XENOPHOBIA, IDENTITY AND NEW FORMS OF NATIONALISM

PUBLISHED BY

Institute of Social Sciences

Belgrade 2019

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SERIES

Edited Volumes

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ISBN 978-86-7093-223-4

edited volumes

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Institute of Social Sciences | Belgrade 2019

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Editors' Foreword

It has been almost two years since we first decided to embark on a project of organizing an international philosophical conference which would be devoted to a familiar but highly disturbing subject: the extraordinary upsurge of nationalism in its novel and unprecedented forms, with extreme xenophobia as one of its central features. The conference, organized by the Center for Philosophy of the Institute of Social Sciences, under the title "Xenophobia, Identity and New Forms of Nationalism", was held on October 4–5 of 2018 in Belgrade. It was attended by 17 lecturers from eight countries, most of them philosophers, but also sociologists, political scientists, jurists, journalists or fiction writers. This collective volume is its result.

As is well known, at the time of the inception of our idea, the issue of new nationalism and xenophobia had already become burning not only in Europe (in the political as well as historical and cultural meaning of the term) but in many other parts of the world too. Sadly, in the meantime, it has gained even more in impetus and significance in social, political and institutional life, above all in developed Western countries. Obviously, one of the main reasons for this state of affairs is the (so inappropriately named) "migration problem", which is in fact the problem of inequality in the world society. If the words "migration" or "immigration" did not figure in the title of the conference, it is only because their connection to xenophobia, to the new forms of nationalism and to the politics of identity is so manifest, that those terms, as it seemed to us, could be omitted with no harm for the discussion of our

subject, and because we hoped that the imposing realities to which they refer would not be overlooked by the participants anyway. This has proven to be true.

However, the sheer topicality of the theme was not the only reason for our decision to devote a special attention to it. Dealing with what we have termed "new nationalism", strongly colored by xenophobia and framed in identitarian slogans – most of them newly forged, but highly reminiscent of the past – is above all intellectually challenging, particularly from, dare we say, a philosophical point of view. It involves a distinctly philosophical task of identifying the conceptual borders of a historically changing, Protean phenomenon. What is at stake here is the relationship between old and new forms of nationalism, which forms the center of the first part of the volume ("Xenophobia Inherited, Xenophobia Transformed"). Is new nationalism merely a sequel to the historical one, or something radically different and novel? No doubt this question allows for different answers. At the very least, the new nationalism seems to have taken the place in the political spectrum which was up to now occupied by extremist far-right parties, and deserves for that reason to be treated as their successor. In particular cases, historical continuity is warranted by sticking to the old party name, regardless of significant and outspoken changes in the party program. However, one may even go so far as to deny altogether that the new xenophobic identitarianism represents a form of nationalism as we have known it, as is the case in the opening article of the first section (by Rastko Močnik).

Another point calling for reflection is the relationship between nationalist and xenophobic practices or feelings and the world of ideas or systems of thought in the broadest sense of the term (treated by Goran Bašić, János Boros, Slobodan Divjak). This relationship is at least twofold, as it can signify either the embeddedness of nationalism in ideological and philosophical matrices which serve to justify it, or the capacity of the latter to deal with nationalism and its detrimental societal effects. Here again, the most striking feature of new nationalism is perhaps its extraordinary capacity to change and adapt to different ideological and philosophical standpoints – postmodernism, communitarianism, multiculturalism or even liberalism. By appropriating the arguments of their opponents – by appealing to justice, equality or right to difference – new nationalist narratives blur the distinctions between

different theoretical positions and their usual political implications (most notably, the one between "progressive" and "reactionary" political orientations) and provoke confusions in our ideological maps – or testify to their inadequacy for understanding the issues of contemporary world. For example, new nationalism has developed an elaborate strategy of victimization of the very hegemonic social groups (as shown by Lewis R. Gordon), which works very well, even if it is based on completely false premises. In contrast to earlier forms of missionary or "civilizing" nationalism or imperialism, characteristic of the historical Western metropoleis, it has also achieved important successes in presenting itself under the modest guise of a merely protective nativist movement, having a defensive posture and no other ambitions than to defend its "own" home or territory from aggressive newcomers (as argued by Aleksandar Prnjat and Vladimir Milisavljević).

The stress laid on xenophobia by the conference title presented the risk of suggesting that the new forms of nationalism should be viewed solely in terms of a subjective experience, which would result in moralizing or even demonizing criticism of it. This type of criticism is all too frequent in political and ideological disputes. However, taken by itself, it is of a rather limited scope. This danger has been averted by the approach adopted by most of the contributors, particularly by those who have highlighted economic and political causes which have given rise to new nationalism and defined its special character – above all, those which pertain to the transformation of capitalism in a globalized world economy of our days (Rastko Močnik, Natalija Mićunović, Paget Henry). Their contributions suggest that, rather than a wanton sentiment, xenophobia should be considered as an essential piece functioning in the complex machine of worldwide domination.

Several chapters of the volume – as a rule, but not exclusively, they have been grouped in the second section ("Global vs. Local and Topical Differences") – have given special attention to local histories and developments of nationalism and xenophobia in Western and Eastern Europe, the USA, Serbia, the countries of former Yugoslavia and the Arab World (by William Leon McBride, Paget Henry, Ugo Vlaisavljević, Dean Komel, Muharem Bazdulj and Dušan Janjić). Some of them have adopted a more specific perspective of gender (Michał Kozłowski) or legal studies (Ana Dimishkovska and Igor Milinković), focusing, in particular, on the questions of discrimination and identitarianism. However

diverse, those topical analyses have let come to the fore essential, if unfortunate similarities between different states, regions or continents, epitomized by the growing importance of walls and barbed wire fences as a major political symbol of our imperfectly globalized world. In such a segregated world – to briefly comment on the title of the third and last section – "open questions", and even disagreements, may count much more than attempts at finding final "solutions". Editing of this volume was a pleasure, but it also gave rise to more questions and will, hopefully, lead to new adventures in researching intriguing phenomena of nationalism and identity.

At last, we wish to thank all those whose aid gave to this volume its present form and made its publication possible. In the first place, we are grateful to the reviewers who have thoroughly scrutinized its contents and went through the painstaking job of amending it by their valuable suggestions: professor Aleksandar Bošković (Faculty of Philosophy, University of Belgrade), professor Omar Dahbour (Hunter College and Graduate School, City University of New York), professor Arnaud François (Department of Philosophy, University of Poitiers), Suzana Ignjatović, senior research associate (Institute of Social Sciences, Belgrade), professor and corresponding member of the Serbian Academy of Sciences and Arts Alpar Lošonc (Faculty of Technical Sciences, University of Novi Sad) and professor Đorđe Pavićević (Faculty of Political Sciences, University of Belgrade). We would like to extend our gratitude to professor Vojin Rakić, president of the program committee of the conference, as well as to other members of the said committee: professor Arnaud François, professor Jane Gordon, professor Lewis R. Gordon, professor Paget Henry, professor Dejan Jović, professor Michał Kozłowski, professor Martin Matuštík, professor William Leon McBride and professor Ugo Vlaisavljević. Our special thanks are due Mrs. Svetlana Inđić-Marjanović, general affairs assistant at the Institute of Social Sciences, who has been of great help in organizing the conference, as well as to M.A. Vesna Jovanović, librarian, who has carefully supervised the process of publication of this volume, and other members of the staff. The conference and publication of the book were realized with funding from the Ministry of Education, Science and Technological Development of the Republic of Serbia.

Vladimir Milisavljević and Natalija Mićunović

ANA DIMISHKOVSKA

Legal Argumentation on Trial: Dissenting Judicial Opinions in Cases Related to Racial Discrimination

Abstract

In this paper, I try to approach the topic of racial discrimination from the perspective of contemporary research on legal reasoning and argumentation, by attempting an argumentative analysis of three cases from the practice of the European Court of Human Rights related to the segregated education of Roma children. In two of the selected cases, the judicial decisions are not unanimous, but reached through majority vote, and their justifications are accompanied by dissenting opinions of the judges that disagree with the majority opinion. The point of this analysis is to shed some light on the complex nature of the practical application of normative mechanisms directed against harmful social practices, such as racism and xenophobia.

The functioning of these mechanisms, enacted, *inter alia*, through judicial activity, confronts the general challenges that stem from the interpretive and dynamic nature of legal reasoning and argumentation. In addition to these, however, the judges in the selected cases also had to tackle the difficulties related to the specific circumstances of different cultural, historical and legal traditions, and current realities, in the vast social area relevant for the jurisprudence of the European Court of Human Rights. Identification and elaboration of the conflicting pleas and arguments in relation to the outcome of a single case will be used as an illustration of the importance of the differences in underlying "legal ideologies" and different prioritizing of legal and societal values by individual judges, in assuring the legal protection against different forms of racial discrimination.

Keywords: dissenting opinions, educational segregation, European Court of Human Rights, legal argumentation, racial discrimination

Introduction

The general theoretical platform that this paper is based on involves logical-argumentative approach to legal reasoning. One of the key assumptions of this approach is that the different ways in which logical and argumentative techniques are being applied in legal reasoning, especially in institutional, judicial contexts, can significantly influence the final outcome of many legal controversies – at least, when it comes to more complex ones. This is due to the fact that the connections between the values, principles, rules and facts to be established and articulated within the framework of legal reasoning, are far less straightforward than they may seem to be at the first glance. The complexity of legal reasoning as a logical and argumentative activity is related, among other things, to the following characteristics: 1) the dynamic interaction of values that underlie the normative structure of law and their different hierarchization in different legally relevant circumstances; 2) the peculiar nature of legal rules, which admit of exceptions and divergent interpretations of their applicability, scope and meaning; 3) the defeasibility of some of the most widely used forms of inference in the legal area, and 4) the open texture of some natural-language concepts that play a crucial role in the legal language (see Bench-Capon, Atkinson and Chorley 2005; Lodder 1999; Prakken and Sartor 2004).

In this paper, an attempt is made to show the relevance of this approach to the general topic of the conference – "Xenophobia, Identity and New Forms of Nationalism". This is done by means of exploring some argumentative aspects of the application of normative regulations directed against racial discrimination in the contemporary European context. The analysis presented in the paper is focused on three cases related to racial discrimination, taken from the recent jurisprudence of the European Court of Human Rights (ECHR). All of the selected cases pertain to the same topic – allegations of rational discrimination of Roma children in the educational systems in their countries. Two of these cases, however, involved significant levels of discord between the judges regarding the judgment made and its justification. The final goal of the analysis is to shed light on the way in which the arguments formulated in

some of the dissenting judicial opinions in different stages of the development of the cases in point, have contributed to important changes in the existing approach to the problem of racial discrimination. The overall influence of these changes was directed towards strengthening of the protection of individuals and groups against direct or indirect discriminatory practices. Thus, this paper intends to emphasize the double significance of dissenting opinions in the general context of legal reasoning. On the one hand, such opinions are presented as rich sources of real-life material for theoretical study of argumentative phenomena in the legal field and, on the other, as important factors of the evolution of the current legal thinking and its normative effects.

The problem of dissenting opinions in the context of justification of judicial decisions

The theoretical interest in dissenting opinions as an integral part of the justification of judicial decisions is motivated by the acceptance of the idea that legal justification is one of the most important forms of legal argumentation. As Feteris puts it, in the general context of legal reasoning, "[t]he acceptability of a legal thesis is dependent on the quality of the justification" (Feteris 1999, 1). The significance of the quality of the justification of a particular legal stance is even more obvious in the cases in which the decisions of collective judicial bodies are not unanimous. In such cases, the strength of the argumentation by which different positions regarding the final decision are being defended may be a crucial factor that determines the outcome of the legal controversy and its influence on subsequent similar cases.

However, the status and the role that dissenting judicial opinions have or should have in the general context of legal justification is an important discussion subject in contemporary theories of legal reasoning and argumentation. Recognizing the fact that dissenting opinions make it possible to identify and evaluate both reasons *pro* and *contra* the majority decision, there are divergent views on the practice of making them public, i.e., giving a larger audience the opportunity to gain insight into the dynamics and

heterogeneity of deliberation inside the court.[1] Opponents of the view that dissenting opinions of one or several judges should be published together with the final judgment, support their stance with three main reasons: 1) public judicial dissent carries a risk of weakening the legal authority of the final, majority decision; 2) it undermines the image of consistency, completeness and determinacy of the legal system, and 3) it may jeopardize the principle of secrecy of judicial deliberation. On the other hand, supporters of the practice of dissenting judicial opinions' publication believe that such a practice manifests judicial integrity, independence and transparency of the process of decision-making. Also, it may motivate the adherents of the majority opinion to elaborate stronger and sharper versions of their own arguments, capable of offering better justificatory support for their stance and resisting more powerful argumentative attacks. Finally, by elaborating and justifying alternative ways of treating the current legal issues, dissenting opinions made available to wider social audience may anticipate new trends in the development of global normative consciousness and legal regulative in respective areas (see Azizi 2011; Ginsburg 2010; Langenieux-Tribalat 2007; McIntyre 2016; Rees QC and Patrick 2009).

The later perspective on the importance of dissenting opinions, especially as factors of normative dynamics in the field of law, is supported by some famous historical examples. Among the most influential of them, relevant for the topic of racial discrimination, are two 19th century cases from the practice of the US Supreme Court. In one of them (Dred Scott v. Sandford, 60 U.S. 393 (1857)), the dissenting opinions of Justice Curtis and Justice McLean were opposing the majority opinion that denied full citizenship to the descendants of African Americans brought to the US as slaves. In the other case (or, rather, a group of them, known as Civil Rights Cases, 109 U.S. 3 (1883)), Justice Harlan's opinion was going

[1] In an institutional sense, different legal systems and traditions have adopted different solutions regarding the role of the dissenting judicial opinions and the formal-procedural possibilities of filing them. In this paper, however, the point of interest is not the formal status of dissenting opinions in particular systems, but, rather, the theoretical aspect of the controversies related to them and their argumentative role in the global framework of legal reasoning.

against the majority decision that supported racial segregation. Ever since, the argumentative justification of their, at the time, minority stances, has epitomized the characteristics of a bold, ground-breaking legal thinking that, according to the suggestive formulation of Justice Charles Evans Hughes, appealed "to the intelligence of a future day" (cited in Ginsburg 2010, 4). In this paper, however, as it has already been mentioned, the emphasis will not be put on the general historical aspect of judicial dissent in cases related to racial discrimination. Theoretical attention will rather be focused only on a limited segment of the contemporary context related to the practical application of non-discrimination law in Europe, which concerns educational segregation of children of Romani origin in their respective countries.

Judicial dissent in cases of racial discrimination and segregation in contemporary European context: the "landmark decision" *D. H. and Others v. the Czech Republic*

The importance accorded to the principle of non-discrimination in the current legal discourse is based on the recognition of the fact that this principle influences the enjoyment of all other human rights. Generally, the protection of this principle in contemporary European context is based on two pillars: prohibition of discrimination provided in the Council of Europe's European Convention on Human Rights (hereinafter referred to as the Convention), as interpreted by the European Court of Human Rights (ECHR), and the law of the European Union, as interpreted by the Court of Justice of the European Union (CJEU). The recent ECHR and CJEU case law comprise many important judgments in cases related to racial discrimination. They have generated intensive discussions, both in professional and wider social circles, inspired extensive secondary literature and reflected the complex dynamics of interpretation and application of the non-discrimination principle in the rapidly changing social circumstances of the modern world (see *Handbook on European Non-Discrimination Law* 2018). One of them is particularly relevant for the purpose of this paper: the "landmark decision" of the ECHR in the case *D.H. and Others v.*

the Czech Republic[2] (Appl. No. 57325/00, judgment (Chamber) of 7 February 2006; judgment (Grand Chamber) of 13 November 2007), which will be subjected to a more extensive analysis.

The applicants in this case were a group of Czech children of Roma descent, who, in the period between 1996 and 1999, had been placed in special schools for children with mental disabilities. According to the statistical data, there was at the time a disproportionate number of Roma school children classified as having special educational needs. Thus, in 1999, the probability of a Roma child being assigned to a "special school" was more than 27 times higher than for a non-Roma child. The argumentation of the applicants before the ECHR consisted, essentially, of the claim that segregation based on race or ethnic origin represented a violation of the right to education, recognized in Article 14 of the Convention (prohibition of discrimination),[3] read in connection with Article 2 of Protocol 1 (right to education).[4]

In 2006, almost seven years after the initial complaint had been lodged with the Strasbourg Court, the Chamber rejected it by six votes to one. The main justificatory arguments for such a decision were the following: 1) the Chamber held that, among other things, the Government has "succeeded in establishing that the system of special schools in the Czech Republic was not introduced solely to cater for Roma children and that considerable efforts are made in these schools to help certain categories of pupils to acquire a basic education" (para. 48 of the Chamber judgment); 2) the rules governing children's placement in special schools did not refer to the pupils' ethnic origin, but to their learning disabilities as

[2] Hereinafter referred to as "the *D.H.* case".

[3] ARTICLE 14 – Prohibition of discrimination: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

[4] ARTICLE 2 of Protocol 1 – General prohibition of discrimination: "1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1".

revealed by psychological tests; 3) the system of special schooling, for the Court, was established with the legitimate aim of adapting the educational system to the needs and aptitudes or disabilities of children, regardless of their ethnic origin; 4) the applicants' parents failed to take any action against placing their children in special schools. Thus, the Court concludes that the concrete evidence in the present case did not justify the allegations of the applicants that their placement in special schools had been the result of racial prejudice.

However, the one judge – Judge Cabral Barreto – who was against the decision filed a dissenting opinion based on the following reasons: 1) Czech government had previously conceded (in a report related to the Framework Convention for the Protection of National Minorities) that at the time which coincides with the relevant period in the instant case, Roma children with average or above-average intellect were often placed in special schools on the basis of results of psychological tests; 2) the tests were conceived for the majority population and did not take Romany specifics into consideration; 3) in some special schools, Roma pupils made up between 80% and 90% of the total number of children. Taken together, these concessions, according to Judge Cabral Barreto, amounted to an express acknowledgement by the Czech State of the discriminatory practices complained of by the applicants. Judge Cabral Barreto agreed with the Court's recognition of the existence of the State margin of appreciation in the education sphere and the necessity of taking into account pupils who, because of their special circumstances, required a specific form of education. However, he emphasized that the Czech State's "different treatment" of the applicants had additionally aggravated the differences between them and the pupils attending the ordinary schools. That prevented Roma pupils with average or above-average learning capacities from achieving their full cognitive and intellectual potential (para. 5 of Judge Cabral Barreto's dissenting opinion). Also, the concurring opinion of another judge – Judge Costa – expressed a concern that resonated with the arguments articulated in Judge Cabral Barreto's dissenting opinion. Judge Costa, who admitted that he had voted with the majority "only after some hesitation" and that he found some of Judge Cabral Barreto's arguments

very strong, clearly pointed out to the danger that "under cover of psychological or intellectual tests, virtually an entire, socially disadvantaged, section of the school population finds itself condemned to low level schools, with little opportunity to mix with children of other origins and without any hope of securing an education that will permit them to progress" (para. 4 of Judge Costa's dissenting opinion).

The decision of the Chamber by which the initial complaint had been rejected, was appealed against by the applicants. It also provoked a strong public backlash, by many NGOs, academics, human rights activists, etc., being described as "conservative and formalistic" (Medda-Windischer 2007/8, 24). After the appeal in 2007, the Grand Chamber of the ECHR reversed the decision. The Grand Chamber held that there had been indirect discrimination against the applicants in the context of education, finding a violation of Article 14 read in conjunction with Article 2 of Protocol 1. Recognizing that the Roma, as a vulnerable minority, required special protection, the Court stated that it was not "satisfied that the difference in treatment between Roma children and non-Roma children was objectively and reasonably justified and that there existed a reasonable relationship of proportionality between the means used and the aim pursued" (para. 208 of the Grand Chamber judgment).

This Grand Chamber judgement became an object of wide academic and social interest and an important reference in the context of non-discrimination law. Described as a "remarkable reversal" (Medda-Windischer 2007/8, 25), this ground-breaking judgement reaffirmed or clarified some of the previously applied principles of protection of individuals and groups against discrimination, but, at the same time, established some new principles and opened new directions in disseminating and deepening anti-discrimination practices (see Devroye 2009). The most important and far-reaching aspects of the judgement in this sense include:

1) To apply and further refine the concept of indirect discrimination. This kind of discrimination is conceived as a situation that occurs when an apparently neutral rule – in this case, the testing and evaluating method – disadvantages a person or

a group sharing the same characteristics. In other words, even in the absence of the explicit discriminatory *intent*, if the actual *effect* of a given measure or policy, without being objectively justified by a legitimate aim, puts persons of a particular racial or ethnic origin at a disadvantage in comparison with other persons, that measure or policy may amount to indirect discrimination (para. 175 of the Grand Chamber judgment).

2) To reaffirm the admissibility of statistical evidence. The judgement of the Court confirmed that statistical data that, on critical examination, will appear to be reliable and significant, can be sufficient for the claimant to rise a presumption of discrimination. Statistical data, however, are not treated as a prerequisite for a finding of indirect discrimination (para. 188, *op. cit.*).

3) To shift the burden of proof when a presumption of discrimination is established. Besides the admissibility of statistical evidence, another aspect of lessening the strictness of evidential rules in cases of alleged indirect discrimination is shifting the burden of proof. As the Court has pointed out, "Convention proceedings do not in all cases lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (he who alleges something must prove that allegation) […]. In certain circumstances, where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation" (para. 179, *op. cit.*). Therefore, once the person alleging discrimination establishes a rebuttable presumption that the effect of a policy or practice is discriminatory (*prima facie* discrimination), the burden shifts to the defendant (the respondent State, in the case in point) which has to show that the difference in treatment is not discriminatory.

4) To address structural arrangements and institutionalized practices that violated the human rights of racial or ethnic groups. One of the aspects described as "innovative" in the Grand Chamber judgment is addressing not only the acts of discrimination against individuals, but also the structural discrimination resulting from systematic social disadvantaging of a particular

ethnic or racial group. In Court's opinion the fact that the relevant legislation as applied in practice at the material time had a disproportionately prejudicial effect on the Roma community, is a sufficient basis to conclude that the applicants as members of that community necessarily suffered the same discriminatory treatment (para. 209, *op. cit.*).

5) To establish that there is no waiver of the right not to be subjected to racial discrimination. This aspect of the judgment is related to the issue of the liability of the parents of Roma children placed in special school and the status of their consent to that measure –whether it was duly informed and free of any sort of constraint. Reversing the previous Chamber's approach to that aspect of the case, the Court finds that "[t]he Roma parents were faced with a dilemma: 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" (para. 203, *op. cit.*). Therefore, the Court finds that even the consent given by the parents of the Roma children placed in special schools cannot prevail over the right of these children not to be subjected to discrimination on racial grounds.

This decision of the Grand Chamber, however, was not unanimous: four out of seventeen judges (Judge Zupančič, Judge Jungwiert, Judge Borrego Borrego and Judge Šikuta) voted against the decision and filed dissenting opinions, yet still finding no violation of the Article 14 of the Convention, read in connection with Article 2 of Protocol 1. In what follows, an attempt is made to systematize the main reasons and arguments against the majority decision taken from all four dissenting opinions, in order to gain deeper insight into the essence of the controversy between the adherents of the majority and of the minority opinions regarding the final outcome of the case.

a) Argument 1: "Double standard" in assessing different states

The first reason for opposing the majority decision adduced in the dissenting opinions is that the Czech Republic was not alone

in having encountered difficulties in providing schooling for Roma children. As it was emphasized by the Court itself, other European States had had similar difficulties. According to Judge Zupančič, the Czech Republic was the only Contracting State that had in fact tackled the special-educational troubles of Roma children (cf. para. 198 and 205 of the Grand Chamber judgment); consequently, in his opinion, it was absurd to find it responsible for the violation of the anti-discrimination principle. The alleged "violation", he continues, would never have happened had the respondent State approached the problem with "benign neglect". Similar argument was advanced by Judge Jungwiert, according to whom the old EU member states, as shown by ample factual evidence that he adduced, had been unable to resolve problems related to the education of Gypsies and Travellers. In his words, "the implication is that it is probably preferable and less risky to do nothing and to leave things as they are elsewhere, in other words to make no effort to confront the problems with which a large section of the Roma community is faced" (para. 15 of Judge Jungwiert's dissenting opinion).

In sum, the criticism towards the majority decision espoused in these two dissenting opinions amounts to the claim that that the positive intent of the Czech Republic to make an effort to tackle the special educational needs of Roma children was misinterpreted as a violation of the anti-discrimination principle. That, according to these dissenting judges, represented an instance of the "double standard" treatment in comparison to the situation in some other EU member states, in which the problem of the lack of education for the large population of Roma children was either neglected or treated even less effectively.

b) Argument 2: Legitimate aim of the difference in treatment – compulsory education for all children

The second argument that can be extracted from dissenting opinions is contained in the claim that the difference in treatment between Roma and non-Roma children pursued a legitimate aim: providing a compulsory education for all children. According to the explication of Judge Jungwiert, the inegalitarian education system in the Czech Republic had been established back in 1920 and successively

improved through a body of procedural safeguards: parental consent for placing their children in special schools; recommendations of the educational psychology centers; the right of appeal to the placement of a child in a special school; possibility of transfer back to an ordinary primary school from a special school, etc. In Judge Jungwiert's opinion, this procedure served a positive aim of getting children to attend school in order to have a chance to succeed through positive discrimination in favour of the disadvantaged population to which they belonged (para. 11, *op. cit.*). In the same vein, the dissenting opinion of Judge Šikuta developed the argument that the establishment of special schools was fully within the scope of the state's margin of appreciation regarding the optimal way to tackle the educational problems in its specific social and historical circumstances. The system of special schooling, he argued, although not being a perfect solution, was to be treated as positive action on the part of the State designed to help children with special educational needs to overcome the obstacles imposed by their different level of preparedness and become able to follow the ordinary curriculum.

c) Argument 3: "Fighting racism through racism"

Besides the previously mentioned reasons of dissenting judges for their not adhering to the majority decision, one of dissenting opinions – that of Judge Borrego Borrego – contains an additional critical remark to the final Grand Chamber judgment. It concerns the negative stereotyping of Roma parents that, in his opinion, was present in the formulation of the judgment. Thus, in one of its paragraphs, the Court calls into question the capacity of Roma parents to perform their parental duty, stating that "the Court is not satisfied that the parents of the Roma children, who were members of a disadvantaged community and often poorly educated, were capable of weighing up all the aspects of the situation and the consequences of giving their consent [for placing their children in the special schools]" (para. 203 of the Grand Chamber judgment). In Judge Borrego Borrego's words, "Such assertions are unduly harsh, superfluous and, above all, unwarranted […]. The grand Chamber asserts that all parents of Roma children, 'even assuming' them to be capable of giving informed consent, are unable

to choose their children's school" (para. 14 of Judge Borrego Borrego's dissenting opinion). For Judge Borrego Borrego such a stance represented an example of the sad human tradition of fighting racism through racism (*ibid.*).

d) Argument 4: Changing the role of the Court – evaluating the global social context instead of responding to individual applications

According to some of the dissenting judges, another problematic aspect of the final judgment in the *D.H.* case were the implications of that judgment for the interpretation of the role of the Court itself, regarding its obligation to respond to individual applications instead of evaluating the global social context in which the issue had emerged. This concern is elaborated in the dissenting opinion of Judge Borrego Borrego, who claimed that, "in contradiction with the role which all judicial bodies assume", the entire Grand Chamber judgment was devoted to assessing the overall social context, which resulted in the Roma becoming a specific type of disadvantaged and vulnerable minority (para. 5 of Judge Borrego Borrego's dissenting opinion). He cited the paragraph 209 of the judgment, in which the Court stated the following: "[...] since it has been established that the relevant legislation [...] had a disproportionately prejudicial effect on the Roma community, the Court considers that the applicants as members of that community necessarily suffered the same discriminatory treatment. Accordingly, it does not need to examine their individual cases". Judge Borrego Borrego's comment on this paragraph reads as follows: "This, then, is the Court's new role: to become a second ECRI (European Commission against Racism and Intolerance) and dispense with an examination of the individual applications […]. None of the applicant children or the parents of those applicants who were still minors were present at the hearing. The individual circumstances of the applicants and their parents were forgotten" (paras. 7–9, *op. cit.*). He further stated the concern that such a practice could introduce an abandoning of the standard procedure, followed by the Chamber in paragraphs 49 and 50 of its judgment, and turn the hearing room of the Grand Chamber into an "ivory tower", divorced from real life and the problems of the minor applicants and their parents (para 10, *op. cit.*).

e) Argument 5: Need of reinterpreting the sense of the expression "persons in similar situations"

Another argument against the majority decision that was elaborated in one of the dissenting opinions – that of Judge Šikuta – is related to the interpretation of the expression "persons in similar situations", which plays a crucial role in the definitions related to the very concept of discrimination. Thus, on the one hand, the discrimination is generally defined as treating differently, without an objective and reasonable justification, persons in relevantly similar situations (para. 175 of the Grand Chamber judgment). On the other hand, Judge Šikuta emphasized that the Court's case law clearly established that a difference in treatment of "persons in otherwise similar situations" did not constitute discrimination where it had an objective and reasonable justification; that is, where it could be shown that it pursued "a legitimate aim" or there was "a reasonable relationship of proportionality" between the means employed and the aim sought to be realized. So, in order to establish whether a discriminatory treatment occurred, it is necessary first to determine which persons or groups of persons are considered to be in relevantly similar situation, i.e., to determine the basis on which the comparison between them is made. In Judge Šikuta's opinion, in the *D.H.* case it was wrong to suppose that the groups whose situation was to be compared were Roma children attending special schools, on one side, and non-Roma children (or all children) attending ordinary schools, on the other. Hence, they were not to be considered as being "persons in otherwise similar situations", being treated differently. The reason for such a claim was the fact that individuals of both "groups" attended both types of school under the same conditions of access: non-Roma children were attending special schools and, at the same time, Roma children were attending ordinary schools. According to Judge Šikuta, the placement of a pupil in the corresponding type of school was made solely on the basis of the results achieved by passing the psychological test – same for all children regardless of their race. He further claimed that, in fact, the real *difference in treatment* had been between children attending ordinary schools on the one hand, and children attending special schools on the other, regardless of whether they were of

Roma or non-Roma origin. However, such difference, continues judge Šikuta, had an objective and reasonable justification and pursued a legitimate aim – providing all children with compulsory education. Further, he argued that the expression "persons in otherwise similar situations" should have been applied to children attending the same special school, both Roma and non-Roma. Here, in his view, there was neither legal nor factual ground to conclude that Roma children attending special schools had been treated less favorably than non-Roma children attending that same special schools. Therefore, he did not share the opinion that the applicants, because of their belonging to the Roma community, had been subjected to discriminatory treatment by their placement in special schools.

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From the argumentative point of view, the legal complexity of the *D.H.* case provides a very important opportunity to illustrate the main idea of this paper: the significance of dissenting opinions for getting a deeper insight into the multiple aspects of the legal controversy in point, increasing the quality of legal justifications and furthering the application of legal principles in synchronization with the constantly changing social circumstances. This short description of the main arguments for and against the final judgement in the *D.H.* case has shown that the dissenting opinions played an important role in the two main stages of the development of the case. Firstly, the dissenting opinion of Judge Cabral Barreto related to the first decision made by the Chamber, which rejected the complaint by *D.H.* and other applicants, formulated the core of reasons, which, although not accepted by the majority at the time when they were first elaborated, gained prominence in the framework of the subsequent "remarkable reversal" of the judgment by the Grand Chamber. In fact, these reasons and arguments were incorporated in the argumentative foundation of the new, reversed decision. Secondly, the dissenting opinions of the four judges opposing the Grand Chamber judgment, although not affecting the final outcome of the case, point out to the actual or potential "points of vulnerability" of the newly adopted approach of the Court. They

deserve special attention in the treatment of further similar cases, either in the sense of sharpening and strengthening of the argumentative support for them, or in the sense of their full or partial revision. The way in which the principles established in the *D.H.* judgment, as well as some of the arguments elaborated in the dissenting opinions reappear in two similar subsequent cases, will be commented on in the following section of the paper.

Sampanis and Others v. Greece: the problematic status of parental consent

In the case *Sampanis and Others v. Greece* (Appl. No. 32526/05, judgment (Chamber) of 5 June 2008; hereinafter referred to as the *Sampanis* case), the applicants, of Roma ethnic origin and residing in a settlement located in the "Psari" area of Aspropyrgos, Attica, complained that the education authorities refused to enroll their children in the local primary school during the school year 2004–2005 and subsequently placed them in an annex to the local primary school, attended only by Roma, five kilometers away from the primary school. Their relocation from the local primary school was due to the reaction of the local non-Roma parents who did not want their children to attend the same school as Roma children. The non-Roma parents staged numerous protests, described by the Court as incidents of racist character. The Court concluded that these events had an impact on the authorities' decision to send the Roma children to the segregated annex, set up in prefabricated containers. The Court held the state authorities responsible for not having enrolled the Romani children during the school year 2004–2005 and emphasized that the placement of the Romani pupils in the segregated school environment had not been the result of special and adequate testing and was based on discriminatory criteria against the representative of an ethic minority. Therefore, the Court found violation of Article 14 of the ECHR, read in connection with Article 2 of Protocol 1.

In this case, the decision of the Court was unanimous. According to the ERRC, this judgment "reinforces the position stemming from the D.H. and Others case that the segregation of

Romani children in inferior schools and classes is illegal and that European governments must take responsibility for this" (European Roma Rights Centre 2008).

For the purpose of this paper, of particular interest are the paragraphs 92 and 93 of the judgment, which concern the status of the parental consent for placing their children in segregated schools. Thus, "in the circumstances of the case, the Court is not convinced that the applicants, as members of a disadvantaged community often without education, were able to assess all the aspects of the situation and the consequences of their consent" (para. 93 of the judgment). The judgment in the *Sampanis* case clearly reaffirmed the stance taken in the *D.H.* Grand Chamber judgment, in spite of Judge Borrego Borrego's harsh criticism of it as instance of "fighting racism through racism". Furthermore, the Court reinforced this position by citing the dilemma with which some of the applicants were confronted in making the choice whether to sign the parental consent. According to the testimony of the first applicant, "he had to choose between the schooling of his children in ordinary classes, with the risk that their integrity would be placed in peril by 'furious' non-Romani people, or their education in the 'ghetto school'" (*ibid.*). Thus, this judgment strengthened the preference to the principle that there can be no waver to the right of not being discriminated against, even to the cost of devaluating the existing parental consent as un-informed and being made under pressure.

Oršus and Others vs. Croatia: legitimate aim of difference in treatment and proportionate means of its achievement

The case *Oršus and Others v. Croatia* (Appl. No. 15766/03. judgment (Chamber) of 17 July 2008; judgment (Grand Chamber) of 16 March 2010)[5] was brought by fifteen Croatians of Roma origin who complained that they were victims of racial discrimination, as they were isolated in a school class comprised solely of Roma pupils. The applicants claimed that this separation had caused Roma children educational, emotional and psychological damage.

[5] Hereinafter referred to as "the *Oršus* case".

After an unsuccessful appeal to domestic institutions, the applicants complained to the ECHR that the segregation had violated their right to education and amounted to discrimination on the basis of their race and origin. The Court, however, accepted Croatia's justification of Roma-only classes being constituted solely on the criterion of pupils' insufficient command of Croatian language and established with a legitimate aim that the pupils acquire, as soon as possible, proficiency in the language of teaching. Therefore, the Court ruled that there had been no violation of Article 2, Protocol 1 of the Convention (right to education) or Article 14 (protection against discrimination).

The applicants appealed against this finding to the Grand Chamber of the ECHR. In its final judgment, while recognizing the efforts made by the Croatian authorities to ensure that Roma children receive schooling, the Court considered, however, that there were no adequate safeguards capable of ensuring proportionality between the means used and the legitimate aim pursued (para. 184 of the Grand Chamber judgment). Thus, the tests determining their placement in such classes did not focus specifically on the language skills; the educational program subsequently followed did not target language problems; there was no evidence of processes to assess improvement and move the Roma children to higher grade classes. The Court held there had been no objective and reasonable justification for the Roma-only classes, finding a violation of Article 14 of the Convention taken together with Article 2 of Protocol 1.

However, unlike the judgment in the *Sampanis* case, the Grand Chamber judgment in the *Oršus* case was not unanimous; on the contrary, it was passed with a slim margin – nine votes to eight. Moreover, the eight dissenting judges (Judges Jungwiert, Vajić, Kovler, Gyulumyan, Jaeger, Myjer, Berro-Lefèvre and Vučinić) issued a joint, partly dissenting opinion in which they stated their point of disagreement with the majority. This disagreement, as it was emphasized in the dissenting opinion, was not related to the key principles that were laid out in the judgment, which were clearly accepted by the dissenting judges, but to the way in which they were applied and to the conclusion drawn from them.

The comparison of the argumentative structure of this dissenting opinion with the arguments extracted from dissenting

opinions in the *D.H.* case shows that what was above described as an argument of the "legitimate aim of the difference in treatment" played a key role in the reasoning of the judicial minority in the *Oršus* case. The dissenting judges were satisfied that the allegedly different treatment of the applicants had not been "based on their ethnic origin or any other 'suspect' grounds, but rather exclusively on their insufficient command of the language, which means on pedagogical grounds. In such circumstances a wider margin of appreciation is allowed to the State authorities in employing method of addressing the applicants' learning difficulties" (para. 18 of joint partly dissenting opinion). The solution adopted by Croatian authorities was motivated by the duty to ensure a fair distribution of available resources among both groups of pupils – on the one hand, Roma children who did not speak Croatian language, and, on the other hand, Croatian pupils and Croatian-speaking Roma. The interest of the first group was to acquire, as soon as possible, proficiency in the language of teaching and thus become able to follow the instruction in regular, mixed classes, while the interest of the second group was not to be held back too much in their education owing to the insufficient linguistic proficiency of a large number of other pupils. Therefore, finding that this case can clearly be distinguished both from *D.H and Sampanis* cases, the dissenting judges "consider that the placement of the applicants in Roma-only classes at times during their primary education in the circumstances of the present case had a legitimate aim pursued by acceptable means for a limited period without discernable alternative at hand. In other words, there existed an objective and reasonable justification" (*ibid.*).

The second key argument that appears in the joint partly dissenting opinion considers the role of the Court in dealing with individual cases, vis-à-vis its evaluation of the global social contexts and the status of an entire population – in this case, the Roma population. In the *D.H.* case, as previously mentioned, this issue was raised in the dissenting opinion of Judge Borrego Borrego. In a similar vein, in this case, the dissenting judges found that the final Grand chamber judgment "became in some respects more a judgment on the special position of the Roma population in general than one based on the facts of the case, as the focus and scope of the case were altered and interpreted beyond the claims as lodged by the applicants

before the Court" (para. 15, *op. cit.*). They also criticized the lack of a more convincing argumentative justification for this judgment and expressed the conviction that without clear guidance on how to apply the notion of indirect discrimination "it could appear that the majority simply used its own discretion to replace a decision of the highest national court with its own. In so doing, the Court runs the risk of being told that it took upon itself the task of the national courts" (para. 19, *op. cit.*). The fact that the opinions of almost half of the judges of the Grand chamber were unified around these two main arguments indicates their importance and the role that they could play in the future development of this issue.

Concluding remarks

The problems of xenophobia, racial discrimination and segregation in the contemporary European context can be treated from many different angles: legal, philosophical, sociological, economic, etc. In this paper, an attempt was made to illustrate the way in which the techniques of legal reasoning, applied in resolving the controversies in the field of anti-discrimination law, may influence the protection of the right of individuals and groups not to be subjected to racial discrimination. In that sense, from a logico-argumentative point of view, the most interesting and most important principles and arguments elaborated in the analyzed judgments and dissenting opinions were the following: 1) the shifting of the burden of proof to the respondent state, as a result of the admissibility of statistical evidence in raising the presumption of discrimination, and 2) different possible interpretations of the expression "persons in relevantly similar situations". Ad 1): The selected cases made it obvious that without alleviating the rigorous application of the principle of placing the burden of proof on the alleging party, it would be far more difficult, if not impossible, for the vulnerable and marginalized individuals or groups to prove the allegations of discrimination. This concerns particularly the circumstances where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities. Therefore, the obligation of the respondent to prove that the difference in treatment is not

discriminatory, once the presumption of discrimination has been successfully raised, represents a significant procedural modification that balances the initial inequality in the positions of applicants and respondents in the case of alleged discriminatory treatment. Ad 2): The selected cases gave additional support to the thesis that establishing relevant similarities and dissimilarities between different persons and situations is one of the main challenges of legal reasoning. The well-known Aristotle's formulation according to which justice is preserved when equals are treated the same, and unequals are treated differently,[6] expresses what is known as "the formal principle of justice". However, the aspects and the degree to which individuals, groups and situations are equal or unequal to one another must be determined in a specific and justifiable way in every particular, legally relevant occasion. The dissenting opinions in the cases described above, reveal the difficulties and the challenges in the concrete application of this general rule.

The controversy concerning segregated education of Roma children made it possible to gain insight into the following characteristics of the dissenting opinions that reflect their important argumentative role: 1) they contribute to sharpening and enriching the argumentative structure of legal justification; 2) they may significantly influence the normative evolution of the legal area in question, inspiring "remarkable reversals"; 3) they reflect differences in underlying "legal ideologies" and different prioritizing of legal and societal values by individual judges, thus showing the axiological complexity of legal reasoning; 4) they articulate reasons and arguments which, accepted or not, are useful in better preparation of the argumentative terrain for the treatment of other similar cases in the future. In that way, even though they may seem to undermine the authority of the final judgement and the image of consistency and completeness of the legal system, in reality, they increase the overall argumentative and justificatory quality of reasoning of collective judicial bodies and inspire wider social dialogue over fundamental issues and values of our collective existence.

[6] For an elaborate treatment of the philosophical aspects of the concept of justice, see Aristotle's *Nicomachean Ethics* (Aristotle 2009, book V).

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