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Argumentation of the Court of Strasbourg's Jurisprudence regarding the discrimination against Roma

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Słowa kluczowe: prawa człowieka, dyskryminacja, Romowie, orzecznictwo, Europejski Trybunał Praw Człowieka

Summary

While the Court has, to some degree, started to protect against discrimination based on birth or nationality, the protection against discrimination on the basis of race until 2005 has been very poor and dubious. Upon reviewing the case law of the ECHR, we find that since the case "Relating to certain aspects of the laws on the use of language in education in Belgium" v. Belgium in 1968, the Court has decided to opt in favor of the original English version of art. 14, which underscores that the enjoyment of the rights and freedoms must be assured "without discrimination" and defends the concept that equality should be interpreted as non-discrimination, while clarifying that this disposition does not prohibit preferential treatment, such that, in the eyes of the Court, this principle is only violated when preferential treatment implies "a discriminatory treatment", so the task for us is to determine in detail when the two are correlated.

The cited decision is an essential reference as it provides the pointers needed to discern whether or not a violation of art. 14 exists, as in a "test" of equality that entails:

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(1) whether the distinction in treatment lacks objective justification; (2) whether the difference in treatment results in conformity with the objective of the effects of the measure examined attendant to the principles that generally prevail in democratic societies; (3) whether there exists a reasonable relationship between the means used and the end sought.

Despite this interpretational recognition of art. 14, if we analyze in detail the Court's jurisprudence, how the Court has approached the topic of discrimination on the basis of racial or ethnic origin is somewhat disappointing. The fact that during decades plaintiffs were required to provide proof beyond the shadow of a doubt has restricted the Court's influence on discriminatory actions based on race or ethnicity; for this reason, it is not unexpected that in time critical dissidence arose, even within the Court itself. A good example of this is given by Judge Bonello in the decision Anguelova vs Bulgaria (2002). Here we analyze how the jurisprudence of the Court of Strasbourg has evolved in the context of discrimination against Roma, so as to ascertain the challenges that remain in this area.

Streszczenie

Orzecznictwo Trybunału w Strasburgu w sprawach związanych z dyskryminacją Romów

Przeciwdziałanie dyskryminacji ze względu na urodzenie lub przynależność państwową, a także ochrona dyskryminacją ze względu na rasę, były ściśle związane z początkami działalności Europejskiego Trybunału Praw Człowieka, jednak do 2005 r. ochrona w tym zakresie była stosunkowo słaba. Praktykę ukształtowało m.in. orzeczenie ETPCz w sprawie „Relating to certain aspects of the laws on the use of language in education in Belgium" v. Belgia z 1968 r.(1 EHRR 252), w którym trybunał stwierdził, że korzystanie z praw i wolności musi być zapewnione bez dyskryminacji, równość należy interpretować jako niedyskryminację, wyjaśniając, że nie oznacza to zakazu preferencyjnego traktowania. Cytowana decyzja jest istotna dla stosowania art. 14 Europejskiej Konwencji Praw Człowieka, co nie oznacza, że nie jest kwestionowana. Dobrym tego przykładem jest decyzja Anguelova vs Bułgaria (2002).

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I.

Despite the fact that discrimination is legally prohibited, the Roma[2] are one of the EU's ethnic minorities that most often are victims of prejudice and social exclusion[3]. The Roma number about 6 million within the EU, with a total population of 10–12 million.

Discriminatory actions against the Roma have a long history in Europe. In recent decades, the rise of populism and human rights abuses in Eastern Europe[4] have exacerbated the situation, which turns the fight against discrimination into a social justice cause, not only in Eastern Europe, but also in Western European democracies[5].

Let us take, as an example, the case of Spain, the country in the European Union with the highest Roma census, representing about 8% of all European Roma[6]. Even though they constitute the largest ethnic minority in Spain, whose history in the country spans at least six centuries, the Roma continue to suffer grave injustices and abuses, both socially and economically[7].

Discrimination and social exclusion has led to the Roma minority suffering even more under the grave economic recession. Roma people need to fight not only against social exclusion, but also economic marginalization. According to the World Bank, in Eastern Europe, 71% or more of Roma

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[2] Roma is the term commonly used in EU policy documents and discussions, although it encompasses diverse groups that include names like Roma, Gypsies, Travellers, Manouches, Ashkali, Sinti and Boyash.

[3] European Commission, D.G. Justice. EU and Roma, http://ec.europa.eu/justice/discrimination/roma/index_en.htm (9.06.2015).

[4] UNICEF (2009) When "Special" Means "Excluded". Roma Segregation in Special Schools in the CEE/CIS region, http://www.romachildren.com/wp-content/uploads/2011/11/When-Special-Means-Excuded.pdf (9.06.2015).

[5] J. Lichfield, *Roma – the unwanted Europeans*, "The Independent", 27.10.2013, http://www.independent.co.uk/news/world/europe/roma--the-unwanted-europeans-8906382.html (9.06.2015).

[6] Vid. Estrategia Nacional para la Inclusión Social de la Población Gitana en España 2012–2020. Informes, Estudios e Investigación 2012. Ministerio de Sanidad, Servicios Sociales e Igualdad, p. 11.

[7] Vid. M.T. Andrés, *La comunidad gitana y la educación. Fundación Secretariado Gitano*, http://www.uned.es/congreso-inter-educacion-intercultural/Grupo_discusion_3/40.%20T.pdf (9.06.2015).

households live below the poverty line. Graduation rates from secondary school lie below 29%, with women having even lower rates. Unemployment among Roman men is more than 50%, and 75% or more for Roma women[8].

The European Commission, in a communiqué presented on July 2, 2008 to the European Parliament and other Community institutions affirmed that millions of Europeans of Roma descent suffer persistent discrimination at the hands of both individuals and the authorities, rendering them social outcastes, notwithstanding the innovative initiatives started in the 1990's aimed at improving the condition of the Roma in the framework of the Community Initiatives Horizon and Integra of the European Social Fund, which led to the inclusion of specific measures and objectives concerning the Roma people in the Programa Operativo de Lucha Contra la Discriminación (POLCD) from 2000–2006, which was continued in the funding period 2007–2013[9].

A survey by the European Union Agency for Fundamental Rights published in May 2014 revealed cases of social exclusion and abject poverty among the Roma of 11 countries in the European Union, with high levels of unemployment (exceeding 66%) and low levels of finishing secondary education (15%). In May of this year, an evaluation by the European Commission on the progress of member States on the integration of Roma found fault with housing and health care policies. In August of 2013, the Commission announced that it would supervise the eviction of Eastern European Roma from France, and in September it requested information from Italy on the discrimination against Roma in that country, according to the Human Rights Watch report on the European Union[10].

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[8] World Bank, Europe and Central Asia (2014), Brief. Roma, http://www.worldbank.org/content/dam/Worldbank/Feature%20Story/ECA/regional-brief-europe-central-asia-april-2014.pdf (9.06.2015).

[9] These measures and objectives form part of the Access Program, managed by the Fundación Secretariado Gitano.

[10] As an example, one might recall that in October 2013, Leonarda Dibrani, a 15-year-old student from Kosovo and of Roma ethnicity,who had spent 4 yours in French schools, was detained and deported. In her specific case, she was arrested by the Frontier Police (PAF) on the 9th of October in the parking lot of a public school while she was embarking on a field trip with her follow 9th graders, which led to an outpouring of messages of indignation and solidarity in the French social networks. The case pinpoints the strict policies of the French

The EU Agency for Fundamental Rights has alerted that the situation of discrimination and intolerance (hate crime included) in the EU has worsened considerably. Evidence herefore are the renewed and continued violations of human rights generally motivated by prejudice.

A number of more general or very specific barriers have arisen, among which are the following:

- low awareness of and sensitivity to discrimination against Roma among legal professionals;
- prejudice towards the Roma and explaining away the problems they face (implying that Roma should generally take responsibility for their own situation);
- segregation of Roma;
- low general awareness of anti-discrimination legislation;
- persistent high degree of permissiveness, indolence and impunity when it comes to racism and discrimination towards the Roma community;
- Roma victims are in most cases extremely vulnerable and disempowered in taking action to defend their rights;
- victims are reluctant to lodge complaints, fearing both retaliation from the perpetrators and of the attitude of their own community which may consider that no action should be taken since it would be pointless and would only cause unnecessary additional problems;
- drawn out legal proceedings, which in some countries may take even longer when Roma are victims;
- a number of professions and professionals (eg. educators, physicians, journalists) may discriminate and lack the strong professional ethics that would make them sanction those among them who discriminate, thus resulting in scant self-regulatory power of professions in general;
- in some countries, weak or apathetic equality bodies which, given their specific role and public expectations of them, can even act as a barrier when they fail to fulfil their role in cases of discrimination, reinforcing the idea that the status quo is the correct one.

In many cases, the victims do not have the financial means to protect their rights before national and international courts[11]. A stronger tradition

government concerning the Roma minority, despite the socialist President Hollande's calls for humane treatment.

[11] The Central and Eastern European Countries, in particular lack, a tradition of pro bono practiced by their bar associations. Also, there may be bar association rules which do

of pro bono legal aid in all EU countries would be necessary to protect the rights of the Roma minority.

II.

The consequences of extended prejudice and racial discrimination are difficult to overcome[12]. Principally in Central and Eastern Europe, we find that the discrimination is self-perpetuating in the Roma community itself, as though it were "almost" natural. The situation of discrimination has become part of the culture itself, and this prevents the Roma from being conscious of the discrimination that they often suffer. Moreover, another problem in this context is the lack of confidence the Roma have in the justice system.

Our country's National Strategy for the Social Inclusion of Roma in Spain 2012–2020 recognizes that the «persistence of negative prejudices against Roma persons in parts of Spanish society makes them one of the groups that suffer the greatest degree of societal rejection. In recent years, various educational campaigns have been launched to counter discrimination and these have had positive effects, but discriminatory attitudes and practices persist within our society, which constitute the primary obstacle to real and complete inclusion of the Roma into society. In fact, discrimination at the per-

not allow the provision of legal services outside the context of private law offices, effectively hampering the possibility of providing pro bono services to the most vulnerable. J.A. Goldston, M. Adjami, *The Opportunities and Challenges of Using Public Interest Litigation to Secure Access to Justice for Roma Minorities in Central and Eastern Europe, Preliminary Draft, Subject to revision*, Prepared for World Justice Forum, Vienna, July 2–5, 2008, p. 3, http://www.lexisnexis.com/documents/pdf/20080924043559_large.pdf (9.06.2015).

[12] In 2005, the Fundación Secretariado Gitano launched a new campaign to complement the one initiated a year earlier under the slogan "Get to know them before judging them" designed to combat the stereotypes associated with the Roma community. With the slogan "Your prejudices are the voices of others", they intended counteract a new element in the process that leads to discrimination: when the steretotypes become fixed in the social imagination, they turn into prejudices that lead to irrational suspicion and fear of the Roma. To counteract these stereotypes, the campaign aimed to question the messages received in the social context, in the educational system, and in the media, which condition, without the recipient being aware of it, the sentiments towards the Roma. The campaign was financed by the European Social Fund through the Operational Programme to Combat Discrimination.

sonal level is pronounced[13], especially concerning employment, access to facilities and services, and housing. Increasing the presence of and interaction with Roma people in the public sphere, making them more aware of their rights, developing mechanisms for civil groups to detect and prosecute discrimination, together with the effects of the economic crisis, can contribute to highlighting cases of discrimination that Roma suffer on the basis of their ethnic origin»[14].

In any event, one can defend the hypothesis that we truly live in an era one can call "liquid racism" in contrast to "classical racism" that was founded in the erroneous biological doctrine of inequality between the races. As Rey correctly emphasizes, liquid racism can only be understood by realizing that many persons exhibit neo-racist behaviors but are not conscious of them: indeed, they certainly will vehemently and sincerely reject racism or xenophobia. To quote Rey: "Racism is viewed by the immense majority as something profoundly erroneous from the moral, social, cultural, and legal points of view, so that it is something we forbid ourselves ideologically. But racial prejudices remain intact"[15].

III.

The fight against racial discrimination should be an aim for all of society, not only for the Roma community. We should take into account that hate crimes[16], unlike regular crimes, have an especially destructive effect not only

[13] In a study conducted on the subjective perception of discrimination by potential victims, persons of sub-Saharan origin were the group that most reported suffering discrimination, followed by the Roma. Panel on discrimination on the basis of racial or ethnic origin (2010): the perceptionof potential victims (2011). Minsitry of Health, Social Services, and Equality, Madrid.

[14] Vid. National Strategy for the Social Inclusion of Roma in Spain 2012–2020, op.cit., pp. 16–17.

[15] F. Rey, *Racismo líquido,* [in:] *Informe Anual FSG 2014. Discriminación y Comunidad Gitana*. Fundación Secretariado Gitano, Madrid 2015, pp. 81–82.

[16] Hate crimes are criminal offences committed with a bias motive. The crime may be against a person or a group of persons or against property associated with the specific person or group defined in relation to a certain protected characteristic. OSCE, ODIHR (2009), Hate crime laws. A practical guide, p. 16, http://www.osce.org/odihr/36426 (9.06.2015). EU

on the individual directly affected, but also on those surrounding her/him and on the wider society[17]. As the European Court of Human Rights (ECtHR) put it in a landmark case regarding violence against the Roma: "Treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights"[18].

At an individual level, hate crimes have devastating psychological effects on its victims, because of the humiliation suffered. The victim is conscious of the fact that the discrimination resulted because of personal characteristics that he or she cannot change. This leads to an increased level of vulnerability. At the group level, the logical conclusion is that all who share these same inherent characteristics can also become victims of this discrimination in global terms. Twentieth century history provides many examples of how this situation can become even worse[19]. If hate crimes are not punished, the impuissance of the victims is heightened, but also leads to the perpetrators not realizing the gravity of their discriminatory actions, because they can then hold that they are correct in their beliefs[20]. From a security perspective, hate crimes have unforeseen negative consequences as their impact can be multiplied[21]. Finally, hate crimes can increase the persistent prejudices in society

Agency for Fundamental Rights (2012) Making hate crime visible in the European Union: acknowledging victim's rights, p. 23, http://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf (9.06.2015).

[17] The National Strategy for the Social Inclusion of Roma in Spain is based on the inclusion of this population group as the recipient of objectives and policy measures that address the entire Spanish population; it is intended that these plans and policies reach the Roma and compensate their current social disadvantages; this requires that they be inclusive, flexible, and accessible. Vid. National Strategy for the Social Inclusion of Roma in Spain 2012–2020, op.cit., p. 36.

[18] European Court of Human Rights, *Nachova and others v. Bulgaria*, no. 43577/98 and 43579/98: Judgement of the Grand Chamber of 6 July 2005, para. 160.

[19] OSCE, ODIHR (2009), Hate crime laws. A practical guide, p. 20, http://www.osce.org/odihr/36426 (9.06.2015).

[20] EU Agency for Fundamental Rights (2012) Making hate crime visible in the European Union: acknowledging victim's rights, p. 22, available at: http://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf (9.06.2015).

[21] OSCE, ODIHR (2009), Hate crime laws. A practical guide, pp. 20–21, http://www.osce.org/odihr/36426 (9.06.2015).

as they reflect "inbuilt tendencies and predispositions of societal structures" and go against the fundamental rules of a democratic society which, inter alia, say that diversity should be valued[22].

IV.

The legal framework surrounding discrimination, the form and severity of sanctions, etc. may vary from one country to the next. Yet, there is a common denominator, since different international and European organisations (UN, Council of Europe, European Union, etc.) have imposed obligations on their member states to ensure a certain level of protection against discrimination, thus creating standards which must be guaranteed by states.

As concerns the Council of Europe, art. 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter 'ECHR' or 'Convention') prohibits 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 conjunction with rights and freedoms protected by the Convention[23]. The list of grounds in art. 14 is not exhaustive as indicated by the expression "any ground such as". Since the drafting of the Convention the Court has also ruled on grounds such as disability or sexual orientation.

Aside from the fact that the right not to be discriminated against is not a stand-alone right, art. 14 was initially seen as applicable when corroborated with those rights foreseen in the articles of the ECHR[24]. This limitation was

[22] EU Agency for Fundamental Rights (2012) Making hate crime visible in the European Union: acknowledging victim's rights, pp. 23–24, http://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf (9.06.2015).

[23] Art. 14 of the ECHR: "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".

[24] Right to life (Art. 2), Prohibition of torture (Art. 3), Prohibition of slavery and forced labour (Art. 4), Right to liberty and security (Art. 5), Right to a fair trial (Art. 6), No punishment without law (Art. 7), Right to respect for private and family life (Art. 8), Freedom of thought, Conscience and Religion (Art. 9), Freedom of Expression (Art. 10), Freedom of

overcome by the Council of Europe by the adoption of Protocol 12, which prohibits discrimination in the enjoyment of not only the rights provided in the ECHR, but in general of any rights foreseen by law[25]. However, the Protocol is only binding for the Member States of the Council of Europe that ratified it[26].

It is interesting to observe that the Explanatory Report to this Protocol emphasizes the limited application to date of art. 14 of the Convention, the inability of the same to distringuish between the different types of discrimination and the lack of significant case law and jurisprudence of the European Court on this provision, above all in the matter of racial and sexual discrimination. We should keep in mind that discrimination on the basis of race or ethnic heritage manifests itself in diverse forms, all of which are clearly delineated in the law[27]: direct discrimination, indirect discrimination, discriminatory harassment or the recently described form known as "multiple discrimination"[28].

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assembly and association (Art. 11), Right to marry (Art. 12), Right to an effective remedy (Art. 13).

[25] Art. 1.1 of Protocol 12: "The enjoyment of any right set forth by law 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".

[26] Council of Europe (2009) Ensuring Access to Rights for Roma and Travellers, The Role of the European Court of Human Rights, A handbook for lawyers defending Roma and Travellers, p. 28, http://www.coe.int/t/dg3/romatravellers/Source/documents/Ensuring%20access%20rights%20for%20Roma%20and%20Travellers%20-%20Handbook%20for%20lawyers%20EN.pdf (9.06.2015).

[27] Direct discrimination occurs when, for reasons of racial or ethnic origin, a person is treated less favorably than another is, has been, or will be treated in a comparable situation; indirect discrimination occurs when a measure, criterion, or practice that is apparently neutral puts persons of a particular racial or ethnic origin at a disadvantage relative to other persons; discriminatory harassment consists of any undesired conduct related to the racial or ethnic origin of a person, which has the purpose or effect of violating their dignity and creating an environment of intimidation, humiliation, or offense. Annual report on the situation of discrimination and application of the principle of equal treatment based on racial or ethnic origin in Spain 2011 (2012), prepared by the Council for the Promotion of Equal Treatment and Non-Discrimination of Persons of Different Racial or Ethnic Origin, Ministry of Health, Social Services and Equality. Centro de Publicaciones, Madrid, p. 15.

[28] Multiple discrimination occurs when different grounds of discrimination concur or interact, creating a specific form of discrimination. Vid. ibidem, p. 15. In other words: the dis-

In these cases, because of the absence of an explicit legal concept of race in national legislation such as that of Spain and because of the Directives 2000/43/CE and 2000/78/CE of the Council[29], national courts have based their decisions on the jurisprudence and the interpretative framework of the maximum guarantor of the ECtHR: the European Court of Human Rights[30].

Now, while the Court of Strasbourg has to a certain degree instituted safeguards against discrimination on the basis of birth or nationality, until 2005, the protections against discrimination on the basis of race, as we will show, have been very scant, overly cautious, and equivocal. This is all the more surprising, as Dworkin affirms, racial discrimination is the most odious form of discrimination, as it "expresses contempt and is profoundly unjust... it destroys the lives of its victims... not only depriving them of some opportunity open to others, but damages them in almost all endeavours and hopes they can have"[31]. Racial discrimination, on the one hand, stigmatizes its victims[32]

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crimination does not arise because a single factor (ethnicity, gender, or sexual orientation), but appears as consequence of several simultaneous factors: ethnicity and disability; gender and ethnicity; social origin, gender, and ethnicity. The concept of multiple discrimination was already in the focus of feminism since the 80s, but has gathered momentum since it was expressly recognized in the United Nations Conference against Racism, Racial Discrimination, Xenophobia and Intolerance, held in Durban, South Africa, in 2001.

[29] The definition of race provided by Directive 2000/43/EC is negative in the sense that is based on opposition to separatist definitions and does not provide an explicit and positive description. Paragraph 5 states that "The European Union rejects theories that seek to establish the existence of human races. The use, in the present Directive, of the term 'racial origin' does not imply acceptance of these theories". The Directive focuses on equal rights and opportunities, including gender equality, and on the fight against multiple forms of discrimination. UE (2000a), op.cit. UE (2000b) Directive 2000/78/CE of the Council, of November 27th, 2000, establish a general framework for equal treatment in employment and occupation.

[30] According to the Committee on the Elimination of Racial Discrimination, for a particular group to be considered a racial group it is sufficient that it be perceived "subjectively" as such. OHRC (2004) The Relevance of International Instruments on Racial Discrimination to Racial Discrimination Policy in Ontario. December 2004.

[31] R. Dworkin, *Sovereign Virtue. The Theory and Practice of Equality*, Harvard Univ. Press 2000, p. 407.

[32] In anti-discrimination law, the stigma theory comes from K.L. Karst, *Equal Citizenship under the Fourtheenth Amendment*, "Harvard Law Review" 1977, 91, pp. 1–68. For this author, at the heart of the idea of equality lies the right to equal citizenship, which guarantees to each

and, on the other hand, converts them into "minorities in isolation and without a voice[33]". Let us keep in mind that anti-discrimination laws in the United States have their roots in the fight against racial discrimination.

Upon reviewing the jurisprudence of the ECtHR, one finds that since the case *Belgian Linguistic Regimen*[34] in 1968, the Court's interpretation adheres to the original English version of art. 14 (ECHR), which states that the exercise of rights and liberties should be assured "without discrimination" and argues that equality should be interpreter as non-discrimination, while clarifying that this provision does not prohibit differential treatment[35]. Differential treatment is not *ipso facto* discriminatory, as such treatment might be permitted by a provision, act, or practice that is justified by a legitimate aim and the necessary and proportionate means required to achieve it. Hence, positive actions or special measures counterbalance the structural disadvantages that are associated with a person's racial or ethnic origin[36].

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individual the right to be treated by society as a respected, responsable, and participating member. Stated in the negative sense, the right to equal citizenship prohibits society from treating an indivdual as a member from a lower or dependent caste or as a non-participant. In other words, the right to equal citizenship protects against degrading treatment or stigmatization, which is the attitude with which "normal people", or "the majority" view those who are different.

[33] Racial minorities are, in the strict sense, "isolated minorities lacking a voice" in the political process. As is well known, the doctrine of the "discrete and insular minorities" was coined by the U.S. Supreme Court in the fourth footnote to the Case Carolene Products v. U.S., of 1938 (plaintiff: Stone) and has been theoretically formulated by J.H. Ely, *Equal Citizenship under the XIV Amendment*, "Harvard Law Review" 1977, 91: 69 ff. According to this theory, the constitutional prohibition against discrimination concerns primarily the judicial protection of those minority groups that are incapable of defending themselves in the political arena because they have been deprived of rights or because of negative stereotypes. Also, form this point of view, the idea that laws against racial discrimination have to be particularly incisive and definitive is reinforced.

[34] Case concerning certain aspects of the languate teaching system in Belgium. Decision of the ECHR of 23rd July, 1968.

[35] T. Freixes Sanjuán, *Las principales construcciones jurisprudenciales del Tribunal Europeo de Derechos Humanos. El standard mínimo exigible a los sistemas internos de derechos en Europa*, "Cuadernos constitucionales de la Cátedra Fadrique Furió Ceriol" 1995, no. 11–12: pp. 97–115. dialnet.unirioja.es/servlet/articulo?codigo=229839 (9.06.2015).

[36] Positive actions are the specific measures that favor certain collectives that are desigend to prevent or compensate for the disadvantages that they face based on their racial or ethnic origin. Vid. ibidem, p. 16.

In this manner, the Court interprets art. 14 as having been violated only when differential treatment implies "discriminatory treatment", so one has to determine on a case-by-case basis and in detail whether one implies the other. The decision just mentioned is crucial, because it outlines the guidelines to determine whether or not a violation of art. 14 ECHR exists. The following litmus test of equality consists of: 1) whether the treatment lacks justification; 2) whether the differential treatment is in conformity with the aim of the measure under question, according to the principles that generally prevail in democratic societies; 3) whether the means used are in reasonable relation to the aim pursued[37].

The Case of *National Belgian Police Union vs Belgium*[38] in 1975 marks another milestone in the jurisprudence of the Court of Strasbourg, as it has since maintained that art. 14 ECHR plays an integral part in each and every precept related to rights and liberties[39]. This interpretation remains important, because it makes equality and non-discrimination precepts that transcend other provisions, allowing the Court to judge the discriminatory nature of any law under the Convention. Equality and non-discrimination, therefore, reach the point at which they become "intertwined with the rights and liberties through which one seeks equality or rejects discrimination"[40].

Despite the Court's interpretation of art. 14 of the Rome Convention, if we analyze subsequent decisions of the ECtHR, the Court has not always lived up to the principles it had set to uphold. As already noted, its approach to the issue of discrimination on the basis or racial or ethnic origin has not, in the course of its jurisprudence, set "a significant milestone" in the protec-

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[37] Ibidem.

[38] ECHR case of October 27th, 1975.

[39] K. Schumann, *The role of Council of Europe*, [in:] *Minority Rights in Europe. The Scope for a Transnational Regime*, London 1994, pp. 90–91.

[40] T. Freixes Sanjuán, *Las principales construcciones jurisprudenciales,* op.cit. The Case Caso Luedicke, Belkacem and Koç highlights the hypothesis that when a substantial violation of a right has been deemed to occur, one should not apply art. 14 ECHR. Likewise, but on the other hand, since the Case Rasmussen the ECtHR has maintained that art. 14 ECHR complements the other normative clauses of the Convention and of the Protocols, so that it does not imply an independent and separate substantiation of a right, and, therefore, should always be invoked in relation to one or more of the rights that are recognized. Essentially, this means that "the right not to be disciminated against" is complementary to all other rights.

tion against discrimination[41]. From my point of view, if the courts in general have been reluctant to condemn discriminatory actions, it is largely because claimants have found it difficult to prove discriminatory treatment per se, although the animus or discriminatory intention of the perpetrator would be more than clearly demonstrable, as in the majority of the cases the relevant evidence is in the hands of the perpetrator. The fact that, for decades, claimants had to prove their cases beyond a reasonable doubt[42] limited the effect of the Court's jurisprudence on discriminatory actions on the basis of racial or ethnic origin; as a consequence, it is not surprising that an atmosphere of criticism and dissent has arisen, including within the ECtHR itself.

A prime example is the dissent of Judge Bonella in the decision *Anguelova vs Bulgaria* (2002)[43], in which he drew the attention of the Court to the difficulty the plaintiff faced in proving discrimination "beyond a reasonable doubt" and its immediate and drastic implication: the absence of case law on racial discrimination during the past half century of the Court's existence[44].

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[41] Informe anual sobre la situación de la discriminación y la aplicación del principio de igualdad de trato por origen racial o étnico en España 2011, p. 43, http://www.igualdadynodiscriminacion.msssi.es/recursos/publicaciones/2012/documentos/2012_12_IA.pdf (9.06.2015).

[42] C. Cahn, *La indolencia de un tribunal: de cómo no afrontar la discriminación sistémica por origen racial en el Tribunal Europeo de Derechos Humano*, "Revista de Derecho Europeo Antidiscriminación" 2006, 4, p. 9.

[43] In this ruling from 2002 on the murder of a man of Roma heritage by the Bulgarian police for racist reasons, the Court held that no violation of the legal provisions concerning non-discrimination based on art. 14 of the Convection had occurred. Case *Anguelova v. Bulgaria* (lawsuit no. 38361/97). Decision of September 13th, 2002.

[44] Judge Bonello made it quite clear in his dissenting vote: «2. (...). Upon going through the annals of the Court, an outside observer could reach the conclusion that, during more than fifty years, democratic Europe has been free of any suspicion of racism, intolerance, or xenophobia. The Europe reflected in the Court's jurisprudence is an exemplary refuge of ethnic brotherhood, in which the peoples of the most diverse origins mix and melt without the least hint of tension, prejudices, nor recrimination. This case does nothing but feed into this illusion. 3. The Court has frequently and regularly found that members of vulnerable minorites have been assassinated or subject to degrading treatments, in violation of art. 3; but the Court has not, not even once, held that these occurrences were linked to their specific ethnicity. Kurds, blacks, Muslims, Roma and others are assassinated,, tortured, or mutilated again and again, but the Court is still not convinced that their race, color, nationality, or place of birth has anything to do with it».

Based on this argument, Judge Bonella proposed ways to decisively influence the evolution of the ECtHR concerning evidentiary requirements: "the technique of inverting the burden of proof when judging the rights violation if the government in question does not provide the information to which only it has access, or the presumption that when a person from a disadvantaged minority has suffered an injustice when racial tensions are high and the impunity of offending state authorities is epidemic, the burden of proof that the events were not ethnically provoked should be shifted to the State"[45]. The burden of proof had hampered convictions in previous controversial cases such as *Velicosa vs Bulgaria*, decided on May 18, 2000[46].

One would have to wait until the start of 2004 for the Court, in the decision *Nachova and others vs Bulgaria*[47], to recognize the violation of the prohibition against discrimination in art. 14 on the basis or racial or ethnic origin, thereby truly marking a differential change in the burden of proof. In particular, on February 26th of 2004, the fourth Section of the Chamber unanimously agreed with the demands of the plaintiffs in deciding that the Bulgarian State had violated art. 14 (ECHR). The Court decided that the investigation of the claims by state authorities had not been diligently carried out, noting that the plaintiffs were at a disadvantage, lacking the necessary power to collect the proofs required, which were in the hands of the State. For this reason, the Court found it justifiable to shift the burden of proof. The Court courageously affirmed that in cases of racial discrimination, the burden of proof lies with the accused government; that is, the State should, by providing additional evidence in the case or a plausible explanation of the facts, convince the Court that the events in question were not driven by discriminatory attitudes that are prohibited.

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[45] Adding the consideration of racial motives when the State does not adequately investigate the facts in attacks on the life and physical and moral integrity of a member from an ethnic minority.

[46] Case concerning the death of Roma persons in police custody.

[47] Case *Nachova and others v Bulgaria,* February 26th, 2004. Matter: Death of two Roma persons in Bulgaria during a racially motivated detention. Facts: Shots fired by the Bulgarian military police killed two workers of Romani ethnicity that had fled. The plaintiffs claimed that the deaths were due to police behavior arising primarily from racial prejudices. Violation of art. 2 of the Convention, which protects the right to life in connection with art. 14, the right to equal treatment.

As expected, the State of Bulgaria requested that the matter be referred to the Grand Chamber, which decided (July 6th, 2005) to dismiss the claim of racist motivation, based on the inability to preclude beyond a reasonable doubt that the deaths and the absence of an investigation were inspired by racist motives. The authorities were relieved of the obligation to collect proof *ad hoc* and of the obligation to justify the absence of an internal investigation of the events.

It certainly is surprising that until the beginning of 2004, only two positive resolutions on racial issues are to be found, neither of which falls within the provisions of art. 14; but even more striking is that the Court of Strasbourg found it especially difficult to invoke the provisions of the Convention when the matter affects the population of Roma origin[48], which has caused the Court to be accused, not infrequently, of having a marked anti-Roma bias[49].

Therefore, the ECtHR's landmark decision in a case affecting Roma minorities, involving a cruel pogrom in Romania[50], set a new direction for the Court in its interpretation of art. 14 (ECHR). In the ruling *Hadareni vs Romania*, 13th of July, 2005, the Court held that Romania had violated multiple provisions of the European Convention on Human Rights. Particularly interesting, in my view, is that the Court considered the problem of discrimination from different points of view. In reviewing the arguments that referred to alleged violations of different provisions of the Convention con-

[48] Concerng the human rights violations perpetrated against the Roma, I recommend reading C. Cahn, *Human Rights and Roma: What's the Connection?*, [in:] *Roma Rights. Race, Justice and Strategies for Equality, International Debate Education Association*, New York 2002, pp. 10–24, and especially, pp. 18–19.

[49] Vid. L. Clements, *Litigating Cases on Behalf of Roma before the Court and Commission in Strasbourg. Roma Rights*, 1998, http://www.errc.org/cikk.php?cikk=487 (9.06.2015).

[50] It is true that this Case, involving the death and aggressions against Roma citizens in the neighborhood of Hadarini, was not admitted to a trial before the Court without difficulties, because of the fact that the pogrom occurred some months before Romania truly entered into the Council of Europe, and, for that reason, before the Convention would enter into force there. Nonetheless, the Court finally decided to study the Case, considering evidence such as the degrading life conditions under which the victims had to live for many years after the crowd violence, as well as the failure, motivated by racial prejudice, to provide justice in this Case, and reached the conclusion that these constituted continuing violations of the Convention since June 20 1994, when the international treaty went into effect in Romania.

cerning non-discrimination, the Court agreed with these arguments, and held that art. 14 of the Convention had been violated, which the Court linked to art. 6.1 (the right to a fair trial) in view of the duration of the proceedings and 8 (the right to enjoy privacy and family life). The Court also found a violation of art. 3 prohibiting inhumane or degrading treatment for reasons that include racial discrimination. "In view of the arguments listed above, the Court finds that the living conditions of the plaintiffs and the racial discrimination to which they have been publically subjected by the manner in which various authorities have responded to their complaints constitute an offense to their human dignitiy, which reaches the level of «degrading treatment» in the sense of art. 3 of the Convention"[51].

With the decision in the *Hadareni* case, the Court satisfied the task of doing justice when a member State within the Council of Europe had failed, intervening to compensate for severe damages (including damages in light of racial discrimination) and giving judicial satisfaction to the victims. The approach of the Court in the *Hadareni* case contrasts starkly with the hurtful, confusing and erroneous conclusions in another case that was being deliberated during the same time: the lawsuit of a group of Roma children that complained of their racially motivated inclusion in separate and non-standard schools that were meant for the mentally handicapped[52]. This case, *D.H. and others v. Czech Republic*, was finally decided on appeal on November 13, 2007, overturning a decision by the Chamber of February 7th, 2006[53]. We will now proceed to analyze the history of this decision.

It behooves us to stress that the problem of racial segregation of Roma children has been a subject of public discussion since the late 70s, when the civic dissident movement Carta 77 first drew attention to this problem. The Czech government had recognized the existence of this problem on certain occasions, such as, for example, in the year 2000, when the government communicated the following to the United Nations Committee on the Elimi-

[51] *Moldovan and Others v. Romania* (Demandas nº 41138/98 y 64320/01). Decision nº 2, July 12th, 2005, par. 113.

[52] Segregation of Roma children, Human Rights of Roma and Travellers in Europe, Council of Europe, Estrasburgo (2012), pp. 123–131, http://www.coe.int/t/commissioner/source/prems/prems79611_GBR_CouvHumanRightsOfRoma_WEB.pdf (9.06.2015).

[53] Lawsuit nº 57325/00, "ECtHR Czech School Segregation Decision", 7 Feb 2006.

nation of Racial Discrimination: "On the basis of psychological tests that do not take into consideration the social and cultural differences between Roma and non-Roma children, children from the Roma minority are often moved to schools for special needs children, with the consent of the parents, even though these schools are officially designed for children with learning difficulties that make it impossible for them to study in a primary school or a special primary school. The problem lies in the fact that the graduates of schools for special-needs children have fewer options for their future: they cannot be accepted in secondary schools, nor receive vocational training as adults. The estimates indicate that 75% of Roma children are transferred or directly enrolled in these special schools"[54].

The lawsuit was filed first in Czech courts in June of 1999, and after exhausting the national appeals process, before the Court of Strabourg in early 2000. In the lawsuit, filed on behalf of eighteen Roma children, it was argued that forced enrollment, based on ethnic grounds, in schools for the mentally disabled, for which no procedurę existed to question this unjust enrollment or to eventually return to a normal school, was tantamount to racial segregation, in violation of a number of provisions of the Convention.

The matters brought before the court concerned children and their educational trajectories, for which reason a timely decision of the Court was urgently sought. The Court did not respond at all to these concerns, and instead referred the case back to the Czech government in December of 2004, more than three and a half years later after the case was brought before the Court. In the meantime, during the hearing phase, the Court had declined to consider any of the demands of the lawsuit but one; without further explanation, it dismissed the allegations that these matters could rise to the level of degrading treatment, as described under art. 3; rejected all procedural claims; and only agreed to seriously consider the plaintiffs claims of discrimination in the context of the right to an education: art. 14 in relationship to art. 2 of Protocol 1. Finally, in February 2006, the Court decided that the claims did not meet even this criterion and found that no violation of the Convention had taken place.

[54] Fourth Periodic Report of the Participating States for the year 2000, Addendum, Czech Republic CERD/C/372/Add. 1, April 14, 2000, par. 134.

In this grim and sorry decision, the ECHR reiterates its criteria in this matter: «The jurisprudence of the Court establishes that discriminiation signifies treating persons in similar or comparable situations differently, *without an objective or reasonable justification*[55]". "The signatory States enjoy a certain margin of discretion[56] to determine whether, and to what degree, the differences justify a difference in treatment in situations under similar circumstances»[57]. This reasoning contradicts the same decision's claim that "In any case, the final decision on the compliance with the provisions of the Convention lies solely in the purview of the Court"[58].

It is quite disappointing that the decision ends by alleging blithely that alhtough "the general situation in the Czech Republic concerning the education of Roma children is by no means perfect, the Court cannot, under the current circumstances, find that the measures taken against the plaintiffs were discriminatory", and that it feels unable to "conclude that the enrollment of the plaintiffs or, in some cases, the contiued enrollment in special education schools were the result of racial prejudice"[59].

The Court's decision in the Czech school segregation case is remarkable when set in contrast with the Court's judgment in the Hadareni[60] case, and even more so when compared to the case *Timishev vs Rusia* of 2005[61], which

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[55] The italics are mine. *Willis v. the United Kingdom*, no. 36042/97, § 48, ECHR 2002-IV.

[56] The italics are mine.

[57] *Gaygusuz v. Austria*, decided September 16, 1996, Reports of Judgements and Decisions 1996-IV, § 42.

[58] ECtHR Czech School Segregation Decision, par. 44.

[59] ECtHR Czech School Segregation Decision, par. 52.

[60] C. Cahn, *La indolencia de un tribunal: de cómo no afrontar*, op.cit., p. 15.

[61] For example, in its decision of December 2005 in the case *Timishev v Russia*, a case that involved educational discrimination against the ethnically Chechen population in Russia, the Tribunal found: "A differential treatment of persons in similar or comparable situations without an objective or reasonable justfication constitutes discrimination" (see *Willis v United Kingdom*, no. 36042/97, § 48, ECHR 2002-IV). Discrimination on the basis of true or perceived ethnic origin is a form of racial discrimination (...). Racial discrimination is a form of discrimination that is particularly injust, and, in light of its terrible consequences, requires special vigilance on the part of the authorities and authoritative action. For this reason, the authorities should use all means available to combat racism, reinforcing in this manner a vision of democracy in which diversity is not viewed as a threat but as a source of wealth (see Nachova y otros, cited above, § 145). (...) Once the plaintiff has shown that there is a differen-

reveals a possible anti-Roma bias, leading to claims that "the Court is not prepared to do right by the Roma"[62], as it raises questions as to why the Court protected the Chechen population in Russia and had not done the same for the Roma community in the Czech Republic.

To emphasize this point, let us recollect the differentiation the Court made in the *Timishev v. Russia case*: "ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds"[63].

For all these reasons, we should applaud the decision *D.H. and others vs the Czech Republic*, of November 13th, 2007, that annulled–as already mentioned-the previous decision of the Chamber of February 7, 2006, by holding that school segregation in the town of Ostrova, Romania, violated art. 14 of the Convention (the right not to be discriminated against) in conjunction with art. 2 of Protocol 1 to the Convention (securing the right to education). It is of interest to analyze the reasoning used to overturn the previous decision. The full chamber changed its stance, allowing statistics into evidence as proof of the discriminatory nature of the measure, without evaluating the intentions behind such dsicriminatory measures.

In this manner, the case changes the standards of proof and the arguments that can be brought before the ECtHR. The European Roma Rights Centre filed an *amicus curiae* brief to provide additional evidence based on field research in Ostrava, Romania, which showed that over half of Roma

ce in treatment, it is the obligation of the respondent Government to demonstrate that this difference in treatment could be justified (see, for example, cases nos. 25088/94, 28331/95 y 28443/95 *Chassagnou and others v France* 29 EHRR 615, §§ 91–92). (...) the Court finds that that there is no difference in treatment based exclusively, or to a decisive extent, on the ethnic origin of a person that can be objectively justified in a contemporary democratic socjety constructed on the principles of pluralism and respect for different cultures" (case *Timishev v Russia*, lawsuits nos. 55762/00 y 55974/00, December 13th, 2005, par. 56 to 58).

[62] C. Cahn, *La indolencia de un tribunal: de cómo no afrontar,* op.cit., p. 16.

[63] Ibidem, p. 28. *Timishev v. Russia*, App. nos. 55762/00 and 55974/00, Judgment date 13 December 2005, par. 55.

children attend special schools, over half of the students attending remedial (special) schools are Roma, and that any randomly chosen Roma child is more than 27 times more likely to be placed in schools for children with learning disabilities than a similarly situated non-Roma child[64].

In addition, eight NGOs (including Interights, Minority Rights Group and Human Rights Watch) that form part of the international human rights community submitted *amicus curiae* briefs in the case[65], which demonstrated that the matter transcended the particular facts of the case in Ostrava, Romania.

In *DH v. the Czech Republic*, the Court affirms again that a State can treat different groups differently in order to correct "factual inequalities" between them (such as between the Roma and other groups), which *per se* does not represent discrimination. Moreover, under certain circumstances, failing to treat different groups differently may result in discrimination. Also, a general policy or measure may be considered discriminatory, even if it does not target a specific group. The standard for determining discrimination is based on whether a particular measure has "disproportionately prejudicial effects" on that group[66].

Despite the favorable decision and changes in national legislation that were introduced even before the Grand Chamber of the ECtHR issued its final decision, the decision's enforcement has been lacking[67], particularly as prejudices against the Roma remain[68].

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[64] ERRC (2008) *Ostrava case: D.H and others vs the Czech Republic*, http://www.errc.org/cikk.php?cikk=2945 (9.06.2015).

[65] Ibidem.

[66] Ibidem, p. 28. *DH v. The Czech Republic*, Application no. 57325/00, Judgment date 13 November 2007, par. 175.

[67] D. Stanislav, *The Legacy of D.H. and others: Four Years After. In: Roma Rights 2011: Funding Roma Rights: Challenges and Prospects. ERRC.* 2012, http://www.errc.org/roma-rights-journal/roma-rights-2011-funding-roma-rights-challenges-and-prospects/4062/5 (9.06.2015).

[68] A comprehensive description of the case, from a strategic litigation strategy can be found in J.A. Goldston, M. Adjami, *The Opportunities and Challenges of Using Public Interest Litigation to Secure Access to Justice for Roma Minorities in Central and Eastern Europe, Preliminary Draft, Subject to revision*, Prepared for World Justice Forum, Vienna 2008, July 2–5, pp. 33–42, http://www.lexisnexis.com/documents/pdf/20080924043559_large.pdf (9.06.2015).

Nonetheless, it is a positive development that we are witnessing a Copernican revolution of the ECtHR, which is confirmed by the decision *Orsus and others v. Croatia* (2010)[69], although in this case the Court did not find it necessary to resort to statistics to determine the facts of discrimination and segregation of Roma children. For the Court, it was sufficient to find that the measure of assigning children to separate classes based on their command of the Croatian language was only applied to Roma children, leading to the presumption of differential treatment.

Along the same lines, the decision of the European Court of Human Rights in the case of *Muñoz Díaz v Spain*, decided December 9th 2009, is of interest, in which the Court decided in favor of the right to a widow's pension of an ethnically Roma woman with six children, who had not been legally married according to the laws in Spain in 1971 (according to Catholic rites), but was married according to Roma rites[70], which, in the first instance, deprived her of the right to a widow's pension. The Court of Strastbourg determined in this case that the provision of non-discrimination (Art. 14 ECHR) had been violated in conjunction with the right to property of the First Additional Protocol[71].

Specifically, the Court addressed the Spanish Constitutional Court's decision 69/2007, of April 16th, which had denied the appeal of the plaintiff, refusing to enter into the particulars of the case or the evidently concurrent ethnic aspects. The Constitutional Court held that art. 14 of the Spanish constitution, that is, the principle of equality, does not extend to discrimination based on a lack of differentiation, that is, does not guarantee a right to inequality, which in this case implied that matrimony according to Roma rites has no consequences in civil law and thus permits no right to inequality derived from its recognition. Therefore, the florist María Luisa Muñoz Díaz

[69] ECHR ruling of March 16th, 2010, in the case "Assignment of Roma Croatian children to separate classes".

[70] The plaintiff was a Roma woman of Spanish nationality to whom the national authorities denied a widow's pension because she had not married according to the legal standards in the year 1971 (Catholic rite), but rather married in the Roma tradition.

[71] The Spanish administration had acted wrongly and the Courts, the Superior Court of Madrid and afterwards the Constitutional Court, had not rectified the matter. The Spanish State would have to pay 70.000 € in compensation to María Luisa Muñoz, according to the decision of the ECHR.

had no right to a window's pension, despite having lived with her husband for nearly 30 years (1971–2000) and having six children with him.

It is interesting to consider whether the decision of the Constitutional Court 69/2007 of April 16th is an example of a *race blind* approach, indifferent to ethnic heritage, and whether the Spanish Constitutional Court truly lacks a strong or strict interpretation of racial discrimination. What at first sight is surprising is that it has hardly resolved such cases (compared to the dozens of cases involving gender discrimination, for instance), that the cases that were resolved were decided in favor of the defendant and not the plaintiff who belonged to the racially discriminated minority, and lastly, that these decisions have been reversed by international organizations on human rights, the Court of Strasbourg, and the Human Rights Committee, as happened in the *Williams* case. This last case, also previously rejected by the Spanish Constitutional Court in the ruling STC 13/2001 of January 29th, concerned police action in requesting identification from a woman just for being black. The Spanish Constitutional Court held that the actions of the police constituted neither overt nor covert discrimination (even though only the plaintiff was required to show identification, because of the color of her skin, among all the passengers disembarking from the train). This surprising ruling, as one could foresee, was declared to be contrary to art. 25 and art. 2.3 of the Covenant on Civil and Political Rights of the United Nations (right to equality and prohibition of discrimination) by the Human Rights Committee in Communication nº 1493/2006 on July 27th, 2009.

But what legal arguments did the European Court at Strasbourg cite in the case *Muñoz Díaz v Spain*? The lawsuit alleged two violations of the European Convention on Human Rights. The first was based on the applicant's view of art. 14 (equality) in conjunction with art. 1 of Protocol nº 1 (property rights). The second raised art. 14 (equality) in conjunction with art. 12 (the right to marry). The first cause was unanimously admitted to the docket of the ECtHR. The second cause was not accepted by majority vote (par. 81), as they reasoned that the right to marry under the precept of equality is guaranteed by current Spanish legislation.

The ECtHR points out that its jurisprudence establishes that discrimination consists in differential treatment, without objective or reasonable cause, of persons who are in comparable situations (par. 47), and the Court main-

tains that the States retain a certain margin of discretion in similar situations (par. 48).

The ECtHR listed three rulings in which the Constitutional Court recognized the right to a widow's pension in the case of canonical marriages that were not registered in the Civil Registry and thus did not have consequences in civil law[72]. In these three cases, the ECtHR decided that the appellants in these prior cases had acted in good faith, to which standard the current plaintiff had not been subjected in this case and when, before the entry into force of the current standard (par. 53), the tenth additional provision of the Spanish Divorce Act recognized the right to a widow's pension for persons in cases like this in which canonical consent to marriage could not be given.

The Court of Strasbourg held that the Constitutional Court did not make this analysis in good faith, unlike what it had done in the other three cited cases, because of Roma heritage of the appellant and now plaintiff (par. 54), an analysis that was called for, given the circumstance that the Spanish authorities had led the plaintiff to believe that her marriage was real and legally valid (par. 56). This is what drew the attention of the ECHR, as the Spanish authorities had recognized in various documents the validity, or the apparent validity, of her marriage: the Spanish "libro de familia", the title of "numerous family", the social security card, all of which were official documents. This led to the ruling to affirm with vehemence the disproportion between the Spanish State giving to the plaintiff and her family... (all these official documents) and its refusal to recognize the validity of a Roma marriage to qualify for widow's pensions. In addition, the Court took into account that in the year 1971, when the couple united, there was only one valid rite, namely the Catholic one (to be exempt from this requirement, one had to previously become apostate).

The Court added another important argument: the ethnic argument. The ruling underlines, first, that the belief of the plaintiff that her marriage was

[72] The decision STC 260/1988 concerns the case of a canonical marriage that was not registered because of the impossibility of a divorce before 1981; STC 180/2001 recognized the right to be indemnified based on a canonical, but unregistered marriage shortly before the Divorce Law of 1981 for reasons of liberty of conscience and religion; STC 199/2004 recognizes the right to a widow's pension based on a canonical marriage that was intentionally not registered in the Civil Registry (par. 32).

valid is demonstrated by her belonging to the Roma community, "which maintains its own set of values within Spanish society". The Court brings back the idea that the new "international consensus" of the Council of Europe to recognize the particular needs of minorities and the obligation to protect their security, identity and ways of life, not only to protect the interests of members of said minorities, but also to preserve cultural diversity that benefits all of society in its entirety. The decision holds that belonging to a minority does not justify incompliance with civil marriage laws, but, nonetheless, it can influence "the way the laws are applied". The Court recalls the prior affirmation that "the vulnerability of the Roma calls for special attention to their needs and their own way of life, both in general and in particular cases". It seems clear that the Court finds that the point is not to give preferential legal treatment to the Roma, but that they should not be treated worse than other persons who are in the same situation.

For all these reasons, the European Court of Human Rights declared the existence of a violation of the right recognized by art. 14 in relation with art. 1 of Protocol nº 1, because the Court held the right to obtain a pension forms part of future goods, which belong to the right of property according to its own jurisprudence (par. 44).

There was a dissident vote by one of the judges in this case: the Dutch judge Myjer, who argued that the ECtHR had exceeded its interpretative functions of the Rome Convention and that this could generate a lack of confidence in the States, as he held that, rather than recognizing rights, that a new right had been created. Myjer fears that this precedent could call into question marriage systems, such as in his country, because in Holland, only civil marriages have civil effects, and not religious marriages (in contrast to Spain).

This decision of December 8th, 2009, did not aim to be a positive action, or a positive discrimination, but a reparation for discrimination. In summary, despite the appearances, the Court of Strasbourg argues in reality from the general clause of equal treatment and not from the specific prohibition of racial/ethnic discrimination

The Court has adopted a more pro-active role in favor of the rights of the Roma people, according to the its own concept of the "new European consensus" in the field of guaranteeing ethnic equality. We must recognize that

documents of other institutions of the Council of Europe, in particular, from ECRI, were very important in landmark cases, such as *Orsus v Croatia* or *V.C. v Slovakia*. In this last case, dated November 8th, 2011, the plaintiff was a Roma woman who, in a public hospital, after the birth of her second child by Caeserean section, and in light of the risks associated with a possible third pregnancy, was sterilized without prior informed consent. The Court found that this paternalistic intervention had damaged her right to give informed consent, that is, had violated her right to personal integrity (art. 3), but also finds that the treatment of was racially discriminatory. Indeed, the probability of being subjected to such types of medical intervention is greater for Roma women given racial prejudices[73] prevalent in the country and, in particular, the idea that Roma women have too many children. Relying once again, as it did in *Orsus v Croatia*, on the reports of the European Commission against Racism and Intolerance and other organizations that identify such racist stereotypes[74], the Court concluded that the Slovak State had no effective safeguards to assure the reproductive health of Roma woman, so it ruled that the right to respect for private and family life (Art. 8 of the Convention) had been violated. Although the case has racial overtones to the extent that sterilization without informed consent particularly affects persons from vulnerable ethnic groups, the Court, nevertheless, did not enter into the question of whether art. 14 of the Convention had been violated, because the medical staff had not acted in bad faith, nor had there been evidence of a sysematic public plan of forced sterilization of women from this ethnic minority. Once again, the decision tiptoes around the racial overtones of the case, as the dissenting vote of Judge Mijovic pointed out, who held that the racial connotations of this case were crucial in understanding and resolving it.

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[73] Concerning the idea of racial or ethnic prejudices, raised to the level of doctrines that are used to legitimate racial discrimination, A. Eide, *Help eliminate Racism*, [in:] *New Expressions of Racism. Growing Areas of Conflict in Europe*, Amsterdam 1987, City Hall, October 19–21, pp. 74–75. Also of interest concerning this topic is the "Guía Dosta! para combatir los estereotipos sobre la comunidad gitana". Ministerio de Sanidad, Servicios Sociales e Igualdad. Centro de Publicaciones, Madrid. www.dosta.org (9.06.2015).

[74] For more on how the Roma are perceived, J.-P. Liégeois, *The Council of Europe and Roma: 40 years of Action, Council of Europe*, Estrasburgo 2012, p. 29. H.P. Glenn, *The Cosmopolitan State, Oxford Constitutional Theory*. Oxford University Press, Oxford 2013.

In short, my view is that it is imperative that all institutions and citizens take the prohibition of racial discrimination seriously at a time when, in Europe, the attacks against the most basic rights of the Roma are multiplying. This is occurring despite the incorporation of the concept of indirect discrimination, which has so remarkably strengthened the mechanisms for the protection against discrimination, and despite the introduction of new procedural aspects that have made evidentiary requirements in traditional judicial procedures more flexible.

We need a new political perspective on the problem of racism in Europe[75] given, among other reasons, the powerful migratory flow within the region and some unambiguously racist incidents provoked by certain European governments (in Hungary, France, Italy, Switzerland, etc., to say nothing of the traditional practices of institutional racism in most countries of Eastern Europe). In short, as the European Court of Human Rights pointed out in the case *Nachova and others v Bulgaria* (2005), one should seek to understand "democracy as a society in which diversity is not perceived as a threat, but as a source of wealth".

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