the Czech Republic adopted on 6 April 2001; Advisory Committee on the Framework Convention for the Protection of National Minorities - *Second opinion on the Czech Republic* adopted on 24 February 2005
[205] *D.H. and others*, Grand Chamber, para. 150.

them, except for one, who was on the borderline between learning difficulties and a socio-culturally disadvantaged environment.[206]

While the requirement of the evaluation of the children's learning abilities seems like an objectively formulated condition, the reports produced by supervisory bodies suggest that the tests applied are not reliable as they were designed for the assessment of Czech children and do not take into consideration the specifics of the Roma minority.[207] For instance, the report published in 2006 by the European Centre for Monitoring Racism and Xenophobia mentions that the tests applied by the educational psychology centres, the Wechsler Intelligence Scale for Children (WISC – III) 'arguably ignore linguistic and cultural differences revealing less about the abilities of Roma children and more about the ethnocentric assumptions of the testers'.[208]

The Government of the Czech Republic itself stated in the report submitted pursuant to Article 25 under the Framework Convention for the Protection of National Minorities that '[t]hese tests are conceived for the majority population and do not take Romany specifics into consideration. […] The number of Romany children in special schools is high; some schools have 80 to 90 percent of Romany students.'[209]

Further observations were submitted by the International Step by Step Association, the Roma Education Fund and the European Early Childhood Education Research Association, noting that the lack of national definitions of 'disability' in Eastern-European countries resulted in connecting the children's socio-cultural backroad to some form of disability. They concluded that

> the assessment of Roma children in the Ostrava region did not take into account the language and culture of the children, or their prior learning experiences, or their unfamiliarity with the demands of the testing situation. Single rather than multiple sources of evidence were used. Testing was done in one sitting, not over time. Evidence was not obtained in realistic or authentic settings where children could demonstrate their skills. Undue emphasis was placed on individually administered, standardised tests normed on other populations.[210]

Without these documents on the nature of the tests applied to evaluate the children before their placement in "special schools", the unconscious biases resulting in the disproportionately high

[206] *D.H. and others*, Grand Chamber, para. 152.
[207] *D.H. and others*, Grand Chamber, paras. 40-41.
[208] *Roma and Travellers in Public Education - An overview of the situation in the EU Member States*, p. 46.
[209] Report Submitted by the Czech Republic pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities, 1 April 1999, p. 29.
[210] D.*H. and others*, Grand Chamber, para. 44.

number of Roma children in these schools would be extremely difficult to prove. As the reports of different supervisory bodies came to similar conclusions, and the Government of the Czech Republic also admitted that the psychological and aptitude tests were not adapted to the specificities of Roma children, whose socio-cultural background significantly differs from the general population, the inefficiency of the tests can be accepted as a fact.

In the *Belgian linguistics* case, the Court established that "Article 14 (art. 14) does not prohibit distinctions in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention."[211] It is, in these circumstances a positive obligation of the State to correct these factual inequalities to ensure equal treatment under the Convention. The Second Section concluded that it was the State's aim to, by creating special schools, adapt the education system to the needs, aptitudes and the disabilities of the children.[212]

While the Grand Chamber noted that the evaluation of the validity of the tests is not its role, based on the evidence it concluded that 'at the very least, there is a 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'.[213]

Accepting the reports of supervisory bodies and the submissions of third-party interveners as evidence seems to be crucially important in order to afford protection to the rights under the Convention. The difference between the Second Section's conclusion regarding the aptitude tests to the Grand Chamber's findings shows the inconsistency during the evaluation of a case. The Second Section applied the strict standard of "proof beyond reasonable doubt", and concluded that

> the tests in the instant case were administered by qualified professionals, who are expected to follow the rules of their profession and to be able to select suitable methods. It would be difficult for the Court to go beyond this factual finding and to ask the Government to prove that the psychologists who examined the applicants had not adopted a particular subjective attitude.[214]

Contrary to the Second Section's argument, the Grand Chamber concluded that while in the individual case, it cannot be proved without doubt that the professionals carrying out the

[211] Belgian linguistics case, para. 7.
[212] Arnardóttir, Oddný Mjöll. *Non-discrimination Under Article 14 ECHR: the Burden of Proof.* 51 Scandinavian Studies in Law 13-39. 2007, p. 30.
[213] *D.H. and others*, Grand Chamber, para. 201.
[214] *D.H. and others*, Second Section, para. 49.

evaluation of the children had a racially prejudiced attitude, with the aid of inferences it can be established that there is at least a possibility that the tests and the resulting placements in "special schools" had a disproportionate effect on children who are members of the Roma community.[215] Lowering the standard of proof is in line with the role of the Court, that is to ensure that member States observe their obligations under the European Convention on Human Rights.

3. Consent of the parent or legal guardian

According to the Article 7 of Decree no. 127/1997 on specialised schools, in force at the material time, the consent of the parent or legal guardian of the children was *conditio sine qua non* regarding the placement of the children in "special schools".[216] The Government stated that the requirement to obtain the consent of the parent or legal guardian acts as a safeguard to ensure that there is no room for arbitrary decisions with regards to the educational needs of the children.[217] The applicants, however, argued that they lacked the necessary information to enable them to make a valid decision. Moreover, two of the written parental consents appeared to have been pre-dated, which, according to the applicants indicate the quasi-automatic procedure that was followed during the assessment of the mental and intellectual capacity of Roma children.[218]

The Second Section of the Court accepted the argument of the Government, and concluded that the parents bear the primary responsibility to make informed decisions about the education of their children, and it is their duty to gather all the necessary information that enables them to form this decision.[219] The standard of proof was high, and the Second Section was not persuaded "beyond reasonable doubt" that the condition to obtain parental consent was not serving as a safeguard to guarantee the objective application of the statutory rule.

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[215] *D.H. and others*, Grand Chamber, para. 200.
[216] *D.H. and others*, Grand Chamber, para. 46.
[217] The difficulties of the objective evaluation of the parental consent to the placement of their children in "special schools" (or in some cases, their request of their child to be placed in these schools) has been studied by the report published by the European Monitoring Centre for Racism and Xenophobia: *Roma and Travellers in Public Education - An overview of the situation in the EU Member States:* "Placement in special education could also be preferred by parents to avoid racial abuse or due to lack of information regarding its far reaching negative consequences. As the practice has been used for several years Roma parents may also consent to such placement for their children, because they were themselves educated in that way." Pp. 46-47.
[218] European Commission Against Racism and Intolerance. *Second report on the Czech Republic*. Adopted on 18 June 1999, Published on 21 March 2000, pp. 13-14.
[219] *D.H. and others*, Second Section, para. 51.

The Grand Chamber, however, relied on the inferences drawn from the reports of supervisory bodies. As it has been noted by various organisations, the parents of the children often lacked information regarding the "special schools", the curriculum they follow, and the long-term negative consequences of obtaining primary education in these schools.[220] The Grand Chamber was also not persuaded that the parents of the Roma children were capable of considering the options of education for their children, as they were members of a disadvantaged minority and often poorly educated.[221] Furthermore, according to a report produced by the European Commission against Racism and Intolerance, the opportunity to educate their children in "special schools" were often presented to the parents as a chance to receive specialized education adapted to their needs, and to be with other Roma children.[222]

Moreover, the Grand Chamber found that even an informed parental consent cannot act as a waiver of the child's right to non-discrimination.[223] The Grand Chamber referred to the principle formulated in *Hermi v. Italy*, that 'such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance […]. In addition, it must not run counter to any important public interest.'[224]

The Second Section, during the assessment of the case, concluded correctly that it cannot be established, based on the specific facts of the case, "beyond reasonable doubt" that the applicants' placement in "special schools" was the result of racial prejudice, or that the measure applied in the case of the applicants was intended to preserve the segregation of Roma children in primary education. However, the information provided by the supervisory bodies helped to show that it is highly probable that the applicants, as members of the Roma community, suffered a discriminatory treatment. The different approaches of the Second Section and the Grand Chamber show the risk of the vaguely defined standard of proof. Had the Grand Chamber followed the approach of the Second Section, the conclusion would have been entirely different.

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[220] For further reading, see: *Stigmata: Segregated Schooling of Roma in Central and Eastern Europe, a survey of patterns of segregated education of Roma in Bulgaria, the Czech Republic, Hungary, Romania, and Slovakia,* European Roma Rights Center, 12 August 2004, pp. 55-56.
[221] *D.H. and others*, Grand Chamber, para. 203.
[222] European Commission against Racism and Intolerance. *Third report on the Czech Republic.* Adopted on 5 December 2003, Published on 8 June 2004, p. 22, para. 108.
[223] *D.H. and others*, Grand Chamber, para. 204.
[224] *Hermi v. Italy*, application no. 18115/02, Court (Grand Chamber), Judgment (Merits), 18 October 2006

Inferences also played a significant part in the evaluation of the cases *Oršuš and others v. Croatia* and *Horváth and Kiss v. Hungary*. In *Oršuš and others*, the First Section of the Court concluded that the placement of Roma children in separate Roma-only classes was a result of objective assessment of their command of the Croatian language and was not influenced by their race or ethnic origin.[225] The Grand Chamber, however, relied on the aid of reports of independent supervisory bodies and documents produced by NGOs, and concluded that the fact that some of the applicants were transferred to Roma-only class after attending mixed class and the fact that the language requirement was applied exclusively to Roma pupils established prima facie that Roma children were treated differently than their non-Roma peers.[226] Moreover, the 'lack of a prescribed and transparent monitoring procedure left a lot of room for arbitrariness'.[227]

In the case *Horváth and Kiss v. Hungary*, the applicants were enrolled in a remedial school for children with mental disabilities, based on tests that assessed the applicants' learning abilities and difficulties. The Court during the assessment of the case, referred to the Grand Chamber decisions of *D.H. and others* and *Orsus and others* with regards to the reports of the general societal context of the Roma minority in Eastern Europe. [228] In conclusion, the Court considered that

> [s]ince it has been established that the relevant legislation, as applied in practice at the material time, had a disproportionately prejudicial effect on the Roma community, and that the State, in a situation of *prima facie* discrimination, failed to prove that it has provided the guarantees needed to avoid the misdiagnosis and misplacement of the Roma applicants, the Court considers that the applicants necessarily suffered from the discriminatory treatment.[229]

Again, the Court applied a lower standard than the strict "beyond reasonable doubt" and assigned significant evidentiary value to the evidence of past discrimination and misdiagnosis of children members of the Roma minority.

The presented cases demonstrate well the inconsistencies in the Court's practice with regards to evidence and the standard of proof. The next subchapter examines the role of statistics in proving indirect discrimination, and the evidentiary value the Court assigns to them.

[225] Or*šuš and others,* First Section, para. 68.
[226] Or*šuš and others,* Grand Chamber, para. 155.
[227] *Orsus and others*, Grand Chamber, para.175.
[228] *Horváth and Kiss v. Hungary*, para. 76.
[229] *Horváth and Kiss v. Hungary*, para. 18.

4.2.3. Evidentiary Value of Statistical Data

The Court reinstated in several decisions that its standard of proof is "beyond reasonable doubt". In cases of alleged indirect discrimination, however, the applicants are in a severely disadvantaged position to provide evidence. What the applicants must establish is that a seemingly neutral policy or measure had a disproportionate effect on them, in comparison to persons in an analogous or relevantly similar situation.

The high standard of proof "beyond reasonable doubt" would make proving indirect discrimination extremely difficult for the applicants. Therefore, the Court in practice applies a lower standard, and requires the applicant to provide enough evidence to establish a rebuttable presumption. This principle is formulated in the *D.H. and others* judgment:

> "the Court has noted in previous cases that applicants may have difficulty in proving discriminatory treatment (…). In order to guarantee those concerned the effective protection of their rights, less strict evidential rules should apply in cases of alleged indirect discrimination."[230]

There are two approaches that confirms the ease of evidentiary demands on applicants: the use of inferences and statistics.[231] The importance and evidentiary value of inferences drawn from reports of independent supervisory bodies, NGOs and other organisations have been discussed in the previous subchapter.

On the role of statistics in proving indirect discrimination, the Court stated in the *Hoogendijk* case that:

> [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

[230] *D.H. and others*, Grand Chamber, para. 186.

[231] 'Inference is the act or process of deriving logical conclusions from premises known or assumed true. In the law of evidence, an *inference* is a truth or proposition drawn from another that is supposed or admitted to be true or a process of reasoning by which a fact or a proposition sought to be established is *deduced* as a logical consequence from other facts, already proved or admitted. It is a "logical and reasonable conclusion of a fact" not presented by direct evidence, but which, by process of logic and reason, a trier of fact may conclude exists from the established facts. Inferences are deductions or conclusions that, with reason and common sense, lead a jury to infer facts that have been established as evidence.' See: Dr. Robert J Girod: *Logical Investigative Methods – Critical Thinking and Reasoning for Successful Investigations*. Taylor and Francis Group. 2015. p. 34.

> to the respondent Government, it will be in practice extremely difficult for applicants to prove indirect discrimination.[232]

Therefore, the use of statistics as evidence have a significant role in proving indirect discrimination. As it has been discussed in the previous chapters, one of the elements of indirect discrimination is the significantly disproportionate effect of a neutral rule, policy or practice on persons compared to persons in an analogous or relevantly similar situation. To prove this disproportionality, statistics are often the only available means. However, while the Court stated that it has no barriers regarding the type of evidence it accepts during the proceedings before it, and it evaluates freely all evidence before it, not all statistics are considered as having sufficient evidentiary value. The fact that there is no guideline on what type of statistics are considered sufficient to become evidence, calls for looking into what statistics does the Court accept as reliable.

Before the assessment of the Court's practice regarding the evaluation of statistics as evidence, the difficulties of obtaining accurate and reliable statistical data that contains information of ethnicity needs to be discussed. The European Roma Rights Centre points out that comprehensive and accurate data on the education of people of Roma origin does not exist.[233] Therefore, the assessment of the situation regarding the education of Roma children is extremely difficult, and the number of people belonging to the Roma minority is often underestimated.[234] According to the ERRC, the available statistical data comes from three sources: official statistics based on the self-identification of Roma; central or local governmental institutions' data collection based on the identification of Roma children by teachers and school directors; and finally, data collected by NGOs and other organisations during field research.[235]

The self-identification of Roma poses significant challenges in assessing their overall social situation. Often, members of the Roma minority do not wish to identify as such, due to the fear of discriminatory treatment and the often-hostile environment. As it has been pointed out by the International Federation for Human Rights, due to the general attitude towards Roma, many schools were unwilling to accept Roma students.[236] This reluctance can be explained by the

[232] *Hoogendijk v. the Netherlands*, p. 21.
[233] *Stigmata: Segregated Schooling of Roma in Central and Eastern Europe, a survey of patterns of segregated education of Roma in Bulgaria, the Czech Republic, Hungary, Romania, and Slovakia,* European Roma Rights Center, 12 August 2004, p. 21.
[234] *Ibid*.
[235] *Ibid*, pp. 21-22.
[236] *D.H. and others*, Grand Chamber, para. 48.

reaction of parents of non-Roma children, 'which, in numerous cases, has been to remove their children from integrated schools because the parents fear that the level of the school will fall following the arrival of Roma children or, quite simply, because of prejudice against the Roma'.[237]

This phenomenon prompted the parents of Roma children to consider consenting to their children's placement in "special schools" or Roma-only classes. As the Grand Chamber noted in *D.H. and others*, the parent had to make 'a choice between ordinary schools that were ill-equipped to cater for their children's social and cultural differences and in which their children risked isolation and ostracism, and special schools where the majority of the pupils were Roma'.[238]

Furthermore, according to the report by the European Commission on measuring discrimination, the collection of statistical data is challenging, due to the difficulties of 'the construction of comparator groups and the calculation of relative disadvantage that is at the core of indirect discrimination claims'.[239] Moreover, due to the lack of a systematic approach in most European countries regarding the measurement of equality, official statistics containing information of ethnic origin of the population is rare.[240]

The Court stated in *D.H. and others* that "[w]hen it comes to assessing the impact of a measure or practice on an 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."[241] Third party interveners in *D.H. and others* also submitted that

> In Council directives and international instruments, *statistics were the key method of proving indirect discrimination*. Where measures were neutral on their face, statistics sometimes proved the only effective means of identifying their varying impact on different segments of society. Obviously, courts had to *assess the credibility, strength and relevance of the statistics* to the case at hand, requiring that they be tied to the applicant's allegations in concrete ways.[242]

Based on these considerations, there are certain questions that need to be addressed in order to establish the significance and evidentiary value of statistical data: How does the Court assess statistics? How does it interpret the terms 'reliable' and 'significant' in the context of statistics

[237] *Ibid*.
[238] *D.H. and others*, Grand Chamber, para. 203. (emphases added)
[239] Makkonen, Timo. *Measuring Discrimination: Data Collection and EU Equality Law*. Directorate-General for Employment, Social Affairs and Equal Opportunities. European Commission. Luxembourg, 2007. p. 6.
[240] *Ibid.*
[241] *D.H and others*, Grand Chamber, para. 188.
[242] *D. H and others*, Grand Chamber, para. 164.

as evidence? It is the author's view that assessing the evidentiary value of statistics has two aspects. On the one hand, it must be determined that the statistical data is reliable in a formal way, so its credibility must be assessed. On the other hand, the figures of the statistics must be relevant and capable of revealing a dominant trend within the scope of the allegation made under the Convention.

A good indicator of the credibility of the statistics is that the respondent Government does not dispute the figures. This principle was articulated in *Hoogendijk*, here the Court noted that undisputed official statistics are capable of establishing *prima facie* that a specific, neutrally formulated rule has a significantly disproportionate effect on persons compared to persons in an analogous or significantly relevant situation.[243].

In *D.H and others*, the Court observed that the "figures are not disputed by the Government and that they have not produced any alternative statistical evidence."[244] The same argument was used in *Horváth and Kiss v. Hungary*, where it was observed that

> [t]he underlying figures not having been disputed by the Government – who have not produced any alternative statistical evidence – the Court considers that these figures reveal a dominant trend. It must thus be observed that a general policy or measure exerted a disproportionately prejudicial effect on the Roma, a particularly vulnerable group.[245]

In *Oršuš and others*, while the statistics submitted were not contested, the figures revealing the proportion of Roma children in special classes were not sufficient to prove different treatment.[246]

As to the assessment of the figures in the statistical evidence, it can establish a *prima facie* case if it can show that the measures or practice has a significantly prejudicial effect on the applicants. The Court uses terms such as "large numbers" and "vast over-representation" to refer to the disproportionate effect. In *D.H. and others*, the statistics submitted

> indicate that at the time 56% of all pupils placed in special schools in Ostrava were Roma. Conversely, Roma represented only 2.26% of the total number of pupils attending primary school in Ostrava. Further, whereas only 1.8% of non-Roma pupils were placed in special schools, the proportion of Roma pupils in Ostrava assigned to special schools was 50.3%.[247]

[243] *Hoogendijk v. the Netherlands*, p. 21.
[244] *D. H. and others*, para. 191.
[245] *Horváth and Kiss v. Hungary*, para.110.
[246] *Oršuš and others*, Grand Chamber, para. 152.
[247] *D.H. and others, Grand Chamber*, para. 190.

The Court found that these figures are not sufficient to establish a rebuttable presumption of the discriminatory effect of the practice. In the judgment, the Chamber acknowledged that while reports and statistics describe a worrying situation, the respondent State established the special schools in order to provide basic education to the pupils who had learning disabilities.

In *Oršuš and others*, the Court assessed the data submitted, and again found that it is not conclusive enough to be able to establish a *prima facie* case:

> [t]he proportion of Roma children in the lower grades in Macinec Primary School varies from 57% to 75%, while in Podturen Primary School it varies from 33% to 36%. The data submitted for the year 2001 show that in Macinec Primary School 44% of pupils were Roma and 73% of those attended a Roma-only class. In Podturen Primary School 10% of pupils were Roma and 36% of Roma pupils attended a Roma-only class. These statistics demonstrate that only in Macinec Primary School did a majority of Roma pupils attend a Roma-only class, while in Podturen Primary School the percentage was below 50%. This confirms that it was not a general policy to automatically place Roma pupils in separate classes in both schools at issue. Therefore, the statistics submitted do not suffice to establish that there is prima facie evidence that the effect of a measure or practice was discriminatory.[248]

In both cases, while the Court was unable to accept the statistical evidence as conclusive, it observed that the figures reveal a dominant trend that large numbers of Roma pupils were placed in special schools or Roma-only classes. It can be concluded form the assessment of the statistical data that the Court seem to assign some evidentiary value even to those statistics that it does not consider conclusive to establish a *prima facie* case.

In *Horváth and Kiss*, on the other hand, the Court found that the statistical data was sufficiently conclusive to prove that children of Roma ethnicity have been overrepresented in special educational programmes, due to their systematic misdiagnosis of mental disability:

> The proportion of Roma students at the Göllesz Viktor Remedial Primary and Vocational School was 40 to 50% in the last ten years. Statistical data indicate that in 2007 Roma represented 8.7% of the total number of pupils attending primary school in Nyíregyháza. In 1993, the last year when ethnic data were officially collected in public education in Hungary, at least 42% of the children in special educational programme were of Roma origin according to official estimates, though they represented only 8.22% of the total student body.[249]

The Court noted that the Government did not dispute the figures in the statistics and did not provide alternative statistical data. Therefore, it accepted that the data revealed a dominant

[248] *Oršuš and others*, Grand Chamber, para. 152.
[249] *Horváth and Kiss*, para. 7.

trend, and the fact that 'a general policy or measure exerted a disproportionately prejudicial effect on the Roma, a particularly vulnerable group'.[250]

The Court's assessment practice regarding statistical evidence shows that there is no general guideline on what data is sufficient to establish a rebuttable presumption in individual cases. In both *D.H. and others* and *Oršuš and others*, while the statistical data in itself was not enough to prove discrimination, the Court read the figures together with reports from independent supervisory bodies and third-party interveners.

The Court's declared standard of proof, "beyond reasonable doubt", would suggest that discrimination must be proved based on evidence in the instant case. By referring to a dominant trend, or a larger societal context, the Court is clearly departing from the strict standard of proof. This approach met with criticism, in the dissenting opinions. For example, Judge Borrego Borrego pointed out that the Court's role is not to assess the general position of a minority in society, but to establish whether the respondent State was in breach of Article 14 of the ECHR:

> After noting the concerns of various organisations about the realities of the Roma's situation, the Chamber stated: "*The Court points out, however, that its role is different from that of the aforementioned 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 ...*" (§ 45).
>
> Yet the Grand Chamber does the exact opposite. In contradiction with the role which all judicial bodies assume, the entire judgment is devoted to assessing the overall social context (…). Thus, to cite but one example, the Court states at the start of paragraph 182: "*The Court notes that as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority*." Is it the Court's role to be doing this?
>
> Following this same line, which to my mind is not one appropriate for a court, the Grand Chamber stated in paragraph 209 after finding a discriminatory difference in treatment between Roma and non-Roma children: "*... since it has been established that the relevant legislation ... had a disproportionately prejudicial effect on the Roma community, the Court considers that the applicants as members of that community necessarily suffered the same discriminatory treatment. Accordingly, it does not need to examine their individual cases*."[251]

Similar concerns were expressed by several Judges in the dissenting opinion to the *Oršuš v. others* judgment. The Judges underlined that the statistical evidence presented in the case was not conclusive enough to be considered as *prima facie* evidence capable of proving that the

[250] *Horváth and Kiss*, para. 110.
[251] *D.H. and others*, Grand Chamber, Dissenting opinion of Judge Borrego Borrego, paras. 4-6.

placement of pupils in special classes was discriminatory. They also agreed that discrimination can be proved without statistical evidence. However, they stated that

> [t]he present case is thus not about the situation of a minority in general but about a concrete question of education practice (in two schools) in respect of a minority insufficiently conversant with the language of instruction, and the measures taken by the domestic authorities to deal with such a situation. (…) [T]he facts would have to show that the effect of the practice had an adverse impact on the applicants and could not be justified on other grounds.
>
> It would seem that the majority viewed the case in the first place as a means of further developing the notion of indirect discrimination in the Court's jurisprudence. To be able to do so it was, however, obliged to lean on arguments outside the concrete facts, referring to the situation of the Roma population in general (…). As a result, this became in some respects more a judgment on the special position of the Roma population in general than one based on the facts of the case, as the focus and scope of the case were altered and interpreted beyond the claims as lodged by the applicants before the Court.[252]

The presented judgments reveal the practice of the Court in assessing evidence in indirect discrimination cases. While providing statistical evidence is an accepted way of proving indirect discrimination, it is not necessarily capable of establishing the rebuttable presumption. Given the disadvantaged position of the applicants to access to evidence, the Court often relies on reports from advisory committees and independent supervisory bodies. However, this approach suggests that while continuously reaffirming that its standard of proof is beyond reasonable doubt", the Court has in fact abandoned this standard when it is examining whether the applicants established a *prima facie* case.

Applying the strict proof "beyond reasonable doubt" principle would have been ineffective in affording protection to the applicants under the Convention in *Oršuš v. others*, therefore the Grand Chamber decided to apply a less strict evidentiary standard. The Grand Chamber referred to the Council Directive on equal treatment:

> [t]he appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence. [253]

[252] *Oršuš and. others*, Grand Chamber, Jointly partly dissenting opinion of Judges Jungwiert, Vajić, Kovler, Gyulumyan, Jaeger, Myjer, Berro-Lefèvre and Vučinić, paras. 14-15.
[253] Council Directive 2000/43/EC, para 15.

The European Court of Justice also ruled that it permits tribunals to rely on statistical evidence, given that it is valid and significant[254]. Furthermore, the Grand Chamber referred to information submitted by third-party interveners, noting that national courts and UN supervisory bodies also accept statistics as evidence of indirect discrimination in connection of the applicants' burden to establish a prima facie case. The Court consequently refers to "official" and "reliable" statistics, however, it has not provided any definition or guidance on what statistics does it consider reliable based on critical examination.

In *D.H. and others*, the statistics submitted by the applicants were obtained from questionnaires sent out to the head teachers of ordinary and special schools in Ostrava. The Government argued that the figures in the statistics are not sufficiently conclusive and that the questionnaires did not contain official information on the ethnic origin of the pupils. The problem regarding the difficulties in collecting comprehensive data including ethnicity or association with a national minority has been pointed out by the European Commission.[255] The Grand Chamber, while observing that the data cannot be considered entirely reliable, noted that it does "reveal a dominant trend that has been confirmed both by the respondent State and the independent supervisory bodies which have looked into the question."[256]

As discussed previously, the Grand Chamber relied on reports submitted by the respondent State and the advisory bodies, and concluded that "the statutory provisions had considerably more impact in practice on Roma children than on non-Roma children and resulted in statistically disproportionate numbers of placements of the former in special schools."[257] Moreover, the Grand Chamber stated that, in contrast to the Chamber's decision, it is not necessary to prove discriminatory intent on the part of the relevant authorities.[258]

This argument is a clear deviation from the high standard proof "beyond reasonable doubt". However, the flexible interpretation of the standard, or indeed the application of a lower standard is beneficial for the applicants, who are in a significantly disadvantaged position with regards to access of evidence, compared to the Government. Accepting statistical inferences aims to correct this power imbalance.

[254] *D. H. and others*, Grand Chamber, para. 187.
[255] Makkonen, Timo. *Measuring Discrimination: Data Collection and EU Equality Law*. Directorate-General for Employment, Social Affairs and Equal Opportunities. European Commission. Luxembourg, 2007. p. 6.
[256] *D. H. and others*, Grand Chamber, para. 191.
[257] *D. H. and others*, Grand Chamber, para. 193.
[258] *D.H. and others*, Grand Chamber, para. 193.

The Court formulated in previous cases that while statistics are accepted as evidence in proving a breach of Article 14, it is possible to prove indirect discrimination without statistical evidence.[259] As discussed before, in *Oršuš and others v. Croatia* 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 several schools in Međimurje County, including the two primary schools attended by the applicants in the present case. Thus, the measure in question clearly represents a difference in treatment.[260]

The Court also referred to general comments by the ECRI and the Commissioner of Human Rights, both reporting that non-Roma parents opposed to the introduction of mixed classes, creating an atmosphere of non-tolerance, thus hindering the end of segregation.[261] The burden of proof shifted to respondent Government, that had to prove that the practice of maintaining Roma-only classes had an objective and reasonable justification.

These cases demonstrate the attitude of the Court when deciding on alleged indirect discrimination in breach of the Convention. While the Court repeated in numerous decisions that its standard of proof is "beyond reasonable doubt", it is clear that the interpretation of the standard is dependent on the subject matter. In indirect discrimination cases, an important aspect of evidence is the elements that need proof. When submitting an individual application alleging indirect discrimination, the applicant needs to establish a disproportionate effect of a seemingly neutral measure, practice or policy. The use of statistical inferences is common in the decisions in segregation: when an applicant is able to demonstrate discriminatory patterns and connect these patterns to a seemingly neutral regulation or policy, the Court may consider it sufficient to establish a *prima facie* case. Moreover, given the fact that the applicants have to select a group of comparators, and the "use of statistics helps to shift focus away from narrow individual comparisons and toward the identification of broader underlying structural inequalities".[262]

[259] *D.H. and others*, Grand Chamber, para. 188.
[260] *Oršuš and others*, Grand Chamber, para. 153.
[261] *Oršuš and others*, Grand Chamber, para 154
[262] *Non-Discrimination in International Law: A Handbook for Practitioners.* Interights, 2005, p. 127

5. Conclusion

As demonstrated in this thesis, the European Court of Human Rights has no formalised standard of proof. According to the Convention, the Court is free to determine its own evidentiary standards and it has no procedural barriers to the admissibility of evidence or predetermined formulae for its assessment. While the ability of the Court to articulate its own standards can be justified given the wide range of cases and the various types of Convention rights, this practise creates ambiguity and legal uncertainty.

The Court, when interpreting the Convention, relies on the rules of international law, especially when they refer to the protection of human rights. The present research analysed the interrelationship between the Convention and other regional documents, within both the Council of Europe and the European Union. These documents together form the European legal framework of non-discrimination. Using this framework, the Court created its own analytical framework, through instrumental decisions. These decisions interpreted the concept of indirect discrimination, the shared burden of proof and the standard of proof.

The role of the Court, when considering individual applications is to determine whether the respondent State was in violation with the Convention. The principle of the presumption of compliance and the legal maxim *onus probandi actori incumbit* places the burden of proof on the applicant. The Court stated in *Nachova* that its standard of proof is "beyond reasonable doubt". In indirect discrimination cases, however, it is ready to apply a lower standard:

> [t]he Court has also recognised that Convention proceedings do not in all cases lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (…) In certain circumstances, where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.[263]

However, proving indirect discrimination, as demonstrated, can become an extremely difficult task for the applicants, due to their disadvantaged position compared to the respondent State. To ensure fairness and to afford protection to the applicants' rights, the Court, if the applicant establishes a rebuttable presumption of indirect discrimination, shifts the burden of proof to the respondent State.

Establishing a rebuttable presumption, however, can prove challenging. The thesis analysed the decisions in the cases of *D.H and others v. the Czech Republic* and *Oršuš and others v.*

[263] *D.H. and others*, Grand Chamber, para. 179.

Croatia. The aim of the analysis was to identify the inconsistencies in the Court's approach to the standard of proof and the level of persuasion. The fact that in both cases the Chamber and the Grand Chamber came to different conclusions calls for the re-evaluation of the standard applied by the Court.

The Chamber, in both cases, stayed within the scope of the application and the claims by the applicant. It required the applicants to establish that in their individual cases, based on the facts of the cases, the State practice of placing Roma children in "special schools" or separate classes had a disproportionate effect on them, compared to non-Roma children. As it has been shown in this research, the disproportionate effect is extremely difficult to prove.

To establish the rebuttable presumption of indirect discrimination, applicants rely heavily on statistics. While the Court previously articulated that it accepts statistics as evidence, the Chamber has not found them conclusive enough in *D.H and others*. Moreover, while it acknowledged that the statistics revealed worrying figures, based on the concrete evidence it was not convinced that it was a result of racial prejudice. The Chamber focused on the purpose of the establishment of special schools and concluded that the discriminatory motive behind the practice of the placement of Roma children in special schools had not been proven. Consequently, it refused to shift the burden of proof to the respondent State. This reasoning shows the 'failure to grasp the concept of indirect discrimination, the essence of which is that the provision or practice which is alleged to have a discriminatory effect is neutral on its face as to the prohibited ground'.[264]

The Grand Chamber, however, overturned the Second Section judgment, stating clearly that indirect discrimination 'may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group'[265] and it does not require a discriminatory intent.[266] Furthermore, the Grand Chamber considered not only the facts of the individual case, but also the overall societal context. It established that the relevant state practice is prejudicial towards the Roma community, and given that the applicants are members of that community, they 'necessarily suffered the same discriminatory treatment'.[267] The decision was criticised in dissenting opinions, stating that the Court

[264] Corinna Ferguson (2008) Running Ahead of Strasbourg: Indirect Discrimination and Article 14 ECHR, Judicial Review, 13:2, 71-77, p. 75.
[265] *D.H. and others*, Grand Chamber, para. 184.
[266] Ibid.
[267] *D.H. and others*, Grand Chamber, para. 209.

overstepped its subsidiary role when it came to a different conclusion than the Czech Constitutional Court during the review of the constitutional complaint[268] and the decision of the Second Section. On the other hand, the Grand Chamber decision was welcomed because it clearly meant that the Court is willing to rule on indirect discrimination cases, and will accept statistical evidence, as long as they are "reliable and significant".[269] While it seemed that the judgment clearly indicated a new direction regarding the assessment of indirect discrimination cases, it may not be the case.

Besides the ambiguous terms "reliable" and "significant" with regards to statistical evidence, a more obvious sign of the inconsistency in the interpretation of the Court's standard of proof is the First Section judgment in the case of *Oršuš and others v. Croatia.* The decision came after the key judgment of *D.H. and others*, however, the First Section did not take into consideration the principles established by the Grand Chamber, nor did it comprehend fully the concept of indirect discrimination. It once again examined the purpose of the creation of separate classes for pupils with an inadequate command of the Croatian language and considered it a positive measure aiming to correct factual inequalities, under the margin of appreciation of the State. Even though statistics were submitted to prove the prejudicial effect of the placement of Roma children in separate classes, the First Section, unanimously, did not find that the State violated Article 14 in conjunction with Article 2 of Protocol 1.

The case, after referral, was decided by the Grand Chamber. The Grand Chamber followed the approach of *D.H. and others*, and while it did not find the statistical data sufficient to establish the prejudicial effect, it pointed out that since '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 several schools'[270], it clearly represented a different treatment.

The Court shifted the burden of proof to the respondent State that had to prove that the different treatment was not discriminatory. However, it failed to discharge this burden, thus the Grand Chamber found that the State violated the applicants' right not to be discriminated against based on their association with an ethnic minority under Article 14 of the Convention.

The Grand Chamber, while relying on the documentary evidence, did not find the statistical data submitted by the applicants to be sufficient to prove the prejudicial effect of the measure

[268] *D.H. and others*, Grand Chamber, para. 28.
[269] Corinna Ferguson (2008) Running Ahead of Strasbourg: Indirect Discrimination and Article 14 ECHR, Judicial Review, 13:2, 71-77,. P. 76
[270] *Oršuš and others,* Grand Chamber, para. 153.

of placing Roma children in separate, Roma-only classes. Therefore, it shifted the burden of proof based on reports from independent supervisory bodies and advisory committees, describing the general societal position of the national minorities to which the applicants belong. The Grand Chamber decision on the violation of Article 14 was concluded with 9 votes to 8, and the reliance on arguments outside of the concrete facts of the cases met with criticism.

It is the author's view that the assessment of a case of indirect discrimination, especially regarding national minorities, must not be considered taken out of context. As the examined cases show, the societal context of the Roma minorities plays a significant role in deciding whether a seemingly neutral rule, policy or measure have a significantly disproportionate effect on members of these communities. Moreover, without the overall context, it would be extremely difficult to prove that the applicant was a victim of indirect discrimination.

As it has been discussed in this research, the difficulty in obtaining evidence to prove indirect discrimination lies in the nature of the violation. It is covert, based on an objective rule or measure that applies to everyone. Therefore, taken out of context, it often seems justified. However, it is the prejudicial effect of these measures that is the essence of indirect discrimination, and the burden to prove this effect lies on the applicant.

While the Court consistently states that it applies the standard "beyond reasonable doubt", it also underlined that the standard is not applied with the same scrutiny as in criminal proceedings. However, the ambiguous interpretation of the standard result in substantially different approaches to the assessment of the applications, and consequently, entirely different conclusions, as it has been shown through the cases *D.H. and others* and *Oršuš and others*.

When the Court assigns evidentiary value to the overall societal context of a minority in an individual application, it does in fact overstep the scope of the application and reaches over the facts of the case. In the author's view, departing from the strict focus on the facts of an individual case also means the departure from the standard "beyond reasonable doubt", and it is the direction the Court should be moving towards.

This research also discussed the role of the Court, which is, according to the Convention, to safeguard the observance of the obligations of the Parties. It has also been discussed that the Court has subsidiary jurisdiction, meaning that it acts as a fourth-instant tribunal. It does not aim to establish criminal guilt or civil liability; it functions to ensure that States parties to the Convention respect and guarantee the rights enshrined in the Convention. This role of the Court is further emphasized by the admissibility criteria. The Convention requires applicants to

establish the facts of the case and provide arguments substantiating their claims. Moreover, the Convention requires the applicants to exhaust all available domestic remedies. These requirements further underline the subsidiary role of the Court in protecting the Convention rights.

Given the fact that by the time an application reaches the Court, the facts of the case, as well as the claims of the applicants have already been well established, it is unreasonable to expect the Court to conduct a thorough analysis into the merits of each individual case to establish each relevant fact "beyond reasonable doubt". Instead, acting as a subsidiary supervisory body, the Court must establish, as the Grand Chamber did in *D.H. and others*, that the State rule, measure or practice in question has or can have a significantly disproportionate effect on a vulnerable minority.

It has been established by the Convention and the Court as well that the Court's rule is not to determine guilt or liability of the respondent State, but to ensure the protection of the rights enshrined in the Convention. Individual applications are capable of pointing out deficiencies in the domestic legislation, be it substantive or procedural. When the Court departs from the approach that each individual case has to be established "beyond reasonable doubt", it is able to fulfil its supervisory function, and through the assessment of the individual application, it can reveal deficiencies the respondent State has to correct in order to be in compliance with the Convention.

The Court already stated that it is ready to lower its standard of proof in certain circumstances. The analysis of the cases *D.H. and others* and *Orsus and others* showed that the Court's standard of proof, while inconsistent, in indirect discrimination cases is closer to the "preponderance of evidence" principle. In this author's view that is the approach that will ensure the highest level of protection of the vulnerable national minorities right to non-discrimination.

The required standard to shift the burden of proof is lower than "beyond reasonable doubt". The Court has articulated that in indirect discrimination cases, if the applicant is able to establish *prima facie* that he was treated differently than persons in a relevantly similar situation, the burden shifts to the respondent State to prove that the difference in treatment has an objective and reasonable justification. As it has been discussed in this thesis, not only the interpretation of *prima facie* case varies from case-to-case, but the evaluation of evidence and the concept of a comparator also requires clarification form the Court. The acceptance of

statistics as evidence helps proving the discriminatory effect of a rule or practice, however, the Court does not assign evidentiary value to all statistics. The reliance on statistical data during the evaluation of a case is quite ambiguous. In *D.H. and others*, for instance, the Second Section stated that it found the figures "worrying", however, it did not find it "worrying" enough to shift the burden of proof from the applicants to the respondent State.[271] Moreover, the Court stated that it is willing to accept statistics given that they are "reliable", "official" or "undisputed", but it does not provide any guidance on how these concepts are interpreted.

This study examined the evidentiary standards of the European Court of Human Rights, with regards to indirect discrimination based on association with a national minority. It revealed the inconsistencies in the Court's practice during the assessment of evidence and the application and interpretation of its own standard of proof. It also showed that while the Court insists that its standard is "beyond reasonable doubt", it does, in fact, apply a less strict standard during the evaluation of indirect discrimination cases.

This author's view is that the departure from the strict interpretation of the "beyond reasonable doubt" standard is justified. Conclusive evidence is not always available for the applicants, therefore sharing the burden of proof and lowering the standard of proof increases the protection of the Convention right at stake. However, flexibility of interpretation and a case-to-case approach can create ambiguity. The Court does not accept all evidence presented, and there is no general guideline on what statistics does the Court consider reliable, and how does the Court assess the figures of the statistical evidence.

What is needed from the Court is to pronounce this lower standard as a principle in cases of indirect discrimination, to avoid conflicting judgments based on similar facts, as it happened in *D.H. and others* and *Oršuš and others*. A clearly defined standard of proof would undoubtedly enhance protection of the rights of members of vulnerable minorities. Simultaneously, it would ensure consistent decisions, thus encouraging the States to comply with their obligations under the Convention and correct the substantive or procedural deficiencies.

Furthermore, clearly defined concepts of evidence would provide applicants alleging violation of their right to non-discrimination with more legal certainty. A standardised approach to the

[271] *D.H. and others*, Second Section, para. 52.

assessment of evidence would also be capable to make the Court proceedings more time-efficient and it would decrease the workload of the Court.

While the Chamber disregarded the evidence on the situation of the Roma community in both *D. H. and others* and *Oršuš and others*, the Grand Chamber did put a strong emphasis on the history and the overall societal context of this vulnerable minority group.
In this author's view, when assessing a case of indirect discrimination, indeed because of the nature of it, it is important to understand the position of the Roma population in order to decide whether they are victims of systematic violation of their rights. Regardless of which approach the Court takes, more consistency is required to establish the evidentiary value of the overall assessment of evidence outside the scope of the applications and the concrete facts of the case.

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