ADDRESSING 'ROMAPHOBIA' IN THE STRASBOURG COURT: CHALLENGES TO THE REALISATION OF SUBSTANTIVE EQUALITY

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INTRODUCTION

It is now over twenty years since the UN Committee on the Elimination of Racial Discrimination issued its thematic Recommendation on Discrimination Against Roma.[1] Yet progress toward social inclusion and the eradication of discrimination has been glacial. There has been a notable increase in the number of Roma cases heard by the Strasbourg court, but the facts of these cases remain sadly predictable. The Court regularly finds breaches of Article 3 in police brutality cases, Articles 2 and 3 in state failures to investigate ill-treatment, Article 8 in home and family life cases, and Protocol 1 in segregated education cases. The margin of appreciation has been narrowed and, since the case of *Connors v UK,*[2] there has been recognition that the Gypsy way of life may require special measures from the state when assessing proportionality.

Consequently, the menace of anti-Gypsyism or Romaphobia,[3] which often lies at the root of the substantive breach, remains poorly understood despite being pervasive across Council of Europe states. McGarry defines Romaphobia as 'the hatred or fear of those individuals perceived as being Roma/Gypsy/Traveller. It involves the negative ascription of group identity and can result in marginalisation, persecution, and violence. Romaphobia is a form of racism, it is cut from the same cloth.'[4] There are three specific components of Romaphobia:

1. A homogenizing and essentializing perception and description of these groups.
2. The attribution of specific characteristics to them

3. Discriminating social structures and violent practices that emerge against that background, which have a degrading and ostracizing effect and which reproduce structural disadvantages.[5]

This article prefers the term 'Romaphobia' which McGarry describes as 'the last acceptable form of racism,' due to the pejorative implications of the Gypsy label in many European countries.[6] In considering whether the Court's jurisprudence is adequately addressing this problem, it will be important to avoid relying on familiar tropes that essentialize Roma as a disadvantaged socio-economic group. It is also important to consider whether, and to what extent, a Court whose focus has traditionally been on the application of individual rights, can address the complex, intersecting challenges experienced by members of minorities.

There are three significant issues faced by applicants alleging racially motivated ill-treatment before the European Court of Human Rights (hereafter the 'Strasbourg Court'). In *Nachova*[7] the Chamber accepted that *prime facie* evidence of racial discrimination could result in a reversal of the burden of proof. This approach has been applied in the segregated education case of *DH*[8] and in the police brutality case of *Stoica.*[9] However, it is not consistently applied. Secondly, the standard of proof required for allegations of discrimination in police brutality cases before the Court ('beyond reasonable doubt') sets the bar far higher than the civil standard required in most member states. Whilst the Court may be prepared to find a procedural violation of Article 14 where an investigation into alleged racist motivations has not been undertaken, the challenge of proving a substantive violation is considerable. Finally, the Court remains too cautious by ignoring the broader context in which the ill-treatment has occurred. This is particularly surprising given the proactive decisions of the European Committee on Social Rights, and the growing consensus that social inclusion is thwarted by widespread anti-Gypsyism. It is argued that notwithstanding attempts to approach state responsibility through the vulnerable group concept, the Strasbourg Court has retained an individualistic, narrow

understanding of non-discrimination which has done little to tackle Romaphobia or advance understandings of substantive Roma equality.

Whilst the finding of a substantive violation will provide a remedy for the applicant, the failure to address structural discrimination and to properly label hate crimes exempts states from addressing the root causes of breaches; condemning them to be repeated. Nowhere is this failure more apparent than in *Fogarasi* where a three-judge chamber, deciding on the basis 'well-established case law,' ruled that police brutality in Romania was not influenced by racial discrimination. This cautious approach can also be viewed in admissibility decisions where applicants are required to have exhausted domestic remedies. Had the Court called out pervasive discrimination in previous cases they would have had a legal base from which to moderate this expectation. Romani people have little faith in domestic legal institutions and actors, so the rigid application of admissibility criteria is just another hurdle in the realisation of their rights. Dembour argues that the rule of law has stalled the development of Article 14 as it requires Courts to focus only on the specific facts.[10] However the development of indirect discrimination in *DH* and a greater recognition of institutional discrimination in some signatory states (and recently in the Strasbourg Court) show that it is essential to understand the context in which a substantive violation takes place.[11]

To better understand the context in which the Court are adjudicating on discrimination against Roma, it is first necessary to consider some of the barriers to Roma inclusion across Europe. These barriers are local, regional, and national and they transcend the old vs new Europe divide.

THE ROOTS OF ROMAPHOBIA

Those identifying as Roma, Sinti, or Gypsy people form the largest minority group in Europe, estimated to constitute between 10 and 12 million people. A further one million Romani people live in the US, largely as descendants of European Roma who fled Nazi persecution, and there

is a significant Romani population in Brazil whose ancestors are believed to have fled persecution in Portugal. [12]

Precise numbers are notoriously difficult to reliably estimate. Whilst the number who identify as Roma or Gypsy-travellers in the UK is estimated to be around 0.5-0.7% of the population, Romani people make up 7-10% of the population in several European countries including Bulgaria, Macedonia, Slovakia, Spain, Romania, Serbia, and Hungary.[13] Whilst the collection of ethnically disaggregated census data is a relatively new practice in many European states, centuries of hostility and persecution make self-designation an unreliable measure.

Romani people are a heterogeneous, non-territorial minority with a shared historical origin which can be traced back to the Sindh area of Northern India (today Southern Pakistan) between the fifth and tenth century.[14] The Romani language which consists of more than fifty dialects, traces its origins to Punjabi.[15] The very survival of the Romani people is a complex story of migration, adaptation, and resilience. This is best be illustrated by the cultural practice of nomadism. Regarded as central to British Gypsy-traveller identity, it is rarely visible in post-Communist states where Romani people were forcibly settled during communist industrial drives.

Attempts at definitions typically result in arbitrary distinctions and exclusions so this article uses the term Romani people as an umbrella to include those identifying as Roma, Sinti, Gypsy-travellers, and associated tribes and clans. As a non-territorial minority, Romani people are a perfect scapegoat in times of social and economic instability.[16] Whilst their history of economic migration arguably makes them the original European citizens, their recent migration from central and Eastern Europe has been met with resistance and hostility, most recently evidenced by forced eviction and expulsions from France and Italy.

One common feature of the Romani experience is socio-economic disadvantage and civic marginalisation. Policies including segregated education, sterilisation, forced eviction, ghettoization, and the criminalisation of unauthorised encampments, have left Romani people at the margins of European society. This picture shows little sign of improving despite a raft of international and regional commitments to social inclusion and condemnation from European political and judicial bodies, including the European Court of Human Rights and the European Committee on Social Rights.

In 2005 a report for the World Bank concluded that successive policies had failed to address Roma exclusion as they were predominately fragmented and localised. The report demanded an inclusive approach involving government, civil society, and other partners which would 'make a difference through a comprehensive change of direction.'[17] The European Commission met these criticisms through the introduction of a European Roma Integration Framework which aimed at tackling socio-economic exclusion in four areas: education, health, housing, and employment. The Framework encouraged Member States and enlargement countries to adopt a comprehensive approach to Roma integration through the adoption of National Roma Integration Strategies. The framework prioritised four key objectives: ensuring that all Roma children complete primary school and closing the gap between Roma and non-Roma in respect to employment, health status, and access to housing and public utilities.[18] EU Structural and investment funds and pre-accession funds were made available to support state initiatives.

The Framework attempted to better engage national governments allowing states discretion to identify local priorities, avoiding the much-criticised top-down European governance approach.[19] Yet subsequent evaluations show very little progress. Discrimination in education and employment remains significant resulting un unemployment levels that are two to five times higher than the national averages.[20] The gap in housing access has remained

unchanged and a significant number of Romani families find themselves living without adequate sanitation and basic amenities.[21]

Fox and Vermeersch argue that the EUs' Roma integration discourse indirectly contributed to the rearticulation and revitalization of nationality, transforming rather than challenging East Central European nationalisms.[22] This seems to have been borne out by the recent rise and acceptability of a far-right narrative at the heart of European society, a narrative that typically centres on Roma and, to a lesser extent, Jews, and Muslims, as enemies of the state. Van Baar also argues that Roma programs have contributed to this narrative by marginalizing or de-humanizing their supposed beneficiaries.[23] In this respect the growth in Romani activism is very welcome as the paternalistic, marginalizing approach of old is being openly challenged. For example, Bulgarian Roma activists have asked the European Commission to avoid the Roma vulnerability trope in European documents as it 'contributes to their forced marginalisation.'[24] This is a point I will return to later when discussing the vulnerable groups concept in the Strasbourg court.

Institutional Failings on Romaphobia

It should be noted that the lack of success, whilst extremely disappointing, is not surprising to Romani campaigners and advocates. It has been repeatedly observed that the implementation of national commitments at the local level is hampered by a lack of political will and general indifference. In some cases, local mayors and councillors have sort to bolster public approval by publicly condemning their Roma community and sympathising with anti-Roma sentiment (as evidenced in many of the Court cases discussed below). At national level, there are parliamentarians across Europe with openly Romaphobic platforms. The power to suspend privileges of member states for violating the fundamental principles of European Union law, articulated in Article 2 of Treaty on the European Union as 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of

persons belonging to minorities' lacks substance.[25] These values are openly challenged by the prominence of populist political parties across Europe.

Italian local authorities continue to use aggressive powers of eviction against nomad camp residents and there have been numerous incidents of racist abuse and violence towards Roma families.[26] In 2005 the European Committee of Social Rights found Italy in breach of their obligation to provide housing without discrimination under the European Social Charter. Yet forced evictions have continued and residents are either left homeless or relocated to camps without transport and basic amenities. For two and a half years a group of three hundred Roma including young children lived on a toxic landfill site in *Masseria del Pozzo, Campania before the domestic court ruled it was hazardous to human health. The families were then relocated without consultation to a new site on a piece of wasteland lacking any amenities, prompting Amnesty International to make a submission to the UN Committee on the Elimination of Racial Discrimination.*[27] *During recent elections which are expect to give the balance of power to the* far-right Brothers of Italy, a Lega councilor filmed a video of himself walking up to a Roma woman and, speaking to the camera, he promised voters 'Vote for the League on 25 September and you'll never see her again.'[28]

In Bulgaria, Romaphobia moved to the heart of government following elections in 2019 as the Deputy Prime Minister Krasamir Karakachanov, unveiled a new Roma strategy entitled: 'Concept for the Integration of the Unsocialised Gypsy (Roma) Ethnicity' which is replete with hate speech and anti-Roma stereotypes concerning Roma criminality and maladaptability. Karakachanov has publicly described Roma people as 'exceptionally insolent' and 'unsocial.'[29] The Bulgarian Supreme Court has found Karakachanov guilty of discrimination against Roma after public statements which linked the conviction of two Roma men to familiar Romani criminality tropes. His comments were widely reported and resulted in racial violence, threats, and the eventual forced eviction of Romani villagers.

The situation in Hungary is perhaps the most alarming of all. The Orban government and its far-right allies have made no secret of their position regarding Roma people. Hungary had been the most progressive of the former Communist states in recognising the Roma as a national minority with specific rights following the fall of Communism but there has been a significant growth in neo-fascism and far-right ideology over the last fifteen years. Groups including the new Hungarian Guard, Carpathian Brigade, and Mi Hazank Mozgalom (Our Homeland Movement) have supported and organised violent protests and attacks against Roma community members, collaborating with local vigilante organisations and paramilitary groups.[30] Over sixty attacks against Roma people were reported between 2008 and 2012 which included the use of grenades and Molotov cocktails. Those responsible for the racist murder of Roma including a five-year-old child, were convicted in 2013 but anti-Roma racism permeates Hungarian society. Zsolt Bayer, founding member of the ruling Fidesz party, has described Roma as animals who are 'not fit to live among people' and Prime Minister Orban openly criticised a 2020 Debrecen Court decision awarding damages to Roma children illegitimately segregated in special schools as 'money for nothing,' stating 'we take the side of the 80 percent who are decent, working Hungarians who demand a suitable education for their child.'[31]

Polling by the PEW centre in 2019 found that 83% of Italians polled had unfavourable attitudes towards the Roma. The figure was 68% in Bulgaria, 76% in Slovakia, 66% in Czechia, and 61% in Hungary.[32] Those who express a preference for more right-wing politics were notably more likely to express unfavourable views, whereas extensive efforts to address Roma inclusion through education in Spain resulted in a 13% increase in favourability.[33]

At an institutional level, the European Commission has focussed attention on the newer member states where, with the exception of Spain, the highest numbers of Roma live and where

non-discrimination norms have only recently been established. This distraction has allowed discrimination and social exclusion to continue relatively unnoticed in original member states. Yet a recent European survey found that 45% of Roma in western Europe reported having experienced discrimination compared to 26% in Central and Eastern Europe.[34] Whilst this difference may in part be attributable to greater rights awareness in the West it suggests that Romaphobia is widespread and to a large extent socially acceptable. The European Committee on Social Rights has found violations of the right to housing under Article 31 of the European Social Charter by Italy, France, Greece, and Portugal.[35] The Committee confirmed that Article 30 of the Charter requires 'positive measures for groups generally recognised as excluded or disadvantaged, such as Roma, to ensure that they are able to access rights such as housing, which in turn will have an impact on access to other rights such as education, employment and health.'[36] Recently the Committee accepted a complaint against Belgium concerning a police operation which targeted numerous traveller sites with the aim of seizing caravans, cars, and other property.[37] Taking a proactive approach, the Committee unanimously required the immediate adoption of a series of measures with a view to avoiding serious, irreparable injury to the integrity of persons belonging to the Traveller community at immediate risk of being deprived of fundamental social rights.

In the UK, a statutory duty to provide adequate stopping sites for nomadic travellers was repealed in 1994 and new legislation passed this year significantly increases police powers to remove travelling people from unauthorised land with punishment for non-compliance of three months' imprisonment.[38] There is no obligation on the police or local authorities to identify an alternative site and police can seize the homes of occupiers if they do not leave without 'reasonable excuse'.

The compulsory fingerprinting of Roma camp inhabitants in Italy following the imposition of a 'nomad emergency' in 2008 was initially condemned by the European

Parliament and Commission.[39] Yet the Commission subsequently approved of the measures following assurances from the Italian government that they would be applied without racial motivation to enable registration of Roma migrants.[40] This was surprising given the Commission's earlier warning to the Berlusconi government and the evidence provided by the Italian Red Cross who were assisting in data collection who reported that almost all camp inhabitants were of Romani origin and the data was collected regardless of their nationality or residence permits.[41] The following year legislation criminalised undocumented stay in Italy with a fine up to 10,000 euros.[42] It was the Italian Council of State, Italy's Constitutional Court, that finally declared the nomad emergency discriminatory and unlawful in 2011.[43]

Expulsions from France in 2011 initially attracted criticism from the European Commission with Commissioner Reding comparing the expulsions to the Vichy regime's treatment of Jews during the second world war.[44] The European Committee on Social Rights[45] subsequently found the eviction and expulsion measures to be a breach of the Charter. The Committee considered that France had failed to demonstrate that the forced evictions were carried out in conditions that respected dignity, or that the Roma were offered alternative accommodation. Furthermore, the Committee found that the evictions took place against a background of ethnic discrimination, Roma stigmatisation, and constraint in the form of the threat of immediate expulsion from France. The Committee attached considerable weight to the fact that a particular ethnic group was explicitly singled out in both the evictions and expulsions ruling that this constituted direct discrimination, in violation of Art. E of the Charter. Whilst the above examples might appear extreme, the level of Romaphobia across Europe is far greater than suggested. The principal reason for the failure to make significant progress on social inclusion and to secure real opportunity for Romani people across Europe is not one of resources or desire, rather it is a failure to grapple with the menace of or Romaphobia which

stems from institutional denial influenced by the tacit acceptance of discriminatory narratives of Roma poverty and criminality.[46]

ROMA EQUALITY IN THE STRASBOURG COURT

Many excellent academic papers have been written criticising aspects of Romani policy and this analysis does not seek to replicate these arguments. Rather it seeks to interrogate the approach of the Strasbourg Court which is accused of frustrating the development of substantive equality norms. The focus is on Article 14 of the Convention as the free-standing provision in Protocol Twelve has not been ratified by the majority of Council of Europe states. The theoretical underpinning of the Court's approach to the protection of minority rights through an individualist framework will be considered with reference to three dimensions of inclusion identified as individual rights, redistribution, and recognition by Delcour and Hustinx.[47]

The realisation of rights depends on a priori recognition of the rights holder.[48] The notion of the unencumbered self which sits at the root of liberal individualism is arguably a fallacy as the self is constituted by the totality of our experiences, our history and environment.[49] For members of minorities whose identity is intrinsically bound to the culture of the group rights can only be realised through the application of positive obligations or special measures that require states to depart from a position which naturally favours the majority.[50] However, any approach grounded in recognition and special measures needs to avoid inadvertently entrenching inequality by essentializing the minority's disadvantage.

General Principles of Interpretation

The prohibition of discrimination in Article 14 is not a free-standing Convention right but its application does not depend on the finding of a substantive right violation. There has been a

notable rise in cases alleging discriminatory treatment before the Strasbourg court, such that in 2021 allegations under Article 14 amounted to almost 10% of the Court's caseload.[51]

Direct discrimination involves treating people differently based on one of or more of the protected characteristics. It typically requires a comparator from a majority group who does not possess any of the protected characteristics (usually a white, heterosexual male). Indirect discrimination on the other hand enables an examination of supposedly neutral rules and practices on persons who possess one or more protected characteristic. It recognises the flaw in formal equality whereby treating very different people equally can replicate disadvantage and undermine substantive equality.[52] This approach may necessitate the adoption of special measures to enable members of disadvantaged groups to fully participate in society.[53]

Unusually, under the Convention any discrimination is capable of being justified if the state can advance an objective and reasonable justification. The aim of the measure must be legitimate, and it should be applied proportionately. The precise assessment of proportionality will depend on the margin of appreciation that is given to the state. In cases concerning suspect grounds, particularly weighty reasons will be required to justify any difference in treatment. The Convention, now seventy years old, is to be interpreted as a 'living instrument'[54] and the Court will consider whether a particular measure is supported by a European consensus leading to a significantly narrowed margin of appreciation.

Gerards has identified a 'fundamental ambivalence' in the theoretical foundations of Article 14 which is worthy of note when one considers the way in which the Court conceptualises substantive equality and how it accommodates minority rights.[55] Worryingly, it is not easy to predict how the Court will approach an allegation of discriminatory treatment even when faced with a pattern of cases containing strikingly similar facts. Whilst their approach is slowly evolving, there are four areas where the Court's approach frustrates the development of substantive equality:

i) Inconsistent articulations of indirect discrimination

ii) Impossible evidentiary burdens

iii) Paternalistic, vulnerability tropes

iv) Inadmissibility and exclusion from consideration

The Articulation of Indirect Discrimination

Initially the Court was very reluctant to engage with indirect discrimination and, to a large extent, it remains cautious. This is particularly apparent when it is compared to the Court of Justice of the European Union, the Committee on Social Rights, and the Advisory Committee to the Framework Convention on National Minorities. A more proactive approach has been evidenced in Roma education cases starting with the Grand Chamber decision in *DH*[56] where the Court modified evidentiary requirements and narrowed the margin of appreciation by which states can advance a justification for the treatment. However, as discussed below, this approach has not been consistently applied and the degree of dissent in the more recent case of *Orsus v Croatia* (the majority found a violation by 9 votes to 8) suggests that a significant number of judges do not welcome these modifications.

In *DH* the Grand Chamber by a majority of 13-4 overruled the decision of the Chamber, deciding that the fact that Roma pupils in Ostrava were 27 times more likely to be placed in special schools following a reduced curriculum, constituted a violation of Article 2 of Protocol 1 (the right to education) coupled with Article 14. In addition to its importance in the fight for educational opportunity for Roma pupils, the judgment is significant for four reasons. Firstly, in its recognition that indirect discrimination could fall within Article 14. Secondly, the use of statistics and reports to demonstrate that whilst it was not a general policy to place all Roma pupils in special schools, Roma pupils in Ostrava were differentially treated as they were far more likely to be consigned to these schools. This shifted the burden of proof onto the Czech

Government. Thirdly, the rejection of the Government's objective and reasonable justification which centred on the apparently neutral application of an educational admission test, and the consent of Roma parents. The Chamber had accepted the Government's assertion that Roma parents consented to their children's placement, thereby overlooking the rights of the child and 'blaming the parents for the systemic racial discrimination which destroyed their children's life chances.'[57] Finally, the Grand Chamber narrowed the margin of appreciation, requiring that 'special protection' be afforded to vulnerable groups.[58] This vulnerable group category should be considered as a sub-set of the suspect group cases (race, religion, sex or gender, nationality, sexual orientation of illegitimacy) which require the state to provide weighty or particularly serious reasons for differential treatment.[59]

In *Sampanis v Greece,*[60] the Chamber found a violation of the right to education coupled with Article 14 where the Roma pupils were educated in a separate building to their peers. Following the decision, the education authorities moved the Roma pupils into the main school but continued to educate them in separate classes. This led to a further finding of a violation four years later in *Sampani v Greece*. Both *DH* and *Sampani* demonstrate the significant challenges of implementing desegregation for Romani pupils and the need to tackle segregation through a comprehensive strategy that address Romaphobia and inequality at all levels of society. The European Commission commenced enforcement action against the Czech Republic (along with Slovakia and subsequently Hungary) to ensure its compliance with the Race Equality Directive, but the most recent evaluation by the Commissioner on Human Rights in 2020 noted that although there had been legislative reforms there was little change on the ground.[61]

In *Orsus* the Roma pupils were segregated based on Croatian language competency. Both national courts and school authorities took the view that the remedial classes could be justified as they were intended to benefit rather than disadvantage pupils.[62] The Grand

Chamber had regard to Council of Europe recommendations,[63] UN instruments and observations of the Committee on the Elimination of Racial Discrimination, including its opinion on the Czech Republic which noted that placement of Roma in special schools led to *de facto* racial segregation.[64] Unlike *DH* the statistical evidence did not establish a prime face case of discrimination but the Court emphasised that Roma were a particularly disadvantaged and vulnerable minority which required the state to take positive measures to correct disadvantages related to linguistic and cultural differences. These measures included challenging the alleged hostility of non-Roma parents, addressing poor school attendance, and increasing the involvement of Roma parents. The majority supporting the finding of a violation in *DH* had considerably narrowed by *Orsus* with dissenting judgments accusing the Court of going beyond the facts of the case and patronising the pupils and parents.

The *Orsus* dissent illustrates the challenges in developing indirect discrimination norms which are much needed for the eradication of substantive inequality. Segregated education has been condemned by international human rights bodies for decades and this applies irrespective of the educators' motivations and the quality of the education delivered.[65] In finding a violation against France for their policy of repeatedly evicting Roma families, the Committee on Social Rights stressed that the right of equal access to education required positive obligations on all state parties.[66] Drawing on the UN Convention on the Rights of the Child, the Committee of Ministers Recommendation On the Education of Roma/Gypsy Children in Europe,[67] and the best interests of the child principle, the Committee stressed that there should be no separate schools for Roma children and emphasised:

> 'It is also their duty to pay particular attention to vulnerable groups. States' domestic law must prohibit and penalise all forms of violence against children, that is acts or behaviour likely to affect the physical integrity, dignity, development, or psychological well-being of children.'[68]

In *Horvath and Kiss*,[69] two Roma adults complained that the decision to educate them in special schools for mentally impaired pupils was based on discriminatory testing. Once assessed with mild learning difficulties they had no way of moving to mainstream schools and the limited curriculum had significantly reduced their life chances. The Court heard that 42% of pupils in the special school were of Roma ethnicity, though they constituted 8.2% of the total school population in the region. Only 0.4-0.6% of students consigned to the special schools would proceed to take the mainstream school examination.[70] Following *DH and Orsus*, the Court emphasised that, in light of persistent discrimination and their vulnerability as a particularly disadvantaged group, states had a duty to avoid the perpetuation of discrimination against Roma disguised in allegedly neutral tests.[71] Interestingly the decision was unanimous; perhaps suggesting a growing confidence in the Court's articulation of non-discrimination in the educational sphere.

Impossible Evidential Burdens

Whilst the modification of the burden of proof in *DH* is to be welcomed, the Court has adopted a very different approach in caselaw concerning policing and criminal justice. The number of allegations of police ill-treatment towards Romani people is a serious cause for concern. Cases fall into two camps, one where the police themselves are accused of, or complicity in, anti-Roma violence; and the second where the police and prosecutors fail to investigate or prosecute a complaint of ill-treatment made by a Roma complainant.

These cases centre on Articles 2 and 3 of the Convention and there is often an allegation of racial motivation on the part of state authorities. Where the racist motivation is clearly evidenced there will be a violation of Article 14 as in *Lakatosova*[72] where a police officer shot and killed three Roma and seriously injured two others. He was convicted of the murder, but the Slovakian courts declined to treat the case as racially motivated even though the perpetrator had told police of his desire to 'deal with the Roma from Hurbanovo' when preparing his gun.

Regrettably, the approach of the Strasbourg Court has largely been to side-line this part of the facts, ignoring data and statistics suggesting that the behaviour aligns to a broader pattern of Romaphobia in state authorities. A distinction needs to be drawn between procedural and substantive violations in these cases: the former relates to the failure of the authorities to adequately investigate the substantive breach of the right. In these situations, there is a positive obligation to examine the complaint and take appropriate action which should include scrutiny of any evidence of racist motivation.

There have been recent cases where insufficient investigations into alleged hate crimes have met the threshold required for a breach of Article 14 in conjunction with Article 3. This was the result in the cases of *Balazs*[73] and *MF*[74] where the ill-treatment had not been investigated for possible racial motivations. A breach of Article 14 along with the procedural limb of Article 2 was also made out in *Fedorchenko and Lozenko*[75] where an arson attack killed five Roma including three children. The alleged perpetrators, including a high-ranking police officer, had barricaded the family into their home. Only one of the alleged perpetrators was successfully prosecuted for the offence of wilful destruction of property for which he received a suspended prison sentence. As part of the hearing, the Court's attention was drawn to a report from the European Commission against Racism and Intolerance which highlighted the systematic discrimination faced by Ukrainian Roma and frequent reports of:

> 'excessive use of force, ill-treatment, verbal abuse, and destruction of property by law enforcement personnel. Discriminatory practices are also reported to be widespread and include arbitrary checks, unwarranted searches, confiscation of documents and (...) discriminatory enforcement of crime prevention policies targeting persons with criminal records.'[76]

The Court modified the standard of proof by considering this broader context along with three other arson attacks against Romani villagers the same evening. It held that it could

not be excluded that the decision to burn the houses had been 'nourished by ethnic hatred.' In March 2019, eighteen years after the incident, the Council of Europe's Committee of Ministers reported that the Ukrainian government had still not done enough to implement the judgment. The Committee heard evidence of numerous attacks on the homes of Roma since the Court's decision, including fifteen families chased from their homes in Lysa Hora by a far-right vigilante group; Roma families dragged from their homes and beaten by thirty masked men in Lviv; an arson attack on a Roma home in Ternopol, and a violent assault on a group of Roma in Lviv which resulted in the murder of one man. To the extent that any prosecutions have occurred, they have been for the lesser charge of hooliganism. The joint evidence from European Roma Rights Centre and the Chircli Roma women's organisation accused the Ukrainian state authorities of collaborating with far-right groups in their violence towards Roma people.[77]

Substantive violations of Article 14 are rare before the Strasbourg court due to the impossibly high evidential burden required. In *Bekos and Koutropoulos*[78] an internal investigation into police brutality found that the two officers had acted with cruelty and abused their powers when detaining two Romani men. Their suspension had been recommended but this was never carried out, so the officers remained unpunished. The Court found a procedural breach of Article 14 and substantive breach of Article 3 because the applicants who argued that they were subjected to racial abuse whilst detained, were unable to prove beyond all reasonable doubt that racist attitudes had played a role in their mistreatment.

There is an obvious difficulty in requiring proof of discrimination to the criminal standard and it is not something required by the Court of Justice or many national jurisdictions.[79] Smith and O'Connell describe the Court's approach as setting a 'high and unrealistic burden.'[80] They make a comparison with the Inter-American Court of Human Rights which has openly rejected the criminal standard: '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 he acts of States responsible.'[81] For Roma applicants the high threshold for proof of racism is compounded by the fact that state authorities are unlikely to believe their witness statements and may not have properly recorded the evidence of racial motivation. General statements that may be suggestive of Romaphobia will not suffice before the Court.[82] Thus the Strasbourg court's approach runs the risk of compounding the discriminatory treatment.

In *Anguelova*[83] a teenage Roma boy died of a fractured skull he sustained in police custody. It was subsequently revealed that the police forged the detention register, failed to call an ambulance, and lied about the events leading up to his death. The Court found violations of Article 2 due to the absence of a thorough and careful investigation and Article 3 due to the absence of a plausible explanation to explain his injury. However, they found no violation of Article 14 as it could not be shown beyond all reasonable doubt that the police actions were racially motivated. This was the same approach taken in a strikingly similar case where an apparently healthy Romani man arrested for suspected cattle theft had died of injuries sustained whilst in Bulgarian police custody.[84]

The only dissenting opinion in *Anguelova* came from Judge Bonello who, describing the judgment as 'particularly disturbing,' highlighted the failure of the Court to properly protect victims of racially motivated violence, murder, and torture. He criticised the Court's imposition of an unrealistic burden of proof which prevented scrutiny suggesting that Europe was an 'exemplary haven of ethnic fraternity.'[85] He called on his peers to radically and creatively rethink their approach so that the Court was not 'an inept trustee of the Convention'.[86]

To some extent Judge Bonello's criticism was heeded in the next case on police brutality and discrimination in Bulgaria, coming just two years later. In *Nachova* the Grand Chamber acknowledged that there should be increased scrutiny for differentiations on the basis

of race, such that when a person dies at the hands of the state there is a duty to unmask any racist motivation and to establish whether ethnic hatred or violence played a role.[87] This is an important step but it does not go far enough to address the significant barriers to the realisation of substantive equality. As in *DH* the Chamber departed from the approach in *Anguelova* to reverse the burden of proof so that the state was required to prove that the police were not influenced by discriminatory attitudes.[88] However, the enlightened approach of the Chamber was soon modified by the Grand Chamber which distinguished between procedural and substantive limbs of Article 14 and found the state's failure to properly investigate the supposedly racist motivations for the murder should not shift the burden of proof.[89] In so doing, the Court ignores the substantial body of evidence from previous cases concerning police brutality against Bulgarian Roma, reasoning that the state should not be deemed responsible for the 'individual subjective' motivations of their own police force. The decision has been described by Smith and O'Connell as 'a giant step backwards',[90] a position supported by six partially dissenting opinions. The Court subsequently compounded the challenges facing victims of racial violence by granting the state a wide margin of appreciation in *Beganovic.*[91]

It will now be apparent that police brutality is a regular theme in Roma caselaw. *Sashov*[92] was the sixth successful case supported by the European Roma Rights Centre against Bulgaria alone. Yet the Court's unwillingness to place the burden to disprove discriminatory intention on the state adds insult to injury, preventing a full understanding of the challenges that urgently need to be addressed by suggesting, contrary to all the evidence, that the specific incidents are isolated and unusual.

Paternalism and Vulnerability Frames

The decisions in the Roma education cases refer to the Roma as a vulnerable group requiring states to take positive measures to address their situation.[93] The approach can be traced backed to the decision in *Chapman,*[94] concerning a Gypsy woman who wished to settle with her family

on her own land but was denied planning permission and consequently evicted. The Court recognised that the desire to reside in a caravan was an intrinsic part of the applicant's identity as a Gypsy traveller, engaging the right to respect for family and private life as well as home life.[95] Respect for the special needs of minorities was a benefit not just for the individual member of the group but crucially for society in general,[96] reflecting the preamble of the Framework Convention on National Minorities.[97] In narrowing the margin of appreciation the Court identifies the emergence of an international consensus justifying a positive obligation to 'facilitate the Gypsy way of life'.[98]

On the surface this approach appears to fall within a minority recognition frame which departs from formal non-discrimination reasoning.[99] In the event, this recognition proved to have little substance as the majority (17-7) found the interference to be necessary in a democratic society to protect the rights and freedoms of others, an approach echoing the earlier decision of *Buckley* where the European Commission on Human Rights had found a violation of Article 8 having recognised that 'living in a caravan home is an integral and deeply-felt part of her gypsy life- style.'[100] On appeal to the Court, it was held that the violation of the applicants right to a home was justified by the requirements of a robust planning system. In their dissenting opinions Judges Pettiti and Lohmus reasoned that special measures were required to achieve full equality for Gypsy people.

Ringelheim refers to these approaches as 'minority blind'.[101] They are examples of the individual rights frame identified by Delcour and Hustinx which strips Roma of their status as members of a minority and treats them as individuals whose interests can be fairly balanced against those of other individuals.[102] The final approach falls a long way short of recognising minority rights in the way that the Commission in *Buckley* advocated. It is not therefore surprising that when the Court briefly examined the complaints under Article 14 they confined their examination to the specific facts and found there to be no discrimination in *Buckley* and

an objective and reasonable justification in Chapman. The Court declined to consider the ample evidence to suggest that the families would be unable to find alternative homes without abandoning their caravan, and therefore, their culture. As such it appears incoherent. On one hand the Court is emphasising the intrinsic importance of the right of a Gypsy to reside in a caravan, on the other hand that right is later expressed as a matter of individual preference which can be interfered with for the enjoyment of the majority.

The Court revisited these questions in *Connors*, this time considering the impact of rental security and procedural safeguards against eviction for Gypsy families. There is a clear evolution in the case law from *Buckley* to *Connors*. The majority found a breach of Article 8, narrowing the margin of appreciation and recognising the positive obligation on states to consider the needs and lifestyle of Gypsies in their regulatory framework.[103] The applicant's argument that the relevant provisions were in fact discriminatory was not addressed.

A clearer articulation of vulnerable groups in relation to non-discrimination came in *DH*, discussed above, with the Court demanding that the respondent state afford 'special protection' to vulnerable groups, such as the Roma whose vulnerability was based on a 'turbulent history' and, rather curiously given their nomadic tradition, 'constant uprooting'.[104] This approach diverges from the conception of vulnerability advanced by theorists such as Fineman who regard it as intrinsic to the human condition.[105] For the Court, it is associated only with specific groups where negative social attitudes,[106] dependency on the state, historical prejudice, and social exclusion are considered to be markers of vulnerability.[107]

The vulnerability concept has enabled the Court to justify a modification of the burden of proof and a departure from the immediate facts of the case so that underlying conditions of inequality are brought to the fore. This approach sits most comfortably within the redistribution frame identified by Delcour and Hustinx in its recognition that certain socio-economic factors justify a departure from individually constructed rights.[108] However, the approach with its

emphasis on dependency and exclusion, falls short of affirming minority rights and recognising the need for positive measures which members of minorities require to fully participate in society.

Kim argues that the vulnerable groups concept has led to inconsistency and ambiguity in the Court's judgments due to the absence of any coherent theoretical underpinning and corresponding definition of vulnerability.[109] This inconsistency can be seen in several cases where facts are relatively similar. One example is *Yordanova*[110] which concerns the forced eviction of Roma families, here the Court found a violation of Article 8 without any explicit reference to the Roma as a vulnerable group. Yet a year later in *Winterstein* which also concerned forced evictions of Roma families, the Court referred to their previous caselaw and noted 'the vulnerable position of Roma and travellers as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in reaching decisions in particular cases.'[111]

Kim identifies at least four approaches to the concept in Strasbourg jurisprudence, the highpoint being *DH* where vulnerability reversed the burden of proof and narrowed the margin of appreciation. In the state violence cases, an acknowledgement of vulnerability has not been accompanied by any procedural modification. In *Burlya and Others v Ukraine*[112] Roma villagers were violently attacked by their Ukrainian neighbours who looted and set fire to their homes whilst police officers looked on. Whilst the families were forced to reside in temporary accommodation outside the village, the police showed no interest in prosecuting those responsible. Sixteen years after the pogrom, the Strasbourg Court finally ruled that the Romani villagers present at the time of the attack had suffered a breach of Article 3 coupled with Article 14, whilst those not present who lost their homes, had suffered a breach of Article 8 and 14. Whilst the Court emphasised that the Roma were a vulnerable group it did not consider how

this designation might impact on the proceedings, for example by narrowing the margin of appreciation.

Whilst the vulnerable group designation lacks a clear theoretical foundation and a consistent application, there is an even greater problem arising from the Court's awkward accommodation of minority interests. This is exemplified by the decision in *Hirtu and Others*, where the Court were asked to consider the impact of the French Besson law which targeted those travelling without a permit, leading to forced eviction and relocation in unsuitable 'slum' camps. Rather than referring to the Roma as a vulnerable group, the Court stripped the Roma camp dwellers of their ethnicity entirely, describing them as an 'underprivileged social group'.[113] Whilst some regard the special protection approach as progressive in its recognition of group -focused rights,[114] Kim argues that allocating obligations based on a vulnerable group status is paternalistic and stigmatising.[115] This accusation is reminiscent of the criticism made by Romani rights advocates against the European Commission.[116] Stigmatisation is seen to hamper engagement with substantive inequality as the group appear to be asking for something extra (rather than something different), reinforcing further negative stereotyping.[117] Thus there is a significant risk that vulnerability strips Romani people of their political identity as rights holders, confirming their outsider status.[118] Crucially, the state responses to allegations of discrimination suggest that vulnerability can be easily repurposed to blame the victim for the rights violation.

Kim's solution is to move away from the limited recognition of group identity in favour of the traditional rights frame with its emphasis on individual dignity and autonomy.[119] The difficulty here is that individual identity is bound up with the identity of the group and this is even more apparent when the group has been excluded from civic society because of discrimination and entrenched inequality.[120] To reference autonomy and dignity without this context is to present an incomplete picture that fails to engage with the complexities of

structural inequality. This is recognised in the development of the Council of Europe's Framework Convention on the Protection of National Minorities. Arguably had the non-discrimination approach been sufficient there would be no need to have created a separate legal instrument focussed on the rights of members of national minorities. The preamble to the Convention recognises that a 'pluralist and genuinely democratic society should enable members of minorities to express and preserve their identity', and that a climate of tolerance and dialogue is necessary to enable cultural diversity which should be a source of enrichment for each society.[121] The answer to the denial of rights to Roma people is not to deny recognition but to ensure that rights are realisable and not illusory. This requires Roma identity to be celebrated rather than denied.

Inadmissibility and Exclusion from Consideration

Access to justice remains a significant challenge for Romani people in domestic courts.[122] Unfortunately some of these challenges are replicated in the quest for a remedy before the Strasbourg Court. In *Burlya* the Romani victims of a pogrom in Ukraine waited sixteen years for a remedy during which time they were displaced from their damaged homes. The Romani women denied access to maternity benefits in *Negrea and Others*[123] waited eleven years for a finding that their Article 6 rights had been breached. The Article 14 allegation was dismissed due to an absence of evidence.

Typically, the Court has avoided the question of whether a rights violation was prompted or influenced by discrimination, suggesting that the finding of a violation of the substantive right provides a sufficient remedy. In the planning cases the Court balances the right of a member of a minority to live in a home which is culturally appropriate against the broader, ill-defined, public interest. This balance has typically elevated the right for some members of the public to enjoy a green space over the individual rights of a Gypsy family to enjoy a home. This changed with the decision in *Connors* where an Article 8 violation was

substantiated but the Court declined to consider Article 14 as no separate issues arose.[124] This prevented a dialogue with national courts and arguably delayed the development of a European consensus as any discriminatory motivations were hidden from scrutiny. Similarly, in *Bagdonavicius and Others,*[125] the Romani neighbourhood was demolished and burned down by the authorities, leading residents to lose access to their home and essential services. A breach of Article 8 was upheld without any consideration of discriminatory motivations or effects.

Whilst there may be complex planning and environmental concerns in housing cases played out in an awkward balance between individual rights and the public interest, the police brutality cases by contrast appear relatively uncomplicated. The finding of a procedural violation of Article 14 in *Nachova* remains unusual. In *Carabulea v Romania*[126] the Court had found procedural and substantive breaches of Article 2 and 3, as well as the denial of the right to an effective remedy in Article 13, when a Romani man was detained and died in police custody. The majority declined to consider Article 14 or the wider context in which the police were exercising their powers, prompting criticism in the dissenting opinions of Judges Gyulumyan, Ziemek and Power. In *Borbala and Kiss*[127] the Court found a substantive and procedural breach of Article 3 when the police used excessive force to break up a party but rejected the Article 14 allegation due to insufficient evidence of racist motivations. Similarly, in *Koky and Others,* the Court found a breach of Article 3 when the police failed to investigate and prosecute the perpetrators of an armed attack on a group of Roma men. The Article 14 complaint was not examined despite the evidence that perpetrators hurled racist abuse at the victims.[128]

Any hope that the Court's approach might evolve to reflect the living instrument principle, was undermined by *Fogarasi and Others*[129] where a three-judge court found no evidence of racial discrimination in a case involving arbitrary detention and police brutality against a Roma family including an elderly grandfather and thirteen-year-old daughter. One

family member needed three months of medical care for the injuries caused by the police officers. The three-judge court is used in an increasing number of cases where established case law exists to assist the Court in addressing its considerable backlog. Given the numerous international reports and previous caselaw it is difficult to justify the Court's finding. A report from the EU Fundamental Rights Agency the year before found that 75% of Roma in Romania did not report in-person crimes due to lack of trust in the police, resulting from excessive police stops and discrimination.[130] The Court's own judgment in the earlier decision of *Stoica*[131] had found a breach of Article 3 and 14 when a teenage Romani boy was beaten unconscious by police in Romania. What is particularly concerning about the facts in *Fogarasi* is the level of indifference towards Roma victims and witnesses at all levels of the justice apparatus. The deputy mayor and local police were witnessed making racist remarks, but the statements of the Roma villagers were dismissed on the grounds of alleged bias. The military prosecutor further overlooked police statements which mentioned 'purely gypsy behaviour' and thereby ignored the racial animus. The Court also ignored the evidence of police Romaphobia highlighted in the case of *Moldovan and Others*[132] where police were found to be complicit in a violation of Articles 3, 6(1), 8, and 14 following a pogrom where three Romani men were killed and fourteen homes destroyed. *Fogarasi* marks a new low point in the realisation of substantive equality and raises questions about the Court's commitment to equality for Romani people. Weiss accuses the Court of a shameful decision which makes a 'joke of Roma rights'.[133]

The refusal to fully engage with the discriminatory angle in policing stands in marked contrast to the approach taken in educational discrimination cases. This is particularly concerning given the impact of racism on the victim's dignity and the impact of racist policing on a tolerant, democratic society. In 2012 Moschel collated data on Roma cases pending or decided by the Court and found fifteen cases against both Bulgaria and Romani with a further eight against Slovakia, four against Greece and several others against Croatia, Czech Republic,

Hungary, Macedonia, Russia, and Ukraine.[134] It should be immediately obvious from this list that the situation on the ground in these countries has not improved in the intervening decade and in some cases has deteriorated further. The number of these cases that were actively considered under the discrimination provision totalled just twelve (three of which related to Greece).

In *Aksu v Turkey*[135] an academic book and two state funded dictionaries featured several Roma stereotypes that the applicant alleged were discriminatory. The book included passages stating that Gypsies lived as 'thieves, pickpockets, swindlers, robbers, usurers, beggars, drug dealers, prostitutes and brothel keepers' and were 'polygamist and aggressive'. One paragraph refers to 'sorcery' as one of the 'most striking characteristics' of the group concerned. The Turkish dictionaries contained similar offensive stereotypes. 'Gypsy wedding' was defined as a 'crowded and noisy meeting', 'Gypsy fight' as a verbal fight in which vulgar language is used and 'Becoming a Gypsy' as 'displaying miserly behaviour'. The applicant had made several requests for the Ministry of Culture to ban their distribution. Whilst the Court underlined that positive measures are required to prevent stereotyping it then afforded the state a wide margin of appreciation and found no violation of Article 8. The Court declined to consider Article 14 on the basis that 'the applicant has not succeeded in producing prima facie evidence that the impugned publications had a discriminatory intent or effect'.[136] In a strong dissenting opinion, Judge Gyulumyan reasoned that the case should have been examined under Article 14 with the burden of proof shifted to the respondent due to the discriminatory context in which the books were published and the clear perpetuation of racist stereotypes in the texts. She cites decisions from Turkish courts in cases where Turkish identity had been similarly denigrated to support the conclusion that there was a difference in treatment based on ethnicity.

Judge Gyulumyan's opinion echoes that of Judge Bonello in *Angeuelova*. Both recognise that the refusal to explore the discriminatory context perpetuates and condones

incitement to discrimination. Both make reference to wider international obligations and reports including the UN Committee on the Elimination of Discrimination's Recommendation on Roma,[137] and the Strasbourg Declaration on Roma in 2010 which condemns unequivocally 'racism, stigmatisation and hate speech directed against Roma, particularly in public and political discourse' calling for states to 'Strengthen efforts in combating hate speech. Encourage the media to deal responsibly and fairly with the issue of Roma and refrain from negative stereotyping or stigmatisation'.[138]

In view of the considerable challenges in documenting and addressing Romaphobia, it is also important for the Court to modify its expectation that Roma applicants will have exhausted all domestic remedies.[139] In *Hysenav v Albania* the Romani applicant whose home was set alight was unable to lodge a civil claim against the perpetrators.[140] The European Roma Rights Centre highlighted pervasive racism in the domestic courts and prosecution service.[141] The approach in *Kozak v Poland*[142] where the applicant alleged discrimination on the grounds of homosexuality, offers a to take a more flexible approach given the difficulties and considerable delays Roma applicants typically experience navigating domestic courts. The Court rejected the Government's argument that the applicant had not exhausted all remedies determining it would be unnecessary if a realistic account of the facts demonstrated that the general legal and political context in which formal remedies operated would make them ineffective.

CONCLUSION

Roma exclusion remains the most pressing human rights and equality issue in Europe notwithstanding considerable attention from the European institutions, including the Strasbourg Court. It should be very apparent that there is no easy fix to the complex, intersecting challenges that Romani people face in accessing basic rights, but it should also be evident that the approaches taken have, until quite recently, overlooked the discriminatory

context in which policies are designed and implemented. This context has been recognised to some extent in education and housing but nowhere is it more apparent than in the police brutality cases.

The Court's inconsistent and wavering approach to discriminatory context present in many rights violations against Romani peoples has thwarted progress on the realisation of substantive equality in Europe. It has been argued that the Court needs to urgently refine its approach to provide a consistent and decisive voice which shows no tolerance for Romaphobia. In so doing it must be prepared to modify both the burden and standard of proof, particularly the requirement for applicants to prove discrimination beyond all reasonable doubt. This requirement sets an impossible threshold of proof and allows the actions of racist authorities to be hidden from scrutiny. When the state has not demonstrated a full and fair investigation into an allegation of racist behaviour, the burden of proof must shift to them to demonstrate that the action was not motivated by racism.[143] If the state wants to avoid the allocation of blame before an international court, it needs only to undertake an adequate and fair investigation into the allegations. Shifting the burden will therefore improve police procedures and accountability, ensuring that everyone is subject to equality before the law.

The Court also needs to be more proactive by requiring positive obligations to reduce inequality without resorting to paternalistic and stigmatising tropes which centre on comparative vulnerability and inferiority. As Fineman argues, all human beings are inherently vulnerable, therefore the focus should be on how to develop and shape resilience.[144] An approach singling out one group as particularly vulnerable runs the risk of compounding vulnerability. Positive obligations to reduce inequality require recognition of minority rights, but this must be decoupled from vulnerability which emphasises socio-economic characteristics as the defining feature of Romani identity.

The recent decision in *Lingurar v Romania*[145] may provide hope for a new direction in Strasbourg jurisprudence. The case again concerned police brutality during a raid on a Romani village and a failure to prosecute the perpetrators. It was clear that the raid had been motivated by concerns about Roma crime and anti-social behaviour. The Court, sitting as a three-judge committee, found a violation of both procedural and substantive limbs of Article 3 and Article 14. Significantly, the Court referred to 'institutionalised racism' and 'ethnic profiling' and recognised that stereotypes about Roma behaviour could give rise to suspicions of discrimination based on ethnic grounds.

The Court should be more willing to learn from the work of the Advisory Committee on the Framework Convention, the European Committee on Social Rights and the Court of Justice of the European Union. The CJEU has a highly developed principle of equal treatment with elaborate doctrines of direct and indirect discrimination and positive action to ensure meaningful equality of opportunity.[146] Article 5 of the Framework Convention requires that state parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions, and cultural heritage. The Council of Europe's recommendation on the legal situation of Roma in Europe also advocates special measures to ensure genuine equality of treatment.[147] In her rewriting of the *Chapman* decision, Ringelheim demonstrates how the application of these authorities can dramatically enhance rights protection for members of minorities.[148]

Thus, the Court should reaffirm the European consensus on the right of travelling people to live in a caravan and reassert the positive obligation on states to secure that opportunity.[149] Rather than affording states a wide margin of appreciation as in *Aksu*, it should assertively condemn language and behaviour which confirms racist stereotyping. At the same time, it should take care to scrutinise state arguments that endorse a separate but equal approach,

particularly in the allocation of socio-economic rights such as housing and education. The dissenting judgements in Orsus evidenced the risk in allowing states a wide margin of appreciation over 'benevolent' education measures that may provide a short-term gain for pupils but ultimately widen inequality and division.

Ultimately it is refreshing to see that European institutions are now, albeit belatedly, coming to understand the problems of structural inequality which have prevented real progress on Roma integration. Unfortunately, the Strasbourg Court has lagged behind with a reductive, regressive and overly formalistic approach to equality.[150] There are small indicators that this approach may be changing, but for the Roma, this change is long overdue.

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[1] UN Committee on the Elimination of Racial Discrimination General Recommendation XXVII on Discrimination Against Roma Adopted at the Fifty-seventh session of the Committee on the Elimination of Racial Discrimination, on 16 August 2000, A/55/18, annex V.

[2] *Connors v United Kingdom,* App 66746/01, 27th May 2004.

[3] The term anti-Gypsyism is now recognised by European human rights institutions. However, the use of the Gypsy label is viewed as pejorative by many Romani people and has often been used to strip them off their cultural identity. Therefore, the term Romaphobia is preferred, described by Aidan McGarry as the last acceptable form of racism Romaphobia: 'The Last Acceptable Form of Racism' (2013) *Open Democracy.* <https://www.opendemocracy.net/en/can-europe-make-it/romaphobia-last-acceptable-form-of-Racism/>.

[4] Aidan McGarry, 'Romaphobia: A Legacy of Nation Building in Europe' (*Loughborough University London*, Dec 2018) <https://blog.lboro.ac.uk/london/diplomatic-studies/romaphobia-a-legacy-of-nation-building-in-europe>.

[5] Alliance Against anti-Gypsyism, (June 2016) <http://antigypsyism.eu>.

[6] McGarry (n 3).

[7] *Nachova and Others v Bulgaria* 43577.98 and 43579/98, 2005.

[8] *DH v Czech Republic* App. 57325/00 2007, 47 EHRR 59.

[9] *Stoica v Romania* App 42722/02 2008.

[10] Marie Dembour, 'Still Silencing the Racism Suffered by migrants…The Limits of Current Developments Under Article 14 ECHR' (2009) 11 European Journal of Migration and Law 221.

[11] *Lingurar v Romania* App 48474/14 2019.

[12] Estimates now suggest that half of Europe's pre-war Roma population, an estimated 1.5 million, were killed in the *Porrajmos.* Ian Hancock, '*We are the Romani People* (University of Hertfordshire Press 2002) 48.

[13] Helen O'Nions, 'Roma and Sinti' in *Elgar Encyclopedia of Human Rights* (Edward Elgar 2022).

[14] Ian Hancock, *The Pariah Syndrome: An Account of Gypsy Slavery and Persecution* (Karoma 1987); *We are the Romani People* (Univ. of Hertfordshire Press 2002); Dominic Kenrick, *Gypsies: From India to the Mediterranean* (Univ. of Hertfordshire Press 1998).

[15] Yaron Matras, *Romani: A Linguistic Introduction* (Cambridge Univ. Press 2002).

[16] McGarry (n 3).

[17] D Ringold, M Orenstein and E Wilkins, *Roma in an Expanding Europe: Breaking the Poverty Cycle*, (World Bank 2005)

[18] European Commission, *An EU Framework for National Roma Integration Strategies up to 2020* COM/2011/0173 final, Brussels 5th April 2011.

[19] Felix B Chang, 'Roma Integration 'all the way down': Lessons from Federalism and Civil rights' (2018) 1 Critical Romani Studies 1, 62–85.

[20] Ede Ijjasz-Vasquez 'Why We Need to Talk About Roma Inclusion' (World Bank Blog April 14, 2017) <https://blogs.worldbank.org/europeandcentralasia/why-we-need-talk-about-roma-inclusion>

[21] European Commission *Mid-term evaluation of the EU Framework for National Roma Integration Strategies up to 2020* (2018 Luxembourg: Publications Office of the European Union).

[22] Jone Fox and Peter Vermeersch, 'Backdoor Nationalism' (2010) 50 European Journal Of Sociology 325.

[23] Huub Van Baar, 'Europe's Romaphobia: Problematization, Securitisation, Nomadism' (2011) 29 Environment and Planning D: Society and Space 203, 208

[24] Orhan Tahir et al 'Appeal to European Commission', 1st Nov cited in Van Baar (n 23).

[25] Article 2, *Consolidated Version of the Treaty on European Union* OJ C326, 26.10.2012, 13–390.

[26] Rosi Mangiacavallo, 'Violent Anti-Roma Racism In Italy: A Tipping Point Or The Toxic 'New Normal'?' (*European Roma Rights Centre,* 21st May 2019)
< http://www.errc.org/news/violent-anti-roma-racism-in-italy-a-tipping-point-or-the-toxic-new-normal>

[27] Amnesty International 'Submission to The United Nations Committee on The Elimination Of Racial Discrimination' 91st Session, 21 November - 9 December 2016

[28] Angelina Giuffrida ,'Vote for us to never see her again': fury after Italy politician's video with Roma woman' *The Guardian* (6th Sept 2022) <https://www.theguardian.com/world/2022/sep/06/italian-far-right-politician-sparks-row-over-roma-comments>.

[29] Atanas Zahariev, 'Democracy Under Siege: Bulgaria's Parliament To Vote On Fascist Anti-Roma Strategy' (*European Roma Rights Centre Report*, 14th May 2019) <http://www.errc.org/news/democracy-under-siege-bulgarias-parliament-to-vote-on-fascist-anti-roma-strategy>; European Roma Rights Centre 'Open Letter To Boyko Borissov',
<http://www.errc.org/uploads/upload_en/file/5150_file1_letter-of-concern-racist-concept-strategy-for-roma-integration-in-bulgaria-13-may-2019.pdf>

[30] Jacqueline Bhabha and Margareta Matache, 'Anti-Roma Hatred On The Streets Of Budapest' (*EU Observer*, 3rd Jun 2020) <https://euobserver.com/opinion/148532>.

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[34] EU Fundamental Rights Agency *Roma and Travellers in Six Countries*, 2020 < https://fra.europa.eu/en/publication/2020/roma-travellers-survey>
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[62] *Orsus v Croatia* App 1576/03, 2010.
[63] Including European Commission Against racism and Intolerance Third report on Croatia (17th Dec 2004); General Policy Rec. No 3 *On Combating Racism and Intolerance against Roma/Gypsies* adopted on 6th March 1998; General Policy Rec no 7 *On National Legislation To Combat Racism And Racial Discrimination*, adopted on 13th Dec 2002; Final Report on the Situation of Roma, Sinti and Travellers in Europe 15th Feb. 2006; UN Committee on the Elimination of Racal Discrimination, General Recommendation 27 *On Discrimination Against Roma* ,16th Aug 2000. A/55/18, Annex V.
[64] *Committee* on the Elimination of Discrimination against Women *Concluding Observations on the report submitted by the Czech Republic* 30th March 1998; see also UN CERD Gen Comment 27 *On Discrimination against Roma* 57th session, 16th Aug 2000.

[65] See for example the seminal decision of the US Supreme Court in *Brown v Board of Education of Topeka* 347 U.S. 483 (1954); See further James A Goldston, 'The unfulfilled promise of educational opportunity in the United States and Europe: From Brown v Board to DH and Beyond' in J Bhabha, A Mirga, and M Matache (eds.) *Realizing Roma Rights.* (Univ of Pennsylvania Press 2007) 163-184.
[66] *Centre on Housing Rights and Evictions (COHRE) v. France*, No. 63/2010.
[67] Council of Europe: Committee of Ministers, *Recommendation No R (2000) 4 of the Committee of Ministers to member States on the Education of Roma/Gypsy Children in Europe*, 3 February 2000, R (2000) 4.
[68] *Orsus* (n 62) para. 168.
[69] *Horvath and Kiss v Hungary* App 1146/11, 2013.
[70] *Ibid,* para 7
[71] *Ibid,* para.116; Helen O'Nions, 'Warehouses and Window-Dressing: A Legal Perspective on Educational Segregation in Europe' (2015) 1 Zeitschrift für internationale Bildungsforschung und Entwicklungspädagogik, 15.
[72] *Lakatosova and Lakatos v Slovakia* App 655/16, 2018.
[73] *Balazs v Hungary* App 15529/12 2016.
[74] *MF v Hungary* App 45855/12. 2016.
[75] *Fedorchenko and Lozenko v Ukraine* App 387/03, 2012.
[76] *Ibid,* para. 33
[77] The evidence submitted to the Committee of Ministers is <http://www.errc.org/uploads/upload_en/file/4199_file1_rule-9-submission-fedorchenko-lozenko-v-ukraine-20-april-2020.pdf>.
[78] *Bekos and Koutropoulos v Greece* App 15250/02, 2005.
[79] See for example *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, C-83/14, 16th July 2015 where the CJEU found discrimination under the Racial Equality Directive in a case concerning Romani people in Bulgaria. Once evidence of discrimination has been provided the burden shifted to the respondent state to disprove or otherwise justify the conduct. See also *Andre Lawrence Shepherd v Bundesrepublik Deutschland* C472/13 11th Nov 2014.
[80] Anne Smith and Rory O'Connell 'Transition, Equality and Non-Discrimination' in Smith and O'Connell (eds) *Transitional Jurisprudence and the European Court of Human Rights* (Cambridge Univ Press 2011) 185-207, 196.
[81] *Velasquez Rodriguez v Honduras* 29th July 1988 (Ser.C) no 4, para 134.
[82] *Balogh v Hungary* App 47940/99, 2004.
[83] *Anguelova v Bulgaria* App 38361/97, 2002.
[84] *Velikova v Bulgaria* App 41488/98, 2000.
[85] *Anguelova* (n 83) Judge Bonello, para 2.
[86] *Nachova and Others v Bulgaria* 43577.98 and 43579/98, ECHR 2005, para 172.
[87] *Ibid* para. 158
[88] *Ibid* para 169-171
[89] *Ibid* para 157
[90] Smith and O'Connell (n 80) 199
[91] *Beganovic v Croatia* App 46423/06, 2009
[92] *Sashov v Bulgaria* App 63106/00, [2010] ECHR 899
[93] *Orsus* (n 62) paras. 147-148
[94] *Chapman v United Kingdom* App 27238/95, 2001
[95] *Ibid* para. 73
[96] This argument was also made in *Nachova and Others v Bulgaria* (n56) para .56.
[97] Council of Europe *Framework Convention on the protection of National Minorities* European Treaty Series No 157, Strasbourg 1.11.1995.
[98] Chapman (n 94), paras. 93; 96
[99] Delcour and Hustrix (n 47) 3
[100] *Buckley v United Kingdom* App 20348/92 European Commission on Human Rights, para 64, (1997) 23 EHRR 101, para 71.
[101] Julie Ringelheim, 'Chapman redux: the European Court of Human Rights and Roma Traditional Lifestyle' in E. Brems (ed.) *Diversity ad European Human Rights: Rewriting judgements of the ECHR* (Cambridge Univ press 2012) 431.
[102] Delcour and Hustrix (n 47) 3.
[103] *Connors v United Kingdom, App No 66746/01, 2004* para. 94; Kristen Henrard, 'The ECHR and the protection of Roma' 2004 European Diversity and Autonomy Papers 5/2004. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1972960
[104] *DH* (n 8) para. 182
[105] Martha Fineman 'Vulnerability and Social Justice' (2019) 53 Valparaiso Law Review 341; B Hoffmaster, 'What does Vulnerability mean?' (2006) 36 Hastings Centre Report, 38.
[106] *VC v Slovakia* App 18968/07, 2011, 146; 179.
[107] L Peroni and A Timmer, 'Vulnerable groups: the promise of an emerging concept in European Human rights Convention Law' (2013) 11 Int Journal of Constitutional Law 1070.
[108] Delcour and Hustrix (n 47) 3.
[109] Kim (n 51)
[110] *Yordanova v Bulgaria* App 25446/06, 2012.
[111] *Winterstein and Others v France* Application no. 27013/07, 2013, para. 148 .
[112] *Burlya and Others v Ukraine* App 3289/10, 2018.
[113] *Hirtu and Others v France* App 24720/13, 2015.
[114] Delcour and Hustrix (n 47) 8.

[115] Kim (n 51) 12; See also Catriona MacKenzie, 'The Importance Of Relational Autonomy And Capabilities For An Ethics Of Vulnerability' In Mackenzie Et al (eds) *New Essays in Ethics and Feminist Philosophy* (OUP 2013) 1, 37.
[116] See discussion above page
[117] Kim (n 51) 13
[118] Gay y Basco 'Picturing 'Gypsies': interdisciplinary approaches to Roma representation' (2008) 22 Third Text 3, 297-303; Peter Vermeersch 'Reframing the Roma: EU Initiatives and the Politics of Reinterpretation' (2012) 38 Journal of Ethnic and Racial Studies 8, 1195-1212.
[119] The Strasbourg Court refers to applicant's dignity in Burlya (n 112) para 134 and VC (n106 para 115.
[120] Sandel (n 49) ; O'Nions (n 50)
[121] Council of Europe, Explanatory Notes to the Framework Convention for the Protection of National Minorities Strasbourg, 1st Nov 1995. European Treaty Series - No. 157
[122] European Roma Rights Centre, 3rd party intervention in *Hysenaj v Albania,* (2016) para 17. <http://www.errc.org/uploads/upload_en/file/third-party-intervention-hysenaj-v-albania-22-august-2016.pdf >.
[123] *Negrea and Others v Romania* App 53187/07, 2018
[124] *Connors* (n 2), para 97
[125] *Bagdonavicius and Others v Russia* App 19841/06, 2016
[126] *Carabulea v Romania* App 45661/99, 2010
[127] *Borbala and Kiss v Hungary* 59214/11, 2012
[128] *Koky and Others v Slovakia* 13624/03, 2013
[129] *Fogarasi and Others v Romania* App 67598/10, 2017
[130] EU Fundamental Rights Agency, *Data in Focus: The Roma. European Minorities and Discrimination Survey* 2009. <https://fra.europa.eu/sites/default/files/fra_uploads/413-EU- MIDIS_ROMA_EN.pdf
[131] *Stoica v Romania* App 42722/02, 2008
[132] *Moldovan and Others v Romania* App 41138/98 and 64320/01, 2015.
[133] Adam Weiss, 'Weckles: the New Minority Making a Joke of Roma Rights' (European Roma Rights Centre, 10th April 2017) < http://www.errc.org/news/weckles-the-new-minority-making-a-joke-of-roma-rights >.
[134] Mathias Moschel, 'Is the European Court of Human Rights' Case Law on Anti-Roma Violence 'Beyond Reasonable Doubt'? (2012) 12 Human Rights Law Review 3, 479-507.
[135] App **4149/04 & 41029/04, 2012.**
[136] *Ibid* para. 45.
[137] UNCERD (n 1), para 9 calls on States: 'To endeavour, by encouraging a genuine dialogue, consultations or other appropriate means, to improve the relations between Roma communities and non- Roma communities, in particular at local levels, with a view to promoting tolerance and overcoming prejudices and negative stereotypes on both sides, to promoting efforts for adjustment and adaptation and to avoiding discrimination and ensuring that all persons fully enjoy their human rights and freedoms.'
[138] Council of Europe Committee of Ministers High Level Meeting on Roma, *The Strasbourg Declaration on Roma* CM (2010) 133 final 20 October 2010.
[139] Cases declared in admissible for failure to exhaust domestic remedies include *Memet v Romania* App 16401/16; *Kosa v Hungary* App 53461/15, 2017; *Andarov and Others v Bulgaria* App no. 33586/15, 2016; *Petrache and Tranca v Italy* App 15920/16, 2016; *Gratian Lupu v Romania* App 36250/09, 2015; *Dimitrova and Others v Bulgaria* App 44862/04, 2017.
[140] App 78916/11, 2016 pending.
[141] European Roma Rights Centre, 3rd party intervention. <http://www.errc.org/cikk.php?cikk=4511>.
[142] App 13102/02, 2010; Carmelo Danisi, 'How far can the ECtHR go in The Fight Against Discrimination? Defining New Standards in its Non-Discrimination Jurisprudence' (2011) 9 Int. Journal of Constitutional Law 3, 793-807
[143] N135 , 500-501, Judge Bonello (dissenting) *Anguelova v Bulgaria*, para. 10
[144] Martha Fineman. 'Equality, Autonomy, and the Vulnerable Subject In Law And Politics' in M Fineman, and A Grear (eds.) *Vulnerability: Reflections on A New Ethical Foundation for Law and Politics,* (2013 Routledge) 13-27; Fineman 'On Vulnerability and the Law' (*New Legal Realism Project*, Nov 30th 2015) <http://newlegalrealism.org/2015/11/30/fineman-on-vulnerability-and-law/>
[145] *Lingurar v Romania* App 48474/14, 2019.
[146] Janneke Gerards, 'The Discrimination Grounds of Article 14 of The European Convention on Human Rights' (2013) 13 Human Rights Law Review 99, 101.
[147] Parliamentary Assembly *Legal Situation on the Roma in Europe* Doc 9387 Council of Europe 2002.
[148] Ringelheim (n 101) 443
[149] *Ibid* 440
[150] Anne Smith and Rory O'Connell 'Transition, Equality and Non-Discrimination' in Smith and O'Connell (eds) *Transitional Jurisprudence and the European Court of Human Rights* (Cambridge Univ press 2013) 197.