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**How has the case law taken by Roma
applicants to the European Court of
Human Rights affected the
interpretation and development of
Article 14 of the European Convention
on Human Rights?**

**Thesis submitted in fulfillment of the
requirements for Degree of Doctor of
Philosophy**

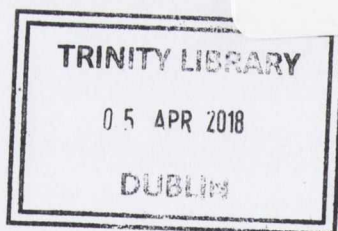
**in the
School of Law, Trinity College Dublin
2017**

Norah Burns

Declaration

I declare that this thesis has not been submitted as an exercise for a degree at this or any other university and it is entirely my own work.

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Summary

This thesis is based on the development of Article 14 of the European Convention on Human Rights in light of the cases taken by Roma to the European Court of Human Rights. Three distinct areas will be covered: Article 14 of the ECHR, theories of equality and three case law sections on Article 14 cases taken by Roma to the Court. This thesis will begin by providing a general introduction to Article 14 in *Chapter 2*. The purpose of this chapter is not to discuss the Roma case law but to discuss the general development of Article 14. The wording of the article and the purpose and nature of the article will be discussed. *Chapter 3* will focus on the formal and substantive models of equality. There are a number of different approaches to the substantive model, which will be introduced such as: the dignity based approach to equality, the substantive disadvantage approach and multidimensional equality. An introduction to intersectionality will then be provided, this will be followed by sub sections on Fredman's conception of substantive equality, structural intersectionality, external and internal discrimination and interlocking oppressions. Affirmative action under the formal and substantive models of equality and the framework of analysis, which will be adopted for discussing the models of equality in each of the three case law chapters, will be provided.

The three case law chapters, namely *Chapters 4, 5 and 6*, will adopt the same structure. Firstly, a background to Roma in relation to anti-Roma violence, forced sterilisation and educational segregation across Europe will be provided. These sections will have both a historic and current focus. These sections will then be followed by a brief but detailed introduction to the seminal cases under each of the case law headings. Short discussions of the case facts provides context for the types of

cases that Roma applicants are bringing before the Court. Each of the chapters will then focus on the particular impact, that that group of cases has had on Article 14. In *Chapter 4* the impact of the anti-Roma violence cases will be looked at under two headings: the impact which this group of cases has had on the burden of proof in Article 14 cases and the recognition by the Court for the first time of procedural and substantive limbs to Article 14 in cases alleging violations of Article 14 in conjunction with Articles 2 and/or 3. This chapter will also look at the lack of a substantive finding of a violation of Article 14 in conjunction with Article 2. In *Chapter 5* the impact of the forced sterilisation cases on the development of Article 14 will focus on the lack of consideration of an Article 14 violation in each of the cases, procedural and substantive violations and the recognition of Roma as a vulnerable minority.

In *Chapter 6* the impact of the educational segregation cases taken by Roma will focus on the recognition by the Court for the first time of indirect discrimination for patterns of racial discrimination in an area of public life, the reliance by the Court on statistical evidence and the clarification by the Court that a lack of statistical evidence will not preclude a finding of indirect discrimination. The Court placing positive obligations on the respondent States to redress systemic discrimination will also be discussed. Each of the case law chapters will conclude by discussing whether there has been a shift to the substantive model of equality and will apply Fredman's conception of intersectionality to the discrimination suffered by the Roma applicants. The overall conclusion to the thesis will provide a summary of the interrelated ways in which each of the case law chapters have contributed to the development of Article 14. The conclusion will also provide critical reflections on the contribution of the Court to Roma rights.

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Abbreviations and Terminology

ECtHR / the Court European Court of Human Rights

ECRI European Commission Against Racism and Intolerance

ERRC European Roma Rights Centre

NGO Non Governmental Organisation

Roma (Including **Gitans, Tsiganes, Manouches, Sinti, Kale** and **Tartere**).

For the purpose of this thesis Roma will include those who are known as Gitans, Tsiganes, Manouches, Sinti and Tartere. It is accepted and acknowledged that the term Roma does not represent a homogenous group, but rather is a term used to encapsulate many disparate groups. While all distinct groups of Roma will be included in this thesis, Travellers from Ireland and Great Britain who are ethnically distinct from Roma/Kale and Sinti will not be focused on in this work. This thesis only looks at those cases brought by individuals citing their Roma ethnicity as the reason for their discrimination.

The word “Rom” can mean “husband” or “man of the Roma ethnic group” depending on the author or the variant of the Romani language being relied upon. Three groups can be seen as being included under the generic understanding of the term Rom: Roma, Kale and Sinti. The majority of Roma speak the Romani language.¹ The group known as Roma can also be divided into Lovari, Burbeti, Churari, Ursari and Kelderash.

In central and eastern Europe and the Balkans the group known as Roma are the most numerous. The Sinti are mainly found in German-speaking countries such as Germany,

¹ Yaron Matras, *The Romani Gypsies* (The Belknap Press of Harvard University Press 2015) 125, Yaron Matras, *I Met Lucky People: The Story of the Romani Gypsies* (Penguin Books 2015) 1-30.

Austria and Switzerland. The Sinti are also found in southern France, Sweden and the Piedmont and Lombardy regions of northern Italy. Sinti in France are referred to as “Manouches”. The word “Manush” means “human being” in Romani. Sinti speak a Germanised version of the Romani language called Sinto. In the Iberian peninsula and southern France Spanish Roma are called Kale. They speak Kaló, a predominantly Spanish language with some elements of Romani. Tartere are a Norwegian and Swedish group of the Romani people who have been resident in Norway and Sweden for 500 years. They have lived in Norway for much longer than a later group of Roma who arrived in the late 19th century.

Historically it was believed that Roma came from Egypt. This premise was based on the fact that in medieval Europe, the whole of Greece, Cyprus and Syria were known as “Little Egypt”. The Turks gave this name to the Izmir region. Therefore, Roma were called “Egyptians”, and in some ancient texts were referred to by names such as “Gitanos”, “Gitans” and “Gypsies”. The group now known as Roma were also confused with a group of magicians and seers known for several centuries in Greece as “Atsinkanos” and “Atsinganos”, the words meaning “untouched/untouchables”.² This name was given to groups of travellers from the east and has remained in use in various countries and languages – “Tsiganes” in French, “Zigenare” in Swedish, “Zigeuner” in German, “Zingari” in Italian and “Ciganos” in Portuguese.³

*** Note: The Council of Europe has used the terms **Roma/Gypsies** for many years. The two terms covered the majority of situations and areas in Europe. In central and eastern Europe the term “Roma” is widely used. The term “Gypsies” in the eyes of

² Jean-Pierre Liégeois, *Roma, Gypsies, Travellers* (Council of Europe Publishing and Documentation Service 1994) 18.

³ Michael Stewart, ‘The Puzzle of Roma Persistence: Group Identity Without a Nation’ in Thomas Acton and Gary Mundy (eds), *Romani Culture and Gypsy Identity* (University of Hertfordshire Press 1997) 84-89.

many European Sinti and Roma is linked with paternalistic and negative stereotypes.⁴ In Hungary, Western Europe and parts of Russia the term “Gypsy” is viewed as acceptable along with its national equivalent such as Tsigane, Cigano, Gitano, etc. The European Court of Human Rights and its Judges refer to applicants before the Court as Roma. The applicants themselves taking cases to the Court refer to themselves as Roma also. Therefore, this thesis will adopt the term Roma due to its lack of causing offence to any individual or group that identifies as Roma/Gypsy and due to its utilisation by the Court.

⁴ Liégeois, *Roma, Gypsies, Travellers* 11 and 15.

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Convention for the Protection of Human Rights and Fundamental Freedoms

Protocol No. 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms Article 5 1(e)-2 Nov 6 1990 repealed by Protocol No. 11 in 1994.

European Convention on Human Rights

Article 2 / 3 / 6 / 8 / 11 /13 /14 / 46 / 48 / Article 2 of Protocol No 1 and Protocols Nos 11 and 12.

Council of Europe

Council of Europe's European Commission against Racism and Intolerance (ECRI) General Policy Recommendation No. 7 2002.

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Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180, 19/07/2000 P. 0022 - 0026, Art. 13

Committee of Ministers

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Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

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Slovakia

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Sweden

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Kiyutin v Russia App no 2700/10 (ECHR, 10 March 2011)

Kleyn and Aleksandrovich v Russia App no 40657/04 (ECHR, 3 August 2012)

Koky and Others v Slovakia App no 13624/03 (ECHR, 12 June 2012)

Koua Poirrez v France App no 9063/80 (ECHR, 30 September 2003)

Kozak v Poland App no 13102/02 (ECHR, 2 June 2010)

Kurić a.o. v Slovenia App no 26828/06 (ECHR, 26 June 2012)

Lăcătuș and Others v Romania App no 12694/04 (ECHR, 13 November 2012)

Lavida and Others v Greece App no 7973/10 (ECHR, 30 May 2013)

Lawless v Ireland App No 332/57 (1961) 1 EHRR 15.

Lingens v Austria App no 9815/82 (ECHR, 8 July 1986)

Lindsay v United Kingdom (1986) 49 D & R 181

Lithgow and Others v The United Kingdom App no 9405/81 (ECHR, 8 July 1986)

Magee v The United Kingdom App no 28135/95 (ECHR, 6 June 2000)

Marckx v Belgium App No 6833/74 (1979) 2 EHRR 330

Marinov v Bulgaria App no 37770/03 (ECHR, 30 September 2010)

Mazurek v France App no 34406/97 (ECHR, 1 February 2000)

Mihaylova and Malinova v Bulgaria App no 36613/08 (ECHR, 24 May 2015)

Mižigárová v Slovakia App no 74832/01 (ECHR, 14 December 2010)

Moldovan and Others v Romania App No 41138/98 and 64320/01 (ECHR, 2 July 2005)

M and Others v Italy and Bulgaria App no 40020/03 (ECHR, 17 December 2012)

Nachova and Others v Bulgaria App nos 43577/98 and 43579/98 (ECHR, 6 July 2005)

National Union of Belgian Police v Belgium App No 4464/70 [1975] ECHR 2

N.B. v Slovakia App no 29518/10 (ECHR, 12 June 2012)

Ognyanova and Choban v Bulgaria App No 46317/99 (ECHR, 23 February 2006)

Okpisz v Germany App no 59140/00 (ECHR, 25 October 2005)

Opuz v Turkey (2010) 50 EHRR 28

Oršuš and Others v Croatia App no 15766/03 (ECHR, 16 March 2010)

Palau-Martinez v France App no 64927/01 (ECHR, 16 December 2003)

Petropoulou – Tsakiris v Greece App No 44803/04 (ECHR, 6 March 2008)

Petrov v Bulgaria App no 15197/02 (ECHR, 22 August 2008)

Pine Valley Developments Ltd and Others v Ireland App no 12742/87 (ECHR, 29 November 1991)

Pla and Puncernau v Andorra 2004-VIII (2006) 42 EHRR 25

Rasmussen v Denmark App no 8777/79 (ECHR, 28 November 1984)

R.K. v the Czech Republic App no 7883/08 (ECHR, 27 November 2012)

Sampani and Others v Greece App no 59608/09 (ECHR, 11 December 2012)

Sampanis and Others v Greece App no 32526/05 (ECHR, 5 June 2008)

Sashov v Bulgaria App no 14383/03 (ECHR, 7 April 2010)

Šečić v Croatia App No 40116/02 (ECHR, 31 August 2007)

Sejdić and Finci v Bosnia and Herzegovina App nos 27996/06 and 34836/06 (ECHR, 22 December 2009)

Smith and Grady v United Kingdom App nos 33985/96 and 33986/96 (ECHR, 27 September 1999)

Soare v Romania App No 24329/02 (ECHR, 22 February 2011)

Sommerfeld v Germany App no 31871/96 (ECHR, 8 July 2003)

Spadea and Scalabrino v Italy App no 12868/87 (ECHR, 28 September 1995)

Sporrong and Lönnroth v Sweden App no 7151/75 (ECHR, 18 December 1984)

Stefanou v Greece App no 2954/07 (ECHR, 4 October 2010)

Stec v The United Kingdom App nos 65731/01 and 65900/01 (ECHR, 12 April 2006)

Stoica v Romania App no 42722/02 (ECHR, 4 March 2008)

Streletz, Kessler and Krenz v Germany App nos 34044/96, 35532/97 and 44801/98 (ECHR, 22 March 2001)

Stubbings and Others v The United Kingdom App no 22083/93; 22095/93 (ECHR, 22 October 1996)

Sulejmanov v The former Yugoslav Republic of Macedonia App no 69875/01 (ECHR, 24 July 2008)

Sunday Times v The United Kingdom (1) App no 6538/74 (ECHR, 26 April 1979)

Tănase v Romania App no 62954/00 (ECHR, 26 May 2009)

Taş v Turkey App no 24396/94 (ECHR, 14 November 2000)

Thlimmenos v Greece App no 34369/97 (ECHR, 6 April 2000)

Timishev v Russia App Nos 55762/00 and 55974/00 (ECHR, 13 March 2006)

Timurtaş v Turkey, no 23531/94, ECHR 2000-VI

Tzekov v Bulgaria App no 45500/99 (ECHR, 23 May 2006)

Van der Mussele v Belgium App no 8919/80 (ECHR, 23 November 1983)

Van Raalte v The Netherlands App no 20060/92 (ECHR, 21 February 1997)

Vasil Sashov Petrov v Bulgaria App No 63106/00 (ECHR, 10 September 2010)

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Velikova and Others v Bulgaria App no 41488/98 (ECHR, 18 May 2000)

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AL Serbia (FC) v Secretary of State for the Home Department [2008] UKHL 42 [22-25]

Clarke v Secretary of State for Environment, Transport, and the Regions [2001] EWHC Admin 800 [5]

Home Secretary v Hindawi [2004] EQCA Civ 1309, [57-83]

R (Cliff) v Home Secretary [2004] EWCA Civ 514 [14-18]

United Nations Committee on the Elimination of Discrimination Against Women

A.S. v. Hungary, Communication No. 4/2004, CEDAW/C/36/D/4/2004

United States

Powell v Pennsylvania (1888) 127 US 678

Chapter 1

Introduction

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1.1 Introduction

[A]s a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority... As the [European] Court [of Human Rights] has noted in previous cases, they therefore require special protection...¹

Article 14 ECHR has often been derided as a Cinderella provision, but during the last few years, this has started to change... Article 14 has developed, and may live up to its potential as a powerful non-discrimination principle.²

‘Roma – Europe’s largest minority of 10-12 million people – are victims of racism, discrimination and social exclusion.’³ This statement from the European Union

¹ *D.H. and Others v Czech Republic*, App No 57325/00 (ECHR, 13 November 2007), para 182.

² Rory O’Connell, ‘Cinderella comes to the Ball: article 14 and the Right to Non-Discrimination in the ECHR’ (2009) 2 *Legal Studies* 211.

³ European Union Agency for Fundamental Rights, United Nations Development Programme and European Commission, *The Situation of Roma in 11 EU Member States Survey Results at a Glance* (European Union Agency for Fundamental Rights and United Nations Development Programme 2012) 3.

Agency for Fundamental Rights is based on a survey of *The situation of Roma in 11 EU Member States*, which was published in 2012. The Report found that:

Of those surveyed in this report, one in three is unemployed... 90% are living below the poverty line. Many face prejudice, intolerance, discrimination and social exclusion in their daily lives. They are marginalized and mostly live in extremely poor socio-economic conditions. This undermines social cohesion and sustainable human development.⁴

This thesis focuses on the changing interpretation and development of Article 14, through the lens of cases taken by Roma to the ECtHR, alleging violations of Article 14 based on their ethnicity. It will be asserted that the Court's interpretation of Article 14 has changed and that the Article 14 cases taken by Roma have been instrumental to this change.

While much consideration has been given to the substantive articles of the ECHR, there has historically been little attention paid to Article 14. This lack of focus on Article 14 was due to its position as an article that can only be considered by the Court when taken in conjunction with a substantive article. As stated by O'Connell: 'Article 14 is sometimes regarded as a Cinderella provision; the European Court of Human Rights not developing it to have significant "bite."⁵ Due to the long held view of Article 14 as an accessory and ancillary provision, there has been little study on the development and possible changing interpretation of the article itself. In recent years there has been much focus on the human rights of minority groups, but there has been little substantial discussion of the provision in the Convention that provides for

⁴ European Union Agency for Fundamental Rights, United Nations Development Programme and European Commission, *The Situation of Roma* 5.

⁵ O'Connell, 'Cinderella comes to the Ball' 211. For a discussion of "bite" being present in equality review see Gerald Gunther, 'The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection' (1973) 86 *Harvard Law Review* 1.

‘the enjoyment of the rights and freedoms set forth in the Convention ... without discrimination’.⁶

Cases taken by Roma to the European Court of Human Rights have surged in recent years. The first case taken by a Roma applicant to the Court was in 1996, alleging a violation of Article 14 in conjunction with Article 8.⁷ No violation of Article 14 was found. The case concerned a refusal to give permission to station permanently, on the applicant’s own land, caravans in which she was living with her family. Cases involving allegations of removal from settlements will not be addressed in this thesis. Three groups of cases focusing on anti-Roma violence, forced sterilisation and educational segregation will be focused on. The reasoning for a focus on these three case law groups is the author’s assertion that it is these cases that have had a profound impact on the interpretation of Article 14. It is also the author’s belief that the Court in these cases has displayed a shift towards a reliance on the substantive model of equality.

In recent years, reports by both European Union and international organisations have ‘raised the alarm about the conditions of life and violations of the fundamental rights of Roma’.⁸ The United Nations Development Programme provided the first robust statistical evidence in 2003 in its report *Avoiding the Dependency Trap*, which found that a significant number of Roma in Europe face severe challenges in terms of infant mortality, illiteracy and malnutrition.⁹ This report was followed in 2009 by the EU Agency for Fundamental Rights *Data in Focus*

⁶ European Convention on Human Rights, Article 14.

⁷ *Buckley v UK* App no 20348/92 (ECHR, 25 September 1996).

⁸ European Union Agency for Fundamental Rights, United Nations Development Programme and European Commission, *The Situation of 5*.

⁹ United Nations Development Programme, *Avoiding the Dependency Trap* (United Nations Development Fund 2003) 1-6.

Report, which showed that a substantial proportion of Roma are affected by what they themselves perceive to be very high levels of discrimination.¹⁰

In September 2010 the European Commission created its own internal Roma Task Force with the participation of the Fundamental Rights Agency, with the objective of coordinating work on Roma integration issues.¹¹ In April 2011 the Task Force launched its landmark Communication on *An EU Framework for national Roma integration strategies up to 2020*.¹² This Communication linked the need to tackle exclusion and poverty while at the same time promoting and protecting fundamental rights.¹³ There has been much cooperation and coordination between European and international bodies on Roma issues as evidenced in 2011 by the Fundamental Rights Agency, United Nations Development Programme and the World Bank contributing to the Communication by providing data, evidence-based advice and analysis.¹⁴

The 2012 report on *The Situation of Roma in 11 EU Member States* found that in the 12 months preceding the survey, 25 per cent of Roma in Romania reported that they had experienced discriminatory treatment because of their ethnicity this figure rose to around 60 per cent in Greece, Italy, Poland and the Czech Republic.¹⁵ As evidenced from the growing number of European and international reports being published in recent years, there has been an acknowledgment of the discrimination

¹⁰ European Union Agency for Fundamental Rights, *EU –Midis European Union Minorities and Discrimination Survey Data in Focus Report* (European Union Agency for Fundamental Rights 2009) 7.

¹¹ European Commission, 'Roma Integration: First Findings of Roma Task Force and Report on Social Inclusion' (European Commission, 21 December 2010) < [Europa.eu/rapid/press-release_MEMO-10-701_en.htm](http://europa.eu/rapid/press-release_MEMO-10-701_en.htm) > accessed 28 March 2017.

¹² European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: An EU Framework for National Roma Integration Strategies up to 2020* (European Commission COM (2011) 173 final).

¹³ European Commission, *Communication from the Commission* 13-15.

¹⁴ European Union Agency for Fundamental Rights, United Nations Development Programme and European Commission, *The Situation of* 3-5.

¹⁵ *ibid* 29.

perpetrated against Roma and the need to effect change.¹⁶ It is important to provide context to show the recent acknowledgment of the discrimination and prejudice suffered by Roma in relation to for example education, medical interventions and treatment of Roma by police authorities.

1.2 Why Roma Case Law?

In this thesis three particular groups of cases will be analysed for the impact they have had on the changing interpretation of Article 14. These three groups of cases focus on state executed violence, forced sterilisation and educational segregation. The cases discussed in this thesis are those cases taken by Roma where they have alleged a violation of Article 14 in conjunction with another substantive Convention article.

¹⁶ European Commission, *The Situation of Roma in an Enlarged EU* (Office for Official Publications of the European Communities 2004), European Monitoring Centre on Racism and Xenophobia, *Roma and Traveller's in Public Education: An Overview of the Situation in the EU Member States* (EUMC 2006), European Network Against Racism, *Fact Sheet 36: Report on the High Level Advisory Group of Experts on the Social Integration of Ethnic Minorities and their Full Participation in the Labour Market* (European Network Against Racism 2007), European Union Agency for Fundamental Rights, *Report on Consultation Process on Future FRA Work on Roma and Traveller Issues* (FRA 2009), European Union Agency for Fundamental Rights, *EU – MIDIS European Union Minorities and Discrimination Survey* (FRA 2009), European Union Agency for Fundamental Rights, *Housing Conditions of Roma and Travellers in the EU* (FRA 2009), European Union Agency for Fundamental Rights, *The Situation of Roma Citizen's Moving to and Settling in Other EU Member States* (FRA 2009), Fundación Secretariado Gitano Health Area, Nuria Serrano Rodriguez and Nuria Rodríguez Derecho, *Health and the Roma Community. Analysis of the Situation in Europe: Bulgaria, Czech Republic, Greece, Portugal, Romania, Slovakia, Spain* (EFXINI POLI – Local Authorities for Social, Cultural, Tourist, Environmental and Agricultural Development Greece, FSG – Fundación Secretariado Gitano Spain, Office of the Council for Roma Community Affairs Czech Republic, PDCS – Partners for Democratic Change Slovakia, REAPN – Rede Europeia Anti-Pobreza Portugal, Romani Criss – Roma Center for Social Interventions and Studies Romania, THRPf – The Health of Romany People Foundation Bulgaria 2009), European Commission, *Improving the tools for the Social Inclusion and non-discrimination of Roma in the EU – Summary of Selected Projects* (European Commission Directorate General for Employment, Social Affairs and Equal Opportunities 2010), European Commission, *Working together for Roma inclusion: The EU Framework Explained* (Publications Office of the EU 2011), European Commission, *Roma and Education: Challenges and Opportunities in the EU* (European Commission Directorate-General for Education, Youth, Sport and Culture 2012), European Commission, José Manuel Fresno, Andreas Tsolakis, Camelia Teodorescu and Robert Rode, *What Works for Roma Inclusion in the EU Policies and Model Approaches* (Publications Office of the EU 2012), European Commission, *National Roma Integration Strategies: A first step in the Implementation of the EU Framework* (European Commission Directorate-General for Justice 2012), John Bennett, *Roma Early Childhood Inclusion Overview Report* (Open Society Foundations, Roma Education Fund and UNICEF 2012), European Commission, *Report on the Implementation of the EU Framework for National Roma Integration Strategies* (European Commission Directorate-General for Justice 2014), European Commission, *Report on Discrimination of Roma Children in Education* (European Commission Directorate-General for Justice 2014).

The need for clarity here is that there are at least 20 other cases that could have been discussed under these three headings, however the Roma applicants did not allege a violation of Article 14, therefore these additional cases will not be analysed for their impact on the development of the Article.¹⁷ There are 26 cases involving allegations of state executed violence against Roma that have been heard before the Court, 3 cases dealing with forced sterilisation and 6 cases involving educational segregation, all of these in conjunction with allegations of violations of Article 14.¹⁸ A decision was taken by the author to not include the Roma housing cases in this thesis. There are a number of reasons for this decision: the Roma housing cases before the Court were some of the first cases taken by Roma to the Court and have been analysed extensively, many of the Roma housing cases have also appeared before the Social Rights Committee and as such are outside the scope of this thesis. Another reason for not including the housing cases is due to the size constraints of this work, in the future the housing cases would be included for context on all issues/ cases brought by Roma before the Court, but for the purpose of this thesis the three case law groups cited above will be relied on.

Dembour has stated that in the years 2004-2009 ‘the Court has significantly developed its case law on racial discrimination in cases brought by Roma applicants against “Eastern” European states’.¹⁹ Between the years 2000 and 2017, 35 cases involving allegations of violations of Article 14 have been brought before the Court by Roma applicants under the three case groupings identified above. While the Court has been hearing cases since 1959, no Roma applicant took a case before the Court where the ethnicity of the applicant was raised or deemed relevant between the years

¹⁷ Please see Appendix 1

¹⁸ Please see Appendix 1

¹⁹ Marie-Bénédicte 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, 222.

1959 and 1996. Yet then in a 17-year period Roma applicants took nearly sixty cases to the Court, 35 of which will be analysed in this thesis for their impact on the interpretation of Article 14.

The crux of this thesis is an analysis of the development of Article 14 from an article that was viewed as an accessory article, which has developed significantly in recent years. This thesis will assert that Article 14's extensive development has been due to the issues brought before the Court in cases taken by Roma. The Roma case law provides a large number of cases, which allows for analysis of the development of the various components of Article 14. The cases allow for questions to be raised, such as: whether the Court should factor in long term histories of discrimination in its judgments, whether the Court is willing to lessen the burden of proof from the onerous "proof beyond reasonable doubt" standard, whether the Court would acknowledge the existence of indirect discrimination, whether statistical evidence is sufficient to prove indirect discrimination and whether the Court in building on its interpretation of Article 14 has shown a shift towards a reliance on a substantive model of equality.

The Roma as a minority group provide a useful demographic to rely upon. As Europe's largest minority group they have faced myriad forms of discrimination.²⁰ As of July 2012, the European Commission, based on figures of the Council of Europe and of the World Bank in 2010, has found that 8.63 per cent of the population in Romania is Roma, 9.94 per cent in Bulgaria, 7.49 per cent in Hungary, 8.23 per cent in Serbia and 9.02 per cent in Slovakia.²¹ It can therefore be seen that the number of Roma in Europe is significant and therefore the issues they face and their use of

²⁰ European Commission, 'EU and Roma' (European Commission, 24 November 2016) < http://ec.europa.eu/justice/discrimination/roma/index_en.htm > accessed on 24 March 2017.

²¹ European Commission, 'Roma Integration – 2014 Commission Assessment: Questions and Answers' (European Commission, 4 April 2014) < http://europa.eu/rapid/press-release_MEMO-14-249_en.htm > accessed 24 March 2017.

Article 14 before the Court is crucial to understanding the development of Article 14.

The Council of Europe has stated that:

They are amongst the most deprived of all communities, facing daily discrimination and racial insults, living in extreme poverty and exclusion from the normal life that other people take for granted – going to school, seeing the doctor, applying for a job or having decent housing.²²

Anti-Roma prejudice has grown in recent years with examples of anti-Roma hatred in Northern Ireland, forced expulsions in Italy and France and violent incidents involving Roma and non-Roma citizens in Bulgaria.²³ As anti-Roma hatred grows, it is important to ensure that the enjoyment of their rights under the ECHR is protected. Article 14 is this protection mechanism. The significant number of cases alleging violations of Article 14 in the last 17 years can be tied directly to the support offered to Roma applicants by groups such as the European Roma Rights Centre (ERRC). Strategic litigation has become a focus of groups such as the ERRC and Open Society Foundation.²⁴ While strategic litigation has led to the increased number of cases, which provide the basis for the analysis of the development of Article 14, strategic litigation will not be discussed in detail in this thesis as it is outside the parameters of this work on Article 14.

²² Council of Europe, 'Making Human Rights for Roma a reality' <www.coe.int/en/web/portal/roma> accessed 2 February 2016. Gregor Maučec, 'Identifying and Changing Stereotypes between Roma and Non-Roma: from Theory to Practice' (2013) 6 (3) *Innovative Issues and Approaches in Social Sciences* 181-203.

²³ Colin Knox, 'Tackling Racism in Northern Ireland: The Race Hate Capital of Europe' (2010) 40 (3) *Journal of Social Policy* 1-26. Jacqueline S Gehring, 'Free Movement for Some: The Treatment of the Roma after the European Union's Eastern Expansion' (2013) 15 (1) *European Journal of Migration and Law* 7-28. H J M van Baar, 'The Perpetual Mobile Machine of Forced Mobility: Europe's Roma and the Institutionalization of Rootlessness' in Yolande Jansen, Robin Celikates and Joost de Bloois (eds), *The Irregularization of Migration in Contemporary Europe: detention, deportation, drowning* (Rowman & Littlefield International 2015) 71-86.

²⁴ Lisa Vanhala, 'Anti-discrimination policy actors and their use of litigation strategies: the influence of identity politics' (2009) 16 (5) *Journal of European Public Policy* 738-754. Sophie Jacquot and Tommaso Vitale, 'Law as weapon of the weak? A Comparative analysis of legal mobilization by Roma and women's groups at the European level' (2014) 21 (4) *Journal of European Public Policy* 587-604. The ERRC is active in both domestic and international litigation and has been involved in more than 500 cases in 15 countries. As of March 2017 the ERRC is involved in 97 legal cases concerning 16 countries.

Given the significant amount of literature, which has been written on the Roma and the discrimination they face, this thesis would move away from assessments of disadvantage and instead look to how the Roma case law has led to the development of Article 14. It would be interesting to change the discourse from viewing Roma solely as victims, but rather instead to view them as a severely disadvantaged group who have challenged the efficacy of Article 14 through their numerous challenges before the Court. The Roma applicants have not only succeeded in securing victories for themselves, but have also led to the development of Article 14, into a more robust article, which can be relied upon now more readily by any applicant who feels they have been discriminated against in their enjoyment of their Convention rights.

1.3 Central Research Question

The central research question to be answered is: how has the case law taken by Roma applicants to the European Court of Human Rights affected the interpretation and development of Article 14 of the European Convention on Human Rights? In answering this question, the thesis will look at a number of key areas, through analysing the three case groups identified in the previous section. Seven often-interrelated areas that need to be addressed are:

1. The burden of proof including the standard of proof and shifting the burden of proof.
2. The recognition of procedural and substantive limbs of Article 14.
3. The recognition of Roma as a particular vulnerable group.
4. Issues of inconsistency in the Court considering an allegation of a violation of Article 14 when a violation of a substantive article has been found.

5. The Court's reliance on reports from Non Governmental Organisations and statistical data to show evidence of a climate of discrimination faced by Roma in a particular state.
6. The recognition of segregation as discrimination and indirect discrimination in cases of patterns of racial discrimination.
7. The question of whether statistical evidence can evidence indirect discrimination. / Whether indirect discrimination can be found where there is no statistical evidence present.

These key areas relate to the interpretation of Article 14 before the Court. In addition to this, there is an additional key overarching issue to be addressed: has the Court shifted from a reliance on the formal model of equality to the substantive model of equality in Article 14 cases? It is the author's argument that the development of Article 14 through the Roma case law significantly displays the Court's shift towards a reliance on the substantive model of equality. In addition to discussing this shift to the substantive model, the Roma cases allow one to look at the discrimination experienced by Roma through the lens of intersectionality. It is the author's additional assertion that while Roma bring allegations of violations of Article 14 to the Court based on their ethnicity, Roma are not discriminated against based on only one ground, but on a multiplicity of grounds which intersect with one another, such as age, gender, disability, etc.

1.4 How This Thesis Contributes to Knowledge

This thesis contributes to knowledge in four areas:

1. It provides a critical analysis of the new interpretation of Article 14 as a more robust article, as a result of the impact which cases taken by Roma applicants have had on the development of Article 14.

2. A discussion of the fact that there has yet to be a finding of a substantive violation of Article 14 before the Court on the ground of race or ethnicity in a case taken by a Roma applicant alleging a violation of Article 2 (loss of life)
3. Rather than engaging in the existing discourse of how Roma are discriminated against, this work shows how Roma with the aid of Non Governmental Organisations are changing the interpretation of discrimination and how discrimination is evidenced in the European Court of Human Rights.
4. As a result of the Roma case law's impact on the interpretation of Article 14, the Court has displayed a shift from a reliance on the formal model of equality to the substantive model of equality.

This thesis fills an interesting lacuna in that it looks at how Roma case law has affected the development and interpretation of Article 14. While a small number of scholars have discussed the increased interest in and reliance on Article 14 before the European Court of Human Rights, this thesis will argue that the Roma as a group have had a significant impact on the interpretation of Article 14 due to the case law they have brought before the Court. As mentioned earlier Article 14 was long viewed as an ancillary article with no life of its own. This thesis will aim to show that Article 14 is now much more than an article with no life of its own. Article 14 is now relied upon frequently as a non-discrimination article and it will be asserted in this work that it was the Roma case law which helped to develop article 14 into an article with a much clearer purpose and function than it had historically.

It could be argued that as a stand alone non-discrimination article now exists in the form of Article 1 of Protocol No. 12, Article 14 may not be as relied upon as it once was, when it was the only non-discrimination article in the Convention.²⁵

²⁵ Article 1, Protocol No. 12, European Convention on Human Rights.

Protocol No. 12 though has not been ratified by all countries, with less than half the 47 Council of Europe member states ratifying the Protocol, which entered into force in 2005. Protocol No. 12 will be discussed in more detail in Chapter 2.²⁶ Therefore it remains the case that Article 14 will be the most relied upon non-discrimination article for those claimants who feel they have suffered direct or indirect discrimination. It is crucial to analyse the development of Article 14, given the lack of ratification of the stand-alone non-discrimination provision. As long as member states do not ratify Protocol No. 12, then applicants must rely on Article 14, and as such a comprehensive overview of how the article has developed in recent years is crucial.

Aside from Judge Bonello in the Court, there has been little discussion of the fact that there has not been one single finding of a substantive violation of Article 2 or 3 in conjunction with Article 14 in a case brought by Roma to the Court since its inception.²⁷ This essentially means that the Court has never once found that the death or torture of a person was as a result of their Roma ethnicity. While the Court has found that states have forcibly sterilised Roma women or failed to investigate whether racist intent was behind the death or injuries suffered by an applicant; none of these actions ever had anything to do with the applicant's or victim's ethnicity. While much has been written on the Roma as a group, there appears to be very little discussion of the fact that the European Court of Human Rights has in its 58 years, and in the nearly 30 cases of anti-Roma violence discussed in this thesis, never once found that Roma ethnicity had led to the actions of the Respondent State.

Aside from contributing to the knowledge base on Article 14, this thesis will also contribute knowledge to an area which has been overlooked in the discourse on

²⁶ Council of Europe, 'Chart of Signatures and Ratifications of Treaty 177' (*Council of Europe*, 7 February 2016) < www.coe.int/en/web/conventions/full-list/-conventions/treaty/177/signatures?p_auth=zCosvQLq > accessed 7 February 2016.

²⁷ *Anguelova v Bulgaria*, partly dissenting opinion of Judge Bonello, paras 2-3.

Roma. Aside from a number of articles on the forced expulsions of Roma and the seminal educational segregation case of *D.H. and Others v the Czech Republic*, there has been no work that has looked at the overall contribution of the cases taken by Roma on the basis of state executed violence, forced sterilisation and educational segregation.²⁹ Thematically there are no articles or books that look at these three groups of cases. These cases, particularly the state executed violence and forced sterilisation cases, have been somewhat ignored in comparison to the housing, expulsion and education cases. With much focus on the importance of the *D.H.* case, it appears as though the literature is focusing only on one dimension of the contribution of Roma case law to the development of Article 14. This is an incorrect assumption to make as the Roma case law in all three of the case law groups have contributed significantly to the development of Article 14.

²⁹ Margaret Brearley, 'The Persecution of gypsies in Europe' (2001) 45 (4) *American Behavioral Scientist* 588-599. Claude Cahn and Elspeth Guild, *Recent Migration of Roma in Europe* (2nd edn, OSCE High Commissioner on National Minorities and of the Council of Europe Commissioner for Human Rights 2010). Aoife Nolan, ' "Aggravated Violations", Roma housing rights and forced expulsions in Italy: Recent developments under the European Social Charter Collective Complaints System' (2011) 11 (2) *Human Rights Law Review* 343-361. Helen O'Nions, 'Roma Expulsions and Discrimination: The Elephant in Brussels' (2011) 13 (4) *European Journal of Migration and Law* 361-388. Aidan McGarry, 'The dilemma of the European union's Roma policy' (2012) 32 (1) *Critical Social Policy* 126-136. HJM van Baar, 'The Perpetual mobile Machine of forced mobility: Europe's Roma and the Institutionalization of Rootlessness' in Yolande Jansen, Robin Celikates and Joost de Bloois (eds), *The Irregularization of Migration in Contemporary Europe: detention, deportation, drowning* (Rowman and Littlefield International 2015) 71-86. Tracy Smith, 'Recognising Difference: the Romani "Gypsy" child socialisation and education process' (1997) 18 (2) *British Journal of Sociology of Education* 243-256. Dena Ringold, Mitchell Alexander Orenstein and Erika Wilkens, *Roma in an Expanding Europe: Breaking the Poverty Cycle* (The International Bank for Reconstruction and Development /The World Bank 2005). Helen O'Nions, 'Different and unequal: the educational segregation of Roma pupils in Europe' (2010) 21 (1) *Intercultural Education* 1-13. Jack Greenberg, 'Report on Roma education today: from slavery to segregation and beyond' (2010) 110 (4) *Columbia Law Review* 919-1001. Christian Brüggemann, *Roma Education in Comparative Perspective: Analysis of the UNDP/World Bank/EC Regional Roma Survey Data Policy brief* (United Nations Development Programme 2012).

1.5 An Introduction to the Literature

This thesis was inspired by O'Connell's article 'Cinderella comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECHR'.³⁰ The article premised the point that while Article 14 has been somewhat overlooked by both the Court and in academic discourse, there had been a renewed vigor in the interpretation and reliance on Article 14. He identified in 2009 that there was a growing development in terms of the burden, the ambit, the recognition of indirect discrimination and the approval of positive action. O'Connell stated his belief that if Article 14 was to develop, it may live up to its potential as a powerful non-discrimination principle. While O'Connell has identified that there was a move towards development of Article 14, the article was written eight years ago and does not focus on all the Roma case law, which in the intervening years has made even more significant contributions to the development of Article 14. His article highlighted that there had been a change in the interpretation of Article 14 and that Roma case law has been instrumental in that change.

While O'Connell's purpose was to identify the new changes in Article 14 case law, other authors have also focused on these changes. These texts have focused predominantly on the question of the ambit, burden of proof and the requirement of a comparator.³¹ Baker and Wintemute's respective studies of the ambit and the burden of proof in relation to Article 14 and Arai-Takahashi's thesis on the margin of appreciation before the European Court of Human Rights have greatly contributed to

³⁰ O'Connell, 'Cinderella comes to the Ball' 211.

³¹ Aaron Baker, 'The Enjoyment of Rights and Freedoms: A New Conception of the 'Ambit' under article 14 ECHR' (2006) 69(5) *Modern Law Review* 714. Aaron Baker, 'Comparison Tainted by Justification: Against a 'Compendious Question' in Article 14 Discrimination' [2006] *Public Law* 475, 483-485. Aaron Baker, 'Proportional, Not Strict, Scrutiny: Against a U.S. 'Suspect Classifications' Model under Article 14 ECHR in the U.K.' (2008) 56 *American Journal of Comparative Law* 847, 847-850. Robert Wintemute, 'Filling the Article 14 'gap': Government ratification and judicial control of Protocol No. 12 ECHR: Part 2' (2004) 5 *European Human Rights Law Review* 484, 484-485.

the discussion of Article 14.³² Neither Baker's, Wintemute's or Arai-Takahashi's studies focused on Roma case law in relation to Article 14. Arnardóttir has undertaken the most significant piece of work on the changing Article 14 in her research on the burden of proof in Article 14 cases.³³ Again, though, her work looked at a number of cases involving allegations of Article 14 and not just the impact of Roma cases on the development of the article. Fredman's 2016 article on the development of Article 14 looks at the move to a reliance on a substantive model of equality in the Court in Article 14 cases.³⁴ Fredman's article does reference some key Roma cases but does not look in detail at the three categories of cases in this thesis. She also focuses on applying her four-part conception of substantive equality to Article 14 case law in general, not specifically Roma case law. While Fredman's article positively supports the overarching assertion of this thesis that Article 14 has developed into a more robust article, she takes a narrow approach to this development by only looking at the shift to the substantive model in the Court's approach to Article 14. Therefore Fredman has left a gap in knowledge, as she does not deal with what other developments have occurred in relation to Article 14.

Mathias Möschel has written two of the most recent articles on Article 14 and Roma case law in 2012 and 2017.³⁵ The 2012 paper is one of the only studies of a group of cases taken by Roma applicants. Möschel provides a detailed analysis of the

³² Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002).

³³ Oddný Mjöll Arnardóttir, *Equality and Non Discrimination under the European Convention on Human Rights* (*International Studies in Human Rights*) (Martinus Nijhoff Publishers 2002) 182-184. Oddný Mjöll Arnardóttir, 'Non-discrimination Under article 14 ECHR: the Burden of Proof' (2007) 51 *Scandinavian Studies in Law* 13. Oddný Mjöll Arnardóttir, 'Multidimensional Equality from Within. Themes from the European Convention on Human Rights' in Dagmar Schiek and Victoria Chege (eds), *European Union Non-Discrimination Law. Comparative Perspectives on Multidimensional Equality Law* (Routledge-Cavendish 2009) 55.

³⁴ Sandra Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights' (2016) 16 *Human Rights Law Review* 273-301.

³⁵ Mathias Möschel, 'Is the European Court of Human Rights' Case Law on Anti-Roma Violence Beyond Reasonable Doubt?' (2012) 12(3) *Human Rights Law Review* 479. Mathias Möschel, 'The Strasbourg Court and Indirect Race Discrimination: Going Beyond the Education Domain' (2017) 80 (1) *Modern Law Review* 121-132.

recent developments with regard to Article 14 in relation to the burden of proof, the looking for racial elements in the case law and cases involving Romania. The article, while providing much clarity on the anti-Roma violence cases, does not cover the educational segregation and forced sterilisation cases. The more recent 2017 article focuses on the application of the Court's decision in *D.H. and Others v Czech Republic* to similar education cases. The article then goes onto discuss how the Court has applied the concept of indirect discrimination to the areas of citizenship and immigration. As such, while Möschel's articles have provided crucial arguments in relation to the particular case of *D.H.* and some of the anti-Roma violence cases, the articles do not cover the development of the interpretation of Article 14 in full. This work will draw on but also add to discourse on Article 14, equality and Roma scholarship. The acknowledgement in the existing literature of the development of the article is accompanied by a dearth of research on this development; this provides an opportunity for a contribution to scholarship to be made in this gap in the literature.

1.6 Methodology

1.6.1 A Doctrinal Analysis and Literature Based Study

This thesis adopts a doctrinal approach, undertaking a thorough investigation and analysis of the case law taken by Roma to the European Court of Human Rights. The word "doctrine" stems from the Latin noun "doctrina" which means knowledge, learning or instruction.³⁶ Mann in the *Australian Law Dictionary* defines doctrine as:

[a] synthesis of various rules, principles, norms, interpretive guidelines and values. It explains, makes coherent or justifies a segment of the

³⁶ Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 (1) *Deakin Law Review* 83, 84.

law as part of a larger system of law. Doctrines can be more or less abstract, binding or non-binding.³⁷

Legal principles and concepts, statutes, cases and rules are all included in the meaning of legal doctrine. Historically lawyers would have passed the law onto each other. This method stemmed from the middle ages when legal training developed with monasteries as centres of learning.³⁸ It can also be clearly seen that the term 'doctrinal' stems from the doctrine of precedent. Legal rules are not just merely convenient or casual, they are to be applied consistently and evolve over time.

As Posner states doctrinal analysis:

[I]nvolves the careful reading and comparison of appellate opinions with a view to identifying ambiguities, exposing inconsistencies among cases and lines of cases, developing distinctions, reconciling holdings, and otherwise exercising the characteristic skills of legal analysis.³⁹

As Posner stated, a number of inconsistencies amongst the groups of cases and between the groups of cases will be outlined. This approach allows for a thorough analysis to be carried out on the development of Article 14. By adopting the doctrinal approach it will be possible to provide a series of conclusions on how Article 14 has developed through the Roma case law. Judgments, appeals to the Grand Chamber and dissenting opinions will be analysed for the way in which the Court has interpreted Article 14. The reasoning for selecting the doctrinal approach centers on its capacity for full emersion in the workings of the Court in considering an allegation of an Article 14 violation. While other approaches will also inform this thesis, at its core this work will be informed predominantly by the words and approach of the Court itself through its case law.

³⁷ Trischa Mann (ed) *Australian Law Dictionary* (Oxford University Press 2010) 197.

³⁸ J M Kelly, *A Short History of Western Legal Theory* (Clarendon Press 1992) 89. Desmond Manderson and Richard Mohr, 'From Oxymoron to Intersection: An Epidemiology of Legal Research' (2002) 6(1) *Law Text Culture* 159, 161.

³⁹ Richard A Posner, 'The Present Situation in Legal Scholarship' (1980) 90 *Yale Law Journal* 1113.

This thesis will also rely on existing literature to provide a basis for discussion of Roma and Article 14. In bringing Article 14 cases before the Court, Roma are providing analysis of their particularly precarious position in Europe today. The analysis of existing literature and statistics on Roma will be useful in a number of ways: it will allow a background on the position of the Roma to be provided and it will allow a discussion of the Roma's use of statistics and Non Governmental Reports before the Court and what this information shows. It is also useful to look at broader sociological and anthropological works on Roma in order to provide a more rounded view of the discrimination faced by Roma both currently and historically. While this work is a legal thesis, it is useful to look at the work of O'Nions and Bancroft on the general position of Roma in order to inform this work.⁴⁰ Existing secondary literature and grey literature from NGOs on the historical position of Article 14 and its development in general, will be useful in order to show how far Article 14 has come in terms of its development and interpretation by the Court.

1.6.2 Theoretical Approach

While this thesis is predominantly concerned with the changing interpretation of Article 14 before the Court, one of the key elements of this change has been the shift in the Court from a reliance on the formal model of equality to the substantive model of equality. In order to assess this change, theories of equality will need to be discussed in addition to the predominantly doctrinal approach of this work. The reasoning for discussing equality theories is due to the fact that Article 14 as a non-discrimination article involves consideration of a theory of equality by the Court when considering a violation of Article 14. Westen's seminal article on formal

⁴⁰ Helen O'Nions, *Minority Rights Protection in International Law: The Roma of Europe* (2nd edn, Routledge 2016). Angus Bancroft, *Roma and Gypsy – Travellers in Europe; Modernity, Race, Space, and Exclusion* (Ashgate 2005).

equality will inform discussion of the Aristotelian version of equality.⁴¹ Many different theories of substantive equality exist and will be discussed briefly in chapter 3. There will then be a lengthier analysis of Fredman's approach to substantive equality on the basis of intersectionality.⁴²

Fredman's approach to substantive equality has been chosen as it allows for a discussion of how under each of the three case law categories the Roma are not discriminated on only one ground, but rather on the intersection between two grounds; such as ethnicity and age or ethnicity and gender, etc. While doctrinal research on Article 14 is crucial to the analysis of the interpretation of the article, one must consider deeper questions such as the impact a theory of equality is having on the Court and the impact the shift from one model to another has had on the development of Article 14. The sole purpose of this thesis is not the discussion of the shift from the formal to the substantive model of equality in the Court, but rather the shift as part of the changing interpretation of Article 14 and a key component in the article's development.

1.7 Structure

This thesis is divided into seven chapters. This the first chapter has set out the central research question, how this works contributes to knowledge, an introduction to the literature and a discussion of the methodology adopted. Chapter 2 will focus on an introduction to Article 14 of the ECHR. The ambit, scope and question of when Article 14 can be invoked will all be discussed. Critical areas such as the burden of

⁴¹ Westen, 'The Empty Idea of Equality' 537.

⁴² Sandra Fredman, 'Equality: A New Generation' (2001) 30 *Industrial Law Journal* 145, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 (2) *South Africa Journal on Human Rights* 163, 'Substantive Equality Revisited' 712, 'Emerging from the Shadows' 273, 'Living Trees of Deadwood: The Interpretative Challenge of the European Convention on Human Rights' in N W Barber, Richard Ekins and Paul Yowell (eds), *Lord Sumption and the Limits of the Law* (Hart 2016).

proof required in Article 14 cases and direct/indirect discrimination will be analysed in order to provide context for discussion of these areas in later chapters. Chapter 3 will focus on theories and models of equality. It will first introduce the formal and substantive models of equality. A detailed discussion of various theories of substantive equality will then be provided. A detailed analysis of the chosen theory of the author for this thesis: Fredman's approach to intersectionality will conclude the chapter.

Chapter 4 will be the first case law chapter. It will focus on the anti-Roma violence cases. These cases can be split into two groups: the first group focuses on anti-Roma violence in Roma settlements and the second will look at deaths / assaults of Roma in police custody. The anti-Roma violence chapter will specifically look at the burden of proof required in great detail and the finding of substantive and procedural violations of Article 14. Chapter 5, the second of the three case law chapters, will address the forced sterilisation cases taken by Roma women to the Court. Particular attention will be given to the Court's discussion of Roma as a vulnerable minority. Chapter 6 will look at the educational segregation cases. They will be divided into two groups: cases where Roma children were placed into special schools and cases where Roma children were segregated into Roma only classes or buildings. Each of the three case law chapters will utilise Fredman's conception of intersectionality to analyse the case law and argue that there has been a move from the formal to the substantive model of equality in the Court. Chapter 7 will provide a conclusion to this thesis. It will discuss the key findings of this work and provide final conclusions on the changing interpretation of Article 14 before the Court.

1.8 Conclusion

This thesis will fill the void that exists between the myriad research on the discrimination of Roma and the critique of Article 14 as an ancillary article with a narrow ambit and lacking a meaningful existence of its own. This work, by adopting a doctrinal approach supported by a literature based study and drawing on equality theories, will provide a comprehensive analysis of the impact which the three groups of Roma case law have had on the interpretation and development of Article 14. The analysis of the new interpretation and development of Article 14 will focus on the ambit and scope of Article 14 along with the shift in the model of equality adopted by the Court in dealing with Article 14 cases. The development of Article 14 can be traced from a reliance on direct discrimination to recognition of indirect discrimination. A change can also be seen in the movement from Article 14 being a little relied upon article, to the recognition of both procedural and substantive limbs to the article, similar to other Convention articles.

The structure of each case law chapter allows the reader to clearly follow the analysis and the impact which each of the groups of cases has had on the interpretation of Article 14. By first providing the context and historical background to the particular cases being discussed and the facts of some of the seminal cases, the reader will have a strong background on the factors behind the cases before being provided with an analysis of the key areas in which that particular group of cases have impacted Article 14. The case law chapters will then all conclude with a discussion of the model of equality being relied upon by the Court in those cases, any shift in the model of equality being relied upon and an application of Fredman's conception of intersectionality to the case law. The next chapter will begin with an introduction to Article 14.

Chapter 2

Article 14 of the European Convention on Human Rights: An Introduction

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2.1 Introduction

- 2.1.1 Background to Article 14 of the ECHR
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 - The Use of Statistical Evidence in the Court

2.9 Conclusion

2.1 Introduction

Article 14 has been described as a ‘Cinderella’ and ‘parasitic’ provision.⁴³ Goodwin has stated that the Court historically has approached Article 14 in a ‘grudging’ fashion.⁴⁴ In recent years though it has been acknowledged that the case law of the Court has ‘contributed in a decisive fashion to the shaping of European non-discrimination law’.⁴⁵ The case law has been beneficial not only to the shaping of European non-discrimination law; it has also been crucial in the development of Article 14 of the Convention. This is true in both the quantitative and qualitative sense. With regard to the quantitative sense; seventy-four violations of Article 14 were found between 1968 and the end of 2012.⁴⁶ More than half of those findings of violations of Article 14 occurred in the five-year period between 2007 and 2012.⁴⁷ It was in 2007 that the Court began to explicitly address indirect discrimination.⁴⁸ On the qualitative side, it will be seen in later chapters that Roma case law before the Court has had a significant effect on the Court’s interpretation of Article 14 in a number of different ways.

The purpose of this chapter is to introduce Article 14 of the ECHR. The central aim of the chapter is to examine and analyse the various elements of Article 14 in order to provide a background to the Article. By outlining and developing a clear

⁴³ Rory O’Connell, ‘Cinderella comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR’, [2009] *Legal Studies* 1-19 and Noel Whitty, Thérèse Murphy and Stephen Livingstone, *Civil Liberties Law: The Human Rights Act Era* (Butterworths 2001) 404.

⁴⁴ Morag Goodwin, ‘Taking on Racial Segregation: The European Court of Human Rights at a Brown v. Board of Education Moment?’ (2009) 170 (3) *Rechtsgeleerd Magazijn Themis* 93, 95. Janneke Gerards, ‘The Application of Article 14 ECHR by the European Court of Human Rights’ in Jan Niessen and Isabelle Chopin (eds), *The Development of Legal Instruments to Combat Racism in a Diverse Europe* (Brill 2004) 3-60.

⁴⁵ Samantha Besson, ‘Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: It Takes Two to Tango in the Council of Europe’ (2012) 60 (1) *The American Journal of Comparative Law* 147, 179.

⁴⁶ *Ibid.*, 158-159.

⁴⁷ *Ibid.*

⁴⁸ *D.H. and Others v the Czech Republic* App no 57325/00 (ECHR, 13 November 2007).

understanding of what Article 14 provides for in the Convention, how it is used in conjunction with other articles, how the Court approaches Article 14 and the types of cases which involve allegations of violations of Article 14, a strong basis can be provided for the examination of Roma case law's effect on the development of particular elements of the Article in later chapters. While this thesis is primarily concerned with the development of Article 14 through the lens of Roma case law, this chapter will outline the allegation of violations of Article 14 in a number of cases related particularly to race and ethnicity. This chapter will not discuss Roma case law in relation to Article 14, but rather will provide a bedrock of discussion and analysis of Article 14 prior to the Roma cases appearing before the Court. This will allow for a detailed examination of the effect of Roma case law on the interpretation of Article 14.

This chapter has a number of interlocking aims. First I will provide an introduction to the Article itself and its insertion into the ECHR, along with a discussion of the definition of discrimination before the Court and its traditional reliance on the acknowledgement of direct discrimination. The chapter will then move onto discussing the grounds, scope and ambit of Article 14; the use of a comparator and the question of justification and margin of appreciation will next be discussed; followed by the burden of proof and the transfer of the burden of proof, which will complete this part of the chapter. The third part of the chapter will focus on the standard of proof required by the Court; the use of NGO reports and statistics will relate both to the burden of proof and standard of proof, but will also relate to the earlier parts of the chapter, which will have discussed indirect discrimination.

2.1.1 Background to Article 14 of the ECHR.

Article 14 of the European Convention on Human Rights states that:

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

In 1953, in contrast to national constitutions and Article 2 (1) of the Universal Declaration of Human Rights, the ECHR did not provide a general prohibition of discrimination.⁴⁹ Simpson states that the European Convention was the product of ‘conflicts, compromise and happenstance’ and therefore there are no straightforward explanations for what the Convention is and why it came to be.⁵⁰ During the inter-war years Briand and Stresemann attempted to encourage a European political federation.⁵¹ Their efforts gained little momentum due to the very rigorous European nationalism prevalent at the time. In the aftermath of the Second World War Winston Churchill took up the mantle of leading the European movement. His United Europe Movement sponsored the Congress of Europe held in May 1948 in The Hague.⁵² Much consideration was given to the issue of human rights.⁵³ It was decided that by establishing international guarantees there would be a greater chance of preventing the sabotage of democratic institutions; it would also ensure that existing liberties would continue and that these liberties would be extended through a wider area.

The issue of whether there should be a listing of the protected rights similar to the Universal Declaration of Human Rights or whether there should be a detailed

⁴⁹ Christoph Grabenwarter, *European Convention on Human Rights: A Commentary* (Oxford Hart 2014) 5-10.

⁵⁰ AWB Simpson, *Human Rights and the End of Empire – Britain and the Genesis of the European Convention* (Oxford University Press 2001) ix

⁵¹ Arnold Zurcher, *The Struggle to Unite Europe, 1940-1958* (New York University Press 1958) 7-9.

⁵² Gordon L Weil, ‘The Evolution of the European Convention on Human Rights’ (1963) 57 *The American Journal of International Law* 804, 804.

⁵³ Mark Gilbert, *European Integration: A Concise History* (Rowman & Littlefield Publishers 2012) 19.

definition of the rights to be protected arose. Continental members of the Assembly felt that there was no need to define the rights, as the rights and freedoms could be understood to be those, which have been defined through long-term usage by democratic states. On the other hand the British members felt that there should be a detailed definition of the rights to be protected, given their wish to limit the depth of their commitment to the human rights system.⁵⁴ The Committee of Ministers felt there should be a compromise between the definition and enumeration of rights; however, ultimately they went with the British viewpoint on the need for precise definition of the protected rights.

While the drafters of the Convention favoured a defined version of the rights to be protected in the Convention, there was a notable contrast between the equality and prohibition of discrimination principle as set down in the Universal Declaration of Human Rights with that provided for in the ECHR. The provision on the prohibition of discrimination and the enunciation of the principle of equality were seen to be so important as to be placed at the beginning of both the United Nations Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights (Articles 2 and 3) and the Universal Declaration of Human Rights (Articles 1 and 2).⁵⁵ While many national Constitutions and international instruments provide for non-discrimination and equality provisions, Article 14 of the ECHR is not a stand alone non-discrimination principle; it is in nature ancillary to the other rights provided for in the ECHR.⁵⁶

While the Convention was drafted in the aftermath of the Second World War in which Jews and Roma had been persecuted and executed in great numbers due to

⁵⁴ Weil, 'The Evolution' 806.

⁵⁵ Francis G Jacobs, *The European Convention on Human Rights* (Clarendon Press 1975) 188.

⁵⁶ Basic law of the Federal Republic of Germany (Article 3), equality and non-discrimination provisions appear in instruments drawn up by the International Labour Organisation, UNESCO and the United Nations.

respective religious belief and ethnicity, the Convention was to help to ensure unity across Europe through the provision of a bill of rights. Interestingly the Convention did not provide a general non-discrimination provision. The drafters of the Convention dealt with discrimination only in terms of the denial of other Convention rights on the grounds of race, sex, ethnicity, etc. Former President of the European Court of Human Rights Luzius Wildhaber has stated:

[T]he accessory nature of the Convention guarantee, which is at least in part symptomatic of how the issue was viewed at the time, has tended to mean that the discrimination aspect of such cases has remained in the background and this may have obscured the treatment of the question by the European Court of Human Rights. The Court's attitude has perhaps not been entirely coherent as to the weight to be given to the non-discrimination guarantee.⁵⁷

While the ECHR was much informed by the UN Declaration on Human Rights, it did not choose to mirror its general prohibition on discrimination. It is worthwhile to consider this lack of provision for a general non-discrimination article when considering in later chapters the lack of findings of substantive violations of Article 14 by the Court and whether it might be argued that there has been a historic reluctance on the part of the signatories to the Convention to ensure equality and non-discrimination in Europe. Consideration for the need for a general prohibition on discrimination and the positive need for equality was not achieved until this century with the introduction of Article 1 of Protocol No. 12, as was discussed in the preceding thesis introduction.

2.1.2 Article 14 of the ECHR: An Accessory Article

The purpose of Article 14 is to ensure that the rights and freedoms set out in the Convention are secured for all individuals without discrimination. Article 14 is not a

⁵⁷ Luzius Wildhaber, 'Protection against Discrimination under the European Convention on Human Rights – A Second-Class Guarantee?' (2002) 2 *Baltic Yearbook of International Law* 71, 72.

freestanding non-discrimination article. As a general rule, if the Court finds a violation of another substantive Convention right, then it will not find it necessary to examine an allegation of a breach of Article 14. The Court will adopt this position, as it will have examined all the necessary aspects of the complaint in relation to the alleged breach of the substantive right. In other cases the individual circumstances of the case will dictate whether the Court first examines whether there has been a violation of Article 14 and may then decide that a separate ruling on the alleged breach of the substantive right is not needed.⁵⁸ In these cases the Court would have considered that, having found a violation of Article 14, there was no additional issue in relation to the substantive right.⁵⁹

Further to this it will be the facts of each individual case which will dictate whether and in what order the Court will examine Article 14 and the substantive right, to which Article 14 is accessory.⁶⁰ If the complaint under Article 14 is not a restatement of the complaint under the substantive provision or if the Court views the importance of the discrimination allegation, then the Court may decide after finding a violation of the substantive guarantee, to consider the allegation of a breach of the non-discrimination principle separately.⁶¹ While the Court may find that there is no infringement of a substantive ECHR article, the Court may still find that discrimination has occurred:

⁵⁸ Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (6th edn, Oxford University Press 2014) 2.

⁵⁹ Grabenwarter, *European Convention* 5-10. *Hoffmann v Austria* App no 12875/87 (ECHR, 23 June 1993), para 37, *Burghartz v Switzerland* App no 16213/90 (ECHR, 22 February 1994) para 30, *Gaygusuz v Austria* App no 17371/90 (ECHR, 16 September 1996), para 57, *Thlimmenos v Greece* App no 34369/97 (ECHR, 6 April 2000), para 53.

⁶⁰ Edwin Busuttill, 'The Case-Law of the Commission as Regards Non-Discrimination (article 14 of the Convention)' in Michele de Salvia and Mark E Villiger (eds), *The Birth of European Human Rights Law* (Nomos 1998) 31.

⁶¹ David Harris, Michael O'Boyle, Colin Warbrick and Ed Bates, *Law of the European Convention on Human Rights* (2nd edn, Oxford University Press 2009) 785-788, *Aziz v Cyprus* App no 69949/01 (ECHR, 22 June 2004) para 36, *Geen v UK* App no 63468/00 (ECHR, 4 December 2007), para 9. *Kurić a.o. v Slovenia* App no 26828/06 (ECHR, 26 June 2012), para 383.

Article 14 only complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to ‘the enjoyment of the rights and freedoms’ safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to that extent is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter.⁶²

In the *Okpisz v Germany* case the Court stated:

As the Court has held on many occasions, Article 14 comes into play whenever, ‘the subject matter of the disadvantage ... constitutes one of the modalities of the exercise of a right guaranteed’, or the measures complained of are ‘linked to the exercise of a right guaranteed’.⁶³

Livingstone has been critical of Article 14 and the European Convention’s limited prohibition on discrimination. He has stated that even though the prevention of discrimination is a central norm of human rights law as evidenced by the UN Conventions on race and sex discrimination, that ‘The European Convention’s anti-discrimination provision is not one beloved of many international human rights lawyers’ due to its ancillary nature.⁶⁴

2.1.3 Article 14: its ambit and scope

While the Strasbourg organs have given careful consideration to issues of non-discrimination, it must be remembered that the list of grounds for discrimination prohibited under Article 14 are not exhaustive. Article 14 safeguards individuals and groups of individuals, placed in similar situations, from discrimination in the enjoyment of the rights and freedoms set forth in other provisions of the Convention.⁶⁵ While Article 26 of the International Covenant on Civil and Political

⁶² *Sommerfeld v Germany* App no 31871/96 (ECHR, 8 July 2003).

⁶³ *Okpisz v Germany* App no 59140/00 (ECHR, 25 October 2005).

⁶⁴ Stephen Livingstone, ‘Article 14 and the prevention of discrimination in the European Convention on Human Rights’ (1997) 1 *European Human Rights Law Review* 25, 25-26.

⁶⁵ Livingstone, ‘Article 14’ 25-26. Luzius Wildhaber, ‘Protection against Discrimination under the European Convention on Human Rights – A Second-Class Guarantee?’ (2002) 2 *Baltic Yearbook of*

Rights prohibits discrimination in all areas of State regulation, Article 14's reach of prohibition is limited to the substantive rights embodied in the Convention.⁶⁶ Since the drawing up of the ECHR there has been much debate about the efficacy of Article 14.⁶⁷ Much of this critique was due to the fact that the article 'was initially conceived as a minimal clause, subsidiary to national constitutional equal protection clauses'.⁶⁸ Article 14 does not provide an additional right not to be discriminated; there is no room for the application of Article 14 unless the facts of a case fall within the scope of the Convention.⁶⁹

It would be disingenuous though to assert that Article 14 has no autonomous function to fulfill in the system of the Convention. The focus of commentary has often been on the subsidiarity of the principle rather than its autonomy. De Schutter believes that Article 14's importance lies in its supplementing the other substantive provisions by adding the requirement that they be applied and implemented without discrimination.⁷⁰ While Article 14 provides no freestanding protection of discrimination, an overemphasis of the contingent nature of Article 14 has contributed to a restrictive understanding of its scope and application. It was in the *Belgian Linguistics* case that the Court emphasized that:

[A] measure which in itself is in conformity with the requirement of the article enshrining the right or freedom in question may, however, infringe this article when read in conjunction with Article 14 for the reason that it is of a discriminatory nature.⁷¹

Nothing in the language of Article 14 provides an unambiguous direction and focus for judicial inquiry. Courts are left to decide several questions, with the answers

International Law 5, 7. Pieter Van Dijk, Friend van Hoof, Arjen van Rijn and Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (Intersentia 2006) 1027.

⁶⁶ International Covenant on Civil and Political Rights, Article 26.

⁶⁷ Besson, 'Evolutions' 156-158, Livingstone, 'Article 14' 25-34.

⁶⁸ *ibid* 154.

⁶⁹ *ibid* 156.

⁷⁰ Olivier De Schutter, *International Human Rights Law* (Cambridge University Press 2011) 571-572.

⁷¹ *Belgian Linguistics Case* App no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (ECHR, 23 July 1968).

to these questions leading to radically different outcomes in cases. Questions such as: what is discrimination? What does it mean to “enjoy” rights and freedoms? In relation to these questions the Court uses the term “ambit” to refer to the area of Article 14’s application. Domestic judges’ approach to interpreting Article 14 as ‘parasitic’ in nature can be seen in *Clarke v Secretary of State for Environment, Transport, and the Regions*, which encapsulated the judge’s view of Article 14’s existence being based on its role to ‘inform’ and ‘expand on’ the meaning of other rights.⁷²

The scope of a principle can be divided into the personal scope and the material scope. The personal scope relates to the group of its addressees and beneficiaries. The material scope refers to its domains of application. Article 14’s personal scope is very broad. Under Article 34 of the ECHR, all Convention principles and rights protect all legal and physical persons under the jurisdiction of a State party to the Convention as groups of individuals or as individuals in their own right. Individuals are not bound directly by Article 14. As seen in *Pla and Puncernau v Andorra* and *Opuz v Turkey*, Article 14’s horizontal effect can be said to be indirect and operates through the Contracting States’ positive obligations and procedural duties to protect Convention rights from both individual and state violations.⁷³

In relation to the material scope of Article 14 the principle of discrimination is limited. The scope is limited in so far as while the Article encompasses all areas of national law, it is limited in that it only applies if one of the Convention rights applies. The Convention is a list of rights, which can be characterized for the most part as “civil and political”. The ECHR has been used increasingly to protect particular “economic and social rights”, whether that is either directly or indirectly through the

⁷² *Clarke v Secretary of State for Environment, Transport, and the Regions* [2001] EWHC Admin 800 [5].

⁷³ *Pla and Puncernau v Andorra* 2004-VIII (2006) 42 EHRR 25, *Opuz v Turkey* (2010) 50 EHRR 28 para 191.

interpretation of political and civil rights.⁷⁴ Critics such as Dubout, Akandji-Kombé and Besson have discussed how Article 14's non-discrimination clause has often been used to effect a more collective and social interpretation of Convention rights.⁷⁵ This point will be referred to later in the Roma educational segregation cases and the forced sterilisation cases.

2.1.4 'The enjoyment of Convention rights'

The ECtHR has provided that the area described by 'the enjoyment of Convention rights' is not the same as the area directly protected by other Convention articles.⁷⁶ While the ECtHR has provided some guidance on 'the enjoyment of Convention rights', it has not addressed with clarity how far the area of 'enjoyment' exceeds the protective scope of the other Convention Articles. If the words of Article 14 are read without reference to the other Convention articles, then one might say that the drafters of the Convention considered that Contracting States may not only encroach on specific protected rights, but may also arrange things in a way in which some people in society would have advantages in their enjoyment of rights when others in society would not.

The phrase 'The enjoyment of [Convention] rights ... shall be secured without discrimination ...' provides that governments of states parties must guarantee that no group or individual will experience discrimination. International instruments define

⁷⁴ Frédéric Sudre, 'La protection des droits sociaux par la Cour Européenne des droits de l'homme: un exercice de jurisprudence fiction?' (2003) 55 *Revue Trimestrielle Des Droits de l'homme* 755-772. *Andrejeva v Latvia* App no 55707/00 (ECHR, 18 February 2009); *Gaygusuz v Austria* 1996-IV (1997) 23 EHRR 364, *Koua Poirrez v France* 2003-X (2005) 40 EHRR 34.

⁷⁵ Edouard Dubout, 'La Cour européenne des droits de l'homme et la justice sociale – à propos de l'égal accès à l'éducation des membres d'une minorité' (2010) 84 *Revue Trimestrielle Des Droits De L'Homme* 987-1011. Akandji-Kombé, 'Le droit à la non-discrimination vecteur de la garantie des droits sociaux' in Frédéric Sudre and Hélène Surrel eds *Le Droit À La Non-discrimination au sens de la Convention Européenne des Droits de L'Homme* (Bruylant 2008), Besson 'Evolutions' 162.

⁷⁶ *Karlheinz Schmidt v Germany* (1994) 18 EHRR 513, para 22, *Home Secretary v Hindawi* [2004] EQCA Civ 1309, [57-83], *R (Cliff) v Home Secretary* [2004] EWCA Civ 514 [14-18], *Thlimmenos v Greece* App no 34369/97 (ECHR 6 April 2000).

discrimination to include a 'distinction, exclusion, or preference ... which nullifies or impairs equality of opportunity of treatment'.⁷⁷ The question then arises of what it means to 'enjoy' a Convention right. According to Wintemute questions of the engagement of the article should be based on the idea of to what extent an individual can enjoy their Convention rights and on the principle of equality with others in society whether their rights been impaired by a government policy or measure, inadvertently or otherwise.⁷⁸

2.1.5 When can Article 14 be invoked?

It has been interpreted that Article 14 can be invoked in two situations: first, when the alleged discrimination occurs in the enjoyment of an ECHR protected right; second when the discrimination is on a ground which relates to the exercise of an ECHR right. The Court affirmed the application of Article 14 to the second situation for the first time in 2000 in *Thlimmenos v Greece*.⁷⁹ In that case the applicant successfully invoked Article 14 in combination with Article 9. The applicant was a Jehovah's Witness who was denied access to the chartered accountants profession because of his past criminal conviction for refusing to wear military uniform. Article 14 can be presumed to apply in situations where the discrimination penalizes persons for having chosen a particular lifestyle or a sexual orientation or for being in a particular family status (Article 8 ECHR) for opinions which they have expressed (Article 10 ECHR) or for joining or refusing to join an association (Article 11 ECHR).

⁷⁷ See for example the International Labour Organisation's anti-discrimination provision, Convention 111 (quote has removed the labour-specific language).

⁷⁸ Robert Wintemute, 'Filling the Article 14 'gap': Government ratification and judicial control of Protocol No. 12 ECHR: Part 2' (2004) 5 *European Human Rights Law Review* 484, 484-485.

⁷⁹ *Thlimmenos v Greece*, para 42

It can be seen from *Belgian Linguistics* that the application of Article 14 does not presuppose the breach of another ECHR right or freedom.⁸⁰ *Belgian Linguistics*, the first pronouncement of Article 14 jurisprudence by the Court, cited examples of how the ambit extends beyond the protective scope of other articles.⁸¹ The applicants in the case submitted applications on their own behalf and on behalf of their children. They alleged that Belgian linguistic legislation relating to education infringed their rights under the Convention. They alleged violations of Article 8 in conjunction with Article 14 and Article 2 of Protocol 1. The applicants asserted that the law of the Dutch speaking regions where they were resident did not provide adequate provisions for French-language education.

The Court by a majority of 8 to 7 found that the Belgian Act of 2 August 1963 did not comply with Article 14 of the Convention read in conjunction with Article 2 of Protocol 1.⁸² This finding was on the basis that the Act prevented certain children solely based on the residence of their parents from accessing French-language schools in the outskirts or communes of Brussels. The Court considered the principle of equality of treatment enshrined in Article 14 in coming to its decision. No breach of Articles 8 and 14 of the Convention and Article 2 of the Protocol were found with regard to the other points of issue and contested legislation. The Court's seminal discussion on justification and proportionality in relation to Article 14 will be discussed in a later section in this chapter.

⁸⁰ *Belgian Linguistics Case* App no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (ECHR, 23 July 1968).

⁸¹ Kristin Henrard, 'The Interrelationship between Individual Human Rights, Minority Rights and the Right to Self-Determination and Its Importance for the Adequate Protection of Linguistic Minorities' (2001) 1 (1) *The Global Review of Ethnopolitics* 41, 51.

⁸² Christian Hillgruber and Matthias Jestaedt, *The European Convention on Human Rights and the Protection of National Minorities* (Verlag Wissenschaft und Politik 1994) 26-27.

2.1.6 Discrimination Grounds.

The benefit of Article 14 is that the language used is open-ended and therefore not bound by a limited list of discrimination grounds.⁸³ The language used in Article 14 leaves virtually everything to be decided in its application; due to the phrasing of the text of the article claimants are able to bring a claim based on a multiplicity of identities. The Court itself has established that the most important factor that will influence the strictness of review under Article 14 is the discrimination ground. The Court for the most part has set out that the “suspect” discrimination grounds calling for strict scrutiny include race/ ethnic origin, sex, nationality, religion, sexual orientation and birth in or outside marriage.⁸⁴ Following the “suspect” category is the intermediate category of discrimination where the grounds are based on quite defined personal identities such as age, social origin, political or other opinion, language, disability and transsexualism.⁸⁵

Due to the passing of time and the shifting boundary between the two categories based on the subject-matter under consideration, it is difficult to outline exactly those grounds which fit within the “suspect” and “non-suspect” grounds of differentiation. In the 2011 decision handed down in *Kiyutin v Russia*, the Court clarified that the wording of Article 14 includes the phrase ‘any other status’.⁸⁶ It was held by the Court that Article 14 had been violated in conjunction with Article 8 on

⁸³ Oddný Mjöll Arnardóttir, ‘Multidimensional Equality from Within. Themes from the European Convention on Human Rights’ in Dagmar Schiek and Victoria Chege (eds), *European Union Non-Discrimination Law. Comparative Perspectives on Multidimensional Equality Law* (Routledge-Cavendish 2009) 55.

⁸⁴ *Kozak v Poland* App no 13102/02 (ECHR, 2 June 2010). *Fredin v Sweden* App no 12033/86 (ECHR, 18 February 1991), *Immobiliare Saffi v Italy* App no 22774/93 (ECHR, 28 July 1999), *Chapman v the United Kingdom* App no 27238/95 (ECHR, 18 January 2001), *Inze v Austria* App no 8695/79 (ECHR, 28 October 1987), *Mazurek v France* App no 34406/97 (ECHR, 1 February 2000), *Sommerfeld v Germany* App No 31871/96 (ECHR, 8 July 2003).

⁸⁵ *Palau-Martinez v France* (App no 64927/01) ECHR 16 December 2003, in this case the Court applied a test based on the legitimacy of the reasons for differentiating on the grounds of religion and secondly on the proportionality of the differentiation however this can be compared with the judgment in *Hoffmann v Austria*, Series A no. 255-C, June 1993 para 36.

⁸⁶ *Kiyutin v Russia* App no 2700/10 (ECHR, 10 March 2011).

the basis of the applicant's health status.⁸⁷ It was argued by the Court that the applicant's claim could be considered under the ground of disability or 'other status'. The Court ultimately found a violation under 'other status'.⁸⁸ The decision related to health status on the basis of the applicant's HIV status in *Kiyutin* displays how the discrimination grounds set out in the text of Article 14 is not closed or fixed ended. The 'any other status' phrase allows for the Court to find discrimination on a ground not explicitly named in the text of the Convention.

The strictness of scrutiny exercised by the Court will depend on the context as a whole.⁸⁹ The exceptions to this approach are cases where differences of treatment are on grounds of race or ethnic origin. As will be seen in later chapters the Court in the Roma case law has discussed how racial discrimination is 'a particularly egregious kind of discrimination'.⁹⁰ Should it be argued that there is a restricted scope of application of Article 14, one could say that this is partly dealt with by the Court's recognition that where it reaches a certain level of severity, discrimination based on ethnic origin, race, sex, religion or sexual orientation may constitute a degrading treatment under Article 3, prohibited in absolute without the possibility of justification.⁹¹ Given the historic position in the Court of not considering a breach of Article 14, it can be said that there has been scope for the extension of the Article in combination with Article 3, Article 8 and Article 1 of Protocol No. 1. In later chapters

⁸⁷ *Kiyutin v Russia*, para 74.

⁸⁸ *ibid* para 57.

⁸⁹ Olivier de Schutter, *The Prohibition of Discrimination under European Human Rights Law: Relevance for the EU non-discrimination directives – an update* (European Commission Directorate-General for Justice May 2011) 14.

⁹⁰ *Nachova and Others v Bulgaria* App Nos 43577/98 and 43579/98 (ECHR, 6 July 2005), para 145.

⁹¹ In relation to race or ethnic origin the report adopted on 14 December 1973 by the Commission under former Article 31 ECHR in *East African Asians v United Kingdom* (Decisions and Reports 78-A, 62). With reference to sex see *Abdulaziz, Cabales and Balkandali v United Kingdom* (Series A No 94, 42 at para 91) and religion: *Cyprus v Turkey* App no 25781/94 (ECHR, 10 May 2001), para 309, sexual orientation: *Smith and Grady v United Kingdom* App nos 33985/96 and 33986/96 (ECHR, 27 September 1999), para 121.

the effect which Roma case law has had on the extension of the scope of the article taken in conjunction with Articles 2, 3, 6 and 8 will be discussed.

2.2 The Court's Approach to Direct Discrimination

McKean states that discrimination is today used in the 'pejorative sense of an unfair, unreasonable, unjustifiable or arbitrary distinction' which applies to 'any act or conduct which denies to individuals equality of treatment with other individuals because they belong to particular groups in society'.⁹² According to McCrudden 'the Primary function of Article 14, essentially, is in protecting the [non-discriminatory] distribution of other human rights protected by the ECHR.'⁹³ While it is crucial to acknowledge the contingent nature of Article 14, it could be said that an overemphasis on its accessory nature may lead to an overly restrictive understanding of its application and scope.⁹⁴ One of the major weaknesses in traditional Article 14 jurisprudence has been the very limited understanding of what was included and covered by the term 'discrimination'. As the Convention has provided no definition for the concept of discrimination, it has been seen that the Court has applied the methodological principles set out in *Demir and Baykara* on how to define concepts set out in the Convention:

[I]n defining the meaning of terms and notions in the text of the Convention, [the Court] can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of the European States reflecting their common values.⁹⁵

⁹² W.A. McKean, 'The Meaning of Discrimination in International and Municipal Law' (1970) 44 *British Yearbook of International Law* 178, 287.

⁹³ Christopher McCrudden, 'Equality and Non-Discrimination' in David Feldman (ed), *English Public Law* (Oxford University Press 2004) para 11.86.

⁹⁴ Aaron Baker, 'The enjoyment of Rights and Freedoms: A New Conception of the "Ambit" under Article 14 ECHR' (2006) 69 (5) *Modern Law Review* 714, 714-715.

⁹⁵ *Demir and Baykara v Turkey* App no 34503/97 (ECHR, 12 November 2008), paras 85-86.

The history of the Court's dealing with Article 14 has focused on a concept of 'discrimination' that has tended to prohibit only 'direct and overt' discrimination. This has led to a failing to address subtler or covert forms of discrimination. In *Belgian Linguistics*, one of the earliest cases to come before the Court, the test for establishing when discrimination has occurred was set out. The Court indicated that not every difference of treatment could be said to amount to discrimination. It stated:

[A] difference in treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship or proportionality between the means employed and the aim sought to be realized.⁹⁶

The definition handed down by the Court can be divided up into three parts: (1) there must be different treatment without both (2) a legitimate aim for such treatment (this was later phrased as an objective and reasonable justification) and (3) proportionality between the legitimacy of this purpose and the ends used to achieve it. These parts will be discussed in a subsequent section, while the next section will discuss indirect discrimination.

2.3 Indirect Discrimination

Indirect discrimination can be said to be grouped into three different forms:

- a. where, without on the face of it creating a difference in treatment (and being thus apparently neutral), a regulation or a practice appears to be particularly disadvantageous to the members of a certain category, if the provision creating the disadvantage is not objectively and reasonably justified.
- b. where a general measure is applied which affects a disproportionately high number of members of a particular category, unless the measure resulting in such a disparate impact is objectively and reasonably justified (disparate impact discrimination).

⁹⁶ *Belgian Linguistics Case* App no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (ECHR, 23 July 1968).

c. where the author of a general measure has without objective and reasonable justification failed to treat differently a specific individual or category by providing for an exception to the application of the general rule.⁹⁷

Without reference to subjective intentions, applicants can claim that on the basis of a particular discrimination ground certain measures have a discriminatory effect.

Historically applicants were unsuccessful in discharging the burden of proof in cases based on covert differentiation. The failure of applicants seems to have been due to the discrimination ground not being considered established. The burden of proof will be discussed in a later section.

The Court has traditionally focused on formal distinctions between persons in analogous positions. This reliance on formal distinctions is useful for straightforward cases of explicit direct distinctions. This approach is not always helpful in recognizing different situations as amounting to discrimination. There is a need to develop a concept of indirect discrimination analysis that does not require the establishment of subjective intent to discriminate. Another issue has been that the Court's attitude to indirect discrimination has been historically hesitant. The Court in 1979 in *Marckx v Belgium*, found violations of Article 8, Article 14 taken in conjunction with Article 8, and Article 14 taken in conjunction with Article 1 of Protocol No. 1. It could be seen from the Court's decision in *Marckx* that the Court in general was hesitant to deal with indirect discrimination. The case was decided on direct discrimination on the ground of birth, however the case was positive in that there were references to an effects-based approach to discrimination from the early case law of the Court. This effects based approach would be built on in later cases towards full recognition of indirect discrimination.

⁹⁷ Olivier de Schutter, *The Prohibition of Discrimination under European Human Rights Law: Relevance for the EU non-discrimination directives – an update* (European Commission Directorate General for Justice May 2011) 23.

Abdulaziz, Cabales and Balkandali v The United Kingdom, a case from 1985, is viewed as the leading judgment in establishing that the Court is not prepared to fully enter into an indirect discrimination approach, this is despite not emphasising intent.⁹⁸ The applicants cited that the immigration rules in question in the case were found by a minority of the Commission to be ‘indirectly racist’.⁹⁹ The applicants also asserted that the condition that stated that couples who intended to marry had to have already met, adversely affected people from the Indian sub-continent. They further said the provision would adversely affect persons from that area, as arranged marriages were customary there.¹⁰⁰ The Court did not enter into an adverse effect analysis on the issue. The part of the application that related to the adverse effect on the applicants was not considered, as the Court decided this element of the case on the grounds that the purpose of the immigration rules generally was to protect the labour market and that the condition of intended spouses having met would help to ensure that the rule was not circumvented. The Court concluded that it had not been established that the immigration rules made a distinction on the grounds of race.¹⁰¹ It further did not agree with the minority of the Commission on their assertion that the rules were indirectly racist as the rules applied to all “non-patrials” and did not contain any regulations that differentiated on the ground of race or ethnic origin.¹⁰² The Court did find a violation of Article 14 in conjunction with Article 8 on the ground of sex. Therefore the overt discrimination ground of sex was found, yet the covert discrimination ground of race was not found.

⁹⁸ Titia Loenen, ‘Rethinking Sex Equality as a Human Right’ (1994) 12(3) *Netherlands Quarterly of Human Rights* 253, 263.

⁹⁹ *Abdulaziz, Cabales and Balkandali v The United Kingdom*, Series A 94 28 May 1985, para 84.

¹⁰⁰ *ibid* para 85.

¹⁰¹ *ibid* para 85.

¹⁰² *ibid* para 84.

Again in *Magee v The United Kingdom* the covert discrimination ground on the basis of a personal characteristic was not established, yet the overt discrimination ground of geographical location was established and found to be justified.¹⁰³ The case is a useful example of the difficulties facing groups who seek to establish the discriminatory effect of *prima facie* neutral legal provisions on them. The Court's judgment appears to merge the objective justification issue with the proof of discrimination ground issue. The applicant complained that a difference based on association with a national minority or on national origin had led to different anti-terrorist legislation being applicable to similar fact-situations in England and Wales and in Northern Ireland. Evidence of the Court's focus on the overt rather than covert discrimination ground can be found when the Court stated that the different treatment was:

...not to be explained in terms of personal characteristics, such as national origin or association with a national minority, but on the geographical location where the individual is arrested and detained.¹⁰⁴

It is only in more recent jurisprudence that the Court explicitly referred to indirect discrimination. In *Hoogendijk v The Netherlands* the Court stated:

[W]here an applicant is able to show, on the basis of undisputed official statistics, the existence of a *prima facie* indication that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of women than men, it is for the Respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex. If the onus of demonstrating that a difference in impact for men and women is not in practice discriminatory does not shift to the Respondent Government, it will be in practice extremely difficult to prove indirect discrimination.¹⁰⁵

Hoogendijk concerned a disability allowance granted under Dutch law. It was only granted, though, if the applicant or applicant's family members' (where they

¹⁰³ *Magee v The United Kingdom*, Reports 2000-VI 6 June 2000, paras 49-50.

¹⁰⁴ *ibid* para 50.

¹⁰⁵ *Hoogendijk v The Netherlands* 6 January 2005 40 EHRR SE 22.

were obliged to contribute to the applicant's maintenance) earnings were below a certain threshold. The Court found indirect sex discrimination. This finding was on the basis that more women than men lost the benefit due to the second condition that related to the income of a family member. This case, though similar to those preceding it, was decided before the creation of the *Hugh Jordan* test for indirect discrimination, which will be discussed in detail below.

In chapter four the issue of the Court's recognition and approach in relation to indirect discrimination will be discussed and an analysis of what impact the *Hugh Jordan* test had on Roma case law will be provided. Whether the Court followed on from the potential of *Hugh Jordan* in providing a detailed and special approach to the issue of proof of prima facie discrimination will also be addressed. It will be discussed in a later chapter whether the Court in the Roma case law has clarified whether and when the *Hugh Jordan* test involving establishing intent for discriminatory effect analysis or the *Thlimmenos* test focusing on no need to establish intent will be relied upon and in what situations.

2.4 The requirement of a comparator and the question of justification.

The Court has consistently emphasized that Article 14 safeguards individuals, or groups of individuals, 'placed in comparable situations'¹⁰⁶ or 'placed in analogous situations'¹⁰⁷, from discrimination in the enjoyment of the rights provided for in the Convention. This requires an individual or group to show that the situations in which differences in treatment exist are comparable or analogous. The requirement was confirmed in the *Van der Mussele* case, where the Court cited its reliance on

¹⁰⁶ *National Union of Belgian Police* App no 4464/70 (ECHR, 27 October 1975), para 44.

¹⁰⁷ *Van der Mussele v Belgium* App no 8919/80 (ECHR, 23 November 1983), para 46. *Lithgow and Others v UK* App no 9405/81 (ECHR, 8 July 1986), para 177.

‘fundamental differences’.¹⁰⁸ The applicant in the case argued that different professional groups were the comparators. The Court found that there were fundamental differences in how the professions were regulated, which prevented them from being used as comparators.

The approach of the Court has been to strictly assess ‘analogous situations’.¹⁰⁹ In addition to this there has been a reliance on the comparator requirement due to the Court’s use of the formal model of equality, which will be discussed in the next chapter. According to Fredman, one of the major issues with the comparator is that it tends to be a white, male, heterosexual, able-bodied Christian.¹¹⁰ This formal conception of a comparator would neglect to reflect the differences in ethnicity, race, culture or background, which would exclude many minority groups in Europe today.

A further issue is the comparator approach’s focus on merely asking if there is a difference, it does not ask whether the difference in treatment could be said to be proportionate to the difference in situation.¹¹¹ The issue with the use of a comparator is that the Court itself has not clarified its position on whether the comparator requirement has a role in Strasbourg case law.¹¹² Baroness Hale of Richmond has attempted to offer clarity by stating that the Strasbourg Court is more focused on questions of justification than the domestic courts’ focus on the need for a comparator.¹¹³ The Strasbourg Court treats the question of whether a comparator is in an analogous position as being closely linked to the question of justification. This

¹⁰⁸ *Van der Musselle v Belgium*, para 46.

¹⁰⁹ Eyal Benvenisti, ‘Margin of Appreciation, Consensus, and Universal Standards’ (1998-1999) 31 *N.Y.U. International Law and Politics* 843.

¹¹⁰ Sandra Fredman, *Discrimination Law* (2nd edn, Oxford University Press 2011) 8-10..

¹¹¹ Fredman, *Discrimination Law* 8-10.

¹¹² Oddný Mjöll Arnardóttir, *Equality and Non Discrimination under the European Convention on Human Rights (International Studies in Human Rights)* (Martinus Nijhoff Publishers 2002) 182-184.

¹¹³ *AL Serbia (FC) v Secretary of State for the Home Department* [2008] UKHL 42 [22-25].

relation between the comparator requirement and justification could cause issues for the development of a substantive equality model under Article 14.

Livingstone in 1997 criticised ECHR jurisprudence as having spent little time on considering and identifying whether someone is in an analogous position to the person from whom they are claiming they are being treated differently.¹¹⁴ He argued that the issue of comparison had been subsumed into the issue of justification and whether any differences in treatment are justified.¹¹⁵ Van Dijk and Van Hoof opine that by subsuming comparability issues into justification risks that ‘the interest protected and/or the goals envisaged in the provisions embodying equality become under-exposed’.¹¹⁶ The other side of the argument would proffer that this approach would be beneficial in that it would avoid the search for “true comparators”. In later chapters the issue of finding “true comparators” in Roma jurisprudence will be analysed.

Commentators such as Westen and MacKinnon have discussed how attempting to assess whether one is comparing like with like is either invidious or circular.¹¹⁷ Westen discusses the circular method of comparing individuals as identifying in what way an individual is like or unlike and then on this basis deciding whether a difference in treatment as being justified or not.¹¹⁸ The invidious perspective looks at how past patterns of discrimination have potentially brought people to a particular position, which leads to all of us being different from each other.¹¹⁹ It could be argued that comparing the earlier cases in the Court’s history,

¹¹⁴ Livingstone, ‘Article 14’ 30.

¹¹⁵ Livingstone, ‘Article 14’ 30-31.

¹¹⁶ Pieter Van Dijk and Godefridus J H Van Hoof, *Theory and Practice of the European Convention on Human Rights* (2nd edn, Kluwer Law International 1990) 540.

¹¹⁷ Peter Westen, ‘The Empty Idea of Equality’ (1983) 95 *Harvard Law Review* 537. Catherine MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1991) 215.

¹¹⁸ Westen, ‘The Empty’ 537.

¹¹⁹ MacKinnon, *Toward a Feminist Theory* 215.

where there was little division between comparability and justification, to the later cases like *Burden* and *Carson* has shown that there has been movement in the Court in being clearer about assessing comparability, but at the same time it could be said that this approach has been a less formalistic one.¹²⁰

In the early days of the Court comparability did not feature as much as in cases once they got past the admissibility stage. On occasions it can be seen that the idea of parties not being similarly situated was used in order to dismiss applications on the grounds of being manifestly ill founded. In *X v United Kingdom* it was found that a United Kingdom national who decided to live abroad was ‘not comparable’ to that of service personnel and diplomats when it came to a decision on having a vote in United Kingdom elections.¹²¹ In *H v Norway* the father of an unborn child was found to not be ‘analogous’ to that of the mother when it related to decisions with respect to termination of the pregnancy.¹²²

The Court also relied on circular reasoning, though, as can be seen in *Lindsay v United Kingdom*.¹²³ In that case the situation of cohabiting and married couples was found not to be analogous in respect of tax assessments. This decision was made on the basis that marriage is a particular legal and social institution. The applicants argued that there was no reason that the status of marriage should justify the different treatment of couples that lived together. In 2013 in *X and Others v Austria* the applicants in the case, a female same-sex couple, claimed their legal exclusion from second parent adoption amounted to discrimination.¹²⁴ Second parent adoption was

¹²⁰ *Burden v The United Kingdom* App No 13378/05 [2008] ECHR 357, *Carson v The United Kingdom* App No 42184/05 judgment of 16 March 2010.

¹²¹ *X v United Kingdom* (1977) D & R 121.

¹²² *H v Norway* (1992) 73 D & R 155.

¹²³ *Lindsay v United Kingdom* (1986) 49 D & R 181

¹²⁴ *X and Others v Austria* App no 19010/07 (ECHR, 19 February 2013).

available to married and unmarried opposite - sex couples, but unavailable to same-sex couples in Austria due to the Civil Code.

The Court found a violation of Article 14 in conjunction with Article 8 on the basis of the difference in treatment of the applicants in comparison with unmarried opposite-sex couples where one partner wanted to adopt the other partner's child. In a positive way in this case the Court found that unmarried same – sex couples were in the same comparable situation as unmarried opposite-sex couples and therefore should be treated in the same way. On the other hand the Court unanimously found no violation of Article 14 in conjunction with Article 8 when the applicants' situation was compared with that of a married couple. The Court was therefore finding that cohabitating same – sex unmarried couples were not in a situation comparable to married opposite – sex couples. The worrying aspect of this judgment was that the Court did not consider that the differential treatment for unmarried same – sex couples and opposite – sex couples not amounting to discrimination will impact same – sex couples more than opposite – sex couples, as same – sex marriage is denied to many couples in European states. Therefore the non-comparability between married and unmarried couples in assessing discrimination will have a more profound negative impact on same – sex couples rather than opposite – sex couples. These cases display the Court's historic position of not sticking rigidly to any one sort of reasoning on comparators and to not adopting a coherent position on the discussion of comparators.

Two seminal cases in the Court's history, namely *Thlimmenos v Greece* and *Hugh Jordan v UK*, have approached the issue of a comparator in two different

ways.¹²⁵ The *Thlimmenos* test moves from a standpoint of the state being required to treat the applicant differently from the comparator group while the *Hugh Jordan* test implies that the applicant be treated the same as the comparator group.¹²⁶ While both tests are arguably suitable, they are dealing with different types of wrongs, in *Thlimmenos* the applicants alleged a violation of Article 14 in conjunction with Article 9 in relation to his right to freedom of religion and discrimination on these grounds. A violation of Article 14 in conjunction with Article 9 was found on the basis that the state had, without objective and reasonable justification, failed to treat differently persons whose situations differed greatly. In *Hugh Jordan* the applicant alleged that his son was unjustifiably shot and killed by a police officer of the Royal Ulster Constabulary in Belfast in November 1992.¹²⁷ He alleged violations of Articles 2, 6, 13 and 14. The Court unanimously found a violation of Article 2, but no violations of Article 6 subsection 1, Article 14 or Article 13. No violation of Article 14 was found as the Court held that statistics showing a disproportionate number of prosecutions and killings among Catholics in the North were insufficient on their own to show discriminatory practice.¹²⁸

It could be said that the *Hugh Jordan* test that focuses on applicants being treated the same as the comparator group is suited to quite complex cases where the different treatment and the disproportionate effect which the 'policy or measure' is having on a group may be established through statistical evidence.¹²⁹ The *Thlimmenos* test, which focuses on the applicant being treated differently from the comparator group is better suited to overt and clear-cut cases where the discrimination

¹²⁵ *Thlimmenos v Greece* App no 34369/97 (ECHR, 6 April 2000), *Hugh Jordan v UK* App no 24746/94 (ECHR, 4 August 2001).

¹²⁶ Oddný Mjöll Arnardóttir, 'Non-discrimination Under Article 14 ECHR: the Burden of Proof' (2007) 51 *Scandinavian Studies in Law* 13, 15.

¹²⁷ *Hugh Jordan v UK*, paras 12-27.

¹²⁸ *ibid* paras 152-155.

¹²⁹ Arnardóttir, 'Non-discrimination' 15.

complained of and its basis is more fact based.¹³⁰ The two tests also differ in how they deal with discriminatory effect; the *Thlimmenos* test moves from a view that the discriminatory effect is similar for all persons in the group and that this discriminatory effect is different from the comparator group; in contrast, the *Hugh Jordan* test deals with wrongdoing in relation to disproportionate effect, and it does not deem it necessary that all individuals in a group be similarly affected by the discriminatory effect. Bruun argues that the interpretation of the scope of the concept of discrimination is quite broad when different treatment in analogous situations in a prima facie case of discrimination takes place.¹³¹

In *Evans v The United Kingdom* a subsidiary argument of the applicant focused on her being treated differently from a woman who could conceive without the use of IVF.¹³² The Grand Chamber noted that it did not need to decide whether the applicant was in an analogous position to a woman who could conceive naturally.¹³³ They stated that as the justification test under Article 8 was already satisfied, then in any event the existence of any distinction could be justified.¹³⁴ In *Ismailova v Russia* a father was granted custody of his children.¹³⁵ The children's mother was the applicant in the case and was not granted custody. She alleged discrimination, however, the Court found against her and stated that while there were a number of differences between the parents' situations, the Court ultimately found that justification for the decision came from these differences.¹³⁶

¹³⁰ Arnardóttir, 'Non-discrimination' 15-16.

¹³¹ Niklas Bruun, 'Prohibition of Discrimination under Article 14 European Convention on Human Rights' in Filip Dorssemont, Klaus Lörcher and Isabelle Schömann (eds), *The European Convention on Human Rights and the Employment Relation* (Hart 2013) 367, 374.

¹³² *Evans v United Kingdom* App no 6339/05 (ECHR, 10 April 2007).

¹³³ *ibid* para 95.

¹³⁴ *ibid* para 95.

¹³⁵ *Ismailova v Russia* App no 37614/02 (ECtHR, 29 November 2007).

¹³⁶ *ibid* paras 57-61.

In can be seen in *Burden and Burden v United Kingdom* that the Court still continues to closely connect the comparator requirement with the question of justification.¹³⁷ The applicants in *Burden* were sisters who had lived together all their lives. Their case centered around their allegation that they were being discriminated against in their treatment under the Inheritance Tax system as opposed to same sex couples. The majority held that they were not in an analogous position to civil partners due to civil partnership and marriage being different forms of relationship to that of siblings. Judge Bjorgvinsson stated that the comparison should focus on the differences in the nature of the relationship and not on the differences in the legal framework.¹³⁸ The Grand Chamber stated:

[A] difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized. The contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment,...

This statement by the Grand Chamber in *Burden* perfectly sums up the connection between the question of justification, the pursuing of a legitimate aim and the issue of proportionality between the means employed and aim sought to be achieved and the margin that is afforded to Respondent States as sovereign entities.

In the aftermath of *Burden*, the Court further established that any difference in treatment between siblings and civil partners/ married couples could be justified in *Carson v United Kingdom*.¹⁴⁰ The Court examined both the question of justification and the analogous situation requirement. The case concerned the indexing of link pensions; the pension of UK citizens resident in the UK were indexed, while the

¹³⁷ *Burden and Burden v The United Kingdom* App no 13378/05 (ECtHR, 7 May 2008).

¹³⁸ *ibid* Concurring Opinion of Judge Davíð Thór Björgvinsson.

¹³⁹ *Burden and Burden v The United Kingdom*, para 60.

¹⁴⁰ *Carson v United Kingdom* App no 42184/05 (ECHR, 16 March 2010) para 80.

pensions of UK citizens resident abroad were not unless they resided in a country which had a treaty providing for the indexing. When the question of being in an analogous position arose, the Court stated that the pensioners in the UK were not in an analogous position to those who were not UK resident.¹⁴¹ It also stated that the pensioners living abroad where there existed a treaty provision were not in an analogous position to those living in a country where there was no treaty in existence.¹⁴²

As stated in *Koua Poirrez v France*, the principle of equal treatment will only be violated if the distinction has 'no objective and reasonable justification'.¹⁴³ The aims and effects of the measure will then be assessed in relation to such justification. The Court built on this rationale in *Timishev v Russia*, where a Chechen lawyer had been denied authorization to pass an administrative border.¹⁴⁴ The Ministry of the Interior of the Kabardino-Balkaria Republic provided an oral instruction to not admit persons of Chechen ethnic origin into the Republic. The Court did not simply note that the Government had provided no justification for the difference in treatment in the enjoyment of their freedom of movement between persons of Chechen and non-Chechen origin. The Court stated that:

In any event, ... no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.¹⁴⁵

The Court found that the victim had been discriminated against, as his right to liberty of movement was restricted 'solely on the ground of his ethnic origin'.¹⁴⁶ It appears from this that the Court imposes an absolute prohibition on any difference of

¹⁴¹ *Carson v United Kingdom*, paras 78-79.

¹⁴² *ibid* paras 78-79.

¹⁴³ *Koua Poirrez v France* App no 9063/80 (ECHR, 30 September 2003).

¹⁴⁴ *Timishev v Russia* App Nos 55762/00 and 55974/00 (ECHR, 13 March 2006).

¹⁴⁵ *Timishev v Russia*, para 58.

¹⁴⁶ *ibid*

treatment on grounds of ethnic origin or race, there being no possibility for contracting States to justify any difference in treatment. This absolute prohibition is in contrast to the Council of Europe's European Commission against Racism and Intolerance (ECRI) General Policy Recommendation No. 7 adopted in 2002 to combat racial discrimination and racism in national legislation. The Policy Recommendation provides for 'any differential treatment ... which has no objective and reasonable justification'.¹⁴⁷ While the Court does not provide an absolute prohibition it does provide the exception that particular measures may be taken to improve the situation of certain underprivileged groups or to ensure the appropriate representation of those groups in particular contexts. As will be seen in later cases taken by Roma the Court has made clear its position in relation to Contracting States being permitted to treat groups differently to correct "factual inequalities".¹⁴⁸ Again in relation to justification, the Court in *Sejdic and Finci v Bosnia-Herzegovina* set down that in certain circumstances, if a Contracting State fails to attempt to correct inequality through different treatment, it may possibly give rise to a breach of Article 14 without an objective and reasonable justification.¹⁴⁹

2.5 The issue of a Legitimate Aim

It was in the earlier mentioned *Belgian Linguistics* case that both the majority judgment and joint dissenting opinion provided several propositions for permissible distinctions under Article 14:

- (A) the distinction made must pursue a legitimate aim;
- (B) the distinction must not lack an 'objective justification'

¹⁴⁷ Council of Europe's European Commission against Racism and Intolerance (ECRI) General Policy Recommendation No. 7 2002.

¹⁴⁸ *Oršuš and Others v Croatia* App No 15766/03 (ECHR, 16 March 2010), para 157.

¹⁴⁹ *Sejdic and Finci v Bosnia-Herzegovina* App Nos 27996/06 and 34836/06, (ECHR, 22 December 2009), para 44.

(C) Article 14 is violated when it is clearly established that no reasonable relationship of proportionality exists between the means employed and the aim sought to be realized.¹⁵⁰

We will first discuss the need for a distinction to pursue a legitimate aim. The following section will deal with comparability and justification followed by a discussion of proportionality. It can be seen from the case law that the Court has not set a very onerous task on Respondent States in proving a legitimate aim for differential treatment. In *Gillow v United Kingdom* the Court found no breach of Article 14 in conjunction with Article 8, as there was a legitimate aim to the Respondent State's provision of preferential treatment to those who had a connection to the island of Guernsey in its restrictive planning laws.¹⁵¹ In contrast a violation of Article 14 in conjunction with Article 1 of Protocol 1 was found in *Darby v Sweden*.¹⁵² The Court found that there was no legitimate aim in the refusal to grant the applicant an exemption from a church tax when they were not a formally registered resident in Sweden. The Respondent State's argument focused on the applicant's case for exemption being weaker than those formally resident in Sweden and would lead to administrative inconvenience. The Court, as will be seen in later cases taken by Roma, appears to give a wide margin of appreciation to contracting states in relation to providing a legitimate aim for the differential treatment they have carried out.

2.6 Proportionality

When it is recognised that Article 14 is applicable to a case, a key element of the Court's ultimate ruling will be based on whether the means used to restrict the right are proportionate to the legitimate aim sought to be achieved. As not all differences

¹⁵⁰ *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* (Merits) 23 July 1968 p 34, 35, 89, 90.

¹⁵¹ *Gillow v United Kingdom* App no 9063/80 (ECHR, 24 November 1986).

¹⁵² *Darby v Sweden* App no 11581/85 (ECHR, 23 October 1990).

in treatment are tantamount to discrimination, the major difficulty lies in deciding on what criteria should be used when deciphering whether a difference in treatment is legitimate or not. The issue for any court applying a proportionality assessment will be how intensive its review should be. The issue concerning criteria was first dealt with in the *Belgian Linguistics* case. The Court in its judgment stated that:

[T]he principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles that normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized.¹⁵³

It can therefore be taken from the judgment that a successful finding of discrimination can be found where the proportionality between the aims sought to be achieved and the means used to achieve it are inadequate or if the differential treatment had no ‘objective and reasonable justification’.¹⁵⁴ It is through the proportionality review that the Court will be able to assess whether the measures taken “fit” with the potentially very general aims to be achieved. The Court may come to two different conclusions: it may uphold any measure even if it infringes on a protected right on the basis that it is seen to have any connection to the prescribed aim. The second outcome may require that evidence be shown to the Court that no other means of achieving the aim existed before holding the measures to a “strict scrutiny” standard.

The Court has consistently highlighted the importance of a proportionate balance to be struck between the aim pursued and the means used to pursue that aim.

¹⁵³ *Belgian Linguistic case*, para 10.

¹⁵⁴ Margarita Tsatsa-Nikolovska, ‘Protection Against Discrimination Under the ECHR’ in Pierre – Henri Imbert (ed), *Non-Discrimination: a Human Right: Seminar Marking the Entry into Force of Protocol No 12 to the European Convention on Human Rights* (Council of Europe Publishing 2006) 29.

In the seminal *Belgian Linguistics* case the Court stressed that, due to the importance of the principle of non-discrimination, close regard should be had to the ‘effects’ of the interference.¹⁵⁵ In addition it must be established whether the ‘disadvantage suffered by the applicant is excessive in relation to the legitimate aim pursued’.¹⁵⁶ Difference in treatment on the grounds of race or sex will incur the strictest evaluation of proportionality.¹⁵⁷ It can be seen that since the *Belgian Linguistic case* the Court has not settled on one particular approach to applying the proportionality test. This inconsistency can be seen in the cases of *Abdulaziz*, *Inze*, *Hoffmann* and *National Union of Belgian Police v Belgium*.¹⁵⁸ In *Abdulaziz* and *Inze* the Court carefully scrutinized the justifications which the Contracting States had put forward for the restrictions. The Court concluded in both cases that the “fit” between the means used to achieve the aim was lacking. In contrast, in *Hoffmann* or *National Union of Belgian Police v Belgium* the level of review was more cursory in nature, which led to the restriction being upheld. When the Court is determining the standard to be applied, there are a number of factors that will be considered.

As discussed extensively earlier, one of the factors will be the ground of discrimination. “Weighty reasons” are needed for distinctions to be upheld while other grounds require less strict scrutiny. A factor not previously discussed is the issue of the existence or lack of existence of a European consensus on the issue. The impact of this factor can be seen in the contrasting outcomes of the *Marckx* and *Rasmussen v Denmark* cases.¹⁵⁹ In *Marckx* the Court cited a European Convention on

¹⁵⁵ *Belgian Linguistics case*, para 10.

¹⁵⁶ *ibid* para 49.

¹⁵⁷ Aaron Baker, ‘Comparison Tainted by Justification: Against a ‘Compendious Question’ in Article 14 Discrimination’ [2006] *Public Law* 475, 483-485.

¹⁵⁸ *Abdulaziz, Cabales and Balkandali v The United Kingdom*, Series A 94 28 May 1985, *Inze v Austria* App No 8695/79 (ECHR, 28 October 1987), *Hoffmann v Austria* 14 EHRR 293, *National Union of Belgian Police v Belgium* App No 4464/70 [1975] ECHR 2,

¹⁵⁹ *Marckx v Belgium* App No 6833/74 (1979) 2 EHRR 330. *Rasmussen v Denmark* App no 8777/79 (ECHR, 28 November 1984).

the Legal Status of Children born out of Wedlock, thus displaying European consensus on the issue. The Court used this Convention to strengthen its view that there was a violation of Article 14 in conjunction with Article 8, on the basis that different treatment of illegitimate children did amount to discrimination. In contrast, in *Rasmussen* it was observed by the Court that little European consensus existed as to whether time limits should exist when it concerned a fathers' right to seek a determination of a child's paternity and whether the same rules should apply for mothers.

It could be argued that this inconsistency is negative in that it is much more difficult for applicants to know what test will be used in assessing whether there has been discrimination or not in the way in which measures are used to achieve a particular aim. The element of the Court's reliance on European consensus on an issue is potentially problematic, in that just because Contracting States view an issue in a particular way may have a negative impact on some applicants, showing that measures are proportionate. On the other hand, in cases such as *Marckx* and *Rasmussen* European consensus displayed the way in which Contracting States had come to realize that discrimination against particular individuals was a Europe wide issue.

2.7 The Margin of Appreciation

Article 14, contrary to the implication of the French text '*sans distinction aucune*', does not prohibit all forms of differential treatment or distinction. All States are faced with situations that require differentiation, either inherently or inevitably. States enjoy a certain margin of appreciation in allowing them to evaluate whether the manner and way in which measures are exercised are discriminatory. The margin of appreciation

can be useful where the Court judges feel that they, as international judges, whose job it is to uphold minimum European standards, are possibly not in the best position to assess whether a fair balance is being struck between the individual's rights and the legitimate public interest. It is important, though, to remember that the doctrine of the margin of appreciation is not mentioned in the Convention itself. While many date the emergence of the doctrine to *Handyside v UK* in 1976, the phrase 'margin of appreciation' was first used in the Commission report in *Lawless v Ireland*, where it was stated:

[H]aving regard to the high responsibility that a government bears to its people to protect them against any threat to the life of the nation; it is evident that a certain discretion – a certain margin of appreciation – must be left to the government.¹⁶⁰

It must be stated that not every distinction will be regarded as discriminatory, however, according to Breitenmoser and Grabenwarter every limitation must have a reasonable justification and legitimate objective.¹⁶¹ In the judgment of *Rasmussen v Denmark* the Court stated that a 'margin of appreciation' was allowed to national authorities 'in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law ... The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background'.¹⁶² The Court in the later judgment of *Abdulaziz, Cabales and Balkandali v UK* repeated the position of the Strasbourg organs that while a margin of appreciation is afforded to States, national decisions are still subject to the review of the Court and Commission.¹⁶³ In *Abdulaziz* the Respondent State sought a margin of

¹⁶⁰ *Handyside v UK* App No 5493/72 (ECHR, 7 December 1976), *Lawless v Ireland* App No 332/57 (1961) 1 EHRR 15.

¹⁶¹ Stephen Breitenmoser, 'The Protection of Groups and Group Rights in Europe' in Koen De Feyter and George Pavlakos (eds), *The Tension Between Group Rights and Human Rights A Multidisciplinary Approach* (Hart 2008) 256.

¹⁶² *Rasmussen v Denmark*, para 40; *Abdulaziz, Cabales and Balkandali v UK*, paras 72 and 78; *Lithgow and others v UK*, para 177; *Inze v Austria* App no 8695/79 (ECHR, 28 October 1987) para 41.

¹⁶³ *Abdulaziz, Cabales and Balkandali v UK*, para 72.

appreciation based on immigration policy.¹⁶⁴ The Court stated that while it did recognize ‘a certain margin of appreciation’ when assessing difference in treatment, it held that the issue of gender equality required ‘very weighty reasons’ to justify a difference in treatment based solely on the ground of sex.¹⁶⁵

There has also been inconsistency in the application of the margin. In *Fretté v France* a wide margin of appreciation was applied in the case of a gay man seeking permission to adopt.¹⁶⁶ No violation of Article 14 was found when the man was denied permission to adopt. A mere four years later the case of *E.B. v France* arose with similar facts.¹⁶⁷ In the latter case a violation of Article 14 was found and notably the margin of appreciation was scarcely mentioned. Macdonald notes the Court, in assessing the margin of appreciation in relation to Article 14, has adopted a general policy of engaging in a ‘particularly detailed’ analysis of the factual background of the case.¹⁶⁸ It could be argued, though, that from the language used by the Court, the scope of the margin left to Respondent States has been reduced to almost nil in cases involving race, sex and being born out of wedlock. This contention will be debated in later chapters in relation to the margin of appreciation granted to Contracting States in cases involving Roma applicants.

2.8 The Burden of Proof in Article 14 cases

The ECtHR follows an investigatory model of proceedings. Under Article 38(1)(a) ECHR the Court has at least theoretically an active role in fact-finding. However, under Article 35, the exhaustion of domestic remedies rule, the Court will in general

¹⁶⁴ *ibid* para 75.

¹⁶⁵ *ibid* para 78.

¹⁶⁶ *Fretté v France* App no 36515/97 (ECHR, 26 February 2002).

¹⁶⁷ *E.B. v France* App no 43546/02 (ECHR, 22 January 2008).

¹⁶⁸ RJ Macdonald, ‘The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights’ in Dota A Giuffrè (ed), *International Law at the Time of its Codification. Essays in Honour of Roberto Ago* (Vol. 3, Cambridge University Press 1987) 187, 187-188.

rely on the domestic courts fact-finding.¹⁶⁹ The concept of the ‘burden of proof’ encompasses two distinct obligations: the burden of persuasion and the burden to come forward with evidence. Only the risk of non-persuasion applies in investigatory proceedings, whereas both obligations apply in adversarial proceedings. In all cases, regardless of their relying on the adversarial or investigatory model, one party or other to the case will have to bear the risk of non-persuasion. If the end result of a proceeding is to arrive at a decision, then it could be said that the burden of persuasion is unavoidable and universal.¹⁷⁰

The standard of proof required bears a close connection to the burden of proof in Article 14 cases. The standard of proof can be defined as the amount of evidence that must be presented before a Court before a fact can be said to exist or not exist. It refers to the objective standard for determining whether or not a fact or issue has been proven. The standard of proof can be the very onerous “beyond reasonable doubt” or conversely it can be on the “balance of probabilities”. The burden of proof refers to the obligation of a party to make out the case against the other party. It is important to note that the standard of proof required for *prima facie* discrimination is satisfied at the point where the burden of proof moves to the Respondent State to establish the objective and reasonable justification. It is acknowledged that it is quite difficult to prove discrimination claims.

Arnardóttir argues that the use of this very high standard of “proof beyond reasonable doubt” makes it even more difficult for applicants when it is applied.¹⁷¹ In

¹⁶⁹ Juliane Kokott, *The Burden of Proof in Comparative and International Human Rights Law* (Kluwer International 1998) 218.

¹⁷⁰ The Court in adversarial proceedings can only rely on evidence adduced by the parties. The parties could consent to the withholding of certain evidence, this would then affect the outcome of the case. The Court in investigatory proceedings would seek to actively discover the “truth”, therefore the situation with regard to a case being judged where some evidence had been withheld would not be theoretically possible.

¹⁷¹ Arnardóttir, ‘Non-Discrimination’ 37-38.

many cases discussed, the claim has been based on covert discrimination and/or discriminatory effect, the application of the standard of proof beyond reasonable doubt and the interpretation of discrimination with a focus on subjective intent leads to a hugely onerous burden of proof for prima facie discrimination having to be met.¹⁷² In many of the earlier cases the Court did make use of its flexible approach to the evaluation of all evidence or its flexible interpretation of the standard of proof.¹⁷³ Article 14 does not address the allocation of the burden of proof. The Article also does not address the possibilities for justifying a difference in treatment or the circumstances, that constitute discrimination.¹⁷⁴ The Court has over time established an analytical framework in its case law involving Article 14. This framework has aided in the identification of the concepts of discrimination that are operative in the Convention.¹⁷⁵

The Court's analytical approach and the concept of discrimination must be accompanied by the existence of a difference in treatment. Arnardóttir believes that there is a close correlation between the allocation of the burden of proof and the effectiveness of protection against discrimination.¹⁷⁶ The tendency in the Court had been to follow the traditional path and place the burden of proof on the party who alleged the discrimination. This essentially means that the person who is seeking to challenge the discriminatory practices of a State has the onerous task of proving that the Respondent State in question was discriminatory in its treatment.¹⁷⁷ The applicant in Article 14 cases must show a *prima facie* case of discrimination; the issue is that

¹⁷² *ibid* 38.

¹⁷³ *ibid*

¹⁷⁴ Oddný Mjöll Arnardóttir, *Equality and Non-Discrimination under the European Convention on Human Rights* (Kluwer Law International 2003) 53.

¹⁷⁵ *ibid* 14-15.

¹⁷⁶ Arnardóttir, *Equality and Non-Discrimination* 16.

¹⁷⁷ Claire Ovey and Robin White, Jacobs and White *The European Convention on Human Rights* (4th edn, Oxford University Press 2006) 425-426. Harris, O'Boyle, Warbrick and Bates, *Law of European Convention* 470-474.

the standard of proof is “proof beyond reasonable doubt”. It is accepted that if requirements for proving discrimination are too high, it will lead to the Court finding no violation. A balance must be struck: if the proof requirement is too lenient, it may result in a finding of discrimination where the conduct had been legitimate.¹⁷⁸ Some of the Article 14 judgments place little emphasis on proof for *prima facie* discrimination, with the Court proceeding straight to the objective justification test.¹⁷⁹ In turn there are also cases where maximum emphasis has been put on the applicant establishing a *prima facie* case of discrimination while the case then never reaches the objective justification analysis.¹⁸⁰ It could also be said that many cases have merged whether a *prima facie* case of discrimination has been proven with the application of the objective justification test.¹⁸¹

It is also crucial to remember that the Court as an international court is unlike a national court, it is more removed from the facts. The Court’s role is in supervising the implementation of State obligations under the Convention and not acting as a court of first instance that establishes facts. The Court does not operate on the basis of detailed stipulations of procedural law or on the basis of a developed theory. The Court has asserted that, while it examines a particular situation from the perspective of the individual making the allegation, it must also focus on the objective reality of the judicial claim in order for the claim to succeed.¹⁸² It is important to consider the very evaluative nature of Article 14. The application of the Article will often be

¹⁷⁸ Robert Belton, ‘Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice’ (1981) 34(5) *Vanderbilt Law Review* 1205, 1224-1225. Geoffrey Bindman, ‘Proof and Evidence of Discrimination’ in Bob Hepple and Erika M Szyszczak (eds), *Discrimination: The Limits of Law* (Mansell 1992) 57.

¹⁷⁹ Aaron Baker, ‘Proportional, Not Strict, Scrutiny: Against a U.S. “Suspect Classifications” Model under Article 14 ECHR in the U.K.’ (2008) 56 *American Journal of Comparative Law* 847-894.

¹⁸⁰ Baker, ‘Proportional, Not Strict, Scrutiny’ 847-894.

¹⁸¹ Arnardóttir, *Equality and Non-Discrimination* 17.

¹⁸² Marie-Bénédicte 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, 226.

influenced by factors such as existing marginalization. It will also be crucial to exercise normative evaluation in deciding whether the rationalisations and arguments of the parties have proven the requisite 'facts'. Difficulties may also arise in relying upon a Respondent State's domestic investigation and adjudication of claims of a breach of Article 14. This in turn may result in the Court becoming somewhat more of a court of first instance in having to fact-find more than it usually would.¹⁸³

Bonello states:

Problems relating to the standard, onus and quantum of proof have repeatedly bedeviled the history of the European Court of Human Rights. The solutions adopted have, in my view, sometimes stunted the proper evolution of its case law and negated the protection of core Convention guarantees to victims of gross human rights abuse.¹⁸⁴

As Bonello has stated, problems relating to proof have stunted the evolution of the jurisprudence of the Court. This is particularly the case in relation to Article 14. The chapter will next discuss what does the Article 14 applicant have to prove and then move onto a discussion of the connection between the burden of proof and the margin of appreciation. The section will then conclude with a discussion of the shifting of the burden of proof.

2.8.1 What Does the Article 14 Applicant Have to Prove?

There is an argument that the Article 14 applicant has to prove 1) the different or similar treatment at issue, 2) its basis, and 3) the applicant being in a different or similar position to the comparator. The burden will be shifted to the Respondent State only when these three factors have been established, the onus will then be on the

¹⁸³ Ugur Erdal, 'Burden and standard of Proof in Proceedings under the European Convention' (2001) 26 *European Law Review Human Rights Survey* 68, 71. These instances of the Court becoming similar to a court of first instance has occurred in cases where serious allegations of Articles 2, 3, 13 and 14 ECHR are alleged in cases involving Bulgaria and Turkey.

¹⁸⁴ Giovanni Bonello, 'Evidentiary Rules of the ECHR in Proceedings Relating to Articles 2, 3 and 14 – A Critique' (2009) 2 *Inter-American and European Human Rights Journal* 66.

Respondent State to provide objective and reasonable justification.¹⁸⁵ Of the three factors it could be argued that establishing the different or similar treatment would be one of the more straightforward parts of drafting a claim of prima facie discrimination.¹⁸⁶ For the most part it will be clear from the application what the alleged discriminatory treatment amounts to. It is much more onerous, though, when dealing with proving how facially neutral State measures or neutral legislative provisions will have a different effect on separate groups.

At times the Court has dealt with claims of facially neutral provisions or measures in a very formal way and has not looked at the objective and reasonable justification arguments for them.¹⁸⁷ The Court in *Stubbings and Others v The United Kingdom* stated that the applicant must establish that:

[O]ther persons in an analogous or relevantly similar situation enjoy preferential treatment, the Court found no different treatment as the rules on limitation periods on civil claims applied equally for all victims of childhood sexual abuse and therefore the rules were seen to be 'neutral'.¹⁸⁸

There have been examples also of the Court not being convinced of the existence of different treatment, but nevertheless moving towards a very lenient review of the objective and reasonable justifications for the alleged treatment.¹⁸⁹ This approach tends to be focused on cases where there is a wide margin of appreciation due to the discrimination ground being one of the non-sensitive grounds of discrimination; this in turn will place the burden of proof on the applicant.¹⁹⁰

¹⁸⁵ Ovey and White, *The European Convention* 425-426. Van Dijk and Van Hoof, *Theory and Practice* 721-722.

¹⁸⁶ Harris, O'Boyle, Warbrick and Bates, *Law of European Convention* 470.

¹⁸⁷ Arnardóttir, 'Non-Discrimination' 21.

¹⁸⁸ *Stubbings and Others v The United Kingdom* App no 22083/93; 22095/93 (ECHR, 22 October 1996), paras 72-73.

¹⁸⁹ *Kamasinski v Austria* App no 9783/82 (ECHR, 19 December 1989), *Streletz, Kessler and Krenz v Germany* App nos 34044/96, 35532/97 and 44801/98 (ECHR, 22 March 2001).

¹⁹⁰ Arnardóttir, 'Non-Discrimination' 21.

The Court made clear in the *Hugh Jordan* case that statistical proof of an adverse effect is not sufficient in and of itself in establishing discrimination.¹⁹¹ Should the applicants wish to establish a *prima facie* case of indirect discrimination, then the Court requires the applicants to establish an underlying practice or pattern. The applicant must establish both the effect itself and the reason or cause behind the effect. As such, it can be argued that the burden to establish that indirect discrimination exists can be severe.¹⁹² The conceptualization of disproportionate effect discrimination has moved from a focus on the effects of measures (in line with indirect discrimination) to a focus on the underlying reasoning for the effects that stems from direct discrimination.¹⁹³ There has been a blurring of the distinction between direct and indirect discrimination. This can be said to be as a result of two factors: the Court establishing that intent is not a precondition in cases of direct discrimination and in cases of indirect discrimination the Court's examination of the reasons behind the disproportionate effects of neutral measures.¹⁹⁴ The Court did not provide a clear workable concept of indirect discrimination. This and the other factors outlined has led to some arguments of an onerous burden being placed on the applicant to prove the discriminatory effect.

While it is often quite straightforward to identify the discrimination ground, there are times when it can be difficult to clearly see which discrimination ground covers the alleged discriminatory treatment.¹⁹⁵ It could therefore be said that there will be a heavier burden when establishing a causal link between the discrimination

¹⁹¹ *Hugh Jordan v The United Kingdom*, para 154.

¹⁹² Harris, O'Boyle, Warbrick and Bates, *Law of European Convention* 477.

¹⁹³ Arnardóttir, 'Non-Discrimination' 22.

¹⁹⁴ Arnardóttir, 'Non-Discrimination' 22. Béatrice Vizkelety, 'Adverse effect Discrimination in Canada: Crossing the Rubicon from Formal to Substantive Equality' in Titia Loenen and Peter R Rodrigues (eds), *Non-Discrimination Law: Comparative Perspectives* (Kluwer Law International 1999) 236. Titia Loenen, 'Indirect Discrimination: Oscillating Between Containment and Revolution' in Titia Loenen and Peter R Rodrigues (eds), *Non-Discrimination Law: Comparative Perspectives* (Kluwer Law International 1999) 204.

¹⁹⁵ Harris, O'Boyle, Warbrick and Bates, *Law of European Convention* 472-473.

ground and the different treatment complained of in certain cases. It will in turn be difficult to justify different treatment on the basis of very sensitive grounds such as sex or race. It will also be easier to shift the burden in cases involving a discrimination ground being overt or express in nature. The difficulty, though, lies in relation to shifting the burden where covert discrimination grounds are involved. The Court in the *Belgian Linguistics* case declared that, 'objective justification had to be assessed in relation to the aims and effects of a measure'.¹⁹⁶ This declaration was further added to in *Marckx v Belgium*, where a legitimate aim of supporting the traditional family could be seen to be a violation of Article 14 if its object or result was to prejudice 'illegitimate' families.¹⁹⁷ It appears clear from the Court's approach in *Belgian Linguistics* and *Marckx* that subjective intentions were not to be a condition when an applicant seeks to establish prima facie discrimination.¹⁹⁸ Where the discrimination ground is covert, it will be difficult for the applicant in seeking to establish a case of direct discrimination, as they will have to allege or border on the verge of alleging a subjective intent on the part of the Respondent.¹⁹⁹ Applicants have not been successful in shifting the burden when alleging subjective intention in a direct discrimination case.²⁰⁰

The question also arises as to whether the burden of proof is on the applicant to show that the treatment they are alleging is: 'different in relation to people in relevantly similar situations, or conversely is similar in relation to people in significantly different situations, before the onus is shifted onto the State to justify this treatment'.²⁰¹ One of the major issues here concerns who are deemed to be equal

¹⁹⁶ *Belgian Linguistic Case* (1979-80) I EHRR 252.

¹⁹⁷ *Marckx v Belgium* App no 6833/74 (ECHR, 13 June), para 40.

¹⁹⁸ Arnardóttir, 'Non-Discrimination' 26.

¹⁹⁹ *ibid*

²⁰⁰ Harris, O'Boyle, Warbrick and Bates, *Law of European Convention* 809-815.

²⁰¹ Arnardóttir, 'Non-Discrimination' 32.

and who are deemed to be unequal. The Aristotelian principle favours treating like as like and unlike as unlike. By placing the burden on the applicant to prove the sameness or difference of a situation, this will in turn place a burden on the applicant 'to justify that the similarity or difference in treatment is required'.²⁰² It is significantly burdensome for an applicant to have to prove that their situation is relevantly similar or different to a comparator group. It has been argued though that in the case law of the Court the establishing of the similarity of situations has not been given a huge amount of consideration, which leads to arguments that there has not been a strict formalistic insistence on showing comparability.²⁰³

In *Fredin v Sweden* the burden was placed on the applicant to show that her situation was similar to the comparator group.²⁰⁴ The applicant complained that the legislation, which enabled the revocation of an exploitation license, applied only to the applicant's company. Therefore, the way in which the applicant showed differentiation was being the only company receiving said treatment. The judgments in the wake of *Fredin* came to different conclusions, with many merging the objective justification scrutiny with whether it has been established that relevantly similar situations exist.²⁰⁵ These cases have not placed a heavy burden on the applicant, as they have not required them to establish a similar situation before the burden is

²⁰² W.D. Ross, *The Works of Aristotle: Ethica Nicomachea* (Book V3, Oxford University Press 1925) 1131a-6.

²⁰³ Livingstone, 'Article 14' 30.

²⁰⁴ *Fredin v Sweden* App no 12033/86 (ECHR, 18 February 1991). *Pine Valley Developments Ltd and Others v Ireland* App no 12742/87 (ECHR, 29 November 1991, para 64, concerned the applicants argument that legislation that retroactively validated invalid planning permission was not applied to them. Due to the Respondent government not providing any justification, a violation was found. *Sporrong and Lönnroth v Sweden* App no 7151/75 (ECHR, 18 December 1984) concerned the lack of uniform application of imposing expropriation permits, while *Sunday Times v The United Kingdom* (1) App no 6538/74 (ECHR, 26 April 1979) concerned a similar argument that other publications were not subject to the same restraints as the applicants.

²⁰⁵ Arnardóttir, 'Non-Discrimination' 33.

transferred to the Respondent State to establish the objective justification scrutiny.²⁰⁶

The case of *Van Raalte v The Netherlands* provides a clear example of how the burden of the sameness/difference argument can be placed on either of the parties.²⁰⁷

The applicant in the case had never married and had no children. He paid contributions under the General Child Care Benefits Act of 1962. This Act provided that payments had to be made by any person under the age of 65 who was subject to the Wages (Tax Deduction) Act or was a Netherlands resident who carried out work in the Netherlands under a contract of employment. The payments collected went towards a scheme, which entitled any person who was subject to the Act or a Netherlands resident who worked in the Netherlands to gain benefits for children for whose maintenance he or she was responsible. By royal decree women who were over 45 unmarried and childless were exempted from making the contributions, men over 45 were not exempted.

The applicant claimed that having to pay the contribution when unmarried women of 45 years of over did not have to amount to discrimination on the basis of gender. He also argued that legal and social developments displayed a clear trend towards equality between men and women. He cited the Court's *Abdulaziz, Cabales and Balkandali v The United Kingdom*, judgment which stated explicitly that 'the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe' and that 'very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention'.²⁰⁸ The Government argued that the distinction was justified as

²⁰⁶ *Dudgeon v The United Kingdom* App no 7525/76 (ECHR, 22 October 1981), *Abdulaziz, Cabales and Balkandali v The United Kingdom* App nos 9214/80; 9473/81 and 9474/81 (ECHR, 28 May 1985), *Holy Monasteries v Greece* App no 13092/87; 13984/88 (ECHR, 9 December 1994). Van Dijk and van Hoof, *Theories and Practice* 724-726.

²⁰⁷ *Van Raalte v The Netherlands* App no 20060/92 (ECHR, 21 February 1997).

²⁰⁸ *Van Raalte v The Netherlands*, para 78.

the comparable groups were not in a similar situation, as once over the age of 45 differences arose in relation to biological possibilities to procreate.²⁰⁹

The Court clarified that the conclusion of similar situations was not affected by factual differences. It stated: ‘It is precisely this distinction which is at the heart of the question whether the difference in treatment complained of can be justified.’²¹⁰ The Court ultimately found that for a difference in treatment based on the ground of sex to be lawful, there would need to be very weighty reasons. It was on this basis that the Court found the justifications offered by the State were not sufficient and a violation of Article 14 taken in conjunction with Article 1 of Protocol No 1 was found. In the Court’s consideration of a violation of Article 14 in *Van Raalte*, the burden or standard of proof required was not mentioned once. The Court immediately began assessing ‘[W]hether there has been a difference in treatment between persons in similar situations’ and ‘[W]hether there is objective and reasonable justification’.²¹¹ It can be seen from these cases that the issue of the burden of proof in relation to establishing similarity of situation appears unclear and somewhat conflicting. It is difficult to decipher from the case law and literature whether the applicant must establish that they are in a relevantly similar or significantly different situation to the comparator.

²⁰⁹ Arnardóttir, ‘Non-Discrimination’ 33

²¹⁰ *Van Raalte v The Netherlands*, para 40.

²¹¹ *ibid* paras 40 and 41-44.

2.8.2 The connection between the Burden of Proof and the Margin of Appreciation

One could look to Kokott's theory of the connection between the burden of proof and the margin of appreciation for some clarity in this muddled area.²¹² The burden of proof will be placed on the applicant to establish sameness or difference of situations where factors indicate a wide margin of appreciation. In contrast, the burden will be placed on the Respondent State to establish objective justification of the treatment in relation to sameness or difference, when the factors indicate a narrow margin of appreciation. In *Spadea and Scalabrino v Italy*, the discrimination ground of 'property' and the social situation of the applicant resulted in a wide margin of appreciation.²¹³ In *Fredin v Sweden*, involving property rights and an unclear discrimination ground, this again led to a wide margin of appreciation being applied and the burden being placed on the applicant.²¹⁴ *Stubbings and Others v The United Kingdom* is another case where a wide margin of appreciation was applied.²¹⁵ The case concerned classifications of types of offenders or types of victims. This alleged discriminatory practice resulted in the burden of proof being placed on the applicants to show similarity of situations.²¹⁶

In contrast a number of cases have attracted strict scrutiny and a narrow margin of appreciation based on the discrimination ground of sex. Cases such as *Stec v The United Kingdom*, *Rasmussen v Denmark*, *Abdulaziz, Cabales and Balkandali v The United Kingdom*, *Karlheinz Schmidt v Germany* and *Van Raalte v The Netherlands* are all examples of a narrow margin of appreciation being applied and

²¹² Juliane Kokott, *The Burden of Proof in Comparative and International Human Rights Law* (Kluwer Law International 1998) 218.

²¹³ *Spadea and Scalabrino v Italy* App no 12868/87 (ECHR, 28 September 1995), para 46.

²¹⁴ *Fredin v Sweden*, para 61.

²¹⁵ *Stubbings and Others v The United Kingdom* App no 22083/93; 22095/93 (ECHR, 22 October 1996).

²¹⁶ *Stubbings and Others v The United Kingdom*, paras 73-74.

the burden of proof for similarity/difference being placed on the Respondent State.²¹⁷ On the ground of discrimination based on ethnic origin, the Respondent Government in *Aziz v Cyprus* failed in their justification of the different situation of Greek Cypriots and Turkish Cypriots.²¹⁸ It can be seen from these cases that the allocation of a wide or narrow margin of appreciation will have a significant effect on whether the applicant will have to lift the burden of proof to establish similar/dissimilar situations.

2.8.3 Shifting the Burden of Proof

In order for a case to succeed, the relevant legal burden must be discharged. The shift of the burden was first dealt with in the CJEU in cases of indirect discrimination in relation to equal pay between men and women. It was in cases such as *Danfoss* and *Enderby* that the CJEU set down the principle of the shifting of the burden of proof.²¹⁹ The Court provided that once a *prima facie* case of discrimination was shown, then the burden would shift to the Respondent State to show that there are non-discriminatory and objective reasons for the difference in treatment. This principle of the reversal of the burden has travelled from the CJEU into the practice of the ECtHR.²²⁰

Confusion often exists in relation to the reversal of the burden: the reversal does not mean that applicants are exempt from having to convince the Court that they have a case. Before the burden can be reversed, the applicants must establish a *prima facie* case. They must convince the Court of the probability or likelihood that they

²¹⁷ *Stev v The United Kingdom* App nos 65731/01 and 65900/01 (ECHR, 12 April 2006), *Rasmussen v Denmark* App no 8777/79 (ECHR, 28 November 1984), para 37, *Abdulaziz, Cabales and Balkandali v The United Kingdom*, para 79, *Karlheinz Schmidt v Germany* App no 13580/88 (ECHR, 18 July 1994), paras 27-28 and *Van Raalte v The Netherlands*, para 40.

²¹⁸ *Aziz v Cyprus*, para 37.

²¹⁹ Case 109/88 *Danfoss* [1989] ECR 3199 and Case C-127/92 *Enderby* [1983] ECR I-5535.

²²⁰ Lilla Farkas and Orlagh O'Farrell, *Reversing the burden of proof: Practical dilemmas at the European and national level* (European Commission Directorate-General for Justice and Consumers 2014) 5.

suffered discrimination. Therefore the burden shifts before the Court can make a clear decision on causation. Once the burden has been reversed, the onus is then placed on the Respondent State to prove that discrimination played no role in the effect or treatment complained of. If the Respondent Government fails or is unable to explain the treatment using objective reasons that are in no way related to discrimination, then it will be found liable for a breach of Article 14. The reversal of the burden is a procedural rule; as such, it must be read in conjunction with the type of discrimination invoked. The reversal of the burden connects evidence to the showing of bias. It could be said that the reversal of the burden details the course of proceedings at two particular points:

i) it lowers the onus of proof (presumption) resting on the plaintiff in relation to the causal link between the protected ground and the conduct (prima facie case), while ii) placing and limiting the remaining onus of proof in relation to bias on the Respondent (justification defence).²²¹

Prejudice and bias lie at the heart of discrimination. It could be argued that the juridification and subsequent technicalisation of the discussion of anti-discrimination in Europe has in some ways diverted attention away from the fundamental underlying issue: that direct discrimination is the reaction to a person because of his or her involuntary membership in a group, not because of that person's conduct. It is a very difficult task to strike the correct balance between the parties in establishing the bias. In optimal cases awareness of power relations and the functioning of societal stereotypes in the wide number of areas where non-discrimination law pertains would be needed in the Court. The very purpose of the reversal of the burden is to "factor in" these forms of bias in relation to the evidentiary rules in order to benefit those who suffer said bias.

²²¹ Farkas and O'Farrell, *Reversing the Burden of Proof* 7.

Kokott believes that the Court is very aware of the relationship between the nature of the substantive right involved in the case and its approach to the issues surrounding proof.²²² She asserts that neither an approach which follows State sovereignty and places the burden of persuasion on the applicant nor an approach which follows the protection line and places the burden on the State, deal appropriately with the issue of where the burden should lie.²²³ Kokott believes the answer to this issue of the allocation of the risk of non-persuasion should derive from an interpretation of the substantive provisions in the case.²²⁴ Kokott states:

[T]he ultimate answers to the problem of burden of proof seem to derive, at least insofar as international human rights are concerned, from the interpretation of the substantive law involved. More precisely, the solution depends on the delimitation of functions and competences between international courts and the sovereign states as laid down in the human rights conventions.²²⁵

Schokkenbroek, in contrast, argues that the margin of appreciation is only concerned with the appreciation and assessment of the facts of a case and is not concerned with establishing those facts.²²⁶ Arnardóttir believes that Schokkenbroek's argument neglects two crucial areas, namely:

[T]he difficulties in distinguishing between taking certain 'facts' as established and their normative assessment and the similar function of the procedural tool of allocating the burden of proof and the substantive tool of adjusting the margin of appreciation.²²⁷

The central question that will be addressed in later chapters dealing with Roma case law will be the impact which those cases have had on the transfer of the burden of

²²² Kokott, *The Burden of Proof* 211-212.

²²³ Arnardóttir, 'Non-Discrimination' 19.

²²⁴ Kokott, *The Burden* 211-215. Kokott does acknowledge that by allocating the burden in line with the interpretation of the substantive provision there will be 'external factors' to be dealt with, including the need for modification due to the suppression or availability of evidence, the evaluation of the evidence and the amount of persuasion needed rather than the risk of non-persuasion.

²²⁵ Kokott, *The Burden* 147.

²²⁶ Jeroen Schokkenbroek, 'The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-law of the European Court of Human Rights' (1998) 19(1) *Human Rights Law Journal* 30, 33.

²²⁷ Arnardóttir, 'Non-Discrimination' 19.

proof to the Respondent State. Assertions and arguments such as the burden automatically transferring in cases taken by Roma due to their history of discrimination and disadvantage in Europe, the amount and kind of evidence that must be provided to establish a prima facie case before the burden will be shifted and the changing position of the Court in relation to the burden in cases of direct and indirect discrimination, and cases involving loss of life, torture, educational segregation and sterilisation will all be analysed. The next section in this chapter will introduce the standard of proof in an Article 14 case and issues related to the use of statistics and NGO reports in the Court.

2.8.4 – Rules of Evidence

As mentioned earlier, the Court does have a set of evidentiary rules, however they are both few and highly discretionary. This paucity of evidentiary rules has given the Court significant latitude in determining what evidence is admissible and, in turn, how much weight it should be given. While as mentioned earlier the Court does have the authority to conduct its own fact-finding investigations, it is more likely that it will rely on factual determinations made by domestic courts and more recently by NGOs and international institutions.²²⁸ One argument proffers a positive take on this reliance on the findings of secondary sources as being practical and often necessary given the Court's expanding jurisdiction, significant caseload and shortages of staff and funding.²²⁹ The corollary of this argument is that there are also issues surrounding the Court's reliance on secondary sources for factual determinations, particularly in respect of fact-intensive cases. Both the positive and negative elements of the use of

²²⁸ Katayoun C Sadeghi, 'The European Court of Human Rights: The Problematic Nature of the Court's Reliance on Secondary Sources for Fact-Finding' (2009-2010) 25 *Connecticut Journal of International Law* 127, 127-128.

²²⁹ Dinah Shelton, 'The Participation of Nongovernmental Organisations in International Judicial Proceedings' (1994) 88 *American Journal of International Law* 611, 616.

the Court's reliance will be introduced in the next section. In later chapters the reliance of NGO reports in Roma case law will be particularly analysed.

Non Governmental Organisations

No generally valid or single definition of NGOs exists. However for the purpose of this section the term NGO is defined using three of the five characteristics identified by Salamon and Anheier these are:

- i) formally constituted;
- ii) organizationally separate from government;
- iii) non-profit-seeking.²³⁰

Salamon and Anheier identified two other characteristics, namely 'self-governing' and 'voluntary to some significant degree'. These are not relied on here, as while NGOs commonly possess these two characteristics, they are not necessary to distinguish NGOs from other types of organisations.²³¹ Alvarez, in his treatise on international organisations, stated that 'no one questions today the fact that international law – both its content and its impact – has been forever changed by the empowerment of NGOs'.²³² Treves notes that 'the role of NGOs is becoming an important chapter of the growing field of the law of international courts and tribunals'.²³³ Pierre-Marie Dupuy has discussed a paradox that exists in relation to NGOs: '[they] do a lot ... in the functioning of international institutions and the

²³⁰ Lester M Salamon and Helmut K Anheier, *The Emerging Nonprofit Sector: An Overview* (John Hopkins Nonprofit Sector Ser. No. 1, 1996) xvii-xviii.

²³¹ Salamon and Anheier, 'The Emerging' xvii-xviii.

²³² José E Alvarez, *International Organisations as Law-Makers* (Oxford University Press 2006) 611.

²³³ Tullio Treves, 'Introduction to Civil Society, International Courts and Compliance Bodies' in Tullio Treves, Marco Frigessi di Rattalma, Attila Tanzi, Alessandro Fodella, Cesare Pitea and Chiara Ragni (eds), *Civil Society, International Courts and Compliance* (Asser Press 2005) 1, 7.

implementation of the law created in their midst,' even though 'de jure, these entities have no existence or a very narrowly defined one ...'.²³⁴

When the Convention was initially created in 1950, individuals and private groups, including NGOs, did not have the right to appear before the Court. Individuals and groups such as NGOs could file complaints with the European Commission of Human Rights alleging a violation by one of the member states of his, her or its rights. The Commission then in turn could bring cases to the Court if it deemed the case admissible and if there was no chance that the case could be solved by friendly settlement. It was the case, though, that even where the European Commission brought such cases, the Commission was the party before the Court, not the group or individual who had filled the complaint. The procedural rules did eventually provide for the original complainant to participate in the case.²³⁵ From at least 1989 forward, groups such as NGOs and individuals had the ability to ask the President of the Court to intervene in any case. This opportunity would be granted if doing so would be in the 'interest of the proper administration of justice'.²³⁶ The President granted this opportunity to NGOs and individuals in a number of cases.²³⁷ From 1994 onward NGOs and individuals had the ability to ask the Court to consider their complaint after the Commission had issued a report, this even if there had been no referral by the Commission. However, the Court could decline this request if a three-judge panel decided that there was not a sufficient reason to consider the

²³⁴ Pierre-Marie Dupuy, 'Conclusion: Return on the Legal Status of NGOs and on the Methodological Problems Which Arise for Legal Scholarship' in Pierre-Marie Dupuy and Luisa Vierucci (eds) *NGOs in International Law: Efficiency in Flexibility?* (Edward Elgar Publishing 2008) 204, 214.

²³⁵ Donna Gomien, David Harria and Leo Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (Council of Europe Publishing 1996) 42.

²³⁶ Anna-Karin Lindblom, *Non-Governmental Organisations in International Law* (Cambridge University Press 2005) 246.

²³⁷ Abdelsalam A Mohamed, Individual and NGO Participation in Human Rights Litigation Before the African Court of Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights (1999) 43 *Journal of African Law* 207-208.

case.²³⁸ While NGOs did have all these options open to them to participate before 1998, it has been found that in total they participated in only several dozen cases.²³⁹ This small number of NGO participation is in contrast to over a thousand Court judgments on the merits between 1959 and 1998.²⁴⁰

In 1998 came the introduction of Protocol 11. It not only eliminated the European Commission, but also expanded greatly the entities that had a right to take a case before the Court. Protocol 11 amended Article 34 of the Convention to provide that:

The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto.²⁴¹

If the NGO wishes to appear before the Court as an applicant, it must be the rights of the NGO itself that have been violated rather than a group of individuals who the NGO represents.²⁴² Another option open to NGOs is to make a third party intervention, the *amicus curiae* brief.²⁴³ It can also be seen that NGO's provide financial and other support to applicants in taking cases before the Court. In all the Roma cases before the Court, a small group of NGOs have supported the applicants, in particular the European Roma Rights Centre.

While it has been important to trace very briefly the role of NGOs before the Court, this thesis is focused on the particular area of the Court's reliance on evidence

²³⁸ Protocol No. 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms Article 5 1(e)-2 Nov 6 1990 repealed by Protocol No. 11 in 1994.

²³⁹ Lloyd Hitoshi Mayer, 'NGO Standing and Influence in Regional Human Rights Courts and Commissions' (2010-2011) 36 *Brooklyn Journal of International Law* 911, 916.

²⁴⁰ Lindblom, *Non Governmental Organisations* 253.

²⁴¹ Protocol 11 and Article 34 of the European Convention on Human Rights.

²⁴² Marco Frigessi di Rattalma, 'NGOs before the European Court of Human Rights: Beyond Amicus Curiae Participation?' in Tulio Treves, Marco Frigessi di Rattalma, Attila Tanzi, Alessandro Fodella, Cesare Pitea and Chiara Ragni (eds) *Civil Society, International Courts and Compliance* (Asser Press 2005) 57, 60.

²⁴³ For example in *Ligens v Austria* App no 9815/82 (ECHR, 8 July 1986) the Court interpreted and expanded the rights under the Convention to free press comment and political expression. INTERIGHTS provided a comparative survey to the Court of American and European law and practice in the area.

provided by NGOs. In cases where violations of Article 14 are alleged, it has been particularly difficult for applicants, as while they have provided reports from NGO's showing endemic discrimination and prejudice in a Respondent State, at the same time the Court has to decide the case on the particular facts at hand and not based on a general report on a state. Reports on the general situation in a Respondent State are exceedingly useful in providing an overview of the issues for example facing Roma in a state, however they will not be able to show that the individual applicant was discriminated against in his/her particular case, as this will have to be decided on the facts of the case. Questions to be discussed in later chapters will focus on whether the Roma case law has had an impact on the number of interventions by NGOs before the Court, whether the evidence provided by NGOs has or should be more taken into account by the Court, along with a potential argument on the role of NGO reports in shifting the burden of proof to a Respondent state where there is evidence of endemic discrimination in a State.

The Use of Statistical Evidence in the Court

Following on from the use of NGO reports before the Court, it must also be considered whether the use of statistical evidence provided by such NGOs can be relied upon in the Court to show the effects of alleged discrimination. Again a similar issue as mentioned in the previous section exists, whereby the statistics cited may be from the particular area where the applicants reside or deal with a particular issue that relates to the applicant's claim, but they will also be general statistics and therefore will not directly prove that the individual applicant has been discriminated against. The issue also arises with the Court's belated recognition of indirect discrimination as

to whether statistical evidence could be relied upon to show the impact of particular policies or laws on an applicant or group of applicants.

The Court in *Hugh Jordan v The United Kingdom*, discussed earlier, did provide that it: ‘does not consider that statistics can in themselves disclose a practice which could be classified as discriminatory within the meaning of Article 14’.²⁴⁴ This case was heard in 2001, prior to the hearing of the majority of cases taken by Roma applicants, where NGO reports were cited in all cases. Historically, as seen in *Hugh Jordan*, the Court adopted a conservative position stating that statistics alone could not disclose a practice as being discriminatory. The question to be dealt with in later chapters will be what impact the Roma jurisprudence has had on the Court’s reliance on the use of statistics to show discriminatory practices.

2.9 Conclusion

In *Anguelova v Bulgaria*, Judge Bonello, in a dissenting opinion, argued for the lowering of the burden of proof for Article 14 allegations, stating:

[n]o more effective tool could be devised to ensure that the protection against racial discrimination becomes illusory and inoperative than requiring from a victim a standard of proof that, in other civil law disputes, is required of no one else ... when a member of a disadvantaged minority group suffers harm in an environment where racial tensions are high and impunity of State offenders epidemic, the burden to prove that the event was not ethnically induced should shift to the Government.²⁴⁵

These words of Judge Bonello identify some of the long-term issues with the use of Article 14 of the ECHR. It has been and will be difficult for the standard of proof to be met by the applicant as long as they have to meet the high standard of “proof beyond reasonable doubt”. This will then have a follow on impact with regard to the

²⁴⁴ *Hugh Jordan v The United Kingdom*, para 154.

²⁴⁵ *Anguelova v Bulgaria* App no 38361/97 (ECHR, 13 June 2012), Partly Dissenting Opinion of Judge Bonello.

difficulty of an applicant having the burden of proof shifted to the Respondent State. In addition to this, the Court for many years did not acknowledge the existence of indirect discrimination. As seen, there were also a myriad of issues surrounding the requirement of a comparator and treating persons in analogous or similar situations alike. It will be seen in later chapters that the Court appears to consistently require “proof beyond reasonable doubt” in the forced sterilisation and anti-Roma violence cases, but not in the educational segregation cases involving indirect discrimination.

The Court has faced much criticism for the way in which the comparator requirement and the question of justification have been looked at together. Many of these issues will be discussed further in Chapter 4. A discussion of the formal and substantive models of equality will be dealt with in the next chapter. This analysis of the Court’s long held use of the formal model of equality will shed light on the way in which the burden, margin and requirement of a comparator have developed in recent years. The Court’s move from the formal to the substantive model will also be discussed and examined for its effect on the case law.

Chapter 3

Theoretical Framework: The Legal Concepts of Equality

3.1 Introduction

3.2 The Concept of Equality

3.3 Introduction to the Formal and Substantive Models of Equality

3.3.1 The Formal Model of Equality

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3.1 Introduction

Equality proves an 'elusive notion' and is an 'amorphous concept'.²⁴⁶ Equality is both a moral and a legal concept.²⁴⁷ The moral principle of equality provides that human beings should be considered equal. The law also recognizes this. Laws should fundamentally apply equally to all human beings, except where exceptions to this rule

²⁴⁶ Nicholas Bamforth, 'Conceptions of Anti-Discrimination Law' (2004) 24(4) *Oxford Journal of Legal Studies* 693, 704. Anne F Bayefsky, 'The Principle of Equality or Non-discrimination in International Law' (1990) 11 *Human Rights Law Journal* 1, 1-2.

²⁴⁷ Stuart White, *Equality* (Polity Press 2007) 4-8.

are provided for by the law itself. Justice Abella of the Ontario Court of Appeal stated:

Equality is evolutionary, in process as well as in substance, it is cumulative, it is contextual and it is persistent. Equality is, at the very least, freedom from adverse discrimination. But what constitutes adverse discrimination changes with time, with information, with experience and with insight. What we tolerated as a society 100, 50 or even 10 years ago is no longer necessarily tolerable. Equality is thus a process, a process of constant and flexible examination, of vigilant introspection, and of aggressive open-mindedness.²⁴⁸

Not only is equality based on both moral and legal considerations but a distinction can also be drawn between formal and substantive concepts of equality.

In this chapter the formal and substantive concepts of equality will be introduced. Under the section on substantive equality, various theories on what should be the basis for the substantive model will be discussed, such as the dignity based approach, the disadvantage test based approach, equality of opportunity and equality of results and substantive equality as equal recognition. There are a number of other views and theories on substantive equality, which due to space constraints cannot be discussed in this thesis. The section on the substantive model of equality looks at each of the chosen approaches in detail, rather than providing a short overview of a larger range of approaches.

The next section will discuss multidimensional equality and intersectionality. Under the heading of intersectionality there will be a discussion of Fredman's conception of substantive equality, structural intersectionality, external and internal oppressions and interlocking oppressions. This will be followed by the provision of a framework for analysis, which will build on the basis of the foregoing section and establish a framework for analysing the use of the formal and substantive models of

²⁴⁸ As quoted in Kathleen Mahoney, 'Canadian Approaches to Equality Rights and Gender Equity in the Courts' in Rebecca Cook (ed) *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994) 437.

equality in cases taken by Roma to the European Court of Human Rights. The way in which the various theories of equality will be relied on in analyzing the case law in later chapters will also be outlined. A conclusion to the chapter will then be provided.

3.2 The Concept of Equality

When considering what Equality means there are a number of different interpretations. As a pluralistic concept, 'equality' is often used in conjunction with other terms, such as 'non-discrimination', 'diversity', 'equal opportunities' and 'equal treatment'.²⁴⁹ Theoretical critiques of equality divide the concept into two separate models: the formal model and the substantive model. The formal model is often referred to as individual justice, while the substantive model is referred to as group justice.²⁵⁰ The notion of equality providing equal treatment is a relative one, as equality can only refer to partial equal treatment and not identical or absolute equal treatment. The reasoning behind this is that human beings and the situations in which they find themselves can never be completely identical.²⁵¹ The situations can only ever be partially or relatively equal or unequal, and this will depend on the criteria, which are taken into account in distinguishing between and within situations. The criteria that are chosen for the comparison as discussed in the previous chapter will be crucial in determining whether a person should be treated equally or not. It will also be the case that when any one person is considered to be in a different situation from another, this summation will be based on a subjective construction.²⁵² Not only is equality a

²⁴⁹ Mark Bell, *Racism and Equality in the European Union* (Oxford University Press 2008) 27.

²⁵⁰ Sandra Fredman, 'Combating Racism with Human Rights: The Right to Equality' in Sandra Fredman (ed), *Discrimination and Human Rights: The Case of Racism* (Oxford University Press 2001) 17.

²⁵¹ E W Vierdag, *The Concept of Non-Discrimination in International Law* (Martinus Nijhoff 1973) 9.

²⁵² Vierdag, *The Concept of Non-Discrimination* 10, Aart Hendriks, 'The Significance of Equality and Non-discrimination for the Protection of the Rights and Dignity of Disabled Persons' in Theresia

relative concept, it is also a relational concept.²⁵³ In order to establish whether one person is treated the same or differently, the treatment of one person must be compared with the treatment of someone else.

The concept of equality has been much criticised and commented on. Westen offers one of the most comprehensive critiques of the concept when he states that:

The endurance of the principle is due to the fact that it is empty of content. For the principle to have meaning, it must incorporate some external values that determine which persons and treatments are alike, but once these external values are found, the principle of equality is superfluous.²⁵⁴

Westen's critique of the concept of equality was even more severe when he stated that equality as a theory is 'entirely "circular" ... an empty vessel with no substantive moral content of its own...'.²⁵⁵ In addition to Westen's critique of the concept, one can also find difficulty in finding how the concept fits with the provision of rights. In considering how the interpretation of Article 14 has been changed by the case law taken by Roma to the ECtHR, there is a need to consider on what model of equality the Court has relied and whether the Court is fully considering the various models of approaches to equality in each of the cases at hand. When considering rights provided in Articles such as Article 14, one can say that while equality is seen as singular and simple, rights are seen as complicated and diverse. In considering the issue of deprivation, rights are concerned with cases of absolute deprivation whereas equality focuses on relative deprivation.

Degener and Yolán Koster-Dreese (eds), *Human Rights and Disabled Persons, Essays and Relevant Human Rights Instruments* (Martinus Nijhoff 1995) 43, 44.

²⁵³ James E S Fawcett, *The Application of the European Convention on Human Rights* (Clarendon Press 1987) 299. Hendriks, 'The Significance of Equality' 43.

²⁵⁴ Peter Westen, 'The Empty Idea of Equality' (1982) 95(3) *Harvard Law Review* 537.

²⁵⁵ Westen, 'The Empty' 547

Barker, Baechler, McLean and Nagel have discussed how there is a perceived tension between ‘equality’ and ‘rights’, due to the juxtaposition between the two.²⁵⁶ This tension is also based on rival views of whether equality is the root of all rights or the corollary: that rights are the source of equality.²⁵⁷ Beck, Machan and Raphael are of the view that rights are more basic than equality, while Dworkin and Rawls believe that equality is the source of all rights, with Hart being critical of Dworkin’s view that all rights stem from equality.²⁵⁸ Westen fundamentally believes that there is a misconception in the contrasting of equality and rights. He correctly points to that fact that the formal concept of equality includes statements that focus on the reason that the way in which a person is treated in a particular way is focused on their being ‘equal to’ or ‘like’ or ‘the same as’ another individual who receives that treatment.²⁵⁹ Westen cites Ginsberg’s definition of rights being based on claims made by or on behalf of an individual or a group of individuals that are justly made in pursuit of a power or condition.²⁶⁰ Gewirth provides another useful definition in stating that ‘A person’s rights are what belong to him as his due, what he is entitled to, hence what he can rightly demand of others.’²⁶¹

Therefore it is easy to see Westen’s argument that the juxtaposition of rights versus equality is futile. Both come from very different sources, one is focused on

²⁵⁶ Ernest Barker, *Principles of Social and Political Theory* (Oxford University Press 1951) 159. Jean Baechler, ‘Liberty, Property, and Equality’ (1980) 22 *Nomos: Property* 269-288. Iain McLean, ‘Liberty, Equality and the Pareto Principle: A Comment on Weale’ (1980) 40 (4) *Analysis* 212-213. Stuart S Nagel, ‘Issues Regarding Tensions Between Goals of Equality and Freedom’ in Gray L Dorsey (ed), *Equality and Freedom* (Oceana Publications 1977) 603.

²⁵⁷ Robert N Beck, ‘Liberty and Equality’ (1980) 10 (1) *Idealistic Studies* 24, 36.

²⁵⁸ Beck, ‘Liberty’ 36. Tibor R Machan, ‘Equality’s Dependence on Liberty’ in Gray Dorsey (ed), *Equality and Freedom: International and Comparative Jurisprudence* (Oceana Publications 1977) 663, 664-665. DD Raphael, ‘Tensions Between the Goals of Equality and Freedom’ in Gray Dorsey (ed), *Equality and Freedom: International and Comparative Jurisprudence* (Oceana Publications 1977) 543, 555. Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 273-274. John Rawls, ‘Justice As Fairness’ (1958) 67 (2) *The Philosophical Review* 164, 165-166. H L A Hart, ‘Between Utility and Rights’ (1979) 79 *Columbia Law Review* 828, 845-846.

²⁵⁹ Westen, ‘The Empty’ 540.

²⁶⁰ Morris Ginsberg, *On Justice in Society* (Cornell University Press 1965) 74.

²⁶¹ Alan Gewirth, ‘The Basis and Content of Human Rights’ (1981) 23 *Nomos: Human Rights* 119, 119-120.

comparisons while the other is focused on the individual's own implicit rights regardless of comparisons. Article 14 as a right focuses on non-discrimination, however, the Court must adopt a theory of equality in deciding whether there has been discrimination. As Harris, O'Boyle and Warbrick note, it is not the job of the Court to attempt to impose equality standards on Member States.²⁶² That would be viewed as going beyond the scrutiny role of the Court and would lead to accusations of infringement on State sovereignty. The Court's role is to interpret and apply the limited protection afforded by Article 14.

A difficulty therefore arises in considering equality within the framework of Article 14. As discussed in the previous chapter Article 14 is an ancillary article that ensures that individuals are not discriminated against in their enjoyment of their Convention rights. However, when considering whether individuals have been discriminated against, the Court, as discussed in the previous chapter, relies on comparators. At the same time the Court also applies the formal or substantive model of equality. Therefore, when considering Article 14 as a right (which was addressed in the previous chapter) in this chapter it is important to consider equality in order to provide a framework for analysis of Article 14 cases in later chapters. While Article 14 is an individual right guaranteed to all individuals, the way in which that right is vindicated is by comparison to the treatment of others, in the same way that equality relies on comparisons. Therefore, there is much commonality between Article 14 as a right and the concept of equality.

²⁶² David Harris, Michael O'Boyle, Colin Warbrick and Ed Bates, *Law of the European Convention on Human Rights* (2nd edn, Oxford University Press 2009) 590.

3.3 – Introduction to the Formal and Substantive Models of Equality

A distinction can be drawn between formal and substantive concepts of equality. While the terminological distinction of formal equality and substantive equality is often used, there has been some criticism of the use of these terms. Fredman, Barnard and Hepple rely on the traditional terminological distinction.²⁶³ Smith, though, has criticised the use of the terms formal and substantive.²⁶⁴ He suggests that the distinction between the two is concerned not with form but with policy, and that ‘substantive’ just means ‘real’, or whatever an author happens to prefer as the solution to the cluster of social issues we usually discuss under the rubric of ‘equality’.²⁶⁵ McColgan believes there is ‘a certain rhetorical appeal’ to Smith’s belief that there is no need for a terminological distinction.²⁶⁶ However, she does assert that without a terminological distinction ‘it leaves us with a formal approach to equality (that) robs us of the tools to do much more than to require that red-haired manufacturers of margarine be treated without distinction by legislation applicable to red-haired manufacturers of margarine’.²⁶⁷

²⁶³ Catherine Barnard and Bob Hepple, ‘Substantive Equality’ (2000) 59(3) *Cambridge Law Journal* 562, 562-85.

²⁶⁴ Nicholas Smith, ‘A Critique of Recent Approaches to Discrimination Law’ (2007) *New Zealand Law Review* 499, 499-500.

²⁶⁵ *ibid.*

²⁶⁶ Aileen McColgan, *Discrimination, Equality and the Law* (Hart Publishing 2014) 23.

²⁶⁷ *ibid.* McColgan refers to the US Supreme Court case of *Powell v Pennsylvania* (1888) 127 US 678 in which the Court rejected an equal protection challenge to the differential treatment of vendors of margarine and butter. J Harlan declared that: ‘The statute places under the same restrictions, and subjects to like penalties and burdens, all who manufacture, or sell, or offer for sale, or keep in possession to sell, the articles embraced by its prohibitions; thus recognizing and preserving the principle of equality among those engaged in the same business.’

3.3.1 – The Formal Model of Equality

Plato and Aristotle began the study of equality and were the first to profess that likes should be treated alike.²⁶⁸ Aristotle, building on the earlier work of Plato, provided two theories on equality that have dominated the discourse on the concept for centuries:

1. Equality in morals means this: things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unalikehood.
2. Equality and justice are synonymous: to be just is to be equal, to be unjust is to be unequal.²⁶⁹

Aristotle referred to this idea as ‘proportionate equality’.²⁷⁰ This idea provides that persons can be equal in some ways yet unequal in others ways. Therefore the task will be to decide in a situation where equal treatment is required, whether persons are equal in particular respects. The model set out by Aristotle sets out that the two ‘like’ things can be treated the same, while the two ‘unlike’ things can be treated differently. There is no third option; the formal model is binary in nature insofar as the thing being compared can only be ‘like’ or ‘unlike’ that to which it is being compared.²⁷¹ Tussman and tenBroek opine that if ‘like’ means ‘simply “similar in the possession of the classifying trait” ... any classification whatsoever would be reasonable by this test’.²⁷² The formal model of equality relies on the viewpoint that all persons who are in the same situation should be afforded the same treatment, regardless of arbitrary characteristics such as race, sex or religion. McCrudden describes this version of

²⁶⁸ Plato, *Gorgias* (B Jowett tr 1892) 507E-508A. Plato, *Laws VI* (B Jowett tr 1892) 757.

²⁶⁹ Aristotle, *Ethica Nicomachea V 3* (W Ross tr 1925) 1131a-1131b. Aristotle, *Ethica Eudemia VII* (W Ross ed 1925) 9.1241b.

²⁷⁰ *ibid.*

²⁷¹ Monica Diggs Mange, ‘The Formal Equality Theory in Practice: The Inability of Current Antidiscrimination Law to Protect Conventional and Unconventional Persons’ (2007) 16 *Columbia Journal of Gender and Law* 1, 6.

²⁷² Joseph Tussman and Jacobus tenBroek, ‘The Equal Protection of the Laws’ (1949) *California Law Review* 341, 345.

equality as 'individualised justice'.²⁷³ Westen is of the opinion that the theory of treating like alike was vacuous.²⁷⁴ He claimed that the idea did not provide any basis on which to determine what 'likeness' amounted to.

There are two parts to the formula that "likes should be treated alike": (1) a determination that two people are alike; and (2) a moral judgment that they ought to be treated alike.²⁷⁵ Part (1) is the determinative component, as it will focus on determining that two individuals are alike for the purposes of then affording them like treatment. It is difficult though to decipher what part (1) essentially means in terms of "likeness". There are three different ways of considering "treat like alike": (A) treating people alike who are in all respects alike, (B) treating people alike who are only alike in some respects and (C) treating people the same based on their being morally alike in a particular way.²⁷⁶ If we are to say that like should be treated alike then does that mean that the two individuals must be alike in all respects? This may then result in a situation where in treating like alike will mean that the individuals are only alike in some respects. In considering individuals being morally alike, a moral standard of treatment would have to be provided and this in turn would mean that categories would have to be defined and standards set which could be referred to, by which the individuals could be treated alike.

It is very difficult to determine how two individuals can be alike; no two individuals will have identical histories, experiences, social, political, economic, language backgrounds, etc. To determine that two males because of their gender, being the same age, and living in the same area are alike would be to ignore other factors such as ethnicity, race, membership of a particular minority group or a history

²⁷³ Christopher McCrudden, 'Theorising European Equality Law', in Cathryn Costello and Eilís Barry (eds), *Equality in Diversity* (Ashfield Publications 2003) 20-21.

²⁷⁴ Westen, 'The Empty' 547.

²⁷⁵ Westen, 'The Empty' 543.

²⁷⁶ *ibid.*

of suffering discrimination or disadvantage. While formal equality attempts to take a colour and gender blind approach, it is people's individual differences, that will mark out their need for equality. Therefore, providing an individual only with equality provided they are like or unlike another individual ignores that particular individual's personal circumstances. The formal model, in its effort to ensure parity, neglects to factor in individual needs and circumstances.

In addition to considering what it means to be alike, the idea of what it means to be treated alike must also be discussed. Some commentators argue that uniform treatment for all members of a category of person's means that all members will be either uniformly granted or denied a particular treatment. Similar to the argument made above, while no two people will be truly "like" there are also no categories of "like" treatment. To be treated alike, and therefore, to receive the same treatment as someone "like" you simply means that you will receive whatever prescribed treatment as set out by a prescribed standard. Therefore, Westen's contention that 'equality is entirely circular' is correct, in that when we consider the theory that "like should be treated alike", when we ask who are "like people", we are informed that they are 'people who should be treated alike'. We are provided with no substantive guidance on what amounts to "like people" and "like treatment". This theory of Westen's builds on the earlier discussion of Locke that '[A]s soon as any weight is put on this principle it seems to collapse into the shattering triviality that cases are alike, morally or in any other respect, unless they are different'.²⁷⁷

²⁷⁷ Don Locke, 'The Trivializability of Universalizability' (1968) 77 *The Philosophical Review* 25, 25-26.

The formal model of equality provides the foundation for the legal concept of direct discrimination.²⁷⁸ One of the major underpinnings of the formal model is consistency in treatment. It would be illegal to treat a woman less favorably than a man, but if both were equally badly treated, then according to the formal model there would be no discrimination due to the consistency in treatment. According to direct discrimination and its basis of formal equality, it will not matter whether an individual belongs to a privileged or disadvantaged group. This lack of consideration for the position of an individual is based on the symmetrical concept of direct discrimination.²⁷⁹ It could be said that the formal model focuses not on the recognition of collective disadvantage, but rather on the protection of individuals from irrational discrimination.²⁸⁰ Fredman has suggested that prohibitions on direct discrimination on specified grounds ‘have traditionally been founded and legitimated on grounds that they further the liberal goals of state neutrality, individualism, and the promotion of autonomy’, neutrality being ‘expressed first and foremost through the notion of formal equality before the law’ and ‘[b]eyond that ... through a focus on fairness as consistency, drawn from the well-worn maxim that likes should be treated alike’.²⁸¹ These words of Fredman espouse the central theory of the formal model of equality.

Fredman believes that the formal model of equality permits ‘leveling down’ and

[I]gnores the extent to which such neutrality reinforces dominant values or existing distributions of power ... The apparent commitment

²⁷⁸ Anne Smith and Rory O’Connell, ‘Transition, equality and non-discrimination’ in Antoine Buyse and Michael Hamilton (eds), *Transitional Jurisprudence and the ECHR. Justice, Politics and Rights* (Cambridge University Press 2014) 192.

²⁷⁹ Bell, *Racism* 31.

²⁸⁰ *ibid* 29.

²⁸¹ Sandra Fredman, ‘Equality: A New Generation?’ (2001) *Acta Juridica* 214, 223.

to neutrality can therefore be seen to mask an insistence on a particular set of values, based on those of the dominant culture'.²⁸²

She further adds that whilst the formal model 'is suspicious of all classification, a substantive equality analysis would only be suspicious of groups who are excluded because of, or in spite of, their especial vulnerability'.²⁸³ This focus on neutrality as a means of reinforcing the dominant cultures power or values can have a detrimental effect on a group, as the formal model of equality will move from a neutral point of view. The formal model and its reliance on direct discrimination also focus on the requirement of a comparator. This requirement tends to favour the homogenous majority, as the comparator tends to be a white, able-bodied, heterosexual male.²⁸⁴ This conception of a comparator is quite limited in its scope; it neglects and ignores a variety of identities, ethnicities and lifestyle preferences prevalent in a multicultural society. While there is merit to the Aristotelian principle of equality, the formal model is quite limited, in that it deals more with reactive discrimination than anything more far reaching such as indirect discrimination.

While there are limits to the formal model of equality, there is also attractiveness to the simplicity of its base reasoning. The model rests on a sense of justice that is based on treating people identically irrespective of their background.²⁸⁵ On the surface, the formal model appears to be predicated on fairness. This perception, though, can cloud the reality of the model's limited efficacy in tackling the deep-seated roots of inequality. The formal model also bases itself on the assumption that

²⁸² Fredman, 'Equality' 224-225. *Abdulaziz v UK* App nos 9214/80, 9473/81, 9474/81 (ECHR, 28 May 1985) concerned a challenge to immigration rules, which discriminated on the grounds of sex. The outcome of the case was that favourable treatment rather than being extended to women was withdrawn from men.

²⁸³ Sandra Fredman, 'Providing Equality: Substantive Equality and The Positive Duty to Provide' (2005) 21 *South African Journal on Human Rights* 163, 170.

²⁸⁴ Sandra Fredman, *Introduction to Discrimination Law* (Oxford University Press 2002) 9.

²⁸⁵ Bell *Racism* 29.

the pre-existing norm is at all times neutral.²⁸⁶ The judgment handed down in *Thlimmenos* stated that the right to non-discrimination is ‘violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different’.²⁸⁷ In the wake of this case the European Committee of Social Rights held that equality could not be achieved if the Roma communities were treated in the same way as the general population.²⁸⁸

The formal model’s reliance on treating people identically irrespective of background is positive in theory but negative in practice for groups such as the Roma. When considering issues such as the unlawful occupation of land, factors such as the Roma’s nomadic way of life, socio-economic disadvantage and cultural beliefs would need to be considered by States. Betten criticizes the formal model for being relatively empty in relation to its underlying objectives and values.²⁸⁹ The overriding emphasis of the model is rationality and consistency. However, this in turn means that the formal model allows for no distinction between majority and minority groups in society.²⁹⁰ Gold has suggested that there is merit in the formal model of equality, in that it could be required that ‘legislative distinctions must be relevant to the purposes of the law’ and that this along with ‘constitutional principles that impose limits on the purposes of legislation’ could have the potential to deal with some of the issues with the formal model.²⁹¹ While this approach could be useful, it is more so directed at the type of general equality clause found for example in the Fourteenth Amendment to

²⁸⁶ Fredman, ‘Combating’ 94.

²⁸⁷ *Thlimmenos v Greece* App no 34369/97 (ECHR, 6 April 2000), para 44.

²⁸⁸ European Committee of Social Rights, *European Social Charter Conclusions XIX-4* (Council of Europe Publishing 2011).

²⁸⁹ Lammy Betten, ‘New equality provisions in European law: some thoughts on the fundamental value of equality as a legal principle’ in Kim Economides, Lammy Betten, John Bridge, Andrew Tettenborn and Vivien Shrubbsall (eds), *Fundamental Values* (Oxford Hart Publishing 2000) 69, 73.

²⁹⁰ Bell, *Racism* 31.

²⁹¹ Marc Gold, ‘The Canadian Conception of Equality’ (1996) 46 *University of Toronto Law Journal* 349, 352.

the US Constitution, rather than the characteristic-specific protection provided by Article 14 of the ECHR.

The symmetrical nature of the formal model, while in essence having a positive purpose at its core, does not allow for the acknowledgement of how endemic long term disadvantage, structural, covert or indirect discrimination or social and economic disadvantage will affect one individual more than another because of their race or background. In the formal model, discrimination against a black African will be viewed in the same terms as discrimination against a white European.²⁹² The individualistic focus of the formal model also appears to ignore the fact that discrimination does not often occur against random individuals, it is most often the case that discrimination occurs against individuals with similar characteristics. This assertion can be evidenced from much of the Article 14 case law: those experiencing discrimination are often individuals or groups of individuals with similar racial or ethnic backgrounds or educational, social or economic backgrounds. Grant states:

Fundamental to the critique of formal equality is its inability to address the historical disadvantage suffered by those subject to discrimination and to recognise that the effect of differential treatment may in fact be heightened as a result.²⁹³

Grant's belief perfectly sums up a major difficulty with the formal model of equality in that the treat 'like cases alike' requirement may result in personal characteristics such as ethnicity, gender or race not being taken into account. While a gender or race neutral approach may have some benefits, it is this lack of consideration of characteristics that could lead to the prevention of the introduction of measures to undo the effects of systemic discrimination based on past disadvantage.

²⁹² Bell, *Racism* 31.

²⁹³ Evadné Grant, 'Dignity and Equality' (2007) 7 (2) *Human Rights Law Review* 299-329, 320.

3.3.2 – The Substantive Model of Equality

The substantive model of equality repudiates the Aristotelian principle of equality. The model moves from ‘a negatively orientated right of non-discrimination to a positively orientated right to substantive equality’.²⁹⁴ The substantive model focuses on collective experiences of inequality. The model emphasizes the recognition of difference over homogeneity and the importance of accommodating the lifestyles and particular needs of a group. The substantive model in contrast to the formal model is concerned with situations or distinctions that may reinforce systemic discrimination. This model attempts to ensure that laws do not reinforce the subordination of groups who are already suffering from economic, political or social exclusion or disadvantage. The goal of the substantive model is to eliminate inequality. The model looks at cultural recognition, socio-economic disadvantage and representation in public office.²⁹⁵ This concept of equality relies on an asymmetrical approach whereby there is an ability to facilitate ‘equality of opportunity’ and ‘equality of results/outcomes’.²⁹⁶ Fredman has identified four ‘specific ... aims’ of substantive equality as:

[B]reak[ing] the cycle of disadvantage associated with out-groups; promot[ing] respect for the equal dignity and worth of all, thereby redressing stigma, stereotyping, humiliation and violence because of membership of an out-group; positive[ly] affirm[ing] and celebrat[ing] ... identity within community; and facilitate[ing] full participation in society.²⁹⁷

The formal model in contrast adopts a colour or gender blind approach to discrimination while the substantive model relies on and moves towards a gender and

²⁹⁴ Smith and O’Connell, ‘Transition, Equality’ 189-190 citing Anne Smith, ‘Constitutionalising Equality: The South African Experience’ (2008) 9 *International Journal of Discrimination and the Law* 201, 201-249.

²⁹⁵ Bell, *Racism* 31.

²⁹⁶ McCrudden, ‘Theorizing’ 19-33.

²⁹⁷ Sandra Fredman, ‘Providing Equality: Substantive Equality and The Positive Duty to Provide’ (2005) 21 *South African Journal on Human Rights* 163, 167.

colour conscious approach.²⁹⁸ The substantive model also provides a more constructive model for the recognition of the needs and cultural diversity of minorities. O'Connell opines that the formulation of Article 14 itself and much of the Court's discrimination jurisprudence has favoured the Aristotelian formal model of equality.²⁹⁹ The Court's reliance on the formal model of equality has begun to abate though, particularly in the case law involving Roma and Article 14.

It could be argued that a substantive model of equality does not fully fit into any of the mainstream equality doctrines. The substantive model does have a significant effect, though: it changes the circumstances which are identified by the Court as giving rise to equality questions and this in turn changed the outcomes of discrimination cases.³⁰⁰ The substantive model begins by asking what is the substance of the inequality. The substantive model's:

[C]ore insight is that inequality, substantively speaking, is always a social relation of rank ordering, typically on a group or categorical basis – higher and lower, more and less, top and bottom, better and worse, clean and dirty, served and serving, appropriately rich and appropriately poor, superior and inferior, dominant and subordinate, justly forceful and rightly violated or victimized, commanding and obeying – that precedes the legal one.³⁰¹

It is often the case that inequalities will overlap or intersect with each other. The core essence of inequality is that some individuals or groups in society are treated as being intrinsically more worthy than others, this results in some being elevated above others due to their actual or perceived position in a particular group. Each inequality is different from the next; however, the commonality between them will be the fact that the operation of a hierarchy will lead to the distinction amounting to inequality. In

²⁹⁸ Smith and O'Connell, 'Transition, Equality' 190.

²⁹⁹ *ibid.*

³⁰⁰ Catharine A. MacKinnon, 'Substantive Equality: A Perspective' (2011-2012) 96 *Minnesota Law Review* 1, 11.

³⁰¹ MacKinnon, 'Substantive Equality' 11. Rory O'Connell, 'The Role of Dignity in Equality Law: Lessons from Canada and South Africa' (2008) 6 (2) *International Journal of Constitutional Law* 267, 267-286.

discussing the substantive model, there is a need to acknowledge that different approaches or lens can be used with which to view the model. The following subsections will address some of these approaches and provide an introductory analysis to how they may be relied on by the Court in its interpretation of Article 14 in cases taken by Roma to the Court and also any issues that arise with the use of these approaches.

3.4 Substantive Models of Equality

3.4.1 The Dignity Based Approach to Equality

Fredman names ‘promot[ing] respect for the equal dignity and worth of all, thereby redressing stigma, stereotyping, humiliation and violence because of membership of an out-group’ as one of the ‘specific ... aims’ of substantive equality.³⁰² Dignity has been much discussed in relation to substantive equality. Amongst the core purposes and bedrocks of human rights in general is the protection of human dignity. It is difficult, though, to define what is meant by dignity. Dignity can be seen as ‘inherent in the humanity of all people’.³⁰³ It is seen as a trigger for equality rather than a limit to accessing equality. ‘Simply by virtue of their humanity’ all persons have value and should therefore be entitled to a minimum standard of respect, which is to be afforded to all people.³⁰⁴ It could be argued that dignity is a more substantive approach to the concept of equality than the formal model’s reliance on likes being treated alike. Dignity can be viewed as both an individual and collective concept: dignity can be applied to an individual in the way that it provides a standard of respect which each person deserves, while at the same time being a collective concept in that dignity can

³⁰² Fredman, ‘Providing’ 170.

³⁰³ Oscar Schachter, ‘Editorial Comment: Human Dignity as a Normative Concept’ (1983) 77 (4) *The American Journal of International Law* 848, 848.

³⁰⁴ Grant, ‘Dignity and Equality’ 305.

facilitate a universal concept of equal treatment regardless of classifications or differentiating factors.

In *Coleman v Attridge Law*, Advocate General Maduro suggested that the ‘values underlying equality’ were ‘human dignity and personal autonomy’.³⁰⁵ This view of Maduro can be contrasted with that of Smith, who believes that “‘dignity’ is something that is attributed to people because of something else’ and that:

“dignity” cannot replace “rationality” (or any other core human attribute) as a foundation for equality, because rationality is (a candidate for) the foundation of human dignity.³⁰⁶

Feldman adds to this assertion by stating that it is ‘difficult to pin down’ the meaning of dignity.³⁰⁷ Smith in turn does state that:

There is nothing wrong with using the placeholder “dignity” as a summary of what is considered special about human beings. One should not, however, expect it to denote something previously overlooked that will explain what it means to discriminate against someone.³⁰⁸

Feldman agrees with this sentiment and suggests that ‘dignity is a quality characteristic of human beings, so that an individual cannot have a right to it’.³⁰⁹ However ‘[a]n umbrella of rights may be justified in preventing interference with ... general human dignity (i.e. dignity attributable to people “by virtue of their membership of the human species”)', and ‘some rights seem to have a particularly prominent role in upholding human dignity. These include ... the right to be free of discriminatory treatment ...’.³¹⁰ Many commentators have agreed with Feldman, that while the nature of the relationship between equality and dignity is much contested, there is a relationship between the two at a very basic level in that as he states:

³⁰⁵ Case C-303-06 *Coleman v Attridge Law* [2008] ECR I-146, para 8.

³⁰⁶ Smith, ‘A Critique’ 514.

³⁰⁷ David Feldman, ‘Human Dignity as a Legal Value: Part 1’ (1999) *Public Law* 682, 682.

³⁰⁸ Smith, ‘A Critique’ 523-524.

³⁰⁹ Feldman, ‘Human Dignity’ 689.

³¹⁰ *ibid* 695

‘Discrimination on the basis of status, etc., is ... a major assault on dignity’.³¹¹

Feldman’s assertion that an individual cannot have a right to dignity as it inheres in a human being is a controversial one. In a model society it would be hoped that dignity would inhere in all human beings, but one must consider the centuries of endemic disadvantage and systemic discrimination which groups such as the Roma have faced. It will be very difficult for them to believe in human dignity, when they have systematically been denied respect from the dominant population.

Grabham and Martin are also concerned that a ‘narrow reading of “human dignity” might exclude from its scope “material factors” ... Put another way, one could conceivably be dignified and materially disadvantaged’.³¹² Fraser expands on this by stating that:

[A] focus on dignity and recognition involves an inherent tension between valuing the universal equality of different people, and valuing their uniqueness, and their unique characteristics. In effect, there exists some tension between equality based on universal humanity and the recognition of individual identity as of value.³¹³

Vickers is not as critical in her view that ‘founding the concept of equality on dignity ... created room to provide broader recognition for differences rather than mere tolerance ... equality and dignity ... can involve recognition of the uniqueness of individuals, and their distinctiveness’ and an ‘acknowledge[ment] that inequality arises not just in socio-economic terms, but in more cultural and symbolic terms too’.³¹⁴ Rather than basing an understanding of discrimination on dignity, Moreau believes that discrimination should be seen as ‘depriving some of a benefit available

³¹¹ *ibid.*

³¹² Emily Grabham, ‘Law v Canada: New Directions for Equality Under the Canadian Charter?’ (2002) 22 *Oxford Journal of Legal Studies* 641, 654-55. Sheilah Martin, ‘Balancing Individual Rights to Equality and Social Goals’ (2001) 80 *The Canadian Bar Review* 299.

³¹³ Nancy Fraser, ‘From Redistribution to Recognition? Dilemmas of Justice in a ‘Post-Socialist’ Age’ (1995) 212(1) *New Left Review* 68.

³¹⁴ Lucy Vickers, ‘Promoting Equality or Fostering Resentment? The Public Sector Equality Duty and Religion and Belief’ (2011) 31(1) *Legal Studies* 135-58, 149.

to others, in circumstances where this treatment is unfair to them'.³¹⁵ While Moreau places dignity as central to the unfairness which leads to discrimination, she does state that the 'subjective conception of dignity', which is concerned with the diminution of 'individuals' feelings of self-worth', is insufficient to 'render that treatment unfair'.³¹⁶ Moreau views treatment as being 'unfair' where it does not respect the 'abstract ... ideal of respect for the equal dignity of all'.³¹⁷ She in turn views 'dignity' in Kantian terms as the 'unchanging, supreme value that inheres in every human being ... the idea of a human being's "unconditional and incomparable worth ..."'.³¹⁸

Moreau is also of the view that 'worth is unconditional', that an individual's situation in life or whether they are shown respect does not affect their worth and other's opinion that they have no worth is irrelevant.³¹⁹ She continues that even if an individual has been stigmatized or marginalized, they have 'a claim to concern and respect for [their] intrinsic worth'.³²⁰ Given her conclusion that the concept of dignity 'does not have sufficient content to explain the precise nature of the wrongs that are done to individuals', Moreau suggests more specific ways of viewing the wrong of unequal treatment:

- (i) it is based on prejudice or stereotyping;
- (ii) it perpetuates oppressive power relationships; [or]
- (iii) it leaves some individuals without access to basic goods.³²¹

Moreau's view of unequal treatment would be beneficial to Roma, as it would be based on the prejudice they have faced for centuries, it would take into account the

³¹⁵ Sophie R Moreau, 'The Wrongs of Unequal Treatment' (2004) 54 *University of Toronto Law Review* 291, 297, 313.

³¹⁶ Moreau, 'The Wrongs' 297, 313.

³¹⁷ *ibid.*

³¹⁸ Moreau, 'The Wrongs' 294-95 citing Immanuel Kant (JW Ellington trans), *Grounding for the Metaphysics of Morals; with, On a Supposed Right to Lie Because of Philanthropic Concerns* (3rd edn, Hackett Publishing Company 1993).

³¹⁹ Moreau, 'The Wrongs' 294-295.

³²⁰ *ibid.*

³²¹ *ibid.* 296.

stereotyping they face and also how this unequal treatment has left Roma with a lack of access to basic goods such as a home, education and healthcare.

While human dignity must be considered as a possible lens through which to view the concept of equality, there are difficulties in applying this particular lens to Article 14. The treatment of dignity is limited by the particular wording of Article 14, as it applies only to ‘the rights and freedoms set forth in [the] Convention’; therefore, the Article only complements those provisions. This wording makes it difficult for the ECtHR to comprehensively and openly look at the concept of dignity within its consideration of Article 14 cases. In later chapters the concept of dignity will be important to consider in cases involving Roma women being forcibly sterilized, Roma children being seen as educationally inferior and therefore placed in “special” schools or segregated, Roma being physically and verbally assaulted while in custody and Roma being forced to live in appalling and degrading conditions due to a lack of consideration for their way of life and culture.

While undoubtedly, as will be discussed in later sections, the Court in its interpretation of Article 14 relies on the concept of dignity. While the Court does repeatedly refer to the concept of dignity it would be very difficult to state that the Court applies a strict concept of dignity as a basis for its decisions on equality.³²⁶ While the word ‘dignity’ is not stated in the European Convention on Human Rights, it can be argued that dignity is immanent in Article 8, with reference to the dignity of the patient. Dupré argues that dignity permeates the entire ECHR and having assessed both the Court of Justice of the European Union and the ECtHR has drawn out the thousands of references those courts have made to the concept of dignity in their case

³²⁶ Catherine Dupré, ‘Human Dignity in Europe: A Foundational Constitutional Principle’ (2013) 19 (2) *European Public Law* 319, 319-340.

law.³²⁷ With regard to the Roma case law discussed in this thesis, dignity has been focused on by the Court particularly in the forced sterilisation cases related to the dignity of the women involved who had not given informed consent. The issue of dignity was also discussed in the educational segregation cases as the Court discussed the impact which marginalisation of the children into Roma only schools, annexes and special schools. In the cases involving anti-Roma violence and allegations of violations of Article 3, the Court has referred to the treatment of Roma males in custody. The Court has not only been vocal about dignity in the Roma cases, but also in a variety of other cases before the ECtHR particularly in cases involving sex discrimination and workers dignity.³²⁸ The reason this argument cannot be made is the fact that the Court has yet to entirely dismiss the idea of ‘leveling down’, whereby equally bad treatment is seen as satisfying the equality principle.³²⁹ There is also the additional concern about an overreliance on dignity, as it may result in the concept being regarded as a separate independent criterion. This could place an even more onerous burden on applicants in that, in addition to proving discrimination, they would also have to show that the disadvantage in question was what led to the lack of respect for the applicant as a person.³³⁰ While the purpose of this section has been to introduce and discuss the concept of dignity, as a lens through which to achieve equality and thereby provide a basis for discussion in later chapters of the use of the concept, in cases taken by Roma there is a need to acknowledge that dignity is not the only concept which the Court is concerned with in its analysis of whether there has been a breach of Article 14 in a case. The Court is also concerned with the

³²⁷ Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Hart Publishing 2016) section 4.

³²⁸ Dupré, *The Age of Dignity*, sections 4 and 5.

³²⁹ *Stec v United Kingdom* App nos 65731/01 65900/01 (ECHR, 12 April 2006), here the allocation of types of disability benefit for illnesses caused in the workplace and conditions of pensionable age to this allocation were found to be based on sexual discrimination.

³³⁰ Fredman, *Discrimination Law* 20.

disadvantage based approach, equality of opportunity and results, multidimensional equality and intersectionality, all of which will be introduced and discussed in subsequent sections.

3.4.2 - The Substantive Disadvantage Approach

The substantive disadvantage approach is contextual in nature. Its core focus is on asymmetrical structures of privilege, power and disadvantage in society. It focuses on eradicating policies and practices that perpetuate or increase disadvantage. It is predominantly concerned with equality of results. While some may argue that this approach moves away from the rule of identical treatment, this is not the case as the approach merely uses techniques and tools in order to effect change and eliminate political and social structures that are discriminatory in nature.³³¹ Due to the perceived weaknesses of other approaches, this approach was elaborated to move away from comparative ideas of sameness or difference. It rather prefers to focus on systemic or structural consequences of gender, race or ethnicity.³³² Theories of social construction form the spine of the disadvantage approach. Hackling perfectly sums up how the disadvantage test is well suited to substantive equality analysis when he states that:

The existence or character of X is not determined by the nature of things, X is not inevitable. X was brought into existence or shaped by social events, forces, history, all of which could have been different.³³³

The disadvantage-based approach is in stark contrast to the formal model, as it rejects that model's focus on individualism. Social construction theory builds on the viewpoint that rather than viewing certain traits as "immutable" or "natural", one

³³¹ Cliona J M Kimber, 'Equality of Self-determination' in Conor Gearty and Adam Tomkins (eds) *Understanding Human Rights* (Mansell Publishing 1996) 266, 271-272.

³³² Stephanie Palmer, 'Critical Perspectives on Women's Rights: The European Convention on Human Rights and Fundamental Freedoms' in Anne Bottomley (ed) *Feminist Perspectives on the Foundational Subjects of Law* (Cavendish Publishing 1996) 223, 228.

³³³ Ian Hacking, *The Social Construction of What?* (Harvard University Press 1999) 6-7.

should view them as social constructs, therefore rejecting essentialism.³³⁴ The approach critically interrogates systemic examples of power, disadvantage and dominance in society. There is a focus on the positive obligations and positive role of States.

This approach determines discrimination in relation to disadvantage. This focus on disadvantage rather than similarity and difference is beneficial to groups such as Roma. It requires one to look at Roma in their place in real life and to consider the years of systemic deprivation and abuse they have experienced due to their ethnicity. The disadvantage approach has been most often applied to women and the deprivation and abuse they suffer due to their position in the sexual hierarchy.³³⁵ This will also be true of Romani women, as not only are they disadvantaged due to their ethnicity but also due to their gender. The approach's focus on patterns of power and dominance in society would greatly assist Roma who, it could be argued, suffer a significant amount of discrimination not only from the dominant group in society but also through the social machinery of a State. State practices and dissolution of power have negative impacts on Roma enjoyment of public services, public spaces and public funds. The disadvantage-based approach would give credence to the various forms of disadvantage that Roma suffer from, be it economic, social, political disadvantage, etc. It would also take into account the significant number of years over which the Roma have suffered from endemic and systemic discrimination and disadvantage. Other approaches do not take this important factor into account.

³³⁴ Oddny Mjöll Arnardóttir, 'Non-Discrimination in International and European Law: Towards Substantive Models' (2007) 25 *Nordisk Tidsskrift for Menneskerettigheter* 140, 145.

³³⁵ Kathleen Mahoney, 'Gender and the Judiciary: Confronting Gender Bias' in Andrew Byrnes and Kirstine Adams (eds), *Gender Equality and the Judiciary: Using International Human Rights Standards to Promote the Human Rights of Women and the Girl-child at the National Level* (Commonwealth Secretariat 1999) 97-98.

It must be admitted, though, that it is also somewhat idealistic to say the Court should adopt the disadvantage approach. As will be seen in the later case law chapters, the Court's task in considering Article 14 violations is to uncover if there has been a specific violation and therefore while it does seem to take into account the disadvantaged position of the Roma, it cannot use a general situation as grounds for a finding. Roma claimants, as will be seen later, argue that given their disadvantaged position there should possibly be a presumption of discrimination that the Respondent State would have to refute rather than the claimant having to prove discrimination. This will be expanded on in later chapters.

3.4.3 - Equality of Opportunity and Equality of Results

One of the limitations concerning the substantive model of equality relates to the equality of opportunity or outcome. While the purpose of substantive equality is said to be the elimination of inequalities, there are some questions about what the ultimate goal of the model is. There are a number of ways in which to interpret what the elimination of inequality actually means. Two of the approaches that can be considered are equality of opportunity and equality of outcome. Smith and O'Connell define "equality of opportunity" as '[c]reating opportunities, which enable and empower people to have options and make choices' and "equality of results" as 'aim[ing] to ensure an equal and fair distribution of goods and opportunities to economically disadvantaged groups to ensure that the result is equal'.³³⁷ Equality of opportunity is predicated on the idea that, for example although, there are no guaranteed jobs for under-represented groups, these groups are provided with training programmes and educational opportunities so that their present or past disadvantage

³³⁷ Smith and O'Connell, 'Transition' 187.

does not impede them from competing for jobs.³³⁸ The focus of the equality of opportunity concept is to provide a level playing field by ensuring that ethnic minorities are in no way disadvantaged in their pursuit of employment, that essentially there is equality of opportunity for all those applying for the job regardless of ethnicity or educational or social factors.³³⁹ Equality of outcome on the other hand, focuses on ensuring that all groups are proportionately represented, for example in the labour market.³⁴⁰

While equality of opportunity and equality of outcome are useful concepts when considering how to achieve equality, their efficacy can be difficult to measure. The underlining ethos of equality of opportunity can be said to be positive in its effort to provide ethnic minorities with the tools, which will help them to succeed, but it can be difficult to measure how successful the measures are without using benchmarks to evaluate outcomes. Some would argue that if there were no solid figures showing how equality of opportunity is helping individuals who are members of ethnic groups to successfully gain employment, then could it really be said that equality of opportunity is achieving its aims? In turn, if one were to use the number of individuals from ethnic minorities represented in the labour market to display equality of opportunity, then that concept would be merging into the aims of the concept of equality of outcome. Bell argues that 'equality of opportunity is not concerned with securing equal outcomes; rather it seeks to ensure that any differences which remain are not attributable to discrimination'.³⁴¹

³³⁸ Bell, *Racism* 37.

³³⁹ Fredman, 'Providing' 178.

³⁴⁰ Bell, *Racism* 37.

³⁴¹ *ibid.*

Olli and Kofod Olsen acknowledge the difficulty in uncovering and explaining the differences in relation to socio-economic outcomes of ethnic groups.³⁴² They discuss the difficulty in separating discriminatory from non-discriminatory factors, the issues when collecting data and the implicit need (yet danger) in having to define groups. There are numerous issues with defining ethnic groups, not least for the myriad of factors such as the denial of some States of the existence of ethnic minorities, the defining and collecting of data reinforcing a categorization mentality, the issues in relation to data protection legislation and the potential for the misuse of collected ethnic data.³⁴³ There is also a very real fear that if statistics are not read correctly or the correct questions asked of the statistics, then the information provided by them may help to reinforce long held racial stereotypes and aid in the continuance of the marginalization of an ethnic minority. For example in relation to crime statistics, if there is found to be an over-representation of Roma, immigrants or ethnic minorities and the statistics are not interpreted with socio-economic status or age factored in, then the data may lead to the reinforcement of negative stereotypes. Babuisk also raises the important point that official data often substantially underestimates the size of the Roma population.³⁴⁴

On the other hand, without data there can be little accurate assessment of whether the aims of equality of opportunity and equality of outcome are being achieved. While data can be negative, it can also be hugely positive in displaying the contours of inequality and an accurate picture of how the equality landscape is changing over time. There also continues to be an issue with interpreting what it is

³⁴² Eero Olli and Birgitte Kofod Olsen, *Towards common measures for discrimination: Exploring possibilities for combating existing data for measuring ethnic discrimination* (Centre for Combating Ethnic Discrimination and the Danish Institute of Human Rights 2005) 95.

³⁴³ Bell, *Racism* 39.

³⁴⁴ Ferenc Babuisk, 'Legitimacy, statistics and research methodology – who is Romani in Hungary today and what are we (not) allowed to know about Roma' (2004) 1 *Roma Rights Quarterly* 14, 14-18.

that equality of outcomes is seeking to achieve. As has been seen, while equality of opportunity and equality of outcomes have very positive goals, they are also faced with a myriad of difficulties which will have to be addressed if they are to be truly useful.

3.4.4 Substantive Equality as Equal Recognition

Sangiuliano states 'Substantive Equality as Equal Recognition regards horizontal social relations as unequal because they are characterized by status hierarchies.'³⁴⁵

Balkin states that some groups are imputed with 'corresponding disapproval and negative qualities', while other social groups have more 'approval, respect, admiration, or positive qualities' associated with them due to their being groups organized around cultural values and common lifestyles.³⁴⁶ Young refers to the oppression of one group in society by another as 'cultural imperialism'.³⁴⁷ It could be argued that the dominant group in society oppresses the subordinate group due to how the 'identity of one is defined in part by its relationship to the identity of the other'.³⁴⁸

The dominant group in society will have access to methods of communication, representation and interpretation. This in turn will allow their life style and cultural values to be privileged over the subordinate groups in society. The values of the dominant group in society and their life experiences are those which are normalized in society as the dominant group's conceptions of honour, moral approval and social prestige will be those that are most strongly and widely disseminated in society.

Young perfectly states this point when she states that 'the dominant group constructs the differences which some groups exhibit as lack and negation. These groups become

³⁴⁵ Anthony Robert Sangiuliano, 'Substantive Equality as Equal Recognition: A New Theory of Section 15 of the Charter' 2015 52(2) *Osgoode Hall Law Journal* 601, 612.

³⁴⁶ JM Balkin, *The Constitution of Status* 1996 106(8) *Yale Law Journal* 2313, 2321.

³⁴⁷ Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 1990) 59.

³⁴⁸ Balkin, 'The Constitution' 2323.

marked as Other'.³⁴⁹ The dominant group will situate the subordinate group as being deviant, as they do not ascribe to the cultural values of the dominant group, which leads to the subordinate groups' identities and cultural values being perceived as lacking honour, moral approval and social prestige.

Social hierarchies exist in a wide variety of situations. Racial or ethnic status hierarchy exists in society where white people are the dominant group and people of colour will be positioned as the subordinate group. Those in subordinate groups due to their ethnicity or race will be seen as deviant due to their being subjected to Eurocentric-norms and to the construction of norms that privilege traits associated with whiteness. Bauman sees the notion of otherness as central to the way in which societies establish identity categories. He sees that identities are set up as dichotomies:

In dichotomies crucial for the practice and the vision of social order the differentiating power hides as a rule behind one of the members of the opposition. The second member is but the other of the first, the opposite (degraded, suppressed, exiled) side of the first and its creation. Thus abnormality is the other of the norm... woman the other of man, stranger the other of the native, enemy the other of friend, "them" the other of "us"...³⁵⁰

This ability to see subordinate groups as "other" provides the dominant group with a way in which to view the subordinate group as not part of society and therefore to benefit from a sense of detachment in how they are treated in society.

Dichotomies of otherness established by the dominant group are set up as being natural and as such it can be seen that they are often presumed to be natural and taken for granted in everyday life. These social identities, though, are not natural; they represent a hierarchy where particular groups are established as subordinate to superior groups – they essentially represent an established social order. A negation of

³⁴⁹ Young, *Justice* 59.

³⁵⁰ Zygmunt Bauman, *Modernity and Ambivalence* (Cornell University Press 1991) 8.

recognition occurs when members of a subordinate group suffer a wrong due to the dominant group's actions or policies. Taylor roots the concept of recognition in the ideal of authenticity. Taylor defines authenticity as being true to oneself: 'Being true to myself means being true to my own originality, which is something only I can articulate and discover. In articulating it, I am also defining myself.'³⁵¹ We define ourselves "dialogically": it is through our public intercourse with others that we formulate our own authentic identity. Our authentic understanding of our identity depends on its recognition by others as similarly worthy. This understanding will be disrupted when it is defined in juxtaposition to the life style and identity of others: this is the way in which the cultural beliefs and lifestyles of subordinate groups are denied recognition when defined in juxtaposition to the lifestyles of the dominant groups.

Honneth states:

If [the] hierarchy of societal values is structured so as to downgrade individual forms of living and convictions for being inferior or deficient, then it robs the subjects in question of every opportunity to accord their abilities social value.³⁵²

In order to address the "othering" that takes place, there needs to be an emphasis on the specificity of a social group. In turn, there will need to be an affirming of the value of the specificity of that social group.

It is said that in viewing substantive equality as equal recognition, 'substantive equality is a norm regulating the interaction between a law's vertical application and horizontal social inequalities'.³⁵³ It can be argued that the law's vertical effects may reproduce horizontal status hierarchies, which would lead to states using a law to discriminate. The force of law should be used to ensure that horizontal status

³⁵¹ Charles Taylor, 'The Politics of Recognition' in Amy Gutmann (ed), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press 1994) 25, 31.

³⁵² Axel Honneth, 'Integrity and Disrespect: Principles of a Conception of Morality Based on the Theory of Recognition' (1992) 20(2) *Political Theory* 187, 191-192.

³⁵³ Sangiuliano, 'Substantive Equality' 614.

hierarchies do not flourish where subordinate groups suffer oppression due to the negative characterisation of their identity. It can be summed up that state-perpetrated discrimination exists where status hierarchies exist and negate the recognition of the subordinate group's and the citizens belonging to those group's authentic identities.³⁵⁴ Substantive equality as equal recognition has been discussed thus far in relation to state-perpetrated discrimination as a wrong against individuals, but it must also be acknowledged that it is also related to the public value of equality that governs state-citizen interactions. Anderson has put forward a conception of equality referred to as "democratic equality", while Scheffler refers to the "social and political ideal of equality".³⁵⁵ Both of these conceptions of equality are based on a common conception of public value, which focuses on a state opposing hierarchies of power. In order to be egalitarian, a state needs to repudiate distinctions of moral worth as being based on social identity, to abolish oppression and to create a social order in which individuals live in a democratic society together rather than in a hierarchical one.

In conclusion to this section, what does substantive equality as Equal Recognition achieve? It could be said that the concept helps to describe what the world and the law should look like when substantive equality is realized. Substantive equality as Equal Recognition has at its core an ambition to ensure that a law does not transmit through its vertical impact horizontal inequalities, which might take the form of status hierarchies. This theory attempts to move beyond viewing substantive equality as a methodological principle and shift towards seeing the theory as seeking to secure the values of personal autonomy and human dignity, which are often denied

³⁵⁴ Judy Fudge, 'The Canadian Charter of Rights: Recognition, Redistribution, and the Imperialism of the Courts' in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press 2001) 335, 340-352.

³⁵⁵ Elizabeth S Anderson, 'What is the Point of Equality?' (1999) 109(2) *Ethics* 287, 312-315. Samuel Scheffler, 'What is Egalitarianism?' (2003) 31(1) *Philosophical and Public Affairs* 5, 21-24.

to subordinate groups in society where there has been a negation of the value of recognition.

3.4.5 - Multidimensional Equality

Issues of inequality historically have been and will continue to be multi-dimensional. Due to this reasoning, there exists an argument that the best strategy would be to confront these inequalities from a multi-dimensional perspective. The multi-dimensional approach to equality favours an incorporation of many different conceptions of equality but in a way in which this new method would transcend the separate conceptions. Each of the approaches outlined already (the formal model, the dignity based approach, substantive disadvantage approach, social inclusion theory, equality of opportunity and equality of results and substantive equality as equal recognition) all have a number of limitations. However, while they each have limitations, they also each have value in addressing particular situations as outlined in previous subsections. It will also be argued in the later case law chapters that the Court in its interpretation of Article 14 has adopted a mixed approach to its reliance on the various conceptions. Multidimensional equality would have a plural approach rather than a plurality of approaches. This is crucial, as the multidimensional approach to equality is not a form of “lucky bag” by which an individual can choose which approach to adopt.

Rivera Ramos has identified a number of demands, that the multi-dimensional strategy requires:

First of all, obtaining as much information as possible about the relevant problems; secondly, identifying their various dimensions; thirdly, conducting a careful examination that reveals the many ways in which the different dimensions of the problem intersect; and, lastly,

weighing the effects of the proposed solutions on each of the aspects of the situation.³⁵⁶

In this analysis it can be useful to apply some parts of the formal model of equality, while on other occasions it will be necessary to move beyond the constraints of that model and adopt strategies that are focused on results. These strategies would look to the negative consequences of real differences and how they can be eliminated and would deal with the particular needs of individuals and place a positive value on differences between groups and persons.³⁵⁷ This plural approach to equality provides for different problems to be dealt with differently. The approach allows each type of inequality to be treated in the best way suited to its peculiarities. Therefore, the solution to a particular situation should include at the same time strategies that come from the different modalities of equality, which would lead to multiple suitable strategies of action.

An example of this use of a plurality of strategies from varying modalities could be applied to a minority group such as the Roma who are seeking an education for their children. If these children were denied access to particular public services such as education due to their ethnicity, then this would amount to a violation of the principle of formal equality. This would then have to be remedied by stating the legal rights of this minority group in relation to the majority population. This in turn may not fully deal with the needs of the group. The Romani parents may seek for their children to be accorded real opportunities to attend school. If the State were to comply, they could provide transportation, grants and any other services or goods that would assist the children. This provision of full services could be seen as providing material equality. The State could, however, require that the Romani children be educated in

³⁵⁶ Efrén Rivera Ramos, 'Equality: A Multi-Dimensional Approach' (Seminario en Latinoamérica de Teoría Constitucional y Política, Yale, 1999) <http://www.law.yale.edu/intellectuallife/sela1999.htm> accessed 23 October 2015.

³⁵⁷ Rivera Ramos, 'Equality' 13.

the language of the majority population, therefore denying the minority population the use of their native language. The State then would provide the justification that equality provides that the group be assimilated to the majority linguistic and cultural community.

It would be apparently egalitarian to focus on this requirement of uniformity, but this would be entirely discriminatory. This focus on uniformity would result in the minority group having to sacrifice that which might be most important to them: their culture and language. This demand is not placed on the majority linguistic or cultural community and this results in the majority population not seeing the value in cultural difference. This results in the difference principle being violated. In order to address the claim of the minority group, there would need to be a positive valuation of difference. In order to achieve this positive valuation, the claim of the minority group to their right to education would have to be recognised, barriers that prevent the full enjoyment and development of their own culture and language would have to be removed, along with the removal of all attempts to suppress the use of their native language. This theoretical example displays how a plural approach that acknowledges the many diverse aspects of the conditions of inequality experienced by a minority group such as the Roma could be significantly beneficial to the minority group in achieving full equality. This example also displays the conflict between the formal and substantive models of equality: whilst the formal model would say that all persons should be treated the same, the substantive model would say that positive action should be taken to ensure access to education for the minority group.

While the benefits of the multi-dimensional approach have been outlined above, it must also be admitted that the application of this approach is not free of issues. It can be difficult to identify which types of conditions and problems, in which

kinds of situations will require which kinds of solutions. In some situations it would be extremely difficult to harmonise solutions. Given the many options available to apply, there will always be implications due to the choice made, on the basis that other beliefs and views in relation to political and social life will be considered. The next section will consider the final theory in this chapter: intersectionality. There is some common ground between the multidimensional concept of substantive equality and the intersectional approach to substantive equality. Both lenses focus on viewing discrimination as being based on a myriad of grounds rather than a unitary approach to discrimination. The difference between the two, though, is also significant, in that multidimensional equality looks at discrimination being based on a number of grounds, while intersectionality, as will now be discussed, looks at how the intersection of grounds (for example race and gender) lead to discrimination.

3.4.6 – Introduction to Intersectionality

The human rights definition states that ‘intersectional oppression arises out of the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone’.³⁵⁸ The concept of intersectionality had its genesis in a critique of ‘multiple’ and ‘unitary’ approaches to discrimination and oppression.³⁵⁹ Traditionally equality policies and anti-discrimination law have been directed at specific groups: ethnic minorities, women, the disabled, sexual minorities. In Europe there is a history of single-dimensional discrimination and equality acts. Hancock has been very critical of this focus on

³⁵⁸ Ontario Human Rights Commission, *An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims Discussion Paper* (Policy and Education Branch of the Ontario Human Rights Commission 2001) 3 citing Mary Eaton, ‘Patently Confused, Complex Inequality and Canada v Mossop’ (1994) 1 *Review of Constitutional Studies* 203, 229.

³⁵⁹ Johanna Kantola and Kevät Nousiainen, ‘Institutionalizing Intersectionality in Europe’ 2009 11(4) *International Feminist Journal of Politics* 459-477, 461.

single-dimensional discrimination; she criticizes academic research on the area by stating that research that places one category of discrimination to the foreground at the expense of others is an example of adopting a 'unitary' approach.³⁶⁰ She says this occurs because one category is seen as the most explanatory or relevant in particular situations; for example, in the forced sterilisation cases the category focused on is ethnicity, while the question of gender or age is not focused on.

Crenshaw brought intersectionality to the forefront of academic debate when she discussed how black women are at the intersection of sexism and racism and that their experiences should not be isolated to one or other, but rather both grounds.³⁶¹ Intersectional approaches, in contrast to multiple approaches, focus on forms of equality that are 'routed through one another and which cannot be untangled to reveal a single cause'.³⁶² The intersectional approach, though it has been found to be challenging in contrast to the relative simplicity of the unitary and multiple approaches, has drawn much scholarly discussion.³⁶³ This work has focused on the core tenant of intersectionality: that it is focused not on identities but on the meeting point of a combination of social structures.³⁶⁴ Grabham et al view intersectional

³⁶⁰ Ange-Marie Hancock, 'When Multiplication Doesn't Equal Quick Addition: Examining Intersectionality as a Research Paradigm', *Perspectives on Politics* 5 (1) 63-79, 67

³⁶¹ Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' in Katharine T Bartlett and Rosanne Kennedy (eds), *Feminist Legal Theory: Readings in Law and Gender* (Westview Press 1991) 57-80.

³⁶² Emily Grabham with Didi Herman, Davina Cooper and Jane Krishnadas, 'Introduction', in Emily Grabham, Davina Cooper, Jane Krishnadas and Didi Herman (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge-Cavendish 2009) 2.

³⁶³ Mary Hawkesworth, 'Congressional Enactments of Race-Gender: Towards a Theory of Raced-Gendered Institutions' (2003) 97 (4) *American Political Science Review* 529-550, Davina Cooper, *Challenging Diversity: Rethinking Equality and the Value of Difference* (Cambridge University Press 2004), Hancock, 'When Multiplication' 67, Grabham, *Intersectionality and Beyond*, Myra Marx Ferree, 'Inequality, Intersectionality, and the Politics of Discourse: Framing Feminist Alliances' in Emanuela Lombardo, Petra Meier and Mieke Verloo (eds), *The Discursive Politics of Gender Equality: Stretching, Bending and Policy-Making* (Routledge 2009) 86-104.

³⁶⁴ Leslie McCall, 'The Complexity of Intersectionality' (2005) 30 (3) *Signs: Journal of Women in Culture and Society* 1771, 1771-1799, L S Weldon, 'The Concept of Intersectionality' in Gary Goertz and Amy Mazur (eds), *Politics, Gender and Concepts: Theory and Methodology* (Cambridge University Press 2008) 193-218, Joanne Conaghan, 'Intersectionality and the Feminist Project of Law'

approaches to equality as focusing on the exploration of the ways in which subjects, domination and subordination are put together in particular contexts and locations, rather than adopting the pre-defined identity categories which human rights discourse has focused on historically.³⁶⁵ In contrast, McCall does not agree with the idea of a total destruction of categories of inequality, but instead focuses on the durable and stable relationships that these categories can represent.³⁶⁶ Regardless of the debates of advocates of intersectional approaches, it must be stated that a focus on the interaction of varying structures of inequality does produce a more grounded, developed and complete picture of the discrimination and oppression faced by particular groups of people.³⁶⁷

Hancock suggests a 'multiple' approach to inequality. This would recognize that individuals belong to many groups and have many identities. The recognition of multiple identity categories would mean that there could be a focus on 'multiple discrimination' and therefore an acknowledgement that a person can be discriminated against on the basis of more than one identity category.³⁶⁸ It is also important to note that all categories are considered to be equal, therefore gender and race would be treated as parallel, with neither of the two taking priority as a more important discrimination ground. It could be suggested that this 'multiple discrimination' approach, in contrast to the unitary approach, will lead to more effective claims being brought by applicants, as they themselves will recognize that they do not have to focus only on one discrimination ground, but can include all those intermingled grounds, that have contributed to the discrimination they have faced. Intersectionality

in Emily Grabham, Davina Cooper, Jane Krishnadas and Didi Herman (eds), *Intersectionality and Beyond: Law Power and the Politics of Location* (Routledge Cavendish 2009) 21-48.

³⁶⁵ Grabham et al, *Intersectionality and Beyond* 2.

³⁶⁶ McCall, 'The Complexity' 1774.

³⁶⁷ Weldon, 'The Concept' 197.

³⁶⁸ Kantola and Nousiainen, 'Institutionalizing Intersectionality' 461.

as a lens allows human rights abuses to be examined in a more nuanced and complete way. Rather than being forced to seek redress based on only race-based violations rather than gender-based violations, intersectionality recognizes the nexus between racism and sexism and how they are inextricable and mutually reinforcing.³⁶⁹

3.5 Fredman's Conception of Substantive Equality

For the purpose of this thesis the concept of intersectionality that will be relied upon is that proffered by Fredman. She provides a meaning of substantive equality which avoids reliance on a single meaning such as those discussed earlier: (equality of opportunity, equality of results or dignity, etc.) and instead focuses on a multidimensional concept which pursues four complementary and interrelated objectives:

- a) redressing disadvantage (the redistributive dimension)
- b) addressing stigma, stereotyping, prejudice and violence (the recognition dimension)
- c) facilitating participation (the participatory dimension)
- d) accommodating difference, including through structural change (the transformative dimensions).³⁷¹

I will now provide a brief discussion of each of these four objectives, which will be relied on in the forthcoming case law chapters as a method of theoretical analysis.

The substantive model of equality does not view individuals in an abstract way and sees the importance in looking at previous discrimination. Under the substantive model, classifications are seen as being necessary in order to compensate for previous disadvantage. One of the core aims of substantive equality is to redress

³⁶⁹ Johanna E Bond, 'Intersecting Identities and Human Rights: The Example of Romani Women's Reproductive Rights' (2004) 5 *The Georgetown Journal of Gender and the Law* 897-916, 908.

³⁷¹ Fredman, *Discrimination Law* 25-33.

disadvantage. This aim of redressing disadvantage has a number of advantages such as: it provides for the recognition of indirect discrimination, it recognizes disparate impact and permits expressly differential treatment and affirmative action to redress previous disadvantage. Removing a benefit from the better off in society would not redress disadvantage suffered. Disadvantage could be in the context of socio-economic disadvantage or non-material disadvantages, such as imbalances in power or subordination; neither of these latter disadvantages would be resolved by leveling down.

The aim of the recognition dimension is to ‘capture the familiar association of the right to equality with dignity, while avoiding its pitfalls, namely that it is vague and oblivious of social relations’.³⁷² As discussed in a preceding section, there has been much criticism of the concept of “dignity” and the conception of dignity to be relied upon under Fredman’s theory of substantive equality is not to be an open-ended conception, but rather a conception that specifies the wrong to be addressed as stereotyping, prejudice, stigma and violence based on a protected characteristic such as race or ethnicity. This recognition dimension does not focus on the individualized notion of dignity. This stems from Fraser’s conception of ‘recognition wrongs’ which consist in inequality in the concern and mutual respect that individuals in society feel for each other and in what Fraser terms ‘misrecognition’.³⁷³ The Hegelian conception of identity views identity as being constructed in relation to how others regard us.³⁷⁴ It must be stated that recognition wrongs are not limited to distributive wrongs or socio-economic disadvantage, but rather recognition wrongs can arise in many different

³⁷² Sandra Fredman, ‘Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights’ (2016) 16 *Human Rights Law Review* 273, 282.

³⁷³ Nancy Fraser and Axel Honneth, *Redistribution or Recognition?: A Political-Philosophical Exchange* (Verso 2003) 29.

³⁷⁴ Philip T Grier, ‘Introduction’ in Philip T Grier (ed), *Identity and Difference: Studies in Hegel’s Logic, Philosophy of Spirit, and Politics* (State University of New York Press 2007) 1-8.

ways such as through prejudice, stereotyping, stigma and violence. It could be said that this dimension also deals with indirect discrimination. By ensuring that there is recognition of the different types of stigma faced by Roma it will be possible to uncover instances of indirect discrimination. For example, a piece of legislation could appear non discriminatory on the surface but in practice is discriminatory to a vulnerable group such as the Roma.

The third objective of Fredman's conception of substantive equality looks at participation. This dimension focuses on Ely's observation that the aim of judicial review is to compensate for the lack of political power for permanently marginalized groups, given that according to Ely elected officials have no interest in attending to those marginalized individuals' wishes and needs.³⁷⁵ A key element of substantive equality is that rather than top down decisions being imposed on marginalized groups, decision-makers are required to listen to and respond to the wishes and voices of groups who share a protected characteristic. Positive duties are also imposed by substantive equality on states to ensure that marginalized groups have the capacity to participate meaningfully in society, politics and decision-making. This third dimension also deals with social exclusion, a concept also mentioned earlier in this chapter, whether through poverty, disability, age, etc.

The fourth and final dimension is the transformative dimension of substantive equality. This element focuses on 'the recognition that equality is not necessarily about sameness'.³⁷⁶ Different characteristics and identities should be celebrated and respected. A person's difference should not attract detriment. Following on from this, assimilation into society should not be a precondition to the right to equality. Some structures may need to be transformed or modified to accommodate difference. This

³⁷⁵ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980) 46.

³⁷⁶ Fredman, 'Emerging' 283.

would mean that rather than an individual having to conform to existing norms, substantive equality requires a transformation of social structures or institutions. This dimension requires both positive and negative duties: a positive duty to achieve equality and a negative duty to prevent discrimination. This dimension also focuses on substantive equalities requirement of accommodation of differences within groups.

The key advantage of this approach is that the framework allows for the interaction between the different dimensions to be addressed. This intersectional approach to substantive equality allows for a more nuanced approach to the various factors leading to the discrimination of a marginalised individual or disadvantaged group. It provides a critical framework for what substantive equality is seeking to achieve. Fredman's conception of substantive equality, though an intersectional approach, stems from the earlier pioneering work of Crenshaw, who in developing the theory of intersectionality differentiated between structural and political intersectionality.³⁷⁷ For the purpose of this thesis, and the Court's interpretation of Article 14 in cases taken by Roma applicants, and an analysis of the theories of equality which the Court has relied on, structural intersectionality will be discussed. Political intersectionality, while crucial to Roma, does not pertain to this piece of work.³⁷⁸ The next section will introduce the concept of structural intersectionality and the division of internal and external intersectionality.

³⁷⁷ Crenshaw, 'Demarginalizing the Intersection' 57-80.

³⁷⁸ Crenshaw's definition of political intersectionality states: 'The concept of political intersectionality highlights the fact that women of color are situated within at least two subordinated groups that frequently pursue conflicting political agendas. The need to split one's political energies between two sometimes opposing groups is a dimension of intersectional disempowerment that men of color and white women seldom confront. Indeed, their specific raced and gendered experiences, although intersectional, often define as well as confine the interests of the entire group.... The problem is not simply that both discourses fail women of color by not acknowledging the "additional" issue of race or of patriarchy but that the discourses are often inadequate even to the discrete tasks of articulating the full dimensions of racism and sexism... Among the most troubling political consequences of the failure of antiracist and feminist discourses to address the intersections of race and gender is the fact that, to the extent they can forward the interest of "people of color" and "women", respectively, one analysis often implicitly denies the validity of the other. The failure of feminism to interrogate race means that

3.5.1 Structural Intersectionality

Structural intersectionality takes place when various discriminatory structures in society interrelate and cause a multifaceted disempowerment of the person in question. It refers to structures established by laws and policies, and practices of state institutions and authorities.³⁷⁹ An example of structural intersectionalities can be seen where European states do not exercise due diligence when it relates to crimes where the alleged victim is Roma and thereby do not investigate and prosecute crimes appropriately. As stated by the European Parliament:

[W]hereas in a number of countries there exist clear indications that police forces and other organs of the criminal justice system are affected by anti-Romani bias, leading to systemic racial discrimination in the exercise of criminal justice.³⁸⁰

One can note that gender plays a role in cases involving sexual violence against Romani girls and women. Organisations have noted that there has been a level of impunity due to gender- based discrimination combining with racial/ethnic biases in justice institutions.³⁸¹ In addition to this issue of gender, there will also be the contributing issue of age. Age is important, as many Romani children would not have the financial resources to claim their legal rights. In addition to this, children are often excluded from administrative and legal proceedings. It can therefore be seen that disadvantages combine: ethnic discrimination, discrimination on the basis of age and

the resistance strategies of feminism will often replicate and reinforce the subordination of people of color, and the failure of antiracism to interrogate patriarchy means that antiracism will frequently reproduce the subordination of women. These mutual elisions present a particularly difficult political dilemma for women of color. Adopting either analysis constitutes a denial of a fundamental dimension of our subordination and precludes the development of a political discourse that more fully empowers women of color.' Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 (6) *Stanford Law Review* 1241, 1251-1252.

³⁷⁹ Camilla Ida Ravnbøl, *Intersectional Discrimination Against Children: Discrimination Against Romani Children and Anti-Discrimination Measures to Address Child Trafficking* (UNICEF Innocenti Research Centre June 2009) 14.

³⁸⁰ European Parliament, *Resolution on the Situation of the Roma in the European Union* adopted 28 April 2005, 130 PE 357.314.

³⁸¹ Asylum Aid, *Romani Women from Central and Eastern Europe: A "Fourth World", or Experience of Multiple Discrimination* (Asylum Aid Refugee Women's Resource Project 2002) 57.

gender-based discrimination all come together to lead to a multiple violation of the rights of the child. There would first of all be a violation of the right of the child in relation to the sexual abuse, but secondly in relation to the consequential access to justice with both of these violations being tied back to the different forms of discrimination.

Structural intersectionality can be both intentional and unintentional in nature. An example of intentional intersectional disempowerment would be the coercive sterilisation of Romani women that has been reported to take place in Hungary, Slovakia and the Czech Republic and which will be discussed in a later chapter. Another example of this intersectional disempowerment would be the placing of Romani children in classes for children with mental disabilities, when the children in question have no disabilities. This practice is particularly prevalent across Central and South-Eastern Europe and again will be discussed in a later chapter.³⁸²

Intersectional disempowerment can also be unintentional in nature. This would occur where policies, laws or institutional rules, which appear neutral have in fact a discriminatory effect in practice. An example of this type of unintentional disempowerment would be where a lack of resources in schools leads to a failure to provide for assistance and opportunities for bilingual education and therefore limits the learning possibilities of children such as Roma who speak minority languages. There are a number of forms of discrimination that interrelate: the children's age precludes them from pushing for budget allocations and children with disabilities from minorities or who are migrants or Romani will in general be excluded from participation in public matters.

³⁸² UNICEF Serbia, *Breaking the Cycle of Exclusion: Roma Children in South East Europe* (UNICEF Serbia 2007) 53, European Monitoring Centre on Racism and Xenophobia (EUMC), *Roma and Travellers in Public Education* (EUMC 2006), European Roma Rights Centre, *Disinterest of the Child: Romani children in the Hungarian Child Protection System* (ERRC 2007).

Intersectionality does not only take place at institutional levels; it also takes place within broader society. To again take Romani children as an example, Romani girls are often given less attention in school due to the school authorities' perception that they will not finish school due to their getting married at a young age, becoming pregnant at an early age, etc.³⁸³ Romani girls, when wearing their traditional dress, may also be denied entry to shops and restaurants. Both Romani boys and girls who are economically disenfranchised may suffer disempowerment on a number of grounds related to ethnicity, age, poverty, etc. and be faced with negative comments, harassment, stereotyping and accusations of their being dirty, lazy or thieves.³⁸⁴

3.5.2 External and Internal Discrimination

In addition to considering the interrelation of different grounds of discrimination, there is also a need to consider the different spheres in which individuals experience discrimination. External discrimination is the discrimination that an individual experiences from the society and State in which they live.³⁸⁵ This discrimination is from a party who is outside the individual's private sphere. However, it would be remiss to think that discrimination only occurs externally, as there are many instances where there can be internal discrimination. This discrimination can come from the individual's affiliated community, particularly if the individual is a member of a racial,

³⁸³ European Monitoring Centre on Racism and Xenophobia, *Breaking the Barriers: Romani Women's Access to Public Health Care* (Office of the OSCE High Commissioner on National Minorities, the Council of Europe's Migration and Roma/Gypsies Division and the EUMC 2003).

³⁸⁴ EUMC, 'Breaking the Barriers' 43-45, Lilla Farkas, *Segregation of Roma Children in Education: Addressing Structural Discrimination through the Race Equality Directive* (European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities Unit 2007) 30, Lilla Farkas, *Report on Discrimination of Roma Children in Education* (European Commission Directorate-General for Justice 2014).

³⁸⁵ The terminology internal and external intersectionality stems from Kymlicka's terminology on group rights for internal or external restriction. Will Kymlicka, *Multicultural Citizenship* (Oxford University Press 1995) 35.

religious, ethnic or linguistic minority within the group. Traditional family practices and patriarchal customary laws can lead to the subordination of women and girls.

While this thesis is concerned with the application and interpretation of external discrimination and intersectionality to the case law taken by Roma to the Court, it is also an important aside to note how internal intersectionality has affected Roma in taking cases. In the forced sterilisation cases, the internal Romani view on the importance of women being able to bear children led to many of the Roma women claimants not bringing their case earlier due to a fear of discrimination within their own community. It has also been the case that internal discrimination has been used by Respondent States in cases such as the educational segregation cases to justify the segregation of Roma children due to the contention that Roma parents had no interest in their children's education and had consented to their children being placed in special classes. The Respondent State was citing negative stereotyping in the guise of internal discrimination as justification for a difference in treatment.

3.5.3 Interlocking Oppressions

Intersectional analysis focuses on the fact that people do not experience compartmentalised forms of human rights abuses.³⁸⁶ Often human rights violations do not occur in isolation. An individual will suffer a violation based on a tangled web of categories. As McIntosh states '[o]ne factor seems clear about all of the interlocking oppressions. They take both active forms which we can see and embedded forms which as a member of the dominant group one is taught not to see'.³⁸⁷ As McIntosh opines, there will be an inherent difficulty for the dominant group to uncover

³⁸⁶ Bond, 'Intersecting Identities' 916.

³⁸⁷ Peggy McIntosh, 'White Privilege: Unpacking the Invisible Knapsack' in Amy Vita Kesselman, Lily D McNair and Nancy Schniedewind (eds), *Women: Images and Realities* (Mountain View 1999) 358-361. Alexandra Oprea, 'Re-envisioning Social Justice from the Ground-Up: Including the Experiences of Romani Women' (2004) 1 (1) *Essex Human Rights Review* 29-39, 38.

interlocking oppressions, therefore it is apparent how historically there has been a unitary approach to human rights discourse given that it will arguably be easier to identify one ground on which to say an individual has been discriminated on.³⁸⁸

Human rights abuses should not be packaged as “race discrimination” or “gender discrimination”. Individuals such as Romani women were forcibly sterilized due to both their ethnicity and their gender. While internal intersectionality is important in so far as Roma women being hesitant to take cases due to feeling they would be ostracized in their own community, this cannot be considered by the Court, as its analysis will have to focus on structural intersectionality, intentional and unintentional intersectionality. Yet internal intersectionality, amongst the other forms of intersectionality, allows one to better view the complete reality of a situation rather than looking at an artificial version of the case based on only one consideration of discrimination. In the forthcoming chapters on allegations of state executed violence, forced sterilisation and educational segregation, Fredman’s conception of substantive equality through an intersectional lens will be adopted for the purpose of analysing the European Court of Human Right’s approach to substantive equality. Structural intersectionality will also be discussed particularly in the sterilisation and educational segregation chapters. It is the argument of this thesis that the Court is moving towards a reliance on the substantive equality model as evidence in its Article 14 cases taken by Roma. It is also put forward that intersectionality could be a particularly effective method through which to view substantive equality, given that it captures the many myriad reasons why a person or group may be discriminated, rather than having to focus on only one ground. Crucially it is the interaction between these grounds that

³⁸⁸ *ibid.*

leads to discrimination, as will be seen particularly in the Roma case law later discussed.

3.6 Framework for Analysis

In this penultimate section of this chapter, I will discuss how the aforementioned theories of equality will provide a framework for analysis of the case law in the following chapters. In each of the case law chapters focusing on death and assault in police custody, forced sterilisations and educational segregation, there will be a theoretical enquiry as to whether the Court, in the case law brought by Roma, has adopted a formal or substantive model of equality. Firstly, there will be a need to note whether there has been a gradual change in the Court's use of a particular model. There will also be a discussion of whether there has been a difference in the model of equality used in the First Section or the Grand Chamber in their respective judgments. Following this more general analysis, there will be a need to focus specifically on the approaches to equality which the Court has adopted and whether these approaches are fully recognising the issues at hand in respective cases.

The case law taken by Roma to the Court alleging violations of Article 14 has been instrumental in changing the Court's interpretation of Article 14. The subsequent case law chapters will endeavor to display these changes. One of the major ways in which the Court's progress can be seen is in the way it has gradually changed its approach to equality. It has moved from a standpoint of recognising only formal equality, with all the difficulties that entails, to moving towards a substantive model. This shift in terms of Roma case law needs to be examined; there needs to be a consideration as to through what type of lens the Court is viewing the substantive model. Not only is it necessary to decipher what lens the Court is using, but also it is

important to consider whether that lens is the most appropriate or whether the Court could be considering other approaches. As outlined in previous subsections, there are positives and faults to all models and approaches, particularly in relation to Article 14 and the limitation, which that Article will place on the use of certain approaches.

In the previous chapter, I introduced Article 14 and the concepts of direct and indirect discrimination and positive action. In this chapter I have outlined the formal and substantive models of equality. Under the substantive model I have provided an analysis of the dignity based approach, the disadvantage based approach, recognition as substantive equality, the multidimensional approach, and intersectionality with a focus on structural intersectionality, internal and external intersectionality. While a discussion of the various lenses through which to view substantive equality was crucial to a full understanding of the various viewpoints on what substantive equality amounts to, the forthcoming case law chapters will be analysed through the lens of intersectionality. The four objectives outlined earlier, as put forward by Fredman, will be utilised to analyse the three groupings of cases focusing on allegations of violence perpetrated against Roma, forced sterilisation and educational segregation. While Fredman's four objectives do not explicitly reference indirect discrimination or positive action, they are implied in the analysis, under the objectives of redressing disadvantage (through positive action) and addressing stigma and stereotyping (both indirect discrimination and positive action can be analysed here). Theories that focus on the disadvantage based approach, dignity and recognition will also be relied upon under Fredman's conception of viewing substantive equality through the lens of intersectionality.

Intersectionality will be relied upon to analyse the Court's move towards a substantive model of equality in the first case law chapter on the cases of violence

perpetrated against Roma. The twin grounds of ethnicity and gender are crucial to these cases, as the cases predominantly involve male Roma. In the chapter on forced sterilisation, the dignity based approach and intersectionality will be applied. As discussed earlier in the cases the applicants are being discriminated against based on their gender and ethnicity. They are also experiencing structural and intentional intersectionality. In the final case law chapter on educational segregation, the Court, in their recognition of indirect discrimination, made some of the greatest strides towards substantive equality. In addition to this, though, the Court also discussed the disadvantage based approach, the dignity based approach and structural and intentional intersectionality. While the case law chapters are crucial for analysing the ways in which the cases taken by Roma have affected the interpretation of Article 14, there is also a need to discuss the ways in which the Court has adopted approaches to equality as a further way of discussing the changing interpretation of Article 14 before the Court.

3.7 Conclusion

While the limitations of the substantive model have been outlined, Fredman asserts that there is now more acceptance of the contention that substantive equality is one of the fundamental bedrocks of a just society in Europe today.³⁸⁹ The substantive model of equality looks to the realities on the ground and it allows this reality to be looked at in comparison to the view of equality that the dominant group in society will have.³⁹⁰ Hepple argues that from 2000 onwards the concept of substantive equality has been

³⁸⁹ Sandra Fredman, 'Combating with Human Rights: The right to equality' in Sandra Fredman (ed), *Discrimination and Human Rights: The Case of Racism* (Oxford University Press 2001).

³⁹⁰ Morag Goodwin, 'Multidimensional exclusion. Viewing Romani marginalization through the nexus of race and poverty' in Dagmar Schiek and Victoria Chege (eds), *European Union Non-Discrimination Law. Comparative Perspectives on Multidimensional Equality Law* (Routledge- Cavendish 2009) 145.

significantly developed.³⁹¹ Alain Supiot agrees that in more recent years discrimination law has gained in importance.³⁹² Bruun argues that the Court has adopted a broad approach to the concept of discrimination, where it gives considerable importance to the factual end result.³⁹³ While the formal model wishes to be neutral and therefore blind to ethnicity, this practice merely reinforces pre-existing cultural hierarchies.³⁹⁴ The formal model moves from the standpoint that ethnic minorities be only afforded the same treatment as that which the dominant ethnic group(s) receives. While the formal model is striving to be neutral and treat all people equally, it is often the case that national and ethnic minorities seek recognition of their difference; they do not seek to be viewed the same as the dominant ethnic group(s). For this and the other reasons outlined, the formal model does not offer the response needed to deal with inequality and the complex cultural differences of contemporary European States.

‘Equality is not only the Leviathan of Rights; it is also a Tantalus. It promises more than it can ever deliver.’³⁹⁵ While equality as a concept may falter in its delivery of promises, there is some promise in the substantive model of equality. Substantive equality challenges assumed norms and probes traditional practices.³⁹⁶ The substantive model looks to the fact that:

[I]f persons start out in, or acquire, unequal positions in life – some advantaged and some disadvantaged – legal rules requiring the state to treat relevantly similar persons equally cannot, of themselves, reduce

³⁹¹ Bob Hepple, ‘Equality at Work’ in Bob Hepple and Bruno Veneziani (eds), *The Transformation of European Labour Law* (Hart 2009) 129-163.

³⁹² Alain Supiot, *The Spirit of Philadelphia. Social Justice vs. the Total Market* (Verso 2012) 35.

³⁹³ Niklas Bruun, ‘Prohibition of Discrimination under Article 14 European Convention on Human Rights’ in Filip Dorssemont, Klaus Lörcher and Isabelle Schömann (eds), *The European Convention on Human Rights and The Employment Relation* (Hart 2013) 367, 372.

³⁹⁴ Bell, *Racism* 42.

³⁹⁵ Beverley McLachlin, ‘Equality: The Most Difficult Right’ (2001) 14 *The Supreme Court Law Review* 17, 20.

³⁹⁶ Bell, *Racism* 42.

or change the initial inequality. If the law merely treats them equally, the respective individuals remain substantively unequal.³⁹⁷

It is argued that substantive equality acknowledges the complexity of inequality, its deep rootedness in the institutions of society, social values and behaviours, the economic system and power relations.³⁹⁸ The substantive model understands the systemic nature of inequality. It requires lawyers and judges to understand not only the inequality but also crucially the context in which the inequality occurred.

The need to understand the context of the inequality will lead to an interrogation of the legal, social and political context in which the alleged violation occurred. The discriminated against group's social or economic position will be examined on its own, but also in light of the group's relationship with the privileged and powerful dominant groups.³⁹⁹ Albertyn identifies four factors which give the substantive model its potential to address inequality and discrimination:

[A]n emphasis on understanding inequality within its social and historic context; a primary concern with the impact of the alleged inequality on the complainant; a recognition of difference as a positive feature of society; and attention to the purpose of the right and its underlying values in a manner that evinces a direct or indirect concern with remedying systemic subordination or disadvantage'.⁴⁰⁰

In addition to these factors, the transformative substantive model of equality would be able to imagine or affirm a future society through normative values means and practical remedies means.⁴⁰¹

³⁹⁷ Gary Goodpaster, 'Equality and Free Speech: The Case Against Substantive Equality' (1996-1997) 82 *Iowa Law Review* 645, 660-661

³⁹⁸ Catherine Albertyn, 'Substantive Equality and Transformation in South Africa' (2007) 23 *South Africa Journal on Human Rights* 253, 254.

³⁹⁹ Martha Minow, 'The Supreme Court 1986 Term, Foreword: Justice Engendered' (1987-88) 1 *Harvard Law Review* 10.

⁴⁰⁰ Albertyn, 'Substantive' 258. Carole Pateman, 'Equality, Difference, Subordination: The Politics of Motherhood and Women's Citizenship' in Gisela Bock and Susan James (eds), *Beyond Equality and Difference* (Routledge 1992) 17, 28. Deborah L Rhode, 'The Politics of Paradigms' in Gisela Bock and Susan James (eds), *Beyond Equality and Difference* (Routledge 1992) 149.

⁴⁰¹ Albertyn, 'Substantive' 258.

While the Court has a long history of using the formal model of equality, there has been a shift in recent years to a more substantive model. This shift to the substantive model has led to the model being viewed through a number of lens such as the dignity-based approach, the disadvantage based approach and intersectionality. It can be seen in later chapters that, from the Court's acknowledgement of indirect discrimination, affirmative actions the use of statistics and NGO reports, the discussion by the Court of the special position of the Roma as a disadvantaged group and the particular need for their protection, the Court has begun to adopt a more substantive approach. There is much merit in the formal model, however; it will be discussed through the case law in the next chapters how the limits of the long established formal model led to a number of issues. An analysis of how the Court is now looking at substantive equality and the impact which this has had not only on case law taken by Roma applicants, but also on the broader interpretation of Article 14 in the Court will also be provided.

Chapter 4

Alleged Violations of Article 14 in cases of Anti-Roma Violence

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4.1 Introduction

This chapter will discuss the cases of alleged violence against Roma taken before the European Court of Human Rights. Many of the applicants in these cases alleged violations of Article 14 taken in conjunction with other substantive Convention articles such as Articles 2, 3, 5, 6 and 8. The applicants in the cases alleged that their Roma ethnicity was a major factor in their being denied their Convention rights. A discussion and analysis of the case law taken by Roma in relation to alleged violence and violations of Article 14 will provide much in terms of addressing the question of the way in which cases taken by Roma to the ECtHR have effected the Court's interpretation of Article 14.

The cases have addressed core issues such as whether the applicants' Roma ethnicity was a factor in the violation of their Convention rights in cases involving attacks by private individuals, attacks on Roma villages, bullet wounds being inflicted during police questioning, death in an arson attack, death in police custody or in detention and police brutality. The cases of alleged violence have been instrumental in two particular areas with regard to Article 14: the standard for the burden of proof to be met and the recognition by the Court for the first time of the possibility of a finding of a procedural and/or substantive violation of Article 14.

This chapter will deal with the most seminal cases and directly trace their effect on the Court's interpretation of Article 14. The chapter will begin by providing the historical background to the anti-Roma violence experienced by Roma in Europe.

It is crucial to provide this background, as in later sections of the chapter the movement of the Court towards looking at the position of Roma in Europe today and the history of violence they have suffered will be outlined. The next section will provide an introduction to the various types of anti-Roma violence cases taken before the Court. This brief background to the cases, along with a table of the case law, will provide the reader with an overview of the large number of cases along with the cases where a violation of Article 14 was found.

Following this introduction to the historical context and particular cases of note, the next thematic section of the chapter will look at the burden of proof in Article 14 cases, (proof beyond reasonable doubt) and the shifting of the burden to the Respondent State. The evidence relied upon by applicants before the Court in establishing proof of discrimination based on race and ethnicity, the use of independent reports of Non-Governmental Organisations and the use of statistical evidence will also be mentioned within the discussion of the burden of proof. Dissenting opinions in the early anti-Roma violence cases were crucial in discussing the onerous standard of proof required and these judgments have provided interesting suggestions on how the burden of proof should be dealt with in Article 14 cases.

The subsequent thematic section will discuss the Court's finding of procedural and substantive violations of Article 14. Prior to the anti-Roma violence cases there had been no discussion that there could be a finding of a violation of Article 14 on both procedural and substantive grounds. While the Court has for the most part adopted this new approach to Article 14, there has been some resistance and this will also be addressed in this section. The last thematic section will discuss the impact the anti-Roma violence cases have had on the model of equality relied on by the Court. The question of whether there has been a move towards a substantive model of

equality will be discussed. The section will also apply Fredman's theory of intersectionality, as introduced in the previous chapter, to the anti-Roma violence cases discussed in this chapter. The chapter will conclude with a brief overview of the key impacts that this group of cases have had on the interpretation of Article 14 before the Court and the possible change to a reliance on a substantive model of equality before the Court in Article 14 cases.

4.2 The Historical Background to the Anti-Roma Violence Experienced in Europe

While the Roma as a group were introduced in the terminology section of this thesis, this particular section will trace the emergence of violence against Roma in Europe. As mentioned already, the Roma have descended from nomadic groups that were displaced in the 10th century.⁴⁰² By the 14th Century the Roma were well established in Bohemia and enjoyed good relations with feudal lords whom they served as soldiers and blacksmiths.⁴⁰³ By 1538, though, relations had become fractured and the first anti-Gypsy legislation was passed in that year in Moravia.⁴⁰⁴ In the late 17th century in central Europe, in the aftermath of the Thirty Years War, there was an emergence of travelling gangs of robbers.⁴⁰⁵ These groups were made up of soldiers returning from the war and displaced persons. They terrorized the sedentary population, however, police measures targeted not only the travelling robbers but also travelling Romani clans. The travelling nature of the gangs led to a perceived threat

⁴⁰² Ivan Bernasovsky, Jana Jurickova and Vladimir Ferak, 'Population Genetic-Study in Gypsies (Roms) from Slovakia: Distribution of Blood-Group Genetic Markers' (1994) 102 *Anthropological Science* 409, 409-419. Ian Hancock, 'A Glossary of Romani Terms' (1997) 45 *American Journal of Comparative Law* 329, 329-344. Ronald Lee, 'The Rom-Vlach Gypsies and the Kris-Romani' (1997) 45 *American Journal of Comparative Law* 345, 345-392.

⁴⁰³ Angus Fraser, 'The Present and Future of the Gypsy Past' (2000) 13 *Cambridge Review of International Affairs* 17, 17-31.

⁴⁰⁴ David M Crowe, *A History of the Gypsies of Eastern Europe and Russia* (St. Martin's Press 1995) 34.

⁴⁰⁵ Yaron Matras, *The Romani Gypsies* (Penguin 2014) 182.

and whole scale incitement against all those who led a nomadic life. This led to a criminalisation of Romani clans, which had nothing to do with the robberies. The extreme poverty after the war and scarcity of resources led to the emergence of hawkers, professional beggars and peddlers who were increasingly associated with Roma, these associations often having negative consequences for settled peoples' view of the Roma.

With the dawn of the 19th century there were some positive outcomes, in that the close to five hundred year serfdom of Roma in Romania came to an end.⁴⁰⁶ With the establishment of Czechoslovakia, the Roma began to make some progress in that the new Constitution recognized them as a national minority and gave them citizenship.⁴⁰⁷ This progress, though, was stymied by the revival of anti-nomadism policies in 1927.⁴⁰⁸ In Povedim, Slovakia, in 1928, an anti-Roma pogrom was reported in the *Slovak* newspaper as 'the Povedim case can be characterized as a citizens' revolt against Gypsy life. In this there are the roots of democracy'.⁴⁰⁹ In 1939, with the Nazi annexation of Czechoslovakia, Roma in that state became a target of racial hatred, much like the Jews. In 1940, Czech Roma were placed in forced 'labour' camps with Jews, while many were shipped to other countries to concentration camps.⁴¹⁰

⁴⁰⁶ Viorel Achim, *The Roma in Romanian History* (Central European University Press 2004) 27-31, 87-106

⁴⁰⁷ Angus Bancroft, "'Gypsies to the Camps!': Exclusion and Marginalisation in the Czech Republic' (1999) 4 *Sociological Research Online* < <http://socresonline.org.uk/4/3/bancroft.html> > accessed 4 April 2017. Andrea Baršová, 'Czech citizenship legislation between past and future' in Rainer Bauböck, Bernhard Perchinig and Wiebke Sievers (eds), *Citizenship Policies in the New Europe. Expanded and Updated Edition* (Amsterdam University Press 2009) 249-250.

⁴⁰⁸ Angus Bancroft, *Roma and Gypsy-Travellers in Europe: Modernity, Race, Space and Exclusion* (Ashgate 2005) 11.

⁴⁰⁹ Will Guy, 'Ways of Looking at Roma: The Case of Czechoslovakia' in Diane Tong (ed), *Gypsies: An Interdisciplinary Reader* (Garland 1975) 14-20. David Crowe, *A History of the Gypsies of Eastern Europe and Russia* (St. Martin's Press 1995).

⁴¹⁰ Rolf-Dieter Muller, Hans Umbreit and Bernhard R Kroener, *Germany and the Second World War: Organization and Mobilization in the German Sphere of Power. War Administration, Economy, and Manpower Resources 1942-1944/5* (Oxford University Press 2003) 277.

During the Communist era in central and Eastern Europe, the Roma were forced to abandon their nomadic way of life, cultural, ethnic and linguistic identities.⁴¹¹ These actions, accompanied by resettlement, meant that Roma often became socially isolated in fixed communities, which did not wish for them to be there.⁴¹² With the end of communism came much social and political upheaval. The Roma became scapegoats for the breakdown in social order and economic dislocation.⁴¹³ This was met with a surge in anti-Roma violence and hate speech in the early 1990s.⁴¹⁴ Verdery has stated that in many ways the move ‘from state-socialism to the nascent democracies was accompanied by profoundly negative effects for the Roma’.⁴¹⁵ A number of Roma were killed in a series of pogroms, which destroyed Roma settlements and property.⁴¹⁶

Regardless of whether they have been based in Western or Eastern Europe, for much of their time on the European continent the Roma have experienced subjugation, discrimination and oppression. The European Roma Rights Centre published a report in 2011 examining 44 cases of anti-Roma violence between 2008 and 2012 in Hungary, Czech Republic and Slovakia.⁴¹⁷ The report showed that there had been a

⁴¹¹ Helen O’Nions, *Minority Rights Protection in International Law: The Roma of Europe* (Ashgate 2007) 10.

⁴¹² Vladimir Macura and Milos Petrovic, *Housing, Urban Planning and Poverty: Problem Faced by Roma/Gypsy Communities with Particular Reference to Central and Eastern Europe* (Document of the Council of Europe 1999).

⁴¹³ Dena Ringold, *Roma and the Transition in Central and Eastern Europe: Trends and Challenges* (The International Bank for Reconstruction and Development 2000) 1, 8.

⁴¹⁴ Scott Nicholas Romaniuk, ‘Overcoming Ethnic Hatred: Peacebuilding and Violent Conflict Prevention in Divided Societies’ in Olivera Simić, Zala Volčič and Catherine R Philpot (eds), *Peace Psychology in the Balkans. Dealing with a Violent Past while Building Peace* (Springer 2012) 219.

⁴¹⁵ Katherine Verdery, ‘Whither “Nation” and “Nationalism”?’ (1993) 122 (3) *Daedalus* 37, 37-46. Katherine Verdery, ‘Nationalism and Nationalist Sentiment in Post-Socialist Romania’ (1993) 52 *Slavic Review* 179-203.

⁴¹⁶ Claude Cahn, *Human Rights, State Sovereignty and Medical Ethics: Examining Struggles* (Martinus Nijhoff Publishers 2015) 121.

⁴¹⁷ European Roma Rights Centre, *Imperfect Justice: Anti-Roma Violence and Impunity* (European Roma Rights Centre, 2011), available at www.errc.org/cms/upload/file/czech-hungary-slovakia-imperfect-justice-06-march-2011.pdf accessed 9 July 2015.

failure of national authorities to properly investigate and prosecute crimes.⁴¹⁸ Anti-Roma violence, though, is not confined to the three named countries. There has also been reports of anti-Roma violence in France and Italy, amongst others.⁴¹⁹ Roma have been the victims of negative stereotyping, which has cast them as a people predisposed to a life of crime.⁴²⁰ This long term negative stereotyping has resulted in the Roma suffering from a long history of violence being perpetrated against them by the majority population and/or state authorities. States and majority populations have continuously cast Roma as ‘outsiders’ consumed by violent predilections.⁴²¹ The next section of this chapter will introduce the various types of cases which the Roma have taken to the European Court of Human Rights alleging violations of their Convention rights due to anti-Roma violence based on ethnic hatred.

4.3 An Introduction to the Various Types of Anti-Roma Violence Cases before the European Court of Human Rights

In the past twelve years the ECtHR has dealt with nearly forty cases involving anti-Roma violence. It can be seen from the late 1990’s that the Court has been increasingly confronted with cases alleging racially motivated violence against Roma people.⁴²² The procedural histories of these cases and fact patterns tend to mirror each other. The significant number of very similar cases provides a picture of state-

⁴¹⁸ European Roma Rights Centre, *Sudden Rage at Dawn: Violence against Roma in Romania* (ERRC 1996), European Roma Rights Centre, ‘Newsbrief: Police in Slovakia Use Electric Cattle-prods during Raids on Romani Community’ (ERRC 1996).

⁴¹⁹ Helen O’Nions, *Minority Rights Protection in International Law: The Roma of Europe* (Ashgate 2007) 11-12.

⁴²⁰ James A Goldston, ‘The Struggle for Roma Rights: Arguments that Have Worked’ (2010) 32 *Human Rights Quarterly* 311, 313.

⁴²¹ Dena Ringold, *Roma and the Transition in Central and Eastern Europe: Trends and Challenges* (The International Bank for Reconstruction and Development 2000) 8.

⁴²² Kristin Henrard, ‘The European Convention on Human Rights and the Protection of the Roma as a Controversial Case of Cultural Diversity’ (European Diversity and Autonomy Papers No 5, 15 December 2004) <www.ssrn.com/abstract=1972960> accessed 4 March 2017. Lisa Conant, ‘Individuals, Courts, and the Development of European Social Rights’ (2006) 39 (1) *Comparative Political Studies* 76, 76-100.

tolerated and state-sponsored violence perpetrated by police officers, judges, prosecutors and hospital staff.⁴²³

There are a number of different types of cases with similar fact patterns. These cases can be broadly looked at in two groupings. The first group of cases concerns individuals or groups who are responsible for killing and/or battering or assaulting Roma individuals or burning down Roma settlements.⁴²⁴ These cases involve allegations of violations of Article 14 in conjunction with Articles 6 and 8. There have been eight cases concerning attacks on Roma, Roma settlements and private and family life brought before the Court. Three of the eight cases ended with unilateral declarations while five led to full hearings of the cases by the Court.⁴²⁵ The five cases

⁴²³ Mathias Möschel, 'Is the European Court of Human Rights' case law on anti-Roma violence 'Beyond Reasonable Doubt?' (2012) 12(3) *Human Rights Law Review* 479, 481-82.

⁴²⁴ *Moldovan and Others v Romania* App No 41138/98 and 64320/01 (ECHR, 2 July 2005), *Kalanyos and Others v Romania* App No 57884/00 (ECHR, 26 April 2007), *Gergely v Romania* App No 57885/00 (ECHR, 26 April 2007), *Tănase & Others v Romania* App No 62954/00 (ECHR, 26 August 2009), *Koky and Others v Slovakia* App No 13624/03 (ECHR, 12 June 2012), *Fedorchenko and Lozenko v Ukraine* App No 387/03 (ECHR, 20 December 2012) and *Ciorcan v Romania* App Nos 29414/09 and 44841/09 (ECHR, 27 April 2015).

⁴²⁵ The cases of *Kalanyos v Romania*, *Gergely v Romania* and *Tănase and Others v Romania* all concerned the burning and destruction of Roma homes. In *Kalanyos v Romania* and *Gergely v Romania* the Court acknowledged that the alleged violations are 'of a very serious and sensitive nature'; the Judges held that they had been addressed exhaustively in the *Moldovan* case. The Court held that another judgment on similar merits would not be useful. *Tănase and Others v Romania* concerned a very similar fact pattern to the other cases and involved burnings of Roma villages and attacks perpetrated by non-Roma individuals including the mayor and the priest. The case was concluded by way of unilateral declaration. A unilateral declaration may be made by a Respondent Government, acknowledging a violation of the ECHR and giving an undertaking to provide redress to the applicant. A unilateral declaration will usually be filled where an attempt to reach a friendly settlement has failed. Any type of case can be concluded by a unilateral declaration, but where the case is complex/ sensitive or involves the most serious human rights violations, the Court will examine the case with particular care and attention. The applicant is invited to submit comments particularly if they feel that the Court should refuse to accept the universal declaration. Should the applicant be satisfied with the terms of the declaration the case will be struck out of the Court's list. However, even if the applicant wishes for the examination of the application to be continued, it is for the Court to decide whether it is justified or not. If the Court decides that it is no longer justified for it to examine the case then certain non-exhaustive criteria must be satisfied including: 'The existence of sufficiently well-established case-law in the matter raised by the application. Clear acknowledgment of a violation of the Convention in respect of the applicant – with an explicit indication of the nature of the violation. Adequate redress, in line with the Court's case-law on just satisfaction. Where appropriate undertakings of a general nature (amendment of legislation or administrative practice, introduction of new policy, etc.). Respect for human rights: the unilateral declaration must provide a sufficient basis for the Court to find that respect for human rights does not require the continued examination of the application.' If the Court accepts the unilateral declaration, it is endorsed by a judgment or a striking out decision. European Court of Human Rights, *Unilateral Declarations: Policy and Practice* (European Court of Human Rights Documents September 2012). *Kalanyos v Romania* App no

that were decided on by the Chamber of the Court in full hearings were: *Moldovan and Others v Romania*, *Koky and Others v Slovakia*, *Fedorchenko and Lozenko v Ukraine*, *Lăcătuș and Others v Romania* and *Ciorcan v Romania*.⁴²⁶ Of these five the cases of *Moldovan* and *Lăcătuș*, led to findings of violations of Article 14 in conjunction with Articles 6 and 8. The two cases focused on the destruction of a large number of Roma homes during the 1993 pogrom in Romania.

The second type of case group centers on a Roma individual or group being arrested by police following an allegation of a bar brawl or stealing.⁴²⁷ The allegations brought by the Roma men and/or their families focus on injuries they allegedly suffered while in custody, ranging in seriousness from bruising to cuts, broken ribs and more serious hematomas. In the more serious cases there have been allegations of individuals dying in mysterious circumstances while in police custody. In *Balogh v Hungary*, one of the earliest anti-Roma violence cases before the Court concerning violence inflicted on a Roma male while in custody, no violation of Article 14 was found, despite the Court stating that:

[W]here an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused.⁴²⁸

57884/00, unilateral declaration and striking out 26 April 2007, *Gergely v Romania* App no 57885/00, unilateral declaration and striking out 26 April 2007, *Tănase and Others v Romania* App no 62954/00, unilateral declaration and striking out 26 May 2009. *Kalanyos v Romania*, paras 27-29 and *Gergely v Romania*, paras 24-26.

⁴²⁶ *Moldovan and Others v Romania* App no 41138/98 and 64320/01 (ECHR, 2 July 2005), *Koky and Others v Slovakia* App no 13624/03 (ECHR, 12 June 2012), *Fedorchenko and Lozenko v Ukraine* App no 387/03 (ECHR, 20 December 2012), *Lăcătuș and Others v Romania* App no 12694/04 (ECHR, 13 February 2013) and *Ciorcan v Romania* App no 29414/09 and 44841/09 (ECHR, 27 April 2015).

⁴²⁷ *Velikova v Bulgaria* App no 41488/98 (ECHR, 4 October 2000), *Anguelova v Bulgaria* App No 38361/97 (ECHR, 13 June 2002), *Nachova and Others v Bulgaria* App Nos 43577/98 and 43579/98 (ECHR, 6 July 2005), *Balogh v Hungary* App No 47940/99 (ECHR, 20 July 2004), *Bekos and Koutropoulos v Greece* App No 15250/02 (ECHR, 13 December 2005), *Stoica v Romania* App No 42722/02 (ECHR, 4 June 2008), *Vasil Sashov Petrov v Bulgaria* App No 63106/00 (ECHR, 10 September 2010), *Carabulea v Romania* App No 45661/99 (ECHR, 13 October 2010), *Mižigárová v Slovakia* App No 74832/01 (ECHR, 14 March 2011).

⁴²⁸ *Balogh v Hungary*, para 47. William Kurt Barth, *On cultural Rights: The Equality of Nations and the Minority Legal Tradition* (Martinus Nijhoff Publishers 2008) 175.

The most important shift in relation to the Court's interpretation of Article 14 came in the Chamber and Grand Chamber judgments in *Nachova*. The case centered on the death of two Roma men who were shot by military police in the course of an arrest.

The Grand Chamber in *Nachova* stated:

[I]n certain cases of alleged discrimination it may require the Respondent Government to disprove an arguable allegation of discrimination...However, where it is alleged...that a violent act was motivated by racial prejudice, such an approach would amount to requiring the Respondent Government to prove the absence of a particular subjective attitude on the part of the person concerned. While in the legal systems of many countries proof of the discriminatory effect of a policy or decision will dispense with the need to prove intent in respect of alleged discrimination in employment or the provision of services, that approach is difficult to transpose to a case where it is alleged that an act of violence was racially motivated.⁴²⁹

Nachova was a turning point in the Court's treatment of Article 14. In the earlier cases of *Velikova*, *Anguelova* and *Balogh*, the Court in finding violations of Articles 2 or 3, felt it unnecessary to consider a separate violation of Article 14. *Nachova* was the first time that the Court had entered into not just a consideration of a violation of Article 14 in conjunction with Article 2; it was also the first time the Court considered procedural and substantive limbs to Article 14, all of which will be discussed in detail in coming sections.

Due to the number of cases taken by Roma alleging anti-Roma violence, the facts of the cases will not be discussed in detail in this section; rather a table of cases has been drafted to show the number of cases taken by Roma, the violations of substantive articles that were found and whether there was a finding of substantive or procedural violations of Article 14. This table is designed to show the three distinct periods in the course of the consideration of Article 14 by the Court: the early cases of *Velikova*, *Anguelova* and *Balogh* (where the Court did not consider a separate

⁴²⁹ *Nachova and Others v Bulgaria*, para 157.

violation of Article 14), the seminal case of *Nachova* (where procedural and substantive limbs to Article 14 were found) and *Stoica* (where only a substantive violation of Article 14 was found).

4.3.1 Table of Cases

Anti-Roma Violence Cases involving Allegations of Violations of Article 14

Name of Case and Date of Judgment	Finding of the Court
<i>Velikova and Others v Bulgaria</i> (18 May 2000)	No finding of an Article 14 violation. Violation of Article 2.
<i>Anguelova v Bulgaria</i> (13 June 2002)	No finding of an Article 14 violation. Violation of Article 2.
<i>Balogh v Hungary</i> (20 October 2004)	No finding of an Article 14 violation. Violation of Article 3.
<i>Moldovan and Others v Romania</i> (12 July 2005)	Finding of a violation of Article 14 taken in conjunction with Articles 6 and 8.
<i>Nachova and Others v Bulgaria</i> (6 July 2005) * <i>Introduction of the Court discussing separate substantive and procedural limbs to Article 14</i>	Finding of a substantive and procedural violation of Article 14 taken in conjunction with Article 3 in the Chamber. No finding of a substantive violation of Article 14 in the Grand Chamber. Finding of a procedural violation of Article 14 taken in conjunction with Article 3.
<i>Bekos and Koutropoulos v Greece</i> (13 December 2005)	No finding of a substantive violation of Article 14. Finding of a procedural violation of Article 14 taken in conjunction with Article 3.
<i>Ognyanova and Choban v Bulgaria</i> (23 May 2006)	No violation of Article 14.

<i>Šečić v Croatia</i> (31 May 2007)	No substantive violation of Article 14. Finding of a procedural violation of Article 14 taken in conjunction with Article 3.
<i>Angelova and Iliev v Bulgaria</i> (26 July 2007)	Finding of a procedural violation of Article 14 taken in conjunction with Article 2.
<i>Karagiannopoulos v Greece</i> (21 June 2007)	No violation of Article 14.
<i>Cobzaru v Romania</i> (26 July 2007)	Violation of Article 14 taken in conjunction with Article 3 in its procedural limb and Article 13.
<i>Petropoulou-Tsakiris v Greece</i> (6 December 2007)	Violation of Article 14 taken in conjunction with Article 3 in its procedural limb.
<i>Stoița v Romania</i> (4 March 2008) Significant case due to the approach taken by the Court	Court did not engage in its usual separate consideration of substantive and procedural limbs of Article 14 . Finding of a violation of Article 14 taken in conjunction with Article 3. Text of the judgment appears to focus on the lack of a racially neutral investigation into the applicant's allegations at the domestic level.
<i>Beganović v Croatia</i> (25 June 2009)	No violation of Article 14 in conjunction with Article 3.
<i>Sashov v Bulgaria</i> (7 April 2010)	No violation of Article 14.
<i>Carabulea v Romania</i> (13 July 2010)	Court deemed it not necessary to examine a separate allegation of Article 14.
<i>Soare and Others v Romania</i> (22 February 2011)	No violation of Article 14 taken in conjunction with Articles 2 and 3 in

	either its procedural or substantive limbs.
<i>Mižigárová v Slovakia</i> (14 December 2010)	No violation of Article 14 taken in conjunction with Article 2 in either its procedural or substantive limbs.
<i>Koky and Others v Slovakia</i> (12 June 2012)	Court did not deem it necessary to decide on the merits of the allegation of a violation of Article 14 in conjunction with Articles 3, 8 and 13.
<i>Fedorchenko and Lozenko v Ukraine</i> (20 September 2012)	Violation of Article 14 taken in conjunction with Article 2 in its procedural limb.
<i>Lăcătuș and Others v Romania</i> (13 November 2012)	Violation of Article 14 in conjunction with Articles 6 and 8.
<i>Ciorcan and Others v Romania</i> (27 January 2015)	Violation of Article 14 taken in conjunction with Articles 2 and 3 in their procedural aspect.
<i>Ion Bălăsoiu v Romania</i> (17 February 2015)	No violation of Article 14 in conjunction with Article 3 in its procedural aspect.
<i>Boacă and Others v Romania</i> (12 January 2016)	Violation of Article 14 in conjunction with Article 3 in its procedural aspect.
<i>Škorjanec v. Croatia</i> (28 March 2017)	Violation of Article 14 in conjunction with Article 3 in its procedural aspect.

4.3.2 Section Conclusion

These cases encompass a seventeen-year period and display the progression of the Court's consideration or lack of consideration of ethnicity as a decisive factor in the perpetration of violence against Roma either by private or state actors. The division of these cases into two categories was carried out in order to show that the Court has been finding violations of Article 14 in conjunction with Articles 6 and 8 in a substantive sense. The Court in those cases was finding that the violation of the

applicant's private and family life was as a direct result of their ethnicity. In the cases alleging violations of Article 14 in conjunction with Articles 2 and 3 the Court in the majority of instances found that ethnicity was a factor in the lack of effective investigation into possible racist overtones to a case, yet ethnicity was never a factor in the loss of life of a Roma victim.

The Court has adopted a very different approach to findings of violations of Article 14 in these two categories of cases. The major factor in this difference as can be seen from the table of cases is the substantive article that the violation of Article 14 is being taken in conjunction with. In the cases where the substantive articles invoked with Article 14 are Articles 6 and 8, the Court appears to accept evidence of racist statements and incidents as evidence of racist overtones and finds a violation of Article 14.⁴³⁰ Yet in cases where Articles 2 and 3 are the substantive articles invoked, the burden of proof appears to make it very difficult for a substantive finding of a violation of Article 14 to be found, whereas the Court appears to be very willing to find a procedural violation of Article 14 for lack of effective investigation into possible racist overtones to an incident.⁴³¹ The next section will deal with this critical issue of the burden of proof.

4.4 An Analysis of the Impact of the Alleged Anti-Roma Violence Cases on the Interpretation of Article 14.

The section will begin by discussing the burden of proof in Article 14 cases, this will be followed by a discussion of the Court's recognition for the first time of the possibility of a finding of a procedural and/or substantive violation of Article 14.

⁴³⁰ *Moldovan and Others v Romania, Koky and Others v Slovakia, Fedorchenko and Lozenko v Ukraine, Lăcătuș and Others v Romania and Ciorcan v Romania.*

⁴³¹ *Nachova and Others v Bulgaria, Bekos and Koutropoulos v Greece, Šečić v Croatia, Angelova and Iliev v Bulgaria, Cobzaru v Romania, Petropoulou-Tsakiris v Greece, Stoică v Romania.*

When analysing the burden of proof there will also be discussion of the evidence required to shift the burden to the Respondent State and the use of NGO reports as evidence in proving discrimination. The section on the recognition by the Court of procedural and substantive limbs to Article 14 will also discuss the Court's challenges in finding substantive violations in contrast to the Court's finding of procedural violations of Article 14 for lack of effective investigation.

4.4.1 Introduction to the Burden of Proof

The anti-Roma violence cases were the first cases brought to the European Court of Human Rights, long before the cases of forced sterilisation or educational segregation. While it will be seen that the sterilisation and educational segregation cases had an impact on the further development of Article 14, the anti-Roma violence cases appear to have impacted on the early stage development of the Article, which was then built on by the later two categories of case law. The first case of alleged anti-Roma violence to reach the Court was *Assenov and Others v Bulgaria* in 1998.⁴³² This case, though, did not allege a violation of Article 14; the first case to do so was *Velikova v Bulgaria* in 2000.⁴³³ From the very first cases of alleged anti-Roma violence being heard in the Court, namely *Velikova*, *Anguelova*, *Balogh* and *Nachova*, the Court spent much of its time discussing the burden of proof in Article 14 cases.⁴³⁴

The Court in these cases has had a tendency to follow the traditional path and place the burden of proof on the party who alleges discrimination. It is perhaps firstly crucial to define what is meant by a number of key terms. In cases where an applicant alleges a violation of Article 14 in conjunction with a substantive Convention article,

⁴³² *Assenov and Others v Bulgaria* App no 90/1997/874/1086 (ECHR, 28 October 1998), para 1.

⁴³³ *Velikova v Bulgaria*, para 1.

⁴³⁴ *Velikova v Bulgaria*, para 70, *Anguelova v Bulgaria*, para 111, *Balogh v Hungary*, para 77, and *Nachova v Bulgaria*, paras 128 and 132.

the applicant must bring forward evidence to prove their claim. Based on this evidence they must then persuade the Court that there is evidence of discrimination. This is known as the burden of proof.

If the burden of proof is satisfied, then the Court will shift the burden of proof to the Respondent State to provide a justification for the alleged interference with Convention rights. The Respondent State's justification must be permitted, though, by the applicable provision.⁴³⁵ Therefore the standard of proof on the Respondent State can also be discussed if justification is possible. The burden of proof, which is placed on the applicant in providing evidence of the discrimination they have allegedly suffered, can be based on two different standards of proof: proof beyond reasonable doubt and on the balance of probabilities. Beyond all reasonable doubt is a very high standard of proof and is used in criminal trials. On the balance of probabilities is a lower standard of proof and is used in civil trials. The standard of "proof beyond reasonable doubt" has been explicitly relied on by the Court in the cases taken by Roma alleging violations of Article 14 in conjunction with Articles 2 and/or 3.⁴³⁶

However, it is important to note here that in the anti-Roma violence cases the applicants are bringing a range of claims of violations of Articles such as 2,3, 8 and 14. There are particular cases where justification is not possible, therefore the State having to meet a standard of proof and the margin of appreciation doctrine do not play a part in the case.⁴³⁷ Many of the applicants in the anti-Roma violence cases as seen in the preceding section bring allegations of violations of Articles 2 and 3. Both these articles contain no general exception clauses and the finding of a violation will be

⁴³⁵ Mónika Ambrus, 'The European Court of Human Rights and Standards of Proof' 236.

⁴³⁶ *Nachova and Others v Bulgaria, Angelova and Iliev v Bulgaria, Soare and Others v Romania, Ciorean and Others v Romania.*

⁴³⁷ Arnardóttir, 'Non-discrimination Under Article 14 ECHR' 21-25.

based on proving factual questions.⁴³⁸ However, applicants have also brought allegations of violations of Articles 8-11 and Article 14; justifications are possible for these articles.

It was in the first equal treatment case of *Belgian Linguistics v Belgium* that it was established that justification is also embedded in Article 14.⁴³⁹ In order to prove interference has occurred in an allegation of a violation of Article 14, factual matters will also need to be provided.⁴⁴⁰ There has been much criticism by both dissenting judges and scholars on the use of the margin of appreciation and the standard of proof imposed on applicants and States in respect of both Article 14 cases taken in conjunction with Articles 2/3 and Articles 8-11.⁴⁴¹ The Court has been criticised for how it obscures and is inconsistent in the way in which it delineates the applicable margin, that the margin is used in an apparently random fashion, that discretion in using the margin is used as justification rather than relying on a proper proportionality analysis.⁴⁴² The next section will look at the burden of proof and standard of proof in Article 14 cases.

4.4.2 The Burden of Proof in Article 14 cases: What is the Standard of Proof to be Met?

According to Article 38(1)(a) of the ECHR, the Court follows an investigatory model of proceedings. Under Article 35 ECHR the Court will generally rely on the fact finding of the domestic courts under the auspices of the exhaustion of domestic

⁴³⁸ Ambrus, 'The European Court of Human Rights and Standards of Proof' 237.

⁴³⁹ *Belgian Linguistics v Belgium* App Nos 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64 (ECHR, 1968). While Article 14 appears similar to Articles 2 and 3 in that its linguistic structure makes it appear as though it does not contain a limitation clause, from the case law it can be seen that Article 14 is more similar to Articles 8-11.

⁴⁴⁰ Ambrus, 'The European Court of Human Rights and Standards of Proof' 237.

⁴⁴¹ Jan Kratochvíl, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights' (2011) 29 *Netherlands Quarterly of Human Rights* 324, 343. Eva Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights' (1996) 56 *Heidelberg Journal of International Law* 240, 256.

⁴⁴² Ambrus, 'The European Court of Human Rights and Standards of Proof' 237-238.

remedies rule.⁴⁴³ Within the ECHR itself there is no mention of what the standard of proof should be in Article 14 cases— whether it should be proof beyond reasonable doubt or on the balance of probabilities. Therefore, it is left to the Court to decide on what standard of proof it requires. It is from the Article 14 case law itself that one can decipher the standard the Court chooses to rely upon and whether there has been any change in that approach over the years.

4.4.3 The Burden of Proof in the Initial Cases of Allegations of Violations of Article 14 in Conjunction with Articles 2 and 3 – *Velikova/Anguelova and Balogh*

The starting point from which to discuss the burden of proof are the earliest cases of *Velikova, Anguelova and Balogh*. The allegations of violations of Article 14 were made in conjunction with Articles 2 or 3. In *Velikova* the Court stated that the standard of proof required under the Convention is ‘proof beyond reasonable doubt’.⁴⁴⁴ The Court stated that the material that was provided before it did not enable it to find beyond a reasonable doubt that the death and the lack of proper investigation into the death were motivated by racial prejudice. The Court found no violation of Article 14. This was the first instance of the Court in an anti-Roma violence case making clear that for an Article 14 violation to be found the applicant would have to prove beyond reasonable doubt that the lack of investigation or the death or torture of an individual was motivated by racial prejudice. This finding of no violation occurred despite the fact that a police officer had made a reference to the fact that the victim

⁴⁴³ Juliane Kokott, *The Burden of Proof in Comparative and International Human Rights Law* (Kluwer Law International 1998) 218.

⁴⁴⁴ *Velikova v Bulgaria*, para 94.

was a 'Gypsy' or to the investigators' comment that injuries on the deceased man's body could not be seen due to the 'dark color of the skin'.⁴⁴⁵

The standard of proof being beyond reasonable doubt was confirmed in *Anguelova v Bulgaria*.⁴⁴⁶ The Court stated that proof beyond reasonable doubt 'may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact'.⁴⁴⁷ The Court cited the decision in *Velikova* and stated that in the instant case while the applicant's arguments were serious, that material once again did not prove beyond reasonable doubt that the Roma man's killing and lack of investigation were motivated by racial prejudice.⁴⁴⁸ It was becoming apparent that, while there was a long history of racial violence against Roma, backed up by NGO and Council of Europe reports, as well as references to 'the Gypsy' or the 'dark colour' of their skin in official police statements, these pieces of evidence were not sufficient to aid the applicants in proving beyond reasonable doubt that there had been a violation of Article 14.⁴⁴⁹

Judge Bonello providing a dissenting opinion in the case of *Anguelova*, stated that, while Roma, Muslims and Kurds amongst others, were consistently tortured and killed, the Court appeared to never be persuaded that race or colour had anything to do with the misfortunes visited on these vulnerable groups.⁴⁵⁰ He offered his view that the root of this situation was directly linked to 'the evidentiary rule which the Court has inflicted on itself'.⁴⁵¹ Judge Bonello pointed out the Court's difficulty in establishing a link between ethnicity and physical abuse in these cases. He pointed to the crucial fact that nowhere in the Convention is there a provision that the standard

⁴⁴⁵ *ibid.*, paras 15, 16, 18 and 26.

⁴⁴⁶ *Anguelova v Bulgaria*, para 111.

⁴⁴⁷ *ibid.*, para 166.

⁴⁴⁸ *Anguelova v Bulgaria*, paras 167-168.

⁴⁴⁹ *ibid.*, paras 164-165.

⁴⁵⁰ *Anguelova v Bulgaria*, partly dissenting opinion of Judge Bonello, para 1.

⁴⁵¹ *ibid.*, para 2.

of ‘proof beyond reasonable doubt’ was the required standard for a victim to convince the Court that ill treatment or death was induced by ethnic prejudice. Article 32 of the Convention allows the Court the widest possible discretion in relation to the interpretation and application of the Convention. It has been stated in cases such as *Artico v Italy* that the Court must apply the Convention in a way that guarantees, ‘not rights that are theoretical or illusory, but rights that are practical and effective’.⁴⁵² The standard of proof being ‘proof beyond reasonable doubt’ goes against the proviso that any exercise in interpreting the Convention must be with the aim of ‘securing the universal and effective recognition and observation’ of the enumerated guarantees.⁴⁵³ By placing such an onerous standard on applicants, the Court is ensuring that protection against racial discrimination becomes inoperative and illusory. Judge Bonello stated the Court provided no explanation or justification for why the standard of proof must be so high.⁴⁵⁴ In judgments such as *Anguelova*, the Court was displaying how it is falling behind other human rights tribunals.⁴⁵⁵

Judge Bonello also cited the Supreme Court of the United States and its approach in requiring the applicant to establish a *prima facie* case of discrimination, then the burden would shift to the defendant and it would then be for them to satisfy the Court that there was justification and legitimacy in the alleged action.⁴⁵⁶ This approach allows for the highest level of protection, rather than the highest level of proof. In *Assenov*, the Court found that injury or death in custody would raise a presumption that would shift the burden of providing an explanation to the Respondent State.⁴⁵⁷ Subsequently the Court was also clear in *Timurtaş v Turkey* and

⁴⁵² *ibid.*, para 9. *Artico v Italy*, judgment of 13 May 1980, Series A no. 37.

⁴⁵³ *Anguelova v Bulgaria*, partly dissenting opinion of Judge Bonello, para 8-9.

⁴⁵⁴ *ibid.*, para 9.

⁴⁵⁵ *ibid.*, para 11.

⁴⁵⁶ *ibid.*, para 12.

⁴⁵⁷ *Assenov and Others v Bulgaria* App no 90/1997/874/1086 (ECHR, 28 October 1998).

Taş v Turkey that, should a Respondent State fail to provide information of which they only had access to, this would give rise to inferences that the applicant's arguments are well-founded.⁴⁵⁸ In *Conka v Belgium*, the Court decided that rather than requiring the applicants to prove beyond reasonable doubt that their expulsion was part of a collective policy of expulsion, the Court would move from an opposite viewpoint that '[t]he procedure followed [by the State authorities] did not enable it [the Court] to eliminate all doubt that the expulsion might have been collective.'⁴⁵⁹ As Judge Bonello discussed, while the Court could be innovative in some ways it was still ensuring that with such a high standard of proof it would be very difficult for applicants to prove an Article 14 violation.⁴⁶⁰

In the earlier cases of *Velikova* and *Anguelova* the Court undertook a short discussion of the allegations of breaches of Article 14 (aside from the dissenting opinion of Judge Bonello in *Anguelova*) and quickly found no violation based on the burden of proof adopted. While in *Velikova* and *Anguelova* the applicants were alleging violations of Article 14 in conjunction with Article 2, in the subsequent case of *Balogh v Hungary* the applicant was alleging a violation of Article 14 in conjunction with Article 3. In *Balogh*, (similar to the approach in the earlier cases of *Velikova* and *Anguelova*), the Court gave very little consideration to the alleged violation of Article 14 aside from stating that '[i]n its opinion, and having regard to all the materials in the case file, there is no substantiation of the applicant's allegation that he was discriminated against in the enjoyment of any of the Convention rights relied on'.⁴⁶¹ The Court reiterated in its very brief discussion of Article 14 that 'proof beyond reasonable doubt' was required and that the general information about the

⁴⁵⁸ *Timurtaş v Turkey*, no 23531/94, ECHR 2000-VI, *Taş v Turkey*, no 24396/94, 14 November 2000.

⁴⁵⁹ *Conka v Belgium*, no 51564/99, ECHR 2002-I.

⁴⁶⁰ *Anguelova v Bulgaria*, partly dissenting opinion of Judge Bonello, para 13.

⁴⁶¹ *Balogh v Hungary*, para 79.

existence of discriminatory attitudes regarding the police officer's racist statement would not be sufficient to find a violation of Article 14.⁴⁶²

The commonality in each of the three earliest cases in relation to Article 14 and the burden of proof is that the Court repeatedly spent very little time considering a violation of Article 14, as a violation of a substantive Convention Article had already been found. In addition to the brevity of their consideration of Article 14, the Court appeared to simply reiterate that the standard of proof was proof beyond reasonable doubt and, as such, completely dismissed any evidence provided by applicants, as it did not in the eyes of the Court meet the very high threshold set. In relation to the burden of proof, the three earliest cases show that the Court from the first case identified the standard of proof to be met as proof beyond reasonable doubt. While the cases are far from positive examples of the serious consideration of Article 14 by the Court, they do show where the Court started out from with cases taken by Roma and allow the author to trace the progress made since 2004 when the last of these three cases was heard.

4.4.4 The Burden of Proof in Cases of Allegations of Violations of Article 14 in Conjunction with Articles 6 and 8

The cases of *Moldovan and Others v Romania* and *Lăcătuș and Others v Romania*, while decided on seven years apart, concerned the same incident. The Court found a violation of Article 14 in both cases in conjunction with Articles 6 and 8. The Public Prosecutors' Office did not bring criminal proceedings against those state agents who had been involved in the burnings. In addition to this, discriminatory remarks about

⁴⁶² *ibid.*, para 77.

the applicants' ethnicity had been stated in the judgment in the criminal case.⁴⁶³ Due to these factors the Court established a picture of the Romanian authorities general attitude which led to the Roma feeling a sense of insecurity, which in turn affected their right to respect for their private and family life and their homes. The Court found a violation of Article 8 in a continuing nature, due to the authorities repeated failure to put an end to the breaches of the applicants' rights. The Court critically also acknowledged that the attacks had been perpetrated against the applicants due to their Roma origin and that their ethnicity had been a major reason behind the length and result of the domestic proceedings.⁴⁶⁴ The Court also noted the significant amount of discriminatory remarks made by the Romanian authorities at all stages of the process.⁴⁶⁵

The way in which the Court discussed the burden of proof when considering a violation of Article 14 in conjunction with Articles 2 and 3 has been different from its discussion of a violation of Article 14 in conjunction with Articles 6 and 8. Clearly there is a difference, in that justifications and a legitimate aim can be provided by Respondent States for allegations of breaches of Articles 6 and 8, but justifications cannot be provided for violations of Articles 2 and 3. The Court found that the applicants' Roma ethnicity was decisive in the length and result of the domestic proceedings. The Court also noted the repeated discriminatory remarks made by the authorities in relation to claims made by the applicants for furnishings or goods under Article 8 and the total refusal to award non-pecuniary damages for the destruction of the applicants family homes was found to be directly related to remarks made about

⁴⁶³ *Moldovan and Others v Romania*, para 36.

⁴⁶⁴ *Moldovan and Others v Romania*, para 138-139.

⁴⁶⁵ *ibid.*, para 139. Andi Dobrushki and Theodoros Alexandridis, 'International Housing Rights and Domestic Prejudice: The Case of Roma and Travellers' in Malcolm Lamford and César Rodríguez-Garavito and Julieta Rossi (eds), *Social Rights Judgments and the Politics of Compliance: Making it Stick* (Cambridge University Press 2017) 460-461.

the applicant's ethnicity. Given the applicants had provided sufficient evidence to establish a *prima facie* case, the burden was then moved to the Respondent State to provide a justification for this difference in treatment of the applicants.⁴⁶⁶ In the cases where violations of Articles 2 and 3 were alleged in conjunction with Article 14, the focus was on "proof beyond reasonable doubt". In *Moldovan*, where the allegations focused on Articles 6 and 8 with Article 14, there was no mention of proof beyond reasonable doubt and instead the Court focused on treatment being discriminatory on the basis of a lack of objective and reasonable justification, lack of a legitimate aim or lack of reasonable relationship of proportionality between the aim to be realised and the means of achieving it.⁴⁶⁷ The Government provided no justification and a violation of Article 14 in conjunction with Articles 6 and 8 was found.

The Court entered into a very brief discussion of the alleged violation of Article 14 in the case of *Lăcătuș and Others v Romania*. The reasoning for this, as mentioned earlier, was due to the applicants' alleging a violation of Article 14 based on the same factual scenario that the applicants in *Moldovan* had based their allegations on. While the approach of the Court to consider violations of Article 14 with Articles 6 and 8 and Articles 2 and 3 has been different, perhaps a positive aspect of the Court's approach to discussing Article 14 with Articles 6 and 8 in *Moldovan* was that the Court accepted the general attitude of Romanian authorities to Roma and racial remarks made about Roma as being sufficient evidence of discrimination to shift the burden of proof to the Respondent State to provide a justification for their treatment of the applicants.

It should be noted, though, that when Roma women (as will be discussed in the next chapter) brought allegations of violations of Article 14 in conjunction with

⁴⁶⁶ *Moldovan and Others v Romania*, para 140.

⁴⁶⁷ *Moldovan and Others v Romania*, para 137.

Article 8 for forced sterilisation based on ethnicity, the Court did not adopt the same approach as they had in *Moldovan* and *Lăcătuș* and the general situation of Roma and remarks about the applicants' ethnicity was not sufficient to shift the burden of proof to the Respondent State. This issue, though, will be discussed in the next chapter. Perhaps the concluding remark to make about the anti-Roma violence cases where violations of Article 14 were found in conjunction with Articles 6 and 8 is that when the Court did not rely on such an onerous standard of proof and took racist remarks and the authorities' hostility towards Roma as evidence of discrimination, it then enabled the burden of proof to shift to the Respondent State. If the Court was more prepared to take this evidence as being sufficient to shift the burden of proof in cases involving allegations of Article 14 with Articles 2 and 3 perhaps then the burden on applicants would be less onerous.

4.4.5 The Burden of Proof in *Nachova*: the Chamber and Grand Chamber Decisions

The Court considerably expanded its consideration of a violation of Article 14 taken in conjunction with Article 2 in *Nachova and Others v Bulgaria*.⁴⁶⁸ The Grand Chamber first cited the earlier judgment of the Chamber, which clearly stated that, in cases where Articles 2 and 14 are combined in cases of deprivation of life, a duty is imposed on State authorities to conduct an effective investigation irrespective of the victim's ethnic or racial origin. The Chamber also provided that authorities in a Respondent State have 'the additional duty to take all reasonable steps to unmask any racist motive in an incident involving the use of force by law enforcement agents.'⁴⁶⁹ The judgment in *Nachova* was pioneering, in that the Court provided extensive reasoning and commentary on the use of the 'beyond reasonable doubt standard'. The

⁴⁶⁸ *Nachova and Others v Bulgaria*, para 168.

⁴⁶⁹ *ibid.*, para 126.

Court stated that ‘that standard should not be interpreted as requiring such a high degree of probability as criminal trials’, that ‘proof may follow from the co-existence of sufficiently strong, clear and concordant inferences or of similar un-rebutted presumptions of fact’ and that ‘[i]t has resisted suggestions to establish rigid evidentiary rules and has adhered to the principle of free assessment of all evidence’.⁴⁷⁰

The Court noted that the body of evidence, along with the applicant’s statement about racist verbal abuse, should have alerted the authorities that an investigation into possible racist motives was needed.⁴⁷¹ Most crucially, the Chamber in its judgment discussed the ‘particular evidentiary difficulties involved in proving discrimination’.⁴⁷² The Chamber held that negative inferences may be drawn or the burden of proof may be shifted to the Respondent Government where it has been found that the authorities failed to investigate acts of violence by State agents and had disregarded evidence of possible discrimination.⁴⁷³ This was the first of the anti-Roma violence cases to discuss negative inferences or shifting the burden where authorities have not taken proper steps to investigate possible incidences of discrimination. The Chamber also considered the conduct of the investigating authorities.

In previous cases the Court had stated that the references to the applicants’ Roma ethnicity was not sufficient to meet the standard for the burden of proof, however, in *Nachova* the Chamber referred to the excessive nature of the force used by a particular police officer and evidence that he had uttered a racist slur would cause the burden of proof to shift to the Respondent State.⁴⁷⁴ The Respondent State felt that the Chamber’s finding of a violation of Article 14 was based solely on

⁴⁷⁰ *Nachova v Bulgaria*, para 166.

⁴⁷¹ *ibid.*, para 127.

⁴⁷² *ibid.*, para 128.

⁴⁷³ *ibid.*, para 128.

⁴⁷⁴ *ibid.*, para 129.

‘general material regarding events outside the scope of the case’.⁴⁷⁵ The Respondent State argued that the two pieces of evidence cited included an alleged offensive remark that had been made against an individual who was not one of the victims and that the events had taken place in a Roma neighbourhood. The State was of the view that neither of these pieces of evidence were sufficient to justify ‘by any acceptable standard of proof’ that the authorities use of firearms was motivated by racial prejudice.⁴⁷⁶

The applicants in the Grand Chamber were aware that no substantive violation of Article 14 had been found in conjunction with Articles 2 and 3 in any of the previous cases taken by Roma to the Court. The applicants realised that the difficulty they faced in bringing a successful claim of a violation of Article 14 centered on the burden of proof. They invited the Grand Chamber ‘to adopt an innovative interpretation of Article 14’.⁴⁷⁷ However, they were clear on their belief that the standard of proof in Article 14 discrimination cases should not be “proof beyond reasonable doubt”. They argued that in cases such as theirs, once a *prima facie* case of discrimination had been established, the burden should always shift to the Respondent Government.⁴⁷⁸ The applicants contested that they had established a *prima facie* case of discrimination based on the officer’s knowledge of the victim’s ethnicity, the racially offensive remark that was made and the disproportionate firepower used in a Roma residential neighbourhood. They cited these pieces of evidence against a backdrop of systemic discrimination against Roma by law enforcement authorities in Bulgaria.

⁴⁷⁵ *Nachova v Bulgaria*, para 131.

⁴⁷⁶ *ibid.*, para 131. Jonas Christoffersen, *Fair Balance: A Study of Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009) 520-521.

⁴⁷⁷ *Nachova v Bulgaria*, para 136.

⁴⁷⁸ *ibid.*, para 136-137.

The Grand Chamber noted that its task in an allegation of a breach of Article 14 in conjunction with Article 2 was to establish whether discrimination based on race was a causal factor in the shooting of the applicants, which led to their deaths.⁴⁷⁹ While acknowledging that the Court had adopted the standard of proof “beyond reasonable doubt”, it stated that it was never the Court’s ‘purpose to borrow the approach of the national legal systems that use that standard’.⁴⁸⁰ It made clear that its role was to rule on Contracting State’s responsibility under the Convention and not to rule on civil or criminal liability. The Grand Chamber cited the earlier judgment of the Chamber, which had shifted the burden of proof to the Respondent State as the authorities had failed to investigate the alleged racist motive for the killing. The Grand Chamber noted that a Respondent State may be required to disprove an arguable allegation of discrimination and if they failed to do this a violation of Article 14 would be found. The Grand Chamber said this would essentially require the Respondent State to prove the absence of a particular subjective attitude on the part of the person who faced an allegation of racism.⁴⁸¹

In many legal systems there is no need for proof of intent in order to prove discriminatory effect of a decision or policy. The Grand Chamber moving away from the Chamber’s approach found that the failure of the Respondent State to carry out an investigation into a supposed racist motive for the deaths of the victims should not shift the burden to the Respondent State. The Grand Chamber did find a procedural violation of Article 14, however, in that particular part of the judgment no reference was made to the burden of proof.⁴⁸²

⁴⁷⁹ *Nachova v Bulgaria*, para 146.

⁴⁸⁰ *ibid.*, para 147.

⁴⁸¹ *ibid.*, para 157.

⁴⁸² *Nachova v Bulgaria*, para 157.

The differing approaches of the Chamber and Grand Chamber to the issue of the burden of proof and the standard of evidence that was required to shift the burden shows that there is and has been a wish for a change in the standard of proof required in the Court, admittedly only from a certain group of judges. It is noteworthy also that *Nachova* was the first case where applicants implored the Court to stop relying on the “beyond reasonable doubt” standard. While the applicants did not succeed in having the Court move away from its reliance on the standard of proof being “proof beyond reasonable doubt”, they did identify the major difficulty Article 14 applicants face which has aided in the future development of the Article. Given that the Court in the case separated for the first time its consideration of Article 14 into procedural and substantive violations, it does appear as though the Court will take racist remarks and the hostility of authorities in a Respondent State as evidence of the need for an effective investigation into possible racist overtones to an incident and, therefore, a finding of a procedural violation of Article 14 in conjunction with Articles 2 and/or 3. The next section will look at the impact of the *Nachova* case on recent case law.

4.5 Post-*Nachova*: The Burden of Proof in Cases of Allegations of Violations of Article 14 in conjunction with Articles 2 and 3

4.5.1 The Inconsistent Approach of the Court

Nachova was an important case for the thought and consideration that the Court gave to the burden of proof. While the Grand Chamber clarified that they were free to adopt any standard of proof they wished, were not confined to the “proof beyond reasonable doubt” standard and would take into account any sufficiently strong and concordant evidence, there has been little change in the standard of proof required by the Court. The most significant developments in the post *Nachova* cases in relation to the burden of proof have concerned the discussion in the Court of the issue of proving

subjective intent in the carrying out of a racist attack in order to find a substantive violation of Article 14.

Bekos and Koutropoulos v Greece concerned alleged ill treatment of the applicants by Greek police officers.⁴⁸³ The applicants alleged a violation of Article 14 in conjunction with Article 3. In relation to the burden of proof, the Court found that while the police officers' conduct during the applicants' detention called for serious criticism, the behaviour in itself was an insufficient basis for concluding that the treatment the applicants suffered was racially motivated.⁴⁸⁴ While it is arguably difficult to prove racial motivation, authorities, the Court said, had to do what was reasonable in the circumstances and to collect and secure evidence, to not omit any suspicious facts that might show racist motive and to explore all means of discovering the truth.⁴⁸⁵

The Court stated that where there was evidence of police using racist verbal abuse in connection with the alleged ill treatment of detained persons from an ethnic or other minority, then the facts should be thoroughly examined to discover any racial motives.⁴⁸⁶ There was no investigation into whether the police officer had been involved in similar incidents in the past, nor had there been any investigation into how officers in that particular police station were dealing with ethnic minority groups when carrying out their duties.⁴⁸⁷ By providing evidence of the police officer's racist verbal abuse, the Court was able to find that this should have triggered an investigation into possible racist motives for the crime.⁴⁸⁸ The Court at the same time stated that such evidence was not sufficient to find that the treatment inflicted by the

⁴⁸³ *Bekos and Koutropoulos v Greece*, para 59-60.

⁴⁸⁴ *ibid.*, para 66.

⁴⁸⁵ *ibid.*, para 69.

⁴⁸⁶ *ibid.*, para 72.

⁴⁸⁷ *Bekos and Koutropoulos v Greece*, para 74.

⁴⁸⁸ *ibid.*, para 75.

police was racially motivated. The Court is willing to find that there should have been an investigation into possible racist motives, but at the same time the Court will not see evidence of racist abuse as being sufficient to show racist motive.

While the Court in *Bekos* found violations of Article 14 in conjunction with Articles 2 and 3 on the grounds of a lack of investigation into whether racist motives could have played a part in the incident, in the case of *Ognyanova and Choban v Bulgaria* the Court found no violation of Article 14 on the basis of the burden of proof.⁴⁸⁹ The Court cited the judgment of the Grand Chamber in *Nachova*, as the complaints were virtually identical. The Court stated that much like in the case of *Nachova*, the materials in the case file contained no concrete indication that racist views had played a role in the incidents and nor did the applicants in the case point to any such facts which could be relied on. The Court reiterated its position that while it looked at NGO reports of systemic anti-Roma violence, its sole task in the instant case was to ascertain if the death of the victim was as a result of racist attitudes.⁴⁹⁰ The Court stated it had not been established through further explanations or information that racist attitudes had played a part in events leading to the injuries and death of the victim.⁴⁹¹

In relation to the authorities' duty to investigate a possible causal link between alleged racist attitudes and the victim's death, the Court said that the authorities had no concrete element in front of them that would have been capable of suggesting that the victim's death was as a result of racism.⁴⁹² Given that the case centered around the death of a Roma man who allegedly jumped out of a police station window and died as a result of his injuries, it is interesting to note that the Court felt there was no need

⁴⁸⁹ *Ognyanova and Choban v Bulgaria* App No 46317/99 (ECHR, 23 February 2006).

⁴⁹⁰ *ibid.*, para 147.

⁴⁹¹ *Ognyanova and Choban v Bulgaria*, para 147.

⁴⁹² *Ognyanova and Choban v Bulgaria*, para 148.

to investigate possible racist elements to the incident given that all information about the incident was in the sole possession of the state authorities. It could be argued, though, that the victim's ethnic origin in itself should have given rise to a possible suggestion that the incident might have been racially motivated, thereby engaging the responsibility to investigate whether there was a causal link. While NGO reports could not be used to prove racist attitudes in the instant case, could these reports not provide a significant picture of the situation for an ethnic minority in a particular State, thus suggesting that the incident might have been racially motivated for the purpose of investigation?

Adding to critics long-held theory on the lack of consistency and clarity in the judgments of the Court on Article 14 violations, in *Šečić v Croatia* the Court returned to finding a procedural violation of Article 14 in conjunction with Article 3.⁴⁹³ Interestingly, while the Court in the previous case of *Ognyanova* could not use the applicants well noted vulnerable position in society, which could be drawn from numerous NGO reports as a basis for an investigation, in *Šečić* the Court cited that the applicant's probable attackers belonging to a skinhead group with a racist and extremist ideology was sufficient to say that the incident at issue was most probably induced by ethnic prejudice and hatred.⁴⁹⁴ This harks to a case of inconsistency: why is the Court more likely to say that an investigation into a causal link should be held on the basis of who the probable attackers are and not on the basis of the applicant being a member of one of the most discriminated ethnic minority groups in Europe?

⁴⁹³ *Šečić v Croatia* App No 40116/02 (ECHR, 31 August 2007), para 63. Carmelo Danisi, 'How far can the European Court of Human Rights go in the fight against discrimination? Defining new standards in its nondiscrimination jurisprudence' (2011) 9 (3-4) *International Journal of Constitutional Law* 793, 793-807. Eva Brems and Laurens Lavrysen, 'Don't Use a Sledgehammer to Crack a Nut: Less Restrictive Means in the Case Law of the European Court of Human Rights' (2015) 15 (1) *Human Rights Law Review* 139, 139-168.

⁴⁹⁴ *Šečić v Croatia*, para 68.

Inconsistency arose in *Karagiannopoulos v Greece*, a violation of Article 2 was found based on the failure of the Greek authorities to protect the life of the applicant, who had been beaten by police officers and subsequently shot and wounded by the authorities.⁴⁹⁵ While there was evidence that the authorities held racist attitudes as one of the police officers had stated in the criminal court that ‘the majority of gypsies are criminals’, this was not found to be sufficient to find a violation of Article 14.⁴⁹⁶ It was not even sufficient to find that there should have been an investigation into whether there was a causal link between the incident and racist attitudes.

In contrast, in *Petropoulou – Tsakiris v Greece* the Court found a violation of Article 14 in conjunction with Article 3 in its procedural limb.⁴⁹⁷ The Court took particular note of the findings of the informal administrative investigation, which stated that it was a ‘common tactic’ of Roma to slander police officers in order to weaken their control.⁴⁹⁸ The Court reiterated its position that State authorities have a duty to take all reasonable steps to unmask any racist motive and to establish whether racist motives played a part in the incidents. The Court, though, said it would be ‘extremely difficult in practice’ to prove racial motivation. The Respondent State’s only obligation was to use best endeavours.⁴⁹⁹

Consistently, the Court makes overarching statements such as that reiterated in *Petropoulou-Tsakiris* from the judgment in *Nachova* that:

...authorities must use all available means to combat racism and racist violence thereby reinforcing democracy’s vision of a society in which

⁴⁹⁵ *Karagiannopoulos v Greece* App No 27850/03 (ECHR, 21 September 2007), para 79.

Francoise Tulkens, Anatoly Kovler, Dean Spielmann and Leto Cariolou (eds) *Judge Loukis Loucaides An Alternative View on the Jurisprudence of the European Court of Human Rights. A Collection of Separate Opinions (1998-2007)* (Martinus Nijhoff Publishers 2008) 83.

⁴⁹⁶ Tulkens et al, *An Alternative View* 85-86.

⁴⁹⁷ *Petropoulou – Tsakiris v Greece* App No 44803/04 (ECHR, 6 March 2008), para 56.

⁴⁹⁸ *ibid.*, para 65.

⁴⁹⁹ *Petropoulou-Tsakiris v Greece*, para 62.

diversity is not perceived as a threat but as a source of its enrichment.⁵⁰⁰

The Court refers to the Respondent State's obligation to uncover all evidence and in cases such as the instant one, the Court refers to evidence of comments made by police officers which are racist in nature. Yet these are not sufficient to meet the weighty burden of proof "beyond reasonable doubt" to find a substantive violation of Article 14. In *Petropoulou-Tsakiris* the Court found that the evidence was sufficient to find a procedural violation of Article 14, stating that the authorities had failed to investigate possible racist motives for the incident.⁵⁰¹

Adding to the charge of inconsistency is the Court's approach to the burden of proof in the case of *Stoica v Romania*.⁵⁰² The Court made clear that, in assessing evidence, it has adopted the standard of "proof beyond reasonable doubt", however, it stated that:

... it has not excluded the possibility that in certain cases of alleged discrimination it may require the Respondent Government to disprove an arguable allegation of discrimination and – if they fail to do so – find a violation of Article 14 of the Convention on that basis.⁵⁰³

The Court appeared to be closely following the pioneering judgment in *Nachova*. Though, the Court discussed that where there has been an allegation that a violent act was motivated by racial prejudice, shifting the burden to the Respondent State may require that State to prove the absence of a subjective attitude on the part of the individual concerned. The Court heard of evidence that the authorities had asked the victim whether he was 'Gypsy or Romanian' before beating him at the request of the deputy Mayor. There was also evidence of negative stereotyping.⁵⁰⁴ Thus the Court found the evidence sufficient to shift the burden to the Respondent State. The State

⁵⁰⁰ *ibid.*, para 61.

⁵⁰¹ *Petropoulou-Tsakiris v Greece*, para 68.

⁵⁰² *Stoica v Romania*, paras 121-127.

⁵⁰³ *Stoica v Romania*, para 126.

⁵⁰⁴ *ibid.*, para 128.

was unable to explain why there was evidence indicating racial motives behind the police officers' actions.

The Court found a violation of Article 14 in conjunction with Article 3.⁵⁰⁵ While the Court was willing to state that the evidence indicated the racial motives behind the police officers' actions, it did not discuss adequately the obligation on the Respondent State to disprove a particular subjective attitude. The Court was also careful to say racial motives and not racial attitude, thereby possibly indicating that while the actions of the police officers were racist, there may be some separation between the act carried out and the mindset of the person carrying out the act. While the Court in *Stoica* made an arguably favourable judgment in finding a substantive violation of Article 14, they once again chose not to elaborate on the issue of the burden being placed on the Respondent State to prove an absence of an individual's particular subjective attitude. In *Stoica* the Court appeared to find that the remarks that were made by the police officers before beating the applicant, such as asking whether he was 'Gypsy or Romanian', were sufficient in the eyes of the Court to establish a *prima facie* case and then shift the burden of proof to the Respondent State.⁵⁰⁶ The Respondent State was unable to provide a justification and a substantive violation of Article 14 in conjunction with Article 3 was found. While the Court appeared to find that the comments made by the police officers were sufficient to establish a *prima facie* case, the Court did not provide much discussion in its judgment on how it found the evidence to be sufficient to shift the burden of proof. This case was a seminal moment for Roma applicants in achieving a substantive violation of Article 14 and will be discussed further in the section on the recognition of procedural and substantive violations of Article 14.

⁵⁰⁵ *Stoica v Romania*, para 124.

⁵⁰⁶ *Stoica v Romania*, para 128.

Violations of Article 14 in conjunction with Articles 2 and 3 of the Convention are not just confined to actions of State authorities; they also encompass the actions of private individuals. In *Beganović v Croatia* the applicant was attacked by private individuals.⁵⁰⁷ No violation of Article 14 in conjunction with Article 3 was found on the basis of the evidence and the fact that the applicants and assailants had previously been in the same group of friends. It would be interesting to see the Court's reaction if there had been no previous relationship between the applicant and assailants, as to how the Court would have dealt with the Respondent State proving that the individuals concerned did not have a particular subjective attitude.

Similarly, a number of years later the case of *Koky and Others v Slovakia* concerned an attack by private individuals on a Roma settlement.⁵⁰⁸ The applicants in the case were all Roma and lived in a Roma settlement in a State where there was much independent evidence of anti-Roma violence and discrimination against Roma by authorities. The Court felt no need to separately consider a violation of Article 14 in conjunction with Article 3. There was evidence, though, of racial verbal slurs uttered by the assailants; however, this was not considered by the Court to be sufficient to meet the burden of proof and warrant consideration of an investigation into an allegation of Article 14 in conjunction with Article 3.⁵⁰⁹ The fact pattern of this case was very similar to that in *Stoiça* and, yet, the Court came to a completely different conclusion based on not seeing the evidence as being sufficient to shift the burden of proof.

The factually similar case of *Fedorchenko and Lozenko v Ukraine* was heard in the aftermath of *Koky*.⁵¹⁰ In a similar incident, several houses owned by Roma

⁵⁰⁷ *Beganović v Croatia* App No 46423/06 (ECHR, 25 September 2009), para 94.

⁵⁰⁸ *Koky and Others v Slovakia*, para 242.

⁵⁰⁹ *Koky and Others v Slovakia*, para 12.

⁵¹⁰ *Fedorchenko and Lozenko v Ukraine*, para 58.

families had been set on fire and an express racist statement had been made by one of the accused. This was found to be sufficient evidence by the Court to warrant a finding of a violation of Article 14 in conjunction with the procedural limb of Article 2. A charge of inconsistency could be leveled at the Court here, as it stated in this case that against the backdrop of the treatment of Roma in Ukraine and the lack of proper investigation for a number of years, an investigation into a possible causal link between racist attitude and the incident that occurred was needed.⁵¹¹ While the evidence in *Koky* of verbal racial slurs and the well reported position of Roma in Slovakia were not sufficient to find that there should be an investigation, in *Fedorchenko* similar evidence was found to be sufficient to find a violation. The Court appears to be very inconsistent as to when it will find racial slurs and the general position of Roma in a state to be sufficient evidence to meet the burden of proof.

4.5.2 Racial Attitude

The applicants in *Sashov Petrov* claimed a violation of Article 14 in conjunction with Article 2, alleging that because of his ethnic origin the authorities had failed to investigate the incident properly and had used excessive force against him.⁵¹² The Court, in one of its first discussions in relation to proving racial attitude, stated that even if it was accepted that the police officers were conscious of the applicant's ethnic origin, it would not be 'possible to speculate whether or not that had any bearing on their perception of the applicant and their decision to use firearms'.⁵¹³ The Court further stated that it could have been possible that the police officers were

⁵¹¹ *Fedorchenko and Lozenko v Ukraine*, para 69.

⁵¹² *Vasil Sashov Petrov v Bulgaria*, para 63.

⁵¹³ *ibid.*, para 69.

adhering to regulations and would have acted as they did regardless of the ethnicity of the individual concerned.⁵¹⁴ As in previous cases, the Court reiterated its point that while the authorities' conduct called for serious criticism, it was not sufficient to show that the use of 'life-threatening force' was racially motivated.⁵¹⁵ In relation to the burden of proof, the Court also made clear that at no point did the applicant allege that the police officers had uttered racist comments during the incident in question.

This case clearly raises the issue of how difficult it would be for applicants to prove subjective attitude on the part of authorities in proving that there had been a racial motivation behind the alleged acts. In the instant case the incident occurred at night with poor visibility and the Court said this meant the officers could not have known the ethnicity of the applicant when they fired at him.⁵¹⁶ However, if this was a case during daylight and at close proximity, would the Court still require that the officers would have needed to utter racist comments at the time of the incident in order to be able to show racist motivation? In relation to a procedural violation of Article 14, the Court also found that there was not sufficient evidence before the authorities to suggest to them that the applicants' shooting may have been racially motivated, therefore there was nothing to suggest that the Respondent State should have undertaken an investigation into a causal link between the shooting and possible racist attitudes. An argument could be made, though, that excessive force being used near a Roma neighbourhood, against someone from a very discriminated against minority group, in a country with a well documented history of State executed anti-Roma violence, should give rise to a suggestion that there may be a causal link and therefore place an obligation on the Respondent State to investigate any possible racist attitudes. The burden of proof being the very onerous "proof beyond reasonable

⁵¹⁴ *ibid.*, paras 69-70.

⁵¹⁵ *ibid.*, para 69.

⁵¹⁶ *Vasil Sashov Petrov v Bulgaria*, paras 69-70.

doubt” is undoubtedly making it more difficult for a sufficient amount of evidence to be presented in order for the burden to be shifted to the Respondent State.

4.5.3 Recent Dissent in the Court

In the case of *Carabulea v Romania*, the applicant brought allegations of breaches of Articles 2, 3, 6, 13 and 14 on the basis of his brother’s death in police custody following his arrest on suspicion of robbery.⁵¹⁷ The Court stated that based on its finding of both substantive and procedural violations of Articles 2 and 3, there was no need to separately consider a violation of Article 14, therefore there was no discussion by the Court of the role of the Roma man’s ethnicity in his death while in police custody. In one of the lengthiest partly joint dissenting opinions, Judges Gyulumyan and Power stated that they could not agree that it was unnecessary to examine the applicant’s complaint in relation to Article 14.⁵¹⁸ They pointed to the victim being of Roma origin and having entered police custody in perfect health, but then undergoing appalling police brutality and subsequently dying while still in custody.⁵¹⁹ The Judges stated their opinion that given the circumstances of the case and the evidence provided, the Respondent State should have been under a positive obligation to investigate and therefore there should have been a finding of a procedural violation of Article 14 in conjunction with Articles 2 and 3.⁵²⁰ They also stated an argument made earlier in this section that given the significant amount of evidence from international bodies about the issue of discrimination against Roma in Romania, this should have triggered an investigation. They also suggested that given that Romania has been

⁵¹⁷ *Carabulea v Romania*, para 168.

⁵¹⁸ *Carabulea v Romania*, partly jointly dissenting opinion of Judges Gyulumyan and Power, para 1.

⁵¹⁹ *ibid.*, paras 1-2.

⁵²⁰ *ibid.*, para 2.

constantly criticised for its treatment of Roma, ‘justice may require that the burden shifts to such a state to show that discrimination formed no part of the events’.⁵²¹

Such was the learned Judges’ displeasure with the burden of proof that they dedicated a particular part of their dissenting judgment to the issue of shifting the burden of proof and discrimination against Roma. The Judges referred to the applicants’ near impossible situation in proving that discrimination based on ethnicity was a factor in his death in the absence of verbal racial abuse.⁵²² The Judges reiterated, though, that while it is incumbent on the one who alleged discrimination to prove discrimination, the Court had previously recognised that not all proceedings lend themselves to a rigorous application of the principle *affirmanti incumbit probatio*.⁵²³ The Judges felt that the majority of the Court has ‘not hesitated to develop its evidentiary law in order to assist it in its search for truth’, and that the burden of proof can (where necessary) be shifted from the applicant to the Respondent State.⁵²⁴ The Judges cited how the information concerning the applicant’s treatment and death in custody resided solely with the authorities in the Respondent State, therefore the burden should shift to the State, as they were in possession of the information which could verify or rebut the applicant’s allegations.

The dissenting opinions of the two Judges was useful in providing some much needed analysis of the allegation of a violation of Article 14 in a case where the rest of the Court felt no need to consider the allegation. However, it is concerning that in a case where a young Roma male was found by the Court to have been beaten and died in police custody, this did not raise any consideration in the minds of the Judiciary that there might be merit in considering the allegation that the victim died as a result

⁵²¹ *ibid.*, para 3.

⁵²² *Carabulea v Romania*, partly jointly dissenting opinion of Judges Gyulumyan and Power, para 10.

⁵²³ *ibid.*

⁵²⁴ *ibid.*

of his ethnicity. The Judges highlighted that the burden of proof could shift if the authorities were in sole possession of the evidence and that the history of anti-Roma discrimination by authorities in Romania should give rise to an investigation under Article 14. It could be proffered that it was left for dissenting members of the Judiciary to attempt to offer some clarity on the interpretation of Article 14, and the burden of proof before the Court. In *Carabulea*, which concerned violations of Article 2 and 3 in conjunction with Article 14 the majority of the Court felt no need to separately consider the alleged violation of Article 14.

4.5.4 Lack of Evidence

Mižigárová v Slovakia also concerned allegations of violations of Articles 2, 3 and 14, but the Court in that case took a lengthy and considered approach to the allegation concerning Article 14.⁵²⁵ Interestingly, when discussing the *prima facie* evidence capable of shifting the burden to the Respondent State, the Court said there were no procedural barriers to the admissibility of evidence. While the Court did not mention the standard of proof being “proof beyond reasonable doubt”, it did state that it did not consider the behavior of the police officer during the applicant’s detention to be sufficient in concluding that the conduct was racially motivated. The Court also stated that the failure of the authorities to carry out an effective investigation into the possible racist attitude behind the attack was not sufficient to shift the burden of proof to the Respondent State in relation to the alleged violation of Article 14 taken with the substantive aspect of Article 2. In relation to a procedural violation of Article 14 in conjunction with Article 2, the Court found that given there had been a finding of a violation of Article 2 in that the Respondent State had failed to carry out a proper

⁵²⁵ *Mižigárová v Slovakia*, para 111.

investigation into the death of the victim, it considered that it must examine separately if there had been a failure to investigate a possible causal link between the death and alleged racist attitudes.⁵²⁶

While the Court did consider this separate need for an investigation, they once found that there was insufficient evidence before the Respondent State's authorities to make them aware that they needed to undertake an investigation into possible racist attitudes. The Court did state that reports on the situation of Roma in Slovakia was not sufficiently strong evidence in itself to provide a suggestion to the Respondent State that the incident may have been fuelled by racist attitudes.⁵²⁷ Again the applicants being Roma was not sufficient in itself to suggest a causal link and to lead to an investigation. This was repeated in the case of *Soare v Romania*, where no violation of Article 14 in conjunction with Articles 2 and 3 was found.⁵²⁸ The Court said there was insufficient evidence to prove that the police officers had held racist attitudes and there was insufficient evidence also to suggest to the authorities that they should undertake an investigation into possible racist motives for the incident. While the police officers' conduct was heavily criticised in a State where there are numerous independent reports of police violence against Roma, none of these factors lead to an investigation. The burden of proof was proving highly onerous in findings of a violation of Article 14.

One of the most recent cases to discuss an allegation of a violation of Article 14 in conjunction with Articles 2 and 3 was *Ciorcan and Others v Romania*.⁵²⁹ The Court once again reiterated its oft-stated position that while the standard of proof was "proof beyond reasonable doubt", the Court imposes no procedural barriers on the

⁵²⁶ *ibid.*, para 121.

⁵²⁷ *Mižigárová v Slovakia*, para 122.

⁵²⁸ *Soare v Romania* App No 24329/02 (ECHR, 22 February 2011), judgment of the court, para 7.

⁵²⁹ *Ciorcan and Others v Romania* App Nos 29414/09 and 44841/09 (ECHR, 17 January 2017), para 152.

admissibility of evidence.⁵³⁰ The Court stated that the level of persuasion necessary for reaching a particular conclusion and the distribution of the burden of proof would be directly linked to the specificity of the nature of the allegation made, the facts and the Convention right at stake.⁵³¹ The Court admitted that it could be inferred from the statement of the prosecutor and the order given by the chief of police in the area ‘that the Roma ethnic origin of the two searched persons and of the inhabitants of the neighbourhood was the reason for the intervention of the special forces’.⁵³² The authorities were not even sure that a crime had been committed or that the two suspects or anyone in the neighbourhood was armed.⁵³³ Therefore, the Court found that the authorities had deployed a ‘grossly excessive force’ to serve summonses for a minor crime to two individuals not believed to be armed or dangerous.⁵³⁴

At the same time, while making these statements, the Court found that while the planning of the operation by the authorities could be heavily criticised, it was not a sufficient basis for finding that the treatment of the applicants had been racially motivated.⁵³⁵ Therefore, it had not been established beyond reasonable doubt that racist attitudes had played a part in the treatment of the applicants. Once again the very high standard of “proof beyond reasonable doubt” resulted in a finding that the applicants’ ethnicity had played no part in their treatment at the hands of the authorities, even though the statements of the police chief and prosecutor indicated that the authorities’ heavy-handed response was due to the applicants’ ethnicity. The Court found a violation of Article 14 in conjunction with Articles 2 and 3 in their

⁵³⁰ *ibid.*, para 157.

⁵³¹ *Ciorcan and Others v Romania*, para 157-158.

⁵³² *Ciorcan and Others v Romania*, para 162.

⁵³³ *ibid.*, paras 162-163.

⁵³⁴ *ibid.*, para 162.

⁵³⁵ *ibid.*

procedural aspect.⁵³⁶ Coupled with the high burden of proof and the Court's constant discussion of how difficult it would be to prove racist motive, will it ever be possible for a victim's family to prove that ethnicity was the reason behind the victim's death?

4.5.5 What impact have the anti-Roma violence cases had on the standard of proof required to satisfy the burden of proof in Article 14 cases?

The anti-Roma violence cases have had a significant impact on the interpretation of Article 14. This impact can be seen in a number of ways: the questioning of the standard of proof being the onerous "proof beyond reasonable doubt", the difficulties for applicants in meeting this standard and thereby shifting the burden of proof to the Respondent State to provide a justification, the strong support of the Court to finding procedural violations of Article 14 where there has been no investigation into possible racist attitudes behind the acts of the Respondent State and the clarification that the burden of proof will shift to the Respondent State where the Respondent Government is in sole possession of the information that could show discrimination. While the Court remains with the standard of proof being "proof beyond reasonable doubt" they have shown considerable flexibility in the anti-Roma violence cases, in some respects.

The early cases such as *Velikova* and *Anguelova* showed a very clear-cut approach by the Court that if there were some utterances of alleged racial comments, they would not be sufficient to meet the standard of proof and no violation of Article 14 would be found.⁵³⁷ This stance of the Court changed in later cases, with evidence of racist verbal abuse by police officers seen to be sufficient to trigger an investigation in *Bekos*.⁵³⁸ Yet, in the subsequent case of *Ognyanova*, where a man

⁵³⁶ *ibid.*, para 167.

⁵³⁷ *Velikova v Bulgaria*, paras 92-93. *Anguelova v Bulgaria*, paras 47, 66 and 164.

⁵³⁸ *Bekos and Koutropoulos v Greece*, para 60.

died in police custody and all evidence was in the hands of the Respondent State, there was no need for an investigation into racist overtones.⁵³⁹ A similar outcome occurred in *Karagiannopoulos*, where an applicant was beaten, shot and wounded by police officers. One officer was quoted as stating that ‘the majority of gypsies are criminals’, yet this did not result in any finding of a violation of Article 14, procedural or substantive.⁵⁴⁰ The Court, though, swung back to its previous rationale in *Petropoulou*: that on the basis of a comment at an informal administrative tribunal that it was a common tactic of Roma to slander police officers led to a finding of a violation of the procedural limb of Article 14.⁵⁴¹

With the progression and influx of anti-Roma violence cases, the Court began to consider the information being provided by NGOs and other third parties as displaying the general landscape in relation to racial violence against Roma in a particular state. In some cases the reports are seen as invaluable to provide a background to whether there is a history of systemic violence being perpetrated on Roma by the authorities in a State, yet in other cases these reports are seen as not a sufficient basis for the finding of a procedural violation.⁵⁴² While the Court is beginning to see the usefulness of independent reports in providing them with an insight into the type and severity of anti-Roma violence and discrimination that exists

⁵³⁹ *Ognyanova and Choban v Bulgaria*, para 144: ‘In assessing whether Respondent State was liable for deprivation of life on the basis of the victims’ race or ethnic origin, the Court adopted an approach based on the specific circumstances of the case and the overall context. It looked into several factual elements pointed by the applicants (excessive use of firearms and uttering a racial slur by one of the law enforcement officers), and also at the reports of a number of organisations, including intergovernmental bodies, which had expressed concern about the occurrence of violent incidents against Roma in Bulgaria. In the circumstances it found those insufficient to conclude that racist attitudes had played a role in the events leading to the death.’

⁵⁴⁰ *Karagiannopoulos v Greece*, paras 20 and 73.

⁵⁴¹ *Petropoulou – Tsakiris v Greece*, paras 29 and 65.

⁵⁴² Emanuela Ignăţoiu-Sora, ‘The discrimination discourse in relation to the Roma: its limits and benefits’ (2011) 34 (10) *Ethnic and Racial Studies* 1697, 1697-1714. Mark Dawson and Elise Muir, ‘Individual, Institutional and Collective Vigilance in Protecting Fundamental Rights in the EU: Lessons from the Roma’ (2011) 48 (3) *Common Market Law Review* 751, 751-775.

in Europe today, at the same time they appear unsure as to whether these reports should be sufficient on their own to give rise to a procedural violation.⁵⁴³

Arguably the discussion of the burden and standard of proof in the Chamber and Grand Chamber in *Nachova v Bulgaria* has had the most profound impact on the interpretation and development of Article 14 amongst the anti-Roma violence cases.⁵⁴⁴ In the Chamber the Court commented that there were positive obligations on Respondent States to unmask any racial motive, it was not the Court's objective to use the standard of proof required for criminal trials, they acknowledged the difficulties involved in proving discrimination and clarified that where a state has disregarded

⁵⁴³ Andrzej Mirga, 'The Extreme Right and Roma and Sinti in Europe: A New Phase in the Use of Hate' (2009) 1 *Roma Rights Quarterly* 5, 5-9. The Court in *Velikova v Bulgaria* and *Anguelova v Bulgaria* held that the evidence that was presented to it, including reports from independent bodies, was not sufficient to meet the standard of proof required. In *Nachova v Bulgaria* the Court stated that in relation to the three NGO bodies that provided statements to the Court on the position of Roma: 'It is true that a number of organisations, including intergovernmental bodies, have expressed concern regarding the occurrences of such incidents. However, the Court cannot lose sight of the fact that its sole concern is to ascertain whether in the case at hand the filling ... was motivated by racism.' The Court appears to consistently stick to its position when it comes to NGO reports and allegations of substantive violations of Article 14. Yet when it came to discussing a possible procedural violation, the Grand Chamber stated that along with the evidence provided, the many published accounts of racial prejudice in Bulgaria called for verification, consequently a violation of Article 14 in conjunction with Article 2 in its procedural aspect was found. Interights, one of the interveners in the case, cited how many national jurisdictions 'had accepted [reports] as capable of establishing a prima facie case of discrimination: evidence of a "general picture" of disadvantage, "common knowledge" of discrimination, facts from "general life", facts that were generally known'.⁵⁴³ The Court did not engage with this submission, however, *Nachova* was the first case to use NGO reports as part of the evidence for stating that there should have been an investigation into a possible causal link. In *Bekos v Greece* the Court followed on from the decision in *Nachova* and did take into consideration the report of the NGO in reference to the treatment of Roma in police detention. The use of NGO reports, though, had been inconsistent. In *Ognyanova v Bulgaria* the Court returned to its position in *Velikova* and *Anguelova* and in finding no procedural violation of Article 14 did not consider the general position of Roma in Bulgaria as evidenced in NGO reports. In *Carabulea v Romania*, in the dissenting opinion of Judges Gyulumyan and Power, they controversially suggested that based on the independent reports, the Court's previous findings in its case law and the awareness of the problem at the domestic level, the authorities had a duty to establish if discrimination had played a part in the applicant's brother's death. In *Mižigarová v Slovakia*, the Court cited that in relation to the procedural aspect of Article 14: 'In respect of persons of Roma origin, it would not exclude the possibility that in a particular case the existence of independent evidence of a systemic problem could, in the absence of any other evidence, be sufficient to alert the authorities to the possible existence of a racist motive.' In the instant case the Court found that the objective evidence was not strong enough in itself to suggest the existence of a racist motive. The Court said that unlike the *Nachova* case, there was not enough concrete information available to make the authorities aware that they should undertake an investigation into a possible causal link between the incident and racist attitudes. Again, while it was important that the Court clarified that independent reports relating to allegations of police brutality could be used as a basis for alerting the authorities to undertake an investigation, the Court found that such evidence in relation to the situation in Slovakia was not sufficient to suggest the existence of a racist motive.

⁵⁴⁴ *Nachova v Bulgaria*, paras 124, 159 and 168.

evidence the burden could shift to the Respondent State.⁵⁴⁵ The Chamber also clarified that excessive use of force and the evidence of a racist slur could also shift the burden of proof.

The Respondent State in *Nachova* also admitted that it understood the burden of proof could shift to the Respondent State where the information was in the sole possession of the State, such as in cases of death in detention.⁵⁴⁶ The Respondent State claimed that an investigation into the existence of racist motives should not take place in every case simply because an applicant claims discrimination, but rather that an investigation should only take place on the basis of evidence.⁵⁴⁷ Of course an investigation into racist motives should be based on the existence of evidence, but in many of the anti-Roma violence cases the evidence is in the sole possession of the Respondent State, there is significant evidence in NGO reports of police in the Respondent State having racist attitudes or having carried out previous racist acts against Roma and these should be taken into account when considering whether a State should have conducted an investigation into possible racist motives. While the Grand Chamber undid much of the pioneering work of the Chamber, as will be seen in the next section, it did provide some clarity in that the lack of undertaking of an investigation would not be sufficient to shift the burden of proof to the Respondent State.

The Court has also been quite inconsistent in terms of considering a violation of Article 14. As seen earlier in *Koky*, there was no consideration of Article 14 as a violation of Article 3 was found.⁵⁴⁸ *Fedorchenko* was heard in the aftermath of *Koky*, the case had a similar fact pattern to *Koky*, but in contrast the Court did consider and

⁵⁴⁵ *ibid.*, para 158.

⁵⁴⁶ *Nachova v Bulgaria*, para 169.

⁵⁴⁷ *ibid.*, para 151.

⁵⁴⁸ *Koky and Others v Slovakia*, paras 242 and 244.

found a procedural violation of Article 14 in conjunction with Article 2.⁵⁴⁹ In *Carabulea* there was no consideration of a violation of Article 14, but as discussed at length earlier, two dissenting judges found it incredible that the majority felt no need to consider a violation of Article 14 in the case.⁵⁵⁰

The Court has found as many violations of Article 14 in conjunction with Articles 3 and 8 as they have in cases involving Article 2 and Article 14. However, it is noteworthy that the Court has only found that the standard of proof for a substantive finding of a violation of Article 14 has only been found in conjunction with Article 3 and Article 8. There has never been a finding of a substantive violation of Article 14 with Article 2 in a case taken by a Roma applicant. It could be argued that the reason for this lack of finding is due to the onerous “proof beyond reasonable doubt” standard and, aside from the case of *Stoica*, the Court’s consistent refrain that Respondent States cannot prove a lack of subjective racist intent means that it will be very difficult to shift the burden of proof to the Respondent State. The same difficulties in relation to reliance on NGO reports, verbal racial insults as sufficient evidence for the need for an investigation into racist motives and meeting the standard of proof to shift the burden of proof have arisen in all of the anti-Roma violence cases.

The judgments in *Stoica* and *Sashov Petrov* have provided some interesting points in relation to the finding of a substantive violation of Article 14.⁵⁵¹ The Court in *Stoica* discussed how the evidence may have indicated racial motives, but the Court did not discuss the obligation on the Respondent State to disprove particular

⁵⁴⁹ *Fedorchenko and Lozenko v Ukraine*, para 71.

⁵⁵⁰ *Carabulea v Romania*, para 168 and partly joint dissenting opinions of Judges Gyulumyan and Power, paras 1-8. It cannot be stated that particular Judges have taken a particular stance in the Court in relation to the lack of findings of a substantive violation of Article 14 with Article 2. Judges Gyulumyan and Power provided powerful dissenting opinions in the case of *Carabulea* but in earlier cases found no need to consider a violation of Article 14.

⁵⁵¹ *Stoica v Romania*, para 132. *Vasil Sashov Petrov v Bulgaria*, paras 70 and 73.

subjective attitude.⁵⁵² In the early anti-Roma violence cases there was discussion of how onerous it would be on Respondent States to have to disprove racist attitudes on the part of individuals.⁵⁵³ While there is some merit in admitting that it would be difficult for a State to disprove racist attitudes, it essentially has meant that the Court has provided an impossible standard for applicants to meet. Applicants will effectively be unable, under the current guidance from the case law, to ever prove that their ethnicity was a decisive factor in their treatment and thus prove a case of a substantive violation of Article 14 in conjunction with Article 2. The Court has also progressed in the language that it is now using in these cases. The Court began by referring to subjective racist attitude, yet that changed in *Stoica* to racial motives and not racist attitudes.⁵⁵⁴ It could be argued that this was the Court attempting to separate racial intent from racial acts.⁵⁵⁵ As the Court has never explicitly discussed in these cases what it defines as racial motives or racist attitudes, one might surmise that the Court is possibly alluding to unconscious racism, whereby the person carrying out the racist act is not aware of their own racist motivations.⁵⁵⁶

The phrase racial motive was only used in *Stoica*. In all cases of allegations of violations of Article 14 with Articles 2 and/or 3 before and since *Stoica*, the Court has relied on the phrase “racist attitudes”. The phrase racist attitudes is used by the Court every time it is addressing whether there has been a substantive violation of Article

⁵⁵² *Stoica v Romania*, paras 119-120.

⁵⁵³ *Nachova v Bulgaria*, paras 133 and 157.

⁵⁵⁴ *Stoica v Romania*, para 119.

⁵⁵⁵ Tufyal Choudhury, Olivier De Schutter, Janneke Gerards, Aileen McColgan and Gay Moon, ‘Direct Discrimination’ in Dagmar Schiek, Lisa Waddington and Mark Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing 2007) 226.

⁵⁵⁶ Charles R. Lawrence III, ‘The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism’ (1987) 39 *Stanford Law Review* 317, 317-388. Tanya Katerí Hernández, ‘Bias Crimes: Unconscious Racism in the Prosecution of “Racially Motivated Violence”’ (1990) 99 (4) *The Yale Law Journal* 845, 845-864. David Wellman, ‘Unconscious Racism, Social Cognition Theory, and the Intent Doctrine: The Neuron Fires Next Time’ in Hernán Vera and Joe R. Feagin (eds), *Handbook of the Sociology of Racial and Ethnic Relations* (Springer 2007) 39-67. Troy Duster, ‘Introduction to Unconscious Racism Debate’ (2008) 71 (1) *Social Psychology Quarterly* 6, 6-11. Hart Blanton and James Jaccard, ‘Unconscious Racism: A Concept in Pursuit of a Measure’ (2008) 34 *Annual Review of Sociology* 277, 277-297.

14 and how it would be too onerous to shift the burden of proof for a Respondent State to have to prove that an individual did not have a racist attitude behind the act they carried out. The word “attitude” it could be argued, implies intent, that a person had a conscious objective of carrying out the act.⁵⁵⁷ “Motive” is different in that it implies that while it is an initial factor in a person carrying out an act, it is difficult to conclusively prove that there is a link between the person’s subjective mind and the act carried out.⁵⁵⁸ Intent linked to attitude could be seen in contrast as attracting more culpability, as it involves deliberate action, in this case deliberate action with a racist purpose. Perhaps one could argue that the Court using the terminology “racist motives” in the *Stoica* case allowed for the Court to find a substantive violation, whereas in all the cases where “racist attitudes” was relied upon the Court has never found a substantive violation of Article 14 on the basis it would be too difficult to prove an absence of racist attitudes.

The Court returned to its usual focus on racist attitudes in the case of *Sashov Petrov*. The Court entered into a discussion of how, while police officer’s may have been conscious of an applicant’s ethnic origin, it was not possible to speculate whether that would have a bearing on the perception of the applicant and their decision to use a firearm.⁵⁵⁹ While the Court of course should enter into these types of discussions, it appears to be moving further in its stance that it would be much too onerous for a Respondent State to have to disprove subjective intent. As long as the Court continues to move in this direction, it would be extremely difficult to see how an applicant could meet the onerous standard of proof beyond reasonable doubt, provide evidence of racial intent and then have the burden transferred to the

⁵⁵⁷ D. Don Welch, ‘Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather than Intent’ (1986-1987) 60 *South California Law Review* 733, 733-740.

⁵⁵⁸ Christopher Y Chen, ‘Rethinking the Direct Evidence Requirement: A Suggested Approach in Analysing Mixed-Motives Discrimination Claims’ (2000-2001) 86 *Cornell Law Review* 899, 905-916.

⁵⁵⁹ *Vasil Sashov Petrov v Bulgaria*, para 69.

Respondent State and ultimately a finding of a substantive violation of Article 14 in conjunction with Article 2. The next section will discuss procedural and/or substantive violations of Article 14.

4.5.6 The Recognition of Procedural and/or Substantive Violations of Article 14

It was in the anti-Roma violence cases that the Court for the first time discussed the possible finding of a procedural and/or substantive violation of Article 14. Prior to the case of *Nachova*, the Court in *Velikova, Anguelova and Balogh* had only considered a violation of Article 14 in its entirety in conjunction with other substantive Convention Articles such as Articles 2 and 3. The Court in its judgment in *Nachova* for the first time divided its consideration of a violation of Article 14 into a discussion of the procedural limb of Article 14 and the substantive limb of Article 14.⁵⁶⁰ The separation of the Court's analysis of Article 14 into substantive and procedural limbs has taken place in every case involving an allegation of Articles 2 and/or 3 since the *Nachova* decision, with only one exception. The Grand Chamber divided its discussion of the alleged violation of Article 14 in conjunction with Article 2 into two sections:

1. Substantive aspect: whether the Respondent State is liable for deprivation of life on the basis of the victim's race or ethnic origin; and,
2. Procedural aspect: whether the Respondent State complied with its obligation to investigate possible racist motives.⁵⁶¹

This division was useful, in that it separated the Court's discussion of whether there was a racist motivation behind the alleged incident, from a question of whether there should have been an investigation into whether there was a possible causal link

⁵⁶⁰ *Nachova and Others v Bulgaria*, paras 144-168.

⁵⁶¹ *Nachova and Others v Bulgaria*, paras 144, 160.

between the incident and racist attitudes.⁵⁶² This division by the Court into separate considerations of procedural and substantive violations of Article 14 in conjunction with Article 2 was not met with overwhelming support. In the Grand Chamber Judges Casadevall, Hedigan, Mularoni, Fura-Sandström, Gyulumyan and Spielman provided a joint partly dissenting opinion.⁵⁶³ They stated that they could not ‘subscribe to the new approach adopted by the Court which entails linking a possible violation of Article 14 of the Convention to the substantive and procedural aspects of Article 2 individually’.⁵⁶⁴ The dissenting Judges stated their preference for an overall approach to Article 14, which in their view ‘better reflected the special nature of Article 14’ as the Article has no independent life of its own.⁵⁶⁵ The dissenting Judges found it unhelpful and artificial to distinguish between procedural and substantive aspects.⁵⁶⁶

The dissenting judgment was interesting, though, in that while the Judges disagreed with a substantive and procedural view of Article 14, they did agree that there should be a finding of a violation of Article 14.⁵⁶⁷ While the Judges were critical of the new approach to Article 14, the dissenting Judges went on to argue that on the basis of the factual evidence there should be a finding of a substantive violation of Article 14 in conjunction with Article 2.⁵⁶⁸ The Judges were critical of the majority of the Grand Chamber, who had found no substantive violation of Article 14, and stated that ‘by restricting the finding of a violation to the procedural aspect, the majority of the Court did not give enough weight to the sufficiently strong, clear and concordant

⁵⁶² *ibid.*, para 161.

⁵⁶³ *Nachova and Others v Bulgaria*, joint partly dissenting opinion of Judges Casadevall, Hedigan, Mularoni, Fura-Sandström, Gyulumyan and Spielman, paras 1-7.

⁵⁶⁴ *ibid.*, para 2.

⁵⁶⁵ *ibid.*

⁵⁶⁶ *Nachova and Others v Bulgaria*, paras 129-130.

⁵⁶⁷ *Nachova and Others v Bulgaria*, joint partly dissenting opinion of Judges Casadevall, Hedigan, Mularoni, Fura-Sandström, Gyulumyan and Spielman, para 4.

⁵⁶⁸ *ibid.*, para 4.

unrebutted presumptions which arose out of the factual evidence'.⁵⁶⁹ While positive in their comments, the Court appears to be very disparate in its views of how to interpret Article 14. The majority of the Grand Chamber divide their consideration of a violation of Article 14 into substantive and procedural grounds; the dissenting Judges are not in favour of this new approach, yet they feel that if there is to be a finding of a violation of Article 14, it should not have just been a procedural violation. The Court appears very unsure of what it wants to achieve with regard to Article 14; they appear to want to make it more robust, for it to no longer be seen as an ancillary article with no meaningful purpose, but in their hope of changing the interpretation of the Article they are confusing the approach of the Court.

The decision of the Court to change its interpretation of Article 14 into two separate questions has had a mixed result. In one way the division of consideration into procedural and substantive is helpful for applicants, as it means that a violation of Article 14 could be found for lack of investigation into racist overtones to an incident, as well as a violation of Article 14 on the ground that the incident itself was as a result of racist attitudes. On the other hand, while applicants have been successful in showing sufficient evidence to meet the standard of proof and shift the burden to the Respondent State for a procedural violation, it continues to appear as though it will be very difficult for applicants as the Court appears wary of placing the burden of proof on a Respondent State to show the absence of racist intent. When the Court looked at the Article as a whole in the pre-*Nachova* cases, there was still (as Judge Bonello stated in *Anguelova*) no finding in over fifty years that an incident had occurred as a result of racial prejudice.⁵⁷⁰ Judge Bonello, in the first hearing of *Nachova* in the Chamber, stated his relief that there has finally been a finding of a substantive

⁵⁶⁹ *Nachova and Others v Bulgaria*, joint partly dissenting opinion of Judges Casadevall, Hedigan, Mularoni, Fura-Sandström, Gyulumyan and Spielman, para 7.

⁵⁷⁰ *Anguelova v Bulgaria*, partly dissenting opinion of Judge Bonello, para 2.

violation of Article 14, given the concerns he had raised in his judgment in the earlier *Anguelova* case.⁵⁷¹

4.5.7 Substantive Violations of Article 14

From 1998 to the present day there has been only two findings of a substantive violation of Article 14: a finding of a substantive violation of Article 14 in conjunction with Article 2 in *Nachova* (yet this was later overturned in the Grand Chamber) and a finding of a substantive violation of Article 14 in conjunction with Article 3 in *Stoica* (which has not been overturned).⁵⁷² While the decision in *Nachova* was ultimately overturned by the Grand Chamber, it was a seminal moment in the development and interpretation of Article 14, as it showed for the first and only time in relation to a violation of Article 14 in conjunction with Article 2, how the Court went about finding that the two men's Roma ethnicity was the reasoning behind their being shot and killed by a member of military police. The Chamber was essentially finding that the deaths of the two men were a result of racist attitudes. While this thesis is focused on Roma applicants, it is also important to frame the significance of this case for other ethnic minorities, in that in over fifty years of case law there had never been a substantive finding of a violation of Article 14 – the Court had never found ethnicity as a substantive element of the treatment meted out to individual applicants by Respondent States in conjunction with Articles 2 and/ or 3.

The finding of a substantive violation was overturned by the Grand Chamber in *Nachova* on the basis that the Respondent State's lack of investigation into racist motives behind the incident should not shift the burden of proof to the Respondent

⁵⁷¹ *Nachova v Bulgaria*, concurring opinion of Judge Bonello, paras 1-5.

⁵⁷² *Nachova v Bulgaria*, paras 164 and 175 and unanimous judgment of the Chamber, para 6.

State to show that racist attitudes did not play a role in the incident.⁵⁷³ The reasoning of the Chamber and the Grand Chamber for varying reasons provides much in terms of the changing interpretation of Article 14 as a result of the cases taken by Roma applicants to the Court. The Chamber appeared to link the lack of effective investigation on the part of the Respondent State to transferring the burden of proof to the Respondent to provide an explanation for why racist attitudes did not play a part in the incident.⁵⁷⁴ There are two sides to the argument in relation to this reasoning: on one hand, it could be argued as to the merits of linking a lack of investigation with a State having to disprove racist attitudes in an allegation of a substantive violation that it is essentially linking a procedural violation with a substantive violation of Article 14. The other side of the argument would look at the fact that if a Respondent State does not carry out an effective investigation, then with the transfer of the burden of proof they should be made to justify that there were no racist attitudes behind the incident, as the State is maintaining there was no evidence which led them to carry out an investigation.

The other significant moment with relation to a finding of a substantive violation of Article 14 came in the earlier mentioned *Stoica* case. The Court did not enter into any groundbreaking discussion on the burden of proof. They stated that the standard of proof is still “proof beyond reasonable doubt”, though in this case they found that the utterances of the police officers were sufficient to meet the standard and shift the burden to the Respondent State. *Stoica*, though, could not be said to follow on from *Nachova*, in that the Court did not enter into the separate discussions of the procedural and substantive limbs of Article 14, as the Court has in all the intervening cases and in all cases since *Stoica*. The judgment in *Stoica* was not

⁵⁷³ *Nachova v Bulgaria*, paras 128 and 157.

⁵⁷⁴ *Nachova v Bulgaria*, para 128.

particularly lengthy and, while the Court did state that transferring the burden of proof to the Respondent State might require the Respondent State to prove the absence of a particular subjective attitude, the Court did not enter into any further discussion on this point. The Court relied on the remarks made by police as being sufficient to shift the burden, but unfortunately for the applicants the Court did not offer much in terms of guidance as to what would amount to sufficient evidence to amount to a substantive violation of Article 14. The Court in every case since *Stoica* has reiterated that the burden that would be placed on the Respondent State to prove the absence of subjective attitude would be too onerous and therefore no finding of a substantive violation of Article 14 has been found since *Stoica* in 2008.

As there has been no case where the Court has found a substantive violation of Article 14 in conjunction with Article 2 that has not been overturned, it is difficult to see what the position of the Court would be going forward. The Court's current position has essentially led to no finding of a substantive violation, but also has meant that applicants are now still unsure as to how they would provide sufficient evidence to prove a substantive violation of Article 14 in conjunction with Article 2. The conclusion at the end of this chapter will provide some arguments on how the Court could deal with the difficulties around finding a substantive violation of Article 14.

4.5.8 Procedural Violations of Article 14

More has been achieved through the consideration of a procedural violation of Article 14. The Court has clarified that there is a positive obligation on a Respondent State to investigate whether there is a causal link between an incident and racist attitudes, but there must be some suggestion from the case itself that there may be a need for an investigation. While the positive obligation should be welcomed, the Court has been

inconsistent in terms of what it requires in order for the Respondent State to have been made aware that there may be a need for an investigation. The applicants being Roma and part of one of the most discriminated against groups in Europe is not sufficient to raise the obligation. Depending on the particular case, as discussed earlier, the Court is inconsistent on whether independent reports which draw a general picture of discrimination in relation to law enforcement authorities are sufficient in themselves to raise the obligation. Here the Court is interpreting Article 14 in a way in which the Article would no longer be an illusory right, but a real tangible right, yet then, in terms of how applicants prove that right has been infringed, the Court still remains highly inconsistent in its approach. One area where the Court has been clear in relation to a procedural violation is in relation to when the information is in the sole possession of the authorities: then the burden will shift to the Respondent State. The Court has remained for the most part consistent in relation to anti-Roma violence perpetrated by law enforcement authorities.

In *Bekos v Greece*, the Court reiterated its position and looked at both the procedural and substantive limbs of Article 14, finding a violation of Article 14 due to the lack of investigation by the authorities into a possible racist motive for the incident and restated that the Respondent State was under an additional duty to investigate not just the incident, but any racist attitude behind the incident.⁵⁷⁵ In *Ognyanova and Choban v Bulgaria*, while the Court found that there was no procedural violation of Article 14 in relation to a lack of investigation, the Court did state that it had to consider whether there should have been a separate investigation into the incident aside from the need for an investigation under Article 2.⁵⁷⁶ The Court continued with its somewhat consistent approach to the procedural aspect of Article

⁵⁷⁵ *Bekos and Koutropoulos v Greece*, paras 68 and 75.

⁵⁷⁶ *Ognyanova and Choban v Bulgaria*, para 148.

14 finding a violation in *Šečić v Croatia*, stating (as it did repeatedly in its judgments) that:

Treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.⁵⁷⁷

The Court, though, has always been careful to state that while it places a positive obligation on a Respondent State to uncover ‘possible racist overtones to a violent attack’, they must use best endeavours and the obligation is not absolute, as the Respondent States’ authorities must do whatever is reasonable in the circumstances.⁵⁷⁸ *Šečić*, as discussed already, raises an interesting point in that it was the alleged assailants’ membership of a skinhead group which led the Court to find that there was a procedural violation for the failure to investigate.⁵⁷⁹ The membership of a particular group by the alleged assailants, who had yet to be apprehended, was sufficient to find a procedural violation, yet the Court has never gone so far as to say that the applicants’ identity as a member of a much discriminated group is sufficient to find a procedural violation. *Šečić* has been the only case involving anti-Roma violence and private assailants where the group membership of the alleged assailants have resulted in a finding that the authorities should have undertaken an investigation.⁵⁸⁰ Again the same comments were made by the Court in finding a procedural violation of Article 14 in conjunction with Article 3 in its procedural limb in *Petropoulou-Tsakiris v Greece*.⁵⁸¹

The Court changed its position in *Stoica v Romania* in that it did not separately consider the procedural and substantive limbs of Article 14 in conjunction

⁵⁷⁷ *Šečić v Croatia*, para 67.

⁵⁷⁸ *ibid.*, paras 67-68.

⁵⁷⁹ *ibid.*, para 67.

⁵⁸⁰ *Šečić v Croatia*, para 70.

⁵⁸¹ *Petropoulou-Tsakiris v Greece*, para 66.

with Article 3.⁵⁸² The Court found, as it did in the early cases, a violation of Article 14 taken in conjunction with Article 3, with no comment as to whether it was a violation in the substantive or procedural limbs.⁵⁸³ The Court in its judgment stated that:

In the present case the evidence indicating the racial motives behind the police officers' actions is clear and neither the prosecutor in charge with the criminal investigation nor the Government could explain in any other way the incidents or, to that end, put forward any arguments showing that the incidents were racially neutral.⁵⁸⁴

The Court appeared to be reverting back to the dissenting judgment provided in *Nachova v Bulgaria*. It would have been helpful, though, for the Court to elaborate more on the procedural and substantive limbs of the allegation. Given the particular way in which the judgment was phrased, with no distinction as to procedural or substantive violation, while it can be drawn from the judgment that the Court is referring to a substantive violation, it is difficult to concretely state this. It could instead be seen that the Court was reverting to its long-held pre *Nachova* view of not discussing procedural and/ or substantive violations of Article 14.

In *Vasil Sahov Petrov v Bulgaria*, the Court returned to its position of providing a separate judgment on the procedural and substantive limbs of an allegation of Article 14 in conjunction with Article 2 of the Convention.⁵⁸⁵ The Court found that while the officer's conduct could be severely criticised it was not sufficient in itself to say that there were racist motives behind the incident.⁵⁸⁶ No violation of the procedural aspect was found, as the Court said there was not sufficient evidence before the Respondent State to bring into play an obligation to investigate a possible

⁵⁸² *Stoica v Romania*, paras 117-133.

⁵⁸³ *ibid.*, paras 131 and 132.

⁵⁸⁴ *ibid.*, para 131.

⁵⁸⁵ *Vasil Sahov Petrov v Bulgaria*, paras 68-70 and paras 71-73.

⁵⁸⁶ *ibid.*, para 69.

causal link.⁵⁸⁷ The Court deemed that the incident occurring near a Roma settlement and the fact that there is a strong history of police violence against Roma in Bulgaria were not sufficient grounds to raise a concern that the incident might have been motivated by racist attitudes.

The dissenting Judges in *Carabulea* disagreed with the lack of consideration of an Article 14 violation by the majority of the Court and stated that there should have been a finding of a procedural violation of Article 14 in conjunction with Articles 2 and 3; given the particular circumstances of the case, the authorities were under a positive obligation to investigate a causal link.⁵⁸⁸ Here the dissenting Judges cited not only the particular facts of the case as evidence of the need for an investigation, but also the well documented discrimination of Roma in Romania and the lack of statistical data being held by the Romanian authorities on the incidence of deaths and violence in custody particularly involving allegations made by Roma.⁵⁸⁹ While this was progressive in terms of what the Court saw as leading to a finding of a procedural violation, these were dissenting opinions.

While the dissenting Judges in *Carabulea* found that independent reports could be used to establish a procedural violation, the Court in *Mižigárova v Slovakia*, while stating that the Court could rely solely on independent reports, found that in the instant case the objective evidence was not sufficiently strong enough to suggest the existence of a racist motive for the incident.⁵⁹⁰ In *Soare v Romania* the Court found there was insufficient evidence to support a procedural violation of Article 14.⁵⁹¹ The Respondent State being Romania, and the Court earlier stating that independent

⁵⁸⁷ *ibid.*, para 73.

⁵⁸⁸ *Carabulea v Romania*, Partly Joint Dissenting Opinion of Judges Gyulumyan and Power, para 2.

⁵⁸⁹ *Carabulea v Romania*, Partly Joint Dissenting Opinion of Judges Gyulumyan and Power, paras 4-8 and 11.

⁵⁹⁰ *Mižigárova v Slovakia*, para 122.

⁵⁹¹ *Soare v Romania* App No 24329/02 (ECHR, 22 February 2011), para 209.

reports could be used to provide a basis for a need for an investigation in a case where Romania was the Respondent State, does not seem to have been followed. Yet then in *Fedorchenko and Lozenko v Ukraine* the Court cited independent reports as part of their reasoning that there was a procedural violation, as the Respondent State should have undertaken an investigation into a possible causal link.⁵⁹²

The Court followed this approach in one of its most recent decisions in *Ciorcan and Others v Romania*, where it again found a procedural violation of Article 14 in conjunction with Articles 2 and 3 on the basis of all the considered evidence.⁵⁹³ It can be seen from the wide range of anti-Roma violence cases discussed in this chapter that the Court has become very consistent for the most part in finding procedural violations of Article 14 where the Respondent State has failed to carry out an investigation into possible racist motives behind the incident. The Court has been somewhat inconsistent, though, in relation to what it will view as sufficient evidence in the files to show that the Respondent State should have considered carrying out an investigation. While being Roma in itself will not be sufficient to warrant an investigation, the Court has been quite inconsistent as to whether evidence from NGO reports on the Respondent State or evidence of racist verbal slurs will be sufficient to warrant an investigation. The Court appears to be moving toward a more consistent approach, in that the reports and evidence of racist slurs will be sufficient evidence to find a procedural violation of Article 14. As the impact of the anti-Roma violence cases on Article 14 has now been discussed, the focus of the next section will be on whether there has been a shift to the substantive model of equality in the Court.

⁵⁹² *Fedorchenko and Lozenko v Ukraine*, para 71.

⁵⁹³ *Ciorcan and Others v Romania*, para 167.

4.6 The discussion of Equality before the European Court of Human Rights in the alleged anti-Roma violence cases.

4.6.1 What model of equality has the Court relied on in the Anti-Roma Violence cases?

As discussed in an earlier section, the anti-Roma violence cases were the first cases to come before the Court where Roma applicants asserted that their ethnicity was a decisive factor behind their treatment. Therefore one could argue that they are the starting point to assess the model of equality which was being relied upon by the Court. The two ways in which the impact of these cases on the model of equality can be assessed is through the interrelated areas of the standard of proof for the burden of proof and the recognition of procedural and/ or substantive violations of Article 14. Developments in relation to the burden of proof and the recognition of procedural and substantive limbs of Article 14 have impacted on the shift from a reliance on the formal model of equality in the Court to the substantive model of equality. There are three distinct periods in this transition from the formal to the substantive model as identified by this author: the early pre *Nachova* anti-Roma violence cases where the Court relied on a formal model of equality, the shift to the substantive model of equality in the *Nachova* case, and thirdly the hesitancy to fully embrace the substantive model of equality in the Court where there has been no finding of a substantive violation of Article 14.

In the pre *Nachova*, cases of *Velikova* and *Anguelova* the Court found no violation of Article 14. This was despite the deaths of the applicants relatives while in police custody.⁵⁹⁴ In *Velikova*, the Court, in setting the standard for the burden of

⁵⁹⁴ *Velikova v Bulgaria*, para 94 and *Anguelova v Bulgaria*, para 168.

proof as the onerous “proof beyond reasonable doubt”, had a significant impact on the model of equality which was to be relied upon by the Court.⁵⁹⁵ While the burden of proof per se does not determine the entire model of equality relied upon by the Court, it could be said that the Court was favouring the formal model of equality. The Court in *Velikova v Bulgaria* and *Anguelova v Bulgaria* did not take into account the particular vulnerable position of the Roma and the NGO reports that outlined the authorities treatment of Roma in Bulgaria. The Court also did not consider that *Velikova* and *Anguelova* were the second and third cases of unlawful death of a Roma victim while in police custody in Bulgaria, which may have displayed endemic issues in Bulgaria, or the fact that all relevant evidence was in the hands of the authorities, as both the victims died in police custody.⁵⁹⁶ None of this evidence or factors were taken into account: the formal model of equality’s “blind” approach to ethnicity was in evidence, in that the Roma were treated by the Court as though they were the same as any other applicant from the majority population, when in fact the Roma are not in the same position to any extent. The burden being so high also led to the Respondent State in neither of the two cases being asked to provide a justification for their actions, as the burden never shifted to them.

While the majority of the Court in *Velikova* and *Anguelova* found no violation of Article 14, it was in *Anguelova* that Judge Bonello handed down his seminal

⁵⁹⁵ *Velikova v Bulgaria*, para 70.

⁵⁹⁶ *Velikova v Bulgaria*, para 92 and *Anguelova v Bulgaria*, paras 164-168. Judge Bonello in his dissenting opinion in *Anguelova v Bulgaria* stated in para 5 that ‘Amnesty International, in a chillingly detailed account, focused on the predilection displayed by police officers for savaging Roma. “Many of the victims of beatings and other ill-treatment by police officers are Roma ... Amnesty International expressed concern to the Bulgarian authorities about two other incidents of mass beatings during police raids on Roma neighbourhoods, five incidents of racial violence where Roma were inadequately protected, five cases of deaths in suspicious circumstances and nine incidents of torture and ill-treatment involving twenty-one victims.” “The problem” adds the report, “is further compounded by a pattern of impunity of law-enforcement officers responsible for human rights violations”. On immunity of police officers from prosecution, Amnesty International added that it was “concerned that police impunity which prevails as Bulgarian authorities consistently fail to investigate such incidents properly and impartially places at ever greater risk of racist violence the most vulnerable ethnic community in Bulgaria”.

dissenting judgment referring to the fact that up to that point the killing of an individual had never been attributed to race or ethnicity in the Court.⁵⁹⁷ The learned Judge pointed to the fact that Article 32 of the Convention gives the Court the widest possible discretion in order to interpret and apply the Convention.⁵⁹⁸ While the Convention does not mandate what the standard of proof should be, it does mandate that the provisions of the Convention should be given thorough implementation. The Judge pointed to the fact that the Court has never explained or justified why it has adopted the standard of “proof beyond reasonable doubt”. He stated his belief that this standard ‘only rewards those the Convention would fain not see rewarded’.⁵⁹⁹ He criticised the Court by saying that, as ‘the cornerstone protection against racial discrimination, the Court has been left lagging behind’.⁶⁰⁰ There is no doubt that in the Court’s conservative attitude, as evidenced in its lack of acceptance of evidence of discrimination in *Velikova* and *Anguelova*, coupled with the onerous standard of proof, the Court was relying on the formal model of equality, which does not take into account the position of the victim or their ethnicity.

While Judge Bonello was a singular dissenting voice in the case of *Anguelova*, it could be seen that his approach was followed in *Nachova*, with the recognition of procedural and substantive limbs of Article 14. *Nachova* has been discussed at length in this chapter, but it is important to recognise its importance here in showing a shift towards the substantive model of equality. The Court, in recognising the existence of the separate procedural and substantive limbs of Article 14, showed that the Court was acknowledging that ethnic discrimination may have been a decisive factor behind the incident, but also that the Respondent State may have failed to investigate whether

⁵⁹⁷ *Anguelova v Bulgaria*, dissenting opinion of Judge Bonello, para 2.

⁵⁹⁸ *Anguelova v Bulgaria*, dissenting opinion of Judge Bonello, para 9.

⁵⁹⁹ *ibid.*, para 10.

⁶⁰⁰ *Anguelova v Bulgaria*, dissenting opinion of Judge Bonello, para 11.

racist motives may have existed. The finding by the Chamber of both a substantive and procedural violation of Article 14 showed that the Court was dramatically shifting in its position from the formal to the substantive model. The Chamber took into account various NGO reports, the history of discrimination against Roma in Bulgaria, the vulnerable position of the victims and the fact that much of the evidence was in the hands of the authorities. This was a significant shift from the Court's previous views in the factually very similar cases of *Velikova* and *Anguelova* involving the same Respondent State and the death of a victim where State authorities were involved. The Chamber, on this basis, found a procedural violation of Article 14.

The Chamber decision in *Nachova*, which was upheld in the Grand Chamber in relation to the evidence the Court was now willing to consider as showing that the Respondent State should have investigated possible racist motives, was a seminal moment in the shift from the formal to the substantive model of equality.⁶⁰¹ The Grand Chamber was now clearly stating that Respondent States would have to investigate possible racist motives or face a procedural violation of Article 14. This displayed the second distinct period in the shift towards the substantive model of equality. The Court has continued to find procedural violations of Article 14, as outlined earlier, which has continued to display a shift towards the substantive model.

The third distinct period in the shift towards the substantive model of equality is derived from the finding of a substantive violation of Article 14 in *Stoica*. While the decision in *Nachova* was overturned by the Grand Chamber, it was also an important moment, in that the Court was for the first time showing that it found that the applicant's ethnicity had induced the killing of the Roma victim. The one remaining finding of a substantive violation of Article 14 in *Stoica* shows how the

⁶⁰¹ *Nachova v Bulgaria*, para 168.

Court transferred the burden of proof to the Respondent State on the basis of racist remarks made by the offending police officers. It could be argued that the shift to the substantive model of equality has been tentative, in that there has yet to be another finding of a substantive violation of Article 14 in a case taken by a Roma applicant in conjunction with Articles 2 and / or 3. There is a continued lack of clarity on how an applicant would meet the standard of “proof beyond reasonable doubt” to show that ethnicity induced the incident. It remains unclear, if the burden was successfully shifted to the Respondent State, whether the Court would once again state that it was too onerous for a Respondent State to have to disprove the presence of subjective racist attitudes’. The finding of a substantive violation of Article 14 shows that the Court has shifted to a reliance on a substantive model of equality in relying on evidence from NGO’s, statistical data, the lack of effective investigation into possible racial attitudes and the position of Roma, etc.

The ground work which was achieved in the early anti-Roma violence cases, such as Judge Bonello’s dissenting opinion in *Anguelova*, the recognition of the possibility of findings of procedural and/or substantive violations for Article 14 and the finding of a substantive violation of Article 14 by the Chamber in *Nachova* and *Stoica*, has been built on in the forced sterilisation and educational segregation cases. The anti-Roma violence cases began the shift towards reliance by the Court on the substantive model of equality. It must be stated, though, that this shift has been somewhat tentative, in that while the Court has shown its exuberant embrace of procedural violations of Article 14 and the need for investigations into possible racist motives (even where the evidence is based solely on NGO reports), this embrace has not extended as far as findings or clarity on the issue of substantive violations of

Article 14. The next section will apply Fredman's conception of intersectionality as a theory of substantive equality to the case law.

4.6.2 Applying Fredman's theory of intersectionality to the case law

As introduced in the preceding chapter, Fredman's theory of intersectionality is based on the premise that individuals are not discriminated against on the basis of only one ground, but rather are discriminated against on multiple intersecting grounds.

Fredman's conception of intersectionality relies on interrelated and complementary objectives. One of those objectives is 'addressing stigma, stereotyping, prejudice and violence'.⁶⁰² In the anti-Roma violence cases, we see the impact which stigma, stereotyping, prejudice and violence has had on the Roma applicants. There are particular groups of intersecting grounds in the anti-Roma violence cases: ethnicity, age, gender and disability.

It is often perceived that Roma are treated by society on the ground of ethnicity alone, but it would be incorrect to take this approach, as society treats individuals on the basis of a multiplicity of grounds.⁶⁰³ Shields states:

Intersectionality first and foremost reflects the reality of lives. The facts of our lives reveal that there is no single identity category that satisfactorily describes how we respond to our social environment or are responded to by others.⁶⁰⁴

Roma are a particularly vulnerable group and face discrimination on multiple grounds, not just on the ground of ethnicity.⁶⁰⁵ It would be remiss to discuss the case law as

⁶⁰² Sandra Fredman, *Introduction to Discrimination Law* (Oxford University Press 2002) 25-33.

⁶⁰³ W Jeffrey Burroughs and Paul Spickard, 'Ethnicity, Multiplicity, and Narrative: Problems and Possibilities in Paul Spickard and W Jeffrey Burroughs (eds), *We are a People: Narrative and Multiplicity in Constructing Ethnic Identity* (Temple University Press 2000) 244, 244-254.

⁶⁰⁴ Stephanie A. Shields 'Gender: An Intersectionality Perspective' (2008) 59 (5) *Sex Roles* 301, 304.

⁶⁰⁵ Alexandra Oprea, 'Re-envisioning Social Justice from the Ground Up: Including the Experience of Romani Women' (2004) 1 (1) *Essex Human Rights Review* 29, 29-32. Katalin Halasz, 'The Rise of the Radical Right in Europe and the Case of Hungary: "Gypsy crime" defines national identity?' (2009) 52 (4) *Development* 490, 490-493.

though the discrimination faced by the applicants and victims was based purely on ethnicity. While ethnicity is of course the most obvious ground on which Roma are discriminated, it is also important to acknowledge that in these cases age and gender also need to be considered as decisive factors along with ethnicity. Purdie -Vaughns and Eibach have explored a hypothesis that where an individual possesses two or more subordinate intersecting identities, this may render a person ‘invisible’ in comparison to a person with a single subordinate identity.⁶⁰⁶ It is interesting to note that when Roma oppression or disadvantage are often discussed by the majority, it is on the basis of their ethnicity rather than on their ethnicity plus gender/age/disability, etc. Within the Court an applicant is bringing a claim of a violation of Article 14 based on a single ground such as race, gender, sexuality, etc.; the applicant is not claiming a violation on a multiplicity of grounds. There is no barrier, though, to the consideration of two or more grounds of discrimination before the Court.⁶⁰⁷ The Court never the less appears to focus on one ground in deciding on Article 14 violations, as will be seen further in the next chapter on forced sterilisation. While the Court is not as yet considering intersecting grounds of discrimination due possibly to applicants’ fear of “diluting” their claim, it is important in this thesis to consider the intersecting grounds on which Roma are discriminated.⁶⁰⁸

⁶⁰⁶ Valerie Purdie-Vaughns and Richard P Eibach ‘Intersectional invisibility: The ideological sources and social consequences of the non-prototypicality of intersectional subordinates’ (2008) (5) *59 Sex Roles* 377, 377-378.

⁶⁰⁷ Anastasia Vakulenko, ‘Islamic Headscarves and the European Convention on Human Rights: An Intersectional Perspective’ (2007) 16 *Social and Legal Studies* 183, 195. In *Abdulaziz, Cabales & Balkandali v United Kingdom* the applicants alleged discrimination on both the grounds of race and sex. The ECtHR approached the complaint by looking at the complaint on two distinct grounds of discrimination. The Court did not look at the clear interaction between the two grounds as the rule in question was based on gendered stereotypes of immigrant of Asian descent. The Court found only sex discrimination; it did not find race discrimination in the case.

⁶⁰⁸ While strategic litigation has been instrumental in the development of Article 14 through the cases taken by Roma applicants to the ECtHR, the focus of this work is on the impact of the cases themselves and not in essence “how” the cases arrived at the Court. The majority of applicants discussed in this thesis received support from the European Roma Rights Centre, Helsinki Monitor or Open Society Foundations in order to take their cases. While it is important to point to the importance of strategic litigation in relation to the Article 14 cases taken by Roma, it is outside the scope of this work to

4.6.3 Ethnicity, Age and Disability as Intersecting Grounds of Discrimination

Hill Collins and Bilge define intersectionality as:

When it comes to social inequality, people's lives and the organisation of power in a given society are better understood as being shaped not by a single axis of social division, be it race or gender or class, but by many axes that work together and influence each other. Intersectionality as an analytic tool gives people better access to the complexity of the world and of themselves.⁶⁰⁹

Koehn and Kobayashi cite the work of Hankivsky et al when coming to formulating their definition of intersectionality, where they specifically mention age and minority status:

Intersectionality considers the simultaneous interactions between multiple dimensions of social identity (for example, sex, gender, age, visible minority and immigration status) that are contextualized within broader systems of power, domination and oppression (such as sexism, ageism and racism).⁶¹⁰

It is critical to consider the intersection between ethnicity and age, as a small but significant number of the cases of anti-Roma violence concern young Roma males. The case of *Anguelova* involved the death of a 17-year-old while in police custody, while *Stoica* involved the racially motivated beating of a 14-year-old while in police custody.⁶¹¹ In *Anguelova* the victim was alleged to have been breaking into cars when he was arrested and taken into custody.⁶¹² While the applicant may indeed have been

discuss the subject in detail. No Roma claimant has yet claimed a violation of Article 14 on a multiplicity of grounds. James A Goldston, 'Public Interest Litigation in Central and Eastern Europe: Roots, Prospects, and Challenges' (2006) 28 *Human Rights Quarterly* 492, 492-497, Lisa Vanhala, 'Anti-discrimination policy actors and their use of litigation strategies: the influence of identity politics' (2009) 16 (5) *Journal of European Public Policy* 738, 738-754, Sophie Jacquot and Tommaso Vitale, 'Law as weapon of the weak? A comparative analysis of legal mobilization by Roma and women's groups at the European level' (2014) 21 (4) *Journal of European Public Policy* 587, 594-595.

⁶⁰⁹ Patricia Hill Collins and Sirma Bilge, *Intersectionality* (Polity Press 2016) 1-2.

⁶¹⁰ Sharon Koehn and Karen Kobayashi, 'Age and Ethnicity' in Malcolm Sargeant (ed) *Age Discrimination and Diversity: Multiple Discrimination from an Age Perspective* (Cambridge University Press 2011) 132, 136. Olena Hankivsky, Renée Cormier and Diego de Merich, *Intersectionality: Moving women's health research and policy forward* (Women's Health research Network 2009).

⁶¹¹ *Anguelova v Bulgaria*, para 10 and *Stoica v Romania*, para 53.

⁶¹² *Anguelova v Bulgaria*, paras 12-16.

breaking into cars, it is also interesting that a claim of this type by the authorities would fit with the negative stereotyping of young Roma males as engaging in criminal activity.⁶¹³ The victim sustained a fractured skull while in custody and died as a result of his injury. At the age of 17 the victim was still a child in the eyes of the law. The Respondent State's authorities failed in their duty to take additional care of a child in custody. Not only was the child not adequately cared for, it was found in a report on his death that the injury that caused his skull fracture was sustained during the time he was in police custody. The victim's mother, the applicant in the case, maintained that her son did not injure himself, but rather that he had been beaten while in police custody by the authorities. While the majority of anti-Roma violence cases involved adults, it is noteworthy that there have been very serious cases resulting in death and very serious beatings where the victims have been children.⁶¹⁴

Anguelova is not an isolated case, in *Stoica* a 14-year-old male child was savagely beaten by police authorities.⁶¹⁵ He was beaten in a situation where four police officers along with the chief of police and six public guards went on the request of the deputy mayor to an area primarily inhabited by Roma.⁶¹⁶ Once there, the police began beating up Roma who were gathered outside a bar. This beating came at the request of the deputy mayor of that locality, who had asked the police to 'teach them a

⁶¹³ Lídia Balogh, 'Possible Responses to the Sweep of Right-Wing Forces and Anti-Gypsyism in Hungary' in Michael Stewart (ed), *The Gypsy 'menace': Populism and the New Anti-Gypsy Politics* (C Hurst & Co 2012) 241, 242. The close linking of criminality to Roma ethnicity is a widespread stereotype. Balogh states that a 2006 survey found that 62 per cent of adults in Hungary agreed fully or to some degree with the statement that: 'The tendency to commit crime is in the blood of the Roma'. She further cites an April 2009 interview with the Parliamentary Commissioner for Civil Rights in Hungary who stated that Hungarian society needed to be warned about 'Gypsy crimes'.

⁶¹⁴ Philip Gounev and Tihomir Bezlov, 'The Roma in Bulgaria's Criminal Justice System: From Ethnic Profiling to Imprisonment' (2006) 14 (3) *Critical Criminology* 313, 313-338. Gounev and Bezlov identified in their 2006 study that: 'Age distribution is also an important factor when analysing crime trends and police practices'. They also found that in the main it was young males aged 15 to 30 that were perceived as being at higher risk of offending.

⁶¹⁵ *Stoica v Romania*, para 53.

⁶¹⁶ *Stoica v Romania*, paras 6-7.

lesson'; the 'them' referred to were the Roma in that area.⁶¹⁷ Not only did the police indiscriminately beat bystanders but a police sergeant also beat the 14-year-old boy. The boy had told the police that he had just undergone head surgery.⁶¹⁸ Despite the boy stating this crucial piece of information, he was beaten unconscious by the police sergeant. The child was diagnosed as suffering from 'ecchymoses, thoracic concussion and excoriation, inflicted by a linear blunt instrument, which could date from 3 April 2001'.⁶¹⁹ In addition to this, it was established by the Commission for the Protection of Handicapped Persons that the child had a first-degree disability, which required a personal assistant and permanent supervision.⁶²⁰ It could be argued that ethnicity and disability also intersected in this case which led to the discrimination perpetrated against the young Roma boy.⁶²¹

4.6.4 Ethnicity, Age and Gender as Intersecting Grounds

Gender as an identity category has been found in all cultures and historical periods. One may consider gender to have been experienced in a stable way over time, however this assumption is incorrect: the social meaning and to whom the identity category applies varies over time.⁶²² Given the negative stereotyping of Roma males, in particular, as criminally active and violent individuals, one can see the impact which the convergence of gender, socioeconomic status and ethnicity has on their interaction with state authorities.⁶²³ In the anti-Roma violence cases that occurred in a

⁶¹⁷ *ibid.*, para 7.

⁶¹⁸ *ibid.*, para 35.

⁶¹⁹ *ibid.*, para 13.

⁶²⁰ *ibid.*, para 14.

⁶²¹ David F Warner and Tyson H Brown, 'Understanding how race/ethnicity and gender define age-trajectories of disability: An intersectionality approach' (2011) 72 (8) *Social Science & Medicine* 1236, 1236-1248.

⁶²² Shields, 'Gender' 304.

⁶²³ Gail Kligman, 'On the Social Construction of "otherness" identifying "the Roma" in post-socialist communities' (2001) 7 (2) *Review of Sociology* 61, 61-64.

Roma settlement, female Roma victims were also impacted and took cases as applicants.⁶²⁴ The majority of applicants in cases of allegations of death resulting from anti-Roma violence while in custody, though, were the mothers, daughters or wives of the victims. In all the cases outlined above under the heading of anti-Roma violence perpetrated while in police custody, the victims were all men. In many of the anti-Roma violence cases as outlined in the previous section the victim was a young Roma male. There has been no case of a Roma woman bringing a case to the Court based on her own inhuman, degrading or violent treatment suffered at the hands of State authorities while in custody. There have been cases, such as *Moldovan*, where female applicants took cases alleging violence perpetrated against them by State authorities in Roma settlements.⁶²⁵ The male applicants in the cases varied in age from early twenties to advanced years, their commonality was their Roma ethnicity and their being male.

The facts of many of the cases outlined above revolved around situations where males were alleged to have been arrested while allegedly stealing, being involved in a brawl or disagreement, threatening the police, stealing goods or having absconded from military service.⁶²⁶ In other situations, Roma persons were simply in their homes when police authorities decided to begin beating and shouting racist slurs at them.⁶²⁷ The violence was targeted predominantly at male members of the community and they therefore became the applicants in cases before the Court in the majority, but not all of the cases. It appears as, though, due to negative stereotyping of

⁶²⁴ Nira Yuval-Davis, 'Intersectionality and Feminist Politics' (2006) 13 *European Journal of Women's Studies* 193, 193-198.

⁶²⁵ *Moldovan and Others v Romania*, para 19.

⁶²⁶ *Velikova v Bulgaria, Anguelova v Bulgaria, Nachova and Others v Bulgaria, Balogh v Hungary, Bekos and Koutropoulos v Greece, Stoica v Romania, Vasil Sashov Petrov v Bulgaria, Carabulea v Romania and Mižigárová v Slovakia*.

⁶²⁷ *Moldovan and Others v Romania, Kalanyos v Romania, Gergely v Romania, Koky and Others v Slovakia, Fedorchenko and Lozenko v Ukraine and Ciorcan v Romania*.

male Roma as being criminally active and dangerous, the police and State authorities have taken a heavy handed approach to their interactions with and arrests and detention of Roma males.⁶²⁸ While in custody, many unfortunate events appear to have befallen the Roma male detainees through allegedly no fault of the Respondent States. Again, it cannot be coincidence that it is Roma males who appear to be constantly targeted by police and state authorities.⁶²⁹ While the forthcoming forced sterilisation cases impacted only Roma women and the educational segregation cases affected both male and female Roma children, the anti-Roma violence cases appear to predominantly focus on Roma males. It is important to acknowledge the important element of gender along with ethnicity as the grounds on which the applicants were discriminated.⁶³⁰

4.7 Conclusion

The anti-Roma violence cases have had a significant impact on the interpretation of Article 14 before the Court. The impact has occurred in two distinct areas: the burden of proof and the recognition of procedural and substantive limbs of Article 14. As discussed earlier, it was in the anti-Roma violence cases that the Court acknowledged that its standard of proof was proof beyond reasonable doubt. While this standard has not been changed, the anti-Roma violence cases have brought flexibility to the evidence, which the Court will consider as meeting the standard of proof and shifting the burden to the Respondent State. The reliance by the Court on NGO reports, the

⁶²⁸ Will Guy, 'Romani Identity and Post-Communist Policy' in Will Guy (ed), *Between Past and Future: The Roma of Central and Eastern Europe* (University of Hertfordshire Press 2001) 11.

⁶²⁹ Nicole T Carr, Kenneth Hudson, Roma D Hanks and Andrea N Hunt, 'Gender Effects Along the Juvenile Justice System: Evidence of a Gendered Organisation' (2008) 3 (1) *Feminist Criminology* 25, 25-43. Matthew D Marden, 'Return to Europe? The Czech Republic and the EU's Influence on its Treatment of Roma' (2004) 37 *Vanderbilt Journal of Transnational Law* 1181, 1181-1193.

⁶³⁰ Dimitrina Petrova, 'The Roma: Between a Myth and the Future' (2003) 70 (1) *Social Research* 111, 111-161.

impact of evidence being in the sole possession of the Respondent state and evidence of racist slurs has all been broadened through the hearing of the anti-Roma violence cases. The Court in these cases also recognised the procedural and substantive limbs of Article 14; this was a significant development in showing that Article 14 would no longer be considered as an ancillary article with no meaningful life.

The burden of proof being “proof beyond reasonable doubt” and the issue with Respondent States having to disprove racist attitudes have meant that there has been only one finding of a substantive violation of Article 14. In *Stoica*, where the Court found the substantive violation, it was in conjunction with Article 3. The Court changed its discussion of Article 14 in only the *Stoica* case, as it returned to the pre *Nachova* position of not discussing separate substantive and procedural violations. The Court, as mentioned earlier, also focused on racist motives in the case rather than racist attitudes. Interesting to note that the only finding of a substantive violation of Article 14 was in a case where the Court found racist slurs sufficient to shift the burden of proof and its usual trepidation at the Respondent State having to prove the absence of racist attitude was dealt with, as the Court referred to motives rather than attitude. It is only the author’s assertion, but arguably “racist motives” implies that it is difficult to state that the police officers had racial intent, as they would possibly arguably had if the Court had relied on the phrase “racial attitudes”.

While the *Stoica* judgment was positive, all the cases since have focused on racist attitudes and the burden of proof being “proof beyond reasonable doubt”, which has undoubtedly shown the difficulties in an applicant attempting to show the necessary evidence to shift the burden of proof. Once the burden shifts, it is then for a Respondent State to disprove the existence of a racist attitude, however, the Court has struck down the Respondent State having to disprove racist intent as being too

onerous on the Respondent State. At this point, we are left in a position where the Court, though somewhat inconsistent in what evidence it will rely on to find a procedural violation of Article 14, has in the majority of cases found procedural violations of the Article. On the other hand, there is still a huge amount of uncertainty surrounding how an applicant may show sufficient evidence for the burden of proof to shift for an allegation of a substantive violation of Article 14 in conjunction with Articles 2 and/or 3.

It is crucial to note that the Court has found substantive violations of Article 14 in conjunction with Articles 6 and 8 in a number of cases and a substantive violation of Article 14 in conjunction with Article 3 in one case. The Court has never found a substantive violation of Article 14 in conjunction with Article 2, which essentially means that the Court has never found that the death of a Roma individual has been a result of their ethnicity, and that in over fifty years the level of evidence provided by applicants has never met the standard of “proof beyond reasonable doubt” to shift the burden of proof to a Respondent State. This is a very concerning finding, as it means that the standard of proof being so high and the Court not resolving their difficulty in shifting the burden of proof to the Respondent State to prove the absence of racial attitudes, it will be very difficult for an applicant to show that the death of their relative was a result of ethnic discrimination.

It also appears to the author that the Court appears to look for proof of intention in the anti-Roma violence cases. The Court in the cases outlined in this chapter discusses subjective intent and attitude. This does not appear to be a rule of the Court, but from the author’s analysis of the case law it appears as though the Court in the anti-Roma violence cases involving allegations of violations of Article 14 with Articles 2 and/or 3 looks for proof of intent. In contrast within the EU legal

framework and the Luxembourg Court's case law there is no requirement regarding proof of intention under any circumstance.⁶³¹ These points will be discussed further in the conclusion chapter of the thesis, when the author comments on the future and changes that could be made.

The anti-Roma violence cases have contributed greatly to the interpretation and development of Article 14. The article is now far more than an ancillary article, but the warning words of Judge Bonello in *Angelova* continue to be the true: that there has yet to be a finding in the Court that ethnicity played a decisive role in the violence inflicted on Roma leading to death.⁶³² Therefore, while the anti-Roma violence cases have contributed to the interpretation of Article 14 in a positive way with regard to the recognition of procedural and substantive limbs of Article 14, there needs to be clarity in the Court in relation to the burden of proof and evidence, especially in relation to substantive violations of Article 14.

⁶³¹ Ashutosh Bhagwat, 'Affirmative Action and Benign Discrimination' in Vikram David Amar and Mark V Tushnet (eds), *Global Perspectives on Constitutional Law* (Oxford University Press 2009) 100. Siofra O'Leary, *Employment Law at the European Court of Justice: Judicial Structures, Policies and Processes* (Hart Publishing 2002) 147 - 148.

⁶³² *Angelova v Bulgaria*, partly dissenting opinion of Judge Bonello, paras 1-3.

Chapter 5

Alleged Violations of Article 14 in cases of forced sterilisation of Romani women.

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5.1 Introduction

A deeply disturbing trend has emerged in the case law involving racial and ethnic discrimination against Roma in recent years. There have been a growing number of cases involving a gendered variant of racial discrimination against Roma women. In a November 2016 report from the European Roma Rights Centre it was stated that ‘[f]orced sterilisation in the twentieth and early twenty-first centuries has often been based on the ethnicity or the disability of the victims’.⁶³³ The number of women who were forcibly or illegally sterilised in Europe has not been estimated. As will be discussed in coming sections of this chapter, a number of European countries implemented state sterilisation programmes, which targeted Romani women in particular. While significant numbers of Romani women allege forced sterilisation, there remain only three cases where an allegation of a violation of Article 14 in relation to sterilisation has come before the European Court of Human Rights; two further cases in 2011 and 2012 ended with a friendly settlement. A further case related to access to medical records in order for the applicant involved to be able to prove an alleged forced sterilisation was heard before the Court in 2009. Slovakia was the Respondent State in the four cases before the Court involving allegations of forced sterilisation and access to medical records, while the Czech Republic was the Respondent in the two cases that ended with a friendly settlement.

A brief sub-section on the history of sterilisation of Romani women in Europe will be provided following this section. As this thesis focuses on the development of Article 14 through Roma case law taken before the Court, a particular section will provide a historical analysis focusing on Czechoslovakia, Slovakia and the Czech Republic. Slovakia and the Czech Republic are the only two countries that have thus

⁶³³ European Roma Rights Centre, *Coercive and Cruel: Sterilisation and its Consequences for Romani Women in the Czech Republic (1966-2016)* (European Roma Rights Centre 2016) 12.

far appeared before the Court on allegations of forced sterilisation. These two sub-sections on the history of forced sterilisation of Romani women will help to set the scene before analysing the cases that have appeared before the Court. They will also aid in providing a wider context for the large number of sterilisations that have been carried out against Romani women in contrast to the small number of cases that have appeared before the Court. The final two sub-sections of the first section will focus on defining forced sterilisation, the legal framework for sterilisation and provide a brief introduction to the cases taken before the Court.

The second section of this chapter will focus on analysing the Article 14 claims before the Court and how these have had an impact on the development of the article. In particular, issues such as a discussion of what the Article 14 applicant has to prove, the use of Non Governmental Reports and indirect discrimination will be discussed in individual sub-sections. The third section will then focus on developing an understanding of the concept of equality, which was relied upon by the Court in these cases, and analysis will be provided on whether the Court relied on the formal or substantive models of equality. A sub-section applying Fredman's theory on intersectionality to the previously discussed cases will then be provided. The last section of this chapter will provide a conclusion on the contribution of the cases involving alleged forced sterilisation of Romani women to the development of Article 14. The conclusion will also focus on the impact which these cases have had on the model of equality being relied upon by the Court.

5.2 Forced Sterilisation of Romani Women in Europe: The Historical Context

The social authority identifies the final solution of the Romani minority issue in the extinction of the minority through its merging into the majority. A minority problem is to be removed by removing the minority.⁶³⁴

Forced sterilisation is not a new form of racial discrimination against Romani women. It is estimated that between half a million to 1.5 million Roma died in the Great Devouring or the *Porajmos*, as the Holocaust is known amongst the Roma.⁶³⁵ The Roma and Sinti were marked out along with the Jews for the Final Solution under the Nuremberg Laws of 1935.⁶³⁶ Social Darwinism had become a mainstream 'science' in the US and Europe in the nineteenth and twentieth centuries.⁶³⁷ The Nazi's social hygiene programmes could be summed up in Hitler's phrase 'life unworthy of life', under which the Roma were viewed as a genetic and social and later 'racial threat' to the 'master race'.⁶³⁸ Roma and Sinti were selected for compulsory sterilisation under the 1933 Law for the Prevention of Hereditarily Diseased Offspring.⁶³⁹ The elimination of the Roma under a eugenics programme was not confined to Nazi Germany. In Sweden, from 1935-1976, an estimated 60,000 women were forcibly

⁶³⁴ Legal Reflection by a group of Charter 77 signatories on the social position of Roma annexed to Document No. 23. Document No. 23 entitled 'Situation of the gypsies in Czechoslovakia' of December 13, 1978 discussed the situation of the Roma in Czechoslovakia and highlighted the sterilisation of Romani women in that state as part of a planned administrative process. Harold Gordon Skilling, *Charter 77 and Human Rights in Czechoslovakia* (Allen & Unwin 1981).

⁶³⁵ Fred Bertram, 'The Particular Problems of the Roma' (1996) 2 *University of California Davis Journal of International Law and Policy* 173, 177.

⁶³⁶ Center for Reproductive Rights and Center for Reproductive Rights and Poradna pre občianske a ľudské práva, in consultation with Ina Zoon, *Body and Soul: Forced Sterilisation and Other Assaults on Roma Reproductive Freedom in Slovakia* (Center for Reproductive Rights and Poradna pre občianske a ľudské práva 2003) 41.

⁶³⁷ Jeremiah A Barondess, 'Care of the medical ethos: reflections on Social Darwinism, racial hygiene and the Holocaust' (1998) 129 (11 Part 1) *Annals of Internal Medicine* 891, 891-898. Steve Jajioff and Martin McKee, 'The Health of the Roma People: A Review of the Published Literature' (2000) 54 *Journal of Epidemiology Community Health* 864, 868.

⁶³⁸ *Lebensunwertes Leben* translated into English as life unworthy of life. Michael Berenbau (ed), *A Mosaic of Victims: Non-Jews Persecuted and Murdered by the Nazis* (New York University Press 1990), Michael Burleigh and Wolfgang Wippermann, *The Racial State: Germany 1933-1945* (Cambridge University Press 1991) 113-136, Ina R Friedman, *The Other Victims: First-Person Stories of Non-Jews Persecuted by the Nazis* (Houghton Mifflin 1990) 7-28.

⁶³⁹ Liz Fekete, 'Roma – Fascism's First Victims, Again' (*Institute of Race Relations*, 13 November 2014) <www.irr.org.uk/news/roma-fascisms-first-victims-again> accessed 8 March 2015.

sterilised by the State.⁶⁴⁰ This number included Roma women who were threatened with the stoppage of their benefits or removal of their children to foster care if they did not agree to be sterilised.⁶⁴¹ The threat of the removal of their children was a very real concern for Roma families, given the history of this action being taken as early as the 18th century in Austro-Hungary where Roma children were taken from their parents and placed with other families.⁶⁴²

There has been much recent discussion of the forced sterilisation of Roma; this debate has focused on the need for recognition of victims of forced sterilisation and for compensation funds to be established to provide redress.⁶⁴³ International recognition of the need to provide special remedies for the victims of forced sterilisation has emerged in recent years. In Austria, those who were forcibly sterilised during the Nazi period are eligible for compensation under the Victim's Pension Law.⁶⁴⁴ In contrast, in Germany compensation for victims of forced sterilisation during the Nazi period has been a particularly contentious issue. This debate about compensation centered on to what extent could victims of forced sterilisation be considered to be victims of Nazi persecution.⁶⁴⁵ A fund was established in 1980 to make lump sum payments to victims.⁶⁴⁶ In addition to this, since 1988 victims of forced sterilisation can claim a monthly pension. Figures made available by the German Government as of 27 February 2012 stated that 9,604

⁶⁴⁰ Camilla Ida Ravnbøl, 'The Human Rights of Minority Women: Romani Women's Rights from a Perspective on International Human Rights Law and Politics' (2010) 17 *International Journal on Minority and Group Rights* 1, 6. Otakar Motejl, Public Defender of Rights, *Final statement of the Public Defender of Rights in the Matter of Sterilisations Performed in Contravention of the Law and Proposed Remedial Measures* (Public Defender of Rights 23 December 2005) 60.

⁶⁴¹ Motejl, *Final Statement* 60 - 61.

⁶⁴² Nikesh Parekh and Tamsin Rose, 'Health Inequalities of the Roma in Europe: A Literature Review' (2011) 19(3) *Central European Journal of Public Health* 139, 139-140. Isabel Fonseca, *Bury me Standing: the Gypsies and Their Journey* (Chatto and Windus 1995) 254-263.

⁶⁴³ ERRC, *Coercive and Cruel* 12-17.

⁶⁴⁴ *ibid* 13.

⁶⁴⁵ *ibid*.

⁶⁴⁶ *ibid*.

victims received monthly payments, while 13,816 people who were forcibly sterilised received the lump-sum payment.⁶⁴⁷ The German Government did not disclose how many of these victims were Roma.

In Sweden, a law was approved in 1934 allowing for forced sterilisations of 'inferior' members of society (which included Roma). This was only reconsidered in 1976, when the law was changed requiring freely given consent for sterilisation.⁶⁴⁸ The issue of compensation for the victims only arose in 1997 following a series of articles in a national newspaper.⁶⁴⁹ The Swedish government in response established a committee. Legislation allowing for the awarding of compensation was introduced and was based on the meeting of certain criteria, such as not having signed an authorisation for sterilisation, being subject to undue influence or being an inmate.⁶⁵⁰ Victims were only given until December 2002 to make a claim. Roughly 1,600 victims of forced sterilisation received compensation.⁶⁵¹

Coercive sterilisation policies were also in place from the 1920s to 1980s in several Swiss cantons.⁶⁵² These policies were influenced by eugenic ideology and mainly targeted young women who had been diagnosed with some form of mental disorder and were viewed as socially disadvantaged. In relation to Roma victims, the Swiss government in 1986 issued an official apology to the victims of forced sterilisation and forced fostering; amongst this group were a significant group of

⁶⁴⁷ *ibid.* The figures from the German Government are available at: <<http://dip21.bundestag.de/dip21/btd/17/087/1708729.pdf>> accessed 3 March 2016.

⁶⁴⁸ ERRC, *Coercive and Cruel* 13.

⁶⁴⁹ The newspaper Dagens Nyheter published a series of articles about the issue of forced sterilisation in 1997.

⁶⁵⁰ Government of Sweden, Law on the Compensation for Sterilisation in some cases (Lag (1999:332) 'om ersät- tning till steriliserade i vissa fall'), 27 May 1999, available at: <http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/sfs_sfs-1999-332/> accessed 3 March 2016.

⁶⁵¹ ERRC, *Coercive and Cruel* 13.

⁶⁵² *ibid.*

Yenish and Sinti.⁶⁵³ A compensation law was voted down in the Swiss Parliament in 1999, however, the Senate voted on a new law in autumn 2016 that provides for 'solidarity contribution' rather than compensation.⁶⁵⁴

The Norwegian Research Council in 1996 funded a four-year-long research project on the situation of Tater/Romani in Norway from 1850 to present.⁶⁵⁵ A particular fund was set aside to investigate those coercive sterilisation policies which were in place from 1934 to 1977. The research found 128 Tater/Romani cases of coercive sterilisation.⁶⁵⁶ It was concluded that Tater/Romani were over represented among the people who were affected by the policies.⁶⁵⁷ It was also found that in the Svanviken work camp, almost 40 per cent of all women were sterilised between 1949 and 1970. The Svanviken work camp was created for Tater/Romani. Following this research being published, the Norwegian government set up a special inter-ministerial working group, which was tasked with considering compensation.

The report of their findings published in 2003 critically concluded that most of the compensation claim cases had an ethnic dimension and would be affected by a statute of limitation period. The group recommended that existing ex-gratia

⁶⁵³ *ibid.* The Yenish are the third-largest population group of nomadic people all over Europe. They live mostly in Austria, Germany, Switzerland, Luxembourg, Belgium and parts of France. It is estimated that there are about 700,000 Yenish people in Europe.

⁶⁵⁴ From 2013 onwards a new government initiative began preparing a new compensation law to rehabilitate victims of 'compulsory social measures', this was to include victims of forced sterilisation measures. Association Humanrights.ch/MERS, 'Compulsory Social Measures: the long way to rehabilitation' (Humanrights.ch/MERS, 14 January, 2015) <<http://www.humanrights.ch/en/switzerland/internal-affairs/protection/miscellaneous/compulsory-social-measures-long-rehabilitation>> accessed 3 March 2016.

⁶⁵⁵ ERRC, *Coercive and Cruel* 15. Norwegian Travellers are known by the majority population as tater. This name displays the original misconception that the group were Tatars, a Turkic people who were one of the five major tribal confederations in the Mongolian plateau in the 12th century. The term Tatars historically referred to a variety of Turco-Mongol semi nomadic empires, the name Tatar came from their control of a vast region known as Tartary. In Norway before the 20th century the majority population did not distinguish between tater and gypsies. However, with the arrival of Kalderash Roma from central Europe and Russia in the late 19th century, the distinction began to apply. The group known as Tater are a Norwegian and Swedish brand of the Romani people who have been resident in Norway and Sweden for 500 years. They have lived in Norway for much longer than a later group of Roma who arrived in the late 19th century.

⁶⁵⁶ ERRC, *Coercive and Cruel* 15.

⁶⁵⁷ *ibid.*

compensation mechanisms for redressing the victims of coercive sterilisation be adjusted by the government. In 2004 the Norwegian government established a compensation mechanism for Tater/Romani people. This fund, besides providing compensation for ethnic bullying, also provided compensation for those who were subjected to coercive sterilisation. While 1,251 people applied for the compensation scheme and 1,231 successfully received compensation, it must be noted that only seven people were documented as receiving compensation for coercive sterilisation.⁶⁵⁸

It can be seen from the above that eugenics policies that targeted Roma amongst others were prevalent in many European countries during the twentieth century. No case against any of the above-discussed States has been taken before the European Court of Human Rights alleging forced sterilisation. The lack of uptake of compensation funds could be attributed to a number of factors: as will be discussed later, Roma families take great pride in family and the ability to have children, so victims of forced sterilisation may not want to come forward due to negative perceptions that may arise within the Roma community themselves. The other major reason for the lack of uptake of compensation could be attributed to Roma's fear of identification: identifying as Roma and filling out an official claim form with personal details may be perceived by Roma parents as dangerous to their or their children's safety.

A crucial piece of information to focus on is that eugenics policies targeting Roma have existed in Europe for many centuries. These policies have focused on ensuring that through coercive or forced sterilisation the number of Roma in the population would be reduced. States have long maintained that the policies they

⁶⁵⁸ ERRC, *Coercive and Cruel* 15.

implemented were not targeted at Roma, yet, as has been discussed above, the figures of Roma coercively sterilised is viewed as an over representation when compared to non-Roma who were coercively sterilised. As will be discussed in a subsequent section, this targeting of Roma through State policies could be viewed as indirect discrimination. The forthcoming section will look particularly at the history of forced sterilisation in Czechoslovakia, Slovakia and the Czech Republic.

5.2.1 Background to the Sterilisation of Romani women in the former Czechoslovakia until the present day Czech Republic and Slovakia

During the Communist era in Czechoslovakia, the State undertook a programme of coercive sterilisation to diminish the 'high, unhealthy birth rate' of the Roma.⁶⁵⁹ A directive issued in 1971 by the Czechoslovakian government compensated gynecologists for performing sterilisations on Romani women.⁶⁶⁰ This policy was to become further entrenched in 1976, when the government issued a recommendation that, as part of 'socialistic humanity', Romani people should undergo sterilisation.⁶⁶¹ Financial incentives and coercion were used, in addition to doctors and social workers threatening to place Roma children in foster care or withhold social welfare benefit in order to ensure Romani women agreed to sterilisation.⁶⁶² These government policies were heavily criticised by a Czechoslovakian human rights group, Charter 77, who

⁶⁵⁹ Claude Cahn, 'Groundbreaking Report by Czech Ombudsman Recognises "Problem" of Coercive Sterilisation and Calls for Far-Reaching Changes to Law, Policy and Society' (2006) 69 *Roma Rights Quarterly* 1.

⁶⁶⁰ Mindy Kay Bricker, 'Sterilisation of Czech Gypsies Persists: Eugenics Policy Dates back to Soviet Era' (*World Prout Assembly*, 12 June 2006)

<www.worldproutassembly.org/archives/2006/06/sterilisation_o.html> accessed 8 March 2016.

⁶⁶¹ Toby F. Sonneman, 'Old Hatreds in the New Europe: Roma After the Revolutions' (Jan/Feb 1992) 7 *Tikkun* 49, 51.

⁶⁶² Elizabeth K Tomasovic, 'Robbed of Reproductive Justice: The Necessity of a Global Initiative to Provide Redress to Roma Women Coercively Sterilised in Eastern Europe' (2010) 41 *Columbia Human Rights Law Review* 765, 771.

believed the state policy of sterilisation of Romani women amounted to 'genocide'.⁶⁶³

In Charter 77's legal reflection on the social position of Roma in the then

Czechoslovakia, they noted that:

The consent of Romani women to sterilisation is obtained through persuasion, the impartiality of which is not guaranteed. In some districts sterilisations of Romani women are performed as a planned administrative measure and the officers' success is rated at external meetings by the number of Romani women they have persuaded to consent to sterilisation. Under such conditions impartiality is out of the question. In many cases a pecuniary reward is demagogically employed to obtain consent to sterilisation. Thus sterilisation becomes one of the policies of the majority population against the minority population directed at preventing childbirths in the minority ethnic group.⁶⁶⁴

Charter 77's document criticised the State for its treatment of the Roma through its policies, citing the escalated use of sterilisation as one of the most worrying examples of these State policies.

While Charter 77 attempted to draw attention to the sterilisation of Romani women in Czechoslovakia, the State policy continued in a more heightened fashion in 1988 with the publication of Section 31 in association with Section 35 of the Decree of the Ministry of Health of the Czech Socialist Republic No. 152/1988 Coll., implementing the Act on Social Security and Czech National Council Act on the Mandate of Czech Socialist Republic Authorities in Social Security. Section 35 provided a one-off monetary benefit or material allowance to individuals undergoing medical intervention.⁶⁶⁵ These medical interventions, though, were under special regulations in the interest of a healthy population and were to overcome unfavourable living conditions of the family.⁶⁶⁶ Pellar has noted that '[t]he Act's authors have failed

⁶⁶³ Bricker, 'Sterilisation of Czech Gypsies'.

⁶⁶⁴ Motejl, *Final Statement* 24.

⁶⁶⁵ Section 35 of Decree of the Ministry of Health of the Czech Socialist Republic No. 152/1988 Coll., implementing the Act on Social Security and Czech National Council Act on the Mandate of Czech Socialist Republic Authorities in Social Security.

⁶⁶⁶ Motejl, *Final Statement* 25.

to grasp that they are essentially carrying on in the thinking traditions that resulted in the origin of the German “Über die Verhütung des erbkranken Nachwuchses” Act (which translates as “on the prevention of congenitally sick offspring”).⁶⁶⁷

In 1988/89, Pellar and Andrš undertook a study to statistically evaluate data on the sterilisation of Czech and Slovak Romani women between 1967 and 1989. *The Report on the Examination in the Problematics of Sexual Sterilisation of Romanies in Czechoslovakia* looked at the experience of 156 Romani women from the Czech part of the former Czechoslovakia.⁶⁶⁸ Their research found that 38 percent of all sterilisations that took place over the 22 year period occurred in 1988/89.⁶⁶⁹ The authors noted that this increase in the rate of sterilisation was accompanied by an increase in the amount of social benefit given for sterilisation from 2,000 CSK to a maximum payment of 10,000 CSK from 1988 onwards.⁶⁷⁰ It was also found that roughly 9.6 percent of women from the group were only informed of their sterilisation after the intervention.⁶⁷¹ The study also crucially looks at the reasons which the women gave for why they decided to undergo sterilisation. 68.8 percent identified social workers campaign and persuasion as the major reason they agreed to sterilisation.⁶⁷² 17.2 percent of women gave financial benefit as their reason, while 10.6 percent cited social workers stating that additional social care was subject to sterilisation as the basis for their decision.⁶⁷³

The Government’s sterilisation policy was not formally rescinded until 1990.

However, there have been reports that following the ‘Velvet Revolution’ coercive

⁶⁶⁷ Ruben Pellar and Zbyněk Andrš, *Statistical Evaluation of the Cases of Sexual Sterilisation of Romani Women in East Slovakia – Appendix to the Report on the Examination in the Problematic Sexual Sterilisation of Romanies in Czechoslovakia* (Center for Civil Human Rights 1990). Motejl, *Final Statement* 25.

⁶⁶⁸ *ibid.* 26.

⁶⁶⁹ *ibid.*

⁶⁷⁰ *ibid.*

⁶⁷¹ *ibid.*

⁶⁷² *ibid.*

⁶⁷³ *ibid.*

sterilisation continued.⁶⁷⁴ There are some differences, though, in the post ‘Velvet Revolution’ cases of sterilisation in the Czech Republic. Gwendolyn Albert, Director of the League of Human Rights in the Czech Republic, stated that cases:

... are primarily instances of doctors recommending Caesarian delivery of pregnant women and then exploiting that opportunity to sterilize them after delivery, or sterilising them during abortions, surgery for ectopic pregnancies, or removal of intrauterine birth control.⁶⁷⁵

It has also been reported that some of the women concerned provided no consent or, where they did provide consent, it was while under anesthesia or suffering pain.⁶⁷⁶ In addition to the issue of consent, women have asserted that they consented without understanding the terminology used, consented due to threats of removal of social benefits, consented without having been given a clear explanation of the consequences of being sterilised or consented on the basis of receiving monetary compensation.⁶⁷⁷ Document No. 3 of 28 January, 1990 includes an accusation that the criteria of objective admissibility of sterilisation provided for by the legislation, such as number of children, age and healthy condition, did not apply to Romani women.⁶⁷⁸ The document stated the view that Romani women were persuaded to undergo sterilisation systematically and provided the example of the 1,111 Romani women in

⁶⁷⁴ The Sterilisation Investigation in the Czech Republic: Briefing of the Commission on Security and Cooperation in Europe, 109th Congress, 3 (2006) <http://www.csce.gov/index.cfm?Fuseaction=ContentRecords.ViewTranscript&Content_id=378&Content_Type=H,B&ContentRecordType=B&CFID=22744580&CFTOKEN=55773805> Cahn, ‘Groundbreaking’ 70. During the 1980s it is reported that in Chanov over one hundred Romani women were sterilised by one particular social worker named Machacova.

⁶⁷⁵ Jeffrey Thomas, ‘Coercive Sterilisation of Romani Women Examined at Hearing’ (*America.gov*, 16 August 2006) <www.america.gov/st/washfile-english/2006/August/200608171045451CJsamohTO.678158.html> accessed 8 March 2015.

⁶⁷⁶ Center for Reproductive Rights, *Body and Soul Forced Sterilisation and Other Assaults on Roma Reproductive Freedom in Slovakia* (Center for Reproductive Rights 2003) 53-74. Julian O’Halloran, ‘Investigation: Gypsy Women “Forced into Sterilisation”, Slovakian Women Say They Are Being Operated on Against Their Will’ *The Independent on Sunday* (London, 26 January 2003) <www.independent.co.uk/news/world/europe/gypsy-women-forced-into-sterilisation-603692.html> accessed 8 March 2015.

⁶⁷⁷ Cahn, ‘Groundbreaking’ 69, Center for Reproductive Rights, *Body and Soul Report* 62, Cahn, ‘Groundbreaking’ 69.

⁶⁷⁸ Motejl, *Final Statement* 27.

the Eastern Slovakian Region who were sterilised in one year.⁶⁷⁹ In contrast to this number, a very small number of non-Romani women were sterilised. The authors of the report Posluhová and Posluch cite the official justification for Roma sterilisation at that time:

... this concerns citizens showing an extensively negative attitude to work and learning, a high crime rate, an inclination to alcoholism, female promiscuity, and last but not least, lagging behind the cultural and social development of other population groups.⁶⁸⁰

Due to a complaint by Pellar, Andrš and Vohryzek, a letter from the Human Rights Committee and the Charter 77 document No. 3/1990, an inquiry by the General Prosecutor's Office of the Czech Republic was initiated in 1990. A statement was requested by the Prosecutor's Office from the Ministry of Health and Social Affairs of the Czech Republic on the subject of the social benefit paid in relation to sterilisation. The Ministry statement provides that:

Social benefits were granted to ... 803 (persons who) were paid the benefit following sterilisation, and where 419 cases involved Romani women. In the territory of the capital city of Prague the benefit was granted for this reason to 58 women, of whom 13 were Roma ... In the Most district it was granted to 105 women, of whom 65 were Roma; ... in the Děčín district the benefit was granted to 26 women, of whom 16 were Roma.⁶⁸¹

In response to the number of Roma who received the benefit, the Ministry stated it was 'due to the quantity of citizens of Romani origin in whose families the social situation is far more difficult or indeed utterly desperate in some cases'.⁶⁸² The Ministry went further and discussed Roma families by stating that:

...these are families with many children insufficiently cared for by the parents ... where there are less children, the parents are incapable of bringing them up, the children or their parents are genetically afflicted,

⁶⁷⁹ *ibid.*

⁶⁸⁰ E Posluhová and J Posluch, 'The Problems of Planned Parenthood among Gypsy Fellow-citizens in the Eastern Slovakian Region' (1989) 39 (4) *Zdravotnícka Pracovníčka* 220-223.

⁶⁸¹ Statement of the Ministry of Health and Social Affairs of the Czech Republic of April 5, 1990.

⁶⁸² Statement of the Ministry of Health and Social Affairs of the Czech Republic of April 5, 1990

the adolescents or their parents commit crimes, abuse alcohol or other substances, lack financial means, have insufficient housing.⁶⁸³

The Ministry of Health and Social Affairs of the Czech Republic defended the provision of the allowance following sterilisation. In contrast, the Ministry of Health and Social Affairs of the Slovak Republic has admitted that the incentive potential of the monetary amount paid following sterilisation may be problematic.⁶⁸⁴

In 1995 the Slovak Minister of Health also appeared to continue the stance of the Communist regime in Czechoslovakia pre-1990 when he stated that the government would 'do everything to ensure that more white children than Romani children are born'.⁶⁸⁵ In 2000, Slovakia's Ministry of Health's position paper stated that '[i]f we do not succeed in integrating the Romani population and modify their reproduction, the percentage of non-qualified and handicapped persons in the population will increase.'⁶⁸⁸ In 2006, the European Roma Rights Centre stated in Written Comments to the U.N. Committee on the Elimination of Racial Discrimination that 'officials as high-ranking as the Prime Minister and President, and also including local officials, have made ... anti-Romani statements or otherwise undertaken speech acts denigrating the dignity of Roma'.⁶⁸⁹ In 2009 the Czech National Party campaign advertisement promised to find 'a final solution to the gypsy issue'.⁶⁹⁰ The words 'final solution' echo the programme of the same name used by the Nazis to exterminate millions of both Jews and Roma.

⁶⁸³ *ibid.*

⁶⁸⁴ Motejl, *Final Statement* 31.

⁶⁸⁵ Ina Zoon, *On the Margins – Slovakia: Roma and Public Services in Slovakia : A Call to Action to Improve Romani Access to Social Protection, Health Care, and Housing* (Open Society Institute 2001) 66. Ministry of Health of the Slovak Republic, Position Paper on the Working Draft of the Document National Strategy of Sustainable Development in the SR (16 October 2000).

⁶⁸⁸ Zoon, *On the Margins* 67.

⁶⁸⁹ European Roma Rights Centre, Written Comments of the European Roma Rights Centre and Vzájemné Soužití Concerning the Czech Republic for Consideration by the U.N. Committee on the Elimination of Racial Discrimination at its 70th Session 7-8 (2006) 2-3
<www2.ohchr.org/english/bodies/cerd/docs/ngos/ERRCCzech-republic.pdf> accessed 8 March 2015.

⁶⁹⁰ BBC, 'Czechs Shocked by Anti-Roma TV Ad' *BBC News* (London, 21 May 2009)
<news.bbc.co.uk/2/hi/8061273.stm> accessed 8 March 2015.

While there have been cases of coercive sterilisation in Bulgaria, Hungary and Romania, the numbers are much smaller than those in the successor countries of Czechoslovakia – Slovakia and the Czech Republic.⁶⁹¹ For this reason it has been important to consider the laws and policies enacted in Czechoslovakia and its successor countries, as it provides a crucial backdrop when considering the cases brought against these states by Romani women alleging forced sterilisations.

5.3 The Legal Framework for Sterilisation

5.3.1 An introduction to Sterilisation

The Final Statement of the Public Defender of Rights in the Matter of Sterilisations Performed in Contravention of the Law and Proposed Remedial Measures in the Czech Republic stated that '[t]he human body's integrity, respectively its protection against external intervention without the person's consent, has been the focus of law from time immemorial.'⁶⁹² External intervention with one's bodily integrity, which the individual has not consented to, is one of the most intrusive ways in which to interfere with one's dignity. Sexual sterilisation is viewed as a means of virtually irreversibly preventing reproductive ability. If a woman does not give her informed consent to have this permanent reproductive intervention, then she will be denied the free choice of the number of children she may wish to have. It will also affect one of the most private social relationships in that it will deny reproductive ability in a partnership. The methods behind the sterilisation of Romani women point to a potentially consistent lack of concern for the dignity of the woman, her human rights, right to bodily integrity and family privacy and dignity.

⁶⁹¹ *A.S. v Hungary*, CEDAW, Comm. No. 4/2004, U.N. Doc. CEDAW/C/26/D/4/2004/(views adopted Aug. 14, 2006).

⁶⁹² Motejl, *Final Statement* 7.

The manual of the International Federation of Gynaecology and Obstetrics (FIGO), which collected both human rights and medical expertise, has stated ‘that sterilisation is never a life-saving operation that needs to be performed on an emergency basis and without full and informed consent’.⁶⁹³ International human rights bodies in the *Guiding Principles for the Provision of Sterilisation Services* highlight the need for sterilisation to be performed in accordance with the principle of autonomy. Full, informed and free decision-making should be at the core of the performance of any sterilisation and:

[A]ny counseling, advice or information given by health-care providers or other support staff or family members should be non-directive enabling individuals to make decisions that are best for themselves, with the knowledge that sterilisation is a permanent procedure and that other, non-permanent methods of fertility control are available.⁶⁹⁴

A core consideration that will be discussed in many of the forthcoming cases before the Court, involves arguments of the need for sterilisation for the prevention of future pregnancy in the situation of a medical emergency. The Guiding Principles are very clear on this matter and state that:

[S]terilisation for prevention of future pregnancy cannot be justified on grounds of medical emergency, which would permit departure from the general principle of informed consent (and) even if a future pregnancy might endanger a person’s life or health, there are alternative contraceptive methods to ensure the individual concerned does not become pregnant immediately, and the individual concerned must be given the time and information needed to make an informed choice about sterilisation.⁶⁹⁵

⁶⁹³ FIGO, *Guidelines for Female Contraceptive Sterilisation* <http://www.womenenabled.org/pdfs/International_Federation_of_Gynecology_and_Obstetrics_Sterilization_Guidelines_FIGO_2011.pdf?atredirects=0> accessed 5 March 2015.

⁶⁹⁴ World Health Organization, *Eliminating forced, coercive and otherwise involuntary sterilization. An interagency statement OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF, WHO* (WHO 2014) 9 <http://apps.who.int/iris/bitstream/10665/112848/1/9789241507325_eng.pdf?ua=1> accessed 8 March 2015.

⁶⁹⁵ *ibid.*

While this thesis is not focused on medical law or terminology, it is important to state that informed consent is based on two fundamental mutually related rights. The first is the patient's right to receive full, true, thorough and comprehensive information in order to enable them to decide on whether they will give consent prior to any medical intervention. The second is the connected right for any healthcare intervention to be only performed given the patient's prior free consent after they had received true and comprehensive information.⁶⁹⁶ Informed consent as a rule is also a tangible expression of the relationship between the patient and doctor being one based on the equality of both parties.⁶⁹⁷ If the relationship between the doctor and patient is one based on a relationship of equals, then the doctor may only intervene with the patient's bodily integrity where the medical professional provides their agreement to provide the medical intervention along with the patient's consent.

While performing medical interventions a doctor generally acts towards the patient as a legally equal provider of a service; not as a superior public authority. Medical intervention is a performance, a service rendering, not an act of public power.⁶⁹⁸

While this thesis does not focus on the medical aspects of sterilisation, it has been important to outline the preceding on the principle of autonomy, on individuals giving full, free and informed consent and the fact that sterilisation is not viewed by the medical community as ever being justified as a life-saving decision or necessary in a medical emergency and that many other avenues are available to medical professionals in regard to a woman's health, reproductive ability and contraceptive choices into the future.

⁶⁹⁶ Stephen Wear and Jonathan D Moreno, 'Informed consent: Patient autonomy and physician beneficence within clinical medicine' (1994) 6 (4) *H E C Forum* 323-325.

⁶⁹⁷ The exception being public interest concerns. Motejl, *Final Statement* 9.

⁶⁹⁸ *ibid.*

5.3.2 Sterilisations as Human Rights Violations

Involuntary sterilisations are considered to be a violation of the physical and mental integrity of the human being and a gross violation of human dignity. A number of international conventions and recommendations deal with violations of human rights where a sterilisation has been carried out without full and informed consent. While this thesis is concerned with the European Convention on Human Rights, sterilisations that lack full and informed consent contradict a number of the provisions of the Convention on the Elimination of All Forms of Discrimination against Women. CEDAW places an obligation on State parties to take ‘all appropriate measures’ to ensure ‘the health and well-being of families, including information and advice on family planning’. Article 12 of the CEDAW, in particular, provides that ‘State parties shall ensure to women appropriate services in connection with pregnancy, confinement, and the post-natal period’.

As will be discussed in the next section, there has been one case before the ECtHR where the applicant sought access to medical records. General Recommendation 21 of the Committee on the Elimination of Discrimination against Women highlights the importance of access to information; it points specifically to access to information in relation to sterilisation.⁶⁹⁹ General Recommendation 19 states that ‘[c]ompulsory sterilisation adversely affects women’s physical and mental health...’.⁷⁰⁰ The International Covenant on Civil and Political Rights addresses the prohibition of forced sterilisation in Article 7, which prohibits torture, cruel, inhuman, or degrading treatment, with Article 17 dealing with the right to privacy. The

⁶⁹⁹ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations*, 1994

⁷⁰⁰ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: Violence Against Women*, 1992

Committee Against Torture (CAT) has recommended that States should take urgent action to investigate thoroughly, impartially, promptly and effectively all allegations of forced sterilisation of women.⁷⁰¹ The CAT also stated that States should prosecute and punish the perpetrators and provide the victims with adequate and fair compensation. The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine has dealt with the issue of the admissibility of any intervention in healthcare and has set the condition to be met as the individual's free and informed consent to such an intervention.⁷⁰² In many states the Convention on Human Rights and Biomedicine in many states takes priority over the domestic Constitution, such as the Czech Republic and Slovakia.⁷⁰³

In 1995 the Beijing Declaration of the Fourth World Conference on Women declared that forced sterilisation was an act of violence against women, that women have the right 'to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence'.⁷⁰⁴ It can be seen from the number of international conventions, declarations and recommendations that forced sterilisation is condemned as a violent act against women. It is crucial to recognise that many other bodies of the

⁷⁰¹ UN Committee Against Torture (CAT Committee), *Concluding Observations: Slovakia*, para 14, U.N. Doc. CAT/C/SVK/CO/2(2009); Czech Republic, para 6(n), U.N. Doc. CAT/C/CR/32/2.

⁷⁰² André den Exter, *International Health Law and Ethics: Basic Documents* (Maklu Publishers 2015) 174-180.

⁷⁰³ The Slovak Constitution is similar and states in Article 7(5) that 'International treaties on human rights and fundamental freedoms ... shall have primacy over the laws'. Article 7(5) of the Slovak Constitution provides that 'International treaties on human rights and fundamental freedoms, international treaties whose executions does not require a law and international treaties which directly establish rights or obligations of natural persons or legal persons and which were ratified and promulgated in a manner laid down by law shall have primacy over the laws'. Article 154 (c) provides that 'International treaties on human rights ... provide for a greater scope of constitutional rights and freedoms'. Dalibor Jilek, 'Human Rights Treaties and the New Constitution' (1993) 8 *Connecticut Journal of International Law* 407, 411-419.

⁷⁰⁴ The United Nations Fourth World Conference on Women, 'Action for Equality, Development and Peace: Strategic Objective C: Women and Health, Objective 96' Beijing China September 1995.

UN such as the Human Rights Committee, the Committee Against Torture, the United Nations and the Council of Europe have urged States to investigate the extent of involuntary sterilisation practices and to prosecute those responsible and provide redress to victims.⁷⁰⁵ The issue in many of those situations, though, is that it is States themselves that have established and executed these sterilisation practices and are now being tasked with investigating their own histories of forced sterilisation.

While it is important to acknowledge the work done by international bodies and pieces of international law in setting out the importance of acknowledging forced

⁷⁰⁵ On the 29 of October 2003 the Commissioner for Human Rights of the Council of Europe concluded that ‘it can reasonably be assumed’ that Romani women in Slovakia were sterilised without their informed consent. Center for Reproductive Rights, ‘Council of Europe Finds Evidence of Forced Sterilisation of Romani Women in Slovakia’ (Center for Reproductive Rights, 30 October 2003) <<https://www.reproductiverights.org/press-room/council-of-europe-finds-evidence-of-forced-sterilization-of-romani-women-in-slovakia>> accessed 2 February 2016. Center for Reproductive Rights and Poradna pre občianske a ľudské práva, in consultation with Ina Zoon, *Body and Soul Forced Sterilization and Other Assaults on Roma Reproductive Freedom in Slovakia* (The Center for Reproductive Rights and Centre for Civil and Human Rights or Poradňa 2003). Calude Cahn, ‘Groundbreaking Report by Czech Ombudsman Recognises “Problem” of Coercive Sterilisation and Calls for Far-Reaching Changes to Law, Policy and Society’ (*European Roma Rights Centre*, 31 March 2006) <<http://www.errc.org/article/groundbreaking-report-by-czech-ombudsman-recognises-problem-of-coercive-sterilisation-and-calls-for-far-reaching-changes-to-law-policy-and-society/2541>> accessed 2 February 2016. On the 23 December 2005 the Czech Republic Public Defender of Rights (Ombudsman) reported that the practice of sterilisation without free and informed consent occurred *en masse* in former Czechoslovakia and that this practice was encouraged by state policy. European Roma Rights Centre, ‘Czech Prime Minister Apologises to Victims of Coercive Sterilisation’ (European Roma Rights Centre, 23 November 2009) <<http://www.errc.org/article/czech-prime-minister-apologises-to-victims-of-coercive-sterilisation/3056>> accessed 2 February 2016. In November 2009 Czech Prime Minister Jan Fischer and the Government acknowledged individual failures and expressed regret for coercive sterilisation. A group of women harmed by coercive sterilisation, the ERRC and the League of Human Rights held a meeting on Human Rights Day on the 10 of December 2014 in Budapest and Prague to discuss the need for redress for the victims of coercive sterilisation. Office of the United Nations High Commissioner for Human Rights, UN Women, The Joint United Nations Programme on HIV/AIDS, United Nations Development Programme, United Nations Population Fund, United Nations Children’s Fund, World Health Organisation, *Eliminating forced, coercive and otherwise involuntary sterilisation: An interagency statement* (WHO Library Cataloguing-in-Publication Data 2014). In June 2015 the case of *G.H. v Hungary* was declared inadmissible in the ECtHR on the basis that the applicant (who herself was not Roma but whose husband was Roma) who alleged she had been forcibly sterilised, had received compensation and had exhausted the remedies available to her in the domestic court. In July/August 2015, during the 55th session of the United Nations Committee against Torture issued its Concluding Observations on Slovakia. They expressed concern about the ongoing practice of involuntary sterilisation of Roma women in Slovakia. The country was not only condemned by CAT but also by the UN Committee on the Elimination of Discrimination against Women, the UN Committee on the Elimination of Racial Discrimination and the UN Human Rights Committee. European Roma Rights Centre, *Coercive and Cruel: A Report by the ERRC, Sterilisation and its Consequences for Romani Women in the Czech Republic (1966-2016)* (European Roma Rights Centre 2016). The Organisation for Security and Cooperation in Europe and Office for Democratic Institution’s and Human Right’s, Event to Focus on Justice and Redress to Roma Victim’s of Forced Sterilisation in the Czech Republic (American Center Prague, June 2016).

sterilisation as a gross violation of a women's rights and dignity, this thesis is concerned with the European Convention on Human Rights. In the particular cases taken by Romani women alleging forced sterilisation, they have alleged violations of: Article 3, the prohibition of torture, inhuman or degrading treatment or punishment; Article 8, right to respect for private and family life; Article 12, the right to marry and to found a family; Article 13, the right to an effective remedy; and Article 14, the prohibition of discrimination. Crucially in the cases taken by Roma alleging forced sterilisation they also alleged that they were forcibly sterilised due to their ethnicity. They alleged a violation of their right to the enjoyment to the rights and freedoms set down under the Convention. In the next section, a brief introduction to the cases taken by Roma women to the ECtHR will be provided.

5.4 Introduction to the cases alleging forced sterilisation before the European Court of Human Rights

The sterilisation cases that have gone before the Court have displayed a number of worrying issues: the lack of recognition of Roma women's rights to their medical records, the timing of alleged consent being given for sterilisations, the comments made on medical records as to the ethnicity of the applicant, and the fact that many of the applicants were not told that they had been sterilized. The sterilisation cases before the Court have led to much discussion of key issues, such as whether the applicants were sterilised due to their ethnic origin or whether the sterilisations were part of a larger programme being implemented in different states.

In this section, the three cases that went before the Court on allegations of alleged forced sterilisation will be introduced as well as the one case relating to access to medical records and the two cases that ended in friendly settlements. As there are

so few cases that have appeared before the Court, it is possible to provide a short discussion of them in this section. The facts of the cases will be brief and are outlined so as to provide a background to the allegations being made by the applicants. The cases will then be analysed in the subsequent two sections for their impact on the development of Article 14 and for the impact they have had on the model of equality being relied upon by the Court.

5.4.1 Access to Medical Records: *K.H. and Others v Slovakia*

The first case brought before the Court in relation to sterilisation was framed as concerning a violation of Article 6 and Article 8. The major reason why the applicants only brought Articles 6 and 8 violations was due to the fact that Roma women had been refused access to their medical records and the eight applicants in *K.H. and Others v Slovakia* needed access to these records, as they suspected they may have been sterilised after giving birth.⁷⁰⁶ The major factor missing from *the K.H.* case was the lack of any recognition of the violence that had been perpetrated on these women. The national courts justified the prohibition on making the medical records available to the applicants on the basis of protecting the information from abuse. The Court noted that it could not see how the applicants could abuse information that was in all aspects about only themselves.⁷⁰⁷ In relation to the claim of a violation of Article 6, the Court accepted the applicants' argument that they were 'in a state of uncertainty as regards their health and reproductive status following their treatment in the two hospitals concerned' and that by obtaining the evidence contained in the medical records, the applicants would be in a position to make 'an assessment of the position

⁷⁰⁶ *K.H. and Others v Slovakia* App no 32881/04 (ECHR, 6 November 2009).

⁷⁰⁷ *ibid.*, para 42.

in their cases from the perspective of effectively seeking redress before the courts in respect of any shortcomings in their medical treatment'.⁷⁰⁸

The Court held there had been no 'sufficiently strong justification for preventing the applicants from obtaining copies of their medical records'.⁷⁰⁹ The Court held that such a restriction 'cannot be considered compatible with an effective exercise by the applicants of their right of access to the court', therefore the Court found a violation of Article 6.1 of the Convention.⁷¹⁰ No violation of Article 13 in conjunction with Article 8 was found and it was held that 'a separate examination of the complaint under Article 13 in conjunction with Article 6.1 of the Convention is not called for'.⁷¹¹ The case was an important one, even though it did not deal directly with forced sterilisations, the violence perpetrated on the Roma women's bodies or racial discrimination as a motivating factor in these assaults. The Court did find in the applicants' favour and ensured that a clear message was sent to the Respondent State that these women were entitled to copies of their medical records. This case would be instrumental in providing Romani women with the evidence they needed to establish if they had been forcibly sterilised unknown to them. It is also interesting to note that it was Romani women who were denied their right to their medical records and not women of other ethnicities.

While *K.H.* was one case, there were a number of applicants attached to the case who were all Romani and all denied access to their records. The Respondent State giving the reason that they were withholding the medical records for fear they would be misused seemed to imply that the Romani women were not in a position to

⁷⁰⁸ *ibid.*, para 65.

⁷⁰⁹ *K.H. and Others v Slovakia*, para 68. Ruth Rubio-Marín and Mathias Möschel, 'Anti-Discrimination Exceptionalism: Racist Violence before the ECtHR and the Holocaust Prism' (2015) 26 (4) *European Journal of International Law* 881, 881-899.

⁷¹⁰ *ibid.*, paras 68-69.

⁷¹¹ *ibid.*, paras 72-73.

hold their own medical records. While a violation of Article 14 was not considered by the Court, it would be worthwhile to consider whether the authorities were withholding the records on the basis that the women were Romani and if the withholding of the records from women who were unsure if they had been sterilised was an attempt by the Respondent State to conceal the fact that these Romani women had been sterilised without their consent.

5.4.2 The Cases of Allegations of Forced Sterilisation before the European Court of Human Rights

V.C. v Slovakia

V.C. v Slovakia is one of the first cases involving forced sterilisation. The applicant, a Romani woman, was forcibly sterilised during a cesarean section in a hospital in Eastern Slovakia.⁷¹² During the cesarean she was asked to give her consent for sterilisation, though she was not informed of what the procedure entailed. She was told a future pregnancy would put her life at risk, and due to fear and pressure, she signed the consent form, not understanding what she was agreeing to. Subsequently the applicant learnt that the procedure was not medically necessary and that her rights had been violated, as she had not been given the full information about or implications of the procedure. The applicant alleged violations of Articles 3, 8, 12, 13 and 14 of the Convention. The Court made clear that for a treatment to be ‘inhuman’ or ‘degrading’, it would have to ‘go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment’.⁷¹³

⁷¹² *V.C. v Slovakia* App no 18968/07 (ECHR, 8 November 2011). Rachel Tritt, *Struggling for Ethnic Identity Czechoslovakia’s Endangered Gypsies : A Helsinki Watch Report* (Human Rights Watch 1992) 19-37.

⁷¹³ *ibid.*, para 104.

The Court highlighted the importance of an individual's right to physical integrity and that interfering against the will of a mentally competent adult would infringe on and interfere with the 'very essence of the Convention', which is 'respect for human dignity and human freedom'.⁷¹⁴ The way in which *V.C.* was treated by hospital staff was criticised by the Court as 'paternalistic, since, in practice, the applicant was not offered any option but to agree to the procedure which the doctors considered appropriate in view of her situation'.⁷¹⁵ Guidance was also provided by the Court on the question of what meaningful consent in relation to reproductive intervention amounts to. The Court based its theory of 'informed consent' on CEDAW's General Recommendation 24 and the Convention on Human Rights and Biomedicine. The Court also looked at human freedom, human dignity and autonomy when considering what amounted to consent.

The Court came to the conclusion that 'informed consent' includes information about the procedure, information on the individual's health status at the time, alternatives to the proposed procedure and then time for the individual to think over the information provided to them. It was seen that 'the applicant's informed consent could not be dispensed with on the basis of an assumption on the part of the hospital staff that she would act in an irresponsible manner with regard to her health in the future'.⁷¹⁶ The Court held there was no 'imminent necessity from a medical point of view' and the procedure and the way in which the applicant was asked to give her consent would 'arise in her feelings of fear, anguish and inferiority'.⁷¹⁷ The Court on this basis found a violation of Article 3. The Respondent State was found to have failed in its positive obligation to provide the applicant with 'a sufficient

⁷¹⁴ *ibid.*, para 105.

⁷¹⁵ *ibid.*

⁷¹⁶ *V.C. v Slovakia*, para 113.

⁷¹⁷ *ibid.*, paras 117-118.

measure of protection' to enable her to enjoy her right to private and family life.⁷¹⁸

The Court stated that it did 'not find it necessary to separately determine whether the facts of the case also gave rise to a breach of Article 14 of the Convention'.⁷¹⁹ I would be of the view that the Court's statement that the applicant's consent could not be dispensed with based on the assumption that she would be irresponsible with her health in the future, does not only relate to Article 3 but also to Article 14. I base this assertion on the fact that the Respondent State stated they acted the way they did due to negative stereotypes of Roma and their need to intervene was based on ethnicity.⁷²⁰ Yet, the Court concluded there was no need to consider Article 14.

N.B. v Slovakia

In the subsequent case of *N.B. v Slovakia*, the applicant N.B. was a Romani woman who during the course of a routine cesarean birth was sterilised.⁷²¹ The hospital stated that the sterilisation was carried out with the applicant's consent and was necessary, as her uterus had ruptured as a result of a suture coming loose during her second pregnancy and thereby putting her life at risk. The medical team stated that a future pregnancy would put both the lives of the applicant and fetus at risk. The Court found a violation of Article 3 of the Convention. The Court criticized the hospital and stated that;

[B]y removing one of the important capacities of the applicant and making her formally agree to such a serious medical procedure while she was in labour, when her cognitive abilities were affected by medication, and then wrongfully indicating that the procedure was

⁷¹⁸ *V.C. v Slovakia*, para 154. Elisa Novic, *The Concept of Cultural Genocide: An International Law Perspective* (Oxford University Press 2016) 183-184.

⁷¹⁹ *V.C. v Slovakia*, para 180.

⁷²⁰ *ibid.* para 150.

⁷²¹ *N.B. v Slovakia* App no 29518/10 (ECHR, 12 June 2012).

indispensable for preserving her life, violated the applicant's physical integrity and was grossly disrespectful of her human dignity.⁷²²

The Court also noted that the applicant was underage and at seventeen years old was at a very 'early stage of her reproductive life', therefore it held that the 'sterilisation grossly interfered with her physical integrity, as she was thereby deprived of her reproductive capacity'.⁷²³ The Court also agreed with the applicant that the procedure, its serious nature and consequences, and the way in which the applicant suffered mentally due to her position in the Roma community having diminished due to her inability to have children, would have led the applicant to experience feelings of anguish, fear and inferiority.⁷²⁴ Due to the domestic investigations that were carried out by the Respondent State, the Court held there was no procedural violation of Article 3.⁷²⁵

The Court held there was a violation of Article 8, as the applicant's sterilisation affected her ability to have more children, 'affected her reproductive health status' and thereby had an effect on a number of aspects of her private and family life.⁷²⁶ It was crucially pointed out in *V.C.* that the domestic practices of sterilisations being carried out without informed consent and the statutory provisions of domestic law in Slovakia were particularly affecting 'vulnerable individuals belonging to various ethnic groups', and the Court did acknowledge that Roma women were particularly at risk due to the shortcomings in practice and in domestic law.⁷²⁷ The Court stated that the failure of the State to provide safeguards to give 'special consideration to the reproductive health of the applicant as a Roma woman'

⁷²² *N.B. v Slovakia*, para 77.

⁷²³ *ibid.*, para 79.

⁷²⁴ *N.B. v Slovakia*, para 80. Alexandra Oprea, 'Toward the Recognition of Critical Race Theory in Human Rights Law: Roma Women's Reproductive Rights' in Jacqueline Bhabha, Andrzej Mirga and Margareta Matache (eds), *Realizing Roma Rights* (University of Pennsylvania Press 2017) 39, 47-49.

⁷²⁵ *N.B. v Slovakia*, paras 87-88.

⁷²⁶ *ibid.*, para 95.

⁷²⁷ *ibid.*, para 96.

and the lack of respect for statutory provisions led to a failure in protecting Article 8 rights.⁷²⁸ Could this finding not have led the Court to consider a possible violation of Article 14, given that the Court was acknowledging that safeguards were needed to give special consideration to Roma? One could argue that safeguards being needed for a particular group might be evidence of this group being at risk and possibly discriminated against in the Respondent State. The Court, though, found that there was no need to examine separately an allegation of a violation of Article 14.

I.G., M.K. and R.H. v Slovakia

In *I.G., M.K. and R.H. v Slovakia*, three Romani women had been sterilised in the same hospital.⁷²⁹ Both the first and second applicants were minors and were sterilised during the birth of their second child by cesarean section.⁷³⁰ The third applicant was sterilised during the birth of her fourth and fifth children (twins) by cesarean section.⁷³¹ As with the previous cases all three women alleged that they had not given their informed consent. The first applicant was asked to sign a form the day after her cesarean and was told the form had to be signed by all women who had undergone cesareans.⁷³² The applicant had no idea at the time that she had been sterilised.⁷³³ The second and third applicants were also asked to sign consent forms during labour while they were experiencing the effects of labour and medication and were unsure of what they were signing.⁷³⁴

⁷²⁸ *N.B. v Slovakia*, para 97. Carmen Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law: Living Instrument or Extinguished Sovereignty?* (Hart Publishing 2017) 129.

⁷²⁹ *I.G., M.K. and R.H. v Slovakia* App no 15966/04 (ECHR, 29 April 2013).

⁷³⁰ *ibid.*, paras 9 and 18.

⁷³¹ *ibid.*, para 23. Charilaos Nikolaidis, *The Right to Equality in European Human Rights Law: The Quest for Substance in the Jurisprudence of the European Courts* (Routledge 2015) 72.

⁷³² *ibid.*, para 12.

⁷³³ *ibid.*, para 14.

⁷³⁴ *ibid.*, paras 19, 20 and 25

The first and second applicants claimed a breach of Article 3. They alleged they had been subjected to inhuman and degrading treatment due to their sterilisation without their or their representatives' informed and full consent. They also wished for a procedural violation of Article 3 to be found, as the authorities had failed to carry out an effective, fair and thorough investigation into the circumstances surrounding the sterilisations. A substantive violation of Article 3 was found in the case of the first and second applicant. A procedural violation of Article 3 was also found on the grounds that the way in which the domestic authorities proceeded with their investigation did not meet the 'requirement of promptness and reasonable expedition'.⁷³⁵ A similar reasoning to that given in the judgment in *N.B.* was given by the Court in deciding that there had been a violation of Article 8 in respect of both the first and second applicant. As R.K., the third applicant, died during the course of the proceedings the Court did not consider her complaint.⁷³⁶

The Court in the sterilisation cases has been very vocal in its discussion of the need for 'informed consent' to be provided by the patient before a proposed procedure can be undertaken. The Court commented strongly against a State taking this right to bodily integrity away from the women. The three cases just discussed were decided on in 2011 and 2012, yet the sterilisations had occurred as far back as the 1990s. These dates provide a number of interesting discussion points: forced sterilisation was still being perpetrated on women in Slovakia as late as the late 20th century and, even though a number of reports had been published in Slovakia (as discussed in a previous section) providing details of the State organised sterilisation practices, the Slovak government in each of the three cases denied any wrongdoing. It could therefore be argued that the "historic" sterilisation policies that did discriminate against Roma had

⁷³⁵ *ibid.*, para 133.

⁷³⁶ *ibid.*, paras 89-93.

not been consigned to the past and, as evidenced by the Slovak government in their repeated denial of wrongdoing, the State was of the view that treating Roma as they did was consistently justified. This can be contrasted with the attitude of the Czech government in the next two cases involving friendly settlements.

5.4.3 Cases ending in a friendly settlement

As of 2015 two cases of Romani women who had been involuntarily sterilised in the Czech Republic reached the ECtHR. Both cases are very similar, in that the applicants had been successful in their claims of forced sterilisation before the domestic courts in the Czech Republic. The applicants brought their cases to the ECtHR not due to their being unsuccessful in their claims of forced sterilisation, but rather because they could not be awarded financial compensation or the compensation awarded to them had not been paid.

Ferenčíková v the Czech Republic

The applicant in this case had been successful in her case before the District court in Ostrava in 2005. The Court found that the applicant had been sterilised without voluntary consent.⁷³⁷ The hospital was ordered to offer an official apology, however, the statute of limitation barred the financial redress. The applicant appealed unsuccessfully to the Supreme and the Constitutional Courts. The applicant then launched proceedings before the ECtHR.⁷³⁸ The case was closed in August 2011 with a friendly settlement between the applicant and the Czech Republic with the applicant being awarded 10,000 EUR from the Czech government.

⁷³⁷ Marsha A Freeman, Christine Chinkin and Beate Rudolf, *The UN Convention on the Elimination of All Forms of Discrimination Against Women A Commentary* (Oxford University Press 2012) 332-333.

⁷³⁸ *Ferenčíková v the Czech Republic* App no 21826/10 (ECHR, 30 August 2011).

R.K. v the Czech Republic

Similar to the previous case, the applicant had been successful in the District and Regional Courts, financial compensation had been ordered but not paid. The friendly settlement between the applicant and the Czech Republic in November 2012 took place after the case had been pending before the ECtHR for four years.⁷³⁹ A 10,000 EUR financial award was made, with the Czech government denying any systemic practice and admitting an exceptional failure on the part of the state.

While it could be argued that it was positive that these cases ended in a friendly settlement and that the domestic courts in the Czech Republic had found in favour of the applicant, it is interesting that it was in the second case, a prolonged failure on the State's part to pay the compensation that was owed. While the State did admit an exceptional failure on its part, it still waited for four years to reach a friendly settlement on the pending case before the ECtHR. Could one argue that this was indicative of the Czech State not taking financial compensation for forced sterilisation as seriously as it should give the gross violation of women's human rights, bodily integrity and dignity that had been involved? While neither of these cases reached the Court and therefore no allegation of Article 14 was discussed it is important to note the seemingly differing attitudes of the two States involved in these cases thus far: the Czech Republic and Slovakia. Applicants in the domestic courts in the Czech Republic were successful in their claims of forced sterilisation and apologies were offered, while in Slovakia the applicants came up against a State that constantly viewed Romani women as being incapable of making decisions for themselves, which therefore, the Slovak State argued, merited the State intervening on their behalf. These cases help to illustrate the still vulnerable and marginalized position in which

⁷³⁹ *R.K. v the Czech Republic* App no 7883/08 (ECHR, 27 November 2012).

Roma are in particular States. The next section will look at the four cases that appeared before the Court and analyse the discussion or lack thereof of allegations of violations of Article 14.

5.5 Analysing the allegations of violations of Article 14 before the European Court of Human Rights in the alleged forced sterilisation cases.

This section will analyse the one case of access to medical records and three cases of allegations of forced sterilisation that have appeared before the European Court of Human Rights. The section will first look at whether an allegation of a breach of Article 14 was made in each of the cases, then will look at what the applicants in these cases were required to prove for a successful violation of Article 14 and this will be followed with a discussion of procedural or substantive violations of Article 14 and a section on indirect discrimination, and finally the third section will provide an overall conclusion on how these cases have impacted on the development of Article 14.

5.5.1 Was an allegation of a violation of Article 14 made before the ECtHR in the access to medical records and alleged forced sterilisation cases?

As discussed in an earlier chapter, the purpose of Article 14 is to ensure that the rights and freedoms set out in the Convention are secured for all individuals without discrimination. Article 14, as previously mentioned, is not a freestanding article and often, where the Court finds a violation of a substantive Convention right, then it will not find it necessary to examine an allegation of a breach of Article 14. In the alleged sterilisation cases the majority of applicants in the various cases brought allegations

of breaches of Article 14 in conjunction with other Convention articles. The applicants in these cases alleged that not only were they forcibly sterilised, but that their sterilisation was tied to their ethnicity.

The first case amongst those discussed earlier, where the applicants alleged a violation of Article 14, was in *K.H. and Others v Slovakia*.⁷⁴⁰ The applicant claim focused on access to medical records. The admissibility decision of October 2007 declared the application partly admissible. Claims of violations of Article 8, Article 6.1 and Article 13 were found to be admissible. There was no discussion of the inadmissibility of the Article 14 race discrimination allegation. There has been growing criticism in recent years of the '[e]xtremely terse reasoning of single judge decisions and the lack of publication of these decisions [which] is inherently problematic.'⁷⁴¹ Gerards made these comments in relation to the lack of reasoning provided in cases of inadmissibility and they can be applied here, where no judicial reasoning was provided for the lack of admissibility of an allegation of a violation of Article 14. Without concrete reasons for why the Article 14 claim was declared inadmissible, one must surmise that the claim did not fulfill the admissibility criteria, that it was possibly manifestly ill-founded or was an unsubstantiated complaint. As Gerards and Schauer argue, 'the outside world can only know if decisions are reasonable if they are aware of the reasons why they have been taken'.⁷⁴² As the Article 14 claim never reached past the admissibility stage, it is difficult to consider the impact which the *K.H.* case would have had on the development of the Article, aside from stating that perhaps the lack of discussion of a claim of a violation of Article 14 can be seen to be mirrored in those cases where an Article 14 claim is

⁷⁴⁰ *K.H. and Others v Slovakia* App no 32881/04 (ECHR, 6 November 2009).

⁷⁴¹ Janneke Gerards, 'Inadmissibility Decisions of the European Court of Human Rights: A Critique of the Lack of Reasoning' (2014) 14 *Human Rights Law Review* 148, 154.

⁷⁴² Gerards, 'Inadmissibility' 154. Frederick Schauer, 'Giving Reasons' (1995) 47 *Stanford Law Review* 633, 640 and 652.

found to be admissible, but is then not considered by the Court. Perhaps there would be a more robust understanding and use of Article 14 if the Court, at each level, had to provide reasoning for why they have not declared the claim admissible or have decided not to consider a claim at the merits and judgment stage.

In *V.C. v Slovakia* the applicant alleged violations of Articles 3, 8, 12, 13 and 14 of the Convention.⁷⁴³ While the outcome of the case was largely positive for the applicant, there was one arguably disappointing aspect to the judgment, namely the Court's decision to not separately address the alleged violation of Article 14. This decision by the Court essentially meant that the crux of the case was not dealt with: that the applicant experienced this forced sterilisation because she was a Romani woman. The applicant alleged 'that her ethnic origin had played a decisive role in the decision by the medical personnel of Prešov Hospital to sterilise her'.⁷⁴⁴ She also argued that she 'had been subjected to a discrimination on the ground of her sex as she had been subjected to difference in treatment in connection with her pregnancy'.⁷⁴⁵ She also contended that, as the sterilisation was carried out without her consent, it amounted to a 'form of violence against women. As such it was contrary to Article 14'.⁷⁴⁶ The applicant decided not to continue with her separate complaint about the segregation of Roma patients in the hospital.⁷⁴⁷ While the Slovak Government did respond to these allegations, which will be discussed in the next section, the Court itself did not feel the need to separately consider a violation of Article 14. The Court found that the Respondent State had failed in its positive

⁷⁴³ *V.C. v Slovakia* App no 18968/07 (ECHR, 8 November 2011).

⁷⁴⁴ *V.C. v Slovakia*, para 170

⁷⁴⁵ *ibid.*, para 171. Sonja C Grover, *The European Court of Human Rights as a Pathway to Impunity for International Crimes* (Springer 2010) 114.

⁷⁴⁶ *V.C. v Slovakia*, para 171.

⁷⁴⁷ *ibid.*, para 170. Rory O'Connell and Sjeff Gevers, 'Fixed Points in a Changing Age? The Council of Europe, Human Rights, and the Regulation of New Health Technologies' in Mark L Flear, Anne-Maree Farrell, Tamara K Hervey and Thérèse Murphy (eds), *European Law and New Health Technologies* (Oxford University Press 2013) 61.

obligation to provide a level of protection to enable the applicant to enjoy her right to respect for her private and family life as a member of the vulnerable Roma community. Therefore, the Court held by six votes to one that there was no need to separately consider a violation of Article 14.⁷⁴⁸

This reasoning was repeated in the subsequent case of *N.B. v Slovakia*, where the Court again did not find it necessary to separately consider Article 14 as they had found a violation of Article 8.⁷⁴⁹ The Court did make some points on doctors not acting in bad faith and the lack of established evidence to show that the medical staff's conduct was intentionally racially motivated.⁷⁵⁰ These issues of intent and subjective attitude will be dealt with in the next section, but again, it is noteworthy that the Court, while offering some minimal comments on the issue of an allegation of Article 14, did not consider separately whether there had been a violation of that Article.⁷⁵¹

In *I.G., M.K. and R.H. v Slovakia* the applicants, similarly to the previous cases, brought an alleged violation of Article 14 before the Court.⁷⁵² The first and second applicants argued:

[T]hat their complaint was to be considered in the context of the intolerance to which persons of Roma origin were subjected in general in Slovakia and which was also prevalent among medical personnel. That was proved by the applicants' segregation during this stay in Krompachy Hospital. The applicants also relied on statements by several politicians and Government members addressing the public's fears concerning high Roma birth rates and calling for the regulation of Roma fertility. These factors indicated *prima facie* that they were subjected to racial discrimination.⁷⁵³

⁷⁴⁸ *V.C. v Slovakia*, decision of the Court, para 6.

⁷⁴⁹ *N.B. v Slovakia* App no 29518/10 (ECHR, 12 June 2012).

⁷⁵⁰ *ibid.*, para 121.

⁷⁵¹ *ibid.*, para 7.

⁷⁵² *I.G., M.K. and R.H. v Slovakia* App no 15966/04 (ECHR, 29 April 2013).

⁷⁵³ *ibid.*, para 159.

The applicants made clear and well-founded arguments and the Court did state that, '[i]n the circumstances of the case, the Court considers it most natural to entertain the discrimination complaint in conjunction with Article 8.'⁷⁵⁴ However, the Court returned to its previous reasoning in *V.C.* and *N.B.* and stated that, once again, it needed to focus on whether the sterilisation was part of an organised policy, the absence of bad faith of the staff and the fact that the conduct was not intentionally racially motivated.⁷⁵⁵

In all three cases related to forced sterilisation, the applicants have alleged violations of Article 14. In all three cases the Court offered some minimal comments on the allegations of racial discrimination, but felt ultimately that they did not need to separately consider a violation of Article 14, as the Court had considered the issues raised under a claim of a violation of Article 8. In the next section the comments made by the Court in relation to racial discrimination in these cases will be more closely considered.

5.5.2 What Does the Article 14 Applicant Have to Prove?

As discussed in the earlier chapter on Article 14, there is an argument that the Article 14 applicant has to prove: 1) the different or similar treatment at issue, 2) its basis, and 3) the applicant being in a different or similar position to the comparator. The burden will only then be shifted to the Respondent State; the onus will then be on the Respondent State to provide objective and reasonable justification. The Roma applicants in the three cases taken before the Court alleged that they were treated differently to the majority population, the basis for this difference of treatment being their ethnicity. The applicants involved also alleged that they were discriminated

⁷⁵⁴ *ibid.*, para 164.

⁷⁵⁵ *ibid.*, para 165.

against based on their gender. The applicants also argued that their ethnicity made them different to the comparator.

In *V.C. v Slovakia* the Government responded to these claims by denying ‘any practice of targeted discrimination of Roma patients in medical institutions in Slovakia’.⁷⁵⁶ They also stated that the sterilisation was for medical purposes, the applicant had consented to the procedure and the entry into the medical records that the applicant was Roma was due to ‘those patients (whose) social and health care had been frequently neglected and they therefore required special attention’.⁷⁵⁷ The Court commented that:

Similarly, and notwithstanding the fact that the applicant’s sterilisation without her informed consent calls for serious criticism, the objective evidence is not sufficiently strong in itself to convince the Court that it was part of an organised policy or that the hospital staff’s conduct was intentionally racially motivated.⁷⁵⁸

While the Court acknowledged that the Respondent State’s practices were based on negative stereotypes of Roma and rejected their justifications, the Court did not refer to the State’s arguments as discriminatory. The Court, while rejecting the government’s argument in relation to VC’s neglecting her health and failing to undergo pre-natal checks during pregnancy, did not find this to be discriminatory.

The majority of the Court in *V.C.* focused on the intention of the doctors and found that they had not acted in bad faith. Again, as mentioned in the previous chapter on anti-Roma violence, there is no evidentiary burden set down in the ECHR that states that the applicant must prove racial intent on the part of the individual who is alleged to have acted in an intentionally racially motivated manner. The need to prove intent is an enormous burden to place on an applicant. The Court in Article 14 cases often refers to intent, yet has provided little guidance on what evidence it would find

⁷⁵⁶ *V.C. v Slovakia*, para 172.

⁷⁵⁷ *ibid.*, paras 173-174.

⁷⁵⁸ *ibid.*, para 177.

as being sufficient to show intent. As seen in the previous chapter, the uttering of racist comments or in the instant cases marking out Roma by their ethnicity on medical forms, will not amount to being sufficient to show subjective intent. While Roma being identified as Roma on a medical form arguably is not sufficient to show subjective racial intent, if coupled with the State's justification that Roma do not care for their health could be sufficient to show that there is a need to consider a violation of Article 14 and in particular a procedural violation of Article 14 due to the lack of investigation into possible racial motivations.

While the majority of the Court, namely Judges Bratza, Garlicki, Björgvinsson, Šikuta, Hirvelä and Poalelungi, did not separately consider a violation of Article 14, Judge Mijović provided a dissenting opinion. While agreeing with the violations of Articles 3 and 8, she felt there should have been a finding of a violation of Article 14. The Judge questioned the Respondent Government's argument that the words 'Patient is of Roma origin' were placed on her medical chart in order for her to receive 'special attention due to Roma patients health and social care often being neglected'.⁷⁵⁹ The Judge contested this point by referring to this 'special attention' having led to the sterilisation of the applicant.⁷⁶⁰ The Judge stated:

Finding violations of Articles 3 and 8 alone in my opinion reduces this case to the individual level, whereas it is obvious that there was a general State policy of sterilisation of Roma women under the communist regime (governed by the 1972 Sterilisation Regulation), the effects of which continued to be felt up to the time of the facts giving rise to the present case ... The fact that there are other cases of this kind pending before the Court reinforces my personal conviction that the sterilisations performed on Roma women were not of an accidental nature, but relics of a long-standing attitude towards the Roma minority in Slovakia. To my mind, the applicant was 'marked out' and observed as a patient who had to be sterilised just because of her origin, since it was obvious that there were no medically relevant reasons for sterilising her. In my view, that represents the strongest form of

⁷⁵⁹ *V.C. v Slovakia*, Dissenting opinion of Judge Mijović..

⁷⁶⁰ *ibid.* David M Crow, *History of the Gypsies of Eastern Europe and Russia* (St. Martin's Griffin 1995) 60.

discrimination and should have led to a finding of a violation of Article 14 in connection with the violations found of Articles 3 and 8 of the Convention.⁷⁶¹

Judge Mijović was the only judge in any of the three cases that provided a dissenting opinion that there should have been a violation of Article 14.

The Judge focused on the historic context, as discussed in an earlier section, that based on the history of a general State policy of sterilisation and number of cases pending before the Court, sterilisation of Roma was a relic of a long term attitude towards Roma in Slovakia. The Judge also looked at the fact that there were other pending cases concerning forced sterilisation of Roma in Slovakia in the same time period as the alleged forced sterilisation in the *V.C.* case. While the Court can only consider the facts in the case at hand, if one of the core allegations was that the applicant had been sterilised due to her ethnicity, then it could be argued that the Court should consider if there was a practice in the Respondent State of targeting Roma as an ethnic minority, thereby discriminating against them. The dissenting judgment also focused on the fact that the applicant's medical records marked her out as being Roma and the Respondent State focused on the reasoning that Roma needed additional care with their health due to their neglecting it in the past. Again, this amounts to negative stereotyping and could lead to and be evidence of the existence of discriminatory practices.

In *N.B. v Slovakia* the Court did not find it necessary to separately consider Article 14, as they had found a violation of Article 8.⁷⁶² The Chamber, similarly to the decision in *V.C.*, comprised of Judges Bratza, Garlicki, Björgvinsson, Šikuta, and Hirvelä, with the additions of Bianku and Vučinić. The Court restated the points made in *V.C.* and held that:

⁷⁶¹ *V.C. v Slovakia*, Dissenting opinion of Judge Mijović.

⁷⁶² *N.B. v Slovakia* App no 29518/10 (ECHR, 12 June 2012).

The Court has previously found that the practice of sterilisation of women without their prior informed consent affected vulnerable individuals from various ethnic groups. In view of the documents available, it cannot be established that the doctors involved acted in bad faith, that the applicant's sterilisation was a part of an organised policy, or that the hospital staff's conduct was intentionally racially motivated. At the same time, the Court finds no reason for departing from its earlier finding that shortcomings in legislation and practice relating to sterilisations were liable to particularly affect members of the Roma community.⁷⁶³

In previous cases involving violence against Roma, the Court had used the phrase 'subjective attitude'.⁷⁶⁴ There had been much discussion of the difficulty in proving the absence of this subjective attitude, most often on the part of police officers or authorities. The Court found that it would be too harsh a burden to place on the Respondent State to show that medical personnel or police officers, for example, lacked subjective racial intent and that therefore it should be the applicant that should prove the presence of subjective racial intent. The use of the word 'intentionally' by the Court should ring alarm bells when considering the effect that the intent requirement could have on cases involving allegations of a substantive violation of Article 14. The issue of intent and indirect discrimination was also not addressed by the Court and will be looked at in a subsequent section.

In *I.G., M.K. and R.H. v Slovakia* the Court once again returned to the 'intent' factor, as previously discussed in *N.B.*⁷⁶⁵ The Chamber again consisted of Judges Bratza, Garlicki, Šikuta, Hirvelä, Bianku, Vučinić with Nicolaou. This was the second case in quick succession in which the Court had moved away from the 'subjective attitude' approach to discussing the intent requirement. There was no dissenting opinion, though, from the Court on Article 14 and therefore no additional comment was made. It can be seen in *I.G.* that the Court was returning to viewing ethnicity as

⁷⁶³ *N.B. v Slovakia*, para 121.

⁷⁶⁴ *N.B. v Slovakia*, para 121-124.

⁷⁶⁵ *I.G., M.K., and R.H. v Slovakia* App no 15966/04 (ECHR, 29 April 2013).

part of a violation of the right to private and family life under Article 8, rather than as a form of Article 14 discrimination. Cahn worries that the lack of consideration of Article 14 in these sterilisation cases signals a return to the jurisprudence in cases such as *Buckley, Chapman and Connors*.⁷⁶⁶ One could also argue that the lack of separate consideration of Article 14 was the Court reverting to seeing Article 14 as an accessory article with no life of its own. In cases such as these, where such serious allegations were being made, women were sterilised due to their ethnicity and the growth of the Roma population was being prevented by these practices, it would be crucial to see a thorough consideration of an allegation of racial discrimination. Again one would argue, as mentioned earlier, that the burden of proof is far too high with the applicant having to prove subjective racial intent; nowhere in the Convention does it state that the burden of proof or the evidence needed in cases before the Court would need to meet the same standard as “beyond all reasonable doubt” in a criminal court. The next section will consider whether the Court looked at procedural and/or substantive violations of Article 14.

5.5.3 Procedural or Substantive Violations

While the Court in all three cases felt there was no need to separately consider a violation of Article 14, the Court made some comments that possibly indicated their background thinking. In *V.C.* the Court focused on the fact that there was a lack of evidence to convince the Court that the sterilisation was part of an organized policy or that the conduct of medical staff was intentionally racially motivated.⁷⁶⁷ This line of thinking was repeated in the two subsequent cases. By the time of the sterilisation

⁷⁶⁶ Claude Cahn, *Human Rights, State Sovereignty and Medical Ethics: Examining Struggles Around Coercive Sterilisation of Romani Women* (Koninklijke Brill NV 2015) 202.

⁷⁶⁷ *V.C. v Slovakia*, para 177.

cases, the Court had begun to consider procedural and/or substantive violations of Article 14. Yet, in the three cases discussed in this section, the Court's only comments in relation to the allegation of a breach of Article 14 relate predominantly to the substantive limb of an alleged violation of Article 14, with the Court discussing subjective intent or bad faith and the absence of both in each of the cases. The Court, in their brief discussion of the allegation of a violation of Article 14 in each case, dismissed any consideration of it due to the lack of evidence of intentional racial motivation. As mentioned in the preceding chapter, the Court has never found a substantive violation of Article 14 in any of the anti-Roma violence cases, similarly to these sterilisation cases.. It could be argued that the burden of proof and the need to prove subjective intent, much like in the anti-Roma violence cases, has precluded any applicant from being able to successfully prove that their being Roma led to the treatment meted out to them and their being racially discriminated against.

The Court in each of the cases also did not discuss at any great length the possibility of a procedural violation of Article 14. The only relevant mention by the Court was that they were of the opinion that there was a lack of evidence of an organised policy that targeted Roma, in particular, and other minorities had also been affected by sterilisation.⁷⁶⁸ As Judge Mijović pointed out in *V.C.*, though, there had been a general State policy of sterilisation under the Communist regime in Slovakia and therefore one could argue that the Court should have considered a procedural violation, as the Respondent State in these cases did not investigate the possible racial undertone to the sterilisations that were carried out. Considering the history of the long-term state policy of sterilisation in the Respondent State, it is questionable why the Court did not relate the State's negative stereotypes of Roma as a justification for

⁷⁶⁸ *V.C. v Slovakia*, para 177.

their treatment and lack of consideration of a racial undertone to the sterilisations. The Court should have thus considered the possibility of a procedural violation. In addition to not considering the possibility of a procedural violation, the Court did not consider the possible existence of indirect discrimination, as discussed in the next section.

5.5.4 Indirect Discrimination

Indirect discrimination was first recognised in *D.H. v Czech Republic* in 2007.⁷⁶⁹ In a case of educational segregation, the Grand Chamber found that educational policies in the Czech Republic led to a violation of Article 14, as the policies had indirectly discriminated against Roma children. In all three of the sterilisation cases the Court discussed how there was a lack of evidence of the sterilisations being part of an organised policy. As Judge Mijović pointed out, though, in his dissenting judgment in *V.C.*, there had been a long and protracted history of laws and policies in the Respondent State. While historic laws are clearly not evidence of a present day policy, in *V.C.* the applicants and dissenting Judge referred to numerous reports of NGOs on the practice of sterilising Romani women in a number of European countries.⁷⁷⁰ It was not clear whether the Court was relying on these reports or merely making reference to them. In the majority judgment the Court referred to statistics from NGO reports that displayed a worrying climate of systemic sterilisation of Romani women in particular European countries, yet the Court did not see this as being a factor when considering if they should address the alleged violation of Article 14.⁷⁷¹ The Court stated that:

⁷⁶⁹ *D.H. v Czech Republic* App no 57325/00 (ECHR, 13 November 2007).

⁷⁷⁰ *V.C. v Slovakia*, para 170 and dissenting opinion of Judge Mijović.

⁷⁷¹ *ibid.*, para 178.

[I]t is relevant from the viewpoint of Article 14 that in their materials both the Human Rights Commissioner and ECRI identified serious shortcomings in the legislation and practice relating to sterilisations. They expressed the view that those shortcomings were liable to particularly affect members of the Roma community, who were severely disadvantaged in most areas of life. The same was implicitly admitted by the group of experts established by the Ministry of Health, who recommended special measures in respect of the Roma population.⁷⁷²

The Court followed the ECRI and Council of Europe Human Rights Commissioner in identifying that the reason the Roma were at a particular risk was due to:

[T]he widespread negative attitudes to the relatively high birth rate among the Roma compared to other parts of the population, often expressed as worries of an increased proportion of the population living on social benefits.⁷⁷³

Judge Mijović, in her dissenting opinion, pointed to a report of ECRI that highlighted their concern that sterilisations were taking place on an ongoing basis without the informed consent of the Romani women involved.⁷⁷⁴ She made clear that given the amount of cases on forced sterilisations of Romani women which the Court was about to hear, it could not have been ‘accidental’ that it was Romani women who were being sterilised.⁷⁷⁵ While the Court had significant evidence before it of V.C.’s treatment in hospital and the reference to her Roma origin, against a backdrop of numerous reports finding systemic sterilisation practices in Slovakian hospitals, the Court felt no need to examine a separate allegation of a violation of Article 14.⁷⁷⁶

⁷⁷² *V.C. v Slovakia*, para 178.

⁷⁷³ *ibid.*, 146-147.

⁷⁷⁴ *ibid.*, Dissenting opinion of Judge Mijović.

⁷⁷⁵ *ibid.*

⁷⁷⁶ *V.C. v Slovakia*, para 47. The applicant relied on the following documents:

Commission of the European Communities, *Regular Report on Slovakia's Progress Towards Accession* (2002) 31, European Roma Rights Centre, *Stigmata: Segregated Schooling of Roma in Central and Eastern Europe, a survey of patterns of segregated education of Roma in Bulgaria, the Czech Republic, Hungary, Romania and Slovakia* (2004), European Roma Rights Centre, *Discrimination in the Slovak Judicial System* (Roma Rights 2002) 106–108, Bureau of Democracy, Human Rights and Labour, US State Department, *Human Rights Practices: Slovak Republic 2001* (2002) 5, Open Society Institute, *Monitoring the EU Accession Process: Minority Protection in Slovakia* (2001), Rachel Tritt, Jeri Laber and Lois Whitman, *Struggling for Ethnic Identity: Czechoslovakia's Endangered Gypsies* (Human Rights Watch 1992) 19, 22 and 139- 144.

Again the Court did not consider that while the laws related to sterilisation in Slovakia may have officially been repealed, the public consensus was that the Roma population should be reduced, with key politicians and members of Government voicing this opinion. One might consider that given the strong evidence of anti-Roma views in the State, there was a possibility that still existing State policies indirectly targeted Roma women more than the majority population. This would be due to the endemic and widespread negative Roma stereotypes that exist in Slovakia and the poverty, discrimination and misunderstanding of Roma culture that exists within the majority population.

In *I.G. and Others v Slovakia* the applicants referred to a number of documents discussing the history of the sterilisation of Romani women.⁷⁷⁷ They pointed to the Body and Soul Report, reports of both Slovakian and international human rights organisations and governmental and inter-governmental bodies' calls for the Slovakian authorities to conduct an investigation into the allegations of the forced sterilisations of Romani women in Slovakia.⁷⁷⁸ The Respondent Government acknowledged that the Body and Soul Report representatives of the Slovakian Society for Planned Parenthood and Parenthood Education had pointed to the lack of a requirement of prior informed consent to sterilisation, which had been absent from the regulatory framework in Slovakia.⁷⁷⁹ However, the Respondent Government stated that frequently the only opportunity to inform Romani women about conception and

David M. Crow, *History of the Gypsies of Eastern Europe and Russia* (St. Martin's Griffin 1995) 60. Ruben Pellar and Zbyněk Andrš, *Statistical Evaluation of the Cases of Sexual Sterilisation of Romani Women in East Slovakia – Appendix to the Report on the Examination in the Problematic Sexual Sterilisation of Romanies in Czechoslovakia* (Center for Civil Human Rights 1990). E Posluchová and J Posluch, 'The Problems of Planned Parenthood among Gypsy Fellow-citizens in the Eastern Slovakian Region' (1989) 39(4) *Zdravotnícka Pracovníčka* 220-223.

⁷⁷⁷ *I.G., M.K. and R.H. v Slovakia*, para 75.

⁷⁷⁸ *ibid.*, para 75.

⁷⁷⁹ *ibid.*, para 77.

sterilisation was just before or during labour.⁷⁸⁰ Their justification was essentially based on the stereotype that Romani women did not attend pre-natal screening or undertake appropriate health checks while pregnant.

While the Court acknowledged that the Respondent State denied the Romani women's right to consent to the procedure, they did not comment on the justification of the Respondent State that they could only explain the procedure to the Romani women right before or during labour. This is an unacceptable reasoning for denying an individual the right to give informed consent. The Court did not consider that the lack of a requirement of prior informed consent in the regulatory framework in Slovakia would potentially have a particularly negative effect on Roma due to their possible lack of education and the oft discussed negative perception which the State had of Roma women and their ability to care for themselves. No consideration was given in the Court to the possibility that Roma would be potentially particularly vulnerable to the particular regulatory framework that existed in Slovakia. While in each of the cases the Court focused on the intention of the doctors and its finding that they did not act in bad faith, they did not discuss the effects which irregular sterilisation practices have on the Roma as a minority group. The Court's focus on intention as a bedrock of discrimination is questionable. In the earlier case of *D.H. and Others v the Czech Republic*, which will be discussed in the next chapter, the Court established that intent is not necessarily the benchmark of discrimination.⁷⁸¹ The Court in that case identified that the effect of an action is as crucial as the intent behind the act. It is questionable why the Court did not look to apply *D.H.*, particularly in relation to the negative stereotype, which the Respondent State had used in its justification of the treatment of Romani women. In addition, material was

⁷⁸⁰ *ibid.*, para 77.

⁷⁸¹ *D.H. and Others v The Czech Republic* App no 57325/00 (ECHR, 13 November 2007).

provided during the case which showed that forced sterilisation particularly affected Roma women.

5.6 The discussion of Equality before the European Court of Human Rights in the alleged forced sterilisation cases.

While the Court in each of the three cases did not separately consider a violation of Article 14, there are some comments that were made in the Court that could lead to some discussion of the model of equality which the Court adopted in these cases. The next two sections will firstly offer some comments on the model of equality being relied upon by the Court, and secondly apply Fredman's theory of intersectionality to the case law.

5.6.1 What model of equality has the Court relied on in these cases?

While separate violations of Article 14 were not considered in the three sterilisation cases, there were other cases concerning Roma applicants before the Court preceding these cases. A number of educational segregation cases were heard just before and during the same years as the cases in this chapter. The Court in those cases did consider separate violations of Article 14 and, as will be discussed in the next chapter, there was a clear move towards a reliance on a substantive model of equality in the Court.⁷⁸² In contrast, it is more difficult to surmise the model of equality which the Court was relying upon in the forced sterilisation cases.

⁷⁸² Panos Kapotas, 'A tale of two cities: positive action as "full equality" in Luxembourg and Strasbourg' in Kanstantsin Dzehtsiarou, Theodore Konstadinides, Tobias Lock and Noreen O'Meara (eds), *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and the ECHR* (Routledge 2014) 203.

Some points can be made from the comments that were made by the majority in each of the three cases and in the one dissenting opinion. In the majority judgments the Court appeared to focus on their historic reliance on the formal model of equality. This argument can be made based on the Court's discussion of how not only Roma women were affected by the sterilisation practices. This could be interpreted as the Court using the comparator requirement to view sterilisation in this context as not discriminatory, as many minorities were affected. The Court did not at any stage consider that Roma might be more adversely affected than other groups aside from once, in the *V.C.* majority judgment, when they said that Roma may be particularly affected by the legislative provisions, but then countered this at another point stating that other minorities were also affected by sterilisation policies.⁷⁸³ The Court did not consider the Roma's particular history of forced sterilisation in Slovakia and the negative stereotypes relied upon by the State in considering that Roma may be more adversely affected by sterilisation policies than other minorities. The Court also did not seem to look into the Respondent State's justification that they treated Roma differently due to their lack of care for their health; the Court did not see this as a form of discrimination masquerading as concern for a 'vulnerable group'.

Further to this, the Court's reliance on the applicant having to meet the high threshold of proving subjective racial intent again results in much evidence that could be relied on to show negative stereotyping or historic and endemic disadvantage and discrimination not being relied upon to help establish a *prima facie* case of discrimination which would transfer the burden to the Respondent State to justify its actions as the Court. While the burden of proof and evidentiary requirements do not relate directly to the model of equality relied upon by the Court, they are important to

⁷⁸³ *V.C. v Slovakia*, para 178.

consider. As will be seen in the *D.H.* case in the next chapter, if the Court solely focuses on the intent behind an action and not on its effect then particular pieces of evidence such as negative stereotypes will not be relied upon as evidence.⁷⁸⁴ If the Court in the sterilisation cases had looked at the effect which sterilisation had rather than just the intent behind the action, then perhaps the Court could have moved to a reliance on the substantive model of equality.

In offering her dissenting opinion Judge Mijović appeared to move towards a reliance on the substantive model of equality.⁷⁸⁵ Given that Judge Mijović was in the minority, it cannot be said that it was the Court moving towards a reliance on the substantive model. Yet one Judge's reliance on a different model did display that there was an appetite amongst the judiciary to broaden their consideration and application of Article 14. In turn it also showed that there was some, though limited, will to broaden the model of equality which the Judges utilise in considering a violation of Article 14, beyond the formal model which had historically been relied upon. Judge Mijović, much like Judge Bonello in *Anguelova*, as discussed earlier, evidences a move by some members of the judiciary to consider the rigid formal model of equality not fit for purpose in Article 14 cases.⁷⁸⁶ Both Bonello in the anti-Roma violence cases and Mijović in the sterilisation cases have set out in a most stringent fashion their views that not only should there have been findings of Article 14 violations in the cases they were deciding on, but also that the history of disadvantage and discrimination faced by Roma and negative stereotyping should be taken into account when considering an allegation of a violation of Article 14. This

⁷⁸⁴ Loretta de Plevitz, 'Special Schooling for Indigenous Students: a New Form of Racial Discrimination?' (2006) 35 *The Australian Journal of Indigenous Education* 44, 45. Lucie Cviklová, 'Social Closure and Discriminatory Practices Related to the Roma Minority in the Czech Republic Through the Perspective of National and European Institutions (2011) 1 *Journal of Comparative Research in Anthropology and Sociology* 55, 55-70.

⁷⁸⁵ *V.C. v Slovakia*, dissenting opinion of Judge Mijović.

⁷⁸⁶ *ibid. Anguelova v Bulgaria* App no 38361/97 (ECHR, 13 June 2002).

reasoning would point to the learned Judges moving towards a substantive model of equality, which would look at the particular history and situation of the applicant at hand rather than adopting a gender or race blind approach to the allegation.

While the majority of the Court have not moved in the same direction as Judge Mijović, they did show some positive signs of moving towards a more substantive model of equality when, in finding a violation of Article 8, they did mention the particular vulnerable position of the Roma. With the majority's focus on intent and lack of focus on effect, it could be said that the Court in their giving considerable thought to and in finding a violation of Article 8 did not feel the need to separately consider Article 14. While the Court should be commended for their consideration of the impact the sterilisation had on the applicants and their families, they did not consider the impact of racial discrimination had on the applicants. While of course it is crucial that the Court consider the impact on private and family life, it could be argued that by not considering why the applicants suffered this impact on their private and family life, the Court was 'leaving out' consideration of a core component of why the applicants were sterilised without consent.

Again perhaps the lack of progress in relation to the model of equality relied upon by the Court could be said to be due to the Court's lack of separate consideration of an Article 14 violation, but also due to the majority of the Court's reliance on the adoption of a gender and race blind approach, as advocated by the formal model of equality. While the three sterilisation cases before the Court could not be said to show a clear move towards a reliance on the substantive model of equality, the comments made by the minority judgment in *V.C.* show that there is unease in some areas of the Court with a reliance on the formal model. Perhaps the sterilisation cases show more about the Court's hesitant approach to Article 14 and its

use rather than providing a discussion of the models of equality to be utilised in considering an Article 14 violation. Some interesting comments that fit with Fredman's theory on intersectionality were made in the Court and these will be discussed in the next section.

5.6.2 Applying Fredman's theory of intersectionality to the case law

As discussed earlier, this thesis is focusing on the Court's move from a reliance on the formal model of equality to the substantive model of equality. Under the substantive model of equality there are a number of theories, which were discussed in Chapter 3. The theory of substantive equality which this thesis espouses, is that of intersectionality, as proposed by Fredman. As previously discussed in detail, Fredman's theory of intersectionality, focuses on a multidimensional concept of equality that looks at the intersection between different grounds of discrimination.⁷⁸⁷

In the *V.C.* case the applicant alleged 'that her ethnic origin had played a decisive role in the decision by the medical personnel of Prešov Hospital to sterilise her'; she also alleged that she 'had been subjected to discrimination on the ground of her sex as she had been subjected to difference in treatment in connection with her pregnancy'.⁷⁸⁸ She also argued, as mentioned earlier, that as her sterilisation was carried out without consent, it amounted to a 'form of violence against women'.⁷⁸⁹ *V.C.*'s arguments are the perfect example of intersectionality: she is claiming that her sterilisation was the result of both her sex and her ethnicity, which she ultimately viewed as violence against her as a woman due to her lack of consent for the procedure.

⁷⁸⁷ Sandra Fredman, *Discrimination Law* (2nd edn, Oxford University Press 2011) 25-33.

⁷⁸⁸ *V.C. v Slovakia*, para 170 – 171.

⁷⁸⁹ *ibid.*, para 171.

In two of the cases before the Court, the applicants provided NGO reports and expert reports from the International Federation of Gynecology and obstetrics to support their allegations of the endemic disadvantage and discrimination they had faced due to their ethnicity, but also due to their gender.⁷⁹⁰ NGO reports showed how Roma women were more likely to be sterilised than other groups; this assertion deals with two grounds of discrimination: they were sterilised due to their gender, but also due to their being Roma. In *V.C.* the applicant maintained that:

[I]n Prešov District 60% of the sterilisation operations performed from 1986 to 1987 had been on Roma women, who represented only 7% of the population of the district. Another study found that in 1983 approximately 26% of sterilised women in eastern Slovakia (the region where the applicant resides) were Roma; by 1987, this figure had risen to 36.6%.⁷⁹¹

The reports also discussed the history of forced sterilisation of Roma women and how Roma were viewed as being unable to care for their children and would be a burden on the State. As seen in many of the cases, the Respondent State Slovakia stated that special attention was paid to Roma mothers in hospital due to fact that they did not care for their health or attend pre-natal checks. The Respondent State did not seem to see the interrelation between endemic disadvantage, a history of forced sterilisation, forced adoption, lack of education, marginalisation and poverty as being contributing factors to why a Roma woman's health might not be as well cared for as a non-Roma pregnant woman is. The Court did not find the Respondent State's comments to be discriminatory, but instead acknowledged that the Roma are a vulnerable group.

Structural intersectionality can also be considered in the sterilisation cases. As discussed earlier, structural intersectionality takes place when various discriminatory structures in society established by laws and policies interrelate and cause a multifaceted disempowerment of the person in question. There existed no policy in

⁷⁹⁰ *ibid.*, paras 43-47. *I.G., M.K. and R.H. v Slovakia*, para 163.

⁷⁹¹ *V.C. v Slovakia*, para 45.

Slovakia that informed consent had to be given before a sterilisation could be carried out. This lack of protection particularly affected Roma women, as due to their poverty, marginalization and lack of education they were in a disadvantaged position, while non-Roma women may have challenged the lack of needing to give consent, many Roma women would have not known that the system was not protecting them. The European Roma Rights Centre has discussed how the ability to bear children is an intrinsic part of Romani women's identity.⁷⁹² The issue of age could also be discussed here. The majority of applicants in the three cases were quite young (one applicant was 17 years old), thus probably they were more afraid of authorities and medical staff. This could contribute to the vulnerable position a Roma woman could be placed in, as due to her ethnicity, gender, age, poverty and lack of education she could be much more detrimentally affected by the policies and laws in Slovakia in relation to sterilisation.

While I am positing these theories for the three cases before the Court, it can concretely be seen concretely, as mentioned earlier in the historical context section, that Roma women were acknowledged as being more targeted by State policies in many European countries. Even though many of the policies did not only target Roma women, it can be argued that due to the myriad factors discussed above, more Roma women were sterilised under those policies and laws than non-Roma women.⁷⁹³ In submissions before the Court, the applicants in *V.C.* provided information from reports that in 1999 nurses who were working in a Finnish refugee reception centres informed Amnesty International researchers that they 'had noticed unusually high

⁷⁹² European Roma Rights Centre, 'Five Years after the Government Officially Expressed its Regret, Victims of Involuntary Sterilisation Still Waiting for Compensation' (*European Roma Rights Centre*, 10 December 2014) <www.errc.org/article/five-years-after-the-government-officially-expressed-its-regret-victims-of-involuntary-sterilisation-still-waiting-for-compensation/4338> accessed 8 March 2015.

⁷⁹³ *V.C. v Slovakia*, paras 45-47.

rates of gynecological procedures such as sterilisation and removal of ovaries among female Roma asylum-seekers from eastern Slovakia'.⁷⁹⁴ All the reports provided to the researchers cited Prešov Hospital as one of the hospitals in Slovakia where such sterilisation practices were carried out, Prešov Hospital being the hospital where V.C. was sterilised.

While the Court repeatedly found that there was no organised policy in Slovakia to sterilise women, as pointed out by Judge Mijović there were a number of cases relating to allegations of forced sterilisation against the same State before the Court and Slovakia had a long history of sterilisation policies. One could argue that if NGO and numerous historical reports were to be relied upon, there was very strong evidence of intentional intersectional structural disempowerment in countries such as Slovakia. State policies should ensure that minorities such as the Roma are adequately protected, rather than either directly or indirectly discriminating against them through State enacted laws or policies. In relation to Fredman's four complementary and interrelated objectives, (redressing disadvantage, addressing stigma, stereotyping, prejudice and violence, facilitating participation and accommodating difference through structural change), the Court and the Respondent State could utilise the following strategies to ensure that positive change is brought about.⁷⁹⁵

5.6.3 Recognition of Roma as a Vulnerable Minority

The Court itself and NGO reports discussed the long-term disadvantage suffered by Roma and, in acknowledging violations of Article 8 and citing Roma as a vulnerable group, the Court did go some way towards redressing the disadvantage suffered by the applicants. The concept of vulnerability, though, is a complex concept. While on

⁷⁹⁴ *V.C. v Slovakia*, para 47.

⁷⁹⁵ Fredman, *Discrimination Law* 25-33.

the one hand the concept is commonly used, its meaning is imprecise, vague, ambiguous and confusing.⁷⁹⁶ The difficulty with the concept can be centered on the fact that it is both particular and universal.⁷⁹⁷ It can be said that we are all vulnerable, but how we experience this vulnerability will be unique to each individual. Being categorised as vulnerable can also be stigmatising.⁷⁹⁸ Fineman defines vulnerability as allowing us to ‘examine hidden assumptions and biases folded into legal ... practices’.⁷⁹⁹

Vulnerability can be seen as a relational concept, considering an ‘individual subject by placing him/her in social context’.⁸⁰⁰ It can be seen that the concept of group vulnerability as provided by the Court rests on three key characteristics: it is relational, particular, and harm-based. It must be stated, though, that while the Court in the sterilisation cases found Roma to be a vulnerable group, they only discussed their vulnerability in so far as other ethnic minorities had also been effected by State practices. Unlike the anti-violence and educational segregation cases the Court did not state that Roma were “particularly” vulnerable; rather the Court was viewing Roma as a vulnerable group akin to other vulnerable groups. The Court in no way appeared to take into account the harm, historical disadvantage or history of forced sterilisation against Roma. It is very difficult to surmise why the Court did not consider more thoroughly the Roma’s vulnerable position. The Court in each of the three forced

⁷⁹⁶ Mary C Ruof, Vulnerability, ‘Vulnerable Populations, and Policy’ (2004) 14 *Kennedy Institute of Ethics Journal* 411, 411. Martha Albertson Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008-2009) 20 *Yale Journal of Law and Feminism* 1, 9. Jan Helge Solbakk, ‘Vulnerability: A Futile or Useful Principle in Healthcare Ethics?’ in Ruth Chadwick, Henk ten Have and Eric M Meslin (eds), *The Sage Handbook of Health Care Ethics* (Sage 2011) 228, 229.

⁷⁹⁷ Debra B. Bergoffen, *Contesting the Politics of Genocidal Rape: Affirming the Dignity of the Vulnerable Body* (Routledge 2012) 101-119. Martha Albertson Fineman, “Elderly” as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility (2012) 20 *The Elder Law Journal* 101.

⁷⁹⁸ Lourdes Peroni and Alexandra Timmer, ‘Vulnerable groups: The promise of an Emerging Concept in European Human Rights Convention Law’ (2013) 11 (4) *International Journal of Constitutional Law* 1056, 1057.

⁷⁹⁹ Martha Albertson Fineman, ‘The Vulnerable Subject and the Responsive State’ (2010) *Emory Law Journal* 251, 266.

⁸⁰⁰ Fineman, ‘The Vulnerable Subject’ 13.

sterilisation cases did not enter into a separate discussion of a violation of Article 14. Without the Court's discussion of this allegation, the only information on which to base any critique is the Court's statements that it acknowledged that the Roma are a vulnerable group and that 'the practice of sterilisation of women without their prior informed consent affected vulnerable individuals from various ethnic groups'.⁸⁰¹

It should be noted that while the Court did state that the Roma were a vulnerable group, unlike in the anti-Roma violence or educational segregation cases in particular, the Court did not discuss at length the vulnerability of the Roma women who had taken the cases or the general history of the disadvantage and related vulnerability of the Roma as a group in deciding whether to consider a separate violation of Article 14. While vulnerability was mentioned by the Court, one cannot say that there was a complete redressing of disadvantage suffered by the applicants, as no consideration or finding of a violation of Article 14 was reached in any of the forced sterilisation cases. Arguably it would be impossible to ever redress the disadvantage suffered due to the irreversible nature of the sterilisation procedure and the discrimination the applicants faced both during and after sterilisation, coupled with the impact on their family and private life. Still, one could argue that if the Court had even considered a separate violation of Article 14, the applicants would have felt that the Court had adequately considered the history of forced sterilisation of Roma women and their endemic disadvantage, even if no violation of the Article were ultimately found.

⁸⁰¹ References to vulnerable individuals from various ethnic groups: *V.C. v Slovakia*, para 177, *N.B. v Slovakia*, para 121, *I.G., M.K. and R.H. v Slovakia*, para 165. References to the vulnerable position of the Roma: *V.C. v Slovakia*, para 146, *N.B. v Slovakia*, para 122, *I.G., M.K. and R.H. v Slovakia*, para 123.

5.6.4 Stigma, Stereotyping and Prejudice

The Court in no way dealt with the stigma, stereotyping and prejudice suffered by the applicants. The Respondent State's stereotypically negative view of Roma women and their health was not commented on by the Court. While finding a violation of Article 8 and the lack of consent given by the applicants, the Court also did not take the opportunity to discuss the violence perpetrated against the applicants by the Respondent State in any of the three cases. The need to facilitate participation of Roma cannot be directly addressed by the Court, but the Court could have pointed to the need for the Respondent Government to better work with Roma in relation to healthcare, so that they might better understand their needs and not merely rely on tired negative stereotypes of a group of people who have a wide variety of needs. The Court stated that they found no evidence of an organised policy of sterilisation, so Article 14 was not considered separately. If it had been considered, the Court might have been able to consider whether structural change was needed in Slovakia and could have ordered that changes be introduced in their judgment.

5.6.5 Section Conclusion

The core tenant of intersectionality is that it is the intersection of different grounds of discrimination that leads to discrimination; individuals are not discriminated against on only one ground, but rather on a number of interconnected grounds, which contribute together to create the space in which a person can be discriminated against. While no violation of Article 14 was found, it could be argued that the women in all the sterilisation and access to medical records cases were in the situation they were in due to a number of factors such as their ethnicity, gender, age, level of education,

poverty and disadvantage, and that all these together interrelated to create a situation where discrimination could occur.

5.7 Conclusion

While this chapter looked at a small number of cases in comparison to the previous chapter, with only one access to medical records case and three sterilisation cases coming before the Court thus far, these cases have still been instrumental in informing the overall thesis question of the development of Article 14 through the lens of cases taken by Roma to the ECtHR. The sterilisation cases are quite different from the anti-Roma violence cases in the previous chapter and the cases of educational segregation that will be discussed in the next chapter, as in none of the cases in this chapter a separate violation of Article 14 was considered. One might wonder: if a separate violation of Article 14 was not considered, then what importance could these cases have in dealing with a thesis question focusing on the development of Article 14?

The way in which the Court discussed how they would not need to consider a separate violation of Article 14 tells us much about how the Court was considering or rather not considering Article 14. The fact that the Court had reverted to focusing on considering a substantive article, in these cases Article 8, rather than considering Article 14 also shows a reversion to the very earliest anti-Roma violence cases discussed in the previous chapter. In the intervening case law the Court had continuously considered an allegation of a violation of Article 14 going so far as to consider separately substantive and/or procedural violations of Article 14. This lack of consideration of a separate violation of Article 14 could be viewed as very negative in a discussion of the development of Article 14, however, one could argue that it

shows the complexity with which the Court was faced when dealing with allegations of Article 14 and the lack of consistency in the Court.

This lack of consistency exists in a number of areas. The dissenting opinion of Judge Mijović showed that while the majority of the Court in all three cases were of the same view, there are still some members of the judiciary that have a very different view on what a violation of Article 14 should look like and amount to today. The lack of consistency in the terminology and standards used by the Court is also evident in these cases. The Court in the cases preceding the sterilisation cases did not focus on intent, yet all the sterilisation cases focused on the applicants' need to prove intention on the part of those accused of racially discriminating. The educational segregation cases, some of which came before the sterilisation cases, showed the Court's focus on the effect which discrimination had on the applicants, rather than on merely focusing on the intent behind the act. Effect was little considered in the allegation of a violation of Article 14, but was somewhat considered in the allegation of a violation of Article 8.

While the purpose of the thesis is not to compare cases, as the evidence and allegations in each will be very individual, it is interesting and important to consider how the Court deals with evidence and the burden of proof in each of the cases involving Article 14 allegations. It appears from the forced sterilisation cases that the Court is rather inconsistent in terms of the evidence it will use to find a violation in Article 14. The sterilisation cases were somewhat consistent with the anti-Roma violence cases, in that anti-Roma comments, identifying the applicant as Roma, negative stereotypes of Roma held by the Respondent State, a history of discrimination and statistical have not been found to be sufficient to find a violation of Article 14. Yet, in the educational segregation cases to be discussed in the next

chapter, the Court did take into account the statistical and NGO evidence that Roma children were overrepresented in special schools and the stereotypical views of the Respondent Government on the lack of interest in education held by Roma parents.

It could be argued that the Court finding no evidence of racial discrimination sends a message to those repeat offender States that while sterilisation is wrong, there is nothing discriminatory in the fact that it is happening to Romani women, as the Court itself has stated that the practice affects all vulnerable groups not just Roma. Perhaps, while it is true that other vulnerable groups have also been effected by sterilisation without consent, it should be noted that in many countries Roma have been overrepresented in the group of women who have been forcibly sterilised. Perhaps one could also argue that while the formal model of equality focuses on the need for a comparator, the substantive model which the Court has been inching towards looks at the historical disadvantage suffered by a group such as the Roma when deciding if they have been discriminated against, rather than focusing on the fact that other vulnerable groups were also targeted.

In Judge Mijović's dissent in *V.C.*, she referred to the Roma education cases where discrimination was seen to be treating differently persons in relevantly similar situations without an objective and reasonable justification.⁸⁰² The Roma sterilisation cases could be said to have been largely positive for the applicants in terms of outcome, as violations of Article 8 were found in all cases, however, it could be argued that the Court has neglected to consider the underlying reasons why there were so many Roma applicants forcibly sterilised in Slovakia during the same time period and whether this had anything to do with their ethnicity. The Court is not seeing the applicant's Roma ethnicity as having anything to do with their reproductive

⁸⁰² *V.C. v Slovakia*, Dissenting opinion of Judge Mijović.

possibilities for the future being irreparably destroyed. While the sterilisation cases have left much to be considered in relation to Article 14 and a lack of consistency, the Roma education cases have helped to clarify some of these issues.

Chapter 6

Alleged Violations of Article 14 in cases of Educational Segregation of Romani children

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6.1 Introduction

This chapter will discuss the cases taken by Roma to the European Court of Human Rights alleging violations of Article 14 in conjunction with Article 2 of Protocol No. 1 of the ECHR. Article 2 of Protocol No.1 states:

No person shall be denied the right to education. In the exercise of any functions, which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.⁸⁰³

The Roma applicants allege that they were placed in ‘special schools’, segregated in annexes to the main school building or placed in Roma only schools due to their ethnicity. This chapter will be divided into a number of sections. The first of these sections will provide an introduction to the education of Roma in Europe. An overview of the situation which the Roma are experiencing in accessing education will be provided, as well as a discussion of the major issues identified in relation to education such as the nomadic nature of Romani families, parental consent to children being segregated, testing by governments before the placement of Roma children into special schools, the issue of white flight and the majority populations reaction to Roma children in mainstream schools. The section following this will introduce the cases involving allegations of educational segregation. This section will be divided into two subsections: the first will focus on the cases concerning the placement of Roma children into ‘special schools’ and will discuss the seminal case of *D.H. and Others v Czech Republic*, along with *Horváth and Kiss v Hungary*; the second subsection will discuss the school segregation cases, including *Sampanis and Others v*

⁸⁰³ Article 2, Protocol No 1 to the European Convention on Human Rights.

*Greece, Oršuš and Others v Croatia, Sampani and Others v Greece and Lavidia and Others v Greece.*⁸⁰⁴

The subsequent section will discuss the impact that the school segregation cases have had on the development and interpretation of Article 14. The section will begin by discussing the area in which the educational segregation cases have had the most impact: the recognition of indirect discrimination and the use of statistics. The section will then move onto discussing the impact the cases have had on areas such as the burden of proof and use of evidence before the Court and positive obligations on Respondent States. The last section of this chapter will then analyse the cases and the Court's discussion of Article 14 to decipher on what model of equality the Court was relying in these cases. Commentary will be offered on whether there has been a shift with regard to the model which the Court relies upon in Article 14 cases. The last section of this chapter will apply Fredman's theory of intersectionality to the case law in order to examine the multiplicity of grounds on which the applicants were discriminated against. A conclusion will then be provided where the development of Article 14 through the lens of these educational segregation cases will be examined.

6.2 Education of Roma in Europe: The Context

Education is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.⁸⁰⁵

⁸⁰⁴ *D.H. and Others v The Czech Republic* App no 57325/00 (ECHR, 13 November 2007), *Horváth and Kiss v Hungary* App no 11146/11 (ECHR, 29 April 2013), *Sampani and Others v Greece* App no 32526/05 (ECHR, 5 June 2008), *Oršuš and Others v Croatia* App no 15766/03 (ECHR, 16 March 2010), *Sampani and Others v Greece* App no 59608/09 (ECHR, 11 December 2012) and *Lavidia and Others v Greece* App no 7973/10 (ECHR, 30 May 2013).

⁸⁰⁵ General Comment No 13 of the United Nations Committee on Economic, Social and Cultural Rights.

This statement of the UN Committee on Economic, Social and Cultural Rights sums up the importance of education as both an end in itself and as a means of realising other rights. There has been a lack of detailed data on the situation of Roma and their access to and experience of education in Europe. There are a number of factors given as reasons for this lack of data, the major obstacles being the difficulties in encouraging Roma to participate in official data collection and the lack of data disaggregated by ethnicity.⁸⁰⁶

A survey carried out in Montenegro and Serbia found that the major reason given by Roma families as to why their children were not in education was due to the financial cost of sending a child to school.⁸⁰⁷ A major reason for this lack of financial resources is the high unemployment rate amongst Roma, their low salary expectations, little job security and unstable earnings.⁸⁰⁸ Due to some of the Roma communities' nomadic way of life, they experience extreme difficulties in securing accommodation which meet their needs. This also has an effect on their ability to access education. States laws in relation to registering in a particular area for school can hamper a Roma family accessing education due to their nomadic lifestyle. Bureaucracy, engagement with local authorities and identifying as Roma can also deter Roma parents from enrolling their children in school. In particular countries, if Roma have no birth certificates or proof of residence, they will be denied the opportunity to access

⁸⁰⁶ Mikael Luciak, 'Minority Schooling and Intercultural Education: A Comparison of Recent Developments in the Old and New EU Member States' (2006) 17 (1) *Intercultural Education* 73, 73-80. Aram A Schvey, Martin S Flaherty and Tracy E Higgins, 'The Children Left Behind: Roma Access to Education in Contemporary Romania' (2005-2006) 29 *Fordham International Law Journal* 1155, 1164. Niall O'Higgins and Andrey Ivanov, 'Education and Employment Opportunities for the Roma' (2006) 48 (1) *Comparative Economic Studies* 6, 6-19. Jack Greenberg, 'Report on Roma Education Today: From Slavery to Segregation and Beyond' (2010) 110 (4) *Columbia Law Review* 919, 919-1001.

⁸⁰⁷ UNICEF, *Breaking the Cycle of Exclusion: Roma Children in South East Europe* (UNICEF Serbia 2007) 50. A Vulnerability Assessment study carried out in Albania found that 54.7% of Roma families stated that they 'could not financially support the education of their children', compared with only 11.5% among the non-Roma population. Research carried out by the Agency for Social Analyses in Bulgaria has estimated that 20% of Roma children in Bulgaria never go to school. UNICEF has also found that over one-third of Roma families in South East Europe cannot afford school materials and books.

⁸⁰⁸ UNICEF, *Breaking the Cycle* 21-23.

education.⁸⁰⁹ In addition to the effect of these practical realities of life on Roma accessing education, discrimination and racism also deter Roma parents from placing their children in school. Parents have stated that they fear their children will be discriminated against, targeted or segregated in mainstream schools.⁸¹⁰ All of these factors contribute to a reported 43 per cent of Roma children aged 7-15 not attending school.⁸¹¹ Compared to a near-universal completion rate of second level education for non-Roma children, less than 50 per cent of Roma children complete second level education, while only 4 per cent of Roma advance to third level education.⁸¹²

Difficulty in accessing education is a Europe wide issue. The European Commission against Racism and Intolerance has reported discrimination against Roma in education in a number of countries, including France, Albania and Portugal.⁸¹³ In Albania, the lack of vaccinations has been used as a justification for refusing Roma children access to schools.⁸¹⁴ The Roma have difficulty in obtaining these vaccinations due to a lack of knowledge about necessary childhood vaccinations and a lack of access to healthcare. In Portugal, parents of non-Roma children have been found to pressure schools into not admitting Roma children. Posters reading ‘no to Gypsies’ have been put up in schools encouraging discrimination against Roma children accessing education.⁸¹⁵ In Georgia, marginalization, racist bullying and anti-

⁸⁰⁹ UNICEF, *Breaking the Cycle* 51.

⁸¹⁰ Brian Foster and Peter Norton, ‘Educational Equality for Gypsy, Roma and Traveller Children and Young People in the UK’ (2012) 8 *The Equal Rights Review* 85, 88-94.

⁸¹¹ Christine O’Hanlon, ‘Roma/Traveller Inclusion in Europe: Why Informal Education is Winning’ in Rosarii Griffin (ed) *Education in Indigenous, Nomadic and Travelling Communities* (Bloomsbury 2014) 111-135, 131.

⁸¹² Commissioner for Human Rights, *Human Rights of Roma and Travellers in Europe* (Council of Europe Publications 2012) 118.

⁸¹³ Lilla Farkas, *Report on Discrimination of Roma Children in Education* (European Commission Directorate-General for Justice 2014) 13.

⁸¹⁴ Roma Youth Action Plan, *Mirrors: Manual on Combating Antigypsyism through Human Rights Education* (Council of Europe 2015) 90.

⁸¹⁵ Council of Europe, *Human Rights of Roma and Travellers in Europe* 117.

Roma prejudice have been seen as a disincentive to Roma parents of enrolling their children in school⁸¹⁶.

There are also issues surrounding consent: parental consent for the segregation of Roma children is usually obtained, though sometimes not in writing. The parents tend to consent for a number of reasons, including not being informed that the 'special school' will not prepare their child for mainstream second level education, apathy towards education or not wanting their child to be in mainstream education where they may be discriminated against.⁸¹⁷ The Czech Government's Commissioner on Minority rights has stated that, '[t]he Roma like to put their children in special schools, because they know it's not as demanding as other schools...'.⁸¹⁸ The domestic laws in the Czech Republic were amended in 2000 to remove any barriers to access to second level education for children from special primary schools.⁸¹⁹ This Act was amended again in 2004 to state that the 'special schools' were to be reserved only for children with mental disabilities.⁸²⁰ The UN Council for Human Rights commented that, 'in practice there is really very little change because the (special school) students have no chance of making it into the secondary school by passing the entrance exam'.⁸²¹

While education had long been proffered as the essential means by which the Roma may change their plight, there is little chance of this happening in a Europe where there is a growing number of school segregation cases involving Roma

⁸¹⁶ *ibid.*

⁸¹⁷ Peter Matyšák, 'Social Problems in the Roma Community in the Slovak Republic' (2015) 1(1) *Clinical Social Work* 97, 102-103.

⁸¹⁸ CNN.com, Gypsy Children Fill Czech Special Schools (September 27, 2000) available at <<http://edition.cnn.com/2000/WORLD/europe/09/26/czecg.school/index.html>> accessed 7 February 2017.

⁸¹⁹ Devroye, 'The Case of D.H.' 84. Vladimíra Kantorová, 'Education and Entry into Motherhood: The Czech Republic during State Socialism and the Transition Period (1970-1997)' (2004) 3 *Demographic Research* 246, 247-249.

⁸²⁰ Law No. 561/2004 Coll., on pre-school, primary, middle, higher technical and other education (the 2004 "Schools Act").

⁸²¹ CNN.com, 'Gypsy Children Fill Czech Special Schools' (CNN, 27 September 2000) <<http://edition.cnn.com/2000/WORLD/europe/09/26/czecg.school/index.html>> accessed 14 August 2014.

applicants appearing before the ECtHR. As a condition of entering the European Union, Eastern European countries have prohibited school segregation.⁸²² However, it has been found that in general this rule is not enforced.⁸²³ There are a number of factors given for this lack of adherence; many schools are reluctant to fulfill anti-segregation laws due to a fear of ‘white flight’.⁸²⁴ This concept essentially means that non-Roma families will leave non-segregated schools due to a mixture of prejudice against Roma and/or a fear that Romani children will need extra attention and thus their children will receive a lower standard of education. As schools are funded on a per capita basis in many Eastern European countries, there is the additional concern that a drop in numbers could lead to the closure of a school in a small town or village. There are some Roma who feel that school-segregation is not entirely negative; they see the strong anti-Roma sentiment in some areas of Eastern Europe and do not wish for their children to experience this hatred in a non-segregated environment.⁸²⁵

The educational segregation cases bring together a complex range of issues which affect the Roma, including housing, health care, labour, social protection, interaction with the State, the nomadic lifestyle, lack of Roma culture and language being incorporated into the classroom, discrimination, racism and white flight. The educational segregation cases themselves can be somewhat divided into two broad types of segregation. The first form of segregation is the placing of Roma children into ‘special schools’; while this is still an issue of segregation at its core, it also raises

⁸²² In 2000, as a condition of admission to the European Union a pledge was made by Eastern European countries to eliminate racial discrimination, this included educational segregation of Roma children. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180, 19/07/2000 P. 0022 - 0026, art. 13 ‘To this end, any direct or indirect discrimination based on racial or ethnic origin as regards the areas covered by this Directive should be prohibited throughout the Community.’

⁸²³ Dena Ringold, *Roma and the Transition in Central and Eastern Europe: Trends and Challenges* (The International Bank for Reconstruction and Development/The World Bank 2000) 17-20. Dena Ringold, Mitchell A Orenstein and Erika Wilkens, *Roma in an Expanding Europe: Breaking the Poverty Cycle* (World Bank 2004) 42-45 and 202-211.

⁸²⁴ Farkas, *Report on Discrimination* 35-39.

⁸²⁵ Farkas, *Report on Discrimination* 6.

the issue of long held negative stereotypes that Roma are mentally inferior to the majority population and, according to the reports on the number of Roma children placed in 'special schools', there is a strong belief in some States that Roma children are at a much higher risk of being mentally disabled.

The second type of school segregation is based on physically removing Roma children from mainstream schools through either their being placed in annexes to the school building, in Roma only classes or in Roma only schools. This segregation is focused on ensuring that Roma children do not mix with the majority population's children. Respondent states claim that this form of segregation is for the betterment of the Roma children's education and that they are provided with additional classes and supports. This form of segregation, while not relying on finding Roma children to be mentally disabled, does seek to justify their segregation on the basis of the children being intellectually inferior to non-Roma children.

Barany has suggested that many of the Roma's contemporary problems can be traced back to poor education and the resultant limitations in the job market.⁸²⁶ As such the cases that have appeared before the Court challenging State practices of educational segregation are particularly important, as not only are they challenging discrimination but they are also dealing with the tool which can unlock a better future for Roma children. Cahn states: 'around Europe, from Spain to Italy to Greece and in nearly all of the countries of the former Communist Block, Roma live and are schooled segregated from non-Roma'.⁸²⁷ It is estimated that about half the Roma

⁸²⁶ Zoltan Barany, *The East European gypsies: Regime Change, Marginality and Ethnopolitics* (Cambridge University Press 2002) 317. Ingi Iusmen, *Children's Rights, Eastern Enlargement and the EU Human Rights Regime* (Manchester University Press 2014) 146-177.

⁸²⁷ Claude Cahn, 'Human Rights and the Roma: What's the Connection?' in Claude Cahn (ed), *Roma Rights: Race, Justice and Strategies for Equality* (International Debate Education Association 2002) 18.

population in Europe are under the age of 18.⁸²⁸ It has been identified that young Roma children are one of the most vulnerable groups in Europe, with their exclusion from society starting from the time of their birth.⁸²⁹ The Bulgarian Helsinki Committee and European Roma Rights Centre found that in 2004 80-90% of the pupils in 46 of the 138 ‘special schools’ in Bulgaria were Roma.⁸³⁰ Estimates of Roma children in ‘special schools’ in Serbia ranged from 50 to 80%.⁸³¹ ‘Special schools’ were established in Central and Eastern Europe in the 1950s and 1960s. Their purpose was to provide an education for children with disabilities and special learning needs.⁸³²

A UNICEF report carried out in Serbia in 2007 found that the special schools were low quality versions of mainstream schools and that they lacked resources and teaching staff who were qualified to teach children with special needs; they also followed a less intensive curricula.⁸³³ Furthermore, it was found that children in special schools often did not earn official school certificates or credits which could enable them to be eligible for employment. In the next section the various types of segregation will be discussed by reference to the case law taken by Roma applicants to the Court.

⁸²⁸ Nursuna Memecan, ‘Ending Discrimination Against Roma Children’ (Committee on Equality and Non-Discrimination Parliamentary Assembly, 25 May 2012).
<<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19545&lang=en>> accessed 2 February 2017.

⁸²⁹ Farkas, *Report on Discrimination* 5.

⁸³⁰ UNICEF, *Breaking the Cycle* 54.

⁸³¹ *ibid.*

⁸³² Claude Cahn, David Chirico, Christina McDonald, Viktória Mohácsi, Tatjana Pric and Ágnes Székely, ‘Roma in the Educational Systems of Central and Eastern Europe’ in Csaba Fényes Christina McDonald Anita Mészáros (eds), *The Roma Education Resource Book: Educational Issues, Methods and Practice, Language and Culture* (Open Society Institute – Institute for Educational Policy 1999) 20 – 27.

⁸³³ UNICEF, *Breaking the Cycle* 53-54.

6.3 Introduction to the cases alleging educational segregation before the European Court of Human Rights

The next section will provide a brief overview firstly of the two cases of placing Roma children in ‘special schools’ and the subsequent section will look at the four cases of segregation into annexes or Roma only schools. This introduction to the cases will provide context for the later analysis of allegations of violations of Article 14, the development of Article 14 and analysis of the equality model relied upon by the Court in these cases.

6.3.1 The placement of Roma children into Special Schools: *D.H. and Others v Czech Republic* and *Horváth and Kiss v Hungary*

This section will provide a very brief introduction to the facts of the two cases that appeared before the ECtHR alleging placement of Roma children into ‘special schools’.

D.H. and Others v the Czech Republic was pioneering in that it was the first challenge to systemic racial segregation in education, that has reached the Court.⁸⁴²

D.H. has had a wide-ranging and significant effect on Article 14 jurisprudence. Eighteen Roma students who between 1996 and 1999 were assigned to special schools for children with learning difficulties took the case. The applicants alleged they had received an inferior education, as they were not taught the same curriculum as mainstream schools. They alleged violations of Article 14 in conjunction with Article 2 of Protocol No. 1 of the Convention.

While the Court heard from a range of Non Governmental Organisations, observations on the segregation of Roma children and statistics to support these

⁸⁴² *D.H. and Others v The Czech Republic* App No 57325/00 (ECHR, 13 November 2007).

observations, the Chamber judgment found no violation of Article 14 taken in conjunction with Article 2 of Protocol No. 1. The Chamber, in its view, felt the Respondent State had succeeded in showing that the special schools had not been solely introduced for Roma children. The applicants took their case to the Grand Chamber, citing the Chamber's restrictive interpretation of discrimination and arguing that it was incompatible with the aim of the Convention and the case law of the Court.⁸⁴³ The applicants asked the Grand Chamber 'to correct the obscure and contradictory test the Chamber has used for deciding whether there had been discrimination'.⁸⁴⁴ This question posed to the Court will be addressed in a later section, though ultimately the Grand Chamber did find a violation of Article 14 in conjunction with Article 2 of Protocol No. 1.

Horváth and Kiss v Hungary concerned two Hungarian men who were diagnosed with having a 'mild mental disability'.⁸⁴⁵ The applicants claimed that:

Their education in a remedial school had amounted to direct and/or indirect discrimination in the enjoyment of their right to education, on the basis of their Roma origin, in that their schooling assessments had been culturally biased, they had been placed in schools designed for the mentally disabled whose curriculum had been limited, and they had been stigmatised in consequence.⁸⁴⁶

In relation to the tests used to assign the children to special schools, the Respondent Government maintained that the over-representation of Roma children in these schools was as a result of social deprivation, which was outside the scope of the right to education in Article 2 of Protocol No. 1. Further to this, the Respondent

⁸⁴³ *D.H. and Others v the Czech Republic*, para 128.

⁸⁴⁴ *D.H. and Others v the Czech Republic*, para 129. Mahnoush H Arsanjani, 'The Uses and Abuses of Illusion in International Politics' in Mahnoush H Arsanjani, Jacob Katz Cogan, Robert D Sloane and Siegfried Wiessner (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff Publishers 2011) 56-57.

⁸⁴⁵ *Horváth and Kiss v Hungary* App no 11146/11 (ECHR, 29/04/2013).

⁸⁴⁶ *Horváth and Kiss v Hungary*, para 3. Nuno Ferreira and Dora Kostakopoulou, 'The Roma and European Union Citizenship' in Nuno Ferreira and Dora Kostakopoulou (eds), *The Human Face of the European Union: Are EU Law and Policy Humane Enough?* (Cambridge University Press 2016) 232-233.

Government did not dispute the racial bias in some of the tests administered but argued that, by providing alternative examination, ‘cultural bias could be compensated’.⁸⁴⁷ The Court clarified that given this ‘danger’ of the tests being culturally biased, it needed to see ‘special safeguards’ to prevent the applicants misdiagnosis.⁸⁴⁸ The Court could find no safeguards in place. The case is also the first to explicitly mention positive obligations on a State to address and ‘to undo a history of racial segregation in special schools’.⁸⁴⁹ The Court found a violation of Article 14 in conjunction with Article 2 of Protocol No. 1. While the introduction to the *D.H.* and *Horváth* cases has been brief, these cases will be discussed in much more detail in a subsequent section on the development of Article 14.

6.3.2 The school segregation cases: *Sampanis and Others v Greece*, *Oršuš and Others v Croatia*, *Sampani and Others v Greece* and *Lavida and Others v Greece*

This section will provide brief introductions to the cases of educational segregation of Roma children into Roma only schools or annexes to main school buildings. The first of the cases to deal with segregation of Roma into Roma only classes was *Sampanis and Others v Greece*.⁸⁵⁰ The applicants, parents of school children of Romani ethnic origin took their case alleging a violation of Article 14 in conjunction with Article 2 of Protocol No. 1. They alleged that the Greek authorities refused to enroll their

⁸⁴⁷ *Horváth and Kiss v Hungary*, para 95. Mónika Ambrus, ‘Constitutionalisation Through Fragmented Adjudication?’ in Andrzej Jakubowski, Karolina Wierczyńska (eds), *Fragmentation vs the Constitutionalisation of International Law: A Practical Inquiry* (Routledge 2016) 211-212.

⁸⁴⁸ *Horváth and Kiss v Hungary*, para 121.

⁸⁴⁹ *Horváth and Kiss v Hungary*, para 127: ‘As a consequence, [the applicants] received an education, which did not offer the necessary guarantees stemming from the positive obligations of the State to undo a history of racial segregation in special schools. The education provided might have compounded their difficulties and compromised their subsequent personal development instead of helping them to integrate into the ordinary schools and develop the skills that would facilitate life among the majority population.’

⁸⁵⁰ *Sampanis and Others v Greece* App no 32526/05 (ECHR, 5 June 2008).

children in the primary school in their area and instead placed them in an annex to the primary school, attended by only Roma students. Non-Roma parents had protested at the admission of the Roma children into the main school and requested that the Roma children be placed in a separate building. Under pressure the Roma parents signed a statement allowing their children to be educated in separate classes in the annex. The Roma children had missed an entire year of school in 2004-2005 before being allowed into the separate classes.⁸⁵¹ The applicants alleged that their children, without objective or reasonable justification, had been subjected to less favourable treatment than that afforded to non-Roma children who were in a comparable situation. It was not disputed in the Court that the Roma children had missed a year's schooling and that the preparatory classes that had been organised the following year had not been organised previously, even though there had been Roma children enrolled in the school in the past.

The Court held that the racist incidents outside the school could not be imputed to the Respondent State.⁸⁵² It was noted, though, that the racist incidents could have influenced the Greek authorities' decision to place the Roma students in a separate building. The Court found that there was a strong presumption of discrimination; it was therefore for the Respondent Government to establish that the different treatment was due to objective factors and not based on ethnic origin.⁸⁵³ A Greek domestic law provided that, due to the nature of the Roma community's situation, they were able to enroll their children in primary school by means of a parental declaration. This law was to ensure that Roma parents would not be

⁸⁵¹ *Sampanis and Others v Greece*, paras 6-14. Zsuzsanna Nyitray, 'The European Court of Human Rights' Jurisprudence Regarding the Segregation of Roma Schoolchildren: A Children's Rights Perspective' in Ton Liefaard and Julia Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child* (Brill Nijhoff 2017) 241-242.

⁸⁵² *Sampanis and Others v Greece*, para 21.

⁸⁵³ *ibid.*, 84-97.

dissuaded from enrolling their children in primary school by a burden of paperwork and bureaucracy. While the primary school authorities had not explicitly refused admittance, they were aware of the domestic law and their obligations under it.⁸⁵⁴ It was also noted that there was no established criteria for choosing which children would be assigned to the special preparatory classes for entrance into ordinary classes. The Court found that the placement of the children into the special preparatory classes and the conditions of school enrollment amounted to discrimination and was a violation of Article 14 in conjunction with Article 2 of Protocol No. 1. The judgment was also positive in that, while there had been dissenting judgments in *D.H.*, there was a unanimous judgment handed down in *Sampanis*.

Sampanis was followed by *Oršuš and Others v Croatia*.⁸⁵⁵ The case concerned the segregation of fifteen Roma children into separate classes in primary schools, on the supposed basis of their lack of proficiency in the Croatian language. The applicants alleged a violation of Article 14 in conjunction with Article 2 of Protocol No. 1. The applicants alleged that their being placed in Roma-only classes was as a result of a blatant practice of discrimination based on ethnicity by the school authorities backed up by pervasive anti-Roma sentiment from the local non-Roma community. The applicants provided data from the Medjmurje County Office of Education, Culture, Information, Sport and Technical Culture. The data showed that 16% of Roma children aged 15 completed primary education; this figure was in comparison to 91% of the general population.⁸⁵⁶ The applicants also alleged that the school curriculum was at a significantly reduced level in the Roma-only classes,

⁸⁵⁴ *ibid.*, paras 37-41. Frédéric Edel, *The Prohibition of Discrimination Under the European Convention on Human Rights* (Council of Europe Publishing 2010) 124-125.

⁸⁵⁵ *Oršuš and Others v Croatia* App no 15766/03 (ECHR, 16 March 2010).

⁸⁵⁶ *Oršuš and Others v Croatia*, para 18. Julie Ringelheim, 'Between Identity Transmission and Equal Opportunities: The Multiple Dimensions of Minorities' Right to Education' in Kristin Henrard (ed), *The Interrelation Between the Right to Identity of Minorities and their Socio-Economic Participation* (Martinus Nijhoff 2013) 107-108.

which led to a lower quality education. The Chamber of the ECtHR found by unanimous decision in 2008 that there was no violation of Article 14 in conjunction with Article 2 of Protocol No. 1. On the basis of the importance of the issues raised in the case, the applicants requested the case to be referred to the Grand Chamber; this request was accepted and the Grand Chamber heard the case in 2010.

In the Grand Chamber, the ERRC and partners argued that the applicants being segregated into Roma-only classes deprived them of their right to not be discriminated against and to receive an education.⁸⁵⁷ They also highlighted the fact that the Croatian Government had failed to provide a rational and consistent explanation for why the Roma-only classes were formed.⁸⁵⁸ The Respondent Government also failed to explain what methods the school authorities had used to improve the Roma children's language skills. Instead of introducing a programme to help the children, they instead educated them to a lower standard. The children also did not take part in any extracurricular activities organised by the school where they would have mixed with children from other ethnicities.⁸⁵⁹ The Grand Chamber noted that, while the Croatian authorities had made efforts to tackle the issue, they were facing additional problems in the form of hostility on the part of non-Roma parents and the difficulty of ensuring the cultural specificities of a minority group.

The Grand Chamber, in clarifying when it would consider a violation of Article 14, stated:

Where a substantive Article of the Convention or its Protocols has been relied on both on its own and in conjunction with Article 14 and a separate breach has been found of the substantive Article, it is not generally necessary for the Court to consider the case under Article 14 as well, though the position is otherwise if a clear inequality of

⁸⁵⁷ *Oršuš and Others v Croatia*, para 143.

⁸⁵⁸ *Oršuš and Others v Croatia*, para 114. Claudia Tavani, *Collective Rights and the Cultural Identity of the Roma: A Case Study of Italy* (Martinus Nijhoff Publishers 2012) 117-118.

⁸⁵⁹ *Oršuš and Others v Croatia*, para 122.

treatment in the enjoyment of the right in question is a fundamental aspect of the case.⁸⁶⁰

This was one of the first times in a case brought by Roma applicants where the Grand Chamber clarified that where inequality of treatment in the enjoyment of a right is a fundamental aspect of the case, the Court will not deem it unnecessary to consider a violation of Article 14 if they have found a violation of a substantive article. The Grand Chamber, in providing this statement, helps to clarify the consideration of Article 14 before the Court and shows that if an alleged violation of Article 14 is central to the case then the Court will consider a violation of the Article. This statement also shows that, even though Article 14 is an accessory article, the Grand Chamber in *Oršuš* have confirmed that non-discrimination in the enjoyment of other Convention rights is as serious a violation to consider as a violation of a substantive article where inequality of treatment is central to the case. The Grand Chamber found a violation of Article 14 in conjunction with Article 2 of Protocol No. 1.

In 2012 the Court once again chastised the Greek authorities in *Sampani and Others v Greece*.⁸⁶¹ The Court noted that there had been little material change since the 2008 judgment in *Sampanis and Others v Greece*. The *Sampani* case related to the period 2008-2010 and an allegation that the school had continued to be exclusively attended by Roma students despite the authorities' intentions to change the situation. While the school had been set up to help to integrate the Roma students into the area and the mainstream education system, the operational problems which the authorities experienced meant that the Roma students continued to suffer a difference in treatment. The applicants had three complaints. The applicants complained that they or their children had been enrolled in a school exclusively attended by Roma children

⁸⁶⁰ *Oršuš and Others v Croatia*, para 144. Sia Spiliopoulou Åkermark, 'Images of Children in Education: A Critical Reading of D.H. and Others v Czech Republic' in Eva Brems (ed), *Diversity and European Human Rights: Rewriting Judgments of the ECHR* (Cambridge University Press 2013) 40-42.

⁸⁶¹ *Sampani and Others v Greece* App no 59608/09 (ECHR, 11 December 2012).

where they received a lower standard of education than in comparable schools; under Article 13 they argued that they were unable to raise their complaints in Greece; and under Article 46 the applicants alleged that the Greek authorities had failed to follow the judgment in *Sampanis and Others v Greece*. It was established that the Greek authorities had made no effort to take into account the particular position of the Roma children as members of a disadvantaged group and their particular needs as members of that group. The applicants argued and the Court accepted that the operation of the school between 2008 and 2010 with only Roma students was a violation of Article 14 in conjunction with Article 2 of Protocol No. 1 and amounted to discrimination.⁸⁶²

Another case of educational segregation taken against Greece was that of *Lavida and Others v Greece*.⁸⁶³ The applicants were twenty-three Greek nationals of Roma origin. They lived in a town where Roma accounted for half the population. While there were four schools in the town, all Roma children attended Primary School No. 4 on the old Roma estate; only Roma children attended this school. When a new Roma estate was built, the catchment area required that Roma children in the new estate attend Primary School No. 4 rather than Primary School No. 1, which was closer to where they now lived.⁸⁶⁴ The applicants' parents allegedly sought to enroll their children in Primary School No. 1, however, they were refused and told by the headmaster that the authorities were of the view that the children should continue to attend Primary School No. 4.

The Respondent Government, in stating that the Roma children's parents could have requested a transfer to end their feeling of discrimination, appears to

⁸⁶² *Sampani and Others v Greece*, para 105. Elisabeth Lambert Abdelgawad. 'A Collective Complaint Mechanism before the European Court of Human Rights? Moving from Mass Actions to Group Actions' in Henry F Carey (ed), *The Challenges of European Governance in the Age of Economic Stagnation, Immigration, and Refugees* (Lexington Books 2017) 227, 234.

⁸⁶³ *Lavida and Others v Greece* App no App no 7973/10 (ECHR, 30 May 2013).

⁸⁶⁴ *Lavida and Others v Greece*, paras 10-19.

suggest that the Greek government felt that the Roma were in some way partially feeling discriminated against because they had allowed their children to continue being educated in the Roma only school.⁸⁶⁵ The Respondent Government was essentially arguing that the applicants were partly at fault for being discriminated against. The Court in its judgment noted that, while all Roma children who lived in the catchment area of School No. 4 attended that school, no non-Roma child who lived in the district attended the school.⁸⁶⁶ The Court also pointed to the fact that the Respondent State was aware of the segregation in the school system in the town and the need for them to correct it. However, the Court would not accept the Respondent State's argument that the applicants could have simply sought for their children to be transferred to another school in order to end the feeling of segregation. The Court also found that the Respondent Government's decision to not engage in effective anti-segregation measures could not be deemed as being objectively justified by a legitimate aim. The Court also noted that the situation complained of by the Roma parents for the 2009-2010 academic year had continued until the 2012-2013 academic year. The Chamber found a violation of Article 14 in conjunction with Article 2 of Protocol No. 1.

As can be seen, the educational segregation cases, while all different in the way in which they segregated Roma students, all had the same result of ensuring that Roma students received a separate and less comprehensive education than non-Roma students in mainstream schools. The next section of this chapter will particularly focus on the ways in which these educational segregation cases have had an impact on the interpretation of Article 14 before the Court.

⁸⁶⁵ *ibid.*, para 12. Wouter Vandenhoele, 'Children's rights from a legal perspective: Children's rights law' in Wouter Vandenhoele, Ellen Desmet, Didier Reynaert and Sara Lembrechts (eds), *Routledge International Handbook of Children's Rights Studies* (Routledge International Handbooks 2015) 37-38.

⁸⁶⁶ *Lavida and Others v Greece*, paras 67-70.

6.4 The Impact of the Educational Segregation Cases on the Interpretation of Article 14

This section will analyse the educational segregation cases in order to decipher the impact they have had on the interpretation of Article 14. The most crucial impact which these cases have had is in relation to indirect discrimination: the seminal finding of a violation of Article 14 in relation to indirect discrimination in a case involving a pattern of racial discrimination in an area of public life, clarification on statistical evidence being relied upon by the Court as evidence of indirect discrimination and the Court finding indirect discrimination where there is no statistical evidence to support the claim of a violation. The impact of these cases can also be seen in the clarification offered by the Court on positive obligations to redress histories of discrimination and comments on how the Court deals with the burden of proof in indirect discrimination cases in comparison with the burden of proof in direct discrimination cases. The following sections will deal with each of these areas.

6.4.1 Introduction: The Impact of *D.H. and Others v the Czech Republic*

It is argued that the major impact the education segregation cases have had on the interpretation of Article 14 is in the area of indirect discrimination.⁸⁶⁷ As mentioned in chapter 2, the Court in *Belgian Linguistic v Belgium*, *Thlimmenos v Greece*, *Jordan v United Kingdom* and *Zarb Adami v Malta* had discussed indirect discrimination.⁸⁶⁸ In *Belgian Linguistic* the Court stressed the importance of considering the ‘effects’ of the interference with one’s rights.⁸⁶⁹ In *Thlimmenos* a violation of Article 14 in conjunction with Article 9 was found on the basis of the Respondent State failing to

⁸⁶⁷ Antonia Eliason, ‘With no Deliberate Speed: The Segregation of Roma Children in Europe’ (2017) 27 (2) *Duke Journal of Comparative and International Law* 191, 191-242.

⁸⁶⁸ *Belgian Linguistic case v Belgium* (1968) Series A no 6, *Thlimmenos v Greece* App no 34369/97 (ECHR, 6 April 2000), *Hugh Jordan v United Kingdom* App no 24746/94 (ECHR, 4 May 2001), *Zarb Adami v Malta* App no 17209/02 (ECHR, 20 June 2006).

⁸⁶⁹ *Belgian Linguistic case v Belgium*, para 10.

treat differently persons whose situations were very different without reasonable and objective justification.⁸⁷⁰ The year after *Thlimmenos* was decided, the Court in *Hugh Jordan v United Kingdom* found that statistics on their own were insufficient to show discriminatory practice.⁸⁷¹ In *Hoogendijk*, while the Court allowed statistical evidence to shift the burden of proof to the Respondent State the Court was somewhat hesitant and stated that statistical evidence was not ‘automatically sufficient for disclosing a practice which could be classified as discriminatory under Article 14 of the Convention’.⁸⁷² Five years after the *Hugh Jordan* case, the Court in *Zarb Adami* found that there was a case of sex discrimination, not on the face of the law itself but in the way in which the exercise of administrative practices led to more men than women serving on juries.⁸⁷³ The Court in that case clarified that discrimination could not be ruled out even if it was not directed at or specifically aimed at that group.⁸⁷⁴

It can therefore be put forward that while there was some willingness on the part of the Court to recognise indirect discrimination, there were also some cases where the Court had rowed back on the progress that was being made or made tentative moves. It is widely recognised that it was in *D.H. v the Czech Republic* that the Court significantly extended its Article 14 jurisprudence by recognising indirect discrimination for patterns of racial discrimination.⁸⁷⁵ The case was also a seminal

⁸⁷⁰ *Thlimmenos v Greece*, para 49.

⁸⁷¹ *Hugh Jordan v United Kingdom*, para 154. Alcidia Moucheboeuf, *Minority Rights Jurisprudence Digest* (Council of Europe Publishing 2006) 180. William A Schabas, *The European Convention on Human Rights A Commentary* (Oxford University Press 2015) 130-131, 135, and 566.

⁸⁷² *Hoogendijk v the Netherlands* App no 58461/00 (ECHR, 6 January 2005) cited in *D.H. and Others v Czech Republic*, para 137.

⁸⁷³ *Zarb Adami v Malta*, para 83.

⁸⁷⁴ *Zarb Adami v Malta*, para 80.

⁸⁷⁵ Loretta de Plevitz, ‘Special Schooling for Indigenous Students: a New Form of Racial Discrimination?’ (2006) 35 *The Australian Journal of Indigenous Education* 44, James A Goldston, ‘Ending Racial Segregation in Schools: The Promise of D.H.’ (2008) 1 *Roma Rights Journal* 1, Devroye, ‘The Case of D.H.’ 81, O’Connell, ‘Cinderella’ 211, O’Connell, ‘Substantive Equality’ 129, William S New and Michael S Merry, ‘Solving the “Gypsy Problem”: D.H. and Others v the Czech Republic’ (2010) 54 (3) *Comparative Education Review* 393, Emanuela Ignăţoiu-Sora, ‘The Discrimination Discourse in Relation to the Roma: its Limits and Benefits’ (2011) 34 (10) *Ethnic and Racial Studies* 1697.

moment in the life of the Court, as it clarified that segregation is discrimination. In relation to patterns of racial discrimination, the applicants supplied figures that showed that Roma only amounted to 2.26 per cent of children in primary schools in Ostrava, yet in contrast the Roma represented 56 per cent of the total number of students in special schools in Ostrava.⁸⁷⁶ A Roma child was 27 times more likely to be placed in a special school than a non-Roma child.⁸⁷⁷ These statistics established a pattern of racial discrimination in publically funded schools in the Czech Republic in the eyes of the Grand Chamber. The issue of the Court's reliance on statistics establishing a *prima facie* case of discrimination will be discussed in a subsequent section.

It is particularly important that the Court established that segregation amounts to discrimination as, according to the Council of Europe, segregation of Roma children is the most widespread violation of Roma children's right to education in Europe.⁸⁷⁸ This segregation takes many forms, including placing Roma children into specific areas in classrooms, placing them in separate Roma only classes, placing them in annexes to the main school building or placing them in special schools. In a 2008 study it was found that 35 per cent of Romani children were not enrolled in school, this figure is in stark contrast to the national figure of just 2 per cent.⁸⁷⁹ In 1945 the Czech Republic began the practice of placing Roma children in 'special schools' for those who were mentally disabled.⁸⁸⁰ While the practice of school segregation is used in Hungary, Bulgaria and Slovakia, the OSCE's High

⁸⁷⁶ *D.H. v The Czech Republic*, para 190.

⁸⁷⁷ *D.H. v The Czech Republic*, para 18. Anna Lawson, *Disability and Equality Law in Britain: The Role of Reasonable Adjustment* (Hart Publishing 2008) 37-38.

⁸⁷⁸ *ibid.*, 121-123

⁸⁷⁹ RAXEN_CC-National Focal Czech Republic Dženo Association, *Report on the situation of Minority Education in the Czech Republic* (RAXEN_CC National Focal Point of the European Monitoring Centre on Racism and Xenophobia (EUMC) 2004) 16.

⁸⁸⁰ RAXEN_CC-Minority Education, *Report on the situation of Minority Education* 16.

Commissioner for National Minorities in a 2000 report found that the practice of segregation was worst in the Czech Republic.⁸⁸¹ The Czech Government has responded to criticism by stating that educational psychologists test the children and that it is not part of a concerted practice to place Roma children in 'special schools'.⁸⁸² An estimated 30 per cent of Roma children in the Czech Republic are placed in schools for children with mild intellectual disabilities; this is in comparison to 2 per cent of non-Roma children.⁸⁸³ Many opponents of the placing of Roma children in these schools have pointed to a number of contributory factors such as the lack of educational background (as many Roma children have not attended preschool) unfamiliarity with being tested and lack of proficiency in the Czech language.⁸⁸⁴

In relation to the finding that segregation amounts to discrimination, the Grand Chamber found that the testing used to decide that the Roma children had special learning needs was not backed up by rigorous standards and practices. As such, the Roma children were taking tests where their lack of previous education, language needs or cultural needs were not addressed. The Respondent State used these tests as a justification: that the segregation of Roma children into special schools was warranted and in the interests of the children. The Amicus Brief in *D.H. v The Czech Republic* states that:

Special schools in Central and South-Eastern Europe are part of an educational context that perpetuates educational segregation of minority groups. Today, special schools represent a lower standard of education from which there are very few opportunities for reintegration into the mainstream or for progression to higher levels of education, this limiting children's future prospects of employment.⁸⁸⁵

⁸⁸¹ Rick Fawn, 'Czech Attitudes Towards the Roma: Expecting More of Havel's Country?' (2001) 53 *8 Europe-Asia Studies* 1197.

⁸⁸² *D.H. and Others v The Czech Republic* App no 57325/00 (ECHR, 13 November 2007), para 20.

⁸⁸³ Farkas, *Report on Discrimination* 18.

⁸⁸⁴ Jennifer Devroye, 'The Case of D.H. and Others v the Czech Republic' (2009) 7 *Northwestern Journal of International Human Rights* 81, 86.

⁸⁸⁵ Written Comments by International Step by Step Association, Roma Education Fund and European Early Childhood Education Research Association pursuant to Article 36 2 of the European Convention

The Grand Chamber also clarified that:

Where an applicant alleging indirect discrimination thus establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the Respondent State, which must show that the difference in treatment is not discriminatory.⁸⁸⁶

While the Court was clarifying many of its positions in relation to indirect discrimination in the case, it was an important moment in the history of the Court, in that the general position of Roma was factored in, the presence of statistics (even though they may have not been without dispute) were relied upon along with the general landscape to draw together a picture of segregation as discrimination and patterns of racial discrimination were in place in the Czech Republic.

6.4.2 Indirect Discrimination and the use of Non Governmental Reports and Statistics

[A] difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group. Such a situation may amount to 'indirect discrimination', which does not necessarily require a discriminatory intent.⁸⁸⁷

In *D.H. v the Czech Republic* the Grand Chamber for the first time found a violation of Article 14 in relation to a pattern of racial discrimination, which was taking place in a publically funded primary school.⁸⁸⁸ This was not a case of racial discrimination in a private school; the education policies which segregated Roma children into special schools were drawn up by State authorities and were therefore State designed

on Human Rights and Rule 44 2 of the Rules of the European Court of Human Rights in the case *D.H. and Others v The Czech Republic* App No 57325/00 (ECHR, 13 November 2007) Amicus Brief 26 October 2006.

⁸⁸⁶ *D.H. and Others v the Czech Republic*, para 189.

⁸⁸⁷ *Horváth and Kiss v Hungary*, para 105 citing the earlier case of *D.H. and Others* para 184.

⁸⁸⁸ Jennifer Devroye, 'The Case of *D.H. and Others v the Czech Republic*' (2009) 7 (1) *Northwestern Journal of International Human Rights* 81.

and enforced practices.⁸⁸⁹ The Court, in a positive way, also clarified that the Convention did not merely protect against isolated acts of racial violence, but also addresses systemic practices, particularly when they effect the enjoyment of Convention rights by ethnic or racial groups.⁸⁹⁰ The Court also highlighted that, due to their history of racial segregation, the Roma were in a particularly vulnerable position and in need of particular protection.⁸⁹¹ This was a deeply positive statement, in that Roma had suffered from educational deprivation for decades and it was crucial for the Court to point out their particularly precarious position in societies in Europe today.

One of the positive aspects of the first judgment on school segregation was the recognition by the court of indirect discrimination. The Court found a case of indirect discrimination based on reports and statistics establishing that Roma are more likely to be discriminated against than non-Roma.⁸⁹² This was a significant moment in the long-term struggle for statistics to be acknowledged by the Court in reaching their decision. The Court clearly departed from its approach in the racial violence cases where it took a narrow approach to facts and looked to the files to establish whether there was an absence or presence of verbal racial abuse.⁸⁹³ In the anti-Roma violence cases the Court would not consider evidence in reports or statistics, even though they demonstrated the culture and issues with police interactions with Roma in those states.

⁸⁸⁹ Morag Goodwin, 'D.H. and Others v Czech Republic: a Major Set-Back for the Development of Non-Discrimination Norms in Europe' (2006) 7 *German Law Journal* 421, 421-426.

⁸⁹⁰ Romyan Russinov, 'Segregation and the Roma' (2011) 10 *European Yearbook of Minority Issues* 415, 415-436.

⁸⁹¹ Lourdes Peroni and Alexandra Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law' (2013) 11 (4) *International Journal of Constitutional Law* 1056 – 1085.

⁸⁹² Helen O'Nions, 'Different and Unequal: the Educational Segregation of Roma Pupils in Europe' (2010) 1 *Intercultural Education* 1, 1 - 13

⁸⁹³ *Nachova v Bulgaria*, para 127, *Bekos and Koutropoulos v Greece*, para 72, 74 and 75, *Koky and Others v Slovakia*, para 12. Roberta Medda-Windischer, 'Dismantling Segregating Education and the European Court of Human Rights – D.H. and Others vs. Czech Republic: Towards an Inclusive Education' (2007/2008) 7 (1) *European Yearbook of Minority Issues* 19, 19-56. Lindsey Michele Green, 'The Role of the Judiciary in the European Union's (De)segregation of Roma Students' (2011) 39 (2) *Georgia Journal of International and Comparative Law* 419, 419-444.

The judgment in *D.H.* was seen as positive, in that it both acknowledged the discrimination that Roma suffer due to their ethnicity and also the effect that this discrimination has on their opportunities in life. The recognition of the Court that it would find a case of indirect discrimination based on statistical evidence only was also a significant moment in the development of Article 14. While the Court has set out that it will rely on statistical evidence in cases of indirect discrimination, a number of issues have arisen, most notably in relation to the burden of proof.

6.4.3 The Burden of Proof and the use of Statistics

As all of the educational segregation cases deal with indirect discrimination, the focus of this section will be on the burden of proof and use of statistics as *prima facie* evidence in cases of indirect discrimination.⁸⁹⁴ The Court in *Horváth* stated that where the ‘applicant alleging indirect discrimination establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden of proof shifts to the Respondent State’.⁸⁹⁵ It would then be for the Respondent State to show that the difference in treatment is not discriminatory. The Grand Chamber in *D.H.* acknowledged that applicants often had difficulty in proving discrimination and that ‘[i]n order to guarantee those concerned the effective protection of their rights, less strict evidential rules should apply in cases of alleged indirect discrimination.’⁸⁹⁶ The Court also acknowledged that if the burden of proof was not shifted in cases involving indirect discrimination, it would be ‘extremely difficult in practice’ for applicants to

⁸⁹⁴ Patrick Simon, ‘The Measurement of Racial Discrimination: the Policy Use of Statistics’ (2005) 57 (18) *International Social Science Journal* 9, 9-25. Alastair Stewart, ‘A critical Analysis of *D.H. v Czech Republic*: Understanding the Recent Shift in Strasbourg’s Thinking’ (2009) 1 (1) *Edinburgh Student Law Review* 90, 94-95.

⁸⁹⁵ *Horváth and Kiss v Hungary*, para 108. Kerime Sule Akoglu, ‘Removing Arbitrary handicaps: Protecting the Right to Education in *Horváth and Kiss v Hungary*’ (2014) 37 (3) *Boston College International and Comparative Law Review* 1, 10.

⁸⁹⁶ *D.H. and Others v Czech Republic*, para 186.

prove indirect discrimination.⁸⁹⁷ While it should be acknowledged that shifting the burden in direct and indirect discrimination cases is different, it is worthwhile to focus on the Court's acknowledgement that in cases of indirect discrimination it would be particularly difficult to prove indirect discrimination without the shift of the burden.

In the direct discrimination cases, the Court has continuously focused on the need for the applicant to provide evidence beyond reasonable doubt that racist discrimination played a role in their treatment in order to find a substantive violation of Article 14. The Court acknowledges that it would be very difficult to shift the burden in cases of direct discrimination to the Respondent State to disprove the existence of subjective attitude, yet the Court does not see it as overly onerous on the applicant to have to show the presence of this intent. Could it not be the case that once an applicant has provided *prima facie* evidence of discrimination without the standard of proof being proof beyond reasonable doubt, that the burden could then shift to the Respondent State to disprove or justify as it does in cases of indirect discrimination? If anything, the Court's dealing with the burden of proof in the indirect discrimination cases shows that there is a willingness to acknowledge the difficulties of applicants in proving discrimination, yet the Court is only willing to adopt this practice in cases of indirect discrimination. It must be made clear though that it is not the Court's official position to require proof of intention in cases of direct discrimination. It has been noted by the author of this work that in all of the anti-Roma violence cases involving allegations of violations of Article 14 with Articles 2 and/or 3, that the Court has sought proof of subjective racial intent to be provided by the applicants as evidence of discrimination. Statistics, NGO reports of the situation in a particular State and evidence of racist verbal slurs have not been sufficient to meet the standard of "proof

⁸⁹⁷ *Horváth and Kiss v Hungary*, para 108.

beyond reasonable doubt”, as the applicants have repeatedly failed to show proof of subjective intent on the part of the Respondent State.

In contrast, in the educational segregation cases, in relation to statistics, the Court in *Horváth* commented that:

When it comes to assessing the impact of a measure or practice on an individual or group, statistics, which appear on critical examination to be reliable and significant, will be sufficient to constitute the *prima facie* evidence the applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence.⁸⁹⁸

The Court, by reaffirming this line of thinking regarding the use and reliance by the Court on statistics from the earlier *D.H.* case, confirms that in cases of indirect discrimination the Court will clearly see statistical evidence as being sufficient to show a *prima facie* case of discrimination.⁸⁹⁹ It appears that the Court has adopted a consistent approach that it will rely on statistical evidence as constituting *prima facie* evidence in cases of indirect discrimination, as evidenced in the educational segregation cases. While it will be discussed in more detail in a subsequent section, the Court in the *Oršuš* case did clarify that a finding of indirect discrimination can still be found where the statistical evidence does not show a *prima facie* case of indirect discrimination.⁹⁰⁰ The recognition of indirect discrimination for patterns of racial discrimination by the Court is often seen as one of the most significant contributions to the development of Article 14. While of course that is true, it is also worth noting that without the Court’s recognition that statistical evidence could show a *prima facie* case of discrimination, it would have been and would be in the future much more difficult for applicants to meet the burden of proof.

⁸⁹⁸ *Horváth and Kiss v Hungary*, para 107 citing *D.H. and Others*, para 188.

⁸⁹⁹ Hugh Collins, ‘Discrimination, Equality and Social Inclusion’ (2003) 66 (1) *Modern Law Review* 16, 16-43.

⁹⁰⁰ *Oršuš and Others v Croatia*, para 153. Andrea Grgic, ‘Recognising Formal and Substantive Equality in the *Oršuš* Case’ (2010) 9 *European Yearbook of Minority Issues* 327, 327-368.

Although the fact that the Chamber and Grand Chamber has in the educational segregation cases considered the effect of discrimination on Roma applicants and the social context and history of segregation is important, it is not sufficient to show a *prima facie* case of discrimination and to transfer the burden of proof to the Respondent State.⁹⁰¹ Judge Borrego Borrego (as will be discussed in detail in a subsequent section) stated in his dissenting judgment in *D.H.* that he was of the opinion that the majority in that case were focusing on the social context of the case rather than a *prima facie* case of discrimination. This was not the case, as there was statistical proof in the case that amounted to *prima facie* evidence that Roma children were being segregated into special schools and this was sufficient to shift the burden of proof to the Respondent State.⁹⁰² The Respondent State in *D.H.* did not provide an objective and reasonable justification for this segregation, which led to the majority finding a violation of Article 14 in conjunction with Article 2 of Protocol No. 1.

The Court in the *Oršuš* case, in contrast, did not have statistical evidence to show a *prima facie* case of discrimination, yet the practice of educating Roma children separately from non-Roma children was seen as sufficient to shift the burden of proof to the Respondent State.⁹⁰³ Contrary to the assertions of the dissenting Judges in *D.H.* and *Oršuš*, the Court does continue to ensure that applicants must meet the onerous burden of proving a case of discrimination before the burden will transfer to the Respondent State. The educational segregation cases have clarified that the use of statistics can be relied upon for proving a *prima facie* case of discrimination and shifting the burden to the Respondent State in cases of indirect discrimination. The

⁹⁰¹ Michele Grigolo, Costanza Hermanin and Mathias Möschel, 'Introduction: how does race "count" in fighting discrimination in Europe?' (2011) 34 (10) *Ethnic and Racial Studies Review* 1635, 1635-1647.

⁹⁰² *D.H. and Others v The Czech Republic*, dissenting opinion of Judge Borrego Borrego.

⁹⁰³ *Oršuš and Others v Croatia*, para 153. Nicole Wells, 'The Modified Mechanism in EU Accession: A Look at Croatia's Accession into the EU and the Plight of Croatia's Roma Population' 29 (3) *Wisconsin International Law Journal* 580, 595-598.

next section will look at the margin of appreciation, proportionality and the pursuit of a legitimate aim as discussed in the educational segregation cases.

6.4.4 The Margin of Appreciation and the Pursuit of a Legitimate Aim

As discussed in the earlier chapter introducing Article 14, a margin of appreciation is afforded to States to allow them to determine the steps that need to be taken to ensure compliance with the Convention, while also having regard to the needs of individuals and groups in that State. It could be said that a wide margin of appreciation has been afforded to States in relation to the fulfillment of rights under Article 2 of Protocol No. 1, as evidenced in the Roma cases before the Court.⁹⁰⁴ This historic wide margin of appreciation has led to states devising policies which enabled them to indirectly discriminate against Roma students. It is understandable that sovereign contracting states to the ECHR should continue to have autonomy in how they ensure compliance with the Convention. A difficulty has arisen, though, in that as discussed in the introduction to the chapter, there has been a long history of segregating Roma children or States classifying Roma children as having learning difficulties or special needs in order to place them in ‘special schools’ away from the majority population.

While it was acknowledged in *Oršuš* that the Croatian authorities had a difficult task in how to best address the learning difficulties of children who lacked proficiency in the Croatian language, the Grand Chamber did warn that:

[W]hen discretion capable of interfering with the enjoyment of a Convention right is conferred on national authorities, the safeguards available to the individual will be especially material in determining whether the Respondent State has, when fixing the regulatory framework, remained within its margin of appreciation.⁹⁰⁵

⁹⁰⁴ *D.H. and Others v The Czech Republic*, paras 139, 157. Helen O’Nions, *Minority Rights Protection in International Law: The Roma of Europe* (2nd edn, Routledge 2016) 146-179.

⁹⁰⁵ *Oršuš and Others v Croatia*, para 181.

The Chamber felt that there were insufficient safeguards for the schooling arrangement for Roma children, there was uncertainty about the amended curriculum and often children remained for substantial periods of time in Roma only classes.⁹⁰⁶ The Grand Chamber ultimately found that there had not been a 'reasonable relationship of proportionality between the means used and the legitimate aim said to be pursued'.⁹⁰⁷ It was found that there was no objective and reasonable justification in placing the applicants in Roma-only classes.

It was for the Court in *Sampani and Others v Greece* to examine whether there had been reasonable and objective justification for the difference in treatment. The Court reiterated that the concept of reasonable and objective justification had to be interpreted as strictly as possible when the difference of treatment was based on colour, race or ethnic origin.⁹⁰⁸ The Court did note, though, that a number of States in Europe faced serious difficulties in providing adequate schooling for Roma children that took into account their issues with language proficiency. It acknowledged that this case was a fine balancing act between various competing interests and that it was not easy to find a way of ensuring that the Roma children benefited from the teaching methods used to assist them in becoming more proficient in the language of instruction. While taking all these issues into consideration the Court still had to state that in exercising its margin of appreciation, the Respondent State was not taking into account the particular needs of the Roma as a disadvantaged group. Therefore, the Court found that there was further discrimination perpetrated on the applicants due to the operation of the school between 2008 and 2010.

In *Horváth* the Respondent Government stated that:

⁹⁰⁶ *Oršuš and Others v Croatia*, para 182. Kristin Henrard, 'The Council of Europe and the Rescue of Roma as a Paradigmatic case of Failed Integration; Abstract Principles versus Protection in Concreto' (2011) 10 *European Yearbook of Minority Issues* 271, 290-291.

⁹⁰⁷ *Oršuš and Others v Croatia*, para 184.

⁹⁰⁸ *Sampani and Others v Greece*, para 90.

[I]nasmuch as their treatment in education had been different from that of non-Roma (and other Roma) children of the same age, it had an objective and reasonable justification... they had not been treated differently from non-Roma children with similar socio-cultural disadvantages.⁹⁰⁹

The Respondent Government believed that if the standards and tests were tailored to Roma children, then the tests would not have a ‘sensible meaning’ for the purpose of assessing the learning abilities of children.⁹¹⁰ The Government also maintained that the children had been tested in a variety of ways and not just on one occasion.⁹¹¹ The Court in its judgment stated that:

Article 14 does not prohibit a member State from treating groups differently in order to correct “factual inequalities” between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article.⁹¹²

The Court went on to reiterate their earlier comments in *D.H.*, when they stated:

The Court has also held that no difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.⁹¹³

The Court in *Horváth* also clarified on the meaning of the word ‘respect’ in Article 2 of Protocol No. 1. The Court provided that ‘respect’ means more than to ‘take into account’ or to ‘acknowledge’, that it implies some positive obligation on the part of the State in addition to a primarily negative undertaking.⁹¹⁴ The Court did also

⁹⁰⁹ *Horváth and Kiss v Hungary*, para 94.

⁹¹⁰ *Horváth and Kiss v Hungary*, para 95. Andreas Joh Wiesand, Kalliopi Chainoglou, Anna Śledzińska-Simon, and Yvonne Donders, *Culture and Human Rights: The Wroclaw Commentaries* (De Gruyter 2016) 104-108.

⁹¹¹ *Horváth and Kiss v Hungary*, para 95. Maria Herczog, ‘Poor Children, Poor Services, Poor Outcomes: Child Poverty and Its Impact on Referral and Placement in Public Care System in Hungary’ in Elizabeth Fernandez, Anat Zeira, Tiziano Vecchiato and Cinzia Canali (eds), *Theoretical and Empirical Insights into Child and Family Poverty: Cross National Perspectives* (Springer 2015) 249-250.

⁹¹² *Horváth and Kiss v Hungary*, para 101.

⁹¹³ *Horváth and Kiss v Hungary*, para 101 citing the earlier case of *D.H. and Others*, paras 175-176.

⁹¹⁴ *ibid.*, para 103. Joseph Marko, ‘Five Years After: Continuing Reflections on the Thematic Commentary on Effective Participation. The Interplay between Equality and Participation’ in Tove H

acknowledge that the word ‘respect’, which also appears in Article 8 of the ECHR, has led to varying requirements from case to case due to the varying climates, practices and situations in contracting States. Therefore, the Court stated that Contracting States ‘enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals’.⁹¹⁵ While the Court acknowledged that the Respondent State had a wide margin of appreciation to decide how to protect individuals’ right to education, at the same time it clarified that States were also under a positive obligation to provide suitable education for Roma children that addressed their needs.

The Court provided the following guidance:

A general policy or measure which is apparently neutral but has disproportionately prejudicial effects on persons or groups of persons who, as for instance in the present case, are identifiable on the basis of an ethnic criterion, may be considered discriminatory notwithstanding that it is not specifically aimed at that group, unless that measure is objectively justified by a legitimate aim and the means of achieving that aim are appropriate, necessary and proportionate.⁹¹⁶

The educational segregation cases are an important lens through which to view the margin of appreciation. While there should be a wide margin of appreciation afforded to contracting States, considering the impact that a wide margin of appreciation can have on policies which may indirectly discriminate against vulnerable ethnic groups, the Court needs to heavily question the legitimate aim of the Respondent State.

The Court should rigorously question, as it did in the educational segregation cases, whether ‘a reasonable relationship of proportionality between the means used

Malloy and Ugo Caruso *Minorities, their Rights, and the Monitoring of the European Framework Convention for the Protection of National Minorities* (Brill 2013) 117.

⁹¹⁵ *Horváth and Kiss v Hungary*, para 103.

⁹¹⁶ Päivi Gynther, *Beyond Systemic Discrimination Educational Rights, Skills Acquisition and the Case of Roma* (Martinus Nijhoff Publishers 2007) 270-271.

and the legitimate aim said to be pursued was achieved and maintained'.⁹¹⁷ The Court, as discussed in previous sections, looked to the reasons why the children were being placed in special schools or annexes, they analysed the claim of the Respondent States that this segregation was due to a lack of proficiency in the majority language and that the separate classes were there to assist them with language needs. The Court looked at the psychological tests that were used to decide whether the children should be placed in the 'special schools'. The Judges considered psychological reports, leading expert medical opinion, statistics, NGO reports and reports of professional medical and educational bodies in deciphering if there was a relationship of proportionality between segregating the Roma children and the alleged aim of ensuring the children received specialised education due to their special learning needs or language needs.

The Court also analysed whether the justifications used by the Respondent States were objective and reasonable. The Court heavily questioned whether the applicants were segregated due to their ethnicity or rather whether the Respondent States were, as they said, assessing the children to ensure that their educational needs were adequately met.⁹¹⁸ It could be argued that the judges of the Chamber and Grand Chamber in each of the educational segregation cases adhered strictly to the need to scrutinise proportionality, the justification provided and the legitimate aim said to be pursued, particularly in light of the ethnic dimension to the cases and the fact that the applicants were part of a disadvantaged group. The educational segregation cases display the Court's rigorous scrutiny of the Respondent state's justifications for why the Roma children were being segregated. The Court, in contrast to the earlier anti-Roma violence and forced sterilisation cases, relied on a wide variety of reports,

⁹¹⁷ *Oršuš and Others v Croatia*, para 184.

⁹¹⁸ Paola Toninato, *Romani Writing: Literacy, Literature and Identity Politics* (Routledge 2014) 37-38.

statistics and medical opinions in deciphering what the “real” reasoning behind state policies were.

The author would argue that the cases resulted in the Court dealing with Article 14 in a more robust way, such as stating that even where a violation of a substantive Convention article had been found, if there were issues of discrimination in the case, then a separate consideration of Article 14 would be carried out. This displays a significant shift from the early anti-Roma violence cases or the forced sterilisation cases, where the Court felt no need to separately address a violation of Article 14 when a violation of a substantive Convention article had been found. No longer was the Court viewing the Article as one that did not need to be considered; it was actively entering into an analysis of the margin of appreciation afforded to the Court, proportionality, pursuit of a legitimate aim and justification. Therefore, arguably the educational segregation cases have provided the most lengthy, consistent and considered thought from the Court with regard to each of these elements of Article 14.

6.4.5 Positive Obligations

Another area where the educational segregation cases have provided instruction on the development of Article 14 has been in relation to positive obligations.⁹¹⁹ The Court had recognised a procedural positive obligation in the *Oršuš* case, in terms of the safeguards that would ensure that special regard would be had for the needs of Roma children as members of a disadvantaged group.⁹²⁰ In the *Horváth* case, the

⁹¹⁹ William K Barth, ‘Minority Rights, Multiculturalism and the Roma of Europe’ (2007) 76 363, 393-394. Anne-Marie Callus and Ruth Farrugia, *The Disabled Child’s Participation Rights* (Routledge 2016) 51-79.

⁹²⁰ *Oršuš v Croatia*, para 177 and para 138, Interights submission stated: ‘The obligation to ensure that education was both adequate and appropriate required States to take positive measures that would enable and help individuals and communities to fully enjoy the right to education.’

Court recognised a substantive positive obligation, to ‘undo a history of racial segregation in special schools’.⁹²¹ The Court was also explicit in its discussion of positive measures. In the sphere of education, members of groups which had suffered endemic and continuing discrimination in education should benefit from positive measures to address structural deficiencies.⁹²² As an example, the Court stated that applicants with difficulties following the school curriculum should be actively assisted.⁹²³ The Court made very clear that ‘these obligations are particularly stringent where there is an actual history of discrimination’.⁹²⁴

The Court went even further by highlighting how these positive measures could be achieved by Recommendation no. R (2000) 4 of the Committee of Ministers, which would encourage the provision of appropriate support structures in order to allow and ensure that Roma children benefit from equal opportunities at school through positive action.⁹²⁵ The Court stated that ‘the State has specific positive obligations to avoid the perpetration of past discrimination or discriminative practices disguised in allegedly neutral tests’.⁹²⁶ The Court further iterated that the state must demonstrate that the tests and their application used to assign the children to special schools are capable of ‘fairly and objectively’ determining the applicant’s learning ability.⁹²⁷

The comment of the Court on positive action was commended by many parties, but has been criticised as being quite demanding. Contracting States to the ECHR may feel that the Court is placing too much of a burden on them; on the other

⁹²¹ *Horváth and Kiss v Hungary*, para 127.

⁹²² *Horváth and Kiss v Hungary*, para 104 citing *Oršuš and Others v Croatia*, para 177.

⁹²³ *ibid.*, para 104.

⁹²⁴ *ibid.*, para 104.

⁹²⁵ At para 104. Recommendation no. R(2000)4 of the Committee of Ministers to member States on the education of Roma/Gypsy children in Europe (adopted by the Committee of Ministers on 3 February 2000 at the 696th meeting of the Ministers’ Deputies).

⁹²⁶ *Horváth and Kiss v Hungary*, para 116.

⁹²⁷ *ibid.*, para 117.

hand the Court identified that the Court is particularly concerned where there is a history of discrimination. Therefore, States are aware that when designing and implementing policies, they must be very careful to take into account past discrimination and how particular vulnerable groups may be affected. The Court pointed to the crucial factor in each of these cases that the tests that are used by States to determine a student's learning ability should be fair and objective. These tests should take into account past discrimination, as it will have an impact on how students perform in the test. The tests do not merely impact a child's short term life in a particular school; they also determine the student's long term future, as they may not receive the level of education required to advance in education or in the workforce.

The added requirement on Contracting States to consider past discrimination can only be positive, as it not only impacts the applicants in an individual case, but it also forces the State to consider the history of discrimination against a particular group in that State and ensures that States cannot conveniently argue that they can only consider the facts of the case at hand. States must also consider the overall historical context of discrimination and that group. Historically contracting states to the ECHR would have faced only negative obligations to abstain from human rights violations. The educational segregation cases display how Article 14 has become a more robust Article, with the Court setting down positive obligations on states to ensure that educational discrimination of Roma is addressed. The next section of this chapter will consider the model of equality relied upon by the Court in the educational segregation cases and will utilise Fredman's thoughts on intersectionality as a tool of analysis to uncover the various grounds on which the applicants in these cases were being discriminated.

6.5 The Model of Equality Relied Upon by the Court in Allegations of a Violation of Article 14 in the Educational Segregation Cases

6.5.1 A Move Towards a Substantive Model of Equality?

In relation to the question of what model of equality was relied upon by the Court in these cases, there is a need to draw two distinctions: firstly in cases where the Grand Chamber overturned an earlier decision of the Chamber and secondly the difference in approach between the majority and minority judgments handed down by the Court. Following this analysis, four particular areas can be identified as displaying the Court's move towards a reliance on a substantive model of equality. The Court, in recognising the need to take into account the specific position of the Roma population, the recognition of indirect discrimination in cases of patterns of racial segregation, the reliance on statistics and the discussion of the need for States to take positive action to redress the educational needs of Roma children displayed a move towards the substantive model of equality.⁹²⁸

It must be acknowledged, though, that the move from the formal to the substantive model has been fraught in the educational segregation cases for two reasons: firstly while the Grand Chamber has been rather forward thinking in relation to substantive equality, it has been overturning earlier Chamber decisions. Secondly, while the majority of the Grand Chamber have been relying on the substantive model, in some of the educational segregation cases a finding of a violation of Article 14 has been reached by a very slight majority and with some strong dissenting opinions. This

⁹²⁸ Andrew Drzemczewski, 'The EU Accession to the ECHR: The Negotiation Process' in Vasiliki Kosta, Nikos Skoutaris and Vassilis P Tzevelekos (eds), *The EU Accession to the ECHR* (Hart Publishing 2014) 17-29. Francesco Seatzu, 'Enhancing a Principled Justificatory Model of Adjudication for the Protection of Human Rights in the Socio-Economic Sphere: The Impact of the European Social Charter on the Case Law of the European Court of Human Rights' in Giuliana Ziccardi Capaldo (ed), *The Global Community: Yearbook of International Law and Jurisprudence* 2015 (Oxford University Press 2016) 246.

section will focus on the inconsistencies in terms of the shift to the substantive model of equality between the Chamber and the Grand Chamber.

Firstly, it is important to acknowledge that the Grand Chamber in both the *D.H.* and *Oršuš* cases found violations of Article 14, thereby overturning the earlier decisions of the Chamber where no violation of Article 14 had been found.⁹²⁹ While *D.H.* was the first of the educational segregation cases and *Oršuš* the third, the Chamber had found a violation of Article 14 in the *Sampanis* case, which came in between the other two cases.⁹³⁰ The Chamber found violations of Article 14 in all three of the most recent cases, namely *Sampani*, *Horváth* and *Lavida*.⁹³¹ In *D.H.* the Chamber, in the first hearing of the case, stated that while the applicants had raised serious arguments, they did not amount to a violation of the Convention.⁹³² The Chamber was of the view that the Czech Government had established that the system of special schools had not been introduced to cater only for Roma children. The Chamber also was of the view that the schools in question had made a considerable effort to help 'certain categories of pupils to acquire a basic education'.⁹³³ Ultimately, the Chamber in *D.H.* was of the view that a legitimate aim was being pursued and that the rules governing the children's placement in special schools was not based on the students' ethnic origin, but rather was ensuring the aim of adapting the education system to the educational needs of the students and their disabilities and aptitudes.⁹³⁴

The Chamber felt that the applicants had not succeeded in refuting the experts' findings that their learning difficulties would prevent them from following the ordinary school curriculum. Worryingly, the Chamber went further than this and

⁹²⁹ *D.H. and Other v Czech Republic*, paras 125-127. *Oršuš and Others v Croatia*, para 112.

⁹³⁰ *Sampanis and Others v Greece*, para 97.

⁹³¹ *Sampani and Others v Greece*, para 105, *Horváth and Kiss v Hungary*, para 129, *Lavida and Others v Greece*, para 74.

⁹³² *D.H. and Others v The Czech Republic*, para 125.

⁹³³ *ibid.*, para 125.

⁹³⁴ *ibid.*, para 125.

stated that the applicants' parents had not taken any action themselves to stop their children from being placed in the special schools and in some cases requested their children's placement in those schools.⁹³⁵ Essentially, the Chamber was arguing that the parents would have needed to object to their children's placement, that unless you fight your perceived discrimination, then you could not be discriminated against. Also, by stating that the parents gave their permission, the Chamber leads to the contention that the parents consented to the segregation and discrimination. Later the Grand Chamber clarified that one cannot consent to being discriminated against. The Chamber concluded that while the statistical evidence did disclose worrying figures and that the general situation in the Czech Republic was not ideal for Roma children, on the basis of the 'concrete evidence' before it, it could not conclude that the applicants were placed in special schools due to racial prejudice.⁹³⁶ It could be argued that the Chamber was relying on the formal model of equality by not taking into account the vulnerable position of the Roma, the history of discrimination and the statistical evidence as being *prima facie* evidence to show a case of discrimination which could shift the burden of proof to the Respondent State.

The position of the Chamber in *D.H.* was replicated in the unanimous decision of the Chamber in *Oršuš*, where no violation of Article 14 was found.⁹³⁷ The Grand Chamber overturned this decision again in a similar fashion to *D.H.*, by a majority but not unanimous decision.⁹³⁸ The Chamber in *Oršuš* was very eager to point out that while on first glance the case may have seemed very similar to the *D.H.* case, they viewed the cases as being entirely different. The Chamber stated:

In the Court's view placing a disproportionate percentage of children

⁹³⁵ *D.H. and Others v The Czech Republic*, para 126.

⁹³⁶ *ibid.*, para 127.

⁹³⁷ *Oršuš and Others v Croatia*, para 112.

⁹³⁸ *ibid.*, para 185. The majority decision was nine votes to eight that there had been a violation of Article 14 in conjunction with Article 2 of Protocol No 1.

belonging to a specific ethnic minority in schools for the mentally retarded bears no comparison with placing Roma children in separate classes on the ground that they lack adequate knowledge of the Croatian language.⁹³⁹

The Chamber very much focused on the lack of statistical proof in comparison to the *D.H.* case. They also focused on differentiating *D.H.* from the instant case on the basis that the difference in treatment in *D.H.* was based on race, which requires the strictest scrutiny, whereas the difference in treatment in *Oršuš* was based on language skills, which as a ground allows for a wider margin of appreciation.⁹⁴⁰ The Chamber also viewed the Croatian Government's keeping Roma in ordinary schools as allowing for more flexible movement between separate and regular classes.⁹⁴¹ The Chamber did admit, though, that there were no clearly set procedures and standards and that the child would be subject to assessment by a class teacher, which may not completely exclude any form of arbitrariness. The Chamber, though, saw the lack of procedures as positive, as it allowed for flexibility in moving from the separate class to the ordinary class. They did not see how the lack of clearly set procedures helped to ensure that the Roma children were the ones selected for the segregated classes.

The Chamber in *Oršuš* also focused on the fact that only four schools utilised the practice of separate classes and that the high rate of Roma in those classes was because there were a lot of Roma children attending those schools.⁹⁴² The Chamber was essentially saying as the practice of separate classes was not a widespread practice, it could not be discriminatory. Moreover, while statistics did not show evidence of discrimination, the Chamber at the same time did not consider the broader context. The Chamber's drawing a comparison to the *D.H.* case was also concerning, in that they viewed placing children in 'special schools' as much worse than placing

⁹³⁹ *Oršuš and Others v Croatia*, para 65.

⁹⁴⁰ *Oršuš and Others v Croatia*, Chamber judgment paras 56, 65-66.

⁹⁴¹ *Oršuš and Others v Croatia*, Chamber judgment para 65.

⁹⁴² *Oršuš and Others v Croatia*, Chamber judgment para 67.

children in segregated classes, where it was later found that they were educated to a lower standard. Their praise of the Croatian government putting these classes in place to acknowledge the needs of the children is also interesting. The Chamber seemed to ignore the various reports of educational segregation of Roma across Europe and within Croatia and the means by which governments disguised their racially driven segregation of Roma students.

While the Grand Chamber in both *D.H.* and *Oršuš* reversed the earlier decisions of the Chamber, it is important to note that there were some very serious dissenting judgments given in both cases. It is not necessary to reiterate here the earlier lengthy discussion of those dissenting opinions. The dissenting opinions in the Grand Chamber relied on similar arguments to those made by the Chamber in the earlier judgment. The dissenting opinions in the Grand Chamber were much more stringent on the fact that the overall context of the past discrimination of Roma should not be taken into account, that statistical evidence should not be relied upon, that only the facts in the instant case could be considered and that the vulnerable position of the Roma could not be considered. It can be seen from the two Chamber judgments and the dissenting judgments in the Grand Chamber that there are still some judges in the Court who do not favour a move to a reliance on the substantive model of equality.⁹⁴³

However, it can be seen that there has been a demonstrated move towards a reliance on the substantive model in the Grand Chamber's comments in *Oršuš*, where the majority commented that:

While the case at issue concerns the individual situation of the fourteen applicants, the Court nevertheless cannot ignore that the applicants are members of the Roma minority. Therefore, in its further analysis the Court shall take into account the specific position of the Roma

⁹⁴³ *D.H. and Others v Czech Republic*, dissenting judgments in the Grand Chamber of Judges Zupančič, Jungwiert, Borrego Borrego and Šikuta. *Oršuš and Others v Croatia*, joint dissenting judgment in the Grand Chamber of Judges Jungwiert, Vajić, Kovler, Gyulumyan, Jaeger, Myjer, Berro - Lefèvre and Vučinić.

population. As the Court has noted in previous cases that as a result of their history, the Roma have become a specific type of disadvantaged and vulnerable minority.⁹⁴⁴

While the Court in previous cases, as discussed earlier, has acknowledged the particularly vulnerable position of the Roma, it was in *Oršuš* that the Grand Chamber went into explicit detail about how it would take into account the particular position of the Roma when undertaking its further analysis in the case.⁹⁴⁵ It also stated:

[T]he vulnerable position of Roma/Gypsies means that special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases.⁹⁴⁶

Here the Court was displaying a shift to the substantive model of equality in considering the particular needs of the Roma, rather than adopting the race/colour blind approach of the formal model of equality. The Court was also referring to the need for positive action to be taken to ensure that regulatory frameworks in Contracting States would also take the vulnerable position of the Roma into account, as well as their different lifestyle when making decisions and implementing regulations.

The Court went even further in its subsequent comment in *Oršuš*, reiterating that the Court in its previous jurisprudence had acknowledged that:

[T]here could be said to be an emerging international consensus amongst the Member States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.⁹⁴⁷

Again this comment from the Court demonstrates a move towards the substantive model of equality, as it recognises the special needs of a minority group, that they are

⁹⁴⁴ *Oršuš and Others v Croatia*, para 147.

⁹⁴⁵ Charilaos Nikolaidis, *The Right to Equality in European Human Rights Law: The Quest for Substance in the Jurisprudence of the European Courts* (Routledge 2015) 60-68.

⁹⁴⁶ *Oršuš and Others v Croatia*, para 148.

⁹⁴⁷ *Oršuš and Others v Croatia*, para 148.

not the same as others in society and their personal characteristics, identity and lifestyle cannot be omitted when providing them with protection.⁹⁴⁸ It displays the majority in the Grand Chamber's thinking that when considering the right to non-discrimination and equality needs of an individual who is part of a minority group, that individual's characteristics should be at the forefront of the Court's consideration.

It can be seen in the preceding sections of this chapter that the educational segregation cases have had a significant impact on the changing model of equality being relied upon by the Court. The next section will rely on the earlier discussed substantive equality theory of intersectionality to analyse on what grounds Roma children are discriminated.

6.5.2 Applying Fredman's Theory of Intersectionality to the Case Law

Fredman's theory of intersectionality, as introduced extensively in the previous chapters, focuses on four key themes, namely: redressing disadvantage; addressing stigma, stereotyping, prejudice and violence; facilitating participation; and accommodating difference through structural change.⁹⁴⁹ This section will analyse some of the various comments made by the Court or by individual Judges in the educational segregation cases in light of Fredman's intersecting and complementary objectives. This section will focus on two of the four themes: addressing stigma, stereotyping, prejudice and violence, and accommodating difference through structural change. Before moving onto an analysis of the case law through the use of these two lenses, there will be a brief discussion of another theory of intersectionality,

⁹⁴⁸ Nafsika Alexiadou, 'Equality and Education Policy in the European Union – An Example from the Case of Roma' in Stephen Parker, Kalervo N. Gulson and Trevor Gale (eds), *Policy and Inequality in Education* (Springer 2017) 111-133.

⁹⁴⁹ Sandra Fredman, *Discrimination Law* (2nd edn, Oxford University Press 2011) 25-33.

namely internal intersectionality, along with a brief discussion of discrimination based on the intersecting grounds of ethnicity and gender, and ethnicity and disability.

6.5.3 Internal Intersectionality and the Intersecting Grounds of Ethnicity and Gender

It is imperative to note that Roma girls face additional marginalisation due to their gender, in addition to their ethnicity and socio-economic status. Primary school enrollment for girls in non-Roma communities who live in close proximity to Roma and face similar socio-economic conditions is 96 per cent, while the rate for Roma girls is just 64 per cent.⁹⁵⁰ It has been found that 21 percent of Romani women believe that basic primary school education is sufficient for girls, while in contrast only 8 percent think the same level of education is enough for boys.⁹⁵¹ Therefore it can be seen that to some extent Roma girls do not only face external issues in relation to their education, but the views of some members of the Roma community are also factors in the girls' lack of education.

In South East Europe, the illiteracy rate of Roma women is 32 per cent, while it is 22 per cent for Roma men.⁹⁵² This is in comparison to just 5 per cent for non-Roma women and 2 per cent for non-Roma men in the same region.⁹⁵³ The Open Society Foundation has found that 23 per cent of Roma women compared to 15 per cent of Roma men have received no formal education in Romania.⁹⁵⁴ When comparing the figures of Roma women with no formal education to women in the

⁹⁵⁰ Niall O'Higgins and Andrey Ivanov, 'Education and Employment Opportunities for the Roma' (2006) 48 (6) *Comparative Economic Studies* 6–19.

⁹⁵¹ Laura Surdu and Mihai Surdu, *Broadening the Agenda: The Status of Romani Women in Romania* (Open Society Institute 2006) 11.

⁹⁵² Andrey Ivanov, *At Risk: Roma and the displaced in South-East Europe* (United Nations Development Programme Regional Bureau for Europe and the Commonwealth of Independent States June 2006) 33.

⁹⁵³ *ibid.*

⁹⁵⁴ Surdu and Surdu, *Broadening the Agenda* 11.

majority population, the figures are in stark contrast, at 23 per cent and 4 per cent respectively.⁹⁵⁵ It is important to assess societies and States policies impact on the education of Roma, it is also imperative to make reference to the internal intersectionalities faced by Roma girls within their own communities. The applicants in these cases were a mixture of males and females, it is important to acknowledge that Roma girls are discriminated against on the twin grounds of ethnicity and gender, as well as facing internal intersectionality in a community where historically Roma female children's education was not seen as being as important as Roma male children's education. While not directly related to the development of Article 14, there is a link in that while the Roma female applicants in the cases were discriminated on the basis of their ethnicity, they were also arguably discriminated against on the ground of gender. Internal intersectionality and the intersecting grounds of ethnicity and gender has been placed together here, as the Roma communities' own perception of Roma girls' need for education will undoubtedly mean that less Roma girls will be in the school system. Those girls who are in the school system will face discrimination on the grounds of ethnicity and gender, due to the issues they face from both the wider non-Roma community and their own community.

6.5.4 The Intersecting Grounds of Ethnicity and Disability

The applicants in the educational segregation cases had been placed in 'special schools' arbitrarily, based on flawed psychological testing and negative stereotyping of Roma children having familial disability. There has been little consideration, though, for students who did have learning difficulties amongst the Roma community. As the testing was arbitrary and incorrectly identified significant numbers of Roma

⁹⁵⁵ Surdu and Surdu, *Broadening the Agenda* 11.

children as having special learning needs, the question is what happened to those children who did have learning difficulties? Those children did not just loose out on a rigorous education to equip them to move to secondary level education, or the opportunity to be in mixed classes with non-Roma children; they also lost the opportunity to have their needs identified. The Respondent States openly saw ‘special schools’ as places that did not have to offer meaningful education. Children with no learning difficulties were disadvantaged in these schools by not receiving the same standard of education as those in mainstream schools. Little consideration, though, has been given to Roma children with learning difficulties: as they have not taken cases to the Court, we do not hear about how they were discriminated against in the way they were educated. Clearly this silent group of children were discriminated against not just on the ground of ethnicity as the other children were but also on the ground of disability.

6.5.5 Addressing Stigma, Stereotyping, Prejudice and Violence

Prejudice Against Roma Parents

Judge Borrego Borrego. in his dissenting opinion in the Grand Chamber judgment in *D.H.*, was very conscious of the way in which the Grand Chamber referred to the applicants’ parents as not being capable of giving consent for their children to attend ‘special schools’.⁹⁵⁶ The Chamber was highlighting the effects that being poorly educated and part of a disadvantaged group can have on Romani parents. Judge Borrego Borrego stated that this practice of viewing Roma parents as not being fit to choose their child’s school was corrosive and could lead to children being ‘abducted’

⁹⁵⁶ *D.H. and Others v The Czech Republic*, dissenting opinion of Judge Borrego Borrego, paras 11 – 15.

from their parents when the latter belong to a particular social group, because certain ‘well intentioned’ people ‘feel constrained to impose their conception of life on all’.⁹⁵⁷ Judge Borrego Borrego stated that if the Court were to depart from its judicial role, it would lead to very serious negative consequences for Europe.

While Judge Borrego Borrego’s dissenting judgment has been criticised in other parts of this chapter, his discussion of the State taking a paternalistic role in relation to Roma parents deciding on their children’s education is a crucial point to raise. While the State should not be taking the negative view of Roma parents that being unable to care for their children, the underlying issue of the effect of systemic disadvantage is important to consider.⁹⁵⁸ If Roma parents themselves were segregated in school, placed in a ‘special school’ or encouraged by the State not to attend school, then those Roma parents may need additional support from the State to remedy their negative experience of education and to assist them in supporting their children in school. In a study carried out by Surdu, Vincze and Wamsiedel in 2010, it was found that 23.1 percent of Roma parents who had never attended school reported that their own parents had never attended school.⁹⁵⁹

In the Grand Chamber decision in *Oršuš*, the dissenting Judges in their joint partly dissenting opinion further referred to the fact that school authorities had made repeated attempts to organise regular parent-teacher meetings at both class level and on an individual basis, along with organised visits of Roma assistants to the students’ homes to stress the importance of school attendance to the Roma parents. The Judges

⁹⁵⁷ *ibid.*, 14.

⁹⁵⁸ Theresia Degener, ‘Intersections between Disability, Race and Gender in Discrimination Law’ in Dagmar Schiek and Anna Lawson (eds), *European Union Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination* (2nd edn, Routledge 2016) 29-47.

⁹⁵⁹ David Mark and Margareta Matache, ‘Confined by Narrow Choices: The Stories of Roma Adolescents’ in Jacqueline Bhabha (ed), *Human Rights and Adolescence* (University of Pennsylvania Press 2014) 277-278.

stressed that the applicants parents rarely responded to such efforts. The role of the parents in these matters cannot be underestimated.⁹⁶⁰ While it is of course important that children are encouraged by their parents to attend school, it is astonishing that the Judges would not have considered that the Roma parents would have serious and well-founded fears in relation to meeting with authorities' and home visits. As discussed in the previous chapter, historically Roma parents have had long held fears about registering their ethnicity or having authorities visit their homes, due to policies of State authorities forcibly threatening to take their children away from them.⁹⁶¹ The Judges also did not consider that perhaps the Roma children did not regularly attend school due to poverty; their parents being unable to afford to feed or clothe them or buy school supplies.⁹⁶² The children may not have attended school due to racism, intolerance and negative stereotyping. The parents themselves may have had a poor experience of schooling and education when they were children and this may have affected their decision as to whether they wanted to encourage their children to attend school.

6.5.6 The Impact on Roma Children of Segregation Based on Stereotyping and Ethnic Discrimination

The Judges in *Oršuš* did not consider the endemic discrimination and disadvantage suffered by Roma when making their comments. While the majority found a violation of Article 14, this was essentially only nine of the seventeen judges sitting on the

⁹⁶⁰ *Oršuš and Others v Croatia*, para 7.

⁹⁶¹ Claudia Tavani, *Collective Rights and the Cultural Identity of the Roma: A Case Study of Italy* (Martinus Nijhoff Publishers 2012) 18-20. Barbara Giovanna Bello, 'Who is Afraid of Whom? Turning Security Threats Upside-down in the Governance of Roma People in Today's Italy' in Salvatore Palidda (ed), *Governance of Security and Ignored Insecurities in Contemporary Europe* (Routledge 2016) 158-159. Alexandra Oprea, 'Toward the Recognition of Critical Race Theory in Human Rights Law: Roma Women's Reproductive Rights' in Jacqueline Bhabha, Andrzej Mirga and Margareta Matache (eds), *Realizing Roma Rights* (University of Pennsylvania Press 2017) 53-56.

⁹⁶² Maria Andruszkiewicz, 'Romani Children in European Schools: Recent Experience' in Eluned Roberts-Schweitzer with Vincent Greaney and Kreszentia Duer (eds), *Promoting Social Cohesion through Education: Case Studies and Tools for Using Textbooks and Curricula* (The World Bank 2006) 103.

Grand Chamber bench.⁹⁶³ Nearly half the members of the judiciary made no reference to the multiple ways in which Roma children were being discriminated against. Instead, the dissenting Judges focused on their parents not sending them to school, with no consideration of the broader factors, which influence the Roma as a group. A psychological study of the segregated Roma children submitted to the Court showed that segregated education produced both psychological and emotional harm in the children.⁹⁶⁴ The psychological study found that amongst the Roma children studied:

most children had never had a non-Roma child as a friend;
86.9% expressed a wish to have a non-Roma child as a friend;
84.5% expressed a wish to attend a mixed class;
89% said they felt unaccepted in the school environment;
92% stated that Roma and non-Roma children did not play together.⁹⁶⁵

It was shown the development of the children's identity and self-esteem was also harmed.⁹⁶⁶ The dissenting Judges, unlike the judges in the *D.H.* case, did not consider the impact that the segregation and discrimination had on the Roma children. They also crucially did not consider that an endemic history of segregation and disadvantage causes a nexus between the various grounds of discrimination, which culminates in Roma children being placed in 'special schools', or segregated into Roma only classes.

The Court observed in *Sampani* that there had been a proposed plan to merge two of the three schools in the catchment area, thereby merging the Roma only school with a school which non-Roma pupils attended.⁹⁶⁷ The Mayor and Prefect had

⁹⁶³ *Oršuš and Others v Croatia*, para 185.

⁹⁶⁴ *Oršuš and Others v Croatia*, para 53.

⁹⁶⁵ *ibid.* Kazuyo Igarashi, 'Support Programmes for Roma Children: Do they Help or Promote Exclusion?' (2005) 16 (5) *Intercultural Education* 443, 443-452. Vera Messing, 'Good Practices Addressing School Integration of Roma/Gypsy Children in Hungary' (2008) 19 (5) *Intercultural Education* 461, 461-473. Helen O'Nions, 'Different and Unequal: the Educational Segregation of Roma Pupils in Europe' (2010) 21 (1) *Intercultural Education* 1, 1-13.

⁹⁶⁶ *ibid.* Ramón Flecha and Marta Soler, 'Turning Difficulties into Possibilities: Engaging Roma Families and Students in School Through Dialogic Learning' (2013) 43 (4) *Cambridge Journal of Education* 451, 451-465.

⁹⁶⁷ *Sampanis and Others v Greece*, paras 9-14.

rejected this plan. The former stated to the Ministry of Education that since ‘Gypsies [had] chosen to live in dumps which they themselves [had] created’ and to ‘engage in illegal activities’, they could not expect ‘to share the same classrooms as the other pupils of Aspropyrgos’.⁹⁶⁸ In addition to this, the Ombudsman described the school as a ‘ghetto school’.⁹⁶⁹ It was also noted that a number of Roma children had begun to not attend classes; this was viewed as being related to the lack of improvements to the running of the school.⁹⁷⁰ The Greek Government had also failed to give any convincing explanation as to why no non-Roma students attended the 12th school.⁹⁷¹ *Sampani* is an interesting case, as it involved the applicants from the earlier *Sampanis* case bringing a case to the ECtHR, because they were of the view that nothing had changed in Greece in the wake of the *Sampanis* judgment.⁹⁷² Again, the comments made by Mayor to the Ministry of Education display the long-held and endemic racism and discrimination faced by Roma. The comments also offer a glimpse of the living conditions of the Roma in that area. If the Mayor himself acknowledges that the Roma lived in substandard conditions, that they themselves had to create, then it shows that it is not just ethnicity that leads to discrimination, but also poor living conditions, poverty, lack of employment and marginalisation.⁹⁷³

6.5.7 Roma Children Stigmatised as Suffering From Familial Disability

In *Horváth and Kiss v Hungary*, the applicants submitted that ‘[s]ocial deprivation was in great part linked to the concept of familial disability’. The applicants stated

⁹⁶⁸ *Sampanis and Others v Greece*, paras 27-29.

⁹⁶⁹ *Sampanis and Others v Greece*, para 26. Lilla Farkas, ‘The Scene After Battle: What is the Victory in D.H. Worth and Where to Go from Here?’ (2008) 1 *Roma Rights Journal* 51, 61-62.

⁹⁷⁰ *Sampanis and Others v Greece*, para 35.

⁹⁷¹ *Sampanis and Others v Greece*, para 83. Melanie H Ram, ‘Europeanized Hypocrisy: Roma Inclusion and Exclusion in Central and Eastern Europe’ (2014) 13 (3) *Journal on Ethnopolitics and Minority Issues in Europe* 15, 15-44.

⁹⁷² *Sampani and Others v Greece*, paras 5 - 30, 122 – 128.

⁹⁷³ Teodor Cozma, Constantin Cucos and Mariana Momanu, ‘The Education of Roma Children in Romania: Description, Difficulties, Solutions’ (2000) 11 (3) *Intercultural Education* 281, 281-288.

that the idea of familial disability was relied upon for the diagnosis of Roma children who were in the 1970s transferred to special schools. The applicants further claimed that, based on contemporary research:

[F]amilial disability could not amount to any type or form of mental disability, as it was in essence based on the social deprivation and the non-mainstream, minority cultural background of Roma families and children. The definition of mental disability as comprising social deprivation and/or having a minority culture amounted to bias and prejudice.⁹⁷⁴

The applicants also pointed to the fact that the tests that were used for placing Roma children in ‘special schools’ were knowledge-based and culturally biased. This therefore put Roma children at a particular disadvantage. It can be seen from the applicant’s submissions in *Horváth* that a number of factors conspired together, resulting in Roma children being placed in ‘special schools’. The children’s lack of previous education and knowledge of the testing language put them at an immediate disadvantage when taking the tests. The children’s poverty and disadvantage in life also contributed to their being discriminated against. The children were not discriminated against only on the basis of their ethnicity; this was just one factor, as they were also discriminated against due to age, poverty, lack of education, etc.

In a positive part of the judgment in *Horváth*, the Court did look at reports from NGO’s and monitoring bodies and sought to reexamine the concept of ‘familial disability’, which had been used as a justification for the misdiagnosis of Roma children.⁹⁷⁵ It was stated by the Court that in relation to the concept of ‘familial disability’, ECRI had published a report in 2009 that showed that ‘the vast majority of children with mild learning disabilities could easily be integrated into mainstream schools; and many are misdiagnosed because of socio-economic disadvantage or

⁹⁷⁴ *Horváth and Kiss v Hungary*, para 91.

⁹⁷⁵ *Horváth and Kiss v Hungary*, para 115. Nancy Stephan, ‘Biological Degeneration: Races and Proper Places’ in J Edward Chamberlin and Sander L Gilman (eds), *Degeneration. The Dark Side of Progress* (Columbia University Press 1985) 97-120.

cultural differences'.⁹⁷⁶ The use of these reports by the majority of the Court could be viewed as positive in *Horváth*, due to the unanimous decision and lack of dissenting opinion criticizing the majority of the Court for its use of them.

6.5.8 Racial Bias or Cultural Bias?

One of the most interesting comments of the Court on racial bias was made in the *Horváth* case. A particular part of the judgment, which has been criticised, is the Court's use of the Respondent Government's classification of racial bias as cultural bias.⁹⁷⁷ The Court, though, did not agree with or accept the Respondent State's argument that social deprivation was the major factor for the high number of Roma children in special schools. There exists an argument, though, that the Court's use of the term 'cultural bias' somewhat lessens the harshness of the applicants' arguments that they were segregated due to their ethnic origin and membership of a minority disadvantaged group. The Court, in the previous or subsequent educational segregation cases, had not used the term 'cultural bias'. Overall, the Court did find a violation of Article 14 in conjunction with Article 2 of Protocol No 1, however, the applicants in *Horváth* were seeking to assert that they had been segregated on the basis of their being Roma, rather than because of 'cultural bias'. It could be argued that 'cultural bias' was one of the reasons why the Roma children were placed in the 'special schools', yet the Court should be careful to ensure that the claims of applicants that they were segregated due to their ethnicity should not in some way be recharacterised as 'cultural bias' rather than 'racial bias'. The author is not seeking to

⁹⁷⁶ *Horváth and Kiss v Hungary*, para 115. István Gylorgy Tóth, 'Economic Transition and income Distribution in Hungary, 1987-2001' in José María Fanelli and Lyn Squire (eds), *Economic Reform in Developing Countries: Reach, Range, Reason* (Edward Elgar 2008) 15-18.

⁹⁷⁷ *Horváth and Kiss v Hungary*, paras 91, 92, 96 and 121. Barbara Tiefenbacher, 'Identifying Roma or Constructing the Other, Slovak Romani Men and Women in Processes of Identification' (2011) 10 *European Yearbook of Minority Issues* 249, 257.

argue that cultural bias is any less serious than racial bias, but is arguing that the Roma applicants were primarily discriminated against due to their Roma ethnicity and in a secondary way based on their culture.

As can be seen from the discussion in earlier sections of this chapter, particularly the sections on indirect discrimination and positive obligations, the Court has identified that Roma are discriminated against on a number of grounds. While the applicants claim discrimination based on their ethnicity, the Court has identified their vulnerable position based on the history of discrimination and disadvantage they have suffered in a number of areas in their lives.

6.5.9 Accommodating Difference Through Structural Change

What Structural Change?

While ‘special schools’ were abolished in the aftermath of the *D.H.* case, ‘practical schools’ essentially replaced them. There have been difficulties in implementing real change in the area of school segregation since the *D.H.* decision.⁹⁷⁹ The Grand Chamber has been criticised for not directing the Committee of Ministers to supervise changes in the domestic legislation and to encourage the passing of an anti-discrimination law.⁹⁸⁰ It has been argued that while *D.H.* had a significant impact on the development of Article 14, it is a decision that lacks any bite in terms of the change that occurred in the lives of Roma in its aftermath.⁹⁸¹ It was within the remit of the Grand Chamber to instruct the Committee of Ministers on changes that the Respondent State could make. While the Grand Chamber did not place any clear obligations on the Czech Republic to change its laws, it stated that this approach was

⁹⁷⁹ Dean Spielmann, ‘Foreword’ in Iulia Motoc and Ineta Ziemele (eds), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspectives* (Cambridge University Press 2016) xxvii-xxviii.

⁹⁸⁰ Farkas, *Report on Discrimination of Roma children* 45 – 48.

⁹⁸¹ Devroye, ‘The Case of D.H.’ 97.

adopted due to the Committee of Ministers having ‘recently made recommendations to the member States on the education of Roma/Gypsy children in Europe’ and the relevant law having already removed the parts that were in conflict with the Convention.⁹⁸² It has been a long time practice of the Court to make predominantly declaratory verdicts, the Committee of Ministers in 2004 did ask the Court to:

[A]s far as possible, ...Identify, in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments.⁹⁸³

The Grand Chamber failed to acknowledge that while Czech laws are not completely to blame for school segregation, they in no way protect Roma children from discrimination. The decision of the Court was only binding on the Czech Republic, however, Goldston (one of the three lawyers who brought the case before the ECtHR) notes that the Grand Chamber ‘expects, and governments would be well advised, to heed the guidance that it is providing’.⁹⁸⁴ Goldston, who represented the Roma applicants in *D.H.*, has commented that ‘nothing’ may be the possible outcome of the ruling.⁹⁸⁵ In spite of this, there has been some positives such as the Commission putting pressure on the Czech Republic and Slovakia to transpose the EU Race Equality Directive into domestic legislation.⁹⁸⁶

Accommodating difference through structural change could be achieved through integrated schools. The Court, in its assessment of the case in *Oršuš v*

⁹⁸² *ibid.*, 96.

⁹⁸³ Committee of Ministers Res. (2004) 3, 12 May 2004, DH Res (2004) 3.

⁹⁸⁴ Kimberly Ashton, ‘Standing for Equality: U.S. Lawyer Wins Groundbreaking Discrimination Case for Romany Students’ *Prague Post* (Prague, 21 November 2007).

⁹⁸⁵ *ibid.*

⁹⁸⁶ Guido Schwellnus, ‘Anti-Discrimination Legislation’ in Bernd Rechel (ed), *Minority Rights in Central and Eastern Europe* (Routledge 2009) 32-46. Antoaneta L Dimitrova and Dimiter Toshkov, ‘Post-Accession Compliance between Administrative Co-Ordination and Political Bargaining’ (2009) 13 (2) *European Integration Online Papers*

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1562659> accessed 8 March 2017.

Croatia, reiterated Interights' view that '[t]he principal aims of education could only be achieved where children from different cultural backgrounds were educated together in integrated schools.'⁹⁸⁷ The Court went on to reiterate Interights' view that '[a]ccess to education without discrimination implied that children should have the opportunity to participate in, and benefit from, a mainstream educational system that ensured their integration into society.'⁹⁸⁸ The Roma children in the *Oršuš* case were not only being segregated due to their lack of knowledge of the majority language; they were also being discriminated against due to their ethnicity, their poverty, their history of disadvantage, the negative stereotyping of Roma by the majority population, their young age and their lack of previous education in the case of both the children and parents.⁹⁸⁹ In *Oršuš*, the children were also being segregated in order to ensure that they would not be educated with majority children.

This segregation of Roma children could, in the words of the Court and Interights, 'effectively deny a minority their right to learn the majority language with consequential negative impact on their ability to benefit from education and to effectively participate in, and integrate into, general society'.⁹⁹⁰ The Roma children were also victims of a vicious cycle of repression and discrimination.⁹⁹¹ They were segregated in each of these cases primarily due to their ethnicity, but this would be to ignore that by segregating Roma children it was ensured that they would never receive a proper education to the standard non-Roma children were being educated, therefore ensuring they could never move onto secondary or tertiary level

⁹⁸⁷ *Oršuš and Others v Croatia*, para 138.

⁹⁸⁸ *Oršuš and Others v Croatia*, para 139.

⁹⁸⁹ Nicolae Gheorghe, 'Roma-Gypsy Ethnicity in Eastern Europe' (1991) 58 (4) *Social Research* 829, 829-844.

⁹⁹⁰ *Oršuš and Others v Croatia*, para 138.

⁹⁹¹ Rossen Vassilev, 'The Roma of Bulgaria: A Pariah Minority' (2004) 3 (2) *Global Review of Ethnopolitics* 40, 40-51.

education.⁹⁹² If there is no meaningful structural change in Europe, there can be no accommodation of difference. Roma children's needs, their parents' needs and their specific needs as an ethnic minority will continue to be ignored.

Positive Obligations to Achieve Structural Change?

In a positive way, the Court in *Horváth* stated that where groups have suffered:

[P]ast discrimination in education with continuing effects, structural deficiencies call for the implementation of positive measures in order, inter alia, to assist the applicants with any difficulties they encountered in following the school curriculum. These obligations are particularly stringent where there is an actual history of direct discrimination.⁹⁹³

The Court here was pointing to the fact that where members of a group have been discriminated in the past through Government policies and 'structural deficiencies' related to education and this has continuing effects, then that State has a positive obligation to help those individuals with difficulties they may have with their education. The Court, in particular by stating that this positive obligation was especially important where there had been a history of direct discrimination, was critical as it recognised that those that had been indirectly discriminated against in the educational segregation cases may have in the past suffered from direct discrimination also.

In the previous chapter, where the cases of anti-Roma violence were discussed, the Court often stated that past consideration of the discrimination or disadvantage suffered by Roma could not be considered in an individual case; however, here in the educational segregation cases where indirect discrimination due to policies of the Respondent Government were being discussed, the Court said that States had to be

⁹⁹² Aram A Shvey, 'Children Left Behind: Roma Access to Education in Contemporary Romania' (2006) 29 (6) *Fordham International Law Journal* 1155, 1172-1173. Maria Roth and Florin Moisa, 'The Right to Education of Roma Children in Romania: European Policies and Romanian Practices' (2011) 19 (3) *International Journal of Children's Rights* 501, 505-506.

⁹⁹³ *Horváth and Kiss v Hungary*, para 104.

cognisant of past discrimination. The Court found that the educational policies of the Respondent States were discriminatory, so the Court did not need to include a mention of past discrimination; however, the Court decided to include a reference to it. Therefore, it is interesting that the Court felt the need to mention not only positive obligations on a State, but also positive obligations in light of past discrimination. The Court acknowledged that while in the *Horváth* case it was not called on to examine the alleged structural problems of biased testing (as the complaint was inadmissible), the Court felt it necessary to state that ‘it is nevertheless incumbent on the State to demonstrate that the tests and their application were capable of determining fairly and objectively the school aptitude and mental capacity of the applicants’.⁹⁹⁴ This again displays the Court’s move towards a substantive model of equality, in that not only is the Court acknowledging past discrimination, but it is also concerning itself with claims that were deemed inadmissible by clarifying for Respondent States that their testing methods must be fair and objective.

It can be seen from the preceding sections that Fredmans’s objectives and the theory of intersectionality lend a useful lens through which to adopt an intersectional analysis of the case law. The core theory of intersectionality shows that Roma suffer from discrimination on a number of interrelated grounds. Structural intersectionality is also particularly pertinent to the educational segregation cases. The need to acknowledge discrimination and address it through structural change is evident in the Court’s findings of violations of Article 14 and directions to Respondent States to take positive steps to ensure that Roma, as a vulnerable group, receive an education in line with their particular needs and are neither segregated or placed in ‘special schools’. The final section of this chapter will provide a brief conclusion.

⁹⁹⁴ *Horváth and Kiss v Hungary*, para 117.

6.6 Conclusion

In many central and eastern European countries, the secondary school attendance of Roma children languishes at 20 to 25 per cent.⁹⁹⁵ On closer inspection of this figure, it can be seen that many of those attending secondary level are enrolled in vocational education programmes.⁹⁹⁶ In Romania, it is estimated that 30 per cent of Roma children do not continue in school beyond fourth grade; in Bulgaria the figure is much lower at an estimated 15 to 20 per cent.⁹⁹⁷ This problem, though, is not confined to only eastern European countries. The United Nations Development Programme and the European Union Agency for Fundamental Rights have found that less than one in 10 Roma children completes secondary level education in Spain, France and Portugal.⁹⁹⁸ It is estimated that while 50 per cent of Roma children in Italy attend primary school, only 2 per cent continue onto secondary school.⁹⁹⁹ It is estimated that Roma children are 15 times more likely to be sent to a special school than their non-Roma counterparts.¹⁰⁰⁰ It has been found that in Hungary ‘about every fifth Roma child is declared to be mildly mentally disabled’.¹⁰⁰¹ This trend of finding Roma children to be mentally disabled is due in part to long held negative stereotyping.

It could be said that against this very negative backdrop the Roma have been quite successful in securing a finding of a violation of Article 14 in conjunction with Article 2 of Protocol No. 1. While the Court has found violations in all of the education cases, there are still some causes for concern. The major issue that has

⁹⁹⁵ Ringold, *Roma and the Transition in Central and Eastern Europe* 17-20.

⁹⁹⁶ Ringold, Orenstein and Wilkens, *Roma in an Expanding* 42-45.

⁹⁹⁷ Mihai Surdu and Eben Friedman, ‘The Roma Education Fund – developments and prospects for Roma inclusion’ in Sabine Hornberg and Christian Brüggemann (eds), *Die Bildungssituation von Roma in Europa* (Waxman 2013) 35-53.

⁹⁹⁸ European Union Agency for Fundamental Rights, *The Situation of Roma in 11 EU Member States: Survey Results at a Glance* (European Union Agency for Fundamental Rights 2012) 13.

⁹⁹⁹ *ibid* 13-14.

¹⁰⁰⁰ Claude Cahn and David Chirico, *A Special Remedy: Roma and Schools for the Mentally Handicapped in the Czech Republic* (ERIC 1999) 22-35.

¹⁰⁰¹ UNESCO, *Reaching the Marginalized* (Oxford 2010) 16-32.

emerged is the lack of change in Europe since the case of *D.H.* in 2007.¹⁰⁰² There has been a significant amount of criticism at the time delay and efficacy of the execution of the judgment and this has been mirrored in the case of *Sampani* in 2012, which involved a complaint that the judgment in the earlier *Sampanis* case in 2008 had not been fully executed.¹⁰⁰³ The education cases have provided some of the Court's landmark judgments. As seen in *D.H.*, the Court dramatically established its position on indirect discrimination in relation to patterns of racial discrimination and provided that the Court, in helping to establish a case of indirect discrimination, could rely on statistical evidence, but also that the lack of statistical evidence would not prevent a finding of indirect discrimination. The Court in *D.H.* also acknowledged that segregation could amount to discrimination. In a number of dissenting opinions in *D.H.* and *Oršuš*, the actions of the Court in taking into account the social context of the Roma in Europe as a discriminated against and disadvantaged ethnic minority was hugely criticised. The Judges in the majority decisions felt it was pertinent to factor in the numerous reports of school segregation as displaying the social context. It also demonstrated long-term endemic segregation of Roma children in school systems in Europe.

The dissenting Judges in *Oršuš* accused the Court of relying on material other than the facts of the case and that the Court had departed from its judicial function and was becoming more akin to an NGO.¹⁰⁰⁴ This dissenting opinion in *Oršuš* was intended to be negative, however, it can be seen as the reverse in that it can be seen from that comment how far the Court has come in considering the broader context in

¹⁰⁰² *D.H. and Others v The Czech Republic* App no 57325/00 (ECHR, 13 November 2007).

¹⁰⁰³ *Sampani and Others v Greece* App no 59608/09 (ECHR, 11 December 2012). *Sampanis and Others v Greece* App no 32526/05 (ECHR, 5 June 2008).

¹⁰⁰⁴ *Oršuš and Others v Croatia* App no 15766/03 (ECHR, 16 March 2010).

which the segregation occurred and have followed the recommendation of Judge Mijović in her dissent in *V.C.* It could be argued that the Roma education cases display the many positive changes which the Court has recognized and implemented in relation to Article 14 as a result of cases taken to the Court by Roma applicants. The Court's stating in *Oršuš* that a separate consideration of a violation of Article 14 should be carried out where discrimination may feature in the case, even where a violation of a substantive Convention article has been found, has also led to Article 14 becoming a more robust and seriously considered article.

These developments in Article 14 jurisprudence have also had an impact on the Court shifting from a reliance on the formal model of equality towards a reliance on a substantive model of equality when considering violations of Article 14. Through the application of Fredman's conception of intersectionality to the case law, it can be seen that the majority of the Court has moved towards a reliance on the substantive model of equality, as evidenced by the focus on the need for structural change, enforcing positive obligations on Respondent States to redress past discrimination, acknowledgment of the negative stereotyping of Roma and the vulnerable position of Roma. Article 14 has long been criticised as 'parasitic', however, it could be argued that the Roma case law involving allegations of violations of Article 14 in light of educational segregation have helped to bolster the understanding of Article 14, helped to enhance the development of the Article and display a tentative but strong move towards a reliance on a substantive model of equality in the Court.

Chapter 7

Conclusion

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7.1 Introduction

Kamal Yuille has identified that ‘[o]utside of the rather limited groups of specialised academics, Roma remain (at best) a footnote in broader anthropological, linguistic, sociological, ethnographic, and legal scholarship’.¹⁰⁰⁵ This work is the first

¹⁰⁰⁵ Lua Kamal Yuille, ‘Nobody Gives a Damn About the Gypsies: The Limits of Westphalian Models for Change’ (2007) 9 (2) *Oregon Review of International Law* 389, 395.

comprehensive piece of scholarship looking at three distinct case law groupings taken by Roma before the ECtHR. In addition to filling this lacuna, this work has also provided a much-needed analysis of a pivotal shift in the way in which the Court interprets Article 14 of the ECHR. The Roma, as the applicant group selected for this study, have provided a method of analysing the Court's changing interpretation of Article 14 due to: 1) the large number of cases which they have taken to the Court alleging violations of Article 14; 2) the number of similar cases taken, which allows for comparisons to be drawn within each group and across each group, based on the violation taken in conjunction with Article 14 and the large number of NGO reports, Commission and Council reports and statistics published on the discrimination and disadvantage suffered by Roma.

In the introduction to this thesis, the central research question was defined as: how has the case law taken by Roma applicants to the European Court of Human Rights affected the interpretation and development of Article 14 of the European Convention on Human Rights? In order to address this core question, a number of interrelated areas were addressed during this thesis including: the standard of proof and shifting the burden of proof, the recognition of procedural and substantive limbs of Article 14, issues of inconsistency in the Court considering an allegation of a violation of Article 14 when a violation of a substantive article has been found, the recognition of Roma as a particular vulnerable group, the Court's reliance on reports from Non Governmental Organisations and statistical data to show evidence of a climate of discrimination faced by Roma in a particular state and the need for positive action, the recognition of indirect discrimination for patterns of racial discrimination, the recognition of segregation as discrimination, and the question of whether

statistical evidence can evidence indirect discrimination/ whether indirect discrimination can be found where there is no statistical evidence present.

In addition to these key areas, the fact that there has been no finding of a substantive violation of Article 14 in conjunction with Article 2 was addressed in detail. Following this, the author made the assertion that part of the development of Article 14 has focused on the Court's shift from a reliance on a formal model of equality to the substantive model of equality. An intersectional analysis of the case law was also provided in order to show that Roma are not discriminated only on the ground of ethnicity, but also on the grounds of age, gender, disability, etc. Each of the following subsections will address one of these key areas outlined to ultimately show that the Roma case law has had a major impact on the interpretation and development of Article 14.

7.2 How has the case law taken by Roma applicants to the European Court of Human Rights affected the interpretation and development of Article 14 of the European Convention on Human Rights?

7.2.1 The Standard of Proof: "Proof Beyond Reasonable Doubt"

As has been seen from the earlier case law chapters, the Court has relied on the standard of proof in Article 14 cases as being "proof beyond reasonable doubt".¹⁰⁰⁶ To reiterate, there is no requirement on the Court to rely on this very onerous standard of proof, as the Court is free to consider any and all evidence before it and to rely on any standard of proof it chooses, as the Convention does not dictate a standard of proof to be relied on by the Court.¹⁰⁰⁷ While the development of Article 14 has been relatively straightforward in many areas, the standard of proof to be relied upon and

¹⁰⁰⁶ *Velikova v Bulgaria*, paras 70, 74 and 94. *Nachova v Bulgaria*, paras 132, 136, 140 and 147. *Anguelova v Bulgaria*, paras 111 and 166.

¹⁰⁰⁷ Mathias Möschel, 'Is the European Court of Human Rights' case law on anti-Roma Violence "Beyond Reasonable Doubt?" (2012) 12 (3) *Human Rights Law Review* 479, 479-507.

the related burden of proof and transfer of the burden of proof have been somewhat problematic. Applicants in the anti-Roma violence cases and educational segregation cases have argued that the standard of proof being “proof beyond reasonable doubt” is far too high a threshold for applicants who are trying to show proof of ethnic discrimination.¹⁰⁰⁸ I agree with the Roma applicants that the standard of proof is currently so high that it is extremely difficult to establish a *prima facie* case of discrimination, which would then shift the burden of proof to the Respondent state. I also agree with applicants that in many of the cases the Respondent State is never asked to justify its alleged actions, as the burden of proof never shifts to them due to the applicant’s failure to meet the onerous standard of “proof beyond reasonable doubt”.¹⁰⁰⁹ The standard of proof being “proof beyond reasonable doubt” is a major causal factor in the Court’s lack of finding of a substantive violation of Article 14 in conjunction with Article 2 of the ECHR.

While Judge Bonello commented back in 2002 that there is no requirement on the Court to adopt such an onerous standard of proof, this criticism has fallen on deaf ears and the Court continues to rely on the same standard.¹⁰¹⁰ The Court appears to have adopted two different approaches to proof in relation to direct and indirect discrimination. In the anti-Roma violence cases (for the most part) and forced sterilisation cases, the Court has found that references to the applicant’s or victim’s ethnicity is not sufficient evidence to show discrimination based on ethnicity.¹⁰¹¹ The fact that copious numbers of police officers were drafted into delivering summons or executing arrest of a Roma suspect, has also not been found to be evidence that Roma

¹⁰⁰⁸ *Nachova v Bulgaria*, para 136. *D.H. and Others v the Czech Republic*, para 130. *Ciorcan and Others v Romania*, para 157.

¹⁰⁰⁹ *Velikova v Bulgaria*, para 94. *Anguelova v Bulgaria*, para 168.

¹⁰¹⁰ *Anguelova v Bulgaria*, partly dissenting opinion of Judge Bonello. *Škorjanec v Croatia*, para 72 – a case decided on in March 2017.

¹⁰¹¹ *Velikova v Bulgaria*, paras 92-94. *Anguelova v Bulgaria*, paras 164-168. *V.C. v Slovakia*, paras 170, 171 and 180. *N.B. v Slovakia*, paras 114, 118-123. *I.G. and Others v Slovakia*, paras 159-167.

were being treated differently based on their ethnicity.¹⁰¹² In the forced sterilisation cases, notes written on the applicant's charts in relation to their ethnicity, in a state where there was widespread evidence of sterilisation programmes and negative attitudes to Roma mothers and births, was also not found to be sufficient to warrant consideration by the Court of a violation of Article 14.¹⁰¹³ The issues of what amounts to sufficient proof in the anti-Roma violence and forced sterilisation cases displays how onerous it will be for an applicant to show they were treated in the way in which they were due to ethnicity.

7.2.2 Proof in cases of Direct/Indirect Discrimination

The previous critical comments dealt with the cases of direct discrimination in the anti-Roma violence cases and forced sterilisation cases. The Court has adopted a slightly different approach in the indirect discrimination educational segregation cases.¹⁰¹⁴ As will be seen in a later section, the Court, in explicitly recognising indirect discrimination for patterns of racial discrimination for the first time in the *D.H.* case and building on its conception in the subsequent *Oršuš* case, clarified that reliable statistical evidence would be sufficient to show a *prima facie* case of discrimination, which would then shift the burden of proof to the Respondent state to

¹⁰¹² *Moldovan and Others v Romania*, para 139, while a violation of Article 14 was found it was on the basis of 'the length and result of the domestic proceedings' with the Court stating that: 'The Court is not competent *ratione temporis* to examine under the Convention the actual burning of the applicants' houses and the killing of some of their relatives.' *Ciorcan and Others v Romania*, paras 160-166.

¹⁰¹³ *V.C. v Slovakia*, para 180: '... the Court does not find it necessary to separately determine whether the facts of the case also gave rise to a breach of Article 14 of the Convention.' *N.B. v Slovakia*, para 123 repeated the same decision as just quoted from *V.C. I.G. and Others v Slovakia*, para 167.

¹⁰¹⁴ *D.H. and Others v the Czech Republic*, para 187: 'The recent case-law of the Court of Justice of the European Communities shows that it permits claimants to rely on statistical evidence and the national courts to take such evidence into account where it is valid and significant. The Grand Chamber further notes the information furnished by the third-party interveners that the courts of many countries and the supervisory bodies of the United Nations treaties habitually accept statistics as evidence of indirect discrimination in order to facilitate the victims' task of adducing *prima facie* evidence. The Court also recognised the importance of official statistics in the above-mentioned cases of *Hoogendijk* and *Zarb Adami* and has shown that it is prepared to accept and take into consideration various types of evidence.'

justify its actions.¹⁰¹⁵ It can be argued that in cases of indirect discrimination, often the covert effect of discriminatory treatment can only be seen in statistics. Surprisingly a general picture of discrimination in a State can be sufficient to contribute in showing a *prima facie* case of discrimination in the educational segregation cases, yet in the forced sterilisation cases the history of forced sterilisation of Roma women could not be considered. The way in which the Court dealt with the educational segregation cases showed how they were willing to allow statistical evidence from general reports to show *prima facie* evidence of discrimination; the burden then shifted to the Respondent State to justify its actions, which it was unable to do.

7.2.3 *Nachova v Bulgaria*: Signaling a Change?

There has been some shift in the Court's dealing with the standard of proof in the anti-Roma violence cases. While the Court in the early violence cases continuously asserted that the applicant's arguments were serious, the material submitted did not display beyond a reasonable doubt that the killing or lack of investigation was due to the applicant's ethnicity. Some change was displayed in the Court's rhetoric in *Nachova v Bulgaria*, where the Grand Chamber cited the earlier judgment of the Chamber that clarified that in cases involving allegations of violations of Article 2 with Article 14, where a loss of life is concerned there is a duty on State authorities to conduct an effective investigation irrespective of the victim's race or ethnic origin.¹⁰¹⁶ The Chamber also stated that the Respondent State must do everything in order to

¹⁰¹⁵ *D.H. and Others v the Czech Republic*, paras 136, 186 and 210. *Oršuš and Others v Croatia*, para 153.

¹⁰¹⁶ *Nachova v Bulgaria*, para 168.

unmask any racist motive in an incident involving the use of force by law enforcement agencies.¹⁰¹⁷

In *Nachova*, the Chamber additionally stated that the evidence provided by the applicant, the racist verbal abuse and the excessive nature of the force used by a particular police officer should have alerted the authorities to the fact that an investigation into possible racist motives was needed.¹⁰¹⁸ Pre-*Nachova*, verbal abuse was not seen as sufficient on its own for the Court to consider finding a violation of Article 14.¹⁰¹⁹ The Court also found that negative inferences may be drawn or the burden of proof could be shifted to the Respondent State where authorities failed to investigate acts of violence by the State. Unlike the earlier cases, the Court in *Nachova* offered a lengthy discussion of the alleged violation of Article 14. The decisions of the Chamber and Grand Chamber in *Nachova* show where the Court has made progress in relation to the standard and burden of proof and display where progress could also be made in the future. The Chamber asserted its ‘task is to establish whether or not racism was a causal factor in the shooting that led to the deaths’.¹⁰²⁰ As will be discussed below, the Court stated that ‘proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact’.¹⁰²¹

However, while the applicants had reported that a law enforcement officer had shouted ‘You damn Gypsies’ immediately after the shooting, this was insufficient evidence for concluding that the Respondent State was liable for a racist killing.¹⁰²² Crucially, this is in contrast to the earlier decision of the Chamber in this case, which

¹⁰¹⁷ *Nachova v Bulgaria*, paras 164-168.

¹⁰¹⁸ Kristin Henrard, ‘The European Convention on Human Rights and the Protection of the Roma as a Controversial Case of Cultural Diversity’ (2004) 5 *European Diversity and Autonomy Papers* 5, 11.

¹⁰¹⁹ *Velikova v Bulgaria*, paras 91-94. *Anguelova v Bulgaria*, paras 164-168.

¹⁰²⁰ *Nachova v Bulgaria*, para 146.

¹⁰²¹ *Nachova v Bulgaria*, para 147.

¹⁰²² *Nachova v Bulgaria*, para 153.

had found a substantive violation of Article 14 taken in conjunction with Article 2 on the basis that the Respondent State was unable to satisfy the Chamber that the events were not shaped by racism.¹⁰²³ In *Nachova*, the applicants argued that once a *prima facie* case of discrimination had been established the burden should always shift to the Respondent Government.¹⁰²⁴ The major issue with this assertion is: what does an applicant have to show in order to establish a *prima facie* case of discrimination? Applicants have stated that once they provide evidence for example of the officer's knowledge of their ethnicity, the disproportionate use of firepower and racist verbal abuse, this should amount to sufficient evidence to show a *prima facie* case of discrimination.¹⁰²⁵

Though the Court itself continues to maintain that "proof beyond reasonable doubt" is not the standard that it is bound to adopt, it has still resulted in the Court adopting a position whereby the evidence which applicants provide is only sufficient for the burden of proof to move to the Respondent State in the case of a procedural violation of Article 14.¹⁰²⁶ Once the burden has shifted, it has been the case that in every anti-Roma violence case since *Nachova* the Court has found a procedural violation of Article 2 or Article 3 in conjunction with Article 14 due to the lack of effective investigation.¹⁰²⁷ This shift in the burden has been positive in terms of

¹⁰²³ *Nachova v Bulgaria*, para 156.

¹⁰²⁴ *Nachova v Bulgaria*, para 136.

¹⁰²⁵ Peter Vermeersch, 'Ethnic Mobilisation and the Political Conditionality of European Union Accession: The Case of the Roma in Slovakia' (2002) 28 (1) *Journal of Ethnic and Migration Studies* 83, 95. Cas Mudde, 'Racist Extremism in Central and Eastern Europe' (2005) 9 (2) *East European Politics and Societies* 161, 161-184. *Velikova v Bulgaria*, paras 92-93. *Anguelova v Bulgaria*, para 164. *Moldovan and Others v Romania*, para 133. *Nachova and Others v Bulgaria*, para 137. *Ciorcan and Others v Romania*, paras 154-155.

¹⁰²⁶ The Court has reiterated in seminal cases such as *Nachova*, *Soare*, *Fedorchenko* etc. that it is not bound to adopt the standard of "proof beyond reasonable doubt".

¹⁰²⁷ The table of cases in Chapter 4 displays the names and dates of all the anti-Roma violence cases from *Nachova* to the most recently decided case of *Škorjanec v Croatia*, where a procedural violation of Article 14 was found.

ensuring that States investigate thoroughly not only the deaths or torture of Roma victims, but also any possible racist motives behind those killings.

7.2.4 Substantive Violations and Subjective Attitude

The Court, in relation to substantive violations of Article 14, has retained the same approach since *Nachova* in 2005.¹⁰²⁸ The Court is not prepared to shift the burden of proof to the Respondent State where it will place a burden on the State to prove the absence of a subjective attitude on the part of, for example, a law enforcement official. This essentially means that in all situations where there has been a successful finding of a breach of Article 2 or Article 3, the Court has found that race or ethnicity led to the lack of an effective investigation, but has never led to a finding that a death was the result of a racism. The Court has been clear that it is not correct to shift the burden of proof to the Respondent State for a substantive violation merely because the Court has shifted the burden for the State to justify why there had been a lack of investigation. I would agree with this summation: lack of effective investigation may signify that a Respondent State does not take incidents with possible racist undertones or motives as seriously as they should when investigating them, but this does not necessarily mean that those who were responsible for the incident had racist motives when they carried out the alleged act.

The Court is prepared to shift the burden for a procedural violation of Article 14 where the applicants have provided a basis for their claim of discrimination. Verbal abuse has been shown to be sufficient to shift the burden to the Respondent State. While this standard is appropriate for a procedural violation and lack of

¹⁰²⁸ *Vasil Sashov Petrov*, (2010) para 70 – no substantive violation found, para 73 – procedural violation found. *Ciorcan and Others v Romania*, (2015) paras 166-167 – no substantive violation found, procedural violation found. *Škorjanec v Croatia*, para 72 – finding of a procedural violation, no finding of a substantive violation.

investigation, it is accepted that possibly a different standard is needed for shifting the burden for a substantive violation. For the future legitimacy of the Court's work and the considerations of minority groups such as the Roma who take cases to the Court, it is crucial that the Court provide a clear understanding of when a burden of proof will shift to a Respondent State in the case of an allegation of a substantive violation of Article 14. As long as the Court goes on stating that it would be too onerous to place the burden on the Respondent state to show a lack of subjective intent, it will rest on the applicant to show the existence of subjective racist intent, which will be near impossible for them to do. The Court should perhaps adopt the approach of the European Union in the burden of proof directive.¹⁰²⁹ The Court should shift the burden to the Respondent state to show evidence to rebut the inference of discrimination. For example, it would require the Respondent state to show that arrests of non-Roma would have occurred in the same way as the arrest of a Roma occurred.

7.2.5 The Future

The Court in *Antayev v Russia* displayed how the standard and burden of proof could be dealt with in Roma cases in the future: the Court found that the applicant's ethnic origin was either the sole or at least decisive factor in their treatment, in the absence of any other explanation offered by the Respondent state.¹⁰³⁰ *Antayev*, while not a case taken by a Roma applicant, was a case that focused on ethnic discrimination and was cited in *Ciorcan*. The Court in *Ciorcan*, though, continued to rely on its approach

¹⁰²⁹ Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex *Official Journal L 014*, 20/01/1998, 0006 – 0008. Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 (3) *International Journal of Constitutional Law* 712, 712-739.

¹⁰³⁰ *Antayev v Russia*, App no 37966/07 (ECtHR, 3 July 2014), paras 127 and 129.

to the standard of proof in *Nachova*.¹⁰³¹ In *Antayev* the Court took racist verbal abuse and recurrent instructions in police documents to treat Chechen suspects in a particular way as providing *prima facie* evidence of discrimination which then shifted the burden of proof to the Respondent State. If the State failed to provide an explanation for their actions, the Court was left with the only option of deciphering that it was the applicants' ethnicity that led to them being treated in such a discriminatory manner. This formula could easily be applied particularly to the copious anti-Roma violence cases and, given that it was cited with approval (though not applied) in *Ciorcan*, it shows that there is hope that the Court may adopt this approach, streamline the issues with the standard of proof being "proof beyond reasonable doubt" and shift the burden of proof to the Respondent State.

7.3 Recognition of Roma as a Particularly Vulnerable Group and Positive Obligations

The vulnerable and disadvantaged position of the Roma was first recognised in the *Buckley* case, relating to the traditional way of life of the Roma.¹⁰³² Further discussion by the Court of the position of the Roma came in the anti-Roma violence cases and educational segregation cases.¹⁰³³ The recognition of Roma as a particularly vulnerable group and the Court setting out positive obligations go hand in hand.¹⁰³⁴ The Court adopting the approach of acknowledging the prior discrimination and disadvantage suffered by Roma means that the Court then addresses this situation

¹⁰³¹ *Antayev v Russia*, para 129. *Ciorcan and Others v Romania*, citing *Antayev* at para 166 and *Nachova v Bulgaria* at paras 43, 155, 156, 166 and 172.

¹⁰³² *Buckley v The United Kingdom* App no 20348/92 (ECtHR, 29 September 1996), partly dissenting opinion of Judge Repik, *Chapman v The United Kingdom* App no 27238/95 (ECtHR, 18 January 2001), citing *Buckley* at para 84 and 93.

¹⁰³³ *Anguelova v Bulgaria*, partly dissenting opinion of Judge Bonello, para 3. *D.H. and Others v The Czech Republic*, paras 143, 169 and 170.

¹⁰³⁴ Jean-Pierre Liégeois, *The Council of Europe and Roma: 40 Years of Action* (Council of Europe Publishing 2012) 141-142.

contextually, by invoking positive obligations to ensure that past and present discrimination is meaningfully addressed. The Court in *Chapman v the United Kingdom* stated that ‘there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the Gypsy way of life’.¹⁰³⁵ A year after *Chapman*, Judge Bonello gave his seminal dissenting opinion in *Anguelova v Bulgaria*, where he expressed his dismay at the fact that while ‘the Court acknowledges that members of vulnerable minorities are deprived of life or subjected to appalling treatment in violation of Article 3; but not once has the Court found that this happens to be linked to their ethnicity’.¹⁰³⁶ While the Court went on to provide many comments on protecting the vulnerable Roma, particularly in the educational segregation cases, it has to be acknowledged that at the same time the Court’s acknowledgement of their vulnerable position has never led to the finding of a substantive violation of Article 14, which will be discussed in more detail in a later section.

Leaving aside the fact that the recognition of the vulnerability of the Roma has not had an impact on a finding of a substantive violation of Article 14, the Court has made much progress in attempting to redress systemic disadvantage in the educational segregation cases. The Court in *D.H. and Others v the Czech Republic* stated:

[T]he vulnerable position of Roma/Gypsies means that special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases ... as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority.¹⁰³⁷

In assessing vulnerability the Court looks not at the individual alone, but the individual in their wider social context. Therefore, the Court’s approach to

¹⁰³⁵ *Chapman v The United Kingdom*, para 96.

¹⁰³⁶ *Anguelova v Bulgaria*, para 3.

¹⁰³⁷ *D.H. and Others v the Czech Republic*, para 181-182.

vulnerability can be said to be relational, as it views vulnerability as being shaped by historical, social and institutional forces.¹⁰³⁸ Secondly, the Court defined Roma as “particularly vulnerable”; the word ‘particular’, being included signifies that these groups are “more” vulnerable than others.¹⁰³⁹ The word “particularly” shows how the Court is viewing, for example, a Roma applicant as a vulnerable group member whose vulnerability has been shaped by the group-based experiences specific to Roma. The third element of the Court’s assessment of vulnerability focuses on harm. In relation to harm within the context of Roma, the Court has clearly considered historical stigmatization and prejudice in the educational segregation cases.¹⁰⁴⁰ It is noteworthy, though, that the Court has changed the connotations of “vulnerable” which it has ascribed to Roma in the case law.

In the educational segregation cases the Court acknowledged the vulnerability of the Roma against the background of prejudice.¹⁰⁴¹ In *D.H., Sampanis and Oršuš*, the Court referred to the ‘turbulent history’ of the Roma and the specific type of disadvantaged group they had become.¹⁰⁴² The Court in its judgments in these cases also referred to Council of Europe documents that reported findings of prejudices against Roma children in several European states.¹⁰⁴³ The inclusion of these reports in the Court’s judgments shows the Court has relied on such prejudices to inform its understanding of Roma’s vulnerability. *Horváth and Kiss v Hungary* explicitly referred to prejudice as a source of group vulnerability, when it found that the Roma students had been misdiagnosed as having mental disability due to ‘bias in past

¹⁰³⁸ Peroni and Timmer, ‘Vulnerable groups’ 1064.

¹⁰³⁹ *Ibid.*

¹⁰⁴⁰ *D.H. and Others v the Czech Republic*, para 144. *Oršuš and Others v Croatia*, para 53.

¹⁰⁴¹ *Sampanis and Others v Greece*, para 101. *Oršuš and Others v Croatia*, para 73, 84 and 137. *Horváth and Kiss v Hungary*, para 91 and 128.

¹⁰⁴² *D.H. and Others v the Czech Republic*, para 182. *Sampanis and Others v Greece*, para 72. *Oršuš and Others v Croatia*, para 147.

¹⁰⁴³ *D.H. and Others v the Czech Republic*, dissenting opinion of Judge Borrego Borrego, para 5. The Judge is very critical of the majority of the Court’s judgment focusing on ‘Council of Europe sources’. *Oršuš and Others v Croatia*, para 147.

placement procedures'.¹⁰⁴⁴ The Court's analysis of vulnerability was also discussed in the forced sterilisation case of *V.C. v Slovakia*, where negative social attitudes were seen as the main source of vulnerability of Roma.¹⁰⁴⁵ The Court noted that forced sterilisation has affected individuals from different ethnic origins, but that Roma are at particular risk. While this was a crucial statement of recognition of the vulnerability of Roma women, it did not lead to a finding of a violation of Article 14, as the Court did not examine the applicant's Article 14 claim separately.¹⁰⁴⁶

The Court has clearly moved towards a multi-stranded understanding of the vulnerability and "particular vulnerability" of the Roma based on their historic disadvantage and current economic and social issues. This has been largely positive in leading to the Court providing for Respondent States to have to address disadvantage through positive obligations particularly in the sphere of education.¹⁰⁴⁷ It has been stated in some of the literature, though, that following the cases dealing with the education of Roma children in Europe, the situation has not largely improved, in so far as "remedial schools" or "practical schools" have appeared to replace "special schools" for the education of Roma in some European states.¹⁰⁴⁸ Therefore, it is arguable the impact which these positive obligations are having on the ground. The decisions of the Court are having a positive impact within the context of this thesis,

¹⁰⁴⁴ *Horváth and Kiss v Hungary*, para 116.

¹⁰⁴⁵ *V.C. v Slovakia*, para 146.

¹⁰⁴⁶ *V.C. v Slovakia*, para 177.

¹⁰⁴⁷ Peroni and Timmer, 'Vulnerable Groups' 1078.

¹⁰⁴⁸ *D.H. and Others v the Czech Republic*, para 145. Claude Cahn, David Chirico, Christina McDonald, Viktória Mohácsi, Tatjana Pric, Ágnes Székely, 'Roma in the Educational Systems of Central and Eastern Europe' in Csaba Fényes, Christina McDonald and Anita Mészáros (eds), *The Roma Education Resource Book: Educational Issues Methods and Practice, Language and Culture* (Open Society Institute – Institute for Educational Policy 1999) 20-27. Vera Messing, 'Good Practices Addressing School Integration of Roma/Gypsy Children in Hungary' (2008) 19 (5) *Intercultural Education* 461, 461-473. Christian Brüggemann, *Roma Education in Comparative Perspective: Analysis of the UNDP/World Bank/ EC Regional Roma Survey Data Policy Brief* (United Nations Development Programme 2010) 1-3. Amnesty International, 'Slovakia: Unlawful Ethnic Segregation in Schools is Failing Romani Children' (Amnesty International, 1 March 2017) <<https://www.amnesty.org/en/latest/news/2017/03/slovakia-unlawful-ethnic-segregation-in-schools-is-failing-romani-children/>> accessed 30 March 2017.

and the development of Article 14. The Court has handed down the most positive obligations on Respondent States in the educational segregation cases. These positive obligations have focused on ensuring that schools or areas that segregate Roma in outbuildings, separate classes or special schools do not continue to do so. The Court have also made clear that a Roma child's lack of knowledge of a language, should not be an impediment to that child being admitted to a school. In relation to the forced sterilisation the only positive obligation the Court set down was to comment on the particular vulnerability of Roma women, and to ensure that they give full, free and informed consent to medical procedures. The impact of these positive obligations will be looked at in more detail in future work. The execution of judgments is still an issue, but is outside the scope of this work. The Court, while not finding violations of Article 14 in the forced sterilisation cases, did demand in *V.C.* that the State put in place 'safeguards to protect the reproductive health of, in particular, women of Roma origin,' enabling the applicant, 'as a member of the vulnerable Roma community, to effectively enjoy her right to respect for her private and family life'.¹⁰⁴⁹ Again, we witness positive words coming from the Court on the need for protection for Roma women, while not finding that their ethnicity had led to their coercive sterilisation. The sterilisation cases were decided on before the more recent educational segregation cases. Therefore, it remains to be seen if the Court will continue as it has in *Horváth*, where it clearly draws a line between prejudice and the vulnerability of the Roma and the fact that the children were treated as they were on the basis of ethnic prejudice.¹⁰⁵⁰

¹⁰⁴⁹ *V.C. v Slovakia*, paras 154 and 179.

¹⁰⁵⁰ *Horváth and Kiss v. Hungary*, para 116.

7.4 Recognition of Procedural and Substantive Limbs of Article 14

It was in the pioneering case of *Nachova v Bulgaria* that the Court separated its consideration of a violation of Article 14 into its procedural and substantive elements.¹⁰⁵¹ This has been largely positive, as the Court has identified that there may be two separate violations of Article 14: one on the ground of a lack of effective investigation and the other on the ground that there was racist intent behind the incident. While the Court had always found procedural and or substantive violations of other Convention Articles, it was seen that Article 14 as an accessory article would not be dealt with in the same way as other substantive articles. This recognition of procedural and substantive obligations has been largely positive for applicants such as the Roma.

In relation to a procedural violation, the Chamber stated in *Nachova v Bulgaria* that:

... States have a general obligation under Article 2 of the Convention to conduct an effective investigation in cases of deprivation of life. That obligation must be discharged without discrimination, as required by Article 14 of the Convention ... [W]here there is suspicion that racial attitudes induced a violent act it is particularly important that the official investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of racism and ethnic hatred and to maintain confidence of minorities in the ability of the authorities to protect them from the threat of racist violence ... [W]hen investigating violent incidents and, in particular, deaths at the hands of State agents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events.¹⁰⁵²

The Chamber crucially recognised the importance for minorities to feel that racist violence will be condemned and that they will be protected from such violence by

¹⁰⁵¹ *Nachova v Bulgaria*, paras 159 and 160.

¹⁰⁵² *Nachova v Bulgaria*, para 160.

State authorities.¹⁰⁵³ While it is critical to unmask any racist motive, it is particularly important that the Chamber stated that State authorities have an additional duty on them to discover racist motives when there has been deaths at the hands of State agents.¹⁰⁵⁴ The Chamber identified the importance of minorities feeling that they would be protected from violence by the State, rather than the State perpetrating that violence and then hiding behind the veil of authority in order to evade prosecution.

It was the Chamber in *Nachova* that provided much of the early guidance on procedural violations of Article 14. The Chamber highlighted that there is a need for States to ensure that there is a distinction made in their legal systems between cases of racist killing and cases of excessive use of force.¹⁰⁵⁵ The Chamber did make clear that it is 'extremely difficult in practice' to prove racial attitudes.¹⁰⁵⁶ It clarified that '[t]he Respondent State's obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and not absolute.'¹⁰⁵⁷ The Grand Chamber added to this that:

...[T]he authorities' duty to investigate the existence of a possible link between racist attitudes and an act of violence is an aspect of their procedural obligations arising under Article 2 of the Convention, but may also be seen as implicit in their responsibilities under Article 14 of the Convention taken in conjunction with Article 2 to secure the enjoyment of the right to life without discrimination.¹⁰⁵⁸

The Grand Chamber alluded to the interplay between the two provisions and that in some cases, depending on the facts of the case and the nature of the allegations made, there may be a need to consider both or just one provision in particular.¹⁰⁵⁹ In all of the Roma cases involving allegations of violations of Article 14 in conjunction with

¹⁰⁵³ *ibid.*, para 160.

¹⁰⁵⁴ *ibid.*, para 161.

¹⁰⁵⁵ *Nachova v Bulgaria*, para 160.

¹⁰⁵⁶ *ibid.*

¹⁰⁵⁷ *ibid.*

¹⁰⁵⁸ *Nachova v Bulgaria*, para 161.

¹⁰⁵⁹ *ibid.*

Articles 2 and/or 3 since *Nachova*, with the exception of only *Stoiça* the Court has considered both the procedural and substantive limbs of Article 14.

The Court has been thorough and consistent in its consideration of both procedural and substantive violations of Article 14; regardless of the fact that there have been a large number of procedural violations, one finding of a substantive violation of Article 14 in conjunction with Article 3 and no finding of a substantive violation of Article 14 in conjunction with Article 2 has been found. With regard to procedural violations, in every anti-Roma violence case since *Nachova*, the Court has found a procedural violation of Article 14. While the Court has provided some guidance, it was stated that the obligation on the Respondent State to investigate racist overtones was to use best endeavours and not absolute.¹⁰⁶⁰ The standard should not be to use best endeavours; potential applicants to the Court would have arguably more faith in discrimination being uncovered if the standard on the Respondent State was higher. There is not an absolute obligation on the Respondent State to investigate, the Court has been finding the evidence submitted by applicants to be sufficient to ground a violation for a lack of investigation and thereby shift the burden to the Respondent State. In each case post-*Nachova*, the Respondent State has failed to prove why there had not been an effective investigation into possible racist overtones to an incident.

Another critical point to note, though: the Court has found numerous procedural violations of Article 14 for lack of effective investigation into possible racist overtones, the same Respondent States are appearing before the Court on a continuous basis.¹⁰⁶¹ It is not the job of the Court to change the landscape in

¹⁰⁶⁰ *Nachova v Bulgaria*, para 160.

¹⁰⁶¹ In relation to police ill-treatment cases have repeatedly involved Bulgaria, *Greece and Romania: Assenov v Bulgaria, Velikova v Bulgaria, Ognyanova and Choban v Bulgaria, Sashov v Bulgaria, Bekos and Koutropoulos v Greece, Karagiannopoulos v Greece, Stoiça v Romania, Carabulea v Romania* and *Ciorcan v Romania*. In relation to education cases have repeatedly involved Greece: *Sampanis and Others v Greece, Sampani and Others v Greece and Lavidia and Others v Greece*. All of

Respondent States, it is important to note that these States are being reprimanded for their lack of investigation and yet they appear to not be adhering to the need to investigate possible racist overtones in cases.

7.4.1 The Lack of a Finding of a Substantive Violation of Article 14 in conjunction with Article 2

It must be first acknowledged that the Court has found substantive violations of Article 14 in cases involving allegations of Articles 3, 6 and 8. However, there has yet to be a finding in the history of the Court that a Roma died as a result of ethnic discrimination. While the Court carried out pioneering work in both the Chamber and Grand Chamber in *Nachova v Bulgaria* by recognising procedural and substantive limbs to Article 14, there has been to date no explicit finding of a substantive violation of Article 14 in conjunction with Article 2 in a case taken by a Roma applicant. While the Chamber in *Nachova* did find a substantive violation, the Grand Chamber later overturned that finding. One cannot be overly critical of the decision to overturn the finding by the Grand Chamber, as the Chamber had found a substantive violation on the basis that the Respondent State had failed to investigate racist motives in the case and therefore the burden shifted to the Respondent State to show a lack of racist intent, which they could not provide.¹⁰⁶² Arguably this is not the way in which a substantive violation of Article 14 should be found, as the Grand Chamber stated a Respondent State should not be found to have violated the substantive limb of Article 14 due to the fact they have violated the procedural limb of the Article.

the cases, both those that have ended in a friendly settlement and before the Court, have involved Slovakia as the Respondent State: *K.H. and Others v Slovakia*, *I.G. and Others v Slovakia*, *V.C. v Slovakia*, *N.B. v Slovakia*.

¹⁰⁶² *Nachova v Bulgaria*, Chamber judgment at paras 170 and 175.

The Grand Chamber in *Nachova* stated that it would be too onerous on a Respondent State to have to show a lack of subjective intent.¹⁰⁶³ This dictum was cited in numerous other cases after *Nachova* and up to the present day. In the *Stoiça* judgment the Court choose not to adhere to its usual separate discussion of a procedural and/ or substantive violation of Article 14.¹⁰⁶⁴ While the Court did not explicitly state that they had found a procedural or substantive violation of Article 14, from a reading of the judgment it appears as though the Court did find a substantive violation of Article 14 in conjunction with Article 3.¹⁰⁶⁵ In every other judgment the Court has been very clear to state that it was finding only a procedural violation of Article 14 in conjunction with Articles 2 and/or 3.

It is rather straightforward for the Court to find that an investigation has not taken place; it is much more difficult to find a substantive violation of Article 14 in conjunction with Articles 2 and/or 3. The Court's shift between a use of the terms 'subjective attitudes' and 'subjective motives' also raises questions.¹⁰⁶⁶ The Court, in all cases involving Articles 2 and/or 3 except for *Stoiça* relied on the wording 'racist attitudes', yet in *Stoiça* used the phrase 'racist motives' when finding a substantive violation of Article 14. The Court may have been using the terms interchangeably, as it has not provided a definition for either. On the other hand, the Court might have been lessening the standard of intent: subjective attitudes requires one to consider the actual state of a person's mind, questions can be asked about whether the person knew

¹⁰⁶³ *Nachova v Bulgaria*, Grand Chamber judgment at para 157.

¹⁰⁶⁴ *Stoiça v Romania*, paras 131 and 132.

¹⁰⁶⁵ *Stoiça v Romania*, paras 125 and 130.

¹⁰⁶⁶ *Nachova v Bulgaria*, paras 133 and 158, the Grand Chamber referred to subjective attitude. In the Grand Chamber judgment in D.H. when the Court referred to how discriminatory intent is not necessarily required for a finding of indirect discrimination. One could interpret this comment as referring to the fact that for direct discrimination discriminatory intent would be needed. *Stoiça v Romania*, para 127 refers to subjective attitude however the Court at para 124 discusses the fact 'that the authorities did not do everything in their power to investigate the possible racist motives behind the conflict'. *Ciorcan v Romania*, paras 152, 155 and 163.

they had subjective racist intent in their mind at the time of the incident.¹⁰⁶⁷ As discussed earlier, it will be more difficult to show that subjective racist motives had led the person to carry out a racist attack.

The Court has continued to focus on subjective attitudes and the difficulty for a Respondent State to show that this intent or attitude did not exist. In the future perhaps the Court could find in a similar way to the approach accepted by the EU in the Burden of Proof Directive and Race Equality Directive.¹⁰⁶⁸ The Court, in the future, should adopt the approach mentioned earlier in the *Antayev* case, the Court came to the conclusion that absent any other reason it was the applicant's ethnicity that was the basis for their treatment.¹⁰⁶⁹ If the Court adopted this approach, then people such as Judge Bonello would not have to worry that another fifty years will pass with no finding that a Roma applicant's ethnicity was the reason behind their death.¹⁰⁷⁰

7.4.2 Recognition of Indirect Discrimination in cases of Patterns of racial Discrimination and Recognition of Segregation as Discrimination

One of the most profound ways in which Roma case law has affected the interpretation of Article 14 has been the recognition by the Court of indirect discrimination for patterns of racial discrimination and the recognition that segregation is discrimination.¹⁰⁷¹ As discussed earlier, the Court in *D.H.* recognised that the Respondent State's policy of placing Roma children in special schools amounted to indirect discrimination. The Court found that the tests used to place the

¹⁰⁶⁷ *Sashov Petrov v Bulgaria*, paras 69 and 72.

¹⁰⁶⁸ Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex. Lisa Waddington and Mark Bell, 'More Equal than Others: Distinguishing European Union Equality Directives' (2001) 38 *Common Market Law Review* 587, 587-611.

¹⁰⁶⁹ *Antayev and Others v Russia* App no 37966/07 (ECtHR, 15 December 2014), paras 127-129.

¹⁰⁷⁰ *Anguelova v Bulgaria*, partly dissenting opinion of Judge Bonello, para 2.

¹⁰⁷¹ *D.H. v the Czech Republic*, paras 175-176.

children in the schools and annexes were flawed and that stereotypical thinking had been in place in classifying Roma children as having intellectual disabilities.¹⁰⁷² The judgment was particularly groundbreaking for a number of reasons. For the first time the Court found a violation of Article 14 in relation to a pattern of racial discrimination in a particular sphere of public life.¹⁰⁷³ The Court made clear that the Convention addressed not only specific acts of discrimination but also systemic practices.¹⁰⁷⁴ The case also stated that racial segregation amounts to discrimination. The decision also brought the ECtHR's Article 14 jurisprudence in line with the principles of antidiscrimination law that dominate within the European Union.¹⁰⁷⁵

The Court also established that though a general policy or measure might be couched in neutral terms, a difference in treatment may take the form of prejudicial effects on ethnic or racial minorities in terms of these policies or measures.¹⁰⁷⁶ The Court also clarified that even where the wording of the legislation is neutral; its application in a racially disproportionate manner without justification, which places individuals in an ethnic or racial group at a significant disadvantage, may amount to discrimination.¹⁰⁷⁷ While arguably there had been some reference to indirect discrimination in the Court prior to *D.H.*, by explicitly recognising indirect discrimination in cases involving patterns of racial discrimination in an aspect of public life and that segregation is discrimination under Article 14, the ambit and

¹⁰⁷² *D.H. v the Czech Republic*, paras 185 and 187.

¹⁰⁷³ *D.H. v the Czech Republic*, para 129.

¹⁰⁷⁴ *D.H. v the Czech Republic*, para 184.

¹⁰⁷⁵ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Mark Bell, *Anti-Discrimination Law and the European Union* (Oxford University Press 2002). Mark Bell, 'The Implementation of European Anti-Discrimination Directives: Converging towards a Common Model?' (2008) 79 (1) *The Political Quarterly* 36, 36-44.

¹⁰⁷⁶ *D.H. v the Czech Republic*, para 193.

¹⁰⁷⁷ *D.H. v the Czech Republic*, paras 138 and 193.

scope of Article 14 was widened.¹⁰⁷⁸ While the Court has been hearing cases since 1959, it was only in 2007 with *D.H.* that the Court finally recognised, by name, the principle of indirect discrimination and defined its scope and ambit with respect to patterns of racial discrimination and segregation.¹⁰⁷⁹

7.4.3 Statistical Data and Evidence from Non Governmental Organisations

This thesis argues that the case law taken by Roma to the Court has broadened the Court's consideration of evidence and statistics provided by NGO's as showing contextual evidence of the discrimination or disadvantage suffered by Roma in a particular Respondent State. The Court in *Karner v Austria* stated that:

Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States.¹⁰⁸⁰

As the Court identified, the core purpose of the system is to provide individual relief, therefore the issue with evidence provided by third-party interveners is that their evidence is based on the broad situation, for example, of Roma in the particular Respondent State, whereas the task of the Court is to consider the facts in relation to the individual case at hand. While the Court must clearly decide the case on its individual merits, it is argued that cases taken by Roma discussed in this thesis often allege violations of discrimination under Article 14 and, therefore, it is crucial to consider the general position of Roma in the Respondent State. As the Court stated in

¹⁰⁷⁸ *Thlimmenos v Greece* App no 34369/97 (ECtHR 6 April 2000), *Hugh Jordan v UK* App no 24746/94 (ECtHR 4 August 2001).

¹⁰⁷⁹ Jennifer Devroye, 'The Case of D.H. and Others v the Czech Republic' (2009) 7 (1) *Northwestern Journal of International Human Rights* 81, 88.

¹⁰⁸⁰ *Karner v Austria* App no 40016/98 (ECtHR, 24 July 2003) para 26.

Karner, a mission of the Convention is 'to determine issues on public-policy grounds in the common interest'.¹⁰⁸¹ Therefore, in considering if an individual Roma applicant has been discriminated against, it is important for the Court to consider the overall position of Roma in the State, as well as the individual circumstances of the case.

In 2013 third-party interventions of human rights NGOs were found in 237 cases that appeared before the Court.¹⁰⁸² Overall, this only amounted to 1.3 per cent of the ECtHR's proceedings. It can be seen that the number of third-party interventions is higher before the Grand Chamber. In 2013, 21 per cent of cases involved third-party interventions before the Grand Chamber.¹⁰⁸³ While the total percentage of NGO interventions before the Court appears quite low, in respect of the Roma case law there has been involvement from third-party interveners in all cases. NGOs such as Amnesty International, European Roma Rights Center, Interights, Human Rights Watch, International Step by Step Association, Roma Education Fund, European Early Childhood Research Association, Greek Helsinki Monitor, Minority Rights Group International, European Network against Racism and the International Federation for Human Rights have all appeared before the Court in order to provide information on the position of Roma in a general sense in a particular state. Alvarez states 'no one questions today the fact that international law – both its content and its impact – has been forever changed by the empowerment of NGOs'.¹⁰⁸⁴ Treves further adds to this sentiment, noting that 'the role of NGOs is becoming an important chapter of the growing field of the law of international courts and tribunals'.¹⁰⁸⁵

¹⁰⁸¹ *ibid.*

¹⁰⁸² Laura Van Den Eynde, 'An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs before the European Court of Human Rights' (2013) 31(3) *Netherlands Quarterly of Human Rights* 271, 280.

¹⁰⁸³ Van Den Eynde, 'An Empirical' 280.

¹⁰⁸⁴ José E Alvarez, *International Organisations as Law-Makers* (Oxford 2005) 611.

¹⁰⁸⁵ Tullio Treves, 'Introduction' in Tullio Treves, Marco Frigessi di Rattalma, Attila Tanzi, Alessandro Fodella, Cesare Pitea and Chiara Ragni (eds), *Civil Society, International Courts and Compliance Bodies* (Cambridge 2005) 1, 7.

In all of the cases discussed in this thesis, the European Roma Rights Centre or Romani Criss have supported Roma in taking litigation before the Court on the basis of allegations of violations of a wide number of Convention articles. Not only do these groups support Roma in taking these cases, but they also provide third party interventions to the Court. It can also be seen in the Roma case law that a myriad of relevant international findings on discrimination against Roma in the particular Respondent State will be admitted before the Court.¹⁰⁸⁶ In relation to statistics, the Roma case law has clarified that when it comes to assessing the impact of a practice or measure on a group or individual, the use of statistics may be relevant.¹⁰⁸⁷ Where statistics on critical examination are shown to be reliable and significant, they will be sufficient to constitute *prima facie* evidence of indirect discrimination.¹⁰⁸⁸ The Court did confirm, though, that the lack of statistical evidence would not be a prerequisite for a finding of indirect discrimination.¹⁰⁸⁹

Particularly in relation to indirect discrimination, statistical evidence can be of huge importance in showing the prejudicial effect that facially neutral measures may have. The educational segregation cases were pioneering in this area, as the Court clarified that statistical evidence primarily provided by the Council of Europe, the Committee of Ministers, the Parliamentary Assembly, The European Commission against Racism and Intolerance, Advisory Committee on the Framework Convention for the Protection of National Minorities and the United Nations Education, Scientific and Cultural Organisation, amongst others, can be relied on by the applicants as proof of indirect discrimination. Before the *D.H.* case, the Court had not explicitly recognised indirect discrimination. The pioneering nature of the decisions in *D.H.* and

¹⁰⁸⁶ Emanuela Ignăţoiu-Sora, 'The Discrimination Discourse in Relation to the Roma: Its Limits and Benefits' (2011) 34 (10) *Ethnic and Racial Studies* 1697, 1697-1714.

¹⁰⁸⁷ *D.H. and Others v the Czech Republic*, para 187.

¹⁰⁸⁸ *D.H. and Others v the Czech Republic*, para 164. *Oršuš and Others v Croatia*, para 152.

¹⁰⁸⁹ *Oršuš and Others v Croatia*, paras 152 and 180.

Oršuš can be viewed contextually. In the preceding case of *Hoogendijk*, heard before the Roma cases of *D.H.* and *Oršuš*, the Court stated that statistics alone were not sufficient to prove discrimination.¹⁰⁹⁰ Even if the statistics were undisputed, the Court in *Hoogendijk* said they would then only be sufficient to amount to *prima facie* evidence of discrimination, which would transfer the burden to the Respondent state to provide a justification.¹⁰⁹¹ The Court's judgments in the Roma educational segregation cases have changed the previous approach to statistics in *Hoogendijk* and bolstered the recognition of and reliance on statistics to show proof of indirect discrimination.

These third party interventions and reports cited both before the Court and in the Court's judgments have been particularly useful in cases involving allegations of procedural violations of Article 14. Reports on Respondent States that show a particular culture or statistics on police violence against ethnic minorities in that State, or educational segregation policies in that State, have been considered by the Court in cases where individuals have alleged that a proper investigation was not held.¹⁰⁹² It is accepted that these reports and forms of contextual evidence will not be as useful in cases of allegations of substantive violations of Article 14, due to the need to show subjective intent. Therefore, the general landscape, while useful, will not be directly helpful. The continued third party representations before the Court in every case taken by Roma regardless of the alleged violation in conjunction with Article 14, has shown that both Roma applicants and the NGOs that support them see the provision of general reports on Respondent States as a key tool in their efforts to have the Court

¹⁰⁹⁰ *Hoogendijk v the Netherlands*, page 21 of the decision of the Court stated: 'statistics in themselves are not automatically sufficient for disclosing a practice which could be classified as discriminatory under Article 14 of the Convention'.

¹⁰⁹¹ *D.H. and Others v the Czech Republic*, para 137. *Oršuš and Others v Croatia*, para 150.

¹⁰⁹² Andrzej Mirga, 'The Extreme Rights and Roma and Sinti in Europe: A New Phase in the Use of Hate Speech and Violence?' (2009) 1 *Roma Rights Journal* 5, 5-7. James A Goldston, 'The Struggle for Roma Rights: Arguments that Have Worked' (2010) 32 (2) *Human Rights Quarterly* 311, 311-325.

find a violation of Article 14. In *D.H.* evidence provided to the Court showed that discriminatory barriers to education for Roma children exist/ed not just in the Respondent state of the Czech Republic, but across Europe.¹⁰⁹³ The Court's reliance on the reports provided to them by NGOs, etc. which provide a contextual overview to the Court of the situation of Roma in Europe, can be seen particularly in relation to the Court's citing of these reports in finding indirect discrimination and procedural violations of Article 14 for the lack of effective investigation.

7.4.4 A shift to the substantive model of equality?

Up to and including the first anti-Roma violence cases, the Court appeared to have adopted the formal model of equality.¹⁰⁹⁴ This was evident in a number of ways: the lack of explicit recognition of indirect discrimination, the lack of discussion of affirmative or positive action, the strict adherence to neutrality and the suspicion of classification, a reliance on direct discrimination and the strict requirement of a comparator. It is evident from the early case law that the Court has interpreted Article 14 in a formal sense, as requiring proof of unequal treatment of two comparable situations without objective or reasonable justification.¹⁰⁹⁵ The Court had also found that unequal situations should be treated unequally.¹⁰⁹⁶ The Court's historic reliance on the formal model of equality had resulted in assertions that the Court was unable to recognise apparently neutral rules that entrenched the values of the dominant groups in society.¹⁰⁹⁷

¹⁰⁹³ *D.H. and Others v the Czech Republic*, paras 50, 51 and 77.

¹⁰⁹⁴ *Velikova v Bulgaria*, paras 92-94. *Anguelova v Bulgaria*, paras 163-168.

¹⁰⁹⁵ Marc DeVos, *Beyond Formal Equality Positive Action under Directives 2000/43/EC and 2000/78/EC* (European Commission 2007) 50.

¹⁰⁹⁶ *Thlimmenos v Greece*, App No 34369/97 judgment 6 April 2000.

¹⁰⁹⁷ Sandra Fredman, 'Combating Racism with Human Rights: The Right to Equality' in Sandra Fredman (ed), *Discrimination and Human Rights: The Case of Racism* (Oxford University Press 2001) 9, 34.

The basis for the Court's reliance on the formal model is understandable, given that equality provisions initially sought to free individuals from the negative effects which being assigned to a particular group could place on them. It was believed that a gender-neutral and color-blind world would allow individuals to develop and thrive without stereotypical assumptions being foisted on them.¹⁰⁹⁸ While the rationale behind this thinking is easily understandable, there are issues as this view of equality is narrowly circumscribed. The requirement of the identification of an appropriate comparator made the principle a relative one. There is also the assumption with the formal model that the only role of state action was negative in nature, the requirement being to stop discrimination, rather than requirements to take positive steps to remedy disadvantage. The formal model of equality was therefore criticised as being unable and unsuited to address complex and deeply entrenched patterns of group disadvantage.¹⁰⁹⁹ There have been many calls for a reliance on the formal model to be replaced with a reliance on the substantive model, not just in the ECtHR but also more broadly in the Court of Justice of the European Union.¹¹⁰⁰

In order to decipher whether there has been a shift to the substantive model of equality, one must look to the cases where a formal model of equality was relied on. The three case groups analysed in this thesis were looked at thematically thus far, but should also be looked at in a linear fashion with regard to the shift to the substantive model of equality. Of the three groups discussed, the anti-Roma violence cases were the first cases to be brought before the Court; from the year 1998 to 2006 the cases

¹⁰⁹⁸ Catherine Albertyn, Sandra Fredman and Judy Fudge, 'Introduction: Substantive Equality, Social Rights and Women: A Comparative Perspective' 23 (2007) *South African Journal on Human Rights* 209.

¹⁰⁹⁹ Ruth Colker, 'Reflections on Race: The Limits of Formal Equality' (2008) 69 *Ohio State Law Journal* 1089, 1089-1091.

¹¹⁰⁰ Sandra Fredman, 'Equality: A New Generation?' (2001) *Acta Juridica* 214, 214-240. Sandra Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 *South African Journal on Human Rights* 163, 163-190. Catharine A MacKinnon, 'Substantive Equality: A Perspective' (2011) 96 (1) *Minnesota Law Review* 1, 1-27. Aileen McColgan, *Discrimination, Equality and the Law* (Hart Publishing 2014) 227-237.

brought to the Court predominantly focused on anti-Roma violence. The sterilisation and educational segregation cases came later, from the years 2007 and 2011. In the two earliest cases where Article 14 was considered, *Velikova* and *Anguelova* the Court did not take into account the context of the situation in which the anti-Roma violence occurred when deciding that there was no need to consider a separate violation of Article 14.¹¹⁰¹ The applicants in *Velikova* sought to rely on the popular prejudice suffered by Roma in Bulgaria. The applicants also stated that their ethnicity had been a decisive factor in contributing to the victim's murder, ill treatment and lack of investigation into his death.¹¹⁰² No violation of Article 14 was found, even though the Court admitted that the Respondent State had not provided a plausible explanation as to the circumstances of the death and the reasons as to why the investigation omitted certain indispensable and fundamental steps that could have shed light on the events.

Formal equality relies on the abstract individual with no ethnicity and focuses on the importance of a comparator. Substantive equality aims to redress disadvantage and acknowledges that while classification can sometimes lead to disadvantage or discrimination, often consideration of classification or context is critical, as it allows for previous disadvantage to be compensated. In *Velikova* the Court did not take into account the situation of Roma in Europe, the comments made by the authorities in relation to race or ethnicity, or the context of the victim's death. The Court was more focused on justification and a comparable situation, and the finding of a violation of Article 2 in relation to the death and lack of effective investigation, rather than considering the myriad factors, which the applicants sought to show as evidence of a violation of Article 14 in conjunction with Article 2.

¹¹⁰¹ *Velikova v Bulgaria*, para 94. *Anguelova v Bulgaria*, paras 163-168.

¹¹⁰² *ibid.* para 92.

In the early cases of *Velikova, Anguelova and Balogh*, the Court rarely discussed Article 14, and when they did discuss an allegation of a violation, it was always on the basis of a comparator and the justification that was provided.¹¹⁰³ While the Court highlighted the accessory nature of Article 14 in *Moldovan*, a finding of a violation of Article 14 was found on the basis of the ‘repeated discriminatory remarks made by the authorities’ and the applicant’s ethnicity being the decisive factor in the length of the domestic proceedings.¹¹⁰⁴ The Court appears to shift back and forth on the use of comparators in cases involving allegations of Article 14. In the coercive sterilisation cases the Court found that the applicants had not been treated as they were on the basis of their ethnicity, as other vulnerable groups had also been treated in the same way.¹¹⁰⁵ However, in the educational segregation cases and the later anti-Roma violence cases, the Court began to take into account the representations of third party interveners who gave an overall context to the situation of Roma in the Respondent State. The Court in those cases appeared to take the context of the situation into account as far as they could; however, it was still constrained by deciding on the facts of a particular case and not the overall situation of the Roma in a particular State.

The Court, particularly in the anti-Roma violence cases and educational segregation cases, placed positive obligations on Respondent States to ensure that Roma children would be appropriately educated, that police would be more culturally sensitive, and that there would be full investigations into allegations of police

¹¹⁰³ *Velikova v Bulgaria*, paras 93-94. *Anguelova v Bulgaria*, paras 164-168. *Balogh v Hungary*, paras 74-79.

¹¹⁰⁴ *Moldovan and Others v Romania*, paras 136 and 137 reiterated the accessory nature of Article 14: ‘The Court reiterates that Article 14 only complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to the enjoyment of the rights and freedoms safeguarded by those provisions.’

¹¹⁰⁵ *V.C. v Slovakia*, para 177. *N.B. v Slovakia*, para 121. *I.G. and Others v Slovakia*, paras 165 and 167.

brutality in the future.¹¹⁰⁶ The Court also clarified that if the Respondent State is in possession of all evidence related to possible racist overtones behind an incident, then the burden of proof will shift to the Respondent State to provide a justification for why they did not undertake an investigation into racist overtones behind the incident. This consideration of the context and general situation of the Roma in a State has contributed to the shift towards the substantive model of equality.

The consideration of the broader context shows that the Court may be beginning to consider that Roma face multiple types of discrimination, not merely based on race or ethnicity, but also on the basis of age, gender, education, etc. This would also signal a move to the substantive model. The recognition of positive action to redress the situation where the Roma have been discriminated against for decades has also displayed a shift to the substantive model. As discussed in an earlier section, the educational segregation cases have been instrumental in increasing recognition of positive obligations. The Grand Chamber in *Oršuš and Others v Croatia* took into account the special needs of Roma children in considering whether the State should have taken positive steps with regard to Roma education in order to address the factual inequalities they suffered.¹¹⁰⁷ The Court in *Horváth* went even further than in previous cases and stated that in light of:

... [R]ecognised bias in past placement procedures [the State had] specific positive obligations to avoid the perpetuation of past discrimination or discriminative practices disguised in allegedly neutral tests.¹¹⁰⁸

The Court went even further and put forward a very far-reaching positive obligation ‘to undo a history of racial segregation in special schools’ and acknowledged that the structural deficiencies suffered by Roma ‘call for the implementation of positive

¹¹⁰⁶ *Nachova v Bulgaria*, para 161. *D.H. v Czech Republic*, paras 207-210. *Sampanis and Others v Greece*, paras 86-97.

¹¹⁰⁷ *Oršuš and Others v Croatia*, para 183.

¹¹⁰⁸ *Horváth and Kiss v Hungary*, para 116 .

measures in order, *inter alia*, to assist the applicants with any difficulties they encountered in following the school curriculum'.¹¹⁰⁹ The Court has shown evidence of providing positive obligations, it must also be acknowledged that the Court still appears to be somewhat hesitant to impose positive obligations under Article 14 and often relies on imposing the obligations under other substantive Convention articles such as the right to education, etc.¹¹¹⁰ While the positive obligations may be provided under other Convention articles, it was allegations of violations of Article 14 in conjunction with those substantive articles that provided the means by which the Court acknowledged the importance of taking into account past discrimination and disadvantage.

The turning point in the shift from the formal to the substantive model of equality in the Court, in the cases taken by Roma, occurred in *Nachova v Bulgaria*.¹¹¹¹ Fredman's theory of substantive equality, which focuses on the connection between racial violence and stigma, prejudice and stereotyping, can be clearly seen in the Grand Chamber's statement in *Nachova* that: 'Racial violence is a particular affront to human dignity and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction.'¹¹¹² The Court in *Nachova* further displayed a shift to the substantive model when it could be seen that it focused on Fredman's conception of substantive equality as being partly based on the need to create a society that facilitates diversity and difference:

Authorities must use all available means to combat racism and racist violence thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of its enrichment.¹¹¹³

¹¹⁰⁹ *ibid.* para 127.

¹¹¹⁰ *D.H. and Others v the Czech Republic*, paras 205-210. *Oršuš and Others v Croatia*, paras 180-186.

¹¹¹¹ *Nachova v Bulgaria*, paras 162-168.

¹¹¹² *ibid.* para 145.

¹¹¹³ *ibid.* paras 103 and 145.

Evidence of this shift to the substantive model can be seen in one of the most recent anti-Roma violence cases of *Ciorcan v Romania*. The Court emphasised the way in which the particular harm of racial violence can be addressed through an equality perspective:

Treating racially-induced violence and brutality on an equal footing with cases that have no racist overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. Failure to make a distinction in the way situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention.¹¹¹⁴

The Court, in its shift to a reliance on a substantive model of equality in the *Nachova* and post-*Nachova* case law, focused on positive obligations, the need to investigate possible racist motives, the recognition that racially induced violence cannot be treated in the same way as cases with no racist element, the need for the Court to consider the context of the situation of Roma in the Respondent State, and that a violation of Article 14 will be considered in cases where discrimination is at issue even where a violation of a substantive article has been found. Following the comments by the Grand Chamber in *Nachova*, the next seminal moment in the shift to the substantive model of equality was the Grand Chamber's decision in *D.H. and Others v the Czech Republic*.¹¹¹⁵ As discussed in detail in a preceding section, the Court prior to the *D.H.* case had predominantly relied on the recognition of direct discrimination. This lack of explicit recognition of indirect discrimination for patterns of racial discrimination and segregation meant that covert practices or policies, which favoured the dominant group in society and discriminated against Roma were not identified as discriminatory. One of the core tenants of the substantive model of equality is the recognition of indirect discrimination. Fredman and Möschel view the

¹¹¹⁴ *Ciorcan v Romania*, para 158.

¹¹¹⁵ *D.H. and Others v the Czech Republic*, paras 175-181.

recognition of indirect discrimination as hailing the implementation of the principle of substantive equality.¹¹¹⁶

As discussed in a previous section, the recognition by the Court of the Roma as a particularly ‘vulnerable and disadvantaged group’, on the basis of past discrimination, has also signaled a move towards the substantive model of equality.¹¹¹⁷ The “vulnerability approach” or “vulnerable groups approach” could be viewed as potentially providing a means of addressing structural inequalities. Peroni and Timmer see the Court’s use of the group vulnerability concept as demonstrating a clear move towards a reliance on the substantive model of equality in the Court.¹¹¹⁸

The Court, as particularly evidenced in the educational segregation cases, has stated its intention to apply a strict standard of scrutiny to alleged violations of the rights of Roma on the basis of racial discrimination.¹¹¹⁹ In all of the educational segregation cases the Court dismissed any justifications provided by the Respondent States for the different treatment meted out to Roma children. The Court also looked at the overall disadvantage and social context faced by the Roma community, rather than focusing only on the situation facing the applicants themselves. This displayed a strong shift towards the substantive model, which focuses on the context or situation of the applicants in contrast to the formal model, which takes a “blind” approach to the issues of ethnicity or past disadvantage. The Court in the educational segregation

¹¹¹⁶ Fredman, ‘Substantive Equality Revisited’ 712-738. Mathias Möschel, ‘The Strasbourg Court and Indirect Race Discrimination: Going Beyond the Education Domain’ (2017) 80 (1) *Modern Law Review* 121, 121-132.

¹¹¹⁷ *D.H. and Others v the Czech Republic*, para 181. *Oršuš and others v. Croatia*, para 183. *Horváth and Kiss v. Hungary*, paras 115 and 127. *Škorjanec v Croatia*, App no 25536/14 (EctHR, 28 March 2017), paras 56-57, para 61 referred to hate crime and paras 65 and 66.

¹¹¹⁸ Peroni and Timmer, ‘Vulnerable Groups’ 1074.

¹¹¹⁹ *D.H. and Others v the Czech Republic*, para 196.

cases showed a narrowing of the margin of appreciation afforded to the Respondent State.¹¹²⁰

While thus far this discussion of the shift to the substantive model has been very positive, it must be acknowledged, as detailed in a previous section, that there has yet to be a finding of a substantive violation of Article 14 in conjunction with Article 2 (that has not been overturned by the Grand Chamber).¹¹²¹ As the Court appears to focus on subjective attitudes and refuses to find that the applicants' ethnicity was a factor in their treatment on the basis of evidence of excessive force, for example, it could be said that the Court has in some ways limited its complete shift to the substantive model. The Court's reliance on subjective attitude is undermining the ability of Article 14 to address disadvantage although one of the key components of Fredman's theory of substantive equality is the need to address systemic disadvantage.¹¹²²

The Grand Chamber's focus on subjective attitude essentially means that it is the victims who will have to provide evidence of subjective attitude, which is unlikely to be available to them. The Grand Chamber, in stating that it would be too onerous to place the burden on the Respondent State of having to disprove subjective racist intent, essentially asserts that it will be for applicants to have to prove racist intent on the part of the State. Instead, the Chamber should demand that evidence be provided by the Respondent State to rebut the inference of discrimination once the applicant has provided a *prima facie* case of discrimination. The example of the *Ciorcan* case could be used here, where state authorities had used 13 police officers to serve a summons

¹¹²⁰ Andrea Broderick, 'A Reflection on Substantive Equality Jurisprudence: The Standard of Scrutiny at the ECtHR for Differential Treatment of Roma and Persons with Disabilities' (2015) 15(1-2) *International Journal of Discrimination and the Law* 101, 108-109.

¹¹²¹ *Nachova v Bulgaria*, paras 130 and 168.

¹¹²² Sandra Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 (2) *South African Journal on Human Rights* 163, 163-190.

to a man of Roma ethnicity, when the same summons could have been posted.¹¹²³

This should have amounted to *prima facie* evidence of excessive force being used due to the applicant's ethnicity. The burden of proof should then have shifted to the Respondent State to show that this approach of using a large number of police officers to serve a summons was used in other non-Roma cases. This approach was not relied upon and, despite the repeated failure of the Romanian authorities to remedy the situation and the expression of concern about allegations of violence by Romanian law enforcement officers against Roma provided by the Advisory Committee on the Framework Convention for the Protection of National Minorities, the Court found these insufficient to establish racist attitudes.

While the lack of a finding of a substantive violation of Article 14 in conjunction with Article 2 has undoubtedly led to confusion about the Court's shift to the substantive model of equality, the Court has made significant progress in recent years in its move towards a substantive model of equality. It is fair to state that it was initially constrained by the wording of Article 14: the Court had to be careful, as human rights discourse sixty years ago, at the formulation of the ECHR, was concerned with treating all persons alike regardless of ethnicity or race. As society and law has moved forward, it can be seen that there is a need for recognition of difference and of the effects which endemic and structural disadvantage can have on a group over a prolonged period of time.

While the Court cannot find a State in violation of Article 14 because of a general situation in a State, it is crucial to a Roma applicant's case that the Court takes into account the general climate in a Respondent State. The Court has evidenced its move towards a reliance on a substantive model of equality in: recognising indirect

¹¹²³ *Ciorcan and Others v Romania*, para 166.

discrimination for patterns of racial discrimination and segregation, the use of statistical data, the need for positive action, taking into consideration the climate and context in a Respondent state and the need for investigations into possible racist motives due to the Court's acknowledgement of the difference between violence which is and is not racially motivated. Perhaps in the future the Court, through dealing with the lack of clarity surrounding the burden of proof and the issue of subjective attitude, may move towards a full reliance on the substantive model of equality, which may result in the finding of a substantive violation of Article 14 in conjunction with Article 2.

7.4.5 Intersecting grounds of discrimination faced by Roma

Fredman states that:

Intersectionality disrupts established group demarcations used in anti-discrimination law. To assume that groups are rigidly delineated by race, gender, disability, sexual orientation or other status, is to render invisible those that are found in the intersection between those groups.¹¹²⁴

While the applicants in all three of the case law groups alleged violations of Article 14 based on ethnicity, it can be argued that those applicants were not only discriminated against on one ground, but rather on two or more intersecting grounds. In the cases involving allegations of anti-Roma violence and educational segregation, it can be clearly seen that the applicants or victims in the cases were discriminated on intersecting grounds such as: ethnicity and age, ethnicity and gender, ethnicity and age and disability. In the two case groups involving allegations of anti-Roma violence and forced sterilisation, it can be seen that the applicants were discriminated against

¹¹²⁴ Sandra Fredman, 'Positive rights and positive duties: Addressing Intersectionality' in Dagmar Schiek and Victoria Chege (eds) *European Union Non-discrimination law: Comparative Perspectives on Multidimensional Equality Law* (Routledge Cavendish 2009), 73.

on the intersecting grounds of ethnicity and gender. In all three of the case law categories, structural intersectionality is also evident.

As discussed earlier, in the cases involving allegations of anti-Roma violence or loss of life either during the applicant's arrest or subsequent detention, the individual concerned was in a number of cases a young man under the age of 18. Given the number of cases and repetition of similar fact patterns, one can establish that the individual concerned was discriminated against not only on the basis of ethnicity, but also on the intersecting ground of being under the age of majority. In the educational segregation cases, while the applicants are now all adults, they were all children when they were discriminated against and segregated into Roma only schools, Roma only classes or 'special schools'. The children in question were not just discriminated against because they were Roma, but also on the intersecting ground of age. Both the young people tortured or abused while in custody and those placed in segregated schools happen to have been both Roma and children when they were discriminated against.

In the cases concerning allegations of anti-Roma violence whilst in custody and in Roma settlements, the applicants/ victims in cases concerning a loss of life have been male in the majority of cases.¹¹²⁵ It also cannot go unnoticed that the Roma males, particularly including young Roma males, are stereotyped as being aggressive and violent by society, thereby allowing state authorities to claim no discrimination of the applicants, but rather that they were dealing with drunk and violent individuals.¹¹²⁶ This negative stereotyping of Roma males cannot be ignored, when one considers that all the cases of anti-Roma violence that occurred whilst in custody concern Roma males and the majority of violence in Roma settlements also concerns

¹¹²⁵ Young males were the victims in *Anguelova v Bulgaria* and *Velikova v Bulgaria*. In *Moldovan and Others v Romania* and *Ciorcan and Others v Romania* the majority of the applicants were male.

¹¹²⁶ *Anguelova v Bulgaria*, paras 106-108. *Velikova v Bulgaria*, paras 65-67.

male Roma applicants. Therefore, Roma males are not merely discriminated against on the basis of ethnicity, but also on the basis of age and gender.

A similar assertion regarding the intersecting grounds of ethnicity and gender can be made in the forced sterilisation cases. All of the female applicants in the alleged forced sterilisation cases cited NGO reports that supported their assertions that Roma women had been the victims of historical practices of forced sterilisation.¹¹²⁷ One could also argue that forced sterilisation could amount to violence against women.¹¹²⁸ Applicant's have alleged they were discriminated on the twin grounds of their Roma ethnicity and being female. The applicant's claimed discrimination on the ground of ethnicity, as they claimed they were being sterilised to ensure that further pregnancies would not ensue and that no more Roma children would be born.¹¹²⁹ The women were also discriminated on the ground of being female, in so far as the Respondent States were forcibly sterilising them without their informed consent, which amounted to violence against women. The sterilisation practices were focused on Roma women and not Roma men.

In the cases of educational segregation, the children were often placed in segregated classes due to lack of knowledge of the official language of the State in which they lived. It was stated by Respondent States that the children were being placed in classes in order to help them to learn the language of instruction. It was found, though, that these classes in no way equipped the children to better their knowledge of the language and did not prepare them for reintegration into mainstream

¹¹²⁷ *V.C. v Slovakia*, paras 80 and 81 and dissenting opinion of Judge Mijovic. *I.G. and Others v Slovakia*, para 75.

¹¹²⁸ Steve Hajiioff and Martin McKee, 'The health of the Roma People: A Review of the Published Literature' (2000) 54 *Journal of Epidemiol Community Health* 864, 866. Elizabeth K. Tomasovic, 'Robbed of Reproductive Justice: the Necessity of a Global Initiative to Provide Redress to Roma Women Coercively Sterilized Eastern Europe' (2009-2010) 41 (3) *Columbia Human Rights Law Review* 765, 765-824. Christina Zampas and Adriana Lamačková, 'Forced and Coerced Sterilisation of Women in Europe' (2011) 114 (2) *International Journal of Gynecology and Obstetrics* 163, 163-166.

¹¹²⁹ *I.G. and Others v Slovakia*, para 160.

classes or for progression into secondary education.¹¹³⁰ The children were being discriminated against on the intersecting grounds of their ethnic background, and especially language. Children in the educational segregation cases were often tested in a questionable way, in which they were disproportionately found to suffer from learning difficulties. Again, some of the children may have had learning difficulties, but both children with disabilities and without disabilities were being discriminated against. Children with learning disabilities were being placed arbitrarily in “special schools” which in no way met their needs, as they were not designed to support children with learning difficulties, but rather to segregate Roma children from non-Roma children. The Roma children who did not have learning difficulties were being segregated into these “special schools” on the basis of their being Roma; again, their needs were not being met, in that these schools in no way prepared the children for further education.

A common feature of all three case law groups is structural intersectionality. In the educational segregation cases, the domestic laws and policies in the Respondent States allowed for the Roma children to be segregated on grounds such as arbitrary educational testing and lack of knowledge of a language. The state justified the segregation as being based on policies to ensure that Roma children were given support to ensure they could progress in education. In reality, Roma were being hidden away with little thought for their education. In the alleged forced sterilisation cases, as outlined earlier, there were state policies in a number of European states to encourage social workers and doctors to advise Roma women to be sterilised in order to receive a payment or with threats that their children would be taken into care.¹¹³¹ In the anti-Roma violence cases, the State, through police officers, was acting on

¹¹³⁰ *D.H. and Others v the Czech Republic*, paras 52, 126, 135 and 208-209.

¹¹³¹ Tomasovic, ‘Robbed of Reproductive Justice’ 765-824. Zampas and Lamačková, ‘Forced and Coerced’ 163-166.

widespread prejudices against Roma in their treatment of Roma during arrests and while in custody.¹¹³² In all three of the case law groups the Roma were being discriminated against on intersecting grounds and through structural intersectionality, which led to a multifaceted disempowerment of the person.

7.5 Conclusion

The Roma case law has been instrumental in affecting the interpretation of Article 14 before the ECtHR. The case law has led to the move from the formal to the substantive model of equality being relied on by the Court, clarification on the reliance on statistical and NGO evidence before the Court, the positive obligations placed on States and clarification on the burden of proof and standard of proof required in Article 14 cases, the recognition of indirect discrimination for patterns of racial discrimination and segregation and a recognition of procedural and substantive violations under Article 14. Article 14 can no longer be accused of lacking bite and being an accessory article with no life of its own. It can be said that as a result of Roma case law Cinderella has finally come to the ball.¹¹³³

7.6 Critical Reflections on the Contribution of the Court to Roma Rights

While this thesis has focused on the impact that the three groups of Roma case law have had on the development of Article 14, some additional critical reflections could be made and will need to be further addressed in the future. There are three distinct areas which the author has identified as needing additional focus in the future: the lack of implementation of judgments and positive obligations, the lack of a finding of

¹¹³² Margaret Brearley, 'The Persecution of Gypsies in Europe' (2001) 45 (4) *American Behavioral Scientist* 588, 588-599.

¹¹³³ O'Connell, 'Cinderella' 211.

a substantive violation of Article 14 in conjunction with Article 2 in a case taken by a Roma applicant, and the issues facing Roma where they have been discriminated against on more than one ground. Within each of these three areas the author in the future will trace whether the Roma case-law has had an influence in other lines of case-law under Article 14. In particular there will be an analysis of whether there has been a lack of a finding of a substantive violation of Article 14 with Articles 2 and/or 3 in cases taken by other applicant's on the grounds of race or ethnicity.

7.6.1 The lack of implementation of judgments and positive obligations

As has been outlined earlier, there has been a lack of implementation of judgments, particularly in the educational segregation cases, as evidenced by the applicants in *Sampanis* taking the *Sampani* case due to the lack of execution of the judgment in the earlier case.¹¹³⁴ The educational segregation cases were particularly important to the development of Article 14, yet the judgments have not had a meaningful impact on the education of Roma in Europe until today.¹¹³⁵ While the Court found violations of Article 14 and provided that States should redress the systemic discrimination, segregation and lack of suitable education provided to Roma, there has been a lack of follow through in terms of the requirements of the judgments. It has been found that while Roma students are not being placed in 'special schools' Roma students are now

¹¹³⁴ Panayote Dimitras, 'Greece's Non-Implementation of International (Quasi-) Judicial Decisions on Roma Issues' (2010) 1 *Roma Rights Quarterly* 9, 29-38.

¹¹³⁵ Dia Anagnostou and Yonko Grozev, 'Human Rights Litigation and Restrictive State Implementation of Strasbourg Court Judgments: The Case of Ethnic Minorities from Southeast Europe' (2010) 16 (3) *European Public Law* 401, 401-418. Dia Anagnostou and Susan Millns, 'Individuals from Minority and Marginalised Groups before the Strasbourg Court: Legal Norms and State Responses from a Comparative Perspective' (2010) 16 (3) *European Public Law* 393, 393-400.

being placed in vocational schools.¹¹³⁶ Arguably placing Roma students in these newly created vocational schools in essence could amount to a new form of ethnic segregation. It could be argued that the placing of Roma students into vocational schools is determining their future opportunities in life with regard to employment or access to tertiary level education. Criticism of lack of implementation of judgments could be leveled at the Committee of Ministers.¹¹³⁷ There is much work to be carried out in the future looking at why there has been a lack of enforcement of judgments, whether States are being given too much discretion in how they address Roma segregation in schools, and whether there has been any material change on the ground for Roma children and their education in Europe today.¹¹³⁸ Cahn acknowledges that some efforts have been made in Europe to alleviate the educational disadvantage suffered by Roma children, these efforts have been too few and too weak to make significant change, due to the enormous problem of contemporary anti-Roma racism in Europe today coupled with historical discrimination and racism.¹¹³⁹ The author in the future would like to further delve into the types of education that Roma are receiving in Europe today and whether these amount to real change or are merely new ways of disguising the segregation of Roma children.

¹¹³⁶ Bojinca Marian, Munteanu Daniela, Toth Alexandru, Mihair Surdu and Judit Szira, *Analysis of the Impact of Affirmative Action for Roma in High Schools, Vocational Schools and Universities* (Gallup / Roma Education Fund 2009) 11-13.

¹¹³⁷ Marinella Marmo, 'The Execution of Judgments of the European Court of Human Rights – A Political Battle' (2008) 15 (2) *Maastricht Journal of European and Comparative Law* 235, 245-246. Helen Keller and Cedric Marti, 'Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights' Judgments' *European Journal of International Law* (2015) 26 (4) 829, 829-850.

¹¹³⁸ Fiona de Londras and Kanstantsin Dzehtsiarou, 'Managing judicial innovation in the European Court of Human Rights' (2015) 15 (3) *Human Rights Law Review* 523-547.

¹¹³⁹ Claude Cahn, 'Human Rights and the Roma: What's the Connection?' in Claude Cahn (ed), *Roma Rights: Race, Justice and Strategies for Equality* (International Debate Education Association 2002) 19.

7.6.2 The Lack of a Substantive Finding of a Violation of Article 14 in Conjunction with Article 2

While this point has been discussed at length in earlier sections, it merits considerable thought that the assertion of Judge Bonello in his dissenting judgment in *Anguelova* in 2002 - that in the fifty year history of the Court there had never been a finding that a Roma man or woman had died as the result of racist or ethnic hatred, still rings true.¹¹⁴⁰ Fifteen years after Judge Bonello's statement and in over twenty cases of anti-Roma violence, the Court has never found a substantive violation of Article 14 in conjunction with Article 2. It was posited above that it is the overly onerous standard of "proof beyond reasonable doubt" and the difficulty for applicants to show evidence that the killing had a racist purpose behind it that has led to a lack of a finding of a violation. There is very little literature that focuses on this lack of a single finding that the killing of a Roma had a racial element behind it. The author would like to further explore whether this has been the situation in cases involving other ethnic minorities. It would be interesting to see in the twelve intervening years whether there has been a finding of a substantive violation of Article 14 in conjunction with Article 2 on the basis of ethnic discrimination involving another minority group.

7.6.3 Intersecting grounds of Discrimination

Another area where there has been very little work is the various grounds on which Roma are discriminated against. While NGO and Council of Europe reports discuss the myriad ways in which Roma are discriminated against, they often list these

¹¹⁴⁰ Giovanni Bonello, 'Evidentiary Rules of the ECHR in Proceedings Relating to Articles 2, 3 and 14 – A Critique' (2009) 2 *Inter-American and European Human Rights Journal* 66, 66-80. Judge Bonello in his dissenting judgment in *Anguelova v Bulgaria*, para 2, stated: 'I consider it particularly disturbing that the Court, in over fifty years of pertinacious judicial scrutiny, has not, to date, found one single instance of violation of the right to life (Article 2) or the right not to be subjected to torture or to other degrading or inhuman treatment or punishment (Article 3) induced by the race, colour or place of origin of the victim'.

grounds as though they are either unconnected, or alternatively, that they are all connected. The Reports do not focus on how the applicants in the cases were discriminated against, for example, in the educational segregation cases due to ethnicity and age, as they were all young children at the time they were discriminated against. The reports do not focus on the nexus between two or more grounds of discrimination and how this impacts the way in which Roma are discriminated against. While the applicants in the cases discussed in this thesis have focused on allegations of ethnic discrimination before the Court, it can be seen in the intersectionality analysis at the end of each chapter that Roma are never discriminated against on only one ground. Future work would focus on questioning why Roma are not bringing allegations of violations of Article 14 based on more than one discrimination ground.

The author also feels that there has been little focus on internal intersectionalities. There has been little focus on how Roma women have been reluctant to report forced sterilisation cases due to negative perceptions of sterile women within the Roma community. As outlined in the chapter on forced sterilisations, thousands of Roma women have been sterilised across Europe, yet only 4 cases have appeared before the Court. Clearly there will be admissibility issues and the need to exhaust domestic remedies, but there are few commentators questioning why there are so few cases appearing before the Court. Do internal intersectionalities play a part in the lack of cases appearing before the Court? There has also been little consideration of how Roma female children face difficulties in accessing education, again, due in part to the Roma communities sometimes placing lesser importance on the education of girls.

The focus in the aftermath of the educational segregation cases has been on ensuring that Roma children are not arbitrarily placed in special schools. The focus

has been on the impact which this education in special schools has had on Roma children with no special learning needs; there has been little consideration for the Roma children who do have special learning needs and the fact that they were not being adequately supported in their learning.¹¹⁴¹ It is crucial to dispel the stigma that the majority of Roma children have a “familial disability”, but it must also be acknowledged that some of the children may have special learning needs. Moreover, why have over twenty anti-Roma violence cases predominantly concerned violence only against Roma men, either adult or juvenile? As mentioned earlier, all cases alleging violations of Article 14 with Articles 2 and/or 3 concern violence against Roma males either during detention or during an arrest. None of these issues have been raised in the Court, or indeed by many academic commentators, therefore there is much scope for future research in these areas building on the findings in this thesis.

¹¹⁴¹ Aram A Shvey, Martin S Flaherty and Tracy E Higgins, ‘Children Left Behind: Roma Access to Education in Contemporary Romania’ (2006) 29 (6) *Fordham International Law Journal* 1155, 1171.

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Appendix

List of Cases taken by Roma to the European Court of Human Rights Discussed in this thesis

1. Cases where no violation of Article 14 was alleged by the Applicants

- Assenov and Others v Bulgaria* App no 24760/94 (ECHR, 28 October 1998)
Bojilov v Bulgaria App no 45114/98 (ECHR, 22 March 2005)
Kehayov v Bulgaria App no 41035/98 (ECHR, 18 April 2005)
Tzekov v Bulgaria App no 45500/99 (ECHR, 23 May 2006)
Jašar v The former Yugoslav Republic of Macedonia App no 69908/01 (ECHR, 15 February 2007) *Dzeladinov and Others v The former Yugoslav Republic of Macedonia* App no 13252/02 (ECHR, 10 July 2008)
Sulejmanov v The former Yugoslav Republic of Macedonia App no 69875/01 (ECHR, 24 July 2008) *Kirilov v Bulgaria* App no 15158/02 (ECHR, 22 August 2008)
K.H. and Others v Slovakia App no 32881/04 (ECHR, 28 April 2009)
Marinov v Bulgaria App no 37770/03 (ECHR, 30 September 2010)
Stefanou v Greece App no 2954/07 (ECHR, 4 October 2010)
Kleyn and Aleksandrovich v Russia App no 40657/04 (ECHR, 3 August 2012)
Borbála Kiss v Hungary App no 59214/11 (ECHR, 26 September 2012)
Dimov and Others v Bulgaria App no 30086/05 (ECHR, 6 November 2012)
M and Others v Italy and Bulgaria App no 40020/03 (ECHR, 17 December 2012)
Eremiášová and Pechová v the Czech Republic App no 23944/04 (ECHR, 20 September 2013)
Guerdner and Others v France App no 68780/10 (ECHR, 17 April 2014)
Mihaylova and Malinova v Bulgaria App no 36613/08 (ECHR, 24 May 2015)
Gheorghijă and Alexe v Romania App no 32163/13 (ECHR, 31 May 2016)
Adam v Slovakia App no 68066/12 (ECHR, 26 July 2016)

2. Cases alleging anti-Roma Violence

- Velikova and Others v Bulgaria* App no 41488/98 (ECHR, 18 May 2000)
Anguelova v Bulgaria App no 38361/97 (ECHR, 13 June 2002)
Balogh v Hungary App no 47940/00 (ECtHR 20 October 2004)

Moldovan and Others v Romania App nos 41138/98 and 64320/01 (ECHR, 12 July 2005)

Nachova and Others v Bulgaria App nos 43577/98 and 43579/98 (ECHR, 6 July 2005)

Bekos and Koutropoulos v Greece App no 15250/02 (ECHR, 13 December 2005)

Ognyanova and Choban v Bulgaria App no 46317/99 (ECHR, 23 February 2006)

Šečić v Croatia App no 40116/02 (ECHR, 31 May 2007)

Angelova and Iliev v Bulgaria App no 55523/00 (ECHR, 26 July 2007)

Cobzaru v Romania App no 48254/99 (ECHR, 26 July 2007)

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Fedorchenko and Lozenko v Ukraine App no 387/03 (ECHR, 20 September 2012)

Ciorcan and Others v Romania App nos 29414/09 and 44841/09 (ECHR, 27 January 2015)

Ion Bălăsoiu v Romania App no 70555/10 (ECHR, 17 February 2015)

Boacă and Others v Romania App no 40355/11 (ECHR, 12 January 2016)

Škorjanec v. Croatia App no 25536/14 (ECHR, 28 March 2017)

3. Cases alleging Forced Sterilisation

V.C. v Slovakia App no 18968/07 (ECHR, 8 November 2011)

N.B. v Slovakia App no 29518/10 (ECHR, 12 June 2012)

I.G. and Others v Slovakia App no 15966/04 (ECHR, 13 November 2012)

4. Cases alleging Educational Segregation

D.H. and Others v the Czech Republic App no 57325/00 (ECHR, 13 November 2007)

Oršuš and Others v Croatia App no 15766/03 (ECHR, 16 March 2010)

Lăcătuș and Others v Romania App no 12694/04 (ECHR, 13 November 2012)

Sampani and Others v Greece App no 59608/09 (ECHR, 11 December 2012)

Horváth and Kiss v Hungary App no 11146/11 (ECHR, 29 January 2013)

Lavida and Others v Greece App no 7973/10 (ECHR, 28 May 2013)