Anti-Discrimination Exceptionalism: Racist Violence before the ECtHR and the Holocaust Prism

Ruth Rubio-Marín* and Mathias Möschel**

Abstract

Over the past years, the European Court of Human Rights has significantly developed and strengthened its Article 14 non-discrimination jurisprudence, including in a number of ground-breaking international law cases establishing increased state responsibility with regard to ethnic segregation in education and gender violence. However, in the type of cases that constitute a large part of its non-discrimination case load, namely physical violence against racial minorities, the Court has so far failed to adequately address Article 14 discrimination claims raised by the victims. We posit that this could be caused in part by what we call the 'Holocaust Prism'. Put briefly, the experience of the Holocaust has shaped the manner in which continental European courts understand racism and race discrimination, at least (or especially) when it is combined with violence. Paradoxically, this entails that in the most heinous cases of race discrimination, the discrimination threshold is raised to the level of criminal conduct. Moreover, to the extent that it is, only the ethnic dimension of such discrimination is foregrounded even in cases that present obvious intersectional (for example, ethnicity plus gender) dimensions. We exemplify this phenomenon by discussing recent case law on forced sterilization of Roma women and argue that the Court should become aware of this issue, recognize intersectional discrimination and align its case law on racist violence with the discrimination doctrine emerging in its gender violence and educational race segregation cases, both for the sake of internal consistency and to better capture the structural nature of racial discrimination in Europe.

* Professor of Public Comparative and Constitutional Law at the European University Institute, Florence, Italy. Email: Ruth.Rubio@eui.eu. The authors would like to thank Dorothy Estrada-Tanck for her research assistance and Miluska Kooij for her editorial contribution. Our analysis of case law ended on 30 September 2014.

** Associate Professor of Comparative Constitutional Law and Human Rights at Central European University, Budapest, Hungary. Email: moschelm@ceu.hu.

EJIL (2015), Vol. 26 No. 4, 881–899 doi:10.1093/ejil/chv058

1 Introduction

At first glance, Europe seems to be strongly committed to the fight against race discrimination. The equality provisions of most national constitutions include race and/or ethnicity as a prohibited ground of discrimination or unequal treatment, and national criminal law aggravates crimes, or creates entirely new crimes, if committed with a racist motive. With the Council Directive (EC) 2000/43 (Race Directive),[1] the European Union (EU) has ensured that, throughout its member states, race discrimination is prohibited in many areas, from employment law to the provision of services, when not only state actors but also private individuals are involved. Moreover, in contrast to the situation in the USA, racist speech can be limited more extensively.

Many of these measures are inextricably linked to the Nazi Holocaust and how it has shaped Europe's understanding of racism and race/ethnic discrimination.[2] National constitutions with strong bills of rights containing equality provisions were adopted in the wake of World War II. The Race Directive was adopted surprisingly quickly, arguably as a reaction to Jörg Haider, a populist politician with a Nazi pedigree, becoming part of the government in Austria.[3] Moreover, the European Court of Human Rights (ECtHR), which interprets the European Convention on Human Rights (ECHR), has been able to limit freedom of speech, possibly because such limitations have been useful for the validation of laws prohibiting Holocaust denial or the spreading of Nazi ideology.

At the same time, this underlying influence of the Holocaust on our understanding of what constitutes race discrimination, and how it is paradigmatically expressed, has also made it difficult to recognize and name race, racism, and race discrimination in mainland Europe's context outside the parameters of the (neo-)Nazi sphere. When evoked in a particular instance, the inherent accusation is so strong and symbolically laden as to make it prohibitive, provoking immediate and total rejection. One can interpret France's resistance to the introduction of ethnic statistics in this way, partially justifying it on the grounds that France only collected its citizens' race and ethnicity during the Vichy regime when it served the aim of deporting mainly Jews to extermination camps.[4] Similar are the proposals to eliminate the word 'race' from

[1] Council Directive (EC) 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Race Directive), [2000] OJ L180/22.

[2] While decolonization certainly played a role in developing such a framework, we hold that at least in the mainland European context – and, therefore, for most judges at the European Court of Human Rights (ECtHR) – the Holocaust has shaped the vision of what racism and race discrimination mean. See also French Criminal Code of 1994 in its current version, available at www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000006419417&cidTexte=LEGITEXT000006070719 (last visited 27 October 2015), where Art. R131-35 establishes the accessory sanction of citizenship education training. A person convicted with the aggravating circumstance of racism must attend such training includes a reminder of the existence of crimes against humanity and especially those committed during the Second World War. Racism is thus equivalent to anti-Semitism and not to colonialism or other forms of racism. Similarly, on German exceptionalism, see Barskanmaz, 'Rasse: Unwort des Antidiskriminierungsrechts?', 44 *Kritische Justiz* (2011) 382.

[3] See M. Bell, *Anti-Discrimination Law and the European Union* (2002), at 74.

[4] See Simon, 'Sciences sociales et racisme: où sont les docteurs Folamour?', 3 *Mouvements* (1999) 111; Mucchielli, 'Il n'y a pas de statistique raciste, seulement des interprétations', 3 *Mouvements* (1999) 115.

the French and German constitutions and legislation[5] because it harkens back to an uncomfortable past and is not a scientifically sound concept. Even the ECtHR is not immune to the legacies of the Holocaust and the ways in which it silences everyday racism. The second part of this article demonstrates the general progressive evolution in the Court's approach to Article 14 of the ECHR with a doctrine that holds great potential for the treatment of forms of both racial and gender discrimination, which, interestingly, has not been extended to the treatment of cases dealing with racist violence (set out in the third part of the article). The fourth part will introduce the influence of the Holocaust as an explanation for this discrepancy as well as for the single focus on race (as opposed to gender) in intersectional cases of violence that reproduce the practices of the Holocaust. It will exemplify this sustained hypothesis using case law on the forced sterilization of Roma women.

2 The New Frontiers of Article 14's Anti-Discrimination Doctrine: Educational Race Segregation and Gender Violence as Discrimination

The history of Article 14 and non-discrimination has been a troubled one in the ECtHR's jurisprudence. It has been argued frequently that one of the main obstacles for fully-fledged Article 14 claims was that they could only be brought in conjunction with the violation of other ECHR rights (the ambit criterion), making Article 14 a 'parasitic' provision.[6] However, the Court has developed increasingly strong non-discrimination jurisprudence – for example, by easing up on the accessory character of Article 14, by interpreting the ambit criterion quite broadly and by declaring the list of grounds contained in Article 14 as being illustrative and not exhaustive.[7]

Most importantly, the ECtHR has increasingly moved from a formal equality conception to a more substantive understanding of equality in its case law, accepting claims

[5] See, e.g., the bill of law for France proposing to eliminate the word 'race' from French legislation: Proposition de loi tendant à la suppression du mot 'race' de notre législation, No. 218, XIV[e] Législature (16 May 2013), available at www.assemblee-nationale.fr/14/ta/ta0139.asp (last visited 27 October 2015). For Germany, see, e.g., the policy papers by Cremer: '[U]nd welcher Rasse gehören Sie an?' Zur Problematik des Begriffs 'Rasse' in der Gesetzgebung, Working Paper Series: Deutsches Institut für Menschenrechte, vol. 10 (2009); Ein Grundgesetz ohne 'Rasse': Vorschlag für eine Änderung des Artikels 3 Grundgesetz, Policy Paper Series: Deutsches Institut für Menschenrechte, vol. 16 (2010).

[6] See D.J. Harris, M. Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (1995), at 463. Protocol 12 established Article 14 as a self-standing right. Protocol 12 to the ECHR 2000, ETS 177, available at http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=177&CL=ENG (last visited 27 October 2015).

[7] On various elements of this evolution, see, e.g., Wintemute, '"Within the Ambit": How Big Is the "Gap" in Article 14 European Convention on Human Rights', *European Human Rights Law Review* (2004) 366; O'Connell, 'Cinderella Comes to the Ball: Art. 14 and the Right to Non-Discrimination in the ECHR', 29 *Legal Studies* (2009) 211; Danisi, 'How Far Can the European Court of Human Rights Go in the Fight against Discrimination? Defining New Standards in Its Non-Discrimination Jurisprudence', 9 *International Journal of Constitutional Law* (2011) 793; Besson, 'Evolutions in Non-Discrimination Law within the ECHR and ESC Systems: It Takes Two to Tango in the Council of Europe', 60 *American Journal of Comparative Law* (2012) 147.

of reasonable accommodation and indirect discrimination.[8] From the start, the Court has focused on whether the different treatment of otherwise similar situations has had an objective or reasonable justification, exploring whether there was a legitimate aim and a reasonable relationship of proportionality between the means employed and the aim sought to be realized. In this aim, contracting states were granted a certain margin of appreciation in assessing whether, and to what extent, differences in otherwise similar situations justified a different treatment in law.[9] More recently, the Court has explicitly endorsed a substantive interpretation of the anti-discrimination provision, placing the emphasis on ensuring the effective enjoyment of rights by acknowledging that discrimination can consist also of treating different situations similarly, so that in order not to violate Article 14 a special accommodation may in fact be required.[10] Furthermore, the Court has recognized that an Article 14 violation may arise from a de facto discrimination (that is, the way a law was applied), as opposed to a de jure discrimination, wherein the laws or regulations directly discriminate,[11] and that general policies or measures that have disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that they are not specifically aimed at that group.[12]

For our purposes, the expansive evolution on the applicable burden of proof in discrimination cases is also of equal importance in view of the difficulties an applicant may have in showing discrimination.[13] Acknowledging such difficulties, the idea of sharing or shifting the burden of proof has gradually become accepted in national and international law and practice, with the ECtHR following the lead of the European Court of Justice and the European directives.[14] The ECtHR has also increasingly, albeit inconsistently, moved towards this analytical framework, with adaptations depending on whether the case before it concerned direct discrimination, indirect discrimination and/or reasonable accommodation. Even though the Court does not always respect this order of analysis, the applicant, in general, has had to present a *prima facie* case of discrimination, which mainly entails showing (i) a different or similar treatment; (ii) the grounds of discrimination and (iii) the comparability of situations. At this point, the burden shifts to the state, which has needed to justify the measures and demonstrate that reasons other than discrimination were/are at work.[15] In addition,

[8] See O.M. Arnardottir, *Equality and Non-Discrimination under the European Convention on Human Rights* (2002).

[9] See, e.g., *Inze v. Austria*, Appl. no. 8695/79, Judgment of 28 October 1987, at 41; *Gaygusuz v. Austria*, Appl. no. 17371/90, Judgment of 16 September 1996, para. 42.

[10] The leading case is *Thlimmenos v. Greece*, Appl. no. 34369/97, Judgment of 6 April 2000.

[11] See *Zarb Adami v. Malta*, Appl. no. 17209/02, Judgment of 20 June 2006, at 49.

[12] See, e.g., *Hugh Jordan v. the United Kingdom*, Appl. no. 24746/94, Judgment of 4 May 2001, para. 154. See also the discussion of Roma education segregation cases later in this article.

[13] Arnardottir, 'Non-Discrimination under Article 14 ECHR: The Burden of Proof', 51 *Scandinavian Studies in Law* (2007) 13.

[14] See, e.g., at the European Union (EU) level, Council Directive (EC) 97/80 on the burden of proof in cases of discrimination based on sex [1998] OJ L14/6; Race Directive, *supra* note 1, Art. 8, which has introduced the shifting of burden of proof to the defendant once the plaintiff has shown a *prima facie* case.

[15] See, e.g., *Chassagnou and Others v. France*, Appl. nos 25088/94, 28331/95 and 28443/95, Judgment of 29 April 1999, paras 91–92.

the Court has established that in certain circumstances, where the events at issue lie wholly, or in large part, within the exclusive knowledge of the authorities, it falls to the authorities to provide a satisfactory and convincing explanation.[16] Finally, with regard to the type of information needed to establish a *prima facie* case of discrimination, the Court has become much more flexible by recognizing that statistics, among other things, can be sufficient to shift the burden of proof to the respondent states.[17] This jurisprudential evolution has had a clear impact on the conceptualization of educational racial segregation and gender violence as forms of discrimination.

A *Race Discrimination in Education Segregation Cases*

The ECtHR explicitly dealt with an indirect discrimination claim for the first time in *D.H. and Others v. Czech Republic* (*Ostrava* case), finding a violation of Article 14 and heavily relying on the fact that statistics could be used to establish a *prima facie* case of indirect discrimination.[18] The applicants from Ostrava argued that there existed de facto a segregated school system because the probability of a Roma child being transferred to a special school for children with mental deficiencies was 27 times higher than for non-Roma children. According to the applicants, this constituted a violation of Article 14, read in conjunction with Article 2 of Protocol 1 on the right to education. With one judge dissenting, the Second Chamber held that no Convention right had been violated, as it did not find the statistics indicative of racial prejudice in the placement of Roma children into special schools, especially considering that the schools also offered support services to some non-Roma children.[19] The Grand Chamber, however, reversed the decision in what has today become one of the Court's best-known cases.

Reflecting evolving European anti-discrimination law standards, the ECtHR considered that racial and ethnic discriminations are particularly invidious kinds of discrimination requiring special vigilance and a vigorous reaction from the authorities so that no difference in treatment, based either exclusively or to a decisive extent on a person's ethnic origin, is allowed to be objectively justified.[20] The Court recalled that discrimination can also occur when a general policy or measure has disproportionately prejudicial effects on a particular group, notwithstanding the fact that it is not specifically aimed at that group. With respect to the burden of proof, the judges held that once the applicant has been able to demonstrate a difference in treatment, the burden falls to the government to show that such treatment was justified. Finally, the judges stressed the fact that Roma/Gypsies are a particularly vulnerable group, which means that special consideration should be given to their needs and different lifestyle.[21]

[16] See, e.g., *Salman v. Turkey*, Appl. no. 21986/93, Judgment of 27 June 2000, para. 100.

[17] See *Hoogendijk v. the Netherlands* (dec.), Appl. no. 58641/00, Judgment of 6 January 2005; *D.H. and Others v. Czech Republic*, Appl. no. 57325/00, Judgment of 13 November 2007.

[18] *Ibid. D.H. and Others v. Czech Republic*, Appl. no. 57325/00, Judgment of 7 February 2006.

[19] *D.H. and Others*, *supra* note 18.

[20] *Ibid.*, paras 175–177.

[21] *Ibid.*, para. 181.

Having thus set out the general principles applying to this case, the Grand Chamber framed the specific issue as one of indirect discrimination, namely whether:

> the manner in which the legislation was applied in practice resulted in a disproportionate number of Roma children – including the applicants – being placed in special schools for children with mental deficiencies without justification, and whether such children were thereby placed at a significant disadvantage.[22]

Beginning with the relevance of statistical evidence as a way to establish a *prima facie* case of indirect discrimination, the ECtHR held that the statistics provided by the applicants, showing that 56 per cent of all pupils placed in special schools in Ostrava were Roma, were sufficient evidence to create a rebuttable presumption of indirect discrimination and shift the burden of proof onto the government.[23] In the end, the prejudicial effects resulting from the placement in special schools led to a finding of non-proportionality under the objective and reasonable justification test and, thus, to a violation of Article 14 of the ECHR, read in conjunction with Article 2 of Protocol 1.[24]

The importance of *D.H. and Others* cannot be overestimated. With this Grand Chamber judgment, the ECtHR was finally aligning itself with European law on indirect discrimination. Moreover, relying on international and comparative material showing the general and structural situation of discrimination that Roma are exposed to in the Czech Republic and in the Ostrava region, the Court declined having to analyse the case of each single applicant since a significant disadvantage was deemed to be almost a given. For this reason, the judgment has been defined as revolutionary, rather than a mere renovation or evolution of the ECtHR's case law on indirect racial discrimination.[25] Crucially, *D.H. and Others* has not remained an isolated case. Quite the contrary, the Court has since confirmed, and even further built on, this case in subsequent judgments, thus symbolically stressing the seriousness of ethnic discrimination.[26]

B *Gender Violence as Discrimination*

Over the years, another form of discrimination, namely gender discrimination in the form of gender violence, has also gained increasing recognition in the case law of the ECtHR, benefiting also from the mentioned shift towards substantive understandings of equality. Developments in this domain are arguably best epitomized by *Opuz v. Turkey*,[27] which built on some of the Court's previous decisions.[28] In *Opuz*, the Court

[22] *Ibid.*, para. 185.

[23] *Ibid.*, paras 187–195.

[24] *Ibid.*, paras 208–210. Protocol 1 to the ECHR 1993, ETS 151.

[25] Dubout, 'L'interdiction des discriminations indirectes par la Cour européenne des droits de l'homme: rénovation ou révolution?', *Revue trimestrielle des droits de l'homme* (2008) 821.

[26] See *Sampanis and Others v. Greece*, Appl. no. 32526/05, Judgment of 5 June 2008; *Sampanis v. Greece*, Appl. no. 59608/09, Judgment of 11 December 2012; *Lavida and Others v. Greece*, Appl. no. 7973/10, Judgment of 30 May 2013; *Oršuš and Others v. Croatia*, Appl. no. 15766/03, Judgment of 16 March 2010; *Horváth and Kiss v. Hungary*, Appl. no. 11146/11, Judgment of 29 January 2013.

[27] *Opuz v. Turkey*, Appl. no. 33401/02, Judgment of 9 June 2009.

[28] See, notably, *Bevacqua and S. v. Bulgaria*, Appl. no. 71127/01, Judgment of 12 June 2008. Here the Court acknowledged Bulgaria's responsibility for breach of Art. 8 (right to respect of private and family life) for failure to protect the applicant and her young son from the violent behaviour of her former husband.

held that a state had a positive obligation to defend women from 'private' violence and that a failure to do so in fact amounted to sex discrimination, thereby echoing the growing international recognition of gender violence as a form of sex discrimination, given its largely disparate impact on women and its contribution to the entrenchment of gender subordination.[29]

The applicant, Nahide Opuz, had been subjected to different forms of physical and psychological mistreatment by her husband, including death threats, which he also directed against her mother, whom he eventually shot dead. For years, the facts had been brought to the attention of state officials, but with no significant effect on the protection of Opuz and her mother, and after the death of the applicant's mother, the state had failed to duly prosecute and punish the perpetrator. In addressing the case, the ECtHR held the state responsible for failing to exercise due diligence to adequately protect women from domestic violence, spelling out some of the practical obligations that such protection required and that the Turkish state had failed to provide.[30] Looking at the events, not as isolated incidents but, rather, as part of a pattern amounting to a situation of risk, the Court recognized that a state's failure to exercise due diligence to protect women against domestic violence, when it 'knows or ought to have known of the situation',[31] breached its positive obligation of taking 'preventive operational measures'.[32]

In order to examine and characterize the general situation of violence against women, including domestic violence, in Turkey as being discriminatory, the decision relied on criteria proposed by international bodies[33] as well as on reports by non-governmental organizations suggesting that domestic violence was generally tolerated by the authorities in the region. Basing the facts of the individual case in the general context of discrimination against women in Turkey, the ECtHR concluded that the failure to exercise due diligence amounted not only to a violation of the right to life of the applicant's mother, and the right to freedom of inhuman or degrading treatment of the applicant (Articles 2 and 3 of the ECHR) but also to the prohibition of gender-based discrimination under Article 14 of the Convention, in relation to those other rights, because of the differential impact that the state's inaction had on women.[34] Tellingly, the applicant's reliance on general statistical information was taken to be sufficient to show the existence of a *prima facie* indication of discrimination, which, in view of the judicial passivity towards violence against women, the Turkish authorities could not

[29] UN Committee on the Elimination of Discrimination against Women (CEDAW Committee), General Recommendation No. 19: Violence against Women, UN Doc. A/47/38 (1992), cited by the ECtHR in *Opuz*, *supra* note 27, para. 74.

[30] In particular, it highlighted the need for enforceable measures of protection as well as a legislative framework enabling criminal prosecutions of domestic violence in the public interest regardless of the withdrawal of charges by the private party in the most serious cases.

[31] *Opuz*, *supra* note 27, para. 130.

[32] *Ibid.*, para. 148.

[33] Such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979, 1249 UNTS 13, and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women 1994, 33 ILM 1534. See *Opuz*, *supra* note 27, para. 185.

[34] *Ibid.*, paras 200, 201 and concluding para. 7.

disprove.[35] Although *Opuz* was the first time that the ECtHR had appreciated gender violence as a form of discrimination, other cases have followed that have allowed the Court to confirm its basic doctrine on state responsibility for violence against women by non-state actors[36] – a doctrine that has been built with the building blocks of disparate impact discrimination and the evidentiary value of statistics portraying a general state of things.[37]

3 Anti-Discrimination Exceptionalism: Racist Violence before the ECtHR

Within this larger evolution of the ECtHR's discrimination case law, one area seems to have remained almost immune from these doctrinal evolutions, namely racist violence. What is striking is that this is not a minor subject area but, rather, the pre-dominant type of fact pattern in the Court's non-discrimination case docket. The Court's initial position on Article 14, when brought into conjunction with the violation of Article 2 (on the right to life) and/or Article 3 (on the prohibition of torture and inhuman or degrading treatment), was quite clear: outright denial. Thus, in the year 2000, in *Velikova v. Bulgaria*,[38] which concerned a Roma man who had died after spending 12 hours in police custody following his arrest and detention on charges of cattle theft, the ECtHR found a violation of Article 2, yet no Article 14 violation, in spite of the fact that a police officer had referred to the victim as a 'Gypsy'[39] and that another investigator had noted that the injuries on the victim's body were not visible due to the 'dark colour of his skin'.[40] While remarking that there were serious reasons to take on Article 14 complaints, the Court nevertheless applied a 'beyond reasonable doubt' standard to the motives behind the conduct.[41]

[35] *Ibid.*, para. 198.

[36] See *E.S. and Others v. Slovakia*, Appl. no. 8227/04, Judgment of 15 September 2009; *Rantsev v. Cyprus and Russia*, Appl. no. 25965/04, Judgment of 7 January 2010; *A. v. Croatia*, Appl. no. 55164/08, Judgment of 14 October 2010; *Hajduová v. Slovakia*, Appl. no. 2660/03, Judgment of 13 November 2010. The '*Opuz* line' was left aside in the recent judgment of *A.A. and Others v. Sweden*, Appl. no. 14499/09, Judgment of 28 June 2012, yet picked up again in *Valiulienė v. Lithuania*, Appl. no. 33234/07, Judgment of 26 March 2013.

[37] A violation of Art. 14 has not been found in every single instance but clearly *Opuz* remains valid law. See, e.g., four recent cases in which the ECtHR explicitly relied on *Opuz* to confirm that the state's failure to protect women against domestic violence amounted to an Article 14 violation: *Eremia and Others v. the Republic of Moldova*, Appl. no. 3564/11, Judgment of 28 May 2013; *Mudric v. the Republic of Moldova*, Appl. no. 74839/10, Judgment of 16 July 2013; *B. v. Republic of Moldova*, Appl. no. 61382/09, Judgment of 16 July 2013; *T.M. and C.M. v. the Republic of Moldova*, Appl. no. 26608/11, Judgment of 28 January 2014.

[38] *Velikova v. Bulgaria*, Appl. no. 41488/98, Judgment of 18 May 2000. The case had already been preceded by *Assenov and Others v. Bulgaria*, Appl. no. 24760/94, Judgment of 28 October 1998, involving violence against Roma people, but here no separate Article 14 claim had been brought. For a critique of this line of cases, see Möschel, 'Is the European Court of Human Rights' Case Law on Anti-Roma Violence "beyond Reasonable Doubt"?', 12 *Human Rights Law Review* (2012) 479.

[39] *Velikova, supra* note 38, paras 15, 16 and 18.

[40] *Ibid.*, para. 26.

[41] For the Court, the 'material before it does not enable [it] to conclude beyond reasonable doubt that [the] death and the lack of a meaningful investigation into it were motivated by racial prejudice as claimed by the applicant.' *Ibid.*, para. 94.

An essentially analogous reasoning was adopted two years later in *Anguelova v. Bulgaria*, a 2002 judgment,[42] even though, this time, in what has arguably become the key dissenting opinion in cases dealing with racist violence by the police, Judge Bonello scathingly criticized the ECtHR's arbitrariness in adopting the standard of proof beyond reasonable doubt[43] and proposed some concrete changes to the jurisprudence of Article 14, such as shifting the burden of proof to the respondent state and/or extending the doctrine of 'procedural violation', which were already operative for Articles 2 and 3.[44] Judge Bonello's dissent seems to have had some effect on the Court's case law. Indeed, starting with the Grand Chamber's decision in *Nachova and Others v. Bulgaria* in 2005,[45] an increasing number of cases involving racist violence against Roma people have ended up with the Court at least finding a procedural violation. Such findings have taken place mainly in cases of private violence – that is, where the state is only responsible for insufficient and/or slow investigations and/or trials into the racist background of the violence and in cases of police violence where the state has failed to investigate or prosecute the racist background of its own agents.

Judge Bonello's dissent seems to also have somewhat tempered the Court's almost automatic referral to the burden of proof 'beyond reasonable doubt.'[46] Indeed, in the *Nachova* Chamber decision, the Court stated that the 'standard should not be interpreted as requiring such a high degree of probability as in criminal trials' and that 'proof may follow from the co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact', resisting 'suggestions to establish rigid evidentiary rules' and adhering to the 'principle of free assessment of all evidence'.[47] In the Grand Chamber decision that followed, while still referring to a high standard of proof, the Court noticed that 'its role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention'.[48]

In spite of these findings, the ECtHR in *Nachova* stopped short of embracing the plain test of whether Roma people or other racial minorities are being treated differently in similar situations, which is the standard test in most other non-discrimination cases, much less admitted the evidentiary relevance of statistics in order to establish a *prima facie* case that would shift the burden of proof to the state. This result can be in part explained by another aspect emerging from *Nachova*, namely the (conceptual)

[42] *Anguelova v. Bulgaria*, Appl. no. 38361/97, Judgment of 13 June 2002, paras 167, 168.

[43] *Ibid.* paras 9–11 (Bonello dissenting).

[44] *Ibid.*, paras 13–18 (Bonello dissenting). This distinction between procedural and substantive ECHR right violations is important. The former occurs when a state's investigation into the alleged human rights violation was insufficient, thereby violating the ECHR, whereas the latter means that the state is found guilty for the actual human rights violation itself. The ECtHR had already accepted this distinction for Art. 2 (*McCann and Others v. United Kingdom*, Appl. no. 18984/91, Judgment of 27 September 1995) and for Art. 3 (*Assenov and Others*, *supra* note 38).

[45] *Nachova and Others v. Bulgaria*, Appl. nos. 43577/98 and 43579/98, Judgment of 28 February 2002.

[46] The Court had derived this extremely high standard from an early case. *Ireland v. United Kingdom*, Appl. no. 5310/71, Judgment of 18 January 1978.

[47] *Nachova and Others*, *supra* note 45, para. 166.

[48] *Ibid.*, para. 147.

separation of (racist) violence cases from other discrimination cases. In the words of the Court:

> [w]hile in the legal systems of many countries proof of the discriminatory effect of a policy or decision will dispense with the need to prove intent in respect of alleged discrimination in employment or the provision of services, that approach is difficult to transpose to a case where it is alleged that an act of violence was racially motivated.[49]

Looking for evidence of specific motives has prevented the Court from asking generally whether, in view of the evidence before it, it can simply accept that certain ethnic minorities are more likely than others to be victims of police, state or private violence and probably from finding violations of Article 14 more easily once it is faced with a concrete case of relevant indicia.

General information and statistics could be relied upon to set presumptions and shift the burden of proof (as in the Roma education or the gender violence context), alleviating the victim from the almost impossible task of demonstrating a particular subjective attitude. Yet this way of proceeding has been the rare exception.[50] In the end, the obsession around individual motives has blinded the ECtHR to the fact that all that really matters is that, in view of both general patterns and concrete indicia, the Court is convinced that the ethnicity of the person is likely to have been related to his/her victimization in accounting for why, how and how much violence was inflicted upon him or her (that is, different treatment).

Doctrinal framing will have to change for the numbers to change as well, considering that so far the overall balance is – not surprisingly – unpromising. In numerous judgments and decisions dealing with violence against Roma, Kurds, Chechens and other racial(ized) and/or religious minorities, the ECtHR – or the Commission under the previous ECHR's system – has rejected the Article 14 claim in separate admissibility decisions;[51] accepted a worryingly high number of friendly settlements[52] and unilateral declarations;[53] rejected the Article 14 claim in its merits[54] or only found

[49] *Ibid*., para. 157.

[50] Notice, however, that the ECtHR has not ruled out the possibility in theory. Thus, in *Mižigárová v. Slovakia*, Appl. no. 74832/01, Judgment of 14 December 2010, para. 117, the Court affirmed that, in view of 'contemporaneous reports documenting – allegation of police brutality' … '[i]n respect of persons of Roma origin, 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'.

[51] See, e.g., *Ilhan v. Turkey*, Appl. no. 22277/93, Judgment of 27 June 2000. Complaints under Art. 14 were no longer maintained after the Commission declared there had been no violation under Art. 14. *Notar v. Romania*, Appl. no. 42860/98, Judgment of 13 November 2003; *K.H. and Others v. Slovakia* (dec.), Appl. no. 32881/04, Judgment of 9 October 2007; *Ferhat Kaya v. Turkey*, Appl. no. 12673/05, Judgment of 25 September 2012.

[52] Friendly settlements are negotiated settlements between the applicant and the respondent state. See, e.g., *Ferenčíková v. Czech Republic*, Appl. no. 21826/10, Judgment of 30 August 2011; *R.K. v. Czech Republic*, Appl. no. 7883/08, Judgment of 27 November 2012.

[53] When a friendly settlement has failed, the respondent state can nevertheless acknowledge the violation of a ECHR right and promises redress by unilateral declaration. Against the applicant's will, the Court can accept such declarations and strike the case out of the records. See, e.g., *Kalanyos v. Romania*, Appl. no. 57884/00, Judgment of 26 April 2007; *Alder v. United Kingdom*, Appl. no. 42078/02, Judgment of 22 November 2011.

[54] See, e.g., *Menteş and Others v. Turkey*, Appl. no. 23186/94, Judgment of 28 November 1997; *Kaya v. Turkey*, Appl. no. 22729/93, Judgment of 19 February 1998; *Ognyanova and Choban v. Bulgaria*, Appl. no. 46317/99, Judgment of 23 February 2006; *Sashov and Others v. Bulgaria*, Appl. no. 14383/03,

a procedural Article 14 violation.[55] Add those cases in which no Article 14 claim was brought, even though the violence involved a racial minority,[56] those that were declared inadmissible from the start[57] or those that are still pending,[58] and one gets roughly 90 cases of death, violence and bodily harm against racial(ized) minorities that have been dealt with by the ECtHR. While in many of these cases, the judges did find a substantive and/or procedural violation of Articles 2 and/or 3 of the ECHR, in very few cases has it found a substantive violation of Article 14.[59] Not promising indeed.

4 The Explanatory Hypothesis: The Holocaust Prism and Forced Sterilization

So what causes this discrepancy in the ECtHR between the general evolution of the non-discrimination doctrine in regard to the (ir)relevance of intent and the shift of the burden of proof, especially in cases of well-documented patterns of discrimination and the approach taken in racist violence cases? There is probably not one single comprehensive answer to this question, and all we can look for are plausible hypotheses. One aspect has already been alluded to earlier and can be related to the fact that the Court itself first distinguishes the racial violence cases from those of employment or provision of services[60] and then explicitly extends this distinction to education.[61] This separation could be explained by the fact that these violence cases most often arise in a

---

Judgment of 7 January 2010; *I.G. and Others v. Slovakia*, Appl. no. 15966/04, Judgment of 13 November 2012; *Amadayev v. Russia*, Appl. no. 18114/06, Judgment of 3 July 2014.

55 This group of cases includes both state and private violence cases (indicated by S and P respectively). Only in state-sponsored violence cases can the ECtHR find a substantive Article 14 violation. See, e.g., *Nachova and Others, supra* note 45 (S); *Milanovic v. Serbia*, Appl. no. 44614/07, Judgment of 14 December 2010 (P); *B.S. v. Spain*, Appl. no. 47159/08, Judgment of 24 July 2012 (S); *Virabyan v. Armenia*, Appl. no. 40094/05, Judgment of 2 October 2012 (S); *Abdu v. Bulgaria*, Appl. no. 26827/08, Judgment of 11 March 2014 (P).

56 See, e.g., *Đurđević v. Croatia*, Appl. no. 52442/09, Judgment of 19 July 2011; *Eremiášová and Pechová v. Czech Republic*, Appl. no. 23944/04, Judgment of 16 February 2012 (as revised on 20 June 2013); *Borbála Kiss v. Hungary*, Appl. no. 59214/11, Judgment of 26 June 2012.

57 See, e.g., *Puky v. Slovakia* (dec.), Appl. no. 45383/07, Judgment of 14 February 2012; *Červeňáková v. Czech Republic* (dec.), Appl. no. 26852/09, Judgment of 23 October 2012; *Z.K. v. Slovakia* (dec.), Appl. no. 13606/11, Judgment of 1 April 2014.

58 See, e.g., *Fogarasi and Others v. Romania*, Appl. no. 67590/2010, lodged on 15 November 2010; *Boacă and Others v. Romania*, Appl. no. 40355/11, lodged on 13 June 2011; *Boacă and Others v. Romania*, Appl. no. 40374/11, lodged on 13 June 2011; *R.B. v. Hungary*, Appl. no. 64602/12, lodged on 2 October 2012; *Adam v. Slovakia*, Appl. no. 68066/12, lodged on 22 October 2012; *Cioban and Others v. Romania*, Appl. no. 58616/13, lodged on 6 September 2013.

59 *Moldovan and Others v. Romania (No. 2)*, Appl. nos. 41138/98 and 64320/01, Judgment of 12 July 2005 (even though, strictly speaking, the Art. 14 violation was found in conjunction with Art. 6 and not with Arts 2 or 3); *Stoica v. Romania*, Appl. no. 42722/02, Judgment of 4 March 2008; *Makhashevy v. Russia*, Appl. no. 20546/07, Judgment of 31 July 2012; *Antayev and Others v. Russia*, Appl. no. 37966/07, Judgment of 3 July 2014.

60 See *Nachova and Others, supra* note 45.

61 See, e.g., *D.H. and Others, supra* note 17, as confirmed by *Horváth and Kiss*, *supra* note 26, para. 106.

national criminal law context, where, in order to affirm the racist nature of the crime, the requirement of *mens rea* (that is, not only the intent to kill, harm or sterilize but also to do so motivated exclusively by racism) is typically one of the necessary elements of the crime, which the prosecution will need to prove beyond a reasonable doubt.

Being familiar with these principles from their national practice and experience, or fearing that its finding of an Article 14 violation may suggest or lead to criminal domestic prosecution of state agents for acts and crimes, it is not surprising that the judges in the ECtHR are tempted to simply transpose their national criminal law standards to their interpretation of racist violence under Article 14 of the ECHR. Unlike in cases of gender violence, which mostly deal with positive obligations (and, thus, more indirect violations) on the part of the state, and other (mostly education-related) race discrimination cases, where the violation does not focus on a specific act of deliberate harms (resulting from a seemingly neutral policy), the Court may simply be reluctant to directly attribute racism to specific state actors for violent conduct, mainly because these kinds of actions tend to be serious criminal offences under domestic law and, as such, carry a particular stigma as well.

However, this may not be the entire explanation, for some of the cases have been framed explicitly as civil cases before reaching the ECtHR, with the plaintiffs demanding compensation as a form of civil redress.[62] More importantly, nor can it be a convincing explanation, considering that the plaintiff in these cases is not a public prosecutor and the consequences for the defendant are not a criminal sanction but, rather, international liability for human rights violations and the payment of some sort of damages. Criminal responsibility would have to be decided separately and under the adequate domestic and/or international criminal law standards. What is interesting, however, is that even in those few cases where the judges self-reflectively elaborate on relevant differences, the results do not seem to change significantly.[63]

A second account may be related to the ECtHR's difficulty in recognizing race discrimination claims more broadly, a phenomenon that Marie-Bénédicte Dembour has referred to as 'post-colonial denial'.[64] According to Dembour, the Court's poor record is caused by a structural failure to recognize the historical relevance of empire and (post-)colonialism in most cases involving race discrimination claims. By conceptually linking (post-)colonialism to Edward Said's Orientalism and to the fact that Western Europe has considered Eastern Europe to be some sort of Russian colony and, thus, as 'demi-Orientalized', Dembour is able to include the anti-Roma violence cases in her post-colonial denial framework.[65]

[62] The civil proceedings brought at the national level in most of the forced sterilization cases, of which there is more in detail later in this article, as well as in some of the other racist violence cases were part of the procedural picture in which the plaintiffs did not obtain any satisfaction. See, e.g., *Mižigárová, supra* note 50, paras 48–54; *Vasil Sashov Petrov v. Bulgaria*, Appl. no. 63106/00, Judgment of 10 June 2010, para. 21.

[63] See, e.g., *Nachova and Others, supra* note 45, para. 147; *Virabyan, supra* note 55, para. 202, where the ECtHR explicitly noticed that its role was not 'to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention'.

[64] Dembour, 'Postcolonial Denial: Why the European Court of Human Rights Finds It So Difficult to Acknowledge Racism', in K. Clarke and M. Goodale (eds), *Mirrors of Justice: Law and Power in the Post-Cold War Era* (2009) 45.

[65] *Ibid.*, at 51–53. E. Said, *Orientalism* (1979).

Agreeing with this broader framing of the challenge, we posit that yet another rationale – which again relates to the unconscious, extra-judicial level of decision making and the role of history – may specifically underlie those race cases that involve state-sponsored violence – a hypothesis that we refer to as the 'Holocaust Prism'. The idea is that the Holocaust trauma has shaped what the ECtHR understands to be the paradigmatic experience of racism, at least when life or bodily integrity (including reproductive integrity) is affected. This connection automatically invites a *Gestalt* shift, whereby those standards that were developed as a response to the Holocaust experience, articulated mostly around the definition of genocide and crimes against humanity, become predominant.[66] In doing so, the Court basically regards the discrimination claim through the lenses and standards of national and international criminal law in a way that renders the grasping of ordinary institutional racism by state agents, including the police, more difficult.[67] It forgets, in other words, that, under international human rights law, discrimination does not require any kind of specific *animus*, referring instead to any unjustified distinction, exclusion, restriction, preference or other differential treatment that is directly or indirectly based on a set of (non-exhaustive) prohibited grounds of discrimination – including race and ethnic and national origin – with the intention or effect of nullifying or impairing the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal footing.[68]

The problem is that having genocide in the back of one's mind when analysing racial violence cases will make it extremely hard to find an Article 14 violation, not only because of the ECtHR's understandable reluctance to act as a criminal law court[69] but also in view of the seriousness of the accusation and the political reactions that may ensue from accused state parties. Ironically then, the closer the forms of discriminatory violence resemble those that actually occurred under the Holocaust (physical abuse by state officials, systematic killings and forced sterilizations, including of Roma people), the less likely the Court is to be inclined to denounce the practice

[66] Rome Statute on the International Criminal Court (Rome Statute) 1998, 2187 UNTS 90, Art. 6 defines genocide as 'any of the following acts committed with *intent* to destroy, in whole or in part, a national, ethnic, racial or religious group,' such as: '(d) Imposing measures intended to prevent births within the group'. Among the list of crimes against humanity, as acts which must be committed as part of a widespread or systematic attack directed against any civilian population, Art. 7 (g) of the Rome Statute includes 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity' (emphasis added).

[67] The ECtHR's approach is in contrast with the evolution around racial violence in some European countries. In the United Kingdom, following the police mishandling of the investigation into the murder of Stephen Lawrence (a young black man), a judicial inquiry found heavy institutional racism in the London police, which defined institutional racism in its report without any reference to intent. See M. Bell, *Racism and Equality in the European Union* (2009), at 11.

[68] See this definition in UN Committee on Economic, Social and Cultural Rights (CERD Committee), General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, Doc. E/C.12/GC/20, 2 July 2009, para. 7. International Covenant on Economic Social and Cultural Rights 1966, 993 UNTS 3, Art. 2, para. 2.

[69] On this reluctance, see S.C. Grover, *The European Court of Human Rights as a Pathway to Impunity for International Crimes* (2010), in particular 93–129, discussing forced sterilizations of Roma women.

as racial discrimination, duly taking into account the broader context as documented in reports and statistics. Instead, it is far more likely that it will analyse it according to the elements enshrined in criminal law to determine individual criminal responsibility. This may explain why, even when the Court acknowledges that racism might be at work, it refuses to call it such, either finding only a procedural violation or 'hiding' the race discrimination analysis under another article of the ECHR.[70]

The best example of how this Holocaust Prism may be distorting the ECtHR's understanding of racist violence as a form of discrimination can be gleaned from a group of cases that, in terms of the phenomenology of violence, closely resemble – to put it mildly – certain expressions of Holocaust violence, namely those cases concerning the forced sterilization of Roma women in the Czech Republic and Slovakia.[71] The cases are also particularly striking because although they affect Roma women and could have been approached through the primordial lenses of gender violence as an acknowledged form of discrimination, the race element in them seems to have completely overshadowed the gender dimension. This has prevented the doctrine of gender violence as a form of discrimination, firmly established in *Opuz v. Turkey*, from coming to the fore and has invited instead the genocidal parameters to prevail, rendering the naming and condemning of racial/ethnic discrimination impossible. Let us take a closer look.

A *Forced Sterilization of Roma Women under the ECHR*

Forced sterilization or compulsory sterilization occurs when surgical sterilization is performed on a person without that person's consent. From the 1920s on, examples inspired by eugenics can be found all over the world.[72] Certainly the most infamous ones are the Nazi German sterilization programs targeting Jews, Roma and disabled people, which were introduced by law in July 1933.[73] However, even countries often

[70] See, e.g., *Koky and Others v. Slovakia*, Appl. no. 13624/03, Judgment of 12 June 2012. Notice, however, that the understanding of racial violence as a form of racial discrimination has at least been partly captured by the CERD Committee. In 1993, in paragraph 1 of its General Recommendation No. 15, the CERD Committee reiterated that when the International Convention on the Elimination of All Forms of Racial Discrimination was being adopted (in 1965), 'article 4 [which compels States to declare an offence punishable by law all acts of violence or incitement to such acts against any race or group of persons] was regarded as central to the struggle against racial discrimination. At that time, there was a widespread fear of the revival of authoritarian ideologies'. CERD Committee, General Recommendation No. 15: Organized Violence Based on Ethnic Origin, UN Doc. A/48/18, 23 March 1993, Art. 4. Moreover, in 2000, the same Committee issued General Recommendation No. 27, which in s. 2, paras 12–16, includes a whole section on the obligation of state parties to adopt '[m]easures for protection against racial violence'. CERD Committee, General Recommendation No. 27: Discrimination against Roma of UN Doc. A/55/18, 16 August 2000, Annex V.

[71] In chronological order, *K.H. and Others v. Slovakia*, Appl. no. 32881/04, Judgment of 28 April 2009; *M.V. v. Slovakia*, (dec.), Appl. no. 62079/09, Judgment of 23 November 2010; *Ferenčíková*, *supra* note 52; *V.C. v. Slovakia*, Appl. no. 18968/07, Judgment of 8 November 2011; *N.B. v. Slovakia*, Appl. no. 29518/10, Judgment of 12 June 2012; *Červeňáková*, *supra* note 57; *I.G. and Others*, *supra* note 54; *R.K. v. Czech Republic*, *supra* note 52; *Z.K. v. Slovakia*, *supra* note 57.

[72] For more details on the emergence of eugenic sterilization policies, see Tredhan and Crowhurst, 'Coerced Sterilization and Female Genital Mutilation in Europe', in H. Widdows, I.A. Idiakez and A.E. Cirión (eds), *Women's Reproductive Rights* (2006) 89.

[73] Gesetz zur Verhütung erbkranken Nachwuchses (Act for the Prevention of Hereditarily Diseased Offspring) 14 July 1933, RGBl. I (1933) 529.

associated with high human rights standards, such as Switzerland, Sweden and a number of states of the USA,[74] performed forced sterilizations on groups considered to be social and racial deviants. Even though sterilizations are easier to perform on men, most of the time it is women who are deprived of their reproductive functions. Forced sterilizations may amount to genocide[75] as well as to a crime against humanity under international criminal law.[76]

One of the areas of the world where forced sterilizations have taken place in the past, at least during the Nazi and communist regime, and keep taking place today, is the territory of the Czech Republic and Slovakia, formerly Czechoslovakia. The entry into force of a national Sterilization Regulation in 1972 seems to have increased, or simply further bolstered, an existing practice.[77] This piece of legislation established a legal framework for sterilization with specific and strict requirements that were to be enforced. Sterilizations were allowed in a medical institution, either at the request of the person concerned or with her consent, if the person's reproductive organs were affected by disease (section 2(a) of the Sterilization Regulation), or when a pregnancy or birth would seriously threaten the life or health of a woman, whose reproductive organs were not affected by disease (section 2(b) of the Sterilization Regulation). The decision on whether or not the sterilization was required was taken by the head physician of the hospital department in which the person concerned was treated. Sterilizations on any other ground needed to be approved by a medical committee.

Nothing in the Sterilization Regulation specifically refers to Roma women. It is in its implementation that this aspect of the Regulation emerged, having been interpreted by the medical practitioners as an authorization or encouragement to sterilize Roma women, in particular, with their consent, often obtained under dubious circumstances. Moreover, in the practice that emerged over the years, only Roma women (not ethnically Czechoslovakian women) were offered financial compensation in exchange for sterilization. In other words, an otherwise race-neutral legislation became racialized through its application, due to the existing racism against Roma people.[78] With the end of the Communist regime in 1989 and the split of the former Czechoslovakia into the Czech Republic and Slovakia, the question became whether this policy and its interpretation would continue unabated.

[74] On the USA's history on compulsory sterilization laws, see Silver, 'Eugenics and Compulsory Sterilization Laws: Providing Redress for the Victims of a Shameful Era in United States History', 72 *George Washington Law Review* (2004) 862.

[75] See, e.g., Rome Statute, *supra* note 66, Art. 6, para. (d); United Nations Convention on the Prevention and Punishment of the Crime of Genocide, 1948, 78 UNTS 277, Art. 2.

[76] See Rome Statute, *supra* note 66, Art. 7, para. 1(g).

[77] Vyhláška Ministerstva zdravotníctva Slovenskej socialistickej republiky č. Z-4 582/1972-B/1, uverejnená vo Vestníku ministerstva zdravotníctva (Regulation of the Ministry of Health of the Slovak Socialist Republic Containing Guidelines Governing Sterilisation in Medical Practice), No. Z-4 582/1972-B/1 (1972).

[78] For more details on the social context in which such a regulation has emerged, and the application towards Roma women, see Sokolová, 'Planned Parenthood Behind the Curtain: Population Policy and Sterilization of Romani Women in Communist Czechoslovakia, 1972–1989', 23 *Anthropology of East Europe Review* (2005) 79.

A 2003 report, which became known as the *Body and Soul Report*, looked into this topic.[79] A number of interviews with more than 230 Romani women from 40 different settlements throughout eastern Slovakia, as well as fact-finding missions, eventually showed that Roma women continued to be targeted under such policies. The *Body and Soul Report* showed a devastatingly clear and recurring pattern in the sterilization of Roma women, which included, in varying degrees, either one, or a combination, of the following elements: false or misguiding information by the medical personnel; performance of multiple Caesarean sections leading to sterilization, usually after the second child; signing of a consent form while in labour; incentive payments for Roma women to get sterilized; racial insults from hospital personnel; racial segregation in hospital rooms and, finally, refusal of access to personal medical files.

Not surprisingly, the *Body and Soul Report* served as a direct basis for the first case on forced sterilizations to reach the ECtHR, the case of *K.H. and Others v. Slovakia*, which was resolved in 2009 but limited to the refusal of the authorities to grant the victims and/or their lawyers access to the medical records.[80] Two years later, the ECtHR was confronted with the compatibility of the actual sterilization practice with international human rights law.[81] In *V.C. v. Slovakia*, the applicant, a 20-year-old Romani woman, was sterilized in a public hospital after giving birth to her second child. According to the hospital, the applicant had requested the sterilization. The applicant instead submitted that, after she had been in labour for several hours, she was told that if she had one more child either her or the baby would die. She thus signed the delivery record while still in labour under the note indicating that she had requested sterilization. The applicant did not even understand the term sterilization since her mother tongue was Romani. Her medical record contained the words 'patient is of Roma origin,' and during her hospitalization she was accommodated in a room with only Roma women. Moreover, she was prevented from using the same bathrooms and toilets as women who were not of Roma origin.

As a result of the sterilization, the applicant suffered from serious medical, psychological, social and personal after-effects, including a false pregnancy, psychiatric treatment, ostracism by the Roma community (which places great emphasis on women's fertility) and divorce from her husband. In response to the publication of the *Body and Soul Report*, criminal investigations were initiated by the government's human rights division into the sterilization of a number of Roma women, but they were eventually discontinued on the grounds that no criminal offence had been committed. In this context, the applicant herself started a civil proceeding seeking protection of her personal rights. She submitted that the sterilization performed on her had been carried out in violation of Slovakian legislation and international human rights standards.

[79] Centre for Reproductive Rights and Poradňa pre občianske a l'udské práva (Centre for Civil and Human Rights or Poradňa), *Body and Soul: Forced Sterilizations and Other Assaults on Roma Reproductive Freedom in Slovakia* (2003).

[80] *K.H. and Others*, *supra* note 71.

[81] Notice, however, that prior to this, the CEDAW Committee had already found that forced sterilizations on Roma women in Hungary violated CEDAW, *supra* note 33. See CEDAW Committee, *A.S. v. Hungary*, Communication No. 4/2004, UN Doc. CEDAW/C/36/D/4/2004 (2004).

She argued that she had not been duly informed about the procedure as such, its consequences and the alternative solutions. She requested an apology for the procedure and claimed compensation for non-pecuniary damage. Her claims were rejected both at the initial trial level and in the appeal on the grounds that the sterilization of the applicant had been performed in accordance with the legislation in force and that it had been required by the applicant's medical condition. The constitutional complaint she initiated thereafter was also unfruitful.

Following these unsuccessful national proceedings, the applicant alleged a breach of Articles 3, 8, 12, 13 and 14 of the ECHR before the ECtHR. With regard to the Article 3 violation, the applicant was successful. Indeed, the Court sided with her argument that she had not been able to provide an informed consent to the sterilization on account of the hours of labour she had experienced, which affected the sound mind principle. Moreover, the Court noted that the sterilization could not be justified as an immediate, life-saving intervention for which informed consent can be waived, as any threat to the applicant's health was only likely to happen in the event of a future pregnancy. For these reasons, the Court held that Slovakia had violated Article 3 of the ECHR.[82]

The ECtHR also found an Article 8 violation, arguing that reproductive rights certainly fall within the purview of Article 8. States need to protect individuals against arbitrary interference by public authorities, and they have a positive obligation to secure effective respect for the rights of persons within their jurisdiction under this provision. This means that Slovakia had the obligation to put in place effective legal safeguards to protect the reproductive health of women of Roma origin since they were particularly vulnerable. In view of this provision, the Court found that the positive obligations under Article 8 had been violated because no adequate legislation and exercise of appropriate supervision of sterilization practices had been put in place.[83]

However, with regard to Article 14's prohibition of discrimination claim, the Court ruled that a separate examination of the complaint under Article 14 of the ECHR was unnecessary. While acknowledging that the materials, statistics and reports before it indicated evidence of a practice of sterilization of Roma women without their prior informed consent, the Court found that the information available was not sufficient to demonstrate, in a convincing manner, that the doctors had acted in bad faith with the intention of ill-treating the applicant, that the sterilizations were part of an organized policy or that the hospital staff's conduct was intentionally racially motivated. Furthermore, since the Court had already established that Slovakia had failed to comply with its positive obligation under Article 8, it was able to dismiss the need for a more in-depth and separate analysis of the Article 14 argument.[84] *V.C. v. Slovakia* has not remained an isolated case. In fact, the Court has confirmed its jurisprudence in two other forced sterilization cases: *N.B. v. Slovakia* and *I.G. and Others v. Slovakia*.[85]

[82] *V.C. v. Slovakia*, *supra* note 71, paras 106–120.

[83] *Ibid.*, paras 138–155.

[84] *Ibid.*, paras 176–180.

[85] *N.B. v. Slovakia*, *supra* note 71, paras 121–123; *I.G. and Others v. Slovakia*, *supra* note 54, paras 165–167.

B *Interpretive Lenses: the Holocaust Prism?*

Forced sterilization jurisprudence can be taken to demonstrate the Holocaust Prism in full operation. First of all, the perspective of racial or ethnic discrimination prevails, pushing aside the specifically gendered dimension of the cases, even when the victims also raise sex/gender discrimination claims.[86] The ghost of race/ethnic discrimination, which is so prevalent in the culturally predominant interpretation of Holocaust violence,[87] overshadows gender discrimination, with the intersecting discrimination between race and gender being completely bypassed in the forced sterilization decisions. This is a missed opportunity for the ECtHR to give due visibility to the gender subordination of the practice and to more intuitively apply its doctrine of the state's failure to live up to its positive or negative obligations concerning gender violence as a form of gender discrimination and, hence, as a violation of Article 14.

Second, the anti-discrimination logic is debunked by the genocidal/criminal paradigm, which leads the ECtHR to totally disregard its standard equality doctrine. Thus, in determining whether there might have been an Article 14 violation at play, the Court looked for an organized policy backing the forced sterilization practice and found that there was not sufficiently strong evidence for this policy. Alternatively, the judges focused on whether 'the hospital staff's conduct was *intentionally* racially motivated'.[88] However, as we have observed, intent was not a requirement in either *D.H. and Others* or in *Opuz,* epitomizing the Court's most progressive equality jurisprudence. This again goes to show that, when life or physical integrity are at stake in conjunction with racist actions, the Court situates itself in the Holocaust paradigm.

Third, the focus on the need to show individual intent, and, in fact, even a systematic policy, has an obvious impact on what amounts to sufficient evidence and on who has the primary burden of proof. By looking too closely at the individual cases to decide whether or not there is sufficient evidence of intent – as the ECtHR has done previously when addressing other racial violence cases – [89] the Court undermines the relevance of context and demonstrates systemic insufficiencies, acknowledged in its case law on racial discrimination in the educational context and on gender violence, both of which have heavily relied on the evidentiary value of statistics and reports documenting structural discrimination.

Fourth, the *Gestalt* shift in the interpretation of Article 14, from the discrimination paradigm to a genocidal one, forces the ECtHR to identify indirect ways of expressing its rejection of the ethnic discriminatory aspect, without, however, condemning the states for it. In *V.C. v. Slovakia,* once the elements of the crime were not found, the existence of a violation of Article 14 was marginalized to such an extent that it was not even considered worthy of serious separate consideration. In fact, the Court ends up squeezing the Article 14 analysis into its Article 8 reasoning, referring to the 'positive obligation under Article 8 to secure through its legal system the rights guaranteed

[86] See, e.g., *V.C. v. Slovakia, supra* note 71, para. 169.

[87] See, e.g., Ringelheim, 'The Unethical and the Unspeakable: Women and the Holocaust', 1 *Simon Wiesenthal Annual* (1984) 69.

[88] *V.C. v. Slovakia, supra* note 71, para. 177 (emphasis added).

[89] See, e.g., *Mižigárová, supra* note 50.

by that Article, by putting in place effective legal safeguards *to protect the reproductive health of women of Roma origin in particular*,' given their vulnerability, indicating that 'the reference in the record to the applicant's ethnic origin without further details being given indicates … *a certain mindset on the part of the medical staff as to the manner in which the medical situation of a Roma woman should be managed.*'[90]

However, this move is not without consequences. Not only does ignoring a separate Article 14 claim reduce its autonomous importance, but it also completely bypasses the underlying reason for those fact patterns, namely that the violence happens to individuals belonging to oppressed minorities to a large extent, if not exclusively, because they belong to such a minority, thus contributing to the larger discriminatory environment and subordination of the groups. Moreover, it prevents victims from obtaining full recognition for the discrimination and humiliation they suffered as well as rendering duly visible the structural dimension of the violations and the way society as a whole, and not just the concrete victims of the case, is affected by their occurrence. Finally, at the level of the implementation of judgments, it prevents the encouragement of programs and general measures to combat the broader phenomenon of racial violence and discrimination by public authorities.

5 Conclusion

In this article, we have tried to explain and link two different, yet related, phenomena. On the one hand, we highlight the empirically observed trend of the ECtHR's reluctance to recognize the discriminatory aspects of racial violence in its case law. This stands in contrast with the increasing recognition of racial discrimination, especially in the educational domain, and gender violence as a form of discrimination. We posit that this paradox is, *inter alia*, caused by an (unconscious) understanding of racial violence from a Holocaust perspective, which triggers a *Gestalt* shift and, with it, the debunking of the discrimination paradigm by a criminal/genocidal paradigm. We find particular confirmation for this hypothesis in the forced sterilization cases against Roma women that have reached the ECtHR over the past years. We argue that this should be overcome if the ECtHR is to give due visibility to the discriminatory dimension of the violence that racial minorities experience today in Europe and that the Court already has the tools and the obligation to do so, primarily by consistently applying its anti-discrimination doctrine, as it has evolved in other domains, to the cases of racial violence.

[90] *V.C. v. Slovakia*, *supra* note 71, paras 145, 151 (emphasis added).