EQUALITY AND NON-DISCRIMINATION IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS; TOWARDS A SUBSTANTIVE APPROACH

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The material in this thesis has not been submitted for any other degree or professional qualification. It has been composed by me and, apart from due acknowledgements, it is entirely my own work.

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ABSTRACT

The case law of the European Court of Human Rights on discrimination under Article 14 of the European Convention on Human Rights is typically considered to be unclear and conflicting. Against that background, new possibilities for more effective protection against discrimination under the Convention are opening up through recent developments in the case law on Article 14 and the advent of the new Protocol 12 to the Convention. The arguments forwarded in this study will be based on an analysis of the Court's case law as well as on analysis of the new Protocol 12. The study demonstrates that the 'objective and reasonable justification' test and conventional treatment of non-discrimination under the Convention in scholarly literature are not apt for dealing with the emerging new possibilities in protection against discrimination or for explaining the variations in strictness of review that truly govern the level of protection against discrimination already provided by the Convention. The study suggests a new approach to understanding protection against discrimination under the Convention developed by focusing on variations in the strictness of objective justification review as applied by the Court.

To identify the point at which a case becomes susceptible to the factors that influence the strictness of objective justification review, the study proposes a new interpretation of the traditional understanding of the burden of proof under Article 14. A three-tiered model of factors that influence the strictness of objective justification review under the non-discrimination provisions of the Convention is then suggested and developed. The model encompasses various influencing factors that interact with and may support or negate the influence of each other. The elaboration of influencing factors under this model requires the development of the concept of "passive discrimination", which is intended to capture the new possibilities hinging on positive state obligations under the non-discrimination provisions of the Convention. Finally, from the induction and elaboration of the influencing factors functioning under the model, it is argued that the equality and non-discrimination provisions of the European Convention on Human Rights have moved towards an asymmetrical and substantive approach.
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This study is dedicated to my husband Gylfi and my son Gísli.
1. INTRODUCTION

1.1. EQUAILITY AND NON-DISCRIMINATION IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS: TOWARDS A SUBSTANTIVE APPROACH

The title of this thesis is “Equality and non-discrimination in the European Convention on Human Rights; towards a substantive approach”.

Legal theory has discussed the difference between formal and substantive equality and non-discrimination. Various solemn declarations in national and international law alike may have the potential for wide reaching substantive impact but critical legal scholars have pointed out the tendency of equality and non-discrimination law to shrink into its formal component when it comes to application by the courts. The formal approach is primarily characterised by the symmetrical equal treatment of what is considered equal in the definition of prevailing groups in society. A substantive approach would focus more on the asymmetrical application of equality and non-discrimination law. Such an approach entails that the strictness of application of prescriptions of non-discrimination is sensitive to the context in which discrimination takes place, in particular to a history of social disadvantage of certain groups of people. Research into equality and non-discrimination provisions, in particular as regards open-model provisions, has accordingly focused increasingly on the strictness of review in their actual application as indicative of their content and potential.¹

As regards the strictness of review under the European Convention on Human Rights,² the European Court of Human Rights has developed the doctrine of the margin of appreciation. It refers to this doctrine when delimiting its competencies vis-à-vis the national authorities of the contracting states and adjusting the strictness of review applied in individual cases. Legal scholarship on the margin of

¹See generally the more detailed treatment of these issues in Chapter 2, with references.
²Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 5 (hereinafter referred to as “the Convention” or “the European Convention on Human Rights”).
appreciation in relation to the non-discrimination provision in Article 14 of the Convention has identified certain factors that influence the margin of appreciation. The literature elaborating the influencing factors focuses on one type of influencing factors, the “badge of differentiation” (sex, race, etc.) at stake in a case and does not discuss other factors or their interaction with the badge of differentiation.\(^3\) It further generally has a formal tone that seems rather to advocate the symmetrical application of these influencing factors, irrespective of whether it is a member of a privileged or a disadvantaged group in society who suffers discrimination.\(^4\)

Any given claim under an open-model prescription of non-discrimination such as Article 14 of the Convention and Article 1 of Protocol 12 to the Convention\(^5\) will entail three basic variables. These variables will be a) a claim of a particular type of discrimination, b) based on a particular badge of differentiation and c) encroaching upon a particular interest. An example might be direct discrimination on the basis of sex in employment. The thesis of this study is that each of these variables can be elaborated on and shown to be an important category of factors influencing the strictness of review in interplay with each other. Under this model new influencing factors will be induced from the materials and elaborated on, including the concept of “passive discrimination”. Establishing this model of the factors influencing the strictness of review and their interplay supports the conclusion that the approach of the European Convention of Human rights and the European Court of Human Rights has become increasingly substantive and asymmetrical in recent years.

\(^3\) D.J. Harris, M. O’Boyle and C. Warbrick: *Law of the European Convention on Human Rights*, London: Butterworths, 1995, p. 472 coined the phrase “badge” for: “…the criterion on the basis of which the difference in treatment has been meted out…”. A badge of differentiation may for example be sex, race, religion or “other status”.

\(^4\) See generally the more detailed treatment of these issues in Chapter 5, with references.

\(^5\) Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *ETS No. 177* (hereinafter referred to as “Protocol 12”). Protocol 12 was opened for signature on the occasion of the 50th anniversary of the European Convention on Human Rights, 4 November 2000. It was signed by 25 states. It will enter into force when 10 states have ratified it, cf. its Article 5.
The arguments put forward in this study will be based on an analysis of the case law of the European Court of Human Rights on Article 14 of the Convention as well as on analysis of the new Protocol 12 to the Convention. All the judgments of the Court that deal with Article 14, pronounced from 23 July 1968 until 1 May 2001, will be analysed. They will be referred to by giving the name of the case and the date of the judgment. As of 1 August 2001 publications of judgments in the official reports of the judgments of the Court only reach as far as May 1999. The more recent

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6 "Case relating to certain aspects of the laws on the use of languages in education in Belgium", hereinafter referred to as *Belgian Linguistics*, 23.07.1968 was the first case in which the Court applied Article 14. As the paragraphs in this judgment are not in consecutive order throughout the judgment, it will be cited with reference to paragraph number and page number in *Publications of the European Court of Human Rights, Series A*.

7 With Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, *ETS No. 155* (hereinafter referred to as "Protocol 11"), the whole control system under the Convention was revised. Protocol 11 entered into force 1 November 1998. After the revision of the control system, judgments on the merits of applications are pronounced either by a Grand Chamber of 17 judges or by Chambers of 7 judges, cf. Article 27 of the Convention. A Grand Chamber only hears cases in exceptional instances. The first possibility is when a Chamber has relinquished jurisdiction as the case at hand: "...raises a serious question affecting the interpretation of the Convention or the protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court...", cf. Article 30. The second possibility is that the Grand Chamber hears a case that has already been decided by a Chamber. In these cases any party to the case may in exceptional cases request referral to the Grand Chamber, which shall be accepted: "...if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance", cf. Article 43. Grand Chamber judgments are final. Judgments of Chambers become final when the parties declare that they will not request referral to the Grand Chamber, when a panel of Grand Chamber members rejects a request of referral under Article 43 or three months after the date of the Chamber judgment if reference of the case to the Grand Chamber has not been requested, cf. Article 44. All the Chamber judgments of the Court pronounced until 1 May 2001 and dealt with in the present study have become final except the following judgments where referral to the Grand Chamber has been requested according to Article 43: Çicek v. Turkey, 27.02.2001, P.M. v. Italy, 11.01.2001 and Platakou v. Greece, 11.01.2001. A note to the effect that the judgment is not final and that a referral to a Grand Chamber has been requested will accompany referrals to any of these three judgments.

8 *Reports of Judgments and Decisions*, Köln: Carl Heymanns Verlag, 1999-III.
judgments dealt with in this study are derived from HUDOC, the searchable database of the case law of the European Convention on Human Rights, accessible via http://hudoc.echr.coe.int/hudoc/. Judgments on the database may be subject to editorial revision before their reproduction in final form in the official reports of selected judgments and decisions of the Court. Tables 1-3, pp. 272-299 present the judgments dealt with from various analytical standpoints. Table 1 exhibits which analytical tests the Court refers to in cases where reasonable and objective justification review has been undertaken. Table 2 exhibits a combination of the badge of differentiation and the type of claim being made in cases where the Court has reviewed the Article 14 question. Table 3 exhibits the approach of the Court to the question of whether it is necessary to review the Article 14 issue at stake in the case. Article 14 is generally only reviewed in conjunction with other substantive Convention Articles. The following study will not refer to these other Convention provisions when discussing the judgments of the Court on Article 14. In this respect reference is made to Table 3, which exhibits these other Convention provisions in all the individual cases analysed.

With Protocol 11 to the Convention, the European Commission on Human Rights⁹ has ceased to exist. The present study will not dwell on the case law of the Commission. To begin with the study agrees with the stance of Bratza and O’Boyle who argue that: “The legacy of substantive case law left by the Commission to the new Court is [...] difficult to assess.” ¹⁰ While it does not deny that many important developments in the field of Convention rights have originated in the case law of the Commission,¹¹ it is aware that it has been an equal possibility in the Convention

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⁹ Hereinafter referred to as “the Commission”.


¹¹ Ibid. See for example Thlimmenos v. Greece, 06.04.2000, para. 38 where the Commission in a novel interpretation of Article 14 considered that it: “...was violated not only when States treated differently persons in analogous situations without providing an objective and reasonable justification, but also when States, without an objective and reasonable justification, failed to treat differently persons whose situations were different.”. This interpretation was, then, adopted by the Court, cf: para. 44.
system that the Court rejects the approach of the Commission.\textsuperscript{12} This has applied to the relationship of the old Court and the Commission and the relationship of the new permanent single Court established on 1 November 1998 and the Commission alike.\textsuperscript{13} It is, therefore, not until the Court embraces indications from the case law of the Commission that they reach the level of established Convention jurisprudence. It follows that indications from the case law of the Commission only have the status of unsubstantiated possibilities for developments in Convention protection. This uncertain status of Commission case law that has not been expressly dealt with by the Court is the main reason why the present study will focus exclusively on the Court’s case law. In addition, as the Commission has now ceased to exist, it is the stance of the study that its case law is bound to become increasingly irrelevant to the development of the Convention’s protection against discrimination. To begin with,

\textsuperscript{12} See the numerous examples mentioned by Bratza and O’Boyle, pp. 225-227. For a few recent examples concerning Article 14 where the Commission and the Court have reached different conclusions see e.g. Elsholz v. Germany, 13.07.2000, Cha’are Shalom Ve Tsedek v. France, 27.06.2000 and Petrovic v. Austria, 27.03.1998. The judgment in Petrovic v. Austria, 27.03.1998 is an interesting example as it exhibits the Commission’s greater willingness to acknowledge a positive obligation to extend a measure applied to one group (mothers) to another group in a similar situation (fathers). See generally Chapter 5.1.3.2. B infra.

\textsuperscript{13} In a transitional period the new permanent Court heard many cases from various stages of the former control mechanism. In accordance with Article 5, Paragraphs 3-5 of Protocol 11 these were the following types of cases: “1. Applications which have been declared admissible at the date of entry into force of this Protocol shall continue to be dealt with by members of the Commission within a period of one year thereafter. Any applications the examination of which has not been completed within the aforesaid period shall be transmitted to the Court which shall examine them as admissible cases in accordance with the provisions of this Protocol. 2. With respect to applications in which the Commission, after the entry into force of this Protocol, has adopted a report in accordance with former Article 31 of the Convention, the report shall be transmitted to the parties, who shall not be at liberty to publish it. In accordance with the provisions applicable prior to the entry into force of this Protocol, a case may be referred to the Court. The panel of the Grand Chamber shall determine whether one of the Chambers or the Grand Chamber shall decide the case. If the case is decided by a Chamber, the decision of the Chamber shall be final. Cases not referred to the Court shall be dealt with by the Committee of Ministers acting in accordance with the provisions of former Article 32 of the Convention. 3. Cases pending before the Court which have not been decided at the date of entry into force of this Protocol shall be transmitted to the Grand Chamber of the Court, which shall examine them in accordance with the provisions of this Protocol.”
the Court no longer has any need or real incentive to address the indications arising out of the Commission’s case law. Second, one of the Court’s principal approaches to interpretation is evolutive interpretation that refers to understanding of the Convention’s provisions in light of contemporary social and cultural ideas.14 While a few years are indeed a short time in the development of Convention jurisprudence, it is clear that the older the Commission case law becomes, the less direct relevance it will have to the development of Convention standards. Third and most important are the recent developments in the Convention’s protection against discrimination that the Commission has never addressed and/or will not address further. Indications from the new Protocol 12 to the Convention and from the Court’s most recent jurisprudence have opened up a wealth of new possibilities that will be developed by the Court exclusively.

Together all the factors mentioned above make it not only difficult but also unnecessary to trace or attempt to assess the impact of the Commission’s case law on the jurisprudence of the Court under Article 14. The Commission’s case law is all the more irrelevant to the development of new concepts and indications for the future derived from Protocol 12 in the study. In sum, the following study is a study describing the present status of the established case law of the European Court of Human Rights on Article 14 of the Convention as well as the indications of that case law and the new Protocol 12 for the future development of the Convention’s protection against discrimination. It does, therefore, not address the case law of the Commission.

1.2. EQUALITY AND NON-DISCRIMINATION; TWO SIDES OF THE SAME COIN

The two provisions subject of study are Article 14 of the European Convention on Human Rights which prohibits discrimination in the enjoyment of Convention rights and Article 1 of Protocol 12 to the European Convention on Human Rights which entails a general prohibition of discrimination.

14 See generally Chapters 3.3.4.1. and 3.3.4.2. infra.
The prohibition of discrimination in Article 14 is stipulated in the following terms:

“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, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Article 1 of Protocol 12 likewise stipulates a general, open model non-discrimination clause:

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

Both provisions refer only to securing non-discrimination and not to the concept of equality. The title of this study nevertheless refers to equality and non-discrimination in the European Convention on Human Rights. It is the approach of the study, and an important factor in the arguments presented, that these concepts in essence connote the same idea. By the same token, equality and discrimination connote opposites. As for the taxonomy under the Convention, the case law of the Court as well as the Explanatory report to Protocol 12 have confirmed this approach. The Explanatory report to Protocol 12 refers to Article 14 as providing protection “...with regard to equality and non-discrimination...”\textsuperscript{15} and states:

“While the equality principle does not appear explicitly in the text of either Article 14 of the Convention or Article 1 of this Protocol, it should be noted that the non-discrimination and equality principles are closely intertwined. For example, the principle of equality requires that equal situations are treated equally and unequal situations differently. Failure to do so will amount to discrimination unless an objective and reasonable justification

\textsuperscript{15} Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Explanatory report, \textit{ETS No. 177} (hereinafter referred to as “Explanatory report to Protocol 12”), para. 1, referring also to “The general principle of equality and non-discrimination...”.
exists. [...] The Court, in its case-law under Article 14, has already made reference to the “principle of equality of treatment” [...] or to “equality of the sexes” [...]”\textsuperscript{16}

This is an approach to the concepts of equality and non-discrimination widely recognised in the literature as equality and non-discrimination are generally taken to be the positive and negative statements of the same principle.\textsuperscript{17}

In 1990 Asbjørn Eide and Torkel Opsahl argued that non-discrimination was only one possible way in which to approach the vague idea of a “right to equality”.\textsuperscript{18} Accordingly they divided their treatment of the subject of equality and non-discrimination into two distinct chapters. Chapter 3 discussed contemporary human rights law of non-discrimination, including Article 14 of the Convention. In chapter 4, however, they discussed: “Other Approaches to Promote Equality in Modern Human Rights Law”. Under this heading, they linked the concept of a right to equality with an independent provision (not accessory like Article 14 of the Convention) and the ideas of positive obligations,\textsuperscript{19} affirmative action,\textsuperscript{20} the

\textsuperscript{16} Ibid, para. 15.

\textsuperscript{17} On equality and non-discrimination being the positive and negative statements of the same principle see Anne F. Bayefsky: The Principle of Equality or Non-Discrimination in International Law, (1990) 11:1-2 Human Rights Law Journal, p. 1, at p. 1, footnote 1 with extensive references.


\textsuperscript{19} Ibid, p. 193.

\textsuperscript{20} Ibid, p. 194.
importance of economic, social and cultural rights,\textsuperscript{21} and non-assimilationist equal treatment that takes relevant differences into account.\textsuperscript{22}

Whatever difference Eide and Opsahl perceived between the concepts of non-discrimination and equality in 1990 is increasingly becoming the subject of corrosion. The issues Eide and Opsahl connected with the concept of equality over and above the concept of non-discrimination are issues that have in recent years been discussed as inherent in \textit{substantive} approaches to non-discrimination and equality alike rather than forming a conceptual distinction between them, \textit{cf.} Chapter 2 \textit{infra.}\n
More importantly they are all issues that have in recent years gradually earned recognition under the European Convention on Human Rights as part and parcel of its non-discrimination provisions. The general prohibition of discrimination in Article 1 of Protocol 12 is an independent provision that reaches into the field of economic, social and cultural rights and, as discussed in the Explanatory report thereto, may entail positive obligations. Recently, positive obligations have also become acknowledged under Article 14, even as regards the positive duty to accommodate for differences.\textsuperscript{23} At present under the Convention system, the difference between the concepts of equality and non-discrimination can, at the most, be taken as one of the degree to which positive obligations are implied as incumbent upon states.

1.3. \textsc{Equality and non-discrimination; complex ideas}

1.3.1. The equality maxim

To many authors: “The study of equality begins with Plato and Aristotle, the first to proclaim that likes should be treated alike...” \textsuperscript{24} In his \textit{Nicomachean Ethics}, Aristotle

\textsuperscript{21} \textit{Ibid}, pp. 195-196.

\textsuperscript{22} \textit{Ibid}, p. 196.

\textsuperscript{23} See in particular Chapter 5.1.3. \textit{infra}.

discussed the maxim that equals should be treated equally and unequals unequally as part and parcel of distributive justice. In his *Politics* he developed further the argument that the concept of justice entails that equals should be treated equally and unequals unequally. This understanding that equal treatment of equals and unequal treatment of unequals are two different conceptions of the same maxim has carried through to modern legal-philosophical discussion. Peter Westen for example emphasises that the former (equals should be treated equally...), necessarily entails the latter, (...and unequals unequally) for all rules of equality can be stated in either form. A rule of treatment can be stated as generating one class of people who are defined as equal in possessing a trait, say the trait X, to whom a certain equal treatment, say Y, is prescribed. Here equals are treated equally. The same rule can also be stated as generating two classes of people, those who possess the trait X and those who do not, and the classes are therefore made of unequals. Only the ones who possess the trait X are accorded the treatment Y. So, logically the same rule also entails that unequals are treated unequally. Therefore: “Both statements are true because they are alternative ways of referring to the same normative relationships.”.

The classical equality maxim begs two questions, respectively: “who are equals?” and “what constitutes equal treatment?”. To apply it as a legal prescription these two questions need to be answered, but the maxim itself does not provide the answers. If


an attempt at an answer is made on the basis of the maxim, the answer to the question of “who are equal?” would be “those who should be treated equally”, and if the question “what constitutes equal treatment?” is asked the maxim only provides us with the answer “the treatment of those who are equal”. It is therefore a logical conclusion that the maxim per se is indeterminate as a legal prescription. It is easy to exhibit the indeterminate nature of the maxim. Any type of equality and any type of equal treatment can be inserted into it and the result, although absurd and against a particular moral view of what is egalitarian, does not violate the equality maxim per se. For example the equality of situations of having red hair and the equal treatment in being executed could be inserted into the equality maxim formula and render the result that all redheads should be executed without violating the maxim per se.

The equality maxim needs to be interpreted, construed and impregnated with a substantive directive of some sort to become functional. This was discovered already by Aristotle himself who pointed out that considerations concerning equality as a synonym for just can be based on various moral principles: “...for all men agree that what is just in distribution must be according to merit in some sense, though they do not all specify the same sort of merit, but democrats identify it with the status of freeman, supporters of oligarchy with wealth (or with noble birth), and supporters of

27 The conclusion of indeterminacy has been expressed in various forms in the literature. See for example: H. L. A. Hart: The Concept of Law, 2nd. ed., Oxford: Clarendon Press, 1994, p. 159: ""Treat like cases alike" must remain an empty form.". See also Westen: The Empty Idea of Equality, p. 547 (footnote reference omitted): "So there it is: equality is entirely [c]ircular [...] when we ask who “like people” are, we are told that they are “people who should be treated alike.” Equality is an empty vessel with no substantive moral content of its own. Without moral standards, equality remains meaningless, a formula that can have nothing to say about how we should act.”. Steven J. Burton: Comment On “Empty Ideas”: Logical Positivist Analyses of Equality and Rules, (1982) 91 The Yale Law Journal, p. 1136, at p. 1151, takes issue with Westen’s logical positivist analysis of the concept of equality but argues that: "...one might not quarrel with an analysis of equality along the lines of that employed by Professor Westen if it were to show the incompleteness of the equality principle itself, and the consequent ways in which arguments from equality often are question-begging or misleading.". 
aristocracy with excellence.".28 The equality maxim needs to be impregnated with an additional substantive guide to behaviour to become functional.

1.3.2. The indeterminacy of the equality and non-discrimination prescriptions of the European Convention on Human Rights

As discussed in Chapter 1.3.1. supra the equality maxim, and hence the concept of equality and non-discrimination, are normatively indeterminate per se. When present in a legal prescription such concepts pose great problems of interpretation.29 Most legal concepts may be argued to be normative, ambiguous and permeated with indeterminacy to varying degree.30 This may apply in particular to the open-textured language of the general principles of constitutional and international human rights law.31 They need to be applied, interpreted and construed to acquire specific meaning and become functional as legal prescriptions. Under the European Convention on Human Rights the role of interpreting the general principles stipulated in the Convention is entrusted to the European Court of Human Rights.

The classical Aristotelian equality maxim is central to the non-discrimination provisions of the Convention. This is evidenced in the case law of the Court and the Explanatory report to Protocol 12 alike.32 The Court has also repeatedly indicated

29 This led Westen: *The Empty Idea of Equality*, p. 542, to conclude that: "Equality, therefore, is an idea that should be banished from moral and legal discourse as an explanatory norm.". See also his treatise in Westen: *Speaking of Equality*. This similarly led Alf Ross to conclude that a principle of equality was: "...no real principle, but the abandonment of any attempt at a rational analysis.". See Alf Ross: *On Law and Justice*, London: Stevens & Sons, 1958, p. 288.
30 For example Burton, p. 1148.
32 Explanatory report to Protocol 12, para. 15, referring to the case law. See also Thlimmenos v. Greece, 06.04.2000, para. 44 where the non-discrimination provision is said to be violated when persons in analogous situations are treated differently and when persons whose situation is significantly different are not treated differently.
that Article 14 secures the equal treatment of those who are in *relevantly similar situations*, either implicitly or by explicitly referring to a criterion of relevance or to similar terms.\(^{33}\) In the *Thlimmenos v. Greece* judgment it added for the first time that Article 14 is violated not only when persons in analogous situations are treated differently but also when persons whose situations are significantly different are not treated differently. The referral in the judgment to *significant differences* seems to indicate a heightened relevance requirement when a case concerns the different treatment of different situations.\(^{34}\) The approach of the Court is, then, clearly to build on the equality maxim with a criterion of relevance attached. In the approach of the Court, relevant equalities prescribe equal treatment and (highly) relevant inequalities prescribe unequal treatment. This, again, follows the Aristotelian tradition, which implies relevance as a guide to construing what equalities or inequalities should count in the maxim that equals should be treated equally and unequals unequally.\(^{35}\) This might at first glance seem to eliminate the rather

\(^{33}\) See e.g. *Fredin v. Sweden*, 18.02.1991, para. 60, *Spadea and Scalabrino v. Italy*, 28.09.1995, para 45 and *The National & Provincial Building Society, The Leeds Permanent Building Society and the Yorkshire Building Society v. The United Kingdom*, hereinafter referred to as *Building Societies v. The United Kingdom*, 23.10.1997, para. 90, which all refer to relevance. The language of the Court is not uniform on this issue, cf. e.g. *Thlimmenos v. Greece*, 06.04.2000, para. 44 referring to analogous situations and *Salgueiro da Silva Mouta v. Portugal*, 21.12.1999, para. 26 where the Court referred to comparable situations ("situations comparables"). In *Larkos v. Cyprus*, 18.02.1999, para. 24, it can be discerned that the applicant claimed to be in an analogous situation to that of a certain group of people but the Court found him to be in a "relevantly similar situation" to that of the group, cf. para. 29. In *Edoardo Palumbo v. Italy*, 30.11.2000, paras. 51-52 the Court referred to the criterion of relevantly similar situations and concluded that the situations compared were not analogous. The *Larkos v. Cyprus* and *Edoardo Palumbo v. Italy* judgments seem to indicate that the terms analogous situations and relevantly similar situations are taken to be identical.

\(^{34}\) *Thlimmenos v. Greece*, 06.04.2000, para. 44.

\(^{35}\) "But there still remains a question: equality or inequality of what?", Aristotle, *Politics*, Book III, cited from Louis P. Pojman and Robert Westmoreland (eds.): *Equality - Selected Readings*, Oxford: Oxford University Press, 1997, p. 25. In rejecting the argument that any equality/difference may count to construe equal/different treatment, Aristotle argued for a criterion of relevance by way of an example that in distributing flutes between flute players the best flute should not be given to the one who is best born but to the one who is superior in flute playing, "...unless the advantages of wealth and birth contribute to excellence in flute-playing, which they do not.", *ibid.*
uncomfortable conclusion that an additional guide to behaviour must be found and construed as part of the equality maxim to make it functional. Indeed, this appears to be the stance of the Court itself as it never refers to or even alludes to any specific theory of equality over and above the “equal treatment” of relevantly similar situations or the unequal treatment of (highly) relevantly different situations. This seems to be the first basic step along the way to impregnating the equality maxim with meaning.

But what does "relevant" stand for? W. T. Blackstone offers a good explanation of the concept of relevance: “To say “x is relevant,” when we are speaking about the treatment of persons, means “x is actually or potentially rated in an instrumentally helpful or harmful way to the attainment of a given end”.” 36 Now, this is a significant feature of the concept of relevance, namely that things cannot be simply “relevant” but necessarily have to be relevant to something, i.e. relevant in that they are instrumentally helpful or harmful to a given end. Hence, identifying relevantly similar or dissimilar situations necessarily also entails identifying them as relevant to a given end. Under the maxim of “equals should be treated equally and unequals unequally”, the descriptively relevant traits rendering persons in equal or unequal situations, must logically be relevant to the equal or unequal treatment they should receive. The similarity or dissimilarity of situations is, thus, evaluated in relation to the treatment required in a case. The philosopher R. M. Hare has argued that: “It is a great mistake to think that there can be a morally or evaluatively neutral process of picking out the relevant features of a situation, which can then be followed by the job of appraising or evaluating the situation morally”.37 He points out that it is possible

37 R. M. Hare: Relevance, in Alvin I. Goldman and Jaegwon Kim (eds.): Values and Morals, Essays in Honor of William Frankena, Charles Stevenson and Richard Brandt, Dordrecht: D. Reidel Publishing Company, 1978, p. 75. Hare was not the first to identify this issue, but he treats it in a very enlightening way. Before Hare, Oppenheim for example discussed this characteristic of the relevance criterion, see Felix E. Oppenheim: Egalitarianism as a Descriptive Concept, cited from Louis P. Pojman and Robert Westmoreland (eds.): Equality - Selected Readings, Oxford: Oxford University Press, 1997, p. 55, at p. 59: “...relevance of a personal characteristic is an evaluative, not a
to describe a situation without any moral judgment but as soon as we proceed to identify which features of the descriptive situation are relevant: "...we are already in the moral business.". The same type of reasoning applies to the legally relevant similarities and dissimilarities prescribing equal or different treatment under the equality maxim. Identifying which features of a situation are to be taken as legally relevant under the equality maxim actually entails invoking the legal principle according to which treatment is prescribed under the maxim. This is no simple task as it indicates the construction of the substantive principle to insert into the equality maxim to make it functional. Thus, assessing whether situations are relevantly similar or dissimilar under the equality maxim cannot really be disentangled from the question of what treatment the maxim prescribes. And this may provide the answer to one often-noticed but never-explained puzzle of the case law of the Court; the common merger of the evaluation of whether similar situations have been established

descriptive, term. While the ascription of characteristics such as a certain age or income to a person is a matter of fact, judgments to the effect that such characteristics are relevant or irrelevant to some kind of distribution are valuational, not factual.". Bernard A. O. Williams before them approached the issue from a different angle, see Bernard A. O. Williams: The Idea of Equality, cited from Louis P. Pojman and Robert Westmoreland (eds.): Equality - Selected Readings, Oxford: Oxford University Press, 1997, p. 91. Williams argued that the question of relevance to a moral consideration was not evaluative and took the example of race as relevant to treatment as an arbitrary assertion of will and not a moral consideration. Oppenheim’s answer to Williams’ argument was that to deny that this particular consideration can denote a moral view is to employ the term moral in a very restricted way, only embracing the morals oneself subscribes to, see Oppenheim: Egalitarianism as a Descriptive Concept, p. 59. Contra see Westen: Speaking of Equality, p. 61 who seems to approach the issue of relevance from a the strictly logical positivist angle that descriptive equalities/inequalities can be objectively verified truth statements: "Descriptive equalities are rarely the subject of serious dispute [as they] tend to lend themselves to objective resolutions because we assume they rest on verifiable assertions of fact.".

38 "...[T]o call a feature morally relevant is already to imply that it is a reason for or against making some moral judgment; and to say this is already to invoke a moral principle. [...] The question of what features of a situation are morally relevant thus collapses into the question of what moral principles apply to the situation; any feature which figures in one of these principles is relevant.", Hare: Relevance, p. 75.
and the evaluation of whether an objective and reasonable justification exists for the treatment in question.³⁹

Again it becomes apparent that the equality maxim needs to be imbued with a substantive guide for behaviour. Inserting the relevance criterion into the equality maxim does not really solve the problem of indeterminacy as it only masks the need to identify a criteria by which the treatment due under the non-discrimination provisions can be evaluated.

1.3.3. The value choices inherent in application of the equality and non-discrimination prescriptions of the European Convention on Human Rights

Even after inserting the equality maxim and a relevance criterion, the non-discrimination provisions of the Convention are still indeterminate. They do not tell us what treatment is due under them. The indeterminacy of the concepts of equality and non-discrimination entails that the true substantive guides for behaviour functioning under Article 14 and Article 1 of Protocol 12 are not expressly identified in the provisions. It has been the task of the Court to interpret and construe Article 14 of the Convention, as it will in future be its task to interpret and construe Article 1 of Protocol 12. The Court’s construction and application of the provisions de facto inserts a normative prescription into them that remedies the indeterminate nature of their basic content.

Amartya Sen, who in 1998 won the Nobel Prize for his contribution to welfare economics, has argued that virtually all theories on the organisation of society are based on some idea of equality, albeit not the same idea of equality.⁴⁰ Indeed, there


⁴⁰ Amartya Sen: Inequality Reexamined, Oxford: Clarendon Press, 1992, preface, p. ix: “I also argue that a common characteristic of virtually all the approaches to the ethics of social arrangements that
exist many different theories and conceptions of equality. It is simply a matter of construction based on underlying values that governs decision on which idea of equality is inserted into the concept of equality when it is applied in political, moral and legal discourse. Similarly, when it comes to the application of Article 14, and in future of Article 1 of Protocol 12, their construction as evidenced in application to individual cases is inevitably based on certain underlying values. The indeterminate concepts of equality or non-discrimination as such give little guidance on these values. Given the vide range of the different possible conceptions of equality these values essentially originate elsewhere or only indirectly in the indeterminate concepts of equality and non-discrimination.\(^\text{41}\)

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1.3.4. The content of the equality and non-discrimination provisions of the European Convention on Human Rights.

Given the indeterminate nature and underlying value choices involved in applying the concepts of equality and non-discrimination as legal prescriptions it is clear that great problems of interpretation are bound to arise. The non-discrimination provisions in Article 14 and Article 1 of Protocol 12 of the Convention are simply general and open textured prescriptions of non-discrimination entailing little guidance as to their precise construction. Given the indeterminacy of the provisions themselves, the values and normative prescriptions governing their construction are not explicit in the text of the Convention. In coming to grips with the difficult task of interpreting and applying Article 14 of the Convention the European Court on Human Rights has had to develop the parameters of the concept of discrimination. The first step, as already discussed, involves the equality maxim as the central tenet of the provision, with a criterion of relevance attached. The first step of analysing cases in the approach of the Court correspondingly refers to the establishment of different treatment of relevantly similar situations or, in the newly expanded construction arising from the Thlimmenos v. Greece judgment, the same treatment of (highly) relevantly different situations. But, as discussed in Chapters 1.3.2. and 1.3.3. supra, even after attaching the equality maxim and a criterion of relevance to the general non-discrimination provision in Article 14, it still remains indeterminate. The Court has no choice but to add another facet to Article 14 in an endeavour to come closer to the normative prescription entailed in the provision. This additional facet is intended to capture the dividing line between instances when a difference of treatment is discriminatory and instances when a difference of treatment is not discriminatory. It would be an impossible construction of the non-discrimination clause that every difference of treatment is discriminatory. It is after all an essential characteristic of legislation and other state action that it classifies people into various groups and provides for different treatment of such groups. States must have the possibility to provide differently for the various shades of factual differences and different situations that occur in life. The Court has indeed made clear that not every

42 Thlimmenos v. Greece, 06.04.2000, para. 44.
form of different treatment is prohibited under Article 14. In the *Belgian Linguistics* case it referred to such a construction as capable of rendering “absurd” results.\textsuperscript{43} Therefore, in addition to requiring that relevant equalities/differences prescribe equal/different treatment the Court has added an objective and reasonable justification test under Article 14. Under this approach the principle of equality of treatment is violated if relevantly similar situations are treated differently or if (highly) relevantly different situations are treated equally without an objective and reasonable justification. Such objective and reasonable justification exists if the treatment pursues a legitimate aim and if there is a: “...reasonable relationship of proportionality between the means employed and the aim sought to be realised.”\textsuperscript{44}

The analytical approach of the Court, requiring the establishment of relevantly similar/different situations and the establishment of an objective and reasonable justification in the form of a legitimate aim and a requirement for proportionality, is the tool with which it comes to grips with the indeterminate non-discrimination provisions. The Court has, thus, filled the indeterminate principle of non-discrimination in Article 14 with meaning through developing an analytical approach and applying it to individual cases.\textsuperscript{45} Legal scholarship on the case law of the Court has mostly involved the induction of general guidelines and principles from these instances of application and sometimes also their discussion in light of theoretical considerations originating outwith the case law itself. Through this process of discourse between the Court and legal scholars, a clearer and continually evolving

\textsuperscript{43} *Belgian Linguistics*, 23.07.1968, para. 10, p. 34, moving on to reason that: “One would, in effect, be led to judge as contrary to the Convention every one of the many legal or administrative provisions which do not secure to everyone complete equality of treatment in the enjoyment of the rights and freedoms recognised. The competent national authorities are frequently confronted with situations and problems which, on account of differences inherent therein, call for different legal solutions; moreover, certain legal inequalities tend only to correct factual inequalities.”.

\textsuperscript{44} *Belgian Linguistics*, 23.07.1968, para. 10, p. 34. This was the first case where the Court based its decision on Article 14 and set out its analytical approach.

\textsuperscript{45} A process which Alf Ross actively took part in, albeit having previously rejected the principle of equality as a functional part of a legal prescription. See *Belgian Linguistics*, 23.07.1968, Collective dissenting opinion of Judges Hombäck, Rodenbourg, Ross, Wiarda and Mast, agreeing with the well foundedness of the analytical approach set out by the majority of the Court.
understanding of the meaning of the non-discrimination provision in Article 14, and now in Article 1 of Protocol 12, should emerge. The preferable conclusion would be that a clear and consistent picture emerged from this process, but the literature, on the contrary, exhibits that the case law of the Court on Article 14 is typically considered unclear and conflicting. Commentators have pointed out various and numerous inconsistencies in the Court’s case law. These are perceived as inconsistencies as the scholarly literature has not been able to explain them under the traditional scholarly approaches to the Court’s case law on non-discrimination that follow the Courts explicit delimitation of the parameters of Article 14 as comprised by evaluating the relevant similarity of situations and the objective and reasonable justification test. A common complaint is how the Court in application mixes up the presumably distinct tests of establishing relevantly similar situations and establishing objective and reasonable justification with the effect that the precise content of these tests is unclear.

At the 7th International Colloquy on the European Convention on Human Rights which was held in 1990 and which inter alia dealt with equality and non-discrimination one of the commentators, Danièle Lochak, agreed with Marc

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46 As will be discussed in more detail in Chapter 3.2.3. infra, the construction of the concept of discrimination and the analytical approach under the new Article 1 of Protocol 12 build on the established practice under Article 14.

47 For general comments on the complexity and/or inconsistency of case law on Article 14 see Gomien, Harris and Zwaak, p. 346 and Dijk and Hoof, p. 711.

48 The development in Thlimmenos v. Greece, 06.04.2000, entailing that significantly different situations require different treatment is so recent that it has not been dealt with to any extent in the literature yet. It will be dealt with in more detail in Chapter 5.1.3. infra.

Bossuyt’s conclusion that the concept of discrimination had lost its homogeneity and become something decided as an individual case by the courts.\textsuperscript{50} Lochak attributed this to the case law of the European Court of Human Rights upon the conclusion that its analysis exhibited that it was not careful legal analysis that decided cases before the European Court of Human Rights, but rather some kind of an overall assessment of whether the treatment complained of was “shocking”. She concluded that the situation in non-discrimination law under the Convention was unsatisfactory as the case law exhibited: “...the extent to which the judge’s assessment of the “objective” and reasonable nature of the justifications put forward is subjective.”.\textsuperscript{51} In a similar vein, Karl Joseph Partsch went so far as to ask: “…whether the requirement of a legitimate aim and the proportionality relationship are separate issues or only two forms of appealing to the spirit of justice, disguised as an objective criterion of a legal nature.”.\textsuperscript{52}

Conclusions such as Lochak’s and Partsch’s must be rejected if they are construed as indicating that the judgments of the Court are the arbitrary results of: “subjective and emotional opinion[s]”.\textsuperscript{53} It is the approach of this study that, behind the façade of the analytical approach and traditional reasoning presented in the case law of the Court, the true normative reasoning governing decision can be detected and presented systemically as a structured approach to non-discrimination under the Convention. Conclusions on the futility of the Court’s analytical approach in searching for the true normative reasoning behind decision in individual cases, thus,


\textsuperscript{51} Lochak, p. 140.

\textsuperscript{52} Partsch, p. 590.

\textsuperscript{53} Ross, p. 288.
only have a grain of truth in them if construed as indicating that this normative reasoning is obscure. The value choices and normative reasoning that govern the variations in outcomes of cases under Article 14, and in future under Article 1 of Protocol 12, are indeed obscure in the language of the Convention, and also to a large extent in the explicit analytical approach and reasoning of the Court as well as in the literature. They are “hidden” behind the façade of the ritual incantation of relevant similarity of situations, legitimate aims and proportionality. The true evaluative reasoning of the Court in applying Article 14, takes place at levels different to these façade arguments.\textsuperscript{54} The relatively recent identification of stricter scrutiny in cases involving certain “sensitive” badges of differentiation is one level at which these value choices have become increasingly visible as the case law of the Court evolves.\textsuperscript{55}

It is the task of the following study to identify and elaborate on the levels at which the true values and normative reasoning implied in the application of the equality and non-discrimination provisions of the Convention take place. These levels are the basic variables of any discrimination claim; a) the type of discrimination alleged, b) the badge of differentiation and c) the interest at stake. The study suggests a wholly new approach to understanding protection against discrimination under the Convention. This approach is developed by focusing on variations in the strictness of objective and reasonable justification review as applied by the Court and identifying the various factors that influence this strictness of review. The variations in strictness of review are the true expressions of the values and normative reasoning behind the application of the non-discrimination provisions of the Convention.\textsuperscript{56} The identification and elaboration of the function of variations in strictness of review not only explains the many perceived complexities in the already existing case law of the Court but also provides a viable framework for dealing with the emerging new possibilities relating to the new Article 1 of Protocol 12 and the recent development in case law that acknowledges accommodation for differences as part of the

\textsuperscript{54} These issues will be discussed in more detail in Chapter 3.3.2. \textit{infra.}

\textsuperscript{55} See generally Chapter 5.2.4. \textit{infra.}

\textsuperscript{56} See in more detail Chapters 2.3.2. and 3.3. \textit{infra.}
protection against discrimination. Finally, the identification and elaboration of factors influencing the strictness of review under the non-discrimination provisions of the Convention will facilitate the positioning of these provisions on the formal-substantive scale of equality.
2. SUBSTANTIVE EQUALITY

2.1. WHY FOCUS ON THE DIFFERENCE BETWEEN FORMAL AND SUBSTANTIVE EQUALITY?

The literature on equality in law has long since taken notice of a difference between formal and substantive equality. Classically the line between formal and substantive equality has been drawn along the lines of whether it concerned respectively only the application of the law regardless of its content or whether it concerned the content of the law as in a requirement of a just distribution of benefits and burdens or some form of social justice. Flowing from this basic distinction, there are two other characteristics that have been associated with substantive equality. One is the significance of difference in that different situations should be treated differently, implying that different treatment may involve some form of positive measures designed to promote equality and benefit underprivileged groups. Substantive equality is considered to allow such different treatment that, hence, is not to be considered discriminatory. Secondly, the literature has linked positive obligations to the concept of substantive equality, i.e. the state may positively be required to prevent or protect against discrimination.

Recent legal literature in the field of equality rights bears witness to a proliferation of concern with the distinction between formal and substantive equality. It seems that


58 Vierdag, p. 18, McKean, pp. 6-7 and Dijk and Hoof, p. 719 make this point particularly clearly.

59 Nowak, pp. 468-469. Nowak clearly links such positive obligations to the substantive component of Article 26 of the International Covenant on Civil and Political Rights, UNTS 171.
despite elaborate legal provisions on equality, disadvantage and discrimination persist in fact. This has been attributed to the fact that prescriptions of equality that may embody the formal and substantive components alike seem commonly to shrink into their formal element when it comes to legal practice.\textsuperscript{60} This has prompted critical legal scholarship that canvasses a more substantive approach to equality, much of this scholarship being from a feminist perspective and, thus, focusing on gender equality.\textsuperscript{61} But what do the concepts of formal and substantive equality connote? Given the indeterminacy of the term equality, the terms substantive or formal equality seem permeated with at least the same indeterminacies. As pointed out by Louise Mulder the term substantive equality escapes clear cut definition over and above it implying a right to: "...better material conditions and social opportunities for those who have fallen behind.".\textsuperscript{62} Without pretending to propose a "grand theory" on substantive equality, an explanation of the principal elements pertaining to the concept can be elaborated on to some extent.

Legal practice reflects the theoretically elaborated concerns associated with the concept of substantive equality.\textsuperscript{63} The (feminist) theoretical probing into the nature, limitations and potential of prescriptions of equality has indeed provided valuable insights and has in fact informed developments in legal practice. An example of this is the development of European Community gender equality law after the \textit{Kalanke} judgment and the criticism thereof.\textsuperscript{64} A policy that gave priority to women applying for promotion provided that women were under-represented in the relevant grade was


\textsuperscript{62} Mulder, p. 66.

\textsuperscript{63} See for example the analysis and conclusions of Wentholt, pp. 62-64.

found discriminatory against men on the grounds of sex. The arguments of the European Court of Justice centred on the view that absolute and unconditional priority to women went beyond the equality of opportunity envisaged in Article 2(4) of The Equal Treatment Directive and onto promoting the equality of results which was considered to be outside the scope of allowed affirmative action programs and only to be arrived at indirectly by providing equality of opportunity. Summarising the critique of the judgment, it can be said that it was primarily criticised for being formal and failing to take into account the structurally different social situation between women and men in the labour market. Following the criticism the European Court of Justice modified its stance considerably, cf. the Marschall case where the Court, albeit in a qualified manner, approved of affirmative action.

The theoretical insights as to the juxtaposition of formal and substantive aspects of gender equality elaborated on in feminist legal theory can have a general relevance as regards open-ended prescriptions of equality. This general relevance has been confirmed both in theory and practice. A practical example is the jurisprudence of the Supreme Court of Canada in the landmark judgment of Andrews v. Law Society of British Columbia concerning discrimination between citizens and non-citizens as regards the practice of law in British Columbia. The approach taken by the Court

was to analyse cases in contextual terms relating to the historical or social disadvantage that certain groups in society have suffered.69 This approach of the Court has been described as being based on the “subordination” or “disadvantage” model of equality elaborated in feminist legal theory.70 In the present study the theoretically elaborated concerns regarding formal and substantive equality will be taken to have a general relevance, mutatis mutandis.

2.2. SUBSTANTIVE EQUALITY IN THEORY

In arguing for a wholly new approach to equality issues in human rights law, Cliona J.M. Kimber has elaborated three different models of equality to contrast with her preferred alternative of a principle of self-determination.71 As it is, in fact, legislative provisions on equality and not self-determination this study addresses it will not dwell on Kimber’s arguments as to her self-determination model. Rather, it


is the illuminating elaboration of the three equality models that is of interest in the present context. Kimber’s discussion encapsulates the essence of each of the three equality models which all have a clear relevance for the present study. First, the three models seem to distil certain developments in the mainly feminist legal theory, which has prompted their elaboration. Second, Kimber’s elaboration takes the models and the related concerns out of a narrow feminist and gender-oriented context and exhibits how they relate to equality issues in other respects, *mutatis mutandis*. Third, as pointed out by Kimber, the three models have approximate correlatives from equality law and jurisprudence. Finally, the three equality models can be applied as explicatory instruments as to the difference between formal and substantive equality.

2.2.1. The formal approach

2.2.1.1. Characteristics

The first model is that which Kimber calls “strict identical treatment” which she also terms the *sameness* or the *formal* approach. Sometimes this approach is also referred to as *symmetrical*. This approach is built upon the equality maxim that equals should be treated equally and unequals unequally, but focuses on rendering certain distinctions, such as those based on gender, race, religion, etc. completely irrelevant. Rendering these characteristics completely irrelevant leads to them never constituting differences that may result in differential treatment. Thus, the focus is on identical treatment irrespective of the possible unequal results flowing from such identical treatment. This focus on identical treatment excludes indirect

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72 Ibid.
73 Fredman: Reversing Discrimination, p. 576.
74 Kimber, p. 267, thus referring to this model as assimilationist.
75 Ibid. Hence, Loenen: Rethinking Sex Equality as a Human Right, p. 257 argues that the formal approach only concerns the first part of the Aristotelian equality maxim (equals should be treated equally) but “forgets” the second part (unequals should be treated unequally).
76 See Titia Loenen: Indirect Discrimination: Oscillating Between Containment and Revolution, in Titia Loenen and Peter R. Rodrigues (eds.): *Non-Discrimination Law: Comparative Perspectives*,
discrimination and sometimes manifests itself as an emphasis on intentional or express discrimination in discrimination analysis.\textsuperscript{77} The formal approach implies symmetry in application in that unequal treatment that benefits underprivileged groups is considered as pernicious as unequal treatment that benefits the already privileged.\textsuperscript{78}

The formal model has been attributed to liberalism and liberal feminism in line with a liberal conception of the state.\textsuperscript{79} Its symmetry and focus on the same treatment is directly related to its focus on individualism in that individual merit and fault are instrumental in analysis and not the structural disadvantages pertaining to membership in a certain group. Therefore, positive measures designed to promote equality ("affirmative action") cannot be justified under the formal approach.\textsuperscript{80}

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\textsuperscript{78} See e.g. Fredman: European Community Discrimination Law: A Critique, p. 128, labelling this the assumption of neutrality.


\textsuperscript{80} See Fredman: Reversing Discrimination, pp. 576-577 and Fredman: European Community Discrimination Law: A Critique, pp. 132-133. Affirmative action such as priority hiring of women from a group of equally qualified applicants cannot be justified as it confers benefits that are not related to individual merit upon members of certain groups (women) and confers burdens that are not
Correlative is emphasis on the passive role of the state in the formal model of equality only requiring abstention from overt discrimination and therefore a negative obligation of the state and no positive obligations.\textsuperscript{81}

2.2.1.2. The strengths of the approach

Kimber analyses the traits of this model and on the positive side finds that it is simple, effective in combating overt discrimination and: "...fits well within the political and legal frameworks of most Western democracies."\textsuperscript{82} Kimber, however, argues that the drawbacks of the formal model override its benefits.

2.2.1.3. The weaknesses of the approach

A. Normative indeterminacy

To begin with the formal model is normatively indeterminate in two respects, like the classical Aristotelian equality maxim, \textit{cf.} Chapter 1.3. \textit{supra}. It is normatively indeterminate in that it guarantees consistency of treatment but makes no demands related to individual fault upon members of certain groups (men). See also the discussion of individual regarding equality and group regarding equality in Donald W. Jackson: \textit{Affirmative Action in Comparative Perspective: India and the United States}, in Titia Loenen and Peter R. Rodrigues (eds.): \textit{Non-Discrimination Law: Comparative Perspectives}, The Hague: Kluwer Law International, 1999, p. 249, at p. 249 with references.

\textsuperscript{81} Sandra Fredman argues that the formal approach rests inter alia upon the basic premise of neoliberal state neutrality postulating abstention from intervention in the free market. See Fredman: \textit{Reversing Discrimination}, p. 577.

\textsuperscript{82} Kimber, p. 268.
on the content of that treatment.\textsuperscript{83} It is also normatively indeterminate in that it does not tell us who are equal and who are unequal for the purposes of its application.\textsuperscript{84}

B. Comparability

The formal model is also limited by its reliance on comparability. First, it requires a suitable comparator before an issue can even be addressed as one of equality, leaving aside from equality analysis issues where no obvious comparators exist. Kimber mentions the cases of pregnancy, part-time work and disabilities as problem areas in this respect.\textsuperscript{85} Second, the reliance on comparability mixed with the normative indeterminacy of the formal model leads to the fact that members of underprivileged groups can only claim the same treatment that privileged groups already have and also only to the extent that the privileged groups enjoy it although the needs of the underprivileged group may be completely different. Examples in this direction mentioned by Kimber include pregnant women, disabilities and special needs in education.\textsuperscript{86} Minority rights would also be a good example.\textsuperscript{87} Thus, the conditioning of rights by having to show sameness with a comparator combined with normative indeterminacy entails that difference leads to exclusion.\textsuperscript{88}


\textsuperscript{84} Kimber, p. 268 (second weakness). She does not discuss this under the rubric of normative emptiness.

\textsuperscript{85} *Ibid*, p. 269 (third weakness).

\textsuperscript{86} *Ibid*, p. 269 (fourth and fifth weaknesses). Kimber does no relate these problems to the normative emptiness of the formal model but only to its reliance on comparability.


\textsuperscript{88} If the appropriate comparator or already existing treatment cannot be found, the formal approach entails that the situation of the socially and economically disadvantaged does not even qualify as an issue of legal equality. Hence, difference leads to exclusion. See Loenen: Rethinking Sex Equality as a Human Right, p. 254.
C. Uncritical of structural disadvantage

Finally, the formal model uncritically accepts prevailing social and political structures. Comparability per se calls for this as it makes the prevailing group in society: "...the measure of all things".\(^8^9\) Thus, the formal model of equality does not address in any way the question of how existing social structures perpetuate situations of privilege and deprivation and how the standards of the dominant groups in society dictate the treatment accorded to people belonging to other groups.\(^9^0\)

2.2.2. The substantive "difference" approach

2.2.2.1. Characteristics

The second model of equality is that which Kimber calls "identical treatment combined with special treatment". It is also commonly referred to as the difference model.\(^9^1\) It has been described as being substantive and asymmetrical\(^9^2\) or as only having substantive elements.\(^9^3\) This model builds on the Aristotelian equality maxim

\(^{8^9}\) In the context of framing questions of gender equality in terms of sameness or difference MacKinnon, p. 220 coined the powerful phrase that it concealed: "...the substantive way in which man has become the measure of all things.". This, she argued, provides: "...ways for the law to hold women to a male standard and to call that sex equality.", ibid, p. 221. See also Lacey, p. 417. Kimber, p. 269 translates this into any dominant group in society, but discusses it simply as a question of comparability (third weakness), missing the important point that such comparisons perpetuate the prevailing dominance of the group of comparison.

\(^{9^0}\) Kimber, pp. 269-270 (sixth weakness). See also Wentholt, p. 57.

\(^{9^1}\) Wentholt, p. 58 argues that: "...the substantive approach to equality requires differences to be taken into account...".

\(^{9^2}\) Fredman: Reversing Discrimination, pp. 577-579 and Loenen: Rethinking Sex Equality as a Human Right, pp. 268-269. Many authors do not categorise the second and third models of equality into qualified substantive or fully substantive approaches, cf. Chapter 2.3.1. infra.

as well as the formal model but accommodates more clearly for differences.\footnote{Kimber, p. 270.} Under the purely formal approach, difference leads to exclusion either by simply lacking an appropriate comparator or by the fact that formal equality claims no normative content for the treatment accorded to different situations.\footnote{In this latter situation equality analysis ends with the finding that cases are different as the different treatment complained about is, then, justified, whatever its content. See e.g. Loenen: Rethinking Sex Equality as a Human Right, p. 257.} Under the difference model, however, it is recognised that some differences must be acted upon in order to achieve substantive equality. What is acknowledged here is that the difference approach \textit{requires} differences to be dealt with appropriately.\footnote{Kimber, p. 270, Wentholt, pp. 55-58.} Kimber associates this model with differences that are “immutable and unchangeable” and classical examples of special treatment required by the difference model of equality include pregnancy and maternity leave, minority languages in education and various situations of positive measures accommodating for disabilities.\footnote{Kimber, p. 270.} This way the difference model imports a normative element into the equality maxim as regards the question of which treatment is required by difference. And the normative content dictates that the treatment required is one that leads to substantive equality, i.e. moves matters closer to equality of results.\footnote{\textit{Ibid}, pp. 270-271. Loenen: Rethinking Sex Equality as a Human Right, p. 258 argues that a substantive approach to equality is result-oriented and that this way: “...difference calls for accommodation and thus inclusion, instead of exclusion.”.} A focus on equality of results opens the possibility for challenging indirect discrimination in that different results as between groups, irrespective of intent, call for equality analysis and objective justification.\footnote{Loenen, Indirect Discrimination: Oscillating Between Containment and Revolution, pp. 199-201.} An important characteristic of the difference model is that situations of accommodating differences are generally dealt with as exceptions from identical treatment.\footnote{Kimber, p. 271, Wentholt, p. 57.}
In the context of gender equality, the roots of the difference approach have been identified as lying in cultural feminism and its focus on the differences between men and women and on women's distinctive values and needs. More generally speaking, the difference approach acknowledges the need to respond to the effects of discrimination on certain groups of people that continue to exist despite formal equality. While arguably not rejecting the individualistic ideal where group membership plays no role at all: "...the ideal should not be confused with present reality, in which status ascriptions play a central role in determining an individual's opportunities." Hence, the difference approach rejects the strict individualism of the formal approach and allows the justification of positive measures designed to promote equality ("affirmative action"). Correlative here is the view that a non-interventionist state with purely negative obligations only functions to perpetuate a status quo in unequal situations and thus is not enough to ensure equality. The difference approach, thus, is more in line with the historical development of human rights from a simple focus on protection from state absolutism to its combination with a positive role for the state in implementing and ensuring human rights, now entrenched in important treaty law. The positive obligations incumbent upon states under the difference approach may range from simple actions to prevent discrimination to positive measures to promote equality ("affirmative action" programs).

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101 Palmer, p. 229.
102 Fredman: Reversing Discrimination, p. 578.
103 Ibid, pp. 578-579.
104 See Article 2 of the International Covenant on Civil and Political Rights, UNTS 171, and Article 1 of the European Convention. The historical development of human rights has been described as an evolution from negative obligation libertarian “freedom from” rights, to positive obligation “rights to” certain conditions and onto third-generation collective rights. The thesis of three generations was first developed by Karel Vasak. See Karel Vasak: A 30-year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights, Unesco Courier, November 1977, p. 29. See also Scott Davidson: Human Rights, Buckingham: Open University Press, 1993, pp. 6-7.
105 Kimber, pp. 270-271. See generally Chapter 5.1.3.1. and 5.1.3.4. infra, elaborating on different levels of positive obligations ranging from simple preventive measures to positive measures.
2.2.2.2. The strengths of the approach

Kimber mentions that one of the laudable aspects of the difference models is that it escapes the first dilemma associated with comparability mixed with normative indeterminacy under the formal model in that it does not require an appropriate comparator to be identified.\textsuperscript{106} It seems clear that the difference model also escapes the other dilemma of limiting claims to the treatment already accorded to a group of comparison. Its normative import entails that the treatment it is possible to claim under the difference model is not limited to such treatment already accorded to others. Another benefit of the difference approach mentioned by Kimber is that it allows special positive measures ("affirmative action") to be justified.\textsuperscript{107} There is also a strong link between the concept of substantive equality and positive obligations of states, ranging all the way from an obligation to remedy simple lacunae in the legislative protection from direct discrimination to enacting positive measures to promote equality.\textsuperscript{108} This entails that not only does this model of equality allow positive measures as non-discriminatory; it may possibly in certain circumstances require the state to enact or apply such positive measures. An additional benefit mentioned by Kimber is that the difference model targets special problems of equality and thus aims at equality of results in those areas. Finally she mentions that the model acknowledges diversity in the sense that it actively requires the accommodation for differences.\textsuperscript{109} There remain, however, a handful of disadvantages under the difference approach.

2.2.2.3. The weaknesses of the approach

A. Normative indeterminacy and ambiguity

\textsuperscript{106} Ibid, p. 271.
\textsuperscript{107} Ibid.
\textsuperscript{108} See generally Mulder, pp. 66-71.
\textsuperscript{109} Kimber, p. 271.
On the one hand the difference approach is still normatively indeterminate as to the question of *which differences* should justify or require special treatment.\(^{110}\) One acknowledged issue in this respect is whether only biological or immutable differences count or whether any and all differences may count.\(^{111}\) On the other hand, while there is a normative import into the treatment aspect of the difference model it is still somewhat ambiguous as to the content of the treatment in question. Since difference can be construed as a meaningful basis for beneficial special treatment in some respects, it can also be construed as a meaningful basis for invidious special treatment in other respects.\(^{112}\)

B. Uncritical of structural disadvantage

Framing equality analysis in terms of a comparative concept like difference maintains the approach that the prevailing groups in society become the standard of measure and thus it can perpetuate situations of privilege and deprivation in society like the formal approach, *cf.* Chapter 2.2.1.3. C *supra.* Therefore, in its simple form it is sometimes only considered to achieve a qualified substance.\(^{113}\) A related critique is that special treatment can function as stigmatising for the groups that receive it and, thus, come to perpetuate the *status quo* in unequal situations.\(^{114}\) Finally the difference approach can be criticised for its potential for the perpetuation

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\(^{110}\) *Ibid,* (first weakness).

\(^{111}\) *Ibid.* See also Loenen: Rethinking Sex Equality as a Human Right, p. 256.

\(^{112}\) Kimber, p. 272 (fourth and sixth weaknesses). Kimber does not relate this weakness to normative ambiguity but mentions two separate examples. One is protective legislation that may end up excluding women from certain jobs and the other is the notorious example from United States equality jurisprudence in the *Sears* case where the argument that women generally preferred the lower-paid, more secure and stress-free sales jobs was found to justify the under-representation of women in the higher-paid commission sales jobs. See EEOC v. Sears, Roebuck and Co., 628 F Supp, 1264 (1986). See also Loenen: Rethinking Sex Equality as a Human Right, p. 256.


\(^{114}\) *Ibid,* p. 272 (third weakness), noting that this has lead to doubts as to whether affirmative action programs are in fact beneficial. See also Fredman: Reversing Discrimination, p. 598 and MacKinnon, p. 225.
of stereotypical views of groups that are “different”, which in turn can entrench disadvantage.  

2.2.3. The substantive “disadvantage” approach

2.2.3.1. Characteristics

This approach is the most recent on the scene both in theory and practice. Kimber refers to this approach as “the subordination principle” and it encompasses the contextual approach to equality advocated in equality models that focus on the asymmetrical structures of power, dominance and disadvantage at work in society. The model analyses whether the measure under scrutiny: “...operates to increase or decrease the conditions of disadvantage of a disadvantaged group.” This model of equality is considered to aim clearly at equality of results through requiring the eradication of practices and policies that increase disadvantage and requiring: “...the changing of social and political structures.” Wide-reaching outlawing of indirect discrimination can be considered as belonging to this model as indirect

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115 Kimber, p. 272. See also Fredman: European Community Discrimination Law: A Critique, pp. 126-127. Fredman mentions the example of the Hoffman case decided by the ECJ, cf. Case 184/83 Ulrich Hofmann v. Barmer Ersatzkasse (1984) E.C.R. 3047, where it was not considered discriminatory that a father was denied state funded benefits available to mothers as maternity leave with reference to the special relationship between the mother and child after birth. She points out that the judgment has connotations to the effect that child-caring responsibilities of women are somehow natural or immutable over and above the strictly biological role of women in childbirth. Also the fact that parental leave is made financially viable for women only encourages women, and not men, to pause their careers on account of childbirth. Thus, this: “...perpetuates both stereotypes and disadvantage.” This type of criticism coincides with criticism of cultural feminism more generally, cf. Palmer, p. 229.

116 Kimber, p. 273. See also footnote 71 supra.

117 Ibid. See also Loenen: Rethinking Sex Equality as a Human Right, pp. 268-269.

118 Kimber, p. 273.

119 Ibid.
discrimination is commonly referred to as potentially revolutionary in challenging structural disadvantage.\textsuperscript{120}

This approach has been elaborated as a response to the weaknesses of framing questions of equality in terms of the comparative concepts of sameness or difference and the weaknesses of the sameness and difference approaches, as discussed in Chapters 2.2.1.3. and 2.2.2.3. \textit{supra}. It has been developed in the feminist scholarship proceeding to move forward from the focus on sameness or difference \textit{per se} onto the structural or systemic consequences of gender.\textsuperscript{121} As such it can be lumped together under the heading of social constructionist feminism.\textsuperscript{122} In a wider context than that of gender and feminism it can be argued that theories of social construction generally form the backbone to the disadvantage approach. In fact, social construction theory seems tailor-made to fit this kind of substantive equality analysis. As elaborated by Ian Hacking: “Social construction work is critical of the status quo.”\textsuperscript{123} It raises awareness that: “…the existence or character of X is not determined by the nature of things. X is not inevitable. X was brought into existence or shaped by social events, forces, history, all of which could have been

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{121} Palmer, p. 330.
\item \textsuperscript{122} The social construction of gender has been described as a theoretical perspective: “…which informs a feminist understanding of the systemic aspects of the position of women in society and also integrates empirical research to demonstrate this reality in women’s and men’s lives.”, Judith Lorber and Susan A. Farrell (eds.): \textit{The Social Construction of Gender}, Newbury Park CA: Sage Publications, 1991, Introduction p. 1.
\end{enumerate}
\end{footnotesize}
different.".124 "X" in the context of equality analysis could be both a certain trait attributed to certain people or the social fact of discrimination or disadvantage. Social construction theory thus rejects essentialism, the claim that certain traits are "natural" or "immutable", and focuses attention on them being social constructs125 as well as critically focusing attention on the systemic patterns of power, dominance and disadvantage in society. More generally, the disadvantage approach clearly rejects the focus on individualism and the laissez-faire state inherent in the formal approach. This is a similar take to that of the difference approach, but the disadvantage approach seems to take this rejection to its fullest capacity. The clearest indication is that the disadvantage approach does not consider special treatment as exceptions from the main rule of identical treatment but as simply sometimes required to eliminate discriminatory social and political structures.126

2.2.3.2. The strengths of the approach

The strengths of this approach seem clear as compared with the weaknesses of the other two approaches. To begin with it has a clearer normative content as to the treatment due, i.e. that of the equality of results through: "...ameliorating conditions of disadvantage, and ending relationships of hierarchy and dominance."127 Secondly, it has been argued that it does away with the problems connected with the focus on comparability and analysis in terms of sameness and difference. Classification in terms of sameness and difference is simply not part of the analysis the disadvantage approach calls for.128 Finally, this approach is more critical of structural disadvantage by being critical of the status quo of existing social and

124 Ibid, pp. 6-7. Hacking goes on to argue that social construction theory often moves on to argue that the X in question is bad and that it should be eliminated or transformed. In the context of non-discrimination law, X being a certain type of discrimination, that part is explicitly declared by normative legal prescriptions.
125 Ibid, p. 20. Hence, the rather obvious juxtaposition of cultural feminism and social constructionist feminism.
126 Kimber, p. 273.
political structures. Correspondingly it enables all sorts of issues connected to structural disadvantage to be addressed as equality issues.\textsuperscript{129}

2.2.3.3. The weaknesses of the approach

A. Remaining problems

While having normative content as to the treatment aspect the disadvantage approach is still normatively indeterminate in terms of identifying the groups that are disadvantaged and therefore entitled to the treatment prescribed.\textsuperscript{130} It has been pointed out that categorising into disadvantaged groups raises similar problems to categorising into different groups. Both in fact construe a deviation from a prevailing norm that: “…remains invisible and unproblematic.”\textsuperscript{131}

B. The role of the Courts

Another weakness is related to the competence of the courts in determining which groups are disadvantaged. The contextual analysis called for here is of a different nature from that the courts traditionally encounter; it is rather a: “…sociological analysis of the society in question, an individual’s place in that society and the political and sociological effect of law in its broadest sense.”\textsuperscript{132} In addition, the courts’ analysis of these issues may be very different from that of the parties concerned.\textsuperscript{133} This last issue goes right back to the courts themselves being social constructs, prone perhaps to maintaining the view of the prevailing group in society

\textsuperscript{129} Ibid, p. 275 (fourth and fifth strengths).

\textsuperscript{130} Ibid, p. 275 (second weakness). The example Kimber mentions are white middle-class women, are they disadvantaged under present day conditions?

\textsuperscript{131} Stychin, pp. 221-223 discussing the categorical thinking of the Canadian disadvantage approach under which discrimination comes under scrutiny if based on explicitly enumerated grounds or grounds analogous thereto on basis of historical or social disadvantage.

\textsuperscript{132} Kimber, p. 273. See also p. 275 (third weakness).

\textsuperscript{133} Ibid, p. 275 (fourth weakness).
as “the measure of all things” rather than being an effective vehicle for change of social and political structures.

C. Distance from doctrinal roots

Perhaps most disturbingly for the disadvantage model, Kimber argues that it actually: “...is almost unrecognisable as equality. The doctrinal basis of the subordination model gains nothing from its adherence to the equality principle...”.

2.3. SUBSTANTIVE EQUALITY IN LEGAL PRACTICE

2.3.1. A sliding scale

Cliona Kimber, to be sure, does not argue that her three equality models actually exist anywhere in their pure form. Instead she refers to their “parameters” and to legislation that may conform “very nearly” to the models. This is a point worth emphasising. Rather than constituting distinct and mutually exclusive categories, the three models constitute snapshots of positions on a sliding scale from the more formal approaches to equality to the more substantive approaches. Under the most formal approach a legal prescription of equality is completely toothless. But for the most critical of critical scholars nothing short of a social revolution seems sufficient. It may well be that the law approaches reality in a categorised manner and that the courts themselves are a social construct but theorising criticism of that seems to have more to do with a problem with the law as a tool for social revolution than a problem with a particular model of equality in law. Most jurisdictions will find themselves somewhere in the middle, and perhaps at different locations on the scale depending on context. Some jurisdictions may currently be at pains to locate themselves on the

134 Ibid, p. 275. This is why she proceeds to propose a principle of self-determination.

135 Ibid, p. 266.
formal-substantive scale.\textsuperscript{136} In fact, a search for balance may well be a perpetual condition of equality law.

Many scholars do not distinguish between the two substantive models and proceed on the presumption that the difference model is truly substantive, often indeed by incorporating some form of the contextual analysis associated with the disadvantage model into the difference model. Titia Loenen for example clearly places herself within the difference camp while arguing for an asymmetrical and contextual equality analysis by the courts, i.e. a stricter scrutiny of discrimination affecting “sensitive” groups confronted with structural disadvantage.\textsuperscript{137} In arguing for her approach Loenen exhibits sensitivity to the role of the courts in a democratic society often missing from the more critical and deeply theoretical debates.

2.3.2. Back to values, then onwards to the strictness of review

In varying degrees all three equality models exhibit some form of normative indeterminacy or ambiguity. Normative indeterminacy dominates the formal model and from there it is an uphill climb along the scale towards a clearer normative directive in the substantive models. In all models, however, normative indeterminacy as to the construction of sameness/difference/disadvantage is a problem as well as varying degrees of ambiguity as to the treatment prescribed. As correctly pointed out by Louise Mulder: “As in the case of the notion of formal equality, the legal purport of substantive equality rests ultimately upon value judgments which cannot be expressed in one universally applicable formula.”\textsuperscript{138}

\textsuperscript{136} This may be the case for EC law as well as American law. See Fredman: Reversing Discrimination. She argues that the EC approach argues from both the formal and substantive camps on the issue of positive action, pp. 585-587 and similarly as to the struggle over affirmative action in the Supreme Court of the United States of America, cf. pp. 590-596.

\textsuperscript{137} Titia Loenen: Rethinking Sex Equality as a Human Right, pp. 268-269. Similarly see Wentholt, p. 59.

\textsuperscript{138} Mulder, p. 66.
In open-ended prescriptions of equality such as Article 14 or Article 1 of Protocol 12 to the Convention, these value judgments and this normative import into the legal prescription take place through court practice.\(^{139}\) It is through application that it becomes apparent whether the formal or the substantive models are at work. To be sure, awareness of the theoretical probing into the function and nature of equality reflected in the scale from formal to substantive equality informs the choices made in application, as evidenced in the examples of the sex equality law of the European Community and Canadian equality law mentioned in Chapter 2.1. \textit{supra}. It is, thus, primarily through the case law of the implementing organs that a study such as the present can analyse the degree to which an open-ended prescription of equality has substantive elements. It is \textit{how} the implementing organs analyse the individual case that becomes instrumental. As pointed out by Titia Loenen in discussing how indirect discrimination can oscillate between containment and revolution the important factor is: "...the strictness of the review involved."\(^{140}\)

The review of discrimination is undertaken through analysis in two principal steps. The first step in analysis must establish the existence and basis of differentiation. Following that the question arises whether the differentiation is justified and the objective and reasonable justification test decides where the line between banned discrimination and permitted or even desirable differentiations lies.\(^{141}\) Strictness or leniency in the review, placing respectively maximal or only minimal burdens on the establishment of difference of treatment and the justification for differentiation, implies whether the approach is formal or substantive. Thus, the strictness of review becomes absolutely instrumental in positioning a case on the sliding scale from formal to substantive equality.

\(^{139}\) Bossuyt, p. 231 argues that discrimination collapses into individual cases that the Courts must decide. See generally Chapter 1.3.4. \textit{supra}.

\(^{140}\) Loenen: \textit{Indirect Discrimination: Oscillating Between Containment and Revolution}, p. 206.

2.4. AN INTEGRATED APPROACH TO SUBSTANTIVE EQUALITY

From the discussion of substantive equality in theory and practice, supra, the principal elements pertaining to substantive equality can be discerned.

The development of the concept of substantive equality is based on three principal theoretically elaborated concerns. First, it is based on a normative import into the concept of equality that exhibits some form of a concern for social justice in the form of equal outcomes. Second, it is based on a concern for equality in terms of social groups as opposed to individuals and is, thus, relatively indifferent to individual intention to discriminate. Finally, it draws on a contextual analysis of difference or disadvantage accompanied by a critical reflection of the asymmetrical social relations of groups.

These concerns inform the level and kind of scrutiny attached to the review of discrimination cases in practice. A shorthand definitional phrase for the kind of scrutiny required by a substantive approach is *a purposeful and contextual scrutiny*. Such scrutiny is conscious of the social realities of structural patterns of disadvantage. It is strict on stereotypes, bigoted and paternalistic differentiations while being lenient, or even openly inviting, on differentiations that function to alleviate the burdens of the disadvantaged.

The strictness of scrutiny reaches through the whole sphere of discrimination analysis to become instrumental in deciding whether formal or substantive approaches to equality are at play. *A purposeful and contextual* approach to non-discrimination is strict on direct forms of discrimination and has allowed the development of the legal definitional phenomena of indirect discrimination, positive measures and positive obligations of states under general non-discrimination provisions.

A study positioning a particular jurisdiction on the scale from formal to substantive equality greatly contributes to our understanding of its potentials and limitations.
The present study will in Chapter 5 turn to elaborating on the three levels and various factors affecting strictness of review under the non-discrimination provisions of the Convention. In Chapter 7, Conclusions, the position of the non-discrimination provisions of the Convention on the formal-substantive scale of equality will be extrapolated from the characteristics of these influencing factors.
3. PROTECTION AGAINST DISCRIMINATION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

3.1. INTRODUCTION

The present part of the study will focus on the general parameters of Article 14 of the Convention and Article 1 of the new Protocol 12 to the Convention, which was opened for signature in November 2000 and will enter into force three months after 10 member states have ratified it, cf. its Article 5. In Chapter 3.2. the structure, scope and basic parameters of the provisions, as well as their interrelationship will be discussed. This part of the study will primarily be based on the analytical approach explicitly set out by the Court when dealing with cases under Article 14, the Explanatory report to Article 1 of Protocol 12, as well as the traditional literature on these issues. Only a few critical comments will be added. The purpose is to provide a relatively clear picture of the traditional approach of theory and practice to the non-discrimination provisions of the Convention. Then, in Chapter 3.3., the analytical approach developed by the Court to deal with discrimination issues and the traditional literary approach to it will be discussed in more detail and critically evaluated. Chapter 3.3. concludes that the traditional approach is ineffective for explaining the existing case law of the Court and not viable as the approach for dealing with the emerging new possibilities in the Convention’s protection against discrimination. This conclusion forms the basis to the new approach to the Convention’s protection against discrimination suggested in Chapters 4 and 5.

3.2. THE NON-DISCRIMINATION PROVISIONS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS - ARTICLE 14 AND ARTICLE 1 OF PROTOCOL 12.

3.2.1. Structure

The structure of a non-discrimination clause may have significant consequences as to its interpretation and application. There are two distinguishing structures for discrimination clauses, an open model and a closed model. Open model discrimination clauses do not limit the potential range of the clause in two significant
ways; they do not limit the possible grounds of discrimination and they do not define in any way what may constitute discrimination. In contrast, closed models limit the possible grounds of discrimination and endeavour to elaborate on what may constitute an objective justification for certain situations.\textsuperscript{142}

Article 14 of the European Convention on Human Rights has been considered the epitome of an open-model non-discrimination clause.\textsuperscript{143} Article 1 of Protocol 12 to the Convention follows the structure of Article 14 in this regard.\textsuperscript{144} The analytical approach to Article 14 has, therefore, been developed solely through the Court’s case law and Article 1 of Protocol 12 follows the already established approach of the Court.\textsuperscript{145}

The first issue of importance is that the open-model formulation in Article 14 entails that the provision itself does not elaborate on the test for drawing the line between illegal discrimination and justified differentiations and does not limit in any way the possible justifications for differentiation. All types of justifications are therefore allowed under the objective and reasonable justification test developed in the case law and followed by Article 1 of Protocol 12.

The second issue of significance concerns the list of discrimination grounds, or in other words the list of badges of differentiation, banned under the provisions. In this regard, it is clear that Article 14 does not attempt to stipulate an exhaustive list as it

\textsuperscript{142} Heringa, p. 27.
\textsuperscript{143} Ibid, p. 28 and Bayefsky, p. 5 referring to the non-exhaustive list of discrimination grounds only. Article 14 stipulates: “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, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”.
\textsuperscript{144} Article 1 of Protocol 12 stipulates: “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.
\textsuperscript{145} No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.”.
\textsuperscript{145} Explanatory report to Protocol 12, paras. 18-20.
bans discrimination “on any ground”, proceeds to mention certain types of discrimination grounds by way of example and ends with the mention of “other status” as a possible badge of differentiation. The enumeration of discrimination grounds in Article 1 of Protocol 12 is identical to that in Article 14. The lists of both provisions mention the following badges of differentiation: sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. While it was acknowledged that new discrimination grounds such as disability, sexual orientation and age have become more important since Article 14 was drafted, the Explanatory report to Protocol 12 states that it was not considered necessary to add further grounds to the list. This was supported by the arguments that the list is non-exhaustive and that the Court has already applied Article 14 to grounds of discrimination not explicitly enumerated on the list. The inclusion of new discrimination grounds was considered able to: “...give rise to unwarranted a contrario interpretations as regards discrimination based on grounds not so included.” A fear of exclusion of discrimination grounds other than those mentioned or interpretations implying a hierarchy in relation to discrimination grounds seems to form the basis to this approach. The argument forwarded for it, however, seems to be rhetorical. Regardless of the number of enumerated grounds, the fact that the list is non-exhaustive should suffice to prevent a contrario interpretations leading to the exclusion of certain discrimination grounds. It is hard to see why the addition of new discrimination grounds into a clearly non-exhaustive list would at present lead to such interpretations as it did not following the adoption of Article 14. As regards a possible hierarchy between discrimination grounds, such a hierarchy in a sense already exists in the case law of the Court. As will be discussed in more detail in Chapter 5.2. infra, the intensity of scrutiny in Article 14 cases varies in relation to the different discrimination grounds and it is to be expected that the same methods will

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146 Explanatory report to Protocol 12, para. 20. The Parliamentary Assembly had called for the inclusion of sexual orientation on the list of grounds as it believed that the enumeration of grounds was meant to list particularly odious forms of discrimination, cf. Draft Protocol No. 12 to the European Convention on Human Rights, Council of Europe Parliamentary Assembly, Opinion No. 216 (2000), para. 6.
be applied in the adjudication of Article 1 of Protocol 12. This, indeed, is an approach that has been hailed as in the spirit of a substantive approach to equality or non-discrimination.\textsuperscript{147} A clear mention of additional discrimination grounds in Protocol 12 could have indicated a common ground between the contracting states that they were of particular relevance or considered particularly serious. That, in turn, could have had the influence that such discrimination grounds were subject to stricter scrutiny. In effect, Protocol 12 leaves it up to the Court to develop the protection of the various discrimination grounds. The Court can already and will continue to be able to add weight to discrimination grounds that are not explicitly included on the list of grounds in Article 14.\textsuperscript{148} While the approach of the Protocol does not exclude continuing developments of that kind, the addition of discrimination grounds could certainly have accelerated them.

Regardless of the influence the list of badges of differentiation could have on the strictness of review under the non-discrimination provisions, the non-exhaustive list has a very significant effect on the extent of protection they afford. The extensive protection entails that distinctions of any kind may engage Article 14 or Article 1 of Protocol 12 scrutiny: “...and the issue of whether or not it has been violated does not turn on questions such as whether sex includes sexual orientation or pregnancy...”.\textsuperscript{149}

3.2.2. Field of application

3.3.2.1. Autonomous but accessory nature of Article 14

\textsuperscript{147} Loenen: Rethinking Sex Equality as a Human Right, p. 269.
\textsuperscript{148} As will be discussed in Chapter 5.2.4. infra, the case law of the Court has already acknowledged the unlisted ground of illegitimacy as ground for strict scrutiny and it can be argued that sexual orientation has also by now reached that status.
\textsuperscript{149} Bayefsky, p. 6. Non-discrimination provisions that contain exhaustive lists of badges of differentiation call for more detailed interpretation of what the enumerated badges of differentiation entail.
Article 14 of the European Convention on Human Rights is expressly confined to the prohibition of discrimination in the enjoyment of the rights and freedoms otherwise set forth in the Convention and has correspondingly been interpreted by the Court as being autonomous in meaning but accessory in scope. The autonomous meaning of Article 14 entails that its application does not presuppose the violation of another Convention provision but because of the accessory scope its application is contingent upon the facts of the case falling within the "ambit" of another Convention provision. Because of the accessory scope of Article 14 it is reviewed "in conjunction" with other Convention provisions. It has been argued that through time the degree of relationship the discrimination issue has to have with the other

\[150\] For a chronological account of the development of case law on the autonomous but accessory nature of Article 14, see Dijk and Hoof, pp. 711-716 and Harris O'Boyle and Warbrick, pp. 464-469. See also Stephen Livingstone: Article 14 and the Prevention of Discrimination in the European Convention on Human Rights, (1997) 1 European Human Rights Law Review, p. 25, at pp. 26-27. The analysis of cases in Table 3, pp. 278-299 refers inter alia to the judgments where the Court has expressly dealt with the scope of Article 14. On the autonomous meaning and accessory scope of Article 14 see Belgian Linguistics, 23.07.1968, para. 9, pp. 33-34, National Union of Belgian Police v. Belgium, 27.10.1975, para. 44, Marcke v. Belgium, 13.06.1979, Van der Mussele v. Belgium, 23.11.1983, para. 43, and the standard test, first presented in Rasmussen v. Denmark, 28.11.1984, para. 29: "Article 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not necessarily presuppose a breach of those provisions - and to this extent it has an autonomous meaning -, there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter.". The following subsequent cases have referred to the Rasmussen v. Denmark "ambit" formula: Abdulaziz, Cabales and Balkandali v. The United Kingdom, 28.05.1985, para. 71, Inze v. Austria, 28.10.1987, para. 36, Karlheinz Schmidt v. Germany, 18.07.1994, para 22, Van Raalte v. The Netherlands, 21.02.1997, para. 33, Petrovic v. Austria, 08.07.1999, para. 22 and Thimmenos v. Greece, 06.04.2000, para. 40. In a similar vein see also Rekvényi v. Hungary, 20.05.1999, para. 67. The judgment in Botta v. Italy, 24.02.1998 is an example of how the Article 14 issue can be excluded, as the facts of the case do not fall within the ambit of another Convention Article. In this case the claims of the applicant under Article 8 concerned the positive obligation to remedy omissions by private bathing establishments, which did not provide disabled access. Article 8 was not found applicable as the claim concerned such broad and indeterminate interpersonal relations that there was no link between it and the state's obligation. Hence, Article 14 could not apply, cf. para. 39.
substantive Convention rights has become more relaxed.\textsuperscript{151} It is interesting to note that it has become more frequent in recent judgments that the Court does not expressly deal with Article 14 "in conjunction" with another Convention provision.\textsuperscript{152} This seems to indicate a continuing such development. There must nevertheless exist a relationship between the substantive rights and freedoms protected in the Convention and the discrimination issue for it to be reviewable under Article 14.

While issues of protection from discrimination may be relevant in any and all fields of law and social relations, the lack of protection against discrimination in the enjoyment of economic, social and cultural rights is particularly conspicuous. Article's 14 autonomous meaning but accessory scope is a well-known and often criticised handicap of the Convention’s protection against discrimination. Criticism has in particular been directed at the fact that the level of protection afforded by the European Convention is lesser than that in other instruments of international human rights protection.\textsuperscript{153}

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\textsuperscript{151} Dijk and Hoof, pp. 713-715, with the conclusion that "...at least some kind of relation..." is required, cf. p. 715.
\textsuperscript{152} See the following judgments: Beard v. The United Kingdom, 18.01.2001, Chapman v. The United Kingdom, 18.01.2001, Coster v. The United Kingdom, 18.01.2001, Jane Smith v. The United Kingdom, 18.01.2001, Lee v. The United Kingdom, 18.01.2001, Bilgin v. Turkey, 16.11.2000, Özgür Gündem v. Turkey, 16.03.2000, Beyeler v. Italy, 05.01.2000, Ergi v. Turkey, 28.07.1998, Tekin v. Turkey, 09.06.1998 and Akdivar and Others v. Turkey, 16.09.1996. This is also the case in P.M. v. Italy, 11.01.2001, which is a Chamber judgment that has not become final as referral to the Grand Chamber has been requested according to Article 43. It will be unnecessary to review the discrimination issue "in conjunction" with another Convention provision under the new independent ban against discrimination in Article 1 of Protocol 12.
\end{flushleft}
The limited accessory nature of Article 14 has two main consequences. First, it leaves the Convention short of expressly recognising a general principle of equality and non-discrimination that has been argued as being recognised generally in international law.154 No less importantly it leaves the Convention provisions short of recognising an independent "right to equality"155 or a right to non-discrimination applicable beyond the confines of the other enumerated rights of the Convention.

3.3.2.2. The new independent Article 1 of Protocol 12

The initiatives of the Council of Europe's Steering Committee for Equality between Women and Men and the European Commission against Racism and Intolerance lay at the foundation of the elaboration of Protocol 12. Both bodies emphasised the need for an independent right in an effort to strengthen the Convention's protection of equality and non-discrimination in their respective fields.156 The new Protocol was intended to: "[broaden] in a general fashion the field of application of Article 14...".157 It is clear that the scope of protection of Article 14 is expanded considerably in Article 1 of Protocol 12. The Explanatory report explains that the expansion reaches discrimination in the following fields:

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154 The preamble to Protocol 12 to the Convention refers to such a principle as well as the Explanatory report to the protocol. See generally Bayefsky.

155 A phrase coined by Torkel Opsahl in drawing a distinction between Article 14 of the European Convention and Article 26 of the International Covenant on Civil and Political Rights, UNTS 171, i.e. respectively accessory equal rights contingent upon the scope of other human rights and an independent right to equality irrespective of other human rights. See Opsahl, p. 54 and 59.

156 Explanatory report to Protocol 12, paras. 4-7.

157 Ibid, para. 10.
“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;
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).”

Clearly the focus of the Protocol and the Explanatory report, like the prevailing focus of Article 14 jurisprudence, is on human rights in the public sphere and not on relations between private parties. The field of application of Protocol 12 is accordingly limited to the conduct of “public authorities”. According to the Explanatory report, the term public authority refers to administrative authorities, courts and legislative bodies alike.

Once the new Protocol 12 enters into force, the question of whether the facts of a case raised as one of discrimination come within the “ambit” of another Convention provision will not be an issue limiting the possible review of the case. For the future, then, the “ambit” test is bound to become redundant.

3.2.3. The concept of discrimination and the analytical approach of the Court

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158 Ibid, para. 22. The combined effect of Article 1 of Protocol 12 as a whole is to reach all the above elements and it was considered irrelevant to specify which of the elements fell under each of its paragraphs, ibid, para. 23. Finally, para 29 of the Explanatory report states that in Article 1 of the Protocol: “The word “law” may also cover international law, but this does not mean that this provision entails jurisdiction for the European Court of Human Rights to examine compliance with rules of law in other international instruments.”.

159 Ibid, para. 30. The term is intended to have the same meaning as in Articles 8 and 10. Questions relating to the “drittwirkung” or indirect horizontal effect of Article 14 and Article 1 of Protocol 12 will be discussed in Chapter 5.1.3 infra. Article 14 also reaches the conduct of administrative authorities, courts and legislative bodies alike, cf. Oddny Mjöll Arnardóttir: Um gildissvið og eðli hinnar almennu jafnrædisreglu Stjórnarskráinnar, (1997) 47:2 Timarit Logfræðinga, p. 94 at p. 102.
The concept of discrimination and the analytical framework for Article 14 is more or less clearly established in the case law of the European Court of Human Rights. The test set out in the *Belgian Linguistics* case is still instrumental.\(^{160}\) To begin with, the concept of discrimination and the analytical approach of the Court hold that a difference in treatment must exist. Sometimes, the Court adds to its express delimitation of the analytical framework that it is different treatment of persons in analogous or relevantly similar situations that must exist.\(^{161}\) In other cases no express reference is made to this issue as part of the analytical approach, but it seems generally to be implied and present in the reasoning of the Court. If the required difference in treatment is established the Court proceeds to the objective justification test.\(^{162}\) Under the objective justification test a violation occurs if the difference in treatment has no *objective and reasonable justification*. Such objective and reasonable justification exists if the difference of treatment pursues a *legitimate aim* and if there is a “...reasonable relationship of *proportionality* between the means employed and the aim sought to be realised.”\(^{163}\)

In the approach of the Court, differences in situations may be relevant in two ways. First, if no relevantly similar situations exist there may be no need to proceed any further in the analysis of the case. In such cases, it is analytically possible that no justification is required for the difference in treatment.\(^{164}\) Second, differences in

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\(^{160}\) *Belgian Linguistics*, 23.07.1968, para. 10, p. 34.

\(^{161}\) As early as in *National Union of Belgian Police v. Belgium*, 27.10.1975, the second case in which the Court decided on Article 14, the consideration was added that: “...it safeguards individuals, or groups of individuals, placed in comparable situations.”, cf. para. 44. For a recent restatement of the analytical approach that includes the analogous situation condition see *Thlimmenos v. Greece*, 06.04.2000, para. 44. For additional cases where the relevantly similar situations test is expressly mentioned see footnote 33 *supra*.

\(^{162}\) As will be discussed in Chapters 4.3.3. and 4.4. *infra* the Court sometimes runs together the consideration of whether there exist analogous or relevantly similar situations and the objective justification test. See Dijk and Hoof, p. 720.

\(^{163}\) *Belgian Linguistics*, para. 10, p. 34 (italics added).

\(^{164}\) Harris, O’Boyle and Warbrick, p. 475, noting that justifications are nevertheless often examined in such cases. The similar judgments in *Edoardo Palumbo v. Italy*, 30.11.2000 and *P.M. v. Italy*, 11.01.2001, which is a Chamber judgment that has not become final as referral to the Grand Chamber.
situations may count as a justification for their different treatment. Commentators take these as instances where the objective and reasonable justification test is performed and the differences inherent in the compared situations function as justifications under the test. Hence, they often take such cases as mixing up the two allegedly distinct tests of establishing comparability and relevantly similar situations on the one hand and of establishing objective justification on the other. A standard formula applied by the Court in this respect links the question of differences as justifications for different treatment with the margin of appreciation accorded to the contracting states. The formula holds that the contracting states are allowed a margin of appreciation: "...in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law...".

In the recent landmark judgment of Thlimmenos v. Greece the Court restated its analytical approach in the above terms. On the basis of this not being the only possible facet of the prohibition against discrimination the Court formulated a wholly new test under Article 14: "The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.".

has been requested according to Article 43, are examples of the Court undertaking no reasonable and objective justification scrutiny regarding comparisons between landlords and tenants. In Edoardo Palumbo v. Italy, para. 52, the Court reasoned: "In view of the fundamental differences between a landlord and a tenant, the Court does not find that these two situations can be compared as being analogous and considers therefore that no question of discrimination arises in the present case. Accordingly, there has been no breach of Articles 14 and 1 of Protocol No. 1 taken together.". In Spadea and Scalabrino v. Italy, 28.09.1995, para. 46, the Court had undertaken some form of an objective and reasonable justification test on the different treatment of landlords and tenants by referring to considerations of proportionality under Article 1 of Protocol 1. The shorter and more formal reasoning of the Court in Edoardo Palumbo v. Italy and, then, in P.M. v. Italy (not final) may have built on the Court's already established stance in the earlier case.

E.g. Livingstone, p. 30 and Dijk and Hoof, p. 720.

For example: Stubbings and Others v. The United Kingdom, 22.10.1996, para. 72. For an in-depth discussion of the issues raised here, see Chapters 4.3.3. and 4.4. infra.

Thlimmenos v. Greece, 06.04.2000, para. 44.
The *Thlimmenos v. Greece* judgment concerned the lack of accommodation for the applicant’s different status as a Jehovah’s Witness and a conscientious objector as compared with other people convicted of a felony. Before the judgment the focus of the case law on Article 14 had been on the equal treatment of situations that were considered analogous. That approach focused on the first part of the equality maxim that equals should be treated equally but not on its second part, that unequals should be treated unequally. The prevailing approach under the Convention had, therefore, been characterised as a formal approach. The consideration of differences or unequal situations had been either a vehicle for excluding review or confined to functioning as a justification for different treatment under the objective and reasonable justification test. Never before had it been the basis for active accommodation of such difference. The *Thlimmenos v. Greece* judgment can therefore be characterised as planting the seeds for a more substantive approach to equality under the Convention.

The new Article 1 of Protocol 12 builds on the prevailing approach to the concept of discrimination as: “The meaning of the term “discrimination” in Article 1 is intended to be identical to that in Article 14 of the Convention.” In particular, both the Explanatory report and the opinion of the Court on the new Protocol, reiterate the established analytical approach stemming from the *Belgian Linguistics* case as well as referring to the margin of appreciation of national authorities to assess how differences in otherwise similar situations may justify differences of treatment.

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168 Loenen: Rethinking Sex Equality as a Human Right, p. 263. The formal approach is discussed generally in Chapter 2.2.1. *supra.*

169 Explanatory report to Protocol 12, para. 18.

The adoption of Protocol 12 is not intended to amend or abrogate Article 14 of the Convention. Article 14 will therefore continue to apply, cf. Article 3 of Protocol 12, which stipulates that Articles 1 and 2 of the Protocol shall be regarded as additional articles to the Convention and that all the provisions of the Convention shall continue to apply.171 There is a considerable overlap between the two provisions in Article 14 of the Convention and Article 1 of Protocol 12. The Explanatory report to Protocol 12 states this in the following terms: “Article 1 of the Protocol encompasses, but is wider in scope than the protection offered by Article 14 of the Convention.”172

Protocol 12 does more than expand the scope of application of Article 14. As will be discussed in detail in Chapter 5.1.3. infra it also touches upon several important issues of positive obligations and indirect horizontal effect. While being issues that have been discussed under Article 14, these are not phenomena that have to any considerable extent been acknowledged as encompassed by Article 14. The Thlimmenos v. Greece judgment is the first sign that accommodation for differences is encompassed by Article 14 and among the first signs that positive obligations are in fact part of state obligation under Article 14. It is noteworthy that the judgment was pronounced during the period when the preparation of Protocol 12 and the related debate was at its zenith in the Council of Europe.173 It is quite possible, indeed likely, that the draft Protocol and its content on positive obligations had an effect on the new and progressive interpretation of Article 14 evidenced in the Thlimmenos v. Greece judgment.

171 Article 1 of Protocol 12 is its substantive article, stipulating a general prohibition of discrimination; Article 2 of Protocol 12 concerns the territorial application of the Protocol.
172 See generally Explanatory report to Protocol 12, para. 33.
Clearly, the conceptual frameworks of Article 14 and Article 1 of Protocol 12 are intended to be identical. It is up to the Court to interpret the two provisions and their relationship. In light of the clear intention for conceptual convergence and the indication from the Thlimmenos v. Greece judgment, it is suggested here that the interpretation of the two provisions will in all likelihood be in concert on all issues other than those related to the clear difference of scope. Therefore, the concept of discrimination, the analytical approach and all the factors that may influence the strictness of review will be taken generally to be subject to the same principles and considerations under the two provisions.

In the following analysis, the observations based on the case law on Article 14 may be taken to apply generally to Article 1 of Protocol 12. Otherwise, if and when Protocol 12 calls for specific discussion it will be addressed separately.

3.3. STRICTNESS OF REVIEW AND THE MARGIN OF APPRECIATION DOCTRINE

3.3.1. Introduction

Chapter 3.3.2. will deal with the analytical tests the Court explicitly applies in its reasoning under Article 14. The stance argued for is that these tests do not capture or explain the true substantive reasoning governing the outcome of cases but rather function to mask it. Instead, it is argued that the strictness of review in application is the key to understanding Article 14 and Article 1 of Protocol 12. In the context of the European Convention on Human Rights the strictness of review can primarily be understood through the doctrine of the margin of appreciation afforded to the contracting states. The principle of subsidiarity and the margin of appreciation doctrine will be discussed in Chapters 3.3.3. and 3.3.4.

3.3.2. The analytical approaches of the Court critically examined

3.3.2.1. Establishing the different/equal treatment of relevantly similar/different situations
As discussed in Chapter 1.3.2. supra, the equality maxim is central to Article 14 of the Convention. Under the equality maxim equal situations prescribe equal treatment and different situations prescribe different treatment. The analytical approach of the Court accordingly entails that in order to evaluate whether Article 14 has been violated, it must first be established that different or similar treatment has taken place, that it is based on a certain badge of differentiation and that relevantly similar situations or (highly) relevantly different situations exists. The literature on Article 14 generally forwards the interpretation that the applicant who claims to be the victim of discrimination bears the burden of proof for establishing these factors. The issues raised by this part of analysis of cases under Article 14 will be discussed in detail in Chapter 4 infra, which offers a new interpretation of the Court’s case law on the burden of proof for the similarity or difference of situations under Article 14. Differences that are inherent in the otherwise similar situations compared may also function as justifications for different treatment. This as an analytical test will be dealt with in Chapter 3.3.2.3. infra.

3.3.2.2. The objective and reasonable justification test

Establishing the different treatment of relevantly similar situations or the same treatment of (highly) relevantly different situations is not enough to finally decide a case under Article 14. As discussed in Chapter 1.3.4. supra, the Court has had to add other facets to its analysis under Article 14 in order to delimit the boundaries between illegal discrimination and allowed forms of treatment. The objective and reasonable justification test is the primary test under which a violation of Article 14 is decided. The test holds that Article 14 is violated if relevantly similar situations are treated differently or if (highly) relevantly different situations are treated equally without an objective and reasonable justification; that is if the treatment does not pursue a legitimate aim or if there is no “...reasonable relationship of proportionality between the means employed and the aim sought to be realised.”174

174 Belgian Linguistics, 23.07.1968, para. 10, p. 34.
So the concepts of *legitimate aim* and *proportionality* form additional guidelines for analysis under the non-discrimination provisions of the Convention. The objective and reasonable justification test, however, raises problems of its own. Without further elaboration of what, more precisely, it takes to establish legitimate aims and proportionality, a test referring to these phenomena seems: "...hardly more than a different way of expressing the problems inherent in the notion of discrimination."  

A. Legitimate aim

The first level of the objective and reasonable justification test requires that the contested measure pursue a legitimate aim. As a legal test for establishing whether certain treatment is discriminatory, assessing whether the respondent state has pursued legitimate aims raises at least two significant issues. The first issue is that it seems quite clear that any treatment can be argued to pursue an aim that may qualify as legitimate. Consequently a legitimate aim can almost always be found and argued for in a case under Article 14. Governments can always claim good intentions and noble aims and the assessment of whether the aim pursued is legitimate only focuses on the aim in isolation. It does not call for assessment of whether the measure taken was actually conducive towards the attainment of that aim or whether the measure taken functions to the detriment of certain groups in society. For example, blatant discriminatory racial segregation can be argued to pursue legitimate aims such as conducing towards public tranquillity, restoring calm and order in society or similar aims which in themselves would be considered legitimate under the Convention.

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175 Sundberg-Weitmann, p. 36. Partsch, p. 590 similarly doubts whether legitimate aim and proportionality are separate issues in analysing cases under Article 14 or simply two different ways of referring to the spirit of justice. As referred to in Chapter 1.3.1. the Aristotelian concept of justice entails the equality maxim.

176 E.g. Partsch, p. 587.

177 For example, in *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, 28.05.1985, para. 81, the Court *per se* accepted the aim of advancing public tranquillity in respect of immigration rules that discriminated against immigrant husbands as compared with immigrant wives, but found that the measure in question did not serve the aim.
In the absence of very clear cases of invidious discriminatory intent, the legitimate aims test \textit{per se} seems able to be satisfied in any case. The second issue arises if the legitimate aims test is taken more seriously and focuses on actually assessing the viability of the aims claimed pursued by the state. Such a test would raise serious questions concerning the competence of the Court to judge the aims pursued by states. Actively assessing the aim sought to be realised by a state entails not only assessing the intentions of a state in how it governs its matters but also the legitimacy of the policies it has, through democratic processes, decided to pursue. If taken seriously and applied strictly, the legitimate aim test, thus, lands right at the heart of subsidiarity and margin of appreciation concerns.\textsuperscript{178} The principle of subsidiarity in the Convention system, after all, entails that: “The national authorities remain free to choose the measures which they consider appropriate in those matters which are covered by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention.”\textsuperscript{179} It would be difficult to reconcile these concerns, relating to the role of the Court \textit{vis-à-vis} the contracting states’ freedom to choose the policies they decide to pursue, if the Court actively assessed the legitimacy of those very policies.

In response to the problem that some legitimate aim can always be found and forwarded, some commentators have endeavoured to argue for a legitimate aims test that encompasses a more detailed guide for behaviour and places a defined constraint on which aims can be considered legitimate. Partsch suggests a legitimate aims test that only allows limitations on the non-discriminatory enjoyment of Convention rights (aims) that are inherent in the nature of the right at stake or are designed to remedy inequalities.\textsuperscript{180} This would in his contention render a legitimate aims test that: “...would exclude giving preference to public interests in relation to individual ones in so far as these are not included in limitation clauses.”\textsuperscript{181} Sundberg-Weitman, in a similar vein, suggests a legitimate aims test that is based on protected

\textsuperscript{178} Discussed in more detail in Chapters 3.3.3. and 3.3.4. \textit{infra}.

\textsuperscript{179} \textit{Belgian Linguistics}, 23.07.1968, para. 10, p. 34.

\textsuperscript{180} Partsch, p. 587.

\textsuperscript{181} \textit{Ibid}, p. 588.
Convention values: “Thus, an aim that runs counter to the state of affairs sought to be realised by the Convention should not be held to be a “legitimate” aim under the Convention.” 182 Although forwarded under their discussion of the legitimate aims test, the concerns expressed seem to relate more clearly to the proportionality test as the test that weighs the public interest in pursuing a certain policy against the private interests related to the enjoyment of the Convention rights at stake. 183 These interpretations of the legitimate aims test have moved from focusing purely on the legitimacy of aims to considering the relationship between that aim and the effect of the measure in question.

The attempts of Partsch and Sundberg-Weitman to elaborate on a more concrete legitimate aims test, thus, only amount to merging it with the proportionality test. 184 The principle of subsidiarity and the doctrine of the margin of appreciation entail that the Court should not assume the role of assessing the legitimacy of the policies the contracting states choose to pursue, but only their conformity in effect with the requirements of the Convention. Approaches to the legitimate aims test that go further than those discussed by Partsch and Sundberg-Weitman and seek guidance elsewhere than in the protected individual interest under the Convention would, therefore, seem to miss the difficulty of reconciling assertive application of the test with the principle of subsidiarity. As a result, the most viable interpretation of the legitimate aims test seems to be that it only entails the absence of discriminatory intent in the aims pursued. 185 This interpretation seems to have some express support

182 Sundberg-Weitmann, pp. 48-49.
183 See the discussion of the proportionality test in Chapter 3.3.2.2. B. infra.
184 Other authors that argue for substantive constraints on the legitimate aims at stake in a case expressly subsume that consideration under a proportionality concern, see Sheldon Leader: Proportionality and the Justification of Discrimination, in Janet Dine and Bob Watt (eds.): Discrimination Law: Concepts, Limitations and Justifications, London: Longman, 1996, p. 110, at p. 111.
185 An interpretation forwarded by Lochak, p. 139. Lochak, however, does not reason out why she forwards this interpretation.
in the case law of the Court.186 However, as will be discussed in Chapter 4.3.1.2. A \textit{infra}, states can almost always rationalise legitimate intentions and it is extremely difficult for applicants to substantiate a claim of discriminatory intent. In terms of the reality of the Court’s case law, this construction of the legitimate aims test therefore entails that it is completely toothless in combating discrimination.

When analysing the case law of the Court it indeed becomes clear that the difficulties related to the construction of the legitimate aims test have rendered it completely redundant. As pointed out by many commentators, states will usually have no difficulty in convincing the Court of the legitimate aims of the measures in question.187 Any treatment can be argued to pursue a legitimate aim and a simple rhetorical assertion of that aim seems to satisfy the Court. Only in two cases has the respondent state been found not to pursue a legitimate aim.188 The first case was \textit{Darby v. Sweden}, in which the Government did not argue that the measure in question had a legitimate aim.189 The second example is more perplexing. In the \textit{Thlimmenos v. Greece} judgment the Court, sitting as a Grand Chamber, concluded that the measure in question was disproportionate and, then, reasoned: “It follows

186 National Union of Belgian Police v. Belgium, 27.10.1975, para. 48, Schmidt and Dahlström v. Sweden, 06.02.1976, para. 40 and Swedish Engine Drivers’ Union v. Sweden, 06.02.1976, para. 46 all link the legitimate aims test with the absence of ill intentions on behalf of the state. The more recent case law of the Court also provides some examples. In Özgür Gündem v. Turkey, 16.03.2000, para. 73, and the very similar case of Ibrahim Aksoy v. Turkey, 10.10.2000, para. 83, the Court found that the restrictive measures on the applicants’ freedom of expression pursued a legitimate aim and that there was, therefore, nothing to suggest that they could be attributed to a difference of treatment based on ethnic origin. Similarly also in Magee v. The United Kingdom, 06.06.2000, para. 50, the Court found that the difference of treatment complained of (different prevention of terrorism legislation in different parts of The United Kingdom) was not based on the alleged badge of differentiation of national origin or association with a national minority but on geographical location within a federal state.


188 See Table 1, p. 272 \textit{infra}.

189 \textit{Darby v. Sweden}, 23.10.1990, para. 33. Livingstone, p. 32 and Arai, p. 7 seem to miss the point that the Government forwarded no legitimate aim in its defense and interpret the judgment as indicating the possibility of a substantive application of the legitimate aims test.
that the applicant’s exclusion from the profession of chartered accountants did not pursue a legitimate aim.”

This reasoning seems to indicate that a finding on the lack of proportionality by definition entails the lack of a legitimate aim. This goes against the established case law of the Court, which has in many instances concluded on the existence of a legitimate aim but the lack of proportionality or objective and reasonable justification.

In the subsequent judgment of *Camp and Bourimi v. The Netherlands* the Court, now as a Chamber, reverted back to the original approach that the legitimate aims test is not simply part of the proportionality test and found that there existed a legitimate aim but no reasonable relationship of proportionality between that aim and the measure in question. However this question may play out in the future case law of the Court, it is clear that the legitimate aims test in either interpretation is redundant as an independent test. In the established interpretation it can only entail the lack of discriminatory intention, which is in effect a redundant test. In the *Thlimmenos v. Greece* interpretation, like in Partsch’s and Sundberg-Weitmann’s, it can only be a part of the proportionality test.

In conclusion, the true substantive reasoning of the Court upon which a case is decided does not really depend on assessing the “legitimate aim” of the contested measure. The establishment of a legitimate aim has become a rhetorical and artificial assertion that has nothing to do with the issues truly deciding the case.

B. Proportionality

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190 *Thlimmenos v. Greece*, 06.04.2000, para. 47.
192 *Camp and Bourimi v. The Netherlands*, 03.10.2000, para. 39.
Marc-André Eissen has argued for the existence of the principle of proportionality throughout the European Convention. Although not expressly stipulated anywhere in the Convention, the principle of proportionality can be identified in the second paragraphs of Articles 8-11 of the Convention, allowing limitations on rights that are “necessary in a democratic society”.\footnote{See Marc-André Eissen: The Principle of Proportionality in the Case-Law of the European Court of Human Rights, in R. St. J. Macdonald, F. Matscher and H. Petzold (eds.): The European System for the Protection of Human Rights, Dordrecht: Martinus Nijhoff Publishers, 1993, p. 125, at pp. 126-131.} It can also be identified in the case law of the Court as part and parcel of many other Convention provisions, in particular when it comes to defining the scope of rights or the scope of allowed limitations to Convention rights.\footnote{Ibid, pp. 131-137 (limitations and restrictions) and pp. 137-140 (scope of a right).} The principle of proportionality has consistently been associated with the “fair balance” test that weighs the public interest in a certain measure against the individual interest involved in the enjoyment of Convention rights.\footnote{Ibid, p. 144.} In applying the proportionality test, the case law of the Court has balanced the consideration of whether certain measures are disproportionate against consideration of the margin of appreciation states enjoy.\footnote{Ibid, p. 145. See also Matscher, p. 79, arguing that: “The principle of proportionality thus acts as a corrective and restriction of the margin of appreciation doctrine.”. The margin of appreciation doctrine will be discussed in Chapter 3.3.4. infra.}

The concept of proportionality under Article 14 of the Convention seems to be closely connected to the general principle of proportionality as present throughout

\footnote{See footnote 191 supra on judgments where legitimate aim is considered to exist but the requirement for proportionality is not met. See also Livingstone, p. 30, Arai, pp. 7-8 and Harris, O’Boyle and Warbrick, p. 480. Partsch, pp. 590-591, however, distinguishes between the weighing of interests at stake and the proportionality tests and argues that the proportionality test is redundant.}
the Convention. Many judgments of the Court reach a conclusion on proportionality under Article 14 by reference to the analytical tests, encompassing proportionality concerns, applied under other Convention provisions. In Cha’are Shalom Ve Tsedek v. France, the Court reviewed the measure in question under Paragraph 2 of Article 9 and found that, with reference to the margin of appreciation, the measure in question could not be considered excessive or disproportionate. For the same reasons it found that the difference of treatment in question had an objective and reasonable justification under Article 14.198 In Rekvényi v. Hungary, the Court found that, having regard to the margin of appreciation, the measure complained of was justified as pursuing a legitimate aim and not being excessive in scope or effect under the “necessary in a democratic society” test relevant to the second paragraphs of Articles 10 and 11.199 As regards review under Article 14, it simply noted that these considerations provided justification, as they were: “…equally valid in the context of Article 14...”.200 In Mathieu-Mohin and Clerfayt v. Belgium the Court allowed for implied limitations on the right to free elections under Article 3 of Protocol 1 and formulated a test for a legitimate aim and proportionality of the limitation to the aim.201 The measure in question was, with reference to the margin of appreciation, not found disproportionate to the legitimate aim of defusing the language disputes in the country.202 As regards review under Article 14 the Court simply referred to its reasons for a finding of non-violation under Article 3 of Protocol 1.203 The “fair balance” test, that assesses whether a measure strikes: “…a fair balance between the demands of the general interests of the community and the requirements of the protection of the individual’s fundamental rights.”204 has also been referred to as

198 Cha’are Shalom Ve Tsedek v. France, 27.06.2000, paras. 84 and 87. The measure in question was denying the applicant association approval to carry out ritual slaughter.
199 Rekvényi v. Hungary, 20.02.1999, paras. 41, 46-49 and 61. The measure complained of was the prohibition on police officers’ membership in political parties.
200 Ibid, para. 68.
201 Mathieu-Mohin and Clerfayt v. Belgium, 02.03.1987, para. 52.
202 Ibid, para. 57. The effect of the system complained of was that parliamentarians belonged to language-groups and institutions depending on the language they took the parliamentary oath in.
203 Ibid, para. 59.
204 Spadea and Scalabrino v. Italy, 28.09.1995, para. 33.
encompassing the proportionality requirement under Article 14. In Spadea and Scalabrino v. Italy the "fair balance" test was applied, in view of the margin of appreciation, to evaluate state control of property allowed in the second paragraph of Article 1 of Protocol 1. Review of the same issue under Article 14 as discriminatory against landlords simply referred to that finding.  

Similarly, in the Sheffield and Horsham v. The United Kingdom judgment, the claim of the applicants hinged upon the state's positive obligation under Articles 8 and 14 to accommodate for their status as transsexuals. When assessing the possible positive obligations under Article 8, the Court referred to the: "...fair balance that has to be struck between the general interest of the community and the interests of the individual..." and found no violation. When reviewing the applicants' claim under Article 14 the Court reasoned that the fair balance test was equally encompassed in the reasonable and objective justification test and found no violation.  

In this case the Court also balanced the application of the analytical tests under Article 8 and Article 14 against the margin of appreciation allowed to the state.  

Finally, in the Belgian Linguistics judgment, when applying the analytical objective and reasonable justification test to questions 1-3 and 6, the Court referred to considerations related to the fair balance test.  

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205 Ibid, paras. 40 and 46. The measure complained of was that the landlord could not recover his property until the tenants, who were not in arrears, left of their own accord. In view of the margin of appreciation, this was not found disproportionate to the aim of protecting tenants in a situation of housing shortage.  

206 Sheffield and Horsham v. The United Kingdom, 30.07.1998, para. 52.  

207 Ibid, para. 76.  

208 Ibid, paras. 59 and 76.  

209 Belgian Linguistics, 23.07.1968, para. 7, p. 44, para. 13, p. 50, para. 19, p. 56 and para. 42, p. 86. The measures complained of were 1) preventing state schools in unilingual areas that did not teach in the language of the area, 2) preventing the operation of mixed language schools in unilingual areas, 3) special status communes where only primary education could be in French and had to be accompanied by compulsory study of Dutch and 6) certificates from some schools not admissible for homologation. On questions 1-3 and 6 the finding of the Court was that the measures in question were not disproportionate. The Court emphasised that the measures did not upset the balance between the public interest and the individual rights guaranteed by the Convention.
Under Article 14 more specifically, the principle of proportionality has been consistently referred to in the terms that Article 14 is violated if there is no: "...reasonable relationship of proportionality between the means employed and the aim sought to be realised." When it comes to elaborating on the proportionality test in more detail, however, the case law and the literature seem to have little to add to this general statement. The literature has characterised the proportionality principle as assessing the “fit” between the measures taken and the aims advanced or by weighing the harshness of the measures against the importance of the aim pursued. Assessing the fit and the harshness of the measure in question evaluates

\[210\] Belgian Linguistics, 23.07.1968, para. 10, p. 34, was the first judgment in which proportionality was referred to in these terms. It has been referred to consistently in these terms ever since. For recent examples see e.g. Camp and Bourmi v. The Netherlands, 03.10.2000, para. 37, Cha'are Shalom Ve Tsedek v. France, 27.06.2000, para. 87, Thlimmenos v. Greece, 06.04.2000, para. 46, Chassagnou and Others v. France, 29.04.1999, para. 91 and Larkos v. Cyprus, 18.02.1999, para. 28. In Belgian Linguistics, 23.07.1968, para. 10, p. 34 it was expressly stated that this relationship of proportionality had to be clearly established. Jeroen Schokkenbroek: The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation, in (1998) 19:1 Human Rights Law Journal, p. 20, at p. 21 points out that although this wording may indicate that the proportionality test is less strict under Article 14 than under other Convention provisions, this does not give rise to any clear conclusions as the strictness of review varies from case to case under all Convention articles. The conclusion that the qualification that the lack of proportionality must be clearly established is not of significance is also supported by the fact that it has not been part of the Court’s statement of the law under Article 14 since the judgments of Belgian Linguistics, ibid, and National Union of Belgian Police v. Belgium, 27.10.1975, paras. 46 and 49.

\[211\] Livingstone, p. 32.

\[212\] Sundberg-Weitmann, p. 53. She argues that the proportionality test entails weighing the importance of the aim against the harshness of the means employed and that this as a test under the Convention goes too far, as judgment of the importance of state policies would conflict with the principle of state sovereignty. Instead she argues for a test that only measures arbitrariness and is limited to assessing whether the aim in question could have been attained by a different measure. The reference to the individual interest in the enjoyment of Convention rights inherent in the proportionality test makes protected Convention rights the source of judgment and, thus, seems to minimise the need for Sundberg-Weitmann’s concern in relation to state sovereignty (the principle of subsidiarity). Her argument for a different arbitrariness test measuring only whether the aim could have been reached by different means seems redundant. As the lesser is entailed in the greater the reasonableness test as set out by Sundberg-Weitmann is encompassed in the proportionality test as
its effect on the private interest in the enjoyment of Convention rights. This private interest is, then, weighed against the public interest involved in the legitimate aims pursued.213 The proportionality principle may be stated as a requirement that the disadvantage or impingement on a Convention right suffered by the individual is not excessive in pursuit of the public interest aim in question.214

As regards the case law, Table 1, pp. 272-274 infra, exhibits that less than half of the cases decided on basis of Article 14 actually refer to the proportionality test in their reasoning.215 If they do, most of the judgments simply repeat the standard formula relating to the requirement for proportionality and then emphasise some of the factual circumstances of the case in support of a finding on whether the measure in question is disproportionate to the aim or not.216 Quite commonly, the application of

applied by the Court cf. Inze v. Austria, 28.10.1987, para. 44 where the Court reasoned that it was established that: "...the aim of the legislation in question could also have been achieved by applying criteria other than that based on birth in or out of wedlock."

213 Dijk and Hoof, p. 726 clearly connect the proportionality principle with the weighing of public and private interest. See also generally Eissen, p. 144 associating the proportionality principle with the "fair balance" test. Partsch, pp. 588-590, however, distinguishes between the weighing of public and private interests and the proportionality test as two distinct tests and emphasises the weighing of public and private interest as the more important test.

214 See National Union of Belgian Police v. Belgium, 27.10.1975, para. 49, which states that the disadvantage suffered by the applicant is not excessive in relation to the legitimate aim pursued by the Government. See also Leader, p. 111.

215 In most judgments the analytical approach, referring to the objective and reasonable justification test, is set out by the Court as a general statement of the law. When it comes to applying the law to the facts of the case, the actual reasoning of the Court, it differs which parts of the analytical tests, if any, are emphasised. See generally Table 1, pp. 272-274 infra.

216 Camp and Bourimi v. The Netherlands, 03.10.2000, para. 39 (Other heirs not unaware of the illegitimate child's existence and the exigencies of the situation did not require the level of protection afforded to the deceased parents and siblings to the detriment of his son. Disproportionate.), Thlimmenos v. Greece, 06.04.2000, para. 47 (Conscientious objection does not imply dishonesty or moral turpitude and the applicant did serve a prison sentence for it. Imposing a further sanction on the applicant, therefore, disproportionate.), Salgueiro da Silva Mouta v. Portugal, 21.12.1999, para. 36 (In a custody case, a distinction was drawn on basis of the father's sexual orientation. Disproportionate.), McMichael v. The United Kingdom, 24.02.1995, para. 98 (A natural father's need to apply to a court to obtain legal recognition of his parental role respected the principle of
the proportionality test is also expressly balanced against the margin of appreciation allowed to a state.\(^{217}\)

\(^{217}\) See Cha're Shalom Ve Tsedek v. France, 27.06.2000, Rekvényi v. Hungary, 20.02.1999, Mathieu-Mohin and Clerfayt v. Belgium, 02.03.1987, Spadea and Scalabrino v. Italy, 28.09.1995, Sheffield and Horsham v. The United Kingdom, 30.07.1998 and Belgian Linguistics, 23.07.1968, discussed supra as subsuming Article 14 proportionality review under the analytical tests applied under other Convention provisions. See also Gillow v. The United Kingdom, 24.11.1986, para. 66 (The exclusion of around 10% of houses from housing control as they were expensive and not likely to be sought after by persons in need of housing protection not considered as imposing a disproportionate burden on owners of more modest houses. Regard had to the margin of appreciation.), James and Others v. The United Kingdom, 21.02.1986, paras. 76-77 (Tenants' right to acquisition of property under the "long leasehold" system of tenure pursued the aim of securing social justice in housing. Applying this right only to a class of property defined by two criteria was not considered disproportionate in light of the margin of appreciation.), Ireland v. The United Kingdom, 18.01.1978, paras. 229-230 (Bearing in mind the limits on its powers of review, the Court could not conclude that the more widespread application of special powers of arrest and detention without trial to IRA terrorist than to Loyalist terrorists was disproportionate to the legitimate aim of eliminating the most formidable organisation first.), Engel and Others v. The Netherlands, 08.06.1976, para. 72 (The Court took note of a considerable margin of appreciation as regards the ranking of servicemen inherent in the hierarchical
The Court has elaborated somewhat on the requirements posed by the proportionality principle in one category of cases. These are the cases where the Court requires that "very weighty reasons" be forwarded as justification for a difference of treatment on the basis of sex, illegitimacy or nationality.\(^{218}\) The literature has in addition argued for a similar heightened requirement for justification in respect of discrimination on basis of race and religion.\(^{219}\) None of the Court’s other judgments on proportionality under Article 14, or their literary treatment, actually elaborate on the degree of "fit" required between the aim and the measure under review or the characteristics required of public or private interests to outweigh each other under the proportionality test.\(^{220}\) In addition it has been pointed out in the literature that if the

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\(^{218}\) See generally the discussion in Chapter 5.2.4.1. *infra.*

\(^{219}\) See Chapters 5.2.4.3. and 5.2.4.6. *infra.*

\(^{220}\) F. Matscher: *Methods of Interpretation of the Convention*, in R. St. J. Macdonald, F. Matscher and H. Petzold (eds.): *The European System for the Protection of Human Rights*, Dordrecht: Martinus Nijhoff Publishers, 1993, p. 63, at p 63 argues that: "the Court’s case-law is largely casuistic and only occasionally contains statements capable of general application...". Iain Cameron: *Protocol 11 to the European Convention on Human Rights: the European Court of Human Rights as a Constitutional Court?*, in (1995) 15 *Yearbook of European Law*, p. 219, at p. 229 points out the practical problems involved in interpreting the judgments of the Court as: "...the fact that the Court is careful to keep as close as possible to the facts of the case at hand reduces the value of its judgments as general statements of the law.". Although forwarded in the context of discussing the value of the Court’s judgments as a source of law for domestic courts and administrative agencies Cameron’s comments are equally relevant to the interpretation of the Court’s case law per se and support the present argument. The practice of the Court to simply restate the standard proportionality formula and then to emphasise some of the factual circumstances of each individual case exhibit clearly the casuistic nature of the Court’s judgments and the difficulty in inferring from its case law any general guidelines as to the principle of proportionality as a legal test under Article 14. For a possible explanation as to
proportionality principle as a justification under a non-discrimination provision only concerns assessing the relationship of proportionality of means to the aim sought to be realised, without placing substantive constraints on what aims can be chosen, the justifications provided by it are artificial as the outcome of the assessment can be controlled through the choice of the aim in question. This sometimes seems to happen in the reasoning of the Court. In any case, as the assertion of a legitimate aim is uncritical and rhetorical but the assessment of proportionality refers to that aim, the proportionality assessment under Article 14 becomes "weak". The considerations actually governing the outcome of a case seem to have very little to do with truly evaluating the aim in question or the proportionality of the measures taken to that aim.


221 Leader, pp. 115-117, referring to this as the "weak" version of the proportionality principle.

222 Rekvényi v. Hungary, 20.05.1999 seems to be a good example of how the outcome in a case may be governed by the choice of a legitimate aim. The case concerned the prohibition on police officers' membership in political parties. The aim of the measure was the protection of national security and public safety and the prevention of disorder (para. 41) in the form of having a politically neutral police force (para. 46). The measure in question was not found disproportionate to that aim as indeed could almost any restriction on the political activity of police officers once the legitimate aim of maintaining a politically neutral police force has been asserted. In Engel and Others v. The Netherlands, 08.06.1976, para. 72, the legitimate aim in question was the: "...preservation of discipline by methods suited to each category of servicemen." Almost any difference in disciplinary measures based on rank seems potentially proportionate to such an aim. In Swedish Engine Driver's Union v. Sweden, 06.02.1976, para. 46, consideration of the aim in question took the following form: "...the Office prefers as a general rule to sign collective agreements only with the most representative organisations; it is anxious not to find itself faced with an excessive number of negotiating partners, in order to avoid dissipating its efforts and to arrive more easily at concrete results. The Court deems this aim to be legitimate...". Declining to sign a collective agreement with the applicant union was not found disproportionate to this aim as could almost any measure that simplifies the collective bargaining process for the state. Similarly in National Union of Belgian Police v. Belgium, 27.10.1975, paras. 48-49, the aim found legitimate was that of avoiding trade union anarchy and ensuring a coherent and balanced staff policy. Declining consultation with a trade union, as it was not among the "most representative" was not found disproportionate to that aim as could almost any measure restricting the possible proliferation of the number of unions consulted.
From the case law of the Court it seems that elaboration of the proportionality test is impossible. With the exception of the cases on discrimination based on race, illegitimacy and nationality that require “very weighty reasons” to justify differences in treatment, there are no structured guidelines to follow in inducing the necessary characteristics of public or private interest or the degree of fit required. This may explain why no commentator on Article 14 seems to have succeeded in elaborating convincingly on the factors that actually govern the evaluation of proportionality as the test that primarily directs the outcome of a case. Rather than elaborating on the proportionality test as such, they seem to proceed to discussing the strictness of review applied in a case as the phenomenon that governs its outcome. As pointed out by Stephen Livingstone the proportionality test is intended to measure the “fit” between the measures in question and the aim sought to be realised, and: “The problem for any court applying this sort of test is how intensive its review should be.”  

3.3.2.3. The differences in otherwise similar situations test

As early as in the Belgian Linguistics judgment, the Court exhibited a concern for the similarity or difference of situations compared as an element of justification under Article 14. When applying the objective and reasonable justification test set out in the judgment, the Court found that the sixth question discussed concerned unequal situations and found the measure complained of justified as pursuing a legitimate aim and not being disproportionate to that aim. In the Engel and Others v. The Netherlands and Kjeldsen, Busk Madsen and Pedersen v. Denmark, its fifth and sixth judgments based on Article 14, the Court for the first time referred to differences inherent in the situations compared as the basis for its judgment, without linking this to the objective and reasonable justification test. In three other cases, judgment

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223 Livingstone, p. 32.

224 Belgian Linguistics, 23.07.1968, para. 42, p. 86. Engel and Others v. The Netherlands, 08.06.1976, para. 73, concerning the difference of treatment between civilians and servicemen: “However, this does not result in any discrimination incompatible with the Convention, the conditions and demands
was based on the comparability of situations or lack of different treatment, without reference to the objective and reasonable justification test. Then, in the Rasmussen v. Denmark judgment, the Court formulated a specific “differences in otherwise similar situations” test and linked it to the margin of appreciation: “The Court has pointed out in several judgments that the Contracting States enjoy a certain ‘margin of appreciation’ in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law.” This differences in otherwise similar situations test has been restated in Article 14 cases ever since.

of military life being by nature different from those of civilian life.”. Kjeldsen, Busk Madsen and Pedersen v. Denmark, 07.12.1976, para. 56: “Accordingly, the distinction objected to by the applicants is founded on dissimilar factual circumstances and is consistent with the requirements of Article 14.”.

225 In Ireland v. The United Kingdom, 18.01.1978, concerning the second period considered, the Court found no different treatment. In Sunday Times v. The United Kingdom (I), 26.04.1979, para. 71, the press and parliamentarians were not found to be placed in comparable situations and there was no different treatment established between newspapers. The judgment in Van der Mussele v. Belgium, 23.11.1983, para. 46, found no similarity between the disparate situations of advocates and other professions.

226 Rasmussen v. Denmark, 28.11.1984, para. 40. The Court stated that it had pointed this out previously. This is not entirely accurate as the Rasmussen v. Denmark judgment is, in fact, the first judgment that relates the margin of appreciation to precisely the issue of differences in similar situations as justifications. In Ireland v. The United Kingdom, 18.01.1978, para. 229 the Court referred generally to the: “...limits on its powers of review...”. In Engel and Others v. The Netherlands, 08.06.1976, para. 72, the Court referred to: “...a considerable margin of appreciation.”. In Swedish Engine Drivers’ Union v. Sweden, 06.02.1976, para. 47, the Court mentioned in a general manner the: “...power of appreciation...” left to the state. Finally in National Union of Belgian Police v. Belgium, 27.10.1975, para. 47, the Court referred to concerns related to the principle of subsidiarity. Other earlier judgments concerning Article 14 do not refer to subsidiarity or margin of appreciation concerns, cf. De Jong, Baljet and van den Brink v. The Netherlands, 22.05.1984, Van der Mussele v. Belgium, 23.11.1983, Sporrong and Lomroth v. Sweden, 23.09.1982, Marckx v. Belgium, 13.06.1979, Sunday Times v. The United Kingdom (I), 26.04.1979, Kjeldsen, Busk Madsen and Pedersen v. Denmark, 07.12.1976 and Schmidt and Dahlström v. Sweden, 06.02.1976.

Strictly speaking, the only possible justification for differences of treatment under the equality maxim would be differences in the situations compared. The importance of the equality maxim repeatedly finds expression in the reasoning of the Court as the dividing line between discrimination and justifiable differences is reasoned out with reference to the differences in the situations compared. As exhibited in Table 1, pp. 272-274 *infra*, around a third of the Court’s case law does not expressly refer to the objective and reasonable justification test when applying Article 14. Instead, these judgments refer to the different treatment or its basis not being established or the lack of similar situations as the reason for the outcome of the case. This case group constitutes around half of the findings of non-violations of Article 14, whereas the finding of non-violation in the other half of the judgments is based on reference to the objective and reasonable justification test or specific aspects of it.  

Many of the judgments that do refer to the objective and reasonable justification test, however, also discuss the similarity or differences inherent in the situations compared as significant factors under that test. A few clear examples include the judgments of *Thlimmenos v. Greece*, *Spadea and Scalabrino v. Italy* and *Rasmussen v. Denmark*, which all primarily focused on the situations compared to reach a conclusion while linking that conclusion to the objective and reasonable justification test.  

Another type of judgments combines considerations related to the objective

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228 See Table 1, pp. 272-274 *infra*. Some judgments address more than one question under Article 14 and may refer to the objective and reasonable justification test in respect of some aspects of the case while not referring to it in respect of other aspects.

229 In *Thlimmenos v. Greece*, 06.04.2000, para. 47, the Court discussed the difference between conscientious objectors to military service and other people convicted of serious criminal offences and related this to a finding of a lack of proportionality and legitimate aim. In *Spadea and Scalabrino v. Italy*, 28.09.1995, para. 46 the different use made of residential and non-residential property provided
and reasonable justification and differences in otherwise similar situations tests. These are examples like the judgments of Building Societies v. The United Kingdom, Stubbings and Others v. The United Kingdom and Kamasinski v. Austria, that find no different treatment and/or no similar situations but nevertheless proceeded to conclude that there exists objective and reasonable justification.\(^{230}\)

It may be argued that the differences in otherwise similar situations and objective and reasonable justification tests are two distinct tests.\(^{231}\) It may also be argued that the reference to differences in otherwise similar situations is a concrete expression of one of the viable justifications under Article’s 14 objective and reasonable justification test.\(^{232}\) The differences in otherwise similar situations test as applied in the case law of the Court makes no attempt at locating itself on either the legitimacy of aims or proportionality requirements inherent in the objective and reasonable

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\(^{230}\) Building Societies v. The United Kingdom, 23.10.1997, para. 89-90, where the Court found that no relevantly similar situations existed but proceeded to pronounce that even if they did, there existed objective and reasonable justification. Stubbings and Others v. The United Kingdom, 22.10.1996, paras. 73-74, where no disparity in treatment and no analogous situations were found, but even if comparisons could properly be drawn the differences in situations provided objective and reasonable justification. Kamasinski v. Austria, 19.12.1989, paras. 93, 100 and 108, where the Court reasoned that even assuming the existence of comparable situations or different treatment, the measures complained of had objective and reasonable justifications.

\(^{231}\) It has been argued that the legitimacy of aims and proportionality tests cannot be the right tests for determining whether certain treatment is allowed under a non-discrimination provision as a difference of treatment can only be justified if the facts of the case require different treatment by exhibiting differences in situations. Such an interpretation would be consistent with a literal reading of the equality maxim. See W. Kewenig: Der Grundsatz der Nichtdiskriminierung im Völkerrecht der internationalen Handelsbeziehungen, Vol. I, Frankfurt: Athenäum Verlag, 1972, p. 106.

\(^{232}\) Brita Sundberg-Weitmann, p. 35, takes the comparability of situations and the justification tests as being, in effect, the same tests: “In the following, only the condition of comparability of situations will be discussed. In practice it may be referred to in other ways, e.g. “lack of justification”. What is stands for, no matter what we call it, is a value judgment.” (footnote reference omitted).
justification test and the case law exhibits that the tests may be referred to simultaneously or separately. The relationship of the two tests is far from being clear in the case law of the Court.

From Article’s 14 basic content of the equality maxim, the Court needed a more concrete normative directive to assess discrimination claims. It, thus, in the Belgian Linguistics judgment spelled out the objective and reasonable justification test and referred to concerns related to the principle of subsidiarity, that later developed into the margin of appreciation doctrine.²³³ Then, in the Rasmussen v. Denmark judgment the Court either concretised this test, or alternatively added as an additional test the requirement that differences in otherwise similar situations may function as justifications and that the contracting states enjoy a margin of appreciation in assessing that for themselves. A test that refers to differences in otherwise similar situations as a justification for different treatment is, really, only restating the equality maxim that differences prescribe different treatment. The attempts of the Court to come closer to the normative content of Article 14 have, thus, travelled a full circle; from the basic content of the indeterminate equality maxim, via the objective and reasonable justification test, to the indeterminate equality maxim again. It is apparent that the differences in otherwise similar situations test, as an attempt to spell out the dividing line between allowed differentiations and discrimination, adds very little to understanding of Article 14.

The case law demonstrates clearly the importance of assessing differences in situations as justifications for different treatment. This is a significant feature in the Court’s normative reasoning and many cases are decided by express reference to assessments of the sameness or differences in the compared situations. The unclear link this assessment has with the objective and reasonable justification test exhibits equally clearly how that test does not really capture or explain the true normative reasoning of the Court.

²³³ Belgian Linguistics, 23.07.19868, para. 10, p. 34. On the principle of subsidiarity and the margin of appreciation doctrine see Chapters 3.3.3. and 3.3.4. infra.
3.3.2.4. Positive obligations

As exhibited in Table 1, p. 274, infra, there are two judgments that refer to none of the express analytical tests the Court has developed to deal with claims under Article 14. These are the judgments in Petrovic v. Austria and Vermeire v. Belgium.\(^{234}\)

As will be discussed in Chapter 5.1.3.2. infra, both of these judgments concern a claim of state action hinging on positive obligations under Article 14. The judgments exhibit how the analytical tests elaborated by the Court under Article 14 are ill suited for dealing with claims of positive obligations. Recent developments under the European Convention have acknowledged that positive obligations are indeed part of state obligation not to discriminate. This is evidenced, in particular, in the Thlimmenos v. Greece judgment and by the advent of Protocol 12 to the Convention and will be discussed in detail in Chapter 5.1.3. infra. In Thlimmenos v. Greece, the Court managed to tailor its arguments on positive obligations to the objective and reasonable justification test in the formulation that discrimination may arise if states: “...without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”\(^{235}\) But the actual reasoning behind a conclusion of violation focused on the differences in situations akin to the differences in otherwise similar situations test. Generally, the reasoning forwarded in the judgment did not explicate the characteristics required of public and private interest to result in a finding of a violation of a positive obligation or why this judgment resulted in a finding of violation in comparison with earlier findings of non-violations when claims hinged on positive obligations.

As regards the question of positive obligations under Article 14, or in future under Article 1 of Protocol 12, it is clear that the traditional analytical tests are permeated with at least the same indeterminacies as ever. Given the delicate issues concerning the role of the Court vis-à-vis the national authorities raised by claims of positive obligations, the traditional analytical tests seem particularly inapt to meet the

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\(^{234}\) Petrovic v. Austria, 27.03.1998 and Vermeire v. Belgium, 29.11.1991.

\(^{235}\) Thlimmenos v. Greece, 06.04.2000, para. 44.
complicated questions bound to arise in future application of the Convention’s non-discrimination provisions.

3.3.2.5. Conclusions

As exhibited in the preceding discussion it is almost impossible to make sense of the case law of the Court when following the ritual incantation of the analytical tests the Court itself poses as encompassing its reasoning. They are applied without much elaboration on their characteristics; the legitimate aims test seems redundant, the proportionality test seems unclear and “weak” and the differences in otherwise similar situations test seems just as indeterminate as the equality maxim itself. The unclear relationship between the objective and reasonable justification test and the differences in otherwise similar situations test complicates the picture greatly.

Commentators have sought answers in the margin of appreciation doctrine in response to the difficulties and indeterminacies of the analytical tests applied by the Court. Instead of elaborating on the analytical tests as such, commentators generally proceed to discuss variations in strictness of review as a result of variations in the width of the margin of appreciation. This is in line with the general realisation in the literature that: “The principled management of national margins of appreciation has become one of the most important and difficult tasks in mature systems for the protection of human rights.”. The literary consideration of variations in strictness of review generally only concerns cases where the Court requires “very weighty reasons” to justify differences in treatment or cases similar to them. This discussion of variations in strictness of review under Article 14 has been linked decisively to the assessment of proportionality under the objective and reasonable


237 See generally Chapter 5.2.4. infra.
justification test. The Court itself, however, has linked margin of appreciation concerns more decisively to the differences in otherwise similar situations test as expressed in the Rasmussen v. Denmark judgment. Variations in strictness of review can indeed be formulated into different tests with reference to the balancing of public and private interest inherent in the proportionality test. Thus, the intensity of review may vary from a simple rationality requirement, where the degree of fit required is only a rational relationship between the means employed and the aim sought to be realised to the other end of the spectrum where a strict test may require: "...a compelling interest which can only be furthered by the disputed discriminatory act...". However, the question of how and when each type of a test is required is

238 In the earlier literature, commentators endeavored to elaborate on and propose changes to the analytical tests of the Court, see for example Sundberg-Weitmann, pp. 56-57 (1980) and Partsch, p. 591-592 (1993). In the more recent literature, however, these efforts have been replaced by discussion of variations in strictness of review. Livingstone, p. 32 argues that the problem in applying the proportionality test is how intensive review should be and Arai, p. 8 refers to: "...the vigour with which proportionality is assessed." Schokkenbroek, The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation, p. 21 also refers to the margin of appreciation as relevant to evaluating proportionality. Harris, O’Boyle and Warbrick, pp. 481, argue that assessing: "...whether the difference in treatment is disproportionate to the objective of the state is subject to the state’s margin of appreciation.". Dijk and Hoof, p. 82 argue that: "There exists a close link between these various kinds of proportionality tests and the margin of appreciation...". On pp. 726-727 they connect the weighing of public and private interests inherent in the proportionality test under Article 14 with discussion of the strictness of review, while also mentioning the formula that the contracting states enjoy a margin of appreciation in assessing the "differences in otherwise similar situations" test as justification for different treatment.


240 Heringa, p. 26. He clearly builds on the United States’ approach under Constitutional law for elaborating on different levels of strictness of review. The United State’ approach is that distinctions on basis of race require strict scrutiny under which a distinction must be: "...precisely tailored to advance a governmental interest of compelling importance.". Distinctions on basis of sex require intermediate scrutiny and therefore must be: "...substantially related to the advancement of an important governmental interest.". Other badges of differentiation are subject to varying lower level standards of review requiring absence of arbitrariness or a rational basis to the measure. See Sedler, pp. 92-93. More generally, commentators have identified differently strict proportionality tests in respect of different Convention provisions. Dijk and Hoof, p. 81 argue that where the “necessary in a democratic society” requirement of the second paragraphs of Articles 8-11 are at stake a strict
not answered by the proportionality test itself. The factors influencing the strictness of review do not arise from the proportionality test, but from factors external to it. As formulated by the Court in the Rasmussen v. Denmark judgment: “The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States.”.\(^{241}\)

It is the stance of the present study that analysis of case law that follows the ritual incantation of the analytical tests is an unfruitful avenue to follow in search for understanding of the non-discrimination provisions of the Convention. The analytical tests as applied by the Court only seem to mask the true criteria by which the treatment due under the non-discrimination provisions is evaluated. The factors that influence the strictness of review applied in individual cases are more revealing as to the considerations truly governing the outcome of the case. The literature has begun to identify these factors in relation to the strict review required in cases based on certain “sensitive” badges of differentiation. The following study will analyse the case law of the Court and the recent developments in Protocol 12 by focusing on variations in strictness of review. The following analysis of case law is not restricted to certain parts of the analytical tests or certain badges of differentiation as is the case with the hitherto limited literature on the strictness of review under Article 14 of the Convention. Instead a new approach is taken; an approach that takes variations in strictness of review as its starting point and as encompassing all aspects of analysis.

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\(^{241}\) Rasmussen v. Denmark, 28.11.1984, para. 40.
Subsidiarity is a basic principle under the European Convention on Human Rights. As elaborated on by Herbert Petzold the principle of subsidiarity is: "...implicit in the Convention, inherent in the system of protection established by the Convention, and it has been confirmed as such by the case-law of the Convention institutions."\(^{242}\)

That the Convention system of protection is envisaged as subsidiary is most clearly evident in its Articles 1, 13 and 35. Article 1 stipulates that it is the primary responsibility of the *contracting parties* to secure the rights and freedoms defined in the Convention, Article 13 provides for a right to effective remedy before a *national* authority in cases of violations and Article 35 requires the exhaustion of *domestic* remedies before a case can be brought before the Court.\(^{243}\)

The Court set out its approach to subsidiarity in the *Belgian Linguistics* case. In the judgment the Court pronounced that it could not assume the role of the national authorities as it would, then, lose sight of the subsidiary nature of the Convention system of protection. The national authorities were pronounced to be free to choose the measures they consider appropriate in the field of the Convention and the review of the Court was pronounced to be limited to scrutinising the conformity of the chosen measures with the requirements of the Convention.\(^{244}\)

The principle of subsidiarity thus entails that it falls primarily upon the national authorities to protect the rights enshrined in the Convention and ensure compliance with it. The Convention system of protection is not designed to substitute the judgement and choices ("appréciation") made by the national authorities, but to supervise and review their actions against the standards of the Convention.\(^{245}\)


\(^{243}\) See generally *ibid*, pp. 43-48 discussing other Convention Articles as well.

\(^{244}\) *Belgian Linguistics*, 23.07.1968, para. 10, p. 34, referred to by Petzold, p. 50. See also *Handyside v. The United Kingdom*, 07.12.1976, para. 49.

\(^{245}\) "Subsidiarity within the legal order of the Convention has two aspects: as a procedural or functional concept it means that before appealing to the Convention institutions, any applicant must have had referred his or her complaints to all those domestic institutions which can be considered to
3.3.4. The margin of appreciation doctrine

3.3.4.1. Basis and principal characteristics

The doctrine of the margin of appreciation has developed from the principle of subsidiarity. The *Handyside v. The United Kingdom* judgment is the leading precedent on the Court’s approach to the doctrine. On the basis of acknowledging that the Convention system is a subsidiary machinery of protection, the Court pronounced that the national authorities were: “[b]y reason of their direct and continuous contact with the vital forces of their countries...” in a better position to make the initial assessments in the case. Consequently the national authorities had a margin of appreciation. Their power of appreciation was, however, pronounced limited by the powers of the Court to review their action. The doctrine has been further elaborated on in theory and practice since. Paul Mahoney has elaborated on the legitimacy and underlying philosophy of the doctrine. In addition to

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248 Ibid, para. 49.

recognising the principle of subsidiarity as one of its fundamental bases he points to three other basic tenets of the Convention system that contribute to the legitimacy of the doctrine. To begin with he argues that the open-textured language of the Convention, stipulating “[s]tandards rather than detailed rules…” necessarily calls for interpretation and leaves open a wide range of plausible choices to the Court in this interpretation. One of the principal methods of interpretation of the Convention is evolutive interpretation, which refers to understanding the open-textured concepts of the Convention in light of contemporary social and cultural ideas. In this situation the Court necessarily has an active role bordering on that of a lawmaker. Thus: “Some principles of judicial review are needed to delineate acceptable boundaries of law-making by the Strasbourg judges.” Another basic feature of the Convention system is its promotion of democracy as a basic value. In the Kjeldsen, Busk Madsen and Pedersen v. Denmark judgment the Court pronounced that the Convention is: “...an instrument designed to maintain and promote the ideals and values of a democratic society.” Mahoney argues that as

Schokkenbroek: The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights, pp. 30-31 takes up the themes of subsidiarity (p. 31) and the need to delimit the Court’s role in interpretational law-making (p. 30), developed by Mahoney.

Mahoney: Marvellous Richness of Diversity or Invidious Cultural Relativism?, p. 2.

250 On evolutive interpretation see e.g. Matscher, pp. 68-70, Bernhardt, pp. 69-70 and Dijk and Hoof, pp. 77-80. Numerous examples from case law could be mentioned. Matscher mentions the oft-repeated statement of the Court in the Tyrer v. The United Kingdom judgment: “The Convention is a living instrument which [...] must be interpreted in the light of present-day conditions.”, cf. Tyrer v. The United Kingdom, 25.04.1978, para. 31.

251 Mahoney: Marvellous Richness of Diversity or Invidious Cultural Relativism?, p. 2.

Schokkenbroek: The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights, p. 30 also stresses that: “The need for the “reviewing” body to define its own role in relation to that of the other players in the constitutional setting is more pressing where the rules it applies are less precise…”.

252 Kjeldsen, Busk Madsen and Pedersen v. Denmark, 07.12.1976, para. 53. Whatever the values and ideals of a democratic society may mean precisely is open for discussion. To a certain extent this has been elaborated on by the Court in repeatedly referring to pluralism, tolerance and broadmindedness as the hallmarks of democratic society, cf. e.g. Handside v. The United Kingdom, 07.12.1976, para. 49. In Young, James and Webster v. The United Kingdom, 13.08.1981, para. 63, the Court further
democratically elected bodies are responsible for enacting law and making policy in
democratic societies, deference to democratic governance is inherent in the
Convention and it follows that the Strasbourg Court must have a limited discretion in
law-making, in particular in the area of social and economic policy. Hence, the
Court: "...must give due recognition to the democratic processes of the many and
varied countries making up the Convention's legal community.". Finally
Mahoney mentions cultural diversity among the contracting states as a legitimate
concern under the Convention entailing that the Court should not strive for uniform
solutions for all the cultural and ideological variety existing in the contracting states.
Pluralism is indeed one of the hallmarks of democratic society and the contracting
states may have a choice between different solutions that could all be legitimate
under the same Convention standard as opposed to the Convention imposing a
uniform solution.255 Mahoney, however notes that: "Recognition of legitimate
cultural variety is not the same as cultural relativism.". There is always a balance
to be struck between democratic discretion and cultural diversity on one hand and the
universal standards of the Convention on the other.

On the basis of the above considerations that are fundamental to and inherent in the
Convention, the doctrine of the margin of appreciation has evolved. It has evolved to
meet the need for structured limits on how active a role the Strasbourg Court takes

254 Mahoney: Marvellous Richness of Diversity or Invidious Cultural Relativism?, p. 2. See also
Mahoney: Judicial Activism and Judicial Restraint in the European Court of Human Rights: Two Sides of the Same Coin, p. 81.
255 E.g. Handyside v. The United Kingdom, 07.12.1976, para. 49 and ibid, p. 3.
256 Mahoney: Marvellous Richness of Diversity or Invidious Cultural Relativism?, p. 2.
vis-à-vis the democratic prerogatives of the national authorities. In this light referrals to the margin of appreciation as a doctrine involved with judicial self-restraint seem valid, albeit not conclusive, in particular as it is the Court itself that passes upon its own appropriate role. Commentators seem to be in agreement as to the principal traits and functions of the doctrine. It is involved in delineating the distribution of powers between the democratic discretion of the national authorities and the international supervisory machinery. It is, thus, involved in delineating the appropriateness of judicial intervention in a given case. The function of the doctrine is to adjust the intensity of judicial scrutiny in a case under review, i.e. to adjust the strictness of review.

The margin of appreciation, thus, affects the strictness of review applied in individual cases. In that sense referrals to the width of the margin of appreciation and the strictness of scrutiny may be used interchangeably; a narrow margin of appreciation will indicate strict scrutiny while a wide margin of appreciation will indicate lenient scrutiny.

3.3.4.2. The margin of appreciation doctrine and interpretation

257 Mahoney: Marvellous Richness of Diversity or Invidious Cultural Relativism?, p. 3, Matscher, p. 78 and Howard Charles Yourow: The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence, The Hague: Kluwer Law International, 1996, p. 187. See also Schokkenbroek: The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights, p. 31 on the Court's own interpretation of the constitutional framework it operates in. Referrals to judicial self-restraint are, however, not conclusive. Mahoney: Marvellous Richness of Diversity or Invidious Cultural Relativism?, p. 4 argues that the doctrine of the margin of appreciation is not solely a voluntary exercise of self-restraint by the Court, but also arises out of inherent constraints on the legitimate interpretations of the Court and that it, thus, has its basis essentially in the Convention.

The literature on the margin of appreciation exhibits some conflict as to how precisely to characterise the doctrine in light of its characteristics. Mahoney and Matscher identify the doctrine of the margin of appreciation as a principle of interpretation of the Convention, while Macdonald and Schokkenbroek have identified it as a theory of justification under the Convention.\(^{259}\) Yourow argues that it is a "multifunctional tool" that may take the guise of a method of interpretation, a technique for balancing claims and defences or as a more formal standard for the scope of review of state action under the Convention.\(^{260}\) Be that as it may, there is a clear link between the margin of appreciation doctrine and the methods of interpretation of the Convention.

The interpretation of the Convention is guided by the emphasis the Court has placed on the object and purpose of the Convention as an instrument of effective human rights protection. On that basis, the Court has adopted evolutive interpretation as one of its principal methods of interpretation as well as autonomous interpretation, giving the concepts of the Convention a meaning independent of their meaning in the laws of the contracting states.\(^{261}\) While acknowledging and embracing these methods of interpretation under the Convention, commentators have generally warned that there are outer limits to the legitimate "judicial activism" or interpretational law making by

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\(^{259}\) Mahoney: Marvellous Richness of Diversity or Invidious Cultural Relativism?, p. 2, Matscher, p. 78, Macdonald, p. 123 and Schokkenbroek: The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights, p. 36. Macdonald, p. 85 speaks of the doctrine as: "...obscuring the important distinction between reviewability and justifiability..." as a reference to the margin of appreciation may mean either that the matter is one where the Court will defer to the states own assessment of the situation or that the matter has been reviewed but found justified. Classifying the doctrine as a theory of justification seems to refer to the latter function of the doctrine and not the more formal scope of review issue. Dijk and Hoof, pp. 82-83 (written by Schokkenbroek as acknowledged in Preface to the Third Edition, p. x), argue that the margin of appreciation doctrine is not one of interpretation of the Convention but reserved for the application of the Convention (as interpreted) in concrete cases which seems to indicate a characterisation of the doctrine as a doctrine of justification under the Convention.

\(^{260}\) Yourow, pp. 195-196. A technique for balancing claims and defenses seems correspond to the classification of the doctrine as a theory of justification.

\(^{261}\) See generally Bernhardt, pp. 66-77, Matscher, pp. 65-74 and Dijk and Hoof, pp. 73-80.
the Court. This concern for a necessary counterbalance has been linked decisively with the doctrine of the margin of appreciation, regardless of how it should be characterised more precisely.\textsuperscript{262} Indeed, as argued by Dijk and Hoof: “The margin of appreciation may be seen as a certain counterweight to the Court’s interpretative activism.”\textsuperscript{263}

Mahoney has argued for a clear connection between evolutive interpretation of the Convention as a form of judicial activism and the margin of appreciation doctrine as a form of judicial restraint:

“The doctrine of the margin of appreciation fits into the scheme of evolutive interpretation, in that it represents the factors of representative government and majority rule in counterbalance to the need for progress and evolution in the Convention’s net of protection. It helps draw the line between the domain of the national authorities and the interpretative domain of the Convention institutions: the broader the State’s margin of appreciation, the

\textsuperscript{262} Bernhardt, pp. 67-68, discusses autonomous interpretation on one hand and the margin of appreciation and the comparative (common standard) method on the other as its necessary counterbalance. On p. 70 he links evolutive interpretation and necessary restrictions on judicial activism. Matscher, p. 78 refers to the doctrine of the margin of appreciation as an expression of judicial restraint which has a clear connection with his concern that the evolutive and autonomous methods of interpretation can go too far and enter into the territory of law-making, cf. pp. 70 and 73. Mahoney: Marvellous Richness of Diversity or Invidious Cultural Relativism?, p. 3 argues that: “...there exist inherent constraints on what is legitimate interpretation of the Convention...” and that they find expression in the doctrine of the margin of appreciation. See also Mahoney: Judicial Activism and Judicial Restraint in the European Court of Human Rights: Two Sides of the Same Coin, pp. 87-88.

\textsuperscript{263} Dijk and Hoof, p. 95 (written by Schokkenbroek as acknowledged in Preface to the Third Edition, p. x). Schokkenbroek’s approach is that the doctrine of the margin of appreciation should be characterised as a theory of justification under the Convention, cf. Schokkenbroek: The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights, p. 36. The same characterisation seems to be forwarded in Dijk and Hoof, p. 83 (written by Schokkenbroek as acknowledged in Preface to the Third Edition, p. x). This does not prevent the acknowledgment that the doctrine functions to counterbalance interpretative law making.
narrower will be the scope for evolutive interpretation by the Convention
institutions, and vice versa.\textsuperscript{264}

In light of delimiting the interpretational law-making role of the Court by reference
to the ideas and values of democratic society, it is not surprising that one of the main
themes of the doctrine is consideration of the common ground or common standards
of European democratic societies.\textsuperscript{265} If there exists a consensus in the contracting
states on a particular issue this indicates that the margin of appreciation may narrow
down and vice versa.\textsuperscript{266} This way, the Court seeks democratic legitimation for its

\textsuperscript{264} Mahoney: Judicial Activism and Judicial Restraint in the European Court of Human Rights: Two
Sides of the Same Coin, p. 84.

\textsuperscript{265} Mahoney: Marvellous Richness of Diversity or Invidious Cultural Relativism?, p. 3 argues that the
Court: "...should be careful not to allow that machinery to be used so as to enable disappointed
opponents of some policy to obtain a victory in Strasbourg that they have been unable to obtain in the
elective and democratic forum of their own country. Where social values are still the subject of
debate and controversy at national level, they should not easily be converted by the Court into
protected Convention values allowing only one approach, even if that be the approach that the
Strasbourg judges personally believe to be the right one.". On the common ground factor generally
see e.g. Mahoney, \textit{ibid}, p. 5 and Schokkenbroek: The Basis, Nature and Application of the Margin-of-
Appreciation Doctrine in the Case-Law of the European Court of Human Rights, p. 34. From the
jurisprudence of the Court see e.g. Marckx \textit{v. Belgium}, 13.06.1979, para. 41, Dudgeon \textit{v. The United

\textsuperscript{266} Mahoney: Judicial Activism and Judicial Restraint in the European Court of Human Rights: Two
Sides of the Same Coin, p. 84 and Schokkenbroek: The Basis, Nature and Application of the Margin-
of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights, p. 34. The
relevant consensus may arise from the Convention itself, other international instruments or the
internal law and practices of European states, cf. Schokkenbroek, \textit{ibid}, with references to cases. The
consensus must be sufficiently concrete on the issue at stake for the Court to narrow down the margin
of appreciation. See Beard \textit{v. The United Kingdom}, 18.01.2001, Chapman \textit{v. The United Kingdom},
18.01.2001 and Lee \textit{v. The United Kingdom}, 18.01.2001. All these judgments concerned similar fact
patterns and were dealt with in almost identical terms by the Court. Hereinafter, the Chapman \textit{v. The
United Kingdom}, 18.01.2001, judgment will be referred to as an example of the Court’s approach in
all five cases. The applicants urged that the Framework Convention on the Protection of National
Minorities, \textit{ETS 157}, exhibited an international consensus recognising the special needs of minorities
and that this should lead to a narrower margin of appreciation in the field. As the Framework
Convention sets out general principles and goals without any means of implementation, the Court was

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power and role in interpretational law making, legitimation based on one of the basic tenets of the Convention system itself.\textsuperscript{267} At the same time this approach, if taken too far, opens up the possibility that the Court: "...would forfeit its aspirational role by tying itself to a crude, positivist conception of "standards".\textsuperscript{268}

3.3.4.3. Factors that influence the width of the margin of appreciation and the strictness of review

As elaborated on by Macdonald, adjusting the margin of appreciation is context-dependent and, thus, not susceptible to definition in the abstract.\textsuperscript{269} The doctrine has been developed on a case-by-case basis, generally without elaboration of principle or even without explanatory analysis as to how the margin is adjusted in individual cases.\textsuperscript{270} Studies of how it functions primarily focus on the identification of factors not convinced: "...that the consensus is sufficiently concrete for it to derive any guidance as to the conduct or standards which the Contracting States consider desirable in any particular situation.", cf. Chapman v. The United Kingdom, 18.01.2001, para. 94.

\textsuperscript{267} Similarly Oddý Mjöll Arnardóttir: Vatnýrðómurinn í ljósi tilgátu um samspil jafnhræðisreglu stjórnarskráinna og endurskoðunarvalds dómstóla, in (2000) 53:2 Úlfjóttur, p. 276 forwards the hypothesis that the Icelandic Supreme Court seems to seek democratic legitimation in its application of the Constitution’s ban against discrimination through reference to the consensus or principles that appear in ordinary domestic legislation, cf. pp. 280-281.

\textsuperscript{268} Macdonald, p. 124.

\textsuperscript{269} Macdonald, pp. 84-85. See also Bernhardt, p. 68, arguing that the borderline between national discretion and international supervision cannot be drawn in the abstract, but only in the individual case.


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that influence the width of the margin of appreciation in the application of particular Convention Articles.271 From such case studies, the induction of general trends and factors that may generally influence the margin of appreciation is possible.272

As regards Article 14 scrutiny more specifically the European Court of Human Rights, in the Rasmussen v. Denmark case, delivered the following general formula on what factors may influence the scope of the margin of appreciation:

“The Court has pointed out in several judgments that the Contracting States enjoy a certain “margin of appreciation” in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the

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Kingdom, 18.01.2001, Coster v. The United Kingdom, 18.01.2001, Jane Smith v. The United Kingdom, 18.01.2001 and Lee v. The United Kingdom, 18.01.2001 are an interesting example of an unusually detailed discussion of the appropriate width of the margin of appreciation. For the Court’s discussion of the width of the margin of appreciation under Article 8 see Chapman v. The United Kingdom, 18.01.2001 paras. 90-104. These judgments may indicate that the Court is responding to the criticism of the margin of appreciation and its use by dealing more openly with the issues raised and that it is beginning to: “...articulate the underlying reasons for why a particular amount of deference is considered proper.”, cf. Macdonald, p. 124.

271 See the studies on individual Convention Articles in Macdonald, 85 ff., and e.g. on Article 14 in Schokkenbroek: The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation, pp. 20-23.

272 Mahoney forwards 7 abstract factors that may possibly affect the margin of appreciation as hypotheses to be tested against analysis of the case law: The common ground in democratic societies, the nature of the right protected, the nature of the duty incumbent on the state, the nature of the aim pursued, the nature of the activities in question, the surrounding circumstances and the text of the Convention. See Mahoney: Marvellous Richness of Diversity or Invidious Cultural Relativism?, pp. 5-6. Schokkenbroek: The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights, pp. 34-35, presents from case studies on individual Articles the general conclusions that the influencing factors are the following: The existence of a common ground, the nature of the aim pursued and the policy context of the measure in question, the nature of the activities and private interests in question and emergency situations. Schokkenbroek emphasises that each of the factors is non-decisive and that they only have a relative weight in the overall assessment of the appropriate width of the margin in each case. Similarly see Dijk and Hoof, pp. 87-90 (written by Schokkenbroek as acknowledged in Preface to the Third Edition, p. x).
circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States.\textsuperscript{273}

This general statement, referring to unclear and unexplained considerations of “circumstances”, “background” and “subject matter” does not really explicate how the adjustment of the strictness of review functions. The only fairly concrete factor mentioned, and notably by way of an example, is that of the existence of a “common ground between the laws of the Contracting States”. In the context of Article 8 of the Convention, the Court has referred to similar unclear factors of influence: “...the nature of the Convention right in issue, its importance to the individual and the nature of the activities concerned.”\textsuperscript{274} Notwithstanding such general statements pronounced by the Court, more concrete indications as the how the width of the margin of appreciation under Article 14 is adjusted remains a puzzle to be solved by inducing the principal influencing factors from application in individual cases.

3.3.4.4. Analysing the width of the margin of appreciation and the strictness of review in individual cases under Article 14.

The question remains of how case studies such as the present study can identify the influencing factors that affect the strictness of review (width of the margin of appreciation) under Article 14? Identifying the factors that influence this strictness of review requires two steps. First it requires identifying the strictness of review, i.e. the level of: “...intensity of judicial scrutiny...”,\textsuperscript{275} to determine whether in the case at hand it was strict, lenient or perhaps of intermediate intensity. Secondly it requires identifying the factors that have influenced the intensity of scrutiny in the case at hand.

Identifying the strictness of review involves a qualitative analysis of the reasoning of the Court and the depth of discrimination analysis, i.e. how independent, critical and

\textsuperscript{273} Rasmussen v. Denmark, 28.11.1984, para. 40.
\textsuperscript{274} See e.g. Buckley v. The United Kingdom, 25.09.1996, para. 74.
\textsuperscript{275} Macdonald, p. 84.
purposeful the discrimination analysis of the Court is in a given case. A primary indication of the strictness of review is the outcome of the case. A finding of a violation strongly indicates a tendency towards stricter review, while a finding of non-violation indicates a tendency towards more lenient review. Sometimes the intensity of scrutiny applied in a case may be discerned from the Court’s discussion of the margin of appreciation doctrine in a judgment. A discussion of the margin of appreciation may clearly indicate a tendency towards strict or lenient scrutiny. Silence on the margin of appreciation in a judgment may also be a clear indication of the level of scrutiny applied in that it has been suggested that judgments in which the Court performs a review of a case but remains silent on the margin of appreciation indicate that the case is clear and a finding of a violation or a non-violation has been evident to the Court. Silence on the margin of appreciation, thus, can help identify

276 Yourow, p. 13 for example generally places great emphasis on the outcome of a case in identifying a wide or a narrow margin. He defines the concept of the margin of appreciation along the lines of the Court’s deference to national authorities before it is prepared to declare a violation of the Convention.

277 See e.g. Abdulaziz, Cabales and Balkandali v. The United Kingdom, 28.05.1985, para. 78: “Although the Contracting States enjoy a certain “margin of appreciation” [...] the scope of this margin will vary...”. The Court went on to argue that the equality of the sexes was a major goal in the member states and that, hence, only very weighty reasons could justify a difference of treatment. Here, the discussion of the margin of appreciation clearly indicates a narrow margin and strict scrutiny. Compare with the lenient scrutiny indicated in Engel and Others v. The Netherlands, 08.06.1976, para. 72, referring to: “… a considerable margin of appreciation.”.

278 Schokkenbroek: The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights, p. 34. The arguments forwarded in support of the thesis are that such cases often are simple and straightforward and, hence, decided unanimously and with scant reasoning. Therefore, the margin of appreciation doctrine is redundant in such cases as the role of the Court may be clear vis-à-vis the national authorities and its application reduce the force of the judgment. See also Schokkenbroek: The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation, p. 23 as regards Article 14 jurisprudence specifically, referring to the Marcks v. Belgium, 13.06.1979, and Vermeire v. Belgium, 29.11.1991 judgments as examples. For a more recent example, see e.g. Salgueiro da Silva Mouta v. Portugal, 21.12.1999. This argument may coincide with Mahoney’s argument that the margin of appreciation doctrine only comes into play in instances where: “…the preliminary conditions of normal democratic governance have been shown to exist. […] Absence of a legitimate aim or of good faith, as well as abuse of power or arbitrariness, render the doctrine inoperative.”, cf. Mahoney: Marvellous Richness of Diversity or Invidious Cultural Relativism?, p. 4.
clear cases of either strict or lenient scrutiny. Sometimes, however, the jurisprudence of the Court exhibits some sort of a middle category, where neither strong nor lenient scrutiny is clearly indicated. In such cases the Court is really wrestling with the appropriateness of judicial intervention and a comprehensive qualitative analysis of the depth of review by the Court, coupled by the strong indication from the outcome of the case, becomes instrumental in identifying the strictness of review.

The second level of inquiry is the identification of the factors that influenced the strictness of review in a judgment. Again, the identification of these factors is a question of a qualitative analysis of the reasoning of the Court. The analysis will have to identify and address the factors emphasised in the reasoning of the Court and the general circumstances of the case. The general formula of the Court is that the factors relevant to the adjustment of the strictness of review are: "...the circumstances, the subject matter and its background...". This may encompass many different factors but the only factor hitherto singled out and principally declared relevant by the Court is: "...the existence or non-existence of common ground between the laws of the Contracting States.". Other relevant factors will have to be induced from the reasoning of the Court in individual cases. On the basis of the common ground factor, the Court has clearly identified a few classes of cases in which the scrutiny is strict in that justification for a difference of treatment requires "very weighty reasons". These categories are sex, illegitimacy and nationality. Apart from clearly identifying from the "very weighty reasons" requirement the three categories of strict scrutiny already mentioned, the literature has identified two other categories of strict scrutiny, race and religion. On the other hand, scholarly literature on Article 14 has identified cases on non-discrimination in conjunction with property rights and the area of trade union rights as areas where the margin of appreciation is relatively wide. Restrictions on the

280 Ibid.
281 See generally Chapter 5.2.4. infra.
282 Gomien, Harris and Zwaak, p. 351, argue that the margin of appreciation is generally wide in Article 14 cases and that this is most evident in two lines of cases, on the protection of property and
expression of racial hatred have also been mentioned as an area where lenient scrutiny is applied.283

The literary discussion of the factors capable of influencing the strictness of review is limited in many regards. To begin with it focuses very much on the badge of differentiation involved, i.e. the basis of discrimination in the case. While this is indeed a valid path of investigation and in fact the only type of influencing factor the Court has explicitly discussed as leading to stricter review, it is quite possible that it is not the only influencing factor susceptible to identification and elaboration. Indeed, the case law shows variations in the levels of scrutiny applied in relation to the same badge of differentiation that cry out in opposition to the rather simplistic presentation of influencing factors hitherto prevalent in the literature on strictness of review in relation to Article 14 of the Convention. Schokkenbroek and Heringa for example discuss variations in the strictness of review in more recent cases concerning discrimination on the basis of sex, but seem to insist on the continuing formal and uniform application of strict review in sex discrimination irrespective of other factors such as the issue of which of the two sexes it is that is discriminated against.284 Also, in relation to cases concerning property rights there has not been drawn a clear line between cases which on the one hand concern instances of discrimination in the enjoyment of the right to property irrespective of the badge of differentiation at stake and cases which on the other hand concern the badge of differentiation of “property” in some sense, irrespective of the field of life (right) at stake. Variations in strictness of review in cases in the field of property rights have been noted but left unexplained.285 These variations in strictness of review cry out

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283 Harris, O'Boyle and Warbrick, p. 481 and Livingstone, p. 29, both referring to a Commission opinion in HWP and K v. Austria, (1987), 26 D&R 216. The lack of confirmation by the Court leaves this category, like many possible other categories, with the status of an unsubstantiated possibility.


285 Gomien, Harris and Zwaak, p. 351 refer to: “...restrictions on the peaceful enjoyment of possessions under Article 1 of Protocol No. 1...”, which would indicate that they are referring to
for explanation and direct attention to other factors than the badge of differentiation, capable of influencing the strictness of review. There seems to be more to: "...the circumstances, the subject matter and its background..."\textsuperscript{286} than has hitherto been induced from the case law of the Court.

As stated in Chapter 1.1. \textit{supra}, discrimination claims entail the three basic variables of a) a claim of a particular type of discrimination, b) based on a particular badge of differentiation and c) encroaching upon a particular interest. The thesis of this study is that it can be shown that each of these variables is an important level at which the value judgments underlying application of the general non-discrimination provisions of the Convention take place. At each of these levels a category of factors influencing the strictness of review exists and interplays with the factors pertaining to the other levels. The elaboration of these levels and the influencing factors pertaining thereto will be undertaken in Chapter 5 \textit{infra}, primarily through the analysis of case law as well as from discussion of recent trends discernable in the new Protocol 12 to the Convention. Before entering into discussing the main variables affecting the width of the margin of appreciation, Chapter 4 will discuss the strictness of review and the burden of proof in non-discrimination cases under the Convention.

\textsuperscript{286} Rasmussen \textit{v.} Denmark, 28.11.1984, para. 40.
4. STRICTNESS OF REVIEW AND THE BURDEN OF PROOF

4.1. INTRODUCTION

A relatively simple model on the burden of proof has been inferred from the case law on Article 14 and proposed in the literature. According to this model it is up to the applicant to establish a difference of treatment, its basis and the existence of similar situations while the burden to establish objective and reasonable justification for the treatment in question rests on the respondent state. In relation to this model for the burden of proof, the limited way in which the margin of appreciation has been referred to in the jurisprudence of the Court should be pointed out. The doctrine of the margin of appreciation has only been explicitly applied to the part where the respondent state bears the burden of proof, i.e. the establishment of objective and reasonable justifications for the treatment complained of. This, of course, is only logical as the margin of appreciation refers to the leeway of states to make their own appreciations and not to prerogatives of individual applicants. But, as the simple model goes, the applicant has to make out his/her case that there exists prima facie discrimination before a shift in the burden of proof onto the state occurs and a case reaches the level of objective justification scrutiny. The strictness of review in a case, then, seems necessarily also influenced by how and when this shift in the burden of proof takes place. This section will deal with the interrelationship between allocating the burden of proof and the strictness of review.

287 Harris, O'Boyle and Warbrick, p. 478. Similarly Dijk and Hoof, p. 721-722 and p. 727. In European Community law the burden of proof in cases of discrimination based on sex is similar. It is explicitly dealt with in Council Directive 97/80/EC of 15 December 1997, cf. (1998) O.J. L14/6, which in Article 1 stipulates that when an applicant has: “...establish[ed], before a Court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.”.

288 “…the Contracting States enjoy a certain “margin of appreciation” in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law.”, Rasmussen v. Denmark, 28.11.1984, para. 40.

289 The term “prima facie” refers to the fact that discrimination can be rebutted by showing objective justification.
The concept of “burden of proof” is generally taken to encompass two distinct obligations; the burden to come forward with evidence on the one hand and the burden of persuasion on the other hand.\textsuperscript{290} It is also taken to be true that in adversarial proceedings both obligations apply while in investigatory proceedings only the risk of non-persuasion applies.\textsuperscript{291} In investigatory proceedings, however, both parties have a duty to cooperate with the Court in establishing the facts and disregard of that duty may result in the Court drawing adverse inferences. This again decreases the practical importance of the difference between the two types of proceedings.\textsuperscript{292}

The European Court of Human Rights follows the investigatory model of proceedings in the sense of an active role in fact-finding.\textsuperscript{293} This is provided for in rule 42 of the Rules of Court.\textsuperscript{294} Generally, as a function of the exhaustion of
domestic remedies rule in Article 35, the Court will rely on the fact finding of domestic Courts while it is not strictly bound by it. In instances where the fact finding of domestic Courts is not sufficient, the establishment of a single Court of human rights according to Protocol 11 means that European Court of Human Rights will have to take over the fact finding function previously exercised by the Commission.

Generally speaking, the Court has hitherto: "...steered clear of the concept of the burden of proof." In Ireland v. The United Kingdom it set out its approach that it would not rely on the concept that one or the other party had "the burden of proof", but rather that the Court would examine all the material before it, irrespective of who presented it to the Court, or obtain materials itself. Kokott takes this language of the Court as referring only to the burden of producing evidence and "of course" not

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295 Kokott, p. 218 and Harris, O’Boyle and Warbrick, p. 680 with references to cases.

296 As a rule, the Court previously relied on the fact finding of the Commission, cf. e.g. Harris, O’Boyle and Warbrick, p. 678 with references to cases. Over the next years the Court will have to develop its new role and its approach to fact-finding. Judge Zupancic has put it this way: "There is now no Commission to perform the essential fact-finding function for the Court. It follows logically that the Court will have to adapt to this new situation. It will have to allow for situations in which, as in this case, its own hearings will be akin to first-instance hearings before the national Courts. The Court will have to hear witnesses, permit the cross-examination of hostile witnesses, directly examine and evaluate material evidence, etc. The Court will have to establish its own evidentiary rules pertaining to the burden of proof, the risk of non-persuasion, the principle in dubio pro reo, etc. These rules are already present in our jurisprudence, albeit in a rudimentary form. Needless to say, in establishing these procedural precepts we must above all strictly follow the guarantees of Article 6, as we require of all the signatories of the Convention.", cf. Rehbock v. Slovenia, 28.11.2000, Partly dissenting opinion of Judge Zupancic, Part I.

297 Harris, O’Boyle and Warbrick, p. 679.

298 Ireland v. The United Kingdom, 18.01.1978, para. 160. See also Artico v. Italy, 13.05.1980, paras 29-30.
to the burden of persuasion.\textsuperscript{299} The burden of persuasion can be taken to be universal and unavoidable if the result of a proceeding is to be to arrive at a decision.\textsuperscript{300} When the time comes for decision in the case, one party or the other is always going to bear the risk of non-persuasion.

As regards Article 14 more specifically, the case law shows certain main trends on the burden of proof (burden of persuasion).\textsuperscript{301} According to the simple model it is up to the applicant to establish a difference of treatment, its basis and the existence of similar situations while the burden to establish objective justification for that difference in treatment is up to the respondent state.\textsuperscript{302} Following the \textit{Thlimmenos v. Greece} judgment the concept of discrimination under Article 14 has been extended to encompass instances where the same treatment is accorded to persons in significantly different situations. The same principles on the burden of proof would seem to apply to such situations.\textsuperscript{303} The traditional tendency to place the burden of proof on the party that takes a case to Court and seeks a change in the \textit{status quo} would justify the fact that the applicant bears the burden of proof to begin with. Policy considerations to the effect that the substantive guarantee of non-discrimination is to remain effective, then, justify a shift in the burden of proof and place the burden on the respondent state to establish an objective justification.\textsuperscript{304} In

\textsuperscript{299} Kokott, p. 193, footnote 584. Notice also the referrals of Judge Zupancic to the burden of proof and the risk of non-persuasion as two separate issues, in \textit{Rehbock v. Slovenia}, 28.11.2000, Partly dissenting opinion of Judge Zupancic, Part I.

\textsuperscript{300} Kokott, pp. 16-17, with references.

\textsuperscript{301} Referrals in the following to the “burden of proof” are to be taken as referrals to that aspect of the burden of proof that relates to the burden of persuasion.

\textsuperscript{302} Cf. footnote 287 supra.

\textsuperscript{303} In \textit{Thlimmenos v. Greece}, 06.04.2000, the arguments forwarded by the parties follow the established pattern. The Court accepted the applicant’s arguments that his refusal to wear the military uniform arose only because of his religion as there was nothing in the case file to disprove this, cf. para. 42. The justifications forwarded by the state were not found sufficient.

the language of Convention jurisprudence it can be said that the model on the burden of proof presented in the case law and literature reflects a balance between considerations of state sovereignty as encompassed by the principle of subsidiarity on one hand and the principle of the effectiveness of protection on the other.\textsuperscript{305}

It is, thus, up to the individual applicant to establish \textit{prima facie discrimination}.\textsuperscript{306} According to the simple model suggested in the literature, the term "prima facie discrimination" entails three basic variables; the badge of differentiation (the basis for treatment), the treatment complained of and, depending on the claim being made, the relevantly similar or significantly different situations of the groups compared.

Some cases demonstrate only a minimal standard of proof for prima facie discrimination and proceed directly to the objective justification test, many cases seem to merge consideration of the establishment of prima facie discrimination with consideration of the objective justification test, while other cases exhibit a maximal standard of proof for prima facie discrimination and do not reach the level of objective justification scrutiny at all. It can hardly be said that the jurisprudence of the Court on this issue is characterised by great clarity or coherence. Chapter 4.3. will analyse the case law of the Court as regards the burden of proof that rests upon the applicant. For reasons that will become apparent in Chapter 4.4. \textit{infra} (conclusions), issues concerning the burden of proof that rests upon the respondent burden of proof in cases of discrimination based on sex is similar. It is explicitly dealt with in Council Directive 97/80/EC of 15 December 1997, \textit{cf.} (1998) O.J. L14/6, \textit{cf.} Article 1. The policy consideration and rationale for this is provided in the Preamble to the Directive, para. 17: "Whereas plaintiffs could be deprived of any effective means of enforcing the principle of equal treatment before the national Courts if the effect of introducing evidence on an apparent discrimination were not to impose upon the respondent the burden of proving that his practice is not in fact discriminatory.". Relevant is the fact that the respondent in a discrimination case is likely to control the evidence much rather than the applicant, see Geoffrey Bindman: \textit{Proof and Evidence of Discrimination}, in Bob Hepple and Erika M. Szyszczak (eds.): \textit{Discrimination: The Limits of Law}, London: Mansell, 1992, p. 50, at p. 57.

\textsuperscript{305} On the principle of effective protection, see e.g. Dijk and Hoof, pp. 74-76.

\textsuperscript{306} The reference to the term discrimination is to be taken to encompass all types of discrimination, including the concept of passive discrimination, which will be discussed in Chapter 5.1.3. \textit{infra}.
state are encompassed by consideration of the strictness of objective and reasonable justification review. The following analysis of case law will, thus, not deal with the state’s burden of proof specifically, but rather focus on identifying the point at which the shift in the burden of proof takes place and the factors that may influence this shift in the burden.

4.3. ANALYSIS OF CASE LAW

4.3.1. Badge of differentiation

Harris, O’Boyle and Warbrick point out that the applicant must show what is the basis of the different treatment. As the list of discrimination grounds in Article 14 and Article 1 of Protocol 12 is non-exhaustive the applicant has a wide range of possible factors to identify as the badge of differentiation. Sometimes it is clear and explicit on the face of the treatment complained of what the badge of differentiation is but in other cases it is not so obvious and there is room for doubt. Hence, it varies greatly whether it is a heavy burden to lift to establish the basis to different treatment complained of.

How difficult it may be to establish the badge of differentiation in a case seems more or less to be relative to the claim being made and the overall circumstances of the case. Identifying the badge of differentiation is in fact of paramount importance to the applicant’s case as the badge of differentiation defines the comparisons called for in analysing the case further. The significance of the many possible badges of differentiation varies in relation to the varying significance of the values underlying the desire to outlaw them. Different treatment based on race or sex is much more difficult to justify than different treatment based on, say, profession. Some badges of differentiation are prima facie morally deplorable while others are not. Accordingly, the badge of differentiation in a case may directly influence the width

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307 Harris, O’Boyle and Warbrick, pp. 472-473.
308 See generally Chapter 5.2. infra.
of the margin of appreciation accorded to states. It may, thus, be of paramount importance to the case to be able to identify and establish it.

4.3.1.1. Instances of overt badges of differentiation

In cases where the discrimination and the badge of differentiation complained of are easily identified from being overt or express, lifting the burden of proof on this issue becomes easy. Examples from case law abound.309

309 Harris, O’Boyle and Warbrick, p. 473, mention the following cases as examples where the badge of differentiation is clear on the face of the legislation complained of: Dudgeon v. The United Kingdom, 22.10.1981 and Norris v. Ireland, 26.10.1988, regarding legislation on homosexual practices that was scrutinised under Article 8 and “Belgian child and inheritance law...”, i.e. Marckx v. Belgium, 13.06.1979, and Vermeire v. Belgium, 29.11.1991. Other examples are: Kjeldsen, Busk Madsen and Pedersen v. Denmark, 07.12.1976 (legislation on compulsory sex education but free religious education), Rasmussen v. Denmark, 28.11.1984 (statutory time limit on instigating paternity proceedings applicable to fathers and not mothers), James and Others v. The United Kingdom, 21.02.1986 (categories of property owners as stipulated in legislation), Lithgow and Others v. The United Kingdom, 08.07.1986 (categories of property owners as stipulated in legislation and as compared with other pieces of legislation), Gillow v. The United Kingdom, 24.11.1986 (categories of property owners as stipulated in legislation), Bouamar v. Belgium, 29.02.1988 (legislation on juvenile offenders different from legislation on adult offenders), Mathieu-Mohin and Clerfayt v. Belgium, 02.03.1987 (legislation making language a condition for membership in Flemish Council), Momell and Morris v. The United Kingdom, 02.03.1987 (rules of law on unmeritorious appeals resulting in loss of time towards serving a sentence only applicable to those in custody), Inzé v. Austria, 28.10.1987 (legislation stipulating that hereditary farms go to legitimate children), Abdulaziz, Cabales and Balkandali v. The United Kingdom, 28.05.1985 (express differentiation based on sex and birth in immigration rules), Darby v. Sweden, 23.10.1990 (legislation on dissenters’ tax making residence a condition for a reduction from full church tax), Kamasinski v. Austria, 19.12.1989 (legislation allowing civil claims in criminal proceedings as evidence of discrimination between defendants in civil and criminal proceedings and Supreme Court decision refusing leave to attend appeal hearing), Hoffmann v. Austria, 23.06.1993 (express reasoning in Court judgment basing the decision on the applicant’s religion), Schuler-Zgraggen v. Switzerland, 24.06.1993 (express reasoning in Court judgment that, being a woman with a child, the applicant would have given up work anyway), Burghartz v. Switzerland, 22.02.1994 (legislation stipulating that only wives and not husbands could put their surname before the family name chosen by the couple), Karlheinz Schmidt v. Germany, 18.07.1994 (legislation on a charge in lieu of fire service levied only on men), Holy Monasteries v.
Borderline cases may exist. The Stjerna v. Finland judgment seems to be a good example. The applicant claimed that the refusal of permission to change his name from Stjerna to Tavaststjerna was based on discriminatory grounds, as his first ancestor to bear the name Stjerna was the illegitimate son of a man bearing the name Tavaststjerna. The Court found that the reference to illegitimacy in the decisions that refused the name change was simply an explanation of why the original name change had taken place and that it did not appear to have had any bearing on the decision itself. The Court, then, moved on to discuss the “real” reason for refusing the name change: “The reason for refusing his request seems rather to have been the fact that the name Tavaststjerna has not been in use in the applicant’s family for more than two hundred years [...] In short, the justification advanced by the Government
appears objective and reasonable.”. The judgment is a rare example of an express mention of the particular badge of differentiation complained of (illegitimacy) not being found proven as the “real” basis to the treatment. The “real” badge of differentiation was equally easily discernable at it was also expressly referred to in the measures complained of. The Court took the express badge of differentiation of lack of use of the name as established, but not the other express badge of illegitimacy. As it was not contended in the case that the “real” badge of differentiation was discriminatory the Court found no violation.

In many cases where the badge of differentiation is express or overt the Court seems to merge the consideration of whether the applicant has established the badge of differentiation (and treatment) with the consideration of whether the state has established objective justification. This may mean either that the badge of differentiation is clear and taken as established or that the Court is easing the burden on the applicant to show the badge of differentiation (and treatment) before the onus is placed on the state to justify the treatment. In conclusion, lifting the burden of proof on the badge of differentiation in cases where it is overt or express seems relatively easy.

4.3.1.2. Instances of covert badges of differentiation

A. Intent

Cases where the badge of differentiation is covert are more difficult to deal with. In such instances the applicants’ claims either clearly allege subjective intent or motive on part of state agents or they may at least border on alleging intent.

Generally, there is no requirement under the Convention to establish intent to discriminate against particular groups. In the Belgian Linguistics judgment the Court declared that objective justification had to be assessed in relation to the aims and

311 Ibid, paras. 10-14.
effects of a measure.312 In Marckx v. Belgium this approach was further established as the Court expressed the opinion that measures in support of the legitimate aim of encouraging the traditional family could nevertheless be in violation of Article 14 if their object or result prejudiced illegitimate families.313 It seems clear that the approach of the Court is not to make subjective intentions a condition for establishing prima facie discrimination.

Although not a condition to establish prima facie discrimination, applicants can claim subjective intention to discriminate on basis of a particular badge of differentiation. These applicants, however, have not been successful in lifting their burden of proof for that claim before the Court.314 The Velikova v. Bulgaria case would be a good example. Here the applicant claimed that: “...the police officers’ perception of [her partner’s] ethnicity was a decisive factor in contributing to his ill-treatment and murder. Prejudice was also the reason for the refusal to investigate.”.315 The Court explicitly took note of the fact that the respondent state had not been able to explain (i.e. justify) the circumstances of the man’s death and the reasons for the significant flaws in its investigation. It nevertheless found no

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312 Belgian Linguistics, 23.07.1968, para. 10, p. 34: “The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration...”. In some of the judgments of the Court some consideration of intent is visible in direct connection with the question of whether there has been established a legitimate aim for the measure in question. This type of intent analysis occurs at the level of objective justification scrutiny and, thus, is not an indication of what is needed to establish prima facie discrimination. See National Union of Belgian Police v. Belgium, 27.10.1975, para. 48, Schmidt and Dahlström v. Sweden, 06.02.1976, para 40, Swedish Engine Drivers’ Union v. Sweden, 06.02.1976, para. 46, Özgür Gündem v. Turkey, judgment 16.03.2000, para. 73 and Ibrahim Aksoy v. Turkey, judgment 10.10.2000, para. 83.

313 Marckx v. Belgium, 13.06.1979, para. 40.

314 Harris, O’Boyle and Warbrick, p. 477, referring to Handyside v. The United Kingdom, 07.12.1976 (a claim of political persecution not proven, similarity with situations of comparison not shown) and Abdualziz, Cabales and Balkandali, 28.05.1985 (concerning the claim of racial motivation, compare with the strict approach to the expressly stipulated badge of difference of sex). See also generally Cameron, p. 255: “In the absence of very clear proof to the contrary, the Court is understandably reluctant to accuse a State of not being in good faith...”.

315 Velikova v. Bulgaria, 18.05.2000, para. 91.
violation of Article 14 on the following rationale: “The Court recalls, however, that the standard of proof under the Convention is “proof beyond reasonable doubt”. The material before it does not enable the Court to conclude that Mr. Tsonchev’s killing and the lack of meaningful investigation into it were motivated by racial prejudice, as claimed by the applicant.”. The burden of proof was clearly placed on the applicant in this case. The need to justify the established flaws in investigation did not arise under Article 14, as the applicant could not prove that it was intentionally based on race as claimed.

The Özgür Gündem v. Turkey judgment is an example of a covert badge of differentiation where the claim made bordered on intent. The case concerned restrictive measures imposed on the Özgür Gündem newspaper which the state considered run by the PKK (Workers’ Party of Kurdistan). The restrictive measures were found in violation of Article 10. The applicants claimed that: “...any expression of Kurdish identity was treated by the authorities as advocacy of separatism and PKK propaganda. In the absence of any justification for the restrictive measures imposed with regard to most of the articles examined by the Commission, the measures could only be explained by prohibited discrimination.”. The Court had already found that the measures complained of were based on the legitimate aims of protecting national security, territorial integrity and the prevention of crime and disorder. These were considered by the Court to be the “real” reasons for the treatment complained of. The Court, therefore, found allegations of difference of treatment on the basis of national origin or association with a national minority unsubstantiated.

316 Ibid, para. 93, emphasis added.
317 Özgür Gündem v. Turkey, 16.03.2000, para. 73.
318 Ibid, para. 75. See also the very similar case of Ibrahim Aksoy v. Turkey, judgment 10.10.2000, para. 83, where the Court, with reference to the Özgür Gündem v. Turkey judgment, reached the conclusion that as the restrictive measures on the applicant’s freedom of expression pursued a legitimate aim, there was nothing to suggest that they could be attributed to a difference of treatment based on ethnic origin. Similarly also in Magee v. The United Kingdom, 06.06.2000, the Court found that the difference of treatment complained of (different prevention of terrorism legislation in different
A general picture emerges from the case law. In situations where the badge of differentiation is covert, the claims of the applicant amount to or border on claiming subjective intent on part of the national authorities. In such situations, the burden of establishing the badge of differentiation on which different treatment is based will be extremely difficult to meet. This is borne out in particular in cases on alleged racial discrimination.319

319 In addition to the judgments that have already been mentioned, a series of cases relating to the situation of Kurds in Turkey supports this conclusion. All these cases concerned house-burnings, deaths, disappearances and ill treatment as well as lack of investigation into the incidents. All cases were directed against Turkey in the years 1996-2001. Among other complaints the applicants claimed that the incidents were based on discriminatory grounds, namely that of their Kurdish origin. The applicants either clearly alleged intent or their claims bordered on such allegations. All cases relate to a period of disturbances and conflict between PKK terrorists and state security forces. In the absence of meaningful investigations into the complaints of the applicants at the domestic level, the Commission investigated the facts of the cases at hearings in Turkey where it inter alia heard witnesses. In no case did the Commission or the Court find allegations of discrimination on account of Kurdish origin substantiated by the applicants. Hence, no review of objective justification was undertaken. See Akdivar and Others v. Turkey, 16.09.1996 (“...deliberate and unjustified policy...”, para. 98), Mentes and Others v. Turkey, 28.11.1997 (“...because of their Kurdish origin...”, para. 93), Kaya v. Turkey, 19.02.1998 (“...most adversely affected [...] the attitude of the security forces...”, para. 110), Selcuk and Asker v. Turkey, 24.04.1998 (“...because of their Kurdish origin...”, para. 99), Kurt v. Turkey, 25.05.1998 (“...forced disappearances primarily affected persons of Kurdish origin.”, para. 143. “The evidence [...] does not substantiate her allegation that her son was the deliberate target of a forced disappearance on account of his ethnic origin.”, para. 147), Tekin v. Turkey, 09.06.1998 (“...because of his Kurdish origin...”, para. 70), Ergi v. Turkey, 28.07.1998 (“...the discriminatory policy pursued by the State against ordinary Kurdish citizens and the existence of an authorised practice...”, para. 99), Bilgin v. Turkey, judgment 16.11.2000 (“...the discriminatory policy pursued by the authorities against persons of Kurdish origin and the existence of an authorised practice...”, para. 126). In Tanli v. Turkey, 10.04.2001 the Commission did not complete its investigation before the case was referred to the Court and the Court based its findings on the submissions and documents provided by the parties. The claim of “...discriminatory policy pursued by the authorities against Kurdish citizens and the existence of an authorised practice...”, cf. para. 175, was found unsubstantiated.
B. Effects

Applicants can also claim that measures have a discriminatory effect on basis of a certain badge of differentiation (i.e. regarding certain groups of people). In these cases the badge of differentiation is overt but "neutral" so that the applicant attempts to allege another covert badge of differentiation and discriminatory effect on basis of that badge. These applicants also find it hard to establish their case of prima facie discrimination. One aspect of that problem is that the Court has not provided the appropriate evidential or conceptual framework for dealing with claims of indirect discrimination. Applicants have not been successful in discharging the burden of proof when they claim discriminatory effects of measures based on covert badges of differentiation. In such cases prima facie discrimination has not been considered established either because of failure to establish the badge of differentiation or because of failure to establish a difference of treatment.

Cases decided on basis of whether different treatment in the form of discriminatory effects has been established will be discussed in Chapter 4.3.2.3. *infra*. The following cases, however, were decided by reference to the applicant not having established the covert badge of differentiation that forms basis to the alleged discriminatory effect. *Abdulaziz, Cabales and Balkandali v. The United Kingdom* is considered to be the leading judgment establishing that, despite not emphasising intent, the Court is not prepared to enter fully into an indirect discrimination approach. A minority of the Commission had found the immigration rules in question "...indirectly racist...". In particular the applicants had argued that the condition that the couple intending to marry had already met adversely affected

320 Harris, O’Boyle and Warbrick, p. 477 do not exclude the possibility of indirect discrimination coming under Article 14 but conclude that: "...the burden upon the applicant to establish that it exists is severe.".

321 Loenen: Rethinking Sex Equality as a Human Right, p. 263 and Harris, O’Boyle and Warbrick, p. 477-478.

322 *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, 28.05.1985, para. 84.
people from the Indian sub-continent where arranged marriages were customary.

The Court entertained no adverse effect analysis on the issue and decided this aspect of the application on the grounds that the purpose of the immigration rules generally was to protect the labour market and more specifically that the condition that intended spouses had met had the purpose of avoiding circumvention of the rules. The conclusion of the Court was that it had not been established that the immigration rules made a distinction on the grounds of race. The judgment has been criticised for glossing over discriminatory-effect analysis and focusing on the purpose of the rules in question. The Court approached the issue from the angle of finding the alleged covert badge of differentiation (race) not proven and finding the overt badge of differentiation (previous-meeting) proven but justified. Similarly, in Johnston and Others v. Ireland the badge of differentiation claimed was financial means as persons of more means could travel abroad to obtain divorce. According to a series of judicial decisions, however, only persons who were truly domiciled abroad could have their divorce recognised in Ireland. Claims that departures from this criterion of domicile had occurred in practice were unsubstantiated. The covert badge of financial status was not proven. Finally the Magee v. The United Kingdom judgment may be an example of the difficulties related to establishing the discriminatory effect of ex facie neutral legal provisions on certain groups. The judgment seems to merge the proof of badge of differentiation issue with the objective justification issue. The complaint concerned a difference based on national origin or association with a national minority as different anti-terrorist legislation was applicable to similar fact-situations in Northern Ireland and in England and Wales. The Court found that the different treatment was: "...not to be explained in terms of personal characteristics, such as national origin or association with a national minority, but on the geographical location where the individual is arrested and detained." The overt badge of geographical location was found to exist and to be justified, but the covert badge of differentiation claimed was not established.

323 Ibid, para. 85.
324 Harris, O'Boyle and Warbrick, p. 478
325 Johnston and Others v. Ireland, 18.12.1986, paras. 20 and 60.
326 Magee v. The United Kingdom, 06.06.2000, para. 50.
4.3.2. Treatment

4.3.2.1. Instances of overt treatment

Harris, O'Boyle and Warbrick argue that: “An applicant usually has no difficulty identifying how he has been treated less favourably than others.”\(^\text{327}\) In a qualified version this statement seems to be well founded in the case law of the Court. The qualification arises from deleting the reference to a comparison with the treatment of others. If comparing the treatment complained of to the treatment of others is deleted from what is required of applicants, they will generally have no problem of establishing the treatment complained of \(\textit{per se}\).\(^\text{328}\) For example, in the cases of overt badges of discrimination referred to in footnote 309 \textit{supra} the treatment connected with the badge is equally overt.\(^\text{329}\)

4.3.2.2. Discriminatory application of law

It may be more troublesome for the applicant to explain how the treatment he/she receives is less favourable than the treatment of the group of comparison. Problems

\(^{327}\)\textit{Ibid,} p. 470. As an example of the opposite they mention \textit{Karlheinz Schmidt v. Germany}, 18.07.1994, where the Court divided on considering the difference of treatment being based on sex or being based on whether people were fit to serve in the fire brigade. Quite clearly the \textit{Karlheinz Schmidt v. Germany} case is an example of identifying the badge of differentiation and not establishing the treatment in question. The treatment in question was clear; it was the duty to pay a levy instead of serving in the fire brigade.

\(^{328}\) The question of comparisons with the treatment of others is discussed under the requirement to establish the comparability of situations in Chapter 4.3.3. \textit{infra}.

\(^{329}\) It is possible, however, that the applicant cannot establish having been subject to the treatment complained of. \textit{Çiçek v. Turkey}, 27.02.2001 is a Chamber judgment that has not become final as referral to the Grand Chamber has been requested according to Article 43. One aspect of the applicant’s complaint was the failure of the state to make adequate provision for the use of the Kurdish language before judicial authorities. As legislation provided for the assistance of interpreters and the applicant had not shown that she had requested and been denied such assistance, her claim of different treatment was found unsubstantiated, \textit{cf.} para. 187.
related to this issue have particularly frustrated claims of discriminatory application of law. In such cases generally the legislation in question stipulates for certain treatment in neutral and general terms, but the applicant claims that the application of these neutral terms is somehow discriminatory. As there is little overt and express about these cases, applicants may run into problems in establishing their cases. For example in Larissis and Others v. Greece the applicants alleged that Greek law against proselytism was applied in a discriminatory manner, in that it was only applied to members of religious minorities and not to members of the Greek Orthodox Church. The Court found that: “...they have not produced any evidence to suggest that an officer in the armed forces who attempted to convert his subordinates to the Orthodox Church in a manner similar to that adopted by the applicants would have been treated differently.”. Many other examples exist of difficulties in substantiating claims of discriminatory application of law.\footnote{330 Larissis and Others v. Greece, 24.02.1998, para. 68.}

In clear cases, however, the applicant may be successful. In Pine Valley Developments Ltd. and Others v. Ireland the treatment complained of was the application of beneficial legislation to all planning permission holders of the same category as the applicants, but not to them. The Government contested the factual

\footnote{331 See Elsholz v. Germany, 13.07.2000 where the applicant complained that according to the German Civil Code, a divorced father was entitled to access to his child unless it was detrimental to the well-being of the child while the natural father of a child born out of wedlock was only entitled to such access if it was in the interest of the child. In light of the fact that the Court judgments complained of were based on the risk to the child’s development if access would be granted, the European Court of Human Rights pronounced that: “... the applicant has not shown that, in a similar situation, a divorced father would have been treated more favourably. Finally, the Federal Constitutional Court has confirmed that the ordinary Courts had applied the same test as would have been applied to a divorced father.”, cf. para. 60. Other examples include Sunday Times v. The United Kingdom (I), 26.04.1979 (non-uniform application of injunctions against publication not proven) and Sporrong and Lönnroth v. Sweden, 23.09.1982 (non-uniform application of imposing expropriation permits not proven). In Observer and Guardian v. The United Kingdom, 26.11.1991, cf. para. 73 and Sunday Times v. The United Kingdom (II), 26.11.1991, cf. para. 58, the allegations of non-uniform applications of injunctions were hardly proven, but reviewed for objective justification anyway, cf. the referrals in the judgments to: “If, and in so far as...” there existed different treatment.}

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foundation of the claim of different treatment but did not succeed as the different
treatment had been clearly established in litigation before the domestic Courts.\textsuperscript{332} In
Fredin \textit{v. Sweden} it was also relatively easy for the applicants to establish the
discriminatory application of law while they could not establish the similarity of the
situations compared. The court emphasised that: “For a claim of violation of the
Article to succeed, it has therefore to be established, \textit{inter alia}, that the situation of
the alleged victim can be considered similar to that of persons who have been better
treated.”\textsuperscript{333} The applicants complained that a provision in legislation enabling the
revocation of licences to exploit gravel pits had only been applied to their business
but not to any other. The Court found that: “…in the absence of further information
from the Government […] the Court has to presume that the applicants’ pit is the
only one to have been closed by virtue of that amendment. However, this is not
sufficient to support a finding that the applicants’ situation can be considered similar
to that of other ongoing businesses which have not been closed.”\textsuperscript{334} The
discriminatory application of law was, thus, considered established but the applicants
could not lift the burden of proof for establishing similarity of situations.

4.3.2.3. \textit{Discriminatory effects of neutral measures}

Similarly, it may be a problem for the applicant to establish how neutral legislative
provisions that stipulate broad general criteria have a different \textit{effect} on different
groups.

In some such cases the Court is clearly not convinced that different treatment exists,
but nevertheless proceeds to some form of very lenient objective and reasonable
justification review. One aspect of the Kamasinski \textit{v. Austria} case concerned a claim

\textsuperscript{332} \textit{Pine Valley Developments Ltd. and Others v. Ireland}, 29.11.1991, paras. 52 and 64. The
Government relied only on the non-existence of different treatment and did not try to forward any
justification. Having found the treatment to have occurred the Court found a violation of Article 14
taken together with Article 1 of Protocol 1, \textit{cf.} paras. 63-64.

\textsuperscript{333} In Fredin \textit{v. Sweden}, 18.02.1991, para 60.

\textsuperscript{334} \textit{Ibid}, para. 61.
of the unequal effect of a general provision on introducing a plea of nullity on defendants not speaking the language of the Court. The Court was not convinced but proceeded to a very cursory objective justification assertion on the assumption that a difference of treatment on basis of language had been established.\textsuperscript{335} The \textit{Building Societies v. The United Kingdom} judgment is also an example of this as the treatment complained of was that legislation, which prevented the applicant building societies from claiming reimbursement of a tax, did not apply to the Woolwich building society. The different treatment complained of arose from a) expressly and narrowly defining one exempt category from a general stipulation in legislation, affecting only the Woolwich\textsuperscript{336} and b) the fact that the successive piece of legislation, although being stipulated in general terms, did not reach the Woolwich.\textsuperscript{337} The Court noted that: "...it must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment...".\textsuperscript{338} The preferential treatment was established as the Woolwich had already received reimbursement and the case was, then, decided in a merged consideration of analogous situations and objective justification. Similarly, in \textit{Sheffield and Horsham v. The United Kingdom}, the applicants’ claims were unclear but concerned their: "...disadvantaged position in law...".\textsuperscript{339} The Court referred to the same requirement for establishing the preferential treatment of others, but decided the case primarily with reference to the margin of appreciation applicable in the case.\textsuperscript{340}

Sometimes the Court approaches cases claiming discriminatory effects of neutral measures more formally and entertains no objective and reasonable justification review at all. In \textit{Stubbings and Others v. The United Kingdom}, one of the applicants’ complaints concerned the discriminatory effect on them of a neutral and general

\textsuperscript{335} \textit{Kamasinski v. Austria}, 19.12.1989, para. 100.


\textsuperscript{337} \textit{Building Societies v. The United Kingdom}, 23.10.1997, this applies to Section 64 of the Finance Act 1992, cf. paras. 42 and 91.

\textsuperscript{338} \textit{Ibid}, para. 88.

\textsuperscript{339} \textit{Sheffield and Horsham v. The United Kingdom}, 30.07.1998, para. 72.

\textsuperscript{340} \textit{Ibid}, paras. 75-77.
stipulation for limitation periods on civil claims for intentionally caused injury.341 The Court referred to the requirement for establishing the preferential treatment of others and in a very formal application found no different treatment because the “neutral” rules applied equally to all of those stipulated subject to them.342 Also, in Streletz, Kessler and Krenz v. Germany and K.-H.W. v. Germany, the Court found no different treatment and performed no objective and reasonable justification review. The applicants had been convicted of homicide for their involvement in the deaths of people who had tried to escape from East Germany (The German Democratic Republic, the GDR). They complained of the application of the national courts to their cases of “Radbruch’s formula” which entailed the principle: “...that positive law must be considered contrary to justice where the contradiction between statute law and justice is so intolerable that the former must give way to the latter.”.343 In their contention it had the effect to: “...deny former citizens of the GDR [...] the possibility of invoking the principle of the non-retroactiveness of criminal statues enshrined in Article 7 § 1 of the Convention.”.344 The Court entertained no discriminatory effect analysis and found no different treatment established. It simply concluded that as the principles applied by the national courts had general scope, they applied equally to those who were former nationals of the GDR and those who were not.345

The judgments in Beard v. The United Kingdom, Chapman v. The United Kingdom, Coster v. The United Kingdom, Jane Smith v. The United Kingdom and Lee v. The United Kingdom are an example of both approaches, i.e. the Court not being

341 Stubbings and Others v. The United Kingdom, 22.10.1996, para. 69. Another aspect of the case was the express distinction between victims of intentionally caused injury and negligently caused injury, cf. paras. 73-74.
342 Ibid, para. 73.
convinced that different, here similar, treatment exists but reviewing the case anyway and the Court entertaining no objective and reasonable justification review at all. The cases concerned the refusal of planning permissions, enforcement proceedings and prosecutions of gypsies for unlawfully occupying caravans on their own land. The applicants’ claims under Article 14 concerned: “...the legal system’s failure to accommodate their traditional way of life, by treating them as if they were the same as members of the majority population, or disadvantaging them relative to members of the general population...”. In other words, they complained that the neutral and general stipulations of planning legislation had a discriminatory effect on them, either through the lack of special accommodation or generally under indirect discrimination analysis. The Court did not address the latter part of the applicants’ complaint concerning indirect discrimination at all. As regards the lack of accommodation for the special circumstances of gypsies the Court, with reference to the Thlimmenos v. Greece judgment, acknowledged that the similar treatment of different situations might result in discrimination. It, however, seemed unconvinced that similar situations in fact existed and, relying heavily on a wide margin of appreciation, found no violation in the case.

346 Beard v. The United Kingdom, 18.01.2001, Chapman v. The United Kingdom, 18.01.2001, Coster v. The United Kingdom, 18.01.2001, Jane Smith v. The United Kingdom, 18.01.2001 and Lee v. The United Kingdom, 18.01.2001. The earlier judgment in Buckley v. The United Kingdom, 25.09.1995, should also be mentioned. There, the applicant’s complaint was that the Caravan Sites Act and the Criminal Justice and Public Order Act prevented gypsies from pursuing their traditional lifestyles. The Court noted that no measures had ever been taken against her on basis of these Acts and that it would not review legislation in the abstract. It, then, added that more generally it did not appear from the case that she was at any time subjected to detrimental treatment on account of her gypsy status and that national policy was in fact aimed at accommodation for gypsies, cf. para. 88.


348 Ibid, para. 129, cf. Thlimmenos v. Greece, 06.04.2000. Under the Thlimmenos v. Greece standard the similar treatment of significantly different situations results in discrimination, cf. Thlimmenos v. Greece, 06.04.2000, para. 44. The treatment that needs to be established by the applicant is therefore similar treatment and not different treatment. It is not clear from the reasoning of the Court in the gypsy cases whether it considered the similar treatment of different situations established. With reference to the reliance by the Court on the fact that some considerations was in fact given to the special situations of the applicants, it seems that the Court would hardly have found similar treatment established if it had gone into articulating its reasoning under Article 14, see e.g. Chapman v. The
4.3.2.4. Conclusions

The incantation of the phrase: "...it must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment..." is notably only present in the case law in relation to situations where the establishment of different treatment raises problems such as in the categories of discriminatory application of law or discriminatory effects of neutral measures.

In discriminatory application cases the applicant’s claim may border on claiming intent and, thus, be difficult to establish. Claims of discriminatory effect of measures often amount to claiming indirect discrimination or may differ from such claims only slightly in relation to whether the effect is only disproportionate on certain groups or absolutely different in all respects for the individual applicant. Some of them in addition concern positive obligations, which seems to place applicants under a heavier burden to establish how they have been subject to different treatment. The Court’s problems in dealing with the concepts of indirect discrimination and positive obligations under Article 14 find expression in the evidentiary burden upon the applicant to establish their case of prima facie discrimination.

United Kingdom, 18.01.2001, paras. 110, 114 and 129. The cases, thus, seem to be an example of a merged consideration of the questions of comparability and objective and reasonable justification. The cases in question were heard by a Grand Chamber of 17 judges. Seven judges dissented in the case and found a violation of Article 8 but in light of that conclusions found that no separate issue arose under Article 14. See e.g. Chapman v. The United Kingdom, 18.01.2001, Joint Dissenting Opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Strážnická, Lorenzen, Fischbach and Casadevall.

349 E.g. Stublings and Others v. The United Kingdom, 22.10.1996, para. 72.
4.3.3. Comparability of situations (sameness/difference)

The most important issue related to the burden of proof is the question of whether it is incumbent on the applicant to establish that the treatment complained of is different in relation to people in *relevantly similar situations*, or conversely is similar in relation to people in *significantly different situations*, before the onus is shifted onto the state to justify this treatment. This condition if strictly applied can function as a wide-reaching limitation on possible discrimination claims. The reason is that, as argued in Chapter 1.3.1. *supra*, the questions of comparability formulated in the question: “who are equal/unequal?” are really posed at the level where the value judgments governing equality analysis take place. Otherwise they can only be answered with reference to the equality maxim as: “those who should receive equal/unequal treatment”. According to the Aristotelian equality maxim relevantly similar situations prescribe similar treatment and relevantly dissimilar situations prescribe dissimilar treatment. Placing the burden on the applicant to establish clearly the sameness/difference of situations also places the burden on him/her to justify that the same/different treatment is required. It can be quite troublesome for the applicant to show that his/her situation is relevantly similar or different to that of the group of comparison and the arguments related to this issue go right to the heart of the justification for the treatment in question.

Some commentators have concluded that this issue of establishing the similarity of situations has not figured prominently in the case law of the Court, rendering its case law less formalistic than a strict insistence upon showing comparability of situations would.\(^{351}\) Other commentators have criticised instances where the comparable situations test is not rigorously applied.\(^{352}\) From the *Fredin v. Sweden* judgment it

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351 Livingstone, p. 30.
352 Dijk and Hoof, p. 722-724. Their arguments go to the objective justification test focusing on public interest as opposed to the similarity of situations tests focusing on individual interest. Their argument is for a better protection of individuals, but strangely seems to miss the fact that all the cases they themselves refer to on the allegedly beneficial comparability test result in a finding of non-violation. The important function of the burden of proof in this relation seems to have escaped their attention.
has been concluded that the burden is on the applicant to show that his/her situation is relevantly similar to that of the group of comparison.\textsuperscript{353} Other judgments, including judgments pronounced after Fredin \textit{v. Sweden}, suggest the opposite. These judgments often merge consideration of whether relevantly similar situations have been established with the objective justification scrutiny. Hence, they do not place a heavy burden on the applicant to establish the similarity of situations before embarking on the objective justification scrutiny for which the respondent state is supposed to bear the burden of proof.\textsuperscript{354} \textit{Van Raalte v. The Netherlands} is a particularly clear example of how the sameness/difference argument may be the burden of either of the parties to the case. Here the government tried to argue that the groups compared (sexes) were not in a similar situation as differences with regard to biological possibilities to procreate once over the age of 45 justified a distinction based on sex. The Court explicitly noted that these factual differences did not affect the conclusion of similar situations as: "It is precisely this distinction which is at the heart of the question whether the difference in treatment complained of can be justified."\textsuperscript{355}

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\textsuperscript{353} Dijk and Hoof, p. 722 and Harris, O'Boyle and Warbrick, p. 474. See Fredin \textit{v. Sweden}, 18.02.1991. Dijk and Hoof, pp. 720-722, mention the following cases as examples of cases dealing clearly with the similarity of situations test and, then, conclude on the rule of evidence that the applicant must show the similarity of situations. In all cases analogous situations were not established and no violation was found of Article 14: \textit{Van der Mussele v. Belgium}, 23.11.1983, \textit{Johnston and Others v. Ireland}, 18.12.1986, \textit{Sunday Times v. The United Kingdom (II)}, 26.11.1991, \textit{Observer and Guardian v. The United Kingdom}, 26.11.1991 and \textit{Spadea and Scalabrino v. Italy}, 28.09.1995. It is open for discussion, however, whether these cases deal with the comparability of situations as a condition for objective justification scrutiny or as the factor constituting objective justification.
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\textsuperscript{354} Cited by Dijk and Hoof, pp. 724-726 are the following cases: Dudgeon \textit{v. The United Kingdom}, 22.10.1981 (concerning Article 8 and not Article 14), Abdulaziz, Cabales and Balkandali \textit{v. The United Kingdom}, 28.05.1985 (merging establishing comparability of situations with objective justification on the issue of close ties with a country, a finding of non-violation) and Holy Monasteries \textit{v. Greece}, 09.12.1994 (merging establishing comparability of situations with objective justification on the issue of different churches and religions, a finding of non-violation).
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\textsuperscript{355} \textit{Van Raalte v. The Netherlands}, 21.02.1997, para. 40. Similarly in Rasmussen \textit{v. Denmark}, 28.11.1984, para. 37 the Court held that it did not have to resolve the issue of analogous situations as it was also of relevance to determining whether objective justification existed. Hence, it proceeded to the objective justification test "...on the assumption..." of analogous situations (emphasis added).
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In conclusion, the state of the case law on the burden of proof in relation to establishing similarity of situation is conflicting and unclear. The literature seems not to have been able to explain the variations in the Court’s approach to this issue.

4.4. CONCLUSIONS

The jurisprudence of the Court on the issue of proof under Article 14 is not characterised by great coherence. Upon a closer analysis the simple model that has been offered in the literature on issues concerning proof under Article 14 leaves one important discrepancy in the case law unexplained. This discrepancy is the unanswered question of whether the applicant must clearly establish that he/she is in a relevantly similar or significantly different situation to that of the group of comparison. The pressing question this discrepancy poses is: what does it take for the burden of proof to shift onto the respondent state to establish objective justification? The lack of clarity on the issue seems particularly serious as overburdening applicants in relation to establishing prima facie discrimination can in effect render protection against discrimination completely ineffective.356

Ina Sjerps has argued that the division applied by the European Court of Justice in relation to indirect discrimination, that a case is established by first establishing a disparate effect and second by establishing that it is not justified, is artificial.357 Many, indeed countless, instances of disparate impact of neutral measures exist, but only some raise questions of discrimination.358 Before even considering bringing a case of indirect discrimination, a sense of injustice must exist and a value-loaded

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356 See footnote 304 supra on the policy considerations behind the burden of proof. See also Loenen: Indirect Discrimination: Oscillating Between Containment and Revolution, p. 211.
357 Sjerps, p. 247.
358 Ibid, pp. 239-240 mentioning for example pay differences between part-timers and full-timers (disparate impact on women) and pay differences between secretarial staff and managers (disparate impact on women).
qualitative debate must take place. Equal situations require equal treatment and vice versa. Thus, the value arguments relevant to equality analysis are always at one level undertaken by arguing for the existence of relevantly similar situations or relevantly different situations, once that is done successfully indications to the treatment due will also be established. The value-loaded qualitative debate will always at one level focus on the relevant similarity or difference of situations. Drawing on this inherent nature of the equality maxim as part of the non-discrimination provisions of the Convention, supported in the project by Sjerp’s analysis, the following conclusion presents itself: Dividing the issues that need to be proven under claims of discrimination into the two levels of a) establishing sameness/difference as a condition for objective justification scrutiny, and b) establishing sameness/difference as justification under objective justification scrutiny, is really artificial. The same qualitative and value-loaded reasoning decides either question. The very common merger of consideration of proof for establishing the relevant similarity of situations and the reasonable and objective justification analysis in the reasoning of the Court under Article 14 convincingly stands out in support of this conclusion.

The answer to the question of the burden of proof in relation to sameness/difference does not lie in the two-tiered approach hitherto put forward in the literature under which each party bears the burden of proof as regards certain issues that can be divided into two distinct parts. The issue of

360 This is argued for in Chapter 1.3.1. supra. The relevant difference of situations may be construed as “difference” in the meaning discussed in the substantive “difference” approach or as “disadvantage” in the meaning discussed in the substantive “disadvantage” approach, cf. Chapters 2.2.2. and 2.2.3. supra.
361 Gomien, Harris and Zwaak, p. 354, blame inconsistencies in application of the analogous situations consideration on this merger of considerations.
362 It is unnecessary to enter deeply into the issue of difficulties related to distinguishing between law, normative evaluations and facts. A few basic points are worth mentioning. Zahle, pp. 34-44 for example discusses the issue that any legal narrative of the “facts” that need to be proven entails both descriptive and normative elements. The legal description of these facts entails a complex of references to “real” verifiable facts, as well as to the legal characterisation of that reality that in varying degrees expresses the judge’s normative evaluation of those facts. In relation to international human rights law more particularly, Kokott, pp. 145 and 167, has forwarded that the distinction
similarity/difference simply cannot be divided in two. There is only one burden of persuasion for similarity/difference and the question is which of the parties bears it.

Kokott argues that the same values form the basis to interpretation of human rights treaties and to the allocation of the burden of persuasion. A balancing act between state sovereignty and national democratic discretion on the one hand and the effective protection of human rights on the other permeates the interpretation of the Convention and presents itself in adjustments in the margin of appreciation. Kokott argues that an approach to the burden of proof that rigidly follows state sovereignty and a corresponding burden of persuasion on the applicant or that rigidly follows the effective protection line and allocates the burden of persuasion on the respondent state misses this essential feature of human rights law. Therefore, according to Kokott, the allocation of the risk of non-persuasion must follow the weighing of interests as presented in the interpretation of the substantive provisions in question. This way: “...the margin of appreciation may also be seen as fulfilling a function very similar to that of the burden of proof.” The margin of appreciation encompasses the interpretational weighing of interests between reliance on state sovereignty and the respondent state’s own assessment of the situation in question on one hand and the need for effective protection of human rights on the other. As the allocation of a wide margin of appreciation leads to reliance on the

between fact and law can be even more blurred than in national constitutional law and that drawing a line between the establishment of facts and their evaluation can be impossible, in particular as regards facts that do not concern the parties directly but have more to do with the general conditions in society. The consequence of the highly indeterminate and evaluative nature of the equality provisions of the Convention is that it is to a large extent an exercise in normative evaluation of the arguments and rationalisations forwarded by the parties to establish whether the requisite “facts” have been proved.

363 Kokott, pp. 211-212.

364 Ibid, p. 215. Kokott does not deny that in addition to allocating the burden of persuasion in line with the interpretation of the substantive provision: “...external factors, such as the availability or suppression of evidence, may appear to create the need for modifications. Often, these modifications concern the evaluation of evidence and the required degree of persuasion, instead of the ultimate risk of non-persuasion.”, Ibid.

365 Ibid, p. 219, with references to literature on a similar issue in German law.
evaluation of domestic authorities it functions as placing the burden of persuasion on the applicant.366 Conversely, a narrow margin of appreciation functions as placing the burden of persuasion on the respondent state. As argued by Kokott: "...the ultimate answers to the problem of burden of proof seem to derive, at least insofar as international human rights are concerned, from the interpretation of the substantive law involved. More precisely, the solution depends on the delimitation of functions and competences between international Courts and the sovereign states as laid down in the human rights conventions."367

Kokott’s theory is that the margin of appreciation and the allocation of the burden of persuasion are influenced by the same considerations and function in the same manner. If the question of proof of similarity/difference is problematic, it is because the substance of the equality provisions and their interpretation in light of the margin of appreciation is problematic. In line with the approach that the burden of proof should depend on the substantive rules and their interpretation the focus of study seems better placed on the substantive issues. Clarifying what factors influence the width of the margin of appreciation would seem to enable the clarification of questions on the allocation of the burden of persuasion. The seemingly conflicting answers on the issue projected by the Court’s case law may be clarified by differences in the factors that influence the margin of appreciation.

366 Ibid. pp. 219-220.
367 Ibid. p. 147. Contra see Shokkenbroek: The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights, p. 33 where he argues that problems in relation to establishing the facts do not relate to the margin of appreciation doctrine as the doctrine does not concern establishing the facts of the case, but only the appreciation and assessment of those facts. See also Dijk and Hoof, p. 86 (written by Schokkenbroek as acknowledged in the Preface to the third edition, p. x). Shokkenbroek’s argument seems to be an oversimplification that misses a) the difficulties in distinguishing between taking certain “facts” as established and their normative assessment and b) the similar function of the procedural tool of allocating the burden of proof and the substantive tool of adjusting the margin of appreciation as elaborated on by Kokott.
The case law of the Court on establishing the badge of differentiation and the treatment complained of is explained by this theory as the Court’s problems in dealing with the concepts of indirect discrimination and positive obligations under Article 14 find expression in the evidentiary burden upon the applicant to establish a prima facie case.368

As regards establishing sameness or difference it emerges that the discrepancies in how the Court allocates the burden of persuasion on the issue can be explained by reference to the margin of appreciation. Factors that indicate a wide margin of appreciation will indicate that the burden of proof is on the applicant for establishing the similarity or dissimilarity of situations. Conversely, factors that indicate a narrow margin of appreciation will indicate that the burden of proof is on the respondent state to establish that the treatment in question is objectively justified with reference to the similarity or dissimilarity of situations. In accordance with the analysis of judgments to be anticipated in Chapter 5 infra, a few clear examples can be given to demonstrate the connection between the width of the margin of appreciation and the allocation of the burden of proof. Fredin v. Sweden is a particularly clear example where the unclear badge of differentiation and the field of life of property rights clearly indicated a wide margin of appreciation and the burden of proof for similarity was placed on the applicant.369 In Spadea and Scalabrino v. Italy, a wide margin of appreciation was implied by the badge of differentiation of “property” as well as the social situation of the applicant. The Court noted that relevantly similar situations had to exist, but merged the question of proof for similar situations with very lenient objective justification review.370 When subsequently dealing with similar cases in Edoardo Palumbo v. Italy and P.M. v. Italy, the wide margin of appreciation indicated had the effect that the burden of proof for similarity of situations was clearly placed on the applicants and the cases never reached

368 The wide margin of appreciation and lenient scrutiny indicated by claims of passive discrimination hinging upon positive obligations as elaborated on in Chapter 5.1.3.5. infra supports this conclusion.


370 Spadea and Scalabrino v. Italy, 28.09.1995, para. 46.
objective and reasonable justification scrutiny.371 Stubbings and Others v. The United Kingdom and Gerger v. Turkey are also examples where traditional legal classifications into types of victims or types of offenders were the claimed badges of differentiation. These badges of differentiation indicated a wide margin of appreciation and the applicants bore the burden of proof for establishing the similarity of situations.372 Conversely, the Van Raalte v. The Netherlands, Karlheinz Schmidt v. Germany, Abdulaziz, Cabales and Balkandali v. The United Kingdom and Rasmussen v. Denmark judgments are all clear examples of how the narrow margin of appreciation and strict scrutiny indicated by the badge of differentiation of sex placed the burden of proof for similarity/difference on the state.373 In addition to these examples, the above conclusions are generally borne out by the analysis of case law in light of the factors that influence the margin of appreciation in Chapter 5 infra.

According to this theoretical framework for the burden of proof in relation to Article 14, and by inference also Article 1 of Protocol 12, the burden of proof on the applicant to establish prima facie discrimination should only be taken to encompass establishing a) the badge of differentiation and b) the treatment complained of. Establishing sameness or difference of situations should not be taken as strictly incumbent on one or the other party, either as a condition for objective justification scrutiny or as part of objective justification itself, but as a variable burden incumbent on either party depending on the with of the margin of appreciation and the factors that influence the strictness of review in the case.

371 Edoardo Palumbo v. Italy, 30.11.2000, para. 52 and P.M. v. Italy, 11.01.2001, para. 54 as regards comparisons between landlords and tenants. P.M. v. Italy, 11.01.2001 is a Chamber judgment that has not become final as referral to the Grand Chamber has been requested according to Article 43.

372 Stubbings and Others v. The United Kingdom, 22.10.1996, paras, 73-74. The situations were not found comparable but "even if" they were, they were found justified. In Gerger v. Turkey, 08.07.1999, however, no objective justification scrutiny was applied and a simple assertion of differences in situations decided the case.

5. STRICTNESS OF REVIEW AND THE INFLUENCING FACTORS

5.1. THE TYPE OF DISCRIMINATION ALLEGED

5.1.1. Introduction

In Chapter 3.3.4.4. supra, it was suggested that any given claim under an open-model prescription of non-discrimination such as Article 14 and Article 1 of Protocol 12 to the Convention will entail three basic variables; a) a claim of a particular type of discrimination, b) based on a particular badge of differentiation and c) encroaching upon a particular interest. The present Chapter will deal with the type of discrimination alleged as a distinct level of factors influencing the strictness of review.

The generic definition of discrimination that can be discerned from the case law of the Court entails the following elements: Discrimination entails different treatment of relevantly similar situations or similar treatment of significantly different situations that cannot be reasonably and objectively justified.

Until the Thlimmenos v. Greece judgment, the only type of discrimination that had reached the European Court of Human Rights had been direct discrimination based on positive acts of the national authorities. No judgment on Article 14 had been considered to clearly connect a positive obligation with the concept of discrimination. On a similar note, no judgment of the Court has ever acknowledged indirect discrimination. With the Thlimmenos v. Greece judgment and with Protocol 12 acknowledging positive obligations, new types of discrimination are bound to become challenged before the Court. It is intriguing to theorise on these new possibilities.

Direct discrimination can be classified into two types. One type is in concert with the traditional negative conception of state obligation under human rights

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374 See generally Chapter 3.2.3. supra.
instruments. This is the type that builds upon the idea that the state should abstain from discriminating and, thus, forbids acts of discrimination. The other type is in concert with the idea that the state has a positive obligation actively to ensure the enjoyment of human rights. This type builds upon the idea that the state should actively ensure non-discrimination. The first type of direct discrimination will be dealt with in Chapter 5.1.2. under the concept of active discrimination and the latter type will be dealt with in Chapter 5.1.3. under the concept of passive discrimination. After dealing with these two forms of direct discrimination, Chapter 5.1.4. will discuss the concept of indirect discrimination.

5.1.2. Active discrimination

5.1.2.1. Concept

A. The outlines of the concept of active discrimination

The concept of active discrimination hardly needs much explanation. Active discrimination is direct discrimination in that it is directly based on certain badges of differentiation. The term active refers to the fact that it is discrimination that results from identifiable acts of state agents. The concept of active discrimination is based on the traditional negative conception of state obligation under human rights instruments. It is founded upon the idea that the state should abstain from discriminating and, thus, prohibits acts of discrimination.

B. Types of claims and the potential of active discrimination

There seem to be three principal types of active discrimination:

1. Express or overt different treatment.

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376 Discrimination may also occur as the result of acts of private parties, but can only be brought under the Convention via the medium of state agents, then, not acting to prevent or remedy such discrimination. Hence, such cases belong to the category of "passive discrimination" set out in Chapter 5.1.3. infra.
2. Covert different treatment.
3. Different applications of the same measure.

In instances of active discrimination the discriminatory treatment complained of typically takes the form of express exclusion or overt different treatment based on a relatively clearly identifiable badge of differentiation. Examples of this kind of discrimination abound in the case law of the European Court of Human Rights, cf. Table 2, pp. 275-277 infra. The potential of this type of discrimination should not be underestimated as it entails and enables claims against the substantive content of the measure in question (e.g. legislation) and not only claims about their uniform application.

Applicants may also claim active discrimination on the basis of covert different treatment. In such cases it is not clear on the face of the measure complained of what the discriminatory treatment consists of or on what basis it differentiates. The applicant may either endeavour to explain the badge of differentiation without referring to subjective intent of state agents and sometimes the badge of differentiation claimed is simply the treatment itself. In other instances the applicant’s claim clearly is, or borders on, claiming the subjective intention of state agents to discriminate on basis of a particular badge of differentiation. In these cases it is also sometimes unclear what the discriminatory treatment consists of as it may be ex facie neutral but have a discriminatory effect on the applicant. There exist many examples of this covert type of active discrimination, cf. Table 2, pp. 275-277 infra. Also here the claim would concern the substantive content of the measure in question.

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377 See the group of judgments labelled: Active discrimination (abstention) - Express exclusion or overt different treatment.
378 See the two groups of judgments labelled: Active discrimination (abstention) - Covert badges of differentiation and the claim may be of (border on) intent and Active discrimination (abstention) - Totally different effect on individual.
379 It is, however, relatively difficult to establish a prima facie case of covert different treatment, see Chapters 4.3.1.2. and 4.3.2.3. supra.
Another type of active discrimination exists where the claim being made is of a measure not being applied uniformly to those it declares itself applicable to. There are also many examples of cases where the claim is of discriminatory applications, cf. Table 2, pp. 275-277 infra.380 The potential of such claims is perhaps the least far reaching of possible discrimination claims as it only concerns the discriminatory application of neutral measures.381 There is an important difference between these cases and cases where the claim being made is of extending measures applied to others to the claimant. The first type is direct discrimination of the active kind as the measure in question does extend to the claimant but through positive acts of state authorities has not been applied to him/her. In the latter instance the direct discrimination is passive in that a certain measure declares itself applicable to a certain group of people but does not extend to the claimant. In these cases the claimant, however, argues that it should be applicable to him/her also. The latter cases are instances of passive discrimination where action is required, i.e. extending the measure to other groups.

5.1.2.2. Strictness of review

A. Establishing prima facie active discrimination

Individual applicants may have varying degree of difficulties in discharging the burden of proof that rests upon them in relation to establishing prima facie discrimination, i.e. the badge of differentiation and the treatment complained of. Chapters 4.3.1. and 4.3.2. supra deal with these difficulties as they relate to each of the different types of active discrimination. In cases where the applicants have

380 See the group of judgments labelled: Active discrimination (abstention) - Measure not applied uniformly.

381 This type of active discrimination would, thus, correspond to the classical and archetypical formal conception of the concept of non-discrimination (equality before the law). This conception places no restrictions on the possible content of the law, if only it is applied in a uniform manner. Although this is the type of discrimination with the least substantive potential, it is relatively hard to establish in relation to the burden of proof that rests upon the applicant to show that the group of comparison receives more favourable treatment under the application of a measure, cf. Chapter 4.3.2.2. supra.
managed to establish prima facie discrimination the question of the margin of appreciation and the strictness of objective justification review becomes active.

B. The strictness of objective justification review

Active discrimination is based on the classical idea of negative state obligations. Once direct acts of discrimination have been established there will be no inhibitions on purposefully and strictly scrutinising them. Numerous examples from the case law of the Court support the conclusion that the starting point from which to approach review of such cases will be a narrow margin of appreciation and strict scrutiny, cf. Table 2. This is particularly so with regard to overt different treatment. Other factors may, then, weigh in to support or negate the indication of strict scrutiny in relation to active discrimination.

5.1.3. Towards the concept of passive discrimination

5.1.3.1. A conceptual framework for positive obligations

The concept of passive discrimination is based on the idea that the state has a positive obligation to ensure the enjoyment of human rights. Protection against passive discrimination would be derived from the positive obligations of the contracting states under Article 14 and Article 1 of Protocol 12.

Positive obligations of states are built upon the notion that the state is obliged to take action to ensure the enjoyment of human rights. In practice a positive obligation presents itself when a state is found to have violated a human rights provision on

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382 Note that violations primarily occur in the category of overt or express active discrimination where it is relatively easy for the applicant to establish prima facie discrimination. Claims under the other categories of active discrimination (covert different treatment and different applications) result in much fewer violations. This is mostly on account of the difficulties for applicants to lift the burden of proof in these situations. The Court's difficulties in dealing with claims bordering on indirect discrimination or positive obligations find expression in the fact that claims of covert different treatment are particularly difficult to establish, cf. Chapter 4.4. supra.
account of neglecting to secure certain rights in law or on account of neglecting to secure the actual enjoyment of such rights under the law or in fact. Positive obligations to ensure non-discrimination may entail different types of action required of states. A simple example would be the duty to enact new legislation banning certain types of discrimination. Positive obligations of states may also, theoretically, reach so far as to entail positive measures. Positive measures are measures that are: "...designed to favour or promote the interests of disadvantaged groups." More precisely, the principal characteristics of positive measures include that they are actions that are taken against conditions that cause or maintain discrimination. Such action is intended to be temporary and to cease when the objective of equality has been reached. Such action entails specific action to promote equality, correct the general conditions of disadvantaged groups in society or even to grant preferential treatment to certain groups of people. Finally, positive obligations of states may also extend to relations between private parties. In such instances, a violation of a

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383 Veli-Pekka Viljanen: Abstention or Involvement? The Nature of State Obligation under Different Categories of Rights, in Krzysztof Drzewicki, Catarina Krause and Allan Rosas (eds.): Social Rights as Human Rights: A European Challenge, Åbo: Åbo Akademi University Institute for Human Rights, 1994, p. 43, at p. 46 argues that rights to positive actions entail the obligation upon states to take either positive factual action or positive normative action. Hélène Combrinck: Positive State Duties to Protect Women from Violence: Recent South African Developments, in (1998) 20 Human Rights Quarterly, p. 666, at p. 670, for example argues that: "States have positive obligations to establish and maintain the necessary legal and other institutions and remedies through which the rights can be guaranteed." and that this may extend to nongovernmental actors.


385 See Bayefsky, pp. 26-27 where she summarises the principal characteristics of the concept of "special measures" (i.e. positive measures) from various sources and authorities of international law, including the definitions of "special measures" in Article 4, Paragraph 1 of the Convention on the Elimination of All Forms of Discrimination against Women, U.N.G.A. Res. 34/180, and Article 1, Paragraph 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, UNTS 195 as well as General Comment no. 18 of the Human Rights Committee, General Comment 18 (37 session 1989), Doc. A/45/40.

386 See General Comment no. 18 of the Human Rights Committee, para. 10, General Comment 18 (37 session 1989), Doc. A/45/40.
right may be found if the state has failed to ensure that relations between private parties are subject to certain standards. This is often referred to as the "drittwirkung" of the Convention or its indirect horizontal effect. Any "drittwirkung" or indirect horizontal effect of the Convention therefore necessarily hinges on the liability of the contracting states. The issue of the indirect horizontal effect of the Convention provisions has, hence, become the issue of positive obligations of states. The question is how far the positive obligations of states under the Convention extend to their liability for violations in the private sphere.

The division of state obligations into negative obligations and positive obligations is often associated with the division of human rights into the categories of civil and political rights on the one hand and economic, social and cultural rights on the other. The traditional contention is that of a dichotomy between the two types of rights in that civil and political rights only incur negative obligations that do not have financial implications while economic, social and cultural rights incur positive obligations that can have financial implications. Without denying that there indeed exist differences in emphasis associated with these types of rights, much modern day

387 For a comprehensive discussion of the issues surrounding human rights in the private sphere, see Andrew Clapham: *Human Rights in the Private Sphere*, Oxford: Clarendon Press, 1993. Clapham rejects "drittwirkung" theories that have their origin in domestic, notably German, law as a viable basis for the international protection of human rights, cf. p. 181. Similarly, see Harris, O'Boyle and Warbrick, p. 21. Be that as it may, the term "drittwirkung" is widely used in the discussion of the more limited issue of the effect between private parties of the Convention, see e.g. Dijk and Hoof, pp. 22-26 and Andrew Clapham: The "Drittewirkung" of the Convention, R. St. J. Macdonald, F. Matscher and H. Petzold (eds.): *The European System for the Protection of Human Rights*, Dordrecht: Martinus Nijhoff Publishers, 1993, p. 163. As the medium of state implication is necessary the phenomenon is best described as indirect horizontal effect, cf. Harris, O'Boyle and Warbrick, p. 21. Dijk and Hoof, p. 23 refer to "indirect drittwirkung".

388 Under Articles 33 and 34 of the European Convention on Human Rights a case may only be brought before the Court if it concerns an alleged violation by one of the contracting states. Cases cannot be brought against private parties. See generally Harris, O'Boyle and Warbrick, p. 21 and Dijk and Hoof, p. 23.
scholarship argues that its significance has been overstated. The text of Article 1 that stipulates that the Contracting Parties “shall secure” the rights defined in the Convention has been interpreted as encompassing negative and positive obligations alike. From the text of certain Convention rights as well as from the Court’s jurisprudence, positive obligations have become acknowledged under the Convention. Case law under the Convention has gradually added examples to the


390 See Harris, O’Boyle and Warbrick, p. 19. The duty to “secure” in Article 1 of Protocol 12 to the Convention is in the Explanatory report to Protocol 12, para. 26, taken to imply positive obligations. Similarly the language of Article 2 of the International Covenant on Civil and Political Rights, UNTS 171, that the state parties undertake to “respect and ensure” the rights therein has been interpreted as comprising both a negative and a positive obligation. See e.g. General Comment 3 (13 session 1981), Doc. A/36/40 and Thomas Burgenthal: To Respect and to Ensure: State Obligation and Permissible Derrogations, in Louis Henkin (ed.): The International Bill of Rights, New York: Columbia University Press, 1981, p. 72, at p. 77.

list of cases wherein positive obligations have been acknowledged. But, as pointed out by Harris, O’Boyle and Warbrick: “The Court has not determined any general theory of positive obligations, and, accordingly, it will be necessary to consider the question in relation to each particular right.”

Positive obligations or the duty to act to secure non-discrimination may take on many forms and function at different levels. In discussing the content of state obligation, Asbjorn Eide has elaborated on three different levels of obligation. First there is the obligation to respect, the second level of obligation is to protect and the third level of obligation it to assist and fulfil. The first level, to respect, would correspond to the classical negative obligation of abstention, i.e. the state should respect rights by not violating them itself, most clearly by not interfering with or restricting the citizens’ freedom. The second level, to protect, would correspond to various obligations

some positive action on the part of the State, in such circumstances, the State cannot simply remain passive, and ‘there is ... no room to distinguish between acts and omissions’."

392 Harris, O’Boyle and Warbrick, p. 284.

393 Eide, pp. 37-38. He argues that the allegation that civil and political rights on the one hand and economic, social and cultural rights on the other differ on basis of whether they require use of resources misses the point that both types of rights may entail obligations at all three levels. This three-level typology of state obligations relevant to civil, political, economic, social and cultural rights alike, attributed to Eide, has become an acknowledged tool to understanding the content of state obligation. See The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, in (1998) 20 Human Rights Quarterly, p. 691, at pp. 693-694 and Victor Dankwa, Cees Flinterman and Scott Leckie: Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, in (1998) 20 Human Rights Quarterly, p. 705 at pp. 713-715. See also the earlier Limburg principles that form the basis to the Maastricht Guidelines: Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, in (1987) 9 Human Rights Quarterly, p. 122. Note the similarity of Eide's three different levels with the “...tripartite typology of duties.” forwarded by Henry Shue: Basic Rights, Subsidence, Affluence and U.S. Foreign Policy, Princeton: Princeton University Press, 1980, p 52. Shue argues that all basic rights (human rights) carry with them three types of duties; duties to avoid depriving the right, duties to protect from deprivation and duties to aid the deprived. Consequently he argues that there is no dichotomy between negative rights and positive rights, cf. p. 52-53.

394 Eide, p. 37. Eide mentions that a part of such an obligation to respect rights could be officially to recognize or register them. For the sake of clarity I would argue that such positive duties upon the
upon states of a positive nature. This would principally entail enacting laws and resorting to other active measures that ensure the protection (enjoyment) of these rights, including protection against violations by actors other than the state itself. The third and final level, to assist and fulfil, is the most far-reaching level of duties. It is a positive duty like the duty to protect, but what divides them into two distinct categories is the level of involvement needed on part of the state. The principal type of duties to assist and fulfil entails the direct provisions for needs or resources, such as legal aid, social security and the like. The duty to assist may also take the form of measures to improve the general conditions in a certain field.

A similar tendency to distinguish between two types of positive obligations can be discerned in Clapham’s work on the horizontal effects of the Convention. Clapham sets out the “outer limits” of the Convention as regards its extension into the private sphere via the medium of positive obligations of states (“ecological liability”). He argues that a distinction should be drawn between the promotion of rights in the private sphere on the one hand and actions that prevent or remedy violations in the private sphere on the other. In relation to the case law of the Court he points out that the Court is cautious and ascribes a wide margin of appreciation to states when confronted with claims of positive obligations: “...which demand governmental policy changes which promote the enjoyment of Convention right in the private sphere...” and that claim: “...active promotion of the enjoyment of

state belong to the category of the duty to protect. This corresponds more clearly to the notion that the duty to respect is a negative duty, cf. Novak, p. 36. See also Dankwa, Flinterman and Leckie, p. 714.

396 Eide, p. 37, Nowak, p. 38 and Dankwa, Flinterman and Leckie, p. 714.
397 Eide, p. 38 and Dankwa, Flinterman and Leckie, pp. 714-715. Nowak does not divide positive obligations into categories depending on the level of involvement of states.
398 Clapham: Human Rights in the Private Sphere, pp. 341-356. The endeavour to distinguish between types of positive obligations seems to be relatively recent. Harris, O’Boyle and Warbrick (on the European Convention on Human Rights), Nowak (on the International Covenant on Civil and Political Rights) and Bayefsky (on a number of international instruments) are examples of important works that do not attempt this.
rights...". Such claims would hinge on positive obligations of a kind that roughly corresponds to the third level of positive obligations as elaborated on by Eide, i.e. the obligation to assist and fulfil the rights in question with direct provisions or measures to improve the general conditions of certain groups. On the other hand he finds that the Court has been more willing to allow claims of positive obligations on the basis that the state has failed to prevent a violation or has failed to provide for a remedy compensating for such violations, notably by leaving gaps in legislative protection against violations. This category would correspond to the second level of state obligation in Eide’s model, the obligation to protect.

Certainly, these two recent attempts at elaborating on the positive obligations of states and dividing them into two categories depending on how far they reach and how heavy a burden they place on states, are not conclusive as a clear theoretical framework. Neither do they clearly stake out the territory of each type of positive obligations. Perhaps it is not possible to elaborate on a clear dividing line. These two attempts, however, endeavour to place a finger on a fairly clear idea; the idea that there are levels to which the positive obligations of states may relatively easily reach and that there are levels to which it is more difficult to extend them. This idea is the logical consequence of the principle of subsidiarity of the Convention mechanism and the theory involved in delineating the distribution of powers between the democratic discretion of the national authorities and the international supervisory machinery. The idea referred to, thus, is the logical consequence of the need for delineating the appropriateness of judicial intervention in a given case. And its practical function would correspond to the function of the margin of appreciation doctrine, i.e. to adjust the intensity of judicial scrutiny in cases under review.

399 Clapham: Human Rights in the Private Sphere, p. 351, referring inter alia to Rees v. The United Kingdom, 17.10.1986 and Cossey v. The United Kingdom, 27.09.1990 where the applicants who were transsexuals claimed a positive obligation under Article 8 to alter birth certificates. The Court rejected the claim, as it would be impossible to acknowledge: "...without a fundamental modification of the existing system for maintaining the register of births, which was accessible to the public.", cf. Cossey v. The United Kingdom, 27.09.1990, para. 38.

400 Clapham: Human Rights in the Private Sphere, pp. 248 and 351, referring to X and Y v. The Netherlands, 26.03.1985, also concerning positive obligations in relation to Article 8.
As pointed out by Harris, O’Boyle and Warbrick, the absence of a general theory of positive obligations under the Convention renders study of individual rights the most fruitful avenue through which to study positive obligations.\textsuperscript{401} Some attempts to litigate positive obligations can be discerned in the case law of the Court on Article 14. Generally the tendency has been to subsume the positive obligations issue under the relevant substantive Convention provision and not the accessory Article 14.\textsuperscript{402} Nevertheless, upon closer analysis the case law on Article 14 holds some interesting examples.

A. Lacunae in legislative protection

The \textit{Vermeire v. Belgium} case concerned the failure by Belgium to implement the principle pronounced in the \textit{Marckx v. Belgium} judgment that the: “...total lack of inheritance rights on intestacy, based only on the ‘illegitimate’ nature of the affiliation, was discriminatory.”.\textsuperscript{403} The still incomplete general revision of legislation on affiliation and inheritance rights prompted by the \textit{Marckx v. Belgium} judgment some 12 years earlier could not justify the failure to implement the ban against such discrimination inherent in the Convention, in particular as: “There was nothing imprecise or incomplete about the rule which prohibited [such] discrimination...”.\textsuperscript{404}

The \textit{Vermeire v. Belgium} case has been discussed as an example of the possible direct effect in national law of the judgments of the Court. This is taken to entail

\textsuperscript{401} Harris, O’Boyle and Warbrick, p. 284.
\textsuperscript{402} Ibid, p. 484.
\textsuperscript{404} Vermeire v. Belgium, 29.11.1991, para. 25. Note that the \textit{Marckx v. Belgium} judgment, from which the rule stemmed, was directed against Belgium like the \textit{Vermeire v. Belgium} judgment some 12 years later.
that, when necessary to comply with a judgment of the Court, the state found in breach of the Convention must amend or reinterpret its legislation.\textsuperscript{405} At a more general level the judgment can also be said to be an example of the acknowledgment of a positive obligation to remedy lacunae in legislative protection under Article 14. As such it seems to have gone unnoticed in the literature on Article 14. The duty upon a state to remedy a lacuna in legislative protection will be most acute upon the state found in breach of the Convention, but when such lacunae exist in other states the duty rests equally upon them to “secure to everyone” the rights entailed in the Convention as interpreted by the Court, cf. Article 1 of the Convention. Therefore, the Vermeire v. Belgium judgment, asserting the duty to remedy established lacuna in legislative protection, may be taken not only as an example of the direct effect of the judgments of the Court in the national law of the respondent state, but as indicating a more general positive obligation under Article 14 on states parties to the Convention to remedy lacunae in legislative protection against discrimination.

B. Extending existing measures to similar groups

In the National Union of Belgian Police v. Belgium judgment of 1975 the Court denied that Articles 11 and 14 entailed a positive obligation on Belgium to set up for provincial and municipal staff a consultation system similar to that in operation for state officials. The action required was actively to ensure the same treatment for similar situations. In this judgment, the positive obligation to extend measures from one group to another similar group was expressly denied.\textsuperscript{406} Similarly, in Petrovic v. Austria, the treatment complained of was the failure to extend parental leave


\textsuperscript{406} National Union of Belgian Police v. Belgium, 27.10.1975, para. 48: “In the Court’s opinion, however, Articles 11 and 14 of the Convention do not oblige Belgium to set up for provincial and municipal staff [...] a consultation system analogous to the one in operation for State officials...”. Similarly, in Lithgow and Others v. The United Kingdom, 08.07.1986, paras. 186-189 the Court dealt very leniently with claims to treatment similar to earlier nationalisation legislation and to treatment similar to that provided in compulsory purchase legislation and found no violation.
allowances provided to mothers to fathers also. Despite considering both parents similarly placed, the Court found no violation with references to considerations indicating a wide margin of appreciation. ⁴⁰⁷

C. Claims for accommodation of differences

The Thlimmenos v. Greece case is a landmark judgment in which positive obligations in the form of accommodating differences were acknowledged for the first time. The facts of the case were that the applicant was a member of the Jehovah's Witnesses and had served a prison sentence for insubordination on account of refusing to wear the military uniform. Later he was denied appointment as a chartered accountant on the grounds that he had been convicted of a felony. The Court set out a wholly new facet of the protection against discrimination in this case:

"The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification. [...] However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different." ⁴⁰⁸

In the Thlimmenos v. Greece judgment, the failure of the state to act led to a violation of Article 14. The applicant did not complain of the fact that criminal offenders were excluded from the profession of chartered accountants, but rather that he as a Jehovah's Witness refusing to serve in the military on religious grounds belonged to a different class from most other offenders and that the failure to accommodate this difference amounted to discrimination. ⁴⁰⁹ The Court found a violation of Article 14 taken in conjunction with Article 9 as the applicant was found to have been

⁴⁰⁷ Petrovic v. Austria, 27.03.1998, paras. 36 and 40-42.
⁴⁰⁸ Thlimmenos v. Greece, 06.04.2000, para. 44.
⁴⁰⁹ Ibid, para. 34.
discriminated against in the exercise of his freedom of religion.\textsuperscript{410} The discrimination consisted in failing to treat the applicant differently from other people convicted of a felony. The discrimination, thus, was a result of failing to fulfil the positive obligation to accommodate the applicant’s difference.

The development witnessed in \textit{Thlimmenos v. Greece} is a breakthrough for claims of positive obligations that relate to accommodation for differences. Earlier, it had been denied that active accommodation for differences might be required. In \textit{Kjeldsen, Busk Madsen and Pedersen v. Denmark} the treatment complained of consisted of compulsory sex education in state schools in comparison with allowing exemption from religious instruction classes. The first line of reasoning by the Court referred to the fact that the measure applied uniformly to all pupils in state schools and that there therefore was nothing in the Act that indicated discriminatory treatment based on a personal characteristic. The second line of reasoning merged the comparability and justificatory arguments and found a difference as the former disseminated only knowledge while the latter concerned indoctrination of tenets.\textsuperscript{411} Clearly what was at stake was uniformly applied sex education that did not accommodate the different religious beliefs or moral opinions of parents. The parents’ claim was for positive accommodation for their needs. A separate opinion argued that respect for the parents’ ideology was called for in a similar manner as respect for the ideology of conscientious objectors to military service.\textsuperscript{412} Similarly in \textit{Lithgow and Others v. The United Kingdom}, one of the claims made was of discrimination on the grounds that the same treatment was accorded to growing and declining companies in valuation of compensation for nationalisation. The Court, in a very cursory examination of the case under Article 14, explicitly pointed out that it doubted that claims of accommodation for difference were part and parcel of Article 14 in the following terms: “...whether or not it falls within the ambit of Article 14, the difference said by the applicants to result from the similar treatment of both growing

\textsuperscript{410} \textit{Ibid}, paras. 42 and 49. After finding a violation of Article 14 in conjunction with Article 9, the Court found it unnecessary to review Article 9 taken on its own.

\textsuperscript{411} \textit{Kjeldsen, Busk Madsen and Pedersen v. Denmark}, 07.12.1976, para 56.

\textsuperscript{412} \textit{Ibid}, Separate Opinion of Judge Verdoss, paras. 9-10.
and declining companies can be regarded as having an objective and reasonable justification." In *Stubbings and Others v. The United Kingdom* one part of the applicants' complaints related to the lack of accommodation for their difference. The applicants were the adult victims of child sexual abuse. Their claims for compensation for psychological injury were classified as stemming from intentionally caused injury and were, thus, time-barred due to a limitation period of six years from the age of majority. The applicants argued that child sexual abuse had specific psychological ramifications that prevented them from realising that they had a cause of action until after their claims had become time-barred. The Court swiftly dealt with this part of the case with the formal approach that as legislation on limitations for intentionally caused injury applied to all intentionally caused injury there was no discrimination. All these judgments indicate a formal assimilationist approach prevailing over accommodation for differences. Generally the Court seems to have been at pains to find ways through which it did not have to deal with such positive accommodation. It simply did not have the conceptual framework to deal with the issues raised.

Before *Thlimmenos v. Greece*, the last example of an unsuccessful claim for accommodation of difference was the *Sheffield and Horsham v. The United Kingdom* judgment. Here, the state had refused to annotate or update the biological pre-operative sex of the applicants with their post-operative gender status. This had the effect that on occasions where birth certificates had to be provided, they had to describe themselves in public by reference to gender that did not correspond to their external appearances. The applicants claimed that this amounted to discrimination as: "...law continues to treat them as being of the male sex...", they also complained that they had a: "...disadvantaged position in law...". In essence the applicants'...
claims concerned the question of whether there existed a positive obligation to recognise for legal purposes their new gender identities. Their claim was, thus, of positive accommodation for their difference. This time, in contrast with earlier cases, the Court actually reviewed the claim of positive accommodation. The review, however, was very lenient and no violation was found. The Court addressed the issue of positive obligations under Article 8. As regarded Article 14 more particularly, the Court referred to the margin of appreciation under Article 8 and concluded that the considerations taken into account in the fair balance test relevant to assessing the existence of positive obligations under Article 8 were also encompassed by the notion of objective and reasonable justification under Article 14. Preceding the Thlimmenos v. Greece judgment, it can be said that the Sheffield and Horsham v. The United Kingdom judgment paved the way for accommodation for differences under Article 14, via the route of positive obligations under Article 8.

After Thlimmenos v. Greece, the Court has again been confronted with a claim of positive accommodation for differences. This was in the five cases of Beard v. The United Kingdom, Chapman v. The United Kingdom, Coster v. The United Kingdom, Jane Smith v. The United Kingdom and Lee v. The United Kingdom, which all concerned the refusal of planning permissions, enforcement proceedings and prosecutions of Gypsies for unlawfully occupying caravans on their own land. One part of the applicants’ claims under Article 14 concerned: “...the legal system’s failure to accommodate their traditional way of life, by treating them as if they were the same as members of the majority population...”. With reference to the

418 Ibid, para. 76. The judgment builds upon earlier judgments on transsexualism. Rees v. The United Kingdom, 17.10.1986, Cossey v. The United Kingdom, 27.09.1990, and B. v. France, 25.03.1992 all concerned Article 8 but a violation of Article 14 was not claimed. In X, Y and Z v. The United Kingdom, 22.04.1997, a violation of Article 14 was also claimed but the Court found it not necessary to consider the complaint.


420 Chapman v. The United Kingdom, 18.01.2001, para. 127. They also complained of the legal system disadvantaging them relative to members of the general population. The Court did not address
Thlimmenos v. Greece judgment, the Court acknowledged that the lack of accommodation for significantly different situations might result in discrimination if it lacked objective and reasonable justification. In these cases, however, the Court found that the lack of accommodation for the special situation of the Gypsy applicants was justified under Article 14 with reference to its findings under Article 8. Under Article 8 review, the Court had found that the state in principle enjoyed a wide margin of appreciation in the field of planning policy and implementation where discretionary decisions involving a multitude of local factors were involved. It concluded that this margin should not be narrowed down on account of a consensus in the contracting states to the effect that the special needs of Gypsies as a national minority should be recognised as the consensus witnessed in the Framework Convention for the Protection of National Minorities, setting out general principles and goals without means of implementation, was not considered concrete enough on common standards in particular situations. The Court acknowledged that there was inherent in Article 8 a positive obligation to facilitate the Gypsy way of life, but only to the extent that: "...some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in arriving at the decisions in particular cases." It excluded the possibility, even in face of the established lack of places available in authorised Gypsy caravan sites, that this positive obligation would reach so far into general social policy as to oblige states to make available a sufficient number of suitably equipped sites. In

this part of the applicants' claim that called for indirect discrimination analysis, cf. Chapter 5.1.4.2. A infra.

422 Chapman v. The United Kingdom, 18.01.2001, para. 92, referring to this stance as set out in the Buckley v. The United Kingdom, 25.09.1996 judgment, para. 75.
424 Chapman v. The United Kingdom, 18.01.2001, para. 96.
425 Ibid, para. 98. In this respect the Court also recalled that Article 8 did not entail a right to be provided with a home, cf. para. 99. In relation to this issue the Court also discussed the suitability of the applicants' alternatives. The evaluation of the suitability of alternatives was an area where the Court concluded that the state enjoyed a wide margin of appreciation, cf. para. 104. On this issue the Court noted that the applicants had not shown sufficiently that they had no alternatives and that
conclusion under Article 8, the Court found that there were strong environmental reasons for refusing the planning permissions and that the applicants' special circumstances had been taken into account in the national decision making process which contained adequate procedural safeguards protecting their interests. The similar treatment of Gypsies and the general population complained of was, with reference to these findings of the Court under Article 8, found to have an objective and reasonable justification under Article 14.

With reference to the Beard v. The United Kingdom, Chapman v. The United Kingdom, Coster v. The United Kingdom, Jane Smith v. The United Kingdom and Lee v. The United Kingdom judgments it seems that the Court is in no rush to start acknowledging any and all claims of positive accommodation for differences under Article 14. When discussing the general principles applicable to deciding the applicants' claims under Article 8 the Court reasoned that special treatment of gypsy caravan sites would raise: "...substantial problems under Article 14 of the Convention." This statement of the Court raises questions as to the Court's commitment to the approach set out in Thlimmenos v. Greece that significantly different situations may require different treatment to prevent discrimination but may be seen as referring to the outer limits of the positive obligations inherent in Article 14. It will be discussed in detail in Chapter 5.1.3.4. C infra, when discussing the outer limits of the concept of passive discrimination. For a general comparison

Article 8 did not go as far as allowing individual preferences to override the general interest, cf. paras. 112-113.

426 Ibid, paras. 110 and 114. The seven dissenting judges on the contrary concluded: "Our view that Article 8 of the Convention imposes a positive obligation on the authorities to ensure that gypsies have a practical and effective opportunity to enjoy their rights to home, private and family life, in accordance with their traditional lifestyle, is not a startling innovation.". See Chapman v. The United Kingdom, 18.01.2001, Joint Dissenting Opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Strážnická, Lorenzen, Fischbach and Casadevall, para. 9.

427 Ibid, 129. The emphasis in the judgment on the national authorities actually having had proper regard to the applicants' predicament as a justifying factor seems to indicate that the Court merged objective and reasonable justification review with the consideration of comparability of situations under Article 14.

428 Ibid, para. 95.
between these judgments and the *Thlimmenos v. Greece* judgment in terms of the strictness of review applied, see Chapter 5.1.3.5. *infra.*

D. Positive measures

Finally, as regards positive obligations to enact positive measures to promote equality, the Court has noted that: "...certain legal inequalities tend only to correct factual inequalities." From this it has been concluded that positive measures would not violate Article 14, provided they had an objective and reasonable justification. Positive measures have never been directly tested or enforced as a positive obligation on basis of Article 14.

5.1.3.3. Positive obligations under Protocol 12

Protocol 12 and the accompanying Explanatory report clearly focus on positive obligations and indirect horizontal effect. The Protocol seems to endeavour to steer a middle course between no positive obligations and very wide reaching positive obligations in what seems to be a compromise solution between the opposite

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429 *Belgian Linguistics*, 23.07.1968, para. 10, p. 34.

430 See generally Harris, O’Boyle and Warbrick, pp. 485-486.

431 The discussion and arguments presented in this Chapter were first presented in a paper originally delivered at a conference held on the occasion of the 50th anniversary of the European Convention on Human Rights, 4 October 2000, by the University of Iceland Human Rights Institute, The Icelandic Human Rights Center and the Reykjavik Academy. The contents of the original conference paper will be published in Icelandic in the forthcoming collection of essays in honor of professor Gunnar G. Schram. The manuscript is appended to the present study, see Oddný Mjöll Arnardóttir: Viðauki nr. 12 við Mannrétindasáttmála Evrópu – Nýir möguleikar á sviði jafnæðisverndar Mannrétindasáttmálan, forthcoming in Ármann Snævarr, Guðrún Erlandsdóttir, Jónatan Bómundsson, Páll Sigurðsson and Borgeir Örlygsson (eds.): *Afmaelisit Gunnar G. Schram sjótagur 2. febrúar 2001*, Reykjavík: Nýja Bókafélagið, 2001, see Appendix 1, pp. 322-336. The publisher's formal permission has been obtained.
In parts the Protocol and the Explanatory notes seem to send conflicting messages on how to draw the line.

The first point of interest in the Protocol is that its operative part does not stipulate the principle of equality, but rather provides for non-discrimination. Equality and non-discrimination are generally taken to be the positive and negative statements of the same principle. Referrals to the equality principle would nevertheless by virtue of a positive formulation indicate positive obligations more clearly than referrals to non-discrimination. This seems to be the first indication of cautiousness in the approach of Protocol 12 to positive obligations. The Principle of equality could not, however, be disregarded altogether and the solution was to refer to it in the preamble to the Protocol, as well as in the Explanatory report. The Explanatory report states: “...it should be noted that the non-discrimination and equality principles are closely intertwined. For example, the principle of equality requires that equal situations are treated equally and unequal situations differently. Failure to do so will amount to discrimination unless an objective and reasonable justification exists...” This approach allows for the possibility of positive obligations in a manner similar to the approach of the Court in Thlimmenos v. Greece. It does not declare a right to equality of treatment or the applicability of positive obligations, but a similar result is reached through the interpretation of the negative concept of discrimination. Stating the fact that a failure to treat equal situations equally or to accommodate for differences may result in discrimination is simply a negative way of stating that the state has a positive obligation to provide similarly for similarities

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432 Moon, p. 50 argues that: “The Committee of Experts (DH-DEV) and the CCDH [The Steering Committee for Human Rights] have debated several draft texts and have found it difficult to reach agreement on a compromise wording.”. It seems that the compromise solution presented in Protocol 12 does not merely reflect a difference of opinion on the nuances of the wording of the Protocol but rather reflects a fundamental difference of opinion on the appropriate approach to positive obligations under the new Article 1 of Protocol 12.

433 See Chapter 1.2. supra.

434 Explanatory report to Protocol 12, paras. 1, 14 and 15.

435 Ibid, para. 15.

and to accommodate for differences. The approach of the Protocol is clearly cautious in not referring to the principle of equality, but it excludes nothing.

Although the wording of Article 1 of Protocol 12 refers only to non-discrimination and not to the principle of equality, it also refers to the duty incumbent upon states to "secure" the enjoyment of non-discrimination, which is the classical legal language from which positive obligations are derived. The Explanatory report states that the wording of Article 1: "...reflects a balanced approach to possible positive obligations...". More particularly it states that while the main objective of the Protocol is to embody a negative obligation incumbent upon the contracting states: "...positive obligations cannot be excluded altogether..." and: "...it cannot be totally excluded that the duty to "secure" under the first paragraph of Article 1 might entail positive obligations." Then, even more precisely as to the content of these possible positive obligations, the Explanatory report states that they concern measures to prevent discrimination, even when it occurs in relations between private persons, and that they concern measures to remedy instances of discrimination. The only example not directly related to indirect horizontal effect that is mentioned is the possibility of lacunae in the domestic legal protection against discrimination.

As regard positive obligations that reach to the duty to regulate relations between private parties (indirect horizontal effect), the Explanatory report sends somewhat clearer messages as to the extent of obligations. It builds on the general approach that positive obligations extend to a duty to prevent or remedy instances of discrimination. To begin with it emphasises that Article 1: "...protects against discrimination by public authorities. The Article is not intended to impose a general positive obligation on the Parties to take measures to prevent or remedy all instances

438 Ibid.
440 Ibid. It seems clear, however, from this example and the following sentence: "Regarding, more specifically relations between private persons..." that the comments of the Explanatory report on positive obligations are not strictly confined to relations between private parties and indirect horizontal effect.
of discrimination in relations between private persons.".441 The scope of Article 1 of Protocol 12 is expressly limited to the enjoyment of "any right set forth by law" and to discrimination "by any public authority". These are stipulations that seek to limit its indirect horizontal effect.442 However, as it cannot be excluded that the duty to "secure" non-discrimination entails positive obligations, the Explanatory report envisages situations where: "...a failure to provide protection from discrimination in such relations might be so clear-cut and grave that it might engage clearly the responsibility of the State...".443 More particularly it is envisaged that: "...any positive obligation in the area of relations between private persons would concern, at the most, relations in the public sphere normally regulated by law, for which the state has a certain responsibility [...] It is understood that purely private matters would not be affected.".444

Finally we come to the question of positive measures under Protocol 12, i.e. action designed to promote equality. The Preamble to Protocol 12 reaffirms that: "...the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures.". More precisely the Explanatory report elaborates that situations of disadvantage or inequalities that exist in fact may constitute justifications for such measures. The Explanatory report underscores that: "...the present Protocol does not impose any obligation to adopt such measures. Such a programmatic obligation would sit ill with the whole nature of the Convention and its control system which is based on the collective guarantee of

441 Ibid, para. 25, noting in addition that: "...defining the various elements of such a wide-ranging obligation of a programmatic character." would not belong to the sphere of justiciable rights stipulated in the Convention.
442 Ibid, paras. 25 and 27, cf. para. 29.
444 Ibid, para. 28. Examples mentioned are arbitrary denials of access to work, restaurants or services that private persons may make available to the public such as health care or utilities. As regards purely private matters, the Explanatory report mentions that their regulation in terms of non-discrimination would be likely to interfere with the right to respect for private and family life in Article 8.
individual rights which are formulated in terms sufficiently specific to be justiciable.”.445

5.1.3.4. The concept of passive discrimination

A. The outlines of the concept of passive discrimination

Recent developments witnessed in the Thlimmenos v. Greece judgment and in Protocol 12 clearly open up the path for positive obligations under the non-discrimination provisions of the Convention. Failure to live up to these positive obligations will open the door for new types of rights-claims under the non-discrimination clauses of Article 14 and Article 1 of Protocol 12. It is suggested here that this new phenomenon should be conceptualised in terms of the concept of passive discrimination. The term passive clearly contrasts with the duty to act under positive obligations. In these instances the failure to act, i.e. passivity, results in a violation of the duty to act in accordance with a positive obligation. Applying the term discrimination to describe the violation has a clear and necessary conceptual reference to the objective justification test that has become part of the concept of discrimination in the jurisprudence of the Court. Indeed, a failure to act when a positive obligation may be incumbent upon states would not per se lead to a finding of discrimination, but would simply trigger the objective justification test in an effort to evaluate whether the failure to act is justified or not.446 Applying the term discrimination to these types of claims is also in line with the approach of the Court and the Protocol not to declare the principle of equality but to approach these new

445 Explanatory report to Protocol 12, para. 16.
446 See the approach in Thlimmenos v. Greece, 06.04.2000, para. 44: “...when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.” (emphasis added). See also in terms of positive measures, the comment of the Explanatory report to Protocol 12, para. 16, that: “...measures taken in order to promote the full and effective equality [...] shall not be prohibited by the principle of non-discrimination, provided that there is an objective and reasonable justification for them...”. In relation to positive obligations under Article 8, the Court has pronounced that similar principles apply to negative and positive obligations alike, cf. Kroon and Others v. The Netherlands, 27.10.1994, para. 31.
possibilities in terms of interpretation of the negative concept of discrimination. Finally, one clear advantage in conceptualising the positive obligations under Article 14 and Protocol 12 in terms of passive discrimination is that, henceforth as hereto, it keeps the term discrimination functional as an all-encompassing concept. Phrases such as “non-discrimination” and “the ban against discrimination” would keep their function of describing the whole of what is not allowed under the relevant provisions.

As the concept of passive discrimination hinges on the positive obligations incumbent on states under the relevant provisions, elaboration of its content coincides with elaboration on how far these positive obligations may reach. Here, we land right in the middle of recent attempts to cultivate a clearer understanding of positive obligations and their potential division into categories in relation to how far they reach. These recent attempts are indeed mirrored in the Explanatory report to Protocol 12, which endeavours to straddle a line between positive obligations to prevent and remedy instances of discrimination on one hand and positive obligations to promote equality on the other.

B. Types of claims and the potential of passive discrimination

The content of the concept of passive discrimination can be extrapolated in more detail from the Thlimmenos v. Greece judgment and the Explanatory report to Protocol 12. First, it is useful to present schematically the possible instances that might result in passive discrimination (possible claims):

1. Failure to provide for non-discrimination in law, even in relations between private parties.
2. Failure to remedy instances of discrimination that occur, even in relations between private parties
3. Failure to provide similar measures for relevantly similar groups, even in relations between private parties.
4. Failure to provide different measures for significantly different groups, even in relations between private parties.

5. Failure to promote equality, even in relations between private parties.

The first category hinges on the positive obligation legally to provide for non-discrimination. This type of positive obligation is clearly envisaged in the Explanatory report to Protocol 12.\textsuperscript{447} This type of passive discrimination is an example of the positive obligation of states to \textit{prevent} violations by enacting the relevant legislation and could reach relations between private parties. With the general incorporation of the Convention into the domestic law of the contracting states and the current state of the law under Article 14, instances of violations of this kind in relations between the states and private parties seem unlikely to occur in practice. The additional scope of protection stipulated in the new Protocol 12 may, once it takes effect, bring some lacunae that still exist in domestic protection under the Convention.

The second type of passive discrimination is discrimination that results from failure to remedy instances of discrimination, even if they occur in relations between private parties. This category of passive discrimination hinges on the positive obligation to provide remedies in cases when discrimination has occurred. This type of passive discrimination is clearly allowed for in the Explanatory report to Protocol 12.\textsuperscript{448} It is an example of the positive obligation of states to provide a \textit{remedy} for violations. This obligation to provide remedies seems to seek inspiration from Clapham’s work on the indirect horizontal effect of the Convention.\textsuperscript{449} But what precisely does this

\textsuperscript{447} Explanatory report to Protocol 12, para. 26 mentions this as an example of a positive obligation under the Protocol.

\textsuperscript{448} Explanatory report to Protocol 12, para. 24.

\textsuperscript{449} Clapham: Human Rights in the Private Sphere, p. 348-351. If the state has an “ecological liability” for all human rights violations, Clapham argues, the question becomes: “...could action by the State reasonably have prevented this violation? and has the State implemented a remedy so that such violations can be compensated?” (p. 348). As an example he mentions gaps in legislation where the state has not provided reparatory legislation in reaction to violations in relations between private parties and refers to the \textit{X and Y v. The Netherlands}, 26.03.1985, case where the state was liable
positive duty to provide remedies for discrimination refer to? In relation to Article 13, which provides for the right to an effective remedy, the concept of a remedy for violations has been interpreted as encompassing the possibilities: “...both to have [a] claim decided and, if appropriate, to obtain redress.”\textsuperscript{450} The duty of the state under this type of passive discrimination, thus, seems to be to enact the channels for testing claims of discrimination and providing, if appropriate, redress and compensation in the event of violations. This category of passive discrimination may, thus, become an interesting forum for claims that have to do with the lack of enforcement mechanisms in relation to non-discrimination. Solemn declarations in national law that ban discrimination but have no effective enforcement mechanisms attached may possibly be contested as passive discrimination hinging on the positive obligation to remedy instances of discrimination. Such possibilities might equally concern relations between the state and private parties as well as relations between private parties. The relationship that this category of passive discrimination may have with Article 13 is, however, unclear.\textsuperscript{451} Article 13, like Article 14, only applies in conjunction with other Convention rights. In the Court’s jurisprudence on Article 13, there seems to have prevailed a tendency to subsume the substantive issues under the other Convention right and in cases of a violation of the substantive right, the Court is: “...not much inclined to consider Article 13 as well.”\textsuperscript{452} However this relationship may develop, the mere fact that the right to an effective remedy is stipulated independently in Article 13, would in terms of a common standard seem to enhance the possibilities for successful claims under this category of passive discrimination.

because a sexual offence, committed by a private perpetrator against a legally incompetent victim, could not be prosecuted.

\textsuperscript{450} Klass and Others v. Germany, 06.09.1978, para. 64.

\textsuperscript{451} Article 13 has been described as obscure and as raising very complicated issues of interpretation, cf. Dijk and Hoof, p. 697 with references.

\textsuperscript{452} Dijk and Hoof, p. 703, referring \textit{inter alia} to the \textit{X and Y v. The Netherlands}, 26.03.1985, judgment that decided the lack of an effective remedy as an issue of indirect horizontal effect under Article 8, and found it not necessary: “...to examine the same issue under Article 13.”, cf. para. 36.
The third category of passive discrimination refers to failure to provide similar measures for relevantly similar groups, even in relations between private parties. The reference to relevantly similar groups is drawn from the case law of the Court.\(^\text{453}\)

This category of passive discrimination hinges on the positive obligation actively to ensure the similar treatment of relevantly similar situations. It builds on the established case law of the Court that it is discrimination to treat differently persons in relevantly similar situations. It corresponds to one-half of the equality maxim, i.e. that equals should be treated equally. This category of passive discrimination approaches this well-known issue from the angle of a positive duty to act. It entails that a failure to actively ensure the similar treatment of relevantly similar situations results in passive discrimination. This type of passive discrimination, hence, is an example of the positive obligation of states to prevent violations and could reach relations between private parties.

It is quite simple logic to infer the positive duty to provide similarly for relevantly similar situations from the negative duty to abstain from differentiating between relevantly similar situations. This third category is simply a logical consequence of approaching equal treatment of equal situations from the angle of a duty to act instead of from the duty to abstain from action.\(^\text{454}\)

This type of passive discrimination is bound to be the most effective path for the “socialising effect” of the Convention. The term “socialising effect” has been applied to describe the phenomenon whereby if states proceed to specific performance in the area of Convention rights they are bound to do so without discrimination and to provide the

\(^{453}\) See footnote 33 supra.

\(^{454}\) Compare with the similar simplicity of the argument acknowledging positive obligations on the basis of Article 6:1 in Airey v. Ireland, 09.10.1979, para. 25 where the Court stated that: “...fulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State, in such circumstances, the State cannot simply remain passive, and 'there is ... no room to distinguish between acts and omissions'.”. Also establishing the simplicity of this logic is the Explanatory report to Protocol 12, para. 15, stating that a failure (emphasis added) to treat equal situations equally and unequal situations unequally will amount to discrimination unless an objective and reasonable justification exists.
same performance in all relevantly similar situations.\textsuperscript{455} This "socialising effect" has in part been attributed to the \textit{Abdulaziz, Cabales and Balkandali v. The United Kingdom} judgment where the Court asserted that: "The notion of discrimination within the meaning of Article 14 includes in general cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention."\textsuperscript{456} The "socialising effect" of the Convention can be argued as entailing a negative obligation or a positive obligation.\textsuperscript{457} With reference to the duty to act entailed in the extension of benefits from one group to another and the reluctance of the Court to actually enforce such claims, this category clearly seems to hinge upon a positive obligation on states. Borderline cases may exist. In \textit{Abdulaziz, Cabales and Balkandali v. The United Kingdom} the government had in fact proceeded to expressly different performance as regarded immigrant wives and immigrant husbands and had, thus, not abstained from discriminatory action. So the case was not really an example of the positive obligation to act to ensure the equal treatment of equal situations.\textsuperscript{458} Conversely, the pressing cases of positive obligation to act to secure the same treatment for similar groups would refer to situations where the relevant treatment has not been expressly denied to the applicant (before he/she begins attempts at the national level to have it acknowledged) but has simply not been ensured except for specifically defined groups to which the applicant does not belong. In such cases, the positive duty to act

\textsuperscript{455} See Melchior, pp. 595-596, referring to \textit{Marckx v. Belgium}, 13.06.1979 and Dijk and Hoof, pp. 729-730, who use the phrase "socialising effect". They do not refer to any judgments of the Court that support it.


\textsuperscript{457} Wintemute, p. 104 argues that it entails a negative obligation.

\textsuperscript{458} This may explain Wintemute's assertion, supported by reference to the \textit{Abdulaziz, Cabales and Balkandali v. The United Kingdom}, 28.05.1985 case, that the: "...government's obligation to refrain from discrimination in respect of whatever benefits it confers..." is a negative duty, cf. pp. 104-105. The same phenomenon can be formulated as a positive duty to extend benefits provided for one group to another similarly situated group. This simply exhibits the circular character positive and negative formulations of equality and discrimination have, cf. Chapter 5.1.3.4. \textit{C infra}. Similarly, in \textit{Marckx v. Belgium}, 13.06.1979, referred to by Melchior, p. 596, the state had provided differently for legitimate and illegitimate children.
is a much clearer aspect of the case. The Petrovic v. Austria judgment would be an example where certain benefits were only available to mothers.\textsuperscript{459} Despite having been discussed as part of non-discrimination under the Convention, there hardly exist any cases that actually support the phenomenon of the socialising effect in this type of claims.\textsuperscript{460} This would be explained by the hitherto prevailing reluctance to acknowledge positive obligations and the duty to act under Article 14. The real problem with acknowledging this type of passive discrimination has not been in terms of the concept of discrimination but in terms of enforcing a positive obligation to take action to prevent discrimination.

Now, with the advent of positive obligations into the non-discrimination provisions of the Convention, the socialising effect of these provisions is bound to become a field of more active recognition.\textsuperscript{461} This “socialising effect” can take place in any field of life, but with the independent non-discrimination provision of Protocol 12 incorporating the whole sphere of economic, social and cultural rights into the reach of non-discrimination, some interesting case-law can be anticipated concerning certain groups’ claims of provisions for economic, social and cultural rights that other similarly situated groups enjoy.

The fourth category of passive discrimination is discrimination that results from failure to provide different measures for significantly different groups, even in relations between private parties. The reference to significant differences is derived from the Thlimmenos v. Greece judgment. This category of passive discrimination

\textsuperscript{459} Petrovic v. Austria, 27.03.1998.

\textsuperscript{460} Dijk and Hoof, pp. 729-730, mentioning no cases in support of the “socialising effect”. The clear cases claiming the extension of measures from one group to another, National Union of Belgian Police v. Belgium, 27.10.1975, Lithgow and Others v. The United Kingdom, 08.07.1986 and Petrovic v. Austria, 27.03.1998 are discussed in Chapter 5.1.3.2. B supra. None of the applications was successful.

\textsuperscript{461} The Court has, in Thlimmenos v. Greece, 06.04.2000, already acknowledged and enforced positive obligations in relation to the further reaching issue of accommodating for differences. The more general acknowledgment of positive obligations as part and parcel of the new independent provision on non-discrimination in Article 1 of Protocol 12 also supports this.
hinges on the positive obligation to accommodate for differences. This type of discrimination was clearly acknowledged by the Court in the Thlimmenos v. Greece judgment as well as the Beard v. The United Kingdom, Chapman v. The United Kingdom, Coster v. The United Kingdom, Jane Smith v. The United Kingdom and Lee v. The United Kingdom judgments.\textsuperscript{462} It corresponds to the second half of the equality maxim, that unequals should be treated unequally. The possibility of construing the ban against non-discrimination as encompassing accommodation for differences is indeed part and parcel of the equality maxim and a logical consequence of the ban against discrimination.\textsuperscript{463} Failure to provide differently for significant differences results in passive discrimination. This category of passive discrimination would therefore, like the third category of passive discrimination, be an example of the positive obligation of states to prevent violations and could also theoretically reach relations between private parties. Hitherto, differences in otherwise similar situations have been acknowledged as justifications for differences in treatment. On approaching the issue from the angle of the positive obligation to act the duty to accord different treatment to different situations becomes effective.

The fifth and final category of passive discrimination is the kind that results from failure to promote equality, even in relations between private parties. This category of passive discrimination would hinge on the positive obligation to: “...promote full and effective equality...”\textsuperscript{464} and relate to positive measures of all kinds. This type of a positive obligation would correspond to the furthest reaching level of positive obligations, i.e. the obligation to promote or to assist and fulfil the rights in question with direct provisions or measures to improve the general conditions of certain groups, cf. Chapter 5.1.3.1. supra. This type of a claim under Article 1 of the new

\textsuperscript{462} Thlimmenos v. Greece, 06.04.2000 (violation), Beard v. The United Kingdom, 18.01.2001, Chapman v. The United Kingdom, 18.01.2001, Coster v. The United Kingdom, 18.01.2001, Jane Smith v. The United Kingdom, 18.01.2001 and Lee v. The United Kingdom, 18.01.2001 (non-violation in all five cases).

\textsuperscript{463} See for example the Explanatory report to Protocol 12, para. 15, stating that a failure to treat equal situations equally and unequal situations unequally will amount to discrimination unless an objective and reasonable justification exists.

\textsuperscript{464} Protocol 12, Preamble.
Protocol 12 is clearly rejected in the Explanatory report. Positive obligations under the Protocol will not entail a duty to take positive measures to promote equality.\footnote{Explanatory report to Protocol 12, para. 16.}

C. The outer limits of passive discrimination\footnote{The arguments presented in this Chapter are the further development of a paper originally delivered at a conference held on the occasion of the 50th anniversary of the European Convention on Human Rights, 4 October 2000, by the University of Iceland Human Rights Institute, The Icelandic Human Rights Center and the Reykjavik Academy. The contents of the original conference paper will be published in Icelandic in the forthcoming collection of essays in honor of professor Gunnar G. Schram. The manuscript is appended to the present study, see Arnardóttir: Viðæuki nr. 12 við Mannréttingasáttmála Evrópu – Nýr möguleikar á sviði jafnraðisverndar Mannréttingasáttmálans, Appendix 1, pp. 322-336. The arguments in the paper are presented generally in the context of positive obligations and not with reference to the concept of passive discrimination. Explanatory report to Protocol 12, paras. 25 and 28.}

It can be asserted that the positive obligations under the non-discrimination provisions of the Convention reach the level of preventing and remedying discrimination but not the level of promoting equality. Insofar as these positive obligations may reach relations between private parties they are subject to the general caveat of the Explanatory report to Protocol 12; violations would have to be clear-cut and grave and concern relations that occur in the public sphere, are normally regulated by law and for which the state has a certain responsibility.\footnote{Explanatory report to Protocol 12, paras. 25 and 28.} The concept of passive discrimination, correspondingly, reaches failures to prevent and remedy discrimination, even in relations between private parties, but not failures to promote equality. But how are the outer limits of passive discrimination to be construed more precisely?

With reference to the Explanatory report to Protocol 12, the simple answer is that the outer limits of passive discrimination lie right before obliging states to enact positive measures in order to promote full and effective equality. Upon closer examination, however, the outer limits of passive discrimination are far from being clear. It will always be possible to state the equality maxim and the concept of equality either as
equals should be treated equally or as unequals should be treated unequally. These are simply: "...alternative ways of referring to the same normative relationships." If justice requires that equals should be treated equally, it also requires the opposite, that unequals should be treated unequally. Now, the term discrimination connotes the opposite to the concept of equality. The equality principle requires that equals should be treated equally and unequals unequally and failure to provide such treatment will result in discrimination. The terms equality and discrimination are simply opposites. They refer either to providing the due treatment or failure to provide the due treatment. Accordingly, the terms equality and non-discrimination are simply: "...alternative ways of referring to the same normative relationships." The circular nature of the different ways of referring to equality and discrimination becomes apparent. A statement of either will refer to the other in its negative form. Non-discrimination entails equality, non-equality entails discrimination. Upon closer analysis, therefore, the distinction between preventing discrimination and promoting equality is not so clear-cut. Preventing discrimination will lead to the result of promoting equality. Promoting equality will entail the prevention of discrimination. The prevention of discrimination and the promotion of equality can be argued to be simply: "...alternative ways of referring to the same normative relationships."

So the construction of the outer limits of the positive obligations under the non-discrimination provisions of the Conventions is no simple task. In particular there

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468 Westen: Speaking of Equality, p. 206. See also Lucas, p. 297. See generally Chapter 1, supra.
469 Cf. discussion of the Aristotelian equality maxim in Chapter 1.3.1.
470 See e.g. Explanatory report to Protocol 12, para. 15.
471 Westen: Speaking of Equality, p. 206, referring not to the terms equality and non-discrimination but to the terms equals should be treated equally and unequals should be treated unequally. Generally see Bayefsky, p. 1, footnote 1 (with references): "It is my view that equality and non-discrimination are positive and negative statements of the same principle."
472 Note the preamble to Protocol 12 which states that the member states of the Council of Europe are: "...resolved to take further steps to promote the equality of all persons through the collective enforcement of a general prohibition of discrimination..." (emphasis added).
are bound to arise areas of uncertainty with regard to the construction of the type of passive discrimination that refers to the failure to accommodate appropriately for differences. Before the *Thlimmenos v. Greece* judgment the prevailing approach of the Court was formal in emphasising the equal treatment of situations that could be considered equal (analogous/relevantly similar). As elaborated on in Chapter 2.2.1. supra, such an approach requires that it must be established that the applicant is somehow equal (in analogous/relevantly similar situations) to persons that enjoy the equal treatment he/she claims. Disadvantage and difference have, thus, functioned as mechanisms of exclusion under the formal approach. The advent of the positive obligation to provide different treatment for significantly different situations implies a more substantive approach. It acknowledges that sometimes inequalities (differences) are such that they require the appropriate unequal (different) treatment for non-discrimination/equality to prevail. Despite being able at present to establish this as one facet of discrimination under the Convention, it is unclear how the Court will construe “differences” and what the normative content of the treatment required may be. A purposeful and contextual approach to claims of accommodation for significant differences may lead to successful claims on states to provide reasonable and appropriate accommodation for the specific needs of certain disadvantaged groups. In such instances there will be a thin line between preventing discrimination and resorting to positive measures that promote equality.

This thin line between preventing discrimination and promoting equality and the Court’s difficulties in construing it are clearly demonstrated in the first cases after *Thlimmenos v. Greece* in which the Court had to deal with claims of accommodation for differences. In the *Beard v. The United Kingdom, Chapman v. The United Kingdom, Coster v. The United Kingdom, Jane Smith v. The United Kingdom* and

474 Loenen: Rethinking Sex Equality as a Human Right, p. 257 and Wentholt, p. 53.

475 The examples of pregnancy, disabilities and transsexualism are the perfect examples of situations where it is difficult to establish analogous situations. See generally Chapter 2.2.1.3. B supra, with references.

476 See generally Chapters 2.2.2. and 2.2.3. supra, with references to the literature on substantive approaches to equality.

477 See Chapter 2.4. supra.
Lee v. The United Kingdom judgments, when discussing the general principles applicable to deciding the applicants’ claims under Article 8, the Court reasoned:

"Moreover, to accord to a gypsy who has unlawfully established a caravan site at a particular place different treatment from that accorded to non-gypsies who have established a caravan site at that place or from that accorded to any individual who has established a house in that particular place would raise substantial problems under Article 14 of the Convention." 478

This paragraph raises “substantial problems” of interpretation in relation to the position of the Court, acknowledged in the same judgments, that a failure to treat significantly different situations differently may constitute discrimination under Article 14. 479 The minority of seven judges seemed to construe the measures in question as entailing only the prevention of discrimination. It reasoned that the situations of gypsies and other individuals would not be likely to be similar and that the failure to treat differently persons whose situations were significantly different might result in discrimination under Article 14. 480 The approach of the minority, thus, was that the failure to treat the situation of gypsies differently would cause problems under Article 14 whereas the approach of the majority seems to be that such different treatment would cause problems under Article 14. The approach of the majority in the paragraph quoted supra seems explainable only if taken as indicating that it would construe the different treatment of gypsies in this situation as a positive measure to promote equality. In that light the positive measure in question might be taken as exceeding the boundaries of preventing discrimination by way of treating different situations differently and reaching over to the sphere of promoting equality by way of providing positive measures. As it is clear that the latter is beyond the limits of the positive obligations inherent in Article 14 (and Article 1 of Protocol 12), such a measure would raise problems in the sense that the obligation to


479 Chapman v. The United Kingdom, 18.01.2001, para. 129.

provide it should not be read into Article 14. However, the most confusing aspect of
the passage quoted supra is revealed when it is compared with the majority’s review
under Article 14 where it found that a failure to treat different situations differently
was established, but that the ensuing similar treatment did not lack objective and
reasonable justification.481 This, of course, indicates the same interpretation as that
of the minority and reveals an inner contradiction in the reasoning of the majority.482
The quoted paragraph raises more questions than it answers and should not be taken
as entailing a distinct indication as to the interpretation of positive obligations under
Article 14. To begin with it is not put forward in the context of Article 14 review
and contrasts with the express approach of the Court under Article 14. In addition it
seems that the prior and clear unlawfulness of the establishment of a home that the
applicants sought protected is a key aspect of this part of the reasoning of the
majority as it proceeded to argue that:

"Nonetheless, although the fact of being a member of a minority with a
traditional lifestyle different from that of the majority of a society does not
confer an immunity from general laws intended to safeguard assets common
to the whole society such as the environment, it may have an incidence on the
manner in which such laws are to be implemented. As intimated in the
Buckley judgment, the vulnerable position of gypsies as a minority means
that some special consideration should be given their needs and their
different lifestyle both in the relevant regulatory planning framework and in
arriving at the decisions in particular cases [...]. To this extent there is thus a
positive obligation imposed on the Contracting States by virtue of Article 8
to facilitate the gypsy way of life."483

It is clear that the dividing line between preventing discrimination and promoting
equality is extremely hard to draw. The differences in the approaches of the majority
and minority in the Beard v. The United Kingdom, Chapman v. The United Kingdom,
Coster v. The United Kingdom, Jane Smith v. The United Kingdom and Lee v. The United Kingdom judgments seem to lie primarily in their different approach to the appropriate width of the margin of appreciation.\[484\] Again, it is clear that the ultimate answers to the construction of non-discrimination under the Convention will lie in how the Court and its judges make use of: "...the great powers which they wield."\[485\] With respect to the construction of the outer limits of the concept of passive discrimination, they will lie in how the margin of appreciation is managed in relation to claims that straddle the dividing line between preventing discrimination and promoting equality.

5.1.3.5. Strictness of review

A. Establishing prima facie passive discrimination

As the concept of passive discrimination is a new phenomenon under the Convention there are few cases to draw on that directly involve passive discrimination. The cases mentioned in Chapter 5.1.3.2. supra indicate that, like in instances of active discrimination, the burden will be on the applicant to establish the badge of differentiation and the treatment complained of.\[486\] Generally similar considerations would apply as regards active discrimination, cf. Chapters 4.3.1. and 4.3.2. supra.\[487\]

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484 See the unusually detailed discussion of the appropriate width of the margin of appreciation in the majority opinion, Chapman v. The United Kingdom, 18.01.2001, paras. 90-104. See also Chapman v. The United Kingdom, 18.01.2001, Joint Dissenting Opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Strážnická, Lorenzen, Fischbach and Casadevall, para. 3 rejecting the wide margin of appreciation and concluding that there must exist: "...compelling reasons for the measures concerned."


486 None of the judgments concerning positive obligations under Article 14 indicate a departure from the general principles of the case law as regards the establishment of the badge of differentiation and the treatment complained of. See Vermeire v. Belgium, 29.11.1991, National Union of Belgian Police v. Belgium, 27.10.1975, Lithgow and Others v. The United Kingdom, 08.07.1986, Petrovic v. Austria, 27.03.1998, Thlimmenos v. Greece, 06.04.2000, Kjeldsen, Busk Madsen and Pedersen v. Denmark, 07.12.1976, Stubbings and Others v. The United Kingdom, 22.10.1996, Sheffield and Horsham v. The
B. The strictness of objective justification review

Once the positive obligations of states are generally acknowledged it is a question of relatively straightforward logic, supported by the *Thlimmenos v. Greece* judgment and the Explanatory report to Protocol 12, to extend the ban against discrimination to passive discrimination of the first four categories discussed in Chapter 5.1.3.4. B *supra.* Acknowledging claims of passive discrimination as being violations of the Convention will entail enforcing positive obligations. The case law shows that the simple logic of there being no call to distinguish between acts and omissions is not enough to persuade the Court to embark actively upon enforcing rights hinging on positive obligations. A journey into that task begins and ends right at the heart of subsidiarity and margin of appreciation considerations. These considerations refer to the delimitation of competencies between the contracting states and the Convention enforcement mechanism. The upshot is that when it comes to enforcing positive obligations the general principle is that the Court will allow the state a relatively wide margin of appreciation. In relation to claims of passive discrimination the

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**United Kingdom, 30.07.1998, Beard v. The United Kingdom, 18.01.2001, Chapman v. The United Kingdom, 18.01.2001, Coster v. The United Kingdom, 18.01.2001, Jane Smith v. The United Kingdom, 18.01.2001 and Lee v. The United Kingdom, 18.01.2001.**

487 See in particular *Thlimmenos v. Greece*, 06.04.2000, para. 42. The applicant’s claim of the badge of differentiation of religion was accepted, as there was nothing in the file to disprove it. Otherwise the Court accepted the applicant’s elaboration of the treatment complained of. The Court’s difficulties in dealing with claims relating to positive obligations find expression in the fact that claims of covert different treatment are particularly difficult to establish, cf. Chapter 4.4. *supra.*

488 The difficult advent of positive obligations into non-discrimination law and the lack of cases in support of its “socialising effect” speak out as examples.

489 Mahoney: Marvellous Richness of Diversity or Invidious Cultural Relativism?, p. 5 forwards a hypothesis on varying margins of appreciation in relation to whether the duty enforced is positive or negative. Shokkenbroek: The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights, p. 32 holistically sums up the jurisprudence of the Court on the margin of appreciation. One of his conclusions is that in relation to positive obligations the Court allows for a relatively wide margin of appreciation. As pointed out by Shokkenbroek the case law of the Court on positive obligations has hitherto primarily concerned Articles 6, 8 and 11. Harris, O’Boyle and Warbrick, p. 284 argue that positive obligations rarely
starting point will therefore be a wide margin of appreciation and correspondingly lenient scrutiny.

There may, however, exist variations in how strongly lenient scrutiny is indicated. These correspond to the attempts at elaborating on various levels of positive obligations in relation to how far they reach in burdening states. Clear and simple instances of lacunae in legislative protection would not, for example, indicate lenient scrutiny as strongly as instances that border on positive measures to promote equality. Measures indicating wide-reaching policy changes would indicate more lenient scrutiny than instances that are more easily isolated.\(^{490}\) Claims that have substantial financial implications would indicate more lenient scrutiny than claims that do not.\(^{491}\) The existence of a European common standard would here, as always, impose "absolute" duties. Clapham, p. 345 argues that when the indirect horizontal effect of the Convention, hinging upon positive obligations of states, is at stake the: "...margin will certainly be wider...". In relation to The International Covenant on Civil and Political Rights, \textit{UNTS} 171, Nowak, p. 37 argues that positive obligations are: "...subject to the principle of relativity...". See generally the wide margin of appreciation in \textit{Beard v. The United Kingdom}, 18.01.2001, \textit{Chapman v. The United Kingdom}, 18.01.2001, \textit{Coster v. The United Kingdom}, 18.01.2001, \textit{Jane Smith v. The United Kingdom}, 18.01.2001 and \textit{Lee v. The United Kingdom}, 18.01.2001.


\(^{491}\) Harris, O'Boyle and Warbrick, p. 284. This consideration is also reflected in the difference between the positive duty to protect and the positive duty to assist and fulfil, \textit{cf.} Chapter 5.1.3.1. \textit{supra}. See for example \textit{Beard v. The United Kingdom}, 18.01.2001, \textit{Chapman v. The United Kingdom}, 18.01.2001, \textit{Coster v. The United Kingdom}, 18.01.2001, \textit{Jane Smith v. The United Kingdom}, 18.01.2001 and \textit{Lee v. The United Kingdom}, 18.01.2001 where the Court noted that Article 8 does not entail the right to be provided with a home (and the corresponding positive obligation on states) as the question whether the state provides funds for this is: "...a matter for political not judicial decision.", \textit{cf. Chapman v. The United Kingdom}, 18.01.2001, para. 99.
be one of the factors weighed in when adjusting the margin of appreciation. For example, if a contracting state had no legislation banning sex discrimination in relation to employment, a common European standard would point in the direction of less lenient scrutiny than generally in instances of passive discrimination.\textsuperscript{492}

The \textit{Petrovic v. Austria} judgment provides a perfect example. The treatment complained of consisted of a failure to extend parental leave allowance provided to mothers to fathers also. The case is an example of passive discrimination of the third type identified in Chapter 5.1.3.4. B supra, i.e. extending measures applied to one group to another similar group. It evidences that despite the simple logic of the "socialising effect" of Article 14, the positive obligations implication inherent in the concept functions as a strong indication towards lenient review. Despite being based on sex, a badge of differentiation that implies strict scrutiny, the Court never really addressed the question of whether the distinction was justifiable.\textsuperscript{493} Instead, the Court focused exclusively on the factors in the case generally conducive towards allowing a wide margin of appreciation. These factors were the relevant time to its evaluation being around 1989, the gradual process underway towards a more equal sharing of family responsibilities, the relatively recent idea of financial assistance to parents and the lack of a common standard in the contracting states as to whether fathers are entitled to parental leave allowance.\textsuperscript{494} In particular the financial implication and the lack of common standard indicate lenient scrutiny. In comparison the easily isolated instance of discrimination and absence of financial

\textsuperscript{492} The common standard could be derived from the Convention, other international instruments or the internal law and practices of European states, see Schokkenbroek: The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights, p. 34. The common standard must be sufficiently concrete on the issue at stake for the Court to narrow down the margin of appreciation. See Beard \textit{v. The United Kingdom}, 18.01.2001, Chapman \textit{v. The United Kingdom}, 18.01.2001, Coster \textit{v. The United Kingdom}, 18.01.2001, Jane Smith \textit{v. The United Kingdom}, 18.01.2001 and Lee \textit{v. The United Kingdom}, 18.01.2001 and the discussion in footnote 266 supra.

\textsuperscript{493} \textit{Petrovic v. Austria}, 27.03.1998. The Court did note that it started from the premise that both parents were similarly placed with respect of taking care of their children after an initial period of recovery for the mother, cf. para. 36.

\textsuperscript{494} \textit{Ibid}, paras. 40-42.
implications in *Thlimmenos v. Greece* function to counteract the indication towards lenient scrutiny.

In *Sheffield and Horsham v. The United Kingdom* the applicants' claim was of positive accommodation for their difference. The Court addressed the issue of positive obligations under Article 8. It noted that in determining whether such obligations existed, regard must be had to the: "...fair balance that has to be struck between the general interest of the community and the interests of the individual...". In its evaluation the Court had regard to the: "...complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States..." at stake, as well as its view that the detriment suffered by the applicant was not serious enough to override the margin of appreciation in the area. As regards Article 14 more particularly, the Court referred to the margin of appreciation under that provision and concluded that the considerations taken into account in the fair balance test under Article 8 were also encompassed by the notion of objective and reasonable justification under Article 14. The clearly lenient scrutiny applied in the case is probably the result of three important factors. First is the fact that the applicants' claim was for positive accommodation in a field of life where there exists no common standard among the contracting states. The second factor is the fundamental policy changes with regard to birth certificates implied in a favourable judgment. Finally, as transsexualism raises complex questions and difficult comparisons it is not a badge of differentiation clearly indicating strict scrutiny.

The judgments in *Beard v. The United Kingdom, Chapman v. The United Kingdom, Coster v. The United Kingdom, Jane Smith v. The United Kingdom* and *Lee v. The

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495 *Sheffield and Horsham v. The United Kingdom*, 30.07.1998, para. 52.
496 *Ibid*, para. 58.
498 *Ibid*, para. 76. The judgment builds upon earlier judgments on transsexualism, see footnote 418 *supra*.
United Kingdom are also a good example. The applicants’ claims were for positive accommodation for their traditional way of life. Also here, the Court referred to the considerations taken into account under Article 8 as providing objective and reasonable justification under Article 14. Lenient scrutiny was indicated strongly by the field of life implicated being the effect on the respect for the home of planning policy choices and implementation, the lack of concrete enough common standards in specific fields of accommodation for national minorities, the general social policy issues involved and the financial implications in the case. The starting point of lenient scrutiny indicated by the claim of positive accommodation was, thus, strongly supported by various factors. These strong indications towards lenient scrutiny functioned to override the fact that the badge of differentiation at stake in the case was ethnic origin, which should indicate stricter scrutiny.

In Thimmenos, however, lenient scrutiny was only indicated to a lesser extent as it concerned an easily isolated instance that did not entail any wide reaching policy changes or any financial burden on the state. Although not explicitly mentioned in the judgment, a certain common ground towards accommodation for conscientious

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502 Ibid, paras. 93-94. This is a point with which the minority opinion disagreed. It argued that there was an emerging consensus that the special needs of minorities should be recognised and that positive steps should be taken to improve their situation and that this entailed that “compelling reasons” should exist to justify the planning policy measures imposed on them. See Chapman v. The United Kingdom, 18.01.2001, Joint Dissenting Opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Strážnická, Lorenzen, Fischbach and Casadevall, para. 3.

503 Ibid, para. 98. See also para. 100 where the Court refers to it not being its role to pass upon the general situation of gypsies in The United Kingdom: “...however deplorable...”, in light of its undertakings in international law. The minority, however, seems to have placed great emphasis on the indication towards stricter scrutiny involved in the badge of differentiation at stake, see Chapman v. The United Kingdom, 18.01.2001, Joint Dissenting Opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Strážnická, Lorenzen, Fischbach and Casadevall, para. 4.

504 Ibid, para. 99.

505 See generally the discussion on the badge of differentiation of race in Chapter 5.2.4.3. infra.
objection may be argued to exist in the member states to the Convention as it is conducive to the effective enjoyment of freedom of thought, conscience and religion.\textsuperscript{506} Finally the badge of differentiation at stake was that of religion which has been argued to indicate strict scrutiny.\textsuperscript{507}

The starting point on claims of passive discrimination, thus, will be lenient scrutiny, but to varying degrees. The starting point does not tell the whole story. Other factors that influence the margin of appreciation may weigh in and function in favour of tightening the margin.\textsuperscript{508} As regards Article 14 and Article 1 of Protocol 12, the type of claim being made is but one of the three principal variables that have to be weighed when managing the margin of appreciation. If the claim is of passive discrimination it will indeed indicate lenient scrutiny, as opposed to active discrimination that will indicate stricter scrutiny. However, this presumption of lenient scrutiny may be countered by considerations within the category of the type of claim being made, such as the common standard consideration or the policy context or financial implications of the case, or by considerations relating to the other two principal elements of influencing factors, namely the badge of difference and the interest at stake.\textsuperscript{509} This is supported by all the judgments discussed \emph{supra} and clearly exhibited in the \emph{Thlimmenos v. Greece} judgment. Until this judgment differences had been acknowledged as basis for justifying different treatment. In relation to dealing with differences as such justifications, the level of difference

\textsuperscript{506} \emph{Thlimmenos v. Greece}, 06.04.2000. On conscientious objection to military service in relation to Article 9 of the Convention, see Dijk and Hoof, pp. 544-546.

\textsuperscript{507} On the badge of differentiation of religion see Chapter 5.2.4.6. \emph{infra}.

\textsuperscript{508} Harris, O'Boyle and Warbrick, p. 284, argue, in relation to positive obligations under Articles 8-11 of the Convention, that: “What is required of the state will vary according to the importance of the right and the resources required to be disbursed to meet any positive obligation.”. Shokkenbroek: The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights, p. 35, when discussing the margin of appreciation generally and not focusing on the context of Article 14 argues that the various factors that may influence the width of the margin of appreciation are relative and may function together or point in opposite directions and, thus, negate the influence of each other. See generally footnote 272 \emph{infra}.

\textsuperscript{509} The interest at stake would encompass “the importance of the right” as referred to by Harris, O'Boyle and Warbrick, p. 284.
required is *differences in otherwise similar situations*.\footnote{E.g. *Stubbings and Others v. The United Kingdom*, 22.10.1996, para. 72.} In comparison, when dealing with difference as imposing a positive duty to act, the referral in *Thlimmenos v. Greece* to *significantly different situations* implies that the positive duty to act will not be imposed upon states too lightly and that support from at least one other type of influencing factors, i.e. the badge of difference in question, is needed.\footnote{*Thlimmenos v. Greece*, 06.04.2000, para. 44.}

5.1.3.6. Conclusions

The concept of passive discrimination reaches failures to prevent and remedy discrimination, even in relations between private parties, but not failures to promote equality. The possible categories of passive discrimination are failures to provide for non-discrimination in law, failures to remedy instances of discrimination, failures to provide similar measures for relevantly similar groups and failures to provide different measures for significantly different groups. Each category may apply even in the sphere of relations between private parties if the violation is sufficiently clear-cut and grave, concerns relations that occur in the public sphere, are normally regulated by law and for which the state has a certain responsibility. Failures to promote equality are not included.

The dividing line between preventing and remedying discrimination on the one hand and promoting equality on the other is not clear-cut. The simple delimitation claims that the outer limits of passive discrimination lie right before entailing an obligation on the state to enact positive measures. A more precise construction of these limits is bound to raise difficulties as the prevention of discrimination and the promotion of equality can be construed as simply being alternative ways of referring to the same principle. Attempts at defining this line coincide with attempts at elaborating different levels of positive obligations in relation to how heavy a burden they place on states. Both seek inspiration from the principle of subsidiarity and the margin of appreciation doctrine that deal with the appropriateness of judicial intervention in

\footnote{E.g. *Stubbings and Others v. The United Kingdom*, 22.10.1996, para. 72.}
relation to the distribution of powers between the Convention mechanism and the democratic discretion of member states.

Claims of passive discrimination will indicate lenient scrutiny, albeit to varying degrees. Variations in degree will follow ideas on how heavy a burden acknowledging the claim would place on the respondent state. Claims indicating wide reaching policy changes e.g. in relation to generally improving the conditions of certain groups, claims indicating considerable financial burdens as in direct provisions for needs and claims bordering on positive measures will indicate lenient scrutiny more strongly than claims of passive discrimination that place lesser burdens on states. The type of claim being made (passive discrimination) is but one out of three principal categories of factors that influence the width of the margin of appreciation. Other factors may weigh in to support lenient scrutiny or to indicate stricter scrutiny and, thus, negate the influence of the claim of passive discrimination.

5.1.4. Indirect discrimination

5.1.4.1. Concept

A. The outlines of the concept of indirect discrimination

Indirect discrimination has been described as instances where: "...a measure which is neutral on its face has a disproportionately negative effect..." on a particular group of people.512 In the European context the concept of indirect discrimination has been developed most clearly in European Community sex discrimination law.513 The

512 Loenen: Rethinking Sex Equality as a Human Right, p. 260. See also Loenen: Indirect Discrimination: Oscillating Between Containment and Revolution, p. 195
basic attributes of the concept are that it focuses on the disparate impact or disproportionate effect of a neutral measure on groups of people.\textsuperscript{514}

B. Types of claims and the potential of indirect discrimination

The focus on disparate impact quite clearly renders consideration of intent irrelevant. Indirect discrimination may be found to exist regardless of any subjective intention or consciousness of the discriminatory effect of the measure in question.\textsuperscript{515} An important feature of the concept is that it concerns measures that are prima facie "neutral". This refers to the fact that the differentiation in question is not based on a "sensitive" criterion such as sex, race, language or religion but on other "neutral" criteria.\textsuperscript{516} The effect of the differentiation, however, functions to the disadvantage of people belonging to the "sensitive" groups.\textsuperscript{517} Finally indirect discrimination focuses on group equality, i.e. the disproportionate effect on certain groups of people and not individuals. A measure that is indirectly discriminatory will affect many

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\textsuperscript{514}L14/6, Article 2: "For purposes of the principle of equal treatment referred to in paragraph 1, indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex."

\textsuperscript{515}Loenen: Indirect Discrimination: Oscillating Between Containment and Revolution, p. 199.

\textsuperscript{516}Loenen argues inter alia that subjectively intentional discrimination is not the main issue in discrimination law as it has become rare, the remaining problem being: "...subtle and unintentional mechanisms which work to the disadvantage and exclusion of [certain] groups.\textsuperscript{,} ibid, p. 201. This way, Loenen argues, the concept of indirect discrimination is a vehicle for a substantive approach to equality as it: "...can direct attention to the myriad ways in which dominant standards and more systemic forms of discrimination in our society, which are at face value neutral, tend to disadvantage or exclude members of less powerful groups.\textsuperscript{,} ibid, p. 199.

\textsuperscript{517}A classical example would be a "neutral" height requirement for service as a fire fighter that de facto excludes most women. The Bilka case concerned the exclusion of part-time workers from a pension scheme that was found indirectly discriminatory on account of sex, as most part-timers were women, cf. Case 170/84 Bilka Kaufhaus v. Weber von Hartz (1986) E.C.R. 1607.

\textsuperscript{517}Loenen: Indirect Discrimination: Oscillating Between Containment and Revolution, p. 198 speaks of distinction not being based on: "...the commonly distinguished grounds of discrimination like
members of the relevant group (e.g. women) but not necessarily all of them and it is irrelevant that some members of the group of comparison (e.g. men) may be negatively affected as well.518

Cases on indirect discrimination have been described as the cases in which the value judgments and moral reasoning behind conceptions of equality is most unsettled.519 At stake are not the badges of difference that are: "...commonly distinguished grounds of discrimination..."520 and therefore settled in terms of the values behind their outlawing. At stake are the unsettled areas, the “neutral” criteria that may not be so neutral upon a closer analysis of their effect on certain groups of people.

5.1.4.2. Strictness of review

A. Establishing prima facie indirect discrimination

An applicant would have to make out his/her case of prima facie indirect discrimination. The legal process of reviewing indirect discrimination is taken to begin with a claim supported by statistical evidence to the effect that a measure has a disparate impact on a certain group as compared with another group.521 Quite clearly much depends on the approach of the Court in question to the issue of proof of

race, sex, religion, sexual orientation, handicap or age..." but having a disparate effect on such groups of people. See also Sjerps, p. 238.

518 See Sjerps, p. 238.

519 "Those are the cases where the legal battle is being fought most feverently, in accordance with the social and political fight.", ibid, p. 251.

520 Loenen: Indirect Discrimination: Oscillating Between Containment and Revolution, p. 198.

521 Sjerps, p. 244. In European Community law the burden of proof for indirect discrimination is provided for in Council Directive 97/80/EC of 15 December 1997, cf. (1998) O.J. L14/6, Article 4, according to which the applicant bears the burden of proof for establishing the facts from which indirect discrimination can be presumed to have occurred before the onus is placed on the respondent state to establish objective justification.
disparate effect. How to handle the statistical evidence in establishing indirect discrimination raises several issues.\textsuperscript{522}

As discussed in Chapters 4.3.1.2. B and 4.3.2.3. \textit{supra}, the Court has not yet acknowledged indirect discrimination as part of the concept of discrimination under the Convention. This principally arises out of the fact that the Court has not developed the appropriate evidential framework for dealing with disproportionate effects of prima facie "neutral" measures. The most recent attempt to litigate a claim of indirect discrimination before the Court does not give rise optimism as to the Court embracing the concept of indirect discrimination in the near future. In the recent Grand Chamber judgments of \textit{Beard v. The United Kingdom, Chapman v. The United Kingdom, Coster v. The United Kingdom, Jane Smith v. The United Kingdom} and \textit{Lee v. The United Kingdom}, one aspect of the applicants’ claims was that the neutral and general stipulations of planning regulation functioned to the disadvantage of gypsies wanting to pursue a traditional lifestyle. The Court did not even address the claim.\textsuperscript{523}

B. The strictness of objective justification review

Upon the finding that the group the claimant belongs to is disproportionately affected by the measure in question, the need arises for analysis in terms of objective


\textsuperscript{523} \textit{Beard v. The United Kingdom, 18.01.2001, Chapman v. The United Kingdom, 18.01.2001, Coster v. The United Kingdom, 18.01.2001, Jane Smith v. The United Kingdom, 18.01.2001 and Lee v. The United Kingdom, 18.01.2001}. See \textit{Chapman v. The United Kingdom}, paras. 127 and 129. Moon, p. 51 seems to connect the advent of Protocol 12 with the possibility of the concept of indirect discrimination developing under the Convention. There are, however, no indications to that effect in the Protocol or the Explanatory report thereto. This seems confirmed in the five judgments, \textit{ibid}, pronounced after the opening for signature of Protocol 12 and after the \textit{Thlimmenos v. Greece, 06.04.2000} judgment wherein the influences of the Protocol may be argued to have already begun to show.
justification. Establishing an incident of indirect discrimination simply leads to the case reaching the level of objective justification review. The strictness of review applied to the objective justification scrutiny in these types of cases is, again, instrumental in the effectiveness of the concept of indirect discrimination.\textsuperscript{524}

As the evidential framework for establishing prima facie indirect discrimination does not exist under the Convention, such claims never reach objective justification scrutiny.

5.1.4.3. Conclusions

The concept of indirect discrimination noticeably seems to stem from equality provisions that are limited in scope to certain grounds of discrimination, such as sex.\textsuperscript{525} In such regimes it becomes important to be able to subsume a difference of treatment under the relevant ground of discrimination, even if only “indirectly”. In regimes that operate on a non-exhaustive list of discrimination grounds it is irrelevant whether the difference of treatment is tested on basis of the “neutral” ground of differentiation or on basis of “indirectly” coming under a specifically outlawed ground of differentiation. In any case of indirect discrimination an alternative exists in that: “...the distinction may also be fought as unjust in itself, and directly outlawed.”.\textsuperscript{526} It is, thus, not of decisive importance that that the

\textsuperscript{524} Loenen: Indirect Discrimination: Oscillating Between Containment and Revolution, p. 208, noting an increasing leniency in indirect discrimination review by the ECJ and the United States Supreme Court alike.

\textsuperscript{525} Cf. footnote 513 supra on the origins of the concept of indirect discrimination. In the United States of America, disparate impact analysis has primarily been developed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et sec. Its list of prohibited grounds of discrimination is limited to race, color, sex, religion and national origin. See Selmi, p. 213.

\textsuperscript{526} Sjerps, p. 247. For example in Abdulaziz, Cabales and Balkandali v. The United Kingdom, 28.05.1985, the applicants claimed that the immigration rules were indirectly discriminatory on the ground of race as the rule that a couple intending to marry had already met disproportionately affected people from the Indian sub-continent. The Court found that different treatment on the ground of race was not proven and that the treatment was simply based on whether the intended couple had met. It,
concept of indirect discrimination is not a part of the repertoire of the European Court of Human Rights. The case may be reviewed under Article 14 and Article 1 of Protocol 12 anyway.

The European Court of Human Rights, therefore, approaches issues that might be approached under indirect discrimination directly on the overt and "neutral" ground of differentiation. This has the effect that analysis and strictness of review does not benefit from established value judgments regarding outlawing "sensitive" or "suspect" or grounds of discrimination. The scrutiny becomes more lenient than in cases where the discrimination in question can be linked to "sensitive" grounds of discrimination.

The potential of the concept of indirect discrimination as a tool for combating structural disadvantage is left untapped under the Convention. The fate of indirect discrimination in the law of the Convention is an example of how theoretical possibilities for wide reaching substantive effects of equality provisions may not fulfil their potential in practical application.

5.2. THE BADGE OF DIFFERENTIATION AND THE SAMENESS OR DIFFERENCE OF SITUATIONS

5.2.1. The significance of comparability

It is the heart of the equality maxim itself that equal situations should be treated equally but different situations differently. Thus, the question of comparability of situations goes right to the core of equality analysis. Under the concept of discrimination and analytical approach developed by the European Court of Human

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then, found the treatment justified. This exhibits how the Court directly addresses the express and "neutral" badge of differentiation and does not deal with the alleged indirect badge of differentiation. See generally Chapter 4.3.1.2. B supra.

527 See e.g. Loenen: Indirect Discrimination: Oscillating Between Containment and Revolution, p. 211 and Sjerps, p. 237.
Rights differences in otherwise similar situations are said to justify differences in treatment and significant differences may even require appropriate accommodation.

This same concept of discrimination, however, renders no clear cut lines as regards the question of what situations are relevantly similar or significantly different, neither are there any clear lines on how to draw conclusions on the issue. The analytical approach that makes equality analysis dependent on these questions is normatively empty when it comes to answering them. All men are equal in some respects and unequal in other respects and similar situations can have many factors that are different and vice versa. The more widely the Court delimits what are relevantly similar situations, the wider the possibility of objective justification review. The widest possible delimitation of relevantly similar situations is that all persons are equal and hence that any differential treatment needs justification. The standard of measure chosen becomes instrumental in drawing the line between relevantly similar situations and situations that are not relevantly similar. And deciding upon the standard of measure and upon what characteristics or factors are relevant is a value judgment per se.\(^{528}\) Thus, and as pointed out by Dijk and Hoof, addressing the standard of measure, i.e. the criterion on the basis of which relevantly similar situations are found to exist or not, can place the underlying values and goals of the equality provision in focus.\(^{529}\) This they describe as “...the heart of the matter...”.\(^{530}\) As a result Dijk and Hoof criticise instances where the Court has merged the analysis of whether relevantly similar situations exist with the objective justification test, arguing that in this way the Court relegates the values connected with the comparability issue and the individual interest to an inferior position compared with the values connected to the public interest usually dominant in finding objective justification.\(^{531}\)

\(^{528}\) See generally the discussion of relevance in Chapter 1.3.2. supra.

\(^{529}\) Dijk and Hoof, p. 720.


\(^{531}\) Dijk and Hoof, pp. 722-726.
Dijk and Hoof assume a connection between the individual interest at stake and the comparability issue and, thus, that emphasis on the comparability test would somehow induce a more effective protection for individuals and less focus on the public interest. It seems that their criticism, justified as it may be as regards an overly rich emphasis on the public interest, is misplaced on the Court undervaluing the comparability test. Let us assume that the comparability test was made the deciding factor. What sort of an equality model would ensue? As discussed in Chapter 2.2.1.3. B supra, a focus on comparability entails that an appropriate comparator has to be identified before an issue can even be addressed as that of equality. But in many situations comparisons are hard to draw as the examples of pregnancy, handicap and transsexualism show. A strict focus on comparability leads to a very formal approach to equality. In addition, a focus on comparability may make it more difficult for individual applicants to discharge the burden of proof for establishing prima facie discrimination.\textsuperscript{532} The logical conclusion of such a formal approach is that differences may lead to exclusion, either by not being encompassed by non-discrimination or by overburdening applicants with measures of proof. Conversely, little or varying emphasis on the comparability test as something the applicant must establish before objective justification scrutiny takes place leads to the situation that the treatment complained of can be reviewed for objective justification irrespective of the existence or non-existence of a clear reference group. Such an approach could enhance possibilities for appropriately accommodating differences that may be unique or call for treatment not necessarily accorded to any particular reference group. And this entails a substantive approach to equality, enabling a more wide reaching effect of the equality provision.\textsuperscript{533}

5.2.2. Back to values, then onwards to the strictness of review

\textsuperscript{532} See Chapter 4.3.3. \textit{supra}.

\textsuperscript{533} Livingstone, p. 30 argues that the approach of the Convention in not emphasising the comparability test is not formalistic and has: "...the benefit of avoiding the tortuous search for "true comparators" which has caused problems for much national sex discrimination law.".
What is the current approach of the European Court of Human Rights to the issue of badges of differentiation and the comparisons they call for? Is it possible to discern a considered or at least to some extent an explicable perspective behind the Court's approach to different comparisons? The issue is of importance in identifying the factors that influence the margin of appreciation which again influence the location on the formal-substantive scale of equality under Article 14, and by inference also Article 1 of Protocol 12.

Again, the assessment of comparable or relevantly similar situations is a value judgment. Certainly the criteria on the basis of which similarities or dissimilarities are considered to exist and the corresponding badge of difference focus attention appropriately on the goals of equality provisions and the varying degrees of individual interest in being free from discrimination on basis of these badges. It seems that the issue of comparable situations is of relevance and has a significant influence on the strictness of scrutiny applied in individual cases. The first situation is when the dissimilarity of situations seems clear and the corresponding badge of differentiation seems clearly irrelevant. In such cases the case law of the Court seems to indicate that the scrutiny is most lenient as evidenced in lenient objective justification review or in the applicant not discharging the burden of persuasion for similarity of situations. The second situation is when the badge of differentiation is unclear and/or the values pertaining to its significance are unclear. Here the case law also seems to indicate lenient scrutiny but not as strongly. The third situation is when the values pertaining to a certain situation or a badge of differentiation are considered to be clear and indicating that it is to be considered of significance. In this category the case law and theory have indicated a strict type of scrutiny.

Schokkenbroek and Heringa seem to argue for a universal and formal approach to the strictness of review in relation to the badges of differentiation. Under such an approach the same badge of differentiation will always call for the same strictness of review. For example they discuss variations in the strictness of review in recent cases concerning discrimination on the basis of sex, but argue for the continuing formal and uniform application of strict review in sex discrimination irrespective of
other factors such as the issue of which of the two sexes it is that is discriminated against or the type of claim being made in the case.\textsuperscript{534} The situation when the differences are such that they call for accommodation is also unexplained by the universal and formal approach. If, say, sex or religion is a deplorable badge in some respects is it so in all respects? Is the conclusion from strict scrutiny in most sex and religion cases that both sexes and all religions are equal in relevant respects necessarily universal and always applicable across the board? An answer in the affirmative would require equal treatment and exclude the finding of significant differences that may require different treatment under the new \textit{Thlimmenos v. Greece} standard. It therefore seems clear that the badge of differentiation is but one variable in the overall balancing of influencing factors in discrimination scrutiny.

The remaining sub-sections of Chapter 5.2. will endeavour to elaborate on two main categories and various sub-groups of badges of differentiation. The object of this study is to seek general guidelines for dividing the different types of badges of differentiation into these groups and for elaborating on the levels of scrutiny they govern. The study will build on the already existing literature on factors that indicate either strict or lenient scrutiny but will in relevant areas add to, contradict or elaborate on the established literature on the strictness of review in relation to badges of differentiation.

\textbf{5.2.3. Insignificant badges of differentiation indicating lenient scrutiny}

\textbf{5.2.3.1. Introduction}

\textsuperscript{534} Schokkenbroek: The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation, p. 22 and Heringa, p. 30-31 who criticises the non-uniform application of strict scrutiny exhibited in the \textit{Petrovic v. Austria}, 27.03.1998, judgment. He nevertheless concedes to the conclusion that with reference to margin of appreciation considerations: "The \textit{Petrovic} decision shows that the suspect-classifications approach is open to exceptions in specific circumstances.". cf. p. 31. The argument of the present study is that variations in strictness of review are not specific exceptions but the logical consequence of the interplay of many different influencing factors.
This category consists of cases where the Court considers the badge of differentiation insignificant. This may encompass a spectrum of situations that range from being clearly different to being unclear in similarities. These badges of differentiation indicate lenient scrutiny to varying degrees dependent upon the situation.

In some instances the Court seems to see no reason for a justificatory argument as to whether situations and corresponding badges are to be considered similar or dissimilar. The differences in situations may be so clear to the Court that a simple assertion of the significant differences in a situation may suffice. This strong indication towards lenient scrutiny has the function that the burden of proof rests upon the applicant to establish the similarity of situations. It is not always lifted and the case may be decided on that basis in a formal approach. In other instances the Court nevertheless proceeds to some form of an objective justification scrutiny, but the approach seems to be that these cases do not merit but such lenient scrutiny that it may best be described as no scrutiny at all.

In other situations lenient scrutiny is certainly indicated but not as decisively. In these cases comparisons and corresponding badges of difference are not dealt with as clearly irrelevant. But they are also not clearly relevant by widespread recognition in international and domestic law and practice like for example the category of clearly relevant comparisons such as sex and race. They are somewhere in between. In these cases, other factors than the badge of differentiation may weigh in and support lenient scrutiny or counteract the indication of lenient scrutiny. In such situations it seems common to merge consideration of whether similar situations have been established and the objective justification test. This indicates that the burden of proof for similarity does not strictly rest upon the applicant and the approach is not as formal as in the most lenient type of scrutiny cases.

5.2.3.2. Legislative classifications not based on personal characteristics

A. Geographical location; federalism and jurisdiction
It has been up for debate whether differences in treatment on account of the different legal provisions that may apply in different geographical locations are subject to Article 14 scrutiny. In particular, this question has been acute as regards the differing legislation that may apply in federal states.\textsuperscript{535} Dissenting in \textit{Dudgeon v. The United Kingdom} Judge Matscher argued that: “The diversity of domestic laws, which is characteristic of a federal state, can in itself never constitute a discrimination, and there is no necessity to justify diversity of this kind.”\textsuperscript{536}

The stance that different legislation depending on geographical location in federal states is simply not subject to objective justification review seems to have been confirmed in the \textit{Magee v. The United Kingdom} judgment.\textsuperscript{537} In that case the anti-terrorist legislation differed between England and Wales on one hand and Northern Ireland on the other. The Court reasoned that legislation in The United Kingdom was not always uniform as between its constituent parts. The question of which legislation applied depended on its geographical reach and the individual’s location, which enabled the legislation to take reasonable regional differences and characteristics into account. The Court found that the treatment complained of was: “…not to be explained in terms of personal characteristics, such as national origin or association with a national minority, but on the geographical location where the

\textsuperscript{535} See the discussion of Harris, O’Boyle and Warbrick, pp. 472-473.

\textsuperscript{536} \textit{Dudgeon v. The United Kingdom}, 22.10.1981, Dissenting opinion of Judge Matscher, part II (quoted also by Harris, O’Boyle and Warbrick, p. 472). The majority of the Court found that comparing legislation on male homosexual acts in the various parts of The United Kingdom was not a fundamental aspect of the case, and thus found it not necessary to review that complaint, \textit{cf.} paras. 67-68. The complaints regarding different legislation on homosexual acts as compared with heterosexual and lesbian acts amounted to the same complaint as already decided under Article 8 and was, hence, considered unnecessary to review, \textit{cf.} para 69. The finding that the comparisons between different geographical locations are not a fundamental aspect of the case implicitly supports the opinion forwarded in Judge Matscher’s dissent, see generally Chapter 6.3. \textit{infra}.

\textsuperscript{537} \textit{Magee v. The United Kingdom}, 06.06.2000. It is difficult to discern whether the judgment is based on the fact that the applicant has not shown the existence of the badge of difference or on the existence of objective justification for the treatment complained of, as the judgment merges consideration of both issues. The first interpretation indicates no objective justification scrutiny at all while the latter strongly indicates lenient scrutiny.
individual is arrested and detained.". 538 Hence, Article 14, in conjunction with Article 6, was not considered violated. It should be added that in Magee v. The United Kingdom one aspect of the treatment complained of under Article 14, i.e. the denial of access to a solicitor for up to 48 hours, was found directly in violation of Article 6:1 in conjunction with Article 6:3 (c). 539 This exhibits that the legislation may always be scrutinised as directly in violation of other provisions of the Convention, but the principal characteristics of federalism per se will not be subject to Article 14 scrutiny.

Geographical location has been claimed as badge of differentiation more generally in relation to legal jurisdiction and application of law. The judgments in Observer and Guardian v. The United Kingdom and Sunday Times v. The United Kingdom (II) show that such claims receive very cursory examination, similarly to those relating to federalism. 540 Both judgments are of the kind where it seems clear to the Court that the situations complained of are not comparable but “even if” they were the Court notes that they would have an objective justification. 541

B. Various types of legislative classifications

A large case-group of unclear comparisons and unclear badges of difference concerns the situation when law defines certain categories based not on personal

538 Ibid, para. 50.
539 Ibid, para 46.
540 Sunday Times v. The United Kingdom (II), 26.11.1991, para. 58: “If, and in so far as, foreign publishers were not subject to the same restrictions as S.T., this was because they were not subject to the jurisdiction of the English Courts and hence were not in a situation similar to that of S.T.”. See also Observer and Guardian v. The United Kingdom, 26.11.1991, para. 73.
541 In Observer and Guardian v. The United Kingdom, 26.11.1991, the Court noted that it was unclear whether the factual basis to claims of different treatment was established, but nevertheless proceeded to the objective justification test as in any event (“even if” type of rationale) the situations were not similar, cf. para. 73. A similar indication arises from the term: “If, and in so far as...” there was different treatment it was because of different situations, cf. Sunday Times v. The United Kingdom (II), 26.11.1991, para. 58.
characteristics but on other "general" criteria. Different treatment is, then, accorded to the different categories. This is indeed an essential characteristic of legislation as: "To legislate is to classify...". Legislation commonly classifies people into groups along various criteria and prescribes a certain treatment to each group. In these cases there is no pre-identifiable badge of differentiation, but it arises out of different categories and treatment in law.

The three trade union cases of 1975 and 1976, *National Union of Belgian Police v. Belgium*, *Schmidt and Dahlström v. Sweden* and *Swedish Engine Drivers' Union v. Sweden* are examples where the badge of differentiation between different trade unions or members of different trade unions were the different treatment accorded by law to different categories of unions or members of different trade unions. In all these cases a lenient standard of scrutiny was applied, the *Swedish Engine Drivers' Union v. Sweden* judgment mentioning for the first time in Article 14 cases the: "...power of appreciation..." accorded to the state. No violation was found.

In *Monnell and Morris v. The United Kingdom*, the treatment complained of was the fact that unmeritorious appeals resulted in loss of time towards serving a sentence. Only persons convicted and already serving their sentence risked this loss of time. The Court seemed to doubt whether the situations were similar, but in a lenient type of review: "...even assuming that the situation of [the applicants] was comparable to


543 Striking v. non-striking unions and the most representative v. other unions.

544 Members of striking or non-striking unions.

545 *Swedish Engine Drivers' Union v. Sweden*, 06.02.1976, para. 47. In *National Union of Belgian Police v. Belgium*, 06.02.1976 the Court also explicitly referred to its subsidiary role, cf. para. 47. Gomien, Harris and Zwaak, p. 351 argue that the margin of appreciation is wide when it comes to the rights of trade unions. See also Livingstone, p. 29. Dijk and Hoof, p. 729 mention the *Swedish Engine Drivers' Union v. Sweden* and *National Union of Belgian Police v. Belgium* judgments as examples of areas where the application of Article 14 is more restricted than in relation to badges of difference that indicate strict scrutiny.
that of convicted persons at liberty..." found the treatment justified.\textsuperscript{546} The same badge of differentiation was claimed in \textit{Kamasinski v. Austria}, but this time in relation to the possibility to attend an appeal hearing. The Court found it justified by reference to the margin of appreciation and the considerations that the appeal did not involve retrial of evidence or assessment of guilt, was not based on grounds related to the applicant's personality, the appellant was represented by counsel and the Supreme Court had no power to increase the sentence.\textsuperscript{547} Another legal classification contested in \textit{Kamasinski v. Austria} was allowing civil claims in criminal proceedings, even the civil claims of witnesses for the prosecution. The distinction complained of was between defendants in civil action and defendants to civil claims in criminal proceedings. Being an: "...established feature in a number of continental legal systems in Europe." it was considered justified in the interests of the proper administration of justice.\textsuperscript{548}

In the \textit{Stubbings and Others v. The United Kingdom} case one of the claims was of active discrimination on basis of the badge of differentiation of a legislative distinction between victims of intentionally inflicted harm and negligently inflicted harm. The difference of treatment consisted of different periods of limitation. Instances of such classical categorisations, ingrained in law and legal thinking, meet with lenient scrutiny. The Court noted that any legal system classified with references to: "...the type of harm suffered, the legal basis of the claim and other factors, who are subject to varying rules and procedures...".\textsuperscript{549} In particular as regarded classification into victims of intentionally and negligently caused injuries, the Court noted that it could be more readily apparent to the victims of intentionally caused harm that they have a cause of action. The Court did not find the situations comparable but added that "even if" they were they would be reasonably and

\textsuperscript{546} \textit{Monnell and Morris v. The United Kingdom}, 02.03.1987, para. 72. The objective justification rationale referred to the aim of the measure being to expedite the process of hearing appeals and so reduce the time spent in custody of those with meritorious appeals and the fact that most appeals were lodged by persons already in custody, \textit{cf.} para. 73.


\textsuperscript{548} \textit{Ibid}, para. 93.

\textsuperscript{549} \textit{Stubbings and Others v. The United Kingdom}, 22.10.1996, para. 73.
objectively justified in light of the margin of appreciation and with reference to the same inherent differences.\textsuperscript{550}

The most recent case concerning traditional legislative classifications was the Gerger v. Turkey case. Here the badge of differentiation complained of concerned conviction under the Turkish Prevention of Terrorism Act as opposed to other criminal convictions. People convicted of terrorist offences were not entitled to automatic parole until having served three quarters of their sentence as opposed to half the sentence for others. The Court simply noted that: "...the distinction is made not between different groups of people, but between different types of offence, according to the legislature’s view of their gravity. The Court sees no ground for concluding that that practice amounts to a form of "discrimination"...".\textsuperscript{551} The legal classification of offences according to their gravity is a type of classification (badge of differentiation) at the very core of penal law. In Gerger v. Turkey the Court’s review seems the most lenient in comparison with the other cases on legislative classifications. Here, a simple assertion of the differences in situations was sufficient and no real objective justification scrutiny was undertaken.

Sometimes the badge of differentiation is simply the treatment complained of. This may come under the category of legislative classifications directly or indirectly via the application of general criteria stipulated in legislation. The judgment in Fredin v. Sweden is an example. The treatment complained of was that legislation enabling the revocation of an exploitation licence was only applied to the applicants’ company. The badge of differentiation was simply being the only company receiving the treatment. In Fredin v. Sweden no scrutiny was undertaken really as it was decided primarily on basis of the applicants’ claims being unsubstantiated as the burden of proof rested with the applicant.\textsuperscript{552} In the Building Societies v. The United

\textsuperscript{550} \textit{Ibid}, paras. 73-74. Another facet of this case is the claim of passive discrimination and lack of accommodation for difference discussed in Chapter 5.1.3.2. C \textit{supra}.

\textsuperscript{551} Gerger v. Turkey, 08.07.1999, para. 69.

\textsuperscript{552} Fredin v. Sweden, 18.02.1991. Harris, O’Boyle and Warbrick, p. 475 mention both Fredin v. Sweden and Pine Valley Developments Ltd. and Others v. Ireland, 29.11.1991 as examples of badges of differentiation consisting of the treatment meted out. In Pine Valley Developments Ltd. and Others
Kingdom judgment the badge of differentiation was simply the treatment meted out according to two successive pieces of legislation in that they did not reach all the implicated building societies in the same manner. The case received lenient scrutiny.553

C. The badge of differentiation of profession

Profession seems to be a distinction that is rather clearly considered irrelevant by the Court. In the beginning, the approach of the Court was clearly formal as the burden of persuasion for establishing similarity rested upon the applicant and a finding of non-comparable situations excluded further scrutiny. The Engel and Others v. The Netherlands case is an example of this as regards the comparisons between military personnel and civilians. The widespread European and international recognition of a separate military disciplinary regime rendered the comparison clearly irrelevant.554 Similarly in the Sunday Times v. The United Kingdom (I) case the difference in duties and responsibilities between parliamentarians and the press were considered so clearly different that no scrutiny was applied to differences as to their freedom of expression.555 Van der Mussele v. Belgium is also a clear example. The Court found that advocates had a corpus of rights and duties fundamentally different from that of other judicial, parajudicial or other professions. Upon the conclusion that there did

\[553\text{Building Societies v. The United Kingdom, 23.10.1997. The lenient scrutiny in this case is also and perhaps primarily affected by the fact that it concerns the field of life of the protection of property, cf. Chapter 5.3.2. infra.}\]

\[554\text{Engel and Others v. The Netherlands, 08.06.1976.}\]

\[555\text{Sunday Times v. The United Kingdom (I), 26.04.1979.}\]
not exist analogous situations in the case no further scrutiny was applied.\textsuperscript{556} It is not unlikely that it appeared obvious to the Court that the profession of advocates has a unique standing in the administration of justice and that its situation hence is clearly and relevantly different from that of other professions. Most recently the Rekvényi\textit{v. Hungary} judgment dealt with different treatment based on profession. Here, the Hungarian Constitution had been amended so as to prohibit political party membership and political activities of members in the armed forces, the police and the security services. As regards the argument that this discriminated on the basis of profession the Court simply noted that: "...\textit{even assuming} that police officers can be taken to be in a comparable position to ordinary citizens..."\textsuperscript{557} the applicant's special status as a police officer justified the different treatment. While the case was not dealt with on the formal approach that concludes review upon the finding that similar situations had not been established, it clearly indicates that the comparison being drawn was considered insignificant and, thus, not meriting detailed discrimination analysis.\textsuperscript{558}

Different duties within the same profession may also come under this category, but here lenient scrutiny is not indicated quite as strongly as in the early cases under the formal approach. The Engel and Others\textit{v. The Netherlands} case is an example as regards the difference between military ranks in disciplinary measures prescribed by law. The comparability and objective justification issues were merged and a lenient standard of scrutiny applied, referring to the state's: "...considerable margin of appreciation."\textsuperscript{559} There was no violation. In De Jong, Baljet and van den Brink\textit{v.}

\begin{itemize}
\item \textsuperscript{556} \textit{Van der Mussele v. Belgium}, 23.11.1983, para. 46.
\item \textsuperscript{557} \textit{Rekvényi v. Hungary}, 20.05.1999, para. 68, emphasis added.
\item \textsuperscript{558} \textit{Ibid.} The judgment on Article 14 in conjunction with Article 10 or 11 refers to consideration of the applicant's special status as a police officer under Articles 10 and 11. In that respect emphasis was placed on the fact that: "...a number of Contracting States restrict certain political activities on the part of their police...", cf. para. 41. The aim of ensuring the political neutrality of police officers was legitimate and indeed had a: "...special historical significance in Hungary because of that country's experience of a totalitarian regime...", cf. para. 41.
\item \textsuperscript{559} \textit{Engel and Others v. The Netherlands}, 08.06.1976, para. 72. In dealing with the margin the Court declared that it was aware of some evolution towards ending distinctions such as those the applicants
\end{itemize}
The Netherlands the badge of differentiation claimed by the applicants was that their battalion in the Netherlands army was designated for a special UN mission in Lebanon. The Court seems to have found that situation unique as compared with other servicemen. It simply declared that even if it assumed that the situation of the applicants was comparable to that of other servicemen, the impending special mission provided an objective and reasonable justification.560

D. The badge of differentiation of “property”

Scholarly literature on Article 14 has identified cases on non-discrimination in conjunction with property rights as an area where the margin of appreciation is relatively wide.561 A clear line has not been drawn between instances where the badge of differentiation is in some sense “property” and instances of discrimination in the enjoyment of the right to property more generally irrespective of the badge of differentiation.562 The case law falls into clearer patterns if analysed from the standpoint of the badge of differentiation (“property”) and from the standpoint of the interest at stake (“right to property”) separately.563 The present analysis will focus on the badge of differentiation of property while the strictness of review related to the field of life of property rights will be discussed in Chapter 5.3.2. infra.

complained of. However, at the time when the treatment took place, such distinctions were generally in place in the legal systems of the contracting states as well as being tolerated in international law. The point in time of measuring the existence of a “common standard” was found to be not at the time of review but at the time the alleged violation took place.

560 De Jong, Baljet and van den Brink v. The Netherlands, 22.05.1984, para. 62. Perhaps there is also an indication of a lenient scrutiny generally when dealing with issues concerning the national militaries.


562 See footnote 285 supra.

563 The Gillow v. The United Kingdom, 24.11.1986 case is an example of how the badge of differentiation of property calls for lenient scrutiny even though the right encroached upon is that of Article 8 (respect for home). The Inze v. Austria, 28.10.1987 and Marckx v. Belgium, 13.06.1979 judgments are examples of how the badge of differentiation of illegitimacy calls for strict scrutiny even though the right encroached upon is Article 1 Protocol 1 (right to property).
The badges of difference complained of in James and Others v. The United Kingdom and Lithgow and Others v. The United Kingdom were different categories of property owners as defined in legislation. The discrimination complained of in these judgments met very lenient scrutiny. In Spadea and Scalabrino v. Italy the badges of differentiation were classification into residential property and non-residential property and the difference in treatment between landlords and tenants. The Court noted that relevantly similar situations had to exist and applied lenient scrutiny in a merged similar situations and objective justification scrutiny. In Edoardo Palumbo v. Italy, however, the situations of tenants and landlords were found incomparable in light of the fundamental differences therein. Therefore, no issue of discrimination was found to arise in the case, and no objective justification scrutiny was performed at all. In P.M. v. Italy, the badges of differentiation were the difference in treatment between owners who rent property and owners who do not as well as between landlords and tenants. The Court dealt with comparisons between landlords and tenants in the same manner as in the Edoardo Palumbo v. Italy

564 In James and Others v. The United Kingdom, 21.02.1986, the categories of landlords were a) landlords under “long leasehold” system of tenure and b) such landlords owning property under a certain maximum rateable value of the property comprising approximately 98-99% of all such landlords, cf. paras. 73 and 21-23. This, the applicant claimed, was differentiation on the grounds of property while the government claimed not as the differentiation was not based on any criteria of wealth. The Court declared the list of grounds in Article 14 non-exhaustive, found that differences were made with regard to different categories of property owners and that these were relevant grounds (“badges”) of difference under Article 14, ibid, para. 74. The judgment shows that the badge of differentiation of property is not easily defined and that Article 14, containing a non-exhaustive list of grounds, encompasses a wide array of instances that may have a link with the term property. In Lithgow and Others v. The United Kingdom, 08.07.1986 the various badges of difference complained of all arose from a statutory formula on compensation for owners of nationalised companies and its application as well as the treatment of the applicants under the relevant Act in comparison with treatment under other Acts in a similar sphere, cf. generally paras. 178-189.

565 Spadea and Scalabrino v. Italy, 28.09.1995, para. 46. The treatment complained of was the suspension of eviction orders on residential property, whereas no such constraints were on eviction from non-residential property. Similarly the applicants complained of the protection of tenants to the detriment of landlords.

566 Edoardo Palumbo v. Italy, 30.11.2000, para. 52.
judgment. The different treatment of those who rent their property and those who do not was found justified with reference to the aim of the legislation in question to enable tenants with expired leases to find acceptable or subsidised housing.\(^{567}\) In all these cases lenient scrutiny was also supported by the fact that the treatment complained of encroached upon the field of life of property rights.\(^{568}\)

The *Gillow v. The United Kingdom* case is also an example of how the badge of differentiation of property calls for lenient scrutiny. Here one of the badges of differentiation complained of was “property” but the case was not argued in terms of the field of property rights but the right to respect for the home under Article 8. The facts of the case had to do with the regulation of housing in Guernsey and the possibility for the owners of a house to actually occupy it.\(^{569}\) The badge of differentiation complained of concerned the classification by legislation into different categories of persons, on the one hand not having close links with Guernsey and on the other hand on the basis of property as in not owning a house over a certain rateable value.\(^{570}\) As regards the second complaint the policy of different treatment was, having regard to the state’s margin of appreciation, found justified by the fact that expensive houses were not sought after by those in need of housing.

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\(^{567}\) *P.M. v. Italy*, 11.01.2001, paras. 54-55, the judgment is not final as referral to the Grand Chamber has been requested according to Article 43. Compare *P.M. v. Italy* (not final) and *Edoardo Palumbo v. Italy*, 30.11.2000 with *Spadea and Scalabrino v. Italy*, 28.09.1995, where the difference of treatment between tenants and landlords was found to raise the question of objective justification. The approach to place the burden of proof for similarity of situations on the applicant and apply no objective justification scrutiny at all to this issue in *P.M. v. Italy* (not final) and *Edoardo Palumbo v. Italy* most likely fed on the earlier judgment in *Spadea and Scalabrino v. Italy* establishing a wide margin of appreciation in this type of cases.

\(^{568}\) Cf. Chapter 5.3.2. infra.

\(^{569}\) *Gillow v. The United Kingdom*, 24.11.1986. Protocol 1 was not found applicable by the lack of an express declaration on its application to the island of Guernsey, cf. para. 62. Schokkenbroek: The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation, p. 22, seems to count the *Gillow v. The United Kingdom* case among cases on Article 14 in conjunction with Article 1, Protocol 1.

\(^{570}\) Persons belonging to these groups did not need a licence to occupy a property in Guernsey as did the applicants, *ibid*, para. 64.
It is noteworthy how the aspect of discrimination based on property (rateable value) seems dealt with in more lenient terms than the facet of discrimination based on the closeness of links with Guernsey.

Contrary to what may seem indicated in the literature, the badge of differentiation of property does not uniformly command lenient review. Other factors in the case may have an influence and indicate a stricter approach.

In Larkos v. Cyprus the badge of differentiation can be argued as being a certain property category as the distinction complained of was made between tenants of the Government as opposed to tenants of other landlords. Tenants of the Government did not enjoy the protection of the Rent Control Law and were, as opposed to private tenants, not protected from eviction at the end of the lease. The interest at stake was the right to respect for the home. The applicant was considered to be in a similar situation to private tenants as the terms of the lease clearly indicated that the Government rented the property in a private-law capacity and there was nothing in the lease to indicate that the flat was rented to the applicant as a civil servant or that it was rented to him at a preferential rate. As to the possible objective justification for the different treatment the Court reiterated the considerations relating to similar

571 Gillow v. The United Kingdom, 24.11.1986 para. 66. The margin of appreciation seems to be the overriding consideration here as it seems arguable that the owners of the more expensive houses were equally or even better suited to bearing the necessary burdens of a housing policy aimed at reasonable provision for the poorer section of the population.

572 Schokkenbroek: The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation, p. 22-23. Note that this article is written before the Larkos v. Cyprus, 18.02.1999 and Chassagnou and Others v. France, 29.04.1999 judgments were pronounced.

573 Larkos v. Cyprus, 18.02.1999. The badge of differentiation refers to the situation of different types of tenants, but these different types of tenants are defined by the criterion of the type of property owner they rent from. The real badge of differentiation is, thus, property in the sense of referring to the type of property owner rented from.

574 A violation was found of Article 14 in conjunction with Article 8 and it was not considered necessary to review the case also under Article 14 in conjunction with Article 1 of Protocol 1, ibid, paras. 31 and 35.

575 Ibid, para. 29.
situations. It also noted that the legislation not applicable to the applicant was intended as a measure of social protection and that the decision not to extend it to government tenants needed specific justification.576 The Government was not found to have adduced: "...any objective and reasonable justification for the distinction which meets the requirements of Article 14 of the Convention, even having regard to their margin of appreciation in the area of the control of property.".577 Despite the indication of a wide margin of appreciation, the Court found a violation. The primary influencing factor indicating stricter scrutiny seems to be the situation of disadvantage the tenant finds himself in as compared with the Government as a landlord. See generally the discussion in Chapter 5.3.3.2. infra.

Chassagnou and Others v. France also indicates stricter scrutiny and upon analysis it becomes apparent that this is a very special case in respect of the hybrid of issues and influencing factors raised by it. In essence the complaints of the applicants were the following: They were landowners opposed to hunting on ethical grounds but were according to law obliged to become members of the relevant regional hunters' association. In addition they were obliged by the same Act to transfer hunting rights over their land to the association so that all hunters in the area could hunt on their land.578 As they were small landowners they could not avoid these duties under the Act whereas owners of large areas of land could. This was found to be in violation of Article 1 of Protocol 1 in conjunction with Article 14 as well as in violation of Article 11 in conjunction with Article 14. The Court clearly found the distinction between large and small landowners flagrantly arbitrary as its arguments emphasise the total lack of: "...any convincing explanation..."579 and "...any objective and reasonable justification..."580 for it. It is interesting to note that the distinction between large and small landowners is considered flagrantly arbitrary in relation to

576 Ibid, para. 30.
577 Ibid, para. 30.
578 Hence, violations of both Article 11 and Article 1 of Protocol 1 taken alone were found, cf. Chassagnou and Others v. France, 29.04.1999, paras. 85 and 117. Several judges expressed separate opinions on various aspects of the case.
579 Ibid, para. 92.
580 Ibid, para. 121.
the interest at stake in the case and the seriousness of the interference.\textsuperscript{581} In particular as regards the consideration of a violation of Article 1 of Protocol 1 in conjunction with Article 14, the reasoning of the Court refers to the fact that the treatment compels people to “band together” against their convictions and that allowing hunting is against the conscience of the applicants. Thus, it draws directly on the treatment in question encroaching not only upon the protection of property but also upon freedom of conscience and freedom of association.\textsuperscript{582} This provides additional support for the treatment not passing muster.\textsuperscript{583} On balance, the \textit{Chassagnou and Others v. France} judgment does not seem to indicate that the Court is reverting from lenient scrutiny in cases concerning the badge of differentiation of

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\item \textsuperscript{581} On a similar note, one of the dissenting opinions argued that the proportionality of the treatment in relation to the aim sought to be realised is obviously violated as the treatment is not even useful in pursuit of the aim, \textit{cf. Chassagnou and Others v. France}, 29.04.1999, partly concurring and partly dissenting opinion of Judge Caflisch joined by Judge Pantiru.
\item \textsuperscript{582} \textit{Chassagnou and Others v. France}, 29.04.1999, para. 93: “...while it may be in the interest of hunters who own small plots of land to band together in order to obtain larger hunting grounds, there is no objective and reasonable justification for compelling people who have no wish to band together to do so, by means of compulsory transfer, on the sole criterion of the area of the land...” (emphasis added). See also para. 95: “In conclusion, since the result of the difference in treatment between large and small landowners is to give only the former the right to use their land \textit{in accordance with their conscience}, it constitutes discrimination...” (emphasis added).
\item \textsuperscript{583} In his partly concurring and partly dissenting opinion Judge Zupancic did not find any discrimination in the case, applying the test that the treatment is: “...rationally related to a legitimate legislative interest.” (sic) as relevant to the social and economic issues at play in the judgment. In addition he argued that: “If this was a suspect classification in terms of race, alienage or national origin etc. the strict scrutiny test would apply, i.e. the Convention would be deemed to be violated unless there were a compelling state interest and the law in question would be suitably tailored to serve it. If gender of illegitimacy etc. was the issue the heightened scrutiny test would be applicable, i.e. the law would be in violation unless it was suitably related to a sufficiently important state interest.”, \textit{cf. Chassagnou and Others v. France}, 29.04.1999, Partly concurring and partly dissenting opinion of Judge Zupancic, Part III, l.f. This whole approach seeks inspiration directly to American constitutional law, see e.g. Sedler, pp. 92-93 with references. This approach, focusing as it does on the badge of differentiation as the only influencing factor, is too formal and simplistic to catch the shades of the various different factors that affect the strictness of scrutiny in the case law of the European Court of Human Rights. Indeed, the \textit{Chassagnou and Others v. France} judgment itself provides clear support for that conclusion.
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property, or for that matter concerning the field of property rights. Rather, it indicates that flagrantly arbitrary distinctions will not pass such lenient scrutiny, particularly not if stricter scrutiny is supported by other factors at stake in the case.

5.2.3.3. Various personal characteristics

There seems to exist a hybrid group of cases where a distinction based on a rather clearly defined personal characteristic exists, such as those expressly recounted in Article 14, but differences having to do with more detailed aspects of the characteristic in question are put forward as justifications for different treatment. In such cases consideration of comparability and analysis of objective justification are commonly merged. The scrutiny applied becomes rather lenient because although the case concerns a fairly clearly defined personal characteristic, the Court nevertheless entertains and analyses possible justifications hinging on inherent differences therein.

The case of Abdulaziz, Cabales and Balkandali v. The United Kingdom is an example as regards the question of discrimination on the ground of birth. It was not disputed in the case that a distinction of that kind existed in more favourable rules pertaining to the immigrant husbands of women who were born or had a parent born within The United Kingdom. The outcome of the case nevertheless was decided by the comparability of these women and the group of reference as the Court held that there were: "...persuasive social reasons for giving special treatment to those whose link with a country stems from birth within it."\(^{584}\) What ensued was scrutiny of the more lenient kind and a finding of non-violation.\(^{585}\) In further support of this

\(^{584}\) Abdulaziz, Cabales and Balkandali v. The United Kingdom, 28.05.1985, para. 88. The Commission’s approach had been stricter in that it was held that a difference of treatment could not be: "...based on the mere accident of birth...", ibid, para. 87. What the European Court of Human Rights was in effect saying was that birth was not a completely irrelevant criteria, a "mere accident", when it came to the particular context of establishing links with the country of birth, whereas it might be an irrelevant criteria in many other contexts. Compare with the analysis of cases in Chapter 5.3.4. infra, concerning the relevance of the badge of differentiation to the interest at stake in the case.

\(^{585}\) Ibid, paras. 88-89.
conclusion is the fact that although the criterion of “very weighty reasons” was first forwarded as regards sex in the Abdulaziz, Cabales and Balkandali v. The United Kingdom case, cf. Chapter 5.2.4.2. infra, there was silence on a similar criterion as regards birth.

In McMichael v. The United Kingdom the status of an unmarried father as compared with married fathers was considered. The different treatment in question was expressly provided for in legislation; married fathers obtained parental rights automatically while an unmarried father had to apply to a Court to gain parental rights, which would be dealt with expeditiously upon the mother’s consent. As regards the status of unmarried fathers the Court noted that the relationships of natural fathers with their children could vary: “...from ignorance and indifference at one end of the spectrum to a close stable relationship indistinguishable from the conventional matrimonial-based family unit at the other.”. Clearly it was not obvious to the Court that married fathers and unmarried fathers were always in comparable situations. The procedure in question was found to have the legitimate aim of identifying “meritorious” fathers, thereby protecting the interests of the child and the mother. The proportionality principle was also considered respected.

Gillow v. The United Kingdom is also an example as regards the badge of differentiation of close ties with Guernsey, but the case concerned alleged discrimination in drawing the line between the groups of people that needed specific licences to reside on the island and the groups of people who did not. The badge of differentiation claimed was a classification based on having specified close links with Guernsey. As regards that complaint the Court found the differentiation complained of justified by running together consideration of comparability and

586 McMichael v. The United Kingdom, 24.02.1995, para. 98, the Court citing the Commission’s report.
587 Ibid. Compare with Elsholz v. Germany, 13.07.2000 where a natural father could not prove that he would have received a more favourable treatment as a divorced father as regards access to the child as the same tests regarding the paramount interest of the child prevailed in both situations, cf. paras. 59-60.
objective justification, i.e. the badge of differentiation complained of actually justified the different treatment.\(^588\)

In *Sheffield and Horsham v. The United Kingdom* the badge of differentiation was transsexualism. In its evaluation of the case under Article 8 the Court had regard to the: "...complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States..."\(^589\) at stake, as well as its view that the detriment suffered by the applicant was not serious enough to override the margin of appreciation in the area.\(^590\) As regards Article 14 more particularly, the Court referred to the margin of appreciation under that provision and concluded that the considerations taken into account in the fair balance test under Article 8 were also encompassed by the notion of objective and reasonable justification under Article 14.\(^591\) Transsexualism raises many complex questions and comparisons are, thus, hard to draw. This is reflected in the judgment as the applicants compared themselves with other members of society, other women and men.\(^592\) The Court did not enter into the comparability issue and reached its conclusion: "...irrespective of the reference group relied on."\(^593\) This, per se, indicates a substantive approach, as appropriate comparators are not formally a precondition of scrutiny. But the scrutiny applied may move in the direction of leniency instead. The lenient scrutiny applied seems to arise from this ambivalent badge of differentiation as well as the fact that the claim made was of passive discrimination.

In *Bouamar v. Belgium* the distinction between juvenile and adult offenders was found justified as it arose out of the protective and not punitive nature of the measure

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\(^{588}\) *Gillow v. The United Kingdom*, 24.11.1986, para. 65. The preferential treatment of those with strong links to the island was justified by precisely those links.

\(^{589}\) *Sheffield and Horsham v. The United Kingdom*, 30.07.1998, para. 58.

\(^{590}\) Ibid, para. 59.

\(^{591}\) Ibid, para. 76.

\(^{592}\) Ibid, para. 76.

\(^{593}\) Ibid, para. 76.
in question. In Ireland v. The United Kingdom the distinction between IRA and Loyalist terrorists was given fairly detailed review, but the Court nevertheless found the treatment complained of justified as lenient scrutiny was indicated by the emergency situation dealt with in the judgment. The badge of differentiation complained of in Stubbings and Others v. The United Kingdom was the personal status of being a victim of child sexual abuse. The case received lenient scrutiny, which seems influenced primarily by the fact that the applicants’ claim was of passive discrimination.

Finally, language seems to be a personal characteristic that indicates lenient scrutiny. In Belgian Linguistics, the Court referred to the principle of subsidiarity. The system on the language of education in Belgium was that state-subsidised education was only provided in the language of the region in areas designated as unilingual, in the maternal language in bilingual areas and optional in “special-status” areas. The applicants claimed this system to be discriminatory in various respects, which were all except one found justified with reference to the public interest in protecting linguistic homogeneity. The treatment found discriminatory was distinction between the availability of language classes in the “special status” areas, as French-speaking non-residents could not attend French classes while Dutch-speaking non-residents were allowed to attend classes in Dutch. In Mathieu-Mohin and Clerfayt v. Belgium the applicants were elected French-speaking parliamentarians resident in the Flemish (Dutch-speaking) area. They complained of a system under which they could not be members of the Flemish regional executive Council, as it was comprised only of Dutch speaking parliamentarians. The discrimination issue was decided by reference to the decision under Article 3 of Protocol 1 in isolation. The overriding concern seems to have been the margin of appreciation and the legitimate

595 Ireland v. The United Kingdom, 18.01.1978. See generally Chapter 5.3.5. infra.
596 Stubbings and Others v. The United Kingdom, 22.10.1996. See Chapter 5.1.3.2. C supra.
598 Mathieu-Mohin and Clerfayt v. Belgium, 02.03.1987, 58. They could, however, be members of the French speaking authorities that exercised power in French speaking territories in which the applicants did not reside.
aim of reaching an equilibrium in the linguistic disputes in the country through a complex system of checks and balances.\textsuperscript{599}

\section*{5.2.4. Significant badges of differentiation indicating strict scrutiny}

\subsection*{5.2.4.1. Introduction}

What constitutes clearly relevant comparisons and clearly significant badges of difference is dictated by values outwith the equality provision itself. The common European standard the Court may discern in dealing with a particular situation is in particular an effective tool it relies on for guidance. While relying to a large extent on processes and value assertions originating elsewhere, the Court may of its own accord add to, accelerate or slow down such processes.

In this category, scholarly treatment of the case law of the European Court of Human Rights has identified a trend leading to a narrower margin of appreciation and, hence, a stricter scrutiny in cases involving distinctions on basis of certain suspect classifications or badges of difference.\textsuperscript{600} In the language of the Court “very weighty reasons”\textsuperscript{601} are needed to justify a difference in treatment based on these classifications. The trend as identified and discussed in the literature is simply

\textsuperscript{599} \textit{Ibid}, paras. 57 and 59. In \textit{Kamasinski v. Austria}, 19.12.1989 the applicant’s claim of discrimination on basis of language seemed clearly unfounded. The applicant was provided with an interpreter at trial and had, at his own request, an appointed lawyer who was also an interpreter and communicated with him in his own language. The Court simply noted that even assuming a difference of treatment based on language, it would not be unjustified to limit nullity challenges on the ground on inadequate interpretation to motions made at trial, cf. para. 100.

\textsuperscript{600} E.g. Schokkenbroek: The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation, p. 22 and Harris, O’Boyle and Warbrick, p. 481.

\textsuperscript{601} See for example \textit{Petrovic v. Austria}, 27.03.1998, para. 37.
referred to as a narrow margin of appreciation indicating stricter scrutiny, or a “high burden of justification”.603

But what are these suspect badges of differentiation that are considered to require a strict scrutiny? The case law of the European Court of Human Rights has clearly defined a few categories. To begin with, there are three categories of cases in which the Court has explicitly referred to the need for “very weighty reasons” to justify differentiation. These categories are sex, illegitimacy and nationality. The Court does not refer explicitly to the strict scrutiny catchphrase of “very weighty reasons” in every case concerning these badges of difference whereas strict scrutiny nevertheless may be applied. In the case of Mazurek v. France for example the Court never mentioned the state’s narrow margin of appreciation or the need for very weighty reasons to justify a distinction on basis of illegitimacy. It simply stated that no good reason existed for the discrimination complained of, thus revealing a stringent application of the objective justification test.604 Strict scrutiny may also be identified with regard to other badges of differentiation without the Court explicitly mentioning the criteria of “very weighty reasons”.

In cases where significant badges of differentiation are at play strict scrutiny is prima facie indicated. As always, other factors may also have an influence on the strictness of review.

5.2.4.2. Sex

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603 Harris, O’Boyle and Warbrick, p. 481, footnote 6. See also Livingstone, p. 29.
604 Mazurek v. France, 01.02.2000, para. 54. An earlier example is the Marckx v. Belgium, 13.06.1979 case which stems from a period before the Court began to refer to the “very weighty reasons” test. In Marckx v. Belgium strict scrutiny is nevertheless considered to have been applied, cf. e.g. Schokkenbroek: The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation, p. 22 and Livingstone p. 29, footnote 21.
In *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, the Court reasoned that: "...the advancement of the equality of the sexes is today a major goal in the member-States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention."605 This was the first judgment concerning the badge of differentiation of sex where the Court explicitly referred to the formula of "very weighty reasons" as indicating stricter scrutiny. Every judgment on that badge of differentiation since has referred to a heightened strictness of scrutiny by referring to the test of "very weighty reasons".606 The literature is in agreement as to the badge of differentiation of sex indicating strict scrutiny.607

In the *Abdulaziz, Cabales and Balkandali v. The United Kingdom* judgment the difference of treatment on the grounds of sex was explicitly stipulated in legislation. The Government endeavoured to justify the difference of treatment, in the form of harsher restrictions on the immigration of husbands than on the immigration of wives joining their spouses in Britain, by differences in their situations. The justificatory argument primarily went to the different impact on the labour market of immigrant husbands, as men were statistically more likely to seek work than women. The Court, conceding the protection of the labour market as a legitimate aim, nevertheless found the statistical evidence inconclusive and the possible residual

605 *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, 28.05.1985, para. 78.
different impact on the labour market not significant enough to constitute a “very weighty reason”. In addition the aim of advancement of public tranquillity, argued as a justification, was not even considered to be furthered by the distinction between the sexes.\textsuperscript{608} Similarly in \textit{Schuler-Zgraggen v. Switzerland} a woman was deprived of her invalidity pension by a Court judgment, which was based on the assumption that because she was a woman with a young child she would not have worked outside the home anyway. The Court found no very weighty reasons in justification of the different treatment.\textsuperscript{609} Both these judgments exhibit a strict approach regarding stereotypical and traditional conceptions on the roles of the sexes in public and private life alike. In both these cases they function to the detriment of women.

The judgments in \textit{Burghartz v. Switzerland}, \textit{Karlheinz Schmidt v. Germany} and \textit{Van Raalte v. The Netherlands} demonstrate that the Court is equally strict in its approach to traditional and stereotypical distinctions that function to the detriment of men. In contrast to the judgments on discrimination to the detriment of women these cases concern the public sphere only. In \textit{Burghartz v. Switzerland}, only wives and not husbands could put their own surname before the family name chosen by the couple. The Court referred to evolutive interpretation: “...in light of present-day conditions, especially the importance of the principle of non-discrimination.” and dismissed all references to family unity, tradition and the greater deliberateness on part of husbands than wives in opting for the wife’s name as family name.\textsuperscript{610} In \textit{Karlheinz Schmidt v. Germany} only men were subject to compulsory service in the fire brigade

\textsuperscript{608}\textit{Abdulaziz, Cabales and Balkandali v. The United Kingdom}, 28.05.1985, paras. 78-81. The Government also tried to forward the justification that as admission to the county was not required by the Convention the more generous allowances towards wives could not be considered discrimination against husbands. As Article 14 \textit{per se} provides protection from discrimination, i.e. less favourable treatment of some persons or groups, it is not of relevance that the more favourable treatment of others is not called for by the Convention, cf. para. 82.

\textsuperscript{609}\textit{Schuler-Zgraggen v. Switzerland}, 24.06.1993, paras. 64 and 67. The very weighty reason of sex weighed against the indication towards a wide margin of appreciation and lenient scrutiny indicated as the case concerned the taking of evidence in a national Court, which is normally considered within the state’s margin of appreciation, cf. para. 66.

\textsuperscript{610}\textit{Burghartz v. Switzerland}, 22.02.1994, para. 28.
or a financial contribution in lieu of such service. The argument of the state for the distinction referred to the physical and mental characteristics of women and the aim of protecting women. The Court did not directly decide whether there “nowadays” existed justification for the distinction based on sex in relation to fire service per se, although an answer in the negative seems more than likely from the Court’s tone. As the payment had lost its compensatory nature anyway and had become a simple financial burden: “...a difference of treatment on the ground of sex can hardly be justified.” In Van Raalte v. The Netherlands, unmarried childless men over the age of 45 had to pay contributions under the Child Care Benefits Act whereas women of the same age did not. The Court noted that “compelling” reasons were needed to justify different treatment based on sex. It simply dismissed all generalisations as regards possibilities to procreate and the paternalistic justification of sparing the feelings of unmarried childless women.

The Court seems to be having more problems with treatment that is detrimental to men but takes place in the private sphere. Issues relating to regulating paternity caused difficulty for the Court in the Rasmussen v. Denmark judgment of 1984 and the Petrovic v. Austria judgment of 1998 shows that its approach to detrimental treatment of men in the private sphere has not changed much. The Rasmussen v. Denmark case is the first example of a sex discrimination case and the scrutiny applied was of the kind where the Court seems genuinely to struggle with the case. The treatment complained of concerned a statutory time limit for husbands to institute proceedings for a declaration of non-paternity of a wife’s child while there was no such time limit for the wife and mother. The Court expressly merged the

611 Karlheinz Schmidt v. Germany, 18.07.1994, para. 27.
612 Ibid, para. 28.
615 The Court found it not necessary to determine on what grounds the distinction complained of was made, as the list of grounds in Article 14 was not exhaustive, cf. Rasmussen v. Denmark, 28.11.1984, para. 34.
616 There is, however, an indirect link with a biological difference as normally the biological certainty of fatherhood is more difficult to ascertain than that of motherhood.
analogous situations considerations with the objective justification test. It proceeded on the assumption that the husband and the mother were in analogous situations and addressed the distinguishing characteristics between their respective situations under the objective justification test. Clearly the Court was struggling with whether the differences inherent in the respective situations of the husband and the mother were to be held relevant. Generally it held that time limits on instigating paternity proceedings were legitimate to protect the interests of the child. The difference relied on by the state and found valid by the Court was that a time limit was less necessary for the mother as her: "...interests usually coincided with those of the child, she being awarded custody in most cases of divorce or separation." In this difficult situation the Court relied on the state's margin of appreciation and did not very actively or critically review the justificatory arguments of the state. Given the lack of common ground between the contracting states on a uniform regulation of the situation of mothers and their husbands in respect of paternity proceedings and the careful study and evaluation of the situation undertaken by the respondent state at the time of enacting the disputed legislation, the Court found that the respondent state had acted within its margin of appreciation. In Petrovic v. Austria the difference of treatment arose from fathers' non-entitlement to parental leave allowance. The Court noted that very weighty reasons were needed for differentiations on basis of sex but also that the national authorities enjoyed a margin of appreciation. In its reasoning the Court never really addressed the question of whether the distinction was justifiable apart from noting that it started from the premise that both parents are similarly placed with respect of taking care of their children after an initial period of

617 Rasmussen v. Denmark, 28.11.1984, paras. 36-37. The minority of the Commission had found that the mother and her husband were not placed in analogous situations.
618 Ibid, para. 41. Related was the concern that husbands might instigate late paternity proceedings in order to avoid maintenance obligations upon separation or divorce, cf. the arguments of the respondent state in para. 39.
619 The general formula on the margin of appreciation in Article 14 cases indeed stems from Rasmussen v. Denmark, 28.11.1984, para. 40. See Chapter 3.3.4.3. supra.
620 Ibid, para. 41.
621 Petrovic v. Austria, 27.03.1998, paras. 37-38.
recovery for the mother.\textsuperscript{622} The Court, however, focused exclusively on factors related to allowing a wide margin of appreciation. These factors were the date of the events being evaluated (around 1989), the gradual process underway towards a more equal sharing of family responsibilities, the relatively recent idea of financial assistance to parents and the lack of a common standard in the contracting states as to whether fathers are entitled to parental leave allowance.\textsuperscript{623}

It is particularly interesting to compare the \textit{Van Raalte v. The Netherlands} and \textit{Petrovic v. Austria} judgments that clearly exhibit opposite approaches to the strictness of review of sex discrimination. Two issues stand out in that comparison. The first is the distinction between the public and private spheres. The second issue is the type of claim being made in the cases. In \textit{Van Raalte v. The Netherlands} the claim was of active discrimination in that the state had imposed a burden upon the applicant. In contrast the \textit{Petrovic v. Austria} judgment concerns a claim of passive discrimination in the failure of the state to extend beneficial measures applied to one group to another group in a relevantly similar situation. The relative weight accorded to these factors in the judgments may be up for debate, but identifying them may at least explain the differing strictness of review they exhibit.

In conclusion, the badge of differentiation of sex does not command uniformly strict scrutiny. Notably the question of regulating the situation of men in the private sphere seems still less sensitive to strict review than other fields of sex discrimination. The lagging behind of protection in this sphere seems symptomatic of the gradual development of social attitudes and values in European states.

\textsuperscript{622} \textit{Ibid}, para. 36. Note that parental leave allowance refers to a period commencing 8 weeks after childbirth. Until that time maternity leave, intended to enable the mother to recover from childbirth and breastfeed, applied.

\textsuperscript{623} \textit{Ibid}, paras. 40-42. Heringa, p. 31 criticises the judgment. His criticism stems primarily from disregarding sex as a “suspect classification”, but also from confusing the margin of appreciation as regards establishing parental allowance in the first place (which is not obligatory under the Convention) with securing that it is not discriminatory once it has been set up. The latter argument reflects the approach of the Commission to finding a violation, \textit{cf. Petrovic v. Austria}, 27.03.1998, para. 33.
5.2.4.3. Race

There exist no cases from the European Court of Human Rights in which discrimination on the ground of race has been found. The literature has, however, widely argued for race as a sensitive badge of differentiation requiring strict scrutiny once it reaches the level of objective justification scrutiny. The related badges of differentiation of race, colour, descent and national or ethnic origin should all be taken to belong to the general category of "race". Similarly, when the badge of differentiation of association with a national minority has expressly been claimed before the Court, it relates to racial discrimination.

While race has in the literature been argued as being a badge of difference that should meet strict scrutiny it is interesting to note that the Court has usually circumvented dealing with claims of discrimination on the ground of race. Most claims of racial discrimination have been frustrated by the lack of proof of prima facie discrimination and have, thus, not reached the level of objective justification.

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625 Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, UNTS 195, defines the term racial discrimination as distinctions on the grounds of race, colour, descent, national or ethnic origin. In Özgür Gündem v. Turkey, 16.03.2000 and Magee v. The United Kingdom, 06.06.2000, the applicants claimed discrimination on the grounds of national origin and/or association with a national minority. The clear rationale is that all these badges of differentiation relate to the same values. This is also supported in the case law of the European Court of Human Rights, cf. Velikova v. Bulgaria, 18.05.2000, paras. 91 and 93, where the applicant claimed discrimination on the ground of ethnic origin and the Court found racial discrimination not proven.
The seriousness of the allegation seems to have begun to function to the detriment of effective protection against such discrimination. A serious and unlikely situation like racial discrimination seems to hinge on a presumption in favour of states’ not resorting to such deplorable forms of discrimination. This presumption has the effect that the burden of proof is placed on the applicant and the measure of proof required also seems raised to a higher level.\textsuperscript{627} The problem is that, given the close relationship between the burden of proof and the margin of appreciation, this has the function of allocating a wide margin of appreciation to the state. It is in such situations that acknowledging indirect discrimination would be crucial to effective protection. When allegations of discrimination reach the level of being so heavily normatively loaded and deplorable, it seems that a presumption in favour of states not resorting to it begins to function to deprive the citizens of protection from it. This is an interesting paradox speaking clearly in favour of introducing the concept of indirect discrimination into the jurisprudence of the Court.

The Court has only once dealt with objective and reasonable justification review of a claim of discrimination based on grounds related to the category of race. This was in the five similar cases of Beard v. The United Kingdom, Chapman v. The United Kingdom, Coster v. The United Kingdom, Jane Smith v. The United Kingdom and Lee v. The United Kingdom, which all concerned discrimination of the ground of

\textsuperscript{626} In Abdulaziz, Cabales and Balkandali v. The United Kingdom, 28.05.1985, para. 85, it was not established that the immigration rules in question made a distinction on the ground of race as claimed. In Velikova v. Bulgaria 18.05.2000, para. 93 racial prejudice as motivation to the treatment complained of was not proved. In Ibrahim Aksoy v. Turkey, 10.10.2000, para. 83, and Özgür Gündem v. Turkey, 16.03.2000, para. 75, the Court found that as the measures in question pursued legitimate aims, there was no reason to believe that they were based on the applicants’ ethnic origin (Ibrahim Aksoy v. Turkey) or national origin or association with a national minority (Özgür Gündem v. Turkey). See also the 9 judgments on alleged discrimination against Kurds discussed in footnote 319 supra. In Streletz, Kessler and Krenz v. Germany, 22.03.2001, para. 113 and K.-H.W. v. Germany, 22.03.2001, para. 116 the badge of differentiation claimed was being a former national of the German Democratic Republic. This indicates that national origin was the badge of differentiation in question. The Court found no different treatment established.

\textsuperscript{627} Velikova v. Bulgaria, 18.05.2000, para. 93 is the only case on Article 14 that explicitly refers to the requirement of “proof beyond reasonable doubt”.

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belonging to an ethnic (gypsy) minority. In these cases the basis for treatment being gypsy status was express as it had been a consideration weighed in favour of the applicants in the implementation of planning decisions at the national level. The cases, however, concerned claims of positive accommodation for the different situation of the applicants as compared with other persons relating to which several strong indications towards lenient scrutiny applied. These indications towards lenient scrutiny seem to have overridden the strict scrutiny implied by the badge of differentiation of race.

5.2.4.4. Illegitimacy

Illegitimacy has been considered one of the badges of differentiation that commands strict scrutiny. As regards difference of treatment on the grounds of illegitimaecy, the Court has placed great emphasis on the evolution of domestic law in the member states as well as international instruments requiring equality between children born in and out of wedlock. In the Marckx v. Belgium judgment the Court relied on the evolution of European domestic and international law, referred to the principle of


629 Chapman v. The United Kingdom, 18.01.2001, para. 17.

630 The starting point of lenient scrutiny indicated by the claim of positive accommodation was strongly supported by the following factors: The field of life implicated was the effect on respect for the home of planning policy choices and implementation, the lack of common standards in specific fields of accommodation for national minorities, the general social policy issues involved and the financial implications in the case. See generally Chapter 5.1.3.2. C supra. Another aspect of the cases concerned a claim of indirect discrimination, which the Court did not even address, cf. Chapman v. The United Kingdom, 18.01.2001, para. 129.

evolutive interpretation of the Convention and applied strict scrutiny. On the basis of the approach in Marckx v. Belgium, the requirement for “very weighty reasons” justifying different treatment was explicitly spelled out in the Inze v. Austria case. Vermeire v. Belgium confirms the strict scrutiny in relation to comparing children born out of wedlock with children born in wedlock, without explicitly referring to the “very weighty reasons” test. The very strict tone in Mazurek v. France where the Court found no good reason that might justify the treatment complained of seems to indicate that the Court simply is not prepared to listen to attempts at rationalising different treatment based on whether a child is born in or out of marriage.

In Camp and Bourimi v. The Netherlands, the Court noted that the child in question was not only treated differently from children born in wedlock, but also from children who were born out of wedlock but had been recognised by their father. The Court found that: “...similarly weighty reasons are required for this latter difference to be compatible with the Convention in the circumstances of the present case.” The references to the particular circumstances of the case would seem to indicate that it was not only the badge of differentiation that governed the strictness of review, but also the other factors specific to the case.

632 Marckx v. Belgium, 13.06.1979, para. 41.
633 Inze v. Austria, 28.10.1987, para. 41.
635 Mazurek v. France, 01.02.2000, para. 54: “Or la Cour ne trouve, en l’espèce, aucun motif de nature à justifier une discrimination fondée sur la naissance hors mariage.”. In paragraph 52 it is interesting to see that the Court, in relation to evolutive interpretation of the Convention, argues that the institution of the family is a social construct, not rigidly codified historically, sociologically or legally. On the argument for the moral interests in protecting the traditional family the Court simply pointed out the varied picture that socio-demographic data provided on the issue.
636 Camp and Bourimi v. The Netherlands. 03.10.2000, para. 38. The particular circumstances were the death of the father while the child was still unborn and that no conscious decision not to recognise the child existed. The parents had intended to marry and the child had received “letters of legitimation” acknowledging the child as his father’s son. The “letters of legitimation” had, however, been pronounced as not having retroactive effect so that they could not establish inheritance rights, cf: paras. 13 and 38.
5.2.4.5. Nationality

In Gaygusuz v. Austria, the Court expressly required strict scrutiny by formulating a requirement that: "...very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention." 637 From the Gaygusuz v. Austria judgment, it has been argued that the badge of differentiation of nationality commands strict scrutiny. 638

Shokkenbroek, however, also notes that with reference to the earlier Moustaquim v. Belgium and C. v. Belgium judgments the exception should be made that the badge of differentiation of EU citizenship (nationality in a EU country as compared with nationality elsewhere) does not command strict scrutiny. 639 Heringa has similarly

637 Gaygusuz v. Austria, 16.09.1996, para 42, without referring to evolutive interpretation or "common ground". The applicant's complaint concerned entitlement to benefits under the Austrian Unemployment Insurance Act. As the applicant was legally resident and had paid contributions to the unemployment insurance fund there existed no objective and reasonable justification for the difference of treatment.

638 Schokkenbroek: The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation, p. 22: "...leaves very limited scope for applying the margin of appreciation.". Dijk and Hoof, p. 727-728, Heringa, p. 30 and Aral, p. 9 similarly argue that nationality is a sensitive badge of differentiation subject to stricter scrutiny. As the Gaygusuz v. Austria, 16.09.1996, judgment had not been pronounced at the time of writing, this category is not mentioned by the following authors: Harris, O'Boyle and Warbrick, p. 481 (1995), Bayefsky, pp. 19-24 (1990) and Lord Lester of Herne Hill: Non-Discrimination in International Human Rights Law, p. 1659 (1993). Livingstone, p. 29 (1997) does not mention nationality as a suspect category either.

added a caveat in respect of the badge of differentiation of nationality as regards EU
citizenship and the admission and expulsion of aliens.640

In spite of the fairly direct requirement for "very weighty reasons" if differentiation
is based on nationality in Gaygusuz v. Austria, it seems to be an overly wide reaching
interpretation of the judgment that it indicates that the badge of differentiation of
nationality generally commands strict scrutiny. Article 16 of the Convention for
example, although arguably outdated in light of contemporary social and cultural
ideas,641 expressly stipulates that nothing in Articles 10, 11 and 14 is to be construed
as preventing the imposition of restrictions on the political activity of aliens.
Furthermore, different treatment of nationals and aliens is in fact provided for in the
protocols to the Convention as regards the admission to and expulsion from a
country.642 In conclusion, if the badge of differentiation at stake can be construed as
national origin, and hence as coming under the category of race, strict scrutiny
should indeed be strongly indicated. Otherwise, the issue of nationality and the
question of how states treat aliens as compared with nationals and EU citizens, raise
various questions that cannot be dealt with in one uniform approach under Article 14.

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640 Heringa, p. 30. While not mentioning examples it is clear he seeks inspiration from the
Moustaquim v. Belgium, 18.02.1991 judgment, which concerned deportation from Belgium of a
Moroccan national as compared with expulsions of Belgian nationals (which would in itself be a
violation of Article 3 of Protocol 4) or EU citizens. C. v. Belgium, 07.08.1996, concerned the
expulsion of a Moroccan national from Belgium as compared with EU citizens. Arai, p. 9 cautiously
argues that nationality: "...may also call for strict scrutiny in some areas.”.
641 Dijk and Hof, p. 750 argue that it should be abolished.
642 Article 3 of Protocol 4 stipulates that no one shall be expelled from or deprived of the right to enter
the territory of the state of which he is a national. Article 1 of Protocol 7, however, stipulates the
conditions for the expulsion of aliens lawfully resident in the state. In addition to regulating the
expulsion of aliens, the reference to "lawful residence" implies that domestic law determines the
conditions for an alien's admission into the country. See generally Dijk and Hoof, p. 682. Article 1
of the International Covenant on the Elimination of All Forms of Racial Discrimination, UNTS 195,
also stipulates that the Covenant does not apply to distinctions, exclusions, restrictions or preferences
made by states between citizens and non-citizens.
Strict scrutiny may only be implied to a lesser extent and the strictness of review more easily subject to other influencing factors than the badge of differentiation.\footnote{For example, the lenient scrutiny in \textit{Moustaquim v. Belgium}, 18.02.1991 and \textit{C. v. Belgium}, 07.08.1996 was influenced by the relevance of the badge of differentiation to the interest at stake, cf. Chapter 5.3.4. \textit{infra}. In \textit{Gaygusuz v. Austria}, 16.09.1996, the stricter scrutiny was probably aided by the fact that the applicant had paid contributions to the unemployment insurance fund and claimed pecuniary rights linked to these payments, cf. para. 39.}

5.2.4.6. Religion

In the \textit{Hoffmann v. Austria} judgment the Court pronounced: "Notwithstanding any possible arguments to the contrary, a distinction based essentially on a difference in religion alone is not acceptable."\footnote{\textit{Hoffmann v. Austria}, 23.06.1993, para. 36, without referring to evolutive interpretation or "common ground".} From the silence on the margin of appreciation and strict tone in this judgment it has been argued that the margin of appreciation is narrow in cases where the badge of differentiation is religion.\footnote{Dijk and Hoof, pp. 728-729, Schokkenbroek: The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation, p. 22 and Heringa, p. 30 (Heringa without referring to cases in support). With reference to the Declaration on the Elimination of All Forms of Intolerance and discrimination Based on Religion or Belief, \textit{GA Res. 36/55 (25.11.1981)} Bayefsky, p. 23 and Lord Lester of Herne Hill: Non-Discrimination in International Human Rights Law, p. 1659, argue that religion is an international "suspect" classification requiring a more strict review. Harris, O'Boyle and Warbrick, p. 482 do not count religion among the badges of differentiation commanding strict scrutiny, noting that: "...the mere existence of an international agreement prohibiting discrimination on a particular ground may not be enough.". Livingstone, p. 29 and Arai, pp. 8-9, do not mention religion as a sensitive badge of differentiation.} The judgment in \textit{Canea Catholic Church v. Greece}, also supports this.\footnote{\textit{Canea Catholic Church v. Greece}, 16.12.1997, see Schokkenbroek: The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation, p. 22 footnote 14.} In a strict application, the Court simply disregarded all arguments of the respondent state, reiterated the different treatment and declared a violation.\footnote{\textit{Canea Catholic Church v. Greece}, 16.12.1997, para. 47. The differences were between different churches (religions) and resulted in denying the Canea Catholic Church access to Court as it lacked legal personality while the Greek Orthodox Church and the Jewish community enjoyed legal
finally confirms the strict scrutiny indicated by the badge of differentiation of religion. The badge of differentiation of religion was able to counteract the lenient scrutiny indicated by the claim of passive discrimination in the case.648

The judgment in *Hoffmann v. Austria* is a good example of how the narrow margin of appreciation functions as placing the burden of proof on the respondent state. The Austrian Supreme Court judgment complained of had deprived the applicant of custody over her children. In reaching that conclusion it took into consideration issues relating to the applicant’s religion as a Jehovah’s Witness, in particular the refusal of blood transfusions and the possibly negative effect on the social life of the children. The European Court of Human Rights found that these considerations could be legitimate as they might: “…in themselves be capable of tipping the scales in favour of one parent rather than the other.”649 However, the introduction of the Federal Act on the Religious Education of Children and the emphasis by the Austrian Supreme Court on the fact that it was unlawful under the Act for the applicant to raise her children as Jehovah’s Witnesses, supported by: “…the tone and phrasing of the Supreme Court’s consideration regarding the practical consequences of the applicant’s religion.”650 led the European Court of Human Rights to accept that there had been different treatment and that it was based on the badge of differentiation of religion. If strictly applied, it is hard to see how the applicant would be able to establish “beyond reasonable doubt” the fact that the decision was based on her religion and not legitimate considerations of the child’s interest. In effect, the judgment shows that in the situation it was the respondent state that bore the risk of non-persuasion.

In an interesting contrast, the review applied in *Holy Monasteries v. Greece*, is not of the strict kind, but rather of the more lenient kind that merges consideration of personality. The rationalisations of the state concerned the need for all churches to establish legal personality but argued that the simplicity in meeting such requirements for the Greek Orthodox Church and the Jewish Community had particular reasons, cf. para. 45.

649 *Hoffmann v. Austria*, 23.06.1993, para. 33.
comparability with objective justification. Similarly, the judgment in Cha’are Shalom Ve Tsedek v. France did not apply strict scrutiny. The lenient scrutiny applied in these judgments will be explained infra by reference to other influencing factors than the badge of differentiation of religion.

5.2.4.7. Sexual orientation

In the Salgueiro da Silva Mouta v. Portugal case, the Court seems to be applying a standard of strict scrutiny as regards distinctions on basis of homosexuality. By extension all types of sexual orientation would seem to be subject to strict scrutiny. The European Court of Human Rights found that while the aim of protecting the child’s health and rights was legitimate, the decisive factor in depriving the applicant custody over his daughter was his homosexuality. Then the Court simply stated that

652 Cha’are Shalom Ve Tsedek v. France, 27.06.2000, paras. 84 and 87. A dissenting opinion of 7 of the 17 judges composing the Grand Chamber opted for stricter scrutiny.
653 The interest at stake in Holy Monasteries v. Greece, 09.12.1994, is the protection of property rights, cf. Chapter 5.3.3.2. infra. Both cases concerned regulation of the relationship of religions and the state, cf. Chapter 5.3.4. infra.
654 For a chronological account of the case law of the Court and Commission on sexual orientation see Wintemute, Chapters 4 and 5. Wintemute’s rather bleak conclusions on the protection under the Convention, presented on pp. 142-143 have been contradicted by the protection provided in the following cases: Salgueiro da Silva Mouta v. Portugal, 21.12.1999 (a finding of discrimination on basis of sexual orientation), Smith and Grady v. The United Kingdom, 27.09.1999, Lustig-Prean and Beckett v. The United Kingdom, 27.09.1999 (both judgments found the discharge from the army based on sexual orientation a violation of Article 8) and A.D.T. v. The United Kingdom, 31.07.2000 (criminalisation of homosexual activities of more than two men found to be a violation of Article 8). As the Salgueiro da Silva Mouta v. Portugal judgment had not been pronounced at the time of writing, none of the authors analysing the case law on Article 14 have included sexual orientation in their list of badges of differentiation calling for strict scrutiny, see Dijk and Hoof, p. 728-729, Harris, O’Boyle and Warbrick, p. 481-482, Schokkenbroek: The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation, p. 21-22, Livingstone, p. 29, Heringa, p. 30 and Arai, pp. 8-9. Also, on international law more generally Bayefsky, pp. 20-23 and Lord Lester of Herne Hill: Non-Discrimination in International Human Rights Law, pp. 1659-1660 do not include sexual orientation among the “suspect” distinctions.
a distinction had been made on basis of sexual orientation, a distinction that could not to be tolerated under the Convention.\textsuperscript{655} The strict tone of the judgment, simply clamping down with this declaration, indicates that sexual orientation may have reached the level of “suspect category” where “very weighty reasons” must be forwarded before a distinction can be justified. In further support of this finding is the fact that the judgment refers to the Hoffmann v. Austria case, where a similar “sweeping statement”\textsuperscript{656} clamped down on distinctions on basis of religion alone.\textsuperscript{657}

Understanding the Salgueiro da Silva Mouta v. Portugal case as asserting homosexuality as a “suspect category” also seems to be a logical development of an earlier string of cases on homosexuality from Dudgeon v. The United Kingdom and onwards. These judgments found a violation of Article 8, Paragraph 2 but did not find it necessary to review the discrimination issue.\textsuperscript{658} In 1995 Harris, O’Boyle and

\textsuperscript{655} Salgueiro da Silva Mouta v. Portugal, 21.12.1999, para. 36: “...la cour d’appel a opéré une distinction dictée par des considérations tenant à l’orientation sexuell du requérant, distinction qu’on ne saurait tolérer d’après la Convention...”.

\textsuperscript{656} Schokkenbroek: The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation, p. 22.

\textsuperscript{657} The strictness of review in Salgueiro da Silva Mouta v. Portugal, 21.12.1999 (sexual orientation) and Hoffmann v. Austria, 23.06.1993 (religion) alike may also have been assisted by two other factors. The fist is the important personal interest involved in the cases concerning the deprivation of custody over children. The second is the clearly overt and invidious discrimination at stake. In Salgueiro da Silva Mouta v. Portugal the appeal Court depriving the applicant of parental rights over his child pronounced certain clearly bigoted statements. These statements included references to the effect that homosexuality might be an illness and that it were in any event an abnormality and that the applicant should refrain from behaving in a manner that would make his daughter aware of his homosexuality, cf. paras. 34-35. In Hoffmann v. Austria the European Court of Human Rights had no difficulty in finding a difference in treatment on basis on religion, noting in particular the tone and phrasing of the Austrian Supreme Court judgment under scrutiny. The tone and phrasing referred to included remarks on the Jehovah’s Witnesses being a sect that was not a recognised religious community and on the children becoming social outcasts if raised under their teachings, cf. paras. 33 and 15.

\textsuperscript{658} See Dudgeon v. The United Kingdom, 22.10.1981 and the similar complaints and approach of the Court in Norris v. Ireland, 26.10.1988 and Modinos v. Cyprus, 22.04.1993 where the applicants did not rely on Article 14 at all. The cases of Smith and Grady v. The United Kingdom, 27.09.1999 and Lustig-Prean and Beckett v. The United Kingdom, 27.09.1999 also belong to this string of cases.
Warbrick argued that the development of social attitudes might elevate sexual orientation from the "not necessary" to review category to the "fundamental aspect of the case" level of being reviewed irrespective of a violation of another Article.\textsuperscript{659} In \textit{Salgueiro da Silva Mouta v. Portugal} the Court turned the approach established in the \textit{Dudgeon v. The United Kingdom} line of cases around and reviewed the case in terms of Article 14 instead of Article 8 alone.\textsuperscript{660} It seems clear that the: "...policy of judicial abstention..."\textsuperscript{661} involved in the "not necessary" cases was now being discarded in favour of a clear clamping down on discrimination on the basis of the badge of sexual orientation.\textsuperscript{662} In fact it seems that the earlier judgments in the \textit{Dudgeon v. The United Kingdom} line of cases did the groundwork and enabled the Court both to review the case under Article 14 in the first place as well as clamping down on sexual orientation as a significant badge of differentiation indicating strict scrutiny. To begin with these judgments confirmed a certain value judgment already in place in the contracting states as regards the general acceptance and tolerance of homosexual practices between consenting adults in private.\textsuperscript{663} Having thus added the international seal of approval on tolerance and respect for homosexuality it became

\textsuperscript{659} Harris, O'Boyle and Warbrick, p. 469 referring to the "fundamental aspect" test for Article 14 reviewability in \textit{Airey v. Ireland}, 09.10.1979, paras. 29-30. See generally Chapter 6 infra.


\textsuperscript{661} Harris, O'Boyle and Warbrick, p. 469.

\textsuperscript{662} See Chapter 6.3. infra.

\textsuperscript{663} \textit{Dudgeon v. The United Kingdom}, 22.10.1981 concerned the general criminalisation of homosexual practices. The Court narrowed the margin of appreciation accorded to the state under Article 8 down as the case concerned an intimate aspect of private life and required: "...particularly serious reasons..." to justify interferences, cf. para. 52. Assessing the reasons put forward by the state the Court relied heavily on a common standard among the contracting states of better understanding and tolerance of homosexual behaviour, cf. para. 60. The judgments in \textit{Lustig-Prean and Beckett v. The United Kingdom}, 27.09.1999 and \textit{Smith and Grady v. The United Kingdom}, 27.09.1999 found an absolute policy of discharge from the armed forces of homosexuals and intrusive investigations into the applicants' sexual orientation in violation of Article 8, Paragraph 2. The Court followed the \textit{Dudgeon v. The United Kingdom} approach, searching for and not finding: "...particularly convincing and weighty reasons..." (emphasis added) and relying on a common standard between the contracting states in accepting homosexuals in the armed forces, cf. \textit{Smith and Grady v. The United Kingdom}, 27.09.1999, paras. 94 and 104.
much easier to clamp down and assert sexual orientation as a “suspect category” under Article 14 in the Salgueiro da Silva Mouta v. Portugal case.

Upon this reading of the Salgueiro da Silva Mouta v. Portugal case it may seem surprising that in the A.D.T. v. The United Kingdom case the Court reverted back to the Dudgeon v. The United Kingdom approach of it being “not necessary” to consider Article 14. An explanation for this different treatment of the cases will be offered in Chapter 5.3.4. infra. It shows that homosexuality, like the other significant badges of differentiation, does not formally and universally call for strict scrutiny. They are but one factor entered into the model of influencing factors along with other variables that may affect the level of scrutiny applied in the final instance.

5.2.5. Conclusions

5.2.5.1. The general logic presented by case law

The foregoing analysis of the case law has shown that the effect the characteristic (badge) under examination has on the strictness of review follows a certain logic connected with the underlying value judgments inherent in the application of an open-model prescription of equality. The establishment of similar situations is a value judgment and the clarity of its existence may depend upon how firmly that value is embedded in the democratic societies of the contracting states to the European Convention. When it is clearly established by reference to these values that relevantly similar situations exist and that the corresponding badges of differentiation are inappropriate, detrimental differentiations are perceived as so deplorable that the margin of appreciation narrows down and strict review by the Court places maximal burdens on their justification. Conversely, beneficial

665 In the final analysis the strictness of review may be affected by various other factors. Isolating the comparability factor may lead to the trends discussed here while the outcome of individual cases may depend on these other factors.
666 Cf. one prominent factor in the margin of appreciation doctrine – the existence of a common European standard on the issue.
differentiations and appropriate accommodation for differences may by justified in such situations. On the other hand if the values pertaining to drawing comparisons are unclear and even perhaps conflicting it becomes difficult to draw comparisons and find reference groups. In such cases the Court may be struggling with adjudicating whether the badge of differentiation at play should be reviewed or count as relevant in the first place (is it deplorable, is it even slightly unwanted?). Hence, the scrutiny becomes more lenient and the states enjoy a wide margin of appreciation. So lack of comparability or unclear badges of difference do not categorically lead to unreviewability but they may lead to a more lenient standard of review.

By no means are there clearly defined and elaborated levels of scrutiny similar to that under United States Constitutional law667 and the case law of the European Court of Human Rights does not permit the induction of any such hierarchy. Formal and strict application of such levels of scrutiny, based only on the badge of differentiation at stake would miss the various other factors that can and should continue to be able to influence the strictness of review.

5.2.5.2. Similarity of situations

The analysis of the case law demonstrates that lenient scrutiny is most clearly indicated when the badge of differentiation complained of relates to situations the Court considers clearly different. In these cases, the existence of clearly different situations is supported by clear value judgments originating elsewhere than in the non-discrimination provision itself. Such clearly different situations occur in three of the categories of insignificant badges of differentiation based on legislative classifications, cf. Chapter 5.2.3.2. A-C supra. The fist insignificant badge, geographical location, would seem justified as insignificant on the basis that it would otherwise challenge established basic principles of law relating to the institution of federalism or principles of national jurisdiction. Similarly, classifying as similar

667 See footnote 240 supra.
situations where ex facie neutral legislative classifications are at stake potentially undermines established characteristics of the legal system. Such situations will, thus, strongly indicate lenient scrutiny. Finally, as regards profession the underlying reasoning for its insignificance as a criterion upon which to base different treatment is that the badge is in no way pre-destined or immutable, but rather a function of the applicant’s own choice of profession. Additionally, this category or badge of differentiation seems to imply reverence of meritocracy as the value behind different treatment of different professions.

The insignificant non-personal badge of differentiation of “property” is also of the kind where the Court does not find similarity of situations clearly established, but generally not as unhesitatingly as in the other types of insignificant non-personal badges, cf. Chapter 5.2.3.2. D supra. Here lenient scrutiny is surely indicated but generally not to the degree that scrutiny is almost non-existent.

The badges of differentiation in the insignificant category were classified into groups depending on whether they were based on personal characteristics or not. All the significant badges of differentiation are based on personal characteristics. It is suggested that, while indicating lenient review, the insignificant badges of differentiation based on personal characteristics nevertheless received a more thorough treatment than the various non-personal legislative classifications, cf. Chapter 5.2.3.3. supra. The lack of clear external support for the general outlawing of the insignificant personal badges of differentiation, as opposed to clear such support in respect of significant badges of differentiation, commonly finds

668 See in particular Stubbings and Others v. The United Kingdom, 22.10.1996 where comparable situations were hardly considered to exist but “even if” they were the treatment was found justified and Gerger v. Turkey, 08.07.1999, where a simple assertion of differences in different types of offences sufficed to dispose of the case.

669 Note, however, the exception in Edoardo Palumbo v. Italy, 30.11.2000, para. 52 and P.M. v. Italy, 11.01.2001, para. 54, which is not final as referral to the Grand Chamber has been requested according to Article 43, where it was so clearly established that the situations of landlords and tenants were incomparable that no scrutiny was applied. Compare with Spadea and Scalabrino v. Italy, 28.09.1995, para. 46.
expression in the merger of the similar situations and objective justification tests. To a certain extent the Court may be consciously developing a distinction between personal characteristics and other characteristics. For example, in the recent Magee v. The United Kingdom judgment, the Court referred to the badge of difference not being explicable in terms of personal characteristics such as national origin or association with a national minority, but with reference to geographical location within a federal state.670 Also, sitting as a Grand Chamber in the Gerger v. Turkey judgment, the Court referred to the distinction not being made between different groups of people but between different types of offences.671 Regardless of its explicit or conscious development, the question of whether the badge of differentiation is based on a personal characteristic or not indeed seems to be generally a factor that is of some relevance to the strictness of review.672

The judgments of the Court on the insignificant badges of differentiation indicating lenient scrutiny exhibit the following perspective. Deciding without clear external support upon whether to attach any consequence at all to a certain situation and a corresponding badge of differentiation quite clearly places the question of comparable situations in focus. In these cases, however, the Court is not dealing with clear and simple issues that have the effect of excluding or rendering minimal any need for justification. The Court is rather in need of a justificatory argument as

670 Magee v. The United Kingdom, 06.06.2000, para. 50.
671 Gerger v. Turkey, 08.07.1999, para. 69. The referrals in Gerger v. Turkey and Magee v. The United Kingdom, 06.06.2000 to personal characteristics or groups of people may possibly be a development of the argument forwarded by the Government in Stubbings and Others v. The United Kingdom, 22.10.1996, that it was a condition for entering into analysis of comparable situations that the distinctions made were based on a personal characteristic particular to each group, cf. para. 60. Earlier, in Kjeldsen, Busk Madsen and Pedersen v. Denmark, 07.12.1976, para. 56 the Court had pointed out that Article 14 prohibited: "...discriminatory treatment having as its basis or reason a personal characteristic ('status') by which persons or groups of persons are distinguishable from each other."

672 This is indicated by the significant badges of differentiation being personal as well as the more thorough treatment of the insignificant personal badges of differentiation than the non-personal ones. Note, however, that the non-personal badge of differentiation of "property" might also receive more thorough treatment than the other non-personal badges of differentiation.
to whether the different situation or the badge of differentiation is significant and to count as relevant in the first place. The need for a justificatory argument often leads to the merger of the consideration of relevant differences with the objective justification test. The objective justification scrutiny moves from functioning to address justification of different treatment of similar situations to addressing justification for considering situations relevantly similar or dissimilar in the first place. In such situations of struggling with whether certain differences are to count as relevant the Court has no clear common European standard or other processes helping in the often-difficult value judgment at stake and hence these situations often lead to a merged consideration of comparability and justification. Correspondingly, the Court may rely on the margin of appreciation of the contracting states. What ensues is an indication of lenient review and only two of the cases analysed under the insignificant badges of differentiation resulted in a finding of a violation of Article 14. The exceptions of violations in Larkos v. Cyprus and Chassagnou and Others v. France concern badges of differentiation related to “property”. The logical conclusion seems to be that the badge of differentiation of property, while generally indicating lenient scrutiny, does so to a somewhat lesser extent than the other insignificant badges of differentiation. This has the effect that other influencing factors have a greater chance of tipping the balance in favour of stricter scrutiny when the badge of differentiation of property is at play.673

Significant badges of differentiation, functioning to the detriment of the applicant, are clearly considered to merit general outlawing. Here, the justificatory argument need not dwell on the question of whether there actually exist relevantly similar situations and goes directly to the issue of justification for different treatment. In relation to the significant badges of differentiation there is a presumption that there exist relevantly similar situations irrespective of that badge. Hence, the scrutiny

673 See the Larkos v. Cyprus, 18.02.1999 and Chassagnou and Others v. France, 29.04.1999 judgments. Both cases are discussed in relation to the influencing factor of the social situation of the complainant in Chapter 5.3.3. infra. In Pine Valley Developments Ltd. and Others v. Ireland, 29.11.1991, there was also a finding of a violation, but in that case the respondent government did not try to forward any justifications.
becomes strict as the margin of appreciation of the contracting state narrows down. The Court is not hesitant as to whether it should review the situation or the badge of differentiation in the first place. The relevance of the situation or badge is clear and the value judgments behind that relevance have already been undertaken by someone other than the Court. The Court’s active involvement draws on the values, ideas and goals pertaining to the (formal) outlawing of detrimental differences on the basis of these badges. It is in this category of cases that violations of Article 14 are most often found.674

5.2.5.3. Accommodation for differences

The concept of difference and its construction seems to be of paramount importance to that type of passive discrimination that concerns the accommodation for differences. The question of difference becomes instrumental when there exists a badge of differentiation that is clearly considered significant and to merit (formal) general outlawing but the claim being made is not that of its outlawing but that of its positive accommodation. The value judgments at stake are clear and generally undertaken by someone other than the Court, notably the common standards of the democratic states parties to the Convention. Examples of such badges of difference are sex, race and religion. The Thlimmenos v. Greece standard is that significant differences may require different treatment. The value behind this category is that related to the theoretical discussions of the formal and substantive models of equality. Formal approaches may be justified and effective to outlaw overt and clear detrimental treatment of underprivileged groups, i.e. consideration of e.g. sex, race and religion are not to count as relevant to the detriment of person belonging to such groups. However, the formal approach, general outlawing, may not suffice to achieve substantive equality as between precisely these groups and other (privileged) groups as there may remain differences that need to be accommodated before true equality is reached. The most significant such difference may indeed be the structural disadvantages underprivileged groups are up against; the standards of the

674 See Table 2, pp. 275-277 infra.
privileged groups may be integrated into all social structures and the underprivileged groups may have difficulties in meeting them. To accommodate underprivileged groups such differences may have to be addressed in a positive manner. And thus the differences in belonging to one group rather than another, the badge of differentiation, may become relevant again under a substantive approach. This time however, it is relevant only as regards beneficial accommodation of the special needs of the different group. All the earlier justificatory argument and common standard value establishment as to the need for formal outlawing of the relevance of a certain situation (e.g. belonging to a specific religion) or the relevance of a certain badge of differentiation (e.g. religion) now backfires. And in the Thlimmenos v. Greece approach it functions to become highly relevant to the possible beneficial accommodation of the difference. Hence, the question of comparability and badges of difference is instrumental and it draws on the force of the values connected with the former (formal) outlawing of these badges, entrenched in domestic and international law alike. Thus, the strict scrutiny established in the active discrimination cases, i.e. cases regarding the across the board outlawing of detrimental treatment, make it possible to contemplate the relevance of the same badge of differentiation in passive discrimination cases, i.e. cases regarding positive accommodation for differences.

In passive discrimination cases the starting point is lenient scrutiny. But the strong indication in the direction of strict scrutiny attached to certain badges of differentiation may have a counterbalancing effect making review of such cases possible. It is also possible that the interest at stake indicating strict scrutiny may have such an effect. What seems likely to ensue is scrutiny of the type where the Court struggles with the appropriateness of judicial intervention.675

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5.3. THE INTEREST AT STAKE

5.3.1. Introduction

The following discussion will attempt to flesh out a third category of influencing factors that are discernable from the case law of the Court. This category of influencing factors is called the interest at stake, which is to be taken to refer generally to various considerations that may become relevant to the strictness of review in discrimination cases under the Convention.

In her 1990 article, Anne F. Bayefsky, argued in a footnote that the European Court of Human Rights had not clearly applied Article 14 so as to undertake stricter scrutiny when particular badges of differentiation were at stake. The different levels of strictness of review in relation to the badge of differentiation at stake have since been elaborated on more clearly both in theory and practice, cf. Chapter 5.2. supra. Bayefsky also mentioned that the case law of the Court indicated that the justificatory arguments in cases concerning Article 14 might also be arranged around the interests affected in the case at hand.676 This element has not been fleshed out in the case law or in theory except in respect of the interest at stake in distinctions that encroach upon property rights. The following analysis endeavours to identify factors concerning the interest at stake in a case that have an effect on the strictness of review applied. It is a tentative excursion into an area that, with the exception of the field of life of property rights, is largely unknown to the literature on Article 14. Like in the preceding Chapters, the identification of influencing factors will be undertaken by way of inducing such factors from indications in the case law of the Court. The only factors that will be discussed are those that are relatively clearly discernable and/or arise from more than one judgment. Although many judgments may concern Article 14 in conjunction with one particular Convention Article the influence of the interest connected with that Article will not be discussed except if it

676 Bayefsky, pp. 18-19 and footnote 91 at p. 19, referring Dudgeon v. The United Kingdom, 22.10.1981, concerning the margin of appreciation under Article 8, Paragraph 2, where the Court referred to the scope of the margin being influenced by the: "...nature of the activities involved..." in the case, cf. para. 52.
relatively clearly stands out from the reasoning of the Court in support of either leniency or strictness of review. This seems not to have occurred clearly except when Article 14 is reviewed in conjunction with the protection of property rights in Article 1 of Protocol 1.

In particular, the following analysis will focus on cases that concern the same type of claim and the same badge of differentiation but nevertheless exhibit differences in the strictness of review. Such instances clearly point to alternative influencing factors.

5.3.2. Property rights

In the sphere of property rights the contracting states generally enjoy a wide margin of appreciation.\textsuperscript{677} It has been concluded that this wide margin of appreciation will lead to findings of violations of Article 1 of Protocol 1: “...only in the most extreme cases.”\textsuperscript{678} As regards claims of discrimination where the treatment complained of encroaches upon the field of life of property rights, the wide margin applicable to property rights: “...bears heavily on the Court’s examination of the discrimination issue.”\textsuperscript{679}

To begin with, a combination of the influencing factor of the badge of differentiation of “property” with the other influencing factor of the sphere of property rights seems to have a cumulative effect so as to render the scrutiny applied to this type of cases very lenient. In the \textit{James and Others v. The United Kingdom} judgment the badge of


\textsuperscript{678} Winisdoerffer, p. 19.

\textsuperscript{679} Schokkenbroek: The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation, p. 22 with reference to \textit{James and Others v. The United Kingdom}, 21.02.1986 and \textit{Lithgow and Others v. The United Kingdom}, 08.07.1986 that concern the protection of property, but also referring to \textit{Gillow v. The United Kingdom}, 24.11.1986, which concerns the sphere of Article 8 and respect for the home, but the badge of differentiation of property.
differentiation claimed was the difference as defined in legislation between the categories of landlords subject to the “Leasehold Reform Act” and other landlords.680 The sphere was the protection of property as the treatment complained of concerned compulsory transfer of property under the Act. The aim of the Act in question, found legitimate by the Court, was to eliminate a social injustice in the sphere of housing considered suffered by tenants in the inequitable terms of long leaseholds.681 In view of not having found the treatment in question in violation of Article 1, Protocol 1 and with regard to the margin of appreciation of the respondent state, the Court found no violation of Article 14 in conjunction with Article 1, Protocol 1.682 In Lithgow and Others v. The United Kingdom the various badges of difference complained of all arose from a statutory formula on compensation for owners of nationalised companies and its application as well as the treatment of the applicants under the relevant Act in comparison with treatment under other Acts in a similar sphere.683 The judgment was quite formal in tone. On some issues the Court simply argued that the terms of the Act were uniformly applicable to all those the Act declared subject to it and that therefore there was no difference of treatment.684 Similarly the claim that some of the global stipulations in the Act were discriminatory in not taking account of different factual situations was found justified with reference to the Court’s conclusion under the wide margin of appreciation allowed in its Article 1, Protocol 1 scrutiny.685 All choices made by the respondent state in the application of the flexible standards of the Act were also found objectively justified by a very

680 See footnote 564 supra.

681 Under the long leasehold system tenants either erected the house or paid an initial premium typically based on the building cost and an appropriate profit element to the landlord. Thereafter they paid a low rent. The tenants were, however, liable for all running repairs as well as obliged to yield the property in good repair to the landlord at the end of the lease. See James and Others v. The United Kingdom, 21.02.1986, paras. 12 and 76-77.

682 James and Others v. The United Kingdom, 21.02.1986, paras. 76-77.

683 Lithgow and Others v. The United Kingdom, 08.07.1986, paras. 178-189. The badges of difference as well as the interest at stake were connected with property rights.

684 Ibid, paras. 181 and 185.

685 In addition the Court aired its suspicion that claims for accommodation for differences might not fall within the ambit of Article 14, ibid, para. 183.
cursory analysis. As regards comparisons with persons deprived of their property under other Acts the Court never really reached objective justification analysis as it found the criterion of “analogous situations” hardly or not at all fulfilled. In *Spadea and Scalabrino v. Italy* the badges of differentiation referred to property categories and concerned the field of life of property rights as they concerned restrictions on the eviction of tenants in residential property. The complaint regarding the difference in treatment between landlords and tenants was found justified with reference to the consideration of the complaint under Article 1 of Protocol 1 in isolation, where the Court had referred to the margin of appreciation as regards housing policy. The classification into residential property and non-residential property was simply considered justified with regard to the aim of protection of tenants during a serious housing shortage. Similarly, in *Edoardo Palumbo v. Italy* and *P.M. v. Italy* the case concerned restrictions on the eviction of tenants, but this time the Court found the situations of tenants and landlords so fundamentally different that no objective justification scrutiny was applied. The difference in treatment between property owners who rented their property and those who did not complained of in *P.M. v. Italy* was dealt with very leniently with reference to the aim of the legislation in question, to enable tenants with expired leases to obtain acceptable or subsidised housing.

In all the above cases, the badge of differentiation of property (which indicates lenient scrutiny) and the interest at stake of property rights (which indicates lenient scrutiny) had the accumulative effect of rendering the scrutiny applied very lenient. *Chassagnou and Others v. France*, however, indicates that instances of flagrantly

687 Earlier nationalisation legislation (hardly) and compulsory purchase legislation (not), *Ibid*, paras. 187 and 189.
689 *Ibid*, para. 46.
690 *Edoardo Palumbo v. Italy*, 30.11.2000, para. 52 and *P.M. v. Italy*, 11.01.2001, para. 54, which is not final as referral to the Grand Chamber has been requested according to Article 43.
691 *P.M. v. Italy*, 11.01.2001, para. 55. The judgment is not final as referral to the Grand Chamber has been requested according to Article 43.
arbitrary differentiations do not pass even the lenient scrutiny indicated by cases that concern both the badge of differentiation of property and the field of life of property rights, in particular when there are other factors indicating stricter scrutiny in the case.\footnote{Chassagnou and Others v. France, 29.04.1999. The discrimination in question encroached not only upon the peaceful enjoyment of property but also upon freedom of conscience and freedom of association, which may also have pointed towards stricter scrutiny. See Chapter 5.2.3.2. D supra.}

Other badges of differentiation may indicate lenient scrutiny and function together with the field of life of property rights. In Fredin v. Sweden the badge of differentiation was simply the treatment complained of and the field of life was property rights as in the revocation of an exploitation licence for a gravel pit. The margin of appreciation considered appropriate for the case was so wide that it never really reached any scrutiny.\footnote{Fredin v. Sweden, 18.02.1991. As regarded the alleged violation of Article 1 of Protocol 1, the Court referred to a: "...wide margin of appreciation...", cf. para. 51.} The Building Societies v. The United Kingdom judgment also received very lenient scrutiny.\footnote{Building Societies v. The United Kingdom, 23.10.1997.} First, the Court considered the question of whether similar situations had been established and found that they had not with reference to the Woolwich being the only building society that bore the cost and risk of litigation. The Court nevertheless proceeded to objective justification on the "even if" approach.\footnote{Ibid, para. 90: "...even if it were possible to regard the applicant societies as having been in a relevantly similar situation [...] there was nevertheless a objective and reasonable justification for the distinction made...".} Under the objective justification test it referred to the public interest in preventing further: "...exploitation on technical grounds..." of the invalid regulations that gave rise to the restitution of already paid tax and the legitimate wish not to interfere with a judicial decision as regarded the restitution to the Woolwich.\footnote{Ibid, paras. 89-91.} The scrutiny applied here seems quite clearly to feed on the recognition in the case as regarded Article 1 of Protocol 1 taken alone: "...that a Contracting State, not least when framing and implementing policies in the area of taxation, enjoys a wide margin of appreciation and the Court will respect the
legislature’s assessment in such matters unless it is devoid of reasonable foundation.”.697

Even in cases where the badge of differentiation is of the kind that indicates strict scrutiny, the sphere of property rights may indicate lenient scrutiny. In Holy Monasteries v. Greece, the treatment complained of concerned the compulsory transfer of property to the state. Regardless of the treatment being based on the badge of differentiation of religion, which indicates strict scrutiny, the interest at stake seems to have counteracted that effect and tilted the balance in favour of more lenient scrutiny. The indication towards more lenient scrutiny was also aided by the relevance of the badge of differentiation to the interest at stake, cf. Chapter 5.3.4. infra.698

The judgments in Marckx v. Belgium, Inze v. Austria, Mazurek v. France concerning the badge of differentiation of illegitimacy and Gaygusuz v. Austria concerning the badge of nationality, show that the lenient scrutiny indicated by the field of property rights may be counteracted by a significant badge of differentiation that commands strict scrutiny.699 Van Raalte v. The Netherlands is also a particularly good example

697 Ibid, para. 80. Then, as regarded the allegation of a violation of Article 6:1 in conjunction with Article 14, the same reasoning was applied to the discrimination factor. Here, the reasoning drew on the fact that Article 6:1 was not considered violated in light of the special circumstances of the case. The special circumstances were the facts that the interference at stake was not drastic, that the applicants knew the will of the legislature but instigated proceedings against it, that the introduction of retroactive legislation was known in the tax sector and that if granted their claim the applicants would receive an unwarranted “windfall” on technical grounds.
698 Holy Monasteries v. Greece, 09.12.1994, para. 92. Note that the deprivation of property without compensation resulted in a finding of a violation under Article 1 of Protocol 1 in isolation as the close connection between the monasteries and the Greek Church, and thus the Greek state, did not justify the considerable burden of absence of compensation, cf. paras. 73-75. The same connection between the monasteries, the Greek Church and the state was, however, found to justify the alleged discrimination.
699 Marckx v. Belgium, 13.06.1979, paras. 64-65, where the limited capacity of a mother to make dispositions of her estate in favour of her illegitimate daughter was not found directly in violation of Article 1 of Protocol 1 as states were allowed to control the use of property, including dispositions
of this. Here, while mentioning that there exists a certain margin of appreciation as regards exemptions to obligations to contribute to social security schemes, the Court noted that “compelling” reasons were needed to justify different treatment based on sex.\textsuperscript{700} The wide margin of appreciation related to the field of life of property rights, was reined in with reference to the overriding consideration of the strictness of scrutiny indicated by the badge of differentiation of sex.

\textit{inter vivos} or by will. The fact that the limited control only reached unmarried mothers and not married mothers could not, however, be justified on any “general interest”. Hence a violation of Article 14 in conjunction with Article 1 of Protocol 1 was found. Other aspects of the case concerned violations of Article 14 in conjunction with Article 8. In \textit{Inez v. Austria}, 28.10.1987, legislation stipulating that only legitimate children could receive hereditary farms was found in violation of Article 14 in conjunction with Article 1 of Protocol 1. \textit{Mazurek v. France}, 01.02.2000, exhibits particularly strict scrutiny of legislation stipulating limited inheritance rights of illegitimate children as compared with legitimate children. The Court found no good reason in support of such discrimination. The issues concerned were reviewed under Article 14 in conjunction with Article 1 of Protocol 1 and the Court found it unnecessary to consider Article 14 in conjunction with Article 8. With reference to \textit{Maekx v. Belgium}, 13.06.1979, and \textit{Inez v. Austria}, 28.10.1987, Shokkenbroek: The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation, p. 23 concludes that: “...the Court has not been so generous in allowing a broad margin of appreciation.” when dealing with discrimination in relation to Article 1 of Protocol 1 if the distinction is not based on property. In fact, and with reference to the very strict tone in \textit{Mazurek v. France}, this seems to be an understatement as the scrutiny may actually be very strict if the badge of differentiation is illegitimacy. In \textit{Gaygusuz v. Austria}, 16.09.1996, the badge of differentiation was nationality in the sphere of pecuniary rights under the Austrian Unemployment Insurance Act. As the applicant was legally resident and had paid contributions to the unemployment insurance fund, there existed no objective and reasonable justification for the difference of treatment. By extension other badges of differentiation that command strict scrutiny would have the same effect.

\textsuperscript{700} \textit{Van Raalte v. The Netherlands}, 21.02.1997, para. 42. See Shokkenbroek: The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation, p. 22 who argues that: “...it appears from the recent \textit{Van Raalte} judgment that the Court still considers the margin of appreciation to be of some relevance to cases involving sex-discrimination complaints.”. Shokkenbroek focuses almost exclusively on the badge of differentiation as an influencing factor and does not dwell on other factors. Such a simplified approach does not capture the varied picture presented by the case law of the Court.
5.3.3. Social situation of applicant – disadvantage and privilege

5.3.3.1. Introduction

In relation to the influencing factor of the badge of differentiation, lenient scrutiny will rather be implicated in cases where the badge of differentiation is not a pre-existent badge pertaining to a social category that suffers or has suffered disadvantage. There is no moral sensitivity in the badges claimed. Conversely the badges of differentiation that are subject to strict scrutiny are badges connected with a history of discrimination and disadvantage for the relevant groups of people. Although not expressly asserted in the repertoire of the Court this indicates that a history of social disadvantage resulting in a marginalised position is highly relevant to the type of scrutiny applied to cases. Situations of social disadvantage or privilege may also function more generally as a factor influencing the strictness of review under the category of the interest at stake in a case. Generally these considerations indicate a somewhat asymmetrical approach.

5.3.3.2. Analysis of case law

Applicants in situations of social privilege seem to have a relatively hard time to have their complaints succeed. In Van der Mussele v. Belgium the badge of differentiation claimed was indeed belonging to a privileged group of people, advocates. Similarly in Lithgow and Others v. The United Kingdom the applicants were the former owners of companies in the aircraft and shipbuilding industries, hardly a marginalised or socially deprived group. Both cases met with lenient scrutiny.701

Cases concerning the situation of landlords and tenants form an interesting case group where conflicting outcomes occur. In James and Others v. The United Kingdom, Spadea and Scalabrino v. Italy, Edoardo Palumbo v. Italy and P.M. v.

Italy the badges of differentiation complained of were belonging certain groups of landlords that had to bear the brunt of housing policy measures favourable to tenants. In all cases no violation was found with a level of scrutiny applied that varied from non-existent to lenient scrutiny which referred to housing policy concerns such as eliminating a social injustice or the aim of the protection of tenants. In Larkos v. Cyprus, however, the Court applied stricter scrutiny and found a violation, as a measure of social protection of tenants was not equally applicable to all tenants. All cases concerned a similar badge of differentiation, i.e. different categories of landlords or tenants. But again it becomes apparent that the badge of differentiation is not the only influencing factor at stake in Article 14 cases. In light of the references of all judgments to considerations of social justice and social protection as justificatory arguments the difference in social status of the applicants stands out. The difference between these cases seems explainable with reference to the fact that the applicants complaining in James and Others v. The United Kingdom, Spadea and Scalabrino v. Italy, Edoardo Palumbo v. Italy and P.M. v. Italy indeed enjoyed a socially privileged position as property owners and landlords as opposed to the disadvantaged position of the tenant applicant in Larkos v. Cyprus.

It may also have helped the stricter approach in Larkos v. Cyprus that the case concerned a violation of Article 14 in conjunction with Article 8 and not Article 1 of Protocol 1 as the James and Others v. The United Kingdom, Spadea and Scalabrino v. Italy, Edoardo Palumbo v. Italy and P.M. v. Italy cases. The right to respect for the home under Article 8 would, then, seem to command stricter review than the

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702 See James and Others v. The United Kingdom, 21.02.1986, paras. 76-77, Spadea and Scalabrino v. Italy, 28.09.1995, para. 46, Edoardo Palumbo v. Italy, 30.11.2000, para. 52 and P.M. v. Italy, 11.01.2001, paras. 54-55, which is not final as referral to the Grand Chamber has been requested according to Article 43. The non-existent to lenient scrutiny in all cases fed on the badge of differentiation of property and the sphere of life of property rights.

703 Larkos v. Cyprus, 18.02.1999.

704 In P.M. v. Italy, 11.01.2001, Article 14 was not expressly reviewed “in conjunction” with any particular Convention Article. The case nevertheless clearly concerns property rights in the form of restrictions on evictions. The judgment is a Chamber judgment that has not become final as referral to the Grand Chamber has been requested under Article 43.
protection of property rights under Article 1 of Protocol 1. Given the generally wide margin of appreciation under Article 1 of Protocol 1 this is undoubtedly true. But upon closer analysis this does not fully explain the different approaches in the cases. Such an explanation is too simplistic and ignorant of other influencing factors, as cases on discrimination in the sphere of the right to respect for the home under Article 8 also exhibit sensitivity for a socially vulnerable status. This is borne out by comparing the Larkos v. Cyprus and Gillow v. The United Kingdom judgments. Both judgments concern claims of direct discrimination under Article 14 in conjunction with the right to respect for the home under Article 8, but exhibit different levels of scrutiny. In Larkos v. Cyprus, the applicant was in the socially vulnerable position of a tenant denied social protection against eviction. The scrutiny applied was strict and a violation was found. In Gillow v. The United Kingdom, however, the applicants were property owners who could not occupy their house because of a housing protection policy in favour of the poorer section of the community in Guernsey. One of the badges of differentiation complained of was the value of the house, as owners of more valuable property were not subject to the same restrictions on occupying their houses. The policy of different treatment was, having regard to the state’s margin of appreciation, found justified by the fact that expensive houses were not sought after by those in need of housing protection. The Gillow v. The United Kingdom judgment exhibits the fact that burdens are relatively easily imposed on property owners in pursuit of social (housing) protection considerations, even though they encroach upon the right to respect for the home under Article 8. Again, the different social situation of the applicants stands out as the distinguishing factor explaining the different approaches in otherwise comparable cases. Measures that

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705 The judgments in Beard v. The United Kingdom, 18.01.2001, Chapman v. The United Kingdom, 18.01.2001, Coster v. The United Kingdom, 18.01.2001, Jane Smith v. The United Kingdom, 18.01.2001 and Lee v. The United Kingdom, 18.01.2001 also concern discrimination in relation to the effect of planning policy and implementation on the right to respect for the home. They are not, however, comparable to the Larkos v. Cyprus, 18.02.1999 and Gillow v. The United Kingdom, 24.11.1986 judgments as they concern a claim of passive discrimination and clear indications towards lenient scrutiny on that account, see Chapter 5.1.3.2. C supra.


707 Gillow v. The United Kingdom, 24.11.1986, para. 66.
function to the disadvantage of socially vulnerable groups seem to meet with stricter scrutiny than measures that are unfavourable to the more privileged sections of society.

In respect of analysing the case law of the Court from the perspective of situations of privilege or disadvantage, one group of cases is most interesting. These cases are the ones that would ordinarily belong to a category of strict scrutiny (sex, race, religion, etc.) but on occasion seem to meet with more lenient scrutiny. It is in this sphere that the deficiencies in the formal approach of the literature, which argues for attaching uniformly strict scrutiny to certain badges of differentiation, are most clear. The discrepancies between the literature and the case law cry out for alternative explanations.

As discussed in Chapter 5.2.4.2. supra, sex discrimination that occurs in the private sphere, i.e. concerning family relations, seems to meet less strict scrutiny when it is to the detriment of men than if it is to the detriment of women. In Schuler-Zgraggen v. Switzerland, the presumption that women with children did not work functioned to the detriment of a woman and received strict scrutiny. In Rasmussen v. Denmark and Petrovic v. Austria the treatment complained of similarly reflected traditional presumptions on the primary role of women in childcare, but functioned to the detriment of men and met with more lenient scrutiny. Also in comparison, the Rasmussen v. Denmark case of 1984 and the Abdulaziz, Cabales and Balkandali v. The United Kingdom case of 1985 seem to be at odds with each other. If the social situation of women in being accorded custody of children upon divorce more often was relevant in Rasmussen v. Denmark, why was the social situation of women in

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710 Rasmussen v. Denmark, 28.11.1984 and Petrovic v. Austria, 27.03.1998. In Petrovic v. Austria lenient scrutiny was also indicated by the type of claim in the case being a claim of passive discrimination, see Chapter 5.1.3.5. supra.

711 Rasmussen v. Denmark, 28.11.1984 and Abdulaziz, Cabales and Balkandali v. The United Kingdom, 28.05.1985.
lesser likelihood of economical activeness not relevant in Abdulaziz, Cabales and Balkandali v. The United Kingdom? Here, the inclination to strictly outlawing distinctions based on sex in the public sphere as compared with a lesser emphasis on outlawing them in the private sphere seems a likely explanation. As regards all these cases it is also possible to construe an explanation along the lines of a difference in social status, i.e. women possibly forming an underprivileged or marginalised group and men conversely enjoying a more favourable position. Under such a construction discrimination against men can meet less strict scrutiny than discrimination against women.\textsuperscript{712} Although it has been argued that sex is a suspect category subject always to strict scrutiny, the case law upon a closer analysis does not reveal such a strictly sex “blind” approach. What appears is rather a somewhat contextual and asymmetrical approach.\textsuperscript{713}

In situations where the illegitimacy of children is at issue, there also exists a discrepancy in the scrutiny applied to a case dependent upon who it is that receives detrimental treatment on account of illegitimacy. If it is the child itself scrutiny is most strict.\textsuperscript{714} The strict scrutiny associated with illegitimacy even spills over to comparisons between different categories of illegitimate children if the

\textsuperscript{712} This is what Loenen: Rethinking Sex Equality as a Human Right, p. 269 refers to as a substantive asymmetrical approach. She argues: “If women are disadvantaged judicial review should be very strict indeed. Only the most compelling interest, which cannot be achieved by any other non-discriminatory means, should be allowed as a justification. If the group which is negatively affected is a “non-sensitive” group a much more lenient test is sufficient, as in such cases there is no need to curb the normally large margin of appreciation of the government to classify.”.

\textsuperscript{713} See also Loenen: Rethinking Sex Equality as a Human Right, p. 264 arguing from the Rasmussen v. Denmark, 28.11.1984 case that the European Court of Human Rights might perhaps be sensitive to the different social and economic position of women and men. She, however, points out that the judgment focused on the point in time of the enactment of the 1960 Act and that there might have been a different conclusion if the Act had not already been changed when the judgment was pronounced. This also indicates that the new 1982 Act on equal time limits for instigating paternity proceedings would be found within the margin of appreciation in light of a development in these social situations.

circumstances of the case reveal the unfavourable position of the child and its inability to affect its situation.\textsuperscript{715} It is not difficult to conclude that the strict scrutiny in these situations draws heavily on precisely this position of disadvantage and the child’s inability to have any effect on its situation. Conversely when the situation of the fathers of illegitimate children is considered, the scrutiny applied does not seem particularly strict.\textsuperscript{716} This seems explainable by the Court’s reference to the child’s interest and the father’s possibility to have an effect on his situation. Clearly, the situation of the father of illegitimate children is a situation of privilege as compared with the situation of the child, in particular with reference to their ability to have an effect on the course of events in respect of the child’s legal status and contacts with the father.

In conclusion a situation of a socially marginalised or disadvantaged position will be a factor indicating strict scrutiny that may enter into the overall balancing of influencing factors in a case. As always this factor exists in interplay with other influencing factors that may indicate strict or lenient scrutiny.\textsuperscript{717}

\textsuperscript{715} Camp and Bourimi v. The Netherlands, 03.10.2000, para. 38. See footnote 636 supra.

\textsuperscript{716} McMichael v. The United Kingdom, 24.02.1995. See also Elsholz v. Germany, 13.07.2000 where the father could not prove different treatment as the paramount consideration of the child’s interest applied to the situations of the fathers of illegitimate children and divorced fathers alike, cf. paras. 59-60. Dijk and Hoof, p. 728 notice with reference to McMichael v. The United Kingdom, that the strict scrutiny applied to the complaints of illegitimate children does: "...not mean that all distinctions between natural and married fathers have to be judged with the same strict standard.". They, however, offer no explanation of why this may be so. Similarly, Livingstone, p. 29, footnote 21, mentions the Court being more prepared uphold differential treatment of unmarried fathers where child protection is advanced as an argument for it.

\textsuperscript{717} See for example the judgments in Beard v. The United Kingdom, 18.01.2001, Chapman v. The United Kingdom, 18.01.2001, Coster v. The United Kingdom, 18.01.2001, Jane Smith v. The United Kingdom, 18.01.2001 and Lee v. The United Kingdom, 18.01.2001, which concerned gypsies, a national minority in a clearly disadvantaged social position. However, as the cases concerned a claim of passive discrimination, which strongly indicated lenient scrutiny, the sensitive badge of differentiation and the socially marginalised position of the applicants could not tilt the balance in favour of more strict scrutiny. Seven judges dissented. See generally Chapter 5.1.3.2. C supra.
5.3.4. Relevance of the badge of differentiation to the interest at stake

Some judgments that conflict in strictness of review although concerning the same type of claim and being based on the same badge of differentiation may be explained by reference to the relevance of the badge of differentiation to the treatment complained of. Some badges of differentiation may be justified as basis to different treatment in some respects while not in other respects.

The badge of differentiation of nationality would be an example. In Gaygusuz v. Austria it commanded strict scrutiny in relation to pecuniary rights based essentially on the payment of contributions to an unemployment insurance fund.\(^{718}\) On the other hand in relation to the question of residence in and expulsion from a country, nationality of that country or in any EU country seems obviously relevant. It is indeed provided for as relevant in this respect in Protocols 4 and 7 to the Convention itself.\(^{719}\)

The badge of differentiation of religion is another example. In an interesting contrast with the strict review applied in Hoffmann v. Austria and Canea Catholic Church v. Greece, the review applied in Holy Monasteries v. Greece and Cha’are Shalom Ve Tsedek v. France is of the more lenient kind.\(^{720}\) In Cha’are Shalom Ve Tsedek v. France the Court explicitly set out its approach that the contracting states have a margin of appreciation: “...particularly with regard to establishment of the delicate relations between the State and religions...”.\(^{721}\) The groups compared in the case were different religious bodies within Judaism and the treatment complained of was not being able to authorise slaughterers for Jewish ritual slaughter and, thus, having

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\(^{719}\) See Moustaquim v. Belgium, 18.02.1991 and C. v. Belgium, 07.08.1996. See also generally footnote 642.


\(^{721}\) Cha’are Shalom Ve Tsedek v. France, 27.06.200, para. 84.
to depend on certificates issued by others. In light of the fact that Jews belonging to the applicant association could easily obtain meat slaughtered to their ultra-orthodox religious requirements, either imported from Belgium or as certified by the rabbinical Court in France, the refusal of state approval was not even considered an interference with the right to manifest one’s religion under Article 9.\textsuperscript{722} As regarded the discrimination aspect the Court placed emphasis on the fact that the difference of treatment had a limited effect, pursued the legitimate aim of protection of public health and public order and was considered proportionate having regard to the state’s margin of appreciation in the area of relations between state and religions.\textsuperscript{723}

Similarly in \textit{Holy Monasteries v. Greece}, the treatment complained of concerned an Act providing for compulsory transfer of property to the state. The Court found that the close links between the Holy Monasteries and the Greek Orthodox Church, which again had close links with the state, constituted objective justification for the Act only applying to them and not other churches and denominations.\textsuperscript{724} Upon closer analysis both cases exhibit consideration of religion as a badge of differentiation in relation to regulating generally the relationship of the religions and the state. In these situations religion seems to be a relevant factor and the margin of appreciation widens up. In the field of life of regulating relationships between the state and religions it may, thus, be argued that more lenient scrutiny is indicated. There may nevertheless be variations in how strong this indication is, depending on other important features of the case at hand. A rather convincing dissenting opinion existed in the \textit{Cha'are Shalom Ve Tsedek v. France} judgment.\textsuperscript{725} The dissenting opinion accepted that states enjoy a margin of appreciation in the establishment of the delicate relations between the state and religions. It, however, emphasised that in delimiting that margin of appreciation it had to have regard to: “...the need to secure true religious pluralism, which is an inherent feature of the notion of a democratic

\begin{itemize}
\item \textsuperscript{722} \textit{Ibid}, paras. 81 and 83.
\item \textsuperscript{723} \textit{Ibid}, para. 87.
\item \textsuperscript{724} \textit{Holy Monasteries v. Greece}, 09.12.1994, paras. 12-15 and para. 92. The case also concerned the field of life of protection of property, which indicates lenient scrutiny.
\item \textsuperscript{725} The judgment was a Grand Chamber judgment presided over by 17 judges of which 7 dissented. See \textit{Cha'are Shalom Ve Tsedek v. France}, 27.06.2000, Joint dissenting opinion of Judges Sir Nicolas Bratza, Fischbach, Thomassen, Tsatsa-Nikolovska, Pantiru, Levits and Traja.
\end{itemize}
The dissenting opinion, thus, applied stricter scrutiny and found that the denial of approving the applicant association for authorising religious slaughterers: "...amounted to a failure to secure religious pluralism...". In comparison the Hoffmann v. Austria and Canea Catholic Church v. Greece judgments exhibit the application of a narrow margin of appreciation when religion is an irrelevant criteria to regulate other fields of life than the relationship of the religions and the state. The strict approach in Hoffmann v. Austria and Canea Catholic Church v. Greece, most likely was also influenced by the interests at stake being of great importance to the applicants.

As regards the badge of differentiation of sexual orientation, the relationship between the badge and the interest at stake may be very important. In Chapter 5.2.4.7. supra it was pointed out that upon the reading of the Salgueiro da Silva Mouta v. Portugal case that sexual orientation indicates strict scrutiny, it may seem surprising that in the A.D.T. v. The United Kingdom case the Court reverted back to the Dudgeon v. The United Kingdom approach of it being "not necessary" to consider Article 14 in cases of alleged discrimination on basis of sexual orientation. The A.D.T. v. The United Kingdom case concerned the criminalisation of non-violent, homosexual activities of the applicant with up to 4 other men. There is a difference between the strict approach in Salgueiro da Silva Mouta v. Portugal on one hand and the approach not to review the case under Article 14 on the other hand exhibited in A.D.T. v. The United Kingdom, as well as Dudgeon v. The United Kingdom, Norris v. Ireland and Modinos v. Cyprus. The explanation may be that the latter cases concerned the regulation of sexual activities as such and not treatment on basis of sexual orientation

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728 See Hoffmann v. Austria, 23.06.1993 (concerning religion as the basis to depriving a mother of custody over her children) and Canea Catholic Church v. Greece, 16.12.1997 (concerning not acknowledging the Church as having legal personality and thus depriving it of access to Court).
that encroached upon other aspects of life than sexual behaviour.\textsuperscript{730} In other words, these judgments may be read together as indicating that sexual orientation is a clearly irrelevant comparison and badge as regards issues that have nothing to do with the sexual activities involved as such. In such cases a strict scrutiny is called for like in the \textit{Salgueiro da Silva Mouta v. Portugal} case. Perhaps an additional caveat should be added that strict scrutiny is called for in cases that encroach upon not just any issue not related to sexual activities but upon issues of great importance such as the access to one's children.\textsuperscript{731} But where the actual sexual activities concerned are in fact under consideration the comparisons become markedly more difficult for the Court. While all sexual activities may be regarded the same in being sexual activities they may be seen as different in other respects and there may be very difficult value judgments involved in deciding whether such differences are relevant to their regulation. This is the difficulty that may have resulted in “not necessary” evasion of the issue of discrimination in \textit{A.D.T. v. The United Kingdom}.\textsuperscript{732}

\begin{itemize}
\item \textsuperscript{731} The strict approach to discrimination on the basis of religion in \textit{Hoffmann v. Austria}, 23.06.1993, similarly concerned the custody over children.
\item \textsuperscript{732} Note that the whole line of cases in \textit{Dudgeon v. The United Kingdom}, 22.10.1981, \textit{Norris v. Ireland}, 26.10.1988, \textit{Modinos v. Cyprus}, 22.04.1993, \textit{Smith and Grady v. The United Kingdom}, 27.09.1999 and \textit{Lustig-Prean and Beckett v. The United Kingdom}, 27.09.1999 concern violations of Article 8 on account of an absolute and across the board approach to homosexuality. At the same time the Court has made clear that differences in different types of sexual behaviour may be held relevant. For example the judgment in \textit{Dudgeon v. The United Kingdom}, 22.10.1981, para. 49 pronounced that: “...some degree of regulation of male homosexual conduct, as indeed other forms of sexual conduct...” might be a legitimate necessity in a democratic society, and in \textit{A.D.T. v. The United Kingdom}, 31.07.2000, para. 37 the Court pronounced that: “...at some point, sexual activities can be carried out in such a manner that State interference may be justified...”. Finally in the case of \textit{Laskey, Jaggard and Brown v. The United Kingdom}, 19.02.1997, the Court seems to approach the infliction of injury involved in sado-masochistic sexual behaviour with more lenient scrutiny under Article 8, Paragraph 2, than the \textit{Dudgeon v. The United Kingdom}, \textit{Norris v. Ireland} and \textit{Modinos v. Cyprus} cases.
\end{itemize}
In conclusion it seems that lenient review is indicated by the situation that the badge of differentiation is clearly relevant to the interest at stake. This occurs only when the interest at stake directly concerns regulating the badge of differentiation as such, i.e. religion as relevant to regulating the religions or sexual orientation as relevant to regulating sexual behaviour etc., or when it concerns issues so closely related to the badge of differentiation that they cannot be divided, such as in nationality as relevant to regulating residence in a country.

5.3.5. Emergency situations

The concept of the margin of appreciation was originally elaborated in the jurisprudence of the Court regarding Article 15 on derogations from the Convention: “...in time of war or other public emergency threatening the life of the nation...”.

In relation to reviewing under Article 15 the existence of a public emergency and what is strictly required by it, the Court generally grants a wide margin of appreciation to the national authorities. The general tendency towards a wide margin of appreciation in dealing with emergency situations may be argued to influence the review undertaken when violations of Convention rights are alleged and the context of the violation is some kind of an emergency situation.

This is borne out by the *Ireland v. The United Kingdom* case. Here a clear comparison and badge of differentiation could be detected between IRA terrorists and Loyalist terrorists, but other than that not much guidance was to be had on whether it was to be held of significance. Nevertheless the Court engaged in a rather detailed review of the objective justification for applying different and harsher

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733 Article 15, Paragraph 1.

measures to the IRA. But bearing in mind the political sensitivity of the issue and the Court's explicit sympathy for the difficulties in dealing with the: "...ugly crisis..." in question, it is not surprising that the strictness of review was mediated by the Court's consciousness of: "...the limits on its powers of review...".

The string of cases decided by the Court between 1996 and 2001 on alleged discrimination in relation to Kurdish identity can also be mentioned here. The issue of objective justification scrutiny was, however, conveniently circumvented by the findings that the allegations of the applicants were not proved to be based on race. All cases related to a period of intensive fighting between PKK terrorists and the state military and a very difficult security situation in southeast Turkey. Special legal provisions applied on account of a state of emergency. It may be argued that a situation of a state of emergency like in these cases would be conducive towards a wide margin of appreciation if the cases had actually come to be reviewed under Article 14. In fact these cases may be seen to be in line with Kokott's theory that a wide margin of appreciation functions so as to place the burden of persuasion on the applicants.

735 Notwithstanding the finding of non-violation, the Court may be considered to have gone into quite a detailed review. The reason may perhaps primarily be connected with the urgency of the Convention right in question, Article 5 (right to liberty and security).

736 *Ireland v. The United Kingdom*, 18.01.1978, para. 229.


738 Kokott, pp. 219-220.
5.3.6. Conclusions

The interest at stake in a case has been argued as being a consideration that may generally affect the width of the margin of appreciation under any Convention Article. As discussed in Chapter 5.3.1. supra it has, however, not been elaborated on to any extent in the context of Article 14. The present chapter has identified various influencing factors that may come under the general category of the interest at stake as relevant to the strictness of Article 14 review. The case law, however, does not give rise to wide reaching inductions of influencing factors belonging to this category. One explanation might be that they seem to be of relatively little weight compared with the other categories of influencing factors, the type of claim being made and the badge of differentiation at stake in a case. They are therefore more difficult to detect and primarily seem to function to support an already existing indication towards either strict or lenient review, rather than being the primary indication themselves. Influencing factors belonging to the category of the interest at stake should, nevertheless, not be overlooked as they might in individual cases be the factor tilting the balance in favour of one approach rather than another.

739 Mahoney: Marvellous Richness of Diversity or Invidious Cultural Relativism?, pp. 5-6, for example forwards the hypotheses of inter alia these categories of influencing factors which may come under the general category of the interest at stake: The nature of the aim pursued, the nature of the activities in question and the surrounding circumstances. Schokkenbroek: The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights, pp. 34-35, presents from case studies on individual Articles the general conclusions that the influencing factors are the following: The existence of a common ground, the nature of the aim pursued and the policy context of the measure in question, the nature of the activities and private interests in question and emergency situations. The interest at stake as discussed in the present study may come under any of these categories except the common ground one. In the context of Article 8 scrutiny a type of influencing factor similar to “the interest at stake” as discussed in the present study has been clearly spelled out by the Court. See Dudgeon v. The United Kingdom, 22.10.1981, para. 52 referring to: “...not only the nature of the aim of the restriction but also the nature of the activities involved...” and Buckley v. The United Kingdom, 25.09.1996, para. 74, referring to: “...the nature of the Convention right in issue, its importance to the individual and the nature of the activities concerned.”.
6. STRICTNESS OF REVIEW AND THE NECESSITY OF REVIEW

6.1. INTRODUCTION

All the preceding analysis of case law is based on judgments where the claim of violation of Article 14 was reviewed by the Court. However, although raised by the applicant, Article 14 is not always reviewed as the Court sometimes finds it not necessary to review the discrimination claim. The question of the necessity of review under Article 14 has been dealt with in the literature and the general conclusion seems to be that the case law is in a state of confusion.\footnote{Dijk and Hoof, p. 717, Harris, O’Boyle and Warbrick, p. 468, Livingstone, p. 28 and Gomien, Harris and Zwaak, p. 346.}

The following study in Chapter 6 will endeavour to analyse the case law of the Court on the necessity of review. This analysis will show that there is a strong correlation between the factors influencing the strictness of review as discussed in Chapter 5 and the Court’s approach to the necessity of review.

The question of necessity of review is also relevant to other Convention provisions than Article 14. The Court may equally conclude that a finding of a violation of one substantive Convention provision renders it not necessary to review another substantive Convention provision.\footnote{For example, in Smith and Grady v. The United Kingdom, 27.09.1999, para. 128, it was not considered necessary to review the applicants’ complaints under Article 10 after finding a violation of Article 8. Similarly, in Larissis and Others v. Greece, 24.02.1998, para. 64 it was not considered necessary to review Article 10 after scrutinising the case in the context of Article 9. In Chassagnou and Others v. France, 29.04.1999, the Court reviewed Article 1 of Protocol 1 and Article 11 both on their own and taken in conjunction with Article 14 and found violations on all counts. It, then, found it not necessary to review Article 9 independently, cf. para. 125.} Similar issues may, therefore, arise in future when the Court decides when it is necessary to review a claim of discrimination under the new independent Article 1 of Protocol 12.
The general rule on necessity of review is that stated in the *Airey v. Ireland* judgment:

“If the Court does not find a separate breach of one of those articles that has been invoked both on its own and together with Article 14, it must also examine the case under the latter article. On the other hand, such an examination is not generally required when the Court finds a violation of the former article taken alone. The position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case…” 742

With reference to this statement it has been taken as an established general rule that the Court will not review the discrimination issue if it has found an independent violation of the substantive Convention provision in question, except in exceptional cases. 743  Commentators have critically pointed out that the case law on when this may occur does not seem to be consistent. 744  Despite the apparent inconsistency of the case law of the Court, some indications as to how that question is to be answered may be inferred from its judgments.

Table 3, pp. 278-299 *infra*, presents the judgments of the Court on Article 14 organised into different categories relative to the relationship of Article 14 and other Convention provisions and the question of whether it is considered necessary to review Article 14.

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743 See Dijk and Hoof, p. 716, Harris, O'Boyle and Warbrick, p. 468, Livingstone, p. 26 and Partsch, p. 584.

744 Dijk and van Hoof, p. 717, Harris, O'Boyle and Warbrick, p. 468-469 and Gomien, Harris and Zwaak, p. 346.
The first group of cases in Table 3 are judgments where the Court has found an independent violation of the substantive Article and has found it unnecessary to review the discrimination issue. Apart from simply referring to the Airey v. Ireland formula, that when a violation has been found of the substantive Article taken alone, Article 14 will not be reviewed unless a clear inequality of treatment was a fundamental aspect of the case, the Court has sometimes elaborated somewhat on the factors that govern the finding that it is not necessary to review Article 14.745 There seem to exist three main types of argument. First, the Court may emphasise that the discrimination issue in the case arises out of the same facts as the issues already considered under the substantive Article.746 Second, the Court sometimes stresses that the complaint under Article 14 is in essence the same complaint as that already dealt with under the substantive Article.747 Finally, the Court may reason that the arguments under the independent Convention provision and Article 14 coincide.748

In essence all these types of arguments relate to the same thought. They relate to the situation that the same events lie at the roots of the complaints under different Convention provisions and have already been dealt with under the substantive Article. Sometimes the Court does not forward any arguments and simply states with reference to the finding of a violation under the substantive Article that it is not necessary to review the Article 14 issue.749 Upon closer analysis, however, these judgments show that behind this simple statement lie similar considerations as in the more elaborated judgments.750 Only 3 judgments of 46 provide the exception to the rule and present a finding of it being not necessary to review the Article 14 issue.

745 See Table 3, case-group 1 a), pp. 278-280 infra.
749 Table 3, case-groups 1 b) and 1 c), pp. 280-285 infra.
750 See the analysis of judgments in Table 3, case-group 1 b), pp. 280-284 infra.
even though different events lie at the root of the different complaints and the Court has not dealt with them under the substantive Article.\footnote{See the analysis of judgments in Table 3, case-group 1 c), pp. 284-285 infra.}

The common approach to cases where there has been no violation of the substantive Article is to review the Article 14 question.\footnote{See generally the judgments in Table 3, case-group 5, pp. 291-294 infra.} Sometimes this review is rather cursory in that it simply refers to the findings under the substantive Article.\footnote{See the following cases in Table 3, case-group 5, pp. 291-294 infra: Beard v. The United Kingdom, 18.01.2001, Chapman v. The United Kingdom, 18.01.2001, Coster v. The United Kingdom, 18.01.2001, Jane Smith v. The United Kingdom, 18.01.2001, Lee v. The United Kingdom, 18.01.2001, Smith and Grady v. The United Kingdom, 27.09.1999 (concerning Article 14 in conjunction with Article 3), Sheffield and Horsham v. The United Kingdom, 30.07.1998, Building Societies v. The United Kingdom, 23.10.1997 and Mathieu-Mohin and Clerfayt v. Belgium, 02.03.1987.} The second group of cases in Table 3, however, consists of judgments where the Court has found that there has not been an independent violation of the substantive Article, but nevertheless does not find it necessary to review the Article 14 issue.\footnote{Table 3, case-group 2, p. 285 infra.} This whole group of judgments seems to be at variance with the general Airey v. Ireland formula that if the Court does not find a separate breach of the substantive Article, it must also examine the case under Article 14. It is interesting to note that these cases concern particularly clear instances where at the roots of the complaints under different Convention provisions are the same events and they have already been dealt with under the substantive Article.\footnote{See the analysis of the following judgments in Table 3, case-group 2, p. 285 infra: X, Y and Z v. The United Kingdom, 22.04.1997, Gregory v. The United Kingdom, 25.02.1997, Ankerl v. Switzerland, 23.10.1996, and Hennings v. Germany, 16.12.1992. The Botta v. Italy, 24.02.1998 is a particular exception. Here, the discrimination issue simply did not fall within the ambit of the substantive Article and was therefore unnecessary to review, cf. Botta v. Italy, 24.02.1998, para. 39. Such cases have been extremely rare before the Court as they have been dealt with by the Commission as inadmissible on the ground of raising the discrimination issue in relation to a right not protected in the Convention and have, thus, not reached the Court, cf. Livingstone, p. 28. With the advent of the new independent discrimination provision in Article 1 of Protocol 12 they seem likely to become redundant, much like the “ambit” test itself.}
The third category of cases in Table 3 consists of the perplexing group of judgments where the Court has actually found a violation of the substantive Article, but nevertheless proceeds to review the Article 14 issue. According to the Airey v. Ireland formula these cases should not be reviewed under Article 14 on account of the independent finding of a violation, unless a clear inequality of treatment is a fundamental aspect of the case. Harris, O’Boyle and Warbrick have forwarded that these cases demonstrate that the Court can review the Article 14 question even if there has been a violation of the substantive Article and that one possible factor in explaining when this occurs is the: "...seriousness of the badge of discrimination..." at stake in the case.\(^{756}\) Upon closer analysis of these judgments this reasoning of Harris, O’Boyle and Warbrick, while viable to a certain extent, does not really explain all the variety in this group of judgments. To begin with, around half of these judgments show that different facts lie at the root of the complaint under Article 14 than under the substantive Article taken on its own. In such cases, the Court has not already dealt with the essence of the complaint under Article 14 and thus proceeds to deal with it in spite of the finding of a violation of a substantive Article.\(^{757}\) All these judgments concern badges of differentiations that are not among the ones considered significant ("serious"), but rather among the ones that indicate lenient review.\(^{758}\) Therefore, the approach of the Court in these cases does not seem governed by the badge of differentiation at stake but rather by the fact that the Article 14 question raises a separate issue from the one already dealt with under the substantive Article. Seen in light of these judgments, the term that: "...a clear inequality of treatment concerns a fundamental aspect of the case..."\(^{759}\) must be taken as encompassing situations where the discrimination issue arises out of facts

\(^{756}\) Harris, O’Boyle and Warbrick, p. 469, with reference to a comparison between Airey v. Ireland, 09.10.1979 where Article 14 was not reviewed and the badge of differentiation was property and Marckx v. Belgium, 13.06.1979 where it was reviewed and the badge of differentiation was illegitimacy.

\(^{757}\) See the analysis of the 7 judgments in Table 3, case-group 3 b), pp. 287-289 infra.

\(^{758}\) The badges of differentiation at stake in the judgments recounted in Table 3, case-group 3 b), pp. 287-289 infra are all insignificant badges of differentiation that indicate lenient scrutiny, cf. Chapter 5.2.3. supra.

\(^{759}\) Airey v. Ireland, 09.10.1979, para. 30.
and raises issues that are distinct from the ones already dealt with under the substantive Article, even though the type of discrimination in question is not a particularly serious one. The other half of cases in this group is more perplexing. This seems to be the group of cases where the approach of the Court is most inconsistent and it is most difficult to infer clear guidelines as to why it finds that the fundamental aspect test was met. In these judgments the same events lie at the roots of the complaints under Article 14 and the substantive Article and have already been dealt with under the substantive Article, but the Court nevertheless reviews the discrimination complaint. Certainly, in line with the argument of Harris, O’Boyle and Warbrick, five out of these nine judgments concern particularly sensitive badges of differentiation or serious forms of discrimination, which explains why the discrimination issue is considered a fundamental aspect of the case and the Court pronounces on it. Conversely, four of these judgments concern insignificant badges of differentiation and the cursory treatment and lenient review of the discrimination issue does not indicate that the discrimination at stake was considered serious. It is most likely that these judgments are simply to be explained as inconsistent exceptions. This is supported additionally by the fourth case group.

760 See the analysis of the 9 judgments in Table 3, case-group 3 a), pp. 285-287 infra.

761 See the following judgments analysed in Table 3, case-group 3 a), pp. 285-287 infra: Canea Catholic Church v. Greece, 16.12.1997 and Holy Monasteries v. Greece, 09.12.1994, both concern the badge of differentiation of religion. Moustaquim v. Belgium, 18.02.1991 concerns nationality and Marckx v. Belgium, 13.06.1979 concerns illegitimacy. All these badges of differentiation have been argued as being significant ones that indicate strict review, see Chapter 5.2.4. supra. The judgment in Chassagnou and Others v. France, 29.04.1999 does not concern a badge of differentiation connected with strict review, but other factors in the case indicate a serious issue of discrimination and strict review of the case. The discriminatory distinction between large and small landowners at stake in the case seems to have been considered flagrantly arbitrary in relation to the interest at stake and the seriousness of the interference, cf. Chapter 5.2.3.2. D supra.


763 The fact that review was actually undertaken may even be explained by the fact that these cases call for such lenient review. The cursory treatment given to the discrimination issue in these cases indicates that the Court did not need to go to more trouble to assert that there had been no violation of Article 14 than it would have by asserting that review was unnecessary. In Edoardo Palumbo v. Italy,
which corroborates the thesis that serious forms of discrimination call for Article 14 review.

The fourth group of judgments in Table 3 is an interesting group of recent judgments, the first stemming from 1993, where the Court opts for reviewing Article 14 but finds it not necessary to review the substantive Article(s) at stake. This group of cases clearly demonstrates the viability of the thesis that sensitive badges of differentiation may induce the Court to review the Article 14 question but it seems not to have been dealt with in the literature. These cases are of two kinds. First, there are the judgments where a violation of a substantive Article is claimed in isolation and taken together with Article 14 and the Court reviews the Article 14 aspect but finds it not necessary to review the substantive Article taken on its own.764 Second, the situation may also arise where the Court reviews Article 14 in conjunction with some Convention Article and then finds it not necessary to review the case under yet other Convention provisions.765 In the cases where a violation of a substantive Article was claimed in isolation or taken together with Article 14 and the Court had a choice between which claim it would review, the same facts were at the root of both claims. This would ordinarily indicate review of the substantive Article and no review of Article 14. However, all these judgments concerned claims of discrimination on the ground of particularly serious badges of differentiation or

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765 In Chassagnou and Others v. France, 29.04.1999, the Court reviewed Article 1 of Protocol 1 and Article 11 both on their own and taken in conjunction with Article 14 and found violations on all counts. It, then, found it not necessary to review Article 9 independently. Also in Gaygusuz v. Austria, 16.09.1996, the Court reviewed the case under Article 14 in conjunction with Article 1 of Protocol 1 but found it not necessary to review also Articles 6:1 and 8.
otherwise indicated clearly strict review under Article 14.\footnote{Thlimmenos v. Greece, 06.04.2000 (religion) Camp and Bourimi v. The Netherlands, 03.10.2000 (illegitimacy), Salgueiro da Silva Moula v. Portugal, 21.12.1999 (sexual orientation), Gaygusuz v. Austria, 16.09.1996 (nationality), Burghartz v. Switzerland, 22.02.1994 (sex) and Hoffmann v. Austria, 23.06.1993 (religion). See generally Chapter 5.2.4. supra. The judgment in Chassagnou and Others v. France, 29.04.1999 is an exception as it concerns the badge of differentiation of property which ordinarily does not command strict scrutiny. As discussed in footnote 761 supra strict review was nevertheless indicated by other factors in the case.} It is apparent that the strong indication towards strict review rendered the discrimination issue not only subject of review as a fundamental aspect of the case, but in fact the main subject of review with the effect that the other Convention provisions at stake took a secondary role.\footnote{In Chassagnou and Others v. France, 29.04.1999, the Articles claimed violated in conjunction with Article 14 were also reviewed and did not take a secondary role, but it was then considered unnecessary to review yet another Convention Provision, Article 9.}

Finally, Table 3 defines four groups of judgments where no question of the necessity of review arose. The case may be argued exclusively in the context of a violation of Article 14 in conjunction with some other Convention Article and, therefore, not raise any question of the necessity of review.\footnote{Table 3, case-group 6, pp. 295-296 infra.} It is also possible that although having been pursued before the Commission, the issue of discrimination is not pursued before the Court. In these cases the Court does not review Article 14 \textit{ex officio}.\footnote{Table 3, case-group 7, pp. 296-297 infra.} If the claim of a violation of Article 14 is decided primarily with reference to the applicant not having proved his/her \textit{prima facie} case of discrimination, the question of necessity of review does not seem to arise.\footnote{Table 3, case-group 8, pp. 297-299 infra.} And finally when a claim under Article 14 is decided by reference to the lack of defences by the respondent state the necessity of review does not become an issue.\footnote{Table 3, case-group 9, p. 299 infra.}

6.3. CONCLUSIONS
There seem to be three tests that govern the question of necessity of review under Article 14. By inference, similar considerations may be expected to apply to the necessity of review under Article 1 of Protocol 12 along with or instead of review under other Convention provisions.

According to the first test, Article 14 is generally reviewed when the Court has not found a violation of the relevant substantive Article in isolation 772 and generally not if the Court has found such a violation. 773

The second test for deciding when it is considered necessary to review Article 14 may override the first test. It seems governed by the facts at the roots of the complaint. If the complaint of the applicant under Article 14 is in essence the same complaint as that raised and already reviewed under the substantive Article the Article 14 issue may not be reviewed. 774 Conversely, if the claim under Article 14 rises out of different factual circumstances and has not already been dealt with under the substantive provision, the Court will review it, even though the substantive Article has been declared violated and even though the badge of differentiation at stake is not a sensitive one. 775

The third test operating with regard to the question of necessity of review feeds on the perceived seriousness of the discrimination issue raised in the case. Instances of serious complaints of discrimination may, thus, induce Article 14 review and this

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772 Table 3, case-group 5, pp. 291-294 infra.
773 Table 3, case-group 1, pp. 278-285 infra.
774 Table 3, case-groups 1 and 2, pp. 278-285 infra. This being a distinct test for necessity of review is supported particularly strongly by case-group 2, where the Court has not found a violation of the substantive Article but nevertheless pronounces that it is not necessary to review Article 14. These cases were uncommon until recently, the first being Hennings v. Germany, 16.12.1992. They are at variance with the general rule that the Court will review Article 14 if there has been a finding of non-violation of the substantive Article and exhibit that the second test may override the first test. Gomien, Harris and Zwaak, p. 350 note that “to date” that no such cases had occurred. As their book was published in 1996, they seem to have missed the, at the time, only such case, Hennings v. Germany, 16.12.1992. All other cases in Table 3, case-group 2 stem from 1996 onwards.
775 Table 3, case-group 3 b), pp. 287-289 infra.
factor in the necessity of review assessment may outweigh any other consideration. A serious instance of discrimination would primarily be indicated when the case concerns a particularly significant badge of differentiation, a badge of differentiation that calls for strict scrutiny under Article 14. It may lead to review in cases even though the same issues are at stake under Article 14 and the substantive Article and regardless of whether the substantive Article has been declared violated in isolation.\textsuperscript{776} It may even lead to review under Article 14 \textit{instead} of review under the substantive Article.\textsuperscript{777} It is also possible that a serious instance of discrimination that induces Article 14 review is indicated from other factors in the case than the badge of differentiation at stake if they decisively call for strict review.\textsuperscript{778}

The recent development where the Court actually opts for reviewing the case under Article 14 rather than the substantive Article overrules the opinion sometimes presented in the literature that Article 14 is a subsidiary guarantee to the other Convention provisions.\textsuperscript{779} This development, which has been under way since 1993,\textsuperscript{780} is evidence of the gradually increasing acknowledgment of the importance of non-discrimination under the Convention system that has culminated in the adoption of Protocol 12 to the Convention.

Harris, O'Boyle and Warbrick argue that the approach of the Court towards Article 14 is cautious and that: "...a policy of judicial abstention..." is at work when it decides not to review Article 14.\textsuperscript{781} The recent judgments where the Court actually opts for reviewing the case under Article 14 rather than the substantive Article in isolation demonstrate that a policy of judicial activism may just as well govern the question of whether it is considered necessary to review the Article 14 question. The third test for necessity of review under Article 14 shows that if there are factors in

\textsuperscript{776} Table 3, case-group 3 a), pp. 285-287 \textit{infra}.
\textsuperscript{777} Table 3, case-group 4, pp. 289-290 \textit{infra}.
\textsuperscript{779} Gomien, Harris and Zwaak, p. 349. Dijk and Hoof, p. 716 discuss the "fundamental aspect of the case" test under the heading: "The Subsidiary Guarantee of Article 14".
\textsuperscript{780} Hoffmann \textit{v.} Austria, 23.06.1993. See generally Table 3, case-group 4, pp. 289-290 \textit{infra}.
\textsuperscript{781} Harris, O'Boyle and Warbrick, p. 469.
the case that decisively indicate strict scrutiny under Article 14, the Court may assert itself and pronounce on the Article 14 question where it would ordinarily not. In such cases Article 14, and by inference the new Article 1 of Protocol 12, may well take the leading role and render the other Convention provisions subsidiary to the review of the case at hand. Conversely when the discrimination issue is governed by factors that clearly indicate lenient review, the Court will be more inclined to exercise restraint and refrain from pronouncing on it. The appropriateness of a policy of judicial restraint or judicial activism coincides with the concerns that govern the margin of appreciation doctrine. The factors that govern the width of the margin of appreciation and the strictness of review of discrimination claims, thus, are also highly relevant to deciding the necessity of review question.

In conclusion, understanding strictness of review in discrimination cases is central to understanding the approach of the Court to the necessity of review.

782 Note in particular the judgments of Botta v. Italy, 24.02.1998 and X, Y and Z v. The United Kingdom, 22.04.1997, in Table 3, case-group 2, p. 285 infra. In these cases the Court had already found that the substantive Articles in question had not been violated and should, therefore, according to the general rule have proceeded to review Article 14. The cases, however, concerned claims of passive discrimination in the form of claiming active accommodation for the applicants' difference before the possibility had ever been acknowledged under Article 14 (Thlimmenos v. Greece, 06.04.2000 being younger). The strong indication towards lenient review may have induced the approach that it was not necessary to review the Article 14 question. The more common approach, however, is to follow the general line and undertake the lenient review indicated by passive discrimination if there has not been a violation of the substantive Article, cf. Beard v. The United Kingdom, 18.01.2001, Chapman v. The United Kingdom, 18.01.2001, Coster v. The United Kingdom, 18.01.2001, Jane Smith v. The United Kingdom, 18.01.2001, Lee v. The United Kingdom, 18.01.2001, Sheffield and Horsham v. The United Kingdom, 30.07.1998, Stubbings and Others v. The United Kingdom, 22.10.1996 and Kjeldsen, Busk Madsen and Pedersen v. Denmark, 07.12.1976.

259
7. CONCLUSIONS

7.1. INTRODUCTION

Chapter 1 of this study set out its general approach to the concepts of equality and discrimination. In Chapter 2 the study was placed in the context of formal and substantive approaches to equality in law. In Chapters 2 and 3 it was argued that understanding variations in strictness of review is central to understanding the discrimination provisions of the Convention and that the traditional analytical tests under Article 14 do not enable such an understanding. This has been demonstrated by variations in strictness of review explaining the Court’s approach to the burden of proof for the similarity or difference of situations as discussed in Chapter 4, by the model of influencing factors explaining the substantive case law of the Court in Chapter 5 and finally by explaining the approach of the Court to the issue of the necessity of review in Chapter 6.

The study has shown that there are three basic levels at which the value choices called for by the open model non-discrimination provisions of the Convention enter into play. These levels are inherent in any claim of discrimination that will always entail three basic variables, a) a claim of a particular type of discrimination, b) based on a particular badge of differentiation and c) encroaching upon a particular interest. Each of these variables forms a distinct category of factors that influence the strictness applied in objective justification review. Identifying and elaborating on these factors enables the identification of the values that govern non-discrimination analysis and the positioning of the non-discrimination provisions of the Convention on the formal-substantive scale of equality. The identification and elaboration of the influencing factors and their function has enabled a clearer understanding of the apparently conflicting and unclear case law of the Court.

7.2. THE BURDEN OF PROOF
According to the simple model on the burden of proof under Article 14 put forward in the literature the applicant must establish a *prima facie* case of discrimination, which entails establishing a difference of treatment, the badge of differentiation and the existence of relevantly similar situations. At that point the burden of persuasion is taken to shift onto the respondent state, which bears the burden of persuasion as to the existence of objective and reasonable justification. The doctrine of the margin of appreciation and corresponding variations in strictness of review are only applied to the part of a case for which the respondent state bears the burden of proof, i.e. to the objective justification review. After all, it is a margin accorded to *states* and not applicants. Establishing when and how the shift in the burden of proof takes place and the case becomes susceptible to the factors that influence the margin of appreciation and strictness of review is, therefore, a necessary precondition for a study of these influencing factors.

A study of the burden of proof in relation to Article 14, and by extension in relation to Article 1 of Protocol 12, leads to the following conclusions.

Applicants alleging direct and express or overt forms of discrimination will find it relatively easy to establish the badge of differentiation and the treatment complained of. When it comes to covert badges of differentiation and forms of treatment that are not direct and overt, applicants will find it more difficult to establish their case. When relating to covert badges of differentiation that are not express and documented in relation to the treatment complained of, applicants’ claims are formulated in either of two possible terms. Firstly, they may take the form of alleging or bordering on alleging subjective intention to discriminate, which is extremely difficult to establish under the Convention. Secondly, they may take the form of claiming or bordering on claiming indirect discrimination where the overt badge of differentiation is “neutral” but the treatment complained of has a disproportionate effect on groups defined by reference to another, i.e. covert, badge of differentiation. The Court has not provided the appropriate evidential framework for establishing indirect discrimination and cases concerning such claims will fail in establishing *prima facie* discrimination on either of two grounds. Firstly they may
fail on the basis of not establishing the badge of differentiation complained of. Secondly they may fail on the basis of not establishing the discriminatory element of the treatment in question, i.e. not establishing that: “...other persons in an analogous or relevantly similar situation enjoy preferential treatment...”. Finally applicants alleging discriminatory applications of law are also in a difficult situation of proof. Here, the discriminatory element of the treatment in question is what raises difficulties similarly to claims of indirect discrimination. The requirement of establishing that other persons in relevantly similar situations enjoy preferential treatment in comparison with the applicant is a condition reserved by the Court for these “difficult” claims of discriminatory effects of measures or discriminatory applications of law.

The question of whether there exists a strict requirement upon the applicant to establish the relevant similarity or significant difference of situations is the most problematic of questions relating to the burden of proof. The simple model on the burden of proof that has been presented in the literature claims so but the case law of the Court is conflicting on the issue. There exists an inconsistency as between the simple model and the case law and it is evidenced most clearly in the phenomenon that the question of whether similarity of situations has been established, for which the applicant is supposed to bear the burden of persuasion, is often merged with consideration of whether objective justification has been established, for which the respondent state is supposed to bear the burden of persuasion. This is a phenomenon often noticed in the literature but never explained. It has, thus, remained a discrepancy as between the literature purporting to explain the case law of the Court and the actual application of Article 14 in case law. This discrepancy is highly detrimental to understanding of the non-discrimination provisions of the Convention as the allocation of the burden of proof has a direct influence on the effectiveness of protection.

The present study proposes a different interpretation of the case law of the Court than that hitherto put forward in the literature on the burden of proof in relation to

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783 E.g. Building Societies v. The United Kingdom, 23.10.1997, para. 88.
establishing the relevant similarity or significant difference of situations. To begin with it forwards an explanation of the conflicting and unclear case law. The common merger of the establishment of similar situations and objective justification review is explained by the realisation that a) the assessment of the relevant similarity or difference of situations and b) the assessment of the treatment due cannot be divided in two distinct parts. Drawing on R.M. Hare’s work on relevance, the study showed how the relevance of similarities/differences must necessarily be relevant to the treatment in question and evaluating the former entails invoking the principle or value loaded reasoning according to which the latter should be evaluated. This is the underlying and basic realisation that explains the common merger of the Court’s consideration of the establishment of relevant similarities/differences and the establishment of objective justification. This realisation not only explains this phenomenon of merging issues but also helps in demonstrating how it is artificial to divide the issues that need to be established and the burden of persuasion into the two distinct levels of a) the relevant similarities/differences of situations and b) the objective justification for treatment. The two questions of relevant similarities/differences and objective justification are not only conjoined by the function of the relevance referent but also by the equality maxim itself as the basic content of the non-discrimination provisions of the Convention. According to the equality maxim, the principle and value loaded reasoning behind establishing objective justification (the treatment due) refers primarily to the similarity/difference of situations. As equalities prescribe equal treatment and differences prescribe different treatment, the reasoning behind establishing objective justification (the treatment due) will always at one level concern similarities/differences as justifications for equal/different treatment. So the issue of similarities/differences cannot be divided in two distinct parts for which each of the parties bears the burden of persuasion. In conclusion: There is only one burden of persuasion for similarity/difference and the question is which of the parties bears it.

Taking this conclusion even further the study shows that variations in the case law on the burden of persuasion for similarities/differences in situations and the common merger of establishing relevant similarities/differences and objective justification are
not an inconsistency in the case law. Rather, they can be construed as variations that are consistent with how strongly strict or lenient scrutiny is indicated in a case. This construction draws on the work of Julianne Kokott who has recently argued quite convincingly that generally the margin of appreciation, which governs strictness of review, and allocations of the burden of proof function in a similar manner. A wide margin of appreciation indicates that the burden of proof rests on the applicant, while a narrow margin of appreciation indicates that the burden of proof rests on the respondent state.

The final conclusion of the study on the burden of proof for similarity/difference of situations under the non-discrimination provisions of the Convention is as follows: By taking the conclusion that there is only one and undivided burden of proof on similarity/difference and analysing cases on its allocation in line with Kokott’s theory it becomes apparent that variations in the burden of persuasion for similarity/difference of situations more or less consistently follow the issue of how strongly strict or lenient scrutiny is indicated in the case. If a wide margin of appreciation is strongly indicated in a case, it follows that the burden of persuasion for relevant similarity/difference rests on the applicant, but if a narrow margin of appreciation is strongly indicated in a case, it follows that the burden of persuasion for relevant similarity/difference as an important factor of establishing objective justification rests on the respondent state. The merger of consideration of relevant similarity/difference and the objective justification test seems primarily to take place in cases where indications for a wide or a narrow margin of appreciation are not overwhelmingly strong. The burden of persuasion may in these cases, accordingly, fall on either of the parties in relation to which is indicated more strongly, a wide or a narrow margin of appreciation.

7.3. THE INFLUENCING FACTORS

This study forwards a model of factors that influence the strictness of objective justification review under the non-discrimination provisions of the Convention. Any given claim under an open-model prescription of non-discrimination such as Article
14 and Article 1 of Protocol 12 to the Convention will entail three basic variables. These variables will be a) a claim of a particular type of discrimination, b) based on a particular badge of differentiation and c) encroaching upon a particular interest. An example might be direct discrimination on the basis of sex in employment. The study shows that these variables form a model for influencing factors under which each variable constitutes an important category of factors influencing the strictness of review. It is a significant feature of the model that it is not formal and symmetrical as it would be if certain variables always resulted in the same type of scrutiny. The study demonstrates how the model is rather substantive and asymmetrical in that each category of influencing factors exists in interplay with the other categories. Influencing factors pertaining to each variable, thus, may function to support or negate the influence of each other.

The first category of influencing factors is the type of discrimination alleged in a case. This study appears to be the first addressing this as a distinct category of factors influencing the strictness of review in a case. There are three possible types of discrimination discussed in this study, active discrimination, passive discrimination and indirect discrimination. Active and passive discrimination are both forms of direct discrimination where different/similar treatment is directly based on a certain badge of differentiation, while indirect discrimination refers to the effects of measures that are not directly based on certain badges of differentiation.

Active discrimination is defined as discrimination that results from identifiable acts of state agents and may entail three different claims: A claim of express or overt different treatment, covert different treatment or different applications of the same measure. It is the finding of the study that once claims of active discrimination reach the level of objective justification scrutiny strict scrutiny will be indicated.

Passive discrimination is a new concept proposed in this study. It is developed to encapsulate in one functional term the new possibilities for discrimination claims arising out of the newly acknowledged positive obligations of states to ensure the enjoyment of non-discrimination. It is discrimination that results from the failure of
state agents to act and may entail four different claims: Failure to provide for non-discrimination in law, even in relations between private parties; failure to remedy instances of discrimination that occur, even in relations between private parties; failure to provide similar measures for relevantly similar groups, even in relations between private parties; failure to provide different measures for significantly different groups, even in relations between private parties. The fifth theoretically possible claim of passive discrimination, a claim of a failure to promote equality is excluded from the sphere of the non-discrimination provisions of the Convention. This has been described in the Explanatory report to Protocol 12 in the terms that the positive obligations inherent in the Protocol reach failure to prevent and remedy discrimination but not failure to promote equality. But the terms equality and discrimination are simply two sides of the same coin. The indeterminacy of the approach that passive discrimination reaches the failure to prevent and remedy discrimination and not the failure to promote equality exhibits itself upon the realisation that they are simply alternative ways in which to refer to the same treatment. The prevention of discrimination entails the promotion of equality and vice versa. Attempts at precisely construing the outer limits of the concept of passive discrimination, thus, raise difficulties.

It is the finding of the study that once a claim of passive discrimination reaches the level of objective justification scrutiny lenient scrutiny will be indicated. It will be indicated to varying degrees according to how heavy a burden acknowledging positive obligations would place on the respondent state. Elaborating on how heavily a measure burdens the state will coincide with the construction of the outer limits of the concept of passive discrimination. Factors that influence how strongly lenient scrutiny is indicated may be summarised in the following terms: Claims indicating wide-reaching policy changes e.g. in relation to generally improving the conditions of certain groups, claims indicating considerable financial burdens as in direct provisions for needs and claims bordering on positive measures will indicate lenient scrutiny more strongly than claims of passive discrimination that place lesser burdens on states in terms of being easily isolated, being of limited scope and not placing considerable burdens on the, financial or other, resources of the state.
The Court has not entertained claims of indirect discrimination. Applicants have not succeeded in establishing a prima facie case of indirect discrimination and such claims have never reached the level of objective justification review. A claim of indirect discrimination would, therefore, not at present count as a factor influencing the strictness of objective justification review. The introduction of the concept of indirect discrimination into the jurisprudence of the Court would enable the Convention’s system of protection to reach covert forms of discrimination.

The second category of influencing factors is the badge of differentiation and the similarity or difference of situations at stake in the case. The badges of differentiation can be divided into the three sub-groups; insignificant non-personal badges of differentiation, insignificant personal badges of differentiation and significant personal badges of differentiation. Lenient scrutiny is most clearly indicated in the insignificant non-personal badges of differentiation group. In contradiction to the common approach of the literature that singles the badge of differentiation of “property” particularly out as governing lenient review, the study demonstrates that of all the non-personal insignificant badges of differentiation, cases involving the badge of differentiation of “property” are most likely to be susceptible to the influence of other influencing factors able to counteract the indication towards lenient scrutiny. Lenient scrutiny is also indicated in the insignificant personal badges of differentiation group, which can be defined negatively as encompassing all personal badges of differentiation that have not been elevated to the significant badges of differentiation group. Here, however, lenient scrutiny is not indicated as strongly as generally with respect to the non-personal badges of differentiation, as evidenced in the merger of consideration of the similarity of situations and the objective justification tests. Strict scrutiny is indicated in the last group comprising significant personal badges of differentiation. The significant badges of differentiation of sex, race, nationality, illegitimacy and religion, have already been established in the case law of the Court and the literature. The study concludes that the badge of differentiation of sexual orientation should be added to the list of significant badges of differentiation. According to the Thlimmenos v. Greece
judgment, the indication towards strict scrutiny inherent in the significant personal badges of differentiation is particularly likely to be able to counteract the lenient scrutiny indicated by claims of passive discrimination.

The third category of factors influencing the strictness of objective justification review is the interest at stake in a case. The study identifies and elaborates on certain influencing factors connected with the interest at stake that, with the exception of the sphere of property rights, seem to have largely escaped the attention of the literature. If the interest at stake in a case concerns property rights lenient scrutiny will be indicated, but the indication towards strict scrutiny inherent in the significant personal badges of differentiation is particularly likely to be able to counteract the lenient scrutiny indicated by this interest at stake. A situation of a socially marginalised or disadvantaged situation will be a factor indicating strict scrutiny while a situation of a privileged position will indicate more lenient scrutiny. If the badge of differentiation is clearly relevant to the interest at stake this may also indicate more lenient scrutiny. And, finally, an emergency situation indicates lenient scrutiny. It is the conclusion of this study that the category of influencing factors of the interest at stake seems to be of lesser weight than the other two categories of influencing factors, the type of claim being made and the badge of differentiation at stake in a case. Influencing factors that come under the category of the interest at stake may, however, tilt the balance in favour of either strict or lenient scrutiny and, thus, explain many of the incorrectly perceived inconsistencies in the case law referred to in the literature.

7.4. THE NECESSITY OF REVIEW

The study undertaken in Chapter 6 demonstrates the clear correlation between the strictness of review and the necessity of review under the non-discrimination provisions of the Convention. The first two general rules on the necessity of review of the discrimination claim raised in a case are that it will be reviewed if the Court has not found a violation of another Convention Article or if it arises out of different factual circumstances and raises different issues than that reviewed under the other
Convention provisions. The third test for deciding whether it is necessary to review the discrimination issue, however, taps into the strictness of review issues discussed in this study and may override the other tests. Thus, if the discrimination claim in a case is governed by factors that strongly indicate strict review, the Court can be expected to review it even though it would not ordinarily do so. In such cases it may even assert the importance of the discrimination issue by reviewing it instead of reviewing the case under another Convention provision.

7.5. The values

The induction from case law of the influencing factors governing strictness of review in non-discrimination cases enables the identification of the basic values underlying the non-discrimination provisions and their application by the Court.

The first level of value choices governing non-discrimination analysis under the Convention is exhibited in the different approaches to different types of claims. Claims of active discrimination only concern the traditional negative obligation of states to abstain from discriminating as opposed to the clear connection with positive obligations to actively ensure non-discrimination inherent in claims of passive discrimination. The stricter scrutiny of the former as opposed to a more lenient scrutiny of the latter clearly refers to an underlying value. The division into negative and positive obligations has been connected with the division of human rights into civil and political rights on the one hand and economic, social and cultural rights on the other. The clear preference of negative obligations to positive obligations demonstrated by the outer limits of the concept of passive discrimination and by the different types of scrutiny attached to active discrimination and passive discrimination indicates a preference for the values traditionally connected with negative state obligations and civil and political rights. These values are the western liberal conception of the state and a focus on individualism.\textsuperscript{784} The focus on

\textsuperscript{784} It is commonly acknowledged that the separation of civil, political, economic, social and cultural rights into two treaties during the drafting of The International Covenant in Civil and Political Rights, \textit{UNTS 171}, and the International Covenant on Economic, Social and Cultural Rights, \textit{UNTS 3}, is, at
individualism is also supported by the refusal of the Court to acknowledge indirect discrimination. It should be noted, however, that the active recognition of positive obligations and passive discrimination as a real possibility under the Convention has only recently occurred. While the values connected with civil and political rights may be fundamental to the Convention system, the recent advent of Protocol 12 to the Convention, encompassing as it does the sphere of economic, social and cultural rights as a sphere of influence for non-discrimination, should not be underestimated as a potential vehicle for the gradual development towards stricter scrutiny in passive discrimination cases.

The second level of value choices governing non-discrimination analysis under the Convention is expressed by the different types of scrutiny attached to different types of badges of differentiation. There seems to have evolved a distinction between non-personal characteristics and personal characteristics as bases to discrimination. The stricter type of review connected with the personal badges of differentiation indicates the value of the protection of the individual and the essentially personal interest in being free from status ascriptions and assumptions based on personal characteristics. The significantly stricter type of review connected with the significant personal badges of differentiation indicates a particularly pressing such personal interest in the relevant areas. The significant personal badges of differentiation all relate to groups of people that have history of a disadvantaged or a marginalised social position. As a general rule, these values will have been developed and generally accepted in the democratic processes of the contracting states or in international standard setting before earning active recognition by the Court by being elevated to the level of significant badges of differentiation governing strict scrutiny.

The third level of value choices governing non-discrimination analysis under the Convention is demonstrated by the influence of the interest at stake on the strictness

least to a degree, based on an ideological conflict between the East and the West. Economic, social and cultural rights were associated with the aims of a socialist society while ideologies emphasising economic liberalism and a minimalist state were sceptical of such rights. See for example Craven, p. 9 and Eide, pp. 23-24.
of review. The stricter review indicated by the type of interest at stake of a disadvantaged situation, in contradiction to the more lenient review of situations of privilege, clearly shows a concern for the attainment of social justice and substantive equality in the form of a better protection of those social groups that are in a disadvantaged and marginalised position as opposed to entrenching existing situations of privilege. This conclusion is additionally and quite forcefully supported by the recent recognition of the Convention requiring active accommodation for differences connected with membership in disadvantaged or marginalised groups. In addition the influencing factor of the badge of differentiation being clearly relevant to the interest at stake exhibits the moral sensitivity of allowing personal characteristics to govern treatment that is not related substantively to these characteristics and the absence or lesser degree of such sensitivity when the characteristic in question is being regulated as such.

7.6. THE POSITION ON THE FORMAL-SUBSTANTIVE SCALE OF EQUALITY

Finally, from the induction of factors influencing the strictness of review and the identification of the values underlying their existence, the position of the non-discrimination provisions of the Convention on the formal-substantive scale of equality can be assessed.

The situation of the non-discrimination provisions of the Convention can best be described as belonging to the category of the substantive “difference” approach where the primary focus is on negative obligations and the equal treatment of relevant similarities, but the need for positive obligations and appropriately accommodating differences is recognised as an exception. The non-discrimination provisions of the Convention, however, also show strands from the substantive “disadvantage” approach by being somewhat sensitive to the situation of marginalised or disadvantaged groups. In conclusion, the equality and non-discrimination provisions of the European Convention on Human Rights appear to have moved towards an asymmetrical and substantive approach.
Table 1. The analytical tests referred to by the Court in cases where it has reviewed the Article 14 question. In many cases the analytical tests are set out at the beginning of the Court’s opinion as a general statement of the law. The table does not concern these general statements of the law. It only deals with the references of the Court to the analytical tests when the conclusion on application of the law to the facts of the case is reached with reference to them. Cases marked in red indicate a finding of a violation.

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<th>The reasoning of the Court deals expressly with legitimate aims and proportionality</th>
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The reasoning of the Court indicates the lack of different treatment or similar situations. The reasoning of the court is expressly or implicitly linked with the "differences in otherwise similar situations" test. The "objective and reasonable justification" test is not referred to.

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Table 2. Cases where the Court has reviewed the Article 14 question. The table presents a combination of the badge of differentiation at stake in the case (vertical) and the type of claim being made in the case (horizontal). Each group of judgments is organised in a chronological order, beginning with the most recent. Cases marked in red indicate a finding of a violation.

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<td>&quot;The Court recalls that in its above-mentioned Dudgeon judgment, having found a violation of Article 8, it did not deem it necessary to examine the case under Article 14 as well...&quot;, para. 41.</td>
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<td>&quot;...La Cour estime inutile de statuer sur la violation alléguée de l'article 14, les arguments avancés sur ce point coïncidant, en substance, avec ceux examinés sous l'article 6.&quot;, para. 108.</td>
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<td>&quot;The Court considers that these complaints arise out of the same facts considered under Articles 2, 3 and 13 of the Convention and does not find it necessary to examine them separately.&quot;, para. 131.</td>
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<td>Failure to take reasonable measures to prevent a real and immediate risk to the life of the applicant's brother, 2. Failure to carry out an effective investigation into the circumstances surrounding the applicant's brother's death, 2. No effective remedy, 13.</td>
<td>&quot;The Court considers that these complaints arise out of the same facts considered under Articles 2 and 13 of the Convention and does not find it necessary to examine them separately.&quot;, para. 98.</td>
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<td>&quot;...relate to the same matters as those considered under Article 11; the Court does not consider it necessary to examine them separately.&quot;, para. 49.</td>
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<td>Reason</td>
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<td>b) The Court does not reason why it is not necessary to review.</td>
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<td><strong>&quot;Where a substantive Article of the Convention has been invoked both on its own and together with Article 14 (art. 14) and a separate breach has been found of the substantive Article, it is not generally necessary for the Court also to examine the case under Article 14 (art.14), though the position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case...&quot;, para. 67. &quot;...amounts in effect to the same claim, albeit seen from a different angle...&quot; para. 69.</strong></td>
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<td><strong>İsmihan Özöl and Others v. Turkey, 27.02.2001</strong></td>
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<td><strong>Protection of property, A1P1. Issue: Delays in payment of compensation result in loss as interest rates are lower than inflation. Discrimination, 14 in conjunction with A1P1. Issue: Interest rate lower than inflation.</strong></td>
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<td><strong>Platokat v. Greece, 11.01.2001 (not final)</strong></td>
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<td>Different categories of accused persons</td>
<td><strong>Right to liberty and security, 5:3. Issue: Automatic denial of bail (Government conceded to violations of Articles 5 and 5:3). Discrimination, 14 in conjunction with 5:3. Issue: Automatic denial of bail for certain categories of accused persons.</strong></td>
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<td>&quot;...Article 6 para. 3 (e) (art. 6-3-e) seeks to prevent any inequality between an accused person who is not conversant with the language used in court [...] hence, it is to be regarded as a particular rule in relation to the general rule embodied in Articles 6 para. 1 and 14 (art. 14+6-1) taken together. Accordingly, there is no scope for the application of the two latter provisions. &quot;, para. 53.**</td>
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<td>Case Study</td>
<td>Type of Application</td>
<td>Issue</td>
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<td>News Verlages GmbH &amp; CoKG v. Austria, 11.01.2000</td>
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<td>Right to participate in elections to choose the legislature, A3P1. Issue: The absence of elections in Gibraltar to the European Parliament. Discrimination, 14 in conjunction with A3P1. Issue: The absence of elections in Gibraltar to the European Parliament discriminated against its residents.</td>
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<td>Matthews v. The United Kingdom, 16.02.1999</td>
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<td>Access to court 6.1. Issue: Restrictions on national security grounds to have a claim of discrimination decided by a court or a tribunal. Discrimination, 14 in conjunction with 6.1. Issue: Restrictions on national security grounds to have a claim of discrimination decided by a court or a tribunal discriminate.</td>
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*...not consider it necessary...*, para. 62. It was undisputed that other media could publish the suspect's picture and this was a factor relevant to finding a violation of Article 10 in isolation, para. 62 cf. para. 59. Hence, the issues and arguments at stake seem to arise out of the same factual circumstances and have been already dealt with under Article 10.  

*...no reason to examine separately...*, para. 126. Nationality acknowledged as a potentially relevant factor to pre-emption to keep works of art in the country, para. 117. A1P1 was found to be violated, irrespective of the nationality of the applicant, as there had been unjust enrichment, para. 121. The issues at stake seem to arise out of the same factual circumstances. The Court also seems to have already dealt with the arguments relating to the nationality/discrimination issue under A1P1.  

*...not consider it necessary...*, para. 54. The issues at stake seem to arise out of the same factual circumstances. The arguments also seem to have already been dealt with under Article 10 as regards the content of the work.  

*...not consider it necessary...*, para. 63. The issues at stake seem to arise out of the same factual circumstances. The arguments also seem to have already been dealt with under Article 10 as regards the content of the work.  

*...not consider it necessary...*, para. 68. The issues at stake seem to arise out of the same factual circumstances.  

*...not necessary...*, para. 87. Discrimination issue not pursued in case of a finding of a violation of 6.1. The Court nevertheless pronounced that it was not necessary to review Article 14 since there was a violation of 6.1. The issues at stake seem to arise out of the same factual circumstances.
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<td>Freedom of religion, 9. Issue: Punishment for proselytising civilians. Discrimination, 14 in conjunction with 9. Issue: Law against proselytism applied only to religious minorities.</td>
<td>&quot;Having found a violation of Article 9 [..] no separate issue...&quot;, para. 69. However, as regards the proselytism of airmen (not civilians), the Court had found the claim of discriminatory application of law unsubstantiated. The issues at stake seem to arise out of the same factual circumstances. The Court also had already dealt with the arguments relevant to the discrimination issue as not proven as regards the proselytism of airmen. The same arguments on lack of proof would seem to apply to the proselytism of civilians.</td>
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<td>Canea Catholic Church v. Greece, 16.12.1997</td>
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<td>Right to a court, 6:1. Issue: Legal personality denied. Discrimination, 14 in conjunction with 6:1. Issue: Legal personality only denied to applicant and not two other religions. Freedom of religion and Protection of Property, 9 and A1P1. Issue: Legal personality denied. Discrimination, 14 in conjunction with 9 and/or A1P1. Issue: Legal personality only denied to applicant and not two other religions.</td>
<td>Violation of 6:1 and Article 14 taken together with 6:1. In view of that conclusion: &quot;...not necessary...&quot; to rule on complaints based on Articles 9, A1P1 individually and together with Article 14, cf. para. 50. The issues under Article 14 in conjunction with Article 6:1 on the one hand and under Article 14 in conjunction with Article 9 or A1P1 on the other hand seem to arise out of the same factual circumstances.</td>
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<td>Papageorgiou v. Greece, 22.10.1997</td>
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<td>Fair hearing, 6:1. Issue: Legislation enacted when applicant had a case under appeal, expecting a favourable outcome. The legislation resolved the issue and made the appeal pointless. Length of proceedings, 6:1. Issue: Two years and eight months. Discrimination, 14 in conjunction with 6:1 (unspecified). Issue: Legislation enacted when applicant had a case under appeal, expecting a favourable outcome.</td>
<td>&quot;...no need to rule on those complaints.&quot;, para. 51. The issues at stake seem to be the same under the fair hearing aspect of the case.</td>
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<td>Matos e Silva Lda. and Others v. Portugal, 16.09.1996</td>
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<td>&quot;...not consider it necessary...&quot;, para. 96. The issues at stake seem to arise out of the same factual circumstances.</td>
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<td>&quot;...not consider it necessary...&quot;, para. 72. The issues at stake seem to arise out of the same factual circumstances.</td>
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<td>Piermont v. France, 27.04.1995</td>
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<td>&quot;...unnecessary...&quot;, para. 90. The issues at stake seem to arise out of the same factual circumstances.</td>
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<td>Right to respect for family life.</td>
<td>&quot;...not necessary...&quot;, para. 83. With regard to finding under Article 10 I was not satisfied that the issues raised seem to arise out of the same factual circumstances.</td>
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<td>Case</td>
<td>Measure not</td>
<td>Freedom of expression, 10. Issue: Conviction for insulting the government. Discrimination, 14 in conjunction with 10. Issue: Others expressing similar views not convicted.</td>
<td>&quot;As this question is not a fundamental aspect of the case, the Court does not consider it necessary to deal with it separately...&quot;, para. 52. The issues at stake seem to arise out of the same factual circumstances.</td>
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<td>Only &quot;The Technical Chamber of Greece&quot; had the capacity to take cases on engineers' fees to court. Access to court, 6:1.</td>
<td>Pronouncing on the scope of the case the Court declared that it could examine the complaint under Article 14: &quot;...because it relates to the same facts as the complaints under Articles 6 and 13...&quot;, para. 56. Review had &quot;...no useful purpose...&quot;, para. 68.</td>
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<td>Philis v. Greece, 27.08.1991</td>
<td>Active - overt</td>
<td>Respect for private life. Sexual assault on a handicapped woman. Lack of legal capacity meant that no criminal proceedings could be instigated. Discrimination, 14 in conjunction with 8. Issue: Different treatment of various categories of persons deserving of special protection against sexual assaults.</td>
<td>&quot;An examination of the case under Article 14 (art. 14) is not generally required when the Court finds a violation of one of the former Articles taken alone. The position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case, but this does not apply to the breach of Article 8 (art. 8) found in the present proceedings ...&quot;, para. 32. The issues at stake seem to arise out of the same factual circumstances.</td>
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<tr>
<td>X and Y v. The Netherlands, 26.03.1985</td>
<td>Active - overt</td>
<td>Access to court, 6:1. Issue: Possibility to appear in person before a court to obtain a decree of judicial separation does not provide effective access to court. Discrimination, 14 in conjunction with 6:1. Issue: Judicial separation more easily available to those who are not for financial reasons inhibited from hiring a solicitor.</td>
<td>&quot;...examination is not generally required when the Court finds a violation of the former article taken alone. The position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case, but this does not apply to the breach of Article 6 (1) found in the present proceedings; accordingly the Court does not deem it necessary also to examine the case under Article 14.&quot;, para. 30. The issues at stake seem to arise out of the same factual circumstances.</td>
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<td>Airey v. Ireland, 09.10.1979</td>
<td>Active - overt</td>
<td>Freedom of expression, 10. Issue: Dismissal from job at the state television company infringes. Discrimination, 14 in conjunction with 10. Issue: Dismissal from job not annulled whereas a previous suspension had been annulled.</td>
<td>&quot;...la Cour n'estime pas nécessaire...&quot;, para. 53. The issues at stake seem to arise out of different factual circumstances.</td>
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<td><strong>Informationsverein Lentia and Others v. Austria, 24.11.1993</strong></td>
<td><strong>Active - overt</strong></td>
<td><strong>Freedom of expression, 10. Issue: Public monopoly of audio-visual media. Discrimination, 14 in conjunction with 10. Issue: No indications in the judgment. From the Commission report it can be inferred that the issues raised were a) the different treatment of different types of internal cable television systems and b) discrimination against the Slovene minority as regards rights of access to broadcasting.</strong></td>
<td><strong>&quot;...unnecessary&quot;, para. 44. The issues raised seem to arise out of different factual circumstances.</strong></td>
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<td><strong>Beldjoudi v. France, 26.03.1992</strong></td>
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<td><strong>Right to respect for family life, 8. Issue: Deportation because of criminal conviction. Discrimination, 14 in conjunction with 8. Issue: No indications in the judgment. From the Commission report it can be inferred that the discrimination complaint arose out of legislation which in certain conditions brought about the loss of French nationality for people of Algerian origin.</strong></td>
<td><strong>&quot;...the Court does not consider it necessary...&quot;, para. 81. The issues raised seem to arise out of different factual circumstances.</strong></td>
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<td><strong>2. Non-violation of substantive Article - not necessary to review Article 14</strong></td>
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<td><strong>Botta v. Italy, 24.02.1998</strong></td>
<td><strong>Passive - accommod ate / private sphere</strong></td>
<td><strong>Disabled</strong></td>
<td><strong>Failure to remedy omissions by private bathing establishments which prevented disabled access. 8 not applicable as the claim concerns interpersonal relations of such broad and indeterminate scope that there is no conceivable link between applicant's private life and state obligation.</strong></td>
<td><strong>&quot;...no room for its application unless the facts of the case fall within the ambit...&quot; and &quot;...As the Court has concluded that Article 8 is not applicable, Article 14 cannot apply...&quot;, para. 39.</strong></td>
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<tr>
<td><strong>X,Y and Z v. The United Kingdom, 22.04.1997</strong></td>
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<td><strong>Transsexual</strong></td>
<td><strong>Lack of legal recognition of the status of a transsexual female to male as the father to his partner's child, 8.</strong></td>
<td><strong>&quot;...tantamount to a restatement of the complaint under Article 8 (art. 8) and raises no separate issue.&quot; and &quot;...not necessary...&quot;, para. 56.</strong></td>
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<td><strong>Gregory v. The United Kingdom, 26.02.1997</strong></td>
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<td><strong>Allegation of jury racism, sufficient steps taken by judge, 6:1.</strong></td>
<td><strong>&quot;...the applicant's complaint under Article 14 (art. 14) does not give rise to any separate issue...&quot;, para. 54. A finding of non-violation of Article 14 nevertheless declared.</strong></td>
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<td><strong>Ankerl v. Switzerland, 23.10.1996</strong></td>
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<td><strong>&quot;...already determined the question of compliance with the principle of equality of arms...&quot; and &quot;...no separate issue...&quot;, para. 41.</strong></td>
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<td><strong>&quot;...no reason to examine this claim since it is subsumed in his general complaint that he was denied access to court...&quot;, para. 28.</strong></td>
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<td>Edoardo Palumbo v. Italy, 20.11.2000</td>
<td>Tenants v. landlords</td>
<td>Protection of property, A1P1. Issue: Unable to recover possession of apartment because of legislation on residential property leases. Discrimination, 14 in conjunction with A1P1 (not 6:1). Issue: The legislation in issue protected tenants to the detriment of landlords.</td>
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<td>Protection of property, A1P1. Issue: Legislation compelling small landowners to transfer hunting rights interferes with peaceful enjoyment. Discrimination, 14 in conjunction with A1P1. Issue: Same legislation, distinction between large and small landowners and between hunters and non-hunters. Freedom of association, 11. Issue: Legislation compelling the applicants (small landowners) to become members of hunters’ associations. Discrimination, 14 in conjunction with 11. Issue: Same legislation, distinction between large and small landowners and between hunters and non-hunters. Freedom of thought, and conscience, 9. Issue: Same legislation compelling the applicants (small landowners) to tolerate hunting against their will.</td>
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<td>Holy Monasteries v. Greece, 09.12.1994</td>
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<td>Protection of property, A1P1. Issue: Two legislative acts on transfer of property to State and its management. Right to a court, 6:1. Issue: The first of the two legislative acts deprives of right to a court. Freedom of religion, 9 and freedom of association, 11. Issue: The first of the two legislative acts deprives of necessary means to pursue religious objectives and preserve the treasures of Christendom. Discrimination, 14 in conjunction with 6, 9, 11 and A1P1. Issue: The first of the two legislative acts applied only to monasteries belonging to the Greek Church.</td>
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<td>Observer and Guardian v. The United Kingdom, 26.11.1991</td>
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<td>Bouamar v. Belgium, 29.02.1987</td>
<td>Lawful detention, 5-14. Issue: Lack of possibility to have the lawfulness of the detention decided speedily in juvenile cases. Discrimination, 14 in conjunction with 5-14. Issue: Lack of possibility to have the lawfulness of the detention decided speedily in juvenile cases compared with better possibilities for adults.</td>
<td>Active - overt Juvenile offender v. adult</td>
<td>Non-violation. The issues at stake seem to arise out of the same factual circumstances. Cursory examination of the Article 14 issue (lenient review).</td>
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<td>Marckx v. Belgium, 13.06.1979</td>
<td>Respect for family life, 8 alone and in conjunction with 14. Issues: a) Establishing maternal affiliation of illegitimate children needed recognition or court declaration (8) as compared with simpler procedure for married mothers (8+14). b) Limited extent in law of family relationship of illegitimate child (8) as compared with full integration of legitimate children (8+14). c) Limited patrimonial rights of illegitimate child (8) as compared with extensive rights for legitimate children (8+14). The case also concerned the issue of the mother's limited capacity to make patrimonial dispositions in favour of her illegitimate child on which no independent violations of substantive provisions were found. Violations of Article 14 in conjunction with Articles 8 and A1P1 were, however, found.</td>
<td>Active - overt Illegitimacy</td>
<td>&quot;...although Article 14 (art. 14) has no independent existence, it may play an important autonomous role by complementing the other normative provisions of the Convention and the Protocols: Article 14 (art. 14) safeguards individuals, placed in similar situations, from any discrimination in the enjoyment of the rights and freedoms set forth in those other provisions. A measure which, although in itself in conformity with the requirements of the Article of the Convention or the Protocols enshrining a given right or freedom, is of a discriminatory nature incompatible with Article 14 (art. 14) therefore violates those two Articles taken in conjunction. It is as though Article 14 (art. 14) formed an integral part of each of the provisions laying down rights and freedoms...&quot;, para. 32. Violations. The claims seem to arise out of the same factual circumstances. Detailed examination of the Article 14 issue (strict review).</td>
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b) Different events lie at the roots of the complaints under Article 14 and the substantive Article
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<td>Elsholz v. Germany, 13.07.2000</td>
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<td>Suffered prejudice on ground of legislation on contacts between unmarried fathers and children. Finding of Court based on the insufficient involvement of the applicant in the decision-making process on account of refusal to order an independent psychological report and the absence of a hearing before the Regional Court in question. Discrimination, 14 in conjunction with 8. Suffered prejudice on ground of legislation on contacts between unmarried fathers and children. Non-violation. The issues at stake arise out of the same factual circumstances. The Court, however, deals with the Article 8 issue on basis of a different factual circumstance than the Article 14 issue. Detailed examination of the Article 14 issue (although not particularly strict review).</td>
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<td>McMichael v. The United Kingdom, 24.02.1995</td>
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<td>Fair hearing, 6:1.</td>
<td>Inability to see confidential reports and other documents in adoption proceedings. Respect for family life, 8. Inability to see confidential reports and other documents in adoption proceedings. Discrimination, 14 in conjunction with either 6:1 or 8. As an unmarried father the second applicant had no legal right to custody or to participate in the adoption proceedings. Non-violation. The issues at stake seem to arise out of different factual circumstances. Detailed examination of the Article 14 issue (although not particularly strict review).</td>
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<td>Gillow v. The United Kingdom, 24.11.1996</td>
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<td>Right to respect for the home, 8.</td>
<td>Interference, unspecified. Dealt with by the Court in terms of the legislation in question not constituting a violation whereas the exercise of discretion under the legislation constituted a violation. Discrimination, 14 in conjunction with 8. Preferential treatment accorded to certain groups under the legislation. Non-violation. The issues at stake seem to arise out of different factual circumstances. Detailed examination of the Article 14 issue (although not particularly strict review).</td>
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<td>De Jong, Bajlet and van den Brink v. The Netherlands, 22.05.1984</td>
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<td>Lawful arrest or detention on a reasonable suspicion of having committed an offence, 5:1(c) (non-violation). Arrested or detained brought promptly before a judge, 5:3.</td>
<td>Auditeur-militair does not exercise judicial power. Lawfulness of detention decided speedily, 5:4. Length of absence of access to a court. Discrimination, 14 in conjunction with 5. Procedure contrary to usual practice on account of special mission. Non-violation. The issues at stake seem to arise out of different factual circumstances. Cursory examination of the Article 14 issue (lenient review).</td>
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<td>Case</td>
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<td>Sunday Times (I) v. The United Kingdom, 26.04.1979</td>
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<td>Engel and Others v. The Netherlands, 08.06.1976</td>
<td>Active - overt</td>
<td>Military personnel v. civilians / Different military rank</td>
<td>Lawful arrest or detention, 5:1. Issue: Provisional arrest fulfilling none of the purpose requirements of Article 5:1. Violation in respect of one of the five applicants. Also, a claim of unlawful committal to a disciplinary unit where no violation was found. Discrimination, 14 in conjunction with 5:1. Issue: Different disciplinary measures according to rank and different treatment of servicemen and civilians. Fair trial, 6. Issue: Judicial proceedings conducted in camera in opposition to the requirement for public hearings. Violation in respect of three or five applicants. Also, claims of various other violations of Article 6 where no violations were found. Discrimination, 14 in conjunction with 6: Lesser guarantees in military disciplinary proceedings than in civilian criminal proceedings.</td>
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<tr>
<td>Camp and Bourimi v. The Netherlands, 03.10.2000</td>
<td>Active - overt</td>
<td>Illegitimacy</td>
<td>No violation in respect of relationship of child and mother or mother and father's family. As regards child and father's family: &quot;...the complaint in respect of the family life between Sofian and his father's relatives is closely related to the applicants' contention that the law in force allowed these relatives to treat Sofian differently from a child who, unlike Sofian, had a legally recognised family relationship with his father as from its birth. The Court considers that this issue falls more appropriately to be examined under Article 14 of the Convention taken in conjunction with Article 8&quot;, para. 29.</td>
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<td>Thlimmenos v. Greece, 06.04.2000</td>
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<td>Religion</td>
<td>Freedom of religion, 9. Issue: Conviction for insubordination and refusal to appoint as a chartered accountant interferes. Discrimination, 14 in conjunction with 9. Issue: Refusal to appoint as a chartered accountant because of the conviction for insubordination discriminates. &quot;...no independent existence...&quot; and &quot;...the application of Article 14 does not presuppose a breach of one or more of such provisions and to its extent it is autonomous. For Article 14 to become applicable it suffices that the facts of a case fall within the ambit of another substantive provision of the Convention or its Protocols...&quot;, para. 40. Violation. As regards Article 9 in isolation: &quot;...not necessary...&quot;, para. 53. The issues at stake seem to arise out of the same factual circumstances.</td>
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<td>Protection of property, A1P1 independently and in conjunction with 14. Violations on both counts. Freedom of association, 11 independently and in conjunction with 14. Violations on both counts. Article 9 independently. Not necessary.</td>
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<td>Active - overt</td>
<td>Nationality</td>
<td>Denied social security benefits, 14 in conjunction with A1P1. Also claims of independent violations under 6:1 and 8.</td>
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"Given the nature of the case and the allegations of the applicant, the Court considers it appropriate to examine it first under Article 8 taken in conjunction with Article 14...", para. 23. "In view of the conclusion reached in the preceding paragraph, the Court does not consider it necessary to rule on the allegation of a violation of Article 8 taken alone; the arguments advanced in this respect are essentially the same as those examined in respect of Article 8 taken in conjunction with Article 14", para. 37."

"...no independent existence..." and "Where a substantive Article of the Convention has been invoked both on its own and together with Article 14 and a separate breach has been found of the substantive Article, it is not generally necessary for the Court to consider the case under Article 14 also, though the position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case...", para. 89. Violations of Article 14 in conjunction with both A1P1 and 11. Not necessary to review 9."

Violation. "...not consider it necessary to examine the case under Article 6 para. 1 (art. 6-1).", para. 55. "...no separate issue arises under Article 8 of the Convention (art. 8),", para. 57. The issues at stake seem to arise out of the same factual circumstances."

Violation. "Given the nature of the complaints, the Court, like the Commission, deems it appropriate to examine the case directly under Article 14 taken together with Article 8", para. 21. "...unnecessary to determine whether there has also been a breach of Article 8 taken alone.", para. 30."

"In view of the nature of the allegations made, the Court, like the Commission, considers it appropriate to examine the present case under Article 8 taken in conjunction with Article 14...", para. 30. Violation. "In view of the conclusion reached in paragraph 36 above, the Court does not consider it necessary to rule on the allegation of a violation of Article 8 taken alone; the arguments advanced in this respect are in any case the same as those examined in respect of Article 8 taken in conjunction with Article 14.,", para. 37. "...no separate issue arises under Article 9, either alone or read in conjunction with Article 14, since the factual circumstances relied on [...] are the same as those which are at the root of the complaint under Article 8 taken in conjunction with Article 14, of which a violation has been found.", para. 38."
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| **Passive** |
| -overt |
| -accommodation |

- Ban against political activities, 10 and 11.
- Homosexuals excluded from military service not severe enough to constitute a violation of Article 3.
- Positive obligation to recognize for legal purposes the new sexual identity of applicants, 8.
- Not having already received restitution of tax.
- Victims of unlawful sexual abuse.
- Nationality.
- Tenants v. landlords: residential v. non-residential.
- Sex.
- Civil action v. criminal proceedings.
- Convicted person in custody v. not in custody.

- No independent evidence.
- A measure which itself is in conformity with the requirements of the Article, conforming to the right of freedom in question may however infringe this Article when a line in conjunction with Article 14 for the reason that it is of a discriminatory nature.
- No-violation of Article 3. The Convention taken alone or in conjunction with Article 14, para. 67. Non-violation.
- Court's reasoning under Part 2 is equally uncompromised in the sections of "reasonable and objective justification" for the purposes of Article 14, para. 76. Non-violation of A1P1 in conjunction with 14. On 6:1 in conjunction with Article 14, para 129. Non-violation.
- Non-violation of A1P1 in conjunction with 14. On 6:1 in conjunction with Article 14, para. 118. "...the reasons which have added in respect of the above finding equally support the conclusion that there has been no violation, para. 119.

"...no independent evidence," and "...A measure which itself is in conformity with the requirements of the Article, conforming to the right of freedom in question may however infringe this Article when a line in conjunction with Article 14 for the reason that it is of a discriminatory nature," - no-violation of Article 3. The Convention taken alone or in conjunction with Article 14, para. 67. Non-violation.
- Court's reasoning under Part 2 is equally uncompromised in the sections of "reasonable and objective justification" for the purposes of Article 14, para. 76. Non-violation of A1P1 in conjunction with 14. On 6:1 in conjunction with Article 14, para 129. Non-violation.
- Non-violation of A1P1 in conjunction with 14. On 6:1 in conjunction with Article 14, para 118. "...the reasons which have added in respect of the above finding equally support the conclusion that there has been no violation, para. 119.
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<tr>
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<td>Birth Respect for family life, 8.</td>
<td>Refer to Rasmussen &quot;ambit&quot; formula, para. 71.</td>
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<tr>
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<td>Refer to Rasmussen &quot;ambit&quot; formula, para. 71.</td>
<td>Violation.</td>
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</table>

*The arguments on which the claim [...] rests are the same as those relied on by the applicants in respect of Article 3 of Protocol No. 1 taken in isolation. The Court accordingly simply refers to the reasons for which it has already rejected those arguments.*, para. 59.
### TABLE 3

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<th>Case</th>
<th>Type</th>
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<td>Engel and Others v. The Netherlands, 08.06.1976</td>
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<td>Military personnel v. civilians in different military ranks</td>
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<td>Swedish Engine Drivers' Union v. Sweden, 06.02.1976</td>
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<td>Not among most representative unions</td>
<td>Freedom of association, 11.</td>
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</table>

"...complements the other substantive provisions of the Convention and the Protocols. It may be applied in an autonomous manner as a breach of Article 14 does not presuppose breach of those other provisions. On the other hand, it has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by the other substantive provisions. As the Court has found that there was no forced or compulsory labour for the purposes of Article 4, the question arises whether the facts in issue fall completely outside the ambit of that Article and, hence of Article 14."*, para. 43. Non-violation.

"...a measure which is in itself in conformity with the requirements of the Article enshrining the right or freedom in question may therefore infringe this article when read in conjunction with Article 14 for the reason that it is of a discriminatory nature. It is as though Article 14 formed an integral part of each of the Articles...*", para. 44. Non-violation.

"...a measure which is in itself in conformity with the requirements of the Article enshrining the right or freedom in question may however infringe this Article when read in conjunction with Article 14 for the reason that it is of a discriminatory nature.*", para. 9, p. 33. Violation.
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</tr>
<tr>
<td>Gerger v. Turkey, 08.07.1999</td>
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</tr>
<tr>
<td>Kamasinski v. Austria, 19.12.1989</td>
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<td>Convicted persons in custody v. not in custody</td>
<td>Right to a fair trial. The complaints of the applicant concerned all the different provisions of Article 6, taken on their own, together or in conjunction with Article 14. Complaints reviewed under these Convention provisions as designated by the Court. One of them was the claim that convicted persons in custody could be refused leave to attend appeal hearings. In respect of this complaint no review was undertaken under aspects of Article 6 independently, only Article 14 in conjunction with Article 6.</td>
<td>Non-violation.</td>
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<tr>
<td><strong>TABLE 3</strong></td>
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<td></td>
</tr>
<tr>
<td><strong>Inze v. Austria, 28.10.1987</strong></td>
<td>Active-overt</td>
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<tr>
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8. Claim of a violation of Article 14 decided with reference to issues of proof. The issue of necessity of review does not seem to arise and this seems unrelated to the question of whether there has been a violation of the substantive Article(s) or not.

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JUDGMENTS REFERRED TO IN THE STUDY

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The official publications of the judgments of the European Court of Human Rights are in two forms. The first, entailing judgments from 1960-1995, is *Publications of the European Court of Human Rights, Series A*, Vol. 1-338, Köln: Carl Heymanns Verlag. Judgments reported in this publication are cited by reference to the name of the case, the date of the judgment and the relevant volume of Series A (e.g. *Darby v. Sweden*, Series A, 187). From 1996 onwards the *Publications of the European Court of Human Rights*, Series A, have been replaced by the *Reports of Judgments and Decisions, 1996-*, Köln: Carl Heymanns Verlag. Judgments reported in this publication are cited by reference to the name of the case, the date of the judgment and the relevant year and volume of the reports (e.g. *C. v. Belgium*, Reports 1996-III). As of 1 August 2001 the official reports of judgments and decisions only reach as far as May 1999 (Reports 1999-III). The more recent judgments dealt with in this study are derived from HUDOC, the searchable database of the case law of the European Convention on Human Rights, accessible via http://hudoc.echr.coe.int/hudoc/. These judgments are cited by reference to the name of the case, the date of the judgment and the database’s website (e.g. *Thlimmenos v. Greece*, 06.04.2000, http://hudoc.echr.coe.int/hudoc/).

Abdulaziz, *Cabales and Balkandali v. The United Kingdom*, 28.05.1985, Series A, 94.
Airey v. *Ireland*, 09.10.1979, Series A, 32.
Artico v. *Italy*, 13.05.1980, Series A, 37.
Beyeler v. *Italy*, 05.01.2000, http://hudoc.echr.coe.int/hudoc/.
C. v. *Belgium*, 07.08.1996, Reports 1996-III.
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Petrovic v. Austria, 27.03.1998, Reports 1998-II.


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Rees v. The United Kingdom, 17.10.1986, Series A, 106.


Rekvenyi v. Hungary, 20.05.1999, Reports 1999-III.

Rekvenyi v. Hungary, 20.05.1999, Reports 1999-III.


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Vogel-Polsky, Elaine: Positive action and the constitutional and legislative hindrances to its implementation in the member states of the Council of Europe, EG (89) 1, Strasbourg: European Committee for Equality Between Women and Men, 1989.

CHAPTERS IN EDITED COLLECTIONS


ARTICLES


———: Um gildissvið og eðli hinnar almennu jafnraðisreglu Stjórnarskáítrinnar, (1997) 47:2 Timarit Lögfræðinga, p. 94.


APPENDIX 1
Viðauki nr. 12 við Mannréttindasáttmála Evrópu
-Nýir möguleikar á sviði jafnæðisverndar
Mannréttindasáttmálan -1

1. Inngangur

Þann 4. nóvember 2000 voru 50 ár liðin frá undirritun Mannréttindasáttmála Evrópu. Á þeim tímannótum för fram undirritun á viðauka 12 við sáttmálanum sem felur í sér almennt bann við mismunun. Ísland var á meðal þeirra 25 aðildarríkja Evrópuráðsinns sem undirrituðu viðaukann en hann mun taka gildo er 10 aðildarríki hafa fullgilt hann.


1 Grein þessi er byggð á erindi sem flutt var á málþingi þann 4. nóvember 2000 í tilefni af 50 ára afmæli Mannréttindasáttmála Evrópu. Málþingið var haldin á vegum Mannréttindastofnunar Háskóla Íslands, Mannréttindaskrástofu Íslands og ReykjavíkurAkademilunnan.
2 Mannréttindasáttmáli Evrópu, ETS nr. 5.
hætti meginegluna um jafnraði og bann við mismunun sem segja má að hafi öðlast alljóðilega viðurkenningu.6 þessi takmarkaða staða 14 gr. sem nokkurs konar fylgiréttað hefur gjarnað verið gagnrýnd. Hefur þá einkum verið bent að hún feli í sér rýrari réttarvernd en jafnraðísákvéði annarra mannréttindasáttmála.6

Það var fyrir frumkvéði þeirra stofnana innan Evrópuráðsins sem vinna annars vegar að jafnrétt kynjanna og hins vegar gegn kynþáttahatri að viðauki 12 varð að veruleika. Í báðum tíliaum var á því byrgt að nauðsynlegt væri að tryggður væri sjálfstaður réttur til jafnraðís og bann við mismunun á viðkomandi sviðum og unnið að tillögum þess efnis. Á grundvelli þeirra tillagna hóf styrtnefnd Evrópuráðsins á sviði mannréttinda vinnu að nýjum viðauka við Mannréttindasáttmálann sem myndi með almennum hætti víkka út gildissvið 14. gr. hans.7 Afrakstur þeirrar vinnu er efnisákvéði 1. gr. viðaukans sem hér fer á eftir í lauslegri þyðingu:

□Öll lagaleg réttindi skulu tryggð án nokkurra mismununar svo sem vegna kynferðis, kynþáttar, litarháttar, tungu, trúarbragða, stjórnmála- eða annarra skoðana, þjóðernis eða þjóðafélagsstöðu, tengsla við þjóðernisminnihluta, eigna, uppruna eða annarrar stöðu.
□Enginn skal sæta nokkurri mismunun af hálfu opinberra aðila svo sem vegna þeirra ástæðna sem nefndar eru í 1. málsgrein.8

Segja má að í viðauka 12 og skýringum við hann sé einkum snert á þremur álitaefnum. Þau eru hugtakið mismunun og greiningaraðferð mála þar sem ríkjandi viðhorf eru staðfest, gildissvið banns við mismunun sem víkkað er út og jákvéðar

5 Sjá t.d. tilvísun til silkrar meginreglu í aðfararordum að viðauka 12: “Having regard to the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law.”; Sjá almennt Anne F. Bayefsky: The Principle of Equality or Non-Discrimination in International Law.
6 T.d. van Dijk og van Hoof, bls. 711; Asbjörn Eide og Torkel Opsahl: Equality and Non-Discrimination, bls. 201; Lars Adam Rehof and Tyge Trier: Menneskeret, bls. 393.
8 Þé ensku er 1. gr. viðaukans svohljóðandi:
“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.
□No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.
2. Hugtakíð mismunun og greiningaraðferð mála – staðfesting
Viðauki 12 staðfestir ríkjandi viðhorf og dómastafarmæt um hugtakíð mismunun og greiningaraðferð Mannréttingadómstólóins í málum á grundvelli 14. gr Mannréttingdasátthálóins. Þetta er árættad í skýringum við viðaukann sem og í umsögn Mannréttingadómstólóins um hann. Í því felst að það telst mismunun ef greinararmunur sem gerður er á samþjónilegum tilvikum bygdir ekki á hlutlægum og málefnalegum forsendum. Við mat á því hvort slikar hlutlæg og málefnalegar forsendur séu fyrir hendi er kannað hvort með því að gera greinararmun sé leitast við að fullnægja lögmetu markmiði og hvort gengið sé lengra en þörf krefur við val á aðferð til að ná því markmiði eða m.o.o. hvort ákvæðinni meðalhófsreglu sé fylgt.9 Tilvik sem eru að öðru leyti samþjónileg kunna að hafa í sér fólgunn einhvern þann mun sem réttlaett getur mismunandi meðferð þeirra.10 Í hugtakinnu mismunun felst því ekki að einfaldlega sé bannað að gera greinararmun við meðferð mála.

Ekki var bætt við upptalningu þeirra ástæðu sem geta legið til grundvallar mismunun en þær ástæður sem berum orðum eru taldar upp í 14. gr. Mannréttingdasátthálóins og í 1. gr. viðauka 12 eru: kynferði, kynþáttur, litarháttur, tunga, trúarbrögð, stjórnmálalýsing, aðrar skoðanir, þjóðernis eða þjóðfélagstæða, tengsl við þjóðernismaðhófsreglu, eignir, uppruni eða önnur staða. Var á því byggt að viðbætur væru óparfar þar sem listinn fædi ekki í sér tæmandi talningu og dómstöllinn hefði þegar beitt 14. gr. um mismunun á öðrum grundvelli en þar væri talin. Þá var talin hættta á því að viðbætur við listann gætu leitt til óréttaþanlegar gagnályktunar í túlkun.11

11 Sjá skýringar við viðauka 12, málsgrein 20 þar sem m.a. er vitnað í málið Salgueiro da Silva Mouta gegen Portugal, málsgrein 80 sem fjallað um mismunun á grundvelli kynhneigðar. Í skýringunum eru
3. Gildissvið banns við mismunun - útvikkun

Það er ljóst að með viðauka 12 er gildissvið verndar gegn mismunun verulega víkkað út. Samkvæmt skýringum við viðaukann á bann við mismunun að ná til:¹²

a) Hverskonar réttinda sem eru berum orðum veitt einstaklingum í landsrétti.

b) Hverskonar réttinda sem leiða má af skyldum opinberra aðilja samkvæmt landsrétti.

c) Beitingu opinbers valds við tóku matskenndra ákvarðana.

d) Hverskonan annarrar athafa eða aðathfaleysis af hálfa opinberra aðilja.


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¹² Skyringar við viðauka 12, málsgrein 22.
¹³ Sama heilmild, einkum málsgreinar 22 og 29.
¹⁴ Björn Thorarensen: Einkaréttaðhrif Mannréttindasáttmála Evrópu og skyldur rikja til athafna samkvæmt sáttmálanum, bls. 85, setti fram hugtakið "einkaréttaðhrif" yfir það sem á alþjóðavettvangi er oft kallað "drittwirkung" eða líratr áhrif (e. "horizontal effect") Mannréttindadákvæða, þ.e. ... ðegar lagaákvæði sem luta að mannréttindum gilda um lögskipti einstaklinga ínnsbyrðis en ekki aðeins um lögskipti einstaklinga við ríkis.” Eins og Andrew Clapham: Human Rights in the Private Sphere, bls. 91-93, bendir á eru einkaréttaðhrif fyrir tilstilli jákvæða skyldna ríkja aðeins eitt dæmi af fleirum þar sem einkaréttaðhrifra ákvæða Mannréttindasáttmála Evrópu kann að gæta.
4. Jákvæðar skyldur – nýr möguleikar

4.1. Hugtökin jákvæðar skyldur og einkarárráður

Sögulega hafa mannréttindaákvæði einkum beinst að neikvæðum skyldum ríkja. Neikvæðu skyldurnar fela í sér að ríkið skuli ekki fremja mannréttindabrot eða nokkurs konar athafnaleysisskyldu. Jákvæðar skyldur ríkja á grundvelli mannréttindaákvæða fela hins vegar í sér að ríki skuli gripa til aðgerða eða athafna til þess að tryggja mannréttindi og fela því í sér nokkurskonar athafnaskyldu. Það er ljóst að slik athafnaskylda getur leitt til fjárútláta af hálft ríkssins.15 Í framkvæmd birtast jákvæðar skyldur ríkja í því að þau teljist hafa framið mannréttindabrot vegna vanrækslu um að tryggja ákveðin mannréttindi eða raunhæfð mannréttindarettindavernd með lögum eða í raun.16 Undir slikar jákvæðar skyldur geta fallið ýmis tilvik, einkum þau sem lúta að réttarstóðu einstaklinga og lögskiptum einstaklinga við ríkið en einnig þau sem lúta að lögskiptum einstaklinga eða einkaaðila innbyrðis. Í söðasteindi tilvikinu leidu því jákvæðar skyldur til þess að mannréttindaákvæði hafa svokolluð einkarárráður, þ.e. ríkið er gert ábyrgð samkvæmt mannréttindaákvæði fyrir það að hafa ekki tryggt að samskipti einkaaðila innbyrðis lúti ákveðnum efniskrófum.17

4.2. Hugtökin jákvæðar skyldur og jákvæðar aðgerðir

Rétt er einnig að fjalla hér um hugtökin jákvæðar skyldur og jákvæðar aðgerðir og leggdja áherslu á muninn á þeim. Það sem hér er nefnt jákvæðar aðgerðir nært t.d. yfir það sem í 2. mgr. 22. gr. laga um jafna stóðu og jafnan rétt kvenna og karla, nr. 96/2000, er nefnt sérstakar tímanbandnar aðgerðir og aðgerðir til að auka möguleika kvenna eða karla sérstaklega.18 Það getur gerst að hugtökunum jákvæðar skyldur ríkja

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15 Um neikvæðar og jákvæðar skyldur á vettvangi Mannrétindasáttmála Evrópu, sjá Harris, O'Boyle og Warbrick, bls. 19-20 og Bayefsky, bls. 30-32.
16 Sjá t.d. dóm Mannrétindadómstölsins í málinu Airey gegn Írlandi, málsgrein 25, þar sem tekið var fram að nauðsynlegt geti verið að ríki gripi til aðgerða til að fullhægja skyldum sinum samkvæmt sáttmálanum og að ekki vera efni til að greina á milli athafna og athafnaleysis í því sambandi. Í málinu var það talið brot á 1. mgr. 6. gr. Mannrétindasáttmála á konu var ekki tryggð gíafskón í skilnaðarmál.
17 Harris, O'Boyle og Warbrick, bls. 20-21 og van Dijk og van Hoof, bls. 23. Sjá t.d. dóm Mannrétindadómstölsins í málinu, X og Y gegn Hollandi þar sem ríki var gert ábyrgð vegna þess að ekki var hægt að koma fram ákeru vegna kynderíðsbrots gegn osjálfráðu stúlu.
18 Jákvæðar skyldur eru vennulega kallaðar “positive obligations” á ensku. Ymis orð eru hófð yfir jákvæðar aðgerðir á ensku s.s. “special measures”, “positive action”, “affirmative action”, “preferential treatment” og “reverse discrimination”.

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og jákvæðar aðgerðir sé ruglæð saman eða þau notuð á öljósan hátt.19 Jákvæðar skyldur ríkja fela einfaldlega í sér að ríki geti talist hafa framið mannréttindabrot með aðgerðarleysi um að tryggja mannréttindi. Jákvæðar aðgerðir á grundvelli jafnráðisregluna eru aðgerðir sem gripið er til í því skyni að stuðla með virkum hætti að fullu jafnraði á þeim sviðum þar sem það ríki ekki í raun. Slikum jákvæðum aðgerðum er ætlað að beinast gegn og leiðrétta aðstæður sem valda eða viðhalda mismunun. Þeim er ætlað að vera timabundnar og falla niður þegar þessar aðstæður hafa verið leiðrétta.20 Sem dæmi um jákvæðar aðgerðir má t.d. nefna ýmisskonar átaksverkefni sem eiga að stuðla að vitundarvakningu, sérstök verkefni á sviði menntunar og þjálfunar og allt upp í sértaðt forskot eða viðhalla meðferð einstaklinga sem tilheyra ákveðnum hópum í samkeppni um afmörkuð gæði.21


4.3. Núgildandi réttarstaða á grundvelli 14. gr. Mannréttindasáttmála Evrópu
Hugmyndir um jákvæðar skyldur ríkja á grundvelli ákveða Mannréttindasáttmála Evrópu eru yngri en hugmyndir um neikvæðar skyldur ríkja og eru þær í sifelldri þróun. Í dómum Mannréttindadómstólsins á grundvelli hinna ýmsu efnisgreina sáttmálans hafa smáð saman það við dæmi um jákvæðar skyldur en án þess þó að dómstóllinn hafi sett fram heildstæða nálgun á fyrirbærið.22 Það hefur verið talið einkenna jákvæðu skýldurnar að umflokkun um þær verði að nálgest á grundvelli hvers


21 Sjá t.d. ýmis dæmi um jákvæðar aðgerðir á sviði janfréttis kynjanna sem nefnd eru í Elaine Vogel-Poljsky: Positive action and the constitutional and legislative hindrances to its implementation in the member states of the Council of Europe, bsl. 70-78.

22 Harris, O’Boyle og Warbrick, bsl. 284.
efnisákveðís fyrir sig. Tilvist jákvæðra skyldna og þá hverjar kröfur þær leggi á aðildarríkin sé breytilegt eftir aðstæðum.²³ Hvað varðar jákvæðu skyldurnar er einnig nauðsynlegt að líta til matsvika ríkja. Kenningin um matsvik visar til þess hversu langt dómtöllin skuli ganga í að endurmeta gerðir fullvalda ríkja og til skiptingar valds á milli aðildarríkjanna og dómtölsins.²⁴ Bent hefur verið að dómtöllinn visi gjarnan til matsvika og veiti ríkjun þannig viðtækara svigrum til eigin mats á aðstæðum áður en hann gripi til þess að leggja jákvæðar skyldur á þau.²⁵

Til skamms tíma hefur Mannréttingadómstöll Evrópu veigrað sé við því að tengja jákvæðar skyldur við 14. gr. sáttmálans. Í gagnmerkum dómi sem kveðinn var upp 6. apríl 2000 í málinu Thlimmenos gegn Grikklandi brá þó svo við að dómtöllinn kom í fyrsta sinn að jákvæðri skyldu á grundvelli banns við mismunun. Efnisatriði málsins voru þau að maður sem var meðlimur í söfnudó votta jehóva hafði verið dæmdur til 4 ára fangelsisrefningar fyrir að neita vegna trúarástæðna að klæðast herrmannabúningi. Nokkrum árum síðar var honum neitað um lóggingingu sem endurskoðandi þar sem lagaskilyrði kröfðust þess að hann hefði ekki verið dæmdur til refningar fyrir alvarlegt brot en brot hans flokkaðist sem slíkt. Í fersendum dömsins var tekið fram að til þessa hafi verið á því byggt að það sé mismunun þegar einstaklingar í sambærilegri aðstöðu sæk mismunandi meðferð en að það sé ekki eina birtingarmynd mismununar. Það geti einnig talist mismunun ef ríki vanræka að fara á mismunandi hátt með mál sem eru í grundvallaratriðum ólík og sú vanræksla verður ekki réttlætt með hlutlægum og málefnalegum fersendum.²⁶

Í máli þessu taldi dómtöllinn aðgerðaleysi ríkisins fela í sér mismunun. Aðgerðarleysi fólst í því að hafa ekki í lögum ákvæði sem tæki tillit til þess hversu eðlisólfkt brot mansins væri alvarlegum afbrotu. Með dóminum má segja að til viðbótar áður ríkjandi áherslu á að fara eins með tilfelli sem teljast sambærileg hafi verið bætt áherslu á að fara ekki eins með tilfelli sem teljist eðlisólfík. Dómurinn bendir þó í sjálflu sér til þess að nokkud mikíði geti þurft til að koma. Í nálgun dómsins

²³ Sama heimild, bls. 284-285.
²⁶ Thlimmenos gegn Grikklandi, málsgrein 44.
var í fyrsta lagi vísað til þess að tilfellin þurfi að vera í grundvallaratriðum ólík til þess að skylda til þess að veita mismunandi meðferð vakni.27 Við mat á því hvort um hlutær og málefnaðar forsendur hafi verið að ræða var síðan litið til þess hversu langt var gengið gagnvart manninum með því að meina honum að gerast löggjiltur endurskoðandi. Brot hans að neita af samviskuástæðum að ganga í hermannabúningi var andstætt öðrum alvarlegum brotum ekki talið benda til óheiðarleika eða skorts á síðferði sem haft gæti áhrif á hæfini hans til að starfa sem endurskoðandi. Auk þess var talið of langt gengið að leggja á hann frekari viðurlög þar sem hann hafði þegar afplánað Fangelsisrefsing við brotini.28

4.4. Jákvædar skyldur í ljósi viðauka 12
Álitaefnunum sem varða jákvæðar skyldur ríkja á grundvelli banns við mismunun og það hvort þær geti leit tilit einkaréttaáhrifins eða skyldu til að gripa til jákvæðra aðgerðar er varpað í brennpunkt með viðauka 12 og í skýringunum við hann. Í viðaukanum virðist leitað við að sigla milli skers og báru og finna meðalhofsleið á milli engra jákvæðra skyldna og mjög viðtækra jákvæðra skyldna. Ummæli skýringanna við viðaukann virðast á köflum misvisandi um það hvernig ætlanin er að draga þarna mörkin. Hér á eftir verður þó leitað við að skýra hvernig þessi mörk verði að likendum dregin.

Til að byrja með er gagnlegt að setja fram fáein dæmi um hugsanleger birtingarmynndir jákvæðra skyldna í nokkurs konar röð sem liggur frá tilfellum semanga stutt í að leggja byrðar á ríki á grundvelli jákvæðra skyldna upp í tilfellum semanga langt.29 Rétt er að geta þess að þessi röðun dæma er sett fram til skýringar og einföldunen ekki sem algild sannindi um það hversu ríkar jákvæðar skyldur þau teljast leggja á ríki. Til dæmis er vel hugsanlegt að jákvæð skylda til að banna mismunun sem hefur einkaréttaáhrif (flokkur 1, sbr. 4) teljist ganga skemur en vanræksla um að taka mið af eðlismun tilvika (flokkur 3). Eftirfarandi eru dæmi um tilvik sem gætu talist mismunun á grundvelli jákvæðrar skyldu:

27 “...significantly different.”, sama heimild, málsgrein 44. Mannréttingadómstöllinn hefur margaft áburður talíð að einnenni sem eru ólík með annars samberilegu tilvikum (“...differences in otherwise similar situations...”) geti í sjálflu sér réttlaðt mismunandi meðferð, sbr. t.d. Rasmussen gegn Danmörku, málsgrein 40.
28 Thlimmenos gegn Grikklandi, málsgrein 47.
29 Dæmin eru einhver byggð á skýringunum við viðauka 12 og á domi Mannréttingadómstólsins i málinu Thlimmenos gegn Grikklandi.
1. Vanraeksla um að banna tilteknar tegundir mismununar með lögum.
2. Vanraeksla um að laða meðferð sem tryggð er einum hóp na til annars hóps.
4. Vanraeksla um að tryggja 1-3 á sviði lögskipa einstaklinga innbyrðis (einkaréttaráhrif).
5. Vanraeksla um ýmisskonar aðgerðir til að stuðla að jafnraði, þ.m.t. að tryggja einstaklingum sem tilheyra ákveðnum hópum sértækila viðhalla meðferð (jákvæðar aðgerðir).
6. Vanraeksla um að tryggja 5 á sviði lögskipa einstaklinga innbyrðis (jákvæðar aðgerðir með einkaréttaráhrifum).

Það sem fyrrst vekur athygli í viðaukanum er að ekki er berum orðum vísað til jafnraðis í sjálfrí 1. gr. hans heldur eingöngu stuðst við hína neikvæðu orðmynd mismunun.30 Tilvisanir til jafnraðis vísa mun frekar til jákvæðra skyldna heldur en hín neikvæða orðmynd mismunun. Telja má þetta fyrrstu visbendinguna um varkární í nálgun viðauka 12 þegar kemur að jákvæðum skyldum. Ekki var þó hægt að lita fram hjá meginreglunni um jafnraði og hennar er því getið í eingangssórum að viðaukanum og nánar í skyringum við hann.31 Þar er þess getið að hún féli í sér að fara skuli eins með tilfelli sem séu sambærileg og að fara skuli á mismunandi hátt með tilfelli sem séu mismunandi. Vanhold á sliðkri meðferð geti síðan falið í sér mismunun og þannig séu meginreglan um jafnraði og bann við mismunun tengd.32 Hér er möguleikanum að jákvæðum skyldum ríkja á grundvelli meginreglunnar um jafnraði komið að með sambærilegri nálgun og röksemðafærslu og Mannréttingadómstöllinn beitti í Thlimmenos málinu. Þessi nálgun felur í sér að ekki er beinlínis byggt á meginreglunni um jafnraði nè lýst yfir jákvæðum skyldum en svipaði niðurstöðu komið að með tulkun á neikvæða hugtakinu mismunun. Þessi nálgun hvetur augljóslega til varkární en útilokar í sjálfru sér ekkert.

30 Hugtökin jafnraði og mismunun eru talin vera jákvæð og neikvæð orðmynd sömu meginreglu, sjá t.d. Bayefsky, bsl. 1, nedamálsgrein 1, með tilvísunum til heimilda.
31 Skyringar við viðauka 12, málsgreinar 1, 14 og 15.
32 Sama heimild, málsgrein 15.
Fleiri ummæli í skyringunum eru í svipuðum dúr. Þannig er tekið fram að ekki sé útilokad að jákvæðar skýldur geti falist í viðaukanum þótt vissulega sé meginmarkmið hans að fela í sér neikvæða skýldu ríkj. Hvað varðar þessar jákvæðu skýldur er nánar skýrt að þar sé átt við hugsanlega skýldu til að koma í veg fyrir mismunun eða að bæta fyrir tilfelli þar sem mismunun hefur átt sér stað.33 Sem dæmi um slíkt er nefnt að skýrar eyður í lagalegi vernd gegn mismunun geti leitt til þess að ríki teljist hafa brotið gegn jákvæðum skýldum á grundvelli 1. gr. viðaukans.34 Hér vekur athygli að enn er viðhaft neikvætt orðalag og visað til þess að koma í veg fyrir eða bæta fyrir mismunun en ekki visað til aðgerða sem eiga að stuðla að fullu og virku jafnæði. Í ljósi þeirra ummæla skýringanna sem nú hafa verið rakin og að teknu tilliti til Thlimmenos dómsins verður að telja að jákvæðar skýldur samkvæmt viðaukanum geti náð til flokka 1-3 í upptalningunni hér að framan og sambærilegra dæma.

Þá er að huga að 4. flokki í dæmatalningunni hér að framan, jákvæðum skýldum sem ná til þess að ríkjum ber að gripa til aðgerða sem varða lægskipi einstaklinga innbyrðis. Skýringar við viðauka 12 leggja allnokkrar áherslu á umfjöllum um einkaréttaðarhrifin og skilaboðin eru nokkuð skýr. Tekið er fram að ekki sé stefnt að því að það sé almenna reglan að jákvæðu skýldurnar leiði til einkaréttaðarhrifa.35 Þó er þess getið að það sé ekki útilokað og að til þess að slikt sé hugsanlegt þurfi að vera um að ræða skýra og alvarlega mismunun.36 Nánar tiltekið er útlistað að í mesta lagi geti verið um að ræða þau svið lögskipta einstaklinga innbyrðis sem fari fram í opinberum vettvangi og séu háð lagasetningu sem ríkið beri ákveðna ábyrgð á. Nefnd eru dæmi s.s. starfsráðningar, aðgangur að veitingastöðum og aðgangur að almenningshjónustu sem einkaaðilar veita svo sem á sviði heilsugæslu, vatns- eða ráfinagnsveitna.37 Skýringarnar við viðauka 12 gera þannig ráð fyrir möguleika á einkaréttaðarhrífinum þegar um er að ræða skýra og alvarlega mismunun á afmörkuðum sviðum. Lögð er að það áhersla í skýringunum að einkaréttaðarhrífin séu takmörkuð.

Að lokum er komið að flokki jákvæðra aðgerða eða sérstökum tímabundnum aðgerðum í því skyni að stuðla að fullu og virku jafnæði. Í aðfararorðum að viðauka

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33 Sama heimild, málsgrein 24.
34 Sama heimild, málsgrein 26.
35 Sama heimild, málsgrein 25.
36 Sama heimild, málsgrein 26.
37 Sama heimild, málsgrein 28.
12 er þess getið að bann við mismunun komi ekki í veg fyrir að ríkjum sé heimilt að gripa til jákvæðra aðgerða að því skilyrði uppfylltu að sliktar aðgerðir séu réttlaatanlegar á hlutlægum og málefnalegum forsendum.38 Í skýringum við viðaukann er síðan tekið fram að sú staðreynd að ákveðinir hopar fólkins séu illa staddir eða þá að sýnt sé fram á að mismunun ríki í raun getið falið í sér réttlaettingu fyrir aðgerðum sem veita sértaða vihellta meðferð í því skyni að stuðla að jafnfræði.39 Þar er þó einnig tekið skýrt fram að í viðaukanum sé aðeins gert ráð fyrir því að slikt sé heimilt og ekki brot á banni við mismunun en að ekki eigi að tölka hann svo að ríkjum verði gert skylt að gripa til jákvæðra aðgerða.40 Samkvæmt þessu ná jákvæðar skyldur samkvæmt viðauka 12 ekki til jákvæðra aðgerða (flokkur 5). Þar sem jákvæðar aðgerðir með einkaréttaðarhriðum ganga enn lengra myndi rétt að álykta að því síður nái jákvæðu skyldurnar til sílka tilvika (flokkur 6).

4.5. Nýir möguleikar á sviði jafnfræðisverndar Mannréttindasáttmálans

Það virðist ljóst að viðauki 12 er afleiðing af málamíðlun. Tilraunir til að sigla á milli skers og báru leiða til þess að allhokkr óvissu er um jákvæðu skyldurnar. Lykillinn að því að fá rökrænt samhengi í viðaukann og skýringarnar við hann virðist liggja í því að gera skýran greinarum á jákvæðum skyldum annars vegar og jákvæðum aðgerðum hins vegar. Í skýringum við viðaukann er leitast við að draga skýr mörk þannig að hugsanlegar jákvæðar skyldur nái ekki til jákvæðra aðgerða. Að öðru leyti viðist opinð fyrir möguleikann á jákvæðum skyldum sem og einkaréttaðarhriðum innann vissra marka.

Þótt skýringar við viðaukann leitist við að takmarka jákvæðar skyldur við jákvæðar aðgerðir er ekki víst að mörk jákvæðra aðgerða til að stuðla að jafnfræði og annarra aðgerða sem koma í veg fyrir eða þetta fyrir mismunun séu eins skýr í raun og þar virðist byggt á. Með sama hætti og hugtökinn jafnfræði og mismunun eru þetta einungis jákvæð og neikvæð birtingarmynd af sama fyrirbærinu. Það virðist því ekki sjálfgert að greina skýrt á milli skyldunnar til að taka míð af eðlismun mismunandi tilvika

39 Skýringar við viðauka 12, málsgrein 16.
40 Sama heimild.
annars vegar og jákvædra aðgerða hins vegar (flokka 3 og 5) og verður að lokum vikið að því.

Fyrir tilkomu dóms Mannréttingadómstólssins í Thlimmenos málinu og viðauka 12 hafði á sviði jafnæðisverndar Mannréttingasáttmálan ríkt ábersla á að fara eins með tilfelli sem teljast sambæruleg. Slik nálgun hefur verið nefnd formleg nálgun.41 Samkvæmt henni er það skilyrði réttarverndar að geta sýnt fram á að vera í sambærulegri aðstoðu eða vera “eins” og þeir sem njóta betri stöðu. Jóðarstaða eða það að vera “óðruvisi” hefur því leitt til lakaða réttarverndar.42 Nú hafa bæði dómur Mannréttingadómstólssins í Thlimmenos málinu og ákveðin ummaði í skýringum við viðauka 12 staðfest að bann við mismunun geti falið í sér að skylt sé að taka mið af eðlisnun tilvika. Í þeirri nýju áherslu felst að tilfelli sem eru “óðruvisi” skuli njóta vídeigandi “óðruvisi” meðferðar. Slik áhersla hefur verið talin fela í sér efnislega nálgun.43 Með henni er viðurkennt að stundum sé mismunur á tilvikum þess eðlis að hann krefjist mismunandi meðferðar þeirra til þess að jafnæði náist í raun.44 Þessi efnislega nálgun lætur því í sjálfu sér ósvarað hvaða eðlisnunum komi til greina og hvert inntak hinnar vídeigandi meðferðar skuli vera.45 Það mun ráðast í dómaframkvæmd Mannréttingadómstólssins. Ljóst er þó að ef vel er á haldið getur þetta leitt til þess að í ákveðnum tilvikum sé hægt að gera kröfu um það á hendur ríkjun að koma til móts við sérparþr áttlaða jafnæði. Er þá í raun stutt á milli jákvæðrar skyldu til þess að koma í veg fyrir mismunum sem gert er ráð fyrir í viðaukanum og jákvæðrar skyldu til þess stúðla að jafnæði med jákvæðum aðgerðum sem ekki er gert ráð fyrir í viðaukanum.

5. Lokaorð

Eins og vikið var að í kafla 4.3. hér að framan litur Mannréttingadómstólssinn almennt til aðostæðna hverju sinni sem og matsvika ríkja ádur en jákvæðar skyldur eru lagðar á

43 Loenen, bls. 268-269 og Wenthol, bls. 58.
44 Kimber, bls. 270 og Wenthol, bls. 58.
45 Wenthol, bls. 58.

Heimildir


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