Triple Helix: The Jurisprudence of the European Court of Human Rights, Roma and Racial Discrimination
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The European Court of Human Rights is arguably Europeôs premiere human rights institution. It adjudicates the law of the European Convention on Human Rights and Fundamental Freedoms ï binding law the 47 Member States of the Council of Europe,[1] i.e. from Lisbon to Vladivostok and nearly all points in between. Individuals or states may bring petitions against one or more Council of Europe states for having failed to uphold the European Convention, if they have ñexhausted domestic remedyò, meaning attempted to secure justice via all relevant legal procedures in the country at issue. Although the Convention does not include all human rights ï it is a primarily civil and political rights instrument ï the Court has viewed the Convention as a ñliving instrumentò, and under this doctrine has developed an advanced and nuanced jurisprudence encompassing a range of areas well beyond traditional civil and political rights considerations. The Court is empowered to issue a binding judgment on the state concerned, including awarding monetary damages. It has issued over 10,000 judgments in its fifty-year lifetime.[2] There is arguably no similar institution anywhere else in the world.

The period from the mid-1990s to the present has seen a series of advances by the European Court of Human Rights to address serious harms facing Roma in Council of Europe Member States. This history of Roma in Europe is one of deeply ingrained discrimination, driven by a body of folk wisdom and common prejudices, punctuated by periods of raw persecution. Hundreds of thousands of Roma were killed in the Holocaust. Following 1989, intense anti-Romani sentiment has again become a feature of public life throughout the continent, as have acts of grotesque anti-Romani violence. Discrimination in sectors including education, employment, health care, social services, policing and the administration of justice have become deeper and more widespread, as raw racial antipathy has moved from the margins to the centre of public discourse.[3] What began as a series of unsettling developments in post-Communism in Eastern Europe, has advanced to become a continent-wide pre-occupation with Gypsies as at the core of public order and public security concerns, with state agents and vigilantes alternating in roles as enforcers of an inflamed popular anger. Developments in France, with the Government undertaking the forced expulsion of literally thousands of Roma from Central and Southeastern Europe,[4] are only the latest of a crisis which has intensified on the continent for the past two decades.

These facts notwithstanding, until recently, the Court had particular difficulty identifying Convention issues where Roma are concerned, and some alleged an anti-Romani bias at the Court itself.[5] Since 2004, the Court has changed its approach fundamentally. It has come to identify these harms with the international human rights law ban on racial discrimination, and to develop a legal infrastructure for evaluating these claims. Although flawed and not yet entirely consistent or even stable, the Courtôs approach today is a vast improvement over what it was mere decade ago. This essay discusses in summary the Courtôs jurisprudence in the area of Roma/Gypsies since its first halting steps on these cases in the mid-1990s. It concludes with

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[1] http://www.coe.int/aboutcoe/index.asp?page=47pays1europe&l=en
[2] http://www.echr.coe.int/NR/rdonlyres/DF074FE4-96C2-4384-BFF6-404AAF5BC585/0/Brochure_EN_Portes_ouvertes.pdf
[3] For an overview, see European Commission, Directorate General for Employment and Social Affairs, *Roma in an Enlarged European Union,* 2004.
[4] See Council of Europe Commissioner for Human Rights and OSCE High Commissioner on National Minorities, ñRecent Migration of Roma in Europe: A Study by Mr. Claude Cahn and Professor Elspeth Guildò, 10 December 2008, reprinted with updated introduction in October 2010.
[5] See Clements, Luke, ñLitigating Cases on Behalf of Roma before the Court and Commission in Strasbourgò, Roma Rights, Winter 1998, at: **http://www.errc.org/cikk.php?cikk=487**.

reflections about the long-term viability of this expanded jurisprudence; concerns that, unless transposed into the practices of the Council of Europe, this law will remain effectively a dead letter; and the observation that, in practice, the Court remains to date broadly inaccessible to Roma.

The Buckley/Chapman/Connors Jurisprudence

Buckley

The Courtôs first major engagement with Roma/Gypsy cases was the matter of Buckley v. United Kingdom, ruled on in August 1996. After repeatedly being refused planning permission, as well as fined for illegally parking her caravan on the site in contravention of zoning rules, Mrs. Buckley brought suit at the European Court of Human Rights.

The Court heard the application as two possible violations of law. In the first place, it assessed whether the Conventionôs Article 8 right to private life, home, family and correspondence (in particular, ñhomeò) was infringed by the practice of the U.K. authorities in her case. Secondly, the Court examined whether the case constituted discrimination, as banned under Convention Article 14, in conjunction with Article 8. The Conventionôs Article 14 ban on discrimination has no existence independent of another Convention right.

In assessing the claim under Article 8, the Court assigned itself the work of determining whether an appropriate balance had been struck between ñinterests of the communityò on the one hand, and ñthe applicant's right to respect for her ôhomeõ, a right which is pertinent to her and her children's personal security and well-beingò on the other.[6]

In the case, the Court opted to find no violation of Article 8. It was persuaded that ñproper regard was had to the applicant's predicament both under the terms of the regulatory framework, which contained adequate procedural safeguards protecting her interest under Article 8, and by the responsible planning authorities when exercising their discretion in relation to the particular circumstances of her case.ò[7] In particular, it noted both that Mrs. Buckley had been given the opportunity to move to a nearby site for Gypsy caravans, as well as that the authorities had exercised restraint by not evicting her, despite her violation of planning policy.

The Court nevertheless cited the then-existing Commission ï and thereby established a principle, cited further subsequently, that ñGypsies é required special considerationò.[8] The Court also declined to find the actions of the authorities discriminatory, and thus ruled that there was no violation of Article 14 in conjunction with Article 8. The extent to which the Courtôs approach has shifted since its initial moves in Buckley are perhaps only now fully visible, close to a decade and half later. The Court departed, first of all, from the view that discriminatory treatment of Mrs. Buckley would be based not on ethnicity, but rather on the ñon the ground of her Gypsy statusò[9] or on following ña traditional Gypsy lifestyleò.[10]

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[6] Buckley v. United Kingdom, judgment of 26 August 1996, para. 76.
[7] Ibid., para. 84
[8] Ibid., para. 71.
[9] Ibid. para. 86.
[10] Ibid. para. 88.

Chapman

The Court next visited this strand of its jurisprudence in its judgment in Chapman v. United Kingdom, and in four other, similar cases[11] heard by the Grand Chamber and ruled on on 18 January 2001. Similarly to June Buckley, Sally Chapman purchased land on which to park her caravan and was subsequently repeatedly denied planning permission to park a caravan on the site. Different from Buckley, Mrs. Chapmanôs land was located in the ñGreen Beltò, an area protected for its scenic beauty and to that end subject to specific rules. As a result, she was issued monetary fines and repeatedly threatened with eviction.

In the intervening period between the Buckley and Chapman judgments, the Council of Europeôs Framework Convention for the Protection of National Minorities had entered into force, a fact raised explicitly in the argumentation of Mrs. Chapmanôs representatives, and of which the Court took note.

The Court heard possible violations of Articles 6, 8, Article 1 of Protocol 1, as well as of Article 14 in conjunction with Article 8. The core of the issue was deemed, as in Buckley, to be the Article 8 claim. Departing from Buckley, in assessing the applicability of Article 8, the Court noted that Gypsies in fact are apparently an ethnic group, a matter deemed central to the claim.[12]

The Court was unwilling to ñaccord to a Gypsy who has unlawfully stationed a caravan site at a particular place different treatment from that accorded to non-Gypsiesò[13] because this would, in the Courtôs majority view, raise issues under Convention Article 14. The Court was, however, prepared to establish that there is ña positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the Gypsy way of life.ò[14] The Court ruled that there had been no violation of Article 8, although seven judges dissented from that view.

The material brought before the Court to establish the claim of discrimination in Chapman was considerably more developed than in Buckley. In the first place, it was noted that the Framework Convention for the Protection of National Minorities, as well as other, softer law measures, provide extensive affirmations of non-discrimination against national minorities in general, as well as against Roma/Gypsies in Europe in particular.[15] In addition, the Court was presented with statistical data on planning permission allocation to Gypsies in the United Kingdom, strongly indicating the potential that discriminatory forces were influencing decisions to allocate planning permission, as well as report on the issue by the High Commissioner for National Minorities of the Organization for Security and Co-operation in Europe. ...[16] Nevertheless, the Court rejected the Article 14 claim. There was no dissent to the majority Article 14 discrimination ruling.

Connors

The facts in the case of Connors v. the United Kingdom differed somewhat from those in the previous cases heard by the Court. In the first place, James Connors was actually forcibly evicted from the site on which he had been living, an ñinterferenceò in Article 8 terms considerably more drastic than the planning permission denial and monetary fines at issue in

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[11] *Beard v. the United Kingdom*, application no. 24882/94; *Coster v. the United Kingdom*, application no. 24876/94; *Jane Smith .v the United Kingdom*, application no. 25154/94 and *Lee v. the United Kingdom*, application no 25289/94. Because of the similarity of the Courtôs approach in the five cases, only one of the cases ï Chapman ï is discussed here.

[12] Chapman v. United Kingdom, Judgment of 18 January 2001, paras. 73 and 74.

[13] Ibid., para. 95.

[14] Ibid., para. 96.

[15] Ibid., paras. 55-67.

[16] Ibid., para. 66.

Buckley and Chapman.[17] Also, the site at issue in Connors was not private land, but rather a public site designated for the express purpose of providing for Gypsy accommodation. Mr. Connors was deemed by the public authority to have stayed too long at a site designed for people who travel. The essence of the government's case was therefore that it had been compelled to force Mr. Connors to travel, since he had abusively settled in a place designated for people who move. In the course of its argumentation, the Government seemed to be suggesting that a lower level of Article 8 protection against forced eviction should apply under a regime provided for the protection of a minority right than would otherwise apply to other forms of accommodation, a matter the Court had already deemed impermissible in Larkos v. Cyprus.[18] The perversity of this logic apparently tipped the balance in pushing the Court to finally find, in its judgment in Connors, a violation of Article 8 in a case concerning Roma/Gypsies. The Court rejected Article 6, 13 and 14 claims, with minimal explanation.

Summary

The Buckley/Chapman/Connors jurisprudence constituted the Court's first effort to identify harms arising from the treatment of Roma/Gypsies in Europe, and to name the boundaries of the law concerned. Over the course of this jurisprudential excursion, the Court undertook important explorations into the meaning of new minority rights norms for the Convention system, as well as, perhaps more significantly, into the content, scope and meaning of Article 8 as regards the human habitat.[19]

Nevertheless, the Court's first, halting steps are to a certain extent a distraction on the road to identifying discrimination based on race or ethnicity as the primary nexus of human rights issues where Roma/Gypsies are concerned. In the Buckley/Chapman/Connors strand of jurisprudence, the Court never manages to correct its starting presumption in Buckley, determined by Western European sociological and anthropological literature of the time, in which ethnicity is downplayed or nullified, and what is at issue is a "Gypsy way-of-life". This initial move takes the Court away from the ban on racial discrimination – *inter alia jus cogens* – and instead into unfamiliar normative territory. It will ultimately find more coherent and established normative territory in 2004 and 2005, and will subsequently fuse the Buckley/Chapman/Connors jurisprudence with this more established normative framework. These steps are treated below, after a brief digression into jurisprudence involving the forced expulsion of Roma from states.

Expulsion

Before turning to the developments leading to the Court's identification of discrimination on racial or ethnic grounds as the appropriate normative framework for identifying the harms brought before it, brief attention to one other strand of the Court's jurisprudence concerning Roma merits brief attention here: that of cases concerning expulsion from a Member State.

Given the number, extent, range, persistence and regularity of expulsions of Roma from Council of Europe Member States, as well as the degree to which they take place under legally

[17] The Court has elsewhere refused to hear forced eviction cases – including forced evictions of Roma – on grounds that there is no right to housing under the Convention (Nagy and Kahlik v. Hungary), as well as as a result of non-exhaustion of domestic remedies (Evangelos Tzamalis and Others v. Greece).
[18] Larkos v. Cyprus, judgment of 18 February 1999.
[19] Connors v. United Kingdom, judgment of 27 May 2004, para. 82.

questionable conditions,[20] the relatively low number of cases concerning expulsion to have reached the Court is noteworthy. The now-defunct European Commission on Human Rights ï previously the gatekeeper to and first instance prior to proceedings before the Court ï heard several claims by stateless Roma from Bulgaria and Yugoslavia against Germany and the Netherlands in the mid-1970s.[21] These cases raised a number of Convention issues, but were broadly related to the refusal of the authorities to recognize their residence status and provide them documents, with the concrete implication that they had been or were under threat of expulsion. The Commission rejected all claims ï raised under Article 6(1), 8 and 14 -- as inadmissible.

The former Commission also declared inadmissible on grounds of failure to exhaust domestic remedy a case in which, in February 1993, officials in Usti nad Labem, Czech Republic, forcibly evicted from their housing a group of Roma, forced them on a train to Slovakia and wildly expelled them to Slovakia;[22] the case was later the subject of an amicable settlement. More recently, in Mogos v. Romania, an applicant who had been expelled from Germany and refused to enter Romania brought suit at the Court.[23] However, in that case, nothing related to the expulsion (or any issue involving the acts of German authorities) was the subject of the Courtôs judgment in the matter, which focussed entirely on acts in Romania following the expulsion. Other cases have been found inadmissible or otherwise dismissed.[24]

In Sulejmanovic and Others and Sulejmanovic and Sejdovic v. Italy, a number of Roma expelled by Italian authorities to Bosnia on a chartered plane from Rome on 3 March 2000, lodged applications with the European Court of Human Rights. They alleged violations of Article 8 (right to respect for private and family life), Article 3 (prohibition of inhuman or degrading treatment), Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens), Article 14 (prohibition of discrimination), Article 13 (right to an effective remedy) and Article 1 of Protocol No. 7 (procedural safeguards relating to expulsion of aliens) of the European Convention on Human Rights. They also complained about the period prior to their expulsion under Articles 3 and 14. The complaint was declared admissible, but was struck off the list on 8 November 2002 after the applicants arrived at a friendly settlement with the Italian government.

Perhaps the most noteworthy work by the Court in this area has been the judgment in Conka v. Belgium. Conka concerned a group of Romani asylum seekers in Belgium who were tricked by Belgian police into detention and then forcibly expelled by Belgian authorities, over the protests of the Court, which had been engaged via Rule 39. The Belgian police had informed the Roma concerned that they were required to attend the police station to complete further forms concerning their applications for asylum. Once appearing at the police, they were all arrested, remanded into detention and swiftly expelled to Slovakia. The Court found violations of Articles 5 and 13, as well as of Article 4 of Protocol 4.[25]

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[20] See Council of Europe Commissioner for Human Rights and OSCE High Commissioner on National Minorities, ñRecent Migration of Roma in Europe: A Study by Mr. Claude Cahn and Professor Elspeth Guildò, 10 December 2008, reprinted with updated introduction in October 2010.

[21] 48 Kalderash Gipsies v. the Federal Republic of Germany and the Netherlands, admissibility decision of 6 July 1977.

[22] Cervenak, Cervenakova, Horvatova, Cervenak, Cervenakova, Mirga and Filko v. Czech Republic, admissibility decision of 28 February 1996.

[23] Mogos v. Romania, judgment of 13 October 2005.

[24] See for example Dzavit Berisha and Baljie Hajliti v. former Yugoslav Republic of Macedonia, admissibility decision of 10 April 2007.

[25] Conka v. Belgium, judgment of 5 February 2002.

Discrimination

The ban on discrimination, as set out under Article 14 of the Convention, reads as follows:

> The enjoyment of the rights and freedoms set forth in [the] 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.

According to its case-law, Article 14 of the Convention ñcomplements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to áthe enjoyment of the rights and freedomsô safeguarded by those provisions.ò[26]

As of the early part of the new millenium, the Court had established the following approaches to discrimination. First of all,

> é a difference of treatment is discriminatory for the purposes of Article 14 of the Convention if it ñhas no objective and reasonable justificationò, that is if it does not pursue a ñlegitimate aimò or if there is not a ñreasonable relationship of proportionality between the means employed and the aim sought to be realisedò.[27]

The Court had repeatedly held that ñContracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatmentò.[28] However, ñvery weighty reasons would have to be put forwardò[29] before the Court could regard a difference of treatment based exclusively on grounds set out in the Convention. In a 2000 case concerning Greece, the Court had also established that ñThe right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.ò[30]

Until 2004, the Court had not once in its history found a violation of the Article 14 ban on discrimination in a case involving racial discrimination.[31] In the period 2004-2005, for a number of reasons, the Court was finally persuaded to adjust its approach, and a number of milestones were reached. The section which follows below examines the series of cases which finally led the Court to find a violation of Article 14 in a racial discrimination case, and the subsequent development of one strand of its case law in this area.

<u>The Bulgarian Police Abuse Cases</u>

The fall of Communism was accompanied by a wave of serious violence against Roma in Central and Southeastern Europe, in the form of vigilante actions by newly fashionable groups of so-called ñskinheadsò, pogroms involving collective acts of violence by whole villages, as well

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[26] Willis v. United Kingdom, judgment of 11 June 2002, para. 29.
[27] Ibid., para 39.
[28] Ibid.
[29] Ibid. on grounds of sex; see Gaygusuz v. Austria, judgment of 31 August 1996.
[30] Thlimmenos v. Greece, judgment of 6 April 2000, para. 44.
[31] In the 1973 Commission report on the matter of East African Asians v. United Kingdom, the Commission had ruled that in some cases, racial discrimination can constitute such an extreme form of harm that it can rise to the level of degrading treatment as banned under Article 3. The Court again applied this standard in its 2001 judgment in the case of Cyprus v. Turkey, and then subsequently in Moldovan and Others v. Romania (see below).

as violence in police detention or other custody. By the mid-1990s, a number of these cases reached the Court. In the years of the late 1990s and early 2000s, the Court heard a string of cases involving abuse of Roma by police officers in Bulgaria, including cases involving death in police custody.[32] In the cases Assenov v. Bulgaria, Velikova v. Bulgaria and Anguelova v. Bulgaria, the Court found extensive violations of Convention law as a result of harms and the evident failure to provide due remedy. However, the Court declined to find that the actions racially discriminatory in contravention of Article 14, because it applied the criminal law evidentiary standard of ñbeyond a reasonable doubtò, a practically insurmountable level where proving racial discrimination is concerned.[33]

By the time of the Anguelova judgment, this approach had begun to give rise to serious opposition from within the Court itself. In an opinion dissenting from the majority of the Court with respect to the (non)finding of a violation of Article 14, Judge Bonello wrote:

> Leafing through the annals of the Court, an uninformed observer would be justified to conclude that, for over fifty years democratic Europe has been exempted from any suspicion of racism, intolerance or xenophobia. The Europe projected by the Court's case-law is that of an exemplary haven of ethnic fraternity, in which peoples of the most diverse origin coalesce without distress, prejudice or recrimination. The present case energises that delusion. Frequently and regularly the Court acknowledges that members of vulnerable minorities are deprived of life or subjected to appalling treatment in violation of Article 3; but not once has the Court found that this happens to be linked to their ethnicity. Kurds, coloureds, Muslims, Roma and others are again and again killed, tortured or maimed, but the Court is not persuaded that their race, colour, nationality or place of origin has anything to do with it. Misfortunes punctually visit disadvantaged minority groups, but only as the result of well-disposed coincidence.

In its very next opportunity to review a case similar to Anguelova -- in Nachova v. Bulgaria -- the Court reversed direction, and overturned the standard applied in Velikova and Anguelova. The Bulgarian government then appealed the ruling to the Courtôs Grand Chamber, which adjusted -- and in the views of some partially reversed -- the Chamber ruling. The approach of the Grand Chamber has now been applied in several other cases, and is now apparently the approach the Court regards as its default in cases in which racial discrimination is alleged in connection with Article 2 or Article 3 matters.

Nachova concerned Mr. Kuncho Angelov and Mr. Kiril Petkov, two Romani men serving in the Bulgarian military who went absent without leave while working at a construction site in 1996, while already serving sentences for similar previous infractions. Military police tracked them to the grandmotherôs house of one of the two men in the village of Lesura, a place to which they had fled during previous escapes from military service. When the men fled rather than being detained, police opened fire, first as warning. A subsequent series of rounds by military police killed both men. Neither of the men were armed, nor did police believe they were so. Racist epithets uttered by the officers were heard by witnesses to the killings.

Investigation into the killings was flawed in a number of aspects. Despite being in evident contravention of domestic and international law, the killings were deemed ñlawfulò and

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[32] Bulgaria was particularly prominent in these cases, but not all such police abuse cases arose from Hungary (see for example Balogh v. Hungary, judgment of 21 July 2004).

[33] See for example Velikova v. Bulgaria, judgment of 18 May 2000, paras. 91-94.

no one ï neither the officers concerned nor their superiors ï were convicted of crimes or otherwise disciplined. The investigation file included coded racist references.

The Chamber reached the conclusion that Bulgaria was in violation of both substantive and procedural aspects of Article 2, since the acts of the Bulgarian authorities to protect life, as well as to provide an effective investigation into the deprivation of life, were so obviously in contravention of settled case law in these areas.[34]

On the question of Article 14 racial discrimination, the Court was asked explicitly via third-party intervention to reconsider its ñbeyond a reasonable doubtò standard. The Chamber noted, ñAdmittedly, proving racial motivation will often be extremely difficult in practice. The respondent State's obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and not absolute é The authorities must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of a racially induced violence.ò[35]

Having established a ñproceduralò violation of Article 14, the Chamber turned to the substance of the allegation of discrimination. The Court was mindful of the fact that ñthis is not the first case against Bulgaria in which it has found that law enforcement officers had subjected Roma to violence resulting in deathò, and that ñ[m]any other incidents of alleged police brutality against Roma in Bulgaria have been reportedò.[36] In weighing the proper approach to the matter, on the basis of an assessment of both the facts in the matter and a range of contextual material, the Chamber appropriated the role of finder-of-fact over whether or not racial animus had influenced the facts of the case. The material as a whole provided the ground for shifting the burden of proof to the respondent[37] ï the Government ï which then failed adequately to explain the grounds for the various deficiencies.[38]

The final wording of the Chamber judgment as concerns the Article 14 violation reads: ñThe Court unanimously é [h]olds that there have been violations of the procedural and substantive aspects of Article 14, taken together with Article 2, of the Conventionò. It was the first occasion on which the Court had divided Article 14 into ñproceduralò and ñsubstantiveò aspects, an approach it had developed in previous years with respect to Articles 2 and 3.

An aggrieved Bulgarian government appealed the Chamber judgment to the Courtôs Grand Chamber, on grounds *inter alia* that the law applied in the Chamber ruling was not foreseeable. The Government did not contest the Article 2 and 13 findings, only the aspect of the judgment concerning Article 14. The Grand Chamber overturned the Chamberôs ruling that the issues in Nachova disclosed a ñsubstantiveò violation of Article 14 in conjunction with Article 2, while reserving the right on a future occasion to ñreverse the burden of proofò as the Chamber had done, and require the Government to rebut or explain facts.[39] The Grand Chamber however agreed with the assessment of the Chamber that the investigation into the racially discriminatory aspects of the case had been fundamentally flawed, and that this therefore disclosed a violation of Article 14 in its ñproceduralò aspect. The Court thereby established that Article 14 has ñsubstantiveò and ñproceduralò aspects.

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[34] Over the past decade, the Court has fluctuated in its approach to Article 13 in this regard.
[35] Ibid., paras. 160-163.
[36] Ibid., paras 173 and 174.
[37] Ibid., paras. 169-172.
[38] Ibid., para 175.
[39] Ibid., paras. 157 and 158.

Nachova ultimately affirmed that the Court could no longer ignore potentially racially discriminatory elements of otherwise egregious cases, contenting itself that a finding of illegal killing or illegal torture was sufficient recognition of harm, the approach it had taken in similar cases to date. Nachova also finally established the evident banality that negative treatment of Roma/Gypsies based on their status as such is in fact discrimination based on perceived race or ethnicity.

Over a relatively short period of time, thereafter, the Court moved to flesh out its new approach into other areas of existing case law. First, it found that, where allegations of racial discrimination are not adequately investigated in connection with Article 3 harms, these too will infringe Article 14.[40] It also extended this case law to the investigation of Article 3 harms undertaken by non-state agents,[41] as well as to Article 2 harms carried out by non-state actors.[42] The latter two cases concerned non-investigation of attacks by racist skinheads; Angelova and Iliev concerned the killing of Roma by racist skinheads. In a judgment against Romania, the Court linked the Article 14 violation not only to Article 3, but also to the Article 13 right to an effective remedy, *inter alia* because ñtendentious remarks with respect to the applicantôs Roma originò were made by the Prosecutor ñthroughout the investigationò.[43] In addition, the Court held that not all negative acts against Roma/Gypsies will constitute racial discrimination in the sense of Article 14.[44]

Finally, in a judgment issued on 4 March 2008, the Court held that there had been a ñsubstantiveò violation of 14 in conjunction with Article 3, agreeing that the standard which had been established in the Nachova Grand Chamber judgment had been met. Stoica v. Romania concerned a conflict arising between several police officers and other public officials, and circa 20-30 Roma, after the former entered a bar known to be frequented by Roma, apparently for the purposes of checking the ownerôs documents. During the incident, officers reportedly assaulted a number of persons in and near the bar. The Court ruled *inter alia* that Article 14 had been violated in both its procedural and substantive aspects, in conjunction with Article 3.[45]

Pogrom

Concurrently with the Grand Chamber proceedings in Nachova, the Court considered the first of several cases concerning anti-Romani pogroms in Romania in the early 1990s to reach the Court, the murderous 1993 pogrom in Hădăreni, Mures County. Over 30 such episodes took place in Romania in the period 1990-1994,[46] although only four of them were brought to the

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[40] Bekos and Koutropoulos v. Greece, judgment of 13 December 2005, as well as Petropoulou-Tsakiris v. Greece, judgment of 6 December 2007. Not all police abuse cases of Roma ruled on subsequently have been deemed discriminatory; for example in Sulejmanov v. The Former Yugoslav Republic of Macedonia (judgment of 24 April 2008), as well as in Dzeladinov and Others v. The Former Yugoslav Republic of Macedonia (judgment of 10 April 2008), the Court found Article 3 violations due to the lack of an effective investigation into allegations of police abuse of Roma, but did not find an Article 14 violation.

[41] Secic v. Croatia, judgment, judgment of 31 May 2007.

[42] Angelova and Iliev v. Bulgaria, judgment of 26 July 2007.

[43] Cobzaru v. Romania, judgment of 26 July 2007, para. 98.

[44] Ognyanova and Choban v. Bulgaria, judgment of 23 February 2006, as well Karagiannopoulos v. Greece, judgment of 21 June 2007.

[45] Stoica v. Romania, judgment of 4 March 2008, paras 133.

[46] See Tanaka, Jennifer, ñDiscrepancies in the Damages Incurred and the Charges Depending on the Ethnicity of the Accusedò, unpublished, on file with the author, which details 35 major crimes taking place during the period 1990-1997; see also European Roma Rights Centre, *State of Impunity: Human Rights Abuse of Roma in Romania,* Budapest: 2001.

European Court of Human Rights.[47] The H. d. reni progrom, ruled on in two judgments, both called Moldovan and Others v. Romania, issued within one week of each other in July 2005, constitutes the strongest condemnation of any acts the Court has yet considered in connection with Roma.

On 20 September 1993, as the Council of Europeôs Committee of Ministers was meeting to approve Romaniaôs application to the Council of Europe, a mob of villagers in the town of H. d. reni, Mures County, Romania, on the road between Cluj and Tirgu Mures, were killing of three Romani men, and putting the rest of the community in flight. Following the knifing death of a non-Romani man, a mob involving most of the village chased three suspected Romani perpetrators into a house. With police looking on passively, villagers set the house on fire. Here, accounts differ. According to one version, the villagers beat to death two men who jumped out of the burning building, while a third perished in the fire. According to other accounts, all three men jumped out of the building, were beaten to death, and then the mob decapitated and cut off the arms and legs of the corpse of Mr. Mircea Zoltan and threw his mutilated body back into the burning house. There is no dispute as to what happened next: the mob proceeded to burn to the ground a further 14 houses in the Romani quarter in H. d. reni.

Following the pogrom, the surviving victims lived in degrading circumstances in various parts of Romania. They were forced to live in hen houses, pigsties, windowless cellars, in extremely cold and overcrowded conditions. These conditions lasted for several years and in some cases are still continuing. As a result, many applicants and their families fell ill. Diseases contracted by the victims included hepatitis, a heart condition (ultimately leading to fatal heart attack), diabetes, and meningitis. Some of the victims fled the country.

Complaints against the police were referred to the Military Prosecutorôs Office, which issued a decision not to prosecute. That decision was upheld on appeal. Prosecutors did not bring any form of indictment against perpetrators in the case until 1997. When, under pressure, they finally did, the indictment read more like an indictment of the victims than of the perpetrators. To quote only a small part of the 12 August 1997 indictment, ñGroups of Gypsies have been the source of numerous conflicts with the young people from the village, as they show aggressive behaviour, using force in order to acquire money and goods. é Generally speaking, some of these Gypsies conducted themselves like ómastersô, defying any social norms. é ò[48]

In a judgment issued in July 1998, twelve individuals were convicted of destruction of property and disturbance, including the Deputy Mayor of H. d. reni, and five were convicted of murder. The sentences, ranging from one to seven years were later shortened on appeal. The Supreme Court later acquitted two of the defendants and those remaining in custody were pardoned by the Romanian president in June 2000. A civil court awarded limited pecuniary damages to some of the victims, while rejecting all requests for non-pecuniary damages.[49] In

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[47] Similar episodes took place throughout Central and Southeastern Europe during the early and mid-1990s, although the only other case to be brought before an international tribunal was the 1995 pogrom in Podgorica, Montenegro. In that case, Montenegro was found in violation of the provisions of the United Nations Convention Against Torture in the matter of Hajrizi Dzemajl and Others v. Montenegro, ruled on by the UN Committee Against Torture.

[48] English language translation of the full text of the indictment is available at: **http://www.errc.org/cikk.php?cikk=1792.**

[49] The highest levels of damages provided by any court ruling the case, even after the favourable European Court of Human Rights ruling of July 2005, have been awarded to Nicolae Gall, one of the main perpetrators. He was convicted for acts related to the destruction of the houses (but not in relation to the killing, despite evidence of his involvement in the mob killings), imprisoned briefly, and then amnestied by then-President Iliescu. On the basis of the amnesty, he subsequently sued for wrongful imprisonment and was provided damages amounting to the Romanian lei equivalent of more than 100,000 Euro.

1997, representatives of a number of the Romani victims filed an application at the European Court of Human Rights.

The Court faced difficulties in admitting the case for ruling due to the fact that the pogrom had taken place a number of months before Romania actually joined the Council of Europe, and therefore before the Convention was in effect in Romania. It nevertheless agreed to hear the case, accepting arguments that the degrading living conditions in which the victims lived for many years after the mob violence, as well as the racially motivated failure to deliver justice in the case, constituted continuing violations of the Convention from 20 June 1994, when the Convention entered into effect in Romania.

Eighteen of twenty-five applicants in the case agreed to a friendly settlement. The Court issued judgment with respect to them on 5 July 2005. With respect to the remaining applicants, the Court issued a judgment on the merits on 12 July 2005. In the latter judgment, the Court held that Romania had violated multiple provisions of the European Convention on Human Rights. The Court ruled that there had been violations of Article 6(1) (right to a fair hearing) on account of the length of the proceedings, and Article 8 (right to respect for private and family life). The Court approached the problem of racial discrimination from a number of angles. Reviewing arguments that the Conventionôs non-discrimination provisions had been infringed with respect to the right to a fair hearing and right to respect for private and family life, the Court agreed, and accordingly found a violation of Article 14 of the Conventionin conjunction with Articles 6(1) and 8. The Court also proceeded to find a violation of the Article 3 prohibition of inhuman or degrading treatment for reasons including racial discrimination:

> In the light of the above, the Court finds that the applicantsô living conditions and the racial discrimination to which they have been publicly subjected by the way in which their grievances were dealt with by the various authorities, constitute an interference with their human dignity which [é] amounted to ódegrading treatmentô within the meaning of Article 3 of the Convention.[50]

Between the two judgments, a total of 500,000 EUR in damages was awarded to 25 applicants, divided in various amounts, with the highest single award being 95,000 EUR.[51] The fact of the friendly settlement also made possible a more far-reaching remedy than the Court would likely have been capacitated to offer solely in the context of a judgment on the merits alone. As part of the friendly settlement, the Romanian government agreed to a series of development and inter-communal tolerance measures in Mureк County.[52] The government also agreed that ñsupervision by the Committee of Ministers of the Council of Europe of the execution of Court judgments concerning Romania in these cases is an appropriate mechanism for ensuring that improvements will continue to be made in this context.ò[53] Unfortunately, as of January 2010, the Committee of Ministers was continuing to supervise the implementation of the measures, because they had not yet been satisfactorily undertaken.

Since the Courtôs two rulings concerning the H d reni pogrom, the approach applied in the two judgments has been forcibly applied to cases concerning three other anti-Romani pogroms in Romania in the early 1990s: the 1990 pogrom in Caкinul Nou, the district of PlЂieкii de Jos, Harghita County;[54] the 1991 pogrom in PlЂieкii de Sus, in the district of PlЂieкii de Jos,

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[50] Moldovan and Others v. Romania, Judgment No. 2, 12 July 2005, para. 113.
[51] Ms. Maria Floarea Zoltan was awarded 95,000 EUR. Her husband and brother-in-law had been killed in the attack. She refused to accept the payment however.
[52] Moldovan and Others v. Romania, Judgment No. 1 (friendly settlement), 5 July 2005, para. 29.
[53] Ibid.
[54] Gergely v. Romania, judgment of 26 April 2007.

Harghita County;[55] the 1991 pogrom in Bolintin Deal, Giurgiu County.[56] In all three of these cases, the applicants rejected the government-proposed measures, but these were imposed by the Court in any case.[57] A number of complaints related to the H. d. reni pogrom remain pending at the Court; 30 of these were communicated as a group to the Romanian government on 30 January 2009.

Finally, the Court has rejected as inadmissible allegations by non-Roma that they have been attacked by other non-Roma after selling real estate property to Roma.[58] In the instant case, which was not well-argued by the applicant, the Court held that, notwithstanding shortcomings in the investigation, it was not established that, carried out effectively, the investigation would have yielded results such as to identify and prosecute the perpetrator of the offence of which the applicant was a victim. There was thus no violation of Convention law.

D.H. and Others v. Czech Republic

The Convention includes only one explicit right from the international law economic and social rights *acquis*: the right to education, included at Article 2 of Protocol 1 to the Convention.[59] The Conventionôs Article 14 ban on discrimination is not a free-standing right; it covers only discrimination in the exercise of other rights guaranteed under the Convention.[60] Education is also the only area covered by the new European Union law in the field of non-discrimination in which a Convention rights exists explicitly. The Court came to reflect extensively on new developments in EU law[61] ï and indeed imported them ï when a suitable case of racial discrimination was brought to the Court. The case in which it did so was D.H. and Others v. Czech Republic, first filed in 2000 following exhaustion of domestic remedy, and ruled on by the Chamber in 2006, and the Grand Chamber in 2007.

D.H. concerned fifteen Romani children in the city of Ostrava, Czech Republic, who, similar to many thousands of other Romani children throughout the Czech Republic, had been placed in so-called ñspecial remedial schoolsò for the mildly mentally disabled. The application presented the individual details of their placement in such schools, as well as the near-

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[55] Kalanyos and Others v. Romania, judgment of 26 April 2007.
[56] Tanase and Others v. Romania (striking out), judgment of 26 May 2009.
[57] Ibid., paras. 18 and 19.
[58] Jancova v. Slovakia, inadmissibility decision of 8 October 2002: ñThe applicantôs real property situated in Lekárovce was damaged on several occasions. The applicant considers that this was due to the fact that she had sold one of her houses to a Romany family and that the local inhabitants were opposed to that family settling down in the village. ... On 4 June 1998 a masked man wearing gloves attacked the applicant with a club in her apartment in VeČké Kapuďany.ò
[59] The Court has made extensive creative use of a number of provisions of the Convention, in particular Articles 2, 6, 8, 13 and Article 1 or Protocol 1, to address issues which might in other jurisdictions be approached as economic or social rights issues. As concerns discrimination in social and economic areas, the Court dealt with the issue of discrimination in the context of social security benefits. Here, Austria had refused to provide unemployment benefits to laid-off Turkish workers. The Court held that unemployment benefits were ñpossessionsò in the sense of the Article 1 of Protocol 1 guarantee of the ñpeaceful enjoyment of oneôs possessionsò and that the Austrian governmentôs criteria of allocating such worker protections solely on the basis of nationality infringed the Conventionôs Article 14 ban on discrimination (*Gaygusuz v. Austria,* judgment of 31 August 1996). The Court has since issued similar judgments striking down discriminatory allocation of social goods in other contexts.
[60] In 2000, Protocol 12 to the European Convention was opened for signature; Protocol 12 provides for a ban on discrimination in the exercise of any right secured by law. However, it would only enter into force when 10 Council of Europe Member States ratified it ï it indeed entered into force on 1 April 2005 -- and only in those states. Also in 2000, the Court held that a failure to treat differently situated people differently also constituted a violation of the Convention (*Thlimmenos v. Greece,* judgment of 6 April 2000).
[61] In particular EC Directives 43/2000 and 78/2000, adopted pursuant to revised EC Treaty Article 13 following the Treaty of Amsterdam.

impossibility of transfer back into mainstream schooling, once placed. The petition as a whole relied extensively on statistical data about schooling in Ostrava, revealing that, as of the school year 1998/1999:

- Over half of the Romani children of school age in Ostrava attended special remedial schools;
- Over half of the student population of special remedial schools were Romani;
- Any randomly selected Romani child was approximately 27 times more likely to be enrolled in a school for the mildly mentally disabled than a non-Romani child;
- There was no significant overrepresentation of Roma in the auxiliary schools for the extremely mentally disabled;
- Romani children in regular primary education (i.e., in the 70 standard primary schools) were heavily concentrated in 3 primary schools;
- 32 primary schools had not one single Romani pupil, and as a result 16,722 non-Romani children attended school every day without a single Romani classmate.[62]

In the standard case, a Romani child entering school would be assumed by school administrators to be ripe for inevitable failure. She would then be subjected to a battery of tests, generally at an extremely early age. The tests themselves are generally unavailable to the lay person. Only a psychologist may have access to them. However, testimony by children subjected to such testing, as well as physical copies of the tests themselves, secured during research, indicated that the tests were awash in cultural presumptions. In many cases, the interaction between the (non-Romani) testing psychologist and the Romani child would be the first time the child at issue had ever met a non-Romani person. Armed with the test results, school administrators would put parents under intense pressure to agree to special school placement. Since schooling in mainstream education often means going to school with abusive non-Romani children, school administrators would simultaneously be communicating an intention not to protect Romani children from racist abuse inside and outside the classroom. Convinced that, indeed, their children would be ñhappierò in special schools, all but the most determined parents capitulated.

Once placed in such schools, no viable possibilities existed for children to be transferred back to the normal system. Indeed, there was evidence that within six months of substandard education in the special schools system, children placed in such schools were significantly behind children being educated in standard schools. Graduates of special schools were barred from going on to secondary education, and faced extremely diminished life chances.

In a terse 6-1 ruling delivered in February 2006 (nearly seven years after the applicants first lodged their claim), the Chamber rejected the complaint of the petitioners. The Court held, among other things, that, ñé the Government have (sic) é succeeded in establishing that the system of special schools in the Czech Republic was not introduced solely to cater for Roma childrenò. In doing so, the Court observed ñthat the rules governing childrenôs placement in special schools do not refer to the pupilsô ethnic originò.[63] These considerations were apparently sufficient to avert a Convention violation.[64] In a concurring opinion, an ambivalent Judge Costa suggested that the Grand Chamber might be better placed to assess the issues of law in this area,

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[62] See European Roma Rights Centre, Country Report No. 8, *A Special Remedy: Roma and Schools for the Mentally Handicapped in the Czech Republic,* June 1999.

[63] European Court of Human Rights, Second Section, Case of D.H. and Others v. the Czech Republic, *(Application no. 57325/00),* Judgment, Strasbourg, 7 February 2006, paras. 48 and 49.

[64] For an analysis of the Chamber ruling, see Cahn, Claude, ñThe Elephant in the Room: On Not Tackling Systemic Racial Discrimination at the European Court of Human Rightsò, in *European Anti-Discrimination Law Review,* Issue 4, November 2006.

in light of the possible need to ñdepart from the case lawò. Following a request by the applicants, leave to appeal to the Grand Chamber was granted.

In a dramatic reversal, the Grand Chamber announced on 13 November 2007 that it had, by a vote of 13-4, overturned the Chamber decision, and found the Czech Republic in breach of Article 14 of the Convention (prohibiting discrimination), taken together with Article 2 of Protocol 1 (securing the right to education). The Court awarded 4,000 Euros to each of the applicants in respect of non-pecuniary damage and 10,000 Euros jointly for costs and expenses.

In finding this violation, the Court recalled its own case law, under which:

> Discrimination on account of, *inter alia*, a person's ethnic origin is a form of racial discrimination. Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, 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 é The Court has also held that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures é .[65]

The Court proceeds to set out the role of statistics in demonstrating discrimination, as well as in shifting the onus of demonstrating that differences of treatment have not constituted discrimination.[66] The Court held that, ñé when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the prima facie evidence the applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence.ò[67]

The Court then addressed whether ña presumption of indirect discrimination arises in the instant caseò. The Grand Chamberôs observes:

> It was common ground that the impugned difference in treatment did not result from the wording of the statutory provisions on placements in special schools in force at the material time. Accordingly, the issue in the instant case is whether the manner in which the legislation was applied in practice resulted in a disproportionate number of Roma children ï including the applicants ï being placed in special schools without justification, and whether such children were thereby placed at a significant disadvantage.
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> é the Court considers that when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the prima facie evidence the applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence.[68]

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[65] Ibid., para. 76.
[66] Ibid., para.181.
[67] Ibid., para.188.
[68] Ibid., paras 185 and 186.

The Court devotes a further ten paragraphs to summarizing material it has recited earlier in the judgment, arriving at the conclusion that the burden of proof does, in the instant case, shift to the government.[69] In the context of the shift of the burden of proof, the work of the Court is to assess whether a difference in treatment is discriminatory, meaning that ñit has no objective and reasonable justificationò, ñthat is, if it does not pursue a ólegitimate aimô or if there is not a óreasonable relationship of proportionalityô between the means employed and the aim sought to be realised.ò The Court recalls that, ñWhere the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible.ò[70] Concluding that, indeed, the Czech Republic has violated Article 14 in conjunction with Article 2 of Protocol 1 of the Convention, the Court holds:

> The facts of the instant case indicate that the schooling arrangements for Roma children were not attended by safeguards é that would ensure that, in the exercise of its margin of appreciation in the education sphere, the State took into account their special needs as members of a disadvantaged class é . Furthermore, as a result of the arrangements 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. As a result, they received an education which compounded their difficulties and compromised their subsequent personal development instead of tackling their real problems or helping them to integrate into the ordinary schools and develop the skills that would facilitate life among the majority population.[71]

The Grand Chamber judgment in D.H. and Others v. Czech Republic significantly elaborates Convention anti-discrimination law as concerns the right to education, and potentially sets the ground for elaborating the ban on racial discrimination under the Convention in social and economic areas more generally. It is particularly cogent and detailed in the area of the law of indirect discrimination. In addition, the Court sets out a number of important principles in clear language.

First of all, as to the role of intent in proving racial discrimination, ñThe Court has already accepted in previous cases that a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group. é ò[72] ñWhere it has been shown that legislation produces such a discriminatory effect, the Grand Chamber considers that, as with cases concerning employment or the provision of services, it is not necessary in cases in the educational sphere é to prove any discriminatory intent on the part of the relevant authoritiesò.[73] This approach is apparently not yet applicable in cases concerning violence, as a result of para. 157 of the Grand Chamberôs judgment in Nachova and Others v. Bulgaria, cited above, in which not requiring demonstrating intent ñis difficult to transpose to a case where it is alleged that an act of violence was racially motivatedò.

Secondly, the Court affirms that there is no possibility to waive the non-discrimination right: ñAs regards parental consent, the Court notes the Government's submission that this was the decisive factor without which the applicants would not have been placed in special schools. In view of the fact that a difference in treatment has been established in the instant case, it follows that any such consent would signify an acceptance of the difference in treatment, even if

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[69] Ibid., para 195.
[70] Ibid., para 196.
[71] Ibid., para 207.
[72] Ibid., para.184.
[73] Ibid., para.194.

discriminatory, in other words a waiver of the right not to be discriminated against. However, under the Court's case-law, the waiver of a right guaranteed by the Convention ï in so far as such a waiver is permissible ï 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 é and without constraint é .ò[74] ñIn view of the fundamental importance of the prohibition of racial discrimination, the Grand Chamber considers that, even assuming the conditions referred to in paragraph above were satisfied, no waiver of the right not to be subjected to racial discrimination can be accepted é ò.[75]

In addition, the judgment recognises the ñGypsyò stigma attaching to Roma, independent of any desire or affirmation on the part of the individual person concerned: ñAlthough they have been in Europe since the fourteenth century, often they are not recognised by the majority society as a fully-fledged European people and they have suffered throughout their history from rejection and persecution. é As a result of centuries of rejection many Roma communities today live in very difficult conditions, often on the fringe of society in the countries where they have settled, and their participation in public life is extremely limited.ò[76]

The judgment also reaffirms the Buckley/Chapman/Connors case law on the need to give particular policy attention to Roma/Gypsies, as a result of their vulnerable position: ñé as noted in previous cases, the vulnerable position of Roma/Gypsies means 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 casesé .ò[77]

Apparently for the first time since the 2001 Chapman judgment, the Court affirmed minority rights: ñé the Court also observed 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.ò[78]

Finally, the Court affirmed the principle of informed consent: ñThe Government themselves admitted that consent in this instance had been given by means of a signature on a pre-completed form that contained no information on the available alternatives or the differences between the special-school curriculum and the curriculum followed in other schools. Nor do the domestic authorities appear to have taken any additional measures to ensure that the Roma parents received all the information they needed to make an informed decision or were aware of the consequences that giving their consent would have for their children's futures. It also appears indisputable that the 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.ò[79]

One problematic area of the decision should be noted here: the Court appears to have endorsed the idea that in certain circumstances, paternalistic measures may be justified. Paragraph 203, cited in part above, begins as follows: ñIn the circumstances of the present case, the Court is not satisfied that the parents of the Roma children, who were members of a

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[74] Ibid., para.202.
[75] Ibid., para.204.
[76] Ibid., para. 13.
[77] Ibid., para.181.
[78] Ibid., para.181.
[79] Ibid., para.203.

disadvantaged community and often poorly educated, were capable of weighing up all the aspects of the situation and the consequences of giving their consent.ò This would appear to provide support for the problematic idea that, in certain circumstances, fully capacitated adults may not enjoy full moral and/or legal agency, if they belong to disadvantaged groups.

The D.H. judgment also raises questions as to what level of litigenous energy is required for an individual to secure justice. The Grand Chamber judgment states blithely that the statistical data relied on as primary evidence in the case was ñobtained through questionnaires sent in 1999 to the head teachers of the 8 special schools and 69 primary schools in the town of Ostravaò.[80] In actual fact, the data took a battery of researchers more than 5 months to gather; Czech school officials, although in most cases already in possession of this data, denied its existence. Psychologists similarly made every possible effort to block access to researchers to tests used in the evaluative psychological testing used to send children to special schools. D.H. also required a decade and a half of the cumulative advocacy efforts of a range of non-governmental, intergovernmental and other actors, as well as the concerted mobilization of civil society organisations and legal expertise from literally around the globe. Nine organisations provided four separate *amici curaie* briefs. The Court cited not fewer than six Council of Europe monitoring bodies in their views of Czech schooling as concerns Roma; but advocacy efforts over the period of a decade had been required to bring to these bodies information relevant to reach these views. If the Court will in the future require a similar level of material to that cited in the judgment, in order to shift the burden of proof to the respondent, then D.H. has set a very high bar for the possibility of justice for a person in any standard scenario or exclusion or discrimination. In this sense, D.H. seems potentially to affirm the paradox that, if a person from a pariah minority seeks to challenge discriminatory treatment, their best strategic move would be to not be a person from a pariah minority.

It is also an open question as to whether the Court has yet provided a consistent vision of what kinds of information, or what amount of information or intensity of reports of concern it will require in order to draw an inference of discrimination, or indeed how contextual material is to be incorporated into an assessment of the merits of a claim of racial discrimination. In the immediate wake of the Nachova Grand Chamber ruling, the Grand Chamberôs avoidance of setting out specific criteria in this area gave rise within months to divergent approaches at the Chamber level. Perhaps most dramatic in this regard are the divergent approaches of the Court in the cases of Cobzaru v. Romania on the one hand, and Ognyanova and Choban v. Bulgaria on the other. Both cases concerned acts of police abuse not adequately investigated by the State, and both were ruled on after the Grand Chamber had supposedly clarified the Courtôs approach to Article 14 where investigation of acts of violence potentially influenced by racial animus are at issue. In Ognyanova and Choban, in arriving at a finding that Article 14 had not been violated, the Court reasoned:

> It is true that, as noted above, a number of organisations, including intergovernmental bodies, have expressed concern about the occurrence of incidents involving the use of force against Roma by Bulgarian law enforcement officers that had not resulted in the conviction of those responsible é . However, the Court cannot lose sight of the fact that its sole concern is to ascertain whether in the case at hand the death of Mr Stefanov was the result of racism é , and, failing further information or explanations, must conclude that it has not been established that racist attitudes played a role in events leading to his injuries and death.

[80] Ibid., para. 18.

> Concerning the authoritiesô duty to investigate, the Court notes that it has already found that the Bulgarian authorities violated Article 2 in that they failed to conduct a meaningful investigation into the death of Mr Stefanov é . It considers, as in *Nachova and Others*, that in the present case it must examine separately the complaint that there was also a failure to investigate a possible causal link between alleged racist attitudes and his death. However, it notes that, unlike the situation obtaining in *Nachova and Others* é , in the case at hand the authorities did not have before them any concrete element capable of suggesting that the death of Mr Stefanov was the result of racial prejudice. While the Court does not underestimate the fact that there exist many published accounts of the existence in Bulgaria of prejudice and hostility against Roma é , it does not consider that in the particular circumstances the authorities had before them information which was sufficient to alert them to the need to investigate possible racist overtones in the events that led to the death of Mr Stefanov.[81] (emphasis added)

The Court has recently extended the latter approach by holding that an allegation of racial discrimination was ñmanifestly ill-foundedò and therefore the Article 14 claim in admissible, in a police abuse case concerning Roma in Bulgaria.[82] It is unclear how to harmonize the approach set out above with the approach applied in Cobzaru v. Romania, in which the Court deemed Article 14 violated, *inter alia* because:

> é the Court observes that the numerous anti-Roma incidents which often involved State agents following the fall of the communist regime in 1990, and other documented evidence of repeated failure by the authorities to remedy instances of such violence were known to the public at large, as they were regularly covered by the media. It appears from the evidence submitted by the applicant that all these incidents had been officially brought to the attention of the authorities and that as a result, the latter had set up various programmes designed to eradicate such type of discrimination. Undoubtedly, such incidents, as well as the policies adopted by the highest Romanian authorities in order to fight discrimination against Roma were known to the investigating authorities in the present case, or should have been known, and therefore special care should have been taken in investigating possible racist motives behind the violence.[83] (emphasis added)

Insofar as the D.H. judgment has not set out what information will be necessary to trigger an inference of racial discrimination shifting the burden of proof to a respondent government, it can be expected that, at Chamber level, similar inconsistencies will appear following D.H. in the future. The Court has been criticized in the past for failing to provide sufficient guidance to the Member States on matters such as the ñmargin of appreciationò;[84] the Court has left similar doctrinal unclarities here.

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[81] Ognyanova and Choban v. Bulgaria judgment *Op. cit.,* paras 148 and 149.

[82] Sashov and Others v. Bulgaria, judgment of 7 January 2010, para. 85. See also Balaz and Others v. Slovakia, inadmissibility decision of 28 November 2006.

[83] Cobzaru v. Romania judgment, *Op. cit.,* para. 97.

[84] Lord Lester of Herne Hill has famously stated that ñThe concept of the ómargin of appreciationô has become as slippery and elusive as an eel. Again and again the Court now appears to use the margin of appreciation as a substitute for coherent legal analysis of the issues at stakeé The danger of continuing to use the standardless doctrine of the margin of appreciation is thaté it will become the source of a pernicious òvariable geometryò of human rights, eroding the ó*acquis'* of existing jurisprudence and giving undue deference to local conditions, traditions, and practices.ò (Lord Lester of Herne Hill, QC, *The European Convention on Human Rights in the New Architecture of Europe: General Report, in* PROCEEDINGS OF THE 8TH INTERNATIONAL COLLOQUY ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS 227 (1995)).

Since the Grand Chamber judgment in D.H. and Others v. Czech Republic, the Court has been called upon to rule in several other cases concerning the racially discriminatory denial of Roma to the right to education, as set out under Article 2 of Protocol 1. In Sampanis and Others v. Greece, the Court held that Article 14 had been violated together with Article 2 of the first Protocol because the children concerned had been first refused any enrollment in school, and then had been placed in special classes.[85] In March 2010, by the narrowest of possible margins, the Courtôs Grand Chamber overturned a Chamber judgment in Orđuđ and Others v. Croatia, and reached the conclusion that Croatia had violated Article 2 of Protocol No. 1 in combination with Article 14 of the Convention, by placing Romani children in separate classes for the explicit reason of their ethnicity. The Grand Chamber rejected the legitimacy of relying on the reason of their insufficient command of the Croatian language for the purpose of creating separate classes for ñGypsiesò.[86]

Burst Dam

In the recent period, the Court has advanced its jurisprudence in Roma-related and racial discrimination matters further. In Munoz Diaz v. Spain, the Court at last broke from the level of platitude to substance in its recognition of the minority rights of ethnic groups. In Finci and Sejdic v. Bosnia, the Court pronounced on the balance between social (and ethnic) peace on the one hand, and justice in the framework of representative democracy on the other, by striking down Bosnian arrangements which formally exclude Jews and Roma from certain high offices. The Court has recently found violations of law against Italy in relation to efforts to conduct a census of Roma. Cases concerning the coercive sterilization of Romani women are also now being ruled on.

Munoz Diaz v. Spain concerned a Spanish Romani woman who married in 1971 in a traditional Romani marriage, meaning that, although binding and durable, her marriage was never registered officially with any formal authority. In 2000, Ms. Munoz Diazôs husband died. Mrs. Munoz Diaz was subsequently denied a survivorôs pension, on grounds that she ñ[was] not and [had] never been the wife of the deceased prior to the date of death é ò.[87]

The Court ruled *inter alia* that the denial to provide a survivorôs pension violated Article 14 in conjunction with the Article 1 of Protocol 1 guarantee of the peaceful enjoyment of oneôs possessions. The Court has consistently held that ñhas consistently held that a óclaimô ð even concerning a particular social benefit ð can constitute a ñpossessionò within the meaning of Article 1 of Protocol No. 1 if it is sufficiently established to be enforceableò.[88] It has also held that the denial of certain social benefits on discriminatory grounds will violate the Article 14 ban on discrimination.[89] The judgment constitutes a breakthrough in several senses. Perhaps most importantly however, the Court has recognised the legitimacy of an institution (marriage) lying at the core of the traditional Romani identity itself. The Court moves increasingly away from rigid legal formalism to acknowledgement of the realities and complexities of European societies.

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[85] *Sampanis and Others v. Greece*, judgment of 5 June 2008.
[86] Orđuđ and Others v. Croatia, judgment (Grand Chamber) of 16 March 2010.
[87] Munoz Diaz v. Spain, judgment of 8 December 2009, para. 12.
[88] See for example Malinovskiy v. Russia, judgment of 7 July 2005, para. 40.
[89] See Gaygusuz v. Austria judgment *Op. cit.,* as well as Willis v. United Kingdom, judgment of 11 June 2002. The latter case also concerned a widowôs pension, denied on grounds that the applicant was a man and therefore not a widow.

In Sejdic and Finci v. Bosnia, the Court was confronted with a case which has now become a relative rarity in Europe: rules explicitly barring or preferring one or more ethnic groups over others. Under rules adopted under the Dayton Framework, certain high offices in Bosnia and Herzegovina, including the House of Peoples (the second chamber of the State parliament) and the Presidency (the collective Head of State), were reserved for representatives of "constituent peoples", meaning the three dominant ethnic groups: Croats, Serbs and Bosniacs. The case concerned a Romani man (Sejdic) and a Jewish man (Finci), who attempted to stand for public election, but were blocked from doing so by these explicitly discriminatory rules.

Ruling on the case, the Grand Chamber of the Court held that the "continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina lacks an objective and reasonable justification and has therefore breached Article 14 taken in conjunction with Article 3 of Protocol No. 1."[90] The Grand Chamber also ruled that, for the same reasons, "the impugned pre-condition for eligibility for election to the Presidency constitutes a violation of Article 1 of Protocol No. 12."[91] This was the Court's first finding of a violation of Protocol 12, since it entered into force in 2005. It held the remainder of the complaint – allegations of violations of Articles 3 and 13 – manifestly ill-founded.

In Udorovic v. Italy, an Italian national who is a member of the Sinti community challenged the actions of 1996 and 1999 the Rome City Council in ordering a census and the evacuation of the travellers' encampment where he lived. He sought judicial review of those decisions in the administrative courts. He also brought an action in the civil courts, alleging that the same decisions had been discriminatory. Relying on Article 6 § 1 (right to a fair hearing) of the Convention, he complained that the civil proceedings had been unfair. The Court found a violation of Convention Article 6(1) because of the "undeniably wrong assessment by court of appeal of important facts".[92]

The Court will hear a number of cases concerning the coercive sterilization of Romani women – particularly in the Czech Republic and Slovakia – during the coming period. The first case concerning coercive sterilization issues to be ruled on by the European Court of Human Rights was K.H. and Others v. Slovakia. The Court rendered judgment on 28 April 2009. The matter at issue was not directly the coercive sterilization cases themselves, but rather the question of access to files by the women concerned and their representatives. Ruling on the merits of the case on 28 April 2009, the Court held that (1) there had been a failure to fulfil the positive obligation to ensure effective respect for the applicants' private and family lives in breach of Article 8 of the Convention; (2) that there had been a violation of Article 6(1) of the Convention; (3) that there had not been a violation of Article 13 taken together with Article 8 of the Convention; and (4) that there was no reason to examine separately the issue of Article 13 with Article 6.[93] The Article 6 violation was particularly striking (and drew dissent from the Slovak judge): the victims had never actually complained to a court; they argued that the fact that their access to their files was blocked precluded them from doing so, and raised equality-of-arms issues under Article 6(1). The majority of the Court agreed.

Court judgment on the substantive issue of coercive sterilization itself is the subject of the Court's admissibility decision of 22 September 2009 in the matter of I.G., M.K. and R.H. v Slovakia. The Romani women at issue have complained under Article 3 of the Convention that (i) they had been victims of forced and unlawful sterilisation in a public hospital and (ii) the Slovakian authorities had failed to undertake a thorough, effective and prompt investigation into

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[90] Ibid., para. 50.
[91] Ibid., para. 56.
[92] Udorovic v. Italy, judgment of 18 May 2010.
[93] K.H. and Others v. Slovakia, judgment of 28 April 2009.

the circumstances of their sterilization; under Article 8 of the Convention the applicants complained that their sterilisation had seriously interfered with their private and family lives and that the Slovakian authorities had failed to comply with their positive obligation to protect their rights in that context; under Article 12 of the Convention in that they had been denied their right to found a family as a result of their sterilisation; and under Article 13 of the Convention that they had no effective remedy at their disposal for their complaints under Articles 3, 8 and 12. They also alleged that their sterilisations had been based on grounds of sex, race, colour, membership of a national minority and ethnicity. They relied on Article 14 of the Convention in conjunction with Articles 3, 8 and 12. The Court has held that all of these complaints are admissible before the Court.[94] Judgment is expected during 2010.

Finally, the Court is currently in the process of examining a complaint related to the origin of discrimination against Roma: stereotypes and folk wisdom about the nature of Gypsies. In AKSU v. Turkey, a case lodged in 2004 and communicated to the Turkish government in April 2008, a Turkish man of Romani origin filed a complaint with the Court after Turkish authorities failed to take action against a dictionary, published by a non-governmental organisation, attributing a range of negative attributes to the term ñGypsyò. Violations of Article 8 in conjunction with Article 14 are alleged.

Absence

Finally, this summary would be incomplete without noting that the jurisprudence of the Court has also participated in the exclusion of Roma. The dramatic development of Convention norms in recent decades indeed makes a comprehensive assessment of this area of necessity illusive. One example will have to suffice, derived from Zerilli and Dembourôs detailed examination of the issues giving rise to the European Court case called Brumarescu v. Romania.

In the years before World War II, Mr. Brumarescu built, for himself and his extended family, a ñclan houseò in an area which is, today, an elite neighbourhood of Bucharest. Following the flight of many ethnic Romanians from Bessarabia (todayôs Republic of Moldova) ahead of the Soviet invasion during World War II, Mr. Brumarescu took in a Mr. Mirescu, and he lived on a ground floor apartment.

In the years following 1989, a property dispute arose between Mr. Brumarescu on the one hand, who sought the restitution of the entire house, and Mr. Mirescu on the other, who laid claim to the flat. The Mirescu family based its claim on that they had purchased the flat in 1974, during a period when the Ceausescu regime had sought to raise money during a financial crisis, by selling nationalized assets ï particularly flats ï to tenants living in them. Mr. Brumarescu ultimately brought his claim to the European Court.

Zerilli and Dembour note a number of aspects of the case, including the remarkable fact that, due to the nature of the Conventions system and international human rights law generally, during the ultimate stage of the proceedings, the Mirescu family disappeared as a party to the dispute, which became a matter between Mr. Brumarescu and Romania.

The Mirescu family was at least heard in the course of the European Court proceedings. Zerilli and Dembour, who directly interviewed a number of the players in the course of

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[94] Application no. 15966/04 by I.G., M.K. and R.H. against Slovakia, Admissibility Decision of 22 September 2009. Other coercive sterilization cases have also been communicated to the Government (see for example V.C. v. Slovakia, communicated on 28 April 2008).

examining the case, note that a number of other persons directly affected by the proceedings in fact never participated at all:

> Before concluding this section on ôthe factsô of the case, it is worth signalling that there are other tenants in the house who are not mentioned in the Strasbourg rulings or in the local press é . The second floor flat was occupied until very recently by a family of three who had moved in in 1972 (they were evicted in 2005 following a national court judgment); in 1992, the basement flat was allocated by the City Hall to a single man. When explaining their personal histories, attitudes and behaviour, Brumarescu describes all these people, who have never recognized him as the entitled owner, as being of Gypsy origin, thus invoking standardised images of Gypsiness (such as dirtiness, dishonesty, etc.) widespread in Romania.[95]

These people were pushed entirely from the frame, as the Socialist property order was transformed into a Capitalist one. Brumarescu and Mirescu evidently both grasped and asserted the requirements of the new conditions better than others. The strategy of ñoutingò others (correctly or incorrectly) as Gypsies became a component of strategies to lay claim to symbolic and real power goods. In this regard, Zerilli and Dembour further note that, in the course of their interviews with the parties:

> é Brumarescu and Mirescuôs accounts concord on a number of points. They both recall that the two families were on good terms and used to be pretty close ï so much so that Mirescu owes his middle name ôDanô to Brumarescu. They also agree that both families could claim a ôgenuineô Romanian origin (which in Romania conventionally means Orthodox, not Hungarian, not Jewish and, most of all, not Gypsy).[96]

The European Court ultimately found Romania in violation of Article 6 and Article 1 of Protocol 1 to the Convention, and in a separate judgment issued later, ordered that Romania either restore the entire house to Brumarescu, or compensate him for the loss of the Mirescu flat.

In Brumarescu, as in hundreds if not thousands of similar cases, the European Court of Human Rights enters the frame only in the final stage of proceedings, after the stigmatized non-elite is driven from the field of the dispute, and then ï in a case such as Brumarescu -- issues judgment about ownership, possession and property which seals the exclusion undertaken at domestic level. In this sense, some of the Courtôs normative developments may have a direct impact on the exclusion of Roma, without this being at all apparent from the raw text of any particular judgment.

Some Implications

In the brief seven years since the same Judgeôs dissent in Anguelova, the ban on racial discrimination has moved from the margins of the Courtôs preoccupations to its normative core. In the period of less than a decade and a half, since the Courtôs first tentative steps in Buckley, the Court has developed a substantial apparatus of law concerning Roma/Gypsies on the one

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[95] Zerilli, Filippo M. and Dembour, Marie-Benedicte, ñThe House of Ghosts: Post-Socialist Property Restitution and the European Courtôs Rendition of Human Rights in *Brumarescu v. Romania"*, in Dembour, Marie-Benedicte and Kelly, Thomas (eds.), *Paths to International Justice: Social and Legal Perspectives,* Cambridge: Cambridge University Press, 2007, p.204.

[96] Ibid., p.199.

hand, and the ban on racial discrimination on the other. These have converged, and legal developments in the area of the ban on racial discrimination under European Convention law are due in no small part to the very troubling developments in anti-Romani racism in Europe post-1989, developments to which the Court has been compelled to respond.

As concerns Roma/Gypsies, not without internal and external resistance, the Court has overcome misgivings that Roma may simply be a deviant social group with uncivilized habits, and has come to accept that, however diverse, Roma/Gypsies are an historically persecuted ethnic group, one still facing considerable burdens of racism, giving rise to racial discrimination today.

As concerns racial discrimination, the Court has come increasingly to recognise that this harm deserves distinct and rigorous legal attention in its own right, a marginal view on the Court as recently as the late 1990s, although even as late as the Grand Chamber judgment in Nachova, the Court was still muttering as to the adequacy of treating racially discriminatory elements as inhering in substantive Convention articles, and not necessarily in need of separate treatment.[97] It has, additionally, made major strides in elaborating how allegations of racial discrimination are to be assessed by a supra-national judicial instance. Cases currently pending before the Court offer the Court the opportunity to strengthen also the Buckley/Chapman/Connors jurisprudence, including by recognizing Article 14 issues in this type of forced eviction case.[98] The Courtôs jurisprudence in the area of the ban on racial discrimination is now arguably more advanced than that of any other international tribunal, and indeed of many if not most national systems.

These developments notwithstanding, a number of questions remain open, and the durability, consistency and quality of the Courtôs jurisprudence is open to question in a number of areas. It is unclear, first of all if, after all detritus is removed, whether the Court has established a standard more coherent than that it will base judgment on the individual circumstances of the case at issue. Read in serial, the chain of judgments Nachova Chamber-Nachova Grand Chamber-Ognyanova and Choban-Cobzaru-Sashov are particularly resistant to the identification of a clear and consistent approach by the Court. At one extreme of the Courtôs approach to a procedural violation of Article 14 (Cobzaru), the general level of reports of racist abuse in a given Member State should trigger investigation of the possibility in any particular case. At another extreme (Sashov), this is so resoundingly not the case that an allegation of racial discrimination in this regard is ñmanifestly ill-foundedò.

The Courtôs difficulties in this area shed important light on the nature of the norm of the ban on racial discrimination. The ban on racial discrimination is among the strongest norms in international human rights law. The ban is included in every single major and minor international human rights treaty. In addition, one of the core treaties of the international human rights law system is devoted specifically to the eradication of all forms of racial discrimination, and indeed is the only one of the core human rights treaties to comprise effectively a comprehensive governance program. For these and other reasons, the ban on racial discrimination is regarded as a peremptory norm of customary international law, as well as *jus cogens;* Racial discrimination is banned everywhere.

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[97] ñé the authorities' duty to investigate the existence of a possible link between racist attitudes and an act of violence is an aspect of their procedural obligations arising under Article 2 of the Convention, but may also be seen as implicit in their responsibilities under Article 14 of the Convention taken in conjunction with Article 2 to secure the enjoyment of the right to life without discrimination. Owing to the interplay of the two provisions, issues such as those in the present case may fall to be examined under one of the two provisions only, with no separate issue arising under the other, or may require examination under both Articles. é .ò (Nachova and Others v. Bulgaria, Grand Chamber judgment, Op. cit., para. 161).

[98] See inter alia Winterstein and Others v. France, communicated in September 2008.

Perhaps more than any other norm of international human rights law, however, the ban on racial discrimination has a ñlong tailò; in the more than four decades since the adoption of the International Convention on the Elimination of all Forms of Racial Discrimination, efforts to establish internal consistency within the norm have met with resistance, provoked backlash; establishment of one area of law has in nearly every case given rise to a revolt from within, weakening or nullifying aspects of its implementation in particular jurisdictions.

These tensions play out on the Court. Due to the force of the norm, the Court was compelled to respond to the concerns voiced by Judge Bonello. These were, if you like, the articulation of the requirements of the norm of the ban on racial discrimination as articulated within the halls of the Court.

The opposing forces are articulated indirectly and in the main in non-legal terms. Within the cloaked language of the Court, they perhaps best heard in the dissenting opinions to the Grand Chamber judgment in D.H. and Others v. Czech Republic. First of hall, there is the stung national pride of the Czech Judge Jungwiert: ñé a closer examination of the situation leads me to ask but one question: which country in Europe has done more, or indeed as much, in this sphere?ò[99] Secondly, the dissenting opinion of Judge Borrego Borrego, who believes that in its Grand Chamber judgment in D.H., the Court has strayed from its role as a court: ñThis, 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 é ò[100]

Most frequently, however, these tensions play out in moves by the majority, against which a minority is brought out into the open. Thus, for example, disagreeing with the proposition that it would be ñdifficult to transpose to a case where it is alleged that an act of violence was racially motivatedò the need to dispense with proof of intent, Judge Sir Nicholas Bratza states, in a concurring opinion in Bekos and Koutropoulos v. Greece: ñI consider that circumstances could relatively easily be imagined in which it would be justified to require a Government to prove that the ethnic origins of a detainee had not been a material factor in the ill-treatment to which he had been subjected by agents of the State.ò[101]

One primary source of agonizing within the Court in this context is the perception that, as in the Nachova and Others Camber judgment, when the Court first assessed a ñsubstantiveò violation of Article 14 for reasons of racial discrimination, its assessment has been perceived as flirting with challenging the sovereign identity of the Bulgarian state. Was the Nachova Chamber judgment a finding that Bulgaria is a ñracist stateò? Bulgarian authorities seemed both to fear that the judgment implied so, as well as that such a finding would amount to more than simply a judgment in the instant case or related to formal legal matters, but rather amounted to a fundamental condemnation of Bulgarian reality in its totality.

It is noteworthy that the Court returned to the matter of a substantive violation of Article 14 in an Article 2 or 3 violence cases, only in 2008 in the Stoica judgment. Perhaps the substantive violation was only possible in the context of an equilibrium achieved after the Bulgarian revolt, as addressed by the Grand Chamber Nachova judgment. In this sense, the Bulgarian revolt against the Nachova Chamber judgment, contained as it was within the given

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[99] D.H. and Others v. Czech Republic, Grand Chamber judgment, Op. cit, Dissenting Opinion of Judge Jungwiert, para. 13.

[100] D.H. and Others v. Czech Republic, Grand Chamber judgment, Op. cit, Dissenting Opinion of Judge Borrego Borrego, para. 7.

[101] Bekos and Koutropoulos v. Greece, judgment of 13 December 2005, Concurring Opinion of Judge Sir Nicholas Bratza.

rules, as well as in light of its being both incompetent[102] and lodged by a weak state within the Council of Europe system, had none of the implications which played out in the context of the response by EU Member States to the Austria crisis of 1999-2000. The Courtôs approach in this area is to be tested again in the near future, as a number of further cases in this area are currently pending with the Court,[103] most notably in the series of cases concerning coercive sterilization of Romani women noted above.

Also, as is evident from the summary of the Brumarescu case above, insofar as the Court works on all sorts of issues prioritized by otherwise oppressive majorities, the Courtôs work on discrimination against Roma can also be seen as a counterbalance to other exclusionary forces ï and a potentially weak counterbalance at that. The Courtôs inroads into Roma exclusion are of necessity limited interventions in an otherwise complex totality.

This problem seems linked to one other issue: in its recent case, law, racial discrimination against Roma ï and racial discrimination generally ï has been primarily if not exclusively an issue of Central and Southeastern Europe. This vision of Europe as divided between racist East and multicultural West is untenable, in light not least of very troubling facts in the West. It also raises questions about the potential of regional systems such as the Council of Europe acting, under the cover of a fiction of equality of states in an international community, as a system of dominance of strong states over weak ones.[104] The continuing credibility of the Council of Europe indeed depends on the redress of this current imbalance, although given the profile of cases currently pending before the Court, it is unclear how or when this might take place.

This essay began with the image of a ñtriple helixò. Watson, Crick, Wilkins and Franklinôs description of the structure of DNA as a ñdouble helixò is expanded, with the treatment of the fundamental human rights of Roma, the Courtôs jurisprudence under the Conventionôs substantive articles, and the norm of non-discrimination comprising three intertwined strands of an interlinked chain. The next years promise further developments.

Finally, and perhaps most importantly, there are currently circa 120,000 complaints pending before the Court. Only an estimated one in 20 complaints survives review for admissibility. Review of complaints in general now lasts years. The barriers for Roma facing discrimination in Council of Europe Member States are, for these and a host of other reasons, immense. The efficacy of the Courtôs jurisprudence in this area depends on the Member States themselves finally acting effectively to challenge racial discrimination against Roma, as well as related forms of human rights abuse. That is, the effectiveness of the Courtôs law in this area depends on it being incorporated into domestic law and practice. As of now, there is scant evidence that such a transposition is in fact taking place in all but a limited number of particular scenarios. In this sense, progress still seems at present only a very distant prospect.

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[102] During a hearing organized by the Grand Chamber, after the representatives of the applicants derived arguments primarily from the Governmentôs case file, the Government first requested adjournment by the Court and then returned from recess to offer no further argumentation.

[103] See for example Mizigarova v. Slovakia, declared admissible ï including in its Article 14 aspect ï on 3 November 2009, as well as Koky and Others v. Slovakia, declared admissible ï including in its Article 14 aspect ï on 22 September 2009.

[104] Dembour has explored the problem of divergent approaches by the Court in cases concerning Member States in the East, as opposed to Member States in the West (see Dembour, Marie-Benedicte, *Who Believes in Human Rights?: Reflections on the European Convention,* Cambridge: Cambridge University Press, 2006, pp.41-59)