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Emerging Indirect Discrimination under Article 14 of the ECHR

I. Introduction

In its publication from 2005 INTERIGHTS noted rightly that: "...there are no clear examples from ECHR jurisprudence of a successful allegation of indirect discrimination. At any rate, the distinction between direct and indirect discrimination is not something that the ECfHR focuses on in its jurisprudence."[1] However, the change has happened soon after. The change was announced in *Hoogendijk* in 2005.[2] The *Zarb Adami* case has certain importance in development towards indirect discrimination.[3] In *D.H. and Others* the European Court of Human Rights (hereinafter: the ECfHR) stated: "the evidence submitted by the applicants can be regarded as sufficiently reliable and significant to give rise to a strong presumption of indirect discrimination."[4] In *Sampanis et autres*[5] and *Horváth and Kiss*[6] the ECfHR relied on indirect discrimination. In *Oršuš and Others* the ECfHR considered "that the applicants must have sustained non-pecuniary damage – in particular as a result of the frustration caused by the indirect discrimination of which they were victims."[7] There is no doubt that the ECfHR confirmed that Article 14 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR) covers indirect discrimination.

In *Hoogendijk* the ECfHR found an indication of indirect discrimination in disproportional effects of amendments to the Dutch General Labour Disablement Benefits Act that deprived about 5.100 persons of their entitlement to social benefits. The group of deprived persons consisted of about 3.300 women and 1.800 men.[8] The ECfHR found Mr. Zarb Adami was a victim of discrimination resulted from *de facto* situation consisted of disproportional participation of men and women in Maltese juries. The last four mentioned cases differ among themselves but in all of them segregation of Roma children in elementary schools reached indirect racial discrimination. According to the European Monitoring Centre for Racism and Xenophobia more than half of Roma children in the Czech Republic attended special schools, which were for children with mental deficiencies who were incapable to attend ordinary or specialised primary schools.[9] The ECfHR noted that in schools for children with mental

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[1] *INTERIGHTS*, Non-Discrimination in International Law, A Handbook for Practitioner, Ed. Kevin Kitching, London, 2005, p. 83.

[2] *Hoogendijk v. The Netherlands* (App. no. 58641/00), Decision as to the admissibility of 6 January 2005.

[3] *Zarb Adami v. Malta* (app. no. 17209/02), Judgment of 20 June 2006.

[4] *D.H. and Others v. the Czech Republic* (App. no. 57325/00), Judgment (GC) of 13 November 2007, parag. 195.

[5] *Sampanis et autres c. Grèce* (Req. No. 32526/05), Arrêt 5 juin 2008.

[6] *Horváth and Kiss v. Hungary* (Application no. 11146/11), Judgment of 29 January 2013.

[7] *Oršuš and Others v. Croatia* (App. no. 15766/03), Judgment (GC) of 16 March 2010, parag. 191.

[8] *Hoogendijk*, supra cit., p. 21.

[9] *D.H. and Others*, supra cit., parag. 16, 18.

disabilities Roma Children received education which was not comparable with education in ordinary schools and they remained isolated from children from the wider population.[10] In such a way their difficulties were compounded and their personal development was more difficult.[11] The Government acknowledged that job opportunities were more limited for children from special schools.[12] In Aspropyrgos, a suburb of Athens, Roma pupils were separated in three prefabricated rooms constituting an annex of the Primary school.[13] They attended preparatory classes there to learn Greek language and to accommodate to school conditions. But, over three years, a period under appeal, they were not moved to regularly classes. An evaluation of their progress, which would enable them to join regular classes, was not performing.[14] In some Croatian primary schools Rome children were segregated in separate classes.[15] Small percent of Roma pupils, several times smaller than general population, completed primary school.[16] A psychological study of Roma children attending Roma-only classes in Croatian county Međimurje asserted that "segregated education produced emotional and psychological harm in Roma children, in terms of lower self-esteem and self-respect and problems in the development of their identity."[17] Hungary had remedial primary schools for mentally disabled children. Less than 1% of students with special needs had the opportunity to continue education in mainstream secondary education providing the Baccalaureate.[18] "The systemic misdiagnosis of Roma children as mentally disabled has been a tool to segregate Roma children from non-Roma children in the Hungarian public school system since at least the 1970s."[19]

II. Main principles of indirect discrimination under Article 14 of the ECHR

The main principles of indirect discrimination, as they are defined in case-law of the ECfHR for the time being, comprehend basic standard principles developed under Article 14 of the ECHR and some new ones.

All principles are based on a well-established meaning of term "discrimination": "discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations."[20] That understanding is completed by an important old observation of the ECfHR that Article 14 does not prohibit a member State to treat groups differently if it serves to correct factual inequalities between them. The Court added that in certain circumstances a failure of a State "to attempt to correct inequality through different

[10] Idem, parag. 207.
[11] Ibidem.
[12] Ibidem.
[13] *Sampanis et autres*, supra cit., parag. 82.
[14] Idem, parag. 81.
[15] *Oršuš and Others*, supra cit., parag. 11-15.
[16] Idem, parag. 18.
[17] Idem, parag. 53.
[18] *Horváth and Kiss*, supra cit., parag. 6-8.
[19] Idem, parag. 9.
[20] *D.H. and Others*, supra cit., parag. 175; *Sampanis et autres*, supra cit., parag. 67; *Oršuš and Others*, supra cit., parag. 149; *Horváth and Kiss*, supra cit., parag. 101.

treatment may in itself give rise to a breach of the Article."[21] That old observation from 1968[22] has got new importance in a context of indirect discrimination.

New principles are developed in recent cases. One of them states that: "a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group... and that discrimination potentially contrary to the Convention may result from a *de facto* situation."[23] The same was rephrased in a version closer to indirect discrimination: "a general policy or measure which is apparently neutral but has disproportionately prejudicial effects on persons or groups of persons who ... are identifiable only on the basis of an ethnic criterion, may be considered discriminatory notwithstanding that it is not specifically aimed at that group".[24] Or, an indication of indirect discrimination exists when "a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of women than men."[25]

The ECfHR made the other steps towards indirect discrimination by referring to its previous positions concerning burden of proof and evidence. It has repeated its old position "that once the applicant has shown a difference in treatment, it is for the Government to show that it was justified."[26] In some recent cases, "in which the applicants alleged a difference in the effect of a general measure or *de facto* situation (...), the Court relied extensively on statistics produced by the parties to establish a difference in treatment between two groups (men and women) in similar situations."[27] The ECfHR stated also that when it assesses the impact of a measure or practice on an individual or group, reliable and significant statistics will be sufficient to constitute the *prima facie* evidence the applicant is required to produce.[28] Though, statistical evidence is not an exclusive proof of indirect discrimination.[29]

Since the four cases related to indirect discrimination affecting Roma pupils, children of the same ethnic group, which is a form of racial discrimination, the ECfHR devoted its attention to specificities of racial discrimination. Being a particularly invidious kind of discrimination and producing perilous consequences, racial discrimination "requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment."[30] Starting from that, the ECfHR stated that different treatment based exclusively or to a decisive extent on a person's ethnic origin cannot be objectively justified in "contemporary democratic

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[21] *D.H. and Others*, supra cit., parag. 175; *Sampanis et autres*, supra cit., parag. 68; *Oršuš and Others*, supra cit., parag. 149; *Horváth and Kiss*, supra cit., parag. 101.

[22] *Case relating to certain aspects of the laws on the use of languages in education in Belgium v. Belgium (Merits)*, judgment of 23 July 1968, parag. 10.

[23] *D.H. and Others*, supra cit., parag. 175.

[24] *Sampanis et autres*, supra cit., parag. 68, *Oršuš and Others*, supra cit., parag. 150; *Horváth and Kiss*, supra cit., parag. 105.

[25] *Hoogendijk*, op. cit., p. 21; *D.H. and Others*, supra cit., parag. 180.

[26] *D.H. and Others*, supra cit., parag. 177; *Sampanis et autres*, supra cit., parag. 70.

[27] *D.H. and Others*, supra cit., parag. 180.

[28] Idem, parag. 188; *Horváth and Kiss*, supra cit., parag. 107.

[29] *D.H. and Others*, supra cit., parag. 188, *Oršuš and Others*, supra cit., parag. 153.

[30] *D.H. and Others*, supra cit., parag. 176, *Sampanis et autres*, supra cit., parag. 69, *Horváth and Kiss*, supra cit., parag. 101.

society built on the principles of pluralism and respect for different cultures."[31] However, in *Oršuš* the Court has mitigated that position saying: "very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of ethnic origin as compatible with the Convention."[32] The ECfHR stressed that the vulnerable position of Roma/ Gypses requires "that special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases."[33]

III. Relevance of the concept of indirect discrimination developed in EU law

In *D.H. and Others* the ECfHR has referred to legal sources of EU rules on indirect discrimination. It quoted relevant provisions from some anti-discrimination directives as well as leading judgments of the Court of European Communities. A phrase "general policy or measure which is apparently neutral but has disproportionately prejudicial effects on persons or groups of persons", used by the ECfHR, might has its source of inspiration in words "an apparently neutral provision, criterion or practice" that "disadvantages a substantially higher proportion of the members of" a group, used in EU anti-discrimination directives. The same can be said concerning a burden of proofs.

The Court of European Communities initially used the concept to overcome an obstacle caused by exhaustive numbering grounds of discrimination.[34] Before the Amsterdam Treaty, the Founding Treaties and secondary EC law contained provisions prohibiting discrimination based on nationality in general and on sex in some matters. The Court of European Communities faced the problem when a different treatment was not based on nationality or sex but on other grounds which were also affecting members of protected group – foreign nationals or women. To resolve the problem, the Court of European Communities found that these EC non-discrimination provisions prohibit not only overt discrimination, based on forbidden grounds, but also "all covert forms of discrimination which, by applying other distinguishing criteria, lead in fact to the same result."[35] In *Sotgiu* the Court of European Communities applied prohibition of discrimination based on nationality, as it was provided by Article 7(1) and (4) of Regulation No. 1612/68. It noted that a place of residence of a worker as a criterion for the grant of a separation allowance, which excludes workers who have their places of residence abroad, may constitute discrimination, since its practical effect may be the same as discrimination on the ground of nationality.[36] The criterion of place of residence is apparently neutral in respect to nationality, bit in fact it is not, since much more foreign than domestic workers have their place of residence abroad. The outcome of the *Sotgiu* case, if it were adjudicated by the ECfHR, would be the same. Article 14 of the ECHR provides an open list of grounds of discrimination. It states: "The enjoyment of the rights... shall be

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[31] *D.H. and Others*, supra cit., parag. 176, *Sampanis et autres*, supra cit., parag. 69, *Horváth and Kiss*, supra cit., parag. 101.

[32] *Oršuš and Others*, supra cit., parag. 149.

[33] *D.H. and Others*, supra cit., parag. 181, *Sampanis et autres*, supra cit., parag. 72.

[34] *R. Etinski, I. Krtić*, EU Law on the Elimination of Discrimination, Belgrade, Maribor, 2009, p. 150.

[35] Case 152-73, *Giovanni Maria Sotgiu v. Deutsche Bundespost*, judgment of 12 February 1974, parag. 11.

[36] Idem., parag. 11, 13.

secured without discrimination on any ground such as sex, race, colour... or other status". It means that a place of residence may be the ground of discrimination. Really, the ECfHR confirmed a place of residence as the ground of discrimination in *Vučković*.[37] So, the ECfHR would analyse in *Sotgiu* whether a different treatment based on place of residence was objectively and reasonably justified. The same was done by the Court of European Communities.

Due to the difference regarding exclusive list of grounds in EU provisions and open list of grounds in Article 14 of the ECHR, the same situations require application of the concept of indirect discrimination in EU law and do not require such concept under Article 14 of the ECHR.

The Court of European Communities introduced the concept of indirect discrimination by its judgment in *Sotgiu* from 1974 and the ECfHR applied the concept in its decision in *Hoogendijk* from 2005. It seems that political importance devoted by the EU and the Council of Europe to protection of disadvantaged groups like women and minorities was a reason that the ECfHR has paid its attention to indirect discrimination. It is indicative that the ECfHR has repeated several times "that there could be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community."[38]

A disproportional participation of members of a group particularly protected in the EU and the Council of Europe, such as women or minorities, among members of group disadvantaged by a criterion of different treatment is an indication of indirect discrimination. Disproportional presence of women among members of the group disadvantaged by Dutch General Labour Disablement Benefits Act in *Hoogendijk* or disproportional presence of Roma children among children separated in special classes in the two cases was an indication of indirect discrimination. But, a disproportional representation of members of particularly protected group among members of disadvantaged group is not an eliminating condition for indirect discrimination. In *Sampanis et autres* and *Oršuš and Others* the whole disadvantaged group was consisting only from Roma children. A special feature of indirect discrimination in cases of disproportional representation is that the ECfHR does not investigate whether a different treatment is objectively and reasonably justified in respect to all members of disadvantaged group but only whether it was objectively and reasonably justified in respect to members of particularly protected group.

IV. Analysis of the concept of indirect discrimination as applied by the ECfHR

The *Hoogendijk* case is an example of apparently neutral rule. To adapt the social insurance scheme relating to incapacity for work to available budget, the Netherlands reduced a range of persons eligible to benefit to those who have lost income after the materialisation of the risk. By amendments to the General Labour Disablement Benefits Act in 1979 and 1989, the Netherlands legislator made receipt of a benefit for incapacity for work subject to

[37] *Vučković and others v. Serbia* (App. No. 17153/11), Judgment of 28 August 2012, parag. 87.

[38] *Chapman v. the United Kingdom* (App. no. 27238/95), Judgment of 18 January 2001, parag. 93, *D.H. and Others*, supra cit., parag. 181, *Sampanis et autres*, supra cit., parag. 72

the requirement of having received a certain income from or in connection with work in the year preceding the commencement of incapacity. A criterion of distinction of persons who had and who did not have an entitlement to a benefit for incapacity for work was receiving an income from or in connection to work in the year before incapacity. The criterion was not based on sex. However, since a lot of married women did not use to be employed in the Netherlands in relevant time, they were affected by income requirement much more than men. The ECfHR investigated whether the different treatment, based on the income requirement as a criterion, was objectively and reasonably justified in respect of women that were disproportionally affected. It noted that a purpose of amendments to the General Labour Disablement Benefits Act in 1979 and 1989 - altering the nature of the social insurance scheme from an insurance against loss of income opportunities to an insurance against loss of income – was legitimate in view of the necessity to keep the costs of the social insurance scheme within reasonable budgetary limits and not contrary to Article 14 of the ECHR.

The *Zarb Adami* case is not so clear. In 1997 the number of men on the list of jurors in Malta was three times that of women. In 1996 five women and 174 men served as jurors.[39] According to Article 603(1) of the Maltese Criminal Code, "Every person of the age of twenty-one years or upwards, residing in Malta and being a citizen of Malta, shall be qualified to serve as a juror provided such person has an adequate knowledge of the Maltese language, is of good character and is competent to serve as a juror."[40] According to Article 605 of the Criminal Code the commissioner of police, two magistrates and the registrar of the courts compiled the lists of jurors. They are published in the Government Gazette in August each year.[41] Persons from the list may object to the criminal court against their placement on the list alleging that they do not possess the required qualifications. After a decision of the court, the registrar corrects the list. The names of jurors are written down on separate ballots and every month ballots are drawn.[42] There is nothing discriminatory in the provisions. Distinctions based on the age, place of residence, citizenship, knowledge of the Maltese language, good character and competence were reasonable and justified. No one of them privileged one sex over other. An exemption might be found in Article 604(3) of the Criminal Code according to which persons who had to take care of their family could have been exempted from jury service. More women than men could have relied on that provision.[43] The ECfHR concluded that discrimination "may result not only from a legislative measure (...), but also from a de facto situation."[44] However, *de facto* situation, consisted of disproportional participation of men in juries, was created by application of the said provisions. The disproportional situation has started to change towards balanced representation of two genders. The change was a consequence of certain measures which were taken in meantime such as adding government or bank employers as well as university graduates to the lists of jurors, among which women were well-represented.[45] Obviously, something was wrong with application of the provisions. It can be concluded that the provisions of Maltese Criminal

[39] *Zarb Adami*, supra cit., parag. 77.
[40] Idem, parag. 30.
[41] Idem, parag. 31.
[42] Ibidem.
[43] Idem, parag. 81.
[44] *Zarb Adami*, supra cit., parag. 76.
[45] Idem, parag. 54.

Code related to eligibility of members for juries were really neutral but application of the provisions was discriminatory.

D.H. and Others is a case on neutral provisions that produced discriminatory effects. The Czech Schools Act from 1984 provided special schools for children with „mental deficiencies", ordinary primary schools and specialised primary schools for children suffering from sensory impairment, illness or disability.[46] Classification of schools was changed by the new Schools Act from 2004 according to which there were primary schools and specialised primary schools for children with severe mental disability or multiple disabilities and for autistic children.[47] According to relevant Decree from 1997 a range of subjects were empowered to propose an allocation of a pupil in special school, *inter alia* the pupil's legal guardian, the pupil's current school or an educational psychology centre. The head teacher was empowered to decide to allocate a pupil to special school, but consent of the pupil's legal guardians was necessary. An educational psychology centre was obliged to collect all the documents relevant to the decision and to make a recommendation to the head teacher concerning the type of school.[48] To evaluate intellectual capacity of a child, an educational psychology centre used tests. The testing was neither compulsory nor automatic. Teachers or paediatricians proposed testing either when the child first enrolled at the school or if difficulties were observed in its ordinary primary-school education.[49] The Czech Government admitted that the psychological tests "are conceived for the majority population and do not take Romani specifics into consideration."[50] The Advisory Committee on the Framework Convention found in its first report on the Czech Republic that "it appeared that many Roma children who were not mentally handicapped were placed in them owing to real or perceived language and cultural differences between Roma and the majority."[51] The Czech authorities acknowledged that in 1999 Roma pupils consisted between 80% and 90% of the total number of pupils in some special schools and various international bodies observed that a disproportionately large number of Roma children were situated in special schools.[52] The ECfHR found that the relevant statutory provisions were formulated in neutral terms, but they had significantly more impact in practice on Roma children than on non-Roma children and resulted in statistically disproportionate numbers of Roma children in special schools.[53] It stated that the Czech authorities failed to take into account special needs of Roma children as members of a disadvantaged class.[54]

Minority of judges of the Grand Chamber in *Oršuš and Others* stressed "that in a situation like the present one in which the Court is overruling a well-reasoned judgment by a Constitutional Court, as well as a unanimous judgment of one of its Chambers, by adopting a Grand Chamber judgment by a nine to eight vote, it should have presented more convincing arguments to justify its decision. In addition, it would have been useful if the Court had been willing to offer more practical guidance on how to develop and apply the notion of indirect

[46] *D.H. and Others*, supra cit., parag. 30.
[47] Idem, parag. 31.
[48] Idem, parag. 36.
[49] Idem, parag. 39.
[50] Idem, parag. 41.
[51] Ibidem.
[52] Idem, parag. 192.
[53] Idem, parag. 193.
[54] Idem, parag. 207.

discrimination."[55] The disputed issue was whether an allocation of Roma children in separate classes of primary schools due to their inadequate command of Croatian language amounts to indirect discrimination? The minority of judges underlined that organising teaching in mixed classes where a high percentage or even a majority of pupils do not have sufficient knowledge of the language of teaching causes some difficulties. Satisfaction of special additional needs of these pupils requires certain adaptation of lecturing to their needs and that adaptation might be at expenses of progress of pupils without special needs. The minority objected that the majority of judges did not pay due attention to the importance for Croatian-speaking pupils of being able to progress properly at school.[56] Whether insufficient knowledge of language of teaching does objectively and reasonably justify segregation of Roma children in separate classes? Majority of judges considered that the central question was "whether adequate steps were taken by the school authorities to ensure the applicants' speedy progress in acquiring an adequate command of Croatian and, once this was achieved, their immediate integration in mixed classes."[57] Majority noted that non-Roma parents opposed replacement of separate classes by mixed classes in some schools and created an atmosphere of intolerance.[58] Besides, it noted certain inconsistencies in offered justification. Two applicants were placed initially in a mixed class. After two years they were transferred to a Roma-only class. Majority of judges had a problem to understand why the two applicants would have sufficient knowledge of the Croatian language at the age of seven, but no longer two years later.[59] After investigating the facts of the case, majority found that "the schooling arrangements for Roma children were not sufficiently attended by safeguards that would ensure that, in the exercise of its margin of appreciation in the education sphere, the State had sufficient regard to their special needs as members of a disadvantaged group."[60] The majority concluded that "there were at the relevant time no adequate safeguards in place capable of ensuring that a reasonable relationship of proportionality between the means used and the legitimate aim said to be pursued was achieved and maintained."[61] Really, the issue of insufficient knowledge of a language of teaching might have been addressed in other way. In 2002 Croatia introduced two years pre-school programme to prepare all Roma children for schools, which includes learning of Croatian language.

Sampanis et autres is comparable to *Oršuš and Others* and *Horváth and Kiss* is similar with *D.H. and Others*, but these two couples differ among themselves. In *Horváth and Kiss* and *D.H. and Others* Roma children are disproportionally represented in the disadvantaged group based on insufficient intellectual capacity for ordinary primary schools. In *Sampanis et autres* and *Oršuš and Others* disadvantaged group based on insufficient knowledge of a language of teaching consists exclusively of Roma children. *Zarb Adami* is distinguished by the fact that the disadvantaged group consist exclusively from men.

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[55] *Oršuš and Others*, op. cit., Joint partly dissenting opinion of judges Jungwiert, Vlajić, Kovler, Gyulumyan, Jaeger, Myjer, Berro-Lefèvre and Vučinić, parag. 19.
[56] Idem, parag. 9.
[57] *Oršuš and Others*, supra cit., parag. 145.
[58] Idem, parag. 154.
[59] Idem, parag. 161.
[60] Idem, parag. 182.
[61] Idem, parag. 184.

V. Concluding remarks

The ECfHR confirmed that Article 14 of the ECHR prohibits also indirect discrimination. Indirect discrimination consists of prejudicial effects produced by apparently neutral rule, general policy or measures that disproportionally or exclusively affect members of a group, which is particularly protected by European anti-discrimination law, such as a gender group or minorities. A different treatment may be justified by legitimate aims if means used for their achievement are proportional to the aims. In determination of the aims and selection of means for their achievements States enjoy certain margin of appreciation. A broadness of the margin depends on social field of State's activity and on the ground of different treatment. Some grounds, like race or ethnic origin, permit very narrow margin of appreciation. Having in mind diversity of elementary education in Europe, States enjoy broad discretion in respect of organising primary education. However, segregation of children in primarily schools on any ground has to be justified by extremely weighty reasons. It is the case especially when segregation affects disproportionally or exclusively members of an ethnic group.

Separation of children in schools is a problem by itself. In *Brown v. Board of Education*, the US Supreme Court overruled *"separate but equal"* doctrine that had been in force in US school system. The Court decided that separation of the *"Negro"* and white schools which were completely equalized with respect to buildings, curricula, qualifications and salaries of teachers, and other *"tangible"* factors had detrimental effects upon the coloured children. It adjudged that separate educational facilities were inherently unequal.[62]

The concept of indirect discrimination under Article 14 of the ECHR will strengthen an obligation of a State to correct inequality in enjoyment of rights and freedoms, guaranteed by the ECHR through different more favourable treatment of members of disadvantaged groups whose inferior social position is a result of inherited long lasting discriminatory processes.

[62] *Brown v. Board of Education*, 347 U.S. 483 (1954). The case initiated modern anti-discrimination law in the USA. See *A.D. Freeman*, Legitimizing Racial Discrimination Trough Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, Minnesota Law Review no. 62/1977-1978, p. 1049-1119.