ANTI-ROMA VIOLENCE CASES

IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

- HISTORICAL PERSPECTIVES AND OTHER INFLUENCES ON EFFECTIVE PROTECTION AGAINST DISCRIMINATION -

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Introduction

Equality and justice are fundamental values in modern constitutionalism. One of the instruments enshrining the right to be free from discrimination is the European Convention on Human Rights (ECHR) and the focus of this thesis lies in the European Court of Human Rights (ECtHR) that is mandated to adjudicate on the rights therein.

The aim of this thesis is to assess and better understand the development of the Strasbourg Court's anti-discrimination principles specifically regarding violent racial discrimination cases. These cases concern most often the treatment of the Roma of Eastern Europe as a result of institutional anti-Gypsyism[1] that manifests, primarily, in police brutality and lack of effective investigations. Focus will be given to two key concepts of anti-discrimination: the standard and burden of proof. The distribution of the burden of proof (as in which party has to provide the evidence) and the required level of persuasion (as in how convincing should this evidence be) are of essential importance, because they help fine-tuning the accommodation of victims of discrimination and therefore are essential in affording effective protection.

The Court has always been vocal about the importance of combating discrimination and preventing violence of any kind. When it comes to cases which concern both racism and violence, the Court apparently takes a different approach compared to its practice in cases which involve non-violent racial discrimination or concern violence without a racial undertone. In these latter cases the Court has issued some groundbreaking judgments, which can even be considered activist in affording effective protection to vulnerable individuals. One might assume that in the very serious cases of racist violence, the Court would be at least similarly lenient if not even more prone to accommodating victims. But in reality, as it will be shown by outlining a number of anti-Roma violence cases, the Court takes a much more stringent approach in these instances, that limit the accommodation of the victims, focusing its reasoning on the application of the standard and burden of proof.

[1] The European Commission against Racism and Intolerance (ECRI) of the Council of Europe defines anti-Gypsyism as a "specific form of racism, an ideology founded on racial superiority, a form of dehumanization and institutional racism nurtured by historical discrimination, which is expressed, among others, by violence, hate speech, exploitation, stigmatization and the most blatant kind of discrimination". See ECRI (2011), On Combating Anti-Gypsyism and Discrimination against Roma, September 2011.

This thesis critically analyzes the aforementioned disparity in the Court's approach to different instance of discrimination and violence, with a particular focus on anti-Roma police violence cases. Taking a historical perspective, some possible influences on the European Court's interpretation and application of the key concepts of anti-discrimination principles will be explored. To help contextualize the role of history in shaping judicial attitudes there will be some outlooks to the United States. This will include both the role of the US Supreme Court as an inspiration for anti-discrimination laws worldwide and will serve as a general example of how the different socio-historical conceptions of race and racism in the two jurisdictions shaped legal responses. The thesis will be guided by the following central research questions:

> 1) what role do historical perspectives play in shaping anti-discrimination principles; and, within this context,
>
> 2) how can the standard and burden of proof be interpreted to afford effective protection against discrimination?

The thesis will consist of four main parts. The first chapter will explain the relevance and provide a contextual framework of looking at the US for a better understanding of the ECtHR case law. The second chapter will discuss anti-discrimination principles broadly in both jurisdictions, then explain the concepts in focus and their relevance in affording effective protection from discrimination to vulnerable groups. The third chapter will introduce the development of the anti-discrimination case law of the ECtHR under the right to life and freedom from ill-treatment in the specific form of anti-Roma violence. By an extensive overview of the cases concerning these rights, the reader will identify a worrying trend, namely the Court's reluctance to find a substantive violation of the anti-discrimination clause when it comes to member states' responsibility in potentially racially motivated violence against Roma. Lastly, I will look at possible explanations for this trend which allude to historical influences. The conclusion will take into account some lessons to learn and stress the European Court's role in shaping the protection of freedom from discrimination as a European value.

1. Socio-historical influences on legal principle

1.1. Background and context of the research

The chapter aims to establish a framework that will help understand the broader context in which to look at effective protection against discrimination in the anti-Roma violence cases decided by the ECtHR. This is a framework that on the one hand looks at the influence of another court on the ECtHR, namely the United States Supreme Court, as an acclaimed reference for anti-discrimination law. On the other hand, keeping in mind that considering the societal context is indispensable in understanding discrimination cases, the present analysis looks at the history of racism in Europe and in the United States.

The relevance of the outlook to the US is twofold. The first reason lies in the institutional context, that the US Supreme Court has had an undeniable impact on the development of post-war fundamental rights protection worldwide, and the jurisprudence of the ECtHR is no exception in this regard. The second reason lies in the fact that the Roma of Eastern Europe and African Americans have crossed similar paths. This similarity is both historical and contemporary, as white normativity, privilege and power have been maintained through similar tactics in the two continents.[2] Within this context it seems relevant to identify violent discrimination against racial/ethnic minorities as a pressing issue in both jurisdictions, and setting its understanding, from the European perspective, as the object of inquiry.

1.2. Institutional context

As US Supreme Court Justice Ruth Bader Ginsburg puts it, "the experience in one nation or region [in the area of human rights] may inspire or inform other nations or regions."[3] The basis of being this inspiration in the case of the US Supreme Court is the fact that a written Bill of Rights in the Constitution is the "signature innovation of the US."[4] Examining this influence on the ECtHR, Anthony Baron Kolenc draws up a framework which compares the two courts' structure.[5] He finds, looking at the foundational documents, the scope of the

[2] Margareta Matache and Cornel West „Roma and African Americans Share A Similar Struggle" *The Guardian,* 20 February 2018, Online: www.theguardian.com/commentisfree/2018/feb/20/roma-african-americans-common-struggle (Accessed 8 May 2018)
[3] Anne-Marie Slaughter „A Global Community of Courts" *Harward International Law Review* (2003) Vol.44., No.1., pp 199.
[4] Adam Liptak "US Court Is Now Guiding Fewer Nations" *New York Times*, 17 September 2008, Online: https://www.nytimes.com/2008/09/18/us/18legal.html (Accessed: 17 April 2018)
[5] Anthony Baron Kolenc „Putting Faith in Europe: Should the USSC learn from the ECtHR?" *Georgia Journal of International and Comparative Law* (2016) Vol.45., No.1., pp 10-13.

review, composition of the courts and their enforcement mechanisms, some obvious difference. But as protectors of fundamental rights on a case by case basis, in terms of procedures - such as rules of standing, admissibility and interventions - there are similarities which help contextualize how the ECtHR has been inspired in interpreting human rights protection principles by the American legal theory and practice.[6]

Beyond an academic inspiration that can be traced around the foundation of the ECtHR in the 1950's, it is also not surprising that courts actively talk to each other and cite decisions by one another in their course of daily adjudication. This process of "transjudicial communication" operates outside any formal context and serves the function of cross-fertilization or dissemination of ideas.[7] Its purpose is to improve the quality of the decisions by showing similarity in interpretation of norms, point to the parallel of rules, or shed light to common issues and standards.[8] Erik Voeten, when analyzing the tendency to borrow doctrines between courts, claims that "[w]hen life or liberty is at stake, the landmark judgments of the Supreme Court of the United States, (…) are studied with as much attention in New Delhi or Strasbourg as they are in Washington D.C."[9]

To test this assertion, he conducted a survey of citations of US case law by the ECtHR. He found that 38 cases made express reference to US case law, mostly in separate opinions or in third party submissions.[10] Compared to the amount of judgments the Court issues this is a small number. However, Voeten points out that judges might be sensitive to the strategic implication of external citations, especially when the reasoning affects several state parties.[11] As we will see in the analysis of the decisions in the anti-Roma violence cases issued by the ECtHR, the legal reasoning matters a lot. It is the subject that will be studied by lawmakers, judges and legal scholars around the world.[12] Even if the verdicts are widely criticized, it is the line of reasoning in the judgment and separate opinions that will have influence on the outcome of future cases.

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[6] Ibid, pp 15.
[7] Anne-Marie Slaughter „A Typology for Transjudicial Communication" *University Richmond Law Review* (1994) Vol.29., pp 117.
[8] Erik Voeten „Borrowing and Nonborrowing Among International Courts" *The Journal of Legal Studies*, (2010) Vol.39., No.2., pp 550-553.
[9] Ibid, pp 558.
[10] Ibid, pp 559.
[11] Ibid, pp 572.
[12] Alexandra Timmer „Judging Stereotypes: What the ECtHR Can Borrow from American and Canadian Equal Protection Law" *The American Journal of Comparative Law* (2015) Vol.63., pp 242.

1.3. Societal context

Now that the background of the courts' exchange of principles has been outlined, let us look at the broader societal context of the specific legal problem. As referred to above, racism and racial violence is a pressing issue in both the American and the European contexts. Though there is a wide spectrum of people on both continents from a diversity of racial and ethnic backgrounds who fall victims to racism, particularly African Americans and Roma share many similarities. The similarities are present both in terms of discrimination against these groups historically and in present days, and in their struggle for rights. Just as the European Court has borrowed from the US Court, Roma Rights activists have been inspired by the American Civil Rights Movement, which context strengthens the validity of the juxtaposition of the American and European approaches to non-discrimination law.

To demonstrate the strong link between the societal context and the development of legal responses to specific problems, I will address this issue based on an inquiry into the travel, transplant and applicability of Critical Race Theory (CRT) into the European legal sphere.[13] CRT is an American academic movement which created a theoretical framework to analyze the relationship between race and law. Its most important submission is that context matters, because it explains useful background information and underlying forces in the shaping of the law that we are looking at. The reason why American non-discrimination law has been inspirational to so many developing constitutional systems, is that it has been portrayed as evolving positively,[14] capable of facing and addressing its conceptions that had been used to the detriment of certain societal groups. Race relations in American history have been greatly constructed through law: most ethnic groups faced some sort of classification into a specific legal status that lead to the different formulation of their claims of equality.[15] African Americans, former slaves, pleaded equality of treatment as enshrined in the Constitution. However, it has been a long way from the addendum of the Fourteenth Amendment, the equal protection clause, to achieving formal and more and more substantive equality.

In Europe, race and racism is primarily associated with the Holocaust, or in another context colonialism and according racial hierarchy. The latter, however, is often contextualized as

[13] Mathias Möschel „Law, Lawyers and Race" (2014) *Routledge*
[14] ibid, pp 9.
[15] Native Americans were placed under guardianship to assert federal property interest against their want of a degree of autonomy; Chinese immigrants were deemed unworthy of citizenship (cf Harlan J dissenting in *Plessy v Ferguson*), executive orders allowed the internment of Japanese who were seen as an economic threat, and an *ex-lex* situation emerged for Latinx people, whereby they were citizens for some purposes, but not entirely for others (cf the so called *Insular cases*). Möschel, (2014) pp 19-25.

xenophobia or religious exclusionism, much more so than as racism as understood in the American terminology. This relates again to the history of the Holocaust, that renders it as taboo to employ such language in legislation and legal scholarship that has been used in the elimination of Jews and Roma.[16]

When exactly the Roma arrived to Europe is contested, but anti-Gypsy laws and hostility towards this group have been documented in medieval times already. Enslavement of Roma in the present-day territory of Romania lasted centuries during the Ottoman rule of the Balkans,[17] and just like in the case of former African slaves, it has had a devastating effect on prospects of future social integration. Similarly, the explanation for the continued anti-Gypsy and anti-Black attitudes lie not only in history but the perception of weakness, the lack of Roma and African Americans to gain power.[18]

Reference was made above to a similar path of African Americans and European Roma in their struggle for rights. Both, despite the abolition of most formally distinctive rules, have continually been subject to stereotyping misconceptions, such as being more prone to crime, unwilling to integrate, having negative attitudes to education.[19] These prejudices sustain marginalization, disenfranchisement and exploitation in and by society. Just as it was the National Association for the Advancement of Colored People in the United States that had a significant role in the African American Civil Rights Movement, it was the formation of the European Roma Right Center that triggered a Roma rights discourse,[20] and has taken a leading role in strategic litigation in front of the ECtHR. Within the European context however, the creation of an identity movement, similar to what CRT is based on, is more difficult. This difficulty is due to the fact that Roma (and other racial/ethnic minorities) live in different states, speak different languages and have different social, political and legal perspectives. This leads to different personal experiences, and accordingly, to the assertion of different legal claims.[21] This fact, in my view, makes it all the more important for the ECtHR to contribute, in a loose sense, to the identity formation process by a stronger and more victim accommodating approach in discrimination cases.

[16] Möschel (2014), pp 92-93, 96.
[17] Dimitrina Petrova, "The Roma: Between A Myth and the Future," *Social Research: An International Quarterly* (2003) Vol.70., No.1., pp 126.
[18] Ibid, pp 128.
[19] Ibid, pp 138-139.
[20] Ibid, pp 142.
[21] Möschel, (2014) pp 99.

These parallels and differences outlined above give a basis for understanding the divergent track record in Europe and the United States with regards to race and racism and the legal responses given to them.[22] The following chapter will explore the procedural specificities and main principles applicable in anti-discrimination cases in both jurisdictions. It will explain the concept and importance of the burden and standard of proof which are in the focus of this thesis. And it will address some examples of measures that enhance effective protection against discrimination by a specific consideration of socio-historical factors.

2. Making anti-discrimination effective – principles from both sides of the Atlantic

2.1. General anti-discrimination principles

Non-discrimination principles in general aim to protect vulnerable persons and allow individuals' equality to the fullest meaning within society. Because it is part of human nature to make choices of preference in every aspect of life, which may well be largely based on stereotypes, it is not always clear when these choices impact others, interfering with the principle of equality. Simply put, it is in relation to power that questions of discrimination arise. Therefore non-discrimination rules require those in the position of authority first, not to treat people in similar situations less favorably because of a certain characteristic (direct discrimination/disparate treatment) and second, to take these characteristics into account when people in similar situations should receive different treatment to allow equal opportunities (indirect discrimination/disparate impact).[23] There is a broad consensus on what these characteristics, the so called protected grounds are. The notion that the classification of members of a certain group for purposes of specific treatment raises suspicions of discrimination has a lot to do with historical evidence of discrimination against these groups. It goes without saying that in both Europe and the US race and ethnicity are among the protected grounds.

In fact, in both jurisdictions the anti-discrimination clauses, the Fourteenth Amendment of the US Constitution and Article 14 of the ECHR are open textured, meaning that they leave the determining of the grounds for discrimination within the discretion of judges. This

[22] Ibid, pp 139.
[23] Handbook on European non-discrimination law, European Union Agency for Fundamental Rights, (2011) pp 21-22.

approach can be criticized for the lack of judicial deference with the democratic decision-making process. At the same time, this ensures that the Courts retain control over invidious prejudices. Therefore, the response of the US Supreme Court to these concerns was to differentiate between tires of scrutiny in reviewing possible justifications of the classification of members of a certain group for purposes of specific treatment.[24] Most classifications of people with certain protected characteristics are subject to the so called "rational basis" review. This means that the state will have to show that there is a rational connection between a legitimate interest and the classification and certain treatment of people of a protected characteristic.[25] In the case of fundamental rights, and when discrimination concerns certain suspect groups, such as race, a higher level, the so called "strict scrutiny" is applied by the courts.[26] This means that the government has to show that there is a "compelling state interest" and that the practice in question is "narrowly tailored" to achieve this end.[27]

The US Supreme Court held in *Korematsu* (1944) that "legal restrictions which curtail the civil rights of a single racial group are immediately suspect…Courts must subject them to the most rigid scrutiny."[28] But originally it had been footnote 4 of the *Carolene Products* (1938) case, the most cited footnote in constitutional law scholarship, that elevated race as a suspect group based on systemic marginalization of certain groups.[29] Later on, the notes of Justice Stone had been clarified as to entail a history of purposeful unequal treatment, political powerlessness, or a particularly stigmatic classification based on an immutable characteristic which can define and justify a group to be a suspect class.[30] In sum, in the American legal system, race has long been the ground that immediately raised suspicion and triggered a strict legal approach in order to protect individuals.

In Europe, because of the economic interests of the free market, the main area of focus was assuring equality of the sexes in the labor market, thus anti-discrimination law largely emerged from a gender perspective,[31] which subsequently expanded to other grounds. This does not mean however that the ECtHR would treat race discrimination any less seriously

[24] Sandra Fredman, "Discrimination Law" (2002) *OUP*, pp 76.
[25] Ibid.
[26] An intermediate level of scrutiny was developed in relation to sex discrimination in employment which requires the state to show that the important governmental objective is "substantially related" with the challenged act. (Fredman, pp 80)
[27] Ibid.
[28] Ibid, pp 77.
[29] Ibid.
[30] Ibid, pp 78.
[31] Ibid, pp 31.

than sex discrimination. In fact, the ECtHR adopted a similar approach of multi tiered scrutiny in reviewing claims of alleged discrimination. Though the terminology is different, the main idea is the same: the respondent state must present "very weighty reasons" to rebut claims of discrimination. To assess the the connection between the necessity of the differential treatment and the legitimacy of the alleged underlying aim, the ECtHR employs a proportionality test.

As a general rule, victims of any type of discrimination bringing a claim to court will be required to establish a *prima facie* case, which means that their submissions need to validate their claim of discrimination "on the face." For this to happen, there must exist a ground of discrimination and an act that occurred in connection with this ground, which cannot be objectively and reasonably justified as required by the level of scrutiny described above.[32] It is in this connection that a decisive factor of the accommodation or protection of victims requires careful consideration of how to establish this presumption of discrimination. In other words, the questions must be answered: who bears the burden of providing evidence and how convincing should that evidence be. How the courts proceed from this point in order to afford effective protection to members of vulnerable groups is the question central to this thesis.

2.2. Effective anti-discrimination principles

Before going into detail about the US and European approach to answering the above raised questions, I would like to address two areas of law that take additional measures in combatting discrimination, besides the above described course of review of alleged discrimination. Both of these measures are based on a broad societal consideration of the status of the vulnerable groups that they are to protect. With the example of affirmative action policies, I would like to show how the US legislator used historical reasons as the justification of the measures. With the example of hate crime legislation, I would like to show the significance of the message a verdict conveys towards society. Both these examples will help better understand the shortfalls in the anti-discrimination aspect of the ECtHR's present case law on anti-Roma violence that will be analyzed shortly.

[32] The ECtHR often relies on a comparator test to assess the differential treatment in light of a similarly situated comparator group. This is not an essential element under the American approach, and it has been criticized for posing a risk of overshadowing the particularities of the individual cases by focusing merely on whether there has been a difference. (Oddny Mjöll Arnardottir, "Equality and Non-discrimination under Article 14 ECHR: The Burden of Proof" *Scandinavian Studies in Law*, (2007) Vol.51., No.13., pp 14.)

A) Affirmative action policies

In the United States affording effective protection against discrimination entailed the development of positive measures since the 1960's. Affirmative action is practically a court ordered remedy for past discrimination in certain areas of life, such as employment and education, which also benefits non-victims.[33] It is a clear departure from an abstract and individual form of justice, and though not uncontested, at the root of it lies the recognition that discrimination is a structural phenomenon and not only the manifestation of individual acts of prejudice.

The Supreme Court has had many occasions to refine its stance on the constitutionality and limits on the application of affirmative action. For instance, in *Bakke*, decided by the Court in 1978, it held that race could be taken as a factor in university admissions to remedy the present effect of past discrimination.[34] But recalling the internationally accepted principle that such special measures shall be temporary, the Court limited race-based affirmative action policies. Justice Ginsburg highlighted in the 2003 case of *Grutter* that relatively little time has passed since the same court overruled *de facto* racial segregation in *Brown v Board of Education* and it can only be hoped, that in the near future affirmative action will no longer be needed.[35] In fact, in the most recent, 2017 case of *Fisher v Texas II*, the Court still upheld the constitutionality of an affirmative action policy, subject to strict scrutiny.[36]

B) Specific legislation against bias crimes

The scope of non-discrimination law is primarily in employment, education, social protection and access to services, but there is a specific area of criminal matters, namely harassment, instruction to discriminate and the commission of hate crimes that deserves particular attention as well. What this thesis refers to as violent discrimination, identified above in national jurisdictions as hate crimes, is the occurrence of violence directed against a member (or symbolic property) of a certain protected group. These crimes are considered qualitatively more severe than the same act lacking the bias against the target group as a motive. This is so because they inflict multi-level injuries, threatening not only the directly targeted victim, but the entirety of the group which the victims belong to. Precisely because of this symbolism,

[33] Fredman, pp 145.
[34] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)
[35] Justice Ginsburg concurring in *Grutter v Bollinger*, 539 U.S. 306 (2003)
[36] *Fisher v. University of Texas*, 579 U.S. (2016)

hate crimes have an effect above the individual and targeted group, on society as a whole as well, because they undermine efforts for diversity and equality.[37] A close consequence of this is the heightened risk of tensions and civil disorder: race riots in the most severe cases. Even in the absence of such an explosive civil strife, a direct consequence is the lessening of trust in public authorities, that is generally already a factor hardening the integration of marginalized groups.[38] There is general understanding that harsher sanctions (of crimes with a bias motive compared to the same act committed without the discriminative intent) are validated by their symbolic importance of returning a message that bias motivated criminal behavior will not be tolerated.[39] Another consideration for making a statutory distinction is to enhance the deterring message and to encourage victim reporting at the national level.[40]

In the United States, many state level laws combat hate crimes. In line with the Civil Rights Act of 1986, federal prosecution of perpetrators is permitted.[41] The Supreme Court's judgment in the 1993 case of *Wisconsin v Mitchell*[42] clarified that punishing a defendant's abstract beliefs would not be in line with First Amendment rights, however if said beliefs manifest as a motive for a crime, they fall under the same category as other prohibitions covered by federal and state anti-discrimination laws. This reasoning of the US Court foreshadows a problem with the assessment and admissibility of evidence of racist motives in the commission of violence against vulnerable groups that we will face in the next sections. Though these principles are relevant primarily in the domestic context, the above overview should make it clear that violence targeting minorities has very serious consequences. This recognition has the implication that where specific legislation is not in place or its implementation is flawed, international scrutiny has a role of pushing for more effective protection. It is within this context that the ECtHR, as a court of last resort, should give careful consideration to providing effective protection, especially in cases emerging from countries where biases go largely with impunity.

[37] Matthew D. Fetzer and Frank S. Pezzella, "The Nature of Bias Crime Injuries" *Journal of Interpersonal Violence* (2016) pp 2-3.
[38] Brian Levin, "Hate Crimes – Worse by Definition" *Journal of Contemporary Criminal Justice*, Vol.15., No. 1., (1999) pp 18.
[39] Supra, fn. 38, pp 2.
[40] Levin (1999), pp 14.
[41] Title 18 U.S. Code § 254 2 (b)
[42] *Wisconsin v Mitchell* 508 U.S. 47 (1993)

2.3. The question of the standard and burden of proof

The sections above have shown some general principles of anti-discrimination law and specific considerations for accommodation of victims by positive measures, touching upon criminal law a well. The overlap of these areas, as has been alluded to above, create a situation in which it is extremely important to consider the question of the standard and burden of proof. The burden of proof refers to the obligation of the party that has to satisfy the court with the substantiation of facts. The standard of proof refers to the level of persuasion the evidence has to attain. There is a general rule of *onus probandi actori incumbit.* This means that the party with the claim has to prove the assertions. In discrimination cases, however, this is often not possible because the intent to discriminate can be hidden, and in indirect discrimination cases it is not even necessarily present. For this reason, as outlined above, general anti-discrimination principles mandate the shifting or sharing of the burden of proof to further accommodate victims of discrimination. This is so because often victims are in a position that they cannot prove their case entirely, either because they are not in possession of all the information, or because they are not in the position to challenge the system of bias that led to their discrimination.

For the burden of proof to shift from the claimant to the respondent party, it will have to be determined what type of evidence is acceptable to establish a *prima facie* case, and how persuasive this evidence should be. The level of persuasion differs per legal tradition and area of law.[43] In civil law Europe, the Equal Treatment Directive signals the spirit of accommodating victims of discrimination by expressly requiring the shifting of the burden in any case where discrimination is presumed. Furthermore, it states that rules of evidence more favorable to the victim are encouraged.[44] The word "presumed" is important here, because it implies a level of preponderance of evidence. This level can be loosely translated as "more likely than not" and it is common practice to accept inferential evidence at this level. In the American system, it is sufficient to simply show that the plaintiff belongs to a certain suspect group.[45] The importance of the relationship between the burden and standard of proof is best summarized with Juliane Kokott's words: "the point at which the required standard of proof is satisfied is the precise point at which the burden of proof is shifted to the government. (…)

[43] Juliane Kokott, "Burden of Proof in Comparative and International Human Rights Law" *Kluwer Law International*, (1998) pp 15.
[44] Article 19 Directive 2006/54/EC (This rule is however not binding ont he ECtHR)
[45] *McDonnel Douglas Corp. v Green*, 411 U.S. 792 (1973) at §§ 802.

Where this point lies is of paramount importance from the point of view of the effectiveness of protection."[46] The difficulty central to the topic of the present thesis comes from the fact that criminal law generally requires proof beyond reasonable doubt, for the simple reason that personal liberty should not be limited, unless very weightily justified.

Although the ECtHR is not a criminal court and its place is not to rule on criminal liability, since the 1979 case of *Ireland v UK*[47] the Court has indeed relied on the beyond reasonable doubt standard of proof in most of its cases. *Ireland v UK* concerned inhuman and degrading treatment within the meaning of Article 3 ECHR, such as will be discussed in the next chapter. However, it should be noted with regards to the ECtHR's reliance on this standard that a dispute between two states raises very different and politically much more sensitive issues than cases concerning individual human rights violations.[48]

In light of these general considerations about the conditions for shifting the burden of proof as a means of effective protection of vulnerable victims, the consequences to be drawn for international human rights protection are as follow. Within the international setting, the essential feature is the balancing between state sovereignty and effective protection of individuals.[49] Kokott posits that in international human rights cases – especially where *jus cogens* is concerned, such as the right to life and freedom from ill-treatment – the court not only has the power but the duty to discover the "real truth." In this sense, the driving principle of courts to freely evaluate evidence should be interpreted as to grant individuals the fullest enjoyment of rights, in line with the *in dubio libertate* principle.[50] This principle implies a decision in favor of the victim, which in itself can be seen a positive measure of accommodation of the vulnerable position of victims of both violence and discrimination.

[46] Arnardottir (2014), pp 37.
[47] *Ireland v UK*, Application no. 5310/71 Judgment of 18 January 1978 at §§ 160-161.
[48] Mathias Möschel, "Is the European Court of Human Rights' Case Law on Anti-Roma Violence 'Beyond Reasonable Doubt'?" *Human Rights Law Review,* (2012) Vol.12., No.3., pp 486.
[49] Arnardottir (2014), pp 19.
[50] Kokott, (1998) pp 209-210.

3. Racist violence in the case-law of the ECtHR

3.1. Overview of the pattern of cases

In the over fifty years of the ECtHR's history, it has dealt with a number of different cases of discrimination, one very particular of which is violent racial discrimination. The overwhelming majority of these cases concern anti-Roma violence. This thesis focuses on police brutality and cases of violence where the investigation and prosecution of the perpetrators was insufficient because of possible biases of the authorities.[51] The following sections will provide a chronological and categorized overview of the cases that reached the ECtHR.

The first sub-section will address the very first instances the Court heard anti-Roma violence cases. A separate subsection will be devoted to a powerful dissenting opinion in one of these cases that criticizes the majority's approach and points out some possible solutions. This case was subsequently decided by the Grand Chamber, and thus became the leading authority, as will be discussed in detail in the third subsection. The final part of this chapter will address about a dozen cases from different countries that were all heard after the Grand Chamber decision. Because the chronology is not as important anymore after the establishment of the leading authority, I will address these cases in categories by the type of violation involved. The cases reflect such degree of similarity both in terms of their fact pattern, procedural history and the Court's reasoning, that it is easy to address and compare them in the same subsection. The descriptive approach throughout the chapter serves a dual purpose. Besides understanding the evolution of the case law, the chapter will appeal to the reader's sense of justice and try to exclude any doubt that the cases are one-off examples rather than the clear manifestation of systemic bias against Roma. Devoting attention to the individual stories will shed light to the painfully cynical racist motifs recurring in many member states, that the Court seems to have been reluctant to acknowledge in its judgments. The cases will demonstrate how the high standard of proof (which in consequence prevents shifting the burden of proof to the respondent) prevents a meaningful engagement with the discrimination aspect of the cases. Though it is the standard and burden of proof that are in the focus of the

[51] The thesis is not concerned with forced sterilization of Roma women in Slovakia, the Czech Republic and Hungary. Even though those cases also concern Article 3 of the ECHR, which is in the focus of this thesis, and very often follow the pattern of ineffective investigations which we will see in the cases analyzed below, forced sterilization cases have a specific gender discrimination aspect that is beyond the scope of this thesis.

overview, other related measures will also be mentioned that serve the enhancement of protection from discrimination under Article 14 ECHR.

3.2. The first cases

It was in 2000 that the Court issued its first judgment in the case of *Velikova v Bulgaria*[52] and two years later in *Anguelova v Bulgaria*[53] concerning anti-Roma violence. *Velikova* concerns the death in police custody of Mr Tsonchev, a Bulgarian national of Roma ethnicity, who was taken to the police for interrogation in relation to suspected cattle theft. The police officers stated that he was too drunk to be questioned, which is why they left him to sober up in an interrogation room. His state of health, however, deteriorated to a degree that an ambulance was needed to take him to hospital, where upon arrival he was pronounced dead.[54] The forensic expert discovered that the cause of death was severe trauma, which the hospital report excluded, stating instead, that on the dark skin of the deceased no injuries were visible.[55] The forensic report also stated that in fact his blood alcohol level was below the limit legal for driving under relevant Bulgarian law at the time. However, no question was put to the forensic expert as to when exactly the injuries were sustained, and because it could not be established whether they originated from before or during the time Mr Tsonchev spent in custody, the criminal proceedings were suspended.[56]

Anguelova concerns a strikingly similar case, except that Mr Zabchekhov, taken to police custody for attempted theft was a 17-year-old person of Roma ethnicity. According to the police officers' testimony, it was a foggy and slippery winter night, and Mr Zabchekhov fell two or three times while trying to run away from the police. Because he was shivering and talking slowly, he was examined at the police station by a pediatrician, upon whose advice he was taken to hospital, where he died short after arrival.[57] The cause of death, as revealed by the autopsy, was an epidural oedema caused by an injury. According to the medical report, this could have been the result of a blow, punch or kick, as well as a fall. Yet the autopsy did not involve any data to identify the object that caused the injury.[58] This omission, similar to that in the previous case, led to the suspension of the criminal investigations, on the ground

[52] *Velikova v Bulgaria*, Application no. 41488/98, Judgment of 18 May 2000
[53] *Anguelova v Bulgaria*, Application no. 38316/97 Judgment of 13 June 2002
[54] *Velikova,* §§ 13-25
[55] Ibid, §§ 26
[56] Ibid, §§ 37
[57] *Anguelova*, §§ 9-26, 37
[58] Ibid, §§ 73

that, despite all the evidence was collected, it was still impossible to determine the precise circumstances of the death.[59]

In both cases the investigations were flawed, there were significant delays, and the applicants (next of kin to the deceased) were not duly informed of the proceedings.[60] When the cases reached the ECtHR, both applicants brought complaints under Article 2 of the Convention. They claimed in the substantive part that the deaths were caused by ill-treatment inflicted by the police, that there was no adequate medical care provided (a timely surgical intervention in the case of Mr Zabchekov could have been life saving) and that the authorities failed in their procedural obligation to undertake a thorough and effective investigation into the circumstances of the deaths.[61]

With regards to the claims concerning the violence, in both cases, the Strasbourg Court started its assessment by stating that the right to life safeguarded by Article 2 of the ECHR, together with Article 3, are the most fundamental provisions of the Convention. The court relied on two principles established in its previous case law, which are worth highlighting here: the shifting of the burden of proof triggered by special circumstances and an implied duty of conducting effective investigations.

A) The origins of shifting the burden of proof in custodial violence cases

The first principle that the Court reiterated from its previous case law is a case also concerning police violence: persons in custody are in a vulnerable position and the authorities are responsible for their treatment.[62] The Court has found in the 1995 case of *Ribitsch v Austria*[63] that under special circumstances, the shifting of the burden of proof to the respondent government is mandated in order to advance the effective protection of a vulnerable victim. The Austrian Government tried to rebut this approach by asserting that the Court has always required proof beyond reasonable doubt, which should be met before shifting the burden of proof to the state. The Court dismissed this argument and thus this case became the example of the exceptional circumstances which in fact allowed the shifting of

[59] Ibid, §§ 89
[60] *Velikova* §§ 37-44, *Anguelova* §§ 69-90
[61] *Velikova* §§ 59, *Anguelova* §§ 102
[62] *Velikova* §§ 68-73, *Anguelova* §§ 110-115
[63] *Ribitsch v Austria,* Application no. 18896/91, Judgment of 4 December 1995.

the burden of proof without requiring the evidence supporting the initial claim to be assessed against the beyond reasonable doubt standard.[64]

The Court followed the same approach in the *Velikova* and *Anguelova* cases, highlighting that because the evidence in custodial violence cases is within the exclusive knowledge of the authorities, the burden is on them to provide plausible explanation for the injuries sustained by the detained person. The Court noted that the evidence, though not meeting the beyond reasonable doubt standard, was sufficient to suppose that the deaths were caused by severe beating, which the authorities were not able to rebut. In both cases, the thus-shifted burden of proof led to the finding of a substantive violation of Article 2.[65]

B) The origins of the duty to conduct an effective investigation

In the procedural aspect, the Court found it striking that key questions were omitted from the expert examination of the bodies and it also noted that the domestic investigations into the circumstances of the deaths did not meet the criteria set out in the Court's previous case-law.

It is interesting to note that the duty to effectively investigate ill-treatment by police was first articulated in another anti-Roma violence case, *Assenov and Others v Bulgaria*.[66] This case concerned the detention and beating of a 14-year-old Roma boy, the complaints against which never led to any investigations.[67] Though referencing *Ribitsch*, the Court, found it impossible to establish whether the injuries were caused by the police.[68] Nevertheless because of the "reasonable suspicion" that the injuries were in fact inflicted by the police, these "arguable claims" led the Court to establish an implied obligation on the state to conduct an effective investigation into these claims under Article 3 of the Convention.[69]

Assessing the principles from *Assenov*, the Court found in *Anguelova* that the investigation met the requirement of promptness, but lacked independence and impartiality.[70] In *Velikova* the Court was concerned with the lack of thoroughness.[71] In both cases the Court reached the

[64] Kokott (1998) pp 202.
[65] *Velikova*, §§ 70, *Anguelova* §§ 112.
[66] *Assenov and Others v Bulgaria*, Application nos. 90/1997/874/1086, Judgment of 28 October 1998. (Because the applicants did not raise any discrimination claims in front of the Court, this case is not significant for the current analysis beyond how the Court assessed the requirement of the duty of effective investigation in *Anguelova)*
[67] Ibid, §§ 8-11, 17, 30.
[68] Ibid, §§ 100.
[69] Ibid, §§ 103.
[70] Ibid, §§ 144-147.
[71] *Velikova,* §§ 78-80.

conclusion that the ability of the investigations to identify those responsible for the deaths was undermined, amounting to a violation of the procedural obligations pursuant to Article 2 ECHR.

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The above findings of a violation of Article 2 in both *Anguelova* and *Velikova* and with respect to both the substantive and procedural aspects were made without any reference to the anti-Roma nature of the cases. It is later on in the judgments that the applicants' claims under Article 14 were addressed.[72] These claims were namely that the perception by police officers and investigating authorities of the deceased as Rom/Gypsy had been decisive in their attitude and acts both with regards to the treatment of Mr Zabchekov and Mr Tonchev and during the investigation of the circumstances of their deaths.[73]

Strikingly, the Court found no violation of the anti-discrimination clause in either of the cases. It noted in *Velikova* and cited this decision in *Anguelova* that the arguments are serious, especially viewed against the widespread and systemic racial violence in Bulgaria, which was evidenced by reference to reports of the UN Committee on the Elimination of Racial Discrimination. However, the Court recalled that the standard of proof required under the Convention is proof beyond reasonable doubt and the materials before the Court did not allow it, in either of the cases, to reach the conclusion that the ill-treatment and omissions in the investigations were racially motivated.[74]

Overall, these first cases - namely, *Velikova* and *Anguelova* - set out the Court's very strict approach to anti-Roma violence cases. It is striking that despite the fact that the finding of both substantive and procedural violations of Article 2 was made easier by allowing the shifting of the burden of proof based on a lowered standard of evidence, the Court did not follow this approach with regards to the discrimination aspect of the cases, reluctant to engage with the weighty suspicions of anti-Gypsyism. The line of reasoning sets the threshold for finding a possible violation of Article 14 ECHR in connection with racist

[72] The peculiarity of the ECtHR non-discrimination jurisprudence is that Article 14 has no individual standing, it must be read in conjunction with other Convention rights. Though the prohibition of discrimination only applies to the enjoyment of the rights enshrined therein, this ambit requirement does not presuppose a violation of that right. The accessory nature of the anti-discrimination clause has made it common that cases are decided on the basis of other rights, even where the discrimination is central to the case. (See: Rory O'Connel, "Cinderella Comes to the Ball: Art 14 and the right to non-discrimination in the ECHR" *Legal Studies* (2009) Vol. 29 No. 2, 2009, pp. 211–229.)
[73] *Velikova,* §§ 92, *Anguelova* §§ 163.
[74] *Velikova*, §§ 94, *Anguelova* §§ 168.

violence extremely high.

3.2.1. Judge Bonello's dissent

In protest against the majority's extreme scrutiny of the racial violence allegations, Judge Bonello wrote a very powerful dissenting opinion following the judgment in *Anguelova*. He pointed to the disturbing fact that the Court did not once find a violation of such fundamental rights as guarded by Article 2 or 3 induced by the race or color of the victim. Striking a painfully cynical tone, he asserted that based on the Court's case law, one could assume that Europe is the "exemplary haven of racial fraternity" when in fact the Court has faced frequently members of vulnerable groups being subjected to appalling treatment. He criticized the Court for seeming to adhere to the assumption that "[m]isfortunes punctually visit disadvantaged minority groups, but only as the result of well-disposed coincidence."[75] He pointed out that the Court escaped reality when applying the beyond reasonable doubt standard of proof, despite "the red light about the special treatment of Roma by the Bulgarian police (…) flashing insistently and alarmingly."[76] Furthermore, Judge Bonello highlighted that the Convention does not expressly require the proof beyond reasonable doubt standard. On the contrary, Article 32 on the jurisdiction of the Court mandates a wide scope of interpretation. Despite this fact, the Court has never explained or justified the application of such a high standard.[77]

Of key importance for the sake of the present analysis is the reference by the Judge to comparative law, pointing expressly to the jurisprudence of the United States Supreme Court as a good example. He cited *Griggs v Duke Power Co.* and *McDonnell Douglas Corp. v Green,* which concern the circumstances that validate the shift of the burden of proof to the alleged discriminator in employment discrimination cases. According to these cases, and as already mentioned above in the previous chapter, the US Supreme Court is satisfied if the plaintiff establishes a *prima facie* case by preponderance of evidence to shift the burden of proof to the employer. Judge Bonello sees this reasoning an attainable and equitable level, effecting "the highest level of protection, rather than the highest level of proof."[78] He submitted that only a radical and creative rethinking of the ECtHR's approach can remove its

[75] Judge Bonello dissenting, §§ 2-3, pp 39 of *Anguelova.*
[76] Ibid, §§ 5, pp 40.
[77] Ibid, §§ 9, pp 41.
[78] Ibid, §§ 12, pp 42.

self-imposed barriers to the effective protection of the most fundamental rights.[79] There are various ways to better balance the claims of the victims and the interest of the state as the Judge suggests. First, he points out that the shifting of the burden of proof, as has been done so in connection to the infliction of violence in *Ribitsch* and *Assenov,* could give rise to the inference that the applicant's charges of discrimination are well-founded.[80] Second, and still concerned with the standard and burden of proof, Bonello suggests approaching the question from another angle, citing *Conka v Belgium*.[81] This case suggests that it is from the start on the government to convince the Court that its actions towards a vulnerable applicant were not racially motivated, where there is suspicion of a systemic level of bias.[82] Third and lastly, he suggests recognizing a procedural aspect of Article 14, similar to that of Article 3 "created" in *Assenov* which would indicate a violation, had the racist motives not been properly investigated.[83]

Judge Bonello's dissent highlights the flaws of the majority's approach, which do not seem to put the effective protection of the victims of racial violence in the center of the case. He proposed to remedy the identified issues by borrowing some principles developed by the US Supreme Court. Ideally, evidence assessed against a lowered standard of proof would be sufficient to trigger the shift of the burden of proof to the respondent government, which would enhance the effectiveness of protection against discrimination. Even more victim-oriented would be to automatically shift the burden of proof "when a member of a disadvantaged minority group suffers harm in an environment where racial tensions are high and impunity of State offenders epidemic."[84] This suggestion comes close to the remedial underpinning of some US anti-discrimination measure in that the determination of the presence of such an environment inevitably invites mindfulness of past discrimination. It was not long before another case emerged in which the Court had a chance to consider Judge Bonello's suggestions.

[79] Ibid, §§ 13, pp 42.
[80] Idib, §§ 14-15, pp 42.
[81] *Conka v Belgium* (App no. 51564/99, Judgment 5 February 2002) is one of the few cases concerning Roma in Western-Europe. The Court found that the collective detention and expulsion of Roma families from Ghent, without considering their individual asylum claims - based on the grounds of fear of persecution by skinheads in Slovakia - was in violation of the Convention. It is interesting to note however that the presence of systemic level of bias was considered to be present against refugees much more so than against Roma!
[82] Supra fn 75, §§ 16, pp 43.
[83] Ibid, §§ 17, pp 43.
[84] Ibid, §§ 18, pp 43.

3.3. Way to the leading authority

In *Nachova and Others v Bulgaria*[85], the next case in our chronological overview, the First Section decision seemed to have given thorough consideration to Judge Bonello's voiced concerns. This case concerned the shooting of two Bulgarian nationals of Roma origin. Mr Petkov and Mr Angelov escaped from a prison construction site and were chased by military police warranted to take all measures necessary to effectuate the arrest.[86] The shooting occurred in a Roma neighborhood, and witnesses state that the firing officers uttered racial slurs. Testimonies and the findings of the investigation greatly differ in detail and partly contradict one another. Disregarding the ambiguity of the circumstances, and avoiding the racial claims altogether, the domestic proceedings concluded that the police had been provoked and therefore the use of force was lawful under the Military Police Regulations.[87]

The Court held, however, that in the arrest of non-violent persons, such as the escaped detainees in the present case, the Convention prohibits the use of force, therefore there had been a violation of Article 2, aggravated by the use of excessive firepower.[88] Looking at the course and findings of the investigations, collection and assessment of evidence, the Court concluded that in the present case it was seriously flawed, pointing in particular to the concerning fact that the racial elements of the complaints were ignored at all levels of the investigations.[89]

The obligation to investigate was addressed under Article 14 as well, highlighting that it needs to be discharged without discrimination.[90] This is precisely the distinction of a procedural obligation proposed by Judge Bonello. There is an important link with the issue of the standard and burden of proof, in that the obligation of the domestic authorities to investigate the racial allegations is triggered by a simple preponderance of evidence. In the present case, the failure of the domestic authorities to unmask the possible discriminatory motives in the course of the investigation enabled the the Court to find a procedural violation.

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[85] *Nachova and Others v Bulgaria*, Application nos. 43577/98 and 43579/98, First section judgment of 26 February 2004, Grand Chamber Judgment of 6 July 2005
[86] *Nachova* (First section), §§ 9-31
[87] Ibid, §§ 49.
[88] Ibid, §§ 115. (The excessive firepower refers to the fact that, notwithstanding the assertion that the shooting had not been justifiable in the first place, the shooting officer had a handgun on him, but choose to fire with an automatic rifle instead. The cartridges found at the scene reveal that he shot from within 20 meters, and the examination of the bullet wounds reveal that Mr Petkov was shot in the chest, and hit by a bullet from the front, which suggest that he might have turned to surrender. See §§ 107-109.)
[89] Ibid, §§ 139-141.
[90] Ibid, §§ 155-157.

This finding mandated it to go on and examine the substantive part of Article 14 as well.[91] It first addressed the issue of the burden of proof, stating that the fact that the Court generally employs the beyond reasonable doubt standard does not mean that it is to be interpreted such as in domestic criminal cases.[92] Furthermore, the Court recalled that it has "already recognized that specific approaches to the issue of proof may be needed in cases of alleged discriminatory acts of violence"[93] and that "it has become an established view in Europe that effective implementation of the prohibition of discrimination requires the use of specific measures that take into account the difficulties involved in proving discrimination."[94] In light of this, the Court found it appropriate to shift the burden of proof to the respondent Government. Having offered no convincing explanation of the facts - especially in light of the previous occurrences of anti-Roma violence also known to the Court - Bulgaria was found in violation of Article 14 taken in conjunction with Article 2 of the ECHR.[95] Judge Bonello greeted this judgment as a "giant step forward that does the Court proud."[96]

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The case on appeal of Bulgaria was referred to the Grand Chamber, and thus that decision became the leading authority for the further cases concerning racial violence. The Grand Chamber decided to overturn the first judgment with respect to the discrimination part.[97] Despite the thorough and numerous submissions of interveners pointing both to the climate of racism and its impunity prevalent in Bulgaria,[98] and to the importance of the directions the First Section had taken in the interpretation of Article 14, the Grand Chamber, in essence, returned to its original approach, reasoning as follows.

Although accepting that "[r]acial violence is a particular affront to human dignity and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction,"[99] the Grand Chamber reiterated that the Court has always relied on the

[91] Ibid, §§ 164.
[92] Ibid, §§ 166.
[93] Ibid, §§ 167.
[94] Ibid, §§ 168.
[95] Ibid, §§ 174-175.
[96] § 1 of Judge Bonello's concurrence, pp 40 of the judgment
[97] This was feared because already a few months after the Chamber judgment in *Nachova*, the Court returned to its old approach in the case of *Balogh v Hungary* (App no.7940/99, Judgment of 20 July 2004)
[98] eg. Interights criticized the 'beyond reasonable doubt' standard employed by the Court and pointing *inter alia* to US practice highlighted the generally accepted practice of shifting the burden of proof in discrimination cases (See §§ 55-59 and 138-143)
[99] *Nachova* [GC] §§ 145.

standard of proof beyond reasonable doubt. It went on to clarify how it is to be understood, by citing parts of the reasoning of the Chamber described above: Firstly, that Article 19 of the Convention, about ensuring member states' engagement to secure rights and freedoms of the Convention, gives the basis for the Court's approach to interpretation and evaluation of evidence and proof. Second, the Court reiterated that there are no procedural barriers or pre-determined formulae for the assessment of evidence. Third, that the Court is free in the evaluation of all evidence, which may include inferences from the facts and submissions. Lastly, the Court noted that "the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegations made and the Convention right at stake."[100]

When applying these principles to the circumstances of the present case however, not the slightest departure from the strict interpretation of the beyond reasonable doubt standard followed. The Court found nothing, in the course of the comparator test,[101] that convincingly suggested that the shooting officer would not have fired in a non-Roma neighborhood. Further, the Court saw no convincing link between the grossly excessive firepower and the ethnicity of the victims, which could have also been a result of adherence to the intrinsically problematic regulations. And lastly, the Court noted that while racial slurring in connection with violence is alarming, it was not sufficient in itself for establishing the responsibility of the state.[102]

Thus, departing from the Chamber judgment the Grand Chamber, by eleven votes to six, found no violation in the substantive aspect of Article 14 taken in conjunction with Article 2. However, following Judge Bonello's suggestion, the Court went on to separately examine a procedural aspect on the merits. The uttering of a racial slur, viewed in the context of prevailing prejudice and hostility against Roma in Bulgaria, constituted plausible information before the investigative bodies to alert them to carry out an investigation into any possible racist motives.[103] Because the authorities made no attempt to verify these racist claims, the Court found that the state failed in carrying out its duty under Article 14 amounting to a violation of Article 14 taken in conjunction with Article 2 in its procedural aspect.

[100] Ibid, §§ 147.
[101] Cf. fn 32 on page 11 above.
[102] Supra, fn 99, §§ 150-153.
[103] Ibid, §§ 163-166.

The division between the judges and the above highlighted parts of the reasoning suggest that this was a particularly difficult case to decide. There is a key sentence in the reasoning that is likely a result of great compromise: "[t]he Grand Chamber cannot exclude the possibility that in certain cases of alleged discrimination it may require the respondent Government to disprove an arguable allegation of discrimination and – if they fail to do so – find a violation of Article 14 of the Convention on that basis."[104] On the one hand, (this part of) the reasoning offers the possibility of departure from the standards and findings in this case. This means that in future cases, in theory, even citing its own judgment, the Court could utilize the same reasoning but depart from the conclusion of no substantive finding. On the other hand, considering that it was a case concerning the racially charged killing of Roma people that set the Court' approach to racist violence very high, it seems unlikely that it would find, in future cases, a violation insofar as the facts involve "only" minor violence.

3.4. Subsequent cases

The post-*Nachova* cases show that the Court puts increasing emphasis on the presence or absence of an indication of racial undertones in finding a violation of Convention rights. This however is still viewed against the beyond reasonable doubt standard of evidence as regards the substantive aspect, and, as we will see, it scarcely mandates the finding of a violation of Article 14. A point of novelty that seems to have become the standard in the post-*Nachova* cases is the separate assessment of the procedural limb of Article 14 by default. This, to some extent, explains the Court's reliance on the racist indicators. The general approach, as set out in *Nachova*, is that if there were indications that should have triggered the obligation to investigate any racial motives separately, the Court will find a violation in cases where domestic authorities did not devote enough attention to the uncovering of these elements. In this sense, the threshold to find a violation is quite low, highlighting the disparity with the extreme scrutinizing of the substantive aspect. The anti-Roma violence cases that the Court examined after the Grand Chamber judgment in *Nachova* can be divided into three categories and will be addressed accordingly in the following sub-sections. Claims of ill-treatment by police raised under Article 3 ECHR, which occurred in police custody, and which involved violence outside this context. In the third category are claims raised under Article 2, cases that involve use of force, or resulted in death following time spent in police custody.

[104] Ibid, §§ 157.

3.4.1. Article 3 cases concerning custodial violence

Bekos and Koutropoulos v Greece,[105] *Cobzaru v Romania,*[106] *Stefanou v Greece*[107] and *M.F. v Hungary*[108] are cases in which the applicants were beaten by the police in custody, trying to extract confessions. The ill-treatment involved kicking, punching, throwing the applicants to the ground, dragging them by the hair, hanging them up by handcuffs and beating them with various objects ranging from truncheons to a coat hanger.[109] *Bekos* and *Koutropoulos* heard each other's cries from the interrogation rooms.[110] *Stefanou,* a sixteen-year-old Roma boy, was arbitrarily questioned regarding a theft his friends committed, even though he himself was not identified as a suspect.[111] Upon his release one of the police officers took his cell phone because he suspected it might have been stolen, for which later on he pressed charges against the applicant.[112] *Cobzaru* - whose ill-treatment was witnessed by six officers, none of whom intervened - was forced to sign a statement which said that his injuries were inflicted in a fight prior to his arrival at the police station.[113] In all of these cases the applicants' criminal complaints were met with staggering reluctance on behalf of the authorities to take the allegations of ill-treatment seriously. The prosecutor in the case of *Cobzaru* reasoned that no evidence had been adduced that the police officers had beaten the "25-year-old Gypsy" who was an "antisocial element prone to violence and theft", "well known for causing scandals and always getting into fights" in constant conflict with "fellow members of their ethnic group."[114] In *M.F.* the complaints were dismissed in the domestic procedure on the grounds that the applicant's submissions were not plausible, as "a coercive interrogation was unlikely when the suspect was caught in action."[115] This paints a very alarming picture of the police, and the fact that these cases are almost identical in several member states undoubtedly signals a deep-rooted structural problem.

In all cases the Court began its assessment by reiterating general principles, starting with its jurisprudence confirming the standard of proof beyond reasonable doubt. In *Cobzaru*, one of the earlier cases, it elaborated on the definition of proof as the "coexistence of sufficiently

[105] *Bekos and Koutropoulos v Greece,* Application no.15250/02, Judgment of 13 December 2005.
[106] *Cobzaru v Romania,* Application no. 48254/99 Judgment of 26 July 2007.
[107] *Stefanou v Greece,* Application no. 2954/07, Judgment of 22 April 2010.
[108] *M.F. v Hungary*, Application no. 45855/12, Judgment of 31 October 2017.
[109] *Ibid.* §§ 10.
[110] *Bekos and Koutropoulos*, §§ 14.
[111] *Stefanou,* §§ 8.
[112] Ibid, §§ 11.
[113] *Cobzaru,* §§ 108.
[114] Ibid, §§ 28, 31.
[115] *M.F.*, §§ 19.

strong, clear and concordant inferences or of similar unrebutted presumptions of fact."[116] It also added an acknowledgment of its subsidiary role that cautioned it in its fact-finding exercise. At this point in the development of case-law the Court is quick to acknowledge the seriousness of the interference with fundamental rights by police forces, and the finding of a violation of Article 3 (standing alone) is almost automatic. The same cannot be said of the discrimination claims.

The claims under Article 14 concerned both the ill-treatment inflicted by the police and the flaws of the investigation. Citing the Grand Chamber's decision in *Nachova*, the Court reiterated the duty to investigate possible racial motives and noted also that it should examine whether the authorities discriminated against the applicants in carrying out these investigations. Though acknowledging the concerns submitted by various organizations about violence against Roma in the member states in question, the Court nevertheless reached the conclusions that this background was not sufficient to meet the beyond reasonable doubt standard, and therefore that no violation could be found in the substantive part.[117] Turning to the procedural part, however, the Court reiterated that the insufficiency of the investigations taken together with the discriminatory remarks made by various actors during the course of domestic proceedings - such whose nature has already been found to be an aggravating circumstance[118] - amounted to a violation in three cases.[119] While it is important that the Court, at least in part, engages with the discrimination claims, the distinction of a procedural and substantive limb of Article 14 is not unproblematic. In fact, while the Court is quick to find that there has been a serious interference with the most fundamental rights of the Roma applicants, the holding that discrimination occurred merely from a procedural aspect masks the seriousness of what is actually at stake: that because of their ethnicity the victims were more prone to be victims of abuse.

[116] *Cobzaru*, §§ 64.
[117] *Cobzaru*, §§ 96-97.
[118] *Moldovan and Others v Romania* (App no. 41138/99 and 64320/01) is a case which is not part of the current analysis because it was partly settled outside of court and for the discrimination part, it was addressed from the point of view of Article 6 and 8, despite the fact that the case originated from an anti-Roma pogrom. Nevertheless, the Court, with reference to the derogatory statements made to the ethnicity of the applicants, found a violation of Article 14 in conjunction with Articles 6 and 8 (§§ 140. *Moldovan* No.2) and noted that discrimination based on race can of itself amount to degrading treatment within the meaning of Article 3 and should therefore be taken into account as an aggravating factor in the examination of the applicants' complaint under that article. (ibid, §§ 11.) These findings have been cited *inter alia* in *Cobzaru*.
[119] In *Stefanou* the Court rejected the applicant's claims concerning the discrimination, noting that the claims were time-barred. (§§ 60)

3.4.2. Article 3 cases outside of custodial violence

The single case in which the Court allowed itself of finding a substantive violation emerged also from Romania soon after *Cobzaru*. However, this case concerned police violence outside the context of custody. The case originated from a conflict between local Roma and police in a bar, accounts of which differ to a great extent between the sides. *Stoica,*[120] the applicant, was fourteen years old at the relevant time, he was tripped by a police officer as he tried to run away from the scene, where several Roma were beaten by the police "to teach them a lesson." He was beaten until unconscious.[121] From here, the process of investigation takes uncanny similarities with the other cases examined above: the racist motive is not addressed at all and the complaints were handled with significant omissions and subsequently not pressed for prosecution.[122] Furthermore, allegations that the prosecutor tried to intimidate witnesses was dismissed completely by the police.[123]

As regards the applicant's claims at the Court concerning Article 3 there is nothing new in the assessment of the case: the Court found both substantive and procedural violations.[124] Under Article 14, with the Bonello-suggested distinction, the Court was quick to find a procedural violation based on the fact that the racial implications of the case were not sufficiently investigated. The general attitude of the authorities uncovered in the course of assessment of the procedural limb of Article 14, also raised the suspicion of a substantive violation.[125] The Court reiterated the key sentence from its judgment in *Nachova* that "it has not excluded the possibility that in certain cases of alleged discrimination it may require the respondent Government to disprove an arguable allegation of discrimination."[126] And in fact, the stereotyping remarks of the police reports revealed a context racially not neutral, which created the basis for shifting the burden of proof to the Government.[127] The remark of the prosecutor equated the alleged aggressive behavior of the villagers as "purely Gypsy" which is clearly invidious stereotyping. Compared to the instances of racial slurs, however, that was expressly directed at applicants or witnesses in the previous cases, it seems odd that the Court is ready to base the finding of a violation on biased generalization but not on direct

[120] *Stoica v Romania*, Application no. 42722/02 Judgment of 4 March 2008.
[121] Ibid, §§ 7-9.
[122] Ibid, §§ 17, 21-37.
[123] Ibid, §§ 41.
[124] Ibid, §§ 80.
[125] Ibid, §§ 124-125.
[126] Ibid, §§ 128. (Cf. *Nachova* [GC] §§ 157)
[127] Ibid, §§ 130-132.

expressions of ethnic contempt taken together with very serious human rights violations.

The tempting assumption based on *Stoica,* that outside the context of police custody the Court might be more open to finding a violation is quickly dissolved in *Dzeladinov and Others v The Former Yugoslav Republic of Macedonia*[128] which is almost identical to *Stoica* in its facts. It also concerned the beating of a group of Roma by the police in the local village bar. However, the case ended with only a procedural Article 3 violation and Article 14 claims were not even raised. In *Petropoulos-Tsakiris v Greece,*[129] the applicant had a miscarriage as a result of her ill-treatment during a raid of the settlement in which she resided. The Court found both a substantive and a procedural violation of Article 3, and similar to *Stoica*, it noted that the authorities' assertion that it is a "common tactic [among Roma] to resort to the extreme slandering of police officers with the obvious purpose of weakening any form of police control"[130] is invidious stereotyping. The failure to investigate racist motives in light of this comment amounted to a procedural violation of Article 14, but the examination of the substantive limb was again out of the question.

These cases attest that the clear excess of authority that is undeniably evident by the occurrence of police brutality outside the context of the interrogation room is also not a factor that will, in itself, convince the Court, beyond doubt, that it is necessary to lower the standard of proof and shift the burden of disproving racist allegations to the respondent government. The case of *Stoica* is peculiar in this respect. Perhaps other circumstances beyond the victim's ethnicity, his age and health conditions enhanced his extreme vulnerable position in the Court's eyes and pushed it to accommodate this position.

3.4.3. Article 2 cases

In another set of pot-*Nachova* cases, the Court had to revisit the issue of anti-Roma violence from the Article 2 angle, in the midst of inexplicably suspicious circumstances. In *Ognyanova and Choban v Bulgaria*,[131] a suspect fell out of the window of the third floor interrogation room. The police claimed he jumped. In *Mižigárová v Slovakia* the applicant's husband allegedly shot himself with the off-duty lieutenant's gun, who happened to volunteer

[128] *Dzeladinov v The Former Yugoslav Republic of Macedonia,* Application no. 13525/02, Judgment of 10 July 2008.
[129] *Petropoulos-Tsakiris v Greece,* Application no. 44803/04, Judgment of 6 December 2007.
[130] Ibid, §§ 65.
[131] *Ognyanova and Choban v Bulgaria,* Application no. 46317/99, Judgment of 23 February 2006.

to interrogate him.[132] *Soare* was shot in the head from within a few steps' distance, because the arresting officer so happened to slip when aiming to fire a warning shot.[133] *Carabulea v Romania*[134] is almost identical in its facts to *Velikova*, in that the ill-treated suspect died of his injuries in the hospital - his last words to his family being "[t]hey've killed me! I'm a wreck."[135] *Vasil Sashov Petrov v Bulgaria*[136] is similar to *Nachova*, in that the officer used force against an unarmed person whom he suspected was committing theft in a Roma neighborhood.

The procedure is already familiar, the Court in all of the cases easily found both substantive and procedural violations of Article 2.[137] The assessment of the Article 14 claims is also familiar by this point. Finding a procedural violation of Article 2 standing alone and the arguable claims of racist undertones in all of the cases mandated the examination of the procedural aspect, and led to finding a violation, except for *Soare* and *Carabulea*. In the former case, according to the Court, the reference to the victim degradingly as Gypsy was not substantial enough to trigger a separate examination of possible racist motives. In the latter case, a slim four by three majority rejected the separate examination of the Article 14 claims in light of the Court's previous findings under Article 2 and 3.[138] With regards to the substantive part of Article 14 in the remaining cases, the Court expressed concerns about the plausibility of the police accounts of the deaths and injuries viewed against the evidenced climate of hostility against Roma. With regards to the seemingly unresolvable issue of the racist evidence being enough to condemn the state for not investigating it, but not convincing enough to rule on a substantive violation, the Court cleared its conscience by stating that it "would not exclude the possibility that in a particular case the existence of independent evidence of a systemic problem could, in the absence of any other evidence, be sufficient to alert the authorities to the possible existence of a racist motive. However, in the present case

[132] The lieutenant's accounts of the events changed significantly throughout the course of the investigation. (§§ 24) He was subsequently charged with "injury to health as a result of negligence" and sentenced to a 1-year prison term suspended for 2,5 years. The penal order became final in October 2000, the lieutenant committed suicide in January 2001. (§§ 42-54)
[133] *Soare and Others v Romania,* Application no. 42329/02, Judgment of 22 February 2011.
[134] *Carabulea v Romania,* Application no. 45661/99, Judgment of 13 July 2010.
[135] Ibid, §§ 30.
[136] *Vasil Sashov Petrov v Bulgaria*, Application no. 63106/00, Judgment of 10 June 2010.
[137] In the two Romanian cases, *Soare* and *Carabulea*, absurdly, the applicants themselves were ill-treated by the police in connection with the investigation into the deaths of their loved ones. In this respect, the Court found substantive and procedural violations of Article 3 as well.
[138] *Carabulea*, §§168.

the Court is not persuaded that the objective evidence is sufficiently strong in itself to suggest the existence of such a motive."[139]

The above described post-*Nachova* cases, both in their number and similar fact patterns, indicate that the problem of anti-Roma violence is significant and goes beyond the responsibility of a few individual racist officers. In fact, the many similar cases provided the Court with the opportunity to develop and refine a concise response to institutional anti-Gypsyism. Yet, it repeatedly set the threshold of recognizing the violence as the very manifestation of racism very high. It did so by assessing the evidence against the highest standard of proof, which prevented the shifting of the burden of proof to the respondent government, a measure that is intended to afford effective protection to vulnerable groups. The only step the Court took towards extending effective protection against discrimination is its voicing of the importance of investigating racial undertones. To trigger this obligation, the Court was satisfied by a "reasonable claim" of discrimination brought by the applicant. It looks as if the Court in good faith does not seem to find it conceivable that contracting states would allow the police brutalizing individuals motivated by racism. The haunting implication is thus that it is either equitable excess of authority or racist sloppiness behind these cases, in the Court's mind, and not a systemic, historically entrenched issue. The next chapter will offer some possible explanations to why the Court seems barred from making this recognition.

4. The role of history – explanations and implications

4.1. A theory rooted in history: the Holocaust Prism

Ruth Rubio-Marín and Mathias Möschel propose that a possible explanation of the lack of recognizing racism in anti-Roma violence cases is that Strasbourg judges see racism (at least when it concerns life and bodily integrity) through lenses that have been formed by the "paradigmatic experience of racism", the horrors of the Holocaust.[140] Ironically, the closer the alleged violence is to the actual atrocities that occurred under the Nazi regime, the less

[139] Ibid, §§ 122.
[140] Ruth Rubio-Marín and Mathias Möschel, "Anti-Discrimination Exceptionalism: Racist Violence before the ECtHR and the Holocaust Prism", *European Journal of International Law*, Vol.26, No.4, (2015), 894.

likely the Court will be to denounce it as racist violence.[141] The authors rely on the example of forced sterilization of Roma women in post-socialist Czech Republic, Slovakia and Hungary. This eugenic practice was a core element of Hitler's racial policies, and was continued under the Communist regime as a means to control economic and social issues associated with the Roma.[142] Because the legal response to such grave crimes were formulated with the Holocaust experience in mind, it does not seem to be an issue that the practice of forced sterilizations exhausts the definition of genocide under the 1951 Genocide Convention,[143] it is simply too serious an accusation for the Court to equate a member state's conduct to that of the Nazi Germany.

4.2. Breaking the grounds of non-violent racial discrimination and non-racial violence

The authors point out two cases from the Court's jurisdiction which are of particular interest when looking at anti-Roma discrimination outside the scope of Article 2 and 3, and when looking at Article 2 and 3 outside the scope of anti-Roma violence, but in the form of gender-based discrimination. The first instance is the well-known judgment in the case of *D.H. and Others v The Czech Republic,* which concerned segregation of Roma children in schools of Ostrava. In this case, the Grand Chamber for the first time recognized and condemned a situation of *de facto* discrimination, and affirmed the particular vulnerability of Roma in Eastern Europe.[144] It held that "the [statistical] evidence submitted by the applicants can be regarded as sufficiently reliable and significant to give rise to a strong presumption of indirect discrimination."[145] The second case referred to by Rubio-Marín and Möschel is *Opuz v Turkey*, in which the Court found that the state had a positive obligation to defend women from private violence and that the failure to do so amounted to sex discrimination. The Court reached this conclusion by looking at the facts as a pattern of events posing a risk to women

[141] Ibid, pp 895.
[142] Petrova (2003), pp 154.
[143] Article 2: *In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, racial or religious group, as such… (d) Imposing measures intended to prevent births within the group.*
[144] *D.H. and Others v Czech Republic*, Application no. 57325/00, Judgment of 13 November 2007 at §§ 181. *"(…) [A]s noted in previous cases, the vulnerable position of Roma/Gypsies means that special consideration should be given to their needs (…) in reaching decisions in particular cases. (…) the Court also observed that there could be said to be an emerging international consensus (…) recognizing 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."*
[145] Ibid*,* §§ 195.

in East Turkey. To set out the principles which allowed such a finding, the Court cited its judgment given in *D.H.* as follows:

> "The Court has established in its case-law that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations. (...) It also accepted that disproportionately prejudicial effects on a particular group may be considered discriminatory, and that [notwithstanding the intent] this could result from a *de facto* situation. As to the burden of proof the Court […reiterated] that once the applicant has shown a difference in treatment, it is for the Government to show that it was justified. As regards the question of what constitutes prima facie evidence capable of shifting the burden of proof on to the respondent State, the Court stated in *Nachova* (...) that in proceedings before it there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. (...) The level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. (...) As to whether statistics can constitute evidence, (...) in more recent cases on the question of discrimination in which the applicants alleged a difference in the effect of a general measure or *de facto* situation the Court relied extensively on statistics produced by the parties to establish a difference in treatment between two groups in similar situations."[146]

This reasoning addresses in the affirmative all aspects of anti-discrimination principles that have been highlighted above as enhancing effective protection. This accommodating approach is truly exemplary and in both cases led to groundbreaking judgments. What gives the significance of these judgments is that they take into account the societal context of the cases when considering the distribution of the burden of proof. Accepting statistics and reports as evidence for the establishment of a *prima facie* case and the acknowledgment of indirect discrimination both signal the Court's eagerness to extend the effective protection of victims to the fullest. The Court could very well use its own case law in violent anti-Roma discrimination cases. Already since *Nachova*, it included the very sections cited above that could allow precisely the conclusion that has been needed so badly and long ago: violently

[146] *Opuz v Turkey*, Application no. 33401/02, Judgment of 9 June 2009 at §§ 183. (cf. *D.H.* §§ 177-180.)

targeting minorities because of their identity should be condemned with the utmost charge and without a moment of doubt.

4.3. Political relevance of recognizing racism and acknowledging it in the Court's judgments

Besides - but perhaps partly connected to - the historically rooted explanation, there is a simple political reason as well behind the Court's reluctance to find substantive violations of the discrimination claims in racist police violence cases. That is, the very serious political implications if the Court outright accused member states of tolerating racist violence. The cases arise from the national criminal context, which might validate the Strasbourg judges' wish to rely on their experience from their respective national criminal systems. This, on the one hand, explains the high standard of proof and the *mens rea* requirement that are both applicable in domestic criminal proceedings. On the other hand, as strictly condemned criminal behavior in the national criminal codes, an accusation of racist violent conduct carries a particular stigma. For this reason, and mindful of its subsidiary role, the Court might be tempted not to rule in a way that could in any way induce the prosecution of state agents.[147]

But in reality, this is of course not the case. First, because some cases had simply been formulated as civil redress only or predominantly. Second, and more importantly, because the consequence of the judgment of the Court in no way implies criminal liability.[148] In this sense, the Court could ease this unease by focusing on the racial effect, rather than racist intent, as it did in *D.H.* From the perspective of the states this is presumably preferable,[149] but from the perspective of the sense of justice of the victims, the acknowledgment of their vulnerable position in this form would already bring a significant change.

In addition to this individual level of justice, there is another angle of the political relevance of the content of the judgments. The Court's failure to recognize and acknowledge the racial element so far has prevented, at the level of implementing judgments, the encouragement of measures aiming to effectively combat racist violence in member states. If the Court followed the *D.H.* approach and allowed a *de facto* situation of discrimination to shift the burden of

[147] Rubio-Marín and Möschel, pp 893
[148] Ibid, pp 894
[149] Marie-Bénedicte Dembour, 'Postcolonial Denial', In.: Clarke and Goodale (eds) Mirrors of Justice; Law and Power in the Post-Cold War Era (2009) *Cambridge University Press*, pp 62.

proof to the respondent government, rebutting the presumption of discrimination would only be possible if the state has shown that there have been steps taken to detect and combat institutional bias.[150] This sort of positive duty, derived from the long established climate of discrimination against Roma, would be comparable to the approach to positive action in the US, driven by acknowledging the long history of discrimination and injustice.

Conclusion

This thesis focused on the case law of the ECtHR in the area of anti-Roma violence. The focus was put on the interpretation of the standard and burden of proof, as these are key elements of effective protection against discrimination. By looking at the relevant case law, a record of reluctance became clear, in that the Court did not acknowledge these cases as racist violence. While in all cases the Court found violations of the right to life and prohibition of ill-treatment and the corresponding duty to effectively investigate such allegations, it has, in the course of reviewing an aggravated total of over 50 cases,[151] found only one substantive violation of Article 14 ECHR.[152] The Court has relied traditionally on the highest possible standard of proof, that of "beyond reasonable doubt" when assessing evidence. This has prevented the Court from finding the general climate of hostility against Roma in the concerned states to be sufficient to shift the burden of proof to the respondent government and require the authorities to disprove a possible racist motive behind their actions.

To better understand this approach of the ECtHR, the thesis looked at some possible influences on its jurisprudence. It looked at some American legal traditions, as an important source of inspiration for post-war development in fundamental rights protection. This outlook was further justified by the many similarities that the historically marginalized racial/ethnic minorities, African Americans and Roma have shared. The US Supreme Court developed a system of review that recognizes that effective protection of minorities requires a departure from strict standards of proof. It thus created specific suspect groups, concerning which the shifting of the burden of proof to the alleged discriminator is made procedurally easier. Another specific approach to allowing effective protection to vulnerable groups in the US was upholding affirmative action by the Supreme Court with an express confirmation that

[150] Möschel (2012) pp 504
[151] Möschel, (2012) pp 482.
[152] See **Table 1.** in the *Annexes* for an overview of the cases discussed in Chapter 3.

remedying past discrimination was a legitimate state interest. If the history of oppression of Black people had such an influential role in the development of legal conceptions of effective protection in the United States, the enshrined purpose of the ECHR, namely the prevention of gross human rights violations of World War II must have played a role in the shaping of the European approach. Thus, the thesis further looked at a historically rooted theory to explore the European judges' subconscious.

The authors of this explanatory typology, named the "Holocaust prism", highlighted the dangers of not acknowledging the racism in anti-Roma violence cases. Not only is it dissatisfactory for he victims not to be awarded full justice in their cases, but there are severe societal consequences of the non-recognition of racism in violence against racial/ethnic minorities. The authors called on the Court to overcome the historic barriers, and pointed to other areas where its jurisdiction has been exemplary and could be utilized to acknowledge and act against racist violence.

Such a strong stand from the Court would be essential for individual victims and the vulnerable groups they belong to in terms of affording justice for the wrongs they have suffered and by extending effective protection. A more uniform approach of the Court to recognizing forms of institutional racism would also contribute to bridging a gap in the lack of a common identity among victims of discrimination in Europe. Part of the contextualization of the research was within the loose framework of the American academic movement of Critical Race Theory. CRT as a movement sprung across the US because African American academics at various universities shared a history of oppression and the presence of discrimination in and outside of academia. This common language (symbolically and literally) is not present in Europe, neither are there a sufficient number of minority scholars.[153] The Court's contribution could strengthen the presence of such a transnational alliance, which could perhaps facilitate the start of a discourse comparable to CRT. A key suggestion of the CRT movement is to study race and rights in an integrated positive and practical, reconstructive program.[154] This would entail, within the European context, coming to terms with and addressing implications of history on the conception of race and racism, which seems essential in order to combat it effectively.

[153] Möschel (2014) pp 97-99.
[154] Ibid, pp 54.

The strong message of calling out racism is essential in the still ongoing post-socialist democratization process of Eastern Europe that left the Roma in an exceptionally vulnerable situation. But there is another particular actuality to what Europe understands (and condemns) as racism. It is increasingly important to address the very present tensions between "White Europe" and the many who seek refuge here from war, violence, persecution and unlivable climate (both literally and figuratively). In the parallel reemergence of white supremacist ideologies in the United States as well, it is a crucial time for the courts, as the utmost protectors of individual rights and freedoms to support each other in this important role.

Table 1[*]

Chronology	**Article 2**	**Article 3**	**Article 14**	**Notes, importance**
Assenov and Others v Bulgaria	-	Procedural	Not raised	Custodial violence concerning a minor **Requirement of effective investigation recognized** (*Judge Bonnici's* dissent: vulnerable situation, detention conditions should give rise to violation)
Velikova v Bulgaria	Substantive Procedural	-	No violation	Death in hospital as a result of custodial violence (possibility of injuries excluded because of dark skin)
Anguelova v Bulgaria	Substantive Procedural	No separate examination	No violation	Death in hospital as a result of custodial violence ***Judge Bonello's* dissent**
Nachova and Others v Bulgaria (no.1)	Substantive Procedural	-	Substantive Procedural	Shot by arresting officer **Shifting the burden of proof in discrimination claim**
Balogh v Hungary	-	Substantive Procedural	No violation	Beaten in custody to extract confession
Nachova and Others v Bulgaria (no.2)	Substantive Procedural	-	Procedural	**Leading authority** (reversal of Chamber judgment) **First time separate examination of Article 14 substantive and procedural aspect**
Bekos and Koutropoulos v Greece	-	Substantive Procedural	Procedural	Beaten in custody to extract confession
Moldovan v Romania[x]	-	-	Substantive (in conjunction with Article 6 and 8)	Anti-Roma pogrom, case no.1 unilateral declaration, case no.2 housing claims – **racist remarks of the domestic court recognized as aggravating factor**
Ognyanova and Choban	Substantive Procedural	-	No violation	Death in hospital while under police arrest (fell out of the window)
Šečić v Croatia[y]	-	Substantive Procedural	Procedural	*Hate crime investigation*: beaten by skinheads, 8 years of inaction
Karagiannopoulos v Greece	Substantive Procedural	No separate examination	No violation	Shot in the head by arresting officer (comment about majority of Gypsies being criminal)

Cobzaru v Romania	-	Substantive Procedural	Procedural	Beaten in custody, forced statement about origin of injuries, racist remarks by prosecution (see §§ 31)
D.H. and Others v The Czech Republic[x]	-	-	Violation (13:4)	**Recognizing indirect discrimination** for the first time (in education) based findings on studies, **reports and statistical data**
Petropoulos-Tsakiris v Greece	-	Substantive Procedural	Procedural	Miscarriage as a result of treatment during drug raid of Roma settlement
Stoica v Romania	-	Substantive Procedural	Substantive Procedural	14-year-old applicant tripped and kicked by police after bar aggression scene, prosecution did not address racist motive, condemned villagers for "pure Gypsy behavior" **First and only substantive Article 14 case**
Dzeladinov and Others v The Former Yugoslav Republic of Macedonia	-	Procedural (breach)	Not raised	A group of Roma beaten by police at bar and ill-treated in subsequent related questioning
Beganovic v Croatia[y]	-	Procedural	No violation	*Hate crime investigation*
Opuz v Turkey[x]	Substantive	Substantive	-	**Acceptance of statistical data as evidence** in the prevalence of gender-based discrimination in Eastern Turkey
Shashov and Others v Bulgaria	-	Substantive Procedural	Rejected (no jurisdiction due to non-exhaustion of domestic remedies)	Beaten by (ununiformed) police, who also fired shots to effectuate the arrest, subsequent ill-treatment in custody, racial slurs
Stefanou v Greece	-	Substantive	Rejected	Beaten by police to extract confession (ad hoc interrogation) released but officer kept his cell-phone on the assumption that is was stolen
Carabulea v Romania	Substantive Procedural	Substantive Procedural	Rejected (4:3)	Death in hospital while under police arrest(§§ 31 "they've killed me") + ill-treatment of brother during questioning
Vasil Sashov Petrov v Bulgaria	Substantive Procedural	-	No violation	Shot by arresting officer
Mizigarova. v Slovakia	Substantive Procedural	No separate examination	Rejected	Death in hospital while under police arrest (shot during interrogation)

Soare and Others v Romania	Substantive Procedural	Substantive Procedural (in relation to witnesses)	No violation	Shot in the head by arresting officer (resulting in semi-paralysis)
Durdevic v Croatia[y]		Procedural	Not raised	*Hate crime investigation* and related ill-treatment during questioning
Borbála Kiss v Hungary	-	Substantive Procedural (breach)	Rejected	Excessive force by police (Criminal charges against applicant: obstruction of justice)
Balázs v Hungary[y]	-	In conjunction with Article 14	Procedural (6:1)	*Hate crime investigation:* ignoring 'powerful hate crime indicators'
R.B. v Hungary[y]	-	Rejected	Rejected	*Hate crime* (harassment) *investigation:* "go inside you damned dirty Gypsy/I will paint my house with your blood" - did not meet minimum severity of Article 3: examined under Article 8
M.F. v Hungary	-	Substantive Procedural	Procedural	Beaten in custody to extract confession, racist remarks

x – Non-violent or not anti-Roma cases relevant in the development of the case law

y – Hate-crime investigation cases

[*]This table does not contain forced sterilization cases, cases decided under articles other than Article 2 or 3, settlements and admissibility decisions.

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