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on the implementation of EU law on equal opportunities and anti-discrimination**

**DISCUSSION PAPER
DISCRIMINATION AGAINST ROMA: LEGAL DEVELOPMENTS**

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The situation of Roma in the European Union

The Roma population in Europe today is estimated at around ten million people, greater than the total population of certain Member States. The 2004 EU Roma Report¹ described the treatment of Roma as among the most pressing political, social and *human rights issues* facing Europe. This conclusion is supported by numerous reports of the United Nations and Council of Europe bodies, as well as court cases in several member states, together with a host of discrimination cases before the European Court of Human Rights and the European Committee of Social Rights.

What distinguishes Roma from other protected racial or ethnic minority groups in Europe is the extent of the poverty and deprivation they suffer, as well as the actual proportion of this group living in extreme poverty. Many Roma live in segregated settlements that one would more readily associate with a developing country than the European Union. The United Nations Committee on the Elimination of All Forms of Racial Discrimination described "the place of the Roma communities among those most disadvantaged and *most subject to discrimination in the contemporary world*".²

In April 2009 the European Union Agency for Fundamental Rights (FRA) first ever EU-wide survey revealed that discrimination, harassment and racially motivated violence are far more widespread than recorded in official statistics. The results suggest a sense of resignation among ethnic minorities who appear to lack confidence in mechanisms to protect victims. *Roma reported the highest levels of discrimination, with one in two respondents saying that they were discriminated against in the last 12 months.* At the same time Vladimír Špidla, EU Commissioner for Employment, Social affairs and Equal Opportunities warned: "The current economic crisis increases the risk that the Roma – who are often living at the margins of society – *will be totally excluded*."³ He called for inclusion in mainstream social services.

¹ The Situation of Roma in an Enlarged European Union, European Commission Directorate-General for Employment and Social Affairs Unit D3, European Communities, 2004, report produced by a consortium comprising Focus Consultancy Ltd., the European Roma Rights Center, and the European Roma Information Office.

² CERD, General Recommendation No. 27: Discrimination against Roma, 16/08/2000, para. 49.

³ *Europa*, 24 April 2009

The application of the RED to structural discrimination against Roma

The major legal instrument to combat discrimination against Roma in EU Member States is the Racial Equality Directive (RED, Directive 2000/43/EC). In the case of Roma the focus is not merely on discrimination by individuals but on 'structural discrimination'. Structural discrimination denotes both segregation and institutional discrimination. Segregation refers to the involuntary physical separation between Roma and non-Roma, whereas institutional discrimination describes the collective failure of an organisation to provide an appropriate and professional service to Roma through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping. The RED's applicability to the structural discrimination of Roma is, however, by no means straightforward.

The RED may become an effective tool to fight against discrimination affecting Roma both at the national and regional level – and not only before the European Court of Justice (ECJ), but also the European Court of Human Rights (ECtHR) and the European Committee on Social Rights (ECSR). In order to ensure the highest level of protection and broaden the RED's individual justice model it is necessary to adopt a Community definition of Roma as a *dual racial and ethnic minority*, a *multi-faceted definition* that can capture all their relevant social attributes.

Need for a legal definition of Roma?

The concept of 'racial or ethnic origin' is not defined in the RED. Nevertheless, it is central to the definitions of discrimination, as well as to positive action. There seems to be no doubt that the RED covers Roma *rationae personae* and that during its application ought to emerge a Community definition of Roma that is capable of transcending difficulties arising from differing national definitions that may diminish not only the efficacy but the extent of protection.

In determining whether discrimination has occurred, it is necessary to establish the victim's racial or ethnic origin. It could be argued that a distinction in the case of Roma is not because of their racial or ethnic origin, but for other reasons unrelated to their race or ethnicity – their social class, their nationality, their culture, their language, their religion or their area of residence. To counter such arguments, it is crucial that the definition of discrimination on grounds of racial or ethnic origin in the RED encompasses a multi-faceted view, which takes into account the whole range of social attributes constitutive of Roma identity. The role of socio-economic differences in underpinning and perpetuating racial segregation cannot be over-emphasised. Indeed, in European societies, the image of Roma is inseparably intertwined with that of poverty, demonstrating that class is an integral part of racial discrimination against Roma.⁴

Treating Roma simply as a racial minority on account of their skin colour would deny their historical presence in and ties to Member States, and with this, their protection as an ethnic minority. Conversely, treating them only as an ethnic minority would deny protection on account of their skin colour, which distinguishes them from the majority of ethnic minorities indigenous in Member States and which is a characteristic that may intensify discrimination they suffer.

⁴ In Italy, Greece and Cyprus Roma receive extra financial support for schooling, whereas in Slovakia, Bulgaria, Romania and Hungary, even buying shoes and clothes for Roma children to attend school may pose challenge to parents, www.eumap.org

Treating all social attributes as part and parcel of Roma as a racial group is imperative in light of arguments that may lead to downplaying discrimination by allowing a wider scope of justification on grounds that are not perceived as ascribed characteristics.⁵

Parallel to the Traveller accommodation cases stemming from the UK, over the last 15 years the Roma rights movement has generated anti-discrimination jurisprudence before the ECtHR and the ECSR, but none of the Roma rights cases have to date been referred to the ECJ. Potentially influenced by the Council of Europe's (national) minority rights focus, the ECtHR came to view Roma rights as minority rights "there could be said to be an emerging international consensus amongst the Contracting 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."⁶ It also acknowledged that "the 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."⁷

In DH II the Grand Chamber defined ethnic discrimination as a form of racial discrimination.⁸ Although this finding is in line with the definition of race in the International Convention on the Elimination of All Forms of Racial Discrimination, it fails to highlight the linkages between race and ethnicity.

The arguments known from Chapman resurface in DH II, elevating for protection Roma through their membership in a national minority group and recognising a consensus, a self-imposed obligation on Member States to reasonably accommodate their ethnic minority characteristics in relation to substantive rights protected under the ECHR.⁹ In mapping out their specific situation, their ethnic minority characteristics the ECtHR seems to have adopted a multi-faceted view of Roma (cf. particularities and characteristics of Romani children, members of disadvantaged community, often poorly educated, making decisions under constraint, social and cultural differences (possibly including language), risk of isolation and ostracism in majority settings).¹⁰

Lessons from the ECtHR jurisprudence on Roma

The ECtHR has recognised Roma as a protected group in the area of public education, employment and the access to goods and services and indicated its readiness to impose a duty on states' to reasonably accommodate the needs and specificities of Roma in the field of education.¹¹

⁵ As Schiek argues „If there are different categories of characteristics, discrimination on grounds of which is forbidden, this may justify differences between different prohibitions to discriminate. It appears logical that differentiations on grounds of ascribed otherness are not very easy to justify. Thus, direct discrimination on grounds of race or gender cannot be justified except" for the purpose of positive action. „If suspect criteria are linked to *real differences*, things are different.", Dagmar Schiek *A new framework on equal treatment of persons in EC law?*, 8/2002 E. L. J., p. 304, p. 310.

⁶ Chapman v. the United Kingdom, judgment of 18 January 2001, paras 93-94.

⁷ Chapman v. the United Kingdom, judgment of 18 January 2001, Para 96.

⁸ D.H. and Others v. The Czech Republic, Grand Chamber judgment of 13 November 2007, para. 176.

⁹ Paras 31 and 182, D.H. II.

¹⁰ Paras 201-203, D.H. II.

¹¹ Para. 194, D.H. II.

By elevating Roma for this special protection, and grounding this protection on their ethnic minority status, the Court at the same time limited the scope of protection, which at the moment does not extend to other ethnic groups, or indeed racial minorities. This and the limited material scope of protection clearly begs the question whether or not under the RED domestic courts or indeed the ECJ would see a need for a similarly unique protection status. A similarly significant question is: can the ECJ and domestic courts sidestep the ECtHR's jurisprudence on Roma rights?

The applicants in DH II were conscious not to characterise their case as demanding positive action.¹² The ECtHR adopted this line of reasoning and ruled that positive action was not required viz. misdiagnosed Romani children, but that the respondent state was at fault when failing to take "into account these children's special needs as members of a disadvantaged class."¹³ In reality, however, these special needs cannot be taken into account by simply refraining from discrimination. In other words, unless reasonably accommodating the special needs of Roma in public education legislation, making special financial investments into developing new tests and training professionals, the state cannot facilitate the special interests of Romani children. The same seems to hold true for other fields covered under the RED.

Under the RED, the reasonable accommodation of such special ethnic minority needs amounts to positive action, which hitherto has been rather narrowly defined in sex discrimination cases by the ECJ. It seems at the same time that on the ground of race and ethnicity, many Member States provide a broader reading to positive action.¹⁴ Indeed, the question that needs to be resolved under the RED, i.e. mandatory positive action, is already on the table in relation to housing rights. In the UK and France, where Travellers are primarily itinerant, the key issues relate to the extent to which positive provision should be made for the special needs of Travellers and the implementation of reasonable accommodation duties. Significant arguments can also be borrowed from the ICERD, to which all Member States are parties and which makes positive action mandatory.

Given that the ECtHR does not in effect distinguish between different forms of discrimination, relying on its jurisprudence before the ECJ or national courts may prove problematic, as e.g. under the RED different rules apply to the justification of direct and indirect discrimination. As opposed to the ECtHR test applied in DH II for instance, under the RED it is arguable that the failure to accommodate the racial differences that arise from the social attributes of Roma (language, deprived social status and other ethnicity based special characteristics), in fact does not impose apparently neutral criteria, but treats Roma less favourably than majority persons. Thus it is direct, rather than indirect discrimination, and is not subject to a justification defence. The fact that the conduct is not expressly based on 'race' including ethnicity, but arises on account of various essential minority characteristics, such as culture, history and social status does not mean that it is not racial or ethnic bias, since all these characteristics fall neatly under the notion of race.

¹² Para. 183, D.H. II.

¹³ Para. 207, D.H. II.

¹⁴ See e.g. positive action measures listed in the Segregation Report, in chapter 5.

Group standing, structural remedies

Institutional discrimination could also be conceptualised as direct discrimination, a collective failure to accommodate minority needs. Institutional discrimination “consists of the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes, and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.”¹⁵ Institutional discrimination adds up from individual acts that do in fact differentiate between Roma and non-Roma on the basis of racial stereotypes – even if such stereotyping is concealed as applying the ‘majority’ norm. However, as the UK House of Lords held in the *Prague Airport Case*,¹⁶ acting or stereotyping on racial grounds is wrong, not only if it is untrue – otherwise it would imply that direct discrimination can be justified.

The ECtHR’s perception of de facto discrimination resulting from discriminatory legislation and the tacit understanding supported by relevant mechanisms that *minority rights are collective rights* virtually transformed DH II from an application brought by 18 individual applicants into an *actio popularis* or *collective complaint* - hence the finding that there was no need to examine the applicants’ individual cases. It is a shame therefore that the ECtHR did not accord a suitable remedy, but also a challenge for future actions before domestic fora and the ECJ. Indeed, sanctions addressing structural discrimination are necessary but at the moment a rarity in domestic laws, which questions the adequacy and dissuasiveness of remedies under Article 15 RED. Will domestic courts or the ECJ interpret the RED as requiring positive action to be imposed in certain cases as the sole sanction that is in compliance with Article 15 and/or is national legislation necessary in this regard?

Pursuant to collective complaints the ECSR has rendered decisions in various Roma rights cases revealing structural discrimination e.g. in housing in Greece. But whereas the ECtHR may itself impose sanctions that go beyond individual compensation, the ECSR is dependent on the Committee of Ministers.

When transposing the RED, Romania, Bulgaria and Hungary have introduced a procedural invention, i.e. the right of NGOs to bring *actio popularis* claims addressing structural problems. Similar standing is given in many Member States on the ground of disability, or in the field of consumer and environmental protection.

The following characteristics make *actio popularis* a unique and utmost attractive tool: there is no need for an individual victim as the case is brought by NGOs demonstrating an interest in rights protection and instead of injustices suffered by individual victims it focuses on patterns, trends and scenarios of discrimination. Thus, *actio popularis* is ideal in tackling institutional, structural, or *de facto* discrimination. *In lieu* of an individual client, there is a minimal risk of victimisation – in fact no client needs to be identified for the case. Perennial costs, such as maintaining contact with the client or indeed maintaining a client service for case selection can be saved.

¹⁵ The Stephen Lawrence Inquiry. Report of an inquiry by Sir William Macpherson of Cluny. CM4262-I, para 6.34. The report concluded an investigation into police practices in the UK following a racist murder of a black teenager.

¹⁶ R. V. Immigration Officer at Prague Airport and Anor ex parte ERRC and others, [2004]UKHL 55.

And as counsels for the applicants explained to the ECtHR in DH II, if a case is not about the violation of the rights of an individual victim, then remedies ought also to be tailored accordingly, i.e. they have to tackle 'system failures'. The following EU Member States allow collective actions under the Revised European Social Charter: France, Greece and Finland, Sweden, Belgium, Ireland, Italy, the Netherlands and Portugal.

(In)directly discriminatory legislation

Certain pieces of national legislation may have (in)direct discriminatory impact on Roma. This was the ECtHR's finding of the Czech public education law and practice in DH II. Certain pieces of legislation have been found or are being challenged as (in)directly discriminatory for instance in France, Ireland and the UK. In France the HALDE has already made recommendations to the government in relation to the special law on Travellers in order to ensure compliance with RED. In Ireland, "Lawrence and Others v Mayo County Council, a case currently underway in the High Court ... challenges the Criminal Justice (Public Order) Act, which criminalises *in effect* the entry into and occupation of lands by Travellers, even where the local authority has failed to meet its statutory accommodation obligations. The Equality Authority has joined the case as *amicus curiae* in relation to the application and interpretation of the Race Directive and Equal Status Act". In Bulgaria the "Protection Against Discrimination Act (PADA) applies to the exercise of any explicit or implicit legal right, including housing, without any specific exceptions for housing. However, other legislation governing certain aspects of housing rights, which pre-dates PADA, is not in conformity with PADA, allowing, or even providing for discrimination. For instance, the laws governing municipal and state property and the territorial structure allow for unfettered discretion for forced evictions with no procedural guarantees."

Roma women

The most well-known issue relating specifically to the violation of the rights of Roma women is coerced sterilisation that appears to have been a widespread practice in certain New Member States. Two sets of litigation merit attention in this regard. The first case from Hungary provides a unique example of the rendering of structural as well as individual remedies.¹⁷

On 2 January 2001, a Romani woman, Ms A.S. was sterilised without consent by doctors in North-East Hungary during a caesarian section operation to remove a dead foetus. She unsuccessfully sought damages against the hospital, although the appeal court found that the doctors had indeed acted negligently, as failing to inform the victim of "the exact method of the operation, of the risks of its performance, and of the possible alternative procedures and methods". On 12 February 2004, Ms A.S. filed a complaint with CEDAW under its optional protocol. In August 2006, the Committee found the Hungarian government to be in violation of the Convention¹⁸ and recommended that the Hungarian government provide appropriate compensation to Ms A.S.; review domestic legislation on the principle of informed consent in cases of sterilisation and ensure its conformity with international human rights and medical standards; and monitor public and private health centres, including hospitals and clinics that perform sterilisation procedures to ensure that fully informed consent is given before any sterilisation procedure is carried out.

¹⁷ For a detailed account of the litigation see, eg <http://www.errc.org/cikk.php?cikk=3011&archiv=1>

¹⁸ The full decision of the Committee can be found at http://www2.ohchr.org/english/law/docs/Case4_2004.pdf.

A year later, the Committee again urged the Hungarian government to “provide appropriate compensation. In 2008, the Hungarian Government amended the Public Health Act to ensure that appropriate information be provided to patients in the context of sterilisation procedures to ensure informed consent. On 27 February 2009, after eight years of national and international legal proceedings, compensation was finally paid to Ms A.S.

A set of applications from Slovakian Roma women alleging coerced sterilisation are pending before the ECtHR. So far, judgment has been rendered only in relation to the hospital management’s and the competent authorities’ refusal for three years to grant the eight applicants’ representatives access to their medical files containing details of caesarian sections including potential sterilisation. Clearly, these documents play a pivotal role in seeking civil damages. The ECtHR found violations of Article 8 and 6(1).¹⁹

Questions:

Is the situation of Roma unique? Is there a need for a Community definition of Roma?

What is the legal definition of Roma? How can the structural definition affecting Roma be tackled under the RED: the role of Member States, the ECJ, Equality Bodies, NGOs and Trade Unions?

What lessons can be learnt from the ECtHR jurisprudence relating to Roma rights?

¹⁹ K.H. and others v Slovakia, judgment of 28 April 2009