The European Court of Human Rights and the ‘Special’ Distribution of the Burden of Proof in Racial Discrimination Cases: The Search for Fairness Continues

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Abstract

To improve ‘fairness’ and address victims’ difficulties in proving discrimination, a ‘special allocation of the burden of proof’ has been developed. When the claimant persuades the Court to establish a presumption of discrimination, the burden shifts to the defendant, who must persuade the court that no discrimination has occurred. Focusing on racial discrimination, this article traces the ECtHR’s struggle towards operating a fair shared burden of proof between applicant and defendant. Whereas for indirect racial discrimination, the search for fairness is one of fine-tuning, for hidden direct racial discrimination, particularly involving crimes with discriminatory motives, considerable work is needed still. So far, the Grand Chamber has identified relevant criteria for the distribution of the burden of proof, but has not applied these criteria in concreto. The Court is invited to provide more guidance to assist national authorities and courts in their search for a fair distribution of the burden of proof.

Keywords

direct and indirect discrimination – racial discrimination – distribution of the burden of proof – prima facie case – Nachova criteria – rebuttal (of the presumption) – fairness
Introduction

Sadly, having rights, even human rights, does not mean effectively enjoying them. When states fail to respect their obligations and one seeks judicial redress, various questions of proof come to the fore. Ultimately, these questions concern which party needs to persuade the court of what (the distribution of the burden of proof) and to what extent (the standard of proof). Proof questions are not just an afterthought but actually go to the core of fundamental rights, their substance, and the reach of their protection. The allocation of the burden of proof is particularly decisive for the effective protection against (racial) discrimination.

As always in human rights law, it is all about striking a fair balance. On the one hand, the victim's concern about the effective protection of his/her rights implies that the burden of proof should not be unreasonably demanding. On the other hand, the defendant state's concern not to be unjustly held to have violated fundamental rights implies that the proof needs to be convincing enough. The focus here is on the distribution of the burden of proof between the parties, and more particularly the burden of persuasion. The latter is what matters in the end, since it determines which party bears the risk of not persuading the court and in turn losing the case. The burden of production points to the party that needs to put forward evidence, which shifts back and forth between the parties throughout the proceedings.

Following the Latin adagio 'affirmanti incumbit probatio', the burden of proof baseline requires the claimant to prove their allegation to succeed. The claimant thus bears both the initial burden of production and the ultimate burden of persuading the court. The growing awareness that this allocation of the burden of proof is very difficult to bear by victims of discrimination triggered the development of a special allocation of the burden of proof,
realising a fairer distribution. To achieve this fairer balance, the distribution of the burden of proof is managed in two phases. In the first phase, the claimant needs to prove facts to such an extent that the court is persuaded to establish a *prima facie* case of discrimination. Once the court has established a *prima facie* case of discrimination, the burden of proof shifts to the defendant, who now needs to persuade the court that the presumption of discrimination is rebutted and that no discrimination is to be found to have taken place. In each phase, the burden of proof (both the initial burden of production and the burden of persuasion) is on a different party: in the *prima facie* phase on the claimant, in the rebuttal phase on the defendant.

Although these principles have gained traction in the jurisprudence of international and national (human rights) courts, the actual criteria for either the establishment of the *prima facie* case or the rebuttal thereof are still being developed and fine-tuned. The ongoing nature of the fine-tuning process is nicely visible in EU law: notwithstanding the long pedigree of the special allocation of the burden of proof was already enshrined in UK law in the Sex Discrimination Act 1975 and the Race Relations Act 1976, and thus applied by UK courts. In EU law, the special allocation of the burden of proof started as CJEU jurisprudence, but later the principles were codified in directives on the right to equal treatment: Council Directive 97/80/EC of 15 December 1997 on the Burden of Proof in Cases of Discrimination Based on Sex [1997] OJ L14/6; Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin [2000] OJ L180/22 (Race Equality Directive); Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation [2000] OJ L303/16 (Employment Equality Directive). In turn, this EU law has been a source of inspiration for the ECHR (often included in the overview of relevant international law, for example, *Nachova and Others v Bulgaria* 43577/98 and 43579/98 (ECHR, 26 February 2004) para 74. See also, the phenomenon of transnational judicial dialogue, referring to the regard that international and national courts have for one another’s jurisprudence, the resulting mutual influence and cross-fertilisation, and eventually convergence in lines of jurisprudence: AM Slaughter, ‘A Typology of Transjudicial Communication’ (1994) 29 University of Richmond Law Review 99.

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7 When considering the definitional elements of ‘discrimination’, namely harm (disadvantage), in comparison with another in a comparable situation, and a causal relationship between the harm and a protected ground, the presumption mostly concerns that causal relationship, the establishment of a probable causal link (see also, Ambrus (n 5) 23–25).

8 In line with the distinctive steps in making out a discrimination case, three different modes of rebutting can be distinguished: the negation of comparability of the cases, the negation of a causal link between differential treatment and protected ground invoked, and the justification of the differential treatment (reasonable and objective justification). Ibid 49.

allocation of the burden of proof in gender discrimination cases (since the landmark Danfoss case of 1989), the requirements for establishing a prima facie case and for rebutting a presumption remain unclear and the CJEU is still regularly called upon (via preliminary questions) to further develop its guidance on how to operate the principles.

This contribution traces the ECtHR’s struggle to operate a fair distribution of the burden of proof between applicant and defendant in racial discrimination cases. Following introductory remarks about the ECtHR’s evidentiary principles, the article identifies markedly different development lines concerning the distribution of the burden of proof between direct and indirect (racial) discrimination cases. The Court’s engagement with the special allocation of the burden of proof regarding indirect discrimination was instrumental in its coming to terms with the specific group- and effect-based nature of indirect discrimination. Here, the ongoing search for fairness is one of fine-tuning. By contrast, with respect to direct racial discrimination, especially in criminal cases where racist motives are alleged, the search for fairness is in full development. The ECtHR’s concern that increasing fairness for the victim would not entail an unfair burden for the state has produced three problematic results: 1) imposing a threshold for a prima facie case which is not only too undefined (due to a lack of guidance about operative principles), but also 2) too high (too close to full proof), and 3) failing to explore possible inferences from serious lacunae in official investigations. By way of conclusion, the article invites the ECtHR to further its search for fairness in its operation of the special allocation of the burden of proof in relation to cases of covert direct racial discrimination by gradually developing criteria for a prima facie case and its rebuttal.

2 Evidentiary Principles at the ECtHR

The ECtHR’s general standard of proof, ‘beyond reasonable doubt’, has often been criticised as being very demanding for claimants. The Court denies

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that this standard would be as demanding as the eponymous standard in national criminal law cases, since it does not rule on criminal guilt but on state responsibility under the ECHR. Furthermore, several of the Court’s evaluation principles provide flexibility: all evidence is freely evaluated and ‘proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebuted presumptions of fact.

As a matter of principle, the special allocation of the burden of proof is accepted by the ECtHR and ‘fits’ its broader jurisprudence. Indeed, the way the Court reviews alleged violations of non-absolute human rights lends itself well to the two-stage distribution of the burden of proof. First, the Court establishes whether there has been an interference with a fundamental right at all. Secondly, the Court reviews whether or not that interference is justified. The claimant has to persuade the Court that an interference with the enjoyment of a fundamental right took place. Once this prima facie case has been established, the burden shifts to the respondent state, who has to persuade the Court that the interference is justified, thus rebutting the presumption of a violation. Put differently, the two phases of the special allocation of the burden of proof are aligned with the two steps that the Court distinguishes in its analysis of alleged human rights violations generally. The ECtHR also acknowledges the relevance of the provisions of the shared burden of proof in the EU discrimination directives, including the Race Equality Directive (2000/43/EC), since these often feature in the overview of relevant international law in its judgments.

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13 Aghdgomelashvili and Japaridze v Georgia 7224/11 (ECtHR, 8 October 2020) para 43.
14 See, inter alia, Nachova (n 12) para 147.
15 See also, J Gerards and H Senden, ‘The Structure of Fundamental Rights and the ECtHR’ (2009) 7 International Journal of Constitutional Law 641. Van der Schyff confirms that this bifurcated nature of fundamental rights is not confined to the rights with express limitation clauses, but that ‘most rights in the ECHR evidence a two stage characters either expressly or by implication’ (G van der Schyff, ‘Interpreting the Protection Guaranteed by Two-Stage Rights in the European Convention on Human Rights’, in Shaping Rights in the ECHR: The Role of the ECtHR in Determining the Scope of Human Rights, E Brems and J Gerards (eds), (Oxford University Press 2013) 66).
16 In cases on alleged racial discrimination, reference is made to the Race Equality Directive (n 9), while in cases on alleged discrimination on grounds of handicap, sexual orientation, or religion, the Employment Equality Directive (n 9) is included, as the latter concerns discrimination on grounds of religion or belief, disability, age, or sexual orientation.
Nevertheless, as the following analysis will corroborate, the ECtHR has not embraced the special allocation of the burden of proof smoothly, and is in some respects still reluctant to do so.

3 Direct Versus Indirect Discrimination: Differences in Nature

As the jurisprudence of the ECtHR regarding the distribution of the burden of proof has evolved in markedly different ways for direct and indirect discrimination cases, it is worth reviewing the different nature of these two types of discrimination in light of general non-discrimination theory.\textsuperscript{17} Two major differences can be noted. First, whereas direct discrimination tends to have an individualised focus, indirect discrimination has an inherent group dimension. Direct discrimination concerns the less favourable treatment of one person in comparison with one or more other individuals. Indirect discrimination covers (apparently) neutral measures, which, without targeting a particular person, have a disproportionate negative impact on members of a particular group (without justification).\textsuperscript{18} Second, the degree of directness of the causal relation between the disadvantage suffered and the protected ground differs. Direct racial discrimination involves a more direct causal relation between the disadvantageous treatment and the person’s ethnic origin than indirect racial discrimination does, where establishing the causal relation requires additional considerations regarding the effects of the general measure on persons of a particular ethnic origin.\textsuperscript{19}

Nevertheless, these differences should not be over-emphasised. The individual nature of direct discrimination should be nuanced given the crucial role of stereotypes and prejudice (against the broader group) at the root of direct discrimination.\textsuperscript{20} Similarly, degrees of directness of the causal link

\textsuperscript{17} See, inter alia, the discussion in the respective Chapters (on direct discrimination and on indirect discrimination) in D Schiek, L Waddington, and M Bell, \textit{Cases, Materials and Text on National, Supranational and International Non-Discrimination Law} (Hart 2007).

\textsuperscript{18} See also, the definitions enshrined in Articles 2(2)a and 2(2)b of the Race Equality Directive (n 9).

\textsuperscript{19} This difference in degree of directness of the causal link partly explains why EU law restricts possibilities for the state to justify direct discrimination as compared to indirect discrimination: for indirect discrimination, the general formula of a reasonable and objective justification used in international law applies, but direct discrimination is in principle prohibited, unless an explicit exception is provided in treaty or secondary legislation.

\textsuperscript{20} See, inter alia, R Cook and S Cusack, \textit{Gender Stereotyping: Transnational Legal Perspectives} (University of Pennsylvania Press 2010). See also, the Inter-American, South African, and
involve a sliding scale, and it is thus not always clear whether a case concerns
direct or indirect discrimination. When only one group is affected by a *prima facie*
neutral measure, this arguably points to direct discrimination. There
will always be grey zones between the two categories.

The following more detailed analysis will reveal to what extent the
different nature of direct and indirect discrimination can account for different
trajectories concerning the special allocation of the burden of proof, as well as
other factors which may be at play.

4 Indirect (Racial) Discrimination: From Conceptual Struggle
Over an Overall Fair Distribution of the Burden of Proof to Full
Integration

This section will analyse how in relation to indirect (racial) discrimination,
the Court’s engagement with the special allocation of the burden of proof
was actually instrumental in its coming to terms with the notion of indirect
discrimination and, particularly, its specific group- and effect-based nature.
As the slow acceptance of the notion of indirect discrimination by the ECtHR
happened in cases on a range of grounds, the discussion of cases that concern
grounds other than race will be succinct, and only focus on the Court’s
reasoning and underlying principles regarding the notion and distribution of
the burden of proof regarding indirect discrimination.

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Canadian legal systems. Paradigmatic cases include *Morales de Sierra v Guatemala*, Case

21 See also, C McCrudden, ‘The New Architecture of EU Equality Law After chez: Did the
Court of Justice Reconceptualise Direct and Indirect Discrimination?’ (2016) *European

22 This line of reasoning can be detected in several cases of the CJEU, including: Case
C-177/88 *Dekker v Stichting Vormingscentrum voor Jong Volwassenen* [1990] *ECR* I-03941;

23 In systems like EU law, with very different justification possibilities for direct and indirect
discrimination, respectively, this line-drawing between direct and indirect discrimination
is often critical. Hence, it is not surprising that the CJEU’s case law has been criticised
for its narrow interpretation of the protected ground ‘ethnic origin’, more particularly,
denying any link with ‘nationality’, spelling rules of names on official certificates, and not
including measures disadvantaging ‘foreigners’. See, inter alia, Case C-571/10 *Kamberaj*
C-688/15 *Anisimovienė and Others* [2018] OJ C66/03. For critical notes in relation to the
CJEU’s stances in these cases, see, inter alia, M Möschel, ‘Eighteen Years of Race Equality
and K Henrard (eds), (Hart 2018) 152.
Some of the initial hesitance visible in relation to indirect discrimination merely confirmed the Court’s overall reluctance to find instances of prohibited discrimination, to some extent even denying the distinct value of the prohibition of discrimination. The Court’s reluctance was further enhanced in relation to indirect discrimination because of its inherent group dimension and the need to consider the broader societal context. This group and broader contextual focus does not easily ‘fit’ in the Court’s casuistic approach which focuses on the specific circumstances of the case before it. The latter approach implied that the Court was not alert to more subtle forms of discrimination that only become visible when one considers the broader context, including the higher levels of vulnerability of persons belonging to particular groups.

Over time, the Court’s general reluctance to review allegations of discrimination gradually reduced. In Thlimmenos, the Court acknowledged for the first time that the prohibition of discrimination also encompasses a duty of differential treatment for ‘persons whose situations are significantly

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24 For a recent example of this avoidance of a distinct discrimination analysis, pertaining to access to sanitation for Roma, see, Hudorović and Others v Slovenia 24816/14 and 25140/14 (ECtHR, 10 March 2020) para 162.


26 See, inter alia, DH and Others v the Czech Republic 57325/00 (ECtHR, 7 February 2006) para 45. See also, the complaint in RR and RD v Slovakia 20649/18 (ECtHR, 1 September 2020), concerning the ill-treatment of Roma by the police in a large-scale police operation in a Roma inhabited area. The claim put forward flagged the underlying systemic discrimination of Roma, and contended that these large scale operations were predominantly planned in Roma communities (para 204). The Court claims awareness of ‘the sensitive nature of the situation related to Roma in Slovakia at the relevant time’, but ‘reiterates that … it has to confine itself as far as possible to the examination of the concrete case before it’ (para 215) and that ‘it is not its task to assess the overall social context. Its sole task in the instant case is to examine the individual applications before it and to establish on the basis of the relevant facts whether the reason for the applicants’ placement in the special schools was their ethnic or racial origin.’ See also, O De Schutter, ‘Observations: Le Droit au Mode de Vie Tsigane devant la Cour Européenne des Droits de l’Homme’ (1997) 29 Revue Trimestrielle des Droits de l’Homme 79.

27 De Schutter (n 26).

28 This reduced reluctance of the ECHR to establish instances of prohibited discrimination became, inter alia, visible in the recognition of several grounds of differentiation as ‘suspect’, thus triggering heightened scrutiny: gender (Abdulaziz, Cabales, and Balkandali v the United Kingdom 9214/80 and others (ECtHR, 28 May 1985)), illegitimate birth (Marchax v Belgium 6833/74 (ECtHR, 13 June 1979)), nationality (Gaygusuz v Austria 17371/90 (ECtHR, 16 September 1996)), and sexual orientation (Salgueiro da Silva Mouta v Portugal 33290/96 (ECtHR, 21 December 1999)). For ‘race’ this recognition happened explicitly only in Timishev v Russia 55762/00 and 55974/00 (ECtHR, 13 December 2005) para 58.
different'. The prohibition of discrimination is thus understood as including positive obligations, namely to treat persons who find themselves in significantly different situations differently. This is not only a landmark in the ECtHR’s overall discrimination jurisprudence, it is also an important stepping stone in the Court’s coming to terms with the prohibition of indirect discrimination since it acknowledges implicitly that general norms may impact differently on particular groups, potentially resulting in discrimination. In several cases against the UK in May 2001, the Court explicitly acknowledged that a neutral measure could be discriminatory because of its disproportional prejudicial effects on a particular group, without being specifically directed at that group. This recognition was initially paired with a profound uncertainty as to what would suffice in terms of establishing a prima facie case, and particularly the role of statistics in this respect. According to the ECtHR, statistics could not ‘in themselves disclose a practice which could be classified as discriminatory within the meaning of Article 14’. Obviously, the Court felt that allowing statistical proof to establish a prima facie case, and thus shift the burden of proof to the state, would not amount to a fair distribution of this burden. Unfortunately, the Court did not give any indication as to what else would be needed.

Four years later, the Court did accept in Hoogendijk v the Netherlands that ‘convincing official’ statistics could establish a prima facie case of indirect discrimination. The addition of a quality standard (‘convincing’ and ‘official’) for the statistics enabled the Court to overcome its unease while achieving a fairer distribution of the burden of proof. Interestingly, in Zarb Adami, the Court did not give much consideration to the quality of the statistics. It was easily persuaded that the statistics showed a huge discrepancy between the amount of men and women called for duty service, requiring a justification of this differential treatment by the respondent government. While the Court did not explicitly speak in terms of a prima facie case of discrimination being established on the basis of statistics, its reasoning points at exactly that.

This ‘relaxed’ attitude in relation to statistics and their probative value in Zarb Adami is particularly striking considering that a few months earlier the ECtHR had ‘reverted’ to its reluctant stance about statistics (as not in themselves

29 Thlimmenos v Greece [GC] 34369/97 (ECtHR, 6 April 2000) para 44.
30 Kelly and Others v the United Kingdom 30054/96 (ECtHR, 4 May 2001) para 148; Hugh Jordan v the United Kingdom 24746/94 (ECtHR, 4 May 2001) para 154; McShane v the United Kingdom 43290/98 (ECtHR, 28 May 2002) para 135.
31 Ibid.
32 Hoogendijk v the Netherlands 58641/00 (ECtHR, dec, 6 January 2005).
33 Zarb Adami v Malta 17209/02 (ECtHR, 20 June 2006) para 77–78.
sufficient to establish a *prima facie case* in *DH v the Czech Republic*, a case on indirect racial discrimination, specifically concerning the disproportionate side-lining of Roma children to schools for the mentally disabled. The 2006 Chamber ruling in *DH* was reversed by the Grand Chamber, returning to the notion of indirect discrimination as ‘prepared’ in *Hoogendijk* and *Zarb Adami*. *DH (GC)* has became the landmark ruling, in which the ECtHR seems to have come fully to terms not only with the notion of indirect discrimination, but also the special allocation of the burden of proof and the possible role of statistics in establishing a *prima facie* case of discrimination. Once the applicant persuades the Court to establish a *prima facie* case of racial discrimination on the basis of statistics, the burden of proof shifts to the respondent government, which must prove that the disproportionate impact is the result of objective factors unrelated to any discrimination. The Grand Chamber also confirmed quality demands for statistics in order for them to ‘fairly’ establish a *prima facie* case of indirect discrimination when it highlighted the ‘undisputed official’ nature of the statistics as ‘statistics which appear on critical examination to be reliable and significant’.

The ECtHR has continued to fine-tune its search for fairness in the distribution of the burden of proof for indirect racial discrimination. At times, even when statistics do not disclose a clear discrepancy and as such do not suffice as *prima facie* evidence of a discriminatory practice, the Court’s reliance on reports from ECRI, the Commissioner for Human Rights of the Council of Europe, and similar expert bodies have still allowed it to find a *prima facie* case of discrimination. In later case law, the Court has clarified that the absence of (available) statistics does not prevent it from establishing a *prima facie* case of indirect discrimination. For example, in *Biao v Denmark* the Court deduced from a thorough study of the Danish legislation on family reunification, the preparatory notes, and the subsequent application of the rules concerned that ‘it can reasonably be assumed that ... persons acquiring Danish citizenship at a later point in their life ... would generally be of foreign ethnic origin’ and

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34 *DH and Others* (n 26) para 46.
35 *DH and Others v the Czech Republic* [GC] 57325/00 (ECtHR, 13 November 2007).
36 In several cases on alleged discrimination, the ECtHR duly takes into account the broader context, and even clearly starts and puts considerable weight on the structural problems: *MC and AC v Romania* 12060/12 (ECtHR, 12 April 2016) para 113; *Sakir v Greece* 48475/09 (ECtHR, 24 March 2016); *Lingurar and Others v Romania* 5886/15 (ECtHR, 16 October 2018).
37 *DH and Others* [GC] (n 35) para 189.
38 Ibid paras 187–188.
that the 28-year rule had the indirect effect of favouring Danish nationals of Danish ethnic origin and placing at a disadvantage or having a disproportionately prejudicial effect on persons who ... acquired Danish nationality later in life and who were of an ethnic origin other than Danish.40

According to the Court, a prima facie case of racial discrimination is thus established, since it proceeds with stating that ‘the burden of proof must shift to the Government to show that the difference in the impact of the legislation pursued a legitimate aim and was the result of objective factors unrelated to ethnic origin’.41

The preceding analysis has shown how the Court’s acceptance of the notion of indirect discrimination has hinged on it finding a distribution of the burden of proof that is fair, not only for the victim, but also for the responding state. The ongoing search for fairness is one of fine-tuning only. The following section will reveal that in relation to direct racial discrimination a different scenario unfolds.

5 Direct Racial Discrimination: How a Fairer Distribution Remains to be Achieved Particularly in Racially Motivated Criminal Cases

The ECtHR’s case law shows a court struggling to work with the special allocation of the burden of proof in cases of direct racial discrimination, particularly when the discrimination is covert (as opposed to overt) and especially when criminal law enters the equation and a discriminatory intent is either required or an aggravating circumstance of the crime. In this respect, the Court still has a long way to go before achieving fairness.

Overt differentiation on the basis of the protected ground happens when this is explicitly discussed in official documents, making the establishment of a prima facie case fairly easy. A good example in this respect is offered by the Timishev case,42 concerning the official order to the police to bar Chechens from crossing the administrative border between the Russian regions of Ingushetia and Kabardino-Balkaria. The Court, taking note of the official order, proceeded to establish ‘a clear inequality of treatment in the enjoyment of the right of movement on account of one’s ethnic origin’,43 and shifted the burden

41 Ibid para 114.
42 Timishev (n 28).
43 Ibid para 54.
of proof to the government ‘to show that the difference in treatment could be justified’.\footnote{Ibid para 57.}

Nowadays, however, due to the extensive awareness of its unacceptability, most direct racial discrimination tends to occur covertly, leading to evidentiary challenges for the victims. The ECtHR has clarified early on that proof of discriminatory intent on the part of the alleged perpetrator is not necessary to establish a \textit{prima facie} case of direct discrimination.\footnote{Inter alia, \textit{Case “Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium” v Belgium} 1474/62 and others (ECtHR, 23 July 1968) para 10; \textit{Marckx} (n 28) para 40.} In covert cases, however, establishing a direct causal link between the disadvantageous treatment and one’s ethnic origin/race comes very close to demonstrating a discriminatory intent. In any event, if the case is about the lack of criminal punishment by the state, and discriminatory motive is an element of crime under national law, this intent needs to be convincingly established given the cardinal importance of the presumption of innocence.

The following analysis will demonstrate how the Court’s concern about imposing impossible or unreasonable demands on states in relation to cases concerning (covert) direct racial discrimination in the criminal law field has resulted in three shortcomings concerning the special allocation of the burden of proof.\footnote{These problems are visible in cases concerning both state officials and private persons as perpetrators of discriminatory crimes. The different ways in which this becomes visible are explained below.} Firstly, the ECtHR’s reluctance to identify a \textit{prima facie} case of racial discrimination in such cases informs its lack of guidance about relevant criteria (4.1). Secondly, the Court’s confusion between a \textit{prima facie} case and full proof (concerning the differential treatment on grounds of race) confirms an overly demanding threshold for the former (4.2). Thirdly, the ECtHR has failed to explore possible inferences from significant investigatory flaws concerning discriminatory crimes for possible discriminatory motives of state officials (4.3).

5.1 \textbf{Hidden Direct Racial Discrimination in Criminal Law: Lack of Guidance on Parameters to Establish a Prima Facie Case}

Identifying what is required to establish a \textit{prima facie} case of direct racial discrimination in cases of hidden direct racial discrimination with a criminal law angle has been complex for the ECtHR, which, although intent on realising a fairer distribution of the burden of proof, was wary of imposing an unfair burden on the state. The Court’s concern has played out differently for...
perpetrators who are public officials on the one hand and private persons on the other.

Cases concerning alleged discriminatory crimes perpetrated by private persons come before the ECtHR through the lens of positive state obligations aimed at ensuring the effective protection of fundamental rights in horizontal relations. Indeed, the ECtHR rules on state responsibility and not on the criminal guilt of the perpetrator. When determining the reach of these positive state obligations, requiring public authorities to operate a presumption of discrimination in the criminal field would seem difficult to reconcile with the state duty to respect the presumption of innocence.\(^{47}\) The ECtHR has thus been careful not to require states to operate such a presumption. Instead, it has developed the procedural obligation on states to unmask discriminatory motives of crimes in increasing detail.\(^{48}\)

When state officials are possibly implicated in such crimes, the special allocation of the burden of proof requires that once a \textit{prima facie} case has been established, the state has to prove that no discriminatory motive influenced the adoption of the measure/practice in order to avoid a finding of direct discrimination.\(^{49}\) However, this could give rise to the objection that such a negative proof imposes a very difficult, if not impossible, burden on the state. It is worth reviewing how the Court has navigated this concern.

The landmark case on covert racial discrimination, \textit{Nachova and Others v Bulgaria}, concerned two Roma men whom the Bulgarian police shot as they were fleeing. At Chamber level, the special allocation of the burden of proof was applied\(^{50}\) and a \textit{prima facie} case of racial discrimination was established in light of the severe flaws in the investigation of the event by the public authorities. Due to the way the Bulgarian authorities had disregarded evidence of possible discrimination by the police officers, the Court shifted the burden of proof to the government, who was unable to rebut the presumption.\(^{51}\) However, upon referral, the Grand Chamber came to the opposite conclusion.

\(^{47}\) When discriminatory motives are an element of crime (and/or an aggravating circumstance), working with a presumption of discrimination, seems at odds with the presumption of innocence. The tension is also noted in ARPA Canada, ‘Prima Facie and the Reversal Of Onus’ (6 May 2011): <https://arpacanada.ca/articles/prima-facie-and-the-reversal-of-onus/>. For an article noting and warning against the undermining of the presumption of innocence, see, F de Jong and L van Lent, ‘The Presumption of Innocence as a Counterfactual Principle’ (2016) 12 Utrecht Law Review 32.

\(^{48}\) This line of jurisprudence, its strengths and weaknesses are discussed in section 4.

\(^{49}\) See the analysis of the Court’s Grand Chamber judgment in Nachova [GC] (n 12), immediately following.

\(^{50}\) Nachova (n 9) para 168.

\(^{51}\) Ibid para 169–170.
in the course of which three lines of jurisprudence concerning the distribution of the burden of proof were laid down which remain prominent to this day.

Firstly, the Grand Chamber put a brake on the use of the special allocation of the burden of proof in cases of alleged discriminatory violence, because it would be impossible – and thus not fair to require the government – to provide a negative proof that no racial animus was involved in the killing.\textsuperscript{52} The same concern with a fair distribution of the burden of proof explains why the Court did not want to rule out that in some cases a \textit{prima facie} case of racial discriminatory violence could be established. However, according to the Grand Chamber, merely investigatory flaws concerning an incident of alleged discriminatory violence would not suffice to establish a \textit{prima facie} case.\textsuperscript{53}

Secondly and relatedly, the Grand Chamber (for the first time) firmly distinguished between a substantive and a procedural dimension in the prohibition of discrimination, the first being the prohibition to \textit{engage} in discriminatory violence and the second concerning duties to properly \textit{investigate} incidents of possible discriminatory violence.\textsuperscript{54} This distinction has the advantage of allowing the finding that the prohibition of discrimination has been violated, namely in its procedural dimension, even when discriminatory police violence cannot be proven and thus found.\textsuperscript{55}

Thirdly, and further confirming that the Grand Chamber’s opposite conclusion in the case did not imply a rejection of the special allocation of the burden of proof, the ECtHR identified the criteria that would determine the distribution of the burden of proof, namely ‘the specificity of the facts (1), the nature of the allegations made (2) and the Convention right at stake (3)’.\textsuperscript{56} Unfortunately, the ECtHR has not really provided insights on how it weighs these criteria, as it has not applied them in concreto, neither in this case nor in subsequent cases.\textsuperscript{57} It uses them regularly in cases (also on other grounds of differentiation) but limits itself to mentioning the criteria and then drawing a conclusion.\textsuperscript{58} In several cases, the Court does not even mention these criteria at all.

\begin{itemize}
\item \textsuperscript{52} Nachova (n 12) para 157.
\item \textsuperscript{53} Ibid.
\item \textsuperscript{54} Ibid paras 157 and 161.
\item \textsuperscript{55} Ibid para 159 and 168. See also, infra, under 4.3.
\item \textsuperscript{56} Nachova (n 12) para 147.
\item \textsuperscript{57} At times, the Court in its reasoning concerning the establishment of the \textit{prima facie} case of discrimination actually seems to apply one of the three Nachova criteria, but without acknowledging this. In \textit{RR and BD} (n 26), the ECtHR refers numerous time to the lack of specificity of the complaint put forward (paras 211 and 214), but does not link this to the Nachova criteria, and concludes that ‘the material submitted reveals no issue of discrimination ...’ (para 216).
\item \textsuperscript{58} See, the discussion of particular cases below.
\end{itemize}
all. The potential impact of each of these three criteria on the fair distribution of the burden of proof is worth discussing in turn.

Taking the first criterion, it would seem fair that very specific and detailed facts would weigh in favour of finding a prima facie case established. By contrast, moving to the second criterion, serious allegations, which could lead to damning consequences if a violation was found, would seem to caution against too easily finding a prima facie case. Indeed, numerous jurisdictions, both national and international, abide by the principle that ‘the more serious the allegation, the more compelling must be the evidence to meet the standard of proof’. The overall reluctance of the ECtHR to establish violations of the prohibition of racial discrimination, as is visible in the Grand Chamber’s reasoning in Nachova (and other cases discussed below), confirm the Court’s attentiveness to the seriousness that attaches to a ruling that a contracting state has violated fundamental rights.

At the same time, the burden of proof on the claimant should not be unreasonably high either, keeping in mind the main reason for the special allocation of the burden of proof, namely to alleviate the burden of proof of the claimant, precisely in view of the often insurmountable hurdles for the claimant to gather direct proof. As sufficient effective protection presupposes a fair possibility to establish human rights violations and thus a fair distribution of the burden of proof, this concern seems particularly warranted against the most invidious violations. The latter would include discrimination on suspect grounds, since differentiations on these grounds are considered a priori unacceptable. This rationale may primarily be used to justify strict scrutiny, whilst also supporting a non-excessive, ‘fair’ burden for the alleged victim to establish a prima facie case. However, the ECtHR does not appear to reduce the burden of proof of victims in cases of racial discrimination, notwithstanding the Court’s qualification of racial discrimination as particularly invidious. Put differently, the Court seems to attach more weight to the first criterion than to the second.


60 Thienel (n 2) 573.

61 Nachova [GC] (n 12) para 147.


63 Inter alia, Nachova [GC] (n 12) para 145; Timishev (n 28) para 56.
The third criterion seems to rekindle the discussion about a hierarchy among human rights. While a hierarchy is rejected at a principled level,\textsuperscript{64} it seems confirmed by the identification of non-derogable rights,\textsuperscript{65} and also in some lines of jurisprudence, emphasising that particular rights are essential foundations of democratic society.\textsuperscript{66} Some of the ECtHR’s case law links the prohibition of racial discrimination to the prohibition of inhuman or degrading treatment, one of the non-derogable rights. In cases concerning Roma pogroms and the destruction of houses of a Roma neighbourhood, the Court confirmed that the instances of racial discrimination may in themselves amount to degrading treatment, absolutely prohibited by Article 3 \textit{ECHR}.\textsuperscript{67} Such rights are thus particularly protection-worthy, which would support a fair, not-excessive burden of proof for the alleged victim. As in the case of the second criterion, the ECtHR has not yet developed this line of reasoning.

The preceding discussion demonstrated that the ECtHR has not yet further substantiated the three criteria that it has identified to determine the distribution of the burden of proof in cases of hidden direct racial discrimination. It also revealed that the Court could develop its jurisprudence and provide more guidance to national courts and authorities about the implications of the respective criteria and their relative weight.\textsuperscript{68} Throughout the analysis, the suggestion was made that the Court’s concern about not imposing too heavy a burden of proof on the state could explain its reluctance to provide this clarification. This concern could also explain the next point made in the paper, namely that the Court adopts a seemingly too high threshold for a \textit{prima facie} case.

\begin{itemize}
\item \textsuperscript{64} Inter alia, E Klein, ‘Establishing a Hierarchy of Human Rights: Ideal Solution or Fallacy?’ (2012) 41 \textit{Israel Law Review} 477.
\item \textsuperscript{66} Inter alia, for the freedom of expression: \textit{Lingens v Austria} 9815/82 (ECtHR, 8 July 1986).
\item \textsuperscript{67} \textit{Burlya and Others v Ukraine} 3289/10 (ECtHR, 6 November 2018) paras 121 and 134. This case builds on the similar case of \textit{Moldovan and Others v Romania (No 2)} 4138/98 and 64320/01 (ECtHR, 12 July 2005).
\item \textsuperscript{68} An alternative could be the development of new and or additional criteria. On occasion, the Court has relied on these three criteria to accommodate the claimants’ lack of effective access to evidence. In \textit{Aghdgomelashvili and Japaridze (n 13)}, a case concerning police brutality towards a LGBT organisation, the Court seems to deduce from the three criteria that when events are ‘wholly, or in large part, within the exclusive knowledge of the authorities, the burden of proof is on the government to provide a satisfactory and convincing explanation by producing evidence establishing facts which cast doubt on the account of events given by the victim’ (para 43).
\end{itemize}
5.2  Covert Direct Racial Discrimination and ‘Full Proof’ Versus Proof of Facts Enabling the Establishment of a Prima Facie Case

There is more than one case where the Court was arguably provided with full proof of direct racial discrimination, but despite the force of the available evidence, it qualified the claim as being prima facie (only).69

In Antayev and Others v Russia,70 concerning police violence against Chechens in Russia, the Court established a prima facie case of racist violence by the police on the basis of a combination of direct and, more indirect, contextual proof. The Court actually had quite strong proof before it of racist violence by the police. There was not only proof of biased internal police instructions stipulating that Chechens must be treated in a special manner, but also detailed allegations of racist abuse by the police officers concerned. Nevertheless, the ECtHR chose to establish a prima facie case of racial discrimination. The Court went on to find a violation of the prohibition of racial discrimination by Russia, because the government had not provided any (convincing) proof that the police violence was not tainted by discrimination. Another example is Makuchyan and Minasyan v Azerbaijan and Hungary,71 where the Court arguably had ‘sufficiently strong, clear and concordant inferences’72 not just to establish a prima facie case of racial discrimination but also to directly find a violation of the prohibition of racial discrimination. The case concerned an Azeri man who had murdered an Armenian person in Hungary. Sent to Azerbaijan to complete their sentence, he was not only pardoned by the president but even glorified as a hero. Similarly, in Lingurar v Romania, a case concerning a police raid against Roma, the Court pulled various pieces of information together in order to opine that ‘the decisions to organize the police raid and to use force against the applicants were made on considerations based on the applicants’ ethnic origin ... their ethnic profiling of the applicants was discriminatory’.73 While this hints at the presence of conclusive proof, the next paragraph shifts the burden of proof to the government, thereby implying that the Court had merely established a prima facie case of racial discrimination.

In short, in some cases the Court fails to distinguish between evidence allowing for the establishment of a prima facie case and full proof (concerning the differential treatment on grounds of race). The confusion that it

69 These cases also concern other grounds of discrimination, such as disability: compare Cînta v Romania 3891/19 (ECtHR, 18 February 2020) paras 78 and 79.
70 Antayev and Others v Russia 37966/07 (ECtHR, 3 July 2014).
71 Makuchyan and Minasyan v Azerbaijan and Hungary 17247/13 (ECtHR, 26 May 2020).
72 Ibid para 218.
73 Antayev and Others (n 70) para 76.
demonstrates suggests that the threshold it implicitly applies for accepting that a case has been *prima facie* established is too high, and thus too demanding on the applicant.

5.3 **The Procedural State Obligation to Unveil Possible Discriminatory Motivation of Crimes: Advantages and Missed Connections**

As the analysis of the Nachova Grand Chamber decision already highlighted, cases of covert direct racial discrimination in the field of criminal law have triggered an important line of jurisprudence concerning a special procedural obligation on states to investigate and unveil possible discriminatory motives of crimes.

This additional dimension to the prohibition of discrimination has proven an important advancement in the protection against discrimination.74 A good example of the importance of this additional level of protection has been acknowledged by the Court in a case in which allegations of abusive and racist language during a police beating of a Roma remained unsubstantiated precisely because of the flaws in the subsequent investigation that did not make the necessary efforts to unveil possible racist motives.75 The procedural state obligation to unveil crimes’ racist motives will furthermore facilitate victims obtaining a suitable remedy at the national level. In this regard, it is particularly meaningful that the ECtHR is becoming ever more demanding and specific in what is expected in terms of an effective investigation (into possible discriminatory motives), while the Court closely scrutinises the way in which the national authorities employed national criminal law in this respect. The Court has emphasised that these investigations have to start promptly76 and that the momentum needs to be maintained.77 The Court also urges state authorities to secure not only eye witnesses,78 but also the necessary forensic material.79

However, it is important to acknowledge that, particularly in cases of systemic discrimination, the flawed character of investigations into alleged discriminatory measures/actions can itself be a manifestation of

74 See, inter alia, *RR and RD* (n 26); *Boacă and Others v Romania* 49355/11 (ECtHR, 12 January 2016).
75 *Boacă and Others* (n 74) para 100.
76 *Nachova and Others* (n 9) para 160; *Lakatošová and Lakatoš v Slovakia* 655/16 (ECtHR, 11 December 2018) paras 81, 86, and 94.
77 *BS v Spain* 47159/08 (ECtHR, 24 July 2012) para 61; *Fedorchenko and Lozenko v Ukraine* 387/03 (ECtHR, 20 September 2012) para 70.
78 *BS* (n 77) para 61; *Burya and Others* (n 67) para 126.
79 *RR and RD* (n 26) para 210; *Lakatošová and Lakatoš* (n 76) paras 83 and 89.
discrimination. In other words, the procedural and the substantive dimensions of the prohibition of discrimination are connected. To some extent, the ECtHR acknowledges this, such as in those cases in which it integrates to a great extent the evaluation of the procedural and the substantive violation of the prohibition of discrimination, in the sense that it identifies one (overall) violation of the prohibition of discrimination after having noted problems in terms of both the substantive and the procedural dimensions of the prohibition of discrimination. There are even cases in which the ECtHR seems willing to draw inferences from procedural flaws in the investigations into possible discriminatory motives of crimes, for finding a prima facie case of substantive discrimination as well. Unfortunately, the Court has not yet explicitly explored a possible, albeit partial, return to the reasoning of the Chamber in Nachova and draw such inferences, let alone provided relevant criteria for drawing such inferences.

6 Conclusion

The ECtHR's assessment of alleged violations of human rights is in line with the two-step approach inherent in the special allocation of the burden of proof, in the sense that the claimant needs to persuade the Court that an interference has occurred and that once this has happened the respondent must disprove that a violation took place.

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80 Adzhigitova and Others v Russia 40165/07 and 2593/08 (ECtHR, 22 June 2021) concerned a special operation by Chechen military servicemen in response to a violent incident by an illegal armed group during which members of one particular ethnic group, Avars, were unlawfully detained and ill-treated. The Court ‘concludes that the applicant’s ethnic origin was among the causal factors for their unlawful detention and ill-treatment’ (this not being disputed by the government (paras 273–274), and problematises that no investigation was done about possible racist motives, notwithstanding complaints about racist insults (para 278) and then formulates one overarching conclusion in para 279: ‘there has accordingly been a violation of Article 14 in conjunction with Article 3’.

81 See also, Antayev and Others (n 70), discussed above, regarding police violence against Chechens in Russia. For a recent case on a different ground of discrimination (sexual orientation – sexual identity), and Aghdgomelashvili and Japaridze (n 13), where the failure by the public authorities to investigate the alleged homophobia behind the intrusion of the police led the Court to decide that the facts (concerning discrimination on grounds of sexual identity) as submitted by the claimants are established beyond reasonable doubt.
Nevertheless, the ECtHR’s jurisprudence on the special allocation of the burden of proof in racial discrimination cases shows a markedly different development line in relation to cases of indirect discrimination on the one hand and direct discrimination on the other. To some extent, the different nature of direct and indirect discrimination informs the distinct development lines of the ECtHR jurisprudence in relation to the special allocation of the burden of proof. It is the different nature of indirect discrimination, both in terms of the group dimension it embodies and the less direct and less obvious link between the disadvantage and the protected ground it presents, that explains the ECtHR’s unease with and initial reluctance to even accept the notion of indirect discrimination. What we see is that the Court’s slow progress of coming to terms with the notion of indirect discrimination has gone hand in hand with the development of the special allocation of the burden of proof, namely the determination of what would suffice to establish a *prima facie* case of indirect discrimination (particularly in relation to the use of statistical evidence) and what would subsequently be needed in terms of rebuttal.

Conversely, for direct discrimination, the ECtHR’s ‘ease’ with the notion of direct discrimination did not translate across the board into a smooth adoption of the special allocation of the burden of proof. Tensions arose, especially in the field of criminal law, more particularly for crimes for which a discriminatory intent is either required or constitutes an aggravating circumstance. In cases of covert racial discrimination, working with a presumption of discrimination becomes contentious for triggering an impossible (negative) proof for the defendant state and/or for not being directly reconcilable with the presumption of innocence in criminal law. The Court’s concern about imposing impossible demands on states (in relation to such crimes) has resulted in at least three problematic lines of reasoning regarding the distribution of the burden of proof.82 Firstly, the promising identification by the Grand Chamber of three criteria to operate the distribution of the burden of proof has thus far not brought much clarification, since the criteria have never been applied in concreto. Secondly, the Court’s confusion between a *prima facie* case and full proof of discrimination points to an overly demanding threshold for a *prima facie* case in the criminal law context. Thirdly, the ECtHR’s has so far failed to explore possible inferences from significant flaws in investigating alleged discriminatory motives for crimes towards the identification of a discriminatory motivation of state officials. These three lines of reasoning

82 These problems are visible in cases concerning both state officials and private persons as perpetrators of discriminatory crimes. The different ways in which this becomes visible are explained below.
make the Court’s distribution of the burden of proof for cases of covert direct discrimination unsatisfactory.

This is why the ECtHR should continue its search for fairness in its operation of the special allocation of the burden of proof in relation to cases of covert direct racial discrimination by, first, clarifying the operationalisation of the criteria informing the distribution of the burden of proof,83 second, not pitching the threshold for a prima facie case too high, and, third, exploring in what circumstances flaws in the official investigations should have implications for findings of (substantive) racial discrimination. Admittedly, delineating and identifying objective markers for a prima facie case is complex, especially in cases concerning racial discriminatory violence. Nevertheless, developing such markers is critical to operationalise the shared burden of proof in discrimination cases, thus contributing to the effective protection against racial discrimination. The Court’s gradual development and ongoing refinement of the criteria in relation to indirect discrimination confirm the merit of a development on a case-by-case basis.84

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83 See, in this respect, the suggestions made in the analysis above.
84 The CJEU’s steadily developing jurisprudence on the shared burden of proof in discrimination cases also proceeds on a case by case basis. For a more elaborate discussion, see, Henrard (n 59) 271–301.