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Abstract for Master's Thesis

Subject: Public International Law, Master's Degree Programme in International Human Rights Law	
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Title: Protection of Right to Education, and Prohibition on Discrimination within ECHR	
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<p>Abstract: This thesis examines the case law of European court of Human Rights (ECtHR) regarding protection of right to education and prohibition on discrimination in getting education within the European Convention on Human Rights (ECHR). As the ECtHR articulated, it considers any applicable international law while interpreting the Convention provisions, and it regularly refers to various regional instruments. To determine the elements of discrimination, this thesis examines the European framework for non-discrimination.</p> <p>This thesis will focus on Roma children regarding the discrimination in getting education and access to educational institution by analysing related case law. This is the main issue to analyse in the thesis; nevertheless, to build the structure of this thesis coherently, the thesis will define the concept of "right to education" and "discrimination," as well as explain how courts assess cases of educational violations according to various elements that hinder access to education.</p> <p>Roma has been known as one of the largest vulnerable groups of the Europe who has been facing constant violation of their rights and has been the victim of discrimination in several fields. Among them, exclusion from education is one of those fields. Exclusion from education takes the form such as refusal from enrolment in school, placing Roma in special school or classes where there are only Roma people, anti-Roma sentiment which impact ethnic segregation. Whatever the cause, it is unacceptable from a perspective of human rights for there to be any ethnic segregation. Thus, this thesis aims to analyses what are the grounds of discrimination</p>	

under ECHR, how those grounds affect the individual rights to education, and how court interprets the ground of discrimination through cases.

Furthermore, in this thesis, the part of parental right will be discussed as it has been stated in a same Article where right to education (Article 2 Protocol 1) has been mentioned. There are several occurrences where parents have filed the case on behalf of their children violation on right to education, as well as regarding violation of their parental rights. Accordingly, the thesis looks at the cases to find out what grounds the court determines that there has been a violation regarding parental rights and how it influences parents' objections to matters pertaining to their child's education.

Finally, the thesis concludes by examining the role of non-state actors in safeguarding the educational rights of Roma children and ensuring they do not face discrimination in their pursuit of an education.

Keywords: Right to Education, Roma children, Human Rights, European Court of Human Rights, European Convention of human rights, Education, Discrimination, Respect for parents.

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Abbreviations

CDAPH	Commission for the Rights and Autonomy of Disabled Persons
CoE	Council of Europe
ECEC	Early Childhood Education and Care
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECSR	European Committee of Social Rights
EU	European Union
HELP	Human Rights Education for Legal Professionals
ICESCR	International Covenant on Economic, Social and Cultural Rights
NGOs	Non-Governmental Organization
NHRIs	National Human Rights Institutions
SESSAD	Special Education and Home Care Service
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNICEF	United Nations International Children's Emergency Fund

Chapter 1 Introduction

1.1 Background

Education is essential to a person's ability to operate as a human being in contemporary society and plays a vital role in a person's life by preserving harmony and peace, transmitting information, and maintaining wisdom.¹ Not only education is essential for personal growth, also it is a crucial factor that boosts national development, help for fostering and achieving a peaceful society that is civilised, and devoid of discrimination.²

While right to education is as one of the best societal investments, equitable educational opportunities must be given to all people, including adults and children or any minorities group.³ It is an important investment in a person's development and advancement with the primary objective being to ensure that every citizen can receive an education without barriers or prejudice.⁴ As mentioned earlier, an education is a crucial component of human development which has been codified in several international agreements, including both "soft law" and "hard law".⁵ However, there has been many occasion when right to education has been violated and there are several discrimination factors such as ethnicity, religion, nationality and language which has been considered as the reason of violation while interpreting the case law.

The discrimination in education is prohibited by number of international European law which will be described briefly in the thesis; however, this thesis has a particular focus on ECHR provision which guarantee equal access to education in Article 2 protocol 1 in connection with Article 14. The right against discrimination guaranteed by Article 14 cannot be invoked on its own; rather, it can only be brought up in relation to a claim that another Convention right has been violated.⁶

¹ Andrii M. Aparov and others, 'Right to Education as a Factor of Education Public Administration in the European Court of Human Rights Practice' (2020) 1 *Revista Gênero e Interdisciplinaridade* 238.

² Emine Zendeli, 'The Right to Education as a Fundamental Human Right' (2017) 7 *Contemporary Educational Researches Journal* 158.

³ *ibid* 159.

⁴ *ibid* 158.

⁵ M. Aparov and others (n 1) 244.

⁶ 'GuideMinorities7en.Pdf' 2.

Also, discriminatory difference in treatment can be identified if it does not have an "objective and reasonable justification" or a "legitimate aim,"⁷ In cases where discrimination is based on race, colour, or ethnic origin, the concept of objective and reasonable reasoning needs to be interpreted with absolute strictness.⁸ Regarding discrimination, the thesis will focus on the Roma children who are the most vulnerable group facing misplacement in the special school has a long history in education across the Europe.⁹ Despite the effort to at all European and national level to improve the protection of their fundamental rights, many Roma still are the victim of poverty, lack of opportunities barrier to enjoy their fundamental rights such as education and discrimination.

One might concern why specifically this thesis has focusing on Roma children even though the human right idea is not to focus on certain group of people but treating every individual equally. Roma people from Europe are considered as one of the integral parts of the society facing ethnic discrimination which has been identified as a primary factor limiting access to education.¹⁰ It is widely acknowledged that even after centuries of oppression Roma continue to face several obstacles and discrimination when it comes to obtaining an education.¹¹ The Roma children in Europe are the one who are being the victim of ethnic segregation and has been facing challenges in getting access to education.¹² Poverty, racism, and prejudice, as well as limited access to basic amenities, are major obstacles that prevent many Roma children from participating equally in mainstream education hence, they become the main group of people that frequently falls under the disproportionately against certain group.¹³ For instance, the landmark case of D.H and others, the people of Roma origin was being placed in special school due to their ethnic origin in which the court decided that the Roma population was found to have been subjected to discriminatory treatment and a disproportionately negative impact from the relevant statute as it was implemented in practice at existing time.¹⁴

⁷ *Oršuš and Others v Croatia* [2010] ECtHR [GC] 15766/03 [156].

⁸ *ibid.*

⁹ *Horváth and Kiss v Hungary* [2013] ECtHR 11146/11 [115].

¹⁰ 'Guide on Article 2 of Protocol No. 1 - Right to Education' 14.

¹¹ Florin Moisa and Maria Roth, 'The Right to Education of Roma Children in Romania: European Policies and Romanian Practices' (2011) 19 *The International Journal of Children's Rights* 501, 502.

¹² *ibid* 501.

¹³ Claude Cahn, *Roma Rights: Race, Justice, and Strategies for Equality* (IDEA 2002) 18.

¹⁴ *D.h and Others v the Czech Republic* [2007] ECtHR [GC] 57325/00 [208–210].

Hence, for the Roma people to overcome their difficulties, a thorough and efficient education is essential.¹⁵ Thus, this thesis explores even though there have been many voices raised for protection of Roma right to education and any form of discrimination, what are the ground for discrimination against Roma children, and how the European Court of Human Rights handles cases involving this kind of discrimination. Furthermore, the thesis will also analyse what are the prohibited ground of non-discrimination as well as is there any positive action that is compatible Article 14 of ECHR convention.

The right to education is acknowledged, promoted, and protected on all scales, from the local to the international, and perfectly captures the interaction between the two trends of globalization and localization.¹⁶ The Universal Declaration of Human Rights, which was one of the first texts to properly recognise these right states that "Everyone has the right to education." The "right to education" was considered a fundamental right by many additional international agreements that were adopted later.¹⁷ There are numerous definitions for the term "education." In its broadest definition, education takes place when a person interacts with the social and environmental environments to which they belong.¹⁸ Primary, secondary, and higher secondary education, as well as informal and adult literacy, are all included in the broad category of "rights" to education.¹⁹

The ECHR first clause of the Article 2 protocol 1 ensures everyone's right to an education. Additionally, it was mentioned in the same paragraph that parents have the right to ensure that their children receive an education that is in line with their religious beliefs. The purpose of the second clause is to protect pluralism in education, which is crucial to the survival of a democratic society.²⁰ It does not ensure parents' inalienable right to teach their children by their religious or philosophical beliefs.²¹ To make sure that the parents right have been secured and protected, the ECHR in its judgement in the case of *Folgerø and Others v. Norway*, the court stated that pupils can be exempted from certain classes if the parents philosophical conviction and religious beliefs

¹⁵ 'GuideMinorities7en.Pdf' (n 6) 3.

¹⁶ Katarina Tomasevski, 'Globalizing What: Education as a Human Right or as a Traded Service?'; Audrey Osler and Trond Solhaug, 'Children's Human Rights and Diversity in Schools: Framing and Measuring' (2018) 13 *Research in Comparative and International Education* 276.

¹⁷ Dr Sheeba Pillai, 'Right to Education and International Law - Defining the Right' 3 2012 53, 56.

¹⁸ Douglas Charles Hodgson, 'The Role and Purposes of Public Schools and Religious Fundamentalism: An International Human Rights Law Perspective' 1.

¹⁹ Pillai (n 17).

²⁰ *Folgerø and Others v Norway* [2007] ECtHR [GC] 15472/02 [84].

²¹ Péter Paczolay, 'European Perspectives of Education Rights from the ECtHR' (2022) 7 *Pázmány Law Review* 59.

has to be respected.²² Thus with the aim to analyse the legal basis for parents to file the case on behalf of their children, this thesis will focus on the courts judgement to follow how rights has been given to the parents and on what legal basis the case has been justified.

However, this part of parental rights is only mentioned in chapter 2.3 of this thesis as the focus will be regarding how discrimination, particularly in the context of education, is formed based on racial and religious beliefs, ethnic groupings, disabilities, language barriers, as well as who is the target of this prejudice. Concerning right to education and discrimination the thesis will be more focused on Article 2 Protocol 1 in conjunction with Article 14 of the European Convention on Human Rights. Additionally, Article 8 Right to respect for private and family life and Article 9 Freedom of thought, conscience and religion will also be taken into consideration to some extent. As The ECtHR legal interpretation of the ECHR is important and well-known globally.²³ This thesis will to analysis how the European Court of Human Rights upholds the protection of right to an education along with discrimination as stipulated by the European Convention on Human Rights.

1.2 Research questions and delimitations

Regardless of the effort of International, National and European law in protecting access to education without discrimination, there are still many cases brought before the court in the matter of violation of Article 2 of Protocol No. 1 to the Convention, taken in connection with Article 14 along with other related Articles. Those cases need clarification of legal framework and interpretation by the court. Therefore, the purpose of this thesis is to identify the barriers which cause discrimination in access to education and analyse how court has interpreting the cases regarding it.

Thus, the thesis first research question is how right to education and right not to be discriminated protected within the ECHR has been interpreted in the light of ECtHR. To respond to this question, a few barriers on access to education are discussed. The thesis attempts to examine how the court interprets these barriers to determine whether access to education along with discrimination provision has been violated. For this, a significant body of case law from the European Court of

²² *Folgerø and Others v. Norway* (n 20) paras 95–100.

²³ Claire Fenton-Glynn, *Children and the European Court of Human Rights* (1st edn, Oxford University Press 2020) 1.

Human Rights will be addressed within the range of education-related issues. Furthermore, the study will not only be limited to Protocol 1 Article 2 and Article 14 of the Conventions. To evaluate the case linked to educational affairs, additional Articles such as the Article 1 Protocol 12 general prohibition on discrimination, Article 8 right to respect for private and family life, and Article 9 freedom of thought, conscience and religion will be discussed in some instance.

The second and main research question of the thesis will be focusing on Roma children regarding the cases of ethnic segregation in relation to access to education to find out, how the court determine there has been discrimination, what are the content of the requirement of non-discrimination under Article 14 of the convention and what are the aspect of discrimination that has been highlighted while interpreting the cases. Ethnic segregation has been recognized as a primary factor limiting access to education.²⁴ Thus, on this matter, particularly the case of *D. H. and Others v. the Czech Republic*, *Sampanis and others v. Greece*, *Oršuš and Others v. Croatia* as well as other relevant cases will be discussed.

Due to the limitation, this thesis will be concentrated on European framework focusing the right to education and prohibition on discrimination and exclude other fundamental rights. Language barrier or restricted access to specific documents are just two examples of barriers that may limit the access to ECtHR judgements. This constraint can make the analysis less accurate and comprehensive. Various contextual elements, including the unique facts of the cases, cultural variances, and state parties' legal systems, have an impact on the ECtHR's rulings. These elements may limit the generalizability of the analysis and may have an impact on the court's perspective on rights in education.

1.3 Methodology

While examining normative legal material, jurisprudence applies the dogmatic approach.²⁵ Thus, in this thesis, the legal-dogmatic research approach will be used because legal dogmatic approaches sometimes referred to as the doctrinal study analyse and interpret the current body of

²⁴ 'Guide on Article 2 of Protocol No. 1 - Right to Education' (n 10) 14.

²⁵ South Ural State University and others, 'Formal-Dogmatic Approach in Legal Science in Present Conditions' [2018] *Journal of Siberian Federal University. Humanities & Social Sciences* 968, 968.

legislation.²⁶ Also, by applying the legal dogmatic technique, one can analyse how the European Convention on Human Rights (ECHR) protects the rights to education and the prohibition of discrimination. In the legal-dogmatic approach, the standards of the relevant agreements are identified and interpreted, and their interrelationships are evaluated.

In the second chapter, the European Convention on Human Rights (ECHR or convention) is a key source used in this study to ascertain how the right to education have been safeguarded and how parents and the state are collaborating to defend the right to education and the right to be free from discrimination. Since Article 2 Protocol 1 of the convention includes parental rights in its second sentence, there have also been discussions regarding a parent's right to speak on behalf of their child in relation to education, the protection of private and family life (Article 8) and Freedom of thought, conscience, and religion (Article 9).

The third chapter will discuss the legal framework around discrimination, which is necessary to understand the idea, scope, and causes of prejudice before analysing the cases concerning discrimination in education. Then the fourth chapter of this thesis will primarily address issues of discrimination pertaining to the education of Roma children. It will also look at cases of discrimination against Roma people in the field of getting education and analyse how the courts have interpreted the grounds to consider whether there has been discrimination or not. The key documents used in this chapter are ECHR convention, European social charter, the framework for protection of national minorities and relevant papers. Furthermore, the research for the thesis is done using academic literature, secondary data-based research from books, Articles and journals, and internet sources. Because these sources have a special focus on jurisprudential sources, more predictable results can be obtained through them.²⁷

The final chapter of this thesis will address nonstate actors' roles in defending Roma children's rights to an education free from discrimination, with a particular emphasis on parents' roles in this regard.

²⁶ Jan M Smits, 'What Is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' 5.

²⁷ Salim Ibrahim Ali, Dr Zuryati Mohamed Yusoff and Dr Zainal Amin Ayub, 'Legal Research of Doctrinal and Non-Doctrinal' (2017) 4.

Chapter 2 Education under European Convention on Human Rights

2.1 ECHR and right to education

The European Convention on Human Rights (ECHR) is a regional instrument drafted by council of Europe which came into force in 1953, as a response to the atrocities of the Second World War.²⁸ There are not many explicit references to the right to education in the ECHR. Only Article 2 of Protocol 1 gives "a right of access to educational institutions existing at a given time," not that it requires states to offer education.²⁹ Acknowledging the value of education as a basic right, it establishes guidelines to guarantee its protection to everyone and at all educational levels. To make the right to education a reality for all, it is vital to provide a broad range of educational opportunities in both formal and informal settings that include people of different backgrounds, religions, and ethnicities without any form of discrimination.³⁰ This indicates that there are no limitations or forms of discrimination in the provision of education from preschool through upper school or higher school.³¹ States are required to safeguard the right to education, and any violation of that right will be seen as a breach of international law. Many of the ECtHR's rulings have implications that go beyond the specific case, even if they are only legally binding on the Parties.³²

2.2 Article 2 protocol 1 (Right to Education) of ECHR

Article 2 of Protocol No. 1 of the European Convention on Human Rights (ECHR) defines the right to education as below:

“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”³³

²⁸ Ursula Kilkelly, ‘Protecting Children’s Rights under the ECHR: The Role of Positive Obligations’ (2020) 61 Northern Ireland Legal Quarterly 245, 247.

²⁹ Council of Europe, European Union Agency for Fundamental Rights, *Handbook on European Law Relating to the Rights of the Child* (2nd edn, Publications Office of the European Union 2022) 172.

³⁰ United Nations, Educational, Scientific and, and Cultural Organization, ‘The Right to Education: Law and Policy Review Guidelines; 2014’ (2014) 14.

³¹ ‘Guide on Article 2 of Protocol No. 1 - Right to Education’ (n 10) 3.

³² Suzana Kraljić, ‘Implementation and Protection of the Child’s Right to Education’ (2020) XXXI Šolsko polje 27, 33–34.

³³ European Convention on Human Rights - ECHR Official Texts - ECHR - ECHR / CEDH 1950 art 2 protocol 1.

Article 2 of Protocol No. 1 upholds the right to education and acknowledges parents' rights to make sure their children receive an education in line with their philosophical and religious convictions.³⁴ It means that the this Article obliges States party to the convention has to respect parents' choice to teach their children according to their own religious and philosophical beliefs.³⁵ But as the ECtHR has often noted, the Article is dominated by the first words and thus this fundamental right to education is complemented by the right mentioned in Article 2 second sentence.³⁶

Even if Article 2 of Protocol No. 1 does not specifically mention any restrictions within the context of the right to education, there have always been an issue of restriction in getting education ³⁷ The restriction can be found in various aspect in the form of religion, minorities, ethnicity, language, disabilities, or philosophical conviction.³⁸ Nevertheless, limitations must not be applied to the right in question in a way that undermines its basic characteristics and renders it ineffective. Although there isn't a definitive list of "legitimate aims" under Article 2 of Protocol No. 1, they must be predictable for the parties involved and pursue a reasonable objective.³⁹

The 1968 Belgian Linguistics Case, which will be cited several times in the thesis, established the body of case law from the ECtHR regarding discrimination against education. The right to education means access to education from the educational institution at existing time.⁴⁰ Article 14 of the Convention may be an issue if a State treats different people when carrying out its obligations under Article 2 of Protocol No. 1. The right to education should be in equal footing to everyone as per Article 2 protocol 1 which means the right should be benefited from preschool to elementary school till higher school.⁴¹ The Court has mentioned “the education of children is the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other

³⁴ *ibid* 2 protocol 1 (second sentence).

³⁵ Therese Comodini Cachia, ‘The Protection of the Right to Education within the Framework of the European Convention’ 44 62.

³⁶ *Campbell and Cosans v the United Kingdom* [1982] ECtHR 42935/21, 50851/21, 57455/21, 6310/22, 6395/22, 6398/22, 6799/22, 6825/22, 10829/22, 10849/22, 51094/22 [40].

³⁷ ‘Guide on Article 2 of Protocol No. 1 - Right to Education’ (n 10) 8.

³⁸ *ibid* 3.

³⁹ *ibid* 6.

⁴⁰ *Case ‘relating to certain aspects of the laws on the use of languages in education in belgium’ (merits)* 4 of the law part.

⁴¹ ‘Guide on Article 2 of Protocol No. 1 - Right to Education’ (n 10) 7.

values to the young, whereas teaching or instruction refers in particular to the transmission of knowledge and to intellectual development.”⁴²

Although access to primary and secondary education is effectively established in the first sentence of Article 2 protocol 1, there is no clear distinction between higher education and other forms of education.⁴³ Access to any higher education institution that is in existence at any given time is an essential element of the right stipulated in Protocol No. 1's Article 2's first sentence.⁴⁴ Thus, for providing the higher education from any state, the state should follow the obligation to provide effective right to education for enrolled individual without discrimination which can be illustrated from the case of Leyla Sahin.⁴⁵

The right to an education is not absolute and subject to its limitation.⁴⁶ Since the right of access "by its very nature calls for regulation by the State which may vary in time and place as per the needs of individual or community," it may lead to implicitly accepted limitations.⁴⁷ As a result, the domestic authorities may have a degree of appreciation in these situations, but the Court has to see whether the Convention's criteria are followed.⁴⁸ To ensure that they do not restrict the right in question to the point where they undermine its fundamental qualities and render it ineffective, the court must satisfy that the restrictions are reasonable and pursue a legitimate aim.⁴⁹

While there are no acknowledged restrictions on the use of this right stated in Article 2 of the First Protocol, as mentioned above, a review of the case law suggests that this right is not absolute.⁵⁰ Thus, it is important to examine the Court's interpretation to know what restrictions are to access to education and whether they constitute as discriminatory practices. Concerning the research question of how the right to education under Article 2 Protocol 1 in conjunction with Article 14 has been interpreted, this section will discuss the cases that have been brought before the ECtHR as well as the various restrictions to accessing education along with discrimination provision.

⁴² *Campbell and Cosans v. the United Kingdom* (n 36) para 33.

⁴³ *Leyla Şahin v Turkey* [2005] ECtHR [GC] 44774/98 [136].

⁴⁴ *Irfan Temel and Others v Turkey* [2009] ECtHR 36458/02 [39].

⁴⁵ *Leyla Şahin v. Turkey* (n 43) para 136.

⁴⁶ *ibid* 154.

⁴⁷ *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' (merits)* (n 40) para 4 (interpretation adopted by court).

⁴⁸ 'Guide on Article 2 of Protocol No. 1 - Right to Education' (n 10) 5.

⁴⁹ *Leyla Şahin v. Turkey* (n 43) para 154.

⁵⁰ *Cachia* (n 35) 63.

2.2.1 Barriers on access to education

2.2.1.1 Language

Talking about the barrier on access to education, language barrier has been always an issue faced by the individual. However, Article 2 of protocol No. 1 does not indicate which language should be restricted or in which language instruction in the school must be provided.⁵¹ The prominent case is the *Belgian Linguistics Case* where the applicant who all belongs to the Dutch speaking region claims that their right to respect for private family life (Article 8), in conjunction with non-discrimination (Article 14) and the right to education (Article 2 of Protocol 1) has been violated.⁵²

The applicants claimed that insufficient provisions for French-language instruction were included in the laws of the Dutch-speaking areas in which they resided.⁵³ They also complained that institutions in these locations were not receiving subsidies from the Belgian state because they were not adhering to the language requirements outlined in the education legislation. Additionally, the state prevented the applicants' children from attending French classes that were offered in some locations, forcing the applicants to enrol their children in local schools against their wishes or send them elsewhere, which the applicant claim was dangerous and risky.⁵⁴

In this case, the court determined that there has not been a violation of Articles 8 and 14 of the Convention and Article 2 of the Protocol.⁵⁵ As the Court reviews the complaints and tries to address the general question of whether any Article of the Convention or Protocol may contain provisions affecting a child's or parent's rights or freedoms concerning their child's education, particularly about the selection of the language of instruction.⁵⁶ The court determined that the right to education, as protected by the first sentence of Article 2 of Protocol No. 1, by its very nature necessitates state regulation, which may differ in time and location depending on the needs and resources of the society and citizens.⁵⁷ Such regulations may not interfere with other rights guaranteed by the Convention. In addition, the Court held that the right to an education entailed

⁵¹ Case '*relating to certain aspects of the laws on the use of languages in education in belgium*' (*merits*) (n 40) para 3 (interpretation of the court part).

⁵² *ibid* 3.

⁵³ *ibid*.

⁵⁴ *ibid*.

⁵⁵ *ibid* 42.

⁵⁶ *Irfan Temel and Others v. Turkey* (n 44) para 1 (interpretation adopted by the court part).

⁵⁷ Case '*relating to certain aspects of the laws on the use of languages in education in belgium*' (*merits*) (n 40) para 5 (the interpretation of the court part).

the right to receive an education in the language of the country of origin and did not incorporate a clause requiring the respect of a parent's language preferences.⁵⁸ Thus the court find this case as there has been no violation as per applicants claim.

Despite the child being listed as a right holder in the applicants' submission, the court did not consider the children's perspective in this case. Parents' decisions do, of course, affect their children's education, but the State still has the primary responsibility in this regard. Even while the Court in this decision failed to recognize children as holders of rights, it did acknowledge that the matter pertained to "the rights or freedoms of a child."⁵⁹

The case of *Irfan Temel and Others v. Turkey*, a case of discrimination based on language preferences which also violates the right to education was brought to the ECtHR. In this case, the applicants filed a complaint alleging that they were punished for asking the university to offer Kurdish language classes on an optional basis. They claimed that this sanction had violated their right to freedom of thought and expression.⁶⁰ In addition, due to not having language course to read, they claimed that they had been denied their right to education which violated Article 2 protocol 1 of the convention.⁶¹ According to the Court, these accusations can only need to be addressed under Protocol No. 1's Article 2, as read in light of Convention Article 10.⁶²

In this case, the Court acknowledges that the restriction was accessible and had a legal basis, notably Regulation 9(d) of the Disciplinary Regulations of Higher Education Institutions.⁶³ In order to ensure that the restrictions which are imposed do not curtail the right in question to such an extent as to impair its very essence and deprive it of its effectiveness, they must be foreseeable for those concerned, pursue a legitimate aim and be proportionate to the aim pursued.⁶⁴ However, the Court seriously questions whether there was a legitimate purpose in terms of the Convention served by applying this Regulation in the current case.⁶⁵ Nevertheless, the Court believes that it is

⁵⁸ 'Guide on Article 2 of Protocol No. 1 - Right to Education' (n 10) 7.

⁵⁹ Arianna Braga, 'Roma Children's Discrimination in Education' (*Humanium*, 28 June 2022) <<https://www.humanium.org/en/roma-childrens-discrimination-in-education/>> accessed 21 January 2024.

⁶⁰ *Irfan Temel and Others v. Turkey* (n 44) para 27.

⁶¹ *ibid.*

⁶² *ibid* 28.

⁶³ *ibid* 42.

⁶⁴ *ibid* 41.

⁶⁵ *ibid* 42.

not important to answer this question because the main one to look at is whether a fair balance was established between the means employed and the aim sought to be achieved.⁶⁶

The Court notes that, without engaging in any unacceptable conduct, the applicants faced disciplinary action for merely submitting petitions expressing their opinions regarding the need for Kurdish language education and asking that classes be offered as an optional module is not a reason to get suspended for a class and is not a proportionate measure.⁶⁷ According to the Court, neither the views stated therein nor how they were presented could be interpreted as engaging in conduct that, as per Regulation 9 (d), would cause polarization based on language, race, religion, or denomination.⁶⁸ The Court reaffirms that the use of disciplinary measures, such as suspension or expulsion from an educational institution, to enforce compliance with its internal regulations is not inherently excluded by the right to education.⁶⁹ However, these rules cannot violate other rights protected by the Convention or its Protocols, nor can they compromise the integrity of the right.⁷⁰

This led the court determined that the imposition of a disciplinary consequence of this nature is not reasonable or appropriate in the given circumstances of the case and does not serve the intended legitimate purpose. Thus, the court stated that there has been a violation of Article 2 protocol 1 of the convention.⁷¹ The Court considered this case based on the principles laid down in the decision of the fundamental rules established in Leyla Şahin's case regarding Article 2 of Protocol No. 1.⁷²

2.2.1.2 Admission criteria

Requirements for admission to an educational institution may be set by a state but restraint in education due to different criteria of admission cannot be justified as legitimate aim. Altering the university admissions policies suddenly and without providing for interim corrective measures could violate Article 14 in conjunction with Article 2 protocol 1.⁷³ In the case of *Altınay v. Turkey*, the applicant filed a complaint against the Republic of Turkey, specifically claiming that he was

⁶⁶ *ibid.*

⁶⁷ *ibid* 43–46.

⁶⁸ *ibid* 44.

⁶⁹ *ibid* 45.

⁷⁰ *ibid.*

⁷¹ *ibid* 47.

⁷² *ibid* 38.

⁷³ *Altınay v Turkey* [2013] ECtHR 37222/04 [56–61].

the victim of discrimination due to modifications made to the university entrance system and the absence of transitional terms.⁷⁴

The applicant argued that, in contrast to regular high school students taking the national university entrance exam, he had been refused admission to a communication sciences faculty despite having scored similarly on the exam.⁷⁵ He based his failure on the implementation of a weighted system based on high school average grades, which he claimed put students who attended vocational high schools with a focus on communication, like himself, at a significant disadvantage.⁷⁶ Additionally, he asserted that there were no transitional provisions for the 1999 exam and that the system in question had been introduced in an unpredictable way.⁷⁷ Based on these factors, the applicant complained that his right as per Article 14 has been violated in conjunction with Article 2 protocol 1 of the convention.

In this regard, the Court clarifies that discrimination is defined as treating people differently in reasonably similar situations without providing an objective or reasonable justification, thus if the different treatment is not justified if it does not pursue a legitimate goal, or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. be achieved.⁷⁸

The applicant's right to higher education was restricted by the differential treatment in question, according to the Court, because he was not informed about the changes to the rules governing access to higher education and there were no corrective measures that applied to his situation.⁷⁹ This indicate that it was not effectively proportionate to the aim pursued, and as a result, it violated Article 14 along with Article 2 protocol 1 of the convention.⁸⁰

2.2.1.3 Nationality

⁷⁴ *ibid* 3.

⁷⁵ *ibid* 23.

⁷⁶ *ibid*.

⁷⁷ *ibid*.

⁷⁸ *ibid* 32.

⁷⁹ *ibid* 60.

⁸⁰ *ibid*.

Another important issue that comes as a barrier could be due to the different nationality and liable to pay fee in educational institution. Those who are refugees, stateless individuals, asylum seekers, and other types of migrants who have left their country of origin may face challenges for their kids to get admitted to the school.⁸¹

The case of *Ponomaryovi v. Bulgaria* can be a leading example of the concern regarding being different nationals. Two Russian nationals, Mr. Anatoliy Vladimirovich Ponomaryov and Mr. Vitaliy Vladimirovich Ponomaryov, filed their complaint against the Republic of Bulgaria with the Court on the grounds that they have been discriminated on the ground of Article 14 non-discrimination.⁸² In the beginning of the case, Mr. Anatoliy Ponomaryov was in his final year of secondary school. The head of the Ministry of Education's Regional Education Inspectorate wrote to the head teacher at his school to ask whether the applicant had paid the school fees or not as the applicant was required to pay tuition because he did not have a residence permit from Bulgaria.⁸³

In regard to the matter of paying tuition fee, the applicant stated that their right to education has been infringed because they were expected to pay fees for their secondary education, compared to foreign nationals with permanent residence permits and Bulgarian nationals.⁸⁴ In addition, the applicant said that the requirement that they pay the tuition fee is unjustified and that it is confusing, unclear, ambiguous, and giving extra burdening them.⁸⁵

The court concluded that while States are not required by Article 2 of Protocol 1 of the ECHR to establish specific educational facilities, they are required to provide effective access to the educational institutions.⁸⁶ According to the court, the applicants had enrolled in and attended secondary schools established and managed by the Bulgarian State, but in order to continue their secondary education which is considered important, they were required to pay tuition because of their nationality and residency status. According to this, their complaints fell under the scope of Protocol No. 1's Article 2 which is enough to make Article 14 of the Convention effective.⁸⁷

⁸¹ Rolla Moumné and others, *Right to Education Handbook* (United Nations Educational, Scientific and Cultural Organization (UNESCO) 2019) 98.

⁸² *Ponomaryovi v Bulgaria* [2011] ECtHR 5335/05 [22].

⁸³ *ibid* 17.

⁸⁴ *ibid* 44.

⁸⁵ *ibid* 46.

⁸⁶ *ibid* 49.

⁸⁷ *ibid*.

2.2.1.4 Religion

Even if Article 2 of Protocol No. 1 does not specifically mention any barriers or limitation, there are nonetheless limitations on the right to an education. Nevertheless, these limitations cannot be so severe as to jeopardize the fundamental nature of the right and eliminate its effectiveness.⁸⁸ Article 2 of Protocol No. 1 does not contain a comprehensive list of "legitimate aims," but they must be foreseeable for the parties involved and seek a legitimate aim.⁸⁹

In the case of *Leyla Sahin v. Turkey*, the applicant filed a complaint with the European Court of Human Rights alleging that the rules governing the wearing of the Islamic headscarf in higher education institutions had violated her rights and freedoms under Articles 8, 9, 10, and 14 of the Convention and Article 2 of Protocol No. 1.⁹⁰

Sahin, who comes from a traditional family, was facing the consequences of her traditional belief of wearing a head scarf during her fifth year at the University of Istanbul's College of Medicine in 1998.⁹¹ During that period, a directive was released by the University's Vice-Chancellor, stating that students who wore Islamic scarves or had beards would not be permitted to attend lessons, lectures, or any courses from the university.⁹² As a result of her wearing an Islamic hijab for every written exam, the applicant was refused entry to examinations in multiple subjects.⁹³ The applicant claimed that the prohibition of wearing an Islamic headscarf in higher education institutions constituted to an unwarranted infringement upon her right to religious freedom, specifically her ability to express her convictions.⁹⁴

Regarding the claim of violation of Article 9, the court determined that although she had experienced limitations on her religious freedom, the limitations were reasonable given the university's and the government's efforts to uphold secularism in the country.⁹⁵ The court ruled that

⁸⁸ 'Guide on Article 2 of Protocol No. 1 - Right to Education' (n 10) 8.

⁸⁹ *Leyla Şahin v. Turkey* (n 43) para 154.

⁹⁰ *ibid* 3.

⁹¹ *ibid* 15.

⁹² *ibid* 16.

⁹³ *ibid* 17.

⁹⁴ *ibid* 70.

⁹⁵ *ibid* 114.

the limitation of religious freedoms to the wearing of religious symbols was appropriate, given the purpose of upholding secularism and advancing democracy.⁹⁶

Concerning the argue of violation of Article 2 protocol 1 in conjunction with Article 14, the court asserted that the first sentence of Article 2 of Protocol No. 1 states that everyone falling within the jurisdiction of the Contracting States has the right to "a right of access to educational institutions existing at a given time," however this right to access is only one aspect of the right to education. For that right to be effective, it is also important that the beneficiary, among other things, be able to profit from the education they get.⁹⁷ Additionally, a restriction on the right to education shall only be acceptable under Article 2 of Protocol No. 1 if the means used to achieve the objective are reasonable justification.⁹⁸

In this regard, the court considered that it is not conceivable to suppose that the applicant was not aware of the internal policies of Istanbul University that limit the places in which religious attire is permitted or that they were not adequately educated about the rationale behind the implementation of these policies. Even after being warned, she may have reasonably anticipated that wearing the Islamic headscarf would put her at risk of being denied entrance to lectures and exams.⁹⁹ As a result, the applicant's fundamental right to an education was not infringed by the claimed restriction. Furthermore, considering the conclusions reached regarding the remaining Articles cited by the applicant, the Court notes that the limitation did not contradict any other rights guaranteed by the Convention or its Protocols.¹⁰⁰ Therefore, in conclusion, Article 2 protocol 1 has not been violated.¹⁰¹

Finally, regarding the applicant complaints of violation of Article 14 taken alone or in connection with Article 9 of the Convention or the first sentence of Article 2 of Protocol No. 1, the Court notes that the applicant failed to provide comprehensive details in her pleadings. As the court has already stated, wearing a headscarf does not interfere with one's religious affiliation; rather, it serves the justifiable purpose of preserving educational institutions' secularism by proving

⁹⁶ *ibid* 116.

⁹⁷ *ibid* 152.

⁹⁸ *ibid* 154.

⁹⁹ *ibid* 160.

¹⁰⁰ *ibid* 161.

¹⁰¹ *ibid* 162.

legitimate aim, the court gave a judgment stating that there was no violation on Article 14 in conjunction with other mentioned Articles.¹⁰²

In the context of religious conviction and educational violations in connection with Article 9, the European Court of Human Rights has also addressed the issue of *Lautsi and others v. Italy*. The complainant in this case was on behalf of both her name and her two children, who were minors at the time.¹⁰³ The applicant filed a complaint, claiming that the presence of crucifixes in the schools violated the secularism principle she had hoped her children would learn. She lodged the complaint to the administrative court, but it was denied because the Minister of Education had issued a directive directing school administrators to make sure that crucifixes were on display in classrooms. The applicants then bring a complaint about the same issue before the ECtHR.¹⁰⁴

The applicant filed a complaint alleging that the crucifixes that were placed in the classroom violated the right to education as established by Protocol No. 1, which also protects parents' philosophical convictions. Additionally, they argued that it violated their rights to the freedom of conscience, thought, and religion guaranteed by Article 9 of the Convention.¹⁰⁵ The applicant additionally contended that the principles enshrined in Article 9 of the Convention and Article 2 of Protocol No. 1 are reinforced by the provisions of Article 14 Convention” which was also violated.¹⁰⁶

Following its observation of the case, the chamber concluded that both Article 2 Protocol 1 and Article 9 of the convention had been violated. The chamber derived its ruling from the principles pertaining to the interpretation of Protocol No. 1's Article 2, which established in the Court's case law an obligation on the part of the State to refrain from imposing any beliefs, even indirectly, in places where people were vulnerable and dependent on it, as well as in the schooling of children, which is to be considered a sensitive area in that regard.¹⁰⁷

¹⁰² *ibid* 165–166.

¹⁰³ *Lautsi and Others v Italy* [2011] ECtHR [GC] 30814/06 [1].

¹⁰⁴ *ibid* 13–15.

¹⁰⁵ *ibid* 29.

¹⁰⁶ *ibid* 79.

¹⁰⁷ *ibid* 31.

The Chamber maintained that in public education, where school attendance is required regardless of religious affiliation, the State owed it to its citizens to maintain confessional neutrality. Furthermore, it noted that it was unable to understand how the display of a symbol in State-school classrooms that one could reasonably associate with the predominant religion in Italy could support educational pluralism, which was crucial for the maintenance of a "democratic society." As a result, the state violated its neutrality in education, which is against both the convention's Article 2 protocol 1 and Article 9.¹⁰⁸

However, the Grand Chamber ruled in favour of the state, reversing a previous Chamber ruling that claimed there had been a violation of both article 2 protocol 1 and Article 9 of the convention. The Court believed that, in general, the question of whether crucifixes could be displayed in classrooms was within the state's margin of appreciation, especially in cases where a European consensus was lacking.¹⁰⁹

It was nonetheless necessary for the Court to ensure that indoctrinating was not occurring. The Court determined that there were three factors that greater visibility of the crucifix was offset. First, mandatory Christian education was not linked to the presence of crucifixes.¹¹⁰ Subsequently, there was no indication of intolerance towards individuals of different religions or none at all.¹¹¹ Lastly, the applicant (mother) fully possessed her parental right to educate and counsel her children, to exercise her natural role as an instructor in their eyes, and to lead them consistent with her own philosophical beliefs.¹¹²

Therefore, in determining to maintain crucifixes in the classrooms of the State school that the first applicant's children attended, the authorities had acted within the parameters of the margin of appreciation granted to the respondent State in light of its obligation to respect parents' rights to ensure that their children receive an education and instruction that is consistent with their own

¹⁰⁸ *ibid* 31–32.

¹⁰⁹ *ibid* 67–69.

¹¹⁰ *ibid* 74.

¹¹¹ *ibid*.

¹¹² *ibid* 75.

religious and philosophical convictions.¹¹³ About the alleged violation of Article 14, the Court reiterates that the right to enjoy the freedoms and rights protected by the other substantive provisions of the Convention and its Protocols is the only area in which Article 14 of the Convention has any independent existence, noting that not much evidence has been offered to support this complaint.¹¹⁴

2.3 Respect for parental rights

Article 2, Protocol 1 second sentence of the convention states “... In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”¹¹⁵ As is evident from the fact that the term "respect" was used in place of the words "have regard to" during the drafting of Article 2 protocol 1, this word implies more than just "acknowledge" or "taken into account"; it also implies a positive obligation on the part of the State.¹¹⁶

Parents have the primary responsibility for the upbringing and development of the child.¹¹⁷ It is sometimes necessary to provide possibility of exemption from certain classes to respect parents philosophical and religious conviction.¹¹⁸ In the case of *Folgerø and others v. Norway*, parents who are not Christian filed this case alleging that their children were denied full exemption from a mandatory subject in Christianity, religion, and philosophy during their ten years of compulsory schooling in Norway.¹¹⁹ The complaint further claims that state that the KRL has interference with the parent's right to freedom of conscience and religion under Article 9 of the Convention¹²⁰ taken on their own or in conjunction with Article 14.¹²¹

¹¹³ *ibid* 81.

¹¹⁴ *ibid*.

¹¹⁵ European Convention on Human Rights - ECHR Official Texts - ECHR - ECHR / CEDH art 2 protocol 1.

¹¹⁶ *Campbell and Cosans v. the United Kingdom* (n 36) para 37.

¹¹⁷ Rachel Hodgkin and UNICEF (eds), *Implementation Handbook for the Convention on the Rights of the Child* (Fully rev 3 ed, Unicef 2007) 232.

¹¹⁸ *Folgerø and Others v. Norway* (n 20) para 100.

¹¹⁹ *ibid* 3.

¹²⁰ *ibid*.

¹²¹ *ibid* 52.

The parents of the applicants accused the competent domestic authorities of violating their rights under the Convention by refusing to exempt their children entirely from the KRL subject. Furthermore, it violated the rights of the parents, as stated in Article 2 of Protocol No. 1, which permits them to receive instruction and education that aligns with their own religious and philosophical convictions.

The applicant claimed that their children might not be required to sing, recite, or pray from the Bible, but they would still be required to listen to what was said. The exemption arrangement's basic premise had been that information and involvement could be kept mentally separated.¹²² This means to set apart normative from descriptive information was the partial-exemption structure. It was assumed that the material could be "learned" without the undesirable influences or indoctrination that means while some activities may be excluded from the students, the activities' substance may still be disclosed to them.¹²³

The parents in these applications indicated how this separation did not work for their children, despite the KRL subject evaluations demonstrating that this distinction had not been acknowledged in practice. For them, therefore, partial exemption had not been a possibility.¹²⁴

Not only should the two sentences in Article 2 of Protocol No. 1 be interpreted concerning one another, but also to other Articles, including Articles 8 and 9 of the convention.¹²⁵ The court leaving aside the fact that the children's complaints under Article 9 of the Convention were deemed inadmissible however the Court believes that the parents' complaint is best suited for examination under Article 2 of Protocol No. 1, which serves as the *lex specialis* in the field of education.¹²⁶

According to the Court's ruling, the State must ensure that knowledge or information included in the curriculum is communicated impartially, critically, and pluralistically. It is prohibited for the

¹²² *ibid* 62.

¹²³ *ibid*.

¹²⁴ *ibid*.

¹²⁵ 'Guide on Article 2 of Protocol No. 1 - Right to Education' (n 10) 6.

¹²⁶ *Folgerø and Others v. Norway* (n 20) para 54.

State to carry out indoctrination efforts that could be interpreted as disrespecting the religious and philosophical beliefs of parents.¹²⁷

However, the possibility of an exemption does not have to be provided systematically as can be seen from the case of *Dojan and Others v. Germany*.¹²⁸ In 2005 and 2007, some Christian Evangelical Baptist Church members whose children attended school protested mandatory sex education classes, a school theatre workshop designed to prevent sexual abuse, and raising awareness of sex education to lower the number of cases involving sex crime and pregnancy.¹²⁹

The applicant claimed that these activities such as theatre workshop “My body is mine” went against their moral and religious convictions.¹³⁰ The applicants filed their complaint under Article 2 of Protocol 1 to the Convention as well as Articles 9 and 8 of the Convention stating that the domestic authorities' refusal to exempt their children from attending required sex education classes and a theatre workshop on "my body is mine" constitute the restriction on their children's right to education following their religious convictions.¹³¹

Nonetheless, the school did not grant permission to excuse their kids from the pertinent lessons and workshops since they firmly believed the child should learn to gain potential knowledge.¹³² Following that, several parents intervened to stop the lessons from physically taking place at the school or to prevent their kids from taking the classes.¹³³ Next, these parents received a fine, and when they refused to pay, they were detained for several weeks.¹³⁴

The applicant further added that there had been an infringement on their right to be free from discrimination. They experienced discrimination against parents whose moral and religious beliefs were not violated when they brought the Muslim parents, who were excused from attending sexual education sessions and have been also exempted from paying any fines for keeping their kids out of sexual education programs.¹³⁵

¹²⁷ *ibid.*

¹²⁸ ‘Guide on Article 2 of Protocol No. 1 - Right to Education’ (n 10) 17.

¹²⁹ *Dojan and Others v Germany (dec)* [2011] ECtHR 319/08, 2455/08, 7908/10, 8152/10, 8155/10 4.

¹³⁰ *ibid* 5.

¹³¹ *ibid* 11.

¹³² *ibid* 3.

¹³³ *ibid* 4.

¹³⁴ *ibid.*

¹³⁵ *ibid* 11.

The Court found that sex education did not infringe children's right to an education and that Germany might mandate such classes to integrate minorities and prevent the emergence of "parallel societies" driven by ideology or religion.¹³⁶ As mentioned above, education was intended to be disseminated impartially to enlighten individuals and promote their involvement in a diverse community.¹³⁷

Furthermore, no proof was shown to show that the events and curriculum were not presented in an impartial, critical, and pluralistic way.¹³⁸ Court also added that the parents are free to teach their kids at home if they so desire.¹³⁹ As a result, the Court concluded that the decisions made by domestic authorities and courts were reasonable and were within the Contracting States in establishing and interpreting regulations for their educational systems.¹⁴⁰ Consequently, the Court concluded that these objectives aligned with the impartiality and plurality fundamental to Article 2 of Protocol No. 1.¹⁴¹

Sometimes, parents who choose to educate their children at home use their right provided by convention based on the right to respect for their religious convictions as justification.¹⁴² In the case of *Konrad and others v Germany*, the applicants who came from a Christian community that values the Bible much and for religious reasons opposes their children attending public or private schools stating that the school education does not align with their values.in relation to the system of compulsory primary schooling in Germany.¹⁴³ In this case, the applicants wished to educate their children at home, as no state or private school currently in operation was compatible with their convictions.¹⁴⁴

However, their application for an exemption from compulsory school attendance was rejected by the domestic authorities on the grounds that the parents' wishes could not take precedence over the children's rights: children have an interest in attending school with children from all backgrounds,

¹³⁶ *ibid* 14.

¹³⁷ *ibid* 15.

¹³⁸ *ibid*.

¹³⁹ *ibid* 16.

¹⁴⁰ *ibid*.

¹⁴¹ *ibid*.

¹⁴² 'Guide on Article 2 of Protocol No. 1 - Right to Education' (n 10) 17.

¹⁴³ *Konrad v Germany (dec)* [2006] ECtHR 35504/03 1.

¹⁴⁴ *ibid*.

which enables them to gain their first experiences of society and acquire social skills.¹⁴⁵ The domestic authorities further concluded that parents do not have an exclusive right to educate their children—the state’s obligation to provide children with an education must be regarded as on an equal footing with parents’ right in this respect.¹⁴⁶ The parents’ complaint under Article 2, Protocol 1 was dismissed, by the Freiburg Administrative Court finding that the applicant parents’ desire for their kids to grow up in a "protected area" at home free from outside influence was not allowed as it restrict the State's duty to offer education under the Basic Law would not be fulfilled if the kids had no interaction with other kids, their development by learning from peer groups will decline.¹⁴⁷

In this regard, the applicants claimed that the refusal to permit the applicant parents to educate their children at home in accordance with their own religious and philosophical beliefs violated Articles 8 and 9 of the Convention, Article 2 of Protocol No. 1, and Article 14 of the Convention.¹⁴⁸

The Court finds that the applicant's parents’ allegations mainly relate to the second paragraph of Article 2 of Protocol No. 1.¹⁴⁹ This clause acknowledges both the state's role in education and parents' freedom to teach their children according to their own religious and philosophical convictions.¹⁵⁰ Its goal is to protect educational plurality, which is crucial to the maintenance of the Convention's definition of a "democratic society."¹⁵¹ Citing the *Kjeldsen, Busk Madsen, and Pedersen v. Denmark* decision,¹⁵² the court asserted that state education is the focal point and that the goal needs to be addressed.¹⁵³ Relying on the lack of consensus amongst contracting states with regard to compulsory attendance at primary school, the Court found that the decision of the German authorities that home schooling could not meet the objectives of integration and experiences of society falls within the margin of appreciation in setting up and interpreting rules for their education systems.¹⁵⁴

¹⁴⁵ *ibid* 2.

¹⁴⁶ *ibid*.

¹⁴⁷ *ibid*.

¹⁴⁸ *ibid* 5.

¹⁴⁹ *ibid* 6.

¹⁵⁰ *ibid*.

¹⁵¹ *ibid*.

¹⁵² *Kjeldsen, Busk Madsen and Pedersen v Denmark* [1976] ECtHR 57509/11 [50].

¹⁵³ *Konrad v. Germany (dec.)* (n 143) 6.

¹⁵⁴ *ibid* 7.

Consequently, the court asserted that, as the entire Article 2 protocol 1 is dominated by its initial phrase. This implies that parents cannot deny their children their right to an education on the grounds of their religious or philosophical convictions.¹⁵⁵ The Court also emphasised that the parents were free to educate their children as they wished after school and at weekends. Compulsory school attendance did not deprive them of the right to educate their child in conformity with their religious convictions, but merely restricted it to outside school hours.¹⁵⁶ Consequently, the court dismissed a complaint that the parents' refusal to let them educate their kids at home was manifestly ill-founded.¹⁵⁷

Another case of access to education can be found in the matter of religious symbol which can be illustrated from the case of *Kjeldsen, Busk Madsen, and Pedersen v. Denmark*. The State oversees both public and private education.¹⁵⁸ The State cannot transfer its responsibilities to private organisations or people to guarantee everyone's right to an education. The right to establish and manage a private school is protected by Article 2 of Protocol No. 1, but as the case of *Kjeldsen, Busk Madsen, and Pedersen v. Denmark* has shown, states are not required to positively support a specific method of instruction.¹⁵⁹ This implies that parents have the option to teach their kids at home or send them to a private school.¹⁶⁰

In this case, to raise knowledge and awareness to prevent unintended pregnancies, and foster respect for others, Denmark implemented mandatory sex education in state-run elementary schools.¹⁶¹ Concerning this educational initiative, the applicants, who were the parents of pupils attending State elementary schools file the petition from the parents of the children who were the student at the school to have their children excluded from sex education.¹⁶² They stated that they wanted to teach their child on their own since they did not feel that the requirement for sex education was bringing moral issues to their family life and religion.¹⁶³ Hence, all the applicants filed a complaint, arguing that the 1970 Act's mandatory sex education in State schools was contrary to their religious beliefs as a Christian parent and also violated Article 2 of Protocol No. 1

¹⁵⁵ *ibid* 6.

¹⁵⁶ *ibid* 7.

¹⁵⁷ *ibid* 8.

¹⁵⁸ *Moumné and others* (n 81) 116.

¹⁵⁹ *Kjeldsen, Busk Madsen and Pedersen v. Denmark* (n 152) para 15.

¹⁶⁰ *ibid*.

¹⁶¹ *ibid* 28.

¹⁶² *ibid* 37–38.

¹⁶³ *ibid* 37.

of the ECHR provision as well as invoked the Article 8, 9 and 14 regarding the matter of violation.¹⁶⁴

The Court stated that in order to ensure that the rights of parents as mentioned in second sentence of Article 2 protocol 1, it has to be read together with the first sentence right to education.¹⁶⁵ The right to respect for one's parents' religious and philosophical beliefs is grafted onto this fundamental right, and neither the first nor the second clause makes a distinction between private and state education.¹⁶⁶

Since the goal of the integrated education programme was to reduce unwanted pregnancies and raise awareness of sex education, the Court reasoned that its nature and purpose served a legitimate state interest.¹⁶⁷ The court stated that the objective of the second sentence of Article 2 Protocol 1 is to protect educational plurality, which is necessary to maintain the "democratic society" as defined by the Convention.¹⁶⁸

Nonetheless, this parental freedom right does not exempt State schools from the requirements to be outside of Article 2 Protocol 1 of ECHR.¹⁶⁹ The Court maintained that the State's functions in relation to education and teaching, do not permit a distinction to be drawn between religious instruction and other subjects. It requires the State to honor parents' beliefs, regardless of their religious or philosophical affiliation, during the duration of the State's educational initiative.¹⁷⁰ The court eventually concluded that after interpreting the second sentence of Article 2 of Protocol 1 in light of its first sentence and the entirety of the Convention, the Court concludes that the disputed legislation does not, by itself, violate the applicants' religious and philosophical convictions to the extent that it is prohibited.¹⁷¹ The court also did not find any violation of Article 8 and 9 but in regard to violation of Article 14 together with Article 2 protocol 1, the court determined that the sex education in question and religious instruction are not the same thing. The applicants' objected-to differentiation complies with Article 14 standards and is based on different factual

¹⁶⁴ *ibid* 44.

¹⁶⁵ *ibid* 50.

¹⁶⁶ *ibid*.

¹⁶⁷ *ibid* 53.

¹⁶⁸ *ibid* 50.

¹⁶⁹ *ibid* 51.

¹⁷⁰ *ibid*.

¹⁷¹ *ibid* 54.

circumstances.¹⁷² Thus the court concluded the case stating there has been no violation of Article 2 protocol 1 in conjunction with Article 14.¹⁷³

Another case pertaining to the matter of Article 2 protocol 1 second sentence parents' rights could be analysed from the case of *Hasan Eylem Zengin v. Turkey*. Turkish national Hasan Zengin was born in 1960, and his daughter Eylem Zengin was born in 1988. Mr Zengin and his family practise Alevism, a sect of Islam with a fascinating long history and strong ties to Turkish culture.¹⁷⁴ Specific components of Alevism religious practises, like prayer, fasting, and pilgrimage, differ from those of the Sunni schools taught in the school.¹⁷⁵ The application defines Alevism as a belief system or philosophy that draws inspiration from other cultures, faiths, and philosophical traditions. Within the Islamic religion, it promotes intimate relationships with nature, tolerance, humility, and love for one's neighbor. Alevis reject Sunni and Sharia law and traditions and always stand for human rights, women's rights, democracy, and secularism.¹⁷⁶

As per Article 24 of the Turkish Constitution and Section 12 of Basic Law No. 1739 on national education, children who attend elementary and secondary school must enrol in religious and cultural classes.¹⁷⁷ Thus, Ms Zengin was compelled to take the course as when Ms. Zengin was enrolled in an Istanbul state school, she was in seventh grade when the application was submitted.

The applicants claimed that the way religious ethics and culture were taught in Turkey violated her parents' and her right to a religiously based education as guaranteed by Article 2 of Protocol No. 1 (right to education).¹⁷⁸ The applicant further states that the course programme prioritizes Islamic Sunni law over other faiths.¹⁷⁹

The court examined whether the course material was taught in an impartial, critical, and pluralist manner.¹⁸⁰ It concluded that the curriculum at the school prioritises studying Islamic law, which includes the teachings of the Koran and the prophet Mohamed, over other forms of religious

¹⁷² *ibid* 56.

¹⁷³ *ibid* 58.

¹⁷⁴ *Hasan and Eylem Zengin v Turkey* [2007] ECtHR 1448/04 [7–8].

¹⁷⁵ *ibid* 8.

¹⁷⁶ *ibid* 9.

¹⁷⁷ *ibid* 13.

¹⁷⁸ *ibid* 36.

¹⁷⁹ *ibid*.

¹⁸⁰ *ibid* 54.

law.¹⁸¹ The textbooks not only gave a general overview of faiths but also explicitly emphasised Islam's core concepts, including its cultural practices, prayers, belief in angels, and faith in invisible beings.¹⁸²

Consequently, the Court concluded that religious culture and ethics instruction in Turkey did not satisfy the standards of objectivity and pluralism required for education in a democratic society and did not offer a suitable means of guaranteeing respect for parents' opinions.¹⁸³ As a result, the Court determined that a suitable form of compensation would be to align domestic laws and the Turkish educational system with Article 2 of Protocol No. 1. It further explained that Turkey also restricts students from growing up with a critical attitude towards religion.¹⁸⁴ Thus as a result, the ECtHR concluded the case that it has been violating the right on the second sentence of Article 2 protocol 1 of ECHR provision.¹⁸⁵

The case which is the matter brought by parents as a violation of their right set forth in Article 2 protocol 1 second sentence is *Campbell and Cosans v. the United Kingdom*. Jane Cosans, the mother of fifteen-year-old Jeffrey Cosans, and Grace Campbell, the mother of six-year-old Gordon Campbell, have voiced their opposition to corporal punishment in schools, citing it as an infringement on the right to education as per Article 2 protocol 1 of ECHR.¹⁸⁶ When the son of Mrs. Cosans took an alternate route through a cemetery on his way home from school, his headmaster called him in for corporal punishment.¹⁸⁷ The school interpreted this as a rejection of its demands and threatened legal action against the parents for not making sure their son attended and accept the punishment.¹⁸⁸

Then the applicant claimed that the practice of using corporal punishment¹⁸⁹ on students in schools went against their right to guarantee their children's education "in conformity with

¹⁸¹ *ibid* 60.

¹⁸² *ibid*.

¹⁸³ *ibid* 62–63.

¹⁸⁴ *ibid* 69.

¹⁸⁵ *ibid* 77.

¹⁸⁶ *Campbell and Cosans v. the United Kingdom* (n 36) para 20.

¹⁸⁷ *ibid* 10.

¹⁸⁸ *ibid* 11.

¹⁸⁹ *ibid* 24.

their philosophical convictions (protocol 1, Article 2), which state that children shouldn't be hurt or subjected to any physical harm or punishment.¹⁹⁰

Regarding the applicants claim on violation of Article 2 protocol 1, the government's main argument was that reasonable requirements could be placed on the right of access to educational facilities, as stated in the first sentence. Jeffrey's suspension resulted from his and his parents' refusal to comply with this requirement, so there was no violation of their right to education as stated in Article 2 protocol 1.¹⁹¹

In this regard, the Court believes that it is essential to address the matter of both sentences as stated in Article 2 Protocol 1.¹⁹² The court stated that there is a substantial difference between the legal basis of the two claims, one is for right of a parent and the other a right of a child.¹⁹³ Jeffrey Cosans's and his parents' refusal to accept such corporal punishment led to his suspension which could have been avoided if his parents had acted contrary to their conviction which has to be respected under Article 2 protocol 1 second sentence.¹⁹⁴ A condition of access of education that in any way infringes upon another right or conflicts with other rights guaranteed by Protocol No. 1 cannot be reasonable and acceptable and it in any case goes beyond the State's authority to regulate under Article 2 Protocol 1.¹⁹⁵

Thus, the court determined that the child's right to education had been infringed upon by reason of being suspended from school and thus court regarded there has been a violation of Article 2 protocol 1 first sentence regarding education.¹⁹⁶ Further, the court stated that it is necessary to read the first and second sentences of Article 2 protocol 1 which establish everyone's right to education, together with Parents' right to be respected for their philosophical and religious convictions.¹⁹⁷ In this regard, the court also stated that the parent's rights to raise their children in accordance with their philosophical convictions had been infringed upon under Article 2 Protocol 1 second

¹⁹⁰ *ibid* 20.

¹⁹¹ *ibid* 39.

¹⁹² *ibid* 40.

¹⁹³ *ibid*.

¹⁹⁴ *ibid* 41.

¹⁹⁵ *ibid*.

¹⁹⁶ *ibid*.

¹⁹⁷ *ibid* 37.

sentence.¹⁹⁸ However, the court determined that there had been stated about no breach of the right against corporal punishment which was also the matter brought up by the applicant.¹⁹⁹

2.4 Article 14 and Article 1 of Protocol 12 (Prohibition on discrimination) of ECHR

2.4.1 Education and Discrimination

According to Article 14 of the ECHR, everyone has the right to enjoy the freedoms and rights outlined in the Convention without facing discrimination based on their sex, race, colour, language, religion, national or social origin, or any other status.²⁰⁰ Any treatment that is not deemed discriminatory must have a justifiable aim and be reasonable in its differences from other forms of treatment.²⁰¹ The definition of discrimination can be found in the case of *D.H and others v. Czech Republic*. Through its case law, the Court has held that discrimination is defined as treating individuals differently in relevantly similar situations without necessarily providing any objective or goal and reasonable justification.²⁰²

However, Article 14 is only applicable in conjunction with other substantive provisions of the convention, as it does not establish an independent protection against discrimination.²⁰³ This is not to argue that Article 14 ECHR does not have an independent function to fulfil within the Convention's framework. Conversely, it works as a supplement to all other substantive provisions to be adopted and enforced without discrimination.²⁰⁴ In the Belgian linguistic case, the court noted that, While it is true that this guarantee does not have independent existence on its own because it only relates to "rights and freedoms set forth in the Convention" as defined by Article 14, a measure that complies with the requirements of the Article enshrining the right or freedom in question may violate this Article when read in conjunction with Article 14 due to its discriminatory nature.²⁰⁵

¹⁹⁸ *ibid* 38.

¹⁹⁹ *ibid* 31.

²⁰⁰ European Convention on Human Rights - ECHR Official Texts - ECHR - ECHR / CEDH art 14.

²⁰¹ 'Guide on Article 2 of Protocol No. 1 - Right to Education' (n 10) 7.

²⁰² *D.h. and Others v. the Czech Republic* (n 14) para 175.

²⁰³ Olivier de Schutter, 'The Prohibition of Discrimination under European Human Rights Law: Relevance for EU Racial and Employment Equality Directives' (Office for Official Publ of the Europ Communities 2005) 20.

²⁰⁴ *ibid*.

²⁰⁵ *Case 'relating to certain aspects of the laws on the use of languages in education in belgium' (merits)* (n 40) para 9.

Regarding the matter of discrimination, the case of *Dupin v. France* was brought to ECtHR due to the complaints of the violation of Article 14 along with Article 2 protocol 1 of the convention.

The mother applicant who is a French national is contesting the French government's decision to deny her autistic child admission to a regular school. With assistance from the Special Education and Home Care Service (SESSAD), the applicant filed a request for her child's education and referral to a class for school integration (CLIS) with the Commission for the Rights and Autonomy of Disabled Persons (CDAPH).²⁰⁶ The request was however rejected rather, the child was directed to a unique schooling programme and particular care for children with intellectual disabilities.²⁰⁷ The applicant complained that the domestic authorities had denied her child's request to attend an ordinary school. Citing Article 2 of Protocol No. 1 (right to education) and Article 14 together, she contended that the State had not fulfilled its affirmative obligation to provide the necessary measures for disabled children and that it had also failed to safeguard the rights of autistic children.²⁰⁸

Regarding the applicant claim of violation on Article 2 protocol 1, the Court's initial ruling concerned the purported infringement of the right to education (ECHR Article 2 Protocol 1). It referred to earlier case law, which shows that providing education for kids with disabilities is a difficult task to plan for in a world with limited funding.²⁰⁹ The Court did, however, go on to say that education received at specialized institutions also guarantees the right to education.²¹⁰ Following the French authorities, the Court determined that the child's special education needs are not something that the regular school can easily fulfil, and it is not an easy task to do.²¹¹

Consequently, the Court found no evidence of a violation of Article 2 protocol 1 stating that it cannot be argued that the State's denial of his right to an education in regular school was due to his impairment. additionally, the refusal to admit the applicant's son to an ordinary school be blamed as a failure of the state in protecting the right to education.²¹² Since the internal remedies had not

²⁰⁶ *Dupin v France (dec)* [2018] ECtHR 2282/17 [4].

²⁰⁷ *ibid* 5.

²⁰⁸ *ibid* 12.

²⁰⁹ *ibid* 25.

²¹⁰ *ibid* 26.

²¹¹ *ibid* 28.

²¹² *ibid* 33.

been exhausted, it did not take into consideration the claimed violation of Article 14 of the ECHR.²¹³

Another case that has been concerned with the matter of violation of Article 14 is the case of *G.L. v. Italy*, the applicant was diagnosed with nonverbal autism²¹⁴. According to Italian legislation, children with disabilities have the right to an inclusive education in mainstream public schools.²¹⁵ This right involves the presence of a learning-support teacher and the potential of additional helpers, if needed, for each child with a disability.²¹⁶

But when applicant started elementary school in 2010, the school stopped providing the specialized help she was getting, with no chance of a renewal.²¹⁷ Her parents provided the necessary private support for her, and she remained for two years without receiving any special care and assistance.²¹⁸ The parents' appeal for compensation which was refused in 2015 after the Italian Administrative Court denied their request which claimed the violation of their daughter's right to specialized help.²¹⁹ Then, G.L. claimed that Italy had infringed upon her rights under Articles 2 (right to education) of Protocol No. 1 and 14 (non-discrimination) and 8 (respect for private life) of the European Convention on Human Rights.²²⁰

According to the Court, G.L.'s impairment was the reason why she was not treated equally by other students and could not continue to attend primary school in conditions comparable to those experienced by students without disabilities.²²¹ Further, the state claimed that the G.L. was not receiving enough help because of insufficient funds, which was unjustified, and thus the ECtHR rejected this claim.²²²

Specifically, the Court found that the administrative court ought to have evaluated whether the authorities had taken the proper steps to meet the needs and capacities of the school and whether the lack of funds had comparably affected non-disabled children. The Court further held that the

²¹³ *ibid* 36.

²¹⁴ *G.L v Italy* [2020] ECtHR 59751/15 [1].

²¹⁵ *ibid* 18.

²¹⁶ *ibid*.

²¹⁷ *ibid* 7.

²¹⁸ *ibid* 10.

²¹⁹ *ibid* 14.

²²⁰ *ibid* 32–33.

²²¹ *ibid* 67.

²²² *ibid* 68.

authorities were required by the European Social Charter to promote the full integration and participation of people with disabilities, including through assistance, and that they should have considered alternative options for allocating their limited resources.²²³

The court finds that in this instance, the authorities did not attempt to ascertain the applicant's actual needs in light of her autism to offer a potential solution that would allow her to complete primary school with other children without placing an excessive or undue burden on them.²²⁴ The government was additionally found to have failed to grant applicants who should have equal rights as other children and to strike a reasonable balance so that the applicant may exercise her right to an education.²²⁵ Thus the court found the violation of Article 14 in conjunction with Article 2 protocol 1 of the applicant.²²⁶

The case of *Çam v. Turkey*, is the case known for discrimination based on disabilities when the refusal to enrol blind person in music academy even though she has passed the examination and had a medical certificate from a doctor regarding the matter that she can receive the education and instruction in the music academy where the eyesight is not required.²²⁷ After getting message on refusal to enrol her in a music academy from the director, the parents on behalf of the applicant file a complaints on Istanbul administrative court by citing the name of the person who has been a part of music academy and also blind stating their right has been violated solely based on her disability.²²⁸ The court however dismissed the case stating that the criteria set out on the procedure was not met.²²⁹

The applicant filed a complaint with the ECtHR alleging that her right to education has been violated after exhausting all domestic legal remedies. She disputed the claim that admission to the Music Academy depended on having good vision, arguing that this restriction conflicted with the right to an education which has been given as per Article 2 protocol 1 of the convention.²³⁰ The applicant further mentioned that the State had not upheld its affirmative duty to give people with

²²³ ibid 49.

²²⁴ ibid 70.

²²⁵ ibid 72.

²²⁶ ibid.

²²⁷ *Çam v Turkey* [2016] ECtHR 51500/08 [11–12].

²²⁸ ibid 16.

²²⁹ ibid 18.

²³⁰ ibid 39.

impairments equal access to opportunities as everyone else.²³¹ The applicant claimed that the main reason for the music academy's refusal to enrol her, despite the fact that she passed the exam and had previously provided all required documentation, was her blindness, which is unfair and discriminatory and unfair. She therefore filed a complaint, alleging that there had also been a violation of her Article 14 right to non-discrimination.²³²

The court observed that refusal on enrolling the applicant is based on her disability of her blindness.²³³ the court noted that the domestic authority has not yet taken into consideration the possibility that a reasonable accommodation could have allowed her to attend that institution. This indicates that the applicant has been refused admission to the music academy without any legitimate aim and objective and reasonable justification. Accordingly, it concludes that there has been a breach of Article 14 of the convention in conjunction with Article 2 of protocol 1.²³⁴

The case of *Enver Şahin v. Turkey*, the applicant was a first-year technical faculty mechanics student who suffered severe injuries in an accident that left his lower limbs paralyzed.²³⁵ the applicant's request for the university grounds to be modified so he could resume his studies where the faculty replied that the structure is made to accommodate several floors in order to accommodate all of the students, and that it will eventually take time for the building to be reconstructed. It also mentioned that the applicant's existing situation would make it difficult for them to participate in the hands-on workshops required for the mechanical course. The faculty decided that they would support the candidate in his continued studies to the best of their ability.²³⁶

The applicant filed the case alleging a discriminatory infringement of his right to education and a violation of both Article 2 Protocol 1 and Article 14. He argued that renovations to the faculty building were necessary for him to be able to complete his studies there. He claimed that the convention's Article 2 Protocol 1 had been violated by forcing him to give up his studies after his work request to build a faculty building accessible to him was denied. Additionally, the applicant

²³¹ *ibid.*

²³² *ibid* 45–46.

²³³ *ibid* 69.

²³⁴ *ibid.*

²³⁵ *Enver Şahin v Turkey* [2018] ECtHR 23065/12 [6].

²³⁶ *ibid* 8.

argued that the State should have taken the necessary action to allow him to finish his university degree but failed to do so.²³⁷

The Court concludes, after considering all of the aforementioned factors, that the Government has not shown in this particular case that the national authorities, particularly the judicial and academic authorities, acted with the necessary diligence to guarantee that the right to education is accessible to everyone on equal footing thus applicant should continue his right to education equally with other students.²³⁸ Thus the court concluded that there was a violation of Article 14 in conjunction with Article 2 protocol 1 of the convention.²³⁹

The discrimination based on religious conviction can be illustrated from the case of *Grzelak v. Poland*. In this case, the applicants complained about not receiving a mark in the "religion/ethics" part of their school reports and said that the administration had neglected to schedule a class in ethics for them.²⁴⁰ The applicant claimed to be subject to discrimination and harassment for not attending religious education lessons.²⁴¹ due to the reason mentioned, the applicant filed a complaint alleging that this violated both Article 9 and Article 14 of the convention.²⁴²

In this context, the court reviewed the case's facts and complaints, the court believes that, concerning the lack of a mark for the subject "religion/ethics," it is appropriate to review these complaints under Article 14 considered in conjunction with Article 9 of the Convention.²⁴³ Considering the aforementioned, the Court determines that the third applicant's lack of a mark for "religion/ethics" on his subsequent school reports falls under the negative aspect of freedom of thought, conscience, and religion protected by Article 9 of the Convention because it could be interpreted as indicating his lack of affiliation with any particular religion. Thus, in this circumstance, Article 14 in conjunction with Article 9 is relevant.²⁴⁴ The Court showed its dissatisfaction with how students in religious and ethical subjects are treated differently.²⁴⁵ In this regard, the court declared that there was a reasonable relationship of proportionality between the

²³⁷ *ibid* 28.

²³⁸ *ibid* 75.

²³⁹ *ibid*.

²⁴⁰ *Grzelak v Poland* [2010] ECtHR 7710/02 [49].

²⁴¹ *ibid* 9.

²⁴² *ibid* 49.

²⁴³ *ibid* 50.

²⁴⁴ *ibid* 88.

²⁴⁵ *ibid* 100.

measures used and the objective pursued, and that the disparity in treatments was objectively and reasonably justified.²⁴⁶ The Court believes that the third applicant's fundamental right under Article 9 of the Convention to not publicly express his religious beliefs or other convictions was violated, exceeding the State's margin of appreciation in this case.²⁴⁷

In response to complaints alleging that the convention's Article 2 protocol 1 was violated by the failure to offer ethics classes, the court determined that there was no indication whatsoever that the first and second applicants' rights under Article 2 of Protocol No. 1 had been violated and dismissed the complaints.²⁴⁸

²⁴⁶ *ibid.*

²⁴⁷ *ibid.*

²⁴⁸ *ibid* 105.

Chapter 3 Legal Framework for Non-Discrimination

3.1 Concept of Discrimination

3.1.1 Legal Framework of Council of Europe (CoE)

The European legal framework on Human Rights comprises several laws that make up the basis for non-discrimination in Europe, yet this thesis will focus on the provisions of a European Convention on human rights. However, The European Court of Human Rights emphasized that the European Convention on Human Rights cannot be understood in a vacuum; rather, it must be interpreted with the fundamental rules of international law.²⁴⁹ It is important to consider any applicable international law laws that may affect the parties' relationship, especially those that deal with the international protection of human rights issues.²⁵⁰ Thus, to broaden the scope of the definition of discrimination, this part of the study will also discuss some European non-discrimination legislation. The aim is to define concept of prohibition on discrimination, the international instruments contribution in prohibition on discrimination, and how courts have interpreted the discrimination (direct or indirect) into practice.

3.1.2 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. Protection under the ECHR extends to everyone under a member state's jurisdiction, regardless of citizenship, and even extends outside national borders to places under the state's effective control.²⁵¹ The prohibition of discrimination is covered by two Articles of the convention which are Article 14 and Article 1 of Protocol 12 where the latter of which essentially provides a more thorough explanation of the former.²⁵² It means Although Article 1 of Protocol 12 to the ECHR only addresses the "enjoyment of any right set forth by law," the Protocol provides more protection against discrimination than Article 14 of the ECHR does.²⁵³

²⁴⁹ European Union Agency for Fundamental Rights., European Court of Human Rights., and Council of Europe (Strasbourg)., *Handbook on European Non-Discrimination Law :2018 Edition*. (Publications Office 2018) 25.

²⁵⁰ *ibid*.

²⁵¹ *ibid* 27.

²⁵² Frédéric Edel and Council of Europe, *Prohibition of Discrimination Under the European Convention on Human Rights* (Council of Europe 2010) 10.

²⁵³ Schutter (n 203) 24.

The scope of Article 14 is limited, means the applicability may be restricted by the condition that it only applies in the fields where convention rights are applied.²⁵⁴ The enjoyment of the convention rights is restricted by non-discrimination clause which is often known as “ambit” requirement.²⁵⁵ Article 14 of the European Convention on Human Rights solely does not create an independent protection from discrimination.²⁵⁶ However, it is not the argument that there isn't an independent role for Article 14 ECHR in the Convention's framework. This means that Article 14 can only be examined by the Court in connection with other substantive right.²⁵⁷ In other words, it still needs to happen "within the ambit of" one or more other substantive rights for discrimination to be recognized under Article 14 ECHR.²⁵⁸ Thus, Article 14 of the European Convention on Human Rights will not be relevant unless the alleged discrimination is in the exercise of a right guaranteed by the Convention or does not occur during the enjoyment of a right protected by the Convention.²⁵⁹

Nonetheless, this does not imply that a substantive right violation is the exclusive basis for the examination.²⁶⁰ The Court may first consider the allegation of a substantive Article violation, and then it may consider the allegation of an Article 14 violation in connection with the substantive Article or the court may also consider the substantive Article in connection with Article 14 rather than examining it independently after determining that Article 14 has been violated.²⁶¹ This statement can also be backed by the case of Belgian Linguistics Case. A difference in how persons are treated must have a justifiable purpose for it to be considered non-discriminatory.²⁶² It was determined that the regulation was solely implemented due to linguistic issues, not for any financial reason. This violated both Article 14 of the Convention and Article 2 of Protocol No. 1 because it did not seek any justifiable purpose.²⁶³

²⁵⁴ Rory O'Connell, 'Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECHR' 3.

²⁵⁵ *ibid* 5.

²⁵⁶ Schutter (n 203) 20.

²⁵⁷ *Grzelak v. Poland* (n 240) para 84.

²⁵⁸ Schutter (n 203) 21.

²⁵⁹ *ibid*.

²⁶⁰ *ibid* 20.

²⁶¹ *ibid*.

²⁶² *Case 'relating to certain aspects of the laws on the use of languages in education in belgium' (merits)* (n 40) para 10. See the interpretation adopted by the court part.

²⁶³ *ibid* 32.

Furthermore, the Court has adopted a broad interpretation of the nature of subsidiarity. First, the ECtHR has made clear that it does not require the violation of substantive right of itself to examine claims under Article 14 taken in conjunction with a substantive right.²⁶⁴ Second, it has decided that a discrimination complaint may be covered by a specific right even if it has nothing related to a specific entitlement provided by the ECHR. In certain cases, it was adequate that the case's facts broadly related to topics addressed by the ECHR.²⁶⁵ Furthermore, to provide a broad interpretation of the scope, the ECtHR has taken several approaches to address the scope of protection of the right not to be discriminated against. Most remarkably, in certain cases, it avoids the scope of the discussion entirely by classifying certain discriminatory acts as constituting either inhuman or degrading treatment under Article 3, or violations of the right to respect for one's private and family life under Article 8.²⁶⁶

Above all, the ECtHR emphasizes that Article 14 is an "autonomous" provision, meaning that it can be violated even in cases when the substantive Article that was used to invoke Article 14 has not been violated.²⁶⁷ Even though the European Court of Human Rights has expanded the meaning of Article 14 of the Convention, a complaint under Article 14 will still fail to identify a relevant substantive right and will be dismissed as being obviously unfounded. Even though the Court interpreted Article 14 broadly, if an application does not specify the substantive right, it will still be denied as clearly ill-founded.²⁶⁸ The expansion of protection to include a "general prohibition on discrimination" was therefore a crucial measure for protecting each person's entitlement to equal treatment.

Article 1 protocol 12 of the convention provides the general prohibition on discrimination.²⁶⁹ It states;

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."

²⁶⁴ European Union Agency for Fundamental Rights., European Court of Human Rights., and Council of Europe (Strasbourg). (n 249) 30.

²⁶⁵ *ibid.*

²⁶⁶ O'Connell (n 254) 6.

²⁶⁷ *ibid.*

²⁶⁸ *ibid* 8.

²⁶⁹ European Convention on Human Rights - ECHR Official Texts - ECHR - ECHR / CEDH art Protocol 12, Article 1.

2. “No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.”

It extends the additional scope of protection under Article 1 concerns the right of a person to 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).²⁷⁰

Article 1 Protocol 12 provides more protection against discrimination than Article 14.²⁷¹ However, there are still no cases (until 2023) that are related with violation of education rights in conjunction with discrimination. Since this thesis has concentrated on the right to education and discrimination in the education, it is important to say that Article 1 Protocol 12 will not be the focus of this thesis.

Nevertheless, there is a case of *Elmazova and others v. North Macedonia* (2022) that brought up by the applicant's alleged violations of Article 1 Protocol 12 and Article 14 of the Convention.²⁷² However, the court decided that the complaint should not be raised in relation to Article 1 Protocol 12 of the convention; instead, the court has considered this matter from the perspective of Article 14 violations in connection with Article 2 Protocol 1.²⁷³ This case will be dealt separately later in chapter 4 of the thesis.

²⁷⁰ ‘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.

²⁷¹ Olivier de Schutter, ‘The Prohibition of Discrimination under European Human Rights Law: Relevance for EU Racial and Employment Equality Directives’ (Office for Official Publ of the Europ Communities 2005) 24.

²⁷² *Elmazova and Others v North Macedonia* [2022] ECtHR 11811/20, 13550/20 [39].

²⁷³ *ibid.*

3.1.3 The European social charter

The European Social Charter was initially signed on October 18, 1961, as a compliment to the European Convention on Human Rights, which protects rights to housing, work, and other aspects of human welfare, among many other rights.²⁷⁴ However, The European Social Charter of 1961 does not contain an explicit provision on non-discrimination.²⁷⁵ Although it has described regarding 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’.²⁷⁶

The revised European Social Charter adopted in 1996 brought about two significant changes that are crucial to the fight against discrimination, in addition to increasing the scope of substantive rights safeguarded by the new document. First, the Revised Charter's Part V, Article E describes non-discrimination.

“the enjoyment of the rights set forth in this Charter shall be secured without 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.”²⁷⁷

The Committee also notes that the text of Article E and Article 14 of the European Convention on Human Rights are nearly similar.²⁷⁸ The concept of equality embodied in Article 14 requires treating equals equally and unequals unequally, as the European Court of Human Rights has emphasized time and again when interpreting the Article and most recently in the *Thlimmenos* case.²⁷⁹ In this case, the Court has determined that when States treat individuals differently in similar situations without offering a valid and objective justification, they are violating Article 14

²⁷⁴ Schutter (n 271) 28.

²⁷⁵ *ibid* 29.

²⁷⁶ The European Social Charter - Social Rights - www.coe.int n Preamble.

²⁷⁷ *ibid* Part V, Article E.

²⁷⁸ *Decision on the merits: International Association Autism-Europe v France, Collective Complaint No 13/2002* [52].

²⁷⁹ *ibid*.

which states prohibition against discrimination in the exercise of rights protected by the Convention.²⁸⁰

A second contribution is modifying Article 15, which includes a non-discrimination clause and specifically mentions education as a key tool for advancing the inclusion of children with disabilities in general or mainstream educational programs.²⁸¹ If it is determined that someone has been unlawfully excluded, segregated, or otherwise denied an effective right to education, such legislation should, as a minimum, demand a convincing rationale for any special or segregated educational systems and provide an effective remedy.²⁸²

There is a case that describes about prohibition on discrimination by European Committee of Social Rights (ECSR). The European Committee of Social Rights uses two complementary mechanisms to monitor compliance with the Charter: the Reporting System, which compiles national reports compiled by Contracting Parties, and the Collective Complaints Procedure, which accepts collective complaints from social partners and other non-governmental organizations.²⁸³ In its decision on the merits of Collective complaint no. 13/2002 directed by Autism-Europe against France. Autism-Europe claimed that the Revised Charter's Article E violates since, as a result of alleged shortcomings, people with autism do not effectively benefit from the right to education guaranteed by both Articles 15§1 and 17§1.²⁸⁴ The Committee considers that Article E was added as a stand-alone Article in the Revised Charter shows how much the authors valued the principle of non-discrimination in ensuring that the many substantive rights outlined in it would be achieved.

It additionally takes into consideration that its role is to assist in ensuring the equitable and effective enjoyment of all rights. Consequently, it doesn't represent a separate right that could offer sufficient justification for a complaint on its own. However, the Committee believes that the reference to "other status" sufficiently covers disability, even if it is not specifically listed as a prohibited basis of discrimination under Article E.²⁸⁵ In this regard, the ECSR concluded by 11

²⁸⁰ *Thlimmenos v Greece* [2000] ECtHR [GC] 58561/00 [44].

²⁸¹ The European Social Charter - Social Rights - www.coe.int 248, 7th edition of the collected texts.

²⁸² Schutter (n 271) 35.

²⁸³ 'European Committee of Social Rights - Social Rights - [Www.Coe.Int](http://www.Coe.Int)' (*Social Rights*)

<<https://www.coe.int/en/web/european-social-charter/european-committee-of-social-rights>> accessed 22 January 2024.

²⁸⁴ *Decision on the merits: International Association Autism-Europe v. France, Collective Complaint No. 13/2002* (n 278) para 50.

²⁸⁵ *ibid* 51.

votes to 2 that France had violated Articles 15 § 1 whether alone or combined with Article E of the revised European Social Charter.²⁸⁶

3.1.4 Framework Convention for the Protection of National Minorities

Framework Convention for the Protection of National Minorities is the first international legally binding instrument concerning the general protection of national minorities with the objective of safeguarding national minorities' existence within the Parties' respective areas.

In 1995, the Council of Europe adopted the Framework Convention for the Protection of National Minorities, to promote the effective protection of national minorities and of the rights and freedoms of persons belonging to those minorities, within the rule of law, respecting the territorial integrity and national sovereignty of States.²⁸⁷ Section II, Article 4 of the Framework Convention prohibits discrimination states:

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.”²⁸⁸
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.”²⁸⁹
3. “The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination.”²⁹⁰

²⁸⁶ *ibid* 54.

²⁸⁷ Framework Convention for the Protection of National Minorities - National Minorities (FCNM) - www.coe.int l Preamble.

²⁸⁸ *ibid* 4 (1).

²⁸⁹ *ibid* 4 (2).

²⁹⁰ *ibid* 4 (3).

The concept of positive distinction has been articulated by the European Court of Human Rights in the case of *Thlimmenos v. Greece*. In this case, 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.”²⁹¹

In addition, the Court clarified the effects of applying a neutral rule or action to members of a national minority without considering their unique circumstances in the cases of *D.H. and others v. Czech Republic*. The case established that equality of the result is just as important as equality of opportunity and that discrimination is possible when there is evidence of the impact of a seemingly neutral policy that shows how it differs for different groups, regardless of whether that is the policy's intended outcome. This case will further separately in chapter 4 with the analysis of the interpretation of court regarding the matter of discrimination in education.

3.2 Legal framework of European Union (EU)

Keeping in the mind that the European Court of Human Rights considers that all relevant international and regional law during the interpretation of the Convention, here, the EU will be considered because the non discrimination principle is one of the fundamental values of the European Union for breaking any form of discrimination based on sex, colour, race, ethnicity, religion, age, or sexual orientation.²⁹² Article 10 states that;

“In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”²⁹³

3.2.1 European Union Charter of Fundamental Rights

²⁹¹ *Thlimmenos v. Greece* (n 280) para 44.

²⁹² Consolidated version of the Treaty on the Functioning of the European Union 2012 (OJ C) art 10.

²⁹³ *ibid.*

European Union Charter of Fundamental Rights in its preamble states about respecting the diversity of the cultures and traditions of the peoples of Europe, as well as the national identities of the Member States and the structure of their public authorities at the national, regional, and local levels, the European Union operates to safeguard and advance common values like human dignity, freedom, equality, and solidarity.²⁹⁴

The charters Article 21 deals with the provision on non- discrimination which states;

1. “Any 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 shall be prohibited.”
2. “Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.”²⁹⁵

The charter provides the protection of fundamental rights with Article 6 which has close link with the ECHR. Article 6 of the Treaty on the European Union ensures that the Charter has legal force which states that the Convention for the Protection of Fundamental Freedoms and Human Rights of the European Community shall be ratified by the Union. The powers of the Union as delineated in the Treaties shall not be affected by such accession and the basic foundations of Union law shall be the rights protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as the constitutional traditions shared by the Member States.²⁹⁶

Not only the European Union Charter deals about discrimination but also mentioned the Article related to education in Article 14 which is quite similar as ECHR provision on education. Article 14 states that;

²⁹⁴ Charter of Fundamental Rights of the European Union 2012 (OJ C) 1 Preamble.

²⁹⁵ *ibid* 21.

²⁹⁶ Consolidated version of the Treaty on the Functioning of the European Union art 6.

1. “Everyone has the right to education and to have access to vocational and continuing training.”
2. “This right includes the possibility to receive free compulsory education.”
3. “The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.”²⁹⁷

The protection from any form of discrimination is further protected by the European Commission through various directive which has a function to safeguard against discrimination on any ground such as race and ethnicity²⁹⁸, against discrimination at work on grounds of religion or belief, disability, age or sexual orientation²⁹⁹, and equal treatment.³⁰⁰

The Council Directive 2000/43/EC: The protection of Roma people from any form of discrimination has its importance in the Directive 2000/43/EC which implements the principle of equal treatment between persons irrespective of racial or ethnic origin. The Directive distinguishes between direct and indirect discrimination based on racial or ethnic origin while defining the general prohibition of discrimination.

Article 2 (1) describes the Concept of discrimination and states;

1. “For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.”³⁰¹

And further states;

²⁹⁷ Charter of Fundamental Rights of the European Union art 14.

²⁹⁸ Directive - 2000/43 - EN - EUR-Lex.

²⁹⁹ Council Directive 2000/78/EC 2000.

³⁰⁰ Directive 2006/54/EC 2006.

³⁰¹ Directive - 2000/43 - EN - EUR-Lex art 2 (1).

For the purposes of paragraph 1: (a) “direct discrimination shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;”³⁰²

(b) “indirect discrimination shall be taken to occur where 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.”³⁰³

The directive also stated that specific action in the area of discrimination based on race or ethnic origin should cover areas like education, social protection including social security and healthcare, social advantages, and access to and supply of goods and services. This is to ensure the development of democratic and tolerant societies which allow the participation of all persons irrespective of race or ethnic origin.³⁰⁴

³⁰² *ibid* 2 (1) (a).

³⁰³ *ibid* 2 (1) (b).

³⁰⁴ Directive - 2000/43 - EN - EUR-Lex.

Chapter 4 Discrimination of Roma Children in access to education

4.1 The approach of finding discrimination under ECHR

There are the non exhaustive lists of prohibition grounds of discrimination such as race, sex, colour, religion, ethnic minority, nationality, birth, or other status.³⁰⁵ It is known from the established case law of ECtHR a difference of treatment is discriminatory within the meaning of Article 14 ECHR if differential treatment has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.³⁰⁶ Thus, evaluating a discrimination claim requires a two-pronged approach, with the first focus being on the aim being pursued and the second being the connection between the contested difference in treatment and the achievement of that objective or aim.³⁰⁷ The type of criteria used to determine the difference in treatment may influence how this two-part test is conducted.³⁰⁸ To this extent, the case law of the European Court of Human Rights does seem to establish a hierarchy of grounds; however, in the majority of instances, a difference in treatment will no pass the test of non-discrimination if it pursues a legitimate aim by demonstrating a reasonable relationship of proportionality with that aim. as demonstrated in the cases of *D.H. and Others v. Czech Republic* and *Sampanis and Others v. Greece*. It is however undeniable that certain grounds of differentiation require particularly strong justifications from the State to pursue as a legitimate aim and justification behind the treatment.³⁰⁹

4.2 A form of Prohibited discrimination

The narrow definition of "discrimination" has been the main flaw in traditional Article 14 jurisprudence, until recently, which has led it to primarily forbid only "direct and indirect" discrimination.³¹⁰ Article 14 of the ECHR and Protocol 12's Article 1 both forbid discrimination in the exercise of the freedoms and rights outlined in the Convention. For example, Article 14 of ECHR has been implemented to safeguard people from discrimination based on ethnic origin or

³⁰⁵ Schutter (n 203) 13.

³⁰⁶ *D.h. and Others v. the Czech Republic* (n 14) para 60(b).

³⁰⁷ Schutter (n 203) 14.

³⁰⁸ *ibid.*

³⁰⁹ *ibid.*

³¹⁰ O'Connell (n 254) 8.

any other status.³¹¹ And Article 1 Protocol 12 states the enjoyment of the right specifically granted to an individual under national law.³¹² It further confirmed that the notions of discrimination prohibited by both Article 14 and Article 1 of Protocol No. 12 were to be interpreted in the same manner.³¹³

The discrimination can be known as direct discrimination and indirect discrimination. While the phrases "direct" and "indirect" discrimination have no any legal definition, they can be interpreted differently in different legal system.³¹⁴ However, in the case of *Burden v. United Kingdom*, the Court emphasizes that an individual, non-governmental organization, or group of individuals must be able to assert that they "are the victims of a violation of the rights outlined in the Convention" to be entitled to file a petition. An individual must be directly affected by the contested law in order to assert that they are a victim of a violation. The court has addressed the issue of direct discrimination in this instance, although the expression "direct affected" has been used.³¹⁵

Direct discrimination means when certain groups of people are treated differently without an objective and reasonable justification, either because the treatment does not have a legitimate aim to achieve a legitimate objective or because there is no reasonable link between the means used and the goal pursued.³¹⁶ The expression "direct discrimination" has been interpreted as difference in treatment of persons in similar situations without reasonable justification in the case of *D.H. and Others v. Czech Republic* which concerns the Roma children and their education.³¹⁷

To strengthen the protection provided by Article 14 of ECHR, the European Court of Human Rights is attempting to go beyond the prohibition on direct discrimination.³¹⁸ Distinguishing between indirect and direct discrimination the former needs the same treatment with different consequences, whereas the latter requires separate treatment.³¹⁹ Indirect discrimination can be regarded as being neutral in treatment, targeting a specific minority or community if the policy

³¹¹ Schutter (n 271) 13.

³¹² European Union Agency for Fundamental Rights., European Court of Human Rights., and Council of Europe (Strasbourg). (n 249) 33.

³¹³ *ibid.*

³¹⁴ Schutter (n 271) 16.

³¹⁵ *Burden v the United Kingdom* [2008] ECtHR [GC] 27785/10 [33].

³¹⁶ Schutter (n 271) 16.

³¹⁷ *D.h. and Others v. the Czech Republic* (n 14) para 175.

³¹⁸ Schutter (n 271) 17.

³¹⁹ European Union Agency for Fundamental Rights., European Court of Human Rights., and Council of Europe (Strasbourg). (n 249) 56.

causing the disadvantage is not objectively and reasonably justified, or applying a general measure that disproportionately affects a large number of members of a particular category unless the measure producing objectively and reasonable justification, and to treat differently a particular individual or category by allowing for an exception to the general rule's application.³²⁰ Disparities in treatment may appear as disproportionately adverse effects of a general policy or measure that, despite being presented neutrally, can discriminate against a group without any need of discriminatory intent.³²¹ The majority of Strasbourg Court case law primarily addresses direct discrimination, and the ECtHR is reluctant to accept cases involving indirect discrimination, despite a few rulings addressing indirect discrimination such as the case of *Thlimmenos v. Greece*.³²² Nevertheless, the Court believes that this is not the only aspect of Article 14's prohibition on discrimination. States that fail to treat people differently whose circumstances are significantly different without an objective and reasonable justification also violate the right not to be discriminated against when exercising the rights provided by the Convention.³²³

Understanding the rights protected by this Convention is essential, as Article 14 is entirely dependent on discrimination based on one of the substantive rights granted in the ECHR.³²⁴ It means, Article 14 of the European Convention on Human Rights solely does not create an independent protection from discrimination.³²⁵ However, it is not the argument that there isn't an independent role for Article 14 ECHR in the Convention's framework. This means that Article 14 can only be examined by the Court in connection with other substantive right.³²⁶ In other words, it still needs to happen "within the ambit of" one or more other substantive rights for discrimination to be recognized under Article 14 ECHR.³²⁷ Thus, Article 14 of the European Convention on Human Rights will not be relevant unless the alleged discrimination is in the exercise of a right guaranteed by the Convention or does not occur during the enjoyment of a right protected by the Convention.³²⁸

³²⁰ *Schutter* (n 203) 16.

³²¹ *D.h. and Others v. the Czech Republic* (n 14) para 184.

³²² *O'Connell* (n 254) 11.

³²³ *Schutter* (n 271) 17.

³²⁴ European Union Agency for Fundamental Rights., European Court of Human Rights., and Council of Europe (Strasbourg). (n 249) 29.

³²⁵ *Schutter* (n 203) 20.

³²⁶ *Grzelak v. Poland* (n 240) para 84.

³²⁷ *Schutter* (n 203) 21.

³²⁸ *ibid.*

Nonetheless, this does not imply that a substantive right violation is the exclusive basis for the examination.³²⁹ The Court may first consider the allegation of a substantive Article violation, and then it may consider the allegation of an Article 14 violation in connection with the substantive Article or the court may also consider the substantive Article in connection with Article 14 rather than examining it independently after determining that Article 14 has been violated.³³⁰ This statement can also be backed by the case of Belgian Linguistics Case. A difference in how persons are treated must have a justifiable purpose for it to be considered non-discriminatory.³³¹ It was determined that the regulation was solely implemented due to linguistic issues, not for any financial reason. This violated both Article 14 of the Convention and Article 2 of Protocol No. 1 because it did not seek any justifiable purpose.³³²

In addition to identifying indirect discrimination, in some cases not mentioned discrimination, while in others is established by obiter dictum establishing segregation, the European Court of Human Rights has also discovered that Roma children have been a victim of receiving lower-quality education.³³³ Segregation occurs in three ways: within schools (where Roma children are kept apart from other students in classrooms and other facilities), between schools (where the majority of Roma children attend schools with a majority Roma population), and into special schools, such as schools for children with mental disabilities. Some nations mix the three forms of segregation.³³⁴ The Court has considered two cases about the segregation of Romani students in special education namely *Horváth and Kiss v. Hungary* and *D.H. and others v. Czech Republic*. *Oršuš v. Croatia* and *Sampanis v. Greece* are two cases that show class-level segregation within the same school building and in separate buildings, respectively, and the case of educational segregation, such as those between Roma-only and integrated schools which is the case of *Lavida v. Greece*. These are the cases that will be analysed in this thesis.

4.3 Analysis of the cases regarding discrimination of Roma children

4.3.1 D.H. and others v. Czech Republic

³²⁹ *ibid* 20.

³³⁰ *ibid*.

³³¹ *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' (merits)* (n 40) para 10. See the interpretation adopted by the court part.

³³² *ibid* 32.

³³³ Lilla Farkas, 'Report on Discrimination of Roma Children in Education | Migration Policy Group' (2014) 27.

³³⁴ 'Human Rights of Roma and Travellers in Europe' (Council of Europe Publ 2012) 123.

The *D. H. and Others* case, which brought about an important change in the understanding of discrimination under the European Convention on Human Rights, is the most significant Article 14 case of 2007. Apart from knowing the case which described about “indirect discrimination”, “racial discrimination” was highlighted as a particularly invidious form of prejudice that calls for extreme caution and a strong response from the authorities due to its dangerous consequences and further suggested the government to fight racism with all of the tools at its disposal to uphold democracy's ideal of a just society.³³⁵

In this case, the complaint was filed on behalf of 18 Roma children who were placed in special education because of their learning disabilities and Roma origin as per the applicant.³³⁶ The evidence presented to the court demonstrates that the parents of the applicants approved by signing a form that allowed their children to be put in special school and in certain cases, they specifically requested that their children be placed in a special school.³³⁷ Following their review of the recommendations from the educational psychology centres where applicants had undergone psychological testing, the head teachers of the special schools decided on the placement. In this regard, the parents of the children received a written decision regarding their placement. It included directions on how to file an appeal, a right that none of them ever used.³³⁸ Their main argument that led them to file the action was the submission of information showing that Roma students were often denied admission to the regular education system and assigned to special schools based on their racial or ethnic background rather than their intellectual abilities.³³⁹ This led the applicant to submit complaints with the European Court of Human Rights (ECtHR), alleging that they had been the victim of discrimination in violation of Article 14 as well as that their right to education as per Article 2 of Protocol 1 of the European Convention on Human Rights, had been infringed.³⁴⁰

In this instance, the court took the issue seriously as children had brought out a complaint alleging racial discrimination and a breach of their right to an education. The Court has noted that the Roma people have constituted a particular kind of vulnerable and disadvantaged minority due to their traumatic past and ongoing dislocation. As a result, they require extra care when it comes to

³³⁵ *D.h. and Others v. the Czech Republic* (n 14) para 176.

³³⁶ *ibid* 19.

³³⁷ *ibid* 20.

³³⁸ *ibid*.

³³⁹ *ibid* 25.

³⁴⁰ *ibid*.

education.³⁴¹ When it comes to education, the Court found that the difference in treatment between Roma children and non-Roma children was not objectively and reasonably justified.³⁴² The court held that it is no longer necessary to investigate individual cases because it has been established that the relevant legislation as it was implemented at that time disproportionately harmed the Roma group.³⁴³ Because of this, the court determined that each of the applicants in this case had violated Article 14 of the Convention taken in conjunction with Article 2 of Protocol 1.³⁴⁴

4.3.2 Horváth and Kiss v Hungary

The case of *Horváth and Kiss v Hungary*, where the applicants contended that attending a remedial school violated Article 2 of Protocol No. 1 read with Article 14 since it constituted ethnic discrimination against them in exercising their right to an education.

The complaint concerned to Hungary's educational system, which places students in separate "remedial schools" outside of mainstream classrooms who have been diagnosed with mental disorders, even mild ones.³⁴⁵ Under Article 2 of Protocol No. 1, in conjunction with Article 14 of the Convention, the applicants claimed that receiving their education in a remedial school amounted to discrimination against them in the exercise of their right to an education because of their Roma origin.³⁴⁶ They claimed that the tests were culturally biased as compared to their mainstream counterparts, these remedial schools provide their students fewer options and a more basic curriculum.³⁴⁷ The applicant further claimed that by placing Roma children at a disadvantage and that their sociocultural disadvantaged background stemming from their ethnicity had not been considered.³⁴⁸

In this regard, the Court stated that as the Roma have become a distinct category of vulnerable and impoverished minority needing protection, it is crucial to assist them in integrating into regular schools and acquiring the skills necessary to live comfortably among the majority population.³⁴⁹

³⁴¹ *ibid* 182.

³⁴² *ibid* 208.

³⁴³ *ibid* 209.

³⁴⁴ *ibid* 210.

³⁴⁵ *Horváth and Kiss v. Hungary* (n 9) para 11.

³⁴⁶ *ibid* 3.

³⁴⁷ *ibid*.

³⁴⁸ *ibid*.

³⁴⁹ *ibid* 102.

Regarding the breach of Protocol 1, Article 2, the court observed that this provision's use of the word "respect" suggests a positive obligation on the part of the state.³⁵⁰ The right to education requires that constructive measures be added to school curricula to help members of groups that have experienced prejudice in the past overcome their current struggles.³⁵¹ Thus adds that the State must take proactive steps to combat segregation.³⁵²

Regarding the violation of Article 14, the court stated that The Court observes that because of the widespread misdiagnosis of mental illness, Roma students appear to be overrepresented in remedial institutions in the past. as the Government is not disputing the underlying data and has not shown any other statistical evidence, the Court believes that these figures demonstrate a dominating trend. Therefore, it is necessary to note that a general policy or practice has a disproportionately negative impact mostly on the vulnerable Roma population. The Government was unable to provide a rational explanation for the disparity beyond mentioning, in general, the large number of unfavourable social backgrounds among the Roma.³⁵³

Thus, The Court considered the applicants' complaints that they were denied equal educational opportunities and placed in remedial schools due to curriculum limitations without objective or reasonable justification.³⁵⁴ They also claim that they were treated less favourably than non-Roma children in similar circumstances, which violates their rights to education and to be free from discrimination.³⁵⁵ considering the above mentioned situation, the court gave the judgement stating that there has been a violation of Article 14 of the convention in conjunction with Article 2 protocol 1.³⁵⁶

4.3.3 Sampanis v. Greece

The matter that concern Roma children is also represent in the case of *Sampanis v. Greece* which to some extent has been even a worst situation. Greek nationals of Roma descent filed the lawsuit, claiming that the authorities had neglected to provide their child with an education and infringing

³⁵⁰ *ibid* 103.

³⁵¹ *ibid* 104.

³⁵² *ibid*.

³⁵³ *ibid* 110.

³⁵⁴ *ibid* 109.

³⁵⁵ *ibid*.

³⁵⁶ *ibid* 129.

against their right to education under Article 2 Protocol 1 and Article 14 of the convention.³⁵⁷ The main fact of the case was that when the applicant went to the Greek Primary School to enrol their child, the school director refused to accept the enrolment, claiming that the applicant had not received any instructions from an authorized ministry and that the applicant's parents will get a call when the necessary formalities will be completed.³⁵⁸ However, with regards to their children's registration in the school, the parents were never contacted.³⁵⁹

In this regard, the Greek government claims that in November and December of 2004, a group of primary school teachers went to the Roma Camp in Psari to educate the parents and their minor children about the need to enrol their children in preparatory classes and provide the necessary documentation.³⁶⁰ After deliberating on the issue, the meeting defined that younger students could be taught on the current Aspropyrgos primary school grounds, and that older students would need to enrol in additional classes in order to get ready for integration into regular classrooms.³⁶¹ 23 children of Roma heritage, including the children of the applicants, were enrolled for the 2005–2006 school year on June 9, 2005.³⁶² This makes the non-Roma parents upset and they started to protest that their children shouldn't be in the same classes as other Roma children.³⁶³

The applicants complained that their children had been subjected, without any objective or the reasonable justification, to treatment that was less favourable in the side of Roma children as compared to the treatment that given to non-Roma children.³⁶⁴ And this constituted a violation of Article 14 (prohibition of discrimination) in conjunction with Article 2 of Protocol No. 1 (right to education) of ECHR provisions.

Regarding this case, the ECtHR has given the judgement stating that states had to give the Roma community extra consideration because of their vulnerability. The court held that even in situations where certain administrative documentation is lacking, competent authorities nevertheless must facilitate for Roma children and make it easier for them.³⁶⁵ Thus the court

³⁵⁷ *Sampanis and others v Greece - [English Translation] by European Roma Rights Centre 'ERRC' [59].*

³⁵⁸ *ibid* 7.

³⁵⁹ *ibid* 8.

³⁶⁰ *ibid* 12.

³⁶¹ *ibid* 16.

³⁶² *ibid* 17.

³⁶³ *ibid* 18–19.

³⁶⁴ *ibid* 63.

³⁶⁵ *ibid* 86.

considered that in the terms of those children's school enrolment and their placement in special preparatory classes led to discrimination against them and violated each applicant's rights under Article 14 of the Convention and Article 2 of Protocol No. 1.³⁶⁶

4.3.4 Oršuš and Others v. Croatia

The aspect of discrimination based on language is sometimes used for an excuse as to prove legitimate aim and justification to the case. The case of *Oršuš and Others v. Croatia*, which is a case claiming violations of and 14 prohibitions on discrimination of the European Convention on Human Rights, citing discrimination against Roma children and school segregation along with Article 2 protocol 1 of the convention.³⁶⁷

The case was brought by the 11 applicants stating that the applicants who attended separate classes exclusively made up of Roma students only during their schooling may have been decreased by up to 30% from the usual, full curriculum at a primary school.³⁶⁸ The applicants claimed that they were informed they had to drop out of school at the age of 15 and presented statistics indicating that only 16% of Roma children aged 15 finished primary school, compared to 91% of students in general primary schools, and that the dropout rate for Roma students was 84%.³⁶⁹ The applicant further asserted that assigning them to a special class exclusive to Roma people lacked legal justification. They contended that the assignment of students to special classes reserved for Roma children had not been subject to any transparent, accessible, or reliable procedures.³⁷⁰

Regarding alleged discrimination, the court emphasized that the complainants were minors, for whom the right to an education was crucial.³⁷¹ The court referenced the well-known case of *D.H. and Others v. Czech Republic* to support its position regarding the right to education holds paramount value especially for children.³⁷²

³⁶⁶ *ibid* 96.

³⁶⁷ *Oršuš and Others v. Croatia* (n 7) para 111.

³⁶⁸ *ibid* 10.

³⁶⁹ *ibid* 18.

³⁷⁰ *ibid* 117.

³⁷¹ *ibid* 147.

³⁷² *D.h. and Others v. the Czech Republic* (n 14) para 182.

In determining whether there was differential treatment, the court ruled that a State may treat groups differently to address "factual inequalities" in accordance with Article 14.³⁷³ States have a certain amount of discretion in determining whether and to what degree differential treatment is justified. If a measure is not objectively justified by a legitimate goal and the methods used to achieve it are acceptable, necessary, and proportionate, then it would be discriminatory.³⁷⁴ The Court observed that there was no explicit legal justification for placing children who did not speak Croatian well enough in separate classrooms that aimed to fulfil the justifiable goal of customizing the educational process to each individual student's needs. There was no indication of a method to evaluate language proficiency appropriately and move Roma students to higher grade levels or modify the curriculum to meet their unique requirements.³⁷⁵

Consequently, the Court while acknowledging the efforts made by the Croatian authorities to guarantee that Roma children receive education and attention, determined that there were insufficient safeguards in place to demonstrate the legitimate aim and objective and a reasonable justification to support the notion that there were Roma-only classes for the benefit of the Roma people.³⁷⁶ As a result, the Court determines that Article 14 of the Convention including Article 2 of Protocol No. 1 has been violated in this case.³⁷⁷

There have been many instances where the Court has heard disputes on the education of children with disabilities. The key argument has been whether it is appropriate for domestic authorities to place students in separate schools and to what extent they must mainstream their education and modify facilities and instruction to meet their requirements.³⁷⁸

4.3.5 Lavidia and Others v. Greece

The applicants complain about some of them being sent to a primary school intended only for students of Roma origin. They contend that this placement resulted in depriving the application

³⁷³ *Oršuš and Others v. Croatia* (n 7) para 149.

³⁷⁴ *ibid.*

³⁷⁵ *ibid* 158.

³⁷⁶ *ibid* 184.

³⁷⁷ *ibid* 185.

³⁷⁸ *Fenton-Glynn* (n 23) 151.

pupils of genuine education. this made them file a complaint regarding the violation of Article 14 of the Convention along with Article 2 of Protocol No. 1 of the Convention.³⁷⁹

The government rejected the applicants' arguments, claiming that they were limited to the ethnic composition of the fourth-grade class.³⁸⁰ It claims that the applicants have not offered evidence demonstrating that the way this school operated in 2009–2010 had a significant negative impact on them, placing them at a disadvantage situation when compared to other people.³⁸¹ The candidates would have followed the same curriculum as any other primary student and obtained the same opportunities and validation as other students without discrimination.³⁸² According to the Government, there is no element that proves the applicants has been directly discriminated.³⁸³

The Court referred to the Belgian Language Case, which asserts that everyone falling under the jurisdiction of a member state has the right to education, as guaranteed by the first sentence of Article 2 of Protocol No. 1 of the Convention.³⁸⁴ This right includes the ability to access education from schools at a specific time.³⁸⁵ The Court takes into account Not only do Roma children reside in Sofades' old subdivision, where the school is located, but there are also Roma children who live in the new subdivision who are transported by bus in there.³⁸⁶ The Court notes that no non-Roma children who reside in the area allocated for the 4th school are enrolled in it, despite the regulation stating that students must attend schools close to their homes.³⁸⁷ The Court also notes that the Roma segregation situation in the school has been formally acknowledged by the relevant authorities, along with the necessity of ending it.³⁸⁸

Considering the aforementioned, and even if the State had no intention of discriminating, the Court finds that the position of keeping Roma children in public schools where there are only Roma pupils, as well as the rejection of effective anti-segregationist measures like sending Roma children to mixed classes in other Sofades schools or redrawing the school district map in part due to opposition from parents of non-Roma students, cannot be objectively justified by a legitimate

³⁷⁹ *Lavida and Others v Greece [English Translation] by European Roma Rights Centre 'ERRC' [53].*

³⁸⁰ *ibid* 54.

³⁸¹ *ibid*.

³⁸² *ibid*.

³⁸³ *ibid*.

³⁸⁴ *ibid* 60.

³⁸⁵ *ibid*.

³⁸⁶ *ibid* 64.

³⁸⁷ *ibid*.

³⁸⁸ *ibid* 68.

aim.³⁸⁹ Thus, the court concluded that there has been a violation of Article 14 in conjunction of Article 2 protocol 1 of the convention.³⁹⁰

4.3.6 Elmazova and Others v. North Macedonia

The case of *Elmazova and Others v. North Macedonia* was brought up by the application concerning alleged segregation of Roma pupils in a State-run primary school and classes that those attended by ethnic Macedonian children even though the school was in the same catchment area. The applicants relied on Article 1 of Protocol No. 12 and Article 14 of the Convention.³⁹¹

As regard to the case, the Municipality of Bitola has designated the catchment area for G.S. and T.A., another State-run primary school situated 600 meters away from G.S. Every residential district was required by law to have a primary school that was supported by the State and accepted students who lived within its catchment area.³⁹² Parents were still able to request for their children to be admitted to any other public school within the same or different catchment area. However, permission from the admitting school was needed.³⁹³ The applicants claimed that whereas students of Macedonian ethnic background from the same or nearby catchment area were enrolled in T.A., Roma children from Bair were enrolled in G.S.³⁹⁴ The latter permitted the movement of students of Macedonian ethnic heritage from G.S., but prohibited the transfer of Roma students.³⁹⁵ Thus the applicants complained about the placement of child applicants as a Roma-only school, and in Roma-only classes was alleged segregation of Roma pupils where the applicants relied on Article 1 of Protocol No. 12 to the Convention and Article 14 of the Convention.³⁹⁶

The court observed that the applicants did not provide any objective or reasonable justification for their complaints of segregation in primary schools G.S. and G.D. in Bitola Shtip.³⁹⁷ It is specifically emphasized that discrimination that would violate the Convention could arise from a de facto situation. It is unacceptable to consider the absence of any discriminatory purpose on the

³⁸⁹ *ibid* 72.

³⁹⁰ *ibid* 73.

³⁹¹ *Elmazova and Others v. North Macedonia* (n 272) para 1.

³⁹² *ibid* 5.

³⁹³ *ibid*.

³⁹⁴ *ibid* 6.

³⁹⁵ *ibid*.

³⁹⁶ *ibid* 5.

³⁹⁷ *ibid* 39.

part of the State as objectively justified.³⁹⁸ The court further stressed that because of their violent past and ongoing uprooting, the Roma have always been a particular community of disadvantaged minorities, and that they should receive extra care, protection, and special regard in order to meet their requirements.³⁹⁹

4.4 Role of non-state actors

4.4.1 The role of non-states actors in protecting right to education of Roma children

Without the active support and involvement of numerous other actors, also referred to as non-state actors, such as parents, teachers, NGOs, religious communities, or unions, states cannot fulfil their responsibilities regarding the education of Roma children.⁴⁰⁰ When it comes to education, non-state actors can provide services that comply with human rights standards when they arise. Examples of these eras include the outlawing of discrimination or segregation in any form, inequality, privatization of education as a last resort, transparency, and participation in educational programs.⁴⁰¹ The purpose of this section of the thesis is to examine non-state actors and how they might effectively support the protection of Roma children's right to an education and protection from prejudice. Human rights are more than just people's legal entitlements that can be achieved by passing laws and regulations. These are norms and values that have a direct impact on the daily interactions among people in their communities. The concept of education must be understood by parents, families, and community members to develop an atmosphere where Roma children can study on the basis of equality, equal opportunity in getting education without discrimination. Every community member's action, attitudes, and behaviours have an impact on how well children's rights to education are realized.⁴⁰²

4.4.1.1 Parents

³⁹⁸ *ibid* 68.

³⁹⁹ *ibid* 69.

⁴⁰⁰ 'Roma Education Postition Paper' 67.

⁴⁰¹ 'A Framework to Assess the Role of Non-State Actors in Education against Human Rights' (*Right to Education Initiative*) <<https://www.right-to-education.org/blog/framework-assess-role-non-state-actors-education-against-human-rights>> accessed 22 January 2024.

⁴⁰² 'Roma Education Postition Paper' (n 400) 67.

The likelihood that Roma children will have access to education will depend on whether their parents acknowledge their right to an education.⁴⁰³ Parents should be acknowledged and encouraged in their role as protectors of their kids' educational rights. Since they are their children's guardians, the ECHR has granted parents' rights in the same Article as their right to education (Article 2 protocol 1).⁴⁰⁴ One of the most important components of a successful educational career for Roma children is the parents' unwavering support of their offspring. Parents make up the third component in the educational process, together with students and teachers.⁴⁰⁵ The engagement of parents in their children's education can help them accomplish more and may improve the student's prospects of succeeding academically.⁴⁰⁶ Not only children but also adulthood can get long-term benefits from parental involvement, both at home and in school. Parental involvement in their children's education is closely linked to the socioemotional development of the kids, academic performance, and social adaptation. Parents may be extremely helpful in monitoring progress, pointing out areas of implementation weakness, pushing for stronger legislation where necessary, and holding education authorities and schools accountable for meeting their duties to children.⁴⁰⁷

To ensure that parents are prepared to allow their child to attend lessons, the instructional materials provided by the school should also align with the parents' religious and philosophical beliefs. Because Roma parents frequently worry about things like racism and bullying in schools, safety issues while using public transportation, going on field excursions or participating in physical education classes, and involvement with culturally sensitive subjects like sex education.⁴⁰⁸

Parents and community members have different responsibilities than the State, thus it's essential to establish appropriate and transparent channels of responsibility. For instance, unless the government provides the schools to support that for Roma children, parents cannot fulfil their responsibility to make sure their child is ready for and regularly attends school.⁴⁰⁹ Education institutions bear an essential responsibility to provide fundamental education to Roma children,

⁴⁰³ *ibid.*

⁴⁰⁴ European Convention on Human Rights - ECHR Official Texts - ECHR - ECHR / CEDH art 2 Protocol 1.

⁴⁰⁵ School of Primary Education, Aristotle's University of Thessaloniki, Greece and others, 'Roma Parents' Perceptions on Education' (2019) 4 Journal of Advances in Education Research 15.

⁴⁰⁶ *ibid.*

⁴⁰⁷ 'Roma Education Postition Paper' (n 400) 68.

⁴⁰⁸ Martin Myers and Kalwant Bhopal, 'Gypsy, Roma and Traveller Children in Schools: Understanding of Community and Safety' (2009) 57 British Journal of Educational Studies 417, 418.

⁴⁰⁹ 'Roma Education Postition Paper' (n 400) 67.

free from discrimination. Nevertheless, numerous instances exist wherein schools have refused to admit Roma children on the grounds of their ethnicity or language barrier, and instead have assigned them to alternative educational institutions such as special schools or special classes. For instance, the landmark case of *D.H. and others* was taken on behalf of Roma children because they were discriminated against and sent to "special schools" designated for the mentally challenged rather than non-Roma children.⁴¹⁰ Comparable prejudice toward receiving equal treatment when it comes to access to school is evident in the cases of *Oršuš and others*. The complainants were fifteen Croatian nationals of Roma origins who had attended separate classrooms in their respective primary schools that were exclusively made up of Roma students only. This has impacted their right to education as well as subject to violation of provision on discrimination.

Also, the quality of the home and school relationship can have an impact on the education of Roma children. One important component in building a strong relationship with the formal school is the concern of Roma parents about how the school can support their children's growth so they can compete in every way.⁴¹¹ However, parents of Roma descent think that a variety of circumstances influence their relationship with formal schooling. The first comes from a fear of cultural extinction. Put differently, there exists a belief of Roma descent who view formal education as a danger to their cultural identity.⁴¹² Second, parents worry that because of language hurdles or other problems that could negatively impact their children's mental health, their kids might be the targets of bullying and harassment at school. Additionally, because of their limited financial means and belief that they are unable to meet their children's needs, parents are afraid to send their kids to school. Parents of Roma descent think that schools can provide a diverse range of learning environments and a wide range of subjects in curricula to make their children feel at ease and self-assured.⁴¹³

Thus, to allow Roma people to freely exercise their fundamental rights without facing prejudice, it is necessary to inform parents of the laws, regulations, and resources that are accessible to them and their children. Parents can't be sure they're getting the services they and their children are entitled to unless they have access to clear, accurate, and thorough information.⁴¹⁴

⁴¹⁰ *D.h. and Others v. the Czech Republic* (n 14) para 207.

⁴¹¹ *School of Primary Education, Aristotle's University of Thessaloniki, Greece and others* (n 405) 15.

⁴¹² *ibid.*

⁴¹³ *ibid* 16.

⁴¹⁴ 'Roma Education Postition Paper' (n 400) 68.

In order to defend their children's right to an education, parents must be acknowledged and given help. Teachers, administrators, and educational authorities must therefore figure out how to include parents in their schools, particularly those whose children belong to vulnerable groups.⁴¹⁵ They can be extremely helpful in monitoring progress, spotting flaws in the way education policies are being implemented, ensuring that the right to education is being upheld, challenging rights violations, and holding educational institutions and authorities accountable for reaching their duties to children.⁴¹⁶ Parents have the right to protect their children's rights when those rights are violated, and they occasionally may seek additional help to do so. As such, they may need support from other non-state actors in safeguarding the educational rights of parents and children, such as NGOs, civil society, or other monitoring bodies.⁴¹⁷

4.4.1.2 Civil society organizations

Civil society organizations are essential in advocating for Roma children's right to an education. These organizations have frequently taken on a significant role as service providers in Roma education in the absence of state provision.⁴¹⁸ However, NGOs cannot take the place of well-financed funded government education programs for all Roma children, nor could they be viewed as an emergency solution for issues with municipal education. But they may also, and often do play a significant role in bolstering the availability of education and in giving Roma communities the means to effectively argue for their right to an education. For this reason, establishing partnerships with these groups is crucial for the development of the Roma people's education.⁴¹⁹

For Roma children to have the right to an education free from discrimination, national and local governments must work with civil society organizations to make sure their experiences are included in program design and development. Non-governmental organizations (NGOs) are frequently the source of new approaches to better educational outcomes, as they possess extensive

⁴¹⁵ School of Primary Education, Aristotle's University of Thessaloniki, Greece and others (n 405) 15.

⁴¹⁶ 'Roma Education Postition Paper' (n 400) 68.

⁴¹⁷ *ibid.*

⁴¹⁸ *ibid* 69.

⁴¹⁹ *ibid.*

knowledge about both the areas in which local communities have gaps in services and the approaches that must be used to close those gaps.⁴²⁰

To advance the education agenda, there must be respectful and open communication between the government and civil society organizations in order to gain the greatest benefits. Funding is also required for NGO initiatives that promote the investigation of new methods, particularly those started and run by the Roma community itself.⁴²¹ Between 1989 and the present, the Central and Eastern Europe and the Commonwealth of Independent States (CEECIS) have undergone profound transformations that have affected people's lives and the lives of their children.⁴²² Civil society organizations have been working with the Roma population in the CEECIS region to help them become more capable and to help them find ways to interact with governments so they may achieve their rights.⁴²³

An important role that NGOs can play is in ensuring that government policies and programs are carried out properly and in holding duty-bearers accountable and transparent. NGOs have also helped by increasing the capacity of traditional leaders, parents, and Roma communities through training, awareness-raising, and sensitization.⁴²⁴

4.4.1.3 International community

The international community can make a significant contribution to enhancing the ability of individuals and governments to protect Roma children's right to an education.⁴²⁵ For example, Early Childhood Education and Care (ECEC) significantly improves the lives of children and their parents, especially the most vulnerable ones.⁴²⁶ Early childhood education benefits the development of cognitive skills like language, literacy, and numeracy.⁴²⁷ It offers children a

⁴²⁰ *ibid.*

⁴²¹ *ibid* 71.

⁴²² UNICEF Office of Research- Innocenti, 'The Situation of Children in Transition Countries (CEE/CIS Region)' (*UNICEF-IRC*) <<https://www.unicef-irc.org/research/the-situation-of-children-in-transition-countries-cee-cis-region/>> accessed 22 January 2024.

⁴²³ 'Roma Education Postition Paper' (n 400) 71.

⁴²⁴ *ibid* 72.

⁴²⁵ *ibid.*

⁴²⁶ European Commission. Directorate General for Education, Youth, Sport and Culture. and PPMI Group., 'The Role and Place of ECEC in Integrated Working, Benefitting Vulnerable Groups Such as Roma: Analytical Report.' (Publications Office 2019) 38.

⁴²⁷ James J Heckman, 'The Case for Investing in Disadvantaged Young Children' 49.

disciplined setting where they may efficiently learn to read, write, and express themselves. Language proficiency is essential for effective communication, comprehension of social interactions, and achievement in the academic field.⁴²⁸

The most disadvantaged people are the focus of ECEC and education at equity and equality. The impoverished, Roma, disabled, immigrant, and refugee children are the most vulnerable and disadvantaged. The policies designed to support them also take this particular setting of ECEC into account.⁴²⁹

Low education levels, irregular or unemployed work, poor housing, health issues, social marginalization, and material deprivation are some of the difficulties that vulnerable families, such as those who are impoverished, or Roma families may encounter.⁴³⁰

The role of early childhood education and care (ECEC) in integrated working, which benefits vulnerable groups such as Roma children and families for their increased social integration, higher educational achievement, and improved health, among other benefits.⁴³¹ High-quality ECEC has several long-lasting advantages for educational and other levels of development. In the sense that accessing ECEC services doesn't require a specific requirement to receive ECEC services, however, the barriers can be seen.⁴³² Policies and investments must reflect diversity in the curriculum and create an inclusive, democratic learning environment with a strong care component if they are to increase Roma children's access to and participation in ECEC programs. In addition, they have to embrace the backgrounds of the children and see them as valuable members of society who can learn on their own and as capable adults.⁴³³

⁴²⁸ WS Barnett and Leonard N Masse, 'Comparative Benefit–Cost Analysis of the Abecedarian Program and Its Policy Implications' (2007) 26 *Economics of Education Review* 113, 113.

⁴²⁹ Maria Herczog, 'Rights of the Child and Early Childhood Education and Care in Europe' (2012) 47 *European Journal of Education* 542, 551.

⁴³⁰ European Commission. Directorate General for Education, Youth, Sport and Culture. and PPMI Group., 'The Role and Place of ECEC in Integrated Working, Benefitting Vulnerable Groups Such as Roma: Analytical Report.' (Publications Office 2019) 38.

⁴³¹ *ibid* 39.

⁴³² *ibid*.

⁴³³ *ibid*.

Chapter 5 Conclusion

5.1 Conclusion

It is evident that, in addition to the European Convention on Human Rights (ECtHR), which has been instrumental in defending the aforementioned rights, the ECtHR has stood for prohibiting discrimination of any kind and safeguarding the right to education. To determine whether or not there has been a violation of substantive rights in addition to Article 14, this thesis sought to identify the restriction on access to education. In order to protect the right to education, the thesis examined how the court has weighed limitations based on factors like religion, language, and ethnicity in the cases. It concluded that these factors are the bases that might be used to justify discrimination.

In several cases, the ECtHR has interpreted and applied the ECHR's provisions to guarantee the protection of the right to education. The European Court of Human Rights (ECHR) has recognized education as a basic human right and underlined the significance of providing every individual with equal access to high-quality education free from discrimination. It is crucial to remember that the concept of a right to an education is not new; rather, it has developed throughout time and will continue to need attention in order for the field of the right to education to advance. It is challenging to settle individual issues of not receiving an education due to cultural norms, ethnicity, religious beliefs, and diverse legal systems. As such, the European Court of Human Rights (ECtHR) must be cautious when making conclusions in cases concerning education.

The Court has underlined that one of the most important rights that is essential to a person's existence in a democratic society is education. The Court has acknowledged that education is a costly and well-organized endeavour, and that the government can never have enough resources to support it. According to the court's interpretation in the *Pononyoyovi v. Bulgaria* decision, the State must therefore find a balance between the educational requirements of individuals under its control and its limited capacity to serve them.⁴³⁴

The court has stated that education should be available to all without discrimination, even though it appears that there is no difference between higher education and other forms of education. The

⁴³⁴ *Pononyoyovi v. Bulgaria* (n 82) para 55.

court has emphasized that the state is responsible for providing education that is free from discrimination, as evidenced by the *Sahin v. Turkey* case. However, the court has also shown respect for the state's provision of Turkish law, secularism, and the state religion.

In the well-known Belgian language case, the court did, however, also declare that the right to education is not absolute and is subject to limitations. It also stated that the state is not required to establish public education systems or subsidize private ones; rather, this authority rests with the state.

The Court's ruling in the case of *Irfan Temel and Others* indicates that requiring an educational institution to provide instruction in a particular language in order to impose disciplinary sanctions is not reasonable or proportionate. Moreover, it should not be used as a justification for restricting an individual's right to an education.

In addition, the court upheld the parental rights found in the same ECHR Article as the right to education. As per the judgment of the court, the convention ought to be interpreted comprehensively, with particular attention paid to Articles 8, 9, and 10 of the Convention. These Articles assert the fundamental right of all individuals, including parents and children, to respect their private and family lives. This was demonstrated in the *Folgerø and Others v. Norway* case.

Additionally, the thesis sought to understand the discrimination in education, specifically against Roma children and examined the cases in order to analyse the definition and types of discrimination as well as the interpretations made by the European Court of Human Rights (ECtHR) in the six cases that were considered in this thesis.

The thesis discusses laws concerning discrimination and defines both direct and indirect discrimination. The thesis has been analyzing cases involving violations of Article 2 Protocol 1 and Article 14 of the European Convention on Human Rights (ECHR) due to its focus on the right to education and the prohibition of discrimination. Therefore, this thesis has looked at how Article 14 has been able to fulfill its potential as a strong non-discrimination provision.

The second paragraph of Article 1 of Protocol No. 12 states that no public authority may discriminate against any individual, going beyond "any right set forth by law" in terms of protection. Despite the fact that the latter has further defined the discrimination clause, it can be seen from the cases that the ECtHR has dealt with instances pertaining to education in conjunction with Article 14 but not Article 1 Protocol 12.

However, there is one recent case of *Elmazova and Others v. North Macedonia* was brought up by the application concerning alleged segregation of Roma pupils in a State-run primary school and classes that those attended by ethnic Macedonian children where the applicants relied on Article 1 of Protocol No. 12 in conjunction with Article 2 Protocol 1 of the Convention. However, the court itself considered that the complaint should be analysed under Article 14, to be taken in conjunction with Article 2 of Protocol No. 1 not Article 1 Protocol 12.

When examining a specific application that violates any fundamental rights, the role of the court is to determine whether the respondent state has violated those rights or whether it is still pursuing a "legitimate aim." Thus, the Article requires the State and public institutions that uphold the rights provided by the Convention to refrain from discriminating on the grounds above or based on "other status," unless such discrimination achieves a legitimate aim or is justified.

As previously said, this thesis looks at six cases of discrimination against Roma children and their entitlement to an education. Each case that was submitted was determined to have violated both Article 14 of the ECHR convention and Protocol 1 of Article 2 of the convention. The thesis has first given an understanding of a concept and form of discrimination, before providing a brief case study of the court's interpretation in situations involving violations of educational rights and discriminatory practices. Discrimination is defined as treating people differently, without an objective and reasonable justification, based on pertinently similar situations. Or, a difference in treatment is without any "objective and reasonable justification" if it does not pursue a "legitimate aim" or if there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realized."

This court's interpretation can also be found in several cases such as *Oršuš and Others v. Croatia*, *Çam v. Turkey*, *Enver Şahin v. Turkey*. In the *D.H. and Others* case, the court did interpret, however, that Article 14 of the Convention does not forbid a member state from treating groups

differently in order to rectify "factual inequalities" between them; in fact, under some conditions, failing to make an effort to address inequality through different treatment may constitute a violation of the Article.

In the well-known case of D.H. and others, the court defined discrimination and said that any treatment that does not fall within a legitimate goal is discriminatory, which serves as support for the thesis's understanding of what constitutes discrimination. Eighteen Roma children were the applicants in this case, which was filed before the ECtHR on grounds of racial discrimination in education. The allegations included the placement of Roma children in special schools on the basis of both their ethnic origin and mental incapacity. Although Roma children were placed in special education possibly 27 times more frequently than non-Roma children—the chamber concluded that there had been no violations of Article 14 in conjunction with Article 2 Protocol 1 of the convention. The Grand Chamber said that racial discrimination is strongly opposed and held that Article 14 may mandate attempts to address factual inequity, even if this requires discriminatory treatment. The Grand Chamber ruled that there was no need to demonstrate any purpose to discriminate and that the State was then required to justify the discriminatory effect in accordance with the proportionality standard established by the Court.

It was determined by the chamber that the government of the Czech Republic maintains a special education system for all individuals who are unable to get a basic education, not just Roma children. Hence, the chamber notes that the government has mandated that the school system meet the needs of mentally disabled children as well as those of one ethnic group. Consequently, the chamber declared that the government had pursued a lawful objective and that there had been no infringement of Article 14 along with Article 2 Protocol 1.

Grand Chamber has, however, viewed the issue in a different light. Firstly, it has given a description of the Roma people and the struggles they have endured. and further discussed given their problematic history and persistently unfair treatment. Therefore, because of their past, they ought to receive more attention and protection in all fields, including education.

Next, the grand chamber introduced the concept of discrimination, both direct and indirect. It also discusses how children of Roma descent who have been placed in special schools have been

treated less favourably than non-Roma children without any objective or legitimate reason thus stating that this placement amounts to indirect discrimination.

The grand chamber also discussed the government of the Czech Republic's decision to establish special schools to find alternative ways to meet the unique needs of the children. However, Given the facts of this case, the Court is not satisfied that the parents of the Roma children, who came from a low-income and frequently illiterate background, were able to consider all the relevant factors and the implications of providing their permission. Thus, the grand chamber concluded that there was a violation of Article 14 in conjunction with Article 2 protocol 1 of the ECHR convention because it was not satisfied that treating Roma and non-Roma differently in the field of education was objectively and reasonably justified and that there existed a reasonable relationship of proportionality between the means used and aimed pursued.

An analysis of the D.H. and others case shows how the court gave the Roma people special protection due to their ethnic heritage, history of displacement, and status as a specific type of vulnerable and disadvantaged minority. The ECtHR places further emphasis on States to ensure that protections are in place to ensure that the special needs of the Roma group are given appropriate attention when they proceed to integrate them socially and educationally.

What can be analysed through this case judgement is groundbreaking in number of aspects. First, there is the discriminatory pattern that involves assigning Roma children to special education, which is 27 times more common than it is for non-Roma children with mental disabilities. Additionally, with respect to discrimination against Roma, the court concentrates on cases that move beyond individual applicant violations to systemic discrimination. The second is the implementation of indirect and non-discriminatory practices, which violate Article 14 of the Convention. Third, the issue still exists, which is to accept the vulnerability and segregation of the Roma people throughout Europe, not just in the Czech Republic. Because of their vulnerability and lack of equitable treatment, the court has addressed their case, making them one of the most vulnerable groups in need of extra protection and care.

The grand chamber, however, has not questioned the relevant Czech national law that mandates the Roma children attend special education. The primary concern raised by the applicant in their complaint regarding the case of discrimination and a breach of their right to an education was by

the placement in special school which took 7 years long to finalize the case. even though the case has found that there was a violation of the Article 14 in conjunction with Article 2 protocol 1, the grand chamber has failed to assign a committee of ministers to mandate the necessary adjustments to the School Act or to create an act that effectively prevents discrimination.

The thesis has also shown additional relevant cases involving discrimination against Roma people in which the court has used a similar pattern. The Court's case-law clearly establishes that a difference in treatment of "persons in otherwise similar situations" does not constitute discrimination as stipulated in Article 14 where it has an objective and reasonable justification; that is, where it can be shown that it pursues "a legitimate aim" or there is "a reasonable relationship of proportionality" between the means employed and the aim sought to be realised.

The thesis can be concluded by recognizing the crucial role that nonstate actors play in preventing ethical segregation and defending the right to education in the absence of state action. A particular emphasis on parents was placed on this point because they are a child's first guardian and have the greatest influence over their future.

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