Equality, non-Discrimination and Inclusive Education: An International and Comparative Constitutional Perspective

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I. The Notion of Inclusive Education

Nowadays, when dealing with the relationship between diversity and education, it seems necessary to refer to the concept of inclusive education. According to Mittler, 'inclusion implies a radical reform of the school in terms of curriculum, assessment, pedagogy and grouping of pupils. It is based on a value system that welcomes and celebrates diversity arising from gender, nationality, race, language of origin, social background, level of educational achievement or disability' (Mittler, 10).

This author considers educational inclusion as part of a wider social policy framework. To put it in his own words: 'the process of working toward a more inclusive society has to start long before children first go to school'. 'Social exclusion starts very early, long before a child is born. It is rooted in poverty, inadequate housing, chronic ill health and long-term unemployment. Children born in poverty are denied the resources and opportunities available to other children. Some children face additional obstacles because of their gender, race, religion or disability' (Mittler, 90-93).

Historically seen, inclusive education appears as an ambitious model, which only in recent years has earned legal status. This, however, does not mean that inclusion is fully implemented into educational practice, even in countries where it enjoys normative support.

As Ledesma Marín has explained (17-26), the theoretical approach to diversity has evolved since the *selective model* ('expressly advocating the exclusion of pupils considered different, that is, not fit for studying and therefore sent to a different facility or expelled from the education system').

This author refers also to the *model of compensation*, in which 'diversity is conceived as a problem of academic and intellectual achievement (…) emphasizing deficiencies and dealing with diversity through "extraordinary" and palliative individual measures applied a posteriori (such as review, enrichment, make-up activities, repetition, individual curricular adjustments)'.

Thirdly, the *comprehensive model* 'considers diversity as inherent to each individual in multiple spheres and as a richness of human groups', and hence 'special educational needs (SEN) (…) are considered contextual, that is, they may or may not appear in each specific situation and therefore there is no stigmatization of pupils.' In the comprehensive model, pre-emptive and group measures are adopted in the first place (different depth levels of the curriculum, stage-based pupil advancement, reducing teacher – pupil ratios…) and teachers propose a flexible curriculum with different depth levels.

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Pupils are inevitably diverse and they share the same rooms and learning experiences through the usual learning dynamics for the longest possible time. Only eventually, and only if necessary, specific extraordinary measures should be proposed in each case.

According to Ledesma Marín, 'what distinguishes the *inclusive model* of the comprehensive model is that, in the former, some manifestations of diversity should be reinforced while others (considered unfair) should be eradicated –those that create discrimination and exclusion. In addition, it is assumed that the school environment itself creates some barriers for learning and for the participation of pupils and of the community that should be overcome. (…) In an inclusive school, it is essential that pupils actually "live" collaboration, participation and critical (self-)reflection experiences and that the relationship with teachers is warm and kind as well as demanding.'

II. International Legal Grounds for Inclusive Education

International human rights law includes many elements that can be construed as a normative basis for inclusive education. Considering only the UN core instruments, at least five of these texts should be examined: the Universal Declaration of Human Rights (UDHR), International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the International Convention on the Rights of All Migrant Workers and Their Families Despite and the Convention on the Rights of Persons with Disabilities.

Despite its formal nature of a declaration (and not a convention) the UDHR enjoys a certain normativity given the broad implementation of its principles. Indeed, all of the UN human rights treaties as well as regional human rights conventions expressly aim at developing the 1948 Declaration. Also many national constitutions and courts mention it when referring to human rights or adjudicating cases that involve these. It should be noted that this does not amount to lending the UDHR a full normative status in all national jurisdictions. On the contrary, to ascertain whether the Declaration enjoys normative status, the relevant statutory and case law should be carefully analysed for each legal system. But irrespective of its legal status, the UDHR seems nevertheless like a powerful referent that is worth considering.

Moreover, the European regional system will be discussed below in section IV of this article.

From a substantial point of view, consideration will be granted to the idea of accessibility (possibly the most widespread and robust principle throughout international and constitutional law on education), to the normative aims of education and to certain provisions from the Convention on the Rights of Persons with Disabilities.

A. The principle of accessibility

Article 26 of the UDHR refers to education. Paragraph 1 provides interesting elements from the point of view of accessibility and inclusive education:

> 1. *Everyone* has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be *compulsory*. Technical and professional education shall be made *generally available* and higher education shall be *equally accessible to all on the basis of merit*.

Firstly, paragraph 1 is conclusive in defining the subject of this right, without any distinction or qualification concerning this concept: 'everyone'. Moreover, the second and third sentences of this paragraph create a 'pyramid' structure concerning the population that should have access to each educational: 'elementary' (or primary) education shall be compulsory (for all persons); 'technical and

professional' education shall be generally available (for every person who wishes to follow it); and higher education shall be 'equally accessible to all on the basis of merit.'

Accessibility has often been understood in a physical way, i.e., making buildings and other facilities safe and easy to use by persons with physical or sensorial disabilities. But there is much more to it, as the conception of access to higher education in article 26 of the UDHR suggests.

Indeed, the phrase 'equally accessible to all on the basis of merit' lends itself to further discussion. Firstly, the term 'equally' evokes the idea of evenness, of a uniform standard for all persons. In this context, the words 'to all' seem to allude to the possibility of everyone, with or without a disability, to take the (uniform) exams that may lead to higher education. But this seems like a rather dull or even superfluous interpretation, especially when read in the light of the last phrase: 'on the basis of merit'.

The reference to 'merit' can be construed in two different ways. Firstly, as a formal assessment of proficiency: those who attain a certain level of knowledge or skill may have access to higher education. But, taken together with the words 'to all' ('accessible to all on the basis of merit') perhaps the exigence of merit could be seen from an individual perspective. From this perspective, the effort that a person, given their type and degree of disability or their specific cultural background, has made in order to achieve a certain score may be sufficient proof of their maturity and their ability to extract benefit from higher education, even in certain cases of intellectual disabilities.

It is not possible to elaborate now on all the details of this idea, but I am advocating an adaptation of exams granting access to higher education in certain cases when a standardised test might prevent talented persons with disabilities or members of cultural minorities from having access to higher education.

Forty years after the Declaration, the 1990 International Convention on the Rights of All Migrant Workers and Their Families (ICMW) seems to follow this line of thought. Indeed, it places a special emphasis on accessibility. Some aspects deserve specific attention here.

Firstly, the ICMW includes a general prohibition of discrimination in access. In particular, article 43 establishes the principle of equal treatment in access for migrant workers to (a) 'educational institutions and services subject to the admission requirements and other regulations of the institutions and services concerned and (c) vocational training and retraining facilities and institutions.

Secondly, article 30 of this Convention refers to children of migrant workers. More specifically, it prohibits that access be 'refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child's stay in the State of employment.' In the European context, this idea has been established on the basis of article 2 of the Additional Protocol to the European Convention of Human Rights (ECHR) by the European Court of Human Right's 2005 judgement in the Timishev v. Russia case.

Thirdly, the ICMW goes even further and establishes certain obligations regarding the use of languages in the education of children of migrant workers. Indeed, States of employment shall, with the collaboration of the states of origin whenever necessary or appropriate:

- facilitate 'the integration of children of migrant workers in the local school system, particularly in respect of teaching them the local language' (Art. 45 para. 2);
- (…) 'endeavour to facilitate for the children of migrant workers the teaching of their mother tongue and culture' (Art. 45 para. 3);
- and, more specifically, they 'may provide special schemes of education in the mother tongue of children of migrant workers' (Art. 45 para. 4).

B. Aims of education

According to international law, what should the goals of education be? Let us consider the UDHR once again, as well as two of the major UN treaties on human rights. Indeed, the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) and the 1989 Convention on the Rights of the Child (CRC) seem particularly relevant for understanding the relationship between the legal aims of education and the idea of inclusiveness.

1. The full development of personality

Article 26, para. 2 of the UDHR concerns the aims that should guide state action in education:

> Education shall be directed to the *full development of the human personality* and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

The CRC is considered to base upon and at the same time develop the principle of the best interest of the child. Article 23 refers to the rights of children with disabilities. Although it does not specifically concern education, its broad aim and great importance seem sufficient reason to make it worthy of consideration. Paragraph 1 reads as follows:

> States Parties recognize that a mentally or physically disabled child should enjoy a *full and decent life*, in conditions which ensure *dignity*, promote *self-reliance* and facilitate the child's active participation in the community.

The mandate of the UDHR that 'education shall be directed to the full development of the human personality' seems particularly relevant here. It is only emphasized by the references of the CRC to 'a full and decent life', to 'dignity', to the promotion of 'self-reliance' and to 'the child's active participation in the community'.

What does the notion of 'the full development of personality' mean? We could consider that our personality develops by establishing further relationships with other individuals. As such, access to higher education of persons with disabilities or members of a cultural minority would not only benefit that particular individual but also all the other students, who would be confronted with radically different situations and profit not only from formal education but, more importantly, from a stimulating environment fostering different forms of interaction.

The idea of interaction between individuals is also highly relevant, both in the ICESCR and in other provisions of the CRC, as I will discuss in the following section.

2. Responsible participation in a free society

Article 13 ICESCR is generally considered to be the most comprehensive definition of educational rights in international law. Moreover, it has been the object of the highly interesting General Comment No 13, adopted by the Committee of Educational, Social and Cultural Rights in 1999. Article 13 includes many of the elements already commented in regards of the UDHR, as well as a number of other original provisions. However, given the scope of this lecture, I will only focus on paragraph 1. It reads as follows:

> (…) education shall *enable every person to effectively participate in a free society*, promote *understanding*, *tolerance* and *friendship* among all nations and all racial, ethnic or religious groups (…).

The CRC has already been mentioned. Concerning the idea of participation, its article 29 revisited, over 20 years after the ICESCR, the wording that I have just mentioned and went on to proclaim the following:

> '[T]he education of the child shall be directed to:
> (…)
> (d) The preparation of the child for *responsible* life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.

At least two elements from both these treaties should be emphasized; firstly, participation in a free society; secondly, the promotion of understanding, tolerance and friendship. If the latter element seems easier to connect with the notion of inclusive education, the link of inclusiveness to the former idea may require some explanation.

I have already mentioned that the development of personality is closely linked to the possibility of establishing new and different relationships with other individuals coming from different cultural backgrounds, which could certainly unveil new realities and possibilities of interaction with the world around the child and the young person. This idea is also connected with the moral philosophy's notion that understands *freedom* as the ability to take decisions with the highest possible awareness of the consequences they entail. The CRC only stresses such understanding of a free society when it places the phrase '*responsible* life' in the same sentence.

Thus, a *free society* would be one where interaction with those who are different is not hindered but encouraged. And, if *education shall enable to effectively participate* in such a society, then school should be an initiatory environment for children to experience and appreciate various and diverse relationships, that is, to improve their skills and their confidence to develop as valuable members of a complex social fabric.

C. The right to education of persons with disabilities

According to the World Report on Disability, in 2010 about 15% of the world's population lived with some form of disability, of which between 110 million (2,2%) and 190 million (3,8%) had "severe disability"[1]. This Report also recalls that the UNICEF in 2005 had estimated the number of children with disabilities under age 18 at 150 million[2].

These data account for the importance of a specific UN human rights convention. Indeed, the Convention on the Rights of Persons with Disabilities (CRPD) was adopted on December 13, 2006 and it entered into force on May 3, 2008. So far, over 170 states have become parties to the CRPD.

Article 24 of the CRPD includes five paragraphs establishing specific obligations for member states in the field of education. Given the scope of this piece, it is not possible to analyse every aspect of these provisions here, but at least some elements should be mentioned.

Firstly, the CRPD mandates that inclusive education be ensured in free compulsory primary education and in free quality secondary education – in equal terms with the rest of pupils (Art. 24.2.a and b).

Secondly, the Convention refers to the obligation of states to ensure that reasonable accommodation of the individual's requirements is provided (Art. 24.2.c). The concept of 'reasonable accommodation' is difficult to define in practice because it depends on the circumstances of each individual and their

1 World Health Organization and The World Bank: World Report on Disability, 2011, p. 44.
2 World Report on Disability, p. 36.

context. It is usually understood as excluding 'excessive burden' for public authorities, which does not provide much more information on the meaning of reasonable accommodation. But, if construed from the point of view of administrative law, the principle of reasonable accommodation clearly implies that *public authorities have an obligation to individually justify why it is not possible to accommodate a pupil's request*.

Thirdly, article 24 of the CRPD stresses the importance of recruiting teachers with disabilities and trained staff in all educational levels, thus fostering both personal awareness and professionality in order to enhance an inclusive educational environment for children with disabilities ('no-one knows better the challenges arising from a disability than persons with disabilities themselves').

Fourthly, the Convention expressly mentions certain sensorial disabilities, such as the visual or hearing disabilities, and encourages the states to promote specific measures in order to improve communication skills of these persons. But it is unclear why only certain skills are mentioned (ie, sign language and not lip-reading) and, even more importantly, why physical and intellectual disabilities are not specifically considered.

Lastly, and perhaps most importantly, article 24 enshrines, for the first time in international law, an obligation for states to ensure access of persons with disabilities to higher education ('general tertiary education') and to vocational training, adult education and lifelong learning without discrimination. While references to vocational training were previously known in certain domestic legal systems, *the obligation to ensure access of persons with disabilities to general higher education without discrimination* is a groundbreaking statement that should not pass unnoticed.

III. Equality and non-Discrimination in Education: Elements of Comparative Constitutional Law in the Light of International Law[3]

This section reviews over thirty constitutions from around the world with the aim of discovering which elements of non-discrimination and inclusiveness in education could be considered common to the different constitutional traditions. Given the number of national jurisdictions considered, the text has been organised using some of the principles from international law described above. This, however, should not be considered as an assumption that international treaties enjoy a normative status in all of the domestic jurisdictions analysed. The resort to international law is only intended to simplify the presentation.

The section is divided into three parts: primary education, secondary education and higher education. This is a consequence of the fact that most constitutions treat each of these stages separately.

A. Primary education

When the specifically refer to primary education, constitutions usually consider many different dimensions of this crucial stage of the education system. Of these, some of them bear particular relevance for equality and non-discrimination as well as for inclusiveness as a characteristic of the education system. At least the following five aspects should be considered: the *establishment of a school system by public authorities*; a system that is *sufficient*, *equally accessible*, provided *free of charge* and where attendance is *compulsory*.

Concerning the *establishment of a school system by public authorities*, many constitutions include a provision in this regard. Nevertheless, significant variants can be found across the globe which cannot

3 Part III of this article is a shorter version of different excerpts from three entries previously published as 'Primary Education', 'Secondary Education' and 'Higher Education' in Grote, R; Lachenmann, F; Wolfrum, R (eds.): *Max Planck Encyclopedia of Comparative Constitutional Law*, Oxford University Press, 2017.

be easily divided on the basis of legal culture or geographical criteria. Many constitutions simply mention a responsibility of 'the state' in this respect (South Africa, Art. 29), or even of 'the Republic' (Italy, Art. 33). In a few cases, particularly in the USA, constitutions refer to municipalities or 'towns' (for example the Constitution of the State of Maine), and more often they call both upon municipalities and the state (Mexico, Art. 28 and the German state of Rheinland-Pfalz, Art. 27.2).

Public education systems are often required to be *sufficient* as well as pluralistic. This is the case of the Constitution of the Kingdom of the Netherlands (Art. 23 para. 3) and of the Constitution of Sachsen-Anhalt in Germany (Art. 26 para. 1). The relationship between sufficiency and pluralism is in line with special rapporteur Katarina Tomaševski's pioneer characterisation of education (the so-called 4A-scheme: *availability, accessibility, adaptability, acceptability*), and in particular with the notion of 'availability' of primary education. According to this author, the concept of availability refers to both education provided by public schools and to publicly funded and publicly supervised private institutions. Thus, many constitutions that expressly mention pluralism also refer to the possibility of private school education and to freedom of teaching.

As a complement to Tomaševski's model, an additional 4A-scheme has been proposed by Jan de Groof in his report as a special UNESCO envoy: 'awareness' of the right to education; 'advocacy'; 'adequacy' of the school program and last, but very important, 'accountability'. While Tomaševski's proposal addressed perhaps rather substantive aspects of education (basic material and moral conditions to consider an education system reasonable), De Groof's might be characterised as mainly procedural. This reflects only the author's original field of expertise, namely that of administrative law. More recently, Professor De Groof has added a fifth notion, 'autonomy', which is perhaps more controversial[4] than the previous four.

A third element of the constitutional notion of primary education, and arguably the most widespread principle of fundamental rights concerning education both in international and comparative constitutional law, is that of *equal access*. Some legal systems emphasise equal access to educational facilities (in international law, the First Protocol to the ECHR; in domestic law, the UK's Human Rights Act of 1998 and Turkey's Constitution of 1982, Art. 42). Concerning the subject of the right, some constitutions even use the terms 'universal access' (Nigeria, Art. 18 para. 3). However, other constitutions attribute this right to 'the child' (the Australian Capital Territory's Human Rights Act, Art. 27A para. 1) or to 'youngsters without consideration for their origin or economic situation' (constitutions of the German *Länder* Baden-Württemberg, Art. 11 para. 1, and Sachsen-Anhalt, Art. 25). From a comparative perspective, the emphasis on young people might be considered as a certain restriction for adults, especially if compared to other constitutions that expressly mention 'adult basic education' (South Africa, Art. 29, para. 1) or 'equal access for children and adults' (Constitution of France of 1946, Preamble, para. 13).

It should be added that equal access to primary education has been the object of highly significant judicial decisions reviewing both law and administrative practice. Possibly the most celebrated ruling of the US Supreme Court is *Brown v Board of Education of Topeka*, 347 U.S. 483 (1954). In it, the Supreme Court abolished racial segregation in American elementary and high schools. More recently, the ECtHR judgments in the *D.H.* (Grand Chamber, 2007) and other cases have achieved a great advance in the understanding of and the fight against discrimination in international law. These rulings are discussed more in detail in the last part of this article.

Concerning equality and inclusiveness, a fourth aspect of primary education is that of *free-of-charge* tuition. Many constitutions mandate that primary education be provided on a cost-free basis. Some examples can be found in the Constitution of the Islamic Republic of Iran (Art. 30), the Constitution of India (Art. 21A), or the Constitution of the Italian Republic (Art. 34). In addition, some state

4 In the Constitution of Spain, the principle of university autonomy enjoys constitutional protection. Nevertheless, this constitutional decision has been the object of some criticism and F. Sosa Wagner (2007) has even depicted the notion of university autonomy as a 'myth'.

constitutions in Germany consider free-of-charge education to include even learning materials such as textbooks (Hessen, Art. 59).

Last, primary education is often considered not only as a right but also as one of citizens' duties. This is the case of Turkey's Constitution, that expressly refers to 'the right and duty of education'. Thus, school attendance is often declared *compulsory* for children (Constitution of Greece, Art. 16 para. 3; Constitution of Venezuela, Art. 103) and, in some cases, it is even placed under the responsibility of parents or other adults who have 'boys and girls under their protection' (Constitution of Japan, Art. 26 para. 2).

B. Secondary education

The analytical framework used for the constitutional notion of primary education can be partly applied to secondary education as well. Indeed, one should inquire about the meaning of accessibility in this educational stage and whether education should be provided free of charge.

Concerning access to secondary education, at least three different approaches can be found across national and international law.

Firstly, the UDHR proclaimed in 1948 that 'technical and professional education shall be made *generally* available'. Similarly, some national jurisdictions have adopted the phrase 'general access', as does the Constitution of the Russian Federation (Art. 43, para. 2).

However, *mandatory* schooling up to a certain age –or to a certain educational stage– is increasingly common in national constitutions. As an example of the latter, the Constitution of Bolivia (Art. 81, para. I) created a system of compulsory education that includes 'bachillerato' (a term traditionally used for upper secondary education in Hispanic countries). On the other hand, and possibly reflecting the influence of decades of a socialist regime and its emphasis on equality, the Constitution of Poland makes school education compulsory until the age of 18 (Art. 70, para. 1).

Lastly, a third group of jurisdictions refer to *equal access* to secondary education. Literally, 'equal access' could be understood as a lower standard than the Universal Declaration's 'generally available'. Nevertheless, such an interpretation would be contrary to the UDHR and the ICESCR (which however does not necessarily mean that it would be unacceptable in terms of domestic law). Indeed, the ICESCR of December 10, 1966 supports this view in Art. 13 para. 2b: 'Secondary education in its different forms, including technical and vocational secondary education, shall be made *generally available and accessible to all*'. As an example from a domestic jurisdiction, the Norwegian Constitution simply entrusts the authorities with the responsibility to '*ensure access* to upper secondary education and equal opportunities for higher education on the basis of qualifications', thus leaving little scope for interpretation (Art. 109). On the other hand, the 'equal access' clause may also have important implications from the point of view of non-discrimination. A good example of this was the famous *Brown v Board of Education of Topeka* case, where the Supreme Court unanimously ruled against the 'separate but equal' principle that prevented African American students from attending 'white' elementary and high schools in some US states (Klarman, 57).

A second object of discussion around the notion of secondary education concerns funding. Should pupils or their families bear the expenses, or should public authorities cover tuition?

Together with increasing rates of mandatory schooling, the provision of free secondary education is also growing around the world. Whereas most jurisdictions ensure free-of-charge tuition only in secondary schools owned by the state (or other publicly owned schools, such as municipal schools) some constitutions include other possibilities. Varying interpretations of free secondary education in state schools can be found in four cultural regions of the planet: Latin America, the Middle East,

Africa and some European states (although these are only examples that hardly account for each of the regions).

In Latin America, two conceptions should be mentioned: on one hand, the model of the Peruvian and the Mexican federal constitution. On the other hand, the very particular Chilean system.

Art. 17 of the Constitution of Peru reads as follows: 'Early childhood, primary and secondary education are mandatory. Education is free in state schools (…)'. Art. 3 para. 1 of the Constitution of the United Mexican States has a similar content. This simple statement clearly implies the obligation of public authorities to establish certain educational facilities.

Secondly, the Constitution of Chile deserves specific consideration on account of its highly flexible and innovative formulation. This constitution does not require the state to *provide* but only to *finance* a free-of-charge education system of basic and compulsory 'middle' education (Art. 19, para. 10). Moreover, it is interesting to note that 'in the case of middle education, this system shall be extended, in conformity with the law, until the age of 21 is reached'.

Moreover, in an increasingly influential actor in the global arena and a good example from Islamic societies, Iran's Constitution entrusts the government with the obligation to 'provide all citizen with free education up to secondary school' (Art. 30).

On the other hand, an example from African constitutions seems less categorical: the Constitution of Nigeria states that 'Government shall as and when practicable provide (…) free secondary education' (Art. 18 para. 3).

More frequently, some constitutions allow parliaments to specify the scope and conditions for funding private secondary schools. A good example of this orientation can be found in the Constitution of the Netherlands, which nevertheless seems unambiguous in requiring that a funding system for private secondary schools be established: 'The conditions under which private secondary education and pre-university education shall receive contributions from public funds shall be laid down by Act of Parliament' (Art. 23 para. 3).

C. Higher education

Two dimensions should be considered when examining the constitutional notion of higher education from the perspective of equality, non-discrimination and inclusiveness: access and funding.

Concerning access to higher education, the UDHR enshrined the principle of equality for all on the basis of merit (Art. 26 para. 1). Equal access is a rather common requirement when constitutions or any other laws refer to the right to education. But, given the compulsory nature of primary education and even of some stages of secondary education, equal access in those stages poses only part of the problems that can be found in the case of higher education. In fact, equality in access to higher education becomes even more crucial considering the absence of universal availability in the higher education system and the high cost of educational programs for individuals unless they are publicly funded.

The French Declaration of Rights of Man and Citizen established a precedent for this idea when it required from 'society' to 'put education within all citizens' reach' (Art. 22). The UDHR clause 'on the basis of merit' means, in this respect, that states must ensure that financial difficulties (and of course sexual, racial, religious, status-related etc. obstacles or biases) do not prevent talented and hard-working students from accessing –and completing– a higher education program. This idea can be found also in the Constitution of the Russian Federation, which nevertheless uses a different wording: 'Everyone shall have the right to receive *on a competitive basis* a free higher education in a state or municipal educational establishment and at an enterprise' (Art. 43 para. 3). According to this interpretation, equal

access to higher education is more likely to be construed as an equivalent to equal opportunities rather than to universal or even general access.

Secondly, the responsibilities of funding and creating institutions of higher education should be discussed.

Some constitutions create an obligation for public authorities to establish higher education facilities. In Germany, this can be found in some state constitutions such as the Constitution of Bavaria (Art. 138). In some cases, it is even required that such facilities be 'sufficient', which does not necessarily exclude the existence of private schools or universities. In this respect, the Constitution of Sachsen-Anhalt proclaims that 'the state (*Land*) must establish, sustain and promote institutions of higher education (…). Other owners are admissible' (Art. 31 para. 1).

Nevertheless, some jurisdictions limit or at least regulate the possibility of creating private universities. The Constitution of Bolivia requires private universities to 'observe policies, programs and authorities of the education system' and subjects their authorization to a governmental decision that must verify the fulfilment of legal requirements (Art. 94 para. I).

There is even an extreme case like the Greek prohibition of private universities. Paradoxically, the same constitution that guarantees teachers' freedom against any political interference also includes the following provision: 'The establishment of university level institutions by private persons is prohibited' (Constitution of Greece, Art. 16 para. 8).

Back to the establishment of publicly-owned institutions of higher education, this idea is sometimes linked with free-of-charge education in such facilities. The Preamble to the Constitution of the French Republic: October 27, 1946, still in force, considers public, free-of-charge and secular education *in all stages* as a duty of the state. A much more recent constitution, the 2010/2015 constitution of the Dominican Republic directs the state 'to ensure free-of-charge public education (…) and proclaims that 'public higher education will be funded by the state (…)' (Art 63 para. 3).

Concerning sufficiency of funding for higher education, one of Brazil's state constitutions (Rio Grande do Sul) displays a highly original obligation for the state: 'The state shall allocate 75% of the resources of the aforementioned Fund (State Fund for Social Development, financed with federal allocations from gas exploration) to public education' (Art. 148-A).

Other Latin American jurisdictions have come up with more open formulations, like the Bolivian obligation to 'sufficiently' fund public universities without taking in consideration any other resources they may receive. This, however, does not necessarily imply free tuition for students (Constitution of Bolivia, Art. 93 para. I). The Colombian wording, on the other hand, seems more ambiguous: 'education shall be free in state schools, but tuition fees will be charged to those who can afford them' (Constitution of Colombia, Art. 67). Last, in the case of Mexico, the state shall merely 'promote and attend to every kind and form of education – including pre-primary education and higher education – which are necessary for the development of the nation (…)' (Constitution of the United Mexican States, Art. 3 para. V).

IV. Indirect Discrimination and Inclusive Education according to the European Court of Human Rights: the Rulings on Roma Children

One last aspect of equality, non-discrimination and inclusiveness in education systems regards the international obligation of states to correct certain pre-existing situations of social inequality. This obligation has been established following the concept of 'indirect discrimination'. Since 2007, the European Court of Human Rights has applied this idea in a series of highly interesting judgments.

The first and most important ruling in this respect is the *D.H. and others v. the Czech Republic* Grand Chamber judgment of November 13, 2007. Indeed, the *D.H.* ruling is truly a leading case not only for the ECtHR itself but also for national courts in the European legal arena. In subsequent years, the court developed a body of case-law establishing specific key principles that define the obligations of states in situations of indirect discrimination. After the *D.H.* Grand Chamber ruling, the Court delivered further relevant judgments in *Sampanis and others v. Greece* (September 5, 2008), *Oršuš and others v. Croatia* (Grand Chamber, March 16, 2010) and *Horváth and Kiss v. Hungary* (January 29, 2013).

The facts of each case reflect a specific situation in each particular country and in addition the approach by the authorities was not entirely comparable in all cases. In some cases, Roma children had been placed in special schools for children with mental problems or below-average intellectual development; in other cases, Roma children had been rejected or even physically threatened by parents of non-Roma children in the same schools and subsequently placed by the authorities in different buildings or other specific facilities. Nevertheless, in all four cases the authorities failed to adequately treat Roma pupils and to create a genuinely inclusive education system.

Four main ideas should be stressed from this case-law. On account of its groundbreaking nature and thorough reasoning, the *D.H.* ruling will be granted specific consideration.

The *first* interesting point concerns the way indirect discrimination may be proved. Indeed, in these cases the ECtHR accepted the use of statistics as a *prima facie* proof of discrimination. In particular, statistics showed that the number of Roma pupils in special schools was much higher than the average of Roma pupils in the whole education system and, conversely, the number of Roma pupils that managed to enrol in secondary school and beyond was very small.

These statistics were brought by the applicants and confirmed by independent experts, but most importantly, the respondent governments did not dispute them or simply did not produce any alternative statistical evidence. The court however did not consider statistics as an irrefutable proof that states were discriminating against Roma children. But given the powerful suggestion that such a discrimination could be taking place in certain schools or even in some areas of the countries, the court understood that the statistical evidence justified that the burden of proof should shift to the government,

> 'which must show that the difference in the impact of the legislation was the result of objective factors unrelated to ethnic origin' (*D.H. v. the Czech Republic*, para. 195).

The need for 'objective factors' that could justify the situation brought to light by statistical data leads to considering a *second* interesting element of this case-law. It concerns the idea of *adequacy of education* that has been previously mentioned, in particular at the time of the selection of pupils that should attend either ordinary or special schools. In these cases, that selection was based on certain controversial tests.

The tests used to assess the children's learning abilities were the same for all children, irrespective of their ethnic origin. But, as the Czech authorities acknowledged, this equal treatment paradoxically had the effect of placing many 'Romany children with average or above-average intellect' in special schools, as the tests were conceived for the majority of the population and did not take Roma specificity in consideration. In 1999, the Czech authorities accepted the existence of a certain cultural bias (though

not with these precise words) and explained that a revision of the tests had been undertaken in order to avoid it. Nevertheless, this took place after the previous system had been applied over a certain timespan (the oldest of the applicants of the *D.H.* case had been born in 1985).

Furthermore, the European Commission Against Racism and Intolerance (ECRI) reported to the court that Roma children were often sent to special schools on a 'quasi-automatic' basis and the Council of Europe Commissioner for Human Rights denounced the lack of 'an adequate psychological or pedagogical assessment, the real criteria clearly being their ethnic origin'. Also some of the third-party interveners considered that placements in special schools 'reflected the racial prejudices of the society concerned'.

Therefore, the court concluded that the results of the tests did not provide an 'objective and reasonable justification for the purposes of Article 14 of the Convention' (*D.H.* case, para. 200).

A *third* idea worth mentioning regards the relevance of parental consent that the Czech and the Greek authorities required before placing a pupil in a special school. According to the Czech government, parental consent was a 'decisive factor' before the authorities would place a child in a special school.

The court, however, rejects the validity of that parental consent, as it considers that the waiver of a fundamental right

> 'must be established in an unequivocal manner, and be given in full knowledge of the facts, that is to say on the basis of informed consent and without constraint' (*D.H.* case, para. 202).

In the cases mentioned, the court was not convinced that these conditions had been present. Indeed, it considered that the parents of the applicants 'were members of a disadvantaged community and often poorly educated' and were possibly not 'capable of weighing up all the aspects of the situation and the consequences of giving their consent' (this would amount to lack of informed consent).

Moreover, parents had to make a choice

> 'between ordinary schools that were ill-equipped to cater for their children's social and cultural differences and in which their children risked isolation and ostracism, and special schools where the majority of the pupils were Roma' (*D.H.* case, para. 203).

This can be construed as a probable constraint influencing the decision of the parents, although the court did not expressly brand it as a 'constraint'.

But the court went even farther. Beyond judging parental consent in the *D.H.* and *Sampanis* cases irrelevant, it proclaimed that 'no waiver of the right not to be subjected to racial discrimination can be accepted, as it would be counter to an important public interest' (*D.H.* para. 204, *Sampanis* para. 95). Hence, any possibility of waiving this right would thus be deemed contrary to the convention.

Lastly, a *fourth* idea arising from this case-law (and to some extent a consequence of the previous reasoning) can be phrased as the duty of the state to establish an inclusive education system. This principle stems from the more general obligation of states to correct inequality that exists within a society (*D.H.* case, para. 175) and to take into account the special needs of the members of a disadvantaged class (*D.H.* case, para. 207).

The court nevertheless accepted that 'the choice between a single school for everyone, highly specialised structures and unified structures with specialised sections is not an easy one', but attached particular importance to the 'procedural safeguards available to the individual' in order to prove whether the state had remained within its margin of appreciation or, conversely, whether it had breached the Convention. In the instant case,

> 'the applicants were placed in schools for children with mental disabilities where a more basic curriculum was followed than in ordinary schools and where they were isolated from pupils from the wider population' (*D.H.* case, para. 207).

As a result, the theoretical 'opportunity to transfer back to an ordinary primary school from a special school' (*D.H.* case, para. 11) was extremely difficult to achieve in practice, as the statistical evidence clearly suggested.

But neither this nor the other 'procedural safeguards' mentioned in para. 11 (parental consent, recommendations of the educational psychology centres -based on the controversial tests-, the right to appeal…) satisfied the requirements of the Convention.

According to the court, the states had failed to comply with their obligation of

> 'tackling [the applicants'] real problems or helping them to integrate into the ordinary schools and develop the skills that would facilitate life among the majority population' (*D.H.* case, para. 207).

In the case of the Czech Republic, the principle of inclusion was also stressed by the court's statement that

> 'it notes with interest that the new legislation has abolished special schools and provides for children with special educational needs, including socially disadvantaged children, to be educated in ordinary schools.' (para. 208).

Nevertheless, it considered in all cases that the respondent states had breached the prohibition of discrimination of article 14 of the Convention read in conjunction with article 2 of Protocol No. 1, that is, the prohibition of discrimination and the right to education.

Although the court has not phrased it with such precision, it is possible to infer from the set of arguments used in this case-law that inclusive and adaptable education should be the rule, and states must clearly specify the reasons for a separation of pupils on account of their individual needs.

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