

Non-Discrimination of Children

Martin KORNEL

ABSTRACT

This chapter discusses the historical roots of discrimination against children, including explorations about factors such as origin, gender, race, and birth status, and highlights the persistent forms of discrimination in areas such as education, gender-based practices, and social and economic rights. It provides a general outline of the evolution of the principle of the non-discrimination of children in international and regional instruments. The text outlines key discrimination concepts such as the distinction between accessory and autonomous rights, the state's negative and positive obligations to combat discrimination, formal versus substantive equality, prohibited grounds for discrimination, and various forms of discrimination, including direct, indirect, and discrimination by association. The application of the discrimination test according to Art. 14 of the ECHR in cases involving minors is explained in detail. First, the method used to assess the differences in treatment is clarified, and then it is explored how the European Court of Human Rights examines whether such differences are objectively justified (based on the legitimate aim and proportionality criteria).

KEYWORDS

Non-Discrimination of Children; Discrimination Test; Prohibited Grounds; Difference in Treatment; Legitimate Aim; Proportionality

1. Introduction

The non-discrimination of children is a fundamental principle in international human rights law and is enshrined in various international treaties and conventions. It stems from the demand for equality as a central commitment to human rights, and emphasises that all children, regardless of characteristics or background, should be treated equally and have equal access to their basic rights and protections. However, non-discrimination is not limited to being a mere principle, but rather is conceived as both a substantive and procedural right.¹ This involves the obligation of the state to prevent discrimination and the right to take action to address and rectify discrimination when it occurs.

1 Abramson, 2008, p. 2.

Sadly, discrimination against children has a long history, strong roots, and is marked by various forms of mistreatment and inequality. While there has been significant progress in recent decades on the protection of children's rights, it is important to acknowledge the historical discrimination that children have faced. Examples include discrimination based on origin, gender, nationality, race, property, and birth status. For a significant part of history, children born out of wedlock have been subjected to legal and societal discrimination, facing limitations in terms of establishing paternity, securing maintenance, and inheriting property. Gender-based discrimination against children, particularly girls, has also been a widespread phenomenon, potentially manifesting even before birth through practices such as female foeticide, infanticide, and malnutrition. Discrimination against girls can also extend to their access to education, healthcare, and other opportunities, leading to a significant gender gaps in many societies. The same goes for children from marginalised "racial or ethnic" backgrounds across various societies as they face discrimination, segregation, particularly in educational settings, denied equal access to quality education and subjected to systemic racism. As Samantha Besson points out, it is evident that the evolution of children's rights has been a gradual process, initially focused on achieving equality in relation to adults and then on extending such equality in relation to young adults and eventually to other children.²

Regardless of the advancements, it is disheartening that discrimination against children persists in various forms and sectors, including in education,³ birth status,⁴ through female genital mutilation, forced marriage,⁵ social and economic rights, and the status of refugees, as evidenced by the literature and case law of the European Court of Human Rights (ECtHR). These practices not only violate the fundamental rights of children but also underscore the pressing need for continued efforts to eradicate such harmful traditions and protect the rights of children. The state's obligations to address and prevent discrimination are fundamental to its role in upholding the principles of justice and equality in society. At the national level, the main approaches and principles for combating discrimination include the adoption of relevant legislation (e.g. anti-discrimination laws), establishing regulatory bodies to oversee and enforce anti-discrimination laws (e.g. ombudspersons), implementing education programmes, policies (e.g. affirmative actions), robust judicial review procedures, and data collection and research initiatives. These approaches should be consistently implemented in efforts to combat discrimination against children, which must also remain a priority, with governments, international organisations, and civil society working collectively to address these issues, enforce legal protection, and ensure the well-being and safety of all children. Notwithstanding, despite all these measures that can and should be taken, there are still examples in ECtHR case law of violations of the right of children to not to

² Besson, 2005, p. 458.

³ Peleg, 2018, pp. 113–114.

⁴ Maldonado, 2011, pp. 1–5.

⁵ Rafferty, 2013, pp. 1–23.

be discriminated against, such as the violations made by the Czech Republic,⁶ Poland,⁷ and Hungary.⁸ These cases document that there is still much to be done in this field.

In this chapter, we first discuss the evolution of international and regional human rights instruments on the non-discrimination and promotion of equality, particularly in the context of children's rights. We then define the key concepts of discrimination law that prohibit different forms of discrimination, such as direct and indirect discrimination and discrimination by association. Subsequently, we delve into the operational dynamics of the discrimination assessment framework as established by the ECtHR, particularly in the context of cases involving minors in areas such as education, adoption, inheritance and testaments, and citizenship. The examples cover discrimination against children based on grounds such as sex, race, colour, language, religion, political or other opinions, national or social origin, association with a (national) minority, birth status, age.

2. International human rights instruments

During the 20th century, the protection of individuals, including children, against discrimination and the promotion of equality have both seen gradual strengthening, and human rights-related discussions and instruments have also witnessed progress. Throughout this period, national laws have increasingly reinforced protections against discrimination specifically targeting children, and several international instruments have marked significant milestones in the global context of human rights protection, as is explored hereinafter.

The United Nations Universal Declaration of Human Rights (1948): Although not child-specific, the Universal Declaration of Human Rights laid the foundation for the protection of human rights. Accordingly, many of its principles apply to children, implying that it did play a pivotal role in shaping the subsequent development of instruments specific to children's rights. With respect to protection against discrimination, Art. 2 plays a pivotal role, and is described herein:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

The United Nations Declaration of the Rights of the Child (1959): This is the first international instrument to specifically address children's rights, outlining the basic

6 D.H. and Others vs. the Czech Republic [GC], 2007.

7 Grzelak vs. Poland, 2010.

8 Szolcsán vs. Hungary, 2023.

rights and protections to which all children are entitled. Principle 10 specifically provides that:

The child shall be protected from practices which may foster racial, religious, and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace, and universal brotherhood, and in full consciousness that his energy and talent should be devoted to the service of his fellow men.

The United Nations International Covenant on Civil and Political Rights (also known as ICCPR): as one of the core international human rights treaties, it places a strong emphasis on protection against discrimination (e.g. in Arts. 2 and 26), and specifically addresses the prohibition of discrimination towards children under Art. 24 (1), as shown herein:

Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property, or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

Furthermore, discrimination within the meaning of the Covenant, according to the United Nations Human Rights Committee, should be understood to imply the following:

any distinction, exclusion, restriction, or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status and which has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise by all persons, on an equal footing, of all rights and freedoms.⁹

The elements of the prohibited discrimination as outlined above are (a) differentiation of similar situations, (b) absence of legitimate aim, (c) lack of proportionality of means to the aim, (d) use of suspect classifications.¹⁰ In general, the meaning of equality is also promoted by Art. 26, stating that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

9 Human Rights Committee, General Comment 18, Non-discrimination (37th session, (1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994).

10 Besson, 2005, pp. 435–437.

The United Nations Convention on the Rights of the Child (CRC, 1989): The CRC is a landmark treaty that comprehensively outlines the rights of children and covers a wide range of rights. The principle of non-discrimination has been identified as one of the four general principles of the CRC, and the protection against discrimination is specifically embedded in Art. 2, which prohibits any discrimination against children, provided the following:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

There are also universal international human rights instruments focusing on the non-discrimination of specific groups of children, such as the United Nations Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2000; Art. 9 (4)) and the United Nations Convention on the Rights of Persons with Disabilities (2006; Arts. 5 and 7). In addition to these, regional human rights instruments also protect against discrimination and promote equality. Those relevant in Europe are expounded upon below.

The Council of Europe – European Convention on Human Rights (ECHR, 1950): this is a pivotal international treaty that establishes a framework for protecting and promoting human rights across member states of the Council of Europe. The general non-discrimination provision is Art. 14, which provides that:

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

Additionally, Art. 1 of Protocol 12 to the ECHR, which entered into force in 2005 and had been ratified by 20 member states by 2023, introduced a general prohibition of discrimination to any right set forth by national law:

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. Any public authority shall discriminate against no one on any ground such as those mentioned in paragraph 1.

The European Union Charter of Fundamental Rights (2000): this document provides a fundamental outline of the rights and freedoms of individuals within the European Union, and also addresses the principle of non-discrimination in Art. 21:

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

Moreover, a series of European Union directives specifically targeting protection against discrimination have been adopted in various areas and are relevant to children.¹¹ Furthermore, the principle of non-discrimination and equal treatment is also contained in other regional human rights instruments, including Art. 2 of the American Declaration, Art. 24 of the American Convention on Human Rights, and Arts. 2 and 3 of the African Charter on Human and Peoples' Rights. It is clear, even from the mere wording of the respective articles, that the approaches taken to the prohibition of discrimination may differ, with variations in definitions, the scope of prohibited grounds, the mechanisms for individual complaints, and the accessibility or autonomy of the right. In the following section, we highlight these differences and similarities in a more detailed manner, with a special focus on the CRC and the ECHR, as these are of the utmost importance. Specifically, the importance of the CRC lies in its universal nature, its comprehensive framework for the protection and promotion of children's rights, strong monitoring mechanism based on reporting to the Committee on the Rights of the Child (CRC Committee), observation reports, and individual communications (complaints) mechanism. The importance of the ECHR lies in its use by the ECtHR when playing its crucial role of the protection and enforcement of human rights in Europe.

3. Key concepts in non-discrimination and equality of children

Definition of the child: the definition of who qualifies as a child varies across international instruments dedicated to children's rights. According to the CRC, a child refers to every human being below the age of 18 years, unless, under the law applicable to the child, the majority is attained earlier. Meanwhile, the ECtHR has accepted

11 For example, Citizenship Directive, Family Reunification Directive, Racial Equality Directive, and Gender Directive. See: European Union Agency for Fundamental Rights and Council of Europe, Handbook on European law relating to the rights of the child. pp. 51–53.

applications by and on behalf of children irrespective of their age,¹² albeit it has also accepted the CRC's definition in its jurisprudence, endorsing the "below the age of 18 years" notion.¹³

Accessory vs. autonomous right: the non-discrimination provisions in many international instruments (e.g. CRC, the International Covenant on Civil and Political Rights, Art. 12 to the ECHR) are considered accessory (subordinate rights), meaning that they prohibit discrimination only in the enjoyment of the rights outlined in the respective convention. Although the CRC Committee elevated the right to non-discrimination to "an umbrella right" in the context of the CRC, it still does not provide full and autonomous application.¹⁴ However, Art. 1 of Protocol 12 to the ECHR establishes non-discrimination as an autonomous, freestanding right.¹⁵ This means that non-discrimination is guaranteed in a broader sense and is not limited to the specific rights protected by the instrument.

The negative and positive obligation of the state: non-discrimination might entail both a negative (to refrain from actions that violate the rights of the child) and a positive obligation (to protect, fulfil, or even take positive action under some circumstances). The positive obligation of the state arising out of Art. 2 of the CRC encompasses, according to CRC Committee, the obligation to collect disaggregated data to identify children experiencing discrimination, provision of recommendations on developing comprehensive strategies, conduction of research into discrimination, introduction of information, and implementation of awareness raising campaigns. According to the ECtHR, Art. 14 to the ECHR may imply the obligation of states to prevent, stop, and/or punish discrimination (*Pla and Puncernau vs. Andorra*, 2004, § 62), take "positive measures" (*Horváth and Kiss vs. Hungary*, 2013, § 104), or apply "reverse discrimination" or "affirmative action" to correct factual inequalities. For example, in *Horváth and Kiss vs. Hungary*, in 2013, which was a case concerning the systemic placement of Roma children in special schools in Hungary, the ECtHR concluded that, in the context of the right to education of members of groups that suffered past discrimination in education with continuing effects, the structural deficiencies called for the implementation of positive measures in order, *inter alia*, to assist the applicants with any difficulties they encountered in following the school curriculum. Therefore, some additional steps were needed to address these problems, such as active and structured involvement of the relevant social services.

Formal and substantive equality: international human rights bodies (e.g. the CRC Committee) and scholars distinguish between formal and substantive equality. The formal approach is based on the perception that a person's characteristics should be viewed as irrelevant when determining whether they have a right to a benefit. The substantive approach requires the "equality of results" and the "equality of

12 European Union Agency for Fundamental Rights and Council of Europe, Handbook on European law relating to the rights of the child. p. 19.

13 Ibid.

14 Abramson, 2008, p. 4.

15 Moeckli, 2010, p. 196.

opportunity”, or the primacy of dignity for peoples and groups that are disadvantaged and marginalised in society. Thus, the central question of substantive equality is not whether the law makes distinctions or the state is motivated by prejudice, but whether the effect of the law, policy, or practice perpetuates disadvantage, discrimination, exclusion, or oppression. Some scholars such as Freeman ask for a reconceptualisation of substantive equality to a four-dimensional concept of recognition, redistribution, participation, and transformation.¹⁶ Importantly, the ECtHR jurisprudence surrounding Art. 14 of the ECHR has evolved, shifting from a formal model of equality to a more substantive one.¹⁷

Prohibited Grounds: The list of prohibited grounds for discrimination varies across the human rights instruments, with some being commonly featured (e.g. race, sex, religion, and origin) and others feature only in specific instruments (e.g. the CRC features disability and ethnic origin). Furthermore, while some instruments may not provide a specific list, some provide a non-exhaustive list (e.g. ECHR), and others provide an exhaustive list (e.g. Convention on the Elimination of All Forms of Discrimination Against Women, International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Rights of Persons with Disabilities) of prohibited grounds. Importantly, some international bodies like the ECtHR have qualified some prohibited grounds as particularly invidious; accordingly, in cases involving them, these bodies require particularly solid justification. The CRC Committee does not make this differentiation, but tends to pay special attention, in its practice, to grounds such as gender, disability, race, and birth status.

Direct discrimination: this form of discrimination occurs if one child is treated less favourably than another child in analogous, or relevantly similar situations, and ‘based on an identifiable characteristic, or status’ (*Biao vs. Denmark* [GC], 2016, § 89; *Carson and Others vs. the United Kingdom* [GC], 2010, § 61; § 175; *Burden vs. the United Kingdom* [GC], 2008, § 60).

Indirect discrimination: this form of discrimination occurs when a seemingly neutral rule or requirement disproportionately affects specific groups of children. An ECtHR case that clearly illustrates this concept is *D.H. and Others vs. the Czech Republic* [GC], 2007. In this landmark case, Roma children brought their complaint contesting a practice rooted in neutral statutory regulations, which in turn led to the over-representation of Roma children in special schools designed for children with intellectual disabilities. Despite the rule’s apparent neutrality, its impact resulted in discriminatory outcomes that significantly disadvantaged the Roma children.

Discrimination by association: this form of discrimination occurs when the protected ground relates to another person somehow connected to an applicant. The case *Guberina vs. Croatia* (2016) is a clear example of such discrimination, as he applicant, a man who had a child with a severe disability, lived in an inaccessible flat area and requested a tax exemption for buying accessible housing. He argued that his

16 Fredman, 2016, pp. 712–738.

17 O’Connell, 2009, p. 133.

current flat did not meet his family’s “housing needs”, a request to which the Croatian authorities denied without considering the son’s disability. The ECtHR found that the authorities had applied the law too restrictively and failed to consider the applicant’s family’s specific needs.

4. ECtHR discrimination test and case examples of Art. 14

While the CRC has a broad and extraterritorial scope of application, that is, it is applicable to every child, regardless of their location, nationality, or immigration status, including international waters and refugee situations, the ECHR is much more limited. The latter’s applicability is closely related to its admissibility criteria, which in turn serves to limit the scope of cases that can be brought before the ECtHR. In this context, personal, temporal and jurisdictional incompatibility are specifically paramount. More specifically, in adjudicating cases involving allegations of a violation of Art. 14 of the ECHR, the ECtHR employs a structured test to assess the claims. This section expounds upon this test and delivers examples of ECtHR case law relevant to children’s discrimination.

First, for Art. 14 of the ECHR to be applicable, the facts of the case must fall within the broader material scope of one or more of the ECHR’s substantive articles (*E.B. vs. France* [GC], 2008, § 47;), which does not necessarily mean that the substantive article must have been violated. For example, in the case *Genovese vs. Malta*, 2011, the ECtHR explained that although the right to citizenship was not an ECHR right and its denial in the applicant’s case did not give rise to a violation of Art. 8, its impact on the applicant’s social identity (i.e. as a part of private life) had been such as to bring the right within the general scope of Art. 14 of the ECHR. This gave way for further infringement review from the perspective of non-discrimination.

Therefore, if the facts of the case fall within the ambit of the substantive ECHR article, the Court applies the following test: 1. Has there been a difference in the treatment of persons in analogous or relevantly similar situations, or a failure to treat differently persons in relevantly different situations? 2. If so, is such difference, or absence of difference, objectively justified? In particular, a. Does it pursue a legitimate aim? b. Are the means employed reasonably proportionate to the aim pursued?

4.1. Difference in treatment and prohibited grounds

The applicant must demonstrate that they have been treated differently from another person or a group of persons who are in a relevantly similar situation, or that they have been treated equally to a group of persons who are in a relevantly different situation. The other person or group of persons to whom the applicant is compared is commonly referred to as the “comparator”. The following cases highlight various instances of differential treatment according to ECtHR’s assessment.

1. *Cusan and Fazzo vs. Italy*, 2014: The applicants were a married couple disproving Italian law that allows only the husband’s surname, and thus not the

wife's, to be given to a legitimate child. The comparator was an unmarried couple. The Court found this to be discriminatory.¹⁸ Ground for discrimination: parent gender (a similar case is that by *León Madrid vs. Spain*, 2021)

2. *D.H. and Others vs. the Czech Republic* [GC], 2007: The applicants were Roma minors complaining that they were treated less favourably than non-Roma minors in comparable situations. The national legislation applied in practice resulted in a disproportionate number of Roma children being placed in special schools without justification, meaning that these children were placed at a significant disadvantage. The ECtHR scrutinized the tests used to evaluate the children's intellectual capacities as "general policy or measure" used to decide whether to place these children in normal or in "special" schools for children with learning disabilities. Ground for discrimination: race and colour (ethnicity) (similar cases are *Sampanis and Others vs. Greece*, 2008; *Oršuš and Others vs. Croatia* [GC], 2010).
3. *Terna vs. Italy*, 2021: The applicant, a Roma woman, filed a complaint because her granddaughter was taken into public care because she had lived in a criminal environment and the applicant had been unable to care for her. The comparator was non-Roma children (and caring persons). Despite the available data showing that many Roma children were taken into public care in Italy, in the present case, the domestic courts had not used arguments concerning the child's ethnic origin; instead, their actions were based on the child's best interests. Therefore, the ECtHR did not conclude that the domestic court decisions were motivated by the children's ethnic origin. Alleged ground for discrimination: race and colour (ethnicity).
4. *Palau-Martinez vs. France*, 2003: The applicant, a Jehovah's Witness and mother of two children, complained that she had been treated differently based on her belief – the comparator was other parents – when national courts established the residence of their children with their father. Ground for discrimination: religion.
5. *Fabris vs. France* [GC] 2013: In this case, children born out of wedlock were treated differently from legitimate children because of the possibility of claiming only half the share of their deceased parents' estate.¹⁹ Ground for discrimination: birth status.
6. *Yocheva and Ganeva vs. Bulgaria*, 2021: The ECtHR held that the applicant, a single mother whose children were not recognised by their father, asking for a monthly allowance was in a relevantly similar situation to the single parents of children whose legal ties to both parents had been established

18 European Court of Human Rights. Registry. Guide on Art. 14 of the European Convention on Human Rights and on Art. 1 of Protocol No. 12 to the Convention, p. 16 [Online]. Available at: https://ks.echr.coe.int/documents/d/echr-ks/guide_art_14_art_1_protocol_12_eng (Accessed: 8 August 2024).

19 Ibid.

before the other parent's death by their father.²⁰ Ground for discrimination: birth status.

7. *Mazurek vs. France*, 2000: The applicant, a child born in adultery, was treated differently by national inheritance laws compared to children born in wedlock or even children born out of wedlock but not of an adulterous relationship. Ground for discrimination: birth status.
8. *Pla and Puncernau vs. Andorra*, 2004: In this case, the applicant was an adopted child who could not inherit from his paternal grandmother. This was because the grandmother would leave the estate to her son on the basis that he was to pass on his inheritance to a child or grandchild "from a legitimate and canonical marriage". The domestic courts held that an adopted child did not fit this description because, by choosing not to include adopted children expressly, she must have intended to exclude them. The ECtHR noted that adopted children were in the same position as biological children in all respects.²¹ Ground for discrimination: birth status.
9. *Genovese vs. Malta*, 2011: This case concerned the refusal to grant Maltese citizenship to a child born out of wedlock and whose mother was not Maltese. The applicant was treated differently compared to other children with a father of Maltese nationality and a mother of foreign nationality, and the only distinguishing factor that rendered him ineligible for citizenship was that he was born out of wedlock. Ground for discrimination: birth status
10. *Çam vs. Turkey*, 2016: the applicant filed the application following the Turkish National Musica Academia's withdrawal of an entrance offer upon insufficient facilities to care for her special needs. Ground for discrimination: other status - disability (blindness).

Therefore, differences in treatment (*D.H. and Others vs. the Czech Republic* [GC], 2007) or failure to treat differently (*Çam vs. Turkey*, 2016) can result in any form of discrimination, such as direct, indirect, or by association. However, Art. 14 of the ECHR does not prohibit all the different treatments, only those that are not justified and thus do not pursue a legitimate aim and are not proportionate.

4.2. Justification: legitimate aim

The ECtHR acknowledges certain legitimate aims that may justify differences in treatment, which are provided in the following list (even if it is not exhaustive):

1. protection of national security (e.g. *Konstantin Markin vs. Russia* [GC], 2012, § 137);
2. facilitation of rehabilitation of juvenile delinquents (e.g. *Khamtokhu and Aksenchik vs. Russia* [GC], 2017, § 80);
3. protection of a tradition (e.g. *Mazurek vs. France*, 2000);
4. protection of acquired rights, such as the stability of completed inheritance arrangements (e.g. *Fabris vs. France* [GC], 2013);
5. protection of the well-being and

²⁰ Ibid, p. 17.

²¹ Fenton-Glynn, 2021, p. 209.

rights of the child (e.g. *Schwizgebel vs. Switzerland*, 2010; *Palau-Martinez vs. France*, 2003); 6. adapting the education system to the specific needs of the child (e.g. *D.H. and Others vs. the Czech Republic* [GC], 2007; *Oršuš and Others vs. Croatia* [GC], 2010).

Importantly, there also exist unacceptable aims that cannot justify differences in treatment without the necessity to explore proportionality further. For example, general assumptions or prevailing social attitudes in a particular country were considered to be insufficient justification for a difference in treatment on the grounds of sex (e.g. *Ünal Tekeli vs. Turkey*, 2004, § 63; *Konstantin Markin vs. Russia* [GC], 2012, § 127; *Cusan and Fazzo vs. Italy*, 2014, § 67). Furthermore, in some cases, the government is not even able to present any reasonable legitimate aim (e.g. *Genovese vs. Malta*, 2011; *Pla and Puncernau vs. Andorra*, 2004). A lack of a legitimate aim necessarily leads to the ECtHR finding a violation of Art. 14 without the need to explore proportionality.

4.3. Justification: proportionality

If a difference in treatment is legitimised by its aim, then such difference has to strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms of the individual (e.g. *the Belgian linguistic case*, 1968, § 10 of “the Law” part). States enjoy some margin of appreciation when its scope varies according to the circumstances, subject matter, and background of the case. For example, the scope might be wide (e.g. in matters related to general measures of social strategy: *the Belgian linguistic case*, 1968, § 10 of “the Law” part) or reduced (e.g. in matters related to ethnic origin: *D.H. and Others vs. the Czech Republic* [GC], 2007). Importantly, the ECtHR considers that very weighty reasons must be advanced before a distinction on the grounds of birth outside marriage can be regarded as compatible with the ECHR (e.g. *Fabris vs. France* [GC], 2013), including when the difference in treatment affects the parents of children born in or out of wedlock (e.g. *Sahin vs. Germany* [GC], 2003; *Sommerfeld vs. Germany* [GC], 2003).

1. *D.H. and Others vs. the Czech Republic* [GC], 2007: the ECtHR found unproportionate and insufficient the means used to pursue a legitimate aim. In particular, there was a lack of safeguards to ensure that the special needs of Roma children, as members of a disadvantaged class, were considered in their schooling arrangements. For instance, the test for “sorting out” children was designed in a way fitting to the mainstream Czech population, and its results were not analysed in light of the particularities and special characteristics of the Roma children who were tested. Accordingly, there was a violation of Art. 14 of the ECHR in conjunction with Art. 2 of Protocol No. 1.
2. *Palau-Martinez vs. France*, 2003: the ECtHR considered that the national court did not inquire sufficient information on the children’s lives with each of their parents to ascertain the impact, if any, of their mother’s religious practices on their lives and upbringing. That is, the ruling had been based only on general considerations without establishing a link between the children’s living conditions with their mother and their real interests sufficient to being

reasonably proportionate. Accordingly, there was a violation of Art. 8 of the ECHR in conjunction with Art. 14.

3. *Fabris vs. France* [GC], 2013: in this case, when considering proportionality, the ECtHR found that the protection of the inheritance rights of the applicant's half-brother and -sister was not sufficiently weighty to override the applicant's claim to a share in his mother's estate, especially because of the grounds for discrimination and previous actions of the applicant. Therefore, there was a violation of Art. 14 of the ECHR in conjunction with Art. 1 of Protocol No.1.
4. *Yocheva and Ganeva vs. Bulgaria*, 2021: the ECtHR argued that: states are usually allowed a wide margin of appreciation when it comes to general measures of economic or social strategy (...) and the resources which the authorities may devote to family benefits are inevitably limited. Moreover, widely different systems for social benefits exist in the States Parties to the Convention. However, the lack of a common standard does not absolve those States which adopt family allowance schemes from the obligation to grant such benefits without discrimination (...).
Therefore,
the argument that making the applicant's category eligible for the benefit because it would result in the authorities having to pay more than they currently do is unacceptable and not in itself sufficient for justifying such a difference in treatment.
5. *Mazurek vs. France*, 2000: similar to *Fabris vs. France* [GC], 2013, the difference in the treatment of children born out of wedlock was not proportionate to achieving the aim of protecting tradition, which inevitably led to the ECtHR finding a violation of the ECHR in this case.
6. *Çam vs. Turkey*, 2016: although the commission originally (i.e. in *Dahlberg and Dahlberg vs. Sweden*, 1994) held that states have a wide margin of appreciation as to how to make the best possible use of the resources available to them in the interests of children with disabilities, the approach in this case has shifted towards a more protective one. The ECtHR found that the reasonable accommodation of applicants' needs imposes a proportionate obligation on governments, and that refusal to provide such accommodation constitutes discrimination and is contrary to the ECHR.

5. Conclusions

Combating all forms of discrimination is a top priority for international and European institutions promoting and protecting human rights. Thus, many international conventions, European Union law, and national law instruments include specific provisions for protection against discrimination in general or in respect of children. In the European jurisprudence context, the ECtHR case law plays a critical role because it

provides a comprehensive toolkit to test discrimination cases employed, for instance, by national constitutional courts.²²

The test comprises the following steps: 1. Has there been a difference in the treatment of children in analogous or relevantly similar situations, or a failure to treat differently persons in relevantly different situations? 2. If so, is such difference, or absence of difference, objectively justified? In particular, a. Does it pursue a legitimate aim? b. Are the means employed reasonably proportionate to the aim pursued?

The tricky part of this test lies mainly within the proportionality criteria and mostly because it relies on the concept of the margin of appreciation, which many commentators criticise for its seemingly lack of a uniform or coherent application.²³ In light of this, it is not surprising that in cases of some prohibited grounds (e.g. birth status) or aims (e.g. protection of tradition) the outcome is more predictable, whereas in the cases of other grounds (e.g. disability) or aims (e.g. measures of economic or social strategy) the ECtHR is seemingly more open to find a violation of Art. 14 of the ECHR. Notwithstanding, and as explained above, it seems that the ECtHR is recently tending to find a violation even in those cases where a wider margin of appreciation applies (e.g. *Çam vs. Turkey*, 2016; *Yocheva and Ganeva vs. Bulgaria*, 2021).

22 Czech Constitutional Court, III. ÚS 1068/22.

23 Letsas, 2006, pp. 705–706.

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