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Protection against Violence and Discrimination: The Case of Roma Victims in Member States of the Council of Europe

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This article focuses on the key role and contribution of the European Court of Human Rights (ECHR) in protecting the rights of Roma against systemic patterns of violence and discrimination. It investigates the suitability of individual applications in front of international monitoring organs as a litigation strategy to address structural problems emerging at the national level, such as widespread attacks against members of vulnerable minority groups, and puts forward that this strategy has demonstrated to be successful in the case of Roma. The analysis shows that complaints introduced before the ECHR have at the same time helped in providing redress to individual victims, uncovering patterns of systemic abuses, offering solutions to prevent their resurgence, effectively encouraging the adoption of protective measures domestically, and developing the competences of international supervisory mechanisms. As such, it constitutes the most effective avenue so far to right those societal wrongs.

Keywords: *ECHR case law, Roma victims, violence, discrimination.*

Introduction

Roma are one of the most vulnerable minorities in Europe, as their human rights are violated on a regular basis and state authorities are often accomplice. Allegedly 'neutral' laws are used to marginalise, if not criminalise, their identity and way of life. Economic insecurity further contributes to the exclusion of

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Roma communities from effective participation in the broader society. In this general context of disrespect and ostracism, the efforts of the European Union have been largely redundant. Regrettably, the idiosyncrasies of the EU accession process involve the implementation of double-standards on an overwhelming scale between present member states and candidate countries. With respect to the rights of exposed minorities, chiefly including Roma communities, it results in exclusively imposing adequate standards of protection to new member states and totally ignoring the equally (and sometimes more) appalling situation prevailing in many older member states, with devastating effects. Uncritically embracing double-standards as a matter of policy seriously undermines the credibility and efficiency of EU attempts at tackling the magnitude of the abuses suffered by Roma people across the union. Besides, it has resulted in conceptualising the whole question as an Eastern European problem, which Western states could loftily 'solve' outside of their national borders. The Italian and French governments exploited this wrongful presupposition to its limits. Both administrations adopted measures ordering the (illegal) mass expulsion Roma coming from other member states, respectively through the enactment of a decree for the deportation of European citizens and more individualised notices to leave the national territory. Institutionalised harassment, multiple acts of violence and the destruction of entire Roma camps accompanied the onslaught in the two countries. Moreover, the Common EU Framework for Roma Integration, which tries to remedy the shortcomings of the current legal structures by the endorsement of a shared strategy for all member states, lacks coercive bite and fails to include members of the Roma minority in the decision-making process.¹

In contrast, international human rights provisions protecting individual and minority rights offer a valuable path towards empowerment and equality. As such, they have been increasingly resorted to by Roma people and non-governmental organisations representing their interests. While a deconstruction of the legal concept of national self-determination and the recognition of a superseding notion of individual self-determination would greatly help in giving a voice to stateless minorities like the Roma (Acton, Gheorghe, 2001: 67), litigation and lobbying strategies based on a recognition of the interconnection and necessary complementariness of the human rights and

¹ For a critical analysis of the shortcomings of the EU legal regime, including double-standards between member states and non-inclusion of Roma see Pusca, 2012.

minority rights discourses allow to tackle a substantial part of the problems inherent to the current *status quo* (O'Nions, 2007). The transnational character of the Roma minority and the ominousness of the life conditions of its members call for an objective point of reference and free-standing assessment. In the face of the striking heterogeneity of the national legislative and judicial responses to the plight of Roma communities, and the lack of suitable unifying efforts at the EU level, international avenues constitute a much needed factor of integration of European legal orders and provide an external benchmark for the evaluation of practices whose comparison would otherwise be seriously hampered by their disparity.

The pervasiveness and gravity of the abuses committed against Roma people in the majority of the Council of Europe member states is not due to a lack of appropriate legal protection, but to a violation of existing national provisions and breaches of international commitments. Membership in the Council of Europe is conditioned to the implementation of a comprehensive human rights regime that includes a wide-ranging system of protection of minority rights. In addition to the European Convention on Human Rights and the European Social Charter, the Council of Europe human rights structure comprises two treaties that specifically consecrate the rights of minority groups in Europe: the 1992 European Charter for Regional or Minority Languages and the 1995 Framework Convention for the Protection of National Minorities, which integrate international obligations under pre-existing United Nations agreements or declarations.² Besides, the Parliamentary Assembly of the Council of Europe (PACE) has adopted several recommendations and resolutions concerning the situation and rights of Roma.³

Article 6 § 2 of the Framework Convention for the Protection of National Minorities obliges states parties "to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity". It replicates nearly *verbatim* Article 40 § 2 of the Copenhagen document of the Conference for Security and Cooperation in Europe, in which context "the particular problems of Roma (gypsies)" had been underlined (CSCE, 1990, article 40).

² For an analysis of the limited contribution of the latter three treaties to the improvement of the situation of Roma, see Ignatou-Sora, 2010: 82-183.

³ Council of Europe Parliamentary Assembly, Recommendations Nos 563 (1969), 1203 (1993), 1557 (2002), 1633 (2003), 1924 (2010), 1941 (2010) and 2003 (2012); Resolutions 1740 (2010), 1760 (2010) and 1768 (2010).

Article 6 § 2 should be read in combination with Article 4 of the Framework Convention that provides equal protection of the law to members of national minorities. The personal scope of Article 6 is broader, in the sense that it protects against discrimination and hatred toward people residing in states parties and not solely the members of minority groups, and it consecrates the negative and penalising aspect of complementary provisions. The Advisory Committee charged with monitoring the respect of the relevant international obligations demands that states prosecute and punish acts of discrimination and hate crimes (Gilbert, 2005: 187-191). Institutionalised racism and discriminatory practices in police investigations run counter to states duties, and remedies against incitement to hatred must be effective.⁴ Likewise, a general recommendation of the Committee on the Elimination of All Forms of Racial Discrimination on discrimination against Roma prohibits impunity and commands the prompt investigation and punishment of discriminatory or violent attacks against Roma.⁵

Whereas one might have expected that respect for the rights of the Roma minority and its members would have substantially improved after the adoption of this extensive protection scheme, their living conditions and security have actually worsened over the last two decades. In 2012, the Committee of Ministers of the Council of Europe adopted a Declaration on the Rise of Anti-Gypsyism and Racist Violence against Roma in Europe that stigmatises the recrudescence of the phenomenon. In effect, Roma people are the usual victims of relentless discrimination, brutal assaults, widespread civil violence and pogroms. In 2000, the (then) High Commissioner on National Minorities of the Organisation for Security and Cooperation in Europe (OSCE) already denounced that “these are not isolated incidents, but widespread practices – sometimes systematic and on occasion systemic”. Instead of preventing or repressing the attacks, national police forces contribute to the general climate of impunity and are often implicated in the abuses. Roma people “encounter police violence in almost any [...] everyday life situation” in most OSCE member states, cases of violence are hardly ever investigated or prosecuted and

⁴ Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities, *Opinion on Slovakia*, ACFC/INF/OP/I (2001) 001, 22 Sep. 2000, §§ 28-29; *Opinion on Romania*, ACFC/INF/OP/I (2002) 001, 6 Apr. 2001, §§ 40-42; *Opinion on the United Kingdom*, ACFC/INF/OP/I (2002) 006, 30 Nov. 2001, § 52.

⁵ CERD, *General Recommendation No 27 (57) on Discrimination against Roma*, 16 Aug. 2000, UN Doc. CERD/A/55/18, §§ 12-16.

the victims do not have access to adequate legal redress (Van der Stoel, 2000: 3, 37-38 and 41-45). Subsequently, the OSCE adopted a comprehensive policy document in order to help states ensure the respect of the rights of Roma (OSCE Permanent Council, 2003: §§ 8-10 and 16-18). However, ensuing legislative developments have not contributed to any significant improvement of the situation on the ground and it is still characterised by “a disturbing number of hate crimes against Roma, the use of extremist anti-Roma rhetoric, and continuing reports of police ill-treatment” (Lenarčič, 2013: 10-11).

The present contribution investigates the means and methods adopted by the ECHR to counter systemic patterns of anti-Roma violence and discrimination. This special attention is motivated by the extreme gravity of the sheer barbaric abuses sanctioned in these cases, the fact that the violations they denounce are symptomatic of rampant and structural anti-Roma racism and prejudices in most European societies, the fundamental place occupied by the infringed rights at the top of the rights hierarchy and the novelty and activism of the related jurisprudence. In line with its acknowledgement of the defencelessness of Roma and the ensuing necessity to grant them special protection,⁶ the ECHR has elaborated a set of innovative techniques to interpret the terms of the Convention in a much more inclusive fashion than originally intended. This proactive attitude has, in turn, been extended to cover the basic rights of other individuals and more generally uphold fundamental freedoms and entitlements. The following two sections study violations of the rights to life and physical integrity of members of the Roma minority in several member states of the Council of Europe. In this respect, the ECHR has condemned deaths and ill-treatments at the hands of the police forces, the complicity of state officials and institutions in private hate crimes and the forced sterilisation of Roma women. The last section examines the jurisprudence of the ECHR related to the fight against discrimination, marginalisation and total exclusion of Roma people from all aspects of societal life.

⁶ *DH et al. v. Czech Republic* [Grand Chamber], 13 Nov. 2007, §§ 181-182; *Muñoz Diaz v. Spain*, 8 Dec. 2009, § 61; *VC v. Slovakia*, 8 Nov. 2011, §§ 146 and 177; *Aksu v. Turkey* [Grand Chamber], 15 Mar. 2012, §§ 44 and 75; *NB v. Slovakia*, 12 June 2012, §§ 96 and 121; *IG, MK and RH v. Slovakia*, 13 Nov. 2012, §§ 123, 143 and 165; *Balázs v. Hungary*, 20 Oct. 2015, § 53.

Fighting anti-Roma violence by the police

Roma prisoners are brutally treated on a regular basis and even summarily executed when under arrest or in police custody (Ndiaye, 1996: §§ 81, 161, 406). The ECHR has been seized of numerous cases of police violence against Roma, including cases in which the national authorities participated in pogroms,⁷ burnt alive an entire family,⁸ assassinated a man in his courtyard,⁹ kicked a pregnant woman, leading to her miscarriage,¹⁰ and seriously injured a disabled teenager in a public place.¹¹ In several instances, the victims were severely beaten, tortured¹² or extra-judicially executed in police custody¹³ and army conscripts of Roma origin have been murdered during a military police attempt to arrest them.¹⁴ The monitoring organs of the Council of Europe have resorted to various strategies in order to counter instances of institutional racism and systemic complicity in these abuses, as well as in private hate crimes;¹⁵ some of which constitute innovative and proactive interpretations of the terms of the treaty and have significantly helped in developing the ECHR case law.

With respect to police brutality, the ECHR has been more willing to recognise a material infringement of Articles 2 and 3 of the Convention in the absence of domestic investigations or in cases where they were inadequate. The burden of proof is switched, when a healthy person is found dead or suffers from a physical trauma right after being kept in police custody. The defending state is responsible under Article 2 or 3 of the Convention, unless it can clarify coherently the occurrence of the injuries. The same applies in other

⁷ *Moldovan et al. v. Romania*, 30 Nov. 2005.

⁸ *Fedorchenko and Lozenko v. Ukraine*, 20 Sept. 2012.

⁹ *Cobzaru v. Romania (No 2)*, 25 June 2013.

¹⁰ *Petropoulou-Tsakiris v. Greece*, 6 Dec. 2007.

¹¹ *Stoica v. Romania*, 4 Mar. 2008.

¹² *Assenov et al. v. Bulgaria*, 28 Oct. 1998; *Balogh v. Hungary*, 20 Oct. 2004; *Bekos and Koutropoulos v. Greece*, 13 Dec. 2005; *Cobzaru v. Romania*, 26 July 2007.

¹³ *Velikova v. Bulgaria*, 18 May 2000; *Anguelova v. Bulgaria*, 13 Sep. 2002; *Mižigárová v. Slovakia*, 14 Dec. 2010.

¹⁴ *Nachova et al. v. Bulgaria*, 26 Feb. 2004; [Grand Chamber], 6 July 2005.

¹⁵ *Šečić v. Croatia*, 31 May 2007; *Angelova and Iliev v. Bulgaria*, 26 July 2007; *Koky et al. v. Slovakia*, 12 June 2012; *Balázs v. Hungary*, 20 Oct. 2015.

suspicious cases, like when only the authorities can relate the circumstances of the events or the applicant “raises an arguable claim” that public agents have mistreated her. Secondly, the ECHR considers that Articles 2 and 3 of the Convention enshrine rights so primordial that their respect mandates a serious domestic investigation of all cases in which they might have been violated. The procedural facet of both dispositions serves to fill the evidentiary gap when the ECHR faces difficulties in determining the occurrence of a substantial breach of these provisions, due to a (partial) failure on the side of the national law enforcement or judiciary to treat the victims’ complaints adequately and in a reasonable time. In cases of allegations of excessive use of force by the police, the inquest must assess and establish whether it was justified in the circumstances in hand. Public prosecutors have the obligation to start an enquiry *proprio motu*, as soon as they are aware of the risk that state officials participated in the extra-judicial execution or ill-treatment of persons under their supervision. States that fail to satisfy these supplementary obligations are then condemned for breach of the procedural aspects of Articles 2 and 3. Articles 2 and 3 read conjointly to Article 1 of the Convention entail “an effective official investigation [...] capable of leading to the identification and punishment” of the guilty parties. Guarantees essential to its effectiveness include the “thorough, impartial and careful” nature of the investigation and the investigators’ independence from the alleged perpetrators.¹⁶

Thirdly, the importance of the inalienable rights enounced in Articles 2 and 3 justifies increased duties under Article 13 and imposes on states to undertake an objective and effective investigation of all claims of violations. The subsequent inquest must be capable of leading to the determination of the authors of the abuses (and their punishment) and it should involve the applicant. Whereas a monetary compensation of victims is compulsory, its payment cannot substitute the institution of criminal proceedings; civil actions against the state and the indemnification of the victims or their families do not suffice. Although this prescription is not explicitly inserted in the

¹⁶ *Assenov et al. v. Bulgaria*, 28 Oct. 1998, §§ 101-106; *Velikova v. Bulgaria*, 18 May 2000, §§ 70 and 78-84; *Anguelova v. Bulgaria*, 13 June 2002, §§ 110-111, 136-140 and 149; *Nachova et al. v. Bulgaria*, 26 Feb. 2004, §§ 116-119; *Balogh v. Hungary*, 20 Oct. 2004, §§ 47-52; *Nachova et al. v. Bulgaria* [Grand Chamber], 6 July 2005, §§ 110-113; *Bekos and Koutropoulos v. Greece*, 13 Dec. 2005, §§ 47-48 and 53; *Cobzaru v. Romania*, 26 July 2007, §§ 74-75; *Petropoulou-Tsakiris v. Greece*, 6 Dec. 2007, §§ 39 and 43-54; *Stoica v. Romania*, 4 Mar. 2008, §§ 67-81; *Mižigárová v. Slovakia*, 14 Dec. 2010, §§ 84-104; *Fedorchenko and Lozenko v. Ukraine*, 20 Sept. 2012, §§ 41-49; *Cobzaru v. Romania (No 2)*, 25 June 2013, §§ 55 and 71-76.

text of the Convention, the ECHR considers that the concept of an effective remedy necessarily implies that a simple financial indemnity does not constitute a sufficient compensation for the victims.¹⁷ The criteria that condition the adequacy of the inquest are alternatively (and unsystematically) subsumed under the procedural branch of Articles 2 and 3, Article 13 or both counts, in different judgements. Fourthly, these procedural duties produce additional effects when combined with Article 14 of the Convention. The obligation to effectively investigate arbitrary deprivations of life and ill-treatments without discrimination entails that the investigations must “unmask any racist motive” or possible causal link. When the responsible authorities do not exhaust all available means in order to determine the role of ethnic hatred, discriminatory attitudes and prejudices in the commission of (public or private) crimes, they fail to comply with their international obligations under Article 14. Here again, the Court may decide to draw negative inferences from state agents’ negligence in discharging their functions and switch the burden of proof, in its evaluation of the state’s liability under the procedural branch (and sometimes also the substantial branch) of Article 14. In this respect, while non-governmental reports of systemic anti-Roma violence at the hands of state officials and notorious lack of redress against discriminatory attacks do not constitute sufficient evidence *per se* to ascertain that racism played a causal role in police abuses, this background compels the investigators to exercise more vigilance when they are investigating the motives of violent incidents against individual members of minority groups.¹⁸

The ECHR condemned Romania for its failure to provide redress and acceptable living standards to the victims of a 1993 anti-Roma pogrom. The ECHR judged that the government’s contribution to the continued feelings of insecurity of the applicants seriously violated Article 8 of the Convention, while the abysmal living conditions and official discriminatory attitudes to which they were subjected run counter to Article 3, as well as Articles 6, 8 and

¹⁷ *Assenov et al. v. Bulgaria*, 28 Oct. 1998, § 117; *Velikova v. Bulgaria*, 18 May 2000, §§ 89-90; *Angelova v. Bulgaria*, 13 June 2002, §§ 161-162; *Balogh v. Hungary*, 20 Oct. 2004, § 62; *Cobzaru v. Romania*, 26 July 2007, §§ 82-83.

¹⁸ *Nachova et al. v. Bulgaria*, 26 Feb. 2004, §§ 157-163 and 169; *Nachova et al. v. Bulgaria* [Grand Chamber], 6 July 2005, §§ 157 and 161-168; *Bekos and Koutropoulos v. Greece*, 13 Dec. 2005, §§ 64-65 and 69-75; *Angelova and Iliev v. Bulgaria*, 26 July 2007, §§ 115-117; *Cobzaru v. Romania*, 26 July 2007, §§ 89-101; *Petropoulou-Tsakiris v. Greece*, 6 Dec. 2007, §§ 62-66; *Stoica v. Romania*, 4 Mar. 2008, §§ 118-132; *Fedorchenko and Lozenko v. Ukraine*, 20 Sep. 2012, §§ 64-71; *Balázs v. Hungary*, 20 Oct. 2015, §§ 52-55 and 69-76.

14 combined.¹⁹ Later complaints concerning similar abuses were struck off the list of cases after the government acknowledged the breaches of the Convention, compensated the victims and adopted general measures to remedy the prior failures of the system in providing redress for such abuses. The Committee of Ministers has been monitoring, in its executive capacity, the effectiveness of the reforms undertaken.²⁰

Fighting anti-Roma violence by other (public or private) actors

The widespread forced sterilisation of Roma women constitutes another grave assault on their rights to physical integrity, human treatment and dignity. Whereas the Czech ombudsperson and national courts have condemned this abysmal practice,²¹ a series of complaints were brought in Strasbourg in relation to the forced sterilisation of Roma women in Slovakia. The ECHR found a violation of Articles 6 and 8 of the Convention, due to the absence of legal safeguards protecting the reproductive rights of Roma women and shortcomings in the national proceedings. In particular, the interdiction to obtain photocopies of their own medical records restricted disproportionately their capacity to defend their claims adequately in front of a tribunal.²² A comparable case against the Czech Republic was struck off pursuant to a friendly settlement.²³ In addition, the ECHR condemned Slovakia for breach of Article 3. It castigates the paternalism of the involved doctors and medical personnel, in violation of the applicants' autonomy of moral choice as protected under the terms of the Convention. It refers to the vulnerability of the Roma minority as a population group. It takes into account ostra-

¹⁹ *Moldovan et al. v. Romania*, 30 Nov. 2005, §§ 102-113 and 139-140.

²⁰ *Gergely v. Romania*, 26 Apr. 2007; *Kalanyos et al. v. Romania*, 26 Apr. 2007; *Tanase et al. v. Romania*, 26 May 2009.

²¹ Ostrava District Court, *Ferencikova v. Vitkovicka Hospital*, 11 Nov. 2005; European Roma Rights Centre (2007) *Submission to the United Nations Human Rights Committee Concerning Implementation of the International Covenant on Civil and Political Rights in the Czech Republic*, § IV.3.7, referring to a decision adopted by a court in Plzen in 2000.

²² *KH et al. v. Slovakia*, 28 Apr. 2009, §§ 44-58 and 65-68; *VC v. Slovakia*, 8 Nov. 2011, §§ 140-142, 145 and 152-154; *NB v. Slovakia*, 12 June 2012, §§ 95-98; *IG, MK and RH v. Slovakia*, 13 Nov. 2012, §§ 142-145.

²³ *RK v. Czech Republic*, 27 Nov. 2012.

cism by the Roma community as an aggravating factor of the lasting suffering caused by sterilisation and underlines that their inability to conceive children severely diminished the social position of women within Roma communities, causing them some mental distress. It concludes that, even though the medical staff bore no ill intent, their gross disregard for the applicants' "right to autonomy and choice as a patient" and their "human freedom and dignity" amounted to a substantive breach of Article 3.²⁴ With respect to Slovakia's procedural obligations under Article 3, the ECHR recalls the general principles elaborated in cases of police violence and hate crimes, albeit with a notable qualification. In relation to claims of medical negligence or malpractice, the positive duty of investigation and compensation does not automatically entail the availability of criminal remedies. In their stead, civil proceedings are appropriate where the medical personnel did not act in bad faith or with the intent to mistreat the applicant, as long as they ascertain the responsibility of the implicated doctors, award adequate damages to the victim and are publicised. In any event, both civil and criminal trials must meet "the requirement of promptness and reasonable expedition".²⁵ In the absence of bad faith on the part of the physicians or evidence that the hospital staff acted out of racist motives, the Court considered that an organised policy of sterilisation of Roma women without their informed consent could not be established (even though they were predominantly affected by such abuses) and refused to further investigate the applicants' claims under Article 14 of the Convention.²⁶

The ECHR applies the same proactive judicial developments to cases of unsanctioned private abuses, through the imposition of a positive obligation for the state to guarantee the respect of human rights by all members of society. The ECHR defined the positive duties of public authorities in the face of hate crimes in a case introduced by Šemso Šečić against Croatia. The applicant was attacked by a gang of skinheads and seriously injured, during a wave of violent incidents targeting Roma people in and around Zagreb. In light of the delinquent circumstances that surrounded the beating, the ECHR developed that the conjunction of Articles 1 and 3 of the Convention imposes on states

²⁴ *VC v. Slovakia*, req. No 18968/07, 8 Nov. 2011, §§ 106-119; *NB v. Slovakia*, 12 June 2012, §§ 74-80; *IG, MK and RH v. Slovakia*, 13 Nov. 2012, §§ 120-123 and 125.

²⁵ *VC v. Slovakia*, req. No 18968/07, 8 Nov. 2011, §§ 123-128; *NB v. Slovakia*, 12 June 2012, §§ 84-87; *IG, MK and RH v. Slovakia*, 13 Nov. 2012, §§ 129-133.

²⁶ *VC v. Slovakia*, 8 Nov. 2011, §§ 177-180; *NB v. Slovakia*, 12 June 2012, §§ 121-123; *IG, MK and RH v. Slovakia*, 13 Nov. 2012, §§ 165-167.

parties to adopt “measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals”. In addition, positive procedural obligations under Article 3 (whether read or not in conjunction with Article 14) do not only pertain to the penalisation of public abuses but also apply in the frame of private offences. The formal police enquiry into the assault mostly amounted to a perfunctory exercise, lingered for years, did not examine the racial dimension of the facts and never led to the identification of the culprits. As such, the Court judged that the Croatian authorities had violated the applicant’s rights under Article 3 and under Articles 3 and 14 combined of the Convention.²⁷

In later judgements concerning infringements of Articles 2 and 3 of the Convention, the ECHR restated its condemnation of racially biased police investigations into hate crimes and the failure to hold the culprits accountable for racially motivated crimes.²⁸ In this context, it considers that the discontinuation of investigations into the racist motivation of an assault and ‘underqualification’ of the attack as disorderly conduct violate Article 14 read in conjunction with Article 3 of the Convention, even when the hateful intent could not be proven beyond reasonable doubt.²⁹ In so doing, the Court oversteps the boundaries of prosecutorial discretion at the cost of imposing upon municipal authorities its own assessment of the facts of the case, gathered evidence and individual guilt. As underlined in a dissenting opinion, this runs afoul of the presumption of innocence and established principles of criminal law.³⁰ Finally, one must deplore the recent decision of the ECHR to condemn the inadequacy of police investigations into the verbal aggression and threatening of a Romani woman by armed members of a paramilitary formation as a breach of Article 8 of the Convention, rather than a violation of Articles 3 and 14 combined, on account of the alleged lack of severity of the abuse. It minimises the degrading nature of racist violence and it cannot be reconciled with the ruling that the absence of redress against racially motivated intimidation failed to “provide adequate protection to the applicant against *an attack on her integrity*” [I underline], in contravention to states’ positive obligations under Article

²⁷ *Šečić v. Croatia*, 31 May 2007, §§ 52-59 and 66-70.

²⁸ *Angelova and Iliev v. Bulgaria*, 26 July 2007, §§ 93-105 and 116; *Koky et al. v. Slovakia*, 12 June 2012, §§ 213-215 and 239-240; *Fedorchenko and Lozenko v. Ukraine*, 20 Sept. 2012, § 41.

²⁹ *Balázs v. Hungary*, 20 Oct. 2015, §§ 58-76.

³⁰ *Balázs v. Hungary*, 20 Oct. 2015, J.F. Kjolbro, Dissenting Opinion, § 6.

8.³¹ Indeed, Article 3 of the Convention traditionally guarantees the respect of people's physical and psychological integrity while Article 8 defends their right to private and family life. A separate opinion correctly criticises the majority for refusing to examine the merits of the application under Articles 3 and 14. It also judiciously recalls that enhancing the open texture of the notion of private life in the Convention, by subsuming ethnic identity under the scope of a disposition designed to protect individual autonomy and secrecy in personal affairs, undermines legal certainty and the international rule of law.³²

In relation to the interaction between freedom of association and the protection of members of the Roma minority in Hungary, the ECHR judged that the dissolution of a paramilitary group did not violate Article 11 of the European Convention because its activities intimidated and harmed the Roma minority, even though no physical violence had been perpetrated. The Court did not consider that the application constituted an abuse of the right of petition under Article 17 of the Convention, since the dissolved association had been legally registered and did not aim for the destruction of protected rights or bear totalitarian ambitions. In contrast, its dissolution respected the conditions listed in Article 11 § 2 of the Convention. The organisation backed paramilitary demonstrations and rallies, where participants wore uniforms and insignias reminiscent of the Nazi movement responsible for the extermination of the Hungarian Roma minority, and specifically targeted Roma people and so-called 'gypsy criminality'. As such, its activities created anti-Roma social tensions and amounted to the intimidation of a particularly vulnerable minority group. The ECHR did not only ratify the decisions of the domestic courts, it further developed that the failure to disband the association could have been construed as an official legitimisation of the impending climate of violence.³³ On this basis, national authorities might be held liable for breaches of their international duty to protect minorities against discrimination and threats of abuses when they omit to take actions against racist groupings. In this light, a concurring opinion emphasised the relation between the facts of the case, the existence of an international obligation to penalise hate speech and the special protection that the Court offers to the Roma minority under

³¹ *RB v. Hungary*, req. No 64602/12, 12 Apr. 2016, § 91.

³² *RB v. Hungary*, Wojtyczek, Dissenting Opinion.

³³ *Vona v. Hungary*, 9 July 2013, §§ 33-39 and 63-72.

Article 14 of the European Convention.³⁴ However, the police benefits from a large margin of appreciation regarding operational choices about the maintenance of public security and the dispersal of paramilitary demonstrations.³⁵

In contrast, the ECHR dismissed a claim that government funded publications purportedly insulted the Roma minority in Turkey, as the publications as a whole did not intend to produce such a result but on the contrary to scientifically depict prejudicial public perceptions of the Roma community. The national courts had not exceeded their margin of appreciation in striking a balance between the rights to private life and freedom of expression, even if the vulnerability of Roma people justifies that special attention is given to allegations of discrimination and stereotyping.³⁶ By opposition, a dissenting judge relied on reports from international organisations documenting the overwhelming exposure of Roma to exclusion and discrimination in order to sustain that the government's support of the publications amounted to a breach of Article 8, and possibly of Articles 8 and 14 combined, of the Convention.³⁷

Fighting anti-Roma discrimination

Roma applicants have raised charges of unequal and discriminatory treatment in most instances brought in front of the ECHR. In addition to breaches of Articles 2 and 3 of the Convention, the ECHR has sanctioned patterns of discrimination in relation to the rights to a fair trial and punishment, education, recognition of marital arrangements and social security benefits and, finally, eligibility.

The discriminatory refusal to suspend the execution of a criminal sentence owing to the ethnic Roma origins of the perpetrator was sanctioned as a breach of Articles 6 § 1 and 14 of the Convention read in combination. The first instance judgement relied on the purported existence of a feeling of impunity among members of minority groups, for whom a suspended condemnation would not constitute an actual condemnation. The ECHR discarded the argu-

³⁴ *Vona v. Hungary*, 9 July 2013, P. Pinto de Albuquerque, Concurring Opinion.

³⁵ *RB v. Hungary*, 12 Apr. 2016, §§ 99-101.

³⁶ *Aksu v. Turkey*, 27 July 2010, (Grand Chamber), 15 Mar. 2012, §§ 74-76 and 88.

³⁷ *Aksu v. Turkey*, 27 July 2010, (Grand Chamber), 15 Mar. 2012 (Grand Chamber), A. Gyulumyan, Dissenting Opinion, §§ 8-10.

ments of the government according to which the litigious motivation targeted society as a whole and the ethnicity of the applicant only played a minimal role in the appreciation of the tribunal. Said tribunal had expressly mentioned her Roma origins from the start of its reasoning and connected the societal feeling of impunity to minority groups, to which she personally belonged. The thesis of an arbitrary difference of treatment in the enjoyment of the right to a fair trial was corroborated in that the prosecutor favoured a suspended sentence and decisive evidence for the defence had been rejected on purely formal grounds. Moreover, higher courts failed to address the serious misgivings raised about the discriminatory character of the ambiguous motives set forth in first instance. In the process, the ECHR underlies that the eradication of racism constitutes a primary goal for multicultural societies.³⁸

The ECHR addressed racial segregation in schooling, and the placement of Roma pupils in 'special' primary schools normally intended for children affected by learning disabilities, in a Grand Chamber judgement concerning a set of applications introduced against the Czech Republic in the so-called 'Ostrava' Case. Whereas the decision taken in first instance denied that the rights of the applicants had been violated, the Grand Chamber reversed this finding and condemned the government for a joint breach of Article 14 of the Convention and Article 2 of the First Protocol. In the process, it referred to related international obligations, including those arising under the Framework Convention for the Protection of National Minorities. In relation to proven differences of treatment, the burden of proof is shifted and the government must provide a justification for any departure from the principle of (formal) equality before the law. In addition, the utmost vulnerability of Roma people implies that "special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases". In this light, the ECHR adopted a number of path-breaking conclusions. Outstandingly, it recognised the existence of a pattern of systemic racial discrimination, as distinct from individual instances or acts of discrimination, and characterised segregation as a form of discrimination. Whenever an apparently neutral norm or policy produces disproportionately prejudicial effects for people belonging to a given ethnicity, it constitutes an indirect form of discrimination against all members of that ethnic group even in the absence of discriminatory intent on the part

³⁸ *Paraskeva Todorova v. Bulgaria*, 25 Mar. 2010, §§ 10 and 40-46.

of the public authorities. In this respect, significant statistics represent a *prima facie* evidence of indirect discrimination and create a legal presumption in favour of the applicants. As a result, the ECHR denounced the state policy as a breach of the Convention without entering into the specifics of the individual cases in hand. Moreover, the crucial function and standing of the ban on racial discrimination imply that it protects a public interest and cannot be waived or renounced upon.³⁹ Subsequently, the ECHR has systematically condemned segregation policies in other member states, where they were placed in 'Roma-only' classes or schools, special classes in annexes of the main school buildings and schools for mentally disabled students.⁴⁰

The ECHR had to pronounce itself on the recognition of the validity of marriages celebrated according to traditional Roma rites in a case introduced against Spain. The ECHR judged that the refusal to grant a survivor's pension to a widow because the national authorities did not recognise the civil effects of Roma marriages amounted to a disproportionate difference in treatment in violation of Article 14 of the Convention read in conjunction with Article 1 of Protocol No 1, which protects the individual right to property and social benefits. Besides, it reproached to the domestic courts their failure to take due account of "the specificities of the Roma minority".⁴¹

Lastly, the ECHR found for the first time a violation of Article 1 of Protocol No 12 in relation to the ineligibility of members of minorities to positions in the tripartite presidency or the second chamber of the parliament at the federal level in Bosnia and Herzegovina. It judged that applicants' ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina violated Article 14 of the Convention taken in conjunction with Article 3 of Protocol No 1, while their ineligibility to stand for election to the Presidency of Bosnia and Herzegovina run counter to the requirements of Article 1 of Protocol No 12. The exclusion did not result directly from anti-Roma prejudices and similarly targeted Jews and other people not belonging to the three majority groups. The ECHR still judged that the challenged interdiction from standing for election was discriminatory, even though the disputed constitutional arrange-

³⁹ *DH et al. v. Czech Republic*, req. 7 Feb. 2006; [Grand Chamber], 13 Nov. 2007, §§ 177 and 181-209.

⁴⁰ *Sampanis et al. v. Greece*, 5 June 2008; *Orsus et al. v. Croatia* [Grand Chamber], 16 Mar. 2010; *Sampani et al. v. Greece*, 11 Dec. 2012; *Horvath and Kiss v. Hungary*, 29 Jan. 2013; *Lavida et al. v. Greece*, 28 May 2013.

⁴¹ *Muñoz Diaz v. Spain*, 8 Dec. 2009, §§ 50-70.

ments are an integral part of the 1995 Dayton Peace Agreement that put an end to the Yugoslav conflict. The Framework Agreement establishes a fragile balance between the warring factions and makes a distinction between, on one hand, the political rights of individuals who declare their affiliation to one of the three 'constituent peoples' (Serbs, Croats and Bosnians) and, on the other hand, those of members of ethnic minorities or persons who did not opt for any affiliation. The ECHR neglected the historical background and general context in which the Bosnian constitution was adopted.⁴² Several individual opinions criticised this oversight and the fact that, by sowing ideals totally divorced from the prevalent national reality in the country and the necessity to avoid the resurgence of an armed conflict in the region, the Court risks to harvest a new civil war and its accompanying cortege of atrocities and massacres.⁴³ One cannot fail to acknowledge the wisdom and sagacity of these reproaches. Whereas the activism of most other decisions relating to the proscription of discrimination is commendable, the ECHR might have been well advised to rely on a more traditional understanding of the margin of appreciation left to state authorities in such a sensitive context.

Conclusion

To sum up, the rights of individual members of Roma minorities are severely trampled upon on a daily basis in all European societies. The creation of an international legal framework protecting the fundamental freedoms and entitlements of individual and minority groups, at the level of the Council of Europe, permits to challenge these abuses from an external position shielded from the widespread adverse prejudices that permeate the municipal legislations and case law. While monitoring the respect of the relevant state obligations under the European Convention of Human Rights, the ECHR has relied on a set of innovative techniques and means of interpretation in order to bypass patterns of official complicity and impunity in front of domestic courts and tribunals. Its jurisprudence finally succeeded in giving a voice to the claims of a traditionally victimised community and it is leading to the gradual improvement of the national

⁴² *Sejdić and Finci v. Bosnia and Herzegovina* [Grand Chamber], 22 Dec. 2009, §§ 50-70.

⁴³ *Sejdić and Finci v. Bosnia and Herzegovina* [Grand Chamber], 22 Dec. 2009, G. Bonello, Dissenting Opinion; L. Mijović and K. Hajiyeve, Partly Concurring and Partly Dissenting Opinion.

legal orders, especially in the spheres of the fight against violence and discrimination. As such, it constitutes the most effective avenue to right those societal wrongs and provide redress to the victims of systemic abuses.

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AXELLE REITER

Zaštita od nasilja i diskriminacije: slučaj romskih žrtava u zemljama članicama Saveta Evrope

Rad se fokusira na ključnu ulogu i doprinos Evropskog suda za ljudska prava u zaštiti prava Roma od sistemskog nasilja i diskriminacije. U radu se analizira podobnost pojedinačnih zahteva podnetih međunarodnim monitoring telima kao pravna strategija za rešavanje strukturalnih problema na nacionalnom nivou, poput rasprostranjenih napada na pripadnike ugroženih manjinskih grupa. U vezi sa tim, ukazano je da se ova strategija pokazala uspešnom u slučaju pripadnika romske populacije. Analiza pokazuje da su žalbe upućene Evropskom sudu za ljudska prava istovremeno pomogle u pružanju obeštećenja pojedinačnim žrtvama, ukazale na obrasce sistemskih kršenja ljudskih prava i u vezi sa njima nude rešenja za njihovo dalje sprečavanje, uz istovremeno efikasno podsticanje usvajanja zaštitnih mera na nacionalnom nivou i razvoj kompetencija međunarodnih mehanizama za nadzor. Kao takva, ova strategija predstavlja najefikasniji način da se isprave te društvene nepravde.

Ključne reči: sudska praksa, Evropski sud za ljudska prava, Romi, žrtve, nasilje, diskriminacija.