UNIVERSITY OF ESSEX **DISSERTATION 22-23**

SCHOOL OF LAW AND HUMAN RIGHTS CENTRE

LLM/MA: LLM International Human Rights Law
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DISSERTATION TITLE: Remaining silent: Effectiveness of the European Court of Human Rights in racially motivated violence cases

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LLM in International Human Rights Law

2022-2023

Supervisor**:** Charilaos Nikolaidis

DISSERTATION

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Registration Number: 2202103
Number of Words: 11144
Date Submitted: 08 September 2023

Table of Contents

Introduction

'Kurds, coloureds, Muslims, Roma and others are again and again killed, tortured or maimed, but the Court is not persuaded that their race, colour, nationality or place of origin has anything to do with it.'[1] These are the words of a judge of the European Court of Human Rights who disagreed with the majority opinion, ignoring groups that are systematically discriminated against. Over the years, the Court has substantially developed its case law on non-discrimination and extended the scope of application of Article 14 of the European Convention on Human Rights.[2] When it comes to cases of racial violence, however, it has been reluctant to address Article 14 and allegations of racially discriminatory treatment.[3] This thesis aims to demonstrate why the Court's jurisprudence on racially motivated violence has been disappointing and how it has affected the applicants through case analysis. Ultimately, it argues that the Court can contribute to the legal construction of a Europe that combats racism if it takes into consideration the broader picture of racial violence against disadvantaged ethnic groups.

This thesis is structured in three parts. Chapter 1 introduces the scope of application of Article 14 and briefly sets out criticisms of the Court's review. Next, it refers to types of discrimination covered by the Convention and analyses the Thlimmenos and DH cases, where the Court accepted that indirect discrimination falls within the scope of Article 14.[4] The chapter also explains the discrimination test and the criteria for establishing a difference in treatment and the justification of the difference. This explanation will provide a better understanding of which concept of equality the Court has adopted in its judgments examined in the following chapters since the strictness of the review implies whether the approach is formal or substantive.

Chapter 2 begins with defining racism to explore ways of developing a human rights mechanism capable of combating racism. After that, it examines the Court's jurisprudence of Article 14 on

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[1] See the dissenting opinion of Judge Bonello in Anguelova v Bulgaria [2002] ECHR 489.
[2] Oddný Mjöll Arnardóttir, 'Vulnerability Under Article 14 of the European Convention on Human Rights' (2017) 4(3) Oslo Law Review 150, 151.
[3] Dilek Kurban, *Limits of Supranational Justice: The European Court of Human Rights and Turkey's Kurdish Conflict* (Cambridge University Press 2020) 270.
[4] DH and Others v Czech Republic [2006] ECHR 113; Thlimmenos v Greece [2000] ECHR 162

the grounds of racial discrimination, specifically focusing on police violence and forced sterilisation cases. The chapter argues that there is a tendency to revert to a formal understanding of equality, considering a contradiction between racial violence cases and the general evolution of the non-discrimination doctrine in regard to intent and the shift of the burden of proof.[5] In this respect, it critically considers the Court's attitude and reveals the reasons behind the reluctance to utilise Article 14.

Chapter 3 selects Kurdish applicants as a case study to concentrate on the inefficient approach of the Court. It stresses that although Kurdish applicants claimed that their ethnicity is the reason for violations such as forced displacement, torture, enforced disappearances and the authorities' failure to investigate, the Court never found these violations were linked to their ethnicity[6]. First, it presents the historical background of the Kurdish problem in Turkey in the first section. After analysing the Hasan İlhan Case specifically, it presents the general outline of the applications before the Court and critically examines its perspective. The final section proposes solutions to this problem that serve as a guide not only for Kurds but also for other ethnic identities.

This dissertation will combine a socio-legal and doctrinal methodology to analyse primary and secondary legal sources. Landmark cases are selected to examine the application of Article 14 and assess the Court's jurisprudence. It also draws from politics, reports from NGOs, and academic scholarship from socio-legal research disciplines when establishing the political and historical background of the Kurdish issue. Most of the scholarly literature has been concerned with Article 14 review and criticism about the requirement of the proof beyond reasonable doubt test, which inhibits the effectiveness of the prohibition on discrimination in the European Convention on Human Rights.[7] However, only a few scholars mentioned the struggle of Kurdish

[5] Sandra Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights' (2016) 16 HRLR 273, 301.
[6] Dilek Kurban (n 3) 299.
[7] See e.g. Janneke Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights' (2013) 1 HRLR 99; Samantha Besson, 'Evolutions in Non-Discrimination Law within the ECHR and ESC Systems: It Takes Two to Tango in the Council of Europe' (2012) 60 AJCL 147; Carmelo Danisi, 'How Far Can the European Court of Human Rights Go in the Fight against Discrimination? Defining New Standards in Its Non-Discrimination Jurisprudence' (2011) 9 IJCL 793; Cristina Hermida and María Elósegui, 'Argumentation of the Court of Strasbourg's Jurisprudence Regarding the Discrimination Against Roma' (2017) 60 Racial Justice, Policies and Courts' Legal Reasoning in Europe 93.

applicants.[8] There is no detailed and specific study about Kurdish cases related to Article 14 before the Court. When building on the arguments advanced by these scholars referred to above, the thesis contributes to the literature by highlighting the Kurdish issue and underlining the systemic problem witnessed by the Court that has been going on for years.

Chapter 1: Overview of Article 14 of the Convention

Article 14 of the Convention has been perceived as a weak guarantee of equality and a kind of Cinderella provision, as it has not been developed to any significant effect by the Court.[9] Recently, however, scholars have noted that developments in the jurisprudence of the Court have given this provision importance and an opportunity to shine.[10] This first chapter will introduce the scope of application of Article 14, focusing on forms of discrimination covered by the Convention and the discrimination test followed by the Court.

I. Scope of application of Article 14

Article 14 of the Convention reads as follows:

'The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

As the definition shows, Article 14 only applies to 'rights and freedoms set forth in the Convention.' It does not forbid discrimination in general, but only discrimination in the enjoyment of other substantive rights enumerated in the Convention.[11] In other words, the

[8] Kurban (n 3).
[9] Rory O'Connell, 'Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR' (2009) 29(2) Legal Studies 211, 212.
[10] Arnardóttir (n 2) 151.
[11] Alexander Morawa, 'The Concept of Non-Discrimination: An Introductory Comment' (2002) 3 JEMIE 1, 1.

protection of Article 14 has no autonomous existence.[12] The Court has constantly highlighted that Article 14 complements the other substantive provisions of the Convention and the Protocols.[13] As a result, it is necessary for an individual applicant to demonstrate a clear connection between a substantive Convention provision to invoke the prohibition of discrimination successfully.[14] This accessory character has the potential to limit the application of Article 14, and therefore, it has been described as a 'weak equality guarantee'[15] and even regarded as 'parasitic.'[16]

The requirement concerning the connection between substantive Convention provisions and Article 14 is often called the 'ambit' requirement.[17] The European Commission on Human Rights adopted a strict approach to the ambit requirement and declared inadmissible complaints where it had not found a violation of the relevant substantive Convention provision.[18] For this reason, the effectiveness of the prohibition on discrimination was limited, and claims about a violation of Article 14 were hardly ever successful.[19] In contrast, there were examples that the Court appeared to have been willing to give a wide interpretation of the ambit in subsequent years.[20] In the Belgian Linguistic case, the Court recognised the applicability of Article 14 even if there had been no violation of the substantive right itself.[21]

Beyond accepting the applicability of Article 14 as autonomous, the Court has also been willing to recognise that many situations fall within the ambit of a right.[22] Article 14 has a narrower scope of application than other independent equality provisions, such as Article 26 of the

[12] European Court of Human Rights, 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (28 February 2023), 6 <https://ks.echr.coe.int/documents/d/echr-ks/guide_art_14_art_1_protocol_12_eng> accessed 10 July 2023.
[13] Molla Sali v Greece [2018] ECHR 1048, para. 123; Carson and Others v the United Kingdom [2008] ECHR 1223, para. 63.
[14] Janneke Gerards, 'The Application of Article 14 ECHR by the European Court of Human Rights' in Jan Niessen and Isabelle Chopin(eds), *The Development of Legal Instruments to Combat Racism in a Diverse Europe* (Martinus Nijhoff Publishers 2004) 5.
[15] Antony Paul Lester, 'Equality and UK Law: Past, Present and Future' (2001) Public Law 77, 78; Arnardóttir (n 2) 151.
[16] Joan Small, 'Structure and Substance: Developing a Practical and Effective Prohibition on Discrimination under the European Convention on Human Rights' (2003) 6 European Journal of Discrimination and the Law 45, 47.
[17] O'Connell (n 7) 215.
[18] Isop v Austria [1962] ECHR 2; Gerards (n 14) 5.
[19] Gerards (n 14) 6.
[20] O'Connell (n 9) 215.
[21] Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium [1968] ECHR 3.
[22] O'Connell (n 9) 215.

International Covenant on Civil and Political Rights.[23] The ECHR does not include numerous social and economic rights except for education, property and rights to join a union. Nonetheless, problems of discrimination often occur with social and economic issues such as the right to health, rights to employment or to pay, and working conditions or to housing.[24] Given the seriousness of these problems, it is a remarkable limitation.[25] Subject to its limitation, however, the Court has progressively extended the ambit requirement to areas which do not appear to be under the scope of a Convention right at first glance.[26] In the Gaygasuz case, for instance, it extended the ambit of property rights to social security matters.[27]

Even though the Court has given a wide interpretation of applicability, it is criticised that the Court does not always consider the Article 14 claims. [28] The jurisprudence generally indicates that the Court has been reluctant to address Article 14 if another violation has been established.[29] It also has avoided discussing whether the other violation precludes the Article 14 question. Along with avoiding ambit discussion, the Court sometimes treats some discriminatory acts as inhuman or degrading treatment under Art 3 or as violations of the right to respect for private and family life under Art 8.[30] Even in cases where the issue of discrimination was a fundamental aspect for the applicant, one would question why the Court's stance was to leave Article 14 unexplored. It is worth briefly noting the dissenting opinion in the Aydin case, criticising the majority taking the view that there was no need to examine the complaint under Article 14. [31] While Judge Keller understands that the Court may wish to limit the scope of a ruling for reasons of procedural economy in some cases, she finds its approach unduly reductive and outdated.[32]

[23] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[24] David Harris and others, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (4th edn, OUP 2018) 768.
[25] Ibid.
[26] O'Connell (n 9) 216.
[27] Gaygusuz v Austria [1996] ECHR 36
[28] Harris and others (n 24) 766.
[29] See Airey v Ireland [1979] ECHR 3; Assenov and Others v Bulgaria [1998] ECHR 98; Velikova v Bulgaria [2000] ECHR 198; Anguelova v Bulgaria (n 1).
[30] O'Connell (n 9) 215.
[31] See the dissenting opinion of Judge Keller in Sukran Aydin and Others v Turkey [2013] ECHR 62.
[32] Ibid.

She claims that the Court should take a thorough look at these issues since discrimination regarding the use of a particular language is a fundamental aspect for the applicant in this case.[33]

II. List of Grounds

The Court explicitly confirmed in the Engel Case that: 'the list set out in that provision is illustrative and not exhaustive, as is shown by the words any grounds such as in French *notamment.'* [34] The court regarding the Convention as a living instrument to be interpreted in light of present day conditions extended the scope of Article 14 to include some grounds that are not mentioned in the convention.[35] Thus, sexual orientation, age, disability and individual's health status have been covered over time.

At the first glance, given the formulation of Article 14 and these explanations by the Court, the application of the non-discrimination clause seems to be easy and straightforward. One could think that, any kind of unequal treatment can be brought before the Court to be assessed for its reasonableness, regardless of the ground of discrimination.[36] However, while the case of Engel applies a very open approach towards discrimination cases, in the Kjeldsen case, the Court stated that Article 14 only prohibits discriminatory treatment 'having as its basis personal characteristics by which persons or groups of persons are distinguishable from each other'.[37] In this approach, the Court appears to focus on the meaning of 'other status' instead of 'any ground' formulation.[38] It held in subsequent cases that the expression ‘other status’ should only apply to those grounds that are related to personal belief, choices or inherent personal traits.[39]

In recent years, the Court appears to have tried to bring both these approaches of case law together rather than choosing between two of them.[40] However, the standards that came from this

[33] Ibid.
[34] Engel and Others v Netherlands [1976] ECHR 8 para. 72.
[35] Fredman (n 5) 277.
[36] Janneke Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights' (2013) 13(1) HRLR 99,104.
[37] Kjeldsen, Busk Madsen and Pedersen v Denmark [1976] ECHR 6 para. 56.
[38] Grounds (n 36) 104.
[39] Springett and Others v United Kingdom App. Nos 34726/04, 14287/05 and 34702/05 (ECtHR, 27 April 2010).
[40] Gerards n (36) 112.

effort are not clear and practicable.[41] According to the analysis of case law in 2010 conducted by Gerards, the Court followed these paths: i) it ignores the ground of discrimination in some cases, ii) It does not provide substantive reasons for holding that the case does or does not concern a ground protected by Article 14, iii) It applies the criterion of 'personal status' in unexpected and variable ways.[42] Many cases are still assessed on their merits, although they do not clearly associate with a personal characteristic.[43] In conclusion, the Court would look at all the circumstances of the case to determine: if the circumstances of the case so require distinctions based on impersonal characteristics may take the Court's attention.[44]

III. Forms of discrimination covered by the Convention

'The principle of equality before the law equal protection before the law and non-discrimination, belongs to jus cogens because the whole legal structure of national and international public order rests on it and it is a fundemental principle that permeates all laws.' [45] While Article 14 refers only to securing non-discrimination and not to the principle of equality, it should be stated that the non-discrimination and equality principles are closely engaged.[46] The terms 'equality' and 'non-discrimination' have often been used interchangeably and generally taken as the positive and negative statement of the same principle: While the principle of equality necessitates that equals be treated equally, the prohibition of discrimination prevents differential treatment due to unreasonable grounds.[47]

At the heart of all non-discrimination norms is the formal equality requirement that likes should be treated alike.[48] The formal concept of equality focuses on the process instead of the outcome: equality is achieved if comparable individuals are treated equally, regardless of the result.[49] It

[41] Ibid.
[42] Ibid.
[43] Ibid.
[44] Ibid.
[45] Juricidial Condition and Rights of the Undocumented Migrants, Advisory Opinion, OC-18/03, (17 September 2003) Inter-Am Ct. H.R. (Ser. A) N.18, para 101.
[46] Oddný Mjöll Arnardóttir, *Equality and Non-Discrimination Under the European Convention on Human Rights* (Martinus Nijhoff 2002) 7.
[47] Daniel Moeckli, 'Equality and Non-Discrimination' in Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, and David Harris (eds), *International Human Rights Law* (OUP, 2022) 152.
[48] Moeckli (n 35) 158.
[49] Ibid, 153.

points out the passive role of the State only requiring avoidance of overt discrimination. Therefore, the State has no positive obligations.[50] Formal equality forms the conceptual basis of the term 'direct discrimination', which occurs when a person, on account of one or more prohibited grounds, is treated less favourably than someone else in comparable circumstances.[51] The classic example is given in the literature that members of certain ethnic groups are not allowed access to public facilities, like swimming pools, which are open to all.[52] Yet, the majority of cases of direct discrimination are not as simple as this. Generally, direct discrimination occurs covertly, making it difficult for the complainant to provide sufficient evidence. Most importantly, it cannot be easy to find a person who is in a comparable situation, such as in the cases of pregnancy, part-time work and disabilities. [53]

Sometimes, on the other hand, a practice, rule or requirement that is externally neutral, that is not based on one of the prohibited grounds, can disproportionately affect certain groups.[54] For example, the requirement of a birth certificate for school registration may discriminate against minorities who do not have or have been denied such certificates. [55] In this case, indirect discrimination occurs even if there is no difference in treatment. At this point, the substantive concept of equality provides a more effective approach than the formal one by focusing on equality of results.[56] It goes beyond formal equality and recognises that equality requires more than equal treatment under the law.[57] This is because treating unequals equally causes unequal results for reasons such as structural biases.[58] It also acknowledges that different characteristics and social and economic inequalities can create barriers preventing certain groups from fully participating in society.[59] Such a substantive approach also requires that strict application of non-discrimination provisions should be sensitive to the context in which discrimination takes place,

[50] Arnardóttir (n 34) 22.
[51] Moeckli (n 35) 159.
[52] Ibid.
[53] Ibid.
[54] Ibid.
[55] United Nations Committee on Economic, Social and Cultural Rights, 'General comment no. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)' (2 July 2009), UN Doc E/C.12/GC/20 3.
[56] Arnardóttir (n 34) 24.
[57] Moeckli (n 35) 153.
[58] Ibid, 159.
[59] Ibid, 167.

especially to the history of social disadvantages and inequalities of certain groups.[60] Remedying these inequalities may require other measures to level the playing field, such as positive obligations for the State as well as negative obligations.

Regarding Article 14, it simply states that the enjoyment of the rights shall be secured without discrimination on any grounds mentioned. However, it does not provide a definition.[61] Therefore, what was covered by the term discrimination is unclear. Until recently, it has tended to prohibit only direct and overt discrimination and has failed to uncover more covert or subtle forms of discrimination.[62] Although it has been criticised that it took a long time, more recently, the Court's jurisprudence has developed well beyond the equal treatment doctrine.[63] The first major step beyond the equal treatment model was taken in the Thlimmenos Case.[64] The Court recognised that not only formal discrimination but also indirect discrimination falls within the scope of Article 14.[65] The applicant alleged that had been denied entry into accountancy because he was criminally charged as a result of his conscientious objection to mandatory military service on religious grounds.[66] National law which barred those with a criminal conviction from joining the profession of chartered accountants was applied to all candidates.[67] The Court accepted that equal treatment could be discriminatory in this case: the State should have distinguished between persons convicted of offences committed exclusively because of their religious beliefs and persons convicted of other offences.[68] Finally, the Court decided that the State had violated the applicant's right under Article 14 read in conjunction with Article 9.[69] Most importantly, it is highlighted that for protection from indirect discriminatory treatment, states should adopt positive measures to ensure that they can treat persons differently whose situations are significantly different from one another.[70]

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[60] Arnardóttir (n 34) 5.
[61] Fredman (n 5) 278.
[62] O'Connell (n 9) 217.
[63] Charilaos Nikolaidis, 'Equality and Non-Discrimination in Europe: The Shortcomings of Article 14 of the European Convention on Human Rights and the new Protocol 12' (2014) 7 Annuaire International des Droits de l'Homme 815, 829.
[64] Thlimmenos v Greece (n 2); Fredman (n 5).
[65] Gerards (n 14) 13.
[66] Thlimmenos v Greece (n 2), para 2.
[67] Ibid, para.8
[68] Ibid, para. 47.
[69] Ibid, para. 53.
[70] Ibid, para. 44.

For a fully-fledged principle of indirect discrimination example, one should emphasise the DH case in which the Court explicitly referred to the definition of indirect discrimination.[71] The case is also important because of its stress on the fact that indirect discrimination does not necessarily require discriminatory intent.[72] In this case, Roma children were disproportionately allocated to 'special' schools, delivering inferior education according to the tests used to evaluate the children's intellectual capacities to decide whether to place them in normal or in 'special' schools for children with learning disabilities.[73] The Chamber decided that the same educational tests could not be discriminatory because they were not solely for Rome children and applied to all Czech children.[74] The Grand Chamber, however, overturned this decision.[75] It analysed that the test was formulated for the majority of Czech population, and the results were not analysed in the light of the language and cultural differences Roma children who took them.[76] Compared to children of Czech ethnic origin, tests led to indirect discrimination of Roma children who were more likely to perform poorly due to owing different language were subsequently placed in 'special schools' in a disproportionately high number.[77] Consequently, the Chamber found a violation of Article 14 in conjunction with Article 2 Protocol 1 ECHR.[78]

IV. Discrimination test

Regarding the Court's position on the distinction between formal and substantive concepts of equality, as discussed above, one should note that the strictness of review becomes instrumental in positioning a case on the sliding scale from formal to substantive equality. [79] The following sections should be considered by keeping in mind that the strictness in the review places maximal

[71] DH and Others v Czech Republic [2007] ECHR 922 see para. 184: 'The Court has already accepted in previous cases that a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group … In accordance with, for instance, Council Directives 97/80/EC and 2000/43/EC and the definition provided by ECRI [the European Commission against Racism and Intolerance], such a situation may amount to 'indirect discrimination', which does not necessarily require a discriminatory intent.'
[72] DH v Czech Republic (n 52), para. 184; Fredman (n 5) 280.
[73] DH v Czech Republic (n 4), para. 9.
[74] Ibid, paras. 48 and 49.
[75] DH v Czech Republic (n 52).
[76] Ibid, para. 200.
[77] Ibid, para. 200-201.
[78] Ibid, para. 210.
[79] Arnardóttir (n 34) 17.

or minimal burdens on the establishment of difference in treatment, and the justification for difference implies if the approach is formal or substantive.[80]

In deciding cases of discrimination, the Court applies the following test: [81]

1. Has there been different treatment between persons in analogous or relevantly similar situations – or a failure to treat persons differently in relevantly different situations?

2. Does the difference or absence of difference have objective and reasonable justification?

a. Does the difference in treatment pursue a legitimate aim?

b. Are the means employed reasonably proportionate to the aim sought to be realised?

1. Difference in treatment

First, the applicants must show that they have been treated differently from another person or group of persons. Then, the applicants should also prove that the cases presented to the Court are sufficiently 'analogous' or 'similar.' The Court added a first phase test to its decision model in the Marckx case by stating that 'Article 14 safeguards individuals placed in similar situations from any discrimination in the enjoyment of the rights and freedoms set forth in the other provisions'.[82] If the applicant cannot show that the cases presented to the Court are not sufficiently analogous, the Court will not consider the issue of whether the difference in treatment may be found unjustified for other reasons.[83]

Nevertheless, the Court did not explicitly state how to detect this analogy or similarity in the Marckx Case. Subsequent case law has also failed to provide clarity in this regard: the Court does not appear to represent general and comprehensible standards for the application of the comparability test.[84] This approach, as a reflection of the formal concept of equality discussed in earlier, is criticised by Gerards in that it potentially allows the Court to consider every difference in treatment in accordance with Article 14.[85] Since all cases are both comparable and

[80] Ibid, 31.
[81] European Court of Human Rights (n 12) 16.
[82] Marckx v Belgium [1979] ECHR 2, para. 32.
[83] Gerards (n 14) 17.
[84] Gerards (n 14) 19.
[85] Ibid, 20.

incomparable in certain respects, it is always possible to find differences between persons, cases or situations.[86] It is ironic that these differences can be used to block a discrimination claim regarding that the purpose of antidiscrimination law is to safeguard people who are different and not typically comparable to others.[87] Thus, the reliance on comparability and indeterminacy of the formal model leads to the exclusion of some people.[88] In regard to this problem, Nikolaidis suggests that it may be sufficient to demonstrate the existence of a legitimate interest in order to claim equal treatment.[89] This approach will provide the Court to protect people who are 'unalike' in the situations they find themselves in but 'alike' in their need to be treated as equals by bridging the gap between the formal and the substantive concept of the principle of equality. [90]

2. Lack of objective and reasonable justifications

a. Legitimate aim

If the Court concludes that there is different treatment between persons in analogous or relevantly similar situations or a failure to treat persons differently in relevantly different situations, it moves on to the assessment of the arguments that have been advanced in justification of the discrimination.[91] In the Belgian Linguistics case, the Court made clear that the article does not prohibit every difference in treatment in exercising the rights and freedoms recognised.[92] Otherwise, absurd conclusions can be reached.[93] It set out its analytical approach by adding an objective and reasonable justification test under Article 14. Under this approach, Article 14 is violated if relevantly similar situations are treated differently or if relevantly different situations are treated equally without an objective and reasonable justification.[94] 'The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies.'[95] Nevertheless, it is criticised that the Court generally examines aims and goals case-

[86] Ibid.
[87] Nikolaidis (n 51) 449.
[88] Arnardóttir (n 34) 23.
[89] Nikolaidis (n 51) 451.
[90] Ibid, 458.
[91] Ibid, 28.
[92] Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (n 21), para. 10.
[93] Ibid.
[94] Arnardóttir (n 34) 15.
[95] Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (n 21), para. 10.

by-case and accepts the legitimacy of nearly every aim presented, even recognising general purposes.[96] Unlike several substantive Convention provisions like Articles 8-11, Article 14 does not contain a list of aims and goals that can be considered legitimate.[97] It means that the amount of possible legitimate aims is almost unlimited, and therefore, there is a need to develop criteria to consider the legitimacy of the aims and goals.[98]

b. Proportionality

After establishing a legitimate aim, the Court will assess whether the means employed are reasonably proportionate to the aim sought to be realised. The proportionality principle can be explained as a requirement that the individual cannot be overly disadvantaged in attempting to achieve the public interest aim in question.[99] It has consistently been associated with the fair balance test that weighs the protection of the interests of the community against respect for the rights and freedoms of the individual.[100] In considering the proportionality, the Court takes into account the margin of appreciation since its role is not to substitute the competent national authorities in assessing whether and to what extent differences in otherwise similar situations justified differential treatment.[101]

The doctrine of the margin of appreciation has been derived from the principle of subsidiarity.[102] The principle of subsidiarity requires that it is primarily the national authorities' duty to protect the Convention's rights and ensure compliance with it.[103] In the Belgian Linguistic case, the Court pronounced that the national authorities are free to choose the measures they consider appropriate, and the review of the Court is restricted to examining the conformity of the chosen measures within the Convention.[104] The reason behind the idea is that the national authorities are

[96] Gerards (n 14) 30.
[97] Ibid.
[98] Ibid.
[99] Arnardóttir (n 34) 46.
[100] Ibid.
[101] Europan Court of Human Rights (n 12) 20.
[102] Jeroen Schokkenbroek, 'The Basis, Nature and Application of the Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights' (1998) 19(1) HRLJ 30, 31.
[103] Arnardóttir (n 34) 58.
[104] Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium para 10.

in a better position to make the initial assessments due to their direct and continuous contact with the vital forces of their countries.[105]

The scope of that margin will vary according to the circumstances, the subject matter and the background of the case.[106] On the other hand, the Court has also identified certain grounds of discrimination where such margin is reduced, such as sex, race, religion and sexual orientation.[107] For such grounds, it will be hard for a State to justify discrimination.[108] Still, the doctrine of the margin of appreciation has been criticised for introducing an unjustified subjective element in the interpretation of the Convention and for sometimes constituting 'an abdication by the Court of its enforcement'.[109]

V. Conclusion

The chapter set out an overview of Article 14 of the Convention. Even though the Court has given a wide interpretation of applicability, it is criticised that the Court has been reluctant to address Article 14 if another violation has been established.[110] Still, the Court has developed increasingly strong non-discrimination jurisprudence by accepting claims of indirect discrimination and moved from a formal equality conception to a more substantive understanding of equality.[111] The chapter also briefly explained the discrimination test, in which the Court examines whether there is an objective or reasonable justification for treating similar situations differently and whether there is a reasonable relationship of proportionality between the means used and the legitimate aim sought to be achieved. It revealed the criticisms of the Court's application of the justification test, including its acceptance of the legitimacy of almost every

[105] Handyside v The United Kingdom [1976] ECHR 5, para. 48.
[106] Molla Sali v Greece (n 13), para. 136.
[107] DH and Others v the Czech Republic (n 52), para 176; Sejdić and Finci v. Bosnia and Herzegovina [2009] ECHR 2122, paras. 43-44.
[108] Nikolaidis (n 51) 825.
[109] Ibid; Timothy Jones, 'The Devaluation of Human Rights under the European Convention' (1995) Public Law 430, 432.
[110] Harris and others (n 24) 766.
[111] Mathias Möschel and Ruth-Rubio Marin, 'Anti-Discrimination Exceptionalism: Racist Violence before the ECtHR and the Holocaust Prism' (2016) 26(4) EJIL 881, 884-885.

objective presented, even recognising general aims and allowing a wide margin of appreciation.[112]

Chapter 2: Racial Discrimination under the ECHR

In this chapter, the thesis will move further and focus on racial discrimination. Before examining the Court's review of Article 14 on the grounds of racial discrimination, race and racism will be defined to understand how to develop a human rights mechanism to combat racism. Then, it will demonstrate that there has been a shift in the Court's jurisprudence from the formal model to the substantive model by analysing the DH case.[113] In contrast to this development, the chapter will draw attention to the Court's tendency to revert to a formal understanding when it comes to racial violence cases and demonstrate that its approach particularly affects ethnic groups in Europe.[114]

I. Combating racism

There have been many attempts to give the concept of race a physiological or evolutionary content. Nevertheless, in the name of 'scientific knowledge', these ideas have almost always been utilised to legitimise exclusion, subordination or even extermination of some 'racial' groups by others.[115] Thus, it is widely accepted that race is a social construct ideologically designed to justify domination and strongly based on social and historical context.[116] The characterisation of race as a social construct demonstrates that race covers a range of personal and social attributes as a target for racism, such as culture, nationality, ethnicity and religion.[117] Therefore, race, colour, descent and national or ethnic origin should all be viewed as part of the same umbrella term 'race.'[118] The International Convention on the Elimination of All Forms of Racial Discrimination defines the term racial discrimination as distinctions based on race, colour,

[112] Nikolaidis (n 51) 825; Gerards (n 14) 30.
[113] O'Connell (n 9).
[114] Fredman (n 5) 301.
[115] Sandra Fredman and Philip Alston, *Discrimination and Human Rights: The Case of Racism* (OUP 2001) 9.
[116] Ibid.
[117] Ibid, 11.
[118] Arnardóttir (n 34) 146.

descent, or national or ethnic origin.[119] Also, the Court has recognised ethnic identity as falling within the scope of the ECHR and accepted claims of Roma, Kurds and German Sorbians.[120] It considers discrimination on account of ethnic origin as a form of racial discrimination by stating ethnicity and race are related and overlapping concepts.[121]

According to Fredman, racism is a phenomenon perpetrated and seemingly legitimised not by objective characteristics but by relations of domination and subordination, by hating the 'other' in defence of the 'self', by imagining the 'other' as inferior, disgusting, even subhuman.[122] To combat racism effectively, any strategy must begin with an acknowledgement that all these phenomena and related acts are present or may arise.[123] Boven claims that 'acknowledgement and denial stand to each other in a dialectical relationship.'[124] According to him, only by naming and acknowledging racism can it be fruitfully recognised, identified and addressed.[125] 'Naming and shaming' were declared by the UN Secretary-General as a strategy to unmask and expose human rights violations in a visible and preventive way.[126] This strategy is also applicable to violations of human dignity caused by racism and racial discrimination.[127] It is argued that racism proceeds on at least three lines: derogatory stereotyping, hatred and violence; a cycle of disadvantage; and the negation or even destruction of culture, religion or language.[128] Therefore, strategies to combat racism should also concentrate on all lines by considering the political context and the groups in question.[129] They must confront the common fears about the disappearance of

[119] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.
[120] Timishev v Russia [2005] ECHR 858 see para. 55: "Whereas the notion of race is rooted in the idea of the biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds.'
[121] DH and Others v Czech Republic (n 52), para. 176.
[122] Fredman (n 88) 10.
[123] Theo Van Boven, 'Discrimination and Human Rights Law: Combating Racism' in *Discrimination and Human Rights* (OUP 2001) 114.
[124] Ibid.
[125] Ibid.
[126] UN Secretary-General, 'We the Peoples : the role of the United Nations in the 21st century' (United Nations 2000) 46.
[127] Boven (n 96) 114.
[128] Fredman (n 88) 2.
[129] Ibid.

identities, established biases, exclusion and marginalisation of disadvantaged people, and the exploitation of ethnic, racial, and religious hostilities for political objectives.[130]

At this point, one should decide what kind of equality we seek to achieve. As discussed before, equality can be formulated in different ways, and choosing which concept of equality is not a matter of logic but a political decision.[131] Formal equality can have the consequences of transforming the principle of equality into the principle of sameness, devaluing difference and affirming assimilation and conformity because it uncritically accepts prevailing social and political structures.[132] Hence, it does not discuss the matter of how existing social structures maintain conditions of privilege and deprivation and how the standards of the dominant groups determine the treatment given to people from other groups.[133] The substantive concept of equality, on the other hand, aims to redress disadvantage, address stereotypes, prejudice, humiliation and violence, facilitate participation and accommodate difference, including through structural change.[134] Therefore, it is now generally accepted that formal equality should be transcended by principles of substantive equality to combat racism.[135]

Loenen argues that courts should conduct an asymmetrical and contextual equality analysis and more strictly scrutinise discrimination affecting 'vulnerable' groups facing structural disadvantage.[136] Unfortunately, courts have been criticised for being social structures that tend to perpetuate the view that the dominant group in society is the 'measure of all things' rather than an effective instrument for changing social and political structures.[137] The Court seems to pay special attention to racial discrimination in its judgements and states that all available means should be used to combat racism and thereby strengthen democracy's vision of a society in which diversity is perceived as a source of enrichment rather than a threat.[138] Although it has lofty statements in a few judgments, the Court has failed to develop a substantive concept of equality

[130] Boven (n 96) 115.
[131] Moeckli (n 35) 152.
[132] Fredman (n 88) 3-4; Arnardóttir (n 34) 23.
[133] Arnardóttir (n 34) 23.
[134] Fredman (n 5) 273.
[135] Fredman (n 88) 3-4.
[136] Titia Loenen, 'Rethinking Sex Equality as a Human Right' (1994) 12(3) Netherlands Quarterly of Human Rights 253, 268-269.
[137] Arnardóttir (n 34) 29.
[138] DH and Others v para (n 52) para. 176.

regarding racial discrimination.[139] The clearest expression of its failure can be seen in Judge Bonello's dissenting opinion, which is stated at the beginning of the study.[140] He criticised the Court for ignoring groups that are systematically discriminated against.[141] The next sections will discuss this issue further.

II. Court's review of racial discrimination

Since the Court adopted its very first judgment in 1961, it has decided many cases and found thousands of violations of the Convention.[142] For a long time, however, there was no case law on racial discrimination.[143] In 2004, the Court ruled for the first time that the State violated the prohibition of racial discrimination.[144] Over the years, it has given special importance to racial discrimination and described it as a 'particularly invidious kind of discrimination' and stated that 'in view of its perilous consequences [it] requires from the authorities special vigilance and a vigorous reaction.'[145]

As discussed in Chapter 1, when analysing indirect discrimination, the DH case, which is about the exclusion of Roma children from mainstream education, is also a landmark case for racial discrimination.[146] The judges highlighted that special consideration should be given to Roma people's needs and different lifestyles since they are a significantly vulnerable group.[147] Since the case develops a new approach to evidential rules and the burden of proof, it is also worth analysing in this respect. As a general rule, the Court requires that the applicants have to prove their allegation when considering the cases before it.[148] A normal standard for all rights outlined by the Convention is the standard of proof 'beyond reasonable doubt.'[149] In the DH case,

[139] O'Connell (n 9) 4.
[140] See the dissenting opinion of Judge Bonello in Anguelova v Bulgaria n (2).
[141] Ibid.
[142] Marie-Benedicte Dembour, 'Postcolonial Denial Why the European Court of Human Rights Finds It So Difficult to Acknowledge Racism', in *Mirrors of Justice* (CUP 2009) 47.
[143] Ibid.
[144] Nachova and Others v Bulgaria [2004] ECHR 90.
[145] Nachova and Others v Bulgaria [2005] ECHR 43577/98, para 145; Timishev v Russia (n 93), para 56; DH and Others v Czech Republic (n 52), para 176.
[146] DH and Others v Czech Republic (n 52).
[147] DH and Others v Czech Republic (n 4), para. 181.
[148] European Court of Human Rights (n 12) 21.
[149] Ibid.

however, the Court stated that if the applicants can demonstrate a 'rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent State, which must show that the difference in treatment is not discriminatory.'[150] In other words, the Court would apply 'less strict evidential rules': it was not necessary to prove any intention to discriminate, and once a discriminatory effect was shown by the applicants, the State should justify it under the Court's proportionality test.[151] Another important aspect of this judgement is that the Court based its finding of indirect discrimination largely on studies, reports and statistics documenting that Roma are more likely to be discriminated against than other people.[152] Indeed, the Court has become more flexible by accepting these statistics.[153] It clearly expressed that when assessing the effects of any measure or practice on someone or a group, if statistics appear reliable and significant upon critical examination, they will be deemed sufficient prima facie evidence the applicant must establish.[154] Ultimately, the DH case is a major milestone for a more substantive model of equality regarding racial discrimination and has been confirmed in other subsequent cases about the exclusion of Roma children from the education system.[155]

1. Racially motivated violence cases

Discriminatory violence is defined as 'violence directed towards groups of people who generally are not valued by the majority society, who suffer discrimination in other arenas, and who do not have full access to institutions meant to remedy social, political and economic injustice.'[156] Since the 1990s, the Court has been increasingly confronted with allegations of racially motivated violence against Roma, whose fact patterns and procedural histories are surprisingly similar.[157] Applications regarding discriminatory violence before the Court have taken different forms, such as torture or death in custody, death in hospital, burning of settlements and failure of state

[150] DH and Others v Czech Republic (n 52), para.189.
[151] Ibid; O'Connell (n 9) 221.
[152] DH and Others v Czech Republic (n 52), paras. 188-195.
[153] Möschel (n 84) 884-885.
[154] DH and Others v Czech Republic (n 52), para. 188.
[155] See Lavida and Others v Greece [2013] ECHR 488; Oršuš and Others v Croatia [2010] ECHR 337; Horváth and Kiss v Hungary [2013] ECHR 92.
[156] Leslie Wolfe and Lois Copeland, 'Violence against Women as a Bias-Motivated Hate Crime: Defining the Issues in the USA' in Miranda Davies (ed), *Women and Violence* (Zed Books 1994) 201.
[157] Mathias Mötchel, 'Is the European Court of Human Rights'Case Law on Anti-Roma Violence 'Beyond Reasonable Doubt'?' (2012) 12(3) HRLR 479, 481.

authorities to conduct effective investigations.[158] In this respect, the Court's jurisprudence reflects a picture of state-sponsored and state-tolerated violence at the hands of police forces, prosecutors, judges and hospital personnel.[159]

While the Grand Chamber's decision in DH case appears to indicate a shift in the Court's approach to cases of indirect discrimination, its approach is exactly the opposite of the direct discrimination claims in racial violence cases.[160] As will be analysed below, the Court departed from the new approach in the DH case that shifts the burden of proof regarding the cases about racist violence. It generally considers that Article 2 or 3 ill-treatment has been racially motivated if the applicants prove beyond reasonable doubt that racist attitudes were a factor.

a. Police violence cases

In the Nachova case, two unarmed Roma fugitives were shot dead by the military police attempting to arrest them.[161] The applicants claimed that the police had acted racially motivated, and no investigation was carried out to unmask this racial abuse.[162] In terms of evidence, the Court found excessive use of force, and there was witness evidence that the officer who shot the deceased engaged in racist verbal abuse.[163] It stated that there is no need to interpret the standard of proof as demanding 'such a high degree of probability as in criminal trials.'[164] According to the Court, the nature of the substantive right at stake and the evidentiary difficulties in question should be considered by allowing some flexibility.[165] Therefore, instead of establishing rigid evidentiary rules, it should adhere to the principle of free assessment of all evidence.[166]

The Court paved the way for shifting the burden of proof to Bulgaria, considering the general context, their failure to conduct an effective investigation, and the inferences of possible

[158] Jasmina Mačkić, 'The European Court of Human Rights and Discriminatory Violence Complaints' in *The Globalization of Hate* (OUP 2016) 236.
[159] Mötchel (n 124).
[160] See Sampanis and Others v Greece [2011] ECHR 1637; Oršuš and Others v Croatia (n 122).
[161] Nachova and Others v Bulgaria (n 111).
[162] Ibid, paras. 148-149.
[163] Ibid, para. 107.
[164] Ibid, para. 166.
[165] Nachova and Others v Bulgaria (n 111), para. 166.
[166] Ibid, para.166.

discrimination by the authorities.[167] It also considered that this was not the first time Roma were the victims of racial violence caused by state agents in Bulgaria.[168] Since Bulgaria did not provide any satisfactory explanation, the Court declared not only Article 2 violations but also a violation of Article 14.[169] Furthermore, the Court followed Judge Bonello's previous recommendation[170] and found a procedural violation for the first time alongside the substantive violation.[171] This separation between substantive and procedural limbs used for Article 2 has also been extended to apply to Article 14 whenever it is invoked in conjunction with Article 2.[172] The reason for the finding of a procedural violation was that the authorities failed to investigate the incident sufficiently, despite evidence of gunfire and racist verbal abuse by law enforcement officers in an area densely populated by Roma.[173]

However, The Grand Chamber departed from the novel approach of the Chamber and applied the Court's standard approach to the substantive question concerning Articles 2 and 14.[174] It stated that there is no violation on the substantive aspect and found the facts referred to by the applicants to be insufficient to shift the burden of proof to Bulgaria.[175] One can see that the Court were protective of the respondent Government. It stated that where an act of violence is alleged to be motivated by racial prejudice, the Government cannot require the person in question to prove the absence of a particular 'subjective attitude'.[176] This return to a focus on subjective intention is a serious setback for the developing concept of substantive equality because it undermines the ability of Article 14 to address disadvantages.[177] Besides, it put the criteria about the level of persuasion necessary for reaching a particular conclusion and determining the distribution of the burden of proof: they are linked to 'the specificity of the facts, the nature of the allegation made

[167] Ibid, paras. 156, 171.
[168] Ibid, para.173.
[169] Ibid, paras. 172-175.
[170] Judge Bonello suggested to extend the doctrine of 'procedural violation', which was already operative for Articles 2 and 3, to Article 14. See the dissenting opinion of Judge Bonello in Anguelova v Bulgaria (n 1), paras. 13-18.
[171] Nachova and Others v Bulgaria (n 111), para. 163.
[172] Henrik Olsen and Aysel Küçüksu, 'Finding Hidden Patterns in ECtHR's Case Law: On How Citation Network Analysis Can Improve Our Knowledge of ECtHR's Article 14 Practice' (2017) 17(1) International Journal of Discrimination and the Law 4, 11.
[173] Nachova and Others v Bulgaria (n 111), paras. 161-163.
[174] Nachova and Others v Bulgaria (n 112); Harris and Others (n 24) 794.
[175] Nachova and Others v Bulgaria (n 112), paras. 157 and 159
[176] Ibid, para. 157.
[177] Fredman (n 5) 286.

and the Convention right at stake.'[178] However, it is not clear how the Court weighs these criteria because neither in this case nor in the following cases has been applied in 'concreto' by the Court.[179] Consequently, the Court is nevertheless urged to provide further indications about relevant criteria despite the fact that it can be difficult to identify objective markers for a prima facie case of discrimination.[180]

b. Forced sterilisation cases

In addition to police violence cases, as another racial violence example where the Court has been reluctant to find a violation of Article 14, forced sterilisation claims by Roma women also need to be examined.[181] In recent years, the gendered type of racial discrimination against Roma women has appeared in the form of forced sterilisation claims by Roma women against and the Czech Republic.[182] As a part of a horrifying European tradition, forced sterilisations on Roma women have been practised since the Nazi regime and keep taking place even today.[183]

The VC case establishes a pattern similar to that observed in the racial violence cases examined earlier.[184] The applicant was sterilised in a public hospital during her second child's birth.[185] The delivery record clearly stated her ethnic origin and included a request for sterilisation as well as her signature.[186] She claimed that she had been unaware of the meaning of 'sterilisation' and that she had signed the request because the hospital staff told her that if she fell pregnant again, either she or the child might die.[187] The applicant also argued that Roma women were placed in separate rooms and were not given permission to share the same bathrooms or toilets as non-Roma

[178] Nachova and Others v Bulgaria (n 112), para. 147.
[179] Kristin Henrard, 'The European Court of Human Rights and the ‘Special’ Distribution of the Burden of Proof in Racial Discrimination Cases' (2023) ECHRLR 1, 14.
[180] Kristin Henrard, 'The European Court of Human Rights, Ethnic and Religious Minorities and the Two Dimensions of the Right to Equal Treatment: Jurisprudence at Different Speeds?' (2016) 34(3) Nordic Journal of Human Rights 157, 165.
[181] Performing surgical sterilization on a person without that person's consent is referred to as 'forced sterilization.' see Möschel (n 84) 894.
[182] Möschel (n 84) 895.
[183] Ibid.
[184] VC v Slovakia [2011] ECHR 1888.
[185] Ibid, paras. 9, 10.
[186] Ibid, paras. 14, 17.
[187] Ibid, para. 117.

women.[188] Whereas the Court ruled that there has been a violation of Article 8 and a substantive violation of Article 3, it decided that no separate examination of the complaint under Article 14 was necessary.[189] As the Court had already stated that Slovakia had failed to comply with its positive obligation under Article 8, it was able to ignore the need for a more detailed analysis of the Article 14 argument.[190] According to the Court, the materials available are not sufficiently strong in themselves to convince that the sterilisation was part of an organised policy or that doctors acted in bad faith with the intention of ill-treating the applicant.[191] It has been criticised that if the Court continues to ignore Article 14 and emphasise 'intent', it will contribute to the already strong impression that Article 14 is a Cinderella provision with only secondary importance and relevance.[192]

III. Reasons behind the Court's reluctance

In light of the cases demonstrated above, the Court's reluctance to recognise Article 14 violations in racial violence cases contrasts with the approach taken in the cases of DH and Nachova I. So, what could be the reasons behind the divergence between this approach and the general evolution of the non-discrimination doctrine in terms of intent and the shift of the burden of proof?

First of all, racially motivated violence cases belong to the field of criminal law and in relation to racially motivated crimes, it is necessary to prove both the intention to commit the act of violence and the intention to discriminate.[193] Besides, these necessary elements of the crime should prove beyond a reasonable doubt, given the importance of the presumption of innocence.[194] However, the Court is not a criminal court, and its function is to rule on human rights violations.[195] Its subjective is, therefore, to assess the responsibility of the State, not whether an individual has committed an offence.[196] Ultimately, it is not necessary for the Court to be bound by proof of

[188] Ibid, para. 18.
[189] Ibid, para. 180.
[190] Ibid, para. 179.
[191] Ibid, para. 177.
[192] Möschel (n 124) 492.
[193] Möschel (n 124) 505.
[194] Henrard (n 146) 12; Möscel (no 84) 892.
[195] Möschel (n 124) 506.
[196] Ibid.

beyond reasonable doubt in racial violence cases.[197] Indeed, the Convention does not obligate the 'proof beyond reasonable doubt' for the applicants to prove that death or ill-treatment was motivated by racial prejudice.[198] Judge Bonello agrees with this view in the dissenting opinion in the Anguelova case.[199] He claims that given the difficulty for applicants, the protection against racial discrimination becomes illusory and dysfunctional when the Court requires applicants to meet a standard of proof beyond reasonable doubt.[200]

Then, why does the Court insist on using the beyond reasonable doubt standard instead of establishing a prima facie case that can shift the burden of proof to the State in racial violence cases? It may be unwilling to attribute racism to states for violent acts, as they are generally serious criminal offences under domestic law with a social stigma.[201] The Court has been criticised for 'using ‘the requirement of the proof 'beyond any reasonable doubt' as a pretext for avoiding pronouncing on politically sensitive issues.'[202] As an international human rights body, the Court also deals with a series of problems that are not purely legal and may require considering political and pragmatic matters because serious human violations generally occur in the context of highly politically sensitive situations, including terrorism, internal conflicts and international disputes.[203] In these contexts, the Court would not prefer to confront its member States because the system does not work without their collaboration.[204] Its success is particularly dependent on the willingness of the States spontaneously to execute the judgments in cases to which they are parties because there is no coercive means of enforcement of judicial decisions.[205] Consequently, the Court will be between two fires while trying to protect human rights, find it difficult to attribute racism to states and adopt judicial policies that have no chance of being accepted by them.[206]

[197] Ibid.
[198] See the dissenting opinion of Judge Bonello in Anguelova v Bulgaria (n 1), para. 9.
[199] Ibid.
[200] Ibid.
[201] Möschel (n 84) 892.
[202] Pietro Sardaro, 'Jus non dicere for allegations of serious violations of human rights: questionable trends in the recent case law of the Strasbourg Court' (2003) 6 EHRLR 601, 608.
[203] Ibid, 605.
[204] Ibid.
[205] Ibid.
[206] Ibid, 608.

Dembour also attributes the Court's reluctance to condemn racism to the fear of officially recognising a state as racist in a world that has declared racism to be abhorrent. According to her, however, this is nothing but a form of denial.[207] She has named the Court's difficulty in recognising race discrimination claims as 'postcolonial denial' from a broader perspective.[208] The Court 'is a postcolonial institution by excellence: It was established before decolonisation, not to counteract the suffering of the colonised, but that of white victims.'[209] Dembour claims that the Court's poor record is the result of its structural failure to understand historical connections between empire and post-colonialism in the majority of race discrimination cases. She draws a conceptual link between post-colonialism, Edward Said's Orientalism[210], and the idea that Western Europe has regarded Eastern Europe as a Russian colony.[211] In this way, she includes violence cases in her postcolonial denial framework.[212]

IV. Conclusion

The chapter demonstrated that the post-Nachova jurisprudence with regard to claims of racial discrimination in conjunction with Article 2 and Article 3 is narrow and ineffective because of the Court's reluctance and its denial of systemic violence in similar types of applications that have been before the court for many years.[213] This argument is not only verified by the Roma cases but also by similar cases concerning Kurds, Chechens, and other minority groups who were victims of racial violence in European countries.[214] Overall, the Court's jurisprudence on racist violence contrasts with its statements about racial discrimination, underlined at the beginning of the chapter that it is a particular affront to human dignity and, given its dangerous consequences, requires special vigilance and a vigorous reaction from the authorities.[215] The chapter also set out the reasons for the approach adopted by the Court in cases of racist violence. The Court has used

[207] Dembour (n 109), 50.
[208] Ibid, 45.
[209] Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2002) 16.
[210] Said defined Orientalism as 'a Western style for domination, restructuring, and having authority over the Orient.' See Edward Said, *Orientalism* (Routledge and Kegan Paul 1978) 3.
[211] Dembour (n 109) 51,52; Möschel n(84) 892.
[212] Dembour (n 109) 51-53 and Möschel (n 84) 892.
[213] Möschel (n 124) 492.
[214] See Togcu v Turkey [2005] ECHR 349; Musikhanova and Others v Russia [2008] ECHR 1600; Zelilof v Greece [2007] ECHR 407.
[215] Möschel (n 124) 492.

the criminal law requirement of the proof beyond all reasonable doubt as a pretext rather than focusing on racist motives in these cases due to the seriousness of these cases and the political backlash from States.[216]

Chapter 3: Kurdish Case Study

Another example of a racist violence case in which the Court has frequently found violations of Article 2 or 3 are cases brought before the Court by Kurds in Turkey. Although the Court exceptionally[217] found a violation in the Roma cases regarding racial discrimination, it has not found a violation of Article 14 in any of these cases since the first case was brought by the Kurds.[218] This is an interesting point because the alleged incidents are very similar in that they involve police violence and take place in a specific context. It is surprising that the analysis of these cases is not sufficiently covered in the literature, despite the fact that they have been systematically subjected to rights violations for years. For this reason, this chapter particularly gives importance to Kurdish cases and specifically analyses the Court's stance. The first part will introduce the historical background of the Kurdish problem in Turkey to understand better that violations are systematic. After presenting a general outline of the applications before the Court, the Hasan Ilhan case will be specifically analysed, and the Court's perspective will be critically examined. The final section will propose solutions to this problem. These solutions will provide guidance not only for Kurds but also for other ethnic identities.

I. Historical background of Kurdish issue in Turkey

The Kurds, who live in a mountainous region bordering Turkey, Iraq, Syria, and Iran, are the largest ethnic group in the Middle East without their own State.[219] Today, they have been struggling for political recognition and rights as national communities within the borders of the State in which they live.[220] Throughout history, the Kurdish problem was a significant challenge

[216] Sardaro (n 169) 608.
[217] See Stoica v Romania [2008] ECHR 191.
[218] Kurban (n 3) 270.
[219] David Mcdowall, 'The Kurds' (1996) Minority Rights Group Reports, 6 <https://minorityrights.org/wp-content/uploads/old-site-downloads/download-865-Download-full-report.pdf> accessed 12 August 2023.
[220] Ibid, 4.

faced by the Ottoman Empire and the Turkish Republic.[221] After losing most of its territory and population in the course of a series of wars, the Ottoman Empire sought to centralise power and control the remaining territories.[222] The Republic, founded on the remains of a vast empire, continued its predecessor's attempts and implemented assimilationist policies to achieve ethnic homogenisation by challenging the Kurds' long-time regional autonomy.[223] 'The Turkification policies', following the Treaty of Lausanne, sought to dominate 'Turkishness' and Islam in every aspect of life, including language, citizenship, education, trade, and settlement laws. These policies suppressed the distinct cultures, languages, and histories of ethnic groups, especially the Kurds.[224]

In the face of these policies, Kurds began to mobilise politically. Unsurprisingly, the response of the imperial and republican regime to Kurdish resistance has been repressive: ethically conscious Kurds who demanded political, linguistic and cultural rights have been faced with prosecution, forced exile, imprisonment and deprivation of political rights.[225] Although they sought democratic representation, non-violent opposition failed due to the regime's intolerance of dissent, the increasing ideological polarisation and the lack of prospects for democracy.[226] This situation caused the Kurds to believe that independence was the only way.[227] Out of this discontent, the Kurdistan Workers' Party (Partiya Karkeren Kurdistan-PKK) emerged in 1978 as Turkey's first armed secessionist Kurdish movement, rising from the revolutionary left.[228] From this date, the armed struggle between Turkish security forces and the PKK has led to widespread human rights violations, including torture, ill-treatment, disappearances and extrajudicial executions.[229] As a result, Amnesty International listed Turkey among the top five countries for ongoing, serious and systematic violations of human rights.[230]

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[221] Kurban (n 3) 81.
[222] Ibid.
[223] Ibid, 79; Dilek Kurban, 'Unravelling a Trade-Off: Reconciling Minority Rights and Full Citizenship in Turkey' (2004) 4 European Yearbook of Minority 341, 343-344.
[224] Kurban (n 190) 345.
[225] Kurban (n 3) 80.
[226] Ibid, 81 and 92.
[227] Ibid, 92
[228] Ibid.
[229] Ayla Kiliç, 'Democratization, Human Rights and Ethnic Policies in Turkey' (1998) 18(1) Journal of Muslim Minority Affairs 91, 103.
[230] Amnesty International, 'Amnesty International Annual Report' (1996) <https://www.amnesty.org/en/documents/pol10/0002/1996/en/> accessed 13 August.

After PKK was established, the Turkish State has pursued various policies on the Kurdish question under the name of counterterrorism.[231] Specifically, the village guard system was established with the aim of organising those who knew local conditions to assist the armed forces against the PKK, the 'State of Emergency' was declared in the south-east of Turkey, and the Anti-Terror Law came into force.[232] During the 1990s, village evictions and forced displacements took place, where the majority of the population is Kurdish.[233] Although the Turkish State argues that the displacements are the result of 'terrorism' and the 'fight against terrorism', NGOs point out that the State's village guards and military forces compelled people to leave by burning houses and terrorising civilians.[234] This is confirmed by the Hasan İlhan Case, as will be analysed in the next section.[235]

In the late 1980s, Kurdish non-violent resistance entered a new chapter with the application for EU membership, which also gave them the opportunity to lobby the EU and the Council of Europe.[236] During the civil war between the PKK and the Turkish military, they confronted the state by means of legal mobilisation and electoral participation.[237] While Kurdish lawyers challenged the state in domestic courts and the ECtHR, Kurdish politicians founded the first pro-Kurdish political party (HEP) and ran for national and municipal elections.[238] Even though HEP wasn't established by the PKK, they had the same social basis and broadly similar ideological and political viewings.[239] Therefore, HEP was charged with being linked to the PKK solely on the basis of its programme, and consequently, it dissolved shortly after its foundation.[240] From this point on, party closures became a tradition for Kurdish political parties founded in the following years.[241]

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[231] Kiliç (n 196) 102.
[232] Ibid.
[233] Ayşe Betül Çelik, 'Resolving Internal Displacement in Turkey: The Need For Reconciliation′ in Megan Bradley (ed), *Forced Migration, Reconciliation and Justice* (McGill-Queen's University Press 2015) 202.
[234] See Human Rights Foundation of Turkey, '1995 Türkiye İnsan Hakları Raporu' (1997) <https://tihv.org.tr/wp-content/uploads/2020/04/1995-turkiye-insan-haklari-raporu.pdf> accessed 12 August; Çelik (n 200) 206.
[235] Hasan Ilhan v Turkey [2004] ECHR 593.
[236] Kurban (n 3) 81.
[237] Ibid, 100.
[238] Ibid, 99.
[239] Ibid, 100.
[240] Ibid.
[241] Ibid.

The massive human rights violations against Kurds continue in different forms today: Kurdish MPs and mayors, whose activities have been criminalised and stripped of their seats, are in prison. Not only does the State deprive Kurdish political representatives of 'the capacity to govern effectively', but it also deprives an entire Kurdish electorate of the right to be represented by politicians and parties of their own choosing.[242] According to TIHV's 2022 report, Kurds' freedom of expression, freedom of assembly and freedom of association are widely and systematically violated by law enforcement interventions and obstructions.[243] While It became a new norm for law enforcement to use extreme levels of deadly force against peaceful protests, human rights activists who voice their opposition to state violence remain to face judicial harassment through the misuse of anti-terrorism laws.[244]

In conclusion, after many years of armed struggle, Turkey still refuses to acknowledge that the Kurdish issue it is facing has propelled the nation into a civil war.[245] Instead of recognising the Kurdish people's identity, it still maintains the approach that sees the Kurdish issue as a problem created by 'some armed people terrorizing the mountains of Turkey' and believes that this problem will end by breaking the 'backbone of the terrorists'. [246]

II. Analysis of racial violence cases brought by Kurds

In HUDOC, the searchable database of the case law of the Court, a text search for the word 'Kurdish', the use of filters to select only cases involving Article 14 and only English versions of those cases resulted in 88 cases. No violation was found in any of them. The results show that Article 14 has been invoked in conjunction with Articles 2 and 3 in the majority of cases. The Court had two similar approaches: First, as in the case of Hasan İlhan, which will be analysed

[242] Kurban (n 3) 170; Philippe Schmitter, 'Dangers and Dilemmas of Democracy' (1994) 5 Journal of Democracy 57, 60.
[243] Human Rights Foundation of Turkey, 'Verilerle 2022 Yılında Türkiye'de İnsan Hakları' <https://tihv.org.tr/wp-content/uploads/2022/12/10_Aralik_2022_IHD_TIHV_Veriler.pdf> accessed 12 August 2023.
[244] Dilek Kurban, 'The limits of human rights law in an authoritarian context: Torture and impunity in Turkey' (Middle East Institute, 13 June 2023) <https://www.mei.edu/publications/limits-human-rights-law-authoritarian-context-torture-and-impunity-turkey> accessed 13 August 2023.
[245] Kiliç (n 196) 101.
[246] Ibid.

below, it briefly stated that there had been no violation.[247] Secondly, as a result of the subsidiary character of Article 14 examined in the first part, it concluded that it was unnecessary to examine the claim under Article 14 separately.[248] In this respect, Judge Mularoni disagreed with the majority approach, which is tantamount to considering that the examination of Article 14 is not an important issue on Article 14 in three separate rulings. She justified her objection that having found violations of Articles 2 and 3 in dozens of similar applications by Kurdish applicants, the Court should at least consider that there may be a serious problem under Article 14.[249] As an example of a case in which a violation of Article 14 was alleged in conjunction with Article 3, the Hasan İlhan case will be analysed in the following section.

1. Hasan Ilhan v Turkey

The applicant, Hasan Ilhan, a Turkish citizen of Kurdish origin, was living in Kaynak at the time of the incident, a hamlet in the village of Ahmetli in the province of Mardin in south-eastern Turkey.[250] The applicant argued that military units of the Mardin Gendarmerie Command had searched the applicant's village on 21 April 1992 and told the villagers that they would be killed if they did not leave the village, killed animals and destroyed some houses and barns. On 30 June 1992, the security forces returned to the village and demolished the remaining houses. When they realised the villagers had not left the village, they set fire to the land where vineyards and orchards had been planted.[251] The applicant also claimed that his home and belongings were destroyed due to a governmental policy that constituted discrimination based on his ethnic minority status.[252] In support of this allegation, he also submitted a report containing a list of villages and settlements destroyed in south-east Turkey and a report prepared by Amnesty International entitled 'Turkey: Extrajudicial Killings.'[253] On the other hand, The Turkish Government alleged that an armed attack was conducted on 2 April 1992 by members of the

[247] See Makbule Kaymaz v Turkey [2014] ECHR 471; Muhacir Çicek v Turkey [2016] ECHR 141.
[248] See Yasa v Turkey [1998] ECHR 83
[249] See the dissenting opinion of Judge Mularoni in Dundar v Turkey [2005] ECHR 611; Dizman v Turkey [2005] ECHR 609; Kismir v Turkey [2005] ECHR 345.
[250] Hasan Ilhan v Turkey (n 202), para. 12.
[251] Ibid, paras. 14 and 18.
[252] Ibid, para. 129.
[253] Ibid, para. 28.

PKK on the Konaklı gendarmerie station close to the applicant's village.[254] Therefore, in order to protect the lives and property of the inhabitants of the village from the PKK, military units carried out an operation in the village on 21 April 1992.[255] The government also alleged that the family may have left the village out of fear of being threatened by the PKK following the discovery of weapons hidden by a member of the Ilhan family.[256]

In its assessment of the facts, the Court took into account the fact that the gendarmerie officers had consistently denied the allegations that the security forces had burnt the applicant's houses, the contradiction between their statements, the contradictory information given by the State organs concerning the events of the case.[257] In conclusion, it found that, following the armed attack on the police station, soldiers went to the applicant's village on 21 April 1992 and burnt the applicant's house, orchard and oak trees.[258] With regard to the pain and distress suffered by the applicant's family members as a result of the destruction of the applicant's home and possessions, the Court categorised the actions of the security forces as inhuman treatment, held that they constituted an interference with the applicant's right to respect for his private and family life and his home and that the Turkish authorities had failed to conduct an effective investigation into the applicant's allegations.[259] Therefore, it decided there have been violations of Articles 3, 8 and 13.

However, the Court made the following assessment regarding the allegations of violation of Article 14: 'The Court has examined the applicant's allegation in the light of the evidence submitted to it. It considers that there is an insufficient basis, in fact, for grounding this allegation. There has therefore been no violation of Article 14 of the Convention.'[260] As can be seen, the wording and the reasoning in Article 14 are very brief. On the contrary, Judges Laucaides and Mularoni disagreed with the Court's conclusion, which was very brief in wording and reasoning.[261] They found it highly relevant that the Court had been dealing with numerous similar applications against Turkey for many years, in which the applicants complained of

[254] Ibid, para. 39.
[255] Ibid, para. 21.
[256] Ibid, para. 22.
[257] Ibid, paras. 84,85 and 87.
[258] Ibid, para. 98.
[259] Ibid, paras. 104-127.
[260] Ibid, para. 130.
[261] See the dissenting opinions of Judges Laucaides and Mularoni in Hasan Ilhan v Turkey (n 202).

violations of Articles 2 and 3, alleging that they had been discriminated against because they belong to an ethnic minority.[262] These applications also involved military operations by members of the security forces using the same style of operations against Kurds, with objectives, motives, methods and results strikingly similar to those in the present case.[263] Having examined the facts, Judge Loucaides noted that Gendarmes went to the applicant's village subsequent to the armed attack by the PKK at the Konaklı gendarme station.[264] Hence, the nature and extent of the military operation were inextricably linked to the Government's policy with regard to the activities of the PKK, a Kurdish organisation.[265] Even if it were true, as the Government claimed, that the family was hiding weapons and cooperating with the PKK, in any case, it could not explain why the applicant's property was destroyed by the security forces.[266] In those circumstances, he concluded that the destruction of the house and displacement of the family was part of the overall aim of the military operation in the village, and there is no explanation for the destruction of the applicant's property other than the fact that the applicant was Kurdish.[267]

Kurban agrees with Judge Loucaides on this point: the underlying systematic problem in the displacement cases was the Kurdish question, which is a long-standing ethno-political dispute between Turkey and some of its citizens inhabiting a particular region and having a political and ethnic identity.[268] As presented in the previous section, the security forces' destruction of property was just one of a great number of severe violations carried out in the context of an armed conflict, all of which were justified as part of counterterrorism measures.[269] Kurban also argues that the reason behind the Court's ineffective approach was its unquestioning respect for Turkey's anti-terrorism defence.[270] The Court easily acknowledged the argument that violations were not intentional outcomes of Turkey's conflict against the PKK.[271] Granting Turkey a wide margin of

[262] Ibid.
[263] Ibid..
[264] Ibid.
[265] Ibid.
[266] Ibid.
[267] Ibid.
[268] Dilek Kurban 'Shattered Hopes: When the European Court of Human Rights Shuts Its Doors to the Kurdish Displaced' (2014) 44(1) Perspectives on Europe 24, 29.
[269] Ibid.
[270] Kurban (n 3) 299.
[271] Ibid.

appreciation, the Court did not consider policies of systematic cultural assimilation and political repression, which has long been pursued.[272]

Instead of seeing the broader picture, the Court restricted itself to examining individuals' circumstances separately and refused to address Article 14 claims relating to home destruction and displacement, reasoning insufficient evidence.[273] According to Klocker, the Court's ability to deal with claims concerning any wider discriminatory policy or practice was limited because there was no pilot judgment procedure at the time.[274] However, the Court maintains its approach to similar cases. For instance, it reiterated the same position in the recent RR and RD case, where it was alleged that large-scale operations were planned predominantly in Roma communities.[275] Although it recognises 'the sensitive nature of the situation related to Roma' at the relevant time, it clarified that 'it has to confine itself as far as possible to the examination of the concrete case before it' and that 'it is not its task to assess the overall social context.[276] Ultimately, as discussed earlier, it appears that the Court does not prefer to be in disagreement with states on politically sensitive issues.

III. Proposals for Solution

Given the grave legal and political consequences of racially motivated violence cases, it is not surprising that the Court is particularly careful when considering Article 14 claims.[277] However, given the increase in the number of ethnic groups coming under the protection of the Convention as a result of the accession of new States to the Council of Europe, it cannot remain silent on the need to protect their rights and, more specifically, minorities from discriminatory violence.[278] By pronouncing judgments in cases, the Court has the ability to place certain issues on the regulatory or policy agendas of national legislative and executive bodies and to change domestic law, as in

[272] Ibid.
[273] Cornelia Klocker and Deborah Casalin, 'Discriminatory practices in armed conflict contexts: exploring (parallel) proceedings under the European Convention on Human Rights and the International Convention on the Elimination of All Forms of Racial Discrimination' (2023) 27(5) IJHR 896, 902.
[274] Ibid.
[275] RR and RD v Slovakia [2020] ECHR 593.
[276] Ibid, para. 215.
[277] Klocker (n 232) 899.
[278] Mačkić (n 125) 238.

the case of the criminalisation of homosexual contact.[279] This can be particularly the case if the State's behaviour is rooted in deep-rooted cultural, traditional or legal phenomena where national authorities, such as in Turkey, recognise the problems, such as ethnic issues, but neglect to address them.[280] Therefore, the Court should be encouraged to apply and clearly interpret Article 14 in cases arising out of racially motivated violence contexts in response to allegations or factual indicators of discriminatory practices.[281] Such an approach would appropriately recognise the seriousness of the discriminatory dimensions of conflict-related practices and racially motivated violence and ensure consistency with the Court's own developing case law on discrimination outside racial violence cases. [282]

It is worth at this stage to recall the importance of acknowledgement in combatting racism, as presented in Chapter 2. Klocker emphasised the significance of direct recognition of discriminatory practices in racial violence cases.[283] This is even more crucial in situations of armed conflict, particularly in contexts where national or ethnic divisions are at the root of large-scale human rights violations.[284] Besides, it has been highlighted that recognising discriminatory aspects of conflict-related violations is also critical for conflict transformation, as well as in providing that reparation does not perpetuate pre-existing inequalities and victimisation.[285] By recognising the particularly insidious motivations behind discriminatory violence and handling the cases with appropriate seriousness, the Court would be following the same standards that it expects of domestic authorities.[286] In this respect, it should recognise that violence is inflicted on individuals belonging to oppressed ethnic minorities largely because they belong to such an ethnic group.[287] By doing so, it can ensure that the discrimination and humiliation suffered by victims is fully recognised and make the structural dimension of violations properly visible, not only to the concrete victims of the case but also to society as a whole.[288] More broadly, it would

[279] Janneke Gerards, 'The Prism of Fundamental Rights' (2012) 8(2) European Constitutional Law Review 173, 185-186.
[280] Mačkić (n 125) 240; Gerards (n 238) 186.
[281] Klocker (n 232) 897.
[282] Ibid.
[283] Ibid, 899.
[284] Ibid.
[285] Rashida Manjoo, 'Introduction: Reflections on the Concept and Implementation of Transformative Reparations' (2017) 9 IJHR 9, 21; Çelik (n 200) 197.
[286] Klocker (n 232) 899.
[287] Möschel (n 84) 899.
[288] Ibid.

thereby give effect to the concept of substantive equality, which aims to redress disadvantage and address stereotypes, prejudices, humiliation and violence.

Accordingly, the Court already has a number of tools at its disposal that would allow it to recognise discriminatory practices in racial violence cases.[289] The first one is the shift of the burden of proof to the State. As Judge Bonello suggested, the Court should hold that 'when a member of a disadvantaged minority group suffers harm in an environment where racial tensions are high and impunity of State offenders epidemic, the burden to prove that the event was not ethnically induced shifts to the Government.'[290] Möschel also proposes that the Court may simply rely on its own case law and assume that the violence is racially motivated when it concerns one of the countries that is frequently the respondent in cases of violence.[291] For instance, the Court may find that when a Kurdish person is detained and dies in police custody in Turkey, where racial tensions against Kurds are high, the respondent government has an obligation to provide a reasonable explanation for the events; otherwise, the authorities must be held responsible under Article 14 of the Convention.

Another tool is related to the margin of appreciation. Articles 2 and 3 embody ‘the basic values of the democratic societies making up the Council of Europe’ and cannot be derogated from in time of war or other public emergency. [292] Thus, the Court generally does not provide states a margin of appreciation where the non-derogable rights enshrined in Articles 2 and 3 are concerned.[293] Parallelly, Mačkić claims that the margin should not also provided in discriminatory violence cases where Article 14 is invoked in conjunction with Articles 2 and 3.[294] In addition to Articles 2, 3 and 14 enshrining fundamental rights, there is another factor that makes discriminatory violence complaints considerably more severe than other acts.[295] Discriminatory violence

[289] Stephanie Berry, 'The siren’s call? Exploring the implications of an additional protocol to the European Convention on Human Rights on national minorities' (2016) 23(1) International Journal on Minority and Group Rights 1, 3.
[290] See the dissenting opinion of Judge Bonello in Anguelova v Bulgaria (n 1), para. 18.
[291] Möschel (124) 501.
[292] See McCann and Others v United Kingdom [1995] ECHR 31, para. 147; Soering v United Kingdom [1989] ECHR 14, para. 88.
[293] Dean Spielmann, 'Allowing the Right Margin, the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (2012) 14 Cambridge Yearbook of European Legal Studies 381, 395.
[294] Mačkić (n 125) 242.
[295] Ibid.

treatment affects the victims in a specific emotional and psychological way, encroaching not only on their physical existence but also on the essence of their identity, and affect the wider environment, in particular the general society.[296] Hence, discriminatory violence claims deserve more attention and a strict level of scrutiny because of their particularly grave nature. These suggestions are consistent with the cases, where the Court has already stated that it should be very difficult for the State to justify discrimination on sensitive grounds and therefore, the margin of appreciation should be reduced.[297]

IV. Conclusion

This chapter explored the Kurdish cases regarding discriminatory violence and found that the destruction of property, forced displacement, torture, enforced disappearances and extrajudicial killings to which Kurds were subjected, and the failure of the authorities to investigate were part of a policy directed against them because of their ethnic origin and political views.[298] However, while issuing hundreds of similar judgments in these identical racial violence cases, the Court did not once state that Turkey's treatment of Kurdish citizens constituted discrimination, either on the grounds of insufficient evidence or by refusing to conduct an Article 14 review.[299] The chapter also provided recommendations on how the Court should approach racially motivated cases. The Court should shift the burden of proof to the states, as it is burdensome for victims to prove racial motivation.[300] Besides, when considering objective and reasonable justification, it should also narrow the margin of appreciation available to states by paying close attention to the allegations due to the grave nature of racially motivated cases.[301]

Conclusion

[296] Frederick Lawrence, *Punishing Hate: Bias Crimes Under American Law* (Harvard University Press 1999) 40.
[297] See DH and Others v Czech Republic (n 52) para. 176; Sejdić and Finci v. Bosnia and Herzegovina (n 80) paras. 43-44.
[298] Kurban (n 3) 270.
[299] Ibid, 299.
[300] See the dissenting opinion of Judge Bonello in Anguelova v Bulgaria (n 1), para 18.
[301] Mačkić (n 125) 242.

Article 14 has not received much attention and is regarded as a weak provision due to its accessory character with a limited field of application.[302] Over the recent years, however, the Court has substantially developed its case law on non-discrimination, including the DH case. Despite developments in the scope of application of Article 14 with its broad interpretation, accepting claims of indirect discrimination and shifting the burden of proof, there are still challenges facing applicants, especially regarding racial discriminatory violence. In light of the cases examined, the thesis has attempted to demonstrate the Court's ineffectiveness in cases of racist violence, where it has frequently found violations of Articles 2 and 3 but has been very reluctant to recognise their racially discriminatory aspects.[303]

The thesis has also set out the reasons for the approach adopted by the Court in cases of racist violence. Given the negative connotation attributed to racism today, the Court is extremely careful before finding that a state has violated Article 14 on racial grounds.[304] The Court's reluctance to act as a criminal court, in addition to the seriousness of the accusation and potential political reactions from the states in question, make it challenging for the Court to find an Article 14 violation.[305] As the Kurdish case study in Chapter 3 shows, it tends to remain silent when it comes to violations occurring in the context of politically sensitive situations for its member states.

Returning to the question posed at the beginning of this study, it is now possible to state that the Court's disregard of the Article 14 claim not only diminishes its autonomous significance but also completely misses the underlying cause of the systemic violence, namely that violence happens to people belonging to oppressed ethnic minorities largely because they belong to such an ethnic group, therefore, contributing to the wider discriminatory environment and the subordination of groups.[306] Moreover, it prevents victims from obtaining full recognition for the discrimination and humiliation they have suffered and renders the structural dimension of violations invisible.[307]

[302] Arnardóttir (n 34) 1; Arnardóttir (n 2) 151.
[303] Harris and others (n 24) 23.
[304] Dembour (n 109) 61.
[305] Möschel (n 84) 899.
[306] Möschel (n 84) 899.
[307] Ibid.

Considering the small number of cases in which the Court found a violation of Article 14 in racial violence cases, the Court jurisprudence misleadingly projects that people of various origins live together in a democratic and peaceful Europe without prejudice or intolerance.[308] However, this picture does not show that Europe is a paradise of ethnic fraternisation, but rather that the Court has turned its back on the problem at hand and remained silent.[309] In fact, as the study proposed, the Court has the tools to overcome this problem. Whatever tools the Court uses, the important thing is that it should put itself in a position to acknowledge racism because such a step is vital given the central role it plays in Europe, the 'imagination of human rights' and 'the idea of justice.'[310] To do otherwise would mean that the Court would continue to participate in the general denial of racism and perpetuate the injustice underlying the colonial enterprise.[311]

[308] See the dissenting opinion of Judge Bonello in Anguelova v Bulgaria (n 1), para 2.
[309] bonello
[310] Dembour (n 109) 61.
[311] Ibid.

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