UPPSALA
UNIVERSITET

Department of Law
Spring Term 2017

Master's Thesis in Public International Law
30 ECTS

Cinderella and the Snow Queen

Advancing the Protection Against Discrimination in the ECHR

Author: Alexander Ottosson
Supervisor: Professor Maja K. Eriksson

The values of tolerance, acceptance and solidarity have defined the European project. We cannot abandon them now […] We need our own "European Spring" to overcome old and emerging forms of racism and intolerance.

– Council of Europe Commissioner for Human Rights, Nils Muižnieks [1]

[1] Nils Muižnieks, 'You're Better Than This, Europe', published 28 June 2015, <https://www.nytimes.com/2015/06/29/opinion/youre-better-than-this-europe.html> and after the *[…],* Nils Muižnieks, 'Anti-Muslim Prejudice Hinders Integration', published 24 July 2012, <https://www.coe.int/es/web/commissioner/-/anti-muslim-prejudice-hinders-integrati-1> accessed 28 July 2017.

PREFACE

In your hand, or on your screen, is my Master's Thesis 'Cinderella and the Snow Queen: Advancing the Protection against discrimination in the ECHR'. It was written between January and August 2017 during my final semester in law school at Uppsala University while I was doing an internship at the Swedish Representation at the Council of Europe. When I am now putting the finishing touches on the thesis, I conclude that I owe a great deal of gratitude to several people who have contributed along the way.

First of all, I would like to thank my thesis supervisor, Professor Maja K. Eriksson for providing valuable guidance and encouragement. I would equally like to thank my internship supervisor, Ann-Marie Bolin Pennegård, for opening my eyes to the practical realities of my thesis topic and for her heart-warming confidence and compassion. In fact, thanks go to all my colleagues at the Swedish Representation for their positive spirit and moral support. A special thanks also go out to my fellow intern, Louise Cordonnier, who made me approach the written language with new eyes.

I am, furthermore, indebted to fellow students, Jacob Gustafsson and Fredrik Hultman who provided constructive feedback and engaged in fruitful discussions with me throughout the writing process. I am also thankful to my opponent at the thesis seminar, Rebecca Claesson, who supplied some useful last minute ideas for improvement.

Nonetheless, from initial capital to final period, no one has provided more encouragement and valuable input, nor acted as a better sounding board, than my mother. I am incredibly grateful to have had her by my side not only during the process of writing this thesis but throughout my five years at law school. Lastly, I would like to thank my friend Marcus Brissman, my aunt, my brother and my father for supporting me through the writing process and in life in general. You always advised me to do my best. This is it. Enjoy!

Uppsala, 11 August 2017
Alexander Ottosson

ABSTRACT

Against the background of a surge of populism, racism and intolerance in the European political discourse over the last few years, this thesis addresses one essential aspect of democratic security: the protection against discrimination. The thesis contains an examination of the two anti-discrimination provisions in the ECHR: Article 14 and Article 1 of Protocol No. 12 (Cinderella and the Snow Queen by analogy). Through this examination it explores how the protection against discrimination can be advanced.

The thesis concludes that the main deficiency that needs to be addressed is the Strasbourg Court's casuistic adjudication. It suggests that certain more substantial factors be incorporated into the proportionality test to reduce the need for the Court to rely on a casuistic approach. To advance the protection, it further proposes a subordinate application of the margin of appreciation. This serves to mitigate concerns that the moralistic preferences of the majority get to set the scope of the protection of the rights of minorities. The thesis also advances the view that more States need to ratify Protocol No. 12 to bridge the arbitrary gap in Article 14. It provides arguments for ratification and underlines why the Court can be trusted to control the potential width of the Protocol.

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

CDDH	Steering Committee for Human Rights
CDEG	Steering Committee for Equality between Women and Men
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
ECHR	European Convention on Human Rights
ECJ	European Court of Justice, the Luxembourg Court
ECRI	European Commission against Racism
ECtHR	European Court of Human Rights, the Strasbourg Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination

1 Introduction

1.1 Background

Today, the European democracies are bending under the pressure of populism, racism and intolerance.[2] Recently, the Council of Europe Commissioner for Human Rights warned that we have reached a critical turning point for human rights: 'Either we are at a low point that we can bounce back from through renewed commitment to human rights and cooperation, or we have reached the beginning of the end of the European human rights system and European integration'.[3]

To reverse the negative trend, the Secretary General of the Council of Europe has repeatedly pointed to the prevailing consensus that 'pluralism, inclusive debate and the protection of minority interests' are critical for democratic security.[4] They are, in other words, critical to prevent states from becoming undemocratic. Arguably, the protection against discrimination plays a central role for pluralism, inclusive debate and the protection of minority interests alike. What is more, as the Council of Europe underlines in its Action Plan on Building Inclusive Societies, focusing on combatting discrimination is 'one of the best ways to heal social division and drain the fear and resentment that extremists seek to exploit.'[5] I therefore submit that an essential step to heed the Commissioner's warning is to cultivate a strong protection against discrimination. Such a protection should be able to shed light on discriminatory structures and deter states from subscribing to stereotypes and capitulating to the growing populist agenda driven by xenophobia and fear.

To that end, I would like to advance the view that it is most pertinent to focus on the protection against discrimination in the European Convention on Human Rights. The Convention

---

[2] Compare Secretary General of the Council of Europe, Thorbjørn Jagland, 'State of Democracy, Human Rights and the Rule of Law: Populism – How Strong are Europe's Checks and Balances?' (2017) 127th Session of the Committee of ministers, Nicosia, 19 May 2017, 4–5.

[3] Nils Muižnieks, *Council of Europe Commissioner for Human Rights's Annual Activity Report 2016* (CommDH (2017) 3, Strasbourg, Council of Europe, 6 April 2017) 3.

[4] Secretary General of the Council of Europe, Thorbjørn Jagland (n 2), 6.

[5] Council of Europe Action Plan on Building Inclusive Societies (2016–2019), adopted by the Committee of Ministers on its 1251 Meeting, 15–16 March 2016 (CM(2016)25) 2.

was drafted within the Council of Europe: an international organisation with 47 Member States – including all EU Member States, Norway and Switzerland, the entire Balkan Peninsula, the Black Sea region and the Caucasus.[6] The Council focuses on strengthening democracy, human rights and the rule of law.[7] The Court established to adjudicate cases under the ECHR sits in Strasbourg and has been described as Europe's human rights locomotive.[8] In contrast to the Court of Justice of the EU, which sits in Luxembourg, the Strasbourg Court only focuses on human rights.

The Council of Europe thus has a more singular focus than the EU and a more extensive geographical reach. In a time when the EU suffers from division and a democratic deficit, the Council of Europe and the Court might also have to play a more central role in preserving democratic values and enhancing European integration. However, the quality of the Court's case-law has been criticised in the legal doctrine and by the Member States – mainly for being casuistic and inconsistent.[9] Improvement is, therefore, needed if the Strasbourg Court shall be able to fulfil such a role effectively.

1.2 Purpose

Against this background, I felt compelled to delve deeper into the anti-discrimination provisions of the ECHR to map out and bring clarity to the current legal landscape and to explore the road ahead. Accordingly, the purpose of this thesis is three-fold:

1. to decode the anti-discrimination case-law to form an understanding of the Court's approach to discrimination;
2. to identify potential flaws in the case-law that should be addressed and;
3. to explore how the protection most effectively can be advanced.

---

[6] Europe and its institutions (2017) <https://edoc.coe.int/en/an-overview/7398-l-europe-et-ses-institutions.html> accessed 21 July 2017.
[7] Ibid.
[8] Paul Mahoney and Rachael Kondak, 'Common Ground. A Starting Point or Destination for Comparative-Law Analysis by the European Court of Human Rights?' in Mads Andenas and Duncan Fairgrieve (eds), *Courts and Comparative Law* (OUP 2015); Luzius Wildhaber, Arnaldur Hjartarson, and Stephen Donnelly, 'No Consensus on Consensus? The Practice of the European Court of Human Rights' (2013) 31 HRLJ 257.
[9] See inter alia Rory O'Connell, 'Cinderella comes to the Ball: Art 14 and the Right to Non-discrimination in the ECHR' (2009) 29 Legal Studies, 211.

For this purpose, a close examination of both Article 14 of the ECHR and Article 1 of Protocol No. 12 is necessary.

1.3 Method

The primary basis for the thesis is an extensive study of more than a hundred cases from the Strasbourg Court – out of which I have studied about forty intensively and in depth. I have also surveyed the most relevant legal doctrine and conducted a critical review of the arguments advanced, researched pertinent legal philosophy and analysed reports from Council of Europe bodies and institutions, including statistics from the Court. When in line with the purpose, I have, furthermore, situated issues within a broader international law context pertaining to general aspects of treaty law as defined by the Vienna Convention on the law of treaties[10] and of customary international law.

After a thorough analysis of the Court's approach to discrimination in chapter 4 and 5 follows an analysis focused on the factors that influence, or should influence, the Court's adjudication of the protection against discrimination. This analysis is carried out over three separate chapters, each of which is dedicated to the perspective of one of the primary stakeholders: the individual, the State and the Court.

Finally, the analogy of Cinderella and the Snow Queen has been used comprehensively to facilitate the conceptualisation of Article 14 and Article 1 of Protocol No. 12. Overloading the text with references to the analogy would, however, appear strained and has thus been avoided. The mental operation of relating the case-law to the analogy as set out in chapter 3 has, nevertheless, helped immensely in the writing process and could hopefully be effective also for the reader.

[10] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

1.4 Delimitations

The principle of non-discrimination and equality is indeed a core aspect of international human rights law. It can be found in Article 2 and 26 of the ICCPR[11], in Article 1 and 7 of the Universal Declaration of Human Rights[12] and in Article 20 and 21 of the Charter of Fundamental Rights of the European Union.[13] There are, morover, several specialised instruments, most notably the CEDAW[14], the ICERD[15] and the Convention on the Rights of Persons with Disabilities.[16] The Strasbourg Court is often influenced by these instruments – as well as comparatively by national law – and references to such law by either party can often have persuasive value.[17] This thesis, however, will not undertake to analyse the protection against discrimination in national, EU or other international law contexts. In the interest of conciseness, the focus will be on Article 14 and Article 1 of Protocol No. 12. Likewise, the closer meaning of international law concepts, including customary international law and the function of the persistent objector doctrine, will not be dealt with in substance because such an operation would require disproportionate effort in relation to what it could contribute to the purpose.

Furthermore, as for the analysis in chapter 6–8, the focus will be on a selection of issues, which the conducted research has shown to be most impactful vis-à-vis the purpose. Measures that could strengthen the protection of all convention rights have not been selected for discussion unless they have a particular connection to discrimination – such as the role of the Court and judicial activism that arguably is especially justifiable and important when it comes to discrimination.

---

[11] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[12] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR).
[13] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, 391–407.
[14] Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.
[15] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.
[16] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) A/RES/61/106, Annex I.
[17] See for instance Demir and Baykara v. Turkey [GC], no 34503/97, § 154, ECHR 2008-V.

Finally, I have not investigated intersectional perspectives on discrimination. The reason for this is two-fold. One reason is that such perspectives have not so far been adopted by the Court. The second reason is that, although incorporation of such perspectives in the Court's jurisprudence might contribute to the advancement of the protection against discrimination, there was no time to include them in this thesis in a satisfactory way.

1.5 Contributions

This thesis elaborates on and contributes to existing research by:

- Presenting a brief comprehensible account of relevant legal philosophy: the silent prologue that consciously or unconsciously precedes every legal decision and judgement relating to anti-discrimination: **Chapter 2;**
- Conceptualising the anti-discrimination provisions of the Convention by employing the Cinderella–Snow Queen analogy: **Chapter 3;**
- Decoding the Court's interpretation of Article 14, identifying flaws in the case-law and suggesting some solutions to regulate said flaws: **Chapter 4;**
- Highlighting the differences between Article 14 and Article 1 of Protocol No. 12 and advancing arguments in favour of ratifying Protocol No. 12: **Chapter 5;**
- Pinpointing and addressing the main concerns of the individual, the State and the Court relative to the protection against discrimination: **Chapter 6–8;**
- Concluding how the protection against discrimination most effectively can be advanced: **Chapter 9.**

2 Silent Prologue

In this chapter, I take my cue from legal philosopher Ronald Dworkin who approached legal philosophy as the silent prologue to every legal decision.[18] In the context of this thesis, the silent prologue constitutes the philosophical premises upon which the Strasbourg Court bases its case-law. It will aid the understanding of the case-law and its deficiencies if one has a firm grasp of the silent prologue. Given this premise, it seems pertinent to briefly examine the central philosophical groundwork of discrimination before delving into the decisions and judgements of the Strasbourg Court. To avoid getting too theoretical, we shall only look at different conceptions of equality, their shortcomings, and how the Court has approached them.

From the outset, the Court formed an approach towards discrimination based on formal equality. Formal equality means that everyone is equal before the law and, as far as they are in similar situations, should have the same rights and be treated equally.[19] The problem with this approach is the difficulty of determining similarity or difference. Every such operation is inevitably guided by covert conditions imposed by our worldview. Distinctions imply a certain view on normality, which produces a hierarchical system of characteristics – a system that often favours white, adult, affluent, non-disabled men as the norm.[20] Formal equality has thus been criticised for neglecting the perspective of certain disadvantaged groups.[21] For these reasons, the Court has in turn been criticised for limiting itself to a formal equality approach.[22]

---

[18] George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (1st edn, OUP 2007) 57.
[19] Alexandra Timmer, 'Towards an Anti-Stereotyping Approach for the European Court of Human Rights' (2011) 11 Hum. Rts. L. Rev. 707, 710.
[20] Jack M. Balkin, 'Deconstructive Practice and Legal Theory' (1987) 96 Yale L.J. 743, 748.
[21] Timmer (n 19), 711 with exemplifying reference to Robin West, 'The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory' (2000) 15 Wisconsin Women's Law Journal 149.
[22] See inter alia O'Connell (n 9).

Fortunately, with the advent of its indirect discrimination case-law, the Court adopted an alternative, substantive, conception of equality. In other words, a view based on the real effect of rules and practices on certain disadvantaged groups.[23] Nonetheless, also the substantive equality model has its flaws. As Timmer points out, by merely focusing on the effects of a certain rule, it fails to fully account for 'structural causes of exclusion': the reasons for *why* a certain group is disadvantaged.[24] Although a substantive view on equality can help identify structural issues because of its focus on groups rather than individuals, it is not capable of breaking down the discriminatory structures.[25]

To deal with those discriminatory structures, some commentators have suggested an anti-stereotyping approach that can cast light on the root of the problem: prejudice and stereotypes.[26] So far, the Court has not adopted such an approach.[27] To be sure, doing so in practice is an uphill struggle for an international court that *may* not be in tune with the realities of daily life. As the former Swedish Prime Minister Olof Palme wisely proclaimed:

> *'Prejudice has its root in daily life. It grows in the work place and in the neighbourhood. It is an outlet for failure and disappointment; an expression of ignorance and fear […] Hence prejudice always lurks in the shadows – even in an enlightened society* [my translation].'[28]

With those words in mind, it seems clear that the solution to prejudice that permeates society and generates discriminatory legal and social structures must be provided at a national and local level. The Court can, of course, assist in this endeavour by dismantling stereo-

---

[23] Ibid, 711.
[24] Timmer (n 19), 712.
[25] Ibid.
[26] See inter alia Timmer (n 19), 712; Rebecca J. Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (1st edn, University of Pennsylvania Press 2010) 6; Sandra Fredman, 'Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights', in Ineke Boerefijn et al. (eds), *Temporary special measures. Accelerating De Facto Equality of Women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women* (1st edn, Intersentia 2003) 111, 115.
[27] Ibid, 713.
[28] Speech broadcasted on the national radio in Sweden 25 December 1965, repeated in Olof Palme, *Politik är att vilja [Politics is to be willing]* (1st edn, Prisma 1968) 64–65.

types and by focusing more on the States' positive obligations in relation to equality. In this respect, Timmer's article on an anti-stereotyping approach is well worth a read.[29]

We have now defined and examined different conceptions of equality and how the Court has approached them. Acknowledging the difference between formal and substantive equality, the flaws of each model and being aware of the Court's incorporation of them in its case-law is a good starting point to our inquiry into the protection against discrimination in the ECHR. The next step from that point of departure will be to conceptualise the anti-discrimination provisions, Article 14 and Article 1 of Protocol No. 12, to better grasp their character and differences.

[29] Timmer (n 19).

3 Introducing Cinderella and the Snow Queen

The folk tale of Cinderella, popularised by the Disney film from the 1950s, needs no introduction. Curiously, Article 14 of the Convention has in the literature been called a Cinderella provision because the Court, according to some commentators, has failed to give it any significant 'bite'.[30] I would add to the analogy by referring to the fact that the article is only applicable together with an appropriate substantive article of the Convention that fits the facts of the case: in other words, with a shoe that fits. Apart from that, Cinderella has come to be associated with the idea of someone with unrecognised attributes, who for a period is discounted and met with indifference before achieving success. Even though some commentators maintain that Article 14 still lacks significant 'bite', I find that the article fits this description of new-found success in light of the developments in the Court's case-law the last ten years or so.[31] Having said that, I certainly still maintain that the protection against discrimination can and must become stronger given the stated background.

Article 1 of Protocol No. 12 has not, as far as I know, been called the Snow Queen. However, there are a few aspects of the article and its drafting history that compelled me to draw the analogy. Let me briefly reiterate the relevant plot of the Disney film Frozen where the Snow Queen plays the lead. The parents of Elsa and her sister Anna die when the sisters are still young, and Elsa is crowned the Queen of Arendelle. Elsa has 'ice powers' over which she has no control, and eventually she traps the kingdom in eternal winter. Elsa escapes into the mountains to avoid hurting anyone with her powers.

Article 1 of Protocol No. 12 unchained the protection against discrimination from the substantive convention rights and thus constitutes a more general prohibition on discrimination.[32] While this means overcoming one of the major limitations of Article 14, it also entails a significantly larger and allegedly unpredictable scope, which has discouraged many

[30] O'Connell (n 9), 211.
[31] See O'Connell's conclusion of the positive trend already 2009 at ibid, 228–29.
[32] Nives Mazue-Kumrić, 'General Prohibition of Discrimination in International Law: Sejdić and Finci v. Bosnia and Herzegovina' (2012) 3 Annals Constantin Brancusi U. Targu Jiu Juridical Series 13, 14.

States from ratifying the protocol.[33] Protocol No. 12 thus has potentially dangerous powers – at least for States that fear both getting indicted for discrimination in situations they deem uncalled for and that it will cause more adjudication, costing the States a lot of money. Furthermore, less than half of the Member States of the Council of Europe have ratified the protocol, and there have only been six judgements on the merits by the Court since the entry into force of the protocol more than ten years ago.[34] Hence, one could also argue that Protocol No. 12, like the Snow Queen, lives a somewhat isolated existence.

To facilitate your conceptualisation and understanding of the characteristics of Article 14 and Article 1 of Protocol No. 12, I encourage you to keep this analogy in mind as we go on. Doing so could be especially beneficial when the technicality of the case-law becomes a vehicle for frustration.

[33] Robert Wintemute, 'Filling the Article 14 "Gap": Government ratification and judicial control of Protocol No. 12 ECHR: Part 2' (2004) E.H.R.L.R 484, 484–85.
[34] European Court of Human Right's Case-law Database HUDOC <http://hudoc.echr.coe.int/eng#{"lang uageisocode":["ENG"],"article":["P12-1"],"documentcollectionid2":["JUDGMENTS"]} > accessed 14 July 2017 and Council of Europe Chart of signatures and ratifications of Treaty 177 <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures?p_auth=swlGkVlv> accessed 10 June 2017.

4 Getting to Know Cinderella

4.1 The Court's Reading of Article 14

The right not to be discriminated in Article 14 is a complementary right. It can only be invoked together with another convention right, such as the right to life in Article 2 or the right to freedom of expression in Article 10. This is problematic. Especially so when the Court does not assess the merits of a case under Article 14 because the protection against discrimination does not seem to add anything important.[35] In his dissenting opinion in Anguelova v. Bulgaria, Judge Bonello is critical of the Court's repeated failure to address the substantive aspects of discrimination:

> *'Kurds, coloureds, Muslims, Roma and others are again and again killed, tortured or maimed, but the Court is not persuaded that their race, colour, nationality or place of origin has anything to do with it.'*[36]

Having said that, over the last decade or so the Court has become more intent on also addressing the discrimination aspects in substance.[37] In doing so, however, the Court seems to have attempted to put together a puzzle with pieces from different boxes, thus creating sometimes incongruous and puzzling jurisprudence. There is a clear consensus among academics that the current case-law lacks a sound theoretical basis for the application of Article 14.[38] In the following, I will examine the ambit requirement, protected grounds, the different types of discrimination and the requirement of objective and reasonable justification. I will also assess what role intent has, on whom the burden of proof shall be placed and how the margin of appreciation doctrine applies. In doing so, I will as far as possible establish analytical scaffolding for the Court's current jurisprudence and for the way forward.

---

[35] Janneke Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights' (2013) 13 Hum. Rts. L. Rev 99, 99.
[36] Anguelova v. Bulgaria, no. 38361/97, ECHR 2002–IV.
[37] Gerards (n 35).
[38] Ibid, 102; Oddný Mjöll Arnadóttir, *Equality and Non-Discrimination under the European Convention on Human Rights* (1st edn, Martinus Nijhoff Publishers 2003), 15.

4.2 The Ambit Requirement

4.2.1 Understanding Ambit, Scope, Applicability, Interference and Violation

'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground.' These introductory words of Article 14 contain what is often called the ambit requirement. The wording seems to imply that States must simply secure enjoyment of all convention rights without discrimination. Unfortunately, it is not as clear-cut.

If a substantive article, such as Articles 2–12, is applicable or if the facts fall within the ambit or scope of any of those articles, Article 14 applies.[39] The substantive article does not have to have been interfered with or violated.[40] Applicability, ambit and scope are mostly used synonymously, although sometimes, it can be inferred that ambit is used in a slightly wider sense.[41] When it comes to the qualified rights, notably Article 8–11, there is a difference between interference on the one hand and ambit, scope and applicability on the other. Let me illustrate.

Article 8 of the Convention protects correspondence, among other things. If the facts of a case concern how correctional officers have handled prisoners' correspondence, Article 8 is applicable – the facts fall within the ambit or scope of the Article. It is not, however, until the applicant alleges that their correspondence has been monitored in some way that there is an alleged interference. From my understanding, applicability, scope and ambit concern the facts of the case, while interference concerns imputability: whether the State allegedly has done something to encroach the applicant's rights. A violation, in turn, is an interference that cannot be justified. Being clear on those distinctions, we can turn to some of the illuminating cases I have identified as to the width of the ambit requirement.

---

[39] See inter alia X and Others v. Austria [GC], no.19010/07, § 94, ECHR 2013–II; *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 71, Series A no. 94; Vallianatos and Others v. Greece [GC], no. 29381/09 and 32684/09, § 72, ECHR 2013–VI; Bayev and Others v. Russia, no. 67667/09 44092/12 56717/12, § 87, 20 June 2017.

[40] See inter alia Škorjanec v. Croatia, no. 25536/14, § 36, 28 March 2017; İzzettin Doğan and Others v. Turkey [GC], no. 62649/10, § 165, 26 April 2016.

[41] *Schmidt and Dahlström v. Sweden*, 6 February 1976, § 39, Series A no. 21.

In Karner v. Austria, *Article 14 was applicable because the differential treatment 'adversely affected the enjoyment' of the applicants right* to respect for his home and the facts thus fell within the ambit of Article 8.[42] Karner had not been entitled to succeed the lease when his partner died because they were homosexuals.[43] This is a rather direct negative impact on the applicant's enjoyment of his right to respect for his home. The facts thus clearly fell within the ambit of the substantive right.

In National Union of Belgian Police v. Belgium, Article 14 was applicable because 'the subject-matter of the disadvantage [...] constitute[d] one of the modalities of the exercise of a right guaranteed'.[44] In other words, *Article 14 was applicable because the applicant trade union experienced a disadvantage that hindered it from exercising its rights*. Court held that while consultation under Article 11 was left to the State's discretion, it constituted one of the ways trade union members exercised their right to protect their occupational interests.[45] Here, the facts fell within the ambit of the substantive right although it did not concern a direct entitlement relating to that right. Article 11 contains no right to consultation, only a right to join trade unions for the protection of one's occupational interests.

In Schmidt and Dahlström v. Sweden, *Article 14 was applicable because the 'differential treatment was linked to the exercise of a Convention right'*.[46] A collective agreement had been concluded that gave benefits retroactively only to those that had not been on strike. The applicants' respective trade union had carried out selective strikes, which precluded retroactivity for all members even if they had not participated in the strike – which the applicants had not. The Court underlined that the right to association under Article 11 does not encompass a right to certain benefits. The differential treatment, i.e. not conferring on the applicants retroactivity of benefits, had however been linked to the trade unions concerted effort to protect the occupational interests of its members. It was a direct result of the

[42] Karner v. Austria, no. 40016/98, § 33, ECHR 2003-IX. See also Larkos v. Cyprus [GC], no. 29515/95, § 28, ECHR 1999-I.
[43] Karner (n 42), §§ 10–18.
[44] *National Union of Belgian Police v. Belgium*, 27 October 1975, § 45, Series A no. 19.
[45] Ibid.
[46] Schmidt and Dahlström (n 41), § 39.

solidarity that prevailed between the trade union members.[47] The facts consequently fell outside of the scope of the substantive article but were still connected to the exercise of the substantive right.

Finally, in E.B. v. France, the Court clarified that while Article 14 only has effect in relation to 'the enjoyment of the rights and freedoms' safeguarded by the Convention[48], it applies also to 'those additional rights, falling within the *general scope* of any Convention Article, for which the State has voluntarily decided to provide' [emphasis added].[49] E.B. was a homosexual woman whose request for single adoption had been rejected, ostensibly because of her sexual orientation.[50] It was concluded that although adoption was not an entitlement guaranteed by Article 8[51], the fact that it was an entitlement granted through French legislation made it fall within the ambit of Article 8.[52]

Interestingly, this means that although the Convention sets a minimum level of protection against human rights abuses in Europe,[53] the State cannot guarantee a stronger protection with additional entitlements without simultaneously increasing the protection against discrimination. As I see it, the complementary nature of Article 14 thus makes it a variable, not a constant.

4.2.2 Concluding Summary

To conclude, the ambit requirement is fulfilled when the facts falls within the ambit of a substantive article. This is the case when:

1. the differential treatment adversely affects the enjoyment of a substantive right and a direct entitlement under the Convention;

---

[47] Ibid, §§ 39–40.
[48] Ibid, § 47. See also Sahin v. Germany [GC], no. 30943/96, § 85, ECHR 2003-VIII.
[49] Ibid.
[50] E.B. v. France [GC], no. 43546/02, 22 January 2008, §§ 7–25.
[51] See inter alia Fretté v. France, no. 36515/97, § 32, ECHR 2002–I; *Marckx v. Belgium*, 13 June 1979, § 31, Series A no. 31.
[52] E.B. (n 50), § 49.
[53] Article 1 and 53 of the Convention.

2. the differential treatment, although not concerning a direct entitlement under the Convention, causes a disadvantage that hinders the applicant from exercising the substantive right, or;
3. the differential treatment, although falling outside the scope of a substantive right, is linked to the exercise of such a right.

The first is concerned with a more direct negative effect on the enjoyment of a Convention right. The second is slightly more indirect, only requiring a disadvantage on the manner in which a Convention right is exercised. The third seems to be even more indirect still, only requiring that whatever disadvantage the applicant face on account of a differential treatment be linked to the exercise of a Convention right.

Lastly, the complementary nature of Article 14 makes it a variable, rather than a constant, because the protection against discrimination complements also additional rights that the State has voluntarily decided to provide.

4.3 Protected Grounds

4.3.1 Admissibility

Article 14 contains a non-exhaustive list of protected grounds (such as sex, race and colour). The list not being exhaustive is indicated in the text of Article 14 by the phrases 'any ground such as', 'other opinion' and 'other status'. A comparison with the French version provides further support for the list not only being non-exhaustive but also incredibly comprehensive.[54] For instance, the French formulation for 'other status' is 'toute autre situation' [every other situation], which certainly seems all-encompassing. This was also the initial interpretation by the Court. From the beginning, the Court adopted an open approach to the grounds of discrimination where every ground was valid.[55] In 1976, however, the Court introduced a more restrictive approach requiring that the differential treatment be based on a 'personal characteristic […] by which persons or groups of persons are distinguishable

[54] Gerards (n 35), 104.
[55] Ibid. See for reference also *Engel and Others v. Netherlands*, 23 November 1976, Series A no. 22. and *Rasmussen v. Denmark*, 28 November 1984, Series A no. 87.

from each other'.[56] Let us examine some cases in which this more restrictive approach has been used to better grasp its implications.

In Springett and Others v. the United Kingdom the Court clarified the criteria for finding if the differential treatment was based on a personal characteristic. The Court created two categories. Category 1 contains treatment based on 'an innate characteristic that applies from birth', such as sex, race, colour, language, national or social origin. Category 2 instead contains grounds related to a core or personal belief or choice, encompassing for instance 'religion', 'political or other opinion' and 'place of residence'.[57] In Springett, the Court found that whether one had acquired the right to a welfare benefit did not fall under any of these categories and could therefore not be considered a personal characteristic.[58]

Some commentators view part of subsequent case-law, such as Clift v. the United Kingdom, as an inconsistent departure from Springett.[59] I contend, however, that Clift added an additional category to the Springett setup. Clift concerned a difference in how parole proceedings were conducted depending on what sort of sentence prisoners were serving.[60] The Court in Clift, having cited the principle of effectiveness, held that difference in treatment with regard to an early release scheme (i.e. parole) warranted review because such treatment could run counter to the objective of Article 5 to protect prisoners from arbitrary detention.[61] It thus seems clear that this third category makes review under Article 14 possible with reference to the principle of effectiveness – i.e. that the Convention rights must be practical and effective rather than theoretical and illusory.[62]

So, the Court normally applies the stricter approach to the admissibility of protected grounds and the three categories identified above. When the applicant is a legal person,

---

[56] Gerards (n 35), 105. See for reference *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, Series A no. 23. For a more recent example see also Carson v. the United Kingdom, no. 42184/05, § 61, ECHR 2010–II.
[57] Springett and Others v. the United Kingdom (dec.), nos. 34726/04 14287/05 34702/05, § 7, 27 April 2010.
[58] Ibid.
[59] Gerards (n 34), 107.
[60] Clift v. the United Kingdom, no. 7205/07, §§ 6–8, 13 July 2010.
[61] Ibid, § 62.
[62] See among other authorities *Airey v. Ireland*, 9 October 1979, § 24, Series A no. 32.

however, the Court has returned back to the more open approach that allows all discrimination grounds.[63] It does, of course, seem unnatural to discuss personal characteristics when it comes to legal persons so there is a logic behind not applying the personal characteristics criterion in those cases. Still, this logic comes with an illogical consequence: not applying the personal characteristics criterion for legal persons means that the protection against discrimination becomes wider and stronger for legal persons than for physical persons.

There seem to be two options to remedy this: either to stop applying the personal characteristics criterion also relative to physical persons or to start applying it to legal persons. In my view, the difficulties of applying the requirement of personal characteristic to legal persons provide a good argument for consistently applying the more extensive approach in every type of case. It seems, as Gerards observes, that in most cases the Court simply refers to earlier judgements pertaining to the same discrimination ground without dealing directly with the personal characteristic requirement anyway.[64]

A balanced way forward would, in my submission, be a return to the all-encompassing approach while maintaining the personal characteristic requirement as a factor in determining the margin of appreciation. An impersonal discrimination ground would thus imply a wider margin. This would both entail a stronger protection for individuals than for legal persons as well as a stronger protection against discrimination based on characteristics we are born with or that concern our core choices or beliefs. At the same time, it would not preclude potentially meritorious cases at an early stage just on the basis of how the discrimination ground is construed. Such an approach would also be consistent with the current case-law concerning sensitive grounds, which call for a narrower margin of appreciation and require more weighty reasons for justification.[65]

---

[63] Gerards (n 35), 105. See also Lithgow and Others v. the United Kingdom, 8 July 1986, Series A no. 102; *Fredin (No. 1) v. Sweden*, 18 February 1991, Series A no. 192.
[64] Gerards (n 35), 110. See also inter alia Şerife Yigit v. Turkey, no. 3976/05, § 79, 2 November 2010.
[65] See inter alia Hämäläinen v. Finland [GC], no. 37359/09, § 109, ECHR 2014–IV. See also Wintemute (n 33).

4.3.2 Character

Admissible discrimination grounds can be of different character. The discrimination ground can be overt or covert.[66] An overt discrimination ground is clear from the measure itself.[67] It could, for example, be when a law expressly distinguishes between men and women. A covert discrimination ground, by contrast, cannot be directly inferred from the measure itself. Whether a discrimination ground is overt or covert has implications for the issue of proof. See more in chapter 4.6 below.

The discrimination ground can also be sensitive. To date, the Court has found that a differential treatment based on any of the following sensitive grounds is associated with a narrow margin of appreciation and are hard to justify (requiring 'particularly serious' or 'very weighty' reasons)[68]:

- Race/ethnic origin[69]
- Nationality[70]
- Religion[71]
- Sex[72]
- Sexual orientation[73]
- Birth out of wedlock[74]

4.3.3 Concluding Summary

Article 14 contains a non-exhaustive list of protected grounds. However, the Court has sometimes limited the admissibility of grounds in its jurisprudence by requiring that the ground be based on a personal characteristic. Today, the Court does not always explicitly

---

[66] Oddný Mjöll Arnardóttir, 'Non-discrimination Under Article 14 ECHR: the Burden of Proof' (2007) 51 Scandinavian Studies in Law 13, 26.
[67] Ibid.
[68] See n 74.
[69] Biao v. Denmark [GC], no. 38590/10, § 94, 24 May 2016; Sander v. the United Kingdom, no. 34129/96, § 44, ECHR 2000–V.
[70] Gaygusuz v. Austria, no. 17371/90, § 42, 16 September 1996.
[71] Hoffmann v. Austria, no. 12875/87, § 36, 23 June 1993.
[72] Stec and others v. the United Kingdom, no. 65731/01 65900/01, § 52, ECHR 2006–VI; Abdulaziz, Cabales and Balkandali (n 39), § 78.
[73] Salgueiro Da Silva Mouta v. Portugal, no. 33290/96, § 36, ECHR 1999–IX.
[74] *Inze v. Austria,* 28 October 1987, § 41, Series A no. 126.

deal with the personal characteristic requirement if it has already established that a certain ground fulfils that criterion. Moreover, when it comes to legal persons, the Court has held that all grounds are admissible. This has the effect that the protection against discrimination is wider for legal persons than for physical persons. To resolve this illogical consequence, the Court should go back to its earlier jurisprudence and consistently allow all discrimination grounds. The personal characteristic concept can instead be used to influence the margin of appreciation and the proportionality test.

An aspect of a discrimination ground's character that already affects the proportionality test and the margin of appreciation is whether the ground is sensitive. Sensitive grounds, such as ethnicity, nationality and sex, entail a narrow margin and require 'particularly serious' or 'very weighty' reasons as justification.

The discrimination ground can also be of an overt or covert character. An overt ground is clear from the measure itself; while a covert ground cannot be directly inferred. This categorisation has implications for the applicant's possibility to lift the burden of proof.

4.4 Forms of discrimination

4.4.1 Direct Discrimination

Most of the case-law under Article 14 concerns direct discrimination[75] – which in the context of the ECHR means treating people in relevantly similar situations differently without objective and reasonable justification[76]. The first direct discrimination judgement was handed down in the so-called Belgian Linguistics case in 1968.[77] Still, it was not until the second discrimination judgement, in National Union of Belgian Police v. Belgium that the Court expressly referred to the so called comparator requirement, which is emblematic of direct discrimination. The requirement dictates that there must be a comparator group in relation to which the applicant has been treated differently.[78] Subsequently, the Court has

[75] O'Connell (n 9), 11.
[76] Burden v. the United Kingdom [GC], no. 13378/05, § 60, ECHR 2008–III.
[77] Luzius Wildhaber, 'Protection against Discrimination under the European Convention on Human Rights – A Second-Class Guarantee?' (2002) 2 Baltic Y.B. Intl L. 71, 74. Arnadóttir (n 38), 14.
[78] Ibid. See also National Union of Belgian Police (n 44), § 44.

addressed direct discrimination in hundreds of cases and has seriously grappled with the comparator requirement – arguably without ever fully coming to grips with it.

In his paper on deconstruction and discrimination, Thomas Bull clarified the fairly complex difficulties of the comparator requirement by reference to the beloved Swedish children's programme 'Fem myror är fler än fyra elefanter' [Five ants are more than four elephants].[79] During one recurring segment, Brasse, one of the three hosts, presents four real or fictional animals and asks the other hosts, Eva and Magnus, to guess which is the odd one out. In one episode the animals were a crocodile, a big fish, a shrimp and a pig (here is a link to the segment). Eva first suggests that the crocodile is the odd one out because it is the only one dangerous to humans. Magnus instead argues for the shrimp because it does not compare to the others in size. Finally, Brasse explains that to his mind, the more clever solution is to remove the pig because it lives exclusively on land. As we can see, and as Bull also observes, there are always differences and similarities that *can* be taken into account; what is needed are guidelines as to which *should* be taken into account.[80]

In laying down such guidelines, one must be aware that a too low degree of generality – in which the Court would require a comparator in almost exactly the same situation – could have absurd effects.[81] Bull argues that such an approach ignores the social realities the protection against discrimination is meant to counteract.[82] Conceivably, a woman could thus not be discriminated against in comparison to a man; a 60-year-old could not be discriminated against in comparison with a 30-year-old; and an immigrant could not be discriminated against in comparison with a non-immigrant. This would indeed result in a weak protection against discrimination.

Having polished our understanding of the theoretical aspects of the comparator requirement, we may examine which comparability guidelines can be inferred from the Court's

---

[79] Thomas Bull, *Fundamentala fragment: ett konstitutionellt lapptäcke* [Fundamental fragments: a constitutional patchwork] (1st edn, Iustus förlag 2013) 170.
[80] Ibid.
[81] Ibid, 180.
[82] Ibid.

case-law. To that end, it is important to recall that exact likeness is implausible and that the Court consequently is bound to attach more importance to certain differences and similarities than others.[83] Consequently, if one *can* identify what factors the Court attaches importance to; one can paint a clearer picture of the comparison requirement. Unfortunately, I could not. The picture I managed to paint after having examined the Courts application of the comparator requirement in over forty cases resembled the drawing of a five year old surrealist. Let me illustrate the difficulties I encountered by looking into only one potential factor for comparison: legal differences and similarities.

Larkos v. Cyprus is a good case in point. Being a tenant of the State, not of a private landlord, Larkos faced the threat of eviction because a different legal provision applied.[84] When interpreting the comparator requirement the Court attached more importance to the terms of the lease agreement than to the difference in applicable law.[85] The Court found that the terms indicated that the state acted in a private law capacity since the lease did not significantly diverge from how such an agreement normally looked like if entered into with a private landlord. The Court also attached weight to the fact that the rent was at market rate and that Larkos status as a civil servant did not grant him any other preferential rental terms.[86] With this in mind, the Court held that while there was a difference in applicable law for tenants of the State and those with private landlords, the two situations were still comparable for the purposes of Article 14.[87]

In Darby v. Sweden, the Court reasoned similarly and did not preclude similarity by reference to differences in applicable law. Darby was a Finnish citizen working in Sweden who could not claim reduction of the church tax because he was not registered as a Swedish resident.[88] The Court concluded, without expending any mental calories on developing its reasoning, that other non-members of the Church registered in Sweden were the relevant group

[83] Ibid, 178.
[84] Larkos (n 42), § 28.
[85] Ibid, § 30.
[86] Ibid.
[87] Ibid.
[88] Darby v. Sweden, no. 11581/85, § 9, 23 October 1990.

of comparison.[89] Ostensibly, the Court ignored the difference in legal position between registered residents and non-registered residents. Bull argues that Darby and Larkos suggest an approach by the Court to not preclude the similarity of two situations by reference to differences in the applicable law.[90] Yet, this hypothesis does not hold up.

In Burden v. the United Kingdom, the question was if two cohabiting sisters could be compared to cohabiting couples. Here, the Court did not attach any importance to the length or nature of the relationship, but instead the 'existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature.'[91] The Court clarified that married and Civil Partnership Act couples could not be compared to heterosexual or homosexual cohabiting couples that choose not to marry or enter a civil partnership.[92] This conclusion goes against Bull's hypothesis because the difference in legal status was determinative. Because the sisters lacked a legally binding agreement, they were not found to be in a relevantly similar situation to a married or Civil Partnership Act couple.[93]

By this reasoning a State can treat cohabiting siblings differently without issue; but can a State also treat cohabiting homosexual couples differently if the State has not allowed for some form of civil partnership? In a country, which does not give homosexuals an opportunity to enter into a legally binding agreement, attaching weight to this factor when construing the comparator requirement would erode the protection against discrimination. Luckily, in Oliari and Others v. Italy, the Court established a positive obligation under Article 8, the right to private and family life, to provide a legal framework that provides protection and recognition of same-sex unions.[94] Therefore, discrimination would perhaps be ruled out if there were no comparable legal regimes for heterosexual and homosexual couples, but it would still be a violation of Article 8. As I see it, this peculiar situation arises because the Court tried to construe the comparator requirement in light of a legal fiction.

---

[89] Ibid, § 32.
[90] Ibid.
[91] Burden (n 76), § 65.
[92] Ibid.
[93] Ibid, § 66.
[94] Oliari and Others v. Italy, no. 18766/11 36030/11, § 185, 21 July 2015.

As we can see, the attempt to find any workable guidelines as to comparability quickly becomes frustrating. Fortunately, the Court often treats the comparator requirement in relation to the justification issue, and avoids dealing with it substantively in a way that could impair the protection.[95] Moreover, the comparator requirement is only strictly applied when it comes to direct, and, as we will soon see, negligent discrimination.[96] Strict comparability is naturally less problematic when it comes to indirect discrimination that strives to achieve substantive equality (recall the silent prologue: a view on equality based on the *real* effect of rules and practices on certain disadvantaged groups rather than on formal distinctions).

4.4.2 Negligent Discrimination

Already in the Belgian Linguistics case, the Court expressed that inherent differences call for different legal solutions.[97] Still, it was not until 2000 in Thlimmenos v. Greece, that the Court found that Article 14 was contravened when States 'without an objective and reasonable justification fail to treat differently persons whose situations are significantly different'.[98] Thlimmenos was convicted for refusing to serve in the military, which he, as a member of Jehovah's Witnesses, for religious reasons was prevented from doing. The Court found that Thlimmenos was discriminated by the fact that the law made no distinction between regular convicts and those having being convicted because of their religious beliefs.[99] A more simple example of this kind of discrimination would be if the State made no distinction between disabled people in need of wheelchair ramps and people that can walk when building a school. Those two groups are not in similar situations and should thus be treated differently. The Court itself has no name for this type of discrimination. But it seems clear that it is different from direct and indirect discrimination in many aspects.

Arnardóttir refers to the Thlimmenos type cases as passive discrimination since it is related to the States' positive obligations. Such a discriminatory treatment stems from inaction or

---

[95] O'Connell (n 9), 218.
[96] Timmer (n 19), 711.
[97] *Belgium Linguistics Case – Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium",* 23 July 1968, § 10, Series A no. 6.
[98] Thlimmenos v. Greece [GC], no. 34369/97, § 44, ECHR 2000–IV.
[99] Ibid, §§ 42 and 49.

indeed passivity.[100] One should recall that a positive obligation is an obligation to do something. A negative obligation, by contrast, is an obligation for the State not to do something: e.g. not to expropriate someone's property or not to treat someone differently because of their religion.[101] When a State is guilty of indirect or direct discrimination, it has treated the applicant differently than the comparison group. It has failed in its negative obligations. When a State is guilty of what Arnardóttir call passive discrimination, the State has been passive and failed to treat the applicant differently than the comparison group.[102]

Against this background, using the term passive discrimination seems more suitable than indirect or direct discrimination. There are, however, some issues with the term passive discrimination. Using the term passive discrimination in this context means that we need to maintain a distinction between indiscriminate passivity and discriminate passivity. Indiscriminate passivity means that the State is 'unselective' in its passivity. Discriminate passivity means that the State is selectively passive. That could imply that the State investigates crimes against men but not crimes against women. In Opuz v. Turkey, for instance, the Court identified a general and discriminatory judicial passivity to domestic violence against women.[103] Influenced by CEDAW[104], the Court found that this constituted a form of indirect gender discrimination.[105]

Instead of using the term indirect or passive discrimination for the Thlimmenos type cases, where the passivity is always *indiscriminate,* and thus constitute similar treatment instead of differential treatment, I suggest using 'negligent discrimination'. The term 'negligent discrimination' is suitable because it is reasonable to assume that in many cases where the State has not treated people in different situation differently, it has failed to identify the issue and has thus been negligent in its passivity. Even if the State had identified the difference in situation and remained passive, the term negligent discrimination is appropriate.

---

[100] Arnardóttir (n 66) 15.
[101] David Harris et al., *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*, (3rd edn, OUP 2014) 21 et seq.
[102] Arnardóttir (n 66) 15.
[103] Opuz v. Turkey, no. 33401/02, § 200, ECHR 2009–III.
[104] Convention on the Elimination of All Forms of Discrimination Against Women (n 14).
[105] Opuz (n 103).

Now, as we have seen, negligent discrimination is different from direct and indirect discrimination because it deals with similar treatment instead of differential treatment. Before moving on to indirect discrimination, however, we must also distinguish negligent discrimination from so called affirmative action.

The positive obligation arising from Thlimmenos is an obligation to take into account *factual differences* between individuals in certain situations and treat people differently *when their situation is different*. This should not be confused with affirmative action, which means treating *two groups in the same situation* differently by awarding privileges to the underprivileged group to correct *factual inequalities* between the groups.[106] Although the ECHR does not carry an obligation to take affirmative action, the State may be justified in taking such action. In Stec, the government had instituted a difference in State pensionable age between men and women as a form of affirmative action to correct factual inequalities. Even though the case concerned a sensitive discrimination ground (sex), the Court found that the differential treatment, on account of the disadvantaged economic position of women, was justified.[107]

4.4.3 Indirect Discrimination

The concept of indirect discrimination can be traced back to the American judgement Griggs v. Duke Power Co (Griggs), which deals with racial discrimination in the employment sphere. It was handed down by the US Supreme Court in 1971. The precedent was then picked up by domestic courts in the United Kingdom and subsequently transferred into EU law through, inter alia, the Race Equality Directive.[108] The Strasbourg Court, in turn, borrowed its approach to indirect discrimination from the EU and in particular from the directive mentioned above.[109] The Court also referred directly to the Griggs judgement

---

[106] George Gerapetritis, *Affirmative Action Policies and Judicial Review Worldwide* (1st edn, Springer 2016), 2. Compare Stec and Others (n 72), 64.
[107] Ibid, § 66.
[108] Mathias Möschel, 'The Strasbourg Court and Indirect Race Discrimination: Going Beyond the Education Domain' (2017) 80 TOC, 121, 123. See also Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22 and Griggs v Duke Power Co, 401 US 424 (1971).
[109] D.H. and Others v. the Czech Republic [GC], no. 57325/00, § 184, ECHR 2007–IV. See also Sina van den Bogaert, 'Roma Segregation in Education: Direct or Indirect Discrimination? An Analysis of the Parallels and

when it finally established its approach to indirect discrimination in D.H. and Others v. the Czech Republic.[110]

However, the Court first began to form its approach to indirect discrimination *obiter dicta* in Hugh Jordan v. the United Kingdom. Here, the Court conceded, obviously inspired by Griggs and the EU legislation, that 'where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group.'[111] Furthermore, in Zarb Adami v. Malta, the Court specified that discrimination does not have to stem from legislation, but can also result from a well-established practice or *de facto* situation.[112] In Zarb Adami, the discriminatory practice consisted of calling primarily men for jury duty.[113]

It was not until 2007 in D.H., that the Court first explicitly determined beyond doubt that Article 14 encompasses indirect discrimination even when the measure in question is couched in neutral terms.[114] In the D.H. case, 12 applicants of Roma origin had been placed in schools for children with learning abilities. They argued that their placement in this type of school was a general practice that led to segregation and racial discrimination by effectively instituting a different school system for Roma children.[115] The Court concurred and found a violation of Article 14 in conjunction with the right to education in Article 2 of Protocol No. 1. The Court reasoned that the practical application of the relevant legislation had 'a disproportionately prejudicial effect on the Roma community', which in an unjustified manner put them at a disadvantage vis-à-vis the wider population.[116]

Differences between Council Directive 2000/43/EC and Recent ECtHR Case-law on Roma Educational Matters' (2011) 71 ZaöRV 719, 720.

[110] D.H. and Others v. the Czech Republic [GC], no. 57325/00, § 107, ECHR 2007–IV.

[111] Hugh Jordan v. the United Kingdom, no. 24746/94, § 154, 4 May 2001.

[112] Zarb Adami v. Malta, no. 17209/02, §§ 75–76, ECHR 2006–VIII.

[113] Ibid, § 78.

[114] D.H. and Others (n 110), § 184.

[115] Ibid, § 25.

[116] Ibid, §§ 207-209.

In theory, the D.H. judgement seems clear enough. However, the approach set out in D.H. and the subsequent case-law often makes the distinction between direct and indirect discrimination blurred. The critique of a cluster of cases following D.H. (containing notably Oršuš and Others v. Croatia and Sampanis and Others v. Greece[117]), which were also dealt with as indirect discrimination, may serve as an illustrative example.

D.H., Oršuš and Sampanis all deal with the segregation of Roma children in respect of their education.[118] In D.H. the official reason for the segregation was the children's low performance on intelligence tests that seemingly stemmed from them not having Czech as their mother tongue.[119] In Oršuš the official reason was the lower level of Croatian among the Roma Children.[120] In Sampanis the government also stressed the lower level of proficiency in the language.[121] Van den Bogaert argues that this cannot be seen as indirect discrimination if the government as justification had invented the language criterion after the fact. If that were the case and the children in reality had been put in separate classes because of their Roma origin, that would be direct discrimination.[122]

According to van den Bogaert, the language aspect was not just a form of justification in the D.H. case. Instead, the neutral intelligence tests that required a certain level in Czech had prejudicial effects on the Roma children by undervaluing their intelligence. Therefore, van den Bogaert deemed D.H. correctly categorised as indirect discrimination.[123] In Sampanis by contrast, the explanation that the Roma children needed special attention in view of their inadequate language skills and lack of cultural understanding was only submitted on the basis of tests that had been carried out after the placement of the children in special classes. The initial placement was, therefore, not based on a neutral measure but constituted direct discrimination on the basis of ethnic origin.[124] Similarly, there was no legal basis or

---

[117] Oršuš and Others v. Croatia [GC], no. 15766/03, ECHR 2010–II; Sampanis and Others v. Greece, no. 32526/05, 5 June 2008.
[118] D.H. and Others (n 110), §§ 19–22; Oršuš and Others (n 117), §§ 9–10; Sampanis (n 117), §§ 5–6.
[119] D.H. and Others (n 110), § 20.
[120] Oršuš and Others (n 117), § 123.
[121] Sampanis (n 117), § 62.
[122] Van den Bogaert (n 109), 723.
[123] Ibid, 736.
[124] Ibid, 739. Compare Sampanis and Others (n 117), §§ 90 and 96.

test upon which the placement in special classes was made in Oršuš. Consequently, by van den Bogaert reasoning, Oršuš should also be classified as direct discrimination.[125]

Whether or not the Court or van den Bogaert is correct in their qualification can be discussed. More critically, as I see it, is that an uncertainty about the difference between direct and indirect discrimination has surfaced from our examination of this cluster of cases. Accordingly, the question arises, if this uncertainty might impair the effectiveness of the protection against discrimination.

Van den Bogaert suggests that the immediate effectiveness is not at stake because the qualification of direct or indirect (and had she made the distinction, also negligent discrimination) does not have any doctrinal implications for the objective justification test.[126] She does, however, point to some comparative issues with the qualification arising out of the fact that only indirect discrimination can be justified under the EU's Racial Equality Directive.[127] In this connection, she points out that in view of the mutual borrowing habits of the Strasbourg and Luxembourg Courts, it is important that a clear distinction between direct and indirect discrimination is maintained in Strasbourg. If the Court fails to maintain a clear distinction it might impair the protection against discrimination within the EU (at least when it comes to racial discrimination) by increasing the risk that the Luxembourg Court incorrectly qualifies a situation as indirect. Since direct discrimination cannot be justified under the Racial Equality Directive, it would be preferable for the individual to have their case qualified as direct discrimination.

The risk of negative influence on the Luxembourg Court will likely be compounded by the future EU accession to the ECHR.[128] Naturally, it is outside of the scope of this thesis to elaborate on EU anti-discrimination law, but I should nevertheless like to make clear that consistency and clarity in the Court's jurisprudence are also critical to its perceived legiti-

[125] Van den Bogaert (n 109), 749.
[126] Van den Bogaert (n 109), 720.
[127] Ibid, 723. See also Council Directive 2000/43/EC (n 108), Article 2.
[128] Ibid, 724, 731 and 750.

macy.[129] Contributing to a detrimental judicial interplay between the European courts would undoubtedly damage the Court's legitimacy and in the long run, its effectiveness.

Before moving on, another clarification is called for. Van den Bogaert correctly stated that the qualification of indirect and direct do not have any doctrinal implications for the objective justification test.[130] Yet, there is at least one other issue that might curtail the effectiveness of the protection against discrimination: whether intent has to be proved. However, the situations that may be wrongly qualified are inevitably those that can be characterised as either indirect discrimination or direct discrimination based on a covert ground – in other words, a discrimination ground that is not express. Given the role of intent in each of these cases, the applicant would be more likely to meet the burden of proof if the facts were qualified as indirect discrimination where intent does not have to be proved (see chapter 4.6 below for an exposition of the role of intent). The current tendency, as illustrated by the cluster of cases discussed above, to occasionally classify a potential direct discrimination case as indirect discrimination would therefore not upset the effectiveness. Unless the mischaracterisation is made in the opposite direction, van den Bogaert's conclusion still stands: the qualification operation carries no immediate risk to the effectiveness of the protection.

Having now examined the three main forms of discrimination – direct, indirect and negligent discrimination – we must conclude this part by canvassing the umbrella term 'structural discrimination' within a broader frame to complete the picture.

4.4.4 Structural Discrimination

Structural discrimination is the name for discriminatory structures that exist in society. It manifests itself by presenting obstacles based on prejudice and stereotypes that have become part of the architecture that makes up legal and societal structures and thus hinders certain groups from enjoying the same rights as the majority.[131] By this definition, the connection to indirect discrimination is apparent. A strong merit of the prohibition of indirect

---

[129] Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (1st edn, Cambridge University Press 2015) 9.
[130] Van den Bogaert, (n 109), 720.
[131] Timmer (n 19), 710 and 717.

discrimination is its capacity to guarantee substantive equality. In that connection, disallowing indirect discrimination can in the long run help foil structural discrimination in a way that the prohibition of direct discrimination, which aims at ensuring formal equality, cannot.[132] In my understanding, however, structural discrimination should be able to increase instances of direct discrimination against a certain group by normalising bias and prejudice. Nevertheless, I agree that it would be problematic to identify the structural aspect by reference to the formal model of equality, which focuses on the individual.

As for the strength of indirect discrimination in shedding light on structural issues, the D.H. case discussed above is a case in point. In D.H., the Court expressed for the first time that the Convention also affords protection against structural and systemic discrimination.[133] Drawing this conclusion, the Court could justify not going into the details of each applicant's individual case (D.H. and 17 other Roma children) and instead assess the case in a broader social context.[134] The violation found in D.H. could subsequently also serve to cast a light on the structural problem with discrimination of Roma people.[135]

Having said that, the flaws with substantive equality identified in the silent prologue are still valid. Although indirect discrimination might be able to shed light on structural problems, an anti-stereotyping approach with more emphasis on positive obligations is necessary to really, as it were, 'combat' structural discrimination.

4.4.5 Concluding Summary

The different types of discrimination could be summarised in the following way:

- Direct discrimination: without objective and reasonable justification covertly or overtly treating people in relevantly similar situations differently;
- Negligent discrimination: without objective and reasonable justification overtly treating people in significantly different situations the same;

---

[132] Möschel (n 108) 121.
[133] D.H. and Others (n 110), §§ 207–209. See also Van den Bogaert (n 109), 733.
[134] Ibid.
[135] D.H. and Others (n 110), §§ 209–210.

- Indirect discrimination: without objective and reasonable justification covertly putting a certain group at a disadvantage when implementing a neutral or general policy or measure.

The different or similar treatment may in all case be based on law (or indeed any form of policy or provision – including, as was the case in Sejdić and Finci v. Bosnia and Herzegovina, the constitution[136]) or on a well-established practice or *de facto* situation. By contrast to negligent and direct discrimination, indirect discrimination is always concerned with neutral measures or provisions. Another important difference is that harm is identified at the individual level for direct and negligent discrimination, while it is identified at group level for indirect discrimination.[137] When the harm is identified at group level, discriminatory structures can be assessed in a broader context, which is why the prohibition of indirect discrimination serves a purpose to shed light on structural discrimination. Still, an anti-stereotyping approach is needed to help States disintegrate discriminatory structures.

4.5 Objective and Reasonable Justification

No matter the form of discrimination, the State has to provide objective and reasonable justification for the Court not to find a violation. This means that the State has to convince the Court of having attained a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'.[138] When the treatment is based on one of the sensitive discrimination grounds enumerated in chapter 4.3.2, the State must provide very weighty reasons.[139] In Timishev v. Russia, the Court even held that when a person's ethnic origin is the decisive or only factor for a differential treatment, justification is not possible.[140] The Court has also repeatedly found that some minorities, notably the Roma, must be afforded special consideration given their vulnerable situation.[141]

---

[136] Sejdić and Finci v. Bosnia and Herzegovina [GC], no. 27996/06 34836/06, § 56, ECHR 2009–VI.
[137] Edouard Dubout, 'L'interdiction des discriminations indirect par la cour Européenne des droits de L'homme: Rénovation ou révolution' [The prohibition of indirect discrimination by the European Court of Human Rights: Renovation or revolution] (2008) 75 Revue trimestrielle des droits de l'homme 821, 824–825.
[138] See inter alia Schalk and Kopf v. Austria, no. 30141/04, § 96, ECHR 2010–IV.
[139] Arnadóttir (n 66), 50. See also referenced case-law under chapter 4.3.2.
[140] Timishev v. Russia, nos. 55762/00 55974/00, § 58, ECHR 2005–XII. See also D.H. and Others (n 110), § 176.
[141] D.H. and Others (n 110), § 181. See also Chapman v. the United Kingdom [GC], no. 27238/95, § 96, ECHR 2001–I.

A part from that, the Court's case-law has rightfully been criticised in the literature for being casuistic and for failing to provide any workable guidelines to determine the 'fit' between the aim and the measure.[142] Moreover, in contrast to the qualified Articles 8–11, there is no express substantive limitation on the aims that can be provided and the Court has devised no clear such limitation either.[143] The need for substantive limitations of the acceptable aims and for workable guidelines to determine the 'fit' between the aim and the measure will be addressed in chapter 6.2 below. So, if the Court's jurisprudence does not allow for much elaboration of the proportionality test itself, we need to instead focus on investigating the intensity and character of the review to be carried out by the Court. In the following, I will, therefore, conclude the chapter on Cinderella by inquiring into burden and standard of proof, the margin of appreciation and the standard of review.

4.6 The Burden of Proof and the Role of Intent

Burden of proof is closely linked to the effectiveness of protection.[144] Burden of proof under the ECHR contains both the obligation to provide evidence and the burden of persuasion – those two being connected.[145] The Court engages in a free evaluation of evidence unrestricted by procedural barriers and 'predetermined formulae' to identify the 'coexistence of sufficiently strong, clear and concordant inferences or similar unrebutted presumptions of fact'.[146] To that end, the required level of persuasion is, as the Court put it, 'intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake'.[147] It is not easy to discern a complete and tangible image of what this approach gives rise to in practice. However, my conclusions below as to the margin of appreciation, the standard of review and the role of intent might bring some light on the practical implications.

---

[142] Arnadóttir (n 38), 50.
[143] Ibid, 51.
[144] Samantha Besson, 'Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?' (2008) 8 Human Rights Law Review 647, 669; Arnardóttir (n 66), 16.
[145] Arnardóttir, ibid, 11.
[146] D.H. and Others (n 110), 178; Nachova and Others v. Bulgaria [GC], nos. 43577/98 43579/98, § 147, ECHR 2005–VII.
[147] Ibid.

In my mind, the most problematic issue relating to the burden of proof, aside from the practical implications of the evaluation of evidence, is the role of intent. Before inquiring into this issue let me briefly expound on the more uncontroversial aspects of the burden of proof. In a standard case, where none of the later considerations about intent comes into play, the applicant has to prove, or rather persuade the Court of[148]:

1. the existence of differential or similar treatment;
2. the basis for the treatment, i.e. the discrimination ground;
3. and of being in a relevantly similar or significantly different situation to the relevant group of comparison.

If the applicant can lift this burden, it is up to the State to provide objective and reasonable justification.[149] This is relatively straightforward in theory until the issue of intent under point 2 complicates things.

From my understanding, discriminatory intent is not intent to discriminate per se but intent to treat someone differently on the basis of a certain protected ground. Now, whether intent has to be proved, is determined by the form and character of the alleged discrimination (direct, indirect or negligent discrimination and overt or covert).[150] To reiterate, an overt discrimination ground is clear from the measure itself.[151] A covert discrimination ground, by contrast, cannot be directly inferred from the measure itself. This is always the case with indirect discrimination, which by definition concerns prejudicial effects of neutral measures. Direct discrimination can be both overt and covert and negligent discrimination is always overt.[152]

As for direct discrimination based on an overt discrimination ground, the Court has used the terms 'aims and effects' and 'object or result' rather than subjective intent.[153] To be

[148] Arnardóttir (n 66), 20. See also among other authorities Timishev (n 140) § 57; Thlimmenos (n 98), §§ 44–45.
[149] Ibid.
[150] Besson (n 144), 670–671.
[151] Arnardóttir (n 66), 26.
[152] Ibid, 37.
[153] Ibid, 26. See also Belgian Linguistics Case (n 97), § 10 and Marckx (n 51), § 40.

sure, subjective intent is irrelevant when the overt nature of a discrimination claim, as Arnardóttir puts it, 'can be equated with an established intent'.[154] Where it becomes intricate and difficult to avoid the issue of subjective intent is when the discrimination ground is covert – be it relative to direct or indirect discrimination.

When it comes to direct discrimination based on a covert discrimination ground alleging subjective intent is both inevitable and rather difficult – no applicant has so far succeeded with such a claim.[155] In Nachova and Others v. Bulgaria, a police officer had fired his weapon in a Roma neighbourhood killing two people. He had also allegedly shouted, 'You damn Gypsies' shortly after firing his weapon.[156] This single event, if it were found to be racially motivated, would have constituted direct discrimination based on a covert discrimination ground: race/ethnicity. The Court found that the applicant could not be exempt from proving subjective intent because that would impose on the State the impossible burden of proving the absence of intent.[157] Still, the Court conceded that the State might have to disprove 'an arguable allegation of discrimination' when 'the events lie wholly, or in large part, within the exclusive knowledge of the authorities […]'.[158]

In the D.H. case discussed above, the Court found that indirect discrimination 'does not *necessarily* require a discriminatory intent' [added emphasis].[159] Recently, however, the Court has e.g. in Belcacemi and Oussar v. Belgium, been much more clear that discriminatory effects of neutral measure can be in violation of Article 14 even if the State lacks intent.[160] As for indirect discrimination, the Court in D.H. also provided the applicant with a possibility of establishing a presumption of indirect discrimination by statistical evidence, which would shift the burden of proof onto the State. The Grand Chamber underlined that in the context of indirect discrimination; the applicant *must* be allowed to rely on undisputed official statistics to provide a prima facie indication of prejudicial effects of a neutral

[154] Ibid, 37.
[155] Ibid, 26.
[156] Nachova and Others (n 146), §§ 10–11 and 35.
[157] Ibid, § 157.
[158] Ibid.
[159] D.H. and Others (n 110), § 184 with reference to ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination (adopted by ECRI on 13 December 2002).
[160] Belcacemi and Oussar v. Belgium, no. 37798/13, § 66, 11 July 2017.

measure on a certain group.[161] If statistics provides such an indication, the burden shifts onto the State that must show that the statistic results are unrelated to the alleged discrimination ground.[162] The Court holds that without this opportunity of shifting the burden of proof it would be almost impossible for the applicant to prove indirect discrimination.[163]

Finally, as for negligent discrimination, intent plays no role at all because the failure to act causes everyone in the relevant group to be discriminated regardless of whether the State had even identified the group. As Arnardóttir puts it, 'the causal link between belonging to the group and being subject to the treatment is […] clear', which is why, as with overt direct discrimination, proving subjective intent is superfluous.[164]

We have now covered the burden of proof. To put a bow on this chapter, allow me to make a brief comment also on the standard of proof. The burden of proof shifts when the standard of proof is met. The two concepts are therefore closely connected.[165] The Court has been heavily criticised for adopting an unsuitable and too burdensome standard by requiring proof 'beyond reasonable doubt'.[166] You will surely recognise this standard from a national criminal law context, and many critics have pointed out that its suitability as to criminal liability does not make it suitable for establishing state liability under international law.[167] This criticism begs the question what would be a suitable standard.

Julianne Kokott's argues that the burden of proof should be allocated in such a way that it takes into account the balancing act between effective human rights protection and respect for State sovereignty that imbues international human rights law.[168] This is a logical solution because it furthers the protection against discrimination, while paying due deference to

---

[161] D.H. and Others (n 110), § 180.
[162] Ibid.
[163] Ibid.
[164] Ibid.
[165] Arnardóttir (n 66), 37.
[166] See inter alia Besson (n 144), 679.
[167] Ugur Erdal 'Burden and standard of proof in proceeding under the European Convention' (2001) 26, European Law Review Human Rights Survey 68, 76-78.
[168] Juliane Kokott, *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems* (1st edn, Kluwer Law International 1998) 219–220.

State sovereignty. In the context of the ECHR, the margin of appreciation, which exists to perform that balancing between State sovereignty and effective human rights protection, could be used to regulate the burden of proof and the standard of proof required to shift it. Accordingly, a narrow margin would place a heavier burden on the State by increasing the Court's scrutiny, and a wide margin would place it more on the applicant by increasing the Court's reliance on the assessment by the national authorities.[169] I completely adhere to this view and I will return to this argument in chapter 6.3. Before then, we must above all refine our understanding of the margin of appreciation doctrine.

4.7 The Margin of Appreciation Doctrine and Standard of Review

The margin of appreciation doctrine is an interpretative tool with the aim to ensure respect for the principle of subsidiarity and to preserve the Court's legitimacy.[170] Within the margin, States are given latitude to by their own assessment address the relationship between individual rights and freedoms and collective goals. A narrow margin can either intensify the Court's review or imply that it is not up to the State whether to provide a certain right.[171] In general, when there is a wide margin the measure or policy is deemed to be in compliance with the Convention unless it is 'manifestly without reasonable foundation.'[172] If there is only a certain margin or a narrow margin the State has to provide more weighty reasons to persuade the Court of the 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'.[173]

Having said that, I agree with Dijk and Hoof that even the stricter standard of review seems to be more lenient under Article 14 than it is for the qualified articles where the impugned measure must be necessary in a democratic society.[174] The standard of review that applies in those cases, unless the margin is wide, was established in Handyside v. the United King-

---

[169] Ibid.
[170] Letsas (n 18) 81.
[171] Ibid, 80 et seq.
[172] See inter alia Dickson v. the United Kingdom [GC], no. 44362/04, 78 §, ECHR 2007–V, Andrejeva v. Latvia [GC], no. 55707/00, § 83, ECHR 2009–II; National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom, no. 21319/93 21449/93 21675/93, § 80, ECHR 1997–VII; Stec and Others (n 72), § 52.
[173] See inter alia Schalk and Kopf (n 138), § 96.
[174] Pieter van Dijk, Godefridus J. H. Hoof, G. J. H. Van Hoof, Theory and Practice of the European Convention on Human Rights (3rd edn, Martinus Nijhoff Publishers 1998), 81.

dom.[175] It requires the State to provide relevant and sufficient reasons as to why the restriction corresponds to and is a proportionate response to a pressing social need.[176] The Court has nevertheless provided for a somewhat stricter approach also under Article 14 when it comes to a differential treatment based on a sensitive discrimination ground (see chapter 4.3.2). In such case the State must produce 'particularly serious reasons' for the measure or policy to be justified.[177]

In a substantive sense, a wide margin can imply that it is up to the State to determine what rights are conferred on its citizen and a narrow margin implies that there is a positive obligation incumbent on the State to confer a certain right. Still, not doing so might still be justified if sufficient reasons can be provided.[178] In a procedural sense, a wide margin decreases and a narrow margin increases the intensity of the Court's review margin.[179] The choice of giving either a substantive or a procedural margin precedent can in some cases have a decisive impact on the outcome of the case. Schalk and Kopf v. Austria is a good example.

In Schalk and Kopf v. Austria, a homosexual couple argued that their right to respect for their family life under Article 8 taken in conjunction with Article 14 had been violated because their sexuality precluded them from marrying.[180] The Court did not find a violation. Referring to the lack of a European consensus, the Court held that it fell within the State's margin of appreciation what rights and obligation be conferred by a registered partnership, which was the legal form open to the applicants at the time.[181] At this stage, the State was thus not required to provide the same rights to homosexual partnership couples as to heterosexual married couples.

Some judges did not agree that the margin of appreciation doctrine or the European consen-

---

[175] *Handyside v. the United Kingdom*, 7 December 1976, §§ 48–50, Series A no. 24.
[176] Ibid.
[177] See inter alia Schalk and Kopf (n 138), § 97, L. and V. v. Austria, no. 39392/98 39829/98, § 47, ECHR 2003–I; Karner (n 42), § 37.
[178] Dzehtsiarou (n 129), 29. See also Sitaropoulos and Giakoumopoulos v. Greece [GC], no. 42202/07, §§ 74–80, ECHR 2012–II.
[179] Letsas (n 18) 80 et seq.
[180] Schalk and Kopf (n 138), § 76.
[181] Ibid, § 109.

sus analysis should be applied in this way and wrote a dissenting opinion. They argued that because the State advanced no reasons for the differential treatment the Court should have found a violation. Only if the State had provided such reasons, the dissenters argued, could the margin of appreciation come into play and allow for the conclusion that the national authorities were better placed to address the matter.[182] In practice, that would entail making a substantive use of the margin subordinate in a case where both substantive and procedural uses potentially apply. It is obvious that in these cases, prioritising a procedural use would be more beneficial for the applicant because that would reduce the obstacles to finding a violation. Had the Court found that the substantive margin was narrow and the State had to provide certain rights to the applicant, the State could still justify its actions and land within its procedural margin. If, as the dissenters suggest, the procedural margin is prioritised, there is no room for application of the substantive margin, and it immediately comes down to the State's ability to advance sufficient arguments for objective and reasonable justification. I will return to this issue in chapter 6.1.

Another relevant aspect of the margin of appreciation doctrine is the factors that influence its variable scope. Above, I have already touched upon one factor, which only exists in discrimination cases: whether the discrimination ground is sensitive. Other more general factors are the weight and nature of the aim referred to and whether there exists a European consensus.[183] The latter factor is of particular relevance in discrimination cases. When there is no uniform approach among the Member States, the Court almost always affords a wide margin for the State to classify a treatment as merely different rather than discriminatory. If most States agree that a certain practice is discriminatory, a diverging State enjoys no margin at all.[184] In my experience, focusing on whether a ground is sensitive and whether there exists a European consensus is almost always sufficient to determine the width of the margin in discrimination cases.

---

[182] Ibid, the joint dissenting opinion of Judges Rozakis, Spielmann and Jebens, § 8.
[183] Harris et al. (n 101), 16.
[184] Steven Greer, *The Margin of Appreciation. Interpretation and Discretion under the European Convention on Human Rights*, Human rights files No. 17, (1st edn, Council of Europe Publishing 2000) 33.

4.8 Concluding Summary

We have now acquainted ourselves with Cinderella and in chapter 6–9 we will return to her flaws. Before then we shall move on to the Snow Queen. However, there is reason to ensure that we first have a firm grasp of Article 14 since the interpretation of Article 14 is an integral part of the interpretation of Protocol No. 12. Therefore, it could be helpful at this stage to go over a summarised step-by-step version of the Court's approach to the application of Article 14.

1. Does the subject-matter fall within the ambit of a substantive article?

In contrast to Protocol No. 12, the Cinderella provision Article 14 only offers protection against discrimination relative to the enjoyment of the rights and freedoms set forth in the Convention. In other words, one has to identify if there is a shoe that fits: if the facts fall within the ambit of a substantive article. This is the case when:

1. the differential treatment adversely affects the enjoyment of a substantive right and a direct entitlement under the Convention;[185]
2. the differential treatment, although not concerning a direct entitlement under the Convention, causes a disadvantage that hinders the applicant from exercising the substantive right, or; [186]
3. the differential treatment, although falling outside the scope of a substantive right, is linked to the exercise of such a right. [187]

These three different formulations could be viewed as categorisations of different levels of gravity. Accordingly, the first category entails a more direct adverse effect on the enjoyment of a substantive right – it is the most serious. The second category does not concern a direct entitlement under the Convention but does still fall within the scope of a substantive right – it is slightly less serious. The third category falls outside the scope of the substantive rights all together, but there is still a link to the exercise of such a right – in other words, it's less serious than the other two given the central guarantees provided by the Convention. These distinctions do not make any difference in practice: they are all enough to fulfil the

[185] Karner (n 42), § 28.
[186] National Union of Belgian Police (n 44), § 45.
[187] Schmidt and Dahlström (n 41), § 39.

ambit requirement. However, in the future, they may be useful to navigate the strictness of review because it seems reasonable to be less strict when the facts are only loosely linked to the substantive scope of the Convention – unless another factor prompts a strict review.

Furthermore, Article 14 should be seen as a variable, rather than a constant, because the protection against discrimination also complements any additional rights that the State has voluntarily decided to provide. Article 14 thus goes beyond the enjoyment of the substantive Convention rights although it only has effect in relation to it.

2. Is there an admissible discrimination ground?

If the ambit requirement is fulfilled, the next step is to assess the existence of an admissible discrimination ground. Article 14 contains a non-exhaustive list of protected grounds in relation to which there are two lines of case-law with different approaches to whether there are any limiting constraints. One allows all discrimination grounds and one require that the discrimination ground be based on a personal characteristic. The latter line of case-law has taken priority unless the applicant is a legal person. The personal characteristic jurisprudence arguably contains three categories of admissible discrimination grounds:

- Grounds that are based on 'an innate characteristic that applies from birth', such as sex, race, colour, language, national or social origin[188];
- Grounds that are based on core or personal belief or choice, such as religion, political or other opinion and place of residence[189];
- Grounds that are not strictly based on a personal characteristic but are admissible with reference to the principle of effectiveness and the need to avoid that the essence of a right is impaired[190].

If there exists a discrimination ground that falls under any of these categories, one can move on to determine the character of the discrimination ground.

[188] Springett and Others (n 57), § 7.
[189] Ibid.
[190] Clift (n 60), § 62.

3. What is the character of the discrimination ground?

The discrimination ground can be overt or covert, and it can be sensitive. An overt discrimination ground is clear from the measure itself. A covert discrimination ground, on the other hand, cannot be directly inferred from the measure itself. Indirect discrimination is always covert because it concerns neutral measures. Direct discrimination can be both overt and covert depending on the circumstances, and negligent discrimination can only be overt.

Next is the question if the discrimination ground is sensitive. If this is the case, there will be a narrow margin of appreciation unless there are other factors that more strongly prompt a wide margin. A sensitive discrimination ground entails that the State has to provide 'particularly serious' or 'very weighty' reasons as justification. These grounds are sensitive:

- Race/ethnic origin[191]
- Nationality[192]
- Religion[193]
- Sex[194]
- Sexual orientation[195]
- Birth out of wedlock[196]

4. Which form of discrimination is it?

The next step is to identify if the case concerns direct, negligent or indirect discrimination. The classification does not affect the objective justification test but it has implications for the burden of proof – and reasoning without being clear on this might hamper clarity of argument. The different forms of discrimination could be summarised as follows:

- Direct discrimination: without objective and reasonable justification covertly or overtly treating people in relevantly similar situations differently;

[191] Jersild v. Denmark [GC], no. 15890/89, § 30, 23 September 1994; Sander (n 69), § 44.
[192] Gaygusuz (n 70), § 42.
[193] Hoffmann (n 71), § 36.
[194] Stec and Others (n 72), § 52; Abdulaziz, Cabales and Balkandali (n 39), § 78.
[195] Salgueiro Da Silva Mouta (n 73), § 36.
[196] Inze (n 74), § 41.

- Negligent discrimination: without objective and reasonable justification treating people in significantly different situations the same;
- Indirect discrimination: without objective and reasonable justification putting a certain group at a disadvantage when implementing a neutral policy or measure.

The different or similar treatment may in all case be based on any form of policy or provision or on a well-established practice or *de facto* situation. An important difference between the different forms is that harm is identified at the individual level for direct and negligent discrimination, while it is identified at group level for indirect discrimination.

5. Can the applicant lift the burden of proof?

Next comes the issue of burden of proof, which entails both the obligation to provide evidence and the burden of persuasion. The burden of proof shifts when the standard of proof is met. The Court has been criticised for adopting an unsuitable and too burdensome standard by requiring proof 'beyond reasonable doubt'. To clarify the application of the burden of proof, let us first examine negligent and direct discrimination in conjunction and then move on to indirect discrimination, which is treated slightly differently.

In a standard case of direct or negligent discrimination, the applicant has to prove or persuade the Court beyond reasonable doubt of:

1. the existence of different or similar treatment;
2. the basis for the treatment, i.e. the discrimination ground;
3. and of being in a relevantly similar or significantly different situation to the relevant group of comparison.

Proving the basis for the treatment is no problem when the discrimination ground is overt because the overt nature of the differential treatment can be equated with established intent. However, when it comes to direct discrimination based on a covert discrimination ground (negligent discrimination can not be covert because the passivity gives the hand away, as it were) alleging subjective intent is both inevitable and rather difficult – no applicant have so far succeeded with such a claim. In those cases the applicant has to prove subjective intent. Otherwise it would be incumbent on the State to prove the absence of intent, which is a

rather impossible task. Nevertheless, if 'the events lie wholly, or in large part, within the exclusive knowledge of the authorities […]' the Court has indicated that the applicant may be absolved from the requirement to prove intent also in cases of covert direct discrimination. In any case, if the applicant can lift the burden and thus establish a case of prima facie discrimination, it is up to the State to provide objective and reasonable justification.

Now, as for indirect discrimination, there are a few difference to the approach intimated above. First, there is no need to find a hypothetical person in a comparable situation because with indirect discrimination harm is identified at group level. Moreover, indirect discrimination does not require a discriminatory intent. With indirect discrimination, it is also possible to establish a presumption of indirect discrimination solely by reference to undisputed official statistical evidence. If such statistics provide an indication of prejudicial effects of a neutral measure on a certain group, the burden of proof shifts unto the State that has to displace the presumption by persuading the Court that there is a satisfying reason for the ostensibly prejudicial effect on the group in question.

For all forms of discrimination, and no matter how the applicant arrives at establishing prima facie discrimination, one has to proceed to determine the width and application of the margin of appreciation before moving on to the justification test.

6. How does the margin of appreciation doctrine apply?

The margin of appreciation doctrine is a tool used by the Court to navigate how much latitude States should be given to by their assessment address the relationship between individual rights and freedoms and collective goals. The margin is applied to ensure respect for the principle of subsidiarity and to preserve the Court's legitimacy. It can either be used in a procedural sense and regulate the intensity of the Court's review of a measure or in a substantive sense and imply that it is not up to the State whether to provide a certain right.

When there is a wide margin the measure or policy is deemed to be in compliance with the Convention unless it is 'manifestly without reasonable foundation'.[197] If there is only a cer-

[197] See among other authorities Dickson (n 172), 78 §; Andrejeva (n 172), § 83.

tain margin or a narrow margin the State has to provide more weighty reasons to persuade the Court that there is a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'. Note that even when the margin is wide, there is no requirement of necessity in a democratic society under Article 14. The standard of review is consequently more lenient under Article 14 than it is for the qualified articles.

The most relevant factors to determine the width of the margin in discrimination cases are whether there is a European consensus and whether the discrimination ground is sensitive. Other factors that might be of relevance are the nature and weight of the aim of the measure or policy.

7. Can the State provide objective and reasonable justification?

As stated above, to justify a prima facie case of discrimination, the State has to convince the Court of having attained a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'. There are, however, no workable guidelines to determine the 'fit' between the aim and the measure and there are no substantive limitations on the acceptable aims as for the qualified articles. Unless one deals with a case that is very similar to a case that has been previously adjudicated by the Court, it is consequently not easy to answer what it takes for the State to pass the justification test. The Court's approach in this respect is thus very casuistic and can yield unpredictable results. The outcome of the justification test can most easily be assessed in relation to the application of the margin of appreciation and the outcome of similar cases. If there are no similar cases, there is little to go on apart from perhaps a systematic interpretation of the Convention or arguments related to European consensus, EU law or other human rights treaties.

5 Getting to Know the Snow Queen

5.1 The Court's Reading of Article 1 of Protocol No. 12

Protocol No. 12 entered into force 1 April 2005 and constitutes a general prohibition of discrimination. It does neither amend nor repeal Article 14, which will continue to exist as *lex specialis* to Protocol No. 12 with a substantial overlap.[198] As of the end of July 2017, the Protocol has been ratified by 20 States and signed by another 18 that have not yet gone on to ratify the instrument. 8 States have neither signed nor ratified the protocol – including the United Kingdom, Sweden and Switzerland.[199] I will shortly account for the controversy surrounding the drafting of the protocol and why so few States have signed or ratified it. However, it is pertinent to first look at the Court's interpretation of the Protocol. Luckily, this will be a much swifter affair than with Article 14.

Getting to know Cinderella does indeed involve a lot of commitment – which is evident from the rather extensive nature of the previous chapter. Getting to know the Snow Queen is not easier per se because it requires that you already know Cinderella, but it is a different experience, which involves more waiting and less reading. Reading all 255 judgements on Article 14 is a tall order – and in any case not necessary. As for Article 1 of Protocol No. 12 and its six judgements, anyone with an interest in law and an afternoon to spare could rise to the occasion. If you also read the Explanatory Report, you have what you need. Accordingly, in the light of our now familiar relationship with Cinderella, there should be no issues with getting to know the Snow Queen. All we have to do is to identify the differences between the two provisions.

The term 'discrimination' shall be interpreted identically in Article 14 and Article 1 of Protocol No. 12. This means that as soon as the article is found applicable, the relevant tests

[198] See inter alia Fabio Buonomo, 'Protocol 12 to the European Convention on Human Rights' (2001/2) 1 European Yearbook of Minority Issues 425, 432.
[199] Council of Europe Chart of signatures and ratifications of Treaty 177 (n 34).

are the same.[200] Even though we do not yet have any case-law to support this explicitly, Protocol No. 12 would thus presumably also cover direct, indirect and negligent discrimination. The difference is the scope. Article 1 of Protocol No. 12 reads:

> 1. The enjoyment of any right set forth by law 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.
>
> 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

As we have already established, Article 14 affords protection against discrimination only in the enjoyment of the Convention rights. On the face of it, Protocol No. 12 seems to merely extend the protection to 'any right set forth by law'. But the scope is wider still. As we learn from Savez Crkava 'Riječ života' and Others v. Croatia, the Protocol extends the scope to encompass discrimination by a public authority in a larger sense, as can be inferred from paragraph 2 of the article.[201] The Court refers to the Explanatory Report, which delineates four categories of protection: i.e. when an individual is discriminated against[202]:

> 'i. in the enjoyment of any right specifically granted to an individual under national law;
>
> ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;

[200] Pilav v. Bosnia and Herzegovina, no. 41939/07, § 40, 9 June 2016, Zornić v. Bosnia and Herzegovina, no. 3681/06, § 27, 15 July 2014, Sejdić and Finci (n 136), § 55, Maktouf and Damjanović v. Bosnia and Herzegovina [GC], nos. 2312/08 34179/08, § 81, ECHR 2013–IV. See also Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms – Explanatory Report – [2000] COETSER 3 (4 November 2000), para 18.
[201] Savez Crkava 'Riječ života' and Others v. Croatia, no. 7798/08, § 104, 9 December 2010.
[202] Ibid.

iii. by a public authority in the exercise of discretionary power (for example, granting certain subsidies);

iv. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).'

Savez Crkava 'Riječ života' concerned the right to provide religious education in public schools and nurseries, which was conferred by the discretionary power of the State. The Court determined that it was irrelevant whether that complaint fell under paragraph 1 or 2 as long as it fell under one of the four categories above – and as the case concerned the State exercising discretionary power, the facts well under category three.[203]

Furthermore, the term 'law' in Protocol No. 12 includes international law.[204] This is in line with the autonomous term 'law' that is usually employed by the Court.[205] Still, it is carefully underlined in the Explanatory Report that the Court does not have jurisdiction to determine compliance with international instruments other than the Convention.[206] Even so, if the Court starts to rely on international treaties where national law is inadequate in scope, it has been suggested that this could be problematic in dualist states such as Sweden or the United Kingdom.[207] Some commentators contend that the wording of the Explanatory Report – 'may also cover international law' – signifies that international law will only be covered in monist countries.[208] Commentators such as Khaliq and Buonomo suggests that the Court, in any case, should construe the term 'law' to include only such international law that has been incorporated into domestic law.[209]

---

[203] Savez Crkava 'Riječ života' (n 201), §§ 105 and 107.
[204] Explanatory Report (n 200), para 29.
[205] *The Sunday Times* v. the United Kingdom (No. 1), 26 April 1979, §§ 47–49 Series A No. 30. See also Slivenko v. Latvia [GC], no. 48321/99, §§ 100 and 107 ECHR 2003–X.
[206] Explanatory Report (n 200), para 29.
[207] Buonomo (n 198), 429.
[208] Nicholas Grief, 'Non-Discrimination under the European Convention on Human Rights: a Critique of the United Kingdom Government's Refusal to Sign and Ratify Protocol 12' (2002) 27 EL Rev, 3, 14; Joel Quek, 'A view from Across the Water: Why the United Kingdom Needs to Sign, Ratify and Incorporate Protocol 12 to the European Convention on Human Rights' (2011) 11 U.C. Dublin L. Rev. 101, 112.
[209] Urfan Khaliq, 'Protocol 12 to the European Convention on Human Rights: A Step Forward or a Step Too Far?' (2001) Public Law (Aut) 457, 457. See also Fabio Buonomo, (n 198), 429.

In theory, I completely concur with Khaliq's and Buonomo's approach even though there would be a slight divergence between the term 'law' in Protocol No. 12 and the autonomous term used in the rest of the Convention. Here, I recall that the autonomous term is mainly used in the context of the legality requirement for justification. In that context, it serves the State to have a broader conception of the term and the same issues for dualist states do not apply. Consequently, I submit that the different functions of the same term might justify the divergent meaning. Yet, in practice, I do not believe this is a valid concern in the first place. Recall the wording of Article 1 'the enjoyment of any right set forth by law shall be secured without discrimination'. The Article does not require the State to secure the right in the first place. It is hard to conceive how a dualist State could make a discriminatory distinction concerning international law that is not incorporated. In my view, if an international law norm is not incorporated, it is not secured; and if it is not secured, it cannot be said to be secured in a discriminatory way.

Moreover, the Explanatory Report sets out that Protocol No. 12 primarily embodies negative obligations: an obligation not to discriminate.[210] Still, it unavoidably also encompasses some positive obligations: inter alia to provide effective legislation to prohibit discrimination between individuals.[211] This is particularly so when there is a 'clear lacuna in domestic legal protection from discrimination'.[212] However, as for private persons, such a positive obligation would only come into play in 'the public sphere normally regulated by law, for which the state has a certain responsibility'.[213] In this context, as Buonomo points out, the Court must be particularly attentive in its assessment of to what extent certain relations between individuals are the proper object of legal consideration.[214] Presumably, this issue is one of the issues that deter many States from ratifying the protocol.

At this stage, not much more can be ascertained from the text of the Convention itself. Some relevant insight should, however, be gleaned from the preamble before we move on.

---

[210] Explanatory Report (n 200), para 24.
[211] Ibid.
[212] Ibid, para 26.
[213] Ibid, para 28.
[214] Fabio Buonomo, (n 198), 429 with reference to Gay Moon, 'The Draft Discrimination Protocol to the European Convention on Human Rights: A Progress Report' (2000) 1 EHRLR, 49–53.

In the preamble of the Protocol, the interconnectedness of the principles of equality and non-discrimination is highlighted. This demonstrates that Protocol No. 12 places more emphasis on equality than Article 14. To be sure, the idea that equal situations should be treated equally and unequal situations unequally, which flows from the principle of equality, already exists in the case-law of Article 14. As does the notion that the principle of non-discrimination does not necessarily disallow measures carried out to promote full and effective equality – i.e. affirmative action.[215] Still, this inclusion in the preamble might compel the Court to attach more weight to the relationship between these two principles in its jurisprudence, which hopefully will provide a stronger protection.

During this short encounter with the Snow Queen, the attentive reader has hopefully formed an initial understanding of the difference between the articles. We can then turn to the drafting controversy of Protocol No. 12.

5.2 Drafting Controversy: Arguments for Ratification

Since the 1960s, discussions have taken place in the Committee of Ministers and in the Parliamentary Assembly of the Council of Europe to strengthen the limited protection against discrimination in Article 14.[216] Above all, the ambit requirement has been perceived as a structural weakness.[217] In 1998 some additional guarantees were provided in relation to equality between spouses by the entry into force of Article 5 of Protocol 7.[218] In the early 90s, the European Commission against Racism (ECRI) and the Steering Committee for Equality between Women and Men (CDEG) presented proposals for stronger protection in their respective fields.[219] This was the catalyst that gave new momentum to the debate.[220] In 1998, the Committee of Ministers eventually tasked the Steering Committee for Human Rights (CDDH) with drafting a protocol to the Convention that would broaden the application of Article 14.[221] The Committee of Ministers finally adopted the Draft Protocol, after

[215] Ibid, 427–28.
[216] Buonomo, (n 198), 426.
[217] Alastair Mowbray, 'European Convention on Human Rights: the 12th Protocol and Recent Cases' (2001) 1(1) Human Rights Law Review 127, 127.
[218] Council of Europe Chart of signatures and ratifications of Treaty 117 (n 34).
[219] Fabio Buonomo, (n 198), 426.
[220] Mowbray (n 217), 128.
[221] Fabio Buonomo, (n 198), 426.

extensive debates in the Committee of Ministers and the Parliamentary Assembly, in November 2000.[222]

Nevertheless, several Member States, notably Sweden, France, Spain and the United Kingdom, did not vote in favour of, sign or ratify the protocol, arguing primarily that the protocol was 'too general and open-ended'.[223] In dealing with those objections and finding arguments for ratification, I will use Robert Wintemute's excellent article 'Filling the Article 14 "gap": Government ratification and judicial control of Protocol No. 12 ECHR' as a basis for discussion. Wintemute clearly analysis the States' prerogatives and submits that the following are the main reasons that deterred many States from ratifying the protocol[224]:

1. unwillingness to surrender more sovereignty to a European institution;
2. concerns about increasing the case load for the already overloaded Court (at the time of writing, the backlog consists of over 80 000 cases[225]);
3. objections as to the wording not being sufficiently precise.

Wintemute contends that the first reason is unrelated to the text of the protocol, which does not threaten national sovereignty more than Article 14. Therefore, Wintemute continues, any State that puts forth such an argument could very well denounce the Convention as a whole and withdraw from the Council of Europe.[226] He then goes on to concede that the breadth of the protocol divorces it by definition from Article 14 and other Convention rights as many States argues. He suggests that this is mitigated by the fact that the Court can be trusted to control the breadth by allowing the majority of cases to be justifiable.[227]

First of all, I do not find the word 'threat' to be conducive to this argument. Rather than referring to a threat to national sovereignty, I would perceive it as a possibility for the States to demonstrate renewed commitment to the common values shared by the Council of Europe Member States – as well as an important step to bridge, as Wintemute puts it, 'the

[222] Ibid, 427.
[223] Ibid.
[224] Wintemute (n 33), 484.
[225] European Court of Human Right's Statistical Reports, 'Pending Applications Allocated to a Judicial Formation' <http://www.echr.coe.int/Documents/Stats_pending_2017_BIL.pdf> accessed 18 July 2017.
[226] Wintemute (n 33), 484.
[227] Ibid, 485.

arbitrary gap in Article 14'.[228] Rather than suggesting disinclined States to denounce the Convention, I would instead highlight the fact that although the Protocol has been in force for more than ten years in almost half of the Member States, the Court has only delivered six judgements and has found a violation on only four occasions.[229] In light of this, I agree with Wintemute that the Court can be trusted to control the breadth of Protocol No. 12 by allowing most cases to be justifiable or indeed inadmissible.

As for the second reason, I completely agree with Wintemute. Although the growing backlog of the Court is worrying, having all Member States ratify Protocol No. 12 will not make a significant difference. Today more than 20 states have ratified the Protocol, and it still has not generated a significant increase in the backlog. Today, most cases in the backlog concern prison conditions and the right to a fair trial.[230]

The third reason – that the text is 'too general and open-ended' – has taken three different forms. States have argued that the text is too general and open-ended because it[231]:

- does not expressly allow objective and reasonably justified distinctions;
- does not expressly allow for positive measures to achieve equality (affirmative action) and;
- is unclear whether 'law' includes unincorporated international law.

The first objection can be immediately dismissed with reference to the Court's case-law under Protocol No. 12, from which it is clear that objective and reasonably justified distinctions are allowed.[232] The second objection can also rather easily be dealt with. First, the preamble expressly allows for positive measures and as Joel Quek aptly observes: the Convention must be interpreted in light of the Vienna Convention on the Law of Treaties, which gives the preamble significant interpretative value.[233] Secondly, the case-law under

---

[228] Ibid.
[229] Council of Europe Chart of signatures and ratifications of Treaty 177 (n 33); European Court of Human Right's Case-law Database HUDOC (n 34).
[230] Ibid.
[231] Ibid, 486.
[232] See among other authorities Sejdić and Finci (n 136), § 55; Maktouf and Damjanović (n 200), § 81.
[233] Quek (n 208), 113 with reference to the Vienna Convention on the Law of Treaties (n 10), Article 31.2.

Article 14 allows for affirmative action measures where there is objective and reasonable justification for them.[234] Thirdly, the case-law of the European Court of Justice (ECJ), which often influences the Strasbourg Court, also allows for positive measures.[235] There is simply no reason to doubt that positive measures would be possible under Protocol No. 12.

Finally, as for the third objection, Wintemute submits that it is based on a misunderstanding of the law. If the State treats an individual differently on the basis of say their religion or sex, it does not matter under Protocol No. 12 if that individual has, as Wintemute so elegantly puts it: 'an independent "right" or other entitlement (as a matter of national, international or intergalactic law) to the opportunity they have been denied'.[236] Remember also what I underlined above: if an international law norm is not incorporated, it is not secured; and if it is not secured, it cannot be said to have been secured in a discriminatory way.

Wintemute suggests that the argument that the text is too open-ended is inherently a fear that Protocol No. 12 will cost a lot of money for the State.[237] In light of the arguments I have just rehearsed to you, we can conclude that this fear is mostly unfounded. One might, of course, suspect that, at least initially, there will be a rise in legal procedures against the State at a national level. In my mind, this is a valid concern. Still, a failure to sign and ratify Protocol No. 12 just on account of an added expenditure for legal procedures calls into question the States' commitment to the universal principle of non-discrimination. The sooner States' step up to the plate, the sooner the protection against discrimination in the ECHR can finally be statutory complete, subject to judicial fine-tuning by the Court. At the same time, it is up to the Court to demonstrate that it can be trusted to control the breadth of Protocol No. 12 and to fully respect the principle of subsidiarity – which arguably, it has not always done in the past. This too, is a valid concern from the States' point of view.

5.3 Concluding Summary

In conclusion, the only difference between Article 14 and Article 1 of Protocol No. 12 is the scope. The latter provision constitutes a general prohibition of discrimination and has

[234] See for instance Stec and Others (n 72), § 66.
[235] See among other authorities Marschall v Land Nordrhein Westfalen (1997) C-409/95, § 35.
[236] Wintemute (n 33), 486.
[237] Ibid, 484.

unchained anti-discrimination from the substantive provisions of the Convention and thus bridging the arbitrary gap left by the drafters of Article 14. About half of the Member States of the Council of Europe has not yet ratified the protocol with arguments that it goes too far and is 'too general and open-ended'. For the most part, this fear seems to be manifestly ill-founded given the judgements that now exist under Protocol No. 12, the doctrinal response to those judgements and the Explanatory Report.

Granted, there will be economical implications and more legal procedures at national level at first. The concern that the Court cannot be trusted to control the breadth of the Protocol is also understandable. The Court must, therefore, demonstrate that it can be trusted. The States in turn, should review their values. If the main argument for not filling the arbitrary gap in Article 14 is financial, one can begin to question the States' commitment to the principle of equality. All States should, therefore, sign and ratify Protocol No. 12 as soon as possible to demonstrate renewed commitment to the common values shared by the Council of Europe Member States.

Now that we have gotten to know Cinderella and the Snow Queen, it is time to closer examine what factors should influence the Court's adjudication from the perspective of the primary stakeholders: the individual, the State and the Court itelf.

6 The Individual

6.1 Anti-Majoritarian Rights: Consensus Concerns

The dynamic interpretation of the Convention in light of changes in modern society is a cornerstone of its success, and an effective modern protection of human rights depends on it.[238] It is thus important for the Court to find a balance between judicial activism and self-restraint to maintain its legitimacy while advancing the protection of the Convention rights.[239] To that end, one of the more effective legitimising tools the Court has developed is the 'European consensus analysis'. In simple terms, the Court uses this tool to solve intricate human rights issues by prioritising a specific solution in view of its support by the majority of the Member States.[240]

When it comes to discrimination, however, consensus analysis is not very suitable. George Letsas even asserts that it 'deeply offends the values of legality and equality' when the substantive content of a right is informed by the moralistic preferences of a number of States.[241] In Alekseyev v. Russia, the Court itself observed that it 'would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority'.[242] The major critique of consensus analysis is this 'anti-majoritarian' objection.[243] All human rights are of course of particular relevance for vulnerable and exposed groups although this is probably particularly so when it comes to discrimination. In my view, the 'anti-majoritarian' objection consequently has additional force and relevance when it comes to discrimination.

No matter the principled strength of this argument from the point of view of the individual though, it nevertheless becomes more difficult to defend when reality sticks its nose into the equation. Judge Wildhaber et al. points out that no human rights system can remain

---

[238] Compare Harris et al. (n 101), 8 et seq.
[239] Ibid, 11.
[240] Dzehtsiarou (n 129), 2.
[241] Letsas (n 18), 124.
[242] Alekseyev v. Russia, nos. 4916/07 25924/08 14599/09, § 81, 21 October 2010.
[243] Dzehtsiarou (n 129), 4–5.

accepted and in force without the majorities: it is the majority that confers the power on the Court and determines the budget.[244] Some commentators, such as Benvinisti, do not view this as an argument against dispensing with consensus analysis. They contend that there is only a minimal risk that States would cease to execute the Court's judgements if this were to be done.[245] I tend to agree that it probably would take more to compel all States to stop executing all judgements.

Still, dispensing with consensus analysis completely would logically entail a more substantial risk than dispensing with it only when it comes to minority rights. Benvinisti even suggests that in the very least consensus analysis and reliance on the margin of appreciation should be avoided in relation to minority rights.[246] I completely agree with Benvinisti, but I realise that disregarding consensus analysis and in particular the margin of appreciation in a time when more and more emphasis is being put on subsidiarity in the multilateral discussions could be interpreted the wrong way.[247]

When I struggled with this issue, a speech I had attended a few years back by the former Deputy Secretary-General of the UN, Jan Eliasson came to mind. During a fascinating exposition of his diplomatic career, Eliasson highlighted an elegant solution to a humanitarian emergency in Iraq. None of the fighting parties would agree to a ceasefire because they feared it would make them look weak. Eliasson and his team understood what was a stake and instead of a ceasefire they suggested a 'humanitarian corridor' to evacuate civilians: same *de facto* solution, same result, different word. I realised that something similar could be done here. Let me elaborate.

To mitigate the risk of legitimacy loss even further, instead of suggesting that consensus analysis and margin of appreciation be disregarded, I suggest a subordinate application of

---

[244] Wildhaber, Hjartarson and Donnelly (n 8), 251.
[245] Eyal Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards' (1999) 31 New York University Journal of International Law and Politics 843, 851.
[246] Benvenisti, ibid, 854.
[247] See inter alia The Brighton Declaration adopted on 20 April 2012 at the High-Level Conference on the Future of the European Court of Human Rights.

them. European consensus establishes a presumption, which can be rebutted.[248] A way to let consensus analysis play a subordinate role when it comes to discrimination would be to let the moral force of the principles of equality and non-discrimination *ipso facto* rebut the presumption. Some support for such an approach can be found in the reasoning of the dissenting judges in Schalk and Kopf v. Austria discussed in chapter 4.7. They argued that consensus analysis and the margin of appreciation could only be applied after the assessment of the justification grounds submitted by the State.[249] In Schalk and Kopf, the State had forwarded no form of justification at all. According to the dissenters, the Court should consequently not have relied on the fact that there was no uniform approach as to the rights of homosexuals to find that there had not been a violation.[250] As I see it, the majority in Schalk and Kopf used consensus analysis and the margin of appreciation as a sort of 'bail-out' tool to avoid having to make a judgement that would lead them out of the judicial corridor (see more in chapter 8.1).

This subordinate aspect discussed by the dissenters in Schalk and Kopf is in my mind only one aspect of the approach. The subordination is two-fold. As today, a lack of a European consensus on a particular matter would lead to a wide margin of appreciation for the State in determining the relationship between individual rights and freedoms and collective goals.[251] If the State fails to demonstrate that it has carried out this balancing test, the Court will, as the dissenters in Schalk and Kopf argued, find a violation of either Article 14 in conjunction with a substantive article or of Article 1 of Protocol No. 12 by itself. This is the first aspect of subordination. In addition, the existence of a European consensus establishes a presumption for the solution advanced by the majority.[252] That presumption should be rebutted by the moral force of the principles of equality and non-discrimination if that solution is to the detriment of a minority and risks unduly limiting the minority's right to an effective protection against discrimination. A rebutted presumption would thus mean an intensification of the Court's review. This is the second aspect of the subordination.

---

[248] Dzehtsiarou (n 129), 125.
[249] Schalk and Kopf (n 138), the joint dissenting opinion of Judges Rozakis, Spielmann and Jebens, § 8.
[250] Ibid.
[251] Recall Letsas (n 18), 80 et seq.
[252] Dzehtsiarou (n 129), 29. See also inter alia Sitaropoulos and Giakoumopoulos (n 178), §§ 74–80.

My subordination approach may not be as elegant as Eliasson's humanitarian corridor, but I am convinced that it could be a workable compromise to the anti-majoritarian problem. One should keep in mind that the States do not oppose an effective human rights protection as long as the primary responsibility for ensuring it lies with them. It is after all the States that founded the Council of Europe, drafted the Convention and established the Court. The States' willingness to grant its citizen the most advanced and effective human rights protection in the world is evident from the drafting itself, which enables the Convention to be a living instrument adaptable to changes in society.[253]

Moreover, I would like to underline that a scenario where an established European consensus must be rebutted because it risks unduly limiting the rights of a minority is highly unlikely. First of all, the Court is usually hesitant to determine that there is an established consensus if 6–10 States have distinctly diverging solutions.[254] Furthermore, during my internship at the Swedish representation at the Council of Europe, I have been particularly impressed by the strong and broad support from the Member States for the core values of the Council of Europe. I am therefore convinced that the subordinated approach mainly will have effect in the Schalk and Kopf form – which is hardly controversial enough to risk the Court's legitimacy.

6.2 Substantive Limitations on Acceptable Aims

As you might remember from chapter 4.5, the Court's approach to the justification test has been criticised for being casuistic and for failing to provide any workable guidelines to determine the 'fit' between the aim and the measure.[255] In this connection, one important issue is the lack of any explicit substantive limitation on the aims – such as those that exist for Articles 8–11.[256] The problem with this deficiency is that it weakens the proportionality

[253] Alastair Mowbray, 'Between the Will of the Contracting Parties and the Needs of Today' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights,* (1st edn, Cambridge University Press 2014) 18.
[254] Wildhaber, Hjartarson and Donnelly, (n 8) 259 with reference to Van der Heijden v. the Netherlands [GC], no. 42857/05, 3 April 2012, Schwizgebel v. Switzerland, no. 25762/07, ECHR 2010–V, Wagner and J.M.W.L v. Luxembourg, no. 76240/01, 28 June 2007, S.H. and Others v. Austria [GC], no. 57813/00, ECHR 2011–V and Leyla Şahin v. Turkey, no. 44774/98, ECHR 2005–XI.
[255] Arnardóttir (n 38), 50.
[256] Ibid, 51.

principle. The mere proportionality between means and ends is not particularly persuasive as a means of justification if the aim sought to be realised is not a worthy aim.[257]

Arnardóttir pinpoints some cases where the definition of the legitimate aim determined the outcome. In Rekvenyi v. Hungary, police officers had been prohibited from being members of a political party in an effort to secure a politically neutral police force.[258] Unsurprisingly, the measure was found to be proportionate to the aim – as would almost any restriction on political activity within the police in relation to that aim.[259] Another case in point is National Union of Belgian Police v. Belgium where the State had declined consultation exclusively with the applicant union. The legitimate aim was to avoid trade union anarchy and maintain a coherent and balanced staff policy. Again, the measure was found proportionate and again, as Arnardóttir observes, as would almost any limitation on consultation be.[260] Those are just two examples of many, which demonstrate the need for the Court to be more attentive to the aim proposed by the government. Although identifying this issue, Arnardóttir does not go on to provide any specific solutions. I, on the other hand, will provide at least a slight suggestion.

Recall the principle that the Convention should be read as a whole to promote internal consistency.[261] With that in mind, let us examine the legitimate aims that exist in the qualified articles 8–11:

- national security (Article 8, 10, 11)
- public safety (Article 8, 9, 10, 11)
- territorial integrity (Article 10)
- the economic well-being of the country (Article 8, 10)
- maintaining the authority and impartiality of the judiciary (Article 10)
- prevention of disorder or crime (Article 8, 10, 11)

---

[257] Ibid.
[258] Ibid with reference to Rekvényi v. Hungary [GC], no. 25390/94, § 41, ECHR 1999–III.
[259] Ibid, § 50.
[260] Ibid with reference to National Union of Belgian Police (n 44), §§ 48–49.
[261] See among other authorities *Klass and Others v. Germany*, 6 September 1978, § 68, Series A No. 28; Stec and Others (n 72), § 48.

- prevention of disclosure of information received in confidence (Article 10)
- protection of public order (Article 9)
- protection of health or morals (Article 8, 9, 10, 11)
- protection of the reputation of others (Article 10)
- protection of the rights and freedoms of others (Article 8, 9, 10, 11)

A quick review tells us that some aims are more broadly applicable than others – notably the protection of the rights and freedoms of others, protection of health and morals, and public safety, which are universally applicable for all qualified rights. My suggestion is that the Court looks more closely to these aims in relation to Article 14 and Article 1 of Protocol No. 12 while remaining flexible. The ambit requirement in Article 14 could even provide some additional guidance to what set of aims are more suitable. For instance, if the facts of a case fall within the ambit of Article 11, the legitimate aims relevant for Article 11 might act as a guiding tenet in determining if the aim advanced by the government is to be perceived as legitimate.

Even though Article 1 of Protocol 12 lacks the ambit requirement, which at the same time is the strength of the Article, the facts of the case should in my submission still be thoroughly reviewed when determining whether an aim is legitimate or not. For the individual and in the interest of a strong protection against discrimination, advancing the case-law in this direction is, in my submission, crucial. However, going further would probably not be possible for the Court in view of the Convention as an instrument of international law and if the Court did design more explicit substantive constraints on the legitimate aims, it could very well have a detrimental impact on its legitimacy. Therefore, I will leave it at suggesting that the legitimate aims in Article 8–11 be used as guidance and instead turn to the burden and standard of proof dilemma, which could further strengthen the individual's protection if addressed properly.

6.3 The Burden and Standard of Proof Dilemma

As we have already established, the burden of proof shifts when the standard of proof is met.[262] I have also briefly mentioned that from the individual's perspective the burdensome standard of proof of 'beyond reasonable doubt' is unsuitable.[263] I contend that the Court must dispense with this standard and instead, as Julianne Kokott suggests, allocate and shift the burden of proof through a balancing act between effective human rights protection and respect for State sovereignty.[264] To that end, I agree with Arnardóttir that the margin of appreciation could be used to a certain extent. Nonetheless, there are a few issues that apply to both Article 14 and Article 1 of Protocol No. 12.

To illustrate those issues, let us draw up a blueprint of how the margin of appreciation doctrine would determine the burden and standard of proof. First of all, it seems clear that we would deal with a form of procedural margin: a narrow margin thus increases the Court's scrutiny, and a wide margin increases the Court's reliance on the national authorities.[265] As we recall, it is for the applicant to prove the following:

1. the existence of differential or similar treatment;
2. the basis for the treatment, i.e. the discrimination ground;
3. of being in a relevantly similar or significantly different situation to the relevant group of comparison and;
4. possibly intent.

If the Court finds that this is established beyond reasonable doubt (or that prima facie indirect discrimination can be established, see chapter 4.6 above), it is up to the State to provide objective and reasonable justification. In reality, in cases that are not rejected at an early stage, the Court has access to both the applicant's and after the communication of the case, the government's arguments. This means that the Court can assess the width of the margin of appreciation already at the outset. Having done that, the Court should go through the different criteria in order.

---

[262] Arnardóttir (n 66) 37.
[263] Ibid.
[264] Kokott (n 168) 218.
[265] Recall Letsas (n 18) 81.

As for the existence of differential or similar treatment, there are two scenarios. Either the treatment is indisputable, or it will be subject to the rules of prima facie discrimination. In such case, proving a prima facie case should require less when the margin is narrow.

When it comes to the basis for the treatment, the situation is similar but more problematic. Either the discrimination ground is overt and indisputable, subject to the rules of prima facie *indirect* discrimination, or the applicant alleges direct discrimination based on a covert discrimination ground. In the latter case, even a narrow margin should not, in my view, require the State to prove the lack of intent because of the often impossible nature of this task – as the Court itself held in Nachova and Others, cited above.[266] The only exception to this would be, in accordance with current case-law, when 'the events lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of the death of a person within their control in custody'.[267] Accordingly, if an applicant alleges direct discrimination based on a covert discrimination ground and the margin is narrow, there is no easy solution, and the protection might necessarily be weaker in those case in the interest of foreseeability and judicial certainty. Establishing a rebuttable presumption of prima facie discrimination as with indirect discrimination is not a solution. It would simply return us to the starting point and the issues with proving lack of intent.

Finally, identifying a relevantly similar or significantly different situation to the relevant group of comparison is in my view not a matter of fact but a matter of law. The burden of proof should therefore not apply. It should be up to the Court to make this assessment in line with suitable guidelines on what similarities and differences are to be taken into account. I am sympathetic to the difficulties of establishing such guidelines having unsuccessfully gone through a lot of muddled case-law to find them. Still, if the Court prioritised the need for clarity in this area, I am convinced that it is capable of building coherent, logical and solid models of reasoning.

[266] Nachova and Others (n 146), § 157.
[267] Ibid.

6.4 Concluding Summary

Using 'European consensus analysis' and prioritising a specific solution given its support by the majority of the Member States is not suitable when it comes to discrimination because it makes the protection of minorities conditional on the moralistic preferences of the majority. I, therefore, suggested employing consensus analysis on a subordinate basis. This implies that if the State fails to demonstrate that it has carried out the balancing test between relevant interests, the consensus analysis should not be applied. It also implies that the presumption created by the consensus can be rebutted by the moral force of the principles of equality and non-discrimination if the solution supported by the consensus is to the detriment of a minority and risks unduly limiting the minority's right to effective protection against discrimination.

Moreover, I identified issues with the lack of substantive limitations on which aims the State can refer to. I concluded that this deficiency weakens the proportionality principle: the mere proportionality between means and ends is not persuasive as a means of justification if the aim sought to be realised is not a worthy aim. I suggested that the legitimate aims that are allowed in Article 8–11 should be used as guidance and that the Court should assess the appropriateness of the aim provided by the State in light of the facts of the case. In addition, I argued that the burdensome standard of proof of 'beyond reasonable doubt' is unsuitable and that the burden and standard of proof should be guided by the margin of appreciation, which would lead to a more flexible approach.

7 The State

7.1 Subsidiarity and Sovereignty

In the context of more than 800 million people from Vladivostok to Reykjavik, from Nordkapp to Limassol, the rights protected by the Convention are universal. As Lord Hoffmann correctly contends, however, at the level of application, they are national.[268] Therefore, it is important that the States have the primary responsibility for ensuring their protection. This idea of primary responsibility goes hand in hand with the principle of subsidiarity.[269] When the Court first laid out its approach to subsidiarity in Handyside v. the United Kingdom, it held that 'the machinery of the protection established by the Convention is subsidiary to the national systems safeguarding human rights' and that it is primarily incumbent on the States to secure respect for the Convention rights.[270]

Lord Hoffmann asserts that compromises and judgement calls must be made in light of the realities of the society and the national legal system in question.[271] This view is indeed part of the fabric of the Court's jurisprudence. Already in Handyside, the Court agreed that State authorities were in many ways better placed than the international judge 'by reason of their direct and continuous contact with the vital forces of their countries'.[272] Lord Hoffmann incorrectly asserts that it goes against the idea of human rights being national in application to have an international adjudicator of individual cases.[273] Here, I agree with Judge Spano that universality in principle and national in application do not preclude supervision of the national application by an international court.[274] As long as the Court acknowledges national differences and diversity of solutions that is – which the Court clearly does by applying

---

[268] Lord Hoffmann, 'The Universality of Human Rights' (19 March 2009) Judicial Studies Board Annual Lecture, para 15.
[269] See inter alia the Brighton Declaration (n 247), para 11.
[270] Handyside (n 175), § 48. See also Belgian Linguistic Case (n 97), § 10 in fine, where the Court had previously mentioned the subsidiary nature of the Convention.
[271] Lord Hoffmann (n 268), para 15.
[272] Handyside (n 175), § 48.
[273] Lord Hoffmann (n 268), para 23.
[274] Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14 Hum. Rts. L. Rev 487, 494.

the margin of appreciation doctrine to pay due deference to national differences and diversity when it is called for.

Even though supervision by the Strasbourg Court may not be irreconcilable with national application of rights, it is important from the States' point of view that the Court continues to develop a reasoned approach to subsidiarity. Judge Spano points to a line of case-law that shows that the Court is in the process of doing just that.[275] One aspect of this development is what Judge Spano calls a 'qualitative, democracy-enhancing approach', which increases deference when the quality of the legislative process is beyond reproach.[276] Ostensibly, when it comes to discrimination, this is only relevant in cases where the alleged discrimination is based on a legal instrument or policy rather than a *de facto* situation or established practice.

Furthermore, the States' initiative through Protocol 15, which is not yet in force, to add a reference to the margin of appreciation and the principle of subsidiarity in the preamble is an important step forward to strengthen the role of subsidiarity in the Court's adjudication. The former President of the Court, Judge Dean Spielmann, expressed the importance of this addition to the preamble. It is not, he underlines, 'a mere rhetorical flourish, or form of window-dressing' because pursuant to the Vienna Convention on the Law of Treaties[277], the preamble is an intrinsic part of the treaty and affects its interpretation.[278] It thus seems clear that the conception of the subsidiary nature of the Convention will develop in the future. This has bearing also for the protection against discrimination – even if my suggestion about subordinating the European consensus doctrine were to be implemented.

---

[275] Ibid with reference to Hatton and Others v. the United Kingdom [GC], no. 36022/97, ECHR 2003–VIII; Murphy v. Ireland, no. 44179/98, ECHR 2003–IX; Hirst v. the United Kingdom (No. 2) [GC], no. 74025/01, ECHR 2005–IX; Evans v. the United Kingdom [GC], no. 6339/05, ECHR 2007–I; Animal Defenders International v. the United Kingdom [GC], no. 48876/08, ECHR 2013–II; Shindler v. the United Kingdom, no. 19840/09, 7 May 2013.
[276] Spano (n 274), 499.
[277] Vienna Convention on the Law of Treaties (n 10), Article 31.2.
[278] Dean Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (13 December 2013) Max Planck Institute for Comparative Public Law and International Law, Heidelberg, para 8.

In the end, it is crucial for the Court's legitimacy to ensure respect for the principle of subsidiarity. But it is also essential that States effectively carry out their primary responsibility for securing the Convention rights. The reason for this is two-fold. Firstly, a strong national protection against discrimination would presumably be more effective than a European one because of the much better possibilities of enforcement. Secondly, addressing alleged human rights violations effectively at a national level would reduce the workload of the Court and open it up for the principally difficult issues pertaining to the interpretation of the Convention. This is important because it is the very core of the Court's mandate. The next issue to deal with then, and something the Court must be aware of when adjudicating those issues that advance the protection afforded by the Convention, is the so called 'treaty objection'.

7.2 The Treaty Objection

Lord Bingham pointed out that the process of implication when interpreting an international convention must be carried out with caution to avoid binding the States in ways they had not accepted to be bound.[279] Lord Hoffmann, among others, suggests that the Court has gone too far in its interpretation of the Convention as a 'living instrument'[280]. He concedes that the practical application of certain concepts might change over time and be interpreted differently in light of modern society. Lord Hoffmann is, however, strongly opposed to introducing new concepts that are not mentioned.[281] He would presumably also disagree with going against a clear expression of the will of the Contracting Parties.

As I see it, the 'treaty objection' is mainly a limitation on introducing new concepts and a prohibition on going against a clear expression of the parties will. Lord Hoffmann's position is that there is not only a limitation but also a strict prohibition on introducing new concepts. I would deem some new introductions acceptable if an agreement over such an introduction can be deduced from *opinio juris* and State practice (in other words from customary international law – or a regional version thereof) or from a uniform approach in the majority of Member States – unless some States have manifestly divergent views. In prac-

[279] Lord Hoffmann (n 268), para 34 with reference to Lord Bingham's remarks in Brown v. Stott, [2003] 1 AC 681, 703.
[280] Ibid, para 36.
[281] Ibid.

tice, this would, for instance, mean that the Court could not find a violation of Article 14 or Article 1 of Protocol No. 12 based on the fact that homosexual marriages are not allowed in a State. The reason for this is three-fold. First, States were very clear in Article 12 that the right to marry is only for '[m]en and women of marriageable age'. Secondly, there is no uniform approach among the Member States as to the acceptance of homosexual marriage. Thirdly, the binary choice between allowing or not allowing such marriages means that even if there were a uniform approach, the fact that a handful of States did not allow it would mean that a few States held manifestly divergent views. Accordingly, if the Court decided to introduce a right to marry for homosexuals, although welcome as a matter of principle, the Court would be wrong, wrong and wrong again as a matter of adherence to the treaty objection.

The Court should also keep the 'treaty objection' in mind when it deals with the question of external influence. The Court has for example repeatedly referred to legal solutions in states outside of Europe.[282] As Rasilla del Moral points out, it is not obvious why the situation in other states than the Member States should be of any importance.[283] It follows from Article 31.3(c) in the Vienna Convention that only such international law that is applicable in the relations between the parties is relevant.[284] Yet, the Court has, again and again, let the mere paper existence of international conventions that are not ratified by all Contracting Parties to the ECHR influence its interpretation.[285] This has been heavily criticised in the literature because it not only gives legal effect to a treaty that has not been ratified by the relevant parties but also disregards the notion of the 'persistent objector'.[286] Presumably, the only instance when the Court could safely rely on a treaty that has not been ratified by all Member States is when such a treaty is deemed to have achieved the status of customary international law. Presently, any potential persistent objectors would, however, not be bound by that development in such a case. Granted, there have been some discussions in the literature

[282] See inter alia Harkins and Edwards v. the United Kingdom, no. 9146/07 32650/07, 17 January 2012; Vinter and Others v. the United Kingdom [GC], no. 66069/09 130/10 3896/10, ECHR 2013–III; Gäfgen v. Germany [GC], no. 22978/05, ECHR 2010–IV.
[283] Ignacio Rasilla del Moral, 'The Increasingly Marginal Appreciation of the Margin of Appreciation Doctrine' (2006) 6 German Law Journal 611, 617.
[284] Vienna Convention on the Law of Treaties (n 10).
[285] See among other authorities Marckx (n 51), § 41 and Demir and Baykara (n 17), § 122.
[286] See for instance Wildhaber, Hjartarson, and Donnelly (n 8), 254.

about rethinking the persistent objector doctrine in international human rights law.[287] That might certainly be an important aspect from the individual's perspective, but it is not critical for the purpose of this thesis. What is critical is that the treaty objection is respected to preserve the Court's legitimacy. As we will see, preserving and enhancing the Court's legitimacy is a key to strengthen the protection against discrimination, or indeed any right.

7.3 Legitimacy and Execution of Judgements

Execution of judgements and impact of the judgements on national law requires legitimacy. As any international court, the Strasbourg Court lacks the possibility to enforce its judgements and must, therefore, rely on legitimacy and the good will of the States.[288] I have already established that respect for state sovereignty, subsidiarity and the treaty objection are integral for the Court's legitimacy. There are, however, many factors that come into play. All of those factors comprise what I call the judicial corridor.

Only decisions and judgements adjudicated within the judicial corridor will be fully accepted. Judgements that are lacking in some of the aspects described above may be accepted and executed but still criticised. Judgements that show a blatant disregard for the judicial corridor may even be so controversial that they are not even executed by the responding State. This situation is what Dzehtsiarou calls the 'legitimacy wall'.[289] If the Court runs into this wall too often, and constantly disregards the judicial corridor, the protection against discrimination will not be very effective at the European level. We must, therefore, polish our understanding of the different aspects of the judicial corridor and the legitimacy wall before drawing any definitive conclusions as to the future of anti-discrimination law under the ECHR. However, going into detail about every aspect of the judicial corridor would require an entire thesis of its own. Therefore, I will only briefly conceptualise the corridor without going into too much detail about how the Court can stay within it.

---

[287] Holning Lau, 'Rethinking the Persistent Objector Doctrine in International Human Rights Law' (2005) 6 Chicago Journal of International Law 495.
[288] Dzehtsiarou (n 129), 1 and 144.
[289] Ibid, 155.

Respect for the judicial corridor lies in the interest of not only the State but also of the individual (who counts on the execution of judgements for the realisation of the protection of its rights) and of the Court itself who needs to be perceived as legitimate to fulfil its role. In my view, the judicial corridor is nevertheless addressed most appropriately from the perspective of the Court rather than from the perspective of the individual or the State. The reason for this is that the Court's perspective takes into account matters that relates both to the individual and to the State. I will, therefore, expound on the judicial corridor in the next chapter (chapter 8) dedicated to the perspective of the Court.

7.4 Concluding Summary

It is important that the States' have the primary responsibility for ensuring the protection of the Convention rights because the rights, at the level of application, require a national perspective. The ECHR must, therefore, be subsidiary to the national systems of human rights protection. This is also pertinent because of the States' sovereignty, which States are keen to preserve. Addressing alleged human rights violations effectively at a national level would also reduce the workload of the Court and open it up for more principally difficult issues pertaining to the interpretation of the Convention. In adjudicating those issues, the Court must respect the 'treaty objection' – or in other words interpret the Convention as a treaty in compliance with international law, not as a national constitution or while being influenced by irrelevant factors. Finally, States will only execute judgements up to a point. If the Court repeatedly hands down judgements without regard for what I call the judicial corridor, the Court will lose legitimacy and States may cease to execute judgements.

8 The Court

8.1 The Court's Legitimacy: A Stroll Down the Judicial Corridor

In light of previous chapters, I would like to espouse the view that the main concern for the individual is to have a strong protection against, inter alia, discrimination; that the main concern for the State is to have the primary responsibility for the Convention rights and respect for their sovereignty; and that the main concern for the Court is to fulfil its role. I will elaborate on what this role might be in chapter 8.2 below. In any case, the Court must be perceived as legitimate to fulfil it. Thus, to begin our exploration of legitimacy, let us first take a stroll down the judicial corridor.

So, to be perceived as legitimate, the Court must act within the judicial corridor. In other words, the Court must find a proper balance between judicial activism and self-restraint and be delicate in its assessment of the appropriateness of review. The Court must, furthermore, base its judgement on a sound theoretical paradigm and have efficient working methods so it can produce consistent and transparent jurisprudence. Finally, the Court must avoid fragmentation of the international law regime, respect the treaty objection and have a satisfactory approach to both burden and standard of proof as well as to strictness of review. Only if all of this is achieved, has the Court, in my submission, been able to navigate the judicial corridor adequately. The exact components of the judicial corridor are of course up for debate, as is their relative importance.

Having already dealt with the treaty objection, burden of proof, standard of proof and strictness of review and the preferable theoretical paradigm above, I will not go into detail about those issues. Moreover, I will not expound on consistency, transparency, efficient working methods and fragmentation because they, although important, lack specific connections to discrimination. Instead, I will only focus on the Court's role and its relation to judicial activism and self-restraint. The reason for this, as stated in the delineation, is that the Court's attitude to the balance between activism and self-restraint in relation discrimi-

nation is particularly important if the Court wants to be able to fulfil its role as envisioned by the drafters.

8.2 The Role of the Court: Judicial Activism vs. Self-restraint

The Strasbourg Court has been described as the world's human rights 'locomotive'[290] and the ECHR as 'the most effective human rights regime in the world'.[291] Since its inception, the Court has also from time to time received criticism of judicial activism. In recent years the brigade of critical voices has grown. As Judge Spano points out, the United Kingdom have stood at the forefront of this brigade levelling charges against the Court of 'human rights imperialism', of encroaching on State sovereignty and of lacking democratic legitimacy as a self-proclaimed 'flag-bearer for judge-made fundamental law'.[292] I find this criticism disconcerting. On the one hand, and as Spano emphasises, any court is a counter-majoritarian institution par excellence: the point of judicial review being to offer safeguards against democratic decision-making having adverse effects on human rights and constitutional principles.[293] Anthony Bradley further underlines that criticism of individual judgements often is rooted in the fact that the applicant may not have 'popular support in national politics'.[294] This ought to be particularly true in many discrimination cases where the applicant often belongs to an ostracised minority. On the other hand, courts cannot be immune to criticism. As Bradley reminds us 'Justice is not a cloistered virtue' and taking stock of well-founded criticism is a tool for improvement.[295]

In my view, the criticism of judicial activism may be founded in a disagreement on the role of the Court – which of course begs the question what that role should be. During the drafting of the Convention, the then Solicitor General for England and Wales Ungoed-Thomas, explained why not every right protected by for example the ICCPR had to be contained in

---

[290] Wildhaber, Hjartarson and Donnelly (n 8), 256.
[291] Robin C.A. White and Clare Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* (5th edn, OUP 2010), 574.
[292] Spano (n 274), 488.
[293] Ibid.
[294] Anthony Bradley, 'The Need for Both International and National Protection of Human Rights – The European Challenge' in Spyridon Flogaitis, Tom Zwart and Julie Fraser (eds), *The European Court of Human Rights and its Discontents: Turning Criticism Into Strength* (1st edn, Edward Elgar Publishing 2013), 5.
[295] Ibid, 4.

the ECHR: 'What we are concerned with is not every case of injustice which happens in a particular country but with the question whether a country is ceasing to be democratic'.[296] Here, the words of another drafter, Pierre-Henri Teitgen, should also be recalled. He situated the drafting aptly in its historical context by explaining the function of the Convention and the establishment of the Court as an effort to grow a European conscience, as it were, to sound the alarm when 'evil progresses cunningly with a minority operating […] to remove the levers of control'. Teitgen also reminds us that 'democracies do not become Nazi countries in one day'.[297] So, the role of the Strasbourg Court as envisioned by the drafters is that of a European conscience that prevents states from becoming undemocratic. Consequently, when determining the balance between judicial activism and self-restraint, the Court must at the very least be able to fulfil this role. How then, does the Court fulfil this role? In Ireland v. the United Kingdom, the Court recalled with reference to Article 19 of the Convention that its task was to 'elucidate, safeguard and develop the rules instituted by the Convention'.[298] With all this in mind, let me advance an argument for why judicial activism is particularly called for in relation to discrimination.

As you may recall from the introduction, a strong protection against discrimination is a vaccine against the current rise of populism, racism and intolerance. Logically, an important part of preventing states from becoming undemocratic should, therefore, be to strengthen the protection against discrimination through judicial activism. Apart from dealing with the technical flaws identified in the current case-law, introducing an anti-stereotyping approach to combat structural causes of discrimination, as mentioned in the silent prologue, might be particularly effective to that end.

---

[296] Vol II, *Collected Version of the Travaux Preparatoires*, p. 166 quoted in Paul Gallagher, 'The European Convention on Human Rights and the Margin of Appreciation' (2011) UCD Working Papers in Law, Criminology & Social-Legal Studies, Research Paper No. 52/2011, 3 with reference to Gerard Quinn, 'Dangerous Constitutional Moment: "The 'tactic of legality' in Nazi Germany and the Irish Free State compared" in Morison et al. (eds), *Judges, Transition and Human Rights* (1st edn, OUP 2007).

[297] Pierre-Henri Teitgen before the Consultative Assembly of the Council of Europe in September 1949, quoted in Antoine Buyse, 'Contested Contours: The limits of freedom of expression from an abuse of rights perspective – Articles 10 and 17 ECHR' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (1st edn, Cambridge University Press 2014), 183.

[298] *Ireland v. the United Kingdom*, 18 January 1978, § 154, Series A No. 25.

Under all circumstances, the next consideration becomes to what extent judicial activism is feasible. As Wildhaber et al. observes, the Court has employed 'creative thinking' and evolutive interpretation for a long time, and in many cases, the solutions and interpretations adopted by the Court quickly become accepted.[299] The desirable dosage of creative thinking (and presumably judicial activism in more general terms) is, however, still subject to heated debate. Wildhaber et al. concede that creative thinking is needed, although it must be contained within certain boundaries to ensure due deference to democratic processes and to avoid bringing about permanent legal uncertainty that may cause the Court to lose the support of the Member States.[300]

Here, the usage of the expression 'desirable dosage' is apt. It is necessary to find the minimal effective dose. Too small of a dose, and the desired outcome will not be achieved: the Court will not fulfil its role. By contrast, an overdose will lead to side effects – such as lost support from the States. Determining how to establish the minimal effective dose is a daunting task, to be sure. In my mind, the first step is to establish those boundaries Wildhaber et al. writes about. They should, include above all respect for subsidiarity and the treaty objection, as well as mindfulness over the appropriateness of review and the risk of fragmentation of the international legal regime.

8.3 Concluding Summary

The main concern for the Court is to fulfil its role as envisioned by the drafters. The role envisioned by the drafters is that of a conscience for Europe that can prevent states from becoming undemocratic. To fulfil this role, the Court must be perceived as legitimate, and to that end, the Court must respect the judicial corridor as outlined in chapter 8.1. Moreover, in view of the protection against discrimination as a vaccine against populism, racism and intolerance, an important part of preventing states from becoming undemocratic should be to strengthen the protection against discrimination through judicial activism. In light of the Court's role, judicial activism in the realm of anti-discrimination is therefore particularly justifiable.

---

[299] Wildhaber, Hjartarson and Donnelly (n 8), 254.
[300] Ibid.

9 Final Remarks

In keeping with the purpose of this thesis, I set out to decode the case-law on discrimination to form an understanding of the Court's current approach. Yet, almost every time I thought I had identified coherent, logical and solid models of reasoning; I found another case with another locution that made the conciseness slip through my fingers. The technicality of the judgements and the nexus of their applicability are seldom elegant. However, with more time, effort and experience, I am certain that one could paint a clearer picture of the Court's current approach to discrimination than I have. But there will always be limits imposed by the Court's failure to maintain logically coherent jurisprudence. I would even go as far as to submit that if you are not confused by the case-law, you do not fully understand it. I realise, of course, that it is a difficult task to adjudicate fairly *in casu* while creating a coherent and elegant picture *in principium*. My hope with this thesis is that the interested reader can extract some useful insight into the practical application of the anti-discrimination provisions of the ECHR. I am sure that such insight, together with an awareness of the silent prologue and the judicial corridor can prove to be beneficial for both advocacy and policy-setting purposes and thus be conducive to a strong protection against discrimination.

Moreover, I set out to identify flaws in the case-law that should be addressed by the Court. The main issues found were the Court's casuistic approach and lack of consistency and coherence in the case-law. My contention is that incorporation of more substantial factors into the proportionality test would reduce the need for the Court to rely on a casuistic approach. Such a solution could potentially also improve consistency and coherence because it provides a more developed analytical scaffolding. Arguably, the better defined and developed the factors to take into account are, the more conducive for coherence and consistency they become. To that end, two potential factors that the Court could incorporate into the proportionality test are the facts of the case relative to the ambit requirement and the character of the discrimination ground.

The three layers of the ambit requirement pinpointed in chapter 4.2 could serve a purpose in distinguishing between different levels of gravity. Presumably, a discriminatory measure that adversely affects the enjoyment of a Convention right should be viewed as more serious than a measure that merely affects something that is linked to the exercise of such a right without even falling within the general scope of the substantive article. The Court's failure to adequately rely on this differentiation of levels of gravity precludes a potential tool to be used in the proportionality test. When Article 1 of Protocol No. 12 is in play, an assessment of the facts in relation to the ambit of the substantive Convention articles could still be carried out for the same purpose. That is, not as an aspect of admissibility but as a factor in the proportionality test. The further away from the scope of the rights set to be protected by the Convention, the less it would take from the State to justify the measure.

In addition, the use of the personal characteristic criterion pertaining to the protected discrimination grounds could equally be used as a measure of gravity, as suggested in chapter 4.3. Indeed, the character of the discrimination ground already affects the proportionality test if it is sensitive. If the Court dropped the personal characteristic criterion for admissibility, that could also be used to determine the width of the margin of appreciation and the level of justification needed. Accordingly, if the discrimination ground in question concerns an innate characteristic that applies from birth or relates to a core personal belief or choice, the potential discrimination should be deemed to be of a higher level of gravity, entail a narrower margin of appreciation and require more weighty reasons as justification.

Now, apart from the issues with consistency, coherence and the casuistic approach, some additional flaws should be mentioned. One of those is the too burdensome standard of proof that I in chapter 6.3 suggested be more flexible and set with reference to the margin of appreciation instead of being fixed at 'beyond reasonable doubt'. Using a more flexible approach would also make it easier to deal with the shift of the burden of proof since a narrow margin more readily would allow for a shift of the burden onto the State, and a wide margin more justifiably would increase the burden on the applicant.

Furthermore, the lack of guidance as to what determines whether someone is in a relevantly similar or significantly different situation when construing the comparator requirement is problematic. Here, as we saw in chapter 4.4.1, the Court seems to inevitably have resorted to an inconsistent casuistic approach. At the same time, I recognise the complexity in providing guidance as to the comparability; and although dedicating a lot of time to find some potential guidelines to suggest, I failed to find a workable solution. However, using the majority as the group of comparison as a general rule ought to be effective. More focus on substantive equality would also naturally decrease the importance of the comparator requirement and thus reduce the consequences of failing to adopt workable guidelines to assess difference and similarity.

Additionally, as advocated in chapter 6.1, a subordinate application of the margin of appreciation and the European consensus doctrine should mitigate concerns that moralistic preferences of the majority get to set the scope of the protection of the rights of minorities. However, the Court not fully addressing this issue, although having identified it as we saw in Alekseyev v. Russia, shows that it might be easier said than done to implement a subordinate approach given the need to respect State sovereignty. My position is, nonetheless, that the moral force of the protection against discrimination and the obvious contradiction between state counting as an interpretative tool and the anti-majoritarian nature of the protection should be able to justify the introduction of a subordinate approach.

What is more, the lack of substantive limitation on acceptable aims is a major flaw – perhaps not a flaw in the case-law *per se* but rather a symptom of the drafting that can be, but have not been, mitigated by the Court. I suggested in chapter 6.2 that a systematic interpretation of the Convention could be employed, thus having the legitimate aims in Article 8–11 serve as guiding tenets for the assessment of the aims presented by the State in relation to Article 14 and Article 1 of Protocol No. 12. Adopting this approach would not, if it is flexible and if introduced through proper reasoning, go against the treaty objection.

Finally, referring back to my purpose, I set out to explore how the protection against discrimination in the ECHR most effectively could be advanced. Addressing the flaws identi-

fied above is, of course, imperative to that end. It is also crucial to maximise the room for advancement, while as much as possible remaining within the judicial corridor so the Court remains legitimate. If the Court is not legitimate, there will be no room for advancement. By contrast, if the Court can become more legitimate and trusted to adjudicate consistently and coherently, more States might in the process begin to believe that the Court can also be trusted to control the potential width of Protocol No. 12. This would be an essential step towards more ratifications of the protocol – which in turn would be of great service to the advancement of the protection against discrimination.

Until more States ratify Protocol No.12 the development of the jurisprudence under Article 14 is the major avenue for the advancement of the protection. To most effectively avail itself of this avenue, however, the Court must not shy from judicial activism. Luckily, as intimated in chapter 8.2, judicial activism is particularly justifiable and called for in relation to discrimination given the Court's role. Still, in order to, as it were, 'get away with' judicial activism, the Court has to be very clear about the critical connection between its role and the need to advance the protection against discrimination.

As already concluded, the Court was established to be the conscience of Europe: to prevent States from becoming undemocratic. This role has seldom been more important in a time when populism, racism and intolerance are tearing at the fabric of our democracies. As the Council of Europe Commissioner for Human Rights proclaimed, we are in the dead of winter: at a low point for human rights in Europe. Fortunately, experience tells us that winter never lasts and that, eventually, spring will come. My final contention is this: if the protection against discrimination is taken seriously and advanced, not only in the ECHR but at every level, populist snowflakes will soon be melting in the streets.

References

International Treaties and EU Legislation

Charter of Fundamental rights of the European Union, OJ C 326, 26.10.2012, 391–407.

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22.

Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) A/RES/61/106, Annex I.

International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217A(III).

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

Cases from the Strasbourg Court

- *Abdulaziz v. United Kingdom*, 28 May 1985, Series A no. 94.
- *Airey v. Ireland*, 9 October 1979, Series A no. 32.
- Alekseyev v. Russia, nos. 4916/07 25924/08 14599/09, 21 October 2010.

- Andrejeva v. Latvia [GC], no. 55707/00, ECHR 2009–II.
- Animal Defenders International v. the United Kingdom [GC], no. 48876/08, ECHR 2013–II.
- Anguelova v. Bulgaria, no. 38361/97, ECHR 2002–IV.
- Bayev and Others v. Russia, nos. 67667/09 44092/12 56717/12, 20 June 2017.
- Belcacemi and Oussar v. Belgium, no. 37798/13, 11 July 2017.
- *Belgium Linguistics Case – Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium",* 23 July 1968, Series A no. 6.
- Biao v. Denmark [GC], no. 38590/10, 24 May 2016.
- Burden v. United Kingdom [GC], no. 13378/05, ECHR 2008–III.
- Carson v. the United Kingdom, no. 42184/05, ECHR 2010–II.
- Chapman v. the United Kingdom [GC], no. 27238/95, ECHR 2001–I.
- Clift v. the United Kingdom, no. 7205/07, 13 July 2010.
- Darby v. Sweden, no. 11581/85, 23 October 1990.
- Demir and Baykara v. Turkey [GC], no 34503/97, ECHR 2008-V.
- D.H. and Others v. the Czech Republic [GC], no. 57325/00, ECHR 2007–IV.
- Dickson v. the United Kingdom [GC], no. 44362/04, ECHR 2007–V.
- E.B. v. France [GC], no. 43546/02, 22 January 2008.
- *Engel and Others v. Netherlands*, 23 November 1976, Series A no. 22.
- Evans v. the United Kingdom [GC], no. 6339/05, ECHR 2007–I.
- *Fredin (No. 1) v. Sweden*, 18 February 1991, Series A no. 192.
- Fretté v. France, no. 36515/97, ECHR 2002–I.
- Gaygusuz v. Austria, no. 17371/90, 16 September 1996.
- Gäfgen v. Germany [GC], no. 22978/05, ECHR 2010–IV.
- *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24.
- Harkins and Edwards v. the United Kingdom, nos. 9146/07 32650/07, 17 January 2012.
- Hatton and Others v. the United Kingdom [GC], no. 36022/97, ECHR 2003–VIII.
- Hirst v. the United Kingdom (No. 2) [GC], no. 74025/01, ECHR 2005–IX.
- Hoffmann v. Austria, no. 12875/87, 23 June 1993.

- Hugh Jordan v. the United Kingdom, no. 24746/94, 4 May 2001.
- Hämäläinen v. Finland [GC], no. 37359/09, ECHR 2014–IV.
- *Inze v. Austria*, 28 October 1987, Series A no. 126.
- *Ireland v. the United Kingdom*, 18 January 1978, Series A No. 25.
- İzzettin Doğan and Others v. Turkey [GC], no. 62649/10, 26 April 2016.
- Jersild v. Denmark [GC], no. 15890/89, 23 September 1994.
- Karner v. Austria, no. 40016/98, ECHR 2003-IX.
- *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, Series A no. 23.
- *Klass and Others v. Germany*, 6 September 1978, Series A no. 28.
- L. and V. v. Austria, nos. 39392/98 39829/98, ECHR 2003–I.
- Larkos v. Cyprus [GC], no. 29515/95, ECHR 1999-I.
- Leyla Şahin v. Turkey, no. 44774/98, ECHR 2005–XI.
- *Lithgow and Others v. the United Kingdom*, 8 July 1986, Series A no. 102.
- Maktouf and Damjanović v. Bosnia and Herzegovina [GC], nos. 2312/08 34179/08, ECHR 2013–IV.
- *Marckx v. Belgium*, 13 June 1979, Series A no. 31.
- Murphy v. Ireland, no. 44179/98, ECHR 2003–IX.
- Nachova and Others v. Bulgaria [GC], nos. 43577/98 43579/98, ECHR 2005–VII.
- National and Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom, nos. 21319/93 21449/93 21675/93, ECHR 1997–VII.
- *National Union of Belgian Police v. Belgium*, 27 October 1975, Series A no. 19.
- Oliari and Others v. Italy, nos. 18766/11 36030/11, 21 July 2015.
- Opuz v. Turkey, no. 33401/02, ECHR 2009–III.
- Oršuš and Others v. Croatia [GC], no. 15766/03, ECHR 2010–II.
- Pilav v. Bosnia and Herzegovina, no. 41939/07, 9 June 2016.
- *Rasmussen v. Denmark*, 28 November 1984, Series A no. 87.
- Rekvényi v. Hungary [GC], no. 25390/94, ECHR 1999–III.
- Sahin v. Germany [GC], no. 30943/96, ECHR 2003-VIII.

- Salgueiro Da Silva Mouta v. Portugal, no. 33290/96, ECHR 1999–IX.
- Sampanis and Others v. Greece, no. 32526/05, 5 June 2008.
- Sander v. the United Kingdom, no. 34129/96, ECHR 2000–V.
- Savez crkava "Riječ života" and Others v. Croatia, no. 7798/08, 9 December 2010.
- Schalk and Kopf v. Austria, no. 30141/04, ECHR 2010–IV.
- *Schmidt and Dahlström v. Sweden*, 6 February 1976, Series A no. 21.
- Schwizgebel v. Switzerland, no. 25762/07, ECHR 2010–V.
- Sejdić and Finci v. Bosnia and Herzegovina [GC], nos. 27996/06 34836/06, ECHR 2009–VI.
- Şerife Yigit v. Turkey, no. 3976/05, 2 November 2010.
- S.H. and Others v. Austria [GC], no. 57813/00, ECHR 2011–V.
- Shindler v. the United Kingdom, no. 19840/09, 7 May 2013.
- Sitaropoulos and Giakoumopoulos v. Greece [GC], no. 42202/07, ECHR 2012–II.
- Škorjanec v. Croatia, no. 25536/14, 28 March 2017.
- Slivenko v. Latvia [GC], no. 48321/99, ECHR 2003–X.
- Springett and Others v. the United Kingdom (dec.), nos. 34726/04 14287/05 34702/05, 27 April 2010.
- Stec and others v. the United Kingdom, nos. 65731/01 65900/01, ECHR 2006–VI.
- *The Sunday Times v. the United Kingdom* (No. 1), 26 April 1979, Series A No. 30.
- Thlimmenos v. Greece [GC], no. 34369/97, ECHR 2000–IV.
- Timishev v. Russia, nos. 55762/00 55974/00, ECHR 2005–XII.
- Vallianatos and Others v. Greece [GC], nos. 29381/09 and 32684/09, ECHR 2013–VI.
- Van der Heijden v. the Netherlands [GC], no. 42857/05, 3 April 2012.
- Vinter and Others v. the United Kingdom [GC], nos. 66069/09 130/10 3896/10, ECHR 2013–III.
- Wagner and J.M.W.L v. Luxembourg, no. 76240/01, 28 June 2007.
- X and Others v. Austria [GC], no.19010/07, ECHR 2013–II.
- Zarb Adami v. Malta, no. 17209/02, ECHR 2006–VIII.
- Zornić v. Bosnia and Herzegovina, no. 3681/06, 15 July 2014.

Other Cases

- Marschall v. Land Nordrhein Westfalen (1997) C-409/95.
- Brown v. Stott, [2003] 1 AC 681, 703.
- Griggs v. Duke Power Co, 401 US 424 (1971).

Literature

Monographs

Alastair Mowbray, 'Between the Will of the Contracting Parties and the Needs of Today' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights,* (1st edn, Cambridge University Press 2014).

Anthony Bradley, 'The Need for Both International and National Protection of Human Rights – The European Challenge' in Spyridon Flogaitis, Tom Zwart and Julie Fraser (eds), *The European Court of Human Rights and its Discontents: Turning Criticism Into Strength* (1st edn, Edward Elgar Publishing 2013).

Antoine Buyse, 'Contested Contours: The limits of freedom of expression from an abuse of rights perspective – Articles 10 and 17 ECHR' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (1st edn, Cambridge University Press 2014).

David Harris et al, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*, (3rd edn, OUP 2014).

George Gerapetritis, *Affirmative Action Policies and Judicial Review Worldwide* (1st edn, Springer 2016).

George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (1st edn, OUP 2007).

Gerard Quinn, 'Dangerous Constitutional Moment: The "tactic of legality" in Nazi Germany and the Irish Free State compared' in Morison et al (eds), *Judges, Transition and Human Rights* (1st edn, OUP 2007).

Juliane Kokott, *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems* (1st edn, Kluwer Law International 1998).

Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (1st edn, Cambridge University Press 2015).

Oddný Mjöll Arnadóttir, *Equality and Non-Discrimination under the European Convention on Human Rights* (1st edn, Kluwer Law International 2003).

Olof Palme, *Politik är att vilja [Politics is to be willing]* (1st edn, Prisma 1968).

Paul Mahoney and Rachael Kondak, 'Common Ground. A Starting Point or Destination for Comparative-Law Analysis by the European Court of Human Rights?' in Mads Andenas and Duncan Fairgrieve (eds), *Courts and Comparative Law* (OUP 2015).

Pieter van Dijk, Godefridus J. H. Hoof, G. J. H. Van Hoof, Theory and Practice of the European Convention on Human Rights (3rd edn, Martinus Nijhoff Publishers 1998).

Rebecca J. Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (1st edn, University of Pennsylvania Press 2010).

Robin C.A. White and Clare Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* (5th edn, OUP 2010).

Sandra Fredman, 'Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights', in Ineke Boerefijn et al. (eds), *Temporary special measures. Accelerating De Facto Equality of Women under Article 4(1) UN Convention on the Elimination of All forms of Discrimination Against Women* (1st edn, Intersentia 2003).

Steven Greer, *The Margin of Appreciation. Interpretation and Discretion under the European Convention on Human Rights*, Human rights files No. 17, (1st edn, Council of Europe Publishing 2000).

Thomas Bull, *Fundamentala fragment: ett konstitutionellt lapptäcke* [Fundamental fragments: a constitutional patchwork] (1st edn, Iustus förlag 2013).

Articles

Alastair Mowbray, 'European Convention on Human Rights: the 12th Protocol and Recent Cases' (2001) 1(1) Human Rights Law Review 127.

Alexandra Timmer, 'Towards an Anti-Stereotyping Approach for the European Court of Human Rights' (2011) 11 Hum. Rts. L. Rev. 707.

Dean Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Docrine: Waiver or Subsidiarity of European Review?' (13 December 2013) Max Planck Institute for Comparative Public Law and International Law, Hiedelberg.

Edouard Dubout, 'L'interdiction des discriminations indirect par la cour Européenne des droits de L'homme: Rénovation ou révolution?' [The prohibition of indirect discrimination by the European Court of Human Rights: Renovation or revolution?] (2008) 75 Revue trimestrielle des droits de l'homme 821.

Eyal Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards' (1999) 31 New York University Journal of International Law and Politics 843.

Fabio Buonomo, 'Protocol 12 to the European Convention on Human Rights' (2001/2) 1 European Yearbook of Minority Issues 425.

Gay Moon, 'The Draft Discrimination Protocol to the European Convention on Human Rights: A Progress Report' (2000) 1 EHRLR 49.

Holning Lau, 'Rethinking the Persistent Objector Doctrine in International Human Rights Law' (2005) 6 Chicago Journal of International Law 495.

Ignacio Rasilla del Moral, 'The Increasingly Marginal Appreciation of the Margin of Appreciation Doctrine' (2006) 6 German Law Journal 611.

Jack M. Balkin, 'Deconstructive Practice and Legal Theory' (1987) 96 Yale L.J. 743.

Janneke Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights' (2013) 13 Hum. Rts. L. Rev 99.

Joel Quek, 'A view from Across the Water: Why the United Kingdom Needs to Sign, Ratify and Incorporate Protocol 12 to the European Convention on Human Rights' (2011) 11 U.C. Dublin L. Rev. 101.

Lord Hoffmann, 'The Universality of Human Rights' (19 March 2009) Judicial Studies Board Annual Lecture.

Luzius Wildhaber, 'Protection against Discrimination under the European Convention on Human Rights – A Second-Class Guarantee?' (2002) 2 Baltic Y.B. Intl L. 71.

Luzius Wildhaber, Arnaldur Hjartarson, and Stephen Donnelly, 'No Consensus on Consensus? The Practice of the European Court of Human Rights' (2013) 31 HRLJ 257.

Mathias Möschel, ‘The Strasbourg Court and Indirect Race Discrimination: Going Beyond the Education Domain’ (2017) 80 TOC 121.

Nicholas Grief, ‘Non-Discrimination under the European Convention on Human Rights: a Critique of the United Kingdom Government’s Refusal to Sign and Ratify Protocol 12’ (2002) 27 EL Rev 3.

Nives Mazue-Kumrić, ‘General Prohibition of Discrimination in International Law: Sejdić and Finci v. Bosnia and Herzegovina’ (2012) 3 Annals Constantin Brancusi U. Targu Jiu Juridical Series 13.

Oddný Mjöll Arnardóttir, ‘Non-discrimination Under Article 14 ECHR: the Burden of Proof’ (2007) 51 Scandinavian Studies in Law 13.

Paul Gallagher, ‘The European Convention on Human Rights and the Margin of Appreciation’ (2011) UCD Working Papers in Law, Criminology & Social-Legal Studies, Research Paper No. 52/2011.

Robert Spano, ‘Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity’ (2014) 14 Hum. Rts. L. Rev 487.

Robert Wintemute, ‘Filling the Article 14 ”Gap”: Government ratification and judicial control of Protocol No. 12 ECHR: Part 2’ (2004) E.H.R.L.R 484.

Robin West, ‘The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory’ (2000) 15 Wisconsin Women’s Law Journal 149.

Rory O’Connell, ‘Cinderella comes to the Ball: Art 14 and the Right to Non-discrimination in the ECHR’ (2009) 29 Legal Studies 211.

Samantha Besson, 'Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?' (2008) 8 Human Rights Law Review 647.

Sina van den Bogaert, 'Roma Segregation in Education: Direct or Indirect Discrimination? An Analysis of the Parallels and Differences between Council Directive 2000/43/EC and Recent ECtHR Case-law on Roma Educational Matters' (2011) 71 ZaöRV 719.

Ugur Erdal 'Burden and standard of proof in proceeding under the European Convention' (2001) 26, European Law Review Human Rights Survey 68.

Urfan Khaliq, 'Protocol 12 to the European Convention on Human Rights: A Step Forward or a Step Too Far?' (2001) Public Law (Aut) 457.

Other Sources

Council of Europe Chart of signatures and ratifications of Treaty 177 <http://www.coe.int/en/web/conventions/full-list//conventions/treaty/177/signatures?p_auth=swlGkVlv> accessed 18 July 2017.

Council of Europe Chart of signatures and ratifications of Treaty 117 <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/117> accessed 20 July 2017.

Council of Europe Action Plan on Building Inclusive Societies (2016–2019), adopted by the Committee of Ministers on its 1251 Meeting, 15–16 March 2016 (CM(2016)25).

ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination (adopted by ECRI on 13 December 2002).

Europe and its institutions (2017) <https://edoc.coe.int/en/an-overview/7398-l-europe-et-ses-institutions.html> accessed 21 July 2017.

European Court of Human Right's Statistical Reports, 'Violation by Article and by State 2016' <http://www.echr.coe.int/Documents/Stats_violation_2016_ENG.pdf> accessed 14 July 2017.

European Court of Human Right's Statistical Reports, 'Violation by Article and by States (1959–2016)' <http://www.echr.coe.int/Documents/Stats_violation_1959_2016_ENG .pdf> accessed 14 July 2017.

European Court of Human Right's Statistical Reports, 'Pending Applications Allocated to a Judicial Formation' accessed 18 July 2017.

European Court of Human Right's Case-law Database HUDOC<http://hudoc.echr.coe. int /eng# {"languageisocode":["ENG"],"article":["P12-1"],"documentcollectionid2": ["JUDGMENTS"]}> accessed 14 July 2017.

Nils Muižnieks, *Council of Europe Commissioner for Human Rights's Annual Activity Report 2016* (CommDH(2017)3, Strasbourg, Council of Europe, 6 April 2017).

Nils Muižnieks, 'You're Better Than This, Europe', published 28 June 2015, <https://www.nytimes.com/2015/06/29/opinion/youre-better-than-this-europe.html> accessed 28 July 2017.

Nils Muižnieks, 'Anti-Muslim Prejudice Hinders Integration', published 24 July 2012, <https://www.coe.int/es/web/commissioner/-/anti-muslim-prejudice-hinders-integrati-1> accessed 28 July 2017.

Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms – Explanatory Report – [2000] COETSER 3 (4 November 2000).

Secretary General of the Council of Europe, Thorbjørn Jagland, 'State of Democracy, Human Rights and the Rule of Law: Populism – How Strong are Europe's Checks and Balances?' (2017) 127th Session of the Committee of ministers, Nicosia, 19 May 2017.

The Brighton Declaration adopted on 20 April 2012 at the High-Level Conference on the Future of the European Court of Human Rights.

ANNEX A: Article 14 in English

Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950

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.

ANNEX B: Article 1 of Protocol No. 12 in English

Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.2000

ARTICLE 1

General prohibition of discrimination

1. The enjoyment of any right set forth by law 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.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

ANNEX C: Article 14 in French

Convention de sauvegarde des droits de l'homme et des libertés fondamentales, Rome, 4.XI.1950

ARTICLE 14

Interdiction de discrimination

La jouissance des droits et libertés reconnus dans la présente Convention doit être assurée, sans distinction aucune, fondée notamment sur le sexe, la race, la couleur, la langue, la religion, les opinions politiques ou toutes autres opinions, l'origine nationale ou sociale, l'appartenance à une minorité nationale, la fortune, la naissance ou toute autre situation.

ANNEX D: Article 1 of Protocol No. 12 in French

Protocole n° 12 à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales, Rome, 4.XI.2000

ARTICLE 1

Interdiction générale de la discrimination

1. La jouissance de tout droit prévu par la loi doit être assurée, sans discrimination aucune, fondée notamment sur le sexe, la race, la couleur, la langue, la religion, les opinions politiques ou toutes autres opinions, l'origine nationale ou sociale, l'appartenance à une minorité nationale, la fortune, la naissance ou toute autre situation.

2. Nul ne peut faire l'objet d'une discrimination de la part d'une autorité publique quelle qu'elle soit fondée notamment sur les motifs mentionnés au paragraphe 1.