



Social Closure and Discriminatory Practices related to the Roma Minority in the Czech Republic through the Perspective of National and European Institutions

Lucie Cviklová¹

Abstract

While differentiating among notions of social exclusion, social closure and bridging social capital, the article analyses the evolution of cultural and social borders between the Czech majority on the one hand and the Roma minority on the other. Special attention has been paid to current legal practices concerning discrimination which have shifted the burden of proof in favor of ethnic minorities and have introduced cleavages between the processes of direct and indirect discrimination. It is explained that the unequal access to elementary education has been crucial in generating social exclusion of the minority. In relation to this, the landmark decision of the European Court of Human Rights is discussed, as it particularly highlights the importance of educational segregation of Roma people in Czech schools for children with learning disabilities.

Keywords

Discrimination, bonding and bridging social capital, social opening, Roma citizens, social exclusion, anomie

Introduction

The following is an exploratory essay concerning the social borders between the Romani community and the Czech majority in the Czech Republic which by drawing from empirical sources tries to inform, raise problems and draw attention to a number of issues. Apart from fieldwork and secondary sociological data, the essay relies on an analysis of relevant European and Czech judicial practices related to discrimination of the Romani minority.

¹ Faculty of Social Sciences, Charles University, The University of Finance and Administration, lucie.cviklova@yahoo.com

The current redrafting of social borders among the Romani minority and the Czech majority is in the scientific discourses very often explained by the fact that current Czech society has been in an anomic state of development (Tuček, 2008). The notion of anomie was described by Emile Durkheim (1966) and Robert Merton (1938) and it refers to a breakdown of social norms.² This situation more or less works in favor of Czech governmental structures since such processes as projection, displacement, scapegoating and racism hold various ethnic groups responsible for the deficiencies of current capitalist conditions.³ Construction of minority ethnic groups as “others” or as an inner enemy is particularly useful for the reconciliation of conflicts among different actors of the Czech majority since, due to ethnic tensions, less attention is being paid to purges of former members of the Communist party, policy regarding former informants, the past actions and roles of dissidents, emigrants, etc. One can argue that for this reason in the Czech Republic, enough attention is not paid to the negative aspects of social borders and social closure (See Table 1). Power structures continue to promote or to tolerate measures violating human rights and the placement of Romani children in schools for children with learning disabilities is a very telling example (Šmausová, 1999). This long-term practice has been the result of psychological tests elaborated by Czech psychologists and it has been accepted by large number of the Romani parents (Komárek, 2009).

Table 1. Coexistence of Romani and non-Romani population is bad – compar. in %

	1997	1998	1999	2001	2003	2006	2007
Answers yes	81 %	78 %	66 %	68 %	78 %	69 %	79 %

Source: <http://www.cvvm.cas.cz/index.php?lang=0&disp=zpravy&r=1&shv=100331>

² In his famous work *Suicide*, Durkheim defined “anomie” as a lack of norms or normlessness, or described it as breakdown of social norms. According to Durkheim, anomie arises more generally from a mismatch between personal or group standards and wider social standards, or from the lack of a social ethic resulting in moral deregulation and an absence of legitimate aspirations. In Durkheim’s view anomie is a situation in which cultural norms break down because of rapid change and anomic suicide occurs in the situations when the people are not able to achieve or limit their goals. According to Merton, anomie refers to a situation in which there is a contradiction between cultural norms related to success in life and the appropriate ways to achieve it.

³ Attitudes of Czech citizens towards Roma people as well as an evaluation of real possibilities of Roma integration were investigated by the Center for Research of Public Opinion (Centrum pro výzkum veřejného mínění) in May 2007. The majority of Czech respondents were convinced that relations between Roma and non-Roma people were very bad and a comparison of research projects spanning several years showed a gradual worsening of situation. Various forms of racist discrimination directed toward the Roma population can also be found in the “Report on Racism, Xenophobia and Antisemitism” which was developed by the nonprofit organization People in Need (Člověk v tísni) and derived from national official and unofficial resources as well as the online resources of international organizations and networks dealing with discrimination such as Amnesty International and the European Network Against Racism (ENAR).

Theoretical Framework

Given certain educational and historical aspects of the Romani integration it is useful to ask what notions and conceptions could be useful for an understanding of social borders and opening as well as closing mechanisms. It is worth to consider whether the current understanding of social borders between the majority society and other ethnic groups calls for an inclusion of national, regional and international dimensions and whether the current transformation of European institutions and European civil society forces also have an influence on objective conditions and subjective identities of the Roma populations living on the territory of the Czech Republic.

The interdependence between national, regional and international institutions and their impact on social borders can be observed in several areas relevant for the reproduction of social borders such as the unequal access of ethnic minorities to educational institutions or the broader integration of ethnic groups on the labor market. Ongoing as well as prospective changes of social borders among the majority society and the Romani minority are explained thanks to information provided by international, regional and national non-governmental organizations such as Amnesty International, European Network against Racism, People in Need (Člověk v tísní), etc. The issue is illustrated further by an analysis of a landmark case adjudicated by European Court of Human Rights *D.H. and Others* which has highlighted the importance of current discriminatory practices in the Czech educational system (Ellis, 2005).

When using notions such as “social closure” (Weber, 1978) or “bridging capital” (Putnam, 2000), I focus on the differentiation of “us” from “them”, as well as on the changing attitudes of Czech society towards the Roma community in the Czech Republic. When exploring empirical information related to social closure I use the Weberian definitions of open and closed relationships (Weber, 1978). A social relationship is “open” to outsiders if and insofar as its system of order does not deny participation to anyone who wishes to join and is actually in a position to do so. A relationship will be called “closed” against outsiders if according to its subjective meaning and its binding rules participation of certain persons is excluded, limited or subjected to conditions.

When using the notion of “social capital” I use Putnam’s distinction between “bonding capital” and “bridging capital” (Putnam, 1995: 664-683). While bonding capital represents ties with actors of the same age, same race, same religion, and so on, bridging capital is more based on ties with socially distant groups including different ethnic ones. One of the most important variables for an understanding of the dynamics of social borders between majority society on the one hand and various ethnic groups on the other have become notions of direct and indirect discrimination as they have evolved in the European law and sociological tradition.

Direct discrimination occurs when a person is treated less well, in comparison with someone else, because of his or her ethnic origin, religion or belief, disability, age or sexual orientation. Examples of direct discrimination: a shop owner who refuses to hire suitably qualified people simply because they are of a certain race or ethnic origin. Indirect discrimination occurs when an apparently neutral specification, criteria or

practice would disadvantage people on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation unless the practice can be objectively justified by a legitimate aim. Examples of indirect discrimination: a department store prohibits its employees from wearing hats when serving customers. The store is indirectly discriminating against ethnic or religious group of people unless it can demonstrate that there is an objective reason to justify the policy. Compared to the legal approach, the sociological approach takes into account informal interactions among social groups. For example, it explains the relation between prejudice and discrimination. Prejudices are very often the main cause of discrimination but these two phenomena can exist independently (Giddens, 2000).

In my exploratory essay I also draw on contemporary knowledge concerning ethnic stereotyping and discrimination in schools (Stevens, 2007), (Gillborn and Gipps, 1996) and (Stevens, Görgöz, 2010). Most of this research focuses on students' experiences of ethnic stereotyping and discrimination, teachers' stereotypes of ethnic minority, and the processes and effects of selection. The empirical research concerning ethnic stereotyping and discrimination focuses primarily on establishing if and how teachers and school processes are racist and discriminate against ethnic minority students and the respective theories explaining the development of stereotypes are mainly based on social psychology approaches. Nevertheless, it is also taken into consideration that these approaches have been criticized for not measuring adequately or not investigating the importance of larger institutions, social-processes and structures of inequality (Brown and Turner, 1981).

“Path Dependency” or Historical Background of the Roma Population Living on the Current Territory of the Czech Republic ⁴

The Romani community or more precisely the Romani communities have been on the territory of the Czech Republic for centuries and therefore it could be very useful to recall the most important institutional changes which brought about either deterioration of their situation or opportunities for social openings and cultural changes. Although there existed in the past a long-term common state, under the condition of which cultural and social borders still existed between Czechs and Germans (and the German assimilation policies largely determined those borders, and were critical of the Czech National Revival opposition), tensions resulting from the expulsion of the Germans after World War II have been monitored by international structures as well as by European institutions (Zich, 2009). Apart from transferred Germans (Roubal, 2009) other ethnic groups such as Ukrainians arrived on the territory the Czech Republic only after the fall of Communism. The Roma minority is the main focus of this article as it has been on the territory of the current Czech Republic longer than any other ethnic minority.

⁴ Path dependency is an idea that tries to explain that continued use of a practice is based on historical preference and this holds true even if newer, more efficient practices are available. Put it differently, path dependency explains how the set of decisions one faces for any given circumstance is limited by the decisions one has made in the past, even though past circumstances may no longer be relevant.

After the arrival of Roma people through the Balkan countries in the 12th century or even earlier, mechanisms of social closure developed on religious grounds and due to their migratory inclinations. At that time, the position of Romani communities was not only determined by being labeled as “others,” a homogenous whole and potential threat, but their subjective identities were also influenced by the cultural and social conflicts among Roma communities themselves. In the framework of the Austrian-Hungarian monarchy, they were viewed for centuries as second-rate humans, whose only positive future was to be initially “integrated” by annihilation as a distinctive community and finally assimilated completely. The first attempts to overcome social borders between “us” and “them” were incited by the German and Czech majority society on the basis of Enlightenment ideologies; unlike models of social policies used in the Russian and Ottoman Empire, the paternalistic Austrian-Hungarian state strove to act in the Gypsies’ “best interest,” promoted deliberative policies of “civilising” primitive people, and in fact enforced their total assimilation (Marushiakova, Popov, 2001). Moreover, the “national pattern” of the constitution of social borders had formed not only developments under the First Republic, but it also influenced the large-scale assimilation of Roma people in the so called “socialist era.” While between the wars *status quo* was maintained and Romani migration was regulated by the Roma Migration Act determining conditions of migration, real structural transformation of cultural and social borders between the Czech majority and Roma people occurred only under the so called socialist condition. After World War II Roma people migrating from Slovakia, leaving behind their original living conditions in settlements (*osada*), were entering the labor market on a large-scale, and in the developed environment of Czech industrial cities they became the most proletarianized and urbanized of all European Roma. Despite the Communist policies promoting equalities among people, on their arrival from Slovakia, Roma were living in decayed urban centers of Czech industrial cities, and with their distinctively dark skin and expressive behavior they remained highly visible and separated into communities of what had become virtually minor ghettos. In fact several waves of Communist assimilation campaigns can be compared to the Habsburg assimilation policies in the all-embracing scope of its attack on Romani identity: in 1958 the government of socialist Czechoslovakia banned traveling and launched an ambitious campaign to turn the Roma into model socialist citizens by integrating them fully into the workplace and the community.

Fieldwork was related to my teaching assignment which dealt with integration of the Romani pupils in the Czech elementary schools and enabled me, together with my students, to observe two different simultaneous modes of institutional action.

The first aspect observed were local institutional efforts to overcome existing social borders. We visited an experimental elementary school which employed Romani assistants and organized a special preschool educational programme for Roma children. We conducted interviews with pupils and teachers in the school and we also met street workers of non-governmental organizations providing legal services for free or helping Romani kids to do their homework in the afternoon. The second aspect of institutional heritage we noticed was a multigenerational *mezzo* segregation which was established

under the socialism. It had been brought about by socialist policies which had led to frequent denials of Romani human rights as freedom of movement had been curtailed, women had been coerced into sterilization and children had been increasingly consigned to special schools for children with learning disabilities. These tendencies were more or less preserved under capitalism; the only success was the elimination of a wall in Matiční ulice (under the pressure of international actors) which had divided Czech and Roma neighborhoods. The Ústí nad Labem city authorities had not been unable to force the rent non-payers of Matiční Street to abide by the law and so the authorities had decided to build a wall dividing the anti-social part of the street from the normal one in 1999. Although the wall is broken down in Matiční, discrimination and prejudice continues. (Laubeová, 2002).

The second important source of information were interviews with the former dissident experts who were providing the critical perspectives concerning social exclusion and social closure under the Communist regime. I had a chance to discuss details concerning the evolution of social borders among Roma people and the Czech majority with the members of formerly mentioned dissident groups who, under the Communist regime, spoke against the violation of human rights of the Roma minority in the former Czechoslovakia.

Firstly, interviews with the dissidents dealing with Roma exclusion elucidated important aspects of the development of social borders and openings under the long-term existence of a totalitarian regime. During this period the absence of information and public debates concerning the transformation of social borders among different ethnic groups had resulted from an absence of public opinion polls and other research. Secondly, I understood the evolution of social borders and openings under the post-communist development; while literacy as well as general cultural level of the Roma population have constantly improved, attitudes of the Czech ethnic majority towards them have constantly deteriorated and accordingly bridging capital has decreased.⁵

Transformation of social borders conceptualized as the establishment of segregation mechanisms in educational institutions

In contrast to criteria popular in the last centuries, current integration on the labor market as well as in the broader public structures depends on education as well as on other aspects of cultural capital. For this reason it is worth explaining evolutionary aspects of those Czech discriminatory practices in the educational field which could be relevant for constitution of social borders and eventually for social exclusion. Under the conditions of the Austrian-Hungarian monarchy illiteracy was a marginal phenomenon due to early introduction of compulsory elementary education. However, on their arrival

⁵ The notion of bridging social capital has been coined by the American researcher Robert David Putnam and it refers to cooperation with people from different social environments. It is very often considered to be more valuable than bonding social capital. The bridging social capital refers to the building of connections between heterogenous groups. Despite the fact that these relations are likely to be more fragile, they are more likely to foster long-term social inclusion (Putnam, 1995).

from Moravia and Slovakia after World War II, the Roma had to go through a literacy campaign. These educational differences contributed to the constitution of cultural and social borders between the Czech majority and Roma.

There is a continuous tendency of low integration of Roma people in the educational system which corresponds to the general Czech model of a low proportion of “newcomers” to institutions of higher education, and which should be seen as a serious obstacle of further social opening for Roma people.⁶ Regardless of the situation of the Czech majority, current discriminatory practices concerning the exclusion of almost half of Roma children from normal elementary schools have brought about legal disputes submitted at European Court of Human Rights. In fact, the present actions of current teachers and psychologists are a continuation of socialist practices under which a growing numbers of Roma children were unjustifiably consigned to special schools for those with learning disabilities.⁷ The Charter 77⁸ denounced this widespread practice in one of its reports, but from the early 1970s until the 1990s there was a dramatic increase of Roma children in special schools; by the mid-1980s almost every second Romani child attended special school. Nevertheless, problems of racial segregation have been flawed in their basic assessment: special schools have not been tailored only for Roma students and therefore one cannot speak about direct discrimination against Roma pupils. In fact, only mechanisms of indirect discrimination could be admitted, because practices imposed by the representatives of the Czech educational institutions have had an adverse impact disproportionately on the Romani community. In contrast with the lack of public debates during the communist regime, there are now many non-governmental organizations, independent researchers as well as teachers who have criticized the segregation of Roma in the so-called “special schools.”

Looked at only from the perspective of direct discrimination, the assessment of racial segregation in the Czech schools has been flawed. Special schools have not been tailored only for Roma students and, therefore, they do not discriminate against Roma pupils. According to current proponents of educational segregation such as psychologist

⁶ This mechanism which limits horizontal and vertical mobility of Roma people as well as their general integration in the labor market can also be seen through the lens of OECD statistics: In the Czech Republic and in Bulgaria open access to education institutions is restrained by the highest reproduction of intergenerational transmission of educational privileges or backgrounds, which limit the professional prospects not only of ethnic minorities but also of the Czech majority.

⁷ These may at the first sight look like a very good solution: less children in the classroom, classmates from the same ethnic and cultural background, better qualified teachers and access to qualified specialists, availability of Romani personnel (such as Romani assistants), allocation of more funds per capita, etc. However, these schools have very low expectations and they generally inhibit academic development and the potential of their pupils. They are primarily structured as an institution that should keep mentally handicapped children quiet and not aim to develop their personality.

⁸ Charter 77 was an informal civic initiative in communist Czechoslovakia from 1976 to 1992, named after the document Charter 77 from January 1977 and after the 1989 Velvet Revolution, many of its members played important roles in Czech and Slovak politics. Charter 77 criticized the government for failing to implement human rights provisions of a number of documents it had signed, including the 1960 Constitution of Czechoslovakia, the Final Act of the 1975 Conference on Security and Cooperation in Europe and United Nations covenants on political, civil, economic and cultural rights.

Petr Klíma, participation of children in schools with learning disabilities was the only solution for education of Roma children and it improved their cultural conditions (Komárek, 2009). The position taken by this paper is a critique of this perspective. I argue that these objective limitations (Sobotka, 2004) to obtain education as well as subjective choice of ethnic minorities based on a shortage of original educational privileges have constituted a “vicious circle” and maintain long-term cultural and social cleavages between the Czech majority and ethnic minorities.

Michal Kocáb, the former Czech Minister for Human Rights and Minorities, has made efforts to reduce the social exclusion of Roma citizens. In order to pursue this goal he relies on the comprehensive report “Analysis of socially excluded Roma localities and absorption capacities in their environment” which has been elaborated for the Ministry for Labor and Social Affairs by the private research company GAC. According to it, a basic factor of social exclusion of Roma people has been the high rate of unemployment of citizens from socially excluded localities (ghettos) and the average rate of Roma unemployment is estimated to be around 70% (while in socially excluded localities it is almost 90%), which is disproportionately high when compared to 8% the average unemployment rate in the Czech Republic. The high rate of unemployment spread across nuclear as well as broader Roma families is prone to repetition and very often spans from six months to a period of years. Some identifiable reasons for Roma unemployment are low qualifications, lack of education and bad health conditions. Other determinants contributing to Roma unemployment are intergenerationally transmitted cultural norms which are the result of family and social network which pass on to new generations, cultural messages regarding formal unemployment and participation in informal or shadow economic structures. The issue demands concrete solutions regarding how one can bring about more inclusive and less exclusive principles in the Czech education system which would go further than mere provision of opportunity for the potential development of a small number of children with more or less privileged educational background. While schools are tailored for average and typical pupils, they exclude most children who are “different” not only in terms of abilities but also with regard to their cultural and social background. Moreover, I claim interdependence between processes of placement of a large number of Romani children in so called “special schools” with special curriculum on the one hand and their lack of integration in the labor market on the other, including their incomes being close to minimum wage or living on welfare.⁹ When necessary, municipalities are not able to provide them with economic resources

⁹ The Czech Republic has ratified the International Convention on the Elimination of All Forms of Racial Discrimination and therefore has to protect potential victims of racial discrimination by means of the national courts and other institutions. It also has to submit regular reports to the Committee on the Elimination of Racial Discrimination concerning the implementation of judicial, legislative and other measures related to the Convention. Nevertheless, legal definitions of direct and indirect discrimination regardless the fact whether they are *soft law* or *black letter law* do not grasp those relevant social indicators which could explain mechanisms of social exclusion or social closure as they apply to the Romani minority.

for living and this situation very often ends with the intervention of state authorities and placement of children in foster homes.

As it was stated by the last report submitted to the Committee on the Elimination of Racial Discrimination, Romani socially excluded enclaves formed by several generations should particularly be considered to be the most important issue and this raises the question about its relationship to the Czech system of elementary education. Social exclusion is not just about income poverty. It is a short-hand term for what can happen when people or areas face a combination of linked problems such as unemployment, discrimination, poor skills, low incomes, poor housing, high crime and family breakdown; these problems are linked and mutually reinforcing. From the perspective of multiple discrimination (Bobek, Boučková, Kuehn, 2007), protection of this target group (Romani in this case, but it could equally be applied to other groups such as women, etc.) is rooted in civil rights and therefore it can be achieved by legal means such as judicial practices as well as partially through social policies. In what follows I will turn to discussing a couple of cases in which issues of racial discrimination were taken to court.

The first example, is a case heard by the Czech Regional Court (Oblastní soud) which was finally resolved by alternative dispute resolution or private arrangement before court ruling (Bobek, Boučková, Kuehn, 2007).¹⁰

The claimant had been registered at the Labor Office and after some time she was recommended for a position as an auxiliary unqualified worker in a canteen. After a short interview at the canteen she was told that she was not going to be employed due to her Roma descent and the worker responsible for recruitment also communicated this “cultural message” in written form to the respective Labor Office. On the basis of this discriminatory approach the appellant claimed a violation of Article 3 of the Charter of Fundamental Rights and Basic Freedoms which guarantees freedoms regardless of ethnic origins. She also mentioned Employment law, including the right to mediation concerning the exercise of work regardless of race, color or ethnic origin, the Civil Code, and Articles 5 and 6 of International Convention on the Elimination of All forms of Racial Discrimination (Bobek, Boučková, Kuehn, 2007).

Another case of racial discrimination was adjudicated by The Municipality Court in Prague (Městský soud v Praze) and the complaint was formulated by a Roma woman. In June 2003 she entered a drugstore in order to apply for a job which was advertised on the door of the shop with the message “*We are looking for shop assistant*” and after a short discussion with the shop assistant she was told that the place has been occupied. Shortly after the claimant left the shop an employee of a non-governmental organization

¹⁰ The Constitutional Court is the highest Czech institution which can decide in the area of discrimination issues and its elementary attitude towards racial discrimination has been framed by concepts of equality and to large degree has been influenced by cultural habits and traditions. Nevertheless, complaints concerning racial discrimination have been marginal issues on the agenda of the Constitutional Court as the majority of legal proceedings have been realized by municipality courts. Given this practice it is arguable whether implementation of more differentiated legislation such as the Race Directive or eventually other regulations could change established social routines concerning enforcement of the laws or to improve current situation concerning social closure or social exclusion in the Czech Republic.

(member of the majority society) – using a method of testing – entered the shop and pretended that she was looking for a job.¹¹ In contrast to the experience of the Romani women she was very well received, was offered a job and obtained complementary detailed information concerning the position. The Romani appellant claimed protection of her person against discrimination as rooted in the Civil Code and on the basis of this claim the court decided that the conduct towards the Romani woman was an infringement upon her personal rights and that she had the right to financial satisfaction due to the severity of the violation.

Redrafting of social borders among various ethnic groups under the current European institutional framework

Current determination of social borders between the majority society and various ethnic groups in the Czech Republic has also been the result of the interdependence between the national and the European institutional frameworks, and therefore one should also ascribe sufficient importance to the conflict between the two components. Efforts to advance social equality issues and to enable new social openings have become major reasons for the introduction of antidiscrimination legislation in the European law including the introduction of an article about non-discrimination in the European Convention on Human Rights and Fundamental Freedoms (Čížinský, 2006).

This article has become extremely important for strategic litigations in favor of socially disadvantaged groups and it enabled the formulation of collective complaints of Czech Roma citizens at the European Court of Human Rights in Strasbourg. In one such complaint, a group of Roma objected that they had been discriminated by the Czech educational system which had placed them in so called “special schools.” The complaint claimed violations of several articles of the Convention and it was on the agenda of the European Court of Human Rights twice. In both 2006 and 2007 the Court was to decide whether the disproportional placement of Roma children in inferior separate schools was discriminatory as defined by European Convention of Fundamental Rights and Freedoms. The case was started by the official complaint of 18 nationals of Roma origin living in the Ostrava region of the Czech Republic who complained that between 1996 and 1999 they had been assigned to special schools for children with difficulties where they had received education from a more basic curriculum.

After the dismissal of their claims by the Constitutional Court, applicants complained to the European Court of Human Rights arguing their treatment amounted to a discriminatory denial of their right to education in breach of article 14 taken together with Article 2 of the Protocol of the European Convention on Human Rights.¹² The

¹¹ Discrimination testing which have been used by the non-governmental organizations verifies that during recruitment procedures employers do not discriminate against those candidates who are not members of majority society such as women, ethnic groups, etc.

¹² At the national level applicants and appellants who file a discrimination complaint often use the Charter of Fundamental Rights and Basic Freedoms and, from September 2009, Czech citizens can also use a recently enacted Discrimination act. According to the requirements of the European Union, the Czech Republic was obliged to pass the act against unequal treatment during its entry into the European Union –

formulation of the complaint before the court drew on aforementioned extensive research indicating that Roma children were systemically assigned to segregated schools based on their racial or ethnic identity rather than on their intellectual capacities. Evidence brought before the Court demonstrated that the school selection process frequently discriminates and it rested on the following facts: over half of the Romani child population is schooled in remedial special schools (See Table 2); over half of the population of remedial special schools are Romani; any randomly chosen Romani child is more than 27 times more likely to be placed in schools for those with learning disabilities than a similarly situated non-Romani child is; even where Romani children manage to avoid the trap of placement in remedial special schooling, they are most often schooled in substandard and predominantly Romani urban schools. Romani children in regular schools are segregated due to attitudes of non-Roma parents who dislike having their children in the same class with the Roma and write petitions against mixed groups or request the transfer of their children to “white classes”. The claimants stressed the fact that they had been placed in the special schools according to the standard application of respective legal norms and alleged that they were victims of de facto racial segregation and discrimination. Between 1996-1999, the applicants, after some time spent in “normal” elementary schools, had been transferred to “special schools.” At the national level the complaint *D.H. and Others versus Czech Republic* ended with the rejection of the ruling of the Czech Constitutional Court and with the dissatisfaction of the appellants.

The decision of Czech judicial bodies induced national and European non-governmental organizations to start strategic litigation which was finally adjudicated by the European Court of Human Rights.¹³ After five years the applicants’ complaint was declared admissible and the Court asked for an oral proceeding concerning the investigation of racial segregation in Czech schools. The strategic litigation in favor of Czech citizens of Roma descent was administered by the European Center for Human Rights and other important institutions involved in the case, were the Open Society Justice Initiative in conjunction with the Roma Education Fund.¹⁴ In 2006 the Second

it was the last of the 27 members to do so and due to its long-term delay the Czech Republic faced legal proceedings and a fine from the European Union. The act defines direct and indirect discrimination in business, education, medical care, social benefits, provision/sales of goods and services including housing – under the condition that they are offered to public. The Discrimination act not only prohibits racial discrimination but also sexual discrimination which includes pregnancy, motherhood and fatherhood, and sexual harassment, discrimination based upon sexual orientation, age, disability, religion affiliation, etc. Principles of equal treatment of people regardless of their race or ethnic origins are also rooted in the Race Directive/2000/43 EU. According to European Union requirements the Czech Republic was obligated to implement directives in its national legal system no later than May 2004. It has yet to do so.

¹³ By its decision of admissibility the European Court of Human Rights rejected argumentation of the Czech government that certain claimants had been transferred from special schools to normal ones and therefore they had not been victims who had merited judicial review.

¹⁴ Open Society Justice Initiative (Justice Initiative) is a program which focuses on the education of activists/specialists/in the field of human rights and makes efforts to constitute open communities all around the world. It tried to develop strategic litigation related to national criminal liability, international justice, freedom of expression, equality and citizenship, etc. The Roma Education Fund is a foundation

Section of the European Court of Human Rights found no evidence of discrimination against the applicants based upon three factors. Firstly, they argued that the system of schooling was not established solely to cater for Roma children but with the legitimate aim of assisting children with slight mental disabilities to obtain a basic education (Fredman, 2007). Secondly, tests for placement in the school were administered by professional psychologists and it was not the role of courts to go behind the established facts of the case and require the government to show that individual psychologists had not adopted a discriminatory approach to these particular children. Third, the applicants' parents failed to appeal against the decisions to place their children in special schools and in a number of cases the parents had even requested that their children be transferred to special schools.

Table 2. Romani children in remedial special schools in Ostrava, Czech Republic, 1999

School	Total student body	Romani pupils	%
Kapitána Vajdy	193	31	16,6
U Haldy	166	27	16,26
Čkvalova	191	49	25,65
Na Vizíně	190	110	57,89
Karasova	156	121	77,56
Těšínská	159	135	84,9
Ibsenova	136	128	94,11
Halasova	169	161	95,26
Total	1360	762	56,03

Source: Laubeová, Laura. Inclusive School-Myth or Reality. In: Cahn, Claude (ed.) *Roma Rights: Race, Justice and Strategies for Equality*. New York: IDEA, 2002. page 87

The applicants were dissatisfied with the decision of the Second Section of the European Court of Human rights and therefore they appealed. The Grand Chamber ruled 13 votes to 4 that there had been indirect discrimination against the school children in the provision of education, finding a violation of Article 14 (prohibition of discrimination) of the European Convention on Human Rights read in conjunction with article 2 of Protocol 1 (right to education). The decision held that the disproportionate assignment of Roma children to special schools without an objective and reasonable justification amounted to unlawful discrimination; the most groundbreaking element of the court's decision was that it explicitly embraced the principle of indirect discrimination, reasoning that a *prima facie* allegation of discrimination shifts the burden to the defendant to prove that any difference in treatment is not discriminatory.

with the goal to eliminate educational differences between Roma and non-Roma citizens by means of new social policies and establishment of programs which deal with quality of education among Roma. The foundation also provides advice to governments and organizations which deal with Roma education processes and financial programs which were introduced by non-profit organizations and local and central governments and which have been defending institutional changes of social policies in the educational systems trying to improve Roma inclusion. The foundation has been financed by European and North-American governments as well as by other means.

The legitimation strategy of the argumentation of the Grand Chamber of the European Court of Human Rights was based on the fact that, as the result of their turbulent history and constant uprooting, the Roma are a specific type of disadvantaged and vulnerable minority in need of special protection under the convention and, that due to their segregation, applicants received an education which compounded their difficulties and compromised their subsequent personal development instead of tackling their real problems and helping them integrate into ordinary schools and developing the skills that would facilitate their life among the majority of the population.¹⁵ Although the judgment the Court decided only upon compensation for 18 citizens, it had a large-scale symbolic meaning in the region and, together with judgments developed by Amnesty International, contributed to a new power interplay between the Council of Europe and the Czech Republic:

Unlike in previous time, it was now argued that a good school is good for all pupils, regardless of their differences, and that mainstream schooling is definitively better than segregative schooling (Šmausová, 1999). In fact the segregation of Romani children in special schools in the Czech Republic more or less limits their cultural and social capital to members of the same ethnic and social group, while for the sake of broader integration in majority society, they are supposed to look for bridging capital in Czech society. While bonding social capital is based on homogenous principles, bridging social capital implies contacts developed from originally marginal and weak ties among the Romani minority on the one hand, and majority Czech society on the other (Putnam, 2000). Thus, bridging social capital contributes to the integration of Roma and the Czech majority and increases solidarity among various social groups. It implies a communication between and among socially distanced groups and, therefore, it is more valuable from the perspective of a prospective social opening of borders existing between the Romani and Czech population. Unfortunately, this is not always easy to achieve.

Conclusion

Notions such as fluidity of social borders and concepts of direct and indirect discrimination have been particularly useful for a better understanding of the degree of integration of the Roma minority in Czech society. Particularly it is thanks to a differentiation between social exclusion and closed social relationships that one can better understand different layers of social borders between Czech society on the one hand and the Roma minority on the other. While, on the basis of national and international reports, one can speak about almost 50% of socially excluded Roma people at the national level, segregation tendencies in the educational system and recruitment

¹⁵ In 1990 there had occurred changes having positive influence on Roma pupils. For example, according to the directive of the Czech ministry of Education, from 1995 graduates of special schools have the possibility to continue their education. Special attention was also paid to preschool education in the sense that various educational institutions started to organize preparatory classes for children from socially disadvantaged environments. Czech elementary schools - in the same way as other elementary schools in Central and Eastern Europe - institutionalized the profession of Roma pedagogical assistants responsible to assist teachers and establish relations with Roma families.

processes of the labor market indicate broader mechanisms of social closure from the part of the Czech majority. The marginalization of the Roma people does not only mean that they have a poor quality of life: the rise of ethnic tensions also includes a rise in criminality.

According to a recent estimate of the World Bank, as well as other sources, expenditure on socially excluded groups living on welfare cost the Czech Republic at least sixteen billion crowns every year (Komárek, 2009). Explaining social borders and planning their prospective social opening should draw on an institutional framework determined by national, European and international regulations and, secondly, on grass-root non-discriminatory practices or non-discriminatory social customs (Foster, 2008, 2009). Particularly thanks to new ways of interpretation of direct and indirect discrimination implied in the landmark case issued by the European Court of Human Rights, we could understand that paternalism and institutional racism manifested by educational and local segregation are more dangerous than open expressions of racism; the damage caused cannot be identified and redressed quickly and easily and requires fundamental changes to the worldview of majority population.¹⁶

Modifications of social borders due to racial discrimination and particularly new options of strategic litigations can also be helped by the implementation of the Race Directive. This does not limit the effectiveness of the prohibition of discrimination in regards to employment, but rather it extends the prohibition to education, training, social security, health care, access to goods and services including housing.¹⁷ Social opening and the facing of discrimination in the Czech Republic could also be facilitated by the institutionalization of innovative elements such as the introduction of prosecutors who would specialize in discrimination, the creation of special tribunals or chambers

¹⁶ For example the efficiency of recently passed anti-discrimination law would definitively depend on the prospective empowerment of Czech citizens to formulate their claims on the one hand, but on the other, one should be critical of popular ideas that the new law would lead to a “contamination” of the Czech legal system due to the parallel coexistence of antidiscrimination regulations. The abovementioned cases of racial discrimination heard by various courts have shown that a multiplicity of antidiscrimination regulations also offer to claimants more options as they can consider the use of various articles of international, regional as well as Czech norms – the parallel existence of antidiscrimination regulations thus also enlarges the number of legal and other institutions that could deal with the case and thus indirectly multiplies the possibilities of winning litigation.

¹⁷ The Directive also takes into consideration procedures for sanctions and the enforcement of rights should there be an alleged violation – these procedures include “shifting the burden of proof”. The implementation of the Race Directive in the Czech Republic should also be accompanied with screening processes, this means implementing measures that would be able to abolish any lawful, semi-lawful or administrative regulations in contradiction with the principle of equal treatment – these “flaws” have very often been part of individual or collective contracts, directives at the level of enterprises, in the rule of profit and non-profit associations, independent professions of organizations of workers and employers. Apart from conceptualization of direct and indirect discrimination The Race Directive also supports states’ efforts to intensify social dialogue among various social partners and non-governmental organizations in order to address discriminatory forms of conduct. Thus the integration of The Race Directive into the Czech legal system could open cultural space to new and wider strategic litigations which appeal in legal practice ad hoc and which are “transcendental” in the sense that they are much more influential than one concrete case.

focused on discrimination similar to the Equality Tribunal in Ireland, or specialized entities with quasi-judicial competences such as the Commission for Racial Equality in the United Kingdom (Shaw, 2003).

The aforementioned case of *D. H. and Others* not only modified legal interpretation or discrimination according to the Convention, but it also opened new questions concerning social policies and the redistribution of resources at the national level. According to Czech laws as well as other laws in Central and Eastern Europe, Roma assistants can be employed at various levels of the educational system, with the elementary level being the actual focal point.

As the result of the judgment of the Grand Chamber, the case was transferred to the Committee of Ministers of the Council of Europe to ensure the implementation of the decision in order to put an end to the violation found by the Court and to redress so far as possible the effects. The body charged with implementing the judgment meets periodically to consider the actions that have been taken by the government of the Czech Republic and in the last two years they decided that more information was needed on the impact of the 2005 Czech School Act in practice, as well as with regard to dissemination of the judgment and awareness-raising of all actors concerned. Nevertheless, improvements concerning discriminatory practices, diminution of social closure and increase of bridging capital should have more sources: only common efforts of national, European and international institutions and civil society forces could eliminate stereotyping and promote multicultural values concerning the Romani minority as well as other ethnic groups.

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Lucie Cviklová holds a Ph.D. degree from Université Paris X and she currently teaches at the Faculty of Social Sciences, Charles University, as well as at the Anglo-American University in Prague. Together with her colleagues she benefited from the financial support of Central European University for the introduction of multicultural ideas in Czech institutions of higher education. She is interested in social philosophy, social equality related to race and gender, and media research.