| Chapter 16 |

Prohibition of Discrimination

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ABSTRACT

This study analyses the prohibition of non-discrimination within the framework of the European Convention on Human Rights, focusing thus on Article 14 of the Convention and Article 1 of Protocol No. 12. To facilitate a comprehensive understanding, the study will first provide a concise overview of the relationship between these provisions and other international instruments, particularly those adopted within the European context, followed by a brief examination of the historical evolution of the prohibition of discrimination. Subsequently, the analysis will delve into the scope of the provisions, the elements of discrimination, its various forms, and the conditions under which it operates, all considered in light of the jurisprudence of the European Court of Human Rights. In supporting the theoretical explanations, the study will prioritise the case law concerning Central and Eastern European countries.

KEYWORDS

Prohibition of discrimination, Article 14, Protocol No. 12, European Court of Human Rights

1. Introduction

The idea of equality and inequality has been a concern for humanity since the beginning of time. As Aristotle pointed out, 'In fact, this is the very source of all the quarrelling and wrangling in the world, when either they who are equal have and get awarded to them things not equal, or being not equal those things which are equal.'[1] Since the Age of the Enlightenment, the idea that all human beings are equal and thus deserve to be treated equally has gained an increasingly important role in national constitutions and international instruments,[2] and the principle of non-discrimination has been developed accordingly. As has been observed, virtually every liberal democratic state's constitution[3] and every international human rights instrument includes

1 Aristotle, 1911, p. 108.
2 Moeckli, 2022, p. 151.
3 Moeckli, 2022, p. 151. See also Rainey, McCormick and Ovey, 2020, p. 647.

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a non-discrimination clause,[4] often placed at beginning of the source of law, due to its fundamental role in the legal system it forms the part of.[5]

The prohibition of discrimination in international law is rooted in the United Nations Charter, which articulates a commitment to the promotion of human rights for all individuals without distinction.[6] In pursuit of this goal, a range of instruments has been adopted under the UN's auspices to promote equality and non-discrimination.[7] Furthermore, several specialised treaties directly confront particular forms of discrimination on international and regional levels as well.[8]

In Europe, the prohibition of discrimination is guaranteed at three levels. The aforementioned constitutional provisions, the international instruments – adopted manly under the auspices of the Council of Europe – and, for the Member States of the European Union, the EU sources of law.

With regard to the latter two, it should be noted that, although legal protection exists in parallely for the 27 EU Member States, the two international organisations do not, in principle, wish to create a situation of competition. This is demonstrated by the fact that the European Court of Human Rights (henceforth: the Court) systematically refers to EU sources of law,[9] and the Court of Justice of the European Union refers to instruments adopted under the auspices of the Council of Europe[10] as a source of inspiration.

Since the entry into force of the Amsterdam Treaty, the European Union has acquired competence to combat discrimination on a multiple grounds. Today, the principle of equality is a fundamental value of the EU, enshrined at the very beginning

4 Smith, 2021, p. 194.

5 Rainey, McCormick and Ovey, 2020 p. 647.

6 United Nations Charter, Article 1.

7 See, for example, Articles 1, 2, and 7 of the Universal Declaration of Human Rights; Articles 2, 3, and 26 of the International Covenant on Civil and Political Rights; and Articles 2 and 3 of the International Covenant on Economic, Social and Cultural Rights. In 1993 the principle of equality and non-discrimination were included in the Vienna Declaration and Programme of Action and adopted by the World Conference on Human Rights. See Moeckli, 2022, pp. 151. and 155.

8 See, for example, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of Persons with Disabilities, the Convention on the Rights of the Child, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. It is also worth mentioning that the right to non-discrimination on the grounds of race, sex and religion has evolved into customary international law, thus binding all states regardless of whether they have ratified specific treaties. Moeckli, 2022, pp. 155–156.

9 See, for example, *D.H. and Others v. Czech Republic*, Application. no. 57325/00, Judgment 13 November 2007, para. 187; *Biao v. Denmark*, Application. no. 38590/10, Judgment 24 May 2016, paras. 134–135.

10 See, for example, C-510/11 P, *Kone Oyj and Others v. European Commission,* 24 October 2013, paras. 20–22; Joined cases C-395/08 and C-396/08, *Istituto nazionale della previdenza sociale (INPS) v. Tiziana Bruno and Massimo Pettini* and *Daniela Lotti and Clara Matteucci*, 10 June 2010, paras. 31–32.

of the Treaty on European Union[11] and elaborated in the Treaty on the Functioning of the European Union.[12] The prohibition of discrimination is also provided for in the Charter of Fundamental Rights of the European Union,[13] which binds the EU institutions and Member States when implementing EU law. Furthermore, a range of secondary sources of law[14] have been adopted to implement the non-discrimination policy of the EU and new bodies, such as the European Union Agency for Fundamental Rights, have been established to promote fundamental rights and equality.[15]

In the system of the Council of Europe, the cornerstones of the non-discrimination principle are found in the European Convention on Human Rights and the European Social Charter; however, several other thematic instruments of the Council of Europe provide for the non-discrimination principle as well.[16] Article E of the Revised Charter prohibits discrimination in a form similar to the prohibition in Article 14 of the Convention. The European Committee of Social Rights ensures compliance with the Charter.

The European Convention on Human Rights provides for the prohibition of discrimination in two articles – Article 14 and Article 1 of Protocol 12. The main difference between the two provisions lies in their material scope: while the protection afforded by Article 14 extends only to the rights set out in the Convention, Article 1 of Protocol No. 12 provides for a truly general principle of non-discrimination covering all rights provided for by national law. However, to date, only a total of 20 states have signed and ratified Protocol 12, and a further 18 states have not followed up their signatures with ratifications.[17]

The purpose of this study is to analyse the prohibition of discrimination in the light of the two provisions of the Convention.

11 See Articles 2, 3(3) and 9 of the TEU.
12 See Article 10 of the TFEU.
13 See Article 21 of the Charter.
14 See, for example, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).
15 For further details, see European Union Agency for Fundamental Rights, Council of Europe, 2018, p. 23.
16 See, for example, the Framework Convention for the Protection of National Minorities, the Convention on Action against Trafficking in Human Beings and the Convention on Access to Official Documents, the Protocol to the Convention on Cybercrime, the Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) or the Convention on Human Rights and Biomedicine. For further details, see European Union Agency for Fundamental Rights, Council of Europe, 2018, pp. 19–20.
17 See Council of Europe, 2005.

2. Characterisation of Article 14

Article 14 of the Convention 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.'

The notion "Convention" includes the First, Fourth, Sixth, Seventh and Thirteenth Protocols, as provided in the relevant articles of the Protocols.[18] Thus, the prohibition of discrimination enshrined in Article 14 can be applied in relation to any human right contained in the Convention and its Protocols, with the observation that Article 5 of the Seventh Protocol concerning the equal rights of spouses supersedes the general provision of Article 14 as a special rule.[19]

It has been argued that three main features emerge after the first reading of the text. These are the ancillary nature of the right enshrined in Article 14 – as opposed to the text of the additional protocol – the rather outdated but non-exhaustive nature of the list of prohibited grounds, and the lack of definition of the concept of discrimination.[20] Before discussing these three features in more detail, it is worth noting a further point concerning the wording of the text, i.e. that Article 14 does not mention the notion of equality, but ensures that the relevant rights are protected without discrimination.

With regard to the relationship between the concept of equality and prohibition of discrimination, various opinions can be found in the literature. According to some commentators, they are used as synonyms,[21] while others claim that the prohibition of discrimination corresponds only to the more limited concept of formal equality, covering the negative obligation not to discriminate; meanwhile, the more inclusive term equality shifts the focus to the 'duty to recognise differences between people and to take positive action to achieve real equality,' mirrored by the concept of substantive equality.[22] The difference between the right to equality and non-discrimination is also characterised as 'pragmatic rather than logical,' as most constitutional and international instruments guarantee equality in terms of one or both. Different jurisdictions delineate the distinctions between the two concepts in different manners.[23]

18 See Article 5 of Protocol 1, Article 6 of Protocol 4, Article 6 of Protocol 6, Article 7 of Protocol 7, Article 5 of Protocol 13.
19 Szalayné Sándor, 2021, p. 338.
20 Fredman, 2016a, p. 275.
21 See, for example, Smith, 2021, p. 194.
22 See, for example, Moeckli, 2022, p. 152. For a comparative analysis of the concepts of formal equality and substantive equality see Moeckli, 2022, pp. 151–153; Fredman, 2016b, pp. 712–738.
23 See Fredman, 2016b, p. 715

It should also be borne in mind that the adoption of the European Convention on Human Rights took place in the post-war period, when the protection of human rights was gaining ground. Thus, a concise, non-controversial document was prepared that governments could quickly accept it in a timely manner. As a consequence, the protection of the Convention limits itself to the civil and political rights considered 'essential for a democratic way of life'.[24] Considering the small number of countries that have ratified Protocol 12, the initial limitation of the scope of Article 14 proved to be a sensible decision. However, as will be seen below, although the Convention only obliges State Parties to ensure the *stricto sensu* prohibition of discrimination, the case-law of the Court reveals an attempt to develop a genuine principle of substantive equality through the so-called positive action or affirmative measures.

The objective of this chapter is to examine the main features and scope of Article 14.

2.1. The Ancillary Nature of Article 14

As mentioned above, the prohibition of discrimination enshrined in Article 14 is ancillary in nature. This means that its application is limited to the rights and freedoms set out in the Convention,[25] including its Protocols, it can only be invoked in connection with another right provided for in the Convention. Article 14 has often been considered in the literature to be of "parasitic" nature, with no existence in its own right,[26] as opposed to the right provided for in Article 1 of Protocol No. 12. Article 14 does not extend the list of guaranteed rights but strengthens their protection.[27] According to the Court, Article 14 forms 'an integral part of each of the Articles [of the Convention] laying down rights and freedoms'.[28]

In most cases,[29] especially older ones,[30] the Court has refrained from considering the applicability of Article 14 in cases where it found a violation of the substantive right regarding which question of discrimination had been raised.

For example, in the *Dangeville v. France,* the applicant company alleged a violation of its right of property set out in Article 1 of Protocol 1, citing failing to reimburse VAT paid on the basis of national legislation, which was contrary to Community law. Moreover, the applicant claimed the infringement of Article 14 as well, citing the authorities' decision to abandon proceedings against companies that had not paid the

24 Pierre-Henri Teitgen, CE Consult. Ass, Debates, 1st Session, p 408., 19 August 1949 cited in Harris et al., 2023, p. 5.
25 *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium* ("the *Belgian linguistic case*"), Application nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, Judgment 23 July 1968, para. 9.
26 See Harris et al., 2023, p. 775; Fredman, 2016a, p. 275.
27 Chiriță, 2008, p. 606.
28 *Case "relating to certain aspects of the Laws on the use of languages in education in Belgium" v. Belgium ("the Belgian linguistic case")*, Application nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, Judgment 23 July 1968, para. 9.
29 See Szalayné Sándor, 2021, p. 338.
30 Harris et al., 2023, p. 775; Rainey, McCormick, Ovey, 2020, p. 649; Fredman, 2016a, p. 275.

VAT at all. Having found a violation of Article 1 of Protocol No. 1, the Court found that no separate examination of the second complaint was necessary.[31]

In *Evans v. United Kingdom*, concerning the right of the applicant to become a parent in the genetic sense after the withdrawal of her formal partner's consent to use the embryos created together, the Court did not consider it necessary to analyse the potential infringement of Article 14 as 'the reasons given for finding that there was no violation of Article 8 also afford a reasonable and objective justification under Article 14'.[32] The Court took into account that the applicant herself had submitted that her complaints under Articles 8 and 14 were inextricably linked.

In *Fedotova and Others v. Russia*,[33] concerning Russian law preventing same-sex couples from marrying or entering into any other form of legally recognised and protected union, the Court stated that it was unnecessary to consider Article 14 as it had found a violation of Article 8.[34]

However, there are examples of the opposite situation, as well, where the Court first analyses the applicability of Article 14 and, if it finds a violation of the prohibition of discrimination, does not proceed to analyse the substantive right in respect of which the discrimination claim was made.[35]

In *Gaygusuz v. Austria,* the authorities refused to grant an advance on his pension in the form of emergency assistance to an unemployed man who had exhausted entitlement to unemployment benefit on ground that he did not have Austrian nationality. The Court, having concluded that there has been a breach of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1, did not consider it necessary to examine the case under Article 6 and Article 8 of the Convention.[36]

The Court reached a similar conclusion in *Burghartz v. Switzerland*.[37] In this case the applicant husband was not able to put his own surname in front of his wife's. According to the Swiss law, only a wife had the right to put her own surname before the shared family name.

In certain cases – particularly serious ones, or where the discrimination constitutes a new and decisive element in the overall facts of the case – the Court conducts

31 *S.A. Dangeville v. France*, Application no. 36677/97, Judgment 16 April 2002, para. 66.
32 *Evans v. United Kingdom*, Application no. 6339/05, Judgment 10 April 2007.
33 *Fedotova and Others v. Russia*, Application nos. 40792/10, 30538/14 and 43439/14, Judgment 17 January 2023, para. 230.
34 Harris et al., 2023, 775–776. For a similar solution, see *Olari and Others v. Italy,* Application nos. 18766/11 and 36030/11, Judgment 21 July 2015, para. 188.
35 See also Szalayné Sándor, 2021, p. 338. See also Chiriță, 2008, pp. 606–607.
36 *Gaygusuz v. Austria*, Application no. 17371/90, Judgment 16 September 1996, paras. 55 and 57. Another example would be the case *Thlimmenos v. Greece*, Application no. 34369/97, Judgment 6 April 2000, para. 53: after finding a breach of Article 14 of the Convention taken in conjunction with Article 9, the Court did analyse whether there had been a violation of Article 9 on its own.
37 *Burghartz v. Switzerland*, Application no. 16213/90, Judgment 22 February 1994, para. 30. For further examples see *Pla and Puncernau v. Andorra*, Application no. 69498/01, Judgment 13 July 2004, para. 64. *Sidabras and Džiautas v. Lithuania*, Application nos. 55480/00 and 59330/00, Judgment 27 July 2004, para. 63, *L. and V. v. Austria*, Application nos. 39392/98 and 39829/98, Judgment 9 September 2003, para. 55.

an analysis under Article 14 after finding a violation of the specific substantive right.[38] In these cases, the Court usually finds a violation of both the substantive provision taken alone and the provision read in conjunction with Article 14.[39]

Chassagnou and Others v. France was one of the first cases in which the Court considered it necessary to analyse the violation of the right to non-discrimination, after having found a violation of the substantive provision, namely Article 1 of Protocol No. 1. The case involved ten French landowners who opposed hunting on ethical grounds but were forced to transfer hunting rights to municipal hunters' associations, infringing on their rights to freedom of conscience and peaceful enjoyment of possessions. They argued that this system discriminated against smaller landowners, who faced obligations that larger landowners could avoid, and that hunters received favourable treatment without compensating non-hunters for the loss of their rights. Additionally, while hunters were granted automatic rights over private land, conservation groups could no longer obtain such rights voluntarily. The Court stated that:

> '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.'[40]

In *Kurić and Others v. Slovenia*, eight applicants, previously citizens of the former Yugoslavia, were erased from Slovenia's Register of Permanent Residents in 1992 without notification, leading to statelessness, eviction, and severe hardships. Approximately 25,000 other people were in the same situation. Additionally, the applicants claimed they had been discriminated against on the ground of their national origin, when compared to other foreign citizens (the so-called "real" aliens) who continued to live in Slovenia on the basis of temporary or permanent residence permits. Due to the importance of the discrimination issue in the case, the Grand Chamber considered that the complaint under Article 14 of the Convention should be examined as well.[41]

On similar grounds, in the *Velikova v. Bulgaria* case, after finding a violation of Article 2, the Court examined the applicant's complaints separately based on Article 14 in conjunction with Article 2, as 'The applicant's complaint under Article 14 is

38 Szalayné Sándor, 2021, p. 339.
39 For a similar opinion see Rainey, McCormick, Ovey, 2021, p. 650.
40 *Chassagnou and Others v. France*, Application nos. 25088/94, 28331/95 and 28443/95, Judgment 29 April 1999, para 89. In the same paragraph, the Court referred to an earlier case in which the same allegation had been made. In that case, however, the Court didn't consider it necessary to examine specifically the violation of Article 14. See *Dudgeon v. the United Kingdom*, Application no. 7525/76, Judgment 22 October 1981, paras. 67–70.
41 *Kurić and Others v. Slovenia*, Application no. 26828/06, Judgment 26 June 2012, para. 383. The Court found a violation of Article 8 and a violation of Article 14 taken in conjunction with Article 8 of the Convention.

grounded on a number of serious arguments."[42] The applicant's long-term partner, who belonged to the Romani (Gypsy) ethnic group, died in police custody shortly after his arrest and an autopsy revealed that his death had been caused by trauma resulting from a deliberate beating. The investigation concerning the victim's death circumstances unduly stalled, and the authorities eventually suspended the criminal proceedings without identifying those responsible. Nevertheless, the Court found no violation of Article 14 as the applicant's allegations of racial prejudice on the part of the authorities couldn't be proven beyond reasonable doubt.[43]

Surprisingly, the Court did not find it necessary to consider Article 14 after having found a violation of Articles 3 and 8 in *V.C. v. Slovenia,* concerning the sterilisation of a Roma woman without prior informed consent. Although the applicant's medical papers related to her sterilisation mentioned her Roma origin, and the applicant submitted statistical evidence regarding the history of sterilisation of Roma women, the Court held that 'The objective evidence is not sufficiently strong in itself to convince the Court that it was part of an organised policy or that the hospital staff's conduct was intentionally racially motivated'.[44]

2.2. The "Ambit-Test" and Relative Autonomy

In a *stricto sensu* interpretation, the scope of Article 14 is limited to discrimination regarding 'the rights and freedoms set forth' in the Convention, including its Protocols. As some commentators rightfully observed, in 'practice, this is a significant restriction because a great deal of discrimination law is concerned with the enjoyment of economic and social rights."[45] Furthermore, the Court's early case law indicated that a violation of a substantive provision had to be established before Article 14 could be invoked. This condition rendered Article 14 frequently superfluous, as, if a right was breached, there was no need to examine Article 14 further; and conversely, if there was no breach, Article 14 was irrelevant.[46] Consequently, in light of the comprehensive scope of the right enshrined in Protocol 12, which also encompasses the right set forth in Article 14, it was suggested in the academic literature of the early 2000s that Article 14 was at risk of being marginalised and potentially rendered obsolete.[47] Due to the reluctance of the States to sign and ratify Protocol 12, this threat did not materialise. Meanwhile the Court has been extending the scope of Article 14 and as a consequence, according to some commentators, the case law of the Court from 2003–2004 has marked such a remarkable extension of the scope of Article 14, that it

42 *Velikova v. Bulgaria*, Application no. 41488/98, Judgment 4 October 2000, para. 94.
43 *Velikova v. Bulgaria,* Application. no. 41488/98, Judgment 4 October 2000, para. 94.
44 *V.C. v. Slovakia*, Application no. 18968/07, Judgment 8 November 2011, paras. 177–180.
45 Harris et al., 2023, p. 777.
46 Fredman, 2016a, p. 275.
47 See Renucci, 2009, 149.

has reached a point at which one might question the dependent character of the right contained in Article 14.[48]

At present, the scope of Article 14 is not strictly limited to that of the substantive provision,[49] but covers a larger spectrum of rights as long as they fall within the wider *ambit* of a right provided for in the Convention.[50] The foundations of the so-called "ambit-test", with the consequence of moving away from the requirement that there must be a violation of a substantive right provided for in the Convention in order to find a violation of Article 14, were laid down in the *Belgian Linguistic* case as early as 1968.

The case concerns the application of French-speaking Belgian parents of over 800 children, arguing that the lack of French-language education in their municipalities violates their rights and forces them to pursue inadequate alternatives. The Court first analysed the applicability of Article 2 of Protocol No. 1 and Article 8 of the Convention, and then concluded that Article 2 of Protocol No. 1 did not ensure the right of the parents' linguistic preferences, but only their religious and philosophical convictions,[51] and that Article 8 by itself in no way did guarantee either a right to education or a personal right of parents relating to the education of their children.[52] However, the Court examined the applicability of Article 14, and despite the Belgian Government's submission – according to which a violation of Article 14 without simultaneous violation of one of the substantive provisions of the Convention is "legally impossible" – reached the following conclusions:

> 'While it is true that this guarantee has no independent existence [...], a measure which in itself is 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 (Article 14) for the reason that it is of a discriminatory nature.'[53]

48 See Chiriță, 2008, p. 607; Sudre, 2005, p. 203. Chiriță believes that the sudden change in the Court's optics was the Court's response to the States' refusal to ratify Protocol 12, and, in practice, this is the Court's way of including a general non-discrimination clause in Article 14. See Chiriță, 2008, p. 607.

49 European Court of Human Rights, 2024. Guide on Article 14 of the Convention (prohibition of discrimination) and on Article 1 of Protocol No. 12 (general prohibition of discrimination), p. 6.

50 On this topic see Harris et al., 2023, pp. 775–778; Fredman, 2016a, pp. 275–278.

51 *Case "relating to certain aspects of the Laws on the use of languages in education in Belgium" v. Belgium,* para. 6.

52 *Case "relating to certain aspects of the Laws on the use of languages in education in Belgium" v. Belgium*, para. 7.

53 *Case "relating to certain aspects of the Laws on the use of languages in education in Belgium" v. Belgium*, para. 9.

Recognising the applicability of Article 14 in cases where there was no violation of the substantive right itself became a settled case law of the Court,[54] consequently extending the reach of Article 14 to many areas, such as employment, membership of trade union, social security, education, right to respect for home, access to justice, inheritance rights, access to children, paternity, freedom of expression, assembly and association, right to an effective investigation eligibility for release on parole, and eligibility for tax relief.[55]

In the context of the relative autonomy of Article 14, the Court has interpreted the *ambit* of the right enshrined in Article 1 of Protocol 1 particularly broadly when considering the applicability of Article 14. A very remote connection between one of the elements of the facts with the applicant's property has been sufficient to establish a link with the scope of Article 1 of Protocol 1 in order to examine the role of Article 14.[56] In *Gaygusuz v. Austria,* for example, the Court considered the right to emergency assistance to be a pecuniary right protected under Article 1 of Protocol No. 1.[57]

2.3. Additional Rights

The *Belgian Linguistic* case is also notable for the development of the doctrine of additional rights. In its 1968 judgment, the Court ruled that states were not obliged to grant additional rights falling within the general scope of the articles of the Convention. However, if they went beyond their obligations by creating such rights, they were obliged to grant them in a non-discriminatory manner, as though they 'formed an integral part of each of the Articles laying down rights and freedoms'.[58] With regard to the conditions of the additional rights which may be taken into account for the purpose of examining a possible violation of Article 14, the Court ruled that at least one of the three situations must be present: the contested measures falls within the ambit of the substantive article,[59] the contested measures constitutes one of the modalities of the exercise of a right guaranteed or is linked to the exercise of a right

54 See for instance *Inze v. Austria*, Application no. 8695/79, 28 October 1987, para. 36; *Marckx v. Belgium*, Application no. 6833/74, Judgment 13 June 1979, para. 32; *Thlimmenos v. Greece*, Application no. 34369/97, Judgment 6 April 2000, para. 40; *Sidabras and Džiautas v. Lithuania,* Application nos. 55480/00 and 59330/00, Judgment 27 October 2004, para. 38; *Beeler v. Switzerland*, Application no. 78630/12, Judgment 11 October 2022, para. 48.

55 European Court of Human Rights, 2024, p. 7.

56 Szalayné Sándor, 2021, p. 340. The author gave as an example the case *Gaygasuz v. Austria,* 16 September 1996, no. 17371/90, para. 41.

57 See *Gaygusuz v. Austria*, Application no. 17371/90, Judgment 16 September 1996, para. 41.

58 *Case "relating to certain aspects of the Laws on the use of languages in education in Belgium" v. Belgium*, para. 9. The Court even gives an example in para. 6 of the judgement, showing that States are not obliged to institute a system of appeal courts. However, a state that does set up such courts, going beyond its obligations under Article 6, would violate that Article, read in conjunction with Article 14, if it deprived certain persons from these remedies without a legitimate reason.

59 *Zarb Adami v. Malta,* Application no. 17209/02, Judgment 20 June 2006, para. 49.

guaranteed,[60] or that at least the contested measure does not fall completely outside the ambit of the substantive article.[61]

Within these limits, the Court has succeeded in extending the scope of Article 14 and, implicitly, of the other substantive articles, far beyond their literal meaning.[62] For example, in *Stec and Others v. the United Kingdom,* a case concerning inequalities in a welfare system, the Court examined the violation of Article 14 in conjunction with Article 1 of Protocol No. 1. According to the Court, although the latter did not include a right to acquire property, since the State had created a benefits or pension scheme, it was obliged to do so in a manner that was compatible with Article 14.[63]

In *E.B. v. France,* a case concerning the refusal of the State to grant approval for the purposes of adoption, on the basis of the applicant's life-style as a lesbian living with another woman, the Court found a violation of Article 14 in conjunction with Article 8. The Court underlined that Article 8 did not entail the right to adoption; nevertheless, the state had gone beyond its obligations under Article 8 in creating such a right,[64] and thus was obliged to ensure the enjoyment of the right in a non-discriminatory manner.

In *Genovese v. Malta*, an illegitimate child of a British mother and Maltese father had been denied a Maltese citizenship because according to Maltese law, an illegitimate child was only eligible for Maltese citizenship if their mother was Maltese. The Court reiterated that although the provisions of Article 8 do not guarantee a right to acquire a particular nationality or citizenship, an arbitrary denial of citizenship might raise an issue under Article 14 and the granting of citizenship can be viewed as an additional right falling within the general scope of Article 8 for the purposes of examining a possible breach of the prohibition of discrimination in Article 14.[65]

2.4. The Horizontal Effect of the Right

The Court comprehensively summed up the essence of the horizontal effect of Article 14 in the *Pla and Puncernau v. Andorra* case, stating that although the Court was not in theory required to settle disputes of a purely private nature,

> 'it cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary or [...]s blatantly inconsistent with the prohibition of discrimination

60 *Konstantin Markin v. Russia*, Application no. 30078/06, Judgment 22 March 2012, para 129.
61 *Van der Mussele v. Belgium*, Application no. 8919/80, 23 November 1983, para. 43. See European Court of Human Rights, 2024, p. 8.
62 See also Harris et al., 778, Fredman, 2016a, pp. 276–277.
63 *Stec and Others v. the United Kigdom*, Application nos. 65731/01 and 65900/01, Judgment 12 April 2006, para. 53.
64 *E.B. v. France*, Application no. 43546/02, Judgment 22 January 2008, para. 51. See also *Fretté v. France*, Application no. 36515/97, Judgment 26 February 2002, para. 32.
65 *Genovese v. Malta*, Application no. 53124/09, Judgment 11 October 2011, paras. 30–32.

established by Article 14 and more broadly with the principles underlying the Convention'.[66]

The Court thus obliges the Contracting States to ensure that the right to non-discrimination is also respected in relations between private individuals, thereby imposing both negative and positive obligations on the States. In other words, Contracting States are obliged to refrain from any arbitrary interference with the private and family life of individuals and must also take the necessary positive measures inherent in an effective "respect" for private or family life.[67]

The Court has found violations of Article 14 in numerous cases where discriminatory violence between private parties was not sufficiently investigated by the public authorities or punished by the State. For example, in the *Šečić v. Croatia* case, the Court found a violation of Article 14 in conjunction with Article 3. This was because the investigation into acts of violence committed against the applicant, who was of Roma origin, by assailants believed to belong to a group of skinheads, dragged on for more than seven years without any serious steps being taken to identify or prosecute those responsible. However, the attack was likely to have been the result of ethnic hatred.[68]

In the *Milanović v. Serbia* case, the applicant filed several complaints with the national authorities about a series of religiously motivated attacks perpetrated against him by private individuals. Although the authorities suspected that the attacks had been committed by individuals belonging to one or more extreme right-wing organisations and that there was no guarantee that the attacks wouldn't be repeated in the future, they allowed the investigation to drag on for many years without taking adequate measures to identify and prosecute the perpetrators. *Inter alia*, the Court found a violation of Article 14 in conjunction with Article 3.[69]

The Court also found that several Contracting States failed to take necessary actions to prevent or address discrimination among private parties, leading to breaches of Article 14 in cases involving issues such as trade-union membership,[70]

66 *Pla and Puncernau v. Andorra*, para 59. The Court considered that the national court violated Article 14 in conjunction with Article 8 by inferring that the meaning of the notion "child" used in the contested testamentary disposition concerned only biological children, although the wording of testamentary disposition made no distinction between biological and adopted children. See also *Deaconu and Alexandru Bogdan v. Romania*, Application no. 66299/12, Judgment 29 January 2019, para. 24.

67 *Pla and Puncernau v. Andorra*, paras. 43–44.

68 *Šečić v. Croatia*, Application no. 40116/02, Judgment 31 May 2007, paras. 69–70. See also *Abdu v. Bulgaria*, Application no. 26827/08, Judgment 11 March 2014.

69 *Milanović v. Serbia*, Application no. 44614/07, Judgment 14 December 2010, para. 92. See also *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, Application no. 71156/01, Judgment 3 May 2007.

70 *Danilenkov and Others v. Russia*, Application no. 67336/01, Judgment 30 July 2009.

gender discrimination,[71] parental leave rights,[72] and enforcement of judicial judgments.[73]

3. Article 1 of Protocol No. 12

Article 1 of Protocol No. 12 contains a general prohibition of discrimination, which reads as follows: 1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

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

The Protocol refers to the principle of equality in its preamble as a fundamental principle and commits to take steps to promote the equality of all persons through the collective enforcement of a general prohibition of discrimination. The first paragraph extends the prohibition of discrimination to any right laid down by law, but leaves untouched the non-exhaustive list of protected grounds. In this respect, the Explanatory Report states that the protected grounds have not remained the same because of a lack of awareness of the emergence of additional grounds, but rather in order to avoid possible *a contrario* interpretations as regards discrimination on grounds that are not included. With regards to the meaning of the notion of discrimination the Court has ruled that the same term "discrimination" has been used in Article 14 and in Article 1 of Protocol No. 12. As it has been mentioned in the Explanatory Report, as well,[74] the meaning of the term in Article 1 of Protocol No. 12 was intended to be identical to that in Article 14. As a consequence, the Court does not see any reason to depart from the settled interpretation of "discrimination" in applying Article 1 of Protocol No. 12.[75]

Concerning the scope of the protection of Article 1 of Protocol No. 12, the Court holds that the scope goes beyond "any right set forth by law," as follows in particular from paragraph 2, providing that no one may be discriminated against by a public authority.[76] According to the Explanatory Report, the scope of protection of Article 1 concerns four categories of cases enlisted in paragraph 22 of the Explanatory Report. It was considered unnecessary to specify which of these four elements were covered by the first paragraph of Article 1, and which by the second. The two paragraphs are

71 *García Mateos v. Spain*, Application no. 38285/09, Judgment 19 February 2013.
72 *Hulea v. Romania*, Application no. 33411/05, Judgment 2 October 2012.
73 European Court of Human Rights, 2024, p. 9.
74 Explanatory Report, para. 16.
75 *Sejdić and Finci v. Bosnia and Herzegovina*, Application nos. 27996/06 and 34836/06; Judgment 22 December 2009, para. 55.
76 *Savez crkava "Riječ života" and Others v. Croatia*, Application no. 7798/08, Judgment 9 December 2010, para. 104.

complementary and the distinctions between the four categories are not clear-cut.[77] Therefore, in order to determine whether Article 1 of Protocol 12 is applicable, the Court only needs to establish whether the applicant complaint falls within one of the four categories mentioned above.[78]

So far, the Court has had few opportunities to examine the application of Article 1 of Protocol No. 12. In its first case concerning these provisions, the Court found that the constitutional provisions that rendered the two applicants of Roma and Jew ethnicity ineligible to stand for election to the Presidency – as they hadn't declared affiliation to any of the "constituent people," namely Bosniacs, Croats or Serbs – amounted to discrimination.[79]

In *Napotnik v. Romania,* the Court concluded that the early termination of a diplomatic posting abroad of a pregnant woman fell within the scope of Article 1 of Protocol No. 12. However, the Court held that the measure taken by the State constituted a proportionate interference for achieving the legitimate aim of the protection of the rights of others, notably Romanian nationals in need of consular assistance in Slovenia.[80]

In *Ádám and Others v. Romania,* the applicants, ethnic Hungarian pupils, alleged discrimination in the baccalaureate qualification process, as they were required to take additional examinations in their mother tongue, which limited their preparation and recovery time compared to Romanian pupils. They argued that the difficulty of the Romanian language exams exacerbated their disadvantage and reduced their overall chances of success. The Court held that the difference in treatment they experienced vis-à-vis their Romanian peers was not sufficiently significant for the purposes of Article 1 of Protocol No. 12 to the Convention.[81]

4. Elements of Discrimination

As mentioned above, the Convention does not define the concept of discrimination. Therefore, the Court has developed a multi-step test when deciding cases of discrimination:

Has there been a difference in treatment of persons being in an identical or relevantly similar situations, or a lack of difference in treatment of persons finding themselves in different situation?

77 Explanatory Report, para. 23.
78 *Savez crkava "Riječ života" and Others v. Croatia*, para. 104.
79 *Sejdić and Finci v. Bosnia and Herzegovina*, para 56. See also *Kovačević v. Bosnia and Herzegovina*, Application no. 43651/22, Judgment 29 August 2023.
80 *Napotnik v. Romania,* Application no. 33139/13, Judgment 20 October 2020, para. 87.
81 *Ádám and Others v. Romania,* Application nos. 81114/17 and 5 others, Judgment 13 October 2020, para. 107.

If so, was the difference – or the lack of difference – justified: does it pursue a legitimate aim, and; are the means employed reasonably proportional to the aim pursued?[82]

Under the following headings the elements of the discrimination-test shall be considered.

4.1. Difference in Treatment

The first step in a discrimination test is to establish whether there is a difference in treatment between people in analogous or relevantly similar situations. There are many nuances to this apparently simple statement. Depending on the form of distinction, several types of discrimination are recognised in the case law of the Court and in the literature. While other conditions must be met in addition to the difference in treatment in the broad sense for discrimination to occur, I will discuss the different forms of discrimination under this heading for educational purposes.

4.1.1. Direct Discrimination

According to the case law of the Court, the standard form of discrimination refers to the 'difference in treatment of persons of analogous, or relevantly similar situation'.[83] This is, by the way, the basic form of discrimination, called direct discrimination. It is normally for the applicant to prove this when alleging a violation of Article 14.[84]

For example, in the *Ēcis v. Latvia* case, the applicant complained that he had been discriminated against on the grounds of his sex with respect to the applicable prison regime. The applicant was convicted of murder and sentenced to 20 years' imprisonment. His request of permission to attend his father's funeral was denied. Nevertheless, had he been a female prisoner in analogous circumstances, he would have been eligible for such prison leave. The Court found a violation of Article 14 taken in conjunction with Article 8.[85]

In *Varnas v. Lithuania*, the Court found a violation of Article 14 taken in conjunction with Article 8 as the applicant – a prisoner held in pre-trial detention for more than three years – had been systematically denied conjugal visits from his wife, while convicted prisoners were allowed such visits.[86]

82 European Court of Human Rights, 2024, p. 16. For a slightly different structuring of the questions of the discrimination-test see Rainey, McCormick, Ovey, 2021, pp. 652–653.

83 *Carson and Others v. United Kingdom*, Application no. 42184/05, Judgment 16 March 2010, para. 61; *Biao v. Denmark*, para. 89. For a slightly different phrasing, yet similar meaning see *D.H. and Others v. Czech Republic*, para. 175; *Burden v. the United Kingdom*, Application no. 13378/05, Judgment 29 April 2008, para. 60; *Okpisz v. Germany*, Application no. 59140/00, Judgment 25 October 2005, para 33; *Fredin v. Sweeden*, Application no. 12033/86, Judgment 18 February 1991, para. 60.

84 *D.H. and Others v. Czech Republic*, para. 177; *Timishev v. Russia*, Application nos. 55762/00 and 55974/00, Judgment 13 December 2005, para. 57; *Şerife Yiğit v. Turkey*, Application no. 3976/05, Judgment 2 November 2010, para. 71.

85 *Ēcis v. Latvia*, Application no. 12879/09, Judgment 10 January 2019, para. 94.

86 *Varnas v. Lithuania*, Application no. 42615/06, Judgment 9 July 2013, para. 122.

In *Fabris v. France*, the applicant, a child born out of wedlock, could only claim a share in his mother's estate equal to half the share of his mother's legitimate children. The Grand Chamber found a violation of Article 14 in conjunction with Article 1 of Protocol No. 1.[87]

In certain cases, the parties may disagree with the existence or the cause of the different treatment. In *E.B. v. France*, the applicant alleged that 'at every stage of her application for authorisation to adopt, she had suffered discriminatory treatment that had been based on her sexual orientation'.[88] The Government held that the applicant's request for adoption was refused in view of 'the child's interests alone and had been based on two grounds: lack of a paternal referent and the ambivalence of the applicant's partner's commitment to her adoption plans'.[89]

The logical consequence of the above-mentioned definition – or the other side of the coin – is that treating people who are in significantly different situations in the same way also amounts to discrimination. One of the first cases in which the Court enhanced this definition was the *Thlimmenos v. Greece* case. The applicant, a Jehovah's Witness who had been convicted of insubordination for refusing to wear the military uniform at a time of general mobilisation, was refused appointment to a chartered accountant's post by the Greek Institute of Chartered Accountants because of his previous conviction. The applicant complained that the Greek law did not distinguish between persons convicted as a result of their religious beliefs and persons convicted on other grounds.[90] The Court argued that 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'[91] and found a violation of Article 14 in conjunction with Article 9 regarding freedom of thought, conscience and religion.

In *Selygenenko and Others v. Ukraine* the applicants, originally from Crimea and Donetsk, relocated to Kyiv as internally displaced persons (IDPs) after the events of 2014 but maintained their registered residences in their home regions. They applied to vote in local elections in Kyiv, but their applications were rejected because their registered addresses were outside the city. The applicants submitted that they could not be compared to other people who did not reside at their own registered places of residence, as they had been forced to leave their homes and could not go back. Additionally, no elections were held at their registered places of residence so they could not participate in local elections at all. The Court found that the applicants, as well as any other IDPs, were in a significantly different situation from citizens living at their registered places and thus,

87 *Fabris v. France*, Application no. 16574/08, Judgment 7 February 2013, para. 73.
88 *E.B. v. France*, para. 2.
89 *E.B. v. France,* para. 37. For further examples see European Court of Human Rights, 2024, p. 17; Harris et al., 2023, pp. 778–779.
90 *Thlimmenos v. Greece*, para. 33.
91 *Thlimmenos v. Greece*, para. 44.

> 'measures to put them on an equal footing with others in order to be able effectively to enjoy a right guaranteed by national law – the right to vote in local elections – were necessary in order to avoid discriminating against them'.[92]

Harassment and instruction to discriminate can be viewed as forms of discrimination as well.[93] The *Oganezova v. Armenia* case involved a prominent LGBT community member facing severe harassment and an arson attack on her bar, fuelled by a homophobic campaign and public endorsement of the violence from politicians. Following the attack, she and her staff endured ongoing intimidation and death threats, which ultimately forced her to seek asylum in Sweden. The Court concluded that Armenian authorities failed to protect her from the harassment and did not conduct an effective investigation into the incidents, resulting in the violation of Article 3 of the Convention taken in conjunction with Article 14.[94]

4.1.2. Indirect Discrimination

In some cases, even a seemingly neutral rule can lead to discrimination in practice, if it affects a group of people characterised by a common feature. The concept of indirect discrimination is usually illustrated by the case of *D.H. and Others v. Czech Republic*.[95] While this case is a perfect example for grasping the intricacies of the concept, the seeds of the definition of indirect discrimination were sown in the Court's earlier case law.[96]

In the *D.H. and Others v. Czech Republic,* 18 Czech nationals of Roma origin born between 1985 and 1991, along with a large number of Roma children, were placed in special schools on the basis of tests measuring intellectual ability, which they claim were influenced by their Roma origin. The Court found that the tests used to place children in special schools were designed with the mainstream Czech population in mind and did not take into account the cultural and linguistic differences of Roma. As a result, Roma children performed poorly on the tests and were placed in special schools in a disproportionate number. With regard to the definition of indirect

92 *Selygenenko and Others v. Ukraine,* Application nos. 24919/16 and 28658/16, Judgment 21 October 2021, para. 52.

93 European Court of Human Rights, 2024, p. 12.

94 *Oganezova v. Armenia,* Application nos. 71367/12 and 72961/12, Judgment 17 May 2022, para. 124. See also *Bączkowski and Others v. Poland,* Application no. 1543/06, Judgment 3 May 2007.

95 *D.H. and Others v. Czech Republic.*

96 The *Hugh Jordan v. the United Kingdom,* Application no. 24746/94, Judgment 4 May 2001, case concerns the shooting and killing of the applicant's son by a police officer in unclear circumstances. The applicant alleged, on the basis of statistical data, that there was a discriminatory use of lethal force and a lack of legal protection against a section of the community on the grounds of national origin or association with a national minority. In considering a possible violation of Article 14, the Court concluded that a general policy or measure may be regarded as discriminatory if a general policy or measure had disproportionately prejudicial effects on a particular group, even if it is not specifically aimed at or directed at that group (see para. 154). In this particular case, however, the Court considered that statistics could not in themselves reveal a practice which could be classified as discriminatory within the meaning of Article 14.

discrimination, the Grand Chamber stated that 'a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group'.[97] Moreover, indirect discrimination doesn't necessarily require a discriminatory intent.[98] The Court concluded that the tests were biased and could not justify the differential treatment of Roma children, as their particular characteristics were not taken into account in the evaluation. The Court also took into account the general practice of placing Roma children in special schools in that period of time.

In *Biao v. Denmark,* the applicants, a Danish citizen of Togolese origin and his Ghanaian wife, were faced with the rejection of their application for family reunification in Denmark on the basis of legal compliance issues. According to Danish law, they could have been granted the right if they could demonstrate that their aggregate ties to Denmark were stronger than their attachment to any other country or if they had held Danish citizenship for at least 28 years. The Court found that the law favoured Danish nationals of Danish ethnic origin, and placed at a disadvantage – or had a disproportionately prejudicial effect on – persons who acquired Danish nationality later in life and who were of ethnic origins other than Danish.[99]

Furthermore, as a response to the criticism of its initial refusal of admitting statistical data as proof of indirect discrimination,[100] the Court strengthened its more recent case law[101] in light of which reliable statistics could be taken into account as a prima facie indication that an apparently neutral rule negatively affects a certain group. In such cases, if the evidence submitted can be regarded as 'sufficiently reliable and significant to give rise to a strong presumption of indirect discrimination,'[102] the burden of proof shifts to the Government, which must prove that the negative effects of the measure were the result of objective factors unrelated to the characteristic of the certain group.

4.1.3. Discrimination by Association

According to the Court, the expression "other status" has generally been given a wide meaning in its case law and their interpretation has not been limited to characteristics that are personal – in the sense that they are innate or inherent to the applicant. Article 14 of the Convention also covers instances in which an individual is treated

97 *D.H. and Others v. Czech Republic*, para. 184. See also *Horváth and Kiss,* Application no. 11146/11, Judgment 29 January 2013, para. 105; *Oršuš and Others v. Croatia*, Application no. 15766/03, Judgment 16 March 2010, para. 150.
98 *D.H. and Others v. Czech Republic*, para. 184. See also *Horváth and Kiss*, para. 105. This was reinforced in *Biao v. Denmark*, para. 103, *Oršuš v Croatia*, para. 150.
99 *Biao v. Denmark*, para. 138.
100 *Hugh Jordan v. the United Kingdom,* para. 154.
101 See for example *Hoogendjik v. The Netherlands,* Application no. 58641/00, Judgment 6 January 2005, para. 2 of the part 'the Law'.
102 *D.H. and Others v. Czech Republic*, para. 195. See also *Di Trizio v. Switzerland*, Application no. 7186/09, Judgment 2 February 2016, paras. 85–90.

less favourably on the basis of another person's status or protected characteristics.[103] Based on the settled case law of the Court, Article 14 also covers discrimination by association – that is, situations where the protected ground relates to another person who is related to the applicant.[104]

In *Guberina v. Croatia*, the Court found a violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1 because of the national authorities' failure to take account of the needs of a child with disabilities when determining the applicant father's eligibility for tax relief on the purchase of suitably adapted property. In excluding him from tax exemption, authorities had not given any consideration to the specific needs of the applicant's family related to the child's disability.[105]

In *Weller v. Hungary,* the second and third applicants, the children of a Hungarian father and a Romanian mother, argued that their exclusion from maternity benefit on the basis of their mother's foreign nationality – despite the fact that they were both Hungarian by birth – constituted an unjustified difference in treatment compared with other Hungarian children. The Court considered that the entitlement to an allowance due to a family cannot be dependent on which of the two biological parents of the children is a Hungarian national[106] and found a violation of Article 14 read in conjunction with Article 8.

In the *Molla Sali v. Greece* case, the applicant's Muslim husband left his entire estate to his wife in a will drawn up before a notary in accordance with the provisions of the Greek Civil Code. The sisters of the deceased challenged the will before the national courts, arguing that, in view of the deceased's Muslim religion, Sharia law applied to the inheritance. The Court of Cassation applied Islamic inheritance law on the basis of a provision of international law and deprived the applicant of three quarters of her inheritance. After noticing that the two treaties signed and ratified by Greece and applied by the Court of Cassation did not require Greece to apply Sharia law, the Court claimed that

> 'It cannot be assumed that a testator of Muslim faith, having drawn up a will in accordance with the Civil Code, has automatically waived his right, or that of his beneficiaries, not to be discriminated against on the basis of his religion'.[107]

Applying Sharia law against the wishes of the testator amounted to discrimination. The Court found a violation of Article 14 read in conjunction with Article 1 of Protocol No. 1.[108] It is important to note that the Court did not compare the applicant's situation with that of a non-Muslim woman married to a non-Muslim husband, but rather with

103 *Molla Sali v. Greece*, Application no. 20452/14, Judgment 19 December 2018, para. 138
104 European Court of Human Rights, 2024, p. 13.
105 *Guberina v. Croatia,* Application no. 23682/13, Judgment 22 March 2016, paras. 93–99.
106 *Weller v. Hungary,* Application no. 44399/05, Judgment 31 March 2009, para. 38.
107 *Molla Sali v. Greece*, Application no. 20452/14, Judgment 19 December 2018, para. 156.
108 *Molla Sali v. Greece,* para. 162.

that of a beneficiary of a will made by a non-Muslim testator in accordance with the Greek Civil Code.[109]

4.1.4. Positive Action

In certain cases, in order to respect Article 14, the Contracting States are required to correct "factual inequalities" by different treatment.[110] In these circumstances, not the difference in treatment, but a failure to attempt to correct such inequalities may result in a breach of the prohibition of discrimination.[111] This orientation of the Court can be regarded as a step towards the idea of *substantial equality.*[112]

The Court pays particular attention to the inadequate investigation by the authorities of violence on racial, ethnic or religious grounds. For example, the *Abdu v. Bulgaria* case concerns the failure of the authorities to take reasonable steps to investigate plausible evidence that the violent assault inflicted upon the applicant and one of his friends – both Sudanese nationals – by two Bulgarian youths, alleged skinheads, was racially motivated. The Court stated that in case of investigating violent incidents triggered by suspected racist attitudes, the State authorities are required to take all reasonable action to identify the potential racist motives of the attack and added that treating 'racially motivated violence and brutality on an equal footing with cases lacking any racist overtones would be tantamount to turning a blind eye to the specific nature of acts which are particularly destructive of fundamental human rights'.[113]

The case law of the Court reflects an increasingly evident expectation of a strong State role against racial or ethnic discrimination, particularly in cases involving persons of Roma origin.[114] For this purpose, the Court has repeatedly underlined that that as a result of their history, the Roma have become a specific type of disadvantaged and vulnerable minority and thus require special protection.[115]

The indifference and lack of effective action on the part of certain States in matters relating to domestic violence – in the context of the effective prevention and combating of gender-based violence – is considered by the Court, in conjunction with Articles 2 and 3 of the Convention, to be a violation of the prohibition of discrimination in Article 14.[116]

109 European Court of Human Rights, 2024, pp. 18–19.
110 *D.H. and Others v Czech Republic*, para. 175; *Thlimmenos v Greece,* para. 44; *Stec and Others v. UK,* Application nos. 65731/01 and 65900/01, Judgment 12 April 2006, para. 51.
111 European Court of Human Rights, 2024, p. 14.
112 For further details see Szalayné Sándor, 2021, p. 346.
113 *Abdu v. Bulgaria,* para. 44. See also *Milanović v. Serbia*, para. 97, *Angelova and Iliev v. Bulgaria*, Application no. 55523/00, Judgment 26 July 2007, para. 115; *Nachova and Others v. Bulgaria*, Application nos. 43577/98 and 43579/98, Judgment 6 July 2005, para. 160.
114 Szalayné Sándor, 2021, p. 347.
115 *D.H. and Others v. Czech Republic*, para. 182; *Oršuš and Others v. Croatia*, para. 147; *Horváth and Kiss v. Hungary,* para. 102.
116 Szalayné Sándor, 2021, p. 347.

The positive obligations of the States to stop, prevent, or punish such discrimination is mentioned in the case law of the Court as "positive measures," "reverse discrimination," "positive action," or "affirmative action".[117]

4.2. Comparable Situations

The second step in determining whether discrimination has occurred is to examine whether the people who claim to have been discriminated against are in a relevantly similar situation to another group that has been treated differently, or on the contrary, are in a different situation from the group that has been treated similarly. The other person or group of persons is called the "comparator".[118]

The comparability should be assessed in light of the aim of the subject-matter, objective of the contested provision, and the context in which the alleged discrimination is occurring, not *in abstracto*. As such, two groups of people may be considered as being in an analogous situation for the purpose of one particular complaint but not another.[119] Furthermore, the comparison between the two groups or situations does not require a strict identity between the two situations, the applicant has to prove that concerning the particular nature of their complaint they were in a relevantly similar situation.[120]

Example of situations considered comparable by the Court include prisoners held in pre-trial detention and convicted prisoners with regards to conjugal visits[121] and access to television,[122] legitimate and illegitimate children in regard to succession,[123] and men and women in regard to parental leave.[124]

The Court however held that lawyers and notaries on the one hand, and other legally trained persons on the other, are not in comparable situations for the purposes of their appointment as a guardian in cases where legal representation was necessary.[125] Furthermore, a person who resists the police is not in a relevantly similar situation to a person who assaults a private individual,[126] nor are taxpayers who had challenged a social contribution before it was declared unconstitutional to those who challenged it afterwards.[127] Privately-owned and public kindergartens aren't in a relevantly similar or analogous position for the purpose of payment of subsidies[128]

117 European Court of Human Rights, 2024, p. 14.
118 See European Court of Human Rights, 2024, p. 16.
119 European Union Agency for Fundamental Rights, Council of Europe, 2018, p. 47. See also European Court of Human Rights, 2024, p. 17.
120 European Court of Human Rights, 2024, p. 17.
121 *Varnas v. Lithuania,* Application no. 42615/06. Judgment 9 July 2013.
122 *Laduna v. Slovakia*, Application no. 31827/02, Judgment 13 December 2011.
123 *Fabris v. France*.
124 *Konstantin Markin v. Russia*, Application no. 30078/06, Judgment 22 March 2012.
125 *Graziani-Weiss v. Austria*, Application no. 31950/06, Judgment 18 October 2011, para. 65.
126 *P.W. v. Austria*, Application no. 10425/19, Judgment 21 June 2022, para. 81.
127 *Frantzeskaki and Others v. Greece*, Application nos. 57275/17, 58549/17, 58631/17 et al., Judgment 12 February 2019, para. 42.
128 *Špoljar and Dječji Vrtić Pčelice v. Croatia,* Application no. 68320/13, Judgment 22 September 2020, para. 45.

and pensioners employed in the civil service are not in a relevantly similar situation to pensioners employed in the private sector.[129]

With regards to the situation of beneficiaries of social security systems, in *Carson and Others v. The United Kingdom,* the Court considered that social security benefits, including State pensions, are part of a system of social welfare that exists to ensure certain minimum standards of living for residents of a certain state in that certain state. Furthermore, the pension system is primarily designed to serve the needs of those resident in a certain state, characterised by a range of economic and social variables, which renders it hard to draw any genuine comparison with the position of pensioners living elsewhere.[130]

Another interesting case in which the Court ruled that the applicants were not in a similar or analogous situation to their comparators is *Burden v. the United Kingdom.* The applicants were elderly, unmarried sisters who had lived together all their lives in a house they owned together. They submitted to the Court that if one of them died, the survivor would face a large inheritance tax bill, unlike the survivor of a marriage or civil partnership, who would be exempt from paying such tax. The Grand Chamber emphasised that sibling relationships are qualitatively different from those of married couples and civil partners because of the nature of consanguinity, which does not exist in the latter and the intent of entering into the formers. The Court reaffirmed that marriage had a unique status under Article 12 of the Convention, with social and legal implications that did not extend to other forms of cohabitation.[131]

4.3. Protected Grounds

Article 14 states that discrimination is prohibited "on any ground," giving a list of examples as prohibited ground for discrimination. The last item on the list is "other status". It is clear from the first reading that the list is illustrative and not exhaustive, and the Court of Justice has confirmed this.[132] However, it is important to note that not all protected grounds will carry the same weight. This means that in some cases, such as discrimination based on sex or gender, nationality, race, religion, legitimacy, sexual orientation, and disability, the Court will look very closely at the discriminatory treatment and only very weighty reasons are accepted as justifications.[133]

According to the well-established case law of the Court, not every difference in treatment will amount to a violation of Article 14, but only those based on an identifiable characteristic or "status" based on which persons or groups of persons are

129 *Fábián v. Hungary*, Application no. 78117/13, Judgment 5 September 2017, para. 133.
130 *Carson and Others v. the United Kingdom*, Application no. 42184/05, Judgment 16 March 2010, paras. 85–86. See also *Efe v. Austria*, Application no. 9134/06, Judgment 8 January 2013, paras. 52–53 with regard to family allowance for children living in Austria and abroad. For further details see Szalayné Sándor, 2021, p. 343.
131 *Burden v. the United Kingdom*, Application no. 13378/05, Judgment 29 April 2008, paras. 62–63. For further examples see European Court of Human Rights, 2024, p. 18.
132 *Clift v. the United Kingdom,* Application no. 7205/07, Judgment 13 July 2010, para. 55.
133 See Rainey, McCormick, Ovey, 2020, p. 661.

distinguishable from one another.[134] The Court also stated that asking the victim to alter their personal situation in order to avoid discrimination – for example, by acquiring a nationality – would render Article 14 devoid of substance.[135]

In view of the limitations of this study, only three categories of the protected ground will be discussed. Nevertheless, case studies for the other protected grounds are presented in the study under a number of different topics.

4.3.1. Sex

As the advancement of gender equality is a major goal for member States of the Council of Europe, the Court has emphasised that only for "very weighty reasons" can a difference of treatment on the sole ground of sex be regarded justifiable.[136] Therefore, references to traditions, general assumptions or prevailing attitudes are not accepted by the Court as justifications.[137] For example, the Court found that States are prevented from imposing traditions that derive from the man's primordial role and the woman's secondary role in the family in a case concerning the obligation of married women to bear their husband's surname.[138] Similarly, gender stereotypes – such as the perception that women are the primary child-carers and men the primary breadwinners – cannot in themselves be considered sufficient to justify a difference in treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation.[139]

However, the Court recognised that in certain fields, the difference of treatment between men and women is acceptable if the difference takes the form of positive action aimed at compensating women for existing inequalities.[140]

For example, in *Andrle v. Czech Republic*, the Court found that the lower retirement age for women who have brought up more than one child was an objectively and reasonably justified measure to compensate for the factual inequality between men and women,[141] resulting from the expectation that women will work full time in addition to looking after the home and bringing up children.[142] On the other hand, in *Moraru and Marin,* the Court considered that not giving the applicants the option to continue

134 *Carson and Others v. the United Kingdom*, para. 61; *Molla Sali v. Greece*, para. 134; *Fábián v. Hungary*, para. 113; *Kiyutin v. Russia*, Application no. 2700/10, Judgment 10 March 2011, para. 56.
135 *Andrejeva v. Latvia*, Application no. 55707/00, Judgment 18 February 2009, para. 91.
136 *Abdulaziz, Cabales and Balkandali v. the United Kingdom,* Application nos. 9214/80; 9473/81; 9474/81, Judgment 28 May 1985, para. 78; *Burghartz v. Switzerland,* para. 27; *Konstantin Markin v. Russia*, para. 127.
137 *Konstantin Markin v. Russia*, para. 127.
138 *Ünal Tekeli v. Turkey*, Application no. 29865/96, Judgment 16 November 2004, para. 63.
139 *Konstantin Markin v. Russia*, para. 143; *Carvalho Pinto de Sousa Morais v. Portugal*, Application no. 17484/15, Judgment 25 July 2017, para. 52.
140 European Court of Human Rights, 2024, p. 14.
141 *Andrle v. Czech Republic*, Application no. 6268/08, Judgment 17 February 2011, paras. 59–60. See also *Stec and Others v. the United Kingdom*, Application nos. 65731/01 and 65900/01, Judgment 12 April 2006, para. 61.
142 uropean Court of Human Rights, 2024, p. 14.

to work past their retirement age, until they reached the retirement age set for men constituted discrimination based on sex.[143]

Furthermore, in *Alexandru Enache v. Romania,* the Court considered that the national legislation permitting a deferral of prison sentence for mothers, but not fathers, of children under the age of one year did not amount to a violation of Article 14, as the difference in treatment was justified by the 'special ties that exist between the mother and child during that period'[144] and in view of protecting the specific features of motherhood.[145]

The Court also scrutinises domestic violence laws under Articles 2 and 3 in conjunction with article 14, considering failures to protect women from such violence as forms of gender-based discrimination. In *Opuz v. Turkey,* the applicant's mother was shot and killed by the applicant's husband. In the years preceding the shooting, the husband had subjected both the applicant and her mother to a series of violent assaults and threats. The applicant made multiple reports to the authorities that led to some criminal proceedings; however, these were discontinued after the women withdrew their complaints under pressure. Despite convictions for earlier violent incidents resulting in minimal penalties, the situation escalated to the fatal shooting of the applicant's mother, for which the husband received a life sentence in 2008 but was released pending appeal. The applicant's renewed threats and subsequent need for protection were only addressed seven months later, following intervention from the Court. The Court observed that although the Turkish law then in force did not make explicit distinction between men and women in the enjoyment of rights and freedoms, the alleged discrimination at issue was based on the passive attitude of the authorities with regards to the reported domestic violence.[146] Additionally, the applicant managed to show 'the existence of a *prima facie* indication that the domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence'.[147]

In interesting observation has been made in the literature, namely that the majority of gender discrimination cases have been related to men's equality, rather than to measures taken by the State to promote women's equality. Cases before the Court had

143 *Moraru and Marin v. Romania,* Application nos. 53282/18 and 31428/20, Judgment 20 December 2022, para. 123. On the same note, in *Pająk and Others v. Poland* the Court considered that a newly instituted difference in age between me and women concerning the early termination of their terms as judges amounted to discrimination based on sex. *Pająk and Others v. Poland*, Application nos. 25226/18, 25805/18, 8378/19 and 43949/19, Judgment 24 October 2023, para. 260–263. See also European Court of Human Rights, 2024, p. 27.

144 *Alexandru Enache v. Romania,* Application no. 16986/12, Judgment 3 October 2017, para. 76.

145 *Alexandru Enache v. Romania,* para. 77.

146 *Opuz v. Turkey,* para. 192.

147 *Opuz v. Turkey,* para. 198. See also *Eremia v. the Republic of Moldova,* Application no. 3564/11, Judgment 28 May 2013, para. 82; *Volodina v. Russia*, Application no. 41261/17, Judgment 9 July 2019, para. 132.

mostly raised issues of family law, such as a father's right to see his children, his right to participate in their upbringing or his right to parental leave.[148]

4.3.2. Race, Ethnicity and Colour

The *Timishev v. Russia* case is a perfect illustration and summary of the main principles of the Court on ethnic and racial discrimination. The applicant – a Russian citizen of Chechen origin living as a forced migrant in Nalchik – in the Russian Republic of Kabardino-Balkaria, alleged that he had been refused entry into Kabardino-Balkaria by police officers at a checkpoint on the basis of an oral instruction not to admit persons of Chechen origin. His legal attempts to obtain compensation had been unsuccessful. Furthermore, his children were denied schooling because he could not produce a migrant card, which he had surrendered in exchange for compensation, leading to an informal and precarious solution for their education.

The Court clarified that in its view

> '[e]thnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds'.[149]

The Court added that discrimination based on actual or perceived ethnicity is a form of racial discrimination. Since racial discrimination is a "particularly invidious kind of discrimination" with dangerous consequences, it requires special vigilance and a vigorous response by the authorities. Therefore, the authorities must use all available means to combat racism.[150] The Court also reiterated that in a modern democratic society founded on the principles of pluralism and respect for different cultures, no difference of treatment based exclusively or to a decisive extent on a person's ethnic origin can be objectively justified.[151]

As shown above, the Court has underlined the importance of a strong State role in combating racial or ethnic discrimination, particularly in cases involving persons of Roma origin, as the Roma are a disadvantaged and vulnerable minority in need of special protection.[152] It is important to note that it is generally accepted that Convention does not directly guarantee the civil and political rights of members of minority groups.[153] Nevertheless, the Court has succeeded, through the development of indirect

148 Szalayné Sándor, 2021, p. 354.
149 *Timishev v. Russia*, para. 55. See also *Sejdić and Finci v. Bosnia and Herzegovina*, para. 43.
150 *Timishev v. Russia,* para. 56. See also *Nachova and Others v. Bulgaria*, Application nos. 43577/98 and 43579/98, Judgment 6 July 2005, para. 145.
151 *Timishev v. Russia,* para. 58.
152 See subchapter 4.1.2.
153 Harris et al., 2023, p. 5.

discrimination and the doctrine of positive action, in interpreting the scope of the Convention in an expansive manner, going beyond the strictly personal interests of the applicants and discussing the discrimination of certain minorities.[154]

The Court also underlined the duty of the authorities to investigate racially motivated acts of violence with vigour and impartiality, requiring State authorities to take all reasonable action to ascertain the existence of racial motivation.[155] Nonetheless, the Court admitted that 'proving racial motivation will often be extremely difficult in practice'.[156]

The Court has also dealt with a number of cases of racial discrimination in relation to political rights, as the right to vote or stand for election.[157] For example, in *Aziz v. Cyprus* the applicant, a resident of Nicosia, was denied the right to vote in the parliamentary elections of 27 May 2000 on the basis of constitutional provisions which prevented members of the Turkish Cypriot community from being registered on the Greek Cypriot electoral roll. After having found a violation of Article 3 of Protocol No. 1, the Court proceeded to the analysis of the complaint under Article 14, considering that it 'is not a mere restatement of the applicant's complaint under Article 3 of Protocol No. 1'.[158]

4.3.3. Other Cases

The Court has developed a rich body of case law that has extended the number of protected grounds by interpreting the concept of "other status" broadly.[159] As such, the Court has found that "other status" covers age,[160] gender identity,[161] sexual orientation,[162] place of residence,[163] property,[164] health and disability,[165] parental

154 See for example *D.H. and Others v. Czech Republic*, *Horváth and Kiss*; *Oršuš and Others v. Croatia*; *Lavida and Others v. Greece,* Application no. 7973/10, Judgment 30 May 2013. For further arguments and examples see Harris et al., p. 812; Rainey, McCormick and Ovey, 2021, p. 677.
155 See subchapter 4.1.4. See also *Burlya and Others v. Ukraine*, Application no. 3289/10, Judgment 6 November 2018, *Paketova and Others v. Bulgaria,* Application nos. 17808/19 and 36972/19, Judgment 4 October 2022.
156 *Nachova and Others v. Bulgaria*, para. 159.
157 See for example *Sejdić and Finci v. Bosnia and Herzegovina; Bakirdzi and E.C. v. Hungary*, Application nos. 49636/14 and 65678/14, Judgment 10 November 2022.
158 *Aziz v. Cyprus*, Application no. 69949/01, Judgment 22 June 2004, para. 36.
159 European Court of Human Rights, 2024, p. 25.
160 See for example, *Schwizgebel v. Switzerland*, Application no. 25762/07, Judgment 10 June 2010, para. 85; *Carvalho Pinto de Sousa Morais v. Portugal,* para. 45.
161 *Identoba and Others v. Georgia*, Application no. 73235/12, Judgment 12 May 2015, para. 96.
162 *Salgueiro da Silva Mouta v. Portugal*, Application no. 33290/96, Judgment 21 December 1999, para. 28; *Fretté v. France*, Application no. 36515/97, Judgment 26 February 2002.
163 *Carson and Others v. United Kingdom*, para. 70.
164 *Chassagnou and Others v. France*, Application nos. 25088/94, 28331/95 and 28443/95, Judgment 29 April 1999, para. 95; *Clift v. the United Kingdom,* Application no. 7205/07, Judgment 13 July 2010, para. 56.
165 *Glor v. Switzerland*, Application no. 13444/04, Judgment 30 April 2009, para. 80, *Kiyutin v. Russia,* para. 57.

status,[166] marital status,[167] immigration status[168] or status related to employment.[169] But even less obvious circumstances can count as protected ground under the broad concept of "other status", such as being a prisoner[170] or a collaborator of the political police.[171]

Essentially, in order for discrimination to take place, it has to be established that the less favourable treatment is due to a "protected ground" that cannot be separated from the particular factor,[172] which is usually related to a personal characteristic of the victim, but not exclusively. The *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy* case, for example, concerns the application of an Italian Masonic Order enjoying the status of an association governed by private law, which complained of measures affecting its members, namely the legal prohibition on freemasons holding public offices. The protected ground was, thus, membership of the organisation.[173]

It should be noted that the application of the principle of dynamic interpretation can also be spotted in this area. One of the best illustrations of the functioning of this principle is the margin of appreciation given to the States in assessing discrimination on grounds of sexual orientation. The *Dudgeon v. The United Kingdom* case concerned the existence of legislation in Northern Ireland, which had the effect of criminalising certain homosexual acts between consenting adult males. In its 1981 judgment, the Court, when considering the need to uphold the contested legislation in a democratic society, held that the margin of appreciation should be wider where the protection of morals is at stake, and it was only because the particular case concerned a most intimate aspect of private life that the Court required particularly serious reasons before interference by the public authorities could be legitimate.[174]

In its more recent case law, the Court has significantly reduced the States' margin of appreciation holding that 'discrimination based on sexual orientation is as serious as discrimination based on "race, origin or colour"'[175] and that '[d]ifferences based solely on considerations of sexual orientation are unacceptable under the Convention.'[176] In line with these findings in the the *Beizaras and Levickas v. Lithuania* case concerning the authorities' refusal to prosecute the authors of serious homophobic comments, including calling for undisguised violence and incitement to hatred, after a picture

166 *Weller v. Hungary*, para. 38.
167 *Şerife Yiğit v. Turkey*, Application no. 3976/05, Judgment 2 November 2010, para. 79.
168 *Hode and Abdi v. the United Kingdom*, Application no. 22341/09, Judgment 6 November 2012, para. 47.
169 *Valkov and Others v. Bulgaria*, Application nos. 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05 and 2041/05, Judgment 25 October 2011, para. 115.
170 *Stummer v. Austria*, Application no. 37452/02, Judgment 7 July 2011, para. 90.
171 *Naidin v. Romania*, Application no. 38162/07, Judgment 21 October 2014, paras. 30–36.
172 European Union Agency for Fundamental Rights, Council of Europe, 2018, pp. 49–50.
173 *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy*, Application no. 35972/97, Judgment 2 August 2001, para. 26.
174 *Dudgeon v. the United Kingdom*, paras. 48–52.
175 *Vejdeland v. Sweden*, Application no. 1813/07, Judgment 9 February 2012, para. 55.
176 *Salgueiro da Silva Mouta v. Portugal*, para. 36; *X. and Others v. Austria*, Application No. 19010/07, Judgment 19 February 2013, para. 19.

of the applicant couple kissing was posted on social media, the Court held that the applicants suffered discrimination on the grounds of their sexual orientation. By downplaying the seriousness of the comments, the authorities, at the very least, tolerated them.[177]

With regard to private and family life being protected under Article 8, the Court has held that the relationship between a cohabiting same-sex couple living in a stable *de facto* partnership falls within the notion of "family life", just as the relationship of a different-sex couple.[178] However, the Court added that States are still free, under Article 12 of the Convention as well as under Article 14 taken in conjunction with Article 8, to restrict access to marriage to different-sex couples.[179] With regard to the right to adopt the Court pointed out in *E.B. v. France* that where national law allows single persons to adopt a child, the grounds based on the absence of a "paternal referent" cannot be regarded as justifying the refusal to authorise homosexual couples to adopt.[180]

4.4. Lack of Justification

Difference in treatment or, where appropriate, the absence of it can lead to discrimination only if there has no 'objective and reasonable justification'.[181] Based on the restrictive interpretation of Article 14, the Contracting States enjoy a considerable margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment,[182] and the Convention planned to condemn only the 'really serious, abusive, invidious discrimination'.[183]

The Court also explained that this condition entails two elements, namely the absence of a "legitimate aim" and the absence of a "reasonable relationship of proportionality" between the means employed and the aim sought to be realised.[184] Under the following headings, these two conditions will be analysed.

4.4.1. Legitimate Aim

First of all, in order for different – or, in some cases, identical – treatment to be justified, the Contracting State must prove the existence of a legitimate aim. Unlike Articles 8 to 11 of the Convention, Article 14 does not list the grounds for intervention by the Contracting States with a view to restricting the exercise of the particular right. Therefore, the aim of the State measure does not have to be linked to a specific objective of the Convention, which gives the States a rather wide margin of appreciation.[185]

177 *Beizaras and Levickas v. Lithuania*, Application no. 41288/15, Judgment 14 January 2020, para. 129.
178 *Schalk and Kopf,* Application no. 30141/04, Judgment 24 June 2010, para. 94.
179 *Schalk and Kopf,* para. 108.
180 *E.B. v. France*, paras. 87 and 94. See also Szalayné Sándor, 2021, p. 361.
181 *D.H. and Others v. Czech Republic*, para. 175; *Molla Sali v. Greece,* para. 135.
182 Rainey, McCormick, Ovey, 648.
183 Szalayné Sándor, 2021, p. 350.
184 *Molla Sali v. Greece*, para. 135; *Fabris v. France,* para. 56; *Fábián v. Hungary*, para. 113.
185 Szalayné Sándor, 2021, p. 351.

Furthermore, the State has to show that there is a link between the legitimate aim and the difference in treatment alleged by the applicant.[186] As such, the Court has shown that there is no link between the obligation of married women to bear their husband's surname and the achievement of family unity. As a result, the Court found that there was 'no objective and reasonable justification' for this obligation.[187]

The Court has identified a number of aims that can be accepted for the purpose of justification under Article 14 and several that cannot. With regard to the former, the Court considered to be legitimate aims, amongst others, the followings: the protection of the health and rights of the children,[188] facilitation of the rehabilitation of juvenile delinquents,[189] protection against gender-based violence, abuse and sexual harassment in the prison environment,[190] conditions of employment in the public service,[191] protecting national security,[192] or restoration of peace.[193]

Regarding the aims that the Court did not consider acceptable as legitimate justifications, it was not persuaded by the general and abstract considerations that the precedence given to legitimate children corresponded to what could be presumed to be the deceased's intentions when choosing the successor of a farm.[194] The Court also considered that tradition[195] or general assumptions or prevailing social attitudes in a particular country[196] are insufficient to be accepted as legitimate aims for a difference in treatment on grounds of sex.

On some issues, the case law of the Court of Justice reflects changes in the society's values. For example, in the earlier case law of the Court, the aim of supporting and encouraging a traditional family used to be in itself a "legitimate or even praiseworthy" purpose.[197] Later, the Court considered that the same aim was in the same time "a weighty and legitimate reason which might justify a difference in treatment"[198] and "rather abstract".[199] In even more recent cases, the very same aim has become only "rather abstract"[200] and "may, in some circumstances, amount to a legitimate aim".[201]

186 European Court of Human Rights, 2024, p. 19.
187 *Ünal Tekeli v. Turkey,* para. 66.
188 *Hoffman v. Austria*, Application no. 12875/87, Judgment 23 June 1993, para. 34.
189 *Khamtokhu and Aksenchik v. Russia,* Application nos. 60367/08 and 961/11, Judgment 27 January 2017, para. 80.
190 *Khamtokhu and Aksenchik v. Russia*, para. 82.
191 *Naidin v. Romania*, para. 49.
192 *Konstantin Markin v. Russia,* para. 137.
193 *Sejdić and Finci v. Bosnia and Herzegovina*, para. 45. For further examples see European Court of Human Rights, 2024, pp. 1–20, Szalayné Sándor, 2021, p. 351.
194 *Inze v. Austria*, Application no. 8695/79, Judgment 28 October 1987, paras. 42–43.
195 *Ünal Tekeli v. Turkey*, para. 63.
196 *Konstantin Markin v. Russia*, para. 127.
197 *Marckx v. Belgium*, para. 139; *Mata Estevez v. Spain,* second to last para. of part of 'the Law'.
198 *Karner v. Austria*, Application no. 40016/98, Judgment 24 July 2003, para. 40.
199 *Karner v. Austria*, Application no. 40016/98, Judgment 24 July 2003, para. 41.
200 *X and Others v. Austria*, para. 139.
201 *Taddeucci and McCall v. Italy,* Application no. 51362/09, Judgment 30 June 2016, para. 93. See also European Court of Human Rights, 2024, p. 20.

4.4.2. Proportionality

The second requirement for a justification to be considered objective and relevant is that the difference in treatment must strike a fair balance between the protected value, which is usually to safeguard a public interest, and respect for the rights and freedoms of the individual. In other words, the Court requires a 'reasonable relationship of proportionality between the means employed and the aim sought to be realise'.[202]

The Court made it clear that the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify different treatment.[203] The scope of the margin of appreciation of the Contracting States varies according to the 'circumstances, the subject-matter and the background' of the case.[204] As such, a wide margin is usually allowed to the States when it comes to general measures of economic or social strategy. The Court assumes that due to the direct knowledge of their society and its needs, national authorities are better placed than the international judge to appreciate what is in the public interest on these grounds. It usually accepts the legislature's policy choice, interfering only if it is "manifestly without reasonable foundation".[205] On the contrary, concerning, for example, a difference in treatment based exclusively on the ground of sex very weighty reasons would have to be put forward before the Court to accepted by the Court as compatible with the Convention.[206]

It has been observed that where the protected characteristic is one that the person concerned can in some way control, such as immigrant status, the Court does not require the State to provide an overly stringent explanation to justify the distinction. However, if the discrimination is linked to an intrinsic characteristic of the person concerned – for example, race, ethnicity, or gender, or to a circumstance beyond his or her control, such as refugee status – the Court requires a much stronger explanation from the State.[207]

The existence or non-existence of common ground between the laws of the Contracting States also influences the width of the margin of appreciation of the States,[208] in the sense that the Court's scrutiny is more rigorous if a common ground between the different national laws can be established. For example, in *S.A.S. v. France*, the applicants argued that the blanket ban on wearing the burqa and niqab in public under criminal sanctions was a seemingly neutral rule that mainly disadvantaged

202 *Larkos v. Cyprus,* Application no. 29515/95, Judgment 18 February 1999, para. 29; *Fabris v. France,* para. 56; *Molla Sali v. Greece,* para. 135.
203 *Larkos v. Cyprus,* para. 29; *Mollas Sali v. Greece,* para. 136.
204 *Carson and Others v. the United Kingdom,* para. 61, *Stec and Others v. the United Kingdom,* para. 52.
205 *Carson and Others v. the United Kingdom,* para. 61, *Stec and Others v. the United Kingdom,* para 52.
206 *Stec and Others v. the United Kingdom,* Application nos. 65731/01 and 65900/01, Judgment 12 April 2006, para 52.
207 Szalayné Sándor, 2021, p. 353.
208 *Petrovic v. Austria,* Application no. 156/1996/775/976, Judgment 27 March 1988, para. 38.

Muslim women, claiming the violation of Article 14 taken together with Articles 8 and 9. Somewhat surprisingly, the Court found that the aim pursued by the French government, namely the preservation of the conditions of "living together" as an element of the "protection of the rights and freedoms of others" was a legitimate aim and that the measures taken to achieve that aim were proportionate. The fact that there was no common ground between the member states of the Council of Europe influenced the Court's leniency.[209]

Furthermore, in order to satisfy the proportionality test, it is required that the measure that resulted in the different treatment is in principle suited for realising the legitimate aim and more importantly, that it was necessary in order to achieve that aim.[210] In *Karner v. Austria,* the applicant, asserted that the law in force entitled him as the surviving partner to succeed to the tenancy. Although the court of first instance and the court of appeal dismissed the landlord's action for termination of the tenancy on the grounds that the provision in question protected persons who had lived together for a long time without being married against sudden homelessness and applied to homosexuals as well as heterosexuals, the Supreme Court upheld the landlord's action, stating that it had not been the legislature's intention to include protection for same-sex couples. The Court reiterated that it could accept that the protection of the family in the traditional sense could justify a difference in treatment. However, the Government had failed to demonstrate how the restriction in this case was necessary to achieve that aim.[211]

5. Burden of Proof

According to the practice of the Court, it is for the applicant to prove that there has been a difference in treatment and for the respondent State to show that the difference – or where appropriate, the lack of difference – is justified.[212]

With regard to the assessment of evidence, the Court has adopted the standard of proof "beyond reasonable doubt"; however, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. The Court adopts the conclusions that are supported by a free assessment of all the evidence. Proof may be established by the coexistence of sufficiently strong, clear and consistent inferences or similar unrebutted presumptions of fact. The degree of persuasion required to reach a particular conclusion and, in this context, the allocation of the burden of proof, are inextricably linked to the specificity of the facts, the nature of the claim made and the Convention right at stake.[213]

209 *S.A.S. v. France*, Application no. 43835/11, Judgment 1 July 2014, paras. 153–159 and 162.
210 *Karner v. Austria,* para. 41. See also Chiriță, 2008, p. 615.
211 *Karner v. Austria*, paras. 40–41.
212 *D.H. and Others v. Czech Republic,* para. 177.
213 *Nachova and Others v. Bulgaria,* para. 147.

However, the burden of proof may be reversed, where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities. In such cases, the Court expects the authorities to provide a satisfactory and convincing explanation.[214]

The Court has also noted that applicants may have difficulty in proving discriminatory treatment. Therefore, in order to guarantee the effective protection of the victims' rights, it accepts less strict evidential rules in cases of alleged indirect discrimination.[215] Thus, when it comes to assessing the impact of a measure or practice on an individual or group, statistics that, on critical examination, appear to be reliable and significant, will suffice to establish the *prima facie* evidence which the applicant must establish. And once an applicant alleging indirect discrimination has established a rebuttable presumption of discrimination, the burden shifts to the respondent State to show that the difference in treatment is not discriminatory. This does not mean, of course, that indirect discrimination cannot be proved without statistical data.[216]

6. Concluding Remarks

This study has examined the non-discrimination provisions of Article 14 of the Convention and Article 1 of Protocol No. 12 and the case law of the Court interpreting them. Since the aim of the book, of which this study is a part, is to focus on the implementation of the Convention in Central and Eastern Europe, the study has prioritised cases concerning Central and Eastern European countries in order to support the theoretical explanations.

In the light of the examination of Article 14 and Article 1 of Protocol No. 12, the following conclusions can be drawn: despite the limited scope of Article 14, the Court's broad interpretation has succeeded in extending the prohibition of discrimination beyond the limits set by the Convention. This has been achieved through the ambit-test, the recognition of additional rights and the generous interpretation of "other status" as a protected ground; the case law of the Court reveals an attempt to develop a genuine principle of substantive equality through the positive duties imposed on States, although the text of the Convention only provides for the prohibition of formal discrimination; due to the low number of ratifications, the general prohibition of discrimination in Article 1 of Protocol No. 12 has been of limited use; despite the Court's admirable efforts to extend the scope of Article 14, it has become difficult to predict which matters fall within the scope of the Convention or of Article 14, what circumstances constitute relevant similar situations and when objective and

214 *Salman v. Turkey*, Application no. 21986/93, Judgment 27 June 2000, para. 100; *Anguelova v. Bulgaria*, Application no. 38361/97, Judgment 13 June 2002, para. 111; *D.H. and Others v. Czech Republic*, para. 179.
215 *D.H. and Others v. Czech Republic*, para. 186.
216 *D.H. and Others v. Czech Republic,* paras. 188–189.

reasonable justification can be established;[217] the broad interpretation of discrimination has sometimes been used by the Court to send messages about the eradication of prejudice and intolerance on the part of state authorities in situations related to differences in treatment based on race, gender, and sexual orientation.[218] However, the Court has also been criticised for failing to ensure genuine protection against certain types of discrimination, such as those based on ethnicity.[219]

217 Harris et al., 2023, p. 776.
218 Rainey, McCormick, Ovey, 2021, p. 677.
219 See Nagy, 2023, pp. 20, 24–27.

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