‘Purely Gypsy Behaviour’: Interpreting Negative Stereotypes in Racist Police Violence Cases at the European Court of Human Rights

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Abstract

The European Court of Human Rights has issued judgements that condemn negative stereotypes and protect vulnerable groups from discrimination. Paradoxically, in cases where the victims' bodily integrity is violated in a racist context, the Court has a particularly dubious record of fully engaging with the discrimination aspect of the complaints. This article analyses five illustrative cases where evidentiary materials indicate the authorities held strong prejudices against Romani victims of police violence. Through the lens of vulnerability and anti-stereotyping, the article examines how the Court responds to the presence of negative stereotypes in anti-Romani police violence cases. It shows that the Court's engagement with stereotypes in these cases is inconsistent. The article suggests that a more conscious engagement with the wider societal context of anti-Romani police violence could strengthen the Court's stance against harmful Romaphobic stereotyping.

Keywords

- European Court of Human Rights
- Racist police violence
- Roma rights
- Stereotypes
- Vulnerability

Introduction

Stereotyping is a human rights issue because it may reinforce inequality and discrimination which, in turn, largely impact the enjoyment of other rights (Brems and Timmer 2016). In the jurisprudence of the European Court of Human Rights (hereinafter ECtHR or the Court), the question of harmful stereotyping has gained momentum and led the Court to develop particular approaches to reasoning with various outcomes. This article aims to highlight a group of cases where engaging with stereotypes in more detail could have led the Court in this direction.

The Court's case law concerning Romani Applicants[1] includes most significantly education segregation cases,[2] forced evictions and other housing-related complaints,[3] forced sterilizations,[4] and hate crimes[5] perpetrated by private individuals. By highlighting in these cases that historical prejudice and stigmatization may make people of Romani origin particularly vulnerable to certain human rights violations, the Court has issued some ground-breaking Roma rights judgements. In another area, however, that concerns the most devastating manifestation of anti-Romani discrimination, namely, where the victims' life or physical safety is violated within the scope the European Convention on Human Rights, Article 2 (right to life)[6] or Article 3 (prohibition of torture)[7] by the state itself, the results are strikingly different (Dembour 2009; Möschel 2014, 150–2; Möschel and Rubio-Marin 2015; Mačkić 2017; Rietiker 2019).

The Court has adjudicated almost 50 cases in which Roma have been abused or killed by the police.[8] The severity and extent of this practice are underlined by the number of cases reaching the Court and a plethora of human rights reports documenting hostile attitudes against Roma and a systemic occurrence of police

1 See more detail on the most prominent types of cases, including a list of key judgements in: *Thematic Factsheet on Roma and Travellers* (March 2023). Available online: https://www.echr.coe.int/Documents/FS_Roma_ENG.pdf .

2 *D.H. and Others v the Czech Republic* [GC] (App. No. 57325/00) and recently *Szolcsán v Hungary* (App. No. 24408/16).

3 *Buckley v UK* (App. No. 20348/92), *Winterstein and Others v France* (App. No. 23013/07).

4 *V.C., N.B., and I.G. and Others v Slovakia* (App. Nos. 18968/07, 29518/10, 15966/04).

5 *Kalanyos and Others, Tănase and Others v Romania* (App. Nos. 41138/98, 62954/00, 57884/00), *Koky and Others v Slovakia* (App. No. 13624/03), *J.I. v Croatia* (App. No. 35898/16).

6 European Convention on Human Rights, Article 2 Right to Life:
1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. (2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

7 Article 3 Prohibition of Torture: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

8 The search of the database included judgements issued from the inception of the Court up to and including 7 February 2023. The search consisted of complaints of Articles 2 or 3 and 14 raised (excluding the keywords expulsion, extradition, death penalty, use of force to quell riot or insurrection, and all but the discrimination ground of race) with an additional text search for Roma and police, which yielded 49 results. See further "The Matrix of Roma Discrimination in the Council of Europe System" complete with a list of case law in Möschel (2012) *Anti-Romani*.

abuse.[9] To paint a picture with the Court's own judgements, over 10 incidents resulted in the death of Romani people at the hands of police,[10] a further 7 cases concerned life-threatening situations,[11] and over 20 complaints arose from the abuse of Romani men,[12] women,[13] even children,[14] and sometimes whole families.[15] In the majority of the case law the impression of a hostile, anti-Romani climate is clear; however, hard evidence of it, which the Court tends to look for, hardly exists.[16] This is why the Court rarely found a state explicitly responsible for anti-Romani[17] police misconduct.[18] This article submits that negative stereotypes often play a key role in anti-Romani violence, and their presence in a case file therefore could prompt the Court to pay particular attention to these in its assessments.

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9 See, for example, ERRC (2022) *Brutal and Bigoted: Policing Roma in the EU*; Fair Trials (2020) *Uncovering Aanti-Romani Discrimination in Criminal Justice Systems in Europe*; ENAR (2019) *Dimensions of Antigypsyism in Europe*; Amnesty International (2014) *"We Ask for Justice' Europe's Failure to Protect Roma from Racist Violence*; as well as FRA (2016) *EU-MIDIS II Roma – Selected Findings*; UN Special Rapporteur on Minority Issues (2015) Global Study on the Human Rights Situation of Roma Worldwide A/HRC/29/24.

10 *Anguelova, Velikova, Nachova and Others, Ognyanova and Cioban, Seidova and Others, Mihaylova and Malinova v Bulgaria* (App. Nos. 38361/97, 41488/98, 43579/98, 46317/99, 310/04, 36613/08); *Kleyn and Aleksandrovich v Russia* (App. No. 40657/04); *Carabulea, Soare and Others, Ion Balasoui, Andreea Marusia Dimitriu v Romania* (App. Nos. 45661/99, 24329/02, 70555/10, 9637/16,) *Eremiasova and Pechova v The Czech Republic* (App. No. 23944/04).

11 *Fedorchenko and Lozenko*, *Pastrama v Ukraine* (App. Nos. 387/03, 54476/14); *Ciorcan and Others v Romania* (App. Nos.29414/09 and 44841/09) *Karagiannopoulous v Greece* (App. No. 27850/03); *Lakatosová and Lakatos, P.H. v Slovakia* (App. Nos. 655/16, 37574/19); *Vasil Shashov Petrov v Bulgaria* (App. No. 63106/00*)*.

12 *Balkasi and Others v Albania* (App. No. 14800/18); *Jasar, Sulejmanov v FYRM* (App. Nos. 69908/01, 69875/01); *Balogh, Kovács, Mata, M.F., Nagy v Hungary* (App. Nos. 47940/99, 21321/15, 7329/16, 45855/12, 7329/16); *Memedov v North Macedonia* (App. No. 31016/17); *A.P. v Slovakia* (App. No. 10465/17); *Boaca and Others, Cobzaru v Romania* (App. Nos. 40355/11, 48254/99).

13 *P.H. v Slovakia* (App. No. 37574/19); *Petropoulou-Tsakiris v Greece* (App. No. 44803/04); *Borbala Kiss v Hungary* (App. No. 59214/11).

14 *M.B. and Others* No. 2*, Adam v Slovakia* No. 2 (App. No. 63962/19, 68066/12); *Bekos and Koutropoulos v Greece* (App. No. 15250/02); *Assenov and Others v Bulgaria* (App. No. 24760/94); *X and Y v North Macedonia* (App. No. 173/17).

15 See *Lingurar v Romania* (App. No. 48474/14); *Fogarasi and Others v Romania* (App. No. 67590/10); *Fedorchenko and Lozenko v Ukraine* (App. No. 387/03); *Durdevic v Croatia* (App. No. 52442/09).

16 According to Judge Bratza, in the Concurring Opinion of Judge Sir Nicolas Bratza in *Nachova and Others v Bulgaria* [GC] No.10, p. 40:

> [a]n example would be a case where the evidence showed that attempts to arrest persons of a particular ethnic group had invariably or consistently resulted in the deaths of the persons concerned, while the arrests of persons of other ethnic origin had seldom if ever resulted in the loss of life. A further example would be where the evidence showed that in the planning of an arrest operation it was only where persons of a particular ethnic origin were involved that the arrest team was provided with, or authorised to use, firearms.

17 *Stoica v Romania* (App. No. 42722/02) §129 and *Lingurar* (supra n.15) §80.

18 For example, in the case of *Makashevy v Russia* (App. No. 20546/07) or *Antayev and Others v Russia* (App. No. 37966/07) the Court found that the ill-treatment by police forces of the ethnic Chechen applicants amounted to a substantive violation of Article 14. Similarly in the case *Aghdgomelashvili and Japaridze v Georgia* (App. No. 7224/11) the Court found that the abuse inflicted by the authorities was homophobic and thus amounted to a substantive violation of Article 14. Just like in Romani cases, in cases relating to torture or enforced disappearances of members of the Kurdish minority in Türkiye, the Court has been more reluctant, for example, the *Yaşar v Turkey* (App. No. 46412/99) discrimination claim that was rejected or *Dündar v Turkey* (App. No. 2697/95) which was deemed unnecessary to examine under Article 14.

The article is structured into four sections. First, it offers an explanation of the Court's general principles concerning violence and discrimination in section 1 and provides an overview of the argumentative tools of vulnerability (section 1.1) and of anti-stereotyping (section 1.2) which may aid the Court in engaging with the presence of negative stereotypes in a case before it. These approaches lend themselves to analysis for several reasons: namely, they have proven successful in other cases in bringing an anti-discrimination lens to the Court's assessment (Arnardóttir 2017, 153), yet it is a recurring observation of experts of both approaches that these are achingly missing in the Court's anti-Romani police violence case law (Timmer and Peroni 2013, 1066). In section 2 the article zooms in on five illustrative cases containing stigmatizing stereotypes on the side of the authorities, which give the basis for the assessment of the judicial response to the presence of such stereotypes. The article finds that there are inconsistencies when it comes to responding to stereotypes in the Court's case law concerning anti-Romani police violence. Sections 2.1–2.3 offer a typology of these inconsistencies complete with suggestions for potential applications of vulnerability and anti-stereotyping. Section 3 concludes.

1. Provisions, Principles, and Argumentative Tools in Anti-Romani Police Violence Cases

The question central to this article is whether and how the Court engages with the presence of negative stereotypes in racist police violence cases. To answer this question, an understanding of the Court's adjudicatory framework is necessary. This section introduces the applicable provisions of the European Convention on Human Rights (ECHR) in cases of alleged ill-treatment and discrimination. Then it discusses interpretive directions and evidentiary considerations which the Court may take. Finally, it introduces the concept of vulnerability (in section 1.1) and an anti-stereotyping model (in section 1.2), which the Court has at its disposal to engage with the presence of stereotypes.

In the ECHR system, victims of violence and discrimination may bring their claims under different provisions (Rietiker 2019). Article 2 protects the right to life and Article 3 prohibits torture, inhuman, or degrading treatment. Through interpretation, the Court has distinguished two limbs for each of these articles, one which it calls substantive and the other procedural (Mowbray 2002). The former relates to the state's duty not to inflict violence and to protect persons within its jurisdiction from violence, and the latter to investigate the circumstances when allegations of violence arise. Article 14 is the Convention's anti-discrimination clause[19] that prohibits limiting the rights and freedoms of

19 European Convention on Human Rights Article 14 Prohibition of Discrimination: "The enjoyment of the rights and freedoms set forth in this 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." Article 1 of Protocol 12 to the Convention includes a self-standing anti-discrimination clause, particularly focusing on discrimination by public authorities. This Protocol, however, has not been applied in anti-Romani police violence cases to date. The reason for this is partly that not all States have ratified it, and partly that the Court has decided to assess the claims under Article 14 even where it could have been applied.

the Convention based, for example, on grounds of race, national, or social origin; association with a national minority; or another status (Bruun 2013). It is a peculiar provision in that it cannot be assessed on its own and must always be combined with another provision of the Convention. Invoking Article 14 does not presuppose a violation of the right to which it is attached (O'Connel 2009, 215), yet claims of discrimination are often taken into account as part of the assessment under the core right (Arai-Yokoi 2003, 395) instead of a separate assessment.[20] Under Article 14 applicants must make an arguable claim[21] of discrimination by presenting arguments that there has been a difference in treatment which cannot be objectively justified. In cases of alleged discrimination on racial grounds, any potential justification is typically subject to strict review (Clifford 2013). Just like in the case of Article 2 or 3, the Court has distinguished a substantive limb, referring to the duty to refrain from or to prevent discrimination, and a procedural limb, referring to the obligation to investigate possible bias motives. It has been argued that the distinction between substantive and procedural obligations in the case of core rights enables the Court to "give teeth" to its review (Popelier and van de Heyning 2013), namely by condemning the State for failures in its procedural duties, even where a substantive violation could not be established (Ní Chinnéide 2022, 351), for instance, due to evidentiary reasons. However, in the case of protection from discrimination, a bifurcation (Gerards and Senden 2009) approach can be subject to criticism.[22]

From its inception, the ECtHR has adopted the evidentiary standard of "proof beyond reasonable doubt".[23] This means the Court must be convinced that there is no other plausible explanation as to how the events occurred (O'Boyle 2018). The burden of providing this evidence rests on the Applicant (Arnardóttir 2007, 17–18). In certain cases, however, the Court has departed from this practice, and either shifted (Arnardóttir 2007, 38) or lightened the burden of proof, or adopted a flexible approach to the standard of proof (Gunn 2020, 199). This happens most frequently in cases where the State is in a much better position to provide evidence (Roberts 2021, 7). To issue clear and transparent judgements, the Court will have to give due explanation of its considerations and reasons for applying its principles the way it does (Gerards 2005). For reasons of consistency, the Court may rely on certain argumentative tools it has devised to engage with particular aspects of a case (Timmer 2013, 170).

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20 In the 1970 case of *East African Asians v UK* (App. Nos. 4403/70-4419/70; 4422/70; 4423/70; 4434/70; 4443/70; 4476/70-4478/70;4501/70;426/70-4530/70), the Commission has already established that racial discrimination could in itself amount to degrading treatment under Article 3. The approach of considering elements of discrimination under other than the anti-discrimination provision is, however, not unproblematic. See, for example, Harvey and Livingstone (2001).

21 Also called *prima facie* case §§ 76–79; 83–85 of the ECtHR Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention as updated on 31 August 2022.

22 While the Court is likely to find a procedural violation of Article 14 in cases where the domestic authorities failed to investigate potential racist motives, it usually stops here, due to the high evidentiary standard it imposes on the Applicants when it comes to proving racist intent behind the ill-treatment (see Möschel 2012). Furthermore, separating procedural from substantive limbs can be seen as an arbitrary separation since both the actual direct, racist ill-treatment of an individual as well as a reluctance or failure to investigate alleged instances thereof originate in the same system of bias against racialized members of society.

23 Originally articulated in *Ireland v UK* (App. No. 5310/71) §161, and in the anti-Romani police violence case law in *Velikova* (supra n.10) at §70.

What this article refers to as judicial or argumentative tools are conceptual frameworks which may help the Court to engage with a specific element of a case, such as the presence of stereotypes.[24] This article identifies the concept of vulnerability and a so-called anti-stereotyping model which are well suited for this task. The reasons for focusing on these tools are that they have been applied by the Court in other areas (Timmer 2011, 709; Heri 2021) and are argued to be appropriate in cases of anti-Romani police violence, yet their absence is well-established in the literature.[25] The rationale to pay particular attention to stereotypes in a case is that stereotypes may render people vulnerable to violence and other types of harm potentially amounting to human rights violations (Brems and Timmer 2016).

1.1 Vulnerability

The concept of vulnerability is used widely inside and outside the legal field to refer to specific *groups*, whose members are more vulnerable compared to other members of society, while it can also be understood as the "universal, inevitable, enduring aspect of the human condition" (Fineman 2008) on an *individual* basis.

An early systemic mapping of whether and how human rights courts used the emerging concept of vulnerability has been undertaken by Alexander Morawa in 2003, finding that the concept is, likely intentionally, vague and flexible (143). The overall effect of a vulnerability analysis, he found, is generally higher levels of protection (*Ibid.,* 150). Compared to other regional bodies the ECtHR appears to have been leading the way in recognizing the vulnerability of detainees, while significantly lagging behind when it comes to identifying the specific vulnerabilities of ethnic minorities (*Ibid.*, 147). Ten years later Peroni and Timmer (2013) analysed the overall case law of the ECtHR to examine the use of vulnerability, Arnardóttir (2017) focusing specifically on Article 14 and Heri (2021) on Article 3. What follows will highlight what these authors identify as the potentials of the concept and the considerations to which it may lead the Court.

In a joint study, Peroni and Timmer have provided an analysis of ECtHR case law where *group vulnerability* played a key role in the judgement. Based on a review of these cases, without prejudice to the nature of the complaint or the article invoked, they demonstrate that, for the Court, vulnerability stemming from group membership is relational, particular, and harm-based (2013, 1064). First, vulnerability is understood as constructed by societal circumstances, such as the existence of harmful stereotypes and prejudice against a certain group. Second, the vulnerability of the individual is shaped by their own

24 Although the Court itself does not explicitly call its particular lines of reasoning "argumentative tools" some examples that are highlighted by academics as clearly and consistently explaining a departure from an incrementalist approach are *M.S.S. v Belgium and Greece* (App. No. 30696/09); *Opuz, Salduz v Turkey* (App. Nos. 33401/02, 36391/02); *Yordanova v Bulgaria* (App. No. 25446/06); *M.S. v UK* (App. No. 24527/08).

25 The author is aware that there may be other approaches equally valuable to consider by the Court. However, a word search of the existing anti-Romani police violence case law reveals that references to stereotypes and vulnerability are more prominent than, for example, the language of stigma, even though in several cases the Court refers to multiple of these concepts (for example, in *Alajos Kiss v Hungary* (App. No. 38832/06), *Kiyutin v Russia* (App. No. 2700/10), or *B.S. v Spain* (App. No. 47159/08)). See also: Solanke (2017).

lived reality within their specific group, which means not automatically considering every member of a given group vulnerable (*Ibid.*, 1065). Third, and unsurprisingly, a central indicator of vulnerability for human rights adjudication purposes is that it either exposes the individual to or leads directly to harm. Where the Court discovers these elements to be key components of the case at hand, it may use this finding to take measures specific to the provision complained of, which are aimed at accommodating the vulnerable applicant. These may involve a heightened review, a narrower margin of appreciation, or a specific allocation of the burden of proof, to name a few examples.

Resonating with Peroni and Timmer's analysis but focusing on vulnerability under Article 14, Arnardóttir finds that the application of this concept by the Court has to do with the list of discrimination grounds (2017, 154) which overlaps with the groups the Court for the first time identified as potentially vulnerable in the 2011 case of *Kiyutin v Russia* (*Ibid.*, 159).[26] This judgement emphasizes the importance of shared identity markers of a group and its history of prejudice, disadvantage, and stereotypes in order to constitute a vulnerable group (*Ibid.*, 164). For Arnardóttir, vulnerability under Article 14 is an "identity plus" approach (*Ibid.*, 170), which allows the Court to consider deeply complex situations and to understand the individual's particular lived experience in a larger, societal context. Doing so may enhance measures of protection by triggering a stricter review or result in a more substantive approach (*Ibid.*, 169). However, Arnardóttir points out that the use of this approach is rather restrictive under Article 14 (*Ibid.*, 165).

So far Peroni and Timmer and Arnardóttir focused on a collective understanding of vulnerability. However, focusing on the differences of lived experiences of applicants on a more *individual* and circumstantial basis provides further opportunities for consideration. Timmer (2011) has pursued the analysis and typology of this conception of vulnerability in the Court's jurisprudence. As opposed to vulnerability based on belonging to a stigmatized group, Timmer draws on the idea that – when vulnerability is not understood narrowly as injurability – a "critical focus [turns] towards the institutional production of both privilege and disadvantage" (Timmer 2011, 152) – which allows examining and challenging the complexity of situations that make an individual vulnerable in the specific circumstances. Timmer's list of conditions that enhance individual vulnerability includes, among others, vulnerability due to age, gender, illness, migration background, and most relevant to the focus of this article: being under state control (that is, in detention) and group membership (that is, Romani ethnicity).

Focusing specifically on vulnerability under Article 3 of the Convention, Corina Heri (2021) tailors Timmer's list of individual vulnerability grounds based on the Court's corresponding jurisprudence. She notes that under Article 3 the distinction between group and individual vulnerability does not seem as strict or relevant as for example under Article 14, but in any event Article 3 tends to invite an individual vulnerability approach (Heri 2021, 35). Heri offers a quantitative overview of the Court's use of vulnerability and shows that in 65 per cent of all cases, this stems from the context of vulnerability due to state control (*Ibid.*, 39). Heri identifies that it is a power imbalance which puts the applicants in an

26 *Kiyutin v Russia* (note 25) concerned the refusal of residence due to the applicant's HIV-positive status and identifies in §48 "particularly vulnerable groups – for instance, Roma, homosexuals, persons with mental disabilities – that had suffered a history of prejudice and social exclusion, in respect of which the State had a narrower margin of appreciation".

increasingly vulnerable position, arising in situations of abuse by persons in positions of authority (*Ibid.*, 76) related to the type of crime committed by the detainee or, although there is little case law to confirm this hypothesis, the detainee's identity markers (*Ibid.*, 77). On occasion, the Court has reasoned that the applicants' own feeling of vulnerability may also factor in the judgement, and since this is impossible to prove, the Court seems more ready to make inferences in such cases (*Ibid.*, 90–1), for example, by accepting the applicant's version of the events increasingly favourably "the further a person is removed from outside control" (*Ibid.,* 133).[27]

In light of this analysis, it might seem that the understanding of individual vulnerability or its application to ill-treatment cases does not go hand in hand with stereotypes, as individual vulnerability shifts the focus to the experience of a situation and away from the experience of harm as a person from a stigmatized group. However, the assessment of an individual's vulnerability under certain circumstances can and should be informed by any stereotypical roles likely to be associated with that situation or condition.

To highlight the most important features of both *individual* and *group vulnerability*, they facilitate the assessment of the complex details of a case, making it possible to take into consideration, for example, a broader societal or institutional context. The concrete effects of a vulnerability approach is to enhance protection of victims of human rights violations in areas such as the Court's priority policy[28] (Heri 2021, 121, 125) and admissibility criteria (*Ibid.*, 125–129); its evidentiary considerations, including lowering or shifting the burden of proof (*Ibid*., 132–3) and reassessing domestic findings if deemed necessary (*Ibid.*, 136–7); the state's positive obligations (Peroni and Timmer 2013, 1076–9; Heri 2021, 133–6) and margin of appreciation (Peroni and Timmer 2013, 1080; Arnardóttir 2017, 154, 165) to mention a few. Perhaps equally importantly, a vulnerability analysis, regardless of a group or individual understanding thereof, may contribute to developing clearer normative contents of case law (Peroni and Timmer 2013, 1074). While stereotypes may be the very trigger for the Court to apply a vulnerability analysis, this does not result necessarily in the judicial formation challenging harmful stereotypes.[29] As argued by Timmer (2011, 281), since stereotypes may simultaneously present as the manifestation, rationalization, and justification of discrimination, it is essential to engage with them as such.

1.2 Anti-stereotyping

Turning an American legal methodology into the analysis of the ECtHR's gender-discrimination case law, Timmer proposed a model through which the Court can scrutinise the reference to stereotypes in a

27 Examples of this approach mentioned by Heri are *Aydin* (App. No. 23178/94) and *El-Masri v FYRM* (App. No. 39630/09).

28 The Court operates based on a priority policy with a view to speeding up the processing and adjudication of cases by establishing seven categories ranging from urgent cases concerning vulnerable applicants to clearly inadmissible cases to be decided by a single judge. The current categories are available online: https://www.echr.coe.int/documents/priority_policy_eng.pdf.

29 Some examples that Peroni and Timmer mention are: *D.H.* (note 2) in which the Court recognizes that "as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority" (§ 182) similarly in *V.C.* (note 4) and *Alajos Kiss* (note 25) the Court speaks in general terms about the existence of stereotypes but does not spell out their harmful effect in more nuanced terms.

case before it, which she calls the "anti-stereotyping approach" (Timmer 2011, 709). While her analysis was suggestive rather than a description of an already refined judicial practice, the steps she identified were not at all novel to the Court. Over a decade later Liv Henningsen still argues anti-stereotyping is an emerging principle, though the Court's case law clearly has developed in this area (2022, 186). The point of departure, which this article supports, is to focus on the underlying mechanisms of discrimination, an obvious example being the presence of stereotypes (Timmer 2011, 708).

The key features of the proposed anti-stereotyping approach are divided into two phases: first, explicitly naming and second expressly contesting the stereotype (*Ibid.*, 710). This exercise requires identifying the stereotype, its current effects, and its adverse consequences on the group whose member brought the case to the Court. More concretely, the Court increasingly could rely on international human rights reports and third-party interventions to better understand the material, and then direct its attention to the social and psychological effects which the stereotype has on the members of a given group, in order to make clear the consequences of the stereotype at the heart of the case (*Ibid.*).

In the second phase, whenever the Court identifies a harmful stereotype, it should apply automatically the ECHR anti-discrimination clause in a specific manner (*Ibid.*, 718–9) as suggested in Janneke Gerards' equal treatment judicial review model (2005, 103–120). The essence of this is a consistently intense review, utilizing a so-called disadvantage test (with more distinguishing value and less evidentiary burden) instead of the current comparator test, and finally being extremely critical and rejecting any justification from the state that is itself based on stereotypes (2011, 719, 722–24). Crucially, through the anti-stereotyping approach, a claim should come under the ECHR anti-discrimination clause (*Ibid.,* 724) recognizing stereotyping as a manifestation of substantive discrimination (Henningsen 2022, 194) even where the application is not expressly formulated as such.

This section gave an overview of the concepts of vulnerability and anti-stereotyping and demonstrated how the Court may utilize these. The application of these principles may entail adjusting procedural rules and practices and also lead to normative clarity of judgements. It should be mentioned, however, that both vulnerability and anti-stereotyping are sensitive to pitfalls (Timmer, Baumgärtel et al. 2021). On the one hand, the very tools that aim to combat vulnerability and stereotypes may result in reinforcing these (Peroni and Timmer 2013, 1071–72; Arnardóttir 2017, 168) by painting a picture of categories of people as weak, thereby inviting paternalistic, protective approaches (Timmer, Baumgärtel et al. 2021, 194–5) and reducing agency. On the other hand, the Court's legitimacy may be called into question if it is perceived to expand positive obligations too much (Timmer 2011, 737; Heri 2021, 193) and overstep its subsidiary role. To be cautious of these pitfalls, the Court is called upon to reflect on how and why it assesses certain aspects of a case the way it does. Simply put, such clarity will result in both more transparency and thus legitimacy in the judgements (Timmer 2011, 738) as well as substantive clarity on the enhanced measures afforded to applicants in specific cases.

The following section aims to show, by reference to examples from the Court's anti-Romani police violence case law, just how large is the problem of inconsistent or non-recognition of harmful stereotypes. It also highlights potentials in the illustrative cases for engaging more meaningfully with a stereotype, by applying one or the other above-described principles.

2. Stereotypes and Vulnerability in Anti-Romani Police Violence Cases

This section discusses the facts of five cases of anti-Romani police violence which stand out from the Court's relevant case law in that explicit quotes from the domestic authorities – either the officers concerned in the incident or those involved in the investigation or domestic proceedings – reveal that the officials held prejudices against Roma. To recall, the Court has issued judgements in some 50 cases of anti-Romani police violence. In about a quarter of these, the authorities have used derogatory words to refer to the Applicants' ethnicity,[30] but it is only in a handful of cases where negative stereotypes about Roma by the authorities appeared in a Strasbourg judgement. The primary consideration for the selection of cases, therefore, was the presence of stereotypes in the Court's judgement,[31] and thus not how recent are the decisions or their level of importance to the Court.

The first case to be discussed is *Cobzaru v Romania* (App. No. 48254/99, Merits and Just Satisfaction, 26 July 2007). The applicant, Belmondo Cobzaru, presented himself to the police because he was afraid that his girlfriend's brother would beat him. At the police station officers grabbed and pushed Mr Cobzaru, then kicked him and beat him with a stick. He was made to sign a statement that he had been beaten by his girlfriend's brother (§12). That is indeed the Government's version of the events, despite the fact that the brother consistently denied beating the applicant. When Mr Cobzaru complained about the incident, the prosecutor refused to open a criminal investigation. This decision was based on the wider context of the case, which, according to the prosecution, was that the applicant, as a Romani person was "'prone to violence and theft' and was in constant conflict with 'fellow members of their ethnic group'" (§108). Mr Cobzaru's appeal was dismissed, also partly basing the decision on the belief that "the 25-year-old [G]ypsy [was] well known for scandals and always getting into fights" (§31). To sum up, the case of *Cobzaru* concerns the abuse of the applicant, based on the belief that he himself had a violent nature. The ECtHR held that the authorities were responsible for the abuse of Mr Cobzaru and failed in their duty to investigate its circumstances, including potential racist motives. It did not find the abuse itself to be racially motivated.

The second case selected for this study is *Petropoulou-Tsakiris v Greece* (App. No. 44803/04, Merits and Just Satisfaction, 6 December 2007). The police conducted a large-scale operation related to drug trafficking and raided the settlement where the applicant, ten-weeks pregnant Fani-Yannula Petropoulou-Tsakiris, lived. Residents were instructed to wait to be searched, during which time the applicant was kicked in the back by an officer (§8). Despite the fact that she started bleeding on the spot, she was not taken to hospital. She suffered a miscarriage some days later. In her complaint, she explicitly requested that the police

30 See *inter alia*: *Anguelova v Bulgaria* supra n.10 §47; *Sulejmanov v FYRM* (App. No. 69875/01) §6–7; *M.F. v Hungary* (App. No. 45855/12) §8; *R.R. and R.D. v Slovakia* (App. No. 2 0649/18) §31, 209.

31 The present assessment is made solely on the basis of publicly available judgements. It is entirely possible that other case files have also referred to stereotypes in the domestic proceedings; however, these did not appear in the final judgement. Table 1 references the sections of the judgements where the presence of stereotypes is mentioned.

officers participating in the raid be excluded from conducting the inquiry. Despite this request, the same officers carried out an informal investigation. Their report – based on which the disciplinary proceedings against the violent officer had been suspended – concluded that "the complaints are exaggerated… It is in fact a common tactic employed by the *athinganoi* [Greek for Roma] to resort to the extreme slandering of police officers with the obvious purpose of weakening any form of police control" (§29). To sum up, the case of *Petropoulou-Tsakiris* concerns the abuse of the applicant and the lack of its investigation due to the belief that her complaints were exaggerated. The ECtHR held that the authorities failed in their duty to investigate the circumstances, including potential racist motives, but it did not address the question of whether the abuse itself was racially motivated.

The third case to be examined is *Stoica v Romania* (App. No. 42722/02, Merits and Just Satisfaction, 4 March 2008*)*. The incident at the centre of the case occurred when local police came to "teach the Roma 'a lesson'" (§7). The applicant, a 14-year-old bystander, was attempting to flee the scene with other children when he was tripped by an officer, pushed into a ditch, kicked, and beaten. The Government maintained that it was the locals who became aggressive towards the police. Despite this claim, however, no criminal investigations were initiated by the police on this account, explained by the assertion that "the way in which some of the Roma acted [was] pure Gypsy behaviour and [did] not constitute the crime of insulting behaviour" (§36) which would have warranted further action. The conclusion of the prosecutor regarding the complaint about the ill-treatment of the applicant was not to prosecute, due to lack of evidence. To sum up, the case of Stoica concerns the abuse of a minor and the context in which the violence occurred. The ECtHR held that the authorities inflicted racist abuse and failed in their duty to investigate the circumstances, amounting to both a procedural and substantive violation of Articles 3 and 14.

The fourth case examined here is *Kleyn and Aleksandrovich v Russia* (App. No. 40657/04, Merits and Just Satisfaction, 3 May 2012) which, out of our examples, is the only case resulting in death. The Applicants' wife and mother, Fatsima Aleksandrovich, was arrested on a bus, where another passenger's purse had gone missing. A policeman also travelling on the bus immediately arrested her, hitting her and saying "[o]nly a Gypsy could steal the purse, who else?" (§7). The officer did not arrest Ms Aleksandrovich's non-Romani travel companion. Upon arrival at the police station, the events become impossible to discern. The authorities claim Ms Aleksandrovich died in an attempt to escape through a third-floor window (§45). The Applicants rejected this explanation, finding Ms Aleksandrovich, pregnant at the time, unlikely to have risked her and the baby's life for allegedly stealing a purse worth about 20 Euros (§46). Moreover, the Applicants pointed out that the investigations neither involved assessing Ms Aleksandrovich's psychological state nor exploring whether any other possible reason was behind her death and whether all her injuries resulted from the fatal fall. To sum up, the case of *Kleyn and Aleksandrovich* concerns the suspicious death of a thievery suspect and a total lack of investigation into the circumstances. The ECtHR condemned the authorities for their overall investigative failures but rejected all other claims, including those relating to discrimination.

The fifth and last case is that of *Lingurar v Romania* (App. No. 48474/14, Merits and Just Satisfaction, 16 April 2019), which concerns a raid of the Applicant's home as part of a large-scale intervention involving over 50 officers carrying out 190 identity checks, 140 car searches, and interrogating 64 individuals (§14–5). The justification for the intervention stated that "[o]ut of a total population of 4,300 inhabitants,

2,902 are of Roma ethnicity. Most of the members of this ethnicity do not have a steady income and make ends meet (…) from crime – mostly thefts" (§13). Throughout the domestic proceedings the use of force and immobilization measures which caused the applicants' injuries were found lawful, or in the case of two of the Applicants have been explained by the fact that "[they] had exhibited behaviour specific to Roma in such circumstances" (§37). To sum up, the *Lingurar* case concerns the planning of a police operation, the justification of which was decisively the authorities' expectation that the applicants' ethnicity and criminal behaviour would be connected. The Court held this profiling to be discriminatory, and consequently that the authorities planned and inflicted racist abuse amounting to both a substantive and procedural violation of Article 14 in conjunction with Article 3.

Table 1. *Overview of racist police violence cases at the ECtHR*

	Cobzaru v Romania (No. 48254/99)	***Petropoulou-Tsakiris v Greece*** (No. 44803/04)	***Stoica v Romania*** (No. 42722/02)	***Kleyn and Aleksandrovich v Russia*** (No. 40657/04)	***Lingurar v Romania*** (No. 48474/14)
Date of judgement	July 2007	December 2007	March 2008	May 2012	April 2019
Place of ill-treatment	Police station	Police raid	Patrol	Arrest and custody	Police raid
Victim of violence	24-year-old male	Stateless pregnant woman	By-stander minor, recently operated	Foreign national	Family of six
Who held the prejudice?	Prosecutor	Police (in report)	Police (verbally and in report)	Police (arresting officer verbally)	Police (in an intervention plan regarding raids in the municipality)
Where does the stereotype appear in the judgement?	Statement of facts	Procedural history, merits assessment	Procedural history, merits assessment	Statement of facts	Procedural history, merits assessment
Ruling on violence	Article 3: substantive and procedural violation	Article 3: procedural violation	Article 3: substantive and procedural violation	Article 2: procedural violation Article 3: manifestly ill-founded	Article 3: substantive violation
Ruling on discrimination	Article 14 (+3): procedural violation	Article 14 (+3): procedural violation	Article 14 (+3): substantive and procedural violation	Article 14 (+2): manifestly ill-founded	Article 14 (+3): substantive and procedural violation

This section gave an overview of five exemplary cases in which the domestic authorities – either those involved in the incident of ill-treatment or those investigating or prosecuting it – held prejudices. Table 1 summarises the key elements of each case. The takeaway from this section is that the Court approached the stigmatizing stereotype differently, from ignoring to considering and even expressly condemning them. The following subsections will attempt to typologize what the Court did, and what additional potentials there are to utilizing vulnerability and anti-stereotyping in cases of anti-Romani police violence. The cases introduced in this article may be divided into three categories based on the Court's response to the presence of stereotypes: first, non-engagement with stereotypes (2.1); second, acknowledging stereotypes without contestation (2.2); and finally a semi-application of the anti-stereotyping approach (2.3). Each highlights which elements of the above-discussed approaches the Court had followed in the judgements in focus and points to further potentials.

2.1 Non-engagement: Vulnerability Reasoning to Focus on the Core Right

One approach typically applied by the Court in anti-Romani police violence cases is to assess potentially racist overtones as an aggravating factor under Article 3[32] (O'Connel 2009, 214) usually connected to the vulnerable position of the Applicant. In *Kleyn and Aleksandrovich v Russia,* the Court "emphasize[d] that persons in custody are in a particularly vulnerable position" (§44) a sentence almost always verbatim appearing in the Court's judgements dealing with Article 3 detention cases (Heri 2021, 63). The Court held that "the mere fact that an individual dies in suspicious circumstances while in custody should raise an issue as to whether the State has complied with its obligation to protect that person's right to life" (§44). This approach echoes one of Timmer's categories of individual vulnerability which she identifies as inherent to being placed in detention (Timmer 2013, 206), and naturally, the similar categories in Heri's Article 3 typology (Heri 2021, 76). However, such an approach neglects to consider the complexity of the case, starting with the fact that the mere reason Ms Aleksandrovich was taken to the police station was, admittedly, her ethnicity. A more thorough vulnerability analysis or direct engagement with the stereotype held by the arresting officer might have shed light on the fact that her arrest was based on a stereotype.

The case could be a clear example in Heri's typology where a perceived identity marker makes a person vulnerable in the context of detention (Heri 2021, 77) as stereotypes cannot constitute reasonable suspicion. Within this context the Court could have had more room to consider why Ms Aleksandrovich was at the police station and demanded a more convincing account of what has happened to her before her fatal fall. An even more clear-cut way instead of rejecting the Article 14 complaint for procedural reasons could have been for the Court, "as master of the characterization to be given in law to the facts of the case,"[33] to take an anti-stereotyping approach, which allows an almost automatic consideration of the case as one of discrimination when a stereotype at the heart of the incident is deemed to be harmful.

32 See, for example, *M.B. and Others v Slovakia* (No. 2), note 14, §74 applicants' age as a factor in classifying the events as degrading treatment; or *Anguelova v Bulgaria,* note 10, §110 the applicant's placement in custody.

33 *Radomilja and Others v Croatia* [GC] (App. Nos. 37685/10 and 22768/12) §124–5.

2.2 Acknowledgment: Stereotypes Informing Causality Instead of Contextuality

The cases of *Cobzaru v Romania* and *Petropoulou-Tsakiris v Greece* are similar in that the Court did not explicitly identify the authorities' beliefs as stereotypes but still acknowledged their presence to a certain extent in the discrimination assessment of the cases, contributing to the finding of a procedural violation of Article 3 taken in conjunction with Article 14.

In *Cobzaru* the Court stated that the material before it did not suffice to establish that racism was a causal factor in the ill-treatment because, instead of presenting facts, the Applicant merely urged the Court to evaluate his allegations within the context of anti-Romani attitudes (§94). The materials referred from various organizations did not suffice to establish whether in the specific case of the individual Applicant racist attitudes played a key role (§92), particularly because it was the prosecutor who made tendentious remarks about the Applicant's ethnicity. For the Court these beliefs, concerning as they were (§97), could not be indicative of the attitudes motivating the police officer's violent conduct, as it was looking for evidence of causality between an individual officer's racist attitudes and their racist actions.

In the case of *Petropoulou-Tsakiris* it was the police officers conducting the raid who held prejudices, which became evident from the wording of their investigation report. The Court was "struck by the report" (§65) and stated that the specific quote reflected a "general discriminatory attitude on the part of the authorities" (*Ibid.*), leading to a procedural violation for not having further investigated this element. Even though the Applicant complained that the ill-treatment she suffered was itself due to her Romani ethnic origin, the Court did not engage with this part of the complaint because it could not establish the officers' responsibility for the ill-treatment in the first place (§42).

In these cases, both a vulnerability reasoning[34] and an anti-stereotyping approach could have opened up the possibility for more flexibility regarding the evidentiary materials. On the one hand, a vulnerability approach has paved the way in some cases for increased reliance on inferences (Heri 2021, 48) or contextual evidence. On the other hand, an anti-stereotyping approach could have provided the Court with a basis to shift the "focus of the discrimination assessment away from causal effects and comparison to a more general assessment of invidious prejudice and stereotypes in the attitudes of the national authorities" (Henningsen 2022, 188–9).

2.3 (Semi-)Application of an Anti-stereotyping Approach

In *Stoica v Romania* the Court examined the police report describing the villagers' alleged aggressive behaviour as "purely Gypsy" and found that such remarks are "clearly stereotypical" (§122). Similarly, in

34 For example, the fact that Mr Cobzaru was voluntarily present at the police station (§11) – in which situation the positive obligations of the authorities are less defined as in case a person is taken into custody or detained at the station – and the fact that Ms Petropoulou-Tsakiris was an unregistered stateless person (§9) at the time of the events could be seen as having put them in a vulnerable position vis-à-vis the authorities due to power imbalance (Heri 2021, 65).

Lingurar v Romania the Court found that "the manner in which the authorities justified and executed the police raid shows that the police had exercised their powers in a discriminatory manner, expecting the Applicants to be criminals because of their ethnic origin. (…) [extrapolating] from a stereotypical perception that the authorities had of the Roma community as a whole" (§76).

In the case of *Lingurar* this finding immediately led to a substantive violation of Article 3 in conjunction with Article 14. In a second step the Court held that "the mere fact that in the present case stereotypes about 'Roma behaviour' feature in the authorities' assessment of the situation (…) may give rise to suspicions of discrimination based on ethnic grounds", and in the absence of any analysis of this at the domestic courts it found a violation of the procedural aspect of Article 14 in conjunction with Article 3. In the case of *Stoica* the Court followed a reverse approach: because the domestic authorities did not make any effort in their investigations to address the stereotypical remarks of the police report, this proved to the Court that the officers were not racially neutral, which in turn led to the finding that the violence itself was also not "removed from this racist context" (§129). Therefore, the Court found a violation of Article 14 taken together with Article 3 without separating its substantive and procedural aspects.

While the judgements do not follow the exact steps of the anti-stereotyping model suggested by Timmer – in that they do not entail a detailed analysis of the historical origins and current harmful effects of the stereotypes on the lives of Roma – the impact of the Court's engagement with them is manyfold. First, both judgements address the authorities' biased opinions under the anti-discrimination clause of the Convention, which implicitly recognizes the fact that stereotyping is a manifestation of discrimination. Second, both judgements acknowledge that stereotypes may not justify the authorities' discriminatory conduct. Third, in both cases, the Court's engagement with the stereotype resulted in departing from the "beyond reasonable doubt" standard of proof borne by the Applicant, recognizing the potential *prima facie* evidentiary value of stereotypes. All these effects are beneficial for the Applicants, who are generally in a difficult position to show that discrimination was a key element of their complaint (Mačkić 2013, 52). For these reasons, the best approach that the Court has taken in the judgements reviewed in this article – which were selected because they contained clearly harmful stereotypes – is exemplified in *Stoica* and *Lingurar*. While the facts of the cases and the stereotypes are similar across the entirety of anti-Romani police violence case law, the Court's readiness to engage with them differs, as shown by the analysis of three other cases in this article. Both the clarity of the Court's relevant case law, as well as Applicants' complaints of violence fuelled by bias and stereotypes would benefit from a more consistent approach, particularly one in line with *Stoica* and *Lingurar*.

Conclusion

This article analysed five examples of anti-Romani police violence cases in which harmful stereotypes were clearly present on the side of the domestic authorities. The main question of the analysis was whether and how such stereotypes (could) influence the judicial reasoning and ultimately the outcome of the case. The analysis was informed by the framework drawn up by Timmer (2013) on the Court's approach to *individual vulnerability* in general, and Heri (2021) in particular under Article 3; Timmer and Peroni's (2013) analysis of the Court's application of the concept of *group vulnerability* in general, and

Arnardóttir's in particular under Article 14 (2017); and Timmer's (2011) anti-stereotyping model further conceptualized by Henningsen (2022).

The point of deploying the concept of vulnerability in judicial deliberation is to make it possible to link general and particular realities, thereby shedding light on the wider context of how and which societal mechanisms operate. Applying the anti-stereotyping model enables the Court explicitly to name and contest harmful stereotypes, which, if they remain unchallenged, will perpetuate further prejudices and discrimination. Both these methods, and in fact any others which enable the Court to address the larger context of discrimination, and to address discrimination as such, under the specific anti-discrimination provision are essential in sending a message about the importance of protection from (racial and ethnic) discrimination.

The five cases reviewed through these lenses confirm that the Court does not have a crystalized approach to addressing stereotypes and vulnerability in anti-Romani police violence cases. Furthermore, the analysis showed that there could have been opportunities to better utilize the argumentative tools of vulnerability or anti-stereotyping. Of course, this is not solely the task of the Court. Representatives of the victims of racist police abuse may decide to highlight strategically the evidentiary value of stereotypes or present arguments that show how exactly their client was in a vulnerable position and what that means for the assessment of the application. Third-party interventions also may provide a platform to lay out general arguments in support of the approaches the Court may take when faced with invidious stereotypes.[35]

While it is true that changing attitudes only begins with a judgement, the takeaway from this analysis is that the more actively the Court engages with the broader societal context of the cases, and specifically hostile climate against Roma manifesting in invidious stereotypes, the more laudable, because this not only brings justice to individual victims of racist violence but also contributes to combating the very stereotypes which led to lodging the application with the Court in the first place.

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35 Interventions submitted by the European Roma Rights Centre, for example, in the cases of *Assenov v Bulgaria,* note 14; *A.P. v Slovakia,* note 12; *Cioban and Others v Romania,* note 10; *Kovács v Hungary,* note 12; *Lingurar and Others v Romania* (App. No. 48474/14); *Lupu v Romania* (App. No. 36250/09); *M.B and Others v Slovakia* (No. 1) (App. No. 45322/17); *Pastrama v Ukraine,* note 11 – urging the Court the recognize the vulnerable situation of Roma vis-à-vis police interventions. Available online: http://www.errc.org/search?country=&theme=&area=3&keyword=&search_submit=.

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