Introduction
One of the anomalies of the long and inspiring jurisprudence of the European Convention on Human Rights has been its relative neglect of equality and nondiscrimination as important drivers of effective human rights protection. The Convention in its Preamble declares its source as the Universal Declaration of Human Rights. Yet what was truly revolutionary about that document was the fundamental emphasis it placed on equality in respect of all rights and freedoms. Equality and universality are inseparable dimensions of international human rights. But there was no such statement in the European Convention and its inclusion of the non-discrimination principle in Article 14, perhaps because the drafting of that article has operated so as to subordinate and marginalise equality.¹ However, over the last few years a new approach is emerging in which concern over systematic discrimination and exclusion is moving in from the margins of the Convention’s jurisprudence. The landmark judgments in the Nachova cases in particular represent a significant shift in the approach to Article 14 by the European Court of Human Rights (discussed below). The coming into force of Protocol 12, the free-standing equality provision in 2005, should reinforce the new approach. Mention of Protocol 12 should remind us that the broader human rights mission of the Council of Europe has played a role

Article 14 Bites At Last
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in the Court’s new responsiveness to
discrimination and the plight of minorities.
In particular the work of the European
Commission on Racism and Intolerance
in Europe (ECRI) has identified the
restraints that the Court’s interpretation
of Article 14 has placed on the use of
the Convention by victims of racial
discrimination and xenophobia. ECRI
promoted the idea of a new Protocol on
Equality, now Protocol 12, and has
campaigned for its ratification by all
states. The European Commission has
led the most far reaching legislative
efforts to eradicate racism in Europe,
(Article 13 of the Treaty of Amsterdam
followed by the Racial Equality
Directive) which has surely influenced
the Court. Against this background a crucial role has
been played by strategic litigation supported by NGOs in
encouraging a new determination by the European Court
to confront racial and ethnic discrimination. A leading
example is the litigation by the European Roma Rights
Centre (ERRC).

**Article 14 jurisprudence**
The Court’s thinking on the meaning and scope of
Article 14 was first set out in the “Belgian Linguistics”
case in 1968. A crucial step for the potential effectiveness
of the Article was the confirmation in that case that Article
14 might be violated even where there was no violation of
a substantive right, if there was discrimination involved.
The Court gave the well-known example that Article 6
alone does not compel States to institute a system of
appeal courts. However there would be a violation read in
conjunction with Article 14, if it debarred certain persons
from these remedies without a legitimate reason while
making them available to others in respect of the same
type of actions. The Court went on to declare that Article 14 should be
thought of as if it were an integral part of each right and
freedom protected under the Convention. In subsequent
cases, however, where the Court found a violation of the
substantive article it often ignored the claim under
Article 14, examples including Smith and Grady and
Lustig-Prean and Beckett. As Philip Leach has noted, the
Court has found that Article 14 did not give rise to a
separate issue, although the cases concerned an overtly
discriminatory policy. It is arguable that had the Court
taken its earlier doctrine more seriously, there might have
been less need for the new Protocol 12.

**New approaches and the role of individual judges**
The rethinking of equality under the Convention is an
interesting example of the influence over time of the
dissenting or separate opinions of individual judges.
Thus, in his separate opinion in Brannigan and McBride v.
UK, Judge Matscher argued the non-derogable nature of
Article 14.7 In the Ireland v. UK judgment, he had argued
for the necessity to give broad conceptual scope to the
wording of Article 14.8 Judge Costa’s dissenting opinion over the Court’s narrow
approach to Article 14 in Cyprus v. Turkey provides another
example. He noted that the finding of one violation
of the Convention did not release the Court “from the obligation to examine whether there have been others, save in exceptional circumstances where all the various complaints arise out of exactly the same set of facts”.9

**South East Turkey Cases**

In the many individual applications brought against Turkey from the mid-1990s over the situation in South-East Turkey the Court found numerous and serious violations, yet it applied its existing policy on Article 14 and routinely held it unnecessary to consider also the claims of the Kurdish applicants to be victims of ethnic discrimination.10 The Court declared the allegations to be “unsubstantiated”, even when the applicants referred to the findings of UN bodies.11 Nevertheless, the persistence in pleading Article 14 as a ‘fundamental aspect’ of the Turkish cases did eventually lead some judges to respond. In one Chamber judgment two judges, Mularoni and Loucaides, found violations of Article 14 in conjunction with Article 8 and Protocol No. 1 on the ground of ethnic origin, arising from the deliberate burning down of the applicant’s home by Turkish security forces.12 Judge Mularoni, in three recent Turkish judgments delivered on the same day by the Second Chamber, called for a separate examination of the applicant’s complaint under Article 14 of the Convention on the basis of the sheer number of similar applications resulting in findings of Convention violations.13 He commented that the majority approach “…is tantamount to considering that the prohibition on discrimination in this type of case is not an important issue”.

**Nachova v. Bulgaria**

*Nachova and Others v. Bulgaria*14 has become the landmark decision on discrimination litigation. In earlier and similar cases on the treatment of Roma brought against Bulgaria,15 the Court failed to take up the Article 14 issue, as in the Turkish cases.16 Apparently affected by Judge Bonello’s dissenting opinion in *Anguelova*, the Chamber in *Nachova* not only found a violation of Article 14, read together with Article 2, but established that there is a procedural obligation under Article 14 to investigate possible racist motives in violent incidents. The Grand Chamber upheld this reasoning but it ‘overturned’ the Chamber on the question of the reversal of the burden of proof, from applicant to state, with respect to racist motivation. The authorities’ failure to carry out an effective investigation did not of itself justify shifting the burden of proof on the issue of discrimination to the government. The Chamber judgment in that respect was not convincing and the principle that the state is obliged to address racist motivation in any investigation remains.17

With the new possibilities under Article 14 and expanded ratifications of Protocol 12, there are now more opportunities to tackle systematic discrimination. The breadth of the application of the principle of non-discrimination under Protocol 12 will be wide, extending the jurisdiction of the Court to all rights provided under domestic law and covering any act or omission of the public authorities. The Protocol also incorporates the principle that States may take affirmative action to promote full and effective equality in appropriate circumstances. Lawyers should be ready to identify lack of equality and non-discrimination in every relevant case, and put effort into pleading that dimension. The opportunities that exist for the future to
strengthen the equality jurisdiction of the Convention are good news for minorities in Europe.

* With thanks to Damelya Aitkhozhina (LLM Essex and intern with EHRAC)


Consider Judge Bonnello’s dissenting opinion in *Anguelova v. Bulgaria* 13/06/02

*Bulgarian Linguistics Case* 23/07/68, Series A, para. 9


Ireland v. United Kingdom 18/01/78, Separate opinion para. 2

Cyprus v. Turkey 10/05/01

See among others *Akdeniz v. Turkey* 31/05/05, para. 145; Süheyla Aydin v. Turkey 24/05/05, para 218; Çelikbilek v. Turkey 31/05/05, para. 113; Süheyla Aydin v. Turkey, para. 215; Çelikbilek v. Turkey 31/05/05, para.112

* e.g. Kurt v. Turkey para. 144

Hasan Ihan v. Turkey 09/11/04

* Togcu v. Turkey* 31/05/05, Koku v. Turkey 31/05/05, Yasin Ate v. Turkey 31/05/05

* 26/02/04, 06/07/05

* Assenov and others v. Bulgaria* 28/10/98; Velikova v. Bulgaria 18/05/00; *Anguelova v. Bulgaria* 13/06/02

* Leach 2005 p. 346

* Since Nachova the Court has found discrimination in Moldovan and Others v.