Positive Action and the Inclusion of Roma: Towards Social Policy Prescriptions from the Rulings of the European Court of Human Rights?

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1. Introduction

Among the most effective way to protect and promote minority rights is for many the introduction of specific legislative or administrative measures imposing a duty of positive action. Yet, an obligation to adopt positive action is still controversial within the system of the European Convention on Human Rights as it has not yet been formulated in clear terms by the Strasbourg Court, although other organs of the Council of Europe, such as the European Committee of Social Rights and the CoE Parliamentary Assembly have been much more progressive in this respect. The Court’s position in this regard is rather ambiguous and half-hearted: the Convention does not compel the member states to provide for positive actions in favour of minorities; however, it does not automatically prohibit them as long as the difference in treatment is justified in each case.

Generally, the Strasbourg Court has been reluctant to recognize minority claims and it has thus often left a wide margin of appreciation to the states, especially as long as the recognition of these claims amounts to positive actions or additional financial burdens for the member state and not simply a negative obligation to refrain from performing certain acts or practices. The Court has taken a positive stance toward minority rights only when, under the specific circumstances of the case, a given practice or omission by the state constitutes, ‘a clear and disproportionate disadvantage’ or an ‘excessive burden’ for certain groups. Otherwise, the state’s margin of appreciation has been broadly recognized.

In light of some recent and innovative judgments of the Strasbourg Court vis-à-vis Roma rights in the field of housing, the proposed article analyses whether and under which circumstances positive actions can be expected on the part of the state. A conceptual differentiation between positive obligations and positive actions will constitute the framework and the starting point of the

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1 The term “Roma”, though opposed by some groups that do not recognize themselves under this term, is used in this paper as an umbrella that includes groups of people who have more or less similar cultural characteristics, such as Sinti, Travellers, Gypsies, Kalé, Gens du voyage, etc., whether sedentary or not.
analysis. I will discuss then whether from these openings of the Strasbourg case-law we can derive 
social policy prescriptions that can be imposed on member states with special reference to the 
Roma minority.

2. State Obligations in the Strasbourg System: Limits and Strengths of Positive 
Obligations

Within the Strasbourg system, the European Court of Human Rights (hereinafter “Court”, 
“Strasbourg Court”, or “ECtHR”) has increasingly recognized the existence of positive obligations 
flowing from the European Convention on Human Rights (hereinafter “Convention” or “ECHR”). The basis for this approach is Article 1 requiring Contracting Parties to ‘secure’ to those within 
their jurisdiction the rights guaranteed by the Convention. Together with the text of later articles 
dealing with particular rights, this wording in Article 1 has been interpreted as imposing both negative and positive obligations upon states. This approach is however 
controversial because it is questionable whether ‘securing’ the Convention rights is limited to a 
prohibition on state measures which interfere with them or whether it requires the state to take 
steps to ensure their fulfilment.

In general terms, a negative obligation can be described as one by which a state is required to 
abstain from interference with, and thereby respect, human rights. For example, it must refrain 
from torture (Article 3) and impermissible restrictions upon freedom of expression (Article 10). 
However, as seen, the Convention is also concerned with positive obligations, i.e. obligations on 
state authorities to take positive steps or measures to protect the Convention rights of individuals. These obligations take a number of forms. The most straightforward and obvious arise where, by 
their very nature, a Convention right requires the provision of resources. For instance, the right to 
free legal assistance in criminal cases under Article 6(3)(c), the right to education under Article 2 
of Protocol 1 and the duty to hold elections under Article 3 of Protocol 1.

Positive obligations necessitate thus action by the government, whereas negative obligations 
require only that the government abstain from curtailing rights. However, not all rights can be

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3 D.J. Harris, et al., supra, 51.
4 Ibid., 18.
5 Ibid., 51; M. Pitkänen, “Fair and balanced Positive Obligations –Do They Exist ?”, in 2012 EHRLR 5, 539.
6 D.J. Harris, et al., supra, 18.
8 Ibid., 104; and D.J. Harris, et al., 18.
classified as strictly positive or negative; some fall along the spectrum between these two extremes.⁹

A number of positive obligations are expressly present in, or necessarily follow, the text of the Convention. Other positive obligations have been interpreted as such by the Court. Positive obligations were initially developed in the system of the Convention to render the states indirectly responsible for violations of human rights by private parties. The growing social pressure, as expressed by a new generation of human rights complaints and the writings of insightful scholars in the 1960s and 1970s, culminated in two leading cases – Marckx and Airey – dated 1979, in which positive obligations were recognized as ‘inherent’ in the Convention system.¹⁰

In Marckx v. Belgium, the Court clearly stated, in the context of the right to ‘respect for family life’ in Article 8, that “it does not merely compel the state to abstain from such interferences: in addition to this primary negative undertaking, there may be positive obligations inherent in an “effective respect” for family life.”¹¹ Likewise, in Airey v. Ireland, the same approach was used to establish a positive obligation, this time one involving public expenditure, under the same Article 8 guarantee to provide for effective access to a court for an allegedly battered wife to obtain an order of judicial separation.¹²

In the Marckx and Airey cases, the Court has justified its finding on positive obligations as being necessary to make a Convention right ‘secured’ - as imposed by Article 1 - and ‘effective’.¹³ The emphasis in the Convention is in fact on the ‘effective’ protection of human rights, rather than on the enjoyment of ‘theoretical’ or ‘illusory’ rights.¹⁴

The Strasbourg Court has declared several times that the object and purpose of the ECHR is that the rights which it guarantees must be practical and effective, although it has explicitly declined to develop any ‘general theory’ of positive obligations.

Positive obligations have been created thus as a consequence of applying the effective and dynamic interpretation of the ECHR to protect the rights of individuals.¹⁵ The foundation and the content of positive obligations in the Convention system - the so-called ‘standard of effectiveness’¹⁶ - lies

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¹⁰ D. Xenos, The Positive Obligations of the State under the European Convention of Human Rights (Routledge, 2012), 204.
¹³ D.J. Harris, et al., 18-19.
¹⁵ M. Pitkänen, supra, 540.
¹⁶ D. Xenos, supra, 207.
thus in the recognition that a purely negative approach to the protection of human rights cannot
guarantee their effective protection.  

In general terms, Starmer identifies five broad positive duties, namely, a duty to put in place a *legal framework*, which provides effective protection for Convention rights; a duty to *prevent breaches* of Convention rights; a duty to provide *information and advice* relevant to a breach of Convention rights; a duty to *respond to breaches* of Convention rights; and, finally, and most interestingly for the scope of this contribution, a duty to *provide resources* to individuals to prevent breaches of their Convention rights.  

Although Van Dijk considers that in principle practically all ECHR provisions leave room for ‘implied’ positive obligations, some provisions in the Convention have been interpreted more often than others as implying positive obligations. As I will analyse in more detail in the second part of this contribution, the provision of housing for those unable to secure their own accommodation is considered to be an area of potential expansion of positive obligations.  

If it is generally acknowledged that positive obligations are not confined to any particular kind of Convention right, it is also accepted that the *extent* of any positive obligation arising will vary according to the nature of the issue at stake. It is in fact an intrinsic characteristic of positive obligations that the duties they impose are seldom absolute. What is required of the state, therefore, varies according to the importance of the right and the resources to be disbursed to meet any positive obligation. Consequently, it is acknowledged that in this domain states have a *margin of appreciation* with respect to the general and more detailed content of positive obligations.  

This interpretative approach has been clarified by the Court: “(...)Especially as far as those positive obligations are concerned, the notion of ‘respect’ is not clear-cut: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion’s requirements will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be

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17 K. Starmer, *supra*, 104.
22 D.J. Harris *et al*, 343.
taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals.” 23

The margin of appreciation doctrine is limited by the ‘fair balance test’ according to which, as the Court observed, in determining the steps to be taken to ensure compliance with the Convention “regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole.”24

The ‘fair balance test’ inherent in positive obligations is intimately linked to the limited availability of state’s resources coupled with the economic disparities existing among member states. The ‘fair balance test’ between state interest and the interests of individuals ensures that positive obligations will not impose unbearable or disproportionate burden on states to fulfil the obligations imposed by the Strasbourg Court.25 Hence, the specific content of any positive obligation is determined in relation to the particular requirements of protection and the contextual differences involved. In this way, this approach satisfies the standard of effectiveness and guarantees the functioning of the Convention in the reality. 26

Having analyzed the circumstances and the limits under which positive obligations arise within the Strasbourg system, the following paragraphs will look at the differences between positive obligations and positive or affirmative action. The analysis will go beyond the Strasbourg system as to include the EU legal mechanisms as these are more familiar with the legal discussion around the concept of positive action.27

3. Positive obligations and positive action in the European legal system: differences and similarities

Concepts and terminology

Positive actions are typically considered to consists of proportionate measures undertaken with the purpose of achieving full and effective equality in practice for members of groups that are

24 ECtHR, Powell and Rayner v. The United Kingdom, Appl. 9310/81, Judgment, 21 February 1990, para. 41; ECtHR, Paulik v. Slovakia, Appl. 10699/05, Judgment, 10 October 2006, 43.
26 M. Pitkänen, supra, 545.
27 In this context, note that the EU Charter of Fundamental Rights (2000) reads: “In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.” (Art. 52 (3)).
socially or economically disadvantaged, or otherwise face the consequences of past or present discrimination or disadvantage.\textsuperscript{28}

At the outset it has to be noted that there is a certain confusion and inconsistency in the terminologies used to describe positive measures across countries.\textsuperscript{29} Whilst European countries and within European law and policy, ‘positive action’ is the term most frequently used, ‘affirmative action’ is a term which is used less frequently in Europe, but which is the dominant term in the USA and other non-European countries. In that context, it has been associated with a wide range of measures including strong forms of preferential treatment for disadvantaged groups, such as quotas for ethnic minorities.\textsuperscript{30}

As seen earlier, positive action measures are typically understood to cover a wide range of measures taken to compensate for present and past disadvantages that exist because of discrimination. The rational for such measures is to achieve ‘full equality in practice’, as foreseen, for instance, in article 157 (4) TFEU \textit{(infra)}.\textsuperscript{31} In other words, achieving equality in practice – substantive equality – may require compensatory measures designed to redress the effects of discrimination in the past, as well as discrimination that continues today.

Another distinction that has to be made is between ‘positive action’ – a term reserved for those measures that are lawful – and measures going further, that have been described as ‘positive (or reserved) discrimination’.\textsuperscript{32}

Positive action may have three significant conceptual dimensions: the legislative, the executive or practice, and the political, which includes its communication or surrounding debate.\textsuperscript{33} In terms of ‘users’, while the statutory bodies explain the legislative concept, managers apply this concept through workforce diversity measures, but above all positive action is embedded within a larger political context.\textsuperscript{34}


\textsuperscript{29} Alternative labels for positive action include ‘constructive action’, ‘structural initiatives’, ‘diversification strategies’, ‘mainstreaming projects’ and ‘balancing measures’ (European Commission, \textit{supra}, p.16-7). Whilst these terms may be considered to be related and borderline cases, Archibong \textit{et al}., posit that the terms should, however, remain distinct from positive action itself. See, U. Archibong \textit{et al}, “A concept analysis of positive action in health and education”, 2006 \textit{Diversity and Health and Social Care} 3(4), 223-243.

\textsuperscript{30} European Commission, \textit{supra}, 25 and 6.

\textsuperscript{31} Article 157 (4) (ex Article 141 TEC) Consolidated Version of the Treaty of the Functioning of the European Union (TFEU), OJ C 326, 26 October 2012.


\textsuperscript{34} \textit{Ibid.}
Beyond what is legally permissible, and looking at how the term appears to be used in common parlance, McCrudden provides five types of positive action: (1) eradicating discrimination; (2) facially neutral but purposefully inclusionary policies; (3) outreach programmes; (4) preferential treatment in employment and (5) redefining ‘merit’.\(^{35}\)

Along those lines, positive action can be described as an umbrella term covering all kinds of activities, initiatives, strategies and interventions, designed to achieve one or more of the following goals: (1) preventing or compensating for disadvantages and discrimination, whether these arose in the past or are still ongoing; (2) promoting substantive equality by taking into account the specific situation of members of disadvantaged groups and breaking the cycle of disadvantage associated with membership of a particular group; (3) redressing under-representation and promoting diversity in participation of all groups in social, economic, cultural and political life. Positive action measures achieve these goals by influencing the way in which social goods, such as employment, education, housing or healthcare, are allocated.\(^{36}\)

In more detail and by taking the typology by Bell, there are soft and hard forms of positive action: the former do not directly impinge on the prerogatives of advantaged groups (e.g. men or able-bodies persons), but rather constitute extra efforts on the part of the employer of service provider.\(^{37}\) Examples of soft positive action are outreach advertising whereby a firm includes a statement in a job advertisement specifically welcoming applications from a currently under-represented group (e.g. ethnic minorities), or special university recruitment activities within disadvantaged neighborhoods.\(^{38}\) Hard forms of positive action impact more directly on the prerogatives of advantaged groups, for example, a firm providing a traineeship programme for Roma candidates only.\(^{39}\)

In this context it is also important to distinguish between a target, which is indicative, and a quota, which is compulsory. Whereas a fixed quota generally requires the preferential treatment of the group concerned – at least so long as it is underrepresented – a target does not necessarily imply preferential treatment. Heat suggests that whilst quotas are likely to entail positive discrimination in favor of the disadvantaged groups, targets are consistent with a meritocratic, equal opportunity framework and therefore are politically more realistic to be adopted.\(^{40}\)

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\(^{37}\) M. Bell, *supra*, 6.

\(^{38}\) Ibid.

\(^{39}\) Ibid.

The discussion on main concepts and terminology concerning positive action measures and its variations, will serve as a framework to analyze international treaties and other legal documents concerning positive action.

**Positive Action and International Law**

A major and clear affirmation of positive action is found in two recent EU Directives – the EU Race Directive (Art.5) and the EU Employment Equality Directive (Art. 7(1)) – that address positive action by stating: “With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.”

Previously, in 1999, the Treaty of Amsterdam resulted in the insertion of a new provision in the EC Treaty which concerned positive action, Article 141 – replaced, following the adoption of the Lisbon Treaty, by the current Article 157 (4) – that similarly to the EU Directives, reads: ‘With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintain or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.’

Within the European context, but looking at the Council of Europe, the Framework Convention for the Protection of National Minorities (FCNM) (Article 4 (2)(3)) provides also an affirmation of the need for positive action measures where relevant: “The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between person belonging to a national minorities and those belonging to the majority. The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination.”

The European Committee of Social Rights (ECSR) of the Council of Europe formulated also an obligation to positive action for the state, specifically to redress a particular situation of Roma.

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The ECSR affirmed that “for the integration of an ethnic minority as Roma into mainstream society measures of positive action are needed” and held that indirect discrimination may arise by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible to all. Thus, government failure to undertake specific action to address the particular situation of Roma constitutes a breach of the state’s obligations under the European Social Charter.\(^4^4\)

On Roma and positive action measures, the Parliamentary Assembly of the Council of Europe has called upon the member states to complete six general conditions, which are necessary for the improvement of the situation of Roma in Europe, in terms of improving the legal status, the level of equality and the living conditions of Roma, including developing and implementing “positive action and preferential treatment for the socially deprived strata, including Roma as a socially disadvantaged community, in the field of education, employment and housing”.\(^4^5\)

Within the UN system, the Human Rights Committee has interpreted the International Covenant on Civil and Political Rights as requiring positive action programs in certain circumstances. In its General Comment on non-discrimination the Committee points out that: “…the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. ….(T)he State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population.”\(^4^6\)

The UN Office of the High Commissioner for Human Rights has further elaborated this position by saying: “Differences in the treatment of such groups [minorities], or individuals belonging to them, are justified if they are exercised to promote effective equality and the welfare of the community as a whole. This form of affirmative action may have to be sustained over a prolonged period in order to enable minority groups to benefit from society on an equal footing with the majority”.\(^4^7\)

On the point whether positive action measures are \textit{required} or only \textit{permitted}, as far as the Strasbourg system is concerned, it is emblematic a statement made by Judge Costa, who, in the \textit{DH} case discussing on the measures to be taken to address the problem of the ‘special schools’


\(^{4^5}\) PACE Rec. 1557 (2002), \textit{The legal situation of Roma in Europe}, para. 15(d).

\(^{4^6}\) UNHRC, General Comment 18 on non-discrimination, HRI/GEN/1/Rev.1, Part I (1994), para. 10.

for Roma pupils, noted: “it seems to me that up till now this Court has refused to consider it [positive action] a State obligation.”

In this context, it is also relevant a recent ruling of the US Supreme Court holding that an amendment to the Michigan State Constitution which prohibited affirmative action policies that favour people from a minority background was constitutional. The Court, by a six to two majority, held that state voters could choose to prohibit the consideration of race in university admissions policies, amongst other things, without contravening the Equal Protection Clause of the Constitution. In making its finding, the US Supreme Court noted that it was not being asked to consider whether race-conscious admissions policies were permitted under the constitution, a matter which it stated had been explored in its recent judgment in Fisher v University of Texas. Instead the Court in this case was ruling on whether voters could enact a prohibition on affirmative action measures at the state level. In finding that they could, the US Supreme Court held that the Equal Protection Clause of the US Constitution permitted affirmative action of the type at issue in the case, but did not require it.

In general, as Europe is concerned, there are relatively few examples of positive action schemes designed by statute. Those which most clearly fall into this category are those related to disability and the creation of quotas for the employment of disabled persons. Aside from disability, the other main example of a positive action scheme whose terms are directly found within statute, is in Northern Ireland, where to overcome the historical underrepresentation of Catholics in the police, the Police (Northern Ireland) Act 2000 created a quota scheme based on the principle that one Catholic person should be recruited for each non-Catholic appointed.

As for the temporariness of positive action measures, it is generally acknowledged that once a positive action measure has achieved its aim, and the situation of social or economic disadvantage or the consequences of past or present discrimination or disadvantage have been eliminated, the measure should be discontinued. However, this does not mean that all positive action measures should automatically be temporary in nature. Some forms of exclusion and disadvantage are in fact so embedded that only long-term positive action schemes can help to correct them and where

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50 Ibid.
51 For instance, in France and Austria public authorities and private employers with more than a certain number of workers must ensure that a given percentage of the workforce consists of disabled persons, although the possibility exists for the employer to make a payment as an alternative to complying with the quota. European Commission, supra, 29.
52 Ibid., 29.
a group-related characteristic is likely to lead to a permanent reduction in (employment and educational) possibilities, permanent positive action schemes can be proportionate and justified.\textsuperscript{53}

\textit{European Court of Justice and Positive Action}

In the European context, the European Court of Justice (ECJ) has elaborated the most sophisticated and articulated jurisprudence on positive action. In its case-law on gender equality, the ECJ has held that measures which give absolute and unconditional priority to the underrepresented sex (typically women) at the point of employment selection, constitute unlawful discrimination against members of the other sex.\textsuperscript{54} In other terms, admissible and lawful positive action are those which do not involve \textit{unconditional preferential treatment} in the allocation of social goods based purely on an individual’s characteristics. Otherwise these measures would be considered as ‘positive discrimination’, such as those admitting ethnic minority students to university with lower entrance qualifications than those of other students.\textsuperscript{55}

The European Court of Justice has elaborated this principle in two leading cases, \textit{Kalanke} and \textit{Marschall}.\textsuperscript{56} In more detail, in \textit{Kalanke}, the ECJ distinguished between \textit{equal opportunities} and \textit{equal results}, and concluded that positive action measures aiming at results are inadmissible.\textsuperscript{57} The ECJ’s argument was that an absolute preference for women goes beyond the implementation of equal opportunity, and establishes instead equality of result, which is not the aim of Community law.\textsuperscript{58} The ECJ has thus interpreted EU equality law so as to preclude a strict national quota without an ‘escape’ clause.

In \textit{Marschall}, the ECJ clarified and refined the scope of \textit{Kalanke} by considering a national quota provision accompanied by an escape clause as compatible with Community law. Under \textit{Marschall}, Member States’ hiring and promotion quotas for women in state employment are legal as long as statutory escape clause guarantee that male candidatures are individually and objectively assessed, so that a comprehensive balancing decision may override the statutory priority according to women.

In addition to the above, for the ECJ, to be justified under EU law, a national measure should aim at remedying an existing situation of imbalance between men and women in a specific section or

\begin{flushleft}
\begin{footnotesize}
\textsuperscript{53} Ibid., 26.
\textsuperscript{54} Ibid., 25.
\textsuperscript{55} Ibid., 25.
\textsuperscript{57} ECJ, \textit{Kalanke}, supra, para. 22.
\textsuperscript{58} For Peters, the laconic holding of the ECJ is subject to criticism especially as the dichotomy “equal opportunity – equal results” is unhelpful and overly simplistic, and the distinction is far from clear-cut and difficult to apply. See, A. Peters, \textit{Women, Quotas and Constitutions} (Kluwer Law Int., 1999), 236.
\end{footnotesize}
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career trade.\textsuperscript{59} This means that evidence should be provided of the existence of such an imbalance for the positive action measure to be legitimate. Secondly, a measure of positive action should be adequate. The ECJ will assess whether it is likely that the scrutinized measure will achieve the aim of remedying the existing concrete situation of imbalance. Finally, the measure of positive action must be proportionate – weighted up against the principle of equal treatment for persons who do not benefit from it. The measure should be necessary, appropriate and no going beyond what is needed to achieve its objective. This implies, as seen earlier, that automatic or absolute preferences can never be allowed.

As a consequence, in each individual case, the rule must guarantee all candidates that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the candidates and will override the priority accorded to underrepresented candidates where one or more of those criteria tilts the balance in favor of other candidates. What is required, in short, is a case-by-case examination.\textsuperscript{60}

To sum up, since Kalanke, the ECJ has consistently maintained that it will not accept positive action schemes based on underrepresentation which produce ‘equal results’ through automatic mechanisms at the selection stage. At the same time, it must also be acknowledged that the ECJ is willing to permit a wide range of positive action measures, including strict quotas, prior to the point of employment selection. For example, in Badeck, the ECJ was prepared to accept measures which imposed a strict quota reserving at least 50\% of training places for women, and requiring at least 50\% of all candidates invited to interview to be women.\textsuperscript{61} Moreover, as seen in Marschall, the ECJ has not rejected all forms of positive action at the point of selection, but it does require that these are flexible in nature and guarantee an objective and individual assessment of all candidates.\textsuperscript{62}

\textit{Difference between positive action, reasonable accommodation and social inclusion policies}

A final distinction that has several implications in the discussion of positive action is between positive action measures, reasonable accommodation, and most importantly for the topic of this present article, social inclusion policies.

Reasonable accommodation requirement obliges employers and other providers of social goods to specifically take into account a given (protected) characteristic, for instance disability as

\textsuperscript{60} A. Peters, supra, 239.
\textsuperscript{61} ECJ, Georg Badeck and others, Case C-158/97 [2000] ECR I-1875, paras. 55 and 63.
\textsuperscript{62} ECJ, Marschall, supra, para. 35.
foreseen by the EU Employment Equality Directive (Article 5). A reasonable accommodation requirement prohibits, for example, an employer from denying an individual with a disability an employment opportunity, by failing to take account of the protected characteristic, if taking account of it — in terms of changing the job or physical environment of the workplace — would enable the individual to do the work.

The obligation to provide for a reasonable accommodation can be distinguished from positive action also from a procedural perspective. Unlike most forms of positive action which are aimed at members of socially or economically disadvantaged groups, reasonable accommodations generally possess an individualized character. For this reason, statistical data revealing a numerical imbalance of a particular group of workers, such as women or ethnic minorities, in a particular employer’s workforce are largely irrelevant for decisions concerning reasonable accommodation.

Another important difference is between positive action and general policies to promote social inclusion. Some initiatives are easily categorized as positive action, for example, an hospital internship program that is limited to people with minority ethnic background. At the other end of the spectrum, there are measures which loosely benefit disadvantaged groups but which are traditional elements of national social welfare policy – such as state pensions or free education – rather than positive action.

Some measures, however, cannot be easily distinguished as they fall on the boundary between social policy and positive action. State provision of financial assistance to persons with disabilities or to persons with an ethnic background to encourage them to take up an employment, is a form of positive action (designed to compensate for disadvantages) or is an element of the state social assistance regime? Around this point, some clarity can be made by recognizing that positive action measures share some characteristics, namely, they are targeted at a well-defined group; they seek to redress disadvantages in a specific setting, such as housing or access to education or employment, and they are subject to periodic review. As discussed earlier, this does not mean that positive action must be time-limited, but it is also not automatically assumed to be indefinite.

64 European Commission, supra, 27.
66 European Commission, supra, 28.
67 Ibid., 28.
68 Ibid., 27.
4. Social and Economic Rights within the Strasbourg system

Before analysing the Roma cases, it is worth looking briefly at the approach of the Strasbourg Court vis-à-vis social and economic rights, as housing falls largely into this category.

The Strasbourg Court has rejected the argument that the European Convention on Human Rights is a treaty solely concerned with civil and political rights. In one of its most significant judgments, Airey v. Ireland (1979) the Court held: “Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers …that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight sphere from the fields covered by the Convention.”

It follows that the “mere fact” that a human rights violation is capable of being articulated in the language of socio-economic rights does not of itself mean that the Strasbourg Court will reject its jurisdiction.

As seen earlier for positive obligations, in matters of welfare or economic policy the margin of appreciation enjoyed by states is relatively wide. Specifically in cases under Article 8 of the Convention (home and private/family life), this same margin becomes narrower if and when they involve “rights of central importance to the individual’s identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community.”

For Clements and Simmons by acknowledging that the Strasbourg Convention requires states to protect socio-economic rights, it is possible to distinguish two very general and overlapping categories: 1) gross socio-economic deficits directly or indirectly attributable to State action; and 2) gross socio-economic destitution for which the State has no direct or obviously indirect responsibility.

The first category, the most important for our discussion, namely when the deficit is directly attributable to State failure, can be divided into three sub-categories: a) in a first group of cases, it is alleged that the State is directly culpable for the victim’s deficit, for instance, homelessness; an example can be taken from the Moldovan v. Romania case in which 13 houses belonging to the Roma applicants were destroyed with the direct involvement of state officials; b) a second group

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69 ECtHR, Airey v. Ireland, supra. (Empahsis added).
71 ECtHR, Sentges v. the Netherlands, Appl. 27677/02, Decision on the admissibility, 8 July 2003.
72 ECtHR, Connors v. The United Kingdom, Appl. 66746/01, Judgment, 27 May 2004, para.82.
73 L. Clements and A. Simmons, supra, 410.
74 ECtHR, Moldovan and Others v. Romania, Appls.41138/98 and 64320/01, Judgment, 12 July 2005.
of cases demonstrates a substantial socio-economic disadvantage that is only indirectly the responsibility of the State; this arises where the State is discharging a regulatory function, for example, the exercise of development control over the use of land. A third group of complaints concerns States that have specifically recognised a particular socio-economic right in their legal system and then failed to uphold the right to a degree that causes or threatens severe consequences for the complainant. For Clements and Simmons a variant of these last cases is when the State decides to make available a socio-economic benefit – for instance public housing – and then takes action that would terminate the service with dire consequences.

In addition, although Article 8 (home and private/family life) does not require states to provide a home for everyone, there are circumstances when positive obligations of the Convention will suggest this, for instance for severe disability. The Court specified that: “although Article 8 does not guarantee the right to have one’s housing problem solved by the authorities, a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under article 8 of the Convention because of the impact of such refusal on the private life of the individual.”

In the context of housing, the Strasbourg Court has been so far dealing with housing rights in an almost indifferent way to the other main mechanism on human rights within the Council of Europe, namely the European Committee on Social Rights, which has developed an important jurisprudence on state obligations in this area on a regular basis. The next section will analyze in more detail to what extent and under which circumstances the case-law of the Strasbourg Court is developing along the same lines.

5. ECHR case-law on housing and Roma traditional way of life

At the outset it is noteworthy to look at the state-of-the-art within the Strasbourg case-law following an important and innovative set of leading cases on Roma, namely, Buckley, Chapman, Connors, D.H. and Oršuš cases covering a range of time between 1996 (Buckley) and 2010 (Oršuš). Most cases concerning Roma and housing (Buckley, Chapman and Connors cases) are connected with their traditional way of life and article 8 (home and private/family life). They are generally related to situations in which the Roma applicants wished to settle down with

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75 See, ECommHR, G. and E. v. Norway, Appl. 9278/81, Commission decision, 3 October 1983; ECtHR, Buckley v. The United Kingdom, Appl. 20348/92, Judgment, 29 September 1996.
76 L. Clements and A. Simmons, supra, 411.
77 See, ECtHR, Marzari v. Italy, Appl. 36448/97, decision on the admissibility, 4 May 1999, 8.
78 ECtHR, Buckley, supra.
79 ECtHR, Chapman, supra.
80 ECtHR, Connors, supra.
81 ECtHR, D.H. and Others v. The Czech Republic, Appl. 57325/00, Grand Chamber, Judgment, 13 November 2011.
82 ECtHR, Oršuš and Others v. Croatia, Appl. 15766/03, Grand Chamber, Judgment, 16 March 2010.
their caravans in areas where the authorities would not authorize their dwelling on various grounds, generally for environment protection.

In these cases – though not yet in *Buckley*, where only the dissenting Judge Pettiti supported a positive obligation approach – the Strasbourg Court has identified the need to “facilitate the gypsy way of life” as a “positive obligation” of the State. In *Chapman*, the Court stated: “The vulnerable position of gypsies as a minority means that some 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…To this extent, there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the gypsy way of life.”83 In addition, the Court underlined that there is 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.84

In the *Buckley* case, according to the majority, the prioritising of landscape over the accommodation needs of the Buckley family, despite the unavailability of suitable alternative accommodation, was not considered disproportionate and in breach of Article 8.85

In his dissenting opinion, Judge Pettiti commented: “The Buckley family is caught in a ‘vicious circle’…In attempting to comply with the disproportionate requirements of an authority or a rule, a family runs the risk of contravening other rules. Such unreasonable combination are in fact only employed against gypsy families to prevent them living in certain areas.”86

For Sandland, in the *Buckley* case, the Strasbourg Court “accepted a construction of ‘Gypsies’ as per se being a problem for domestic authorities,”87 whereas, in *Chapman*, the Court recognised the particular problems and prejudices faced by Travellers and, equally importantly, that issues of identity, not merely land use, are at stake.88

Following *Buckley*, in *Chapman* the Court held: “(T)he vulnerable position of Gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in reaching decisions in particular cases.”

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84 ECHR, *Chapman*, supra, para. 93.
87 R. Sandland, supra, 483.
88 Ibid., 488-9.
cases. To this extent, there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the Gypsy was of life”. 89

The Court proceeded to make its position clear: “It is important to recall that Article 8 does not in terms recognised a right to be provided with a home. Nor does any of the jurisprudence of the Court acknowledge such a right. While it is clearly desirable that every human being have a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the Contracting States many persons who have no home. Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision.”90

As for alternative accommodation, the Court noted: “if no alternative accommodation is available the interference is more serious than where such accommodation is available. The more suitable the alternative accommodation is, the less serious is the interference constituted by moving the applicant from his or her existing accommodation”.91 In addition, for the Court there is generally a need to balance “the particular needs of the person concerned – his or her family requirements and financial resources – and, on the other hand, the rights of the local community to environmental protection.”92

In the Chapman case, the Court noted that Chapman had entered the land unlawfully,93 and had been given a “full and fair opportunity” to put her case.94 Nor was the Court persuaded, in the absence of evidence from Chapman, that there was no alternative site available to her.95 In the view of the Court, it was legitimate for the authorities to refuse permission, particular as the site was on a protected area (Green Belt). Hence, there was no violation of Article 8.96

Chapman was not an unanimous decision: seven of the 17 members of the Grand Chamber found a breach of Article 8. For the dissenting judges, the case needed to be reviewed in the light of recent developments, in particular the emerging consensus across Contracting States concerning the FCNM and Art. 27 ICCPR. As it will be seen in the next section, the arguments raised in Chapman by the dissenting Judges only, were put forward by the majority in the most recent rulings of the Strasbourg Court.

As a matter of established principle, the Court will thus take into account the specific position of the Roma population, who as a result of their history, have become a specific type of disadvantaged

89 ECtHR, Chapman, supra, para. 96. (Emphasis added).
90 Ibid., 99. (Emphasis added).
91 Ibid., para. 103.
92 Ibid., para. 104.
93 Ibid., para. 107.
94 Ibid., para. 106.
95 Ibid., para. 113.
96 Ibid., paras. 114-6.
and vulnerable minority and require therefore a special protection.\textsuperscript{97} Moreover, the Court derives from the vulnerable position of Roma 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.\textsuperscript{98}

The ‘special consideration’ principle is strictly linked to the Strasbourg Court’s approach according to which equality does not necessarily treat all individuals in the same way.\textsuperscript{99} The Court supports thus policies of preferential treatment in favour of minority groups that suffer widespread and structural discrimination.\textsuperscript{100} These politics of difference, in contrast to politics of sameness,\textsuperscript{101} may also concern housing through the mechanism of Article 8 (home and private/family life) combined with Article 14 (anti-discrimination clause) and Article 3 (prohibition of torture and inhuman/degrading treatment).

If politics of difference for minorities are generally acknowledged, what does it mean to “facilitate a gypsy way of life” and to provide “special consideration” to Roma as a result of their “vulnerable position”? Should government social housing policy remain color-blind or should instead take into consideration the “special needs” of the Roma? Should measures and policies for Roma adopted as an identity-based issue or Roma-specific housing policies should counter a housing emergency?

6. Recent ECHR Case-law on Housing Rights and Roma: a velvet revolution?

As seen earlier, in the jurisprudence of the Court on Roma rights the concept of vulnerable persons is crucial. To better understand this concept and the consequent state responsibilities flowing from it, an interesting argument has been put forward in the ruling \textit{M.S.S. v. Belgium and Greece},\textsuperscript{102} concerning asylum seekers, but referring, more generally, to vulnerable individuals and groups, including Roma and Travellers.

In the \textit{M.S.S.} case, the applicant, an Afghan asylum seeker, alleged that the state of extreme poverty in which he had lived since his arrival in Greece amounted to inhuman and degrading treatment within the meaning of Article 3. In discussing the living conditions of the applicant, the Court first noted that Article 3 cannot be interpreted as obliging Member States to provide everyone within their jurisdiction with a home.\textsuperscript{103} The Court however considered that providing accommodation

\textsuperscript{97} ECtHR, \textit{Oršuš}, supra, para. 147.
\textsuperscript{98} Ibid., para. 148 referring to ECtHR, \textit{Chapman}, supra, para. 96, and ECtHR, \textit{Connors}, supra, para. 84.
\textsuperscript{99} ECtHR, \textit{Thlimmenos v. Greece}, Appl. 34369/97, Grand Chamber, Judgment, 6 April 2000, para. 44.
\textsuperscript{100} R. Sandland, \textit{supra}, 496.
\textsuperscript{101} Ibid., 496. On this point, see A. Tremlett, “Making a difference without creating a difference: Super-diversity as a new direction for research on Roma minorities”, 2014 \textit{Ethnicities} 14(6), 830-848.
\textsuperscript{102} ECtHR, \textit{M.S.S. v. Belgium and Greece}, Appl. 30696/09, Grand Chamber, Judgment, 21 January 2011
\textsuperscript{103} Ibid., para. 249 referring to ECtHR, \textit{Chapman}, supra, para. 99.
and decent material conditions to impoverished asylum-seekers has now entered into positive law and therefore it is now a state obligation.\footnote{Ibid., para.250.}

The Court underlined two additional points: first, the status as an asylum-seeker implies be a member of a particularly underprivileged and vulnerable population group in need of special protection,\footnote{Ibid., para.251 referring to, mutatis mutandis, ECtHR, Oršuš, supra, para.147.} and second, the existence of a broad consensus at the international and European level concerning this need for special protection.\footnote{Ibid., para. 251.}

In this specific case, the Court had to determine whether a situation of extreme material poverty would raise an issue under the Strasbourg Convention. A crucial element in the examination of the case was the circumstances in which the applicant found himself and the fact that these circumstances were wholly dependent on the State, particularly on the official indifference and inaction \textit{vis-à-vis} a situation of serious deprivation and want incompatible with human dignity.\footnote{Ibid., para. 253.} These circumstances that lasted several months, consisted in living on the street, with no resources or access to sanitary facilities, and without any means of providing for essential needs causing to the applicant an humiliating treatment showing a lack of respect for his dignity and arising feelings of fear, anguish or inferiority capable of inducing desperation.\footnote{Ibid., para.262.} For the Court these circumstances, which were totally dependent on the State due to the inaction and indifference of the authorities, implied a violation by Greece of the Strasburg Convention (Art. 3).

A (partly concurring and partly dissenting) opinion was attached in the \textit{M.S.S.} case by the Hungarian Judge Sajó, in which he analyzed, among others, the applicant’s living conditions in Greece.\footnote{Ibid., pp. 100-109.} In this context, he contested the Court’s argument that asylum seekers should be considered \textit{unconditionally} members of an underprivileged and vulnerable population group, who, due to this adverse social categorization, deserve ‘special protection’.\footnote{Ibid., p. 101.}

For Judge Sajó, the concept of a vulnerable group has a specific meaning in the jurisprudence of the Court, and deserve a classification \textit{per se}, due to the fact that such groups were, for instance, historically subjected to prejudice with lasting consequences, resulting in their social exclusion.\footnote{Ibid., p. 102.} According to Judge Sajò, where a group is vulnerable, special consideration should be given to their needs, as in the case of Roma, who have become a disadvantaged and vulnerable group as a result of their history.\footnote{Ibid., p. 102.} In contrast, Judge Sajó argued that the same approach cannot be said to be legitimate for asylum seekers.

\footnote{Ibid., para.250.}
\footnote{Ibid., para.251 referring to, mutatis mutandis, ECtHR, Oršuš, supra, para.147.}
\footnote{Ibid., para. 251.}
\footnote{Ibid., para.253.}
\footnote{Ibid., para.262.}
\footnote{Ibid., pp. 100-109.}
\footnote{Ibid., p. 101.}
\footnote{Ibid., p. 102.}
\footnote{Ibid., p. 102.}
According to Judge Sajó the current position of the Court seems to be that with regard to *vulnerable groups in an undignified material situation*, the State is responsible under the Convention rights if it is passive over a lengthy period of time because this implies that the applicant is living “in circumstances wholly dependent on State support”. This position is, for Judge Sajò, open to criticism particularly for the over-broad concept of vulnerability and dependence. The Court however seems to ‘limit’ this concept and the consequent state responsibility by indicating that the welfare obligation arises in respect of vulnerable people only where it is the State’s *passivity* that causes the unacceptable conditions.

The Court had the occasion to reiterate and specify its position in the most recent *Tarakhel v. Switzerland* case (2014), concerning an asylum seeker from Afghanistan who arrived first in Italy and then moved to Switzerland. Here, likewise Article 3 was raised in connection with accommodation and decent material conditions for impoverished asylum seekers. The relevance of this case lays in the (partly) dissenting opinion attached by Judges Casadevall, Berro-Lefèvre and Jäderblom, in which they contested the fact that in this specific case the Court did not make an assessment of the individual circumstances of the applicant in order to evaluate whether a real risk of ill-treatment was present or not. In both cases therefore the dissenting Judges contested the ‘group’ approach of the Court and asked for a more individually-based assessment of each specific case.

Regarding the meaning to be given to the term ‘special consideration’ for the needs and lifestyle of Roma, a step further in the direction of more clarification was given by the Court in the decision *Gabriel Louis Stenegry and Sonia Adam v. France*. The facts of the case are similar to the previous *Buckley* and *Chapman* cases. Here, the applicants were Travellers, who acquired a piece of land located in an agricultural area on which no buildings could be erected. Once the applicants decided to settle on their own land and fulfilled the formalities to benefit from an electricity connection and water, the mayor refused the necessary authorisations on environmental grounds.

Subsequently, the local representative of the government (*préfet*) suggested to the applicants to seek a public housing or alternatively to move to the reception areas provided for Travellers leading a nomadic way of life (*gens du voyage itinérants*). These proposals were supposed to be temporary solutions until the so-called ‘family sites’ (*terrain familiaux*) project was finalized.

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115 ECtHR, *Gabriel Louis Stenegry et Sonia Adam v. France*, Appl. 40987/05, decision on the admissibility, 22 May 2007. At the time of writing the text of the decision was only available in French.
Relying on Article 8 of the Convention, the applicants complained that these proposed solution were not consistent with their culture and their way of life as could be instead the so-called ‘family sites’ (terrain familiaux) specifically foreseen by a 2000 national law for the reception and housing of Travellers. They also noted that the option of social housing did not respect their culture as this implies living in caravans and that the reception areas provided for Travellers with a nomadic way of life (gens du voyage itinérants) were not be appropriate to their sedentary status.117

In this case an important distinction is thus made by the applicants and in the reasoning of the Court between the solutions for Travellers with a nomadic way of life (gens du voyage itinérants), for whom a reception area would be adequate, and those for Travellers (gens du voyage) who are, at least partly, sedentary and for whom only a specific area, where they can live in caravans but without implying or being forced to move and have a nomadic way of life, would be adequate.

The Court recalled, on the one hand, the positive obligation to facilitate the Gypsy lifestyle and the special attention to the needs and different way of life of the applicants to be given due to their vulnerability and minority status. On the other hand, the Court noted that the applicants have settled on the land they had acquired in full knowledge of its agricultural character, where thus no buildings could be erected, and on which grounds the refusal of the authorities was based.

As see, the Court accepted that the proposal to live in social housing did not meet their lifestyle of the applicants, however, it had a different approach vis-à-vis the other option linked to the reception area. For the Court this solution would have been able to respect the way of life in a caravan chosen by the applicants because, although it did not match the sedentary lifestyle to which the applicants aspired, it was nevertheless a temporary solution pending the completion of appropriate ‘family sites’.118

Accordingly, the Court considered that the decision-making process took adequately into account the lifestyle of the applicants. Therefore, it considered that the options offered were not disproportionate to the legitimate aim pursued, and, consequently, the complaint was considered manifestly ill-founded and rejected.119

The Yordanova and Others v. Bulgaria case (2012),120 is partly different from the previous case where the applicants were the owners of the land, because it concerned a group of Roma who have lived for many years in the makeshift houses they or their ancestors built on State or municipal land,121 and from which, in 2005, the Bulgarian authorities decided to remove them.122

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117 Ibid., p.6.
118 Ibid. p.13.
119 Ibid., p.13.
120 ECtHR, Yordanova and Others v. Bulgaria, Appl. 25446/06, Judgment, 24 April 2012.
121 Ibid., 102.
122 Ibid., para.104.
The fact that the applicants occupied unlawfully the land did not mean that their houses could not be considered as ‘homes’ under the meaning of Art. 8. In addition, the circumstance that the case concerned the expulsion of the applicants as part of a community of several hundred persons and that this measure had repercussions on the applicants’ lifestyle and social and family ties, made the interference as affecting not only their “homes”, but also their “private and family life”.

The applicants alleged that the removal order did not pursue a legitimate aim but was intended to benefit a private entrepreneur and to satisfy racist demands to free the area of an unwanted Roma settlement. The Government’s position was that the aim of the measure was to recover illegally occupied municipal land, realize plans for urban development and put an end to a situation involving safety and health risks which had given rise to complaints.

At the outset, the Court clarified that it is legitimate for the authorities to seek to regain possession of land from persons who do not have a right to occupy it. Moreover, it was undisputed that the Roma settlement comprised buildings which did not meet the relevant construction requirements and that there was a general intention on the part of the authorities to use the land occupied by the applicants for urban development. The motives in the authorities’ plans to transfer the land to a private investor for development purposes was thus considered proper and legitimate. Improvement of the urban environment by removing unsightly and substandard buildings and replacing them with modern dwellings meeting the relevant architectural and technical requirements is in fact a legitimate aim in the interests of economic well-being and the protection of the health and the rights of others.

As seen earlier, in spheres involving the application of social or economic policies, including regarding housing, the margin of appreciation left to the authorities is wide. However, this margin is narrower where the right at stake is crucial to the individual’s effective enjoyment of intimate or key rights and the extent of the intrusion into the personal sphere of the applicant is significant. In addition for the Court the loss of one’s home is a most extreme form of interference with the right under Article 8 to respect for one’s home, and therefore the measure implying this interference must be proportionate and reasonable.

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123 Ibid., para.103.
124 Ibid., para.105.
125 Ibid., para.109.
126 Ibid., para.111.
127 Ibid., para.112.
128 Ibid.,para.113.
129 Ibid., para.118 (b).
130 Ibid., paras. 118 (d) and 118 (e).
Although, for the Court there was no doubt that the authorities are in principle entitled to remove the applicants, who occupy municipal land unlawfully,\(^{131}\) however, in a crucial part of the ruling, the Court noted that for several decades the national authorities did not move to dislodge the applicants’ families or ancestors and, therefore, *de facto* tolerated the unlawful Roma settlement.\(^{132}\)

Considering that a whole community and a long period were concerned, the principle of proportionality required that such situation was treated as being entirely different from routine cases of removal of an individual from unlawfully occupied property.\(^{133}\) In this specific case, on the contrary, the removal order did not mention any special circumstances, such as decades-old community life, or possible consequences, such as homelessness.\(^{134}\) In other words, the municipal authorities did not give reasons other than to state that the applicants occupied land unlawfully and, expressly refused to hear arguments about proportionality and the lengthy period during which the applicants and their families had lived undisturbed in the area concerned.\(^{135}\) For the Court, this approach is to be considered in itself problematic, amounting to a failure to comply with the principle of proportionality.\(^{136}\)

In addition, a contradictory approach taken by the Bulgarian authorities – and not uncommon across countries in Europe – was also discussed by the Court: on the one hand, the authorities supported the adoption of national and regional programs on Roma inclusion based on the understanding that the applicants are part of an underprivileged community whose problems are specific and must be addressed accordingly, and, on the other hand, they maintained that so doing would amount to “privileged” treatment and would discriminate against the majority population.\(^{137}\) In sum, a sort of double-standard approach was put into place.

Linked to the above consideration, is an important part of the ruling, which in this respect is partly different from previous cases on Roma. The Court noted that the Bulgarian authorities should have acted differently as the applicants are a social group in need of assistance, an outcast community and one of socially disadvantaged groups “regardless of their ethnic origin”.\(^{138}\) For the Court in this specific case the substantial/formal dichotomy was not applied. This would have amounted to treat groups differently in order to correct “factual inequalities” between them, a failure of which in certain circumstances may in itself give rise to a breach of Article 14.\(^{139}\)

\(^{131}\) Ibid., para.120.
\(^{132}\) Ibid., para.121.
\(^{133}\) Ibid., para.121.
\(^{134}\) Ibid., para.122.
\(^{135}\) Ibid., para.122.
\(^{136}\) Ibid., para.123.
\(^{137}\) Ibid., para.128.
\(^{138}\) Ibid., para.129.
\(^{139}\) Ibid., para.129.
Among the circumstances considered by the Court there was the fact that the applicants were not very active in seeking an alternative solution. It appeared that they were reluctant to seek social housing at least partly because they did not want to be dispersed, found it difficult to cover the related expenses and, in general, resented the radical change of their living environment that moving into blocks of flats would entail.\footnote{Ibid., para.131.}

Despite this reluctance on the part of the applicants to seek alternative accommodation, for the Court, the relevant point in this case was, nonetheless, that the \textit{disadvantaged position} of the social group to which the applicants belong could and should have been taken into consideration, for example, in assisting them to obtain officially the status of persons in need of housing which would make them eligible for the available social dwellings on the same footing as others. This has been recognised by the Bulgarian authorities in their national and regional programmes but that did not result in practical steps being taken in the present case.\footnote{Ibid., para.132.}

The \textit{underprivileged status} of the applicants’ group had thus to be a weighty factor in considering approaches to dealing with their unlawful settlement and, if their removal was considered necessary, in deciding on its timing, modalities and, if possible, arrangements for alternative shelter. And for the Court, this was not done in the present case.\footnote{Ibid., para.133.} The Bulgarian authorities failed thus to respect the proportionality principle in their removal order that, accordingly, was not “necessary in a democratic society” as required by the European Convention on Human Rights.

The last case to be analyzed is \textit{Winterstein and Others v. France} (2014) concerning a group of Roma, who were established for many years (five to thirty years) in a wood from which, in 2005, they had to leave following a removal order issued on grounds of environmental protection.\footnote{ECtHR, \textit{Winterstein and Others v. France}, Appl. 27013/07, Judgment, 17 October 2013. At the time of writing the text of the judgment was only available in French.} As in the \textit{Yordanova} case, here as well the Court considered that the applicants maintained sufficiently close and continuous links with their caravans and bungalows located in the wood so that those could be considered as their ‘homes’, regardless of the legality of the occupation under domestic law.

As for the traditional lifestyle, the Court clarified that ‘living in a caravan’ is an integral part of the identity of Travellers, even if they do no longer live in a nomadic way, and that measures concerning caravan parking affect their ability to maintain their identity and lead a private and family life in accordance with that tradition.\footnote{Ibid., para. 14, referring to Chapman, supra, para. 73, and Connors, supra, para. 68.}
For the Court a crucial element in this case was that the authorities had in principle the right to evict the applicants, who occupied illegally the municipal area. However, the same authorities made no attempt in this direction for many years and, similarly to the Yordanova case, had thus de facto tolerated this illegal occupation.145

The inactivity of the authorities implied that the Roma applicants had developed close ties with the place and had built a community. The Court concluded that the principle of proportionality required that such situations, where a whole community and a long period of time are at stake, are treated quite differently from common situations where an individual is expelled from a property he/she occupies illegally.146

Despite the similarities with the Yordanova case, Winterstein differed from Yordanova because here the areas occupied were not municipal areas but private land of which the applicants were mostly tenants or owners, private areas for camping and caravans on which, without an official authorization, permanent stationing of caravans was not permitted.147

The Court noted that the national authorities ordered the expulsion of the applicants without analyzing the proportionality of the measure: once established the non-conformity of their presence according to the land plan, they gave to this aspect a paramount importance without balancing it with the arguments raised by the applicants.148

The Court concluded then that the applicants did not benefit, as part of the removal process, of a review on the proportionality of the interference given the length of their presence, their families and the community they formed.149

Most importantly, the Court referred to other international treaties and documents, in particular those of the Council of Europe, especially the FCNM and the European Social Charter (Revised), and of the UN Committee on Economic, Social and Cultural Rights requiring alternative accommodation in case of forced eviction.150 The Court referred especially to the decision of the European Committee of Social Rights (ECSR) concerning the insufficient number of suitable dwellings for Travellers who have opted for a sedentary way of life.151

145 Ibid., para. 22.
146 Ibid., para. 22.
147 Ibid., para. 24.
148 Ibid., para. 28.
149 Ibid., paras. 31 and 30.
This is an important step in the direction of recognizing a positive obligation and a parallel right to an alternative domicile in case of expulsion. The Court emphasized in this regard that many international treaties and legal documents adopted within the Council of Europe stressed the need, in case of forced evictions of Roma and Travellers, to provide alternative accommodation, unless force majeure. This point is particularly relevant because the principle of proportionality is measured, among others, on the consensus emerging at the international level and among contracting parties.

Another salient point is that in this case the Court combined two aspects of the Roma/Travellers groups, namely be an ethnic minority with a specific identity and culture, and be at the same time, a social underprivileged group. This approach has been supported in particular by the Advisory Committee of the FCNM.152

The Court concluded that for the families who have opted freely for a social housing, the authorities have paid sufficient attention to the needs of the families concerned.153 On the contrary, the Court reached the opposite conclusion regarding those applicants who applied for resettlement on family sites (terrain familaux).154 The ‘family sites’ project was in fact abandoned by the municipality that decided to allocate the plots provided for this purpose to the reception area for Travellers leading a nomadic way of life (gens du voyage itinerants).155 In this regard, the Court also emphasized that the applicants could not be blamed for not having requested or accepted a social housing because, as seen in the Stenegry et Adam decision, the Court accepted, that this type of accommodation is not adequate to their lifestyle.156

The Court concluded that Article 8 was violated in the case of all applicants as for the expulsion procedure because this was not based on a proportionate decision. Moreover, in the case of the applicants who opted for a relocation in the so-called ‘family sites’ (terrains familaux) there was equally a violation of Article 8 as the decision-making process did not sufficiently taken into account their needs.157

7. Final Remarks

153 Ibid., para. 33.
154 Ibid., para. 34.
155 Ibid., para. 34.
156 Ibid., para. 35.
157 Ibid., para. 39.
Roma and Travellers are considered by the Court as members of a particularly underprivileged and vulnerable minority groups in need of special protection as a result of their history, and for the Court, on the need for a special protection exists a broad consensus at the international and European level. But from these general, though very positive, statements can we infer concrete positive obligations, or even positive action measures or social policy prescriptions?

At the outset it is acknowledged that the Strasbourg Court accept positive obligations requiring actions from the state not only to refrain from doing something (negative obligations). Moreover, we have seen that social and economic rights, including housing, are not absent in the Convention system. It has been noted that the richest case law on positive obligations and that with the longest heritage in the judgments of the Court concerns precisely Article 8 and the right to respect for home and private and family life. However, the Court has also clearly held that the state’s positive obligation in connection with respect for the home, does not include a duty to see that each family has its own home.

As far as positive action measures are concerned, namely activities, initiatives and strategies to prevent or compensate for disadvantages and discrimination, whether these arose in the past or are still ongoing, in order to promote substantive equality and redress under-representation of certain groups, the Court is more hesitant and cautious. The position of the Court seems to be that the Court would accept them but not actively and obligatory required. However, some progressive trends in the direction of state obligation can be inferred from recent case-law on housing and Roma.

Along the lines of this discussion we have noted that positive actions on housing and Roma would fall on the boundary between ‘simple’ positive obligations and social policy prescriptions, they could be thus considered as mixed or blurred policies. However, by targeting a well-defined group, by seeking to redress disadvantages in a specific setting, and by being subject to periodic review, these measure would be better considered as ‘positive action measures’.

In the Court’s perspective, in the choice and implementation of social or economic policies, including those on housing, the margin of appreciation left to states is considered to be very wide with the limits given when the rights at stake, such as those involved under Article 8 (home and family/private life) are of central importance to the individual’s identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community.

The principle of proportionality is a pivotal litmus test for the Court’s assessment. It requires that situations where for instance a whole community and a long period are concerned or where for several decades the national authorities did not move to dislodge the applicants and, therefore, *de
facto tolerated the unlawful Roma settlement, must be treated as being entirely different from routine cases of removal of an individual from unlawfully occupied property.

Therefore, a positive obligation that can be inferred from the analysis of the Court’s case-law is that the requirement to give ‘special consideration’ to Roma and Travellers means that the national authorities must take into account factors such as decades-old community life, possible consequences, such as homelessness, or the inactivity and passivity of the authorities towards serious conditions of deprivation and want incompatible with human dignity.

The Court has also admitted the existence of *social welfare obligations* of the State in the name of dignity (Art. 3 – prohibition of torture and inhuman/degrading treatment) by relying on the theory of positive obligations of the State. Such obligations would include the prevention of serious deprivation and undignified material situations through appropriate government-provided services and this position would be compatible with the concept of the Social Welfare State and social rights (*M.S.S.* case).

Moreover, in the recent rulings of the Strasbourg Court an important distinction emerges with regards to Roma, housing and their traditional way of life, namely a difference among adequate housing alternatives compatible with their traditional lifestyle, which can also be find in many national legal frameworks on Roma integration elaborated by EU States upon request of the European Commission in 2011.\(^{158}\)

In general the Court acknowledges that *living in a caravan* is for Roma and Travellers an integral part of their identity, even if they do no longer live in nomadic way. In addition, the Court distinguishes between housing solutions for Travellers having a nomadic way of life (*gens du voyage itinérants*), for whom reception areas would be adequate and consistent with their traditional lifestyle, and housing solutions for Travellers (*gens du voyage*) who are, at least partly, sedentary and for whom only specific areas, where they can live in caravans but without implying or being forced to move and have a nomadic way of life, would be adequate (*Winterstein* case). In contrast, social housing is generally considered by the Court as inconsistent with the traditional way of life of Roma and Travellers (*Yordanova* case).

Whether finding an alternative accommodation can be considered a positive obligation or not, in this regard the Court has been very cautious referring in some cases only to the obligation to assist the Roma applicants to obtain officially the status of persons in need of housing in order to make them eligible for the available social dwellings on the same footing as others. In other words, the underprivileged status of the Roma applicants must be a weighty factor in considering approaches to dealing with their unlawful settlement and, if their removal is necessary, in deciding on its timing

and modalities, but as far as alternative shelters are concerned, these are foreseen as on obligation only “if possible” (Yordanova case).

However, it is considerably relevant that in the recent case-law analyzed in this contribution, the Court made strong reference to other European mechanisms, especially the European Committee on Social Rights on suitable dwellings for Roma and Travellers who have opted for a sedentary way of life. The European Committee on Social Rights has in fact expressly required, in case of forced evictions of Roma and Travellers, alternative accommodation “unless force majeure”. These references can be used by other applicants and, in this way, the Court will be forced to further elaborate this approach, which in the past was only raised by the dissenting Judges within the Court.

The reference to “force majeure” can be connected with the allocation of scarce resource and the prioritization of competing policy concern that the allocation of housing and alternative accommodation, in case of forced eviction, implies. In fact, the problem of the allocation of limited resources poses a significant obstacle in the attempt to impose positive obligations or positive action measures on government. In this context, there is a tension between the conflicting needs of the state, which aims to control expenditures, and equality-seeking groups who seek to impose positive obligations on government. Positive action measures are therefore necessary and appropriate only when the previous distribution method disproportionately disadvantaged members of certain groups, and the positive action measure serves to correct this disadvantage.

In the recent case-law here analyzed the Court also combines two aspects of Roma/Travellers groups precisely as an ethnic minority group with a specific identity and culture, and as a social “underprivileged” group. Since the DH case, the Court has in fact recognized a protection for Roma and Travellers not as individuals, but as a group. In this case, the Court as clearly affirmed that because the applicants are members of the Roma community “necessarily suffered the same discriminatory treatment … it does not need to examine their individual cases.”

Clearly, an approach based on difference rather than sameness implies that applicants are required to find a group to which they could belong for the personal characteristic that separates from other groups. For some, this is problematic because the specificity engendered by such an application of the comparator analysis “precludes complexity, intersectionality or any analysis of layers of oppression.”

159 C. Wilkie and M. Zisman Gary, supra, 55.
160 European Commission, supra, 26.
162 ECtHR, D.H., supra, para. 209.
163 C. Wilkie and M. Zisman Gary, supra, 49.
As said earlier, the Court should be forced through new applications to examine the scope of the housing obligations of States towards Roma and Travellers as specific underprivileged minority and there are signs that the Court is slowly going to this direction. The limitations placed on the use the state’s margin of appreciation, even in case of housing policies, and the reference to other international and European mechanisms requiring an alternative accommodation in case of forced eviction of Roma and Travellers, are additional bricks in the erection of a construction of case-law favouring the most underprivileged minority group living in Europe.
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