TRANSITIONAL
JURISPRUDENCE AND THE
EUROPEAN CONVENTION
ON HUMAN RIGHTS

Justice, Politics and Rights

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FOREWORD

RUTI TEITEL

We are in a 'global' phase of transitional justice, marked by the proliferation of accountability mechanisms and processes at and across different levels – international, regional and domestic. What all of this means theoretically and practically is the central theme of this probing book. This is a work that questions prevailing assumptions, in particular regarding the European Court of Human Rights, through cross-cutting comparative research.

The point of departure is the current state of the field of transitional justice. The global phase has three dimensions: the globalization of the context; the concern for actors and interests beyond the state, both public and private; and the expansion, entrenchment and normalization of accountability as a response to conflict, wherever it occurs and whatever its forms. Moreover, this is a time in which courts are increasingly the institutions called upon to respond to conflict. The purposes of and hopes for transitional justice are extended beyond state building to advance the promotion and maintenance of human security.

Through a comparative lens, the book aims to engage with the jurisprudence of regional tribunals. It interrogates the parameters of transitional justice and it looks to the law that has emerged to assess its form – the relevant modality. What distinguishes this jurisprudence? What might we learn about the rule of law in transitional times and, given the permanency of these judicial structures and their principles of jurisdiction, what relation might these precedents bear to ordinary times?

More specifically – what techniques are employed and what means of supervision exist in the European region? Here, the book explores the central principles which recur in judicial review such as the margin of...
Transition, equality and non-discrimination

ANNE SMITH AND RORY O’CONNELL

Introduction

This chapter examines a necessarily select list of Article 14 (the prohibition of discrimination) jurisprudence involving ethnic minorities, most notably the Roma minority in post-Communist countries before the European Court of Human Rights (the Court). The aim is to identify to what extent, if any, have the cases informed the transition processes. The chapter focuses on the Roma because the Roma form a ‘special minority group’ as they have a ‘double minority status’. They are an ethnic community and most of them belong to the socially disadvantaged groups of society. While this double discrimination exists throughout Europe, there are particular difficulties during transition processes. First, the end of the Communist regimes raised the spectre of ‘old problems of ethno-nationalism ... challenging the authority of central governments, threatening the break up of the nation state, raising tensions between neighbouring states and leading to intra- and inter-state conflict.’ This prompted the Council of Europe to become more concerned with minorities, adopting treaties on minorities and minority languages. Second, many Communist countries adopted a policy of assimilation towards the Roma. While not unique in the Communist states, it was ‘most evident’

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4 European Charter for Regional or Minority Languages 1992ETS no. 148.
in them. Third, the Communist regimes provided a level of social and economic security which could not be guaranteed after the transition to a market economy. For the Roma this transition has been difficult and has sometimes meant that they had to migrate to poorer parts of the countries or the cities. Fourth, despite providing some social and economic benefits for Roma, the Communist states tended to sideline them into less skilled labour roles which were not sustainable in a market regime. Fifth, societies emerging from decades of Communism naturally focus on the groups that are relevant to context specific problem, such as a conflict or a history of authoritarian rule. A transition process addressing such problems may focus on specific groups and neglect the interests of other minorities.

The case law of the Court offers a clear example of this last aspect. As noted in other chapters, Sejdiz focuses on the constitutional structure of Bosnia and Herzegovina. The issue in this case was the exclusion of two applicants (one of Jewish and one of Roma origin) from becoming Members of the Upper House of Parliament as they did not identify as one of the 'constituent peoples'. The Court concluded that these provisions were discriminatory under Article 14 (in combination with Article 3 of Protocol 1) and Protocol 12, the free-standing non-discrimination provision (see below) and could not be justified. There were strong dissenting opinions which emphasised the particular circumstances of the Bosnian transition. While Sejdiz is controversial, it demonstrates the danger that a transition process might include provisions that exacerbate the continuing political exclusion of the most vulnerable.

Discrimination, as this chapter illustrates, is not limited to the political sector. Racial discrimination permeates different fields. As the following discussion demonstrates, such discrimination is either unaddressed by government action and/or inaction. As courts are anti-majoritarian, the option of taking a case before the Court, has, as we will see, become attractive for the Roma minority. However, to what extent, if any, have the Court's standards been informed and helped the process of transition? Using two selected categories of law, this chapter seeks to address this question.

The categories of cases are, first, racially motivated violence and the subsequent failure to carry out an effective investigation into these incidents; and second, segregation in schools. The continuing discrimination in the two categories of case law highlights specific aspects of the Communist past which need to be addressed if Roma are to be recognised and treated as equals. For example, racial discrimination and segregation of ethnic minorities in social and economic areas including housing and education. Prevent Roma exercising their right to adequate housing and the right to education. In so doing, as the case law section illustrates, Roma are denied both the right to 'equality of opportunity' (creating opportunities which enable and empower people to have

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8 Ringhóli, Roma and the Transition in Central and Eastern Europe, viii, 2.
9 EUMC, Roma and Travellers in Public Education, 54, commenting on Hungary.
11 ECHR, Sejdiz and First v. Bosnia and Herzegovina, 22 December 2009 (App. no. 27969/06 and 34836/06). This is the first decision of the Court on Protocol 12 which guarantees a free-standing right to equality (see below).
12 As part of that power-sharing structure, only persons who self-identified as one of the three groups (termed the 'constituent peoples') could become a member of the three-person Presidency or the upper chamber of the federal Parliament (called the 'House of Peoples of the Parliamentary Assembly'). The 'constituent peoples' included the three communities primarily involved in the conflicts in the former Yugoslavia: Bosnian, Croats and Serbs.
13 The right to regular, free and fair elections.
options and make choices) and 'equality of results' (aims to ensure an equal and fair distribution of goods and opportunities to economically disadvantaged groups to ensure that the result is equal). Regarding the failure to carry out effective investigations into racially motivated violence by state (and non-state actors), as Bell and Keenan argue, attempts to hold state actors accountable for human rights abuses lie 'at the heart of more paradigmatic "transitional justice" debates over how to deal with the abuses of the past, post-peace agreement and the relationship of justice to peace'.

For conceptual clarity and coherence of argumentation, the chapter first considers what we mean by 'equality' and 'non-discrimination'. It is important to bear in mind that what is being postulated here is not a radical or new way of thinking about these terms. Rather, this discussion is part of a wider debate, offering a more contemporary understanding of equality. Following on from this, the chapter then examines the non-discrimination provision of the European Convention on Human Rights (ECHR), Article 14. Reference will also be made to the evolution and operation of Article 14 which will then be discussed in the case law section. Following an analysis of the two categories of cases, conclusions will be drawn from the findings of the case law determining what role, if any, has the Court's approach contributed and moved the transitional process forward for Roma.

### Definitional issues: equality and non-discrimination

Equality is an amorphous concept. Equality proves an 'elusive notion', and 'conceptions of equality are notoriously protean'. Broadly speaking, a distinction is frequently drawn between formal and substantive concepts of equality. Similarly, discrimination, which generally refers to differential treatment on grounds such as sex, race, age and so on resulting in the individual or a group of individuals being disadvantaged, can be divided into formal and substantive categories.

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14 Direct discrimination occurs where a person is disadvantaged simply on the ground of her/his race, sex, gender or some other criterion.

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### Formal equality/discrimination

Essentially, formal equality requires that all persons who are in the same situation be accorded the same treatment and that people should not be treated differently on arbitrary characteristics such as religion, race or gender. Any distinction based on such grounds needs to be rationally justifiable. This formulation resonates with the original Aristotelian conception of equality, that like cases should be treated alike. It is the most widespread and least contentious understanding of equality and forms the conceptual basis of the legal concept 'direct discrimination'. Under this formal notion of discrimination, as long as there is consistency in treatment, there will be no discrimination. This means simply that it is illegal to treat a man worse than a woman or a white person worse than a black person and vice versa. Conversely, if both parties were treated equally badly, then there would be no discrimination as there is consistency in treatment. Thus, as far as direct discrimination is concerned, it does not matter if a person belongs to a disadvantaged or a privileged group; it is a symmetrical concept. Another reason why direct discrimination fits neatly into formal equality is the need for a comparator. The comparator in proving direct discrimination tends to be white, male, able-bodied and heterosexual. Such a narrow approach ignores the array of different identities and lifestyles of different groups in a multicultural society, an approach which can have detrimental implications for the Roma minority. Despite its simplicity, a formal notion of equality therefore equates to fairly limited and reactive discrimination rather than anything more far reaching. These limitations raise serious questions as to the suitability of incorporating such an understanding of equality in addressing Roma inequalities in transition processes.

### Substantive equality/discrimination

A substantive notion of equality, in contrast, orients the right to equality from a negatively oriented right of non-discrimination to a positively
orientated right to substantive equality. It does this by ensuring that laws or policies do not reinforce the subordination of groups already suffering social, political or economic disadvantage. The focus is on the group and on the impact of the law on its social, economic or political conditions. A substantive model is therefore concerned with distinctions or situations that tend to reinforce systemic discrimination. It recognises that sameness of treatment can reinforce inequality and, in certain circumstances, equality (of result) actually requires differential or preferential treatment (positive/affirmative action). This positive and 'thick' concept of equality requires the state to adopt an asymmetrical and substantive approach and to facilitate or provide so as to create 'equality of opportunity' and 'equality of outcomes'. With the emphasis on the effect/impact of the law and the move beyond consistency to substance, the different notions of substantive equality are commensurate with the other legal concept of discrimination, namely indirect discrimination. Indirect discrimination occurs when policies are applied which appear to be neutral but have an adverse affect on a disproportionate number of a certain group. Rather than adopting a colour or gender blind approach to discrimination (an approach advocated by formal equality), a substantive model of equality adopts a colour conscious approach. Such an approach is more conducive in maintaining cultural diversity and accommodating and recognising the special needs of minorities. With the emphasis on recognition of difference and not homogeneity, and accommodating special needs of a particular group, such a notion is vital for transitional societies as it helps fulfill four central aims identified by Fredman. These are: breaking the cycle of disadvantage associated with membership of a particular group; promoting respect for equal respect and dignity, thereby reducing stereotypical representation of their own culture; providing positive measures of individuals as members of the group; and facilitating integration and full participation in society. Unfortunately both the formulation of Article 14

and most of the Court's equality jurisprudence has tended to favour the traditional Aristotelian thinking instead of the substantive approach to equality. That said, some of the most recent equality jurisprudence suggests that the pendulum may be swaying in the direction of the latter approach. It is to these issues that the chapter now turns.

Concepts of equality and non-discrimination within the framework of the ECHR: Article 14

Article 14 ECHR reads:

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

There are a number of concerns about the efficacy of Article 14. In contrast with the extensive equality rights in the South African or Canadian constitutions which provide a free-standing right to equality 'before and under' the law as well as 'equal protection' and 'equal benefit' of the law, the text of Article 14 does not include a comprehensive, independent guarantee of equality. The formulation 'the enjoyment of the rights and freedoms set forth in this Convention' enjoin that Article 14 must be linked to another ECHR right/protocol. In other words, Article 14 has to be within the scope of the ECHR which has been referred to as the 'ambit requirement'. Accordingly, Article 14 has been described as a 'parasitic' and a 'Cinderella' provision. Some argue that such descriptions are unjustified as the ambit requirement has been interpreted generously so that even a tenuous link with an ECHR right might be sufficient and therefore does not limit the application of Article 14 to those listed rights/protocols in the European Convention. That said, even those who

[21] While the authors acknowledge the different and, at times, competing tenets underpinning a substantive notion of equality, space constraints mitigates addressing this debate. For further information on this debate see A. Smith, 'Constitutionalizing Equality: The South African Experience', *International Journal of Constitutional Law* 9 (2008) 201–249.

[22] For further discussion on these and other tenets of substantive equality see C. McCrudden, 'Theorising European Equality Law', 19–33.


[29] For example, social security matters have been held to be within the ambit of the right to property: Protocol 1 of Article 1; ECHR, Strc, United Kingdom, 12 April 2005 (App. no. 65731/01 and 65900/01). In Belgian Linguistics, 23 July 1968 (App. no. 1474/63), the first
argue that such descriptions are unjustified and unhelpful, acknowledge that unlike the equality provisions in the South African Bill of Rights and in the Canadian Charter, or Article 26 of the International Covenant on Civil and Political Rights (ICCPR), Article 14 provides no free-standing protection of discrimination. This limitation has been addressed with the introduction of Protocol 12 rendering the non-discrimination clause applicable to 'any right set forth by law' and not only to 'Convention rights'. However, at the time of writing, only eighteen countries have ratified the Protocol.

Although Protocol 12 strengthens Article 14, neither non-discrimination clauses are preceded with a general provision on equality incorporating substantive notions of equality. As was noted earlier, this contrasts with the approach adopted by South Africa and Canada, and by international texts such as Article 26 of the ICCPR and Articles 20 and 21 of the European Union's Charter of Fundamental Rights. Such an approach is important for transitional societies as a general equality provision helps to spell out the objectives of an equality provision, while an accompanying or subsequent discrimination clause helps provide substance to the equality right. Generally, a right to equality is potentially more positive than a prohibition against discrimination as the equality right may require, in appropriate circumstances, government and other actors to act affirmatively, taking positive measures to address pre-existing inequality and disadvantage. On the other hand, a non-discrimination clause is negative as it merely prohibits actions which may have an adverse effect and does not place obligations on governments to take any particular action to address disadvantage or to provide particular benefits. This leaves equality as an issue for the legislature to decide alone. This negative understanding of the right to equality requires only that once governments decide to act, they do so in a non-discriminatory way.

Concerning the non-discrimination clause, this clause highlights the practical reality that individuals and members of particular social groups can often suffer discrimination and need further enhanced equality protection. Equally important for both the general equality provision and equality case, the Court cited examples of how the ambit extends beyond the protective scope of other ECHR rights.

32 Protocol came into force on the 1 April 2005.
33 In describing equality and discrimination in this way, the authors do not mean to suggest the 'negative' versus 'positive' rights dichotomy.

the non-discrimination clause, a positive/substantive conceptualisation is integral to adding substance to both concepts of equality and discrimination if past inequalities are to be remedied. Unfortunately, for transitional societies, the Court has adopted primarily, though not exclusively, a formalistic and thin approach to both concepts. Arguably, such a restrictive approach alongside the doctrine of margin of appreciation (see below), is one of the major weaknesses of Article 14. Such a weakness can, as we will see shortly, influence the Court's approach to the right to equality in transition cases.

**Discrimination**

Until recently the Article 14 case law of the Court focused on the simplest type of discrimination: overt direct discrimination which, as noted earlier, involves an explicit distinction between two groups. According to the case law of the Court, such distinctions are prohibited unless justified. They could be justified if they were shown to have a legitimate aim and bear a reasonable relationship of proportionality to that aim. The justification test operates according to a 'sliding scale' -- certain types of distinction are subject to more rigorous scrutiny than others. The most suspect types of distinction are those based on race, nationality, sex, sexual orientation, birth (within/outside marriage) and similar statuses. Less rigorous scrutiny might be applied to distinctions based for instance on residence, or the type of commercial activity being regulated. Further the margin of appreciation doctrine can be brought in to play where the Court judges believe that they, as international judges upholding minimum European standards, are not best placed to assess whether a fair balance has been struck between a legitimate public interest and the individual's rights.

The breadth of this margin of appreciation can vary over time. In the 2004 case of *Frette v. France*, the Court accorded a wide margin of appreciation to the case of a gay man wanting permission to adopt a child, finding no violation when the man was denied permission. However, when a very similar case came up four years later, the margin of appreciation was barely mentioned and a violation was found.

For a long time, the Court did not move beyond the prohibition of direct discrimination. The Court refused to draw inferences from statistical evidence that a facially neutral rule or policy actually had disparate impact on disadvantaged groups. Apart from a reluctance to consider statistical

evidence, the Court also declined to find violations in cases where an apparently neutral policy might have a discriminatory effect. For instance, the Court did not analyse rules about employees working on a particular day as it might impact on members of particular religions.39

Over the last decade the Court has started to address cases other than the simple form of overt direct discrimination. For example, not all discrimination is overt; a party is unlikely to announce it is discriminating. Therefore it is important to be able to draw inferences from some evidence that there is discrimination. The Băczkowski case demonstrates this.40 An elected mayor in a Polish town made a number of derogatory comments about gay men and lesbians. Not long afterwards a public servant in local government made a decision denying permission for a gay pride march. This decision was flawed in a number of ways, but there was no evidence the public official acted from discriminatory motives. However the Court was prepared to infer that there was discrimination because of the likelihood a public servant would be influenced by the views of the mayor.

The possibility to draw inferences enables a court to identify possible cases of covert discrimination. This is important and valuable but still limited. It fails to address problems of indirect discrimination. While the Court has made occasional references over the decades to indirect discrimination, it was only in 2007 that the Grand Chamber clearly announced that indirect discrimination was a violation of the Convention. This was in DH v. Czech Republic.41 The Grand Chamber announced a sophisticated position on indirect discrimination. If there was evidence of 'disproportionately prejudicial effects on a particular group' or a 'de facto situation' of inequality, then a prima facie case of discrimination was made out. This need not be established beyond all doubt, but rather can be established by showing facts which allow an inference of discriminatory effects; this may include statistical evidence. Once this is done, the burden switches to the state to justify the situation.42

These cases establish a more coherent position on the prohibition of discrimination. However substantive equality requires more than a prohibition of discrimination. It must also include efforts – positive action – to achieve equality in practice. This raises two questions. First, does the ECHR permit such positive action? Second, does the ECHR require positive action?

40 ECHR, Băczkowski v. Poland, 3 May 2007 (App. no. 1543/06).
41 ECHR, DH v. Czech Republic, 13 November 2007 (App. no. 57325/00).
42 Ibid., paras. 175–181.

Article 14 is a qualified right. Therefore a prima facie case of discrimination can be compatible with the ECHR if it can be shown to be a proportionate means to achieve a legitimate aim. The Court has confirmed that the realisation of equality in practice is a legitimate aim.43 So positive action to achieve equality can be justified provided it is proportionate.

That the ECHR permits positive action is important, but probably inadequate to achieve equality. A permissive approach depends on public authorities taking the initiative to adopt positive measures. The ECHR may sometimes go beyond this permissive attitude and require positive action. There are at least two lines of jurisprudence to this effect. First, where there is an allegation of a biased motivation behind the commission of a crime (e.g. racial hatred), then there is a positive obligation to investigate this allegation (see below). Second, there is a line of case law concerning planning decisions made on ostensibly neutral grounds but which impact on Roma, Travellers and other nomads. Here the Court has said that there is a duty to take into account the special needs of nomads as a historically disadvantaged group.44 The Court has invoked this principle in a very different context, holding that where the Spanish authorities had led a Roma woman to believe that her traditional Roma marriage ceremony would be treated as a valid civil law marriage, then the authorities could not deny her a pension paid to the survivor of a married couple.45 As we will see, the Court has started to develop some other important notions of positive obligations in Roma cases.

Overview of the two categories of case law

Category one: racially motivated violence and lack of effective investigations

The Court's Article 14 jurisprudence can arguably be described as rudimentary as the first case where a violation of Article 14 with regard to race/ethnic origin was decided, only as late as 2004 in Nachova46 (see below).

ECtHR, Stec v. United Kingdom, 12 April 2006 (App. nos. 65731/01 and 65900/01) para. 61.
ECtHR, Chapman v. United Kingdom, 18 January 2001 (App. no. 27238/95).
ECtHR, Munoz Diaz v. Spain, 8 December 2009 (App. no. 49150/07).
ECtHR, Nachova and Others v. Bulgaria, 26 February 2004 (App. nos. 43577/98 and 43579/98) and (GC) 6 July 2005. Overall, there has been a low success rate; in only 20 cases since 1998 has a violation of Article 14 been found. S. Besson, Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?, Human Rights Law Review 8(2) (2008) 647–682, 656.
This does not mean that the Court has been unaware of the discrimination against Roma. For example, in Velikova, a case which concerned the death of a Romany Gypsy while in police custody following his arrest on suspicion of cattle theft, the Court found a violation of Article 2(1) as the state failed 'to provide a plausible explanation' of the events leading to the applicant's death who was in good health when taken into police custody. The Court also held that there had been a violation of the investigative/procedural aspect of Article 2 as the state failed to conduct an effective investigation. Although Velikova is important in that the burden of proof was shifted onto the state to provide an explanation refuting the applicant's charges, the Court's approach to equality and subsequently its transitional justice role was disappointing. Despite extensive documentation of instances of racially motivated violence and widespread prejudice against Roma by Bulgarian police officers presented to the Court, the Court unanimously found no violation of Article 14. This was primarily attributable to the Court imposing an onerous evidentiary burden, namely 'beyond reasonable doubt' on the applicant. Requiring such a high standard, akin to criminal trials, the Court concluded that despite acknowledging the seriousness of the applicant's Article 14 arguments:

The material before it does not enable the Court to conclude beyond reasonable doubt that Mr. Tsonchev's death and the lack of meaningful investigation into it were motivated by racial prejudice.

Imposing such a high and unrealistic burden, the Court misunderstood the purpose and function of international protection of human rights which was eloquently stated by another regional court, the Inter-American Court of Human Rights:

The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations but rather to protect the victims and to provide for the reparation of damages resulting from the acts of States responsible.

Not only did the Court's approach demonstrate a lack of understanding of the purpose and function of international protection of human rights, its approach in combating racist discrimination can arguably be described as lacklustre and, thereby, rendering meaningless in Article 14 cases the Court's often cited dictum that the ECHR rights should not be 'theoretical and illusory' but 'practical and effective'. Rather than imposing a positive obligation to investigate allegations of racially motivated violence on the perpetrators (thereby adopting a substantive approach to equality), imposing such difficult procedural and evidentiary obstacles, the Court acted in a reductive, regressive and formalistic manner with negative results for progressing the transitional process. Unfortunately this case is not isolated or unique as even in the most egregious cases of racially motivated violence and/or killings, the Court's failure to develop a substantive conception of equality has prevented the Court from finding a violation of Article 14 in conjunction with Articles 2 and 3. The clearest expression of dissatisfaction of the Court's perfunctory approach was eloquently captured by a powerful, albeit lonely dissenting judgment of Judge Bonello in Anguelova v. Bulgaria. Bonello found it 'particularly disturbing' that at that time, in the fifty years of the Court's history, the Court had failed to find that the maiming, killing and torture of victims was related to the race, colour or place of origin of the victim. This resulted in 'an exemplary haven of ethnic fraternity.' The root cause for

11 Ibid, para. 84.
12 In reaching this decision, the Court referred to unexplained omissions in the investigation, the failure to collect evidence, combined with the failure to provide reasons for failing to investigate, ibid., paras. 77–84. The Court also found a violation of Article 13, the right to an effective remedy, based on the same factors as it relied upon in finding a violation of Article 2. Ibid., paras. 89–90.
13 For example, the applicant quoted from various intergovernmental organisations on racism against Roma by the police. She referred to the UN Special United Nations' Special Rapporteur on Contemporary Forms of Racial, Racial Discrimination, Xenophobia and Related Intolerance (1999), who had reported that 'police abuse of Roma in custody was widespread in Bulgaria... Since 1992, at least fourteen Roma men in Bulgaria have died after having been last seen alive in police custody, or as a result of the unlawful use of firearms by law enforcement officers' and concluded that 'as a rule investigative and judicial remedies are rare'. Ibid., para. 87.
14 Ibid., para. 94.
such a 'haven of ethnic fraternity' was, for the reasons just discussed, the
onerous evidentiary burden on the applicant. 58 Judge Bonello warned that
such an unrealistic burden of proof meant the Court was only paying 'lip-
service' to the ECHR guarantees. 59 The Judge stated that the way forward
was to radically and creatively rethink the Court's approach to ensure the
Court does not become 'an inept trustee of the Convention'. 60

Bonello's warning seemed to have been listened to with the landmark
Chamber judgment in Nachova and Others v. Bulgaria. 61 As noted earlier,
for the first time in its history, the Court found both substantive and pro-
cedural violations of Article 2 in conjunction with Article 14. Regarding
the substantive violation, having examined the evidence including the
unnecessary use of firearms and the lack of an appropriate legal and
administrative framework to ensure adequate protection of the right
to life, coupled with the lack of planning and control of the operation,
the Court held the state was responsible for the fatal shooting of the two
Romani men. 62 The Court was able to reach this conclusion by modifying
the current standard of proof, noting that:

[Where the authorities have not pursued lines of inquiry that were clearly
warranted in their investigation into acts of violence by State agents
and have disregarded evidence of possible discrimination, it may, when
examining complaints under Article 14 of the Convention, draw negative
inferences or shift the burden of proof to the respondent Government. 63

In light of the evidence, 64 the Chamber concluded that the government
should have the burden of proof to prove that the actions were not racially
motivated, a burden which the state failed to discharge. 65 Regarding
the procedural violation, the Chamber criticised the Bulgarian investiga-
tion as 'flawed' 66 as it failed to comply with the standard required by
Article 2. Article 2 imposes a positive obligation to take all possible steps
to investigate whether or not discrimination may have played a role in
the events, which the state failed to do. A striking feature of the judgment
was the Court's emphasis on the need to treat racially motivated violence
differently than those cases with 'no racist overtones'. 67 Such an approach
represents a high water mark in the Court's history in dealing with equal-
ity in transition cases as it is a recognition and affirmation of substantive
equality. As noted earlier, the accommodation of people's differences is
what defines a substantive understanding of equality. Sometimes this will
require treating people differently in light of their circumstances rather
than treating everyone the same way as formal equality does. In this
regard, Judge Bonello's description of the case as a 'giant step forward that
does the Court proud' 68 is justified.

However, if the Chamber judgment represents a high water mark and a
'giant step forward' in equality in transition cases, the Grand Chamber's
rejection of the Chamber's decision to impose the burden of proof on the
state represents a giant step backwards. For the first time, for reasons not
clearly stated, the Grand Chamber distinguished between the procedural
and substantive aspects of Article 14. The Court upheld the Chamber's
finding of a procedural violation of Article 14 in conjunction with Article
2 (which is to be welcomed and commended), however the Court did not
find a substantive violation of Article 14 taken together with Article 2. The
Court held that:

[Does not consider that the alleged failure of the authorities to carry out
an effective investigation into the supposedly racist motive for the kill-
ing should shift the burden of proof to the Government with regard to
the alleged violation of Article 14 of the Convention taken in conjunction
with the substantive aspect of Article 2. 69

This raises the question as to when the burden of proof should be trans-
ferred onto government. The Grand Chamber hinted that:

In certain cases of alleged discrimination it may require the respondent
Government to disprove an arguable allegation of discrimination and - if
they fail to do so - find a violation of Article 14 of the Convention on that

58 Ibid., paras. 4–11. 59 Ibid., para. 13. 60 Ibid., para. 172.
61 ECHR, Nachova and others v. Bulgaria, 26 February 2004 (Appl. nos. 43577/98,
43579/98).
62 The two men had absconded from compulsory military service and an arrest warrant
was subsequently issued. During their arrest, the two unarmed conscripts were fatally
wounded by military police officers.
63 ECHR, Nachova and others v. Bulgaria, 26 February 2004 (Appl. nos. 43577/98, 43579/98)
para. 169.
64 The investigating officers had failed to investigate the excessive use of force and the use of
racist comments from one of the arresting officers.
65 ECHR, Nachova and others v. Bulgaria, 26 February 2004 (Appl. no. 43577/98, 43579/98)
para. 172.
66 Ibid., para. 128.
67 Ibid., para. 168.
68 Ibid., para. 1, concurring opinion of Judge Bonello. In contrast, in ECHR, Balić v.
Hungary, 29 July 2004 (Appl. no. 47940/99) para. 79, the Court held although there was a
violation of Article 3 regarding the applicant's treatment by the police during an arrest,
there was no violation of Article 14 on the basis that unlike in Nachova there was 'no sub-
stantiation of the applicant's allegation that he was discriminated against'.
69 Ibid., para. 157.
basis. However, where it is alleged — as here — that a violent act was motivated by racial prejudice, such an approach would amount to requiring the respondent Government to prove the absence of a particular subjective attitude on the part of the person concerned.70

In other words, Bulgaria could not be considered responsible for the motivations that prompted the state agents. However, unlike the other aspects of the decisions, this particular judgment was not unanimous as six judges partly dissented. Their dissent, shared by third party interveners, some activists and academics,71 was based on the argument that a holistic approach would have been preferable since it better reflects the special nature of Article 14, which has no independent existence. The dissent insisted that the factual evidence was enough if the case was taken as a whole to find a violation of Article 14.72 The authors echo the dissenting judgment as it arguably weakens the Court’s approach in its fight against racial discrimination.

The full impact of the Grand Chamber’s ‘artificial and unhelpful’73 approach has been clearly demonstrated in subsequent cases as a substantive violation of Article 14 in conjunction with either Article 2 or 3 is now difficult to prove.74 While there was a modicum of hope in Stoica v. Romania,75 as the Court found a substantive violation of Article 14 taken together with Article 3, this was short-lived as the Court unanimously held there was no substantive violation of Article 14 taken together with

70 Ibid., para. 157.
73 Ibid.
75 ECHR, Stoica v. Romania, 4 March 2008 (Appl. no. 42722/02).

Article 3 in Begovac v. Croatia.76 The Court reached this finding despite repeating similar dicta from the Chamber’s judgment in Nachova about the need to take all reasonable steps to detect any racial motivations behind criminal acts.77 Notably, in this case, unlike Nachova, the Court continued to state that such an obligation is not absolute and granted the state authorities a wide margin of appreciation, resulting in a failure to identify and punish killings motivated by racial discrimination.78 With these recent developments the Court is ‘paying lip-service’79 to the right guaranteed by Article 14. As noted earlier, while in some cases there have been procedural violations of Article 14 in conjunction with either Articles 2 and/or 3 which the authors fully endorse and support,80 the bifurcation of Article 14 may well have resulted in the Court being less inclined to find a substantive violation. Procedural violations, while important, arguably do not carry the same weight as a substantive violation.81 Furthermore, substantive violations need substantive remedies which are arguably more probing and demanding than procedural remedies. The former may require positive action to address and eradicate endemic and institutionalised racial discriminatory practices (action which is essential for transitional processes), whereas, in the latter, the state is responsible, at most, for rectifying the impugned policy/procedure. Fortunately, as the
following discussion demonstrates, the bifurcation of Article 14 seems to primarily apply to the field of policing.

**Category two: education**

The right to education has many facets. It is intrinsically important for the individual in providing a rewarding experience. It is socially important as education facilitates social and economic development. It is also important as it facilitates and enhances nearly every other right. For example, education is important in protecting the right to health, in seeking employment, in exercising free expression and for taking part in political affairs. It was not a coincidence that one of the main litigation planks in the African American struggle for equality focused on education.

The education situation of Roma, Travellers and other nomads throughout Europe is dire. Roma face difficulties in terms of enrolment at school, attendance, academic attainment, completion rates, bullying and segregation. The Court had not dealt with such cases until the twenty-first century, but has now addressed the problems in three cases, two of which are from ex-Communist states.

The landmark case is *DH v. Czech Republic*. The Czech Republic provided a system of 'special schools' for pupils with 'mental deficiencies'. In some regions, Roma were overrepresented in these schools. In the Ostrava district a Roma pupil was twenty-seven times more likely to be assigned to a special school than a non-Roma child. The applicants in *DH* had been transferred to special schools following psychological tests and with the consent of their parents. The Chamber which initially heard the case concluded by six votes to one that there was no violation.

The Grand Chamber reversed the decision of the Chamber, finding a violation by thirteen votes to four. As noted above, the Grand Chamber adopted a statement on how the Court should approach indirect discrimination cases. The Grand Chamber underlined that the Roma were a 'specific type of disadvantaged and vulnerable minority' and so required 'special protection'. In contrast to its approach in *Nachova*, the Grand Chamber relied on statistical evidence, but also the reports of a variety of international organisations on the general position of the Roma in the Czech Republic, to conclude that a prima facie case of discrimination was made out. The Grand Chamber considered that there was no objective and reasonable justification for this. The tests used to allocate the children were not sufficiently reliable and did not take account of the cultural specificities of the Roma children. Parental consent was not relevant – it was not clear that the parents, who were members of a disadvantaged minority, had been given all the information required to give informed consent. In any event, one could not consent to racial discrimination.

The most recent of the desegregation cases is *Oršuš v. Croatia*. The case concerned Roma children in two schools. In one, Podturen, there were forty-seven Roma children, seventeen of whom were in a Roma-only class. In Macinec 142 pupils attended Roma-only classes while fifty-two Roma pupils attended mixed classes. The Chamber found unanimously that there was no violation of the right to education or of Article 14 in combination with the right to education (though it found a violation of the right to a judicial hearing in good time under Article 6). The Grand Chamber disagreed with the Chamber, finding a violation of Article 14 by nine votes to eight. The Grand Chamber reiterated the need to consider that this was a case involving a vulnerable minority which required special protection. Although the statistical evidence did not establish a prima facie case of discrimination, the Grand Chamber noted that the language requirement was only applied to Roma in some schools; further there was evidence from international reports of hostility by non-Roma parents to mixed schools in Croatia.

Therefore the situation called for an objective and reasonable justification from the government. The Grand Chamber accepted that temporarily putting children in special classes due to language problems was justifiable
provided – this is the crucial point – there were safeguards. The Grand Chamber noted that there was no clear legal basis for the measures and that the allocation decision was not based specifically on language tests. Further, the students were offered an 'adapted curriculum' though it was not clear what this was. Some, but not all, of the pupils were offered extra classes in Croatian. This situation did not satisfy the positive obligation on the state to provide an education, including special language classes in Croatian, to enable the Roma students to join mixed classes as soon as possible. There should have been a transparent monitoring procedure to assess the pupils' competence in Croatian and transfer them to mixed classes as soon as possible; this did not exist. Concerning the problems of absenteeism, the Grand Chamber held that there were positive obligations to raise awareness of the importance of education among Roma parents, to assist the pupils with any difficulties they were having with the curriculum and to involve the social services in a structured way to consider problems of absenteeism.

These cases are still very recent, and so it is difficult to assess their effects. There are some welcome aspects. These include the development of a clear doctrine on indirect discrimination and the identification in Oršuš of specific positive obligations on state parties, going beyond the vague generalities about showing special concern for a disadvantaged minority. Perhaps the most important development is the willingness to use reports by international organisations to assess the general context in which the specific individual cases occur.

That said, there are some points for concern. First, there is a genuine concern that the cases address only one aspect of the problems facing Roma education, but have not as yet considered the wider problems of Roma enrolment. One dissent in DH drew attention to the shocking statistic that in the EU, in 1989, perhaps between 250,000 and 300,000 Roma children had never attended school. Second, there is the significant problem of the effect of these decisions on the ground. A report by the European Roma Rights Centre based on research conducted a year after the Grand Chamber decision in DH noted that there had been some positive efforts by the Czech government.

However it remained the case that education was segregated in practice. The most positive note in the Report was that the Czech government acknowledged that its reforms had failed to end segregation and so new plans were needed. Third, there appears to be considerable and strong disagreement among the judges themselves in these cases. Of the twenty-four judges who considered DH, ten concluded there was no violation; even more strikingly, of the twenty-four judges that heard Oršuš, fifteen found no violation. The dissent were often expressed very forcefully. In DH, Judge Zupančič suggested that the majority were using 'politically charged argumentation' to hide 'ulterior motives'. In the same case Judge Borrego accused the majority of acting as if in an 'ivory tower' and being condescending to the Roma parents and pupils. The joint partly dissenting opinion in Oršuš argues that the majority were going beyond the facts of the actual case before them to develop the general law on indirect discrimination.

Conclusion

The aim of this contribution was to answer the question: has the Court's approach in these two areas of law contributed in progressing the transitional process for Roma? The answer is a qualified yes. On the one hand, some of the most positive features of the case law are: the recognition of the need for a sophisticated indirect discrimination doctrine; the ability of the Court to draw inferences as to the existence of discrimination without insisting on proof beyond all doubt; the development of positive obligations, such as the obligation to investigate allegations of racial bias, and the positive obligation to assist children in non-mainstream classes by providing suitable education. Perhaps the most significant step is the reliance in the school desegregation cases on evidence of the general context of discrimination and disadvantage facing Roma.

However, on the other hand, there are also less promising features. In the cases involving allegations of racially motivated violence, the development of a positive obligation to investigate such allegations frequently goes hand in hand with a reluctance to find a substantive violation of Article 14. The reliance on a duty to investigate sees the Court relying on a familiar technique, but one which also allows it to hold back from a

90 Ibid., para. 154. 91 Ibid., para. 157. 92 Ibid., para. 159–160. 93 Ibid., paras. 164–171. 94 Ibid., para. 177. 95 Ibid., paras. 173–175. 96 Ibid., para. 177. 97 ECtHR, DH v. Czech Republic, 13 November 2007 (Appl. no. 57225/00), dissent of Judge Jungwirt.

98 European Roma Rights Centre (ERRC), Persistent Segregation of Roma in the Czech Education System (Budapest: European Roma Rights Centre, 2009).

99 Ibid., section 6.

30 Joint dissenting opinion of judges Jungwirt, Vajč, Kovler, Gyulanyan, Jaeger, Myjer, Berro, Leffëve and Violinid.
formal finding that state agents were racially biased (even if this was not state policy). Further, even with the progressive decisions in the school desegregation cases, there are still problems about implementation on the ground, dissent among the judges and the wider problem as to whether the ECHR and the Court have the tools and ability to tackle some of the major problems facing the Roma.

All of this reflects the fact that international law and an international court are not immune from the difficulties facing national law and judges in transition processes. International judges may be as inclined as national ones to be activist or deferential in the defence of rights in transitional settings. Much will depend on the work of actors beyond the judges – on the activism of litigants and lawyers at one end of the process, and on the willingness of governments to implement decisions at the other. All actors have a shared responsibility in bridging the unacceptable gap that exists not only in these two areas of law, but in all sectors between Roma and the rest of society. Only then will the Roma be able to shed their inegalitarian past for a more democratic and equitable future.

Bibliography


