

The Discrimination Grounds of Article 14 of the European Convention on Human Rights

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Abstract

The Court's case law on the applicability of the prohibition of discrimination of Article 14 of the European Convention on Human Rights has always been ambivalent. From the 1970s onwards, there are two parallel lines of case law, one allowing complaints about almost all differences in treatment, regardless of their grounds, and another allowing only complaints about discrimination based on personal status or personal characteristics. Although the Court tried to bring its case law together in the cases of *Carson* and *Clift*, an analysis of subsequent cases makes clear that its approach is still confused. It is argued here that the inconsistencies in the definition of grounds of discrimination reflect a fundamental ambivalence as to the theoretical principles underlying Article 14. The article sets out two different rationales for non-discrimination law that may provide a sound basis for a certain approach towards the definition of grounds of discrimination. Both rationales have important but radically opposed consequences for the way Article 14 is applied as well as for the position of the Court. Although the Court may not want to do so, and although both conceptions are defensible, it will need to make a choice in order to guarantee a transparent and predictable non-discrimination case law.

Keywords: non-discrimination – grounds of discrimination – Article 14 European Convention on Human Rights

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1. Introduction

The prohibition of discrimination of Article 14 of the European Convention on Human Rights (ECHR or ‘Convention’) has always been regarded as a rather odd provision. It has been described as a ‘parasitic’ norm¹ and as the ‘Cinderella’ of the Convention,² and it has been said that the approach taken by the Court towards it can at best be described as ‘grudging.’³ The main explanation for the Article’s subordinate role is found in its accessory character.⁴ The prohibition of discrimination can only be invoked in connection with one of the other rights protected by the Convention. To be justiciable before the Court, a difference in treatment must always relate to a substantive Convention right. However, since the Convention right can usually also be invoked on its own and almost any difference in treatment can be dealt with in that context, discrimination complaints often do not add very much to the other allegations made. The Court therefore in many cases decides not to deal with the Article 14 complaint.⁵

Nonetheless, the Convention’s non-discrimination clause has been of growing importance over the past decade. It has been invoked more frequently than before and the Court has dealt with the substance of the discrimination complaint more often. In recent years, it has also started to develop and apply a number of concepts and doctrines that are new to the Court’s case law, such as the concept of indirect discrimination,⁶ the concept

- 1 Small, ‘Structure and Substance: Developing a Practical and Effective Prohibition on Discrimination under the European Convention on Human Rights’ (2003) 6 *European Journal of Discrimination and the Law* 45 at 47; and Baker, ‘The Enjoyment of Rights and Freedoms: A New Conception of the ‘Ambit’ under Article 14 ECHR’ (2006) 69 *Modern Law Review* 714 at 714.
- 2 O’Connell, ‘Cinderella Comes to the Ball: Art 14 and the Right to Non-discrimination in the Convention’ (2009) 29 *Legal Studies* 211.
- 3 Goodwin, ‘Taking on Racial Segregation: The European Court of Human Rights at a *Brown v. Board of Education* Moment?’ (2009) *Rechtsgeleerd Magazijn Themis* 93 at 95.
- 4 Ibid. See also Gerards, ‘The Application of Article 14 ECHR by the European Court of Human Rights’, in Chopin and Niessen (eds), *The Development of Legal Instruments to Combat Racism in a Diverse Europe* (Leiden/Boston: Martinus Nijhoff Publishers, 2004) 3; Wintemute, ‘“Within the Ambit: How Big is the “Gap” in Article 14 European Convention on Human Rights?’ (2004) *European Human Rights Law Review* 366; and Wintemute, ‘Filling the Article 14 “Gap”: Government Ratification and Judicial Control of Protocol No. 12 ECHR’ (2004) *European Human Rights Law Review* 484.
- 5 For two examples out of many, see *S.H. and Others v Austria* Application No 57813/00, Merits and Just Satisfaction, 3 November 2011, at para 120; and *V.C. v Slovakia* Application No 18968/07, Merits and Just Satisfaction, 8 November 2011, at paras 176–80. Many complaints are declared inadmissible because no Convention right is at stake, although the number of complaints thus dismissed have strongly decreased with the widening of the scope of the Convention. One recent example that confirms that the accessory character is still of importance is *Iovițoni and Others v Romania* Application Nos 57583/10, 1245/11 and 4189/11, Admissibility, 3 April 2012, in which the Court held (at para 53) that Article 1 of Protocol No 1 did not apply to the case and, for that reason, the complaint about discrimination in the exercise of that right also had to be declared inadmissible *ratione materiae*. See further, for example, Small, supra n 1; and O’Connell, supra n 2 at 212.
- 6 For example, *DH v Czech Republic* 2007-IV; 47 EHRR 3.

of segregation,⁷ an anti-stereotyping and anti-stigmatisation approach⁸ and a doctrine related to violence inspired by racism or discriminatory motives.⁹ It is not easy to account for this surge in non-discrimination case law. It may be the result of the simple fact that, over the past decade, an increasing number of complaints have reached the Court more generally, of which at least a part relates to discrimination issues. A more substantive (and speculative) explanation may be found in the entry into force in 2005 of Protocol No 12, in which an independent (non-accessory) non-discrimination clause is laid down. Starting with the cases of *Sejdić and Finci*¹⁰ and *Savez Crkava 'Riječ Života'*¹¹ it may be expected that, in due course, many more discrimination cases will be brought before the Court under this Protocol. The parallel existence of two similar, yet different non-discrimination clauses may compel the Court to reflect on the approach to be taken towards discrimination cases more generally. It would be difficult to explain, after all, that non-discrimination means something different under Protocol No 12 from what it does under Article 14, especially since the provisions are almost identically formulated (except for the material scope of application).¹² The Court may have considered that, for that reason, it would be helpful to start developing an equal treatment doctrine under Article 14 to prepare the ground for the application of Protocol No 12. And finally, a potential explanation for the increased attention to discrimination cases may be found in the co-existence of the Strasbourg Court and the Court of Justice of the European Union (CJEU). The CJEU's case law on the principle of equal treatment is highly developed, since the CJEU has always used the principle as leverage to bring Member States to accept internal market norms. The CJEU has created elaborate doctrines of direct and indirect discrimination, there is case law on positive action and equality of opportunity, and the CJEU has even found ways to hold the equality

7 *Sampanis and Others v Greece* Application No 32526/05, Merits and Just Satisfaction, 5 June 2008.

8 See, in particular, *Alajos Kiss v Hungary* Application No 38832/06, Merits and Just Satisfaction, 20 May 2010; *Kiyutin v Russia* Application No 2700/10, Merits and Just Satisfaction, 10 March 2011; and *Konstantin Markin v Russia* Application No 30078/06, Merits and Just Satisfaction, 22 March 2012. See further Timmer, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' (2011) 11 *Human Rights Law Review* 707; and O'Connell, *supra* n 2 at 214.

9 *Nachova and Others v Bulgaria* 2005-VII; 42 EHRR 933; see also Goodwin, *supra* n 3 at 95–6.

10 *Sejdić and Finci v Bosnia and Herzegovina* Application Nos 27996/06 and 34836/06, Merits and Just Satisfaction, 22 December 2009.

11 *Savez Crkava 'Riječ Života' and Others v Croatia* Application No 7798/08, Merits and Just Satisfaction, 9 December 2010.

12 According to the drafting history of Protocol No 12, inconsistencies in the application of Articles 14 and 1 of Protocol No 12 should be avoided. See Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, 14 January 2000, Report No 8614, at para 24ff; see also Edel, *The Prohibition of Discrimination under the European Convention on Human Rights* (Strasbourg: Council of Europe Publishing, 2010) at 8.

principle applicable in relations between private parties.¹³ In light of the future accession of the European Union to the ECHR, as well as for the practical application of non-discrimination principles, it can be considered desirable to streamline the fundamental rights case law of the two supranational courts.¹⁴ In many cases, this means that the CJEU will have to adapt its own interpretations and definitions to the well-established and long-standing human rights case law of the Strasbourg Court. In non-discrimination cases, however, it may be the other way around. To provide for a high level of protection against discrimination, the ECtHR would need to bring the protection offered by Article 14 in line with the sophisticated case law of the CJEU. This may explain the development of equal treatment doctrine in the case law of the ECtHR in directions that it had not explored before, such as the notion of indirect discrimination.

The increase in the number of non-discrimination cases, as well as the further development of equal treatment doctrine in the Court's case law thus may be explained in different ways. If these explanations are regarded as challenges for the future, they make clear that the Court's discrimination case law must be of high quality and it must provide for sound, clear, and convincing interpretations of the Convention's non-discrimination clauses. Arguably, and problematically, however, the Court's non-discrimination case law is currently lacking a sound theoretical or doctrinal basis, to the extent that it is not clear what conception of non-discrimination or unequal treatment underlies the Court's jurisprudential approaches.¹⁵ As a result, the Court's case law is patchy and uneven.¹⁶ Some developments are clearly praiseworthy and find strong support in theoretical literature—this is true, for example, for the case law in which anti-stereotyping approaches are chosen as a basis for the Court's review.¹⁷ Other developments are commendable as such, but the approach taken by the Court is lacking in coherence and quality. This is the case in relation to the development of doctrines of indirect and substantive discrimination,¹⁸ as well as the approach towards the use of

13 This case law has been discussed in numerous places. For an overview, see for example Schiek, 'Indirect Discrimination', in Bell, Schiek and Waddington (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Oxford: Hart Legal Publishers, 2007); for horizontal effect, see mainly C-144/04, *Mangold* [2005] ECR I-9981 and C-555/07, *Kücükdeveci* [2010] ECR I-365.

14 Cf. Besson, 'Gender Discrimination under EU and ECHR Law: *Never Shall the Twain Meet?*' (2008) 8 *Human Rights Law Review* 647 at 649.

15 See also Arnardóttir, *Equality and Non-Discrimination under the European Convention on Human Rights* (The Hague: Martinus Nijhoff Publishers, 2003) at 15.

16 See also critically Cartabia, 'The European Court of Human Rights: Judging nondiscrimination' (2011) 9 *International Journal of Constitutional Law* 808 at 812, speaking of the 'hazy' character of non-discrimination judgments.

17 *Supra* n 8.

18 See, for example, Arnardóttir, 'Non-discrimination under Article 14 ECHR – the Burden of Proof' (2007) 51 *Scandinavian Studies in Law* 13; and Goodwin, *supra* n 3 at paras 98–103.

a ‘comparator’.¹⁹ And finally, some parts of the Court’s case law are simply inconsistent and difficult to understand, such as its case law on the definition of grounds of discrimination.

Against this background, this article aims to explore the recent case law of the Court on the definition of grounds of discrimination from the perspective of consistency as well as of theoretical soundness, arguing that it is seriously defective from both perspectives. The definition of discrimination grounds is of great importance for the applicability of Article 14 (and Protocol No 12), as well as for the Court’s competence to decide on the reasonableness of a difference in treatment. If it is accepted that a difference in treatment is based on a ground protected by the Convention, the Court needs to assess and evaluate the reasons adduced in justification of it. If the ground of discrimination is not covered by the Convention, Article 14 of the ECHR does not apply and the complaint should be declared inadmissible *ratione materiae*. Given the importance of the definition of the discrimination grounds for the outcome of the case and the chances for success of individual applicants, it is essential that the Court’s case law is clear, consistent and transparent. Unfortunately, the analysis of the Court’s recent case law in the area discloses that such clarity, consistency and transparency is currently lacking (Section 2). It is argued here that the shortcomings and inconsistencies in the definition of grounds of discrimination reflect a fundamental ambivalence as to the theoretical principles underlying the prohibition of Article 14. In support of this argument, Section 3 sets out two different rationales for non-discrimination law, which both would provide a sound basis for a certain approach towards the definition of grounds of discrimination. In the concluding section 4, it is argued that the choice of either of the two rationales is defensible—the most important conclusion being that it really is essential for the Court to make a choice, especially in light of the challenges lying ahead of it.

2. The Grounds of Discrimination as Explained by the ECtHR

A. *The Text of Article 14*

Although Article 14 of the ECHR does contain a list of grounds on which discrimination is prohibited (sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority,

19 For example, O’Connell, *supra* n 2 at 217ff; Arnardóttir, *supra* n 15 at 126; and Gerards, *Judicial Review in Equal Treatment Cases* (Leiden/Boston: Martinus Nijhoff, 2005) at 127. For example, disclosing the difficulties related to the comparability test, see *Bah v United Kingdom* Application No 56328/07, Merits and Just Satisfaction, 27 September 2011, at paras 41 and 42; and *B v United Kingdom* Application No 36571/06, Merits and Just Satisfaction, 14 February 2012.

property, birth), the list is not exhaustive.²⁰ Article 14 only mentions the various grounds as examples, perhaps to make clear that the drafters of the provision considered these grounds to constitute the most problematic ones to base decision-making or regulation on. Next to these grounds, the provision prohibits discrimination based on ‘other status’ (or ‘*toute autre situation*’, as it is formulated in the French version of the text). Moreover, the provision stipulates that the rights set forth in the Convention shall be secured without discrimination ‘on any ground such as . . .’. Given this formulation, in principle each difference in treatment can be brought before the Court, as long as it relates to the exercise of one of the Convention rights. The Court expressly confirmed this in its *Engel* case, where it held that ‘[a] distinction based on rank [in this case military rank] may run counter to Article 14. The list set out in that provision is illustrative and not exhaustive, as is shown by the words “any ground such as” (in French “*notamment*”). Besides, the word “status” (in French “*situation*”) is wide enough to include rank.’²¹ A few years later, in the case of *Rasmussen*, it held that ‘[t]here is no call to determine on what ground [the] difference was based, the list of grounds appearing in Article 14 not being exhaustive.’²²

Given the formulation of Article 14 and these explanations by the Court, the application of the non-discrimination clause seems to be easy and straightforward—each and every case of unequal treatment can be brought before the Court to be assessed for its reasonableness, regardless of the ground of discrimination.²³

B. Diverging Lines of Case Law

Whilst the cases of *Engel* and *Rasmussen* disclose a very open approach towards discrimination cases, there is a parallel line of case law according to which not every ground of discrimination comes within the reach of Article 14. In this line of case law, the Court seems to consider the formulation ‘any ground such as . . .’ less important, focusing its attention on the meaning of ‘other status’. This notion implies some limitations, as the Court made clear in the case of *Kjeldsen, Busk Madsen and Pedersen*, decided in 1976.²⁴ It held that a difference in treatment must be based on ‘a personal characteristic (“status”) by

20 See also Edel, *supra* n 12 at 86. At this point Article 1 of Protocol No 12 is formulated in an identical manner. This means that the Court will probably take a similar approach towards the definition of grounds in cases relating to Protocol No 12 as it uses in relation to Article 14. After all, in the case of *Sejdić and Finci v Bosnia and Herzegovina*, it held that similar terms contained in Article 14 and Article 1 of Protocol No 12 should be interpreted in an identical manner: *Sejdić and Finci v Bosnia and Herzegovina*, *supra* n 10 at para 55.

21 *Engel and Others v Netherlands* A 22 (1976); 1 EHRR 647 at para 72.

22 *Rasmussen v Denmark* A 87 (1984); 7 EHRR 371 at para 34.

23 See also O’Connell, *supra* n 2 at 222.

24 *Kjeldsen, Busk Madsen and Pedersen v Denmark* A 23 (1976); 1 EHRR 711.

which persons or groups of persons are distinguishable from each other'.²⁵ As this case concerned a difference in treatment of religious instruction and the sex education, which clearly is a difference that is not based on personal characteristics, this meant that the Court could not deal with the substance of the complaint.²⁶ The Court confirmed this approach in the case of *Magee*, which concerned a difference in the procedural rights of persons arrested and detained in England and Wales as compared to those arrested and detained in Northern Ireland.²⁷ In this case, the Court found that the 'difference is not to be explained in terms of personal characteristics . . . but on the geographical location where the individual is arrested and detained'.²⁸ For that reason, the difference in treatment did not amount to discrimination within the meaning of Article 14. Thus, according to this line of case law only discrimination based on personal characteristics comes within the scope of protection of the Convention's non-discrimination clause.

Importantly, the 'personal status' line of case law has not replaced the *Engel* and *Rasmussen* jurisprudence. Various judgments illustrate that the precise definition of the ground of discrimination often is not relevant at all and are judgments in which the Court held Article 14 to be applicable to a difference in treatment that is not evidently based on a 'personal' characteristic.²⁹ One example is the case of *Fredin*, where the Court considered an allegedly discriminatory treatment resulting from the fact that only the applicant's exploitation of a gravel pit had been stopped, whilst other businesses could carry on.³⁰ The Court decided on the merits of this complaint without paying attention to the question if this difference in treatment was based on a personal characteristic. Another example is the case of *Lithgow*, where the complaint related to differences in compensation sums that were paid in relation to nationalisation.³¹ According to the applicant, the shares of certain non-profitable companies had been valued for compensation purposes by reference to their assets, whereas for other companies the ordinary shares had been valued by reference to their earnings. It is difficult to see the 'personal' element of the grounds of discrimination considered in these cases, yet the Court proceeded to assess the comparability of the presented cases and the justification for the difference in treatment, apparently without paying attention to the question as to whether the distinction was based on a protected ground or a personal characteristic.

25 Ibid. at para 56.

26 Notably, however, the Court did pay some attention to the substance of the complaint even though it was not necessary to do so.

27 *Magee v United Kingdom* 2000-IV; 31 EHRR 822.

28 Ibid. at para 50. For a similar example in the same period, see the Grand Chamber judgment in *Geger v Turkey* Application No 24919/94, Merits and Just Satisfaction, 8 July 1999, at para 69.

29 For other examples than discussed in this section, see O'Connell, supra n 2 at 222–3.

30 *Fredin (No 1) v Sweden* A 192 (1991); 13 EHRR 784, at paras 60–61.

31 *Lithgow and Others v United Kingdom* A 102 (1986); 8 EHRR 329.

C. Recent Case Law: Confusion Continues

(i) Three 2010 cases: *Clift*, *Springett* and *Peterka*

In 2010, the Court was presented with a good opportunity to bring these diverging lines of case law together in the case of *Carson*.³² The case concerned a difference in treatment between pensioners based on their place of residence: the pensions of individuals living in the UK were up-rated each year, whereas pensions of individuals living outside the UK remained fixed at the same level. In the national courts, the question whether place of residence is a personal characteristic within the meaning of Article 14 was expressly discussed³³ and the matter was squarely placed before the Grand Chamber.³⁴ In its judgment, the Grand Chamber brought its diverging case law together in the following terms:

... [The Court] has established in its case-law that only differences in treatment based on a personal characteristic (or “status”) by which persons or groups of persons are distinguishable from each other are capable of amounting to discrimination within the meaning of Article 14 (*Kjeldsen* . . . , § 56). However, the list set out in Article 14 is illustrative and not exhaustive, as is shown by the words “any ground such as” (in French “notamment”) (see *Engel* . . . , § 72). It further recalls that the words “other status” (and *a fortiori* the French ‘toute autre situation’) have been given a wide meaning so as to include, in certain circumstances, a distinction drawn on the basis of a place of residence. Thus, in previous cases the Court has examined under Article 14 the legitimacy of alleged discrimination based, inter alia, on domicile abroad . . . and registration as a resident . . . It is true that regional differences of treatment, resulting from the application of different legislation depending on the geographical location of an applicant, have been held not to be explained in terms of personal characteristics (see, for example, *Magee* . . . § 50). However, . . . these cases are not comparable to the present case, which involves the different application of the same pensions legislation to persons depending on their residence and presence abroad. . . . In conclusion, the Court considers that place of residence constitutes an aspect of personal status for the purposes of Article 14.³⁵

This consideration does not offer much in terms of clarification, as the Court does not only mention that the case must concern a personal characteristic,

32 *Carson and Others v United Kingdom* 51 EHRR 13.

33 See the judgment of the Court of Appeal in *R (Carson and Reynolds) v Secretary of State for Work and Pensions* [2003] EWCA Civ 797, where Laws LJ paid attention to the matter (also quoted in the Court’s judgment at para 30).

34 *Ibid.* at paras 60–66.

35 *Carson and Others v United Kingdom*, supra n 32 at paras 70–71.

but also that the list of grounds is not exhaustive and that a wide reading must be given to the notion of 'other status'. Rather than making a choice of one or the other approach, it appears to respect both lines of case law, holding that 'residence' would constitute a ground protected by Article 14 whatever approach is taken. The result is that there are still two courses open to the Court and the confusion as to the proper definition of Article 14 continues. This can best be illustrated by discussing three other cases decided in 2010.

Firstly, the case of *Clift* concerned differences in the procedure for parole between prisoners serving fixed-term sentences of less than fifteen years or discretionary life sentences, and those serving fixed-term sentences of fifteen years or more.³⁶ According to the Court, there was no need to demonstrate that this distinction, which was apparently the effect of the existence of different legal regimes (as was also the case in *Magee* and *Gerger*), was based on a personal characteristic that is innate or inherent. It expressly referred to the *Engel* line of case law to demonstrate that 'status' does not always need to refer to 'real' personal characteristics. Instead, according to the Court, the question of applicability of Article 14 'is a matter to be assessed taking into consideration all of the circumstances of the case and bearing in mind that the aim of the Convention is to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.³⁷ The factor that it considered decisive in this case was that '[w]here an early release scheme applies differently to prisoners depending on the length of their sentences, there is a risk that, unless the difference in treatment is objectively justified, it will run counter to the very purpose of Article 5, namely to protect the individual from arbitrary detention'.³⁸

Thus, the Court seemed to make clear that the notion of 'personal characteristic' is the only proper interpretation of 'other status', yet also that it may find that distinctions based on impersonal characteristics may require the Court's attention if the circumstances of the case so require. Even if this case can be regarded as a clarification in comparison to *Carson*, the resulting interpretation is confusing.³⁹

The confusion is added to if another case decided in the same period is looked at. In *Springett*, the Court reached a conclusion diametrically opposed to that in *Clift*.⁴⁰ The discrimination complaint in this case related to payments under the so-called Winter Fuel Payment (WFP) scheme. The applicants were refused such payment since they had left the UK before 1998, when WFP was

36 *Clift v United Kingdom* Application No 7205/07, Merits and Just Satisfaction, 13 July 2010.

37 *Ibid.* at para 60.

38 *Ibid.* at 62.

39 The same line of reasoning has been applied in more recent case law: see, for example, *Rangelov v Germany* Application No 5123/07, Merits and Just Satisfaction, 22 March 2012, at paras 83 and 85.

40 *Springett and Others v United Kingdom* Application Nos 34726/04, 14287/05 and 34702/05, Admissibility, 27 April 2010.

introduced; pensioners who moved to another country after having acquired WFP (so after 1998) continued to receive WFP. Thus, the moment in time that a pensioner left the country for emigration purposes determined his claim to welfare benefits. This raised the question if this constituted a ground for discrimination covered by Article 14. Given the *Clift* criteria, one might expect that the Court would look at all the circumstances of the case to determine this, but it took a different approach:

The Court does not consider that the fact of having, or not having, acquired a right to a welfare benefit can be considered to be an aspect of personal status within the meaning of Article 14. Unlike the grounds set out in Article 14... it is not an innate characteristic that applies from birth. Furthermore, unlike 'religion', 'political or other opinion' or even place of residence, the fact of having acquired a right to a benefit does not relate to a core or personal belief or choice. The Court does not consider that the fact that the United Kingdom decided to give effect to a provision of EU law by permitting individuals who had already acquired a right to WFP under domestic law to 'export' this benefit when moving to another EU State gives rise to any issue under Article 14 taken in conjunction with Article 1 of Protocol No 1.⁴¹

Whilst the Court in *Clift* held that the innate or inherent personal character of the ground of discrimination is not determinative for the applicability of Article 14, it appears from this consideration that it is. Moreover, the 'circumstances of the case' criterion is not applied by the Court in this case.

Finally, in the case of *Peterka* the Court followed yet another approach.⁴² This case concerned a difference in treatment based on the duration and nature of an employment contract. In this case, the Court held that the expression 'other status' should only apply to those grounds that are sufficiently analogous or similar to the grounds expressly mentioned in Article 14, which all relate to personal choices or inherent personal traits. The Court also pointed out that the grounds mentioned in Article 14 are mirrored in Article 21 of the EU Charter of Fundamental Rights, implying that these grounds, too, can be used to determine the scope of Article 14. The Court subsequently compared the alleged ground of discrimination (duration and nature of an employment contract) to the grounds listed in Articles 14 and 21, and it concluded that they were not sufficiently similar to justify the application of Article 14 to the case.⁴³

41 Ibid. at para 7.

42 *Peterka v Czech Republic* Application No 21990/08, Admissibility, 20 September 2011.

43 This is even more interesting now that the nature and duration of an employment contract is considered to be a protected ground of discrimination in EU law. Even if the ground is not expressly mentioned in Article 21 of the EU Charter, there is a framework Directive regulating this type of discrimination: see Council Directive 1999/70/EC of 28 June 1999 concerning

After 2010, the Court has applied Article 14 in a large number of other cases, but only in the case of *Laduna* has it provided some clarification of the standard to be applied in determining if a distinction is based on 'personal status'.⁴⁴ In this case, which related (just like *Clift*) to a difference in legal regimes for detainees on remand and convicted prisoners, the Court presented the following criterion: being 'a person detained on remand . . . is inextricably bound up with the individual's personal circumstances and existence.'⁴⁵ This might be a useful criterion, even if it may be difficult to determine when a certain ground is inextricably bound up with the individual's personal circumstances and existence. In later case law, however, the Court has never applied this criterion. Instead, the Court has chosen a number of different approaches towards the issue, which will shortly be presented below.

(ii) The case law after *Clift*, *Springett* and *Peterka*

In most cases decided after *Clift*, *Springett* and *Peterka*, the Court seems to have preferred leaving the question unanswered as to the definition of the ground of discrimination.⁴⁶ This is illustrated by the case of *Bah*, concerning a difference in treatment based on the immigration status of the applicant's son.⁴⁷ The government expressly questioned the applicability of Article 14 to this distinction, since it was based on a legal rather than a personal status. The Court considered that immigration status, just like place of residence, is not an immutable personal characteristic, as it concerns an element of choice. It also mentioned, however, that it had tacitly accepted before that immigration status is covered by Article 14 and that it had held in previous cases that personal characteristics that are not immutable or innate can amount to 'other status' for the purposes of Article 14.⁴⁸ For that reason, it held that Article 14 was applicable to the case. Although the Court did mention *Clift*, it did not apply the criterion formulated in that case, nor did it rely on any of the criteria applied in the other cases discussed above. In fact, it did not even explain why immigration status should be regarded as a 'personal' status.

the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP—Annex (framework agreement on fixed-term work), OJ 1999 L 175/45. There is no streamlining visible of the ECtHR's case law and EU law at this point.

44 *Laduna v Slovakia* Application No 31827/02, Merits and Just Satisfaction, 13 December 2011.

45 *Ibid.* at para 55.

46 See also, for example, *B v United Kingdom*, *supra* n 19, where the Court mentions the criterion of personal status as part of the general principles to be applied, yet it does not apply the criterion to the facts of the case. In some other cases, the Court does apply the criterion, but it does not provide for elaborate reasoning: see, for example, *Stummer v Germany* Application No 37452/02, Merits and Just Satisfaction, 7 July 2011, at para 90, where the Court, without further ado, held that '[i]t has not been disputed in the present case that being a prisoner is an aspect of personal status for the purposes of Article 14'. In similar vein, see *Ponomaryovi v Bulgaria* Application No 5335/05, Merits and Just Satisfaction, 26 June 2011, at para 50.

47 *Bah v United Kingdom*, *supra* n 19.

48 *Ibid.* at para 45.

This is also visible in some other cases in which the Court applied the criterion. Mostly the Court limits itself to referring to earlier judgments in which it has already applied Article 14 to a certain situation of unequal treatment, without really explaining why the alleged discrimination pertains to a personal status.⁴⁹

Secondly, there are several examples of cases in which the Court did apply the personal status requirement. The resulting judgments are not always very satisfactory, as is illustrated by the case of *Raviv v Austria*.⁵⁰ The case concerned a special Austrian social security regime for victims of National Socialist persecution. The regime allowed victims to make contributions to a pension system during employment, even if they were living abroad. The pension was calculated on the basis of the accumulation of insurance months. In making the calculation, periods of higher education spent abroad did count as substitute periods, but periods of child-raising did not. According to the applicant, this constituted a prohibited difference in treatment, but she did not really make clear on what ground the difference was based. It could be argued that the case discloses unequal treatment based on child-raising or an indirect discrimination based on gender. However, the Court solved the case by finding that there was no discrimination based on personal status:

[The Court] observes that here the comparison is between persons falling under the special regime for victims of National-Socialist persecution who cannot obtain crediting for child-raising periods abroad, and persons falling under the special regime and who can obtain crediting for periods of higher education abroad. The Court does not find that there is a difference of treatment between those two groups based on an aspect of personal status as required by Article 14.⁵¹

The Court thus found that periods of education and child-raising were regulated by two different legal regimes and, for that reason, the distinction could not be regarded as based on personal status. This is unsatisfactory, as the same argument can almost always be made in regard to discriminatory legislation.⁵² In the case of *Carson*, for example, it might have been held that pensioners living abroad are covered by a different legal regime from pensioners living in the UK and that, for that reason, the difference in treatment is an ‘impersonal’ one, based on legal rules rather than personal characteristics. If this line of reasoning is taken seriously, this would imply that the Court could avoid deciding on the merits of almost all unequal treatment

49 For example, *Şerife Yiğit v Turkey* Application No 3976/05, Merits, 2 November 2010, at para 79.

50 *Raviv v Austria* Application No 26266/05, Merits and Just Satisfaction, 13 March 2012.

51 *Ibid.* at para 55.

52 In fact, it is rather often made, but it is usually dealt with as part of the test of comparability. For a recent example, see *Gas and Dubois v France* Application No 25951/07, Merits and Just Satisfaction, 15 March 2012.

cases by simply accepting that the existence of different rules for different types of situation cannot constitute discrimination under Article 14 of the ECHR.

Finally, the Court has not consistently applied the personal status approach to all later cases on Article 14. For one first category of cases, this is certainly understandable. These cases do not concern private individuals, but legal persons, such as insurance companies or political parties. It is difficult to see how the criterion of 'personal status' can be applied to legal persons, as they do not have any 'personal' characteristics. Although it is not inconceivable that the Court's 'personal status' case law can be applied in an analogous manner, the Court has not yet made any effort to do so. Instead, it seems that where legal persons are concerned, the Court still favours the general *Rasmussen* line of case law, for which the ground of discrimination is not relevant. In *Granos Organicos Nacionales*, for example, the Court applied Article 14 to a complaint of a company about a difference in treatment of domestic and foreign legal persons, without paying any attention to the ground of discrimination.⁵³ In the case of *Özgürlük Ve Dayanışma Partisi (ÖDP)*, it assessed the justification for a disadvantage in public financing for political parties that are not represented in parliament and that have not obtained at least seven per cent of the popular vote in the parliamentary elections, again without paying attention to the ground of discrimination.⁵⁴

Even in cases that do concern private individuals, moreover, the Court does not always mention the requirement of 'personal status'. The case of *Maggio*, for example, concerned an allegation of unequal treatment in relation to legal proceedings on the calculation of old-age pensions.⁵⁵ In accordance with a bilateral treaty between Switzerland and Italy, Italian pensions were paid out only after taking into consideration any working periods in Switzerland and contributions paid there. If individuals contested the calculations in court, they might receive a favourable outcome. During the applicant's proceedings, new legislation entered into force, which had the result that the pension calculation was final and court proceedings could no longer make a difference. The new legislation did not affect the pensions of individuals whose disputes before the courts had already been finalised and who had won their cases. The applicant complained that he had suffered discrimination because his pension claims had not been liquidated at the material time, as opposed to those whose proceedings had been finalised.⁵⁶ It is far from obvious that this is

53 *Granos Organicos Nacionales SA v Germany* Application No 19508/07, Merits and Just Satisfaction, 22 March 2012, at paras 54–7.

54 *Özgürlük Ve Dayanışma Partisi (ÖDP) v Turkey* Application No 7819/03, Merits and Just Satisfaction, 10 May 2012. For similar examples, see *ALLIANZ and Others v Slovakia* Application No 19276/05, Admissibility, 9 November 2010; and *Verein gegen Tierfabriken v Switzerland* Application No 48703/08, Admissibility, 20 September 2011.

55 *Maggio and Others v Italy* Application Nos 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, Merits and Just Satisfaction, 31 May 2011.

56 *Ibid.* at para 68.

discrimination based on a ground that is ‘inextricably bound up with the individual’s personal circumstances and existence’—this could only be found if a very wide meaning of this notion were chosen, which would also cover the situation that someone has or has not finalised judicial proceedings. For that reason, one might have expected that the Court would pay attention to the ground of discrimination. However, neither did the Court mention the ground of discrimination in this case, nor did it refer to the requirement of a distinction based on a ‘personal characteristic’. Just as in the former *Rasmussen* line of case law, it only established that Article 14 applied and that the government should provide an objective and reasonable justification.⁵⁷ Such judgments surely leave the reader wondering about the relevance and impact of the ‘personal status’ requirement.

D. Conclusion

The analysis of recent case law of the Court on the definition of grounds of discrimination discloses that it is confused and, in some respects, unconvincing. After having worked on two different tracks for years, either requiring a discrimination to be based on personal characteristics or applying Article 14 to cases regarding ‘impersonal’ differences in treatment, the Court has recently started to pay more attention to these diverging lines of case law. Instead of making a choice between one or the other approach, however, the Court seems to have tried to bring both lines of case law together. The criteria resulting from this effort are unclear and unworkable. In 2010, three different approaches were developed in the Court’s case law and, after that, the confusion has only increased. As matters presently stand, the Court either does not pay attention to the ground of discrimination, or it does not provide substantive reasons for holding that the case does (or does not) concern a ground protected by Article 14, or it applies the criterion of ‘personal status’ in unexpected and unfortunate ways. There are still many cases which do not evidently relate to a personal characteristic, yet are still assessed on their merits. The lack of clarity as to the applicable criterion may be difficult to handle for national legal practitioners and national judges, who may find it hard to

57 A similar example related to unequal treatment of different categories of pensioners (discrimination *vis-à-vis* persons still employed, persons working for another employer than the applicants and pensioners whose procedures had been terminated). In this case, the ‘personal status’ element of the discrimination is far from obvious, but the Court did not pay any attention to it. See *Arras and Others v Italy* Application No 17972/07, Merits and Just Satisfaction, 14 February 2012. For other examples in which the Court did not refer to the requirement but simply applied Article 14, see *Polanco Torres and Movilla Polanco v Spain* Application No 34147/07, Merits, 21 September 2010; *Herrmann v Germany* Application No 9300/07, Merits and Just Satisfaction, 20 January 2011; *Graziani-Weiss v Austria* Application No 31950/06, Merits and Just Satisfaction, 18 October 2011; *Valkov and Others v Bulgaria* Application No 2033/04, Merits and Just Satisfaction, 25 October 2011; and *Manzanas Martín v Spain* Application No 17966/10, Merits and Just Satisfaction, 3 April 2012.

predict when Article 14 applies.⁵⁸ As will be explained in Section 3, the confusion seems to be caused by a lack of a sound theoretical basis for the definition of 'grounds' within the meaning of Article 14, as well as by a lack of agreement on the rationale underlying the Convention's prohibition of discrimination. Consequently, the difficulties raised by the muddled case law of the Court in this area are not only of practical relevance, but they also disclose some fundamental difficulties in the Court's approach towards non-discrimination. In fact, only by making a clear choice as to what wrongs Article 14 is meant to protect against can the confusion be solved. For that reason, the next section will further explore what theoretical impact the choice of one or the other definition of discrimination grounds may have, and what this may entail for the Court's jurisprudential approach.

3. Possible Rationales for Article 14

A. Introduction

The confused approach towards the definition of the grounds of discrimination discloses that the Court's case law is not based on sound theoretical or doctrinal views on the rationale of the prohibition of discrimination of Article 14.⁵⁹ To improve the clarity and consistency of the Court's case law, it is therefore important to illuminate the theoretical choices that certain definitions of the grounds of discrimination may express. In this section, for purposes of clarity, only two possible rationales for the prohibition of unequal treatment and non-discrimination are discussed, although more refined categories are certainly thinkable.⁶⁰

B. The Non-discrimination Rationale

First, it may be argued that Article 14 of the ECHR contains a prohibition of discrimination, rather than a general principle of equality.⁶¹ Article 14 then

58 Already there are complaints about the lack of clarity of the Court's case law by national lawyers: see recently, in particular, Hale, 'Argentorum Locutum: Is Strasbourg or the Supreme Court Supreme?' (2012) 12 *Human Rights Law Review* 65 at 68.

59 See further, for example, Arnardóttir, *supra* n 15 at 6, explaining that Article 14 seems to express a combination of a prohibition of discrimination and an equal treatment clause.

60 See, in particular, McCrudden and Kountouros, 'Human Rights and European Equality Law', in Meenan (ed.), *Equality Law in an Enlarged European Union. Understanding the Article 13 Directives* (Cambridge: Cambridge University Press, 2007) at 74, who also distinguish (at 77), for example, the function of the equality principle as the proactive promotion of equality of opportunity between particular groups. It is also possible to speak in terms of 'substantive' and 'formal' discrimination (for example, O'Connell, *supra* n 2) or to distinguish (at 77) between different 'models' (for example, De Schutter, 'Three Models of Equality and European Anti-discrimination Law' (2006) 57 *Northern Ireland Legal Quarterly* 1).

61 Besson, *supra* n 14 at 653.

may be regarded as a prohibition of unequal treatment based on grounds of discrimination that are *a priori* problematic or 'suspect'.⁶² From a substantive, moral perspective, it can be held to be unacceptable if legislation or decisions are based on grounds that cannot be influenced by individuals, either because they concern innate and immutable personal characteristics (race, gender, disability, age)⁶³ or because they are clearly within the range of individual autonomy (religion, political opinion⁶⁴).⁶⁵ It can be considered even more problematic if distinctions are based on personal characteristics that are closely connected with incorrect and overbroad stereotypes⁶⁶ or stigmata,⁶⁷ and that are usually irrelevant for social interaction. Unequal treatment based on such characteristics is often tainted by subjective and negative emotions towards certain groups or persons.

Prohibiting discrimination on 'suspect' grounds expresses clear societal disapproval of acts that are based on irrational motives.⁶⁸ The prohibition of discrimination helps to guarantee that important social goods (employment, services) are divided on rational grounds, not on grounds that are irrelevant

- 62 The notion of 'suspect' grounds of discrimination is derived from the non-discrimination case law in the USA. In the USA, it refers to those grounds that may trigger 'strict scrutiny', that is, highly intensive and careful review of the justification for a difference in treatment. If a distinction is based on grounds such as race or skin colour, it can be suspected that the person responsible for the distinction has acted on unacceptable motives. Cf. Gerards, *supra* n 19 at 85; and Gerards, 'Developments in the Law – Equal Protection' (1969) 82 *Harvard Law Review* 1065 at 1125.
- 63 Sometimes a more specific distinction is made in this respect between 'biological' characteristics, such as age and sex, and 'attributed' characteristics, such as race and gender; cf. Schiek, 'A New Framework on Equal Treatment of Persons in EC Law?' (2002) 8 *European Law Journal* 290 at 309; and Makkonen, *Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalised to the Fore* (Abo: Abo Akademi University, 2002) at 3.
- 64 These are the so-called 'choice grounds': see Schiek, *ibid.* at 310; Gijzen, *Selected Issues in Equal Treatment Law: A Multi-layered Comparison of European, English and Dutch Law* (Antwerp: Intersentia, 2006) 285, but this term is somewhat misleading, as religion and political opinion may be so strongly connected to one's person that it may be difficult to make another 'choice' without losing one's individuality. For good reason, the two types of 'suspect' grounds (non-choice grounds and choice grounds) are usually put on the same line.
- 65 Cf. O'Connell, *supra* n 2 at 221. It must be stressed, however, that the 'suspectness' of these grounds really is an *a priori* one—there are many situations in which it can be acceptable to base a distinction on one of these grounds. Moreover, discrimination that is not based on immutable characteristics (either choice grounds or non-choice grounds) may be equally problematic, as is well explained by Fredman, *Discrimination Law* (Oxford: Oxford University Press, 2002) at 79.
- 66 See more specifically Timmer, *supra* n 8. Stereotyping is not, however, always regarded as a problematic basis for decision-making. Some have argued that it only becomes problematic if it leads to paternalism (for example, Clark, 'Legislative Motivation and Fundamental Rights in Constitutional Law' (1978) 15 *San Diego Law Review* 953 at 965) or if many cases in reality contradict the stereotype (for example, Ely, *Democracy and Distrust* (Cambridge, MA: Harvard University Press, 1980) at 157).
- 67 Cf. Karst, 'Foreword: Equal Citizenship Under the Fourteenth Amendment' (1977) 91 *Harvard Law Review* 1 at 6–7 and 48.
- 68 Cf. Holzleithner, 'Mainstreaming Equality: Disentangling Grounds of Discrimination' (2005) 14 *Transnational Law and Contemporary Problems* 927 at 953.

or that express deeply rooted stereotypes or subjective feelings.⁶⁹ It may also express that it is unfair to advantage or disadvantage individuals purely for reasons that they cannot influence.⁷⁰ Furthermore, the prohibition of discrimination based on 'suspect' grounds or personal characteristics is protective of human dignity, since such discrimination may easily give the message that an individual with a certain characteristic is different, second-rate and inferior.⁷¹ Accordingly, unequal treatment based on (suspect) personal characteristics is *a priori* wrong and unacceptable. This can only be different if it can be demonstrated that the difference in treatment is not really based on the 'suspect' characteristics, but on objective reasons that are fully rational, neutral and fair. One may think of classic examples of limiting breast cancer prevention treatment to women, or setting language requirements for a teacher of a foreign language.

Many national and European non-discrimination laws are (at least partly) based on this rationale. They prohibit specific forms of discrimination based on a limited number of prohibited grounds of discrimination, such as race, gender, religion and sexual orientation, mainly for the reasons given before.⁷² Evidently, the ECHR does not contain such a 'closed' list of grounds. It mentions a number of characteristics that can be considered to be *a priori* suspect (such as sex, race and birth), but it is possible to add new grounds to this. If the Court would take its 'personal status' approach seriously, based on the non-discrimination rationale, it would therefore need to focus its attention on characteristics or grounds that are not mentioned in the list of Article 14, but that can still be regarded as an *a priori* suspect or problematic basis for decision-making. The *Peterka* approach is particularly relevant in this respect. In this approach, the Court would need to assess for each individual case if the ground of discrimination is sufficiently similar to those mentioned in Article 14 or other, similar lists of prohibited grounds such as contained in

69 Cf. the 'equality as protective of prized public goods' rationale distinguished by McCrudden and Kountouros, *supra* n 60 at 75.

70 It must be noted that this rationale is less useful than that of protection against irrational decision-making, as there are many grounds that cannot be influenced by the individual (intelligence, talent) and that are considered acceptable and reasonable bases for decision-making; cf. Gerards, *supra* n 19 at 85.

71 Cf. Makkonen, *supra* n 63 at 7.

72 This is clearly visible in the two main EU Directives on equal treatment, which both contain closed and limited lists of grounds: Directive 2000/78/EC (Framework Directive), OJ 2000 L 303/16, and Directive 2000/43/EC (Race Directive), OJ 2000 L 180/22. On this see (in Dutch) Gerards, 'Gronden van discriminatie – de wenselijkheid van open en gesloten opsommingen', in Bayart, Sottiaux and Van Drooghenbroeck (eds), *De nieuwe federale antidiscriminatiewetten – Les nouvelles lois luttant contre la discrimination* (Bruges: Die Keure/La Charte, 2008) 129; and more generally Schiek, 'Broadening the Scope and the Norms of EU Gender Equality Law: Towards a Multidimensional Concept of Equality Law' (2005) 12 *Maastricht Journal of European and Comparative Law* 427 at 4665.

Article 21 of the EU Charter of Fundamental Rights. Indications for finding an analogy could be found in the fact that the characteristic is usually irrelevant to social behaviour, that it is of innate and immutable character (meaning that it cannot be changed without serious loss of individual autonomy or dignity), or that there are negative stereotypes, prejudice or stigmata related to the characteristic (or the group defined by reference to it). For example, although the grounds of mental disability or genetic characteristics are not mentioned in Article 14, this rationale can justify that the Article is applicable to discrimination based on these grounds.⁷³

Applying the non-discrimination rationale, it would be difficult to hold Article 14 applicable to grounds such as place of residence, or to apply the provision to discrimination against legal persons. For these grounds it may still be possible to argue that there is a close relationship to personal autonomy, but the applicability of Article 14 is at the least debatable. In fact, there is no good reason to apply the non-discrimination clause to these cases, as they will raise no *prima facie* suspicion of irrational unequal treatment based on unacceptable stereotyping or social stigmata. This is true *a fortiori* for cases relating to even more ‘neutral’ grounds, such as duration of contract, length of penal sentence or not having finalised judicial proceedings. These grounds are so far removed from the underlying rationale of the prohibition of discrimination (i.e. preventing irrational and irrelevant grounds to constitute reasons for regulation or decision-making) that the Court ought to conclude that Article 14 does not apply. In practice, this would mean that the Court would need to become stricter than it currently is and that it would need to reject many of the cases that it has decided upon over the years. Cases such as *Clift* or *Lithgow* would then be declared inadmissible. It would not be impossible to deal with some of these cases, though, if the Court would further develop doctrines such as that of indirect discrimination. Using such a doctrine might justify that the Court has a second look at distinctions that appear to be based on ‘neutral’ criteria, but have a disproportionately disadvantageous effect for groups characterised by a suspect ground.

The non-discrimination approach analysed here is theoretically sound. Moreover, using it may be desirable from the perspective of the Court as a European human rights court. The non-discrimination rationale reflects a clear human rights approach towards equal treatment, as it is strongly based on notions of human dignity, personal autonomy, fair and rational distribution of important social goods, and protection of vulnerable and neglected social groups.⁷⁴ Moreover, in several recent cases, such as *Alajos Kiss* and *Konstantin Markin*, the Court has clearly stressed the importance of the

73 Which the Court indeed accepted in the case of *Alajos Kiss v Hungary*, supra n 8.

74 Cf. Besson, supra n 14 at 653–4.

non-discrimination clause as an anti-stereotyping clause.⁷⁵ The choice for a limited application of Article 14 to personal characteristics and 'suspect' grounds would fit in well with this new development. And finally, the approach based on this rationale is attractive from the perspective of subsidiarity, as it would allow the Court to deal only with really problematic and human rights-related cases of discrimination. The national authorities may then decide upon other cases of unequal treatment, which are less suspect and more neutral. Given the criticism of the Court's case law in, for example, social security cases that are not based on suspect grounds, it may be advisable to follow such an approach. Moreover, such a clear choice for a non-discrimination approach might help to reduce the influx of cases, as potential applicants may quickly learn to understand that their cases will be inadmissible. Given the current overload and backlog, this may be an important consideration for the Court.

C. The Equal Treatment Rationale

It is possible, however, to take another theoretical perspective on the meaning of the prohibition of discrimination. Article 14 can be regarded as an expression of the general principle of equality. Different from the prohibition of discrimination, the equality principle is a rather 'empty' legal principle with no moral content of its own.⁷⁶ The function of the equality principle is mainly instrumental or procedural.⁷⁷ It can help an applicant to demonstrate arbitrariness or unfair treatment by pointing at other cases, similar to his own case, where more favourable decisions are taken or which are governed by a less burdensome legal regime. If this perspective is taken, each difference in treatment that affects an applicant's Convention rights should be assessed by the Court for reasonableness and fairness.⁷⁸ The ground on which the difference in treatment is based is not relevant to the applicability for a test of

75 *Alajos Kiss v Hungary* and *Konstantin Markin v Russia*, supra n 8. See further Timmer, supra n 8; and see, more generally, Danisi, 'How Far can the European Court of Human Rights go in the Fight against Discrimination? Defining New Standards in its Non-discrimination Jurisprudence' (2011) 9 *International Journal of Constitutional Law* 793.

76 Cf. Ross, *On Law and Justice* (Berkeley/Los Angeles: University of California Press, 1958) at 272; Lucas, 'Against Equality' (1965) *Philosophy* 296; Benn and Peters, 'Justice and Equality', in Blackstone (ed.), *The Concept of Equality* (Minneapolis: Burgess, 1969) 54 at 62; Westen, 'The Empty Idea of Equality' (1982) 95 *Harvard Law Review* 537 at 547; Gerards, supra n 19 at 9; Ely, supra n 66 at 32; and Chemerinsky, 'In Defense of Equality: A Reply to Professor Westen' (1983) 81 *Michigan Law Review* 575 at 582.

77 Cf. Gerards, 'Equality as Legal Argument', in *IVR Encyclopaedia of Jurisprudence, Legal Theory and Philosophy of Law*, available at: <http://ivr-enc.info/index.php?title=Equality.as.Legal.Argument> [last accessed 15 January 2013]; and Ely, supra n 664 at 32.

78 At least if not a purely formal approach towards the equality principle is chosen: cf. Gerards, supra n 75 at section 6.

justification.⁷⁹ The only relevant question is if one group or person is allowed to exercise a certain right or receive a certain benefit, whilst this is not permitted for another person or group.⁸⁰

The equal treatment approach is radically different from the non-discrimination approach, which clearly does have a normative content of its own.⁸¹ As explained in Section 3.B, the prohibition of discrimination starts from the normative presumption that certain grounds constitute *a priori* unacceptable reasons for decision-making. Such normative reasons relate to human dignity, personal autonomy and the need for objective decision-making that is not tainted by irrational views or stereotypes. Another presumption is that only discrimination on these *a priori* problematic grounds is prohibited, or at the least demands further attention by the Court. This is different if the equal treatment principle is regarded as the underlying rationale for Article 14, since then substantive moral or prescriptive norms are not relevant to the applicability of the provision. The equal treatment rationale implies that all forms of different treatment should be subjected to review, regardless of their grounds.

Using the normatively empty conception of the equality principle may have some advantages. First, it can help to remove social and economic inequalities. Differentiation based on ‘impersonal’ and seemingly unproblematic grounds such as duration or nature of an employment contract may have problematic societal consequences, especially if the difference in treatment affects fundamental rights. If the Court would only accept cases based on ‘suspect’ personal characteristics, it is more difficult for it to deal with cases that relate to ‘hidden’ forms of unequal treatment and to stimulate states to eliminate deeply rooted, nearly invisible discrimination. The Court could do so by using indirect discrimination approaches, but this is not a very attractive option. The concept of indirect discrimination is surrounded by complexities and difficulties, varying from the selection of the relevant group of comparison to the determination of statistic disproportionalities.⁸² Moreover, the Court thus far can be criticised for its rather underdeveloped and defective use of the concept.⁸³ For that reason, it may be desirable for the Court to use the very

79 The ground of discrimination may certainly be relevant to the intensity of review and the applicability of the very weighty reasons test, but this is a different matter than the justiciability of a difference in treatment.

80 This comes down to a test of (comparative) disadvantage; cf. Gerards, *supra* n 19 at 77–8; and, for the desirability of its application instead of the classic test of comparability and its practicability, Gerards, *supra* n 19 at 669–75.

81 Cf. Greenawalt, ‘How Empty is the Idea of Equality?’ (1983) *Columbia Law Review* 1167; and Chemerinsky, *supra* n 76.

82 For the intricacies related to the concept of indirect discrimination, see elaborately Tobler, *Indirect Discrimination* (Antwerp: Intersentia, 2005); and Schiek, *supra* n 13.

83 In the case of *DH v Czech Republic*, *supra* n 6, the Court has developed a number of important standards for review in indirect discrimination cases, for example, pertaining to the establishment of a prima facie case of discrimination and the burden of proof. This case was already criticised for various flaws in its use of the concept: see, for example, Arnardóttir, *supra* n

open formulation of the non-discrimination clause of Article 14 to its fullest extent, by not limiting the provision to personal characteristics, but to consider the justification for all differences in treatment with an open eye to underlying systematic problems of societal or economic discrimination. An additional advantage of this approach is that it makes it easier to deal with complex forms of unequal treatment, such as discrimination based on multiple or cumulative grounds or intersectional discrimination.⁸⁴ Since an open system of equal treatment law allows the Court to take account of the intricate reasons and grounds that may underlie differences in treatment, such a system is better geared to the complexity of discrimination cases in modern society.⁸⁵

Adopting an equal treatment approach does not mean, moreover, that substantive principles and notions related to non-discrimination cannot play a role in the Court's review. The ground of discrimination can be relevant in the determination of the intensity of review (by determining the applicability of the 'very weighty reasons' test),⁸⁶ as well as in the evaluation of the reasonableness of the justification presented by the government.⁸⁷ In fact, the ground of

18; and Goodwin, *supra* n 3 at 98–103. Moreover, in *Oršuš v Croatia* Application No 15766/03, Merits and Just Satisfaction, 16 March 2010, the Court applied the concept of indirect discrimination to a case in which, in reality, only one specific group was affected by the measure that was complained about. In such a situation it would be more appropriate to classify the case as one concerning direct discrimination. Finally, there are cases in which the concept of indirect discrimination could have been usefully applied, as in cases where unmarried couples are treated differently from married couples, which may be a distinction that has a disproportionately negative impact for same-sex couples, but where the Court did not look further than the direct distinction at stake: see, for example, *Gas and Dubois v France*, *supra* n 52, but also, relating to a difference in treatment based on immigration status which might have been qualified as a case of indirect discrimination based on national origin or nationality, *Bah v United Kingdom*, *supra* n 19.

84 See also O'Connell, *supra* n 2 at 223. For a broad overview of this particular problem, see Schiek and Chege (eds), *European Union Non-Discrimination Law. Comparative Perspectives on Multidimensional Equality Law* (Abingdon: Routledge, 2009); see also *Tackling Multiple Discrimination: Practices, Policies and Laws*, Report for the European Commission, September 2007; Makkonen, *supra* n 63 at 10; and Fredman, 'Double Trouble: Multiple Discrimination and EU Law' (2005) *European Anti-Discrimination Law Review* 13.

85 Cf. Schiek, *supra* n 72 at 440ff. Moreover, it does justice to the individual; cf. Holzleithner, *supra* n 68 at 944, 'To be the victim of discrimination is painful. It hurts even more when law and its institutions ignore one's discrimination, or if it is considered worthy of less attention than the discrimination against "others". Being the target of classificatory animosity, without a chance of redress, may lead to frustration and/or resentment. . .'; cf. Fredman, *supra* n 65 at 70–1.

86 Cf. Gerards, 'Intensity of Judicial Review in Equal Treatment Cases' (2004) 51 *Netherlands International Law Review* 135; Arnardóttir, *supra* n 15 at 141; and Arnardóttir, 'Multidimensional Equality from Within. Themes from the European Convention on Human Rights', in Schiek and Chege, *supra* n 84 at 53–72, 57. This is already clearly visible in the Court's case law. Especially in more recent judgments, the Court has applied a very weighty reasons test because of the existence of overbroad stereotypes or negative stigmata about the persons or groups determined by a certain characteristic such as gender or disability: see, in particular, *Alajos Kiss v Hungary* and *Konstantin Markin v Russia*, *supra* n 8. See further, for example, Gerards, *supra* n 63 at 79; and Fredman, *supra* n 65 at 80.

87 On this particular relation between equality norms and substantive justification, see also Gerards, *supra* n 75 at section 6; Westen, *Speaking of Equality. An Analysis of the Rhetorical Force of "Equality" in Moral and Legal Discourse* (New Jersey: Princeton University Press, 1990)

discrimination can be regarded as a very helpful instrument in determining the reasonableness of a difference in treatment. We tend to speak of a *ground* of discrimination, after all, which can be understood as meaning that it constitutes the main reason or motive to distinguish between different persons, groups or cases. The ground of discrimination constitutes a simplified or condensed version of the complex aims that are actually pursued by decision-makers and legislators. In this connection, the ground of differentiation can be considered to be a ‘proxy’ for the real aims or goals of a certain decision, act or rule.⁸⁸ It is useful for lawmakers to rely on such proxies, since they constitute practicable and relatively simple criteria for legislation and decision-making.⁸⁹

The case of *Peterka* may serve to illustrate the use of a proxy.⁹⁰ Wanting to avoid the costs of having to pay old-age pensions to persons who are still able to earn their own income, the Czech government decided that pensioners who had employment contracts of unlimited duration should not be paid a pension allowance. The government considered it reasonable to do so, as their employment contracts guaranteed a sufficient income to these pensioners. The government found that this was different for pensioners with employment contracts of limited duration, who would not have a guaranteed income as soon as their contracts ended. The reason underlying the Czech legislation thus was to pay out pension allowances only to those in want of an income, a choice that was probably rooted in budgetary and financial considerations. Such criteria may be difficult to work with in a legislative text, however. The legislator therefore chose ‘unlimited duration of contract’ as a proxy for having a guaranteed income in the long run. This was accepted by the Czech courts as a reasonable ground for the difference in treatment.

Something similar was at play in the case of *Springett*, which related to the up-rating of WFP for persons living in the UK. In this case, the national authorities regarded ‘living in the UK’ and ‘needing an allowance for high costs of fuel in harsh winters’ (the rationale underlying the regulation) to be sufficiently closely related to justify the use of place of residence as a proxy in the relevant legislation. Arguably, the proxy used in this case is not a really precise one, as it is clearly possible that some *émigrés* live in countries where they do have high fuel costs in winter. Indeed, the Court should have paid more attention to this.⁹¹

Indeed, the Court sometimes does pay attention to the reasonableness of the choice of a proxy, as appears from the case of *Clift*. There, it held that the

at 70–1; and Arnardóttir, *supra* n 15 at 15. It is clear that discrimination based on overbroad stereotypes or irrational grounds cannot be justified. For an example in the Court’s case law, see *Kiyutin v Russia*, *supra* n 8.

88 Cf. Gerards, *supra* n 19 at 612.

89 *Ibid.* at 613.

90 *Peterka v Czech Republic*, *supra* n 42, which is discussed in more detail in Section 2.C.ii.

91 Cf. Gerards, *supra* n 19 at 685.

duration and character of a prison sentence did not constitute a good proxy for the reasons that really informed the procedural differences in determining whether the prisoner could be released on parole. In fact, it was agreed by the parties that the procedure should be based on an estimation of the risk that a prisoner (after having served at least part of his sentence) still constituted for society. Duration of the sentence may be one indication for such risk, but certainly the determination of risk is dependent on a more complex set of factors. Accordingly, the Court concluded that further justification and specification would have been necessary to draw a 'bright line' at a certain length of sentence.

Hence, using the wide conception of equality implies that the Court must assess each difference in treatment for its reasonableness. In doing so the Court may use the ground of discrimination (the 'proxy') as a basis for its review of the justification or to determine the intensity of its review. If it is a reasonable approximation of a legitimate set of underlying aims, it is acceptable to base the distinction on a certain ground. But if unacceptable stereotyping or irrational considerations inspire the 'proxy' or ground of discrimination, the Court's test of justification must be very strict and the difference in treatment can hardly ever be accepted.

For the Court, this conception may result in a useful approach towards unequal treatment cases.⁹² For one part, the approach may ease the Court's task in establishing the applicability of Article 14, since it does not have to bother about the qualification of the ground of discrimination. Instead, it can immediately direct its attention towards the justification and the reasonableness of the use of a certain proxy. Perhaps more importantly, an advantage of this conception is that the Court does not need to rely on the difficult concept of indirect discrimination, but it may deal with societal and economic differences in a more direct manner. Moreover, the equal treatment conception would allow the Court to have an open eye for cases of multiple and intersectional discrimination. The latter argument is especially relevant given the relationship with the European Union. One of the oft-mentioned disadvantages of present EU non-discrimination law is that it focuses on unequal treatment based on a limited number of grounds and it only offers protection in a limited number of areas (mainly employment and to some extent provision

92 Interestingly, moreover, when Protocol No 12 was discussed, the Parliamentary Assembly expressly desired to add an equality principle to the provision, since it found that such a general principle was lacking in the present Article 14. The only reason that this was not accepted seems to have been the desire to keep the text of Protocol No 12 as closely as possible to the text of Article 14: since Article 14 would remain in force, inconsistencies between both provisions were to be avoided. See Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, 14 January 2000, Report No 8614, at paras 24ff. As has been explained in this section, however, it is certainly possible to understand the prohibition of discrimination as a specific expression of the principle of equal treatment, prohibiting unjustified forms of unequal treatment. On this, see also the Explanatory Report to Protocol No 12, *supra* n at paras 18–19; and Arnardóttir, *supra* n 15 at 7.

of services).⁹³ As a result, there is little room to find solutions to intersectional and multiple discrimination or discrimination based on ‘semi-suspect’ grounds such as marital status. If the ECtHR were to adopt an equality-based approach it could act as a ‘safety net’, offering protection against unjustified forms of unequal treatment that cannot be dealt with via EU legislation. Especially after accession of the European Union to the ECHR, this could result in a complementary relationship between the two systems.

Adopting an equal treatment approach would not imply a radical departure from the Court’s current practice. Section 2 has made clear that, in many cases, the Court already applies an equality approach. However, there may be one important reason why the Court could be reluctant to expressly endorse such an approach: the Court could then potentially be confronted with innumerable cases of unequal treatment, which should all be assessed for their reasonableness. Whilst the non-discrimination approach would offer a workable tool for selection (i.e. the ground of discrimination), such a tool would be lacking here.⁹⁴ This would also imply that the Court would need to evaluate many cases related to economic matters or social rights. Since the Court is already strongly criticised for bringing such issues within the scope of the Convention,⁹⁵ the Court might hesitate to invite even more of such cases by embarking on an equality-based approach.

4. Conclusion

The Court’s case law on the applicability of the prohibition of discrimination of Article 14 has always been ambivalent. From the 1970s onwards, there are two distinct lines of case law, one allowing complaints about almost all differences in treatment, regardless of their grounds, and another allowing only complaints about discrimination based on personal status or personal characteristics. Although the Court tried to bring its case law together in the case of *Carson*, subsequent cases make clear that its case law approach is still inconsistent and confused. This is problematic from a perspective of transparency and legal certainty. As a result, national courts, law-makers and legal practitioners may experience difficulties in trying to follow up on the Court’s

93 See, for example, Nielsen, ‘Is European Union Equality Law Capable of Addressing Multiple and Intersectional Discrimination Yet? Precautions against Intersectional Cases’, in Schiek and Chege, *supra* n 84 at 42.

94 It must be added here, however, that there are other possibilities for selection. The Court may decide, for example, to assess only cases of unequal treatment related to the exercise of core fundamental rights. On this, see further Gerards, ‘The Prism of Fundamental Rights’ (2012) *European Constitutional Law Review* (forthcoming).

95 See, for example, Bossuyt, ‘Should the Strasbourg Court Exercise More Self-restraint? On the Extension of the Jurisdiction of the European Court of Human Rights to Social Security Regulations’ (2007) *Human Rights Law Journal* 321.

incoherent reasoning and to determine when they should apply Article 14 in their own legal systems. Furthermore, the Court's case law discloses a lack of conceptual and theoretical underpinning for its non-discrimination case law. It seems to hover between a classic non-discrimination approach, based on a 'thick' understanding of the prohibition of discrimination as protecting individuals against disadvantageous treatment based on grounds that are considered *a priori* problematic, and an approach based on a normatively empty understanding of the equality principle that would allow it to assess each and every difference in treatment for its reasonableness.

It has been argued in this article that both theoretical conceptions have certain advantages if they are used as a basis for the Court's non-discrimination case law. The non-discrimination approach would allow the Court to play the role of a real human rights court, deciding only on discrimination cases that are actually and clearly based on personal status and that raise a suspicion of unjustifiability. The choice for this approach would do justice to the principle of subsidiarity, as it would imply that the Court only corrects the states in hard-core, important discrimination cases, leaving more intricate and 'neutral' cases to be decided by the national authorities. Nonetheless, this approach has some important drawbacks. It would make it less easy for the Court to deal with seemingly unimportant cases of unequal treatment that may be the result of underlying, systemic or structural, hidden forms of discrimination. Moreover, it would always need concepts such as indirect discrimination to address such matters, which is a concept that the Court presently seems to apply only with great reluctance and with many deficiencies.

If the Court would want to avoid the need to rely on indirect discrimination, it might opt for the alternative conception of equal treatment, which would not limit the applicability of Article 14 to discrimination based on 'personal characteristics' or *a priori* unacceptable grounds. Such a choice offers greater protection against unequal treatment, allowing applicants to bring cases before the Court disclosing arbitrary differences in treatment regardless of their grounds. A purely textual interpretation would also seem to support this choice, since Article 14 does not only mention 'other status' (on which the 'personal characteristic' branch of the Court's case law relies), but it also prohibits expressly discrimination on 'any ground'. Finally, the very open concept of equality allows the Court to address all forms of unequal treatment, including complex, cumulative or intersectional discrimination. The Court could thereby offer important protection against unjustified unequal treatment that is complementary to the protection currently offered by EU law.

For those reasons, and from a substantive perspective, it seems preferable that the Court abandons the requirement that a distinction should be based on a 'personal characteristic' in favour of an open-textured, equality-based approach. But of course, strategic reasons also count. In the current situation of legitimacy criticism and backlog, the Court may favour a careful approach

that enables it to limit its review to ‘real’ human rights cases over a more inclusive approach that would compel it to deal with a large amount of cases that do not always clearly relate to core human rights issues.

It is understandable, therefore, that the Court hesitates about adopting one or other approach, and whether substantive or strategic arguments should prevail. Nevertheless, if the Court would have the courage to make a sound and well-considered choice now, and if it would consistently apply it in future case law, this would be of great help to legal practitioners and national courts. Indeed, it is vital that the Court makes a clear choice, for reasons of predictability and legal certainty, as well as of conceptual clarity and purity.