THE EUROPEAN COURT OF HUMAN RIGHTS' MARGIN OF APPRECIATION DOCTRINE ON CASES CONCERNING DISCRIMINATION CLAIMS

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ABSTRACT

The margin of appreciation doctrine is an important tool that the European Court of Human Rights uses in considering whether a member state has breached the European Convention on Human Rights and Fundamental Freedoms. This doctrine does not appear in the European Convention on Human Rights and Fundamental Freedoms; however, it has been developed by the European Court of Human Rights over the years. In the field of prohibition of discrimination, the European Court of Human Rights varies the supervision which it exercises by granting states a wider or narrower margin of appreciation, depending on various factors. Moreover, in most discrimination cases, the European Court of Human Rights is not willing to express its views for that of the national authorities, who are considered better-situated than European Court of Human Rights judges to assess the requirements of moral issues or other legitimate aims pursued in their states. Therefore, the doctrine arises in consideration of the different legal and cultural structures of the state parties. Lastly, the practice of the doctrine on discrimination based cases has been criticised from different points, such as its inconsistency, the absence of clear criteria and universality of human rights.

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1. INTRODUCTION

The margin of appreciation doctrine is an important tool that the European Court of Human Rights uses in considering whether a member state has breached the European Convention on Human Rights and Fundamental Freedoms. This doctrine does not appear in the European Convention on Human Rights and Fundamental Freedoms; however, it has been developed by the European Court of Human Rights over the years. In the field of prohibition of discrimination, the European Court of Human Rights varies the supervision which it exercises by granting states a wider or narrower margin of appreciation, depending on various factors. Moreover, in most discrimination cases, the European Court of Human Rights is not willing to express its views for that of the national authorities, who are considered better-situated than European Court of Human Rights judges to assess the requirements of moral issues or other legitimate aims pursued in their states. Therefore, the doctrine arises in consideration of the different legal and cultural structures of the state parties. Lastly, the practice of the doctrine on discrimination based cases has been criticised from different points, such as its inconsistency, the absence of clear criteria and universality of human rights.

This dissertation is aiming to address, discuss and try to find some answers to the questions on the European Court of Human Rights' margin of appreciation doctrine on cases concerning discrimination claims. After introduction, in first chapter, the European Convention on Human Rights and Fundamental Freedoms' prohibition of discrimination articles' structures and characters, the European Court of Human Rights' jurisprudence on these articles, the European Court of Human Rights' test that it uses on non-discrimination cases, other status and indirect discrimination terms will be explained and discussed. Next, the European Court of Human Rights' margin of appreciation doctrine will be addressed. The origins and uses of the doctrine, subsidiarity principle, evolutive interpretation and critics of the doctrine will be main issues that will take place on this chapter. Then, the factors that determine European Court of Human Rights' margin of appreciation doctrine on prohibition of discrimination cases, strictness of the European Court of Human Rights' review and the width of margin, suspect discrimination grounds and factors that underlying margin of appreciation will be largely assessed. In conclusion, all these indications will be tried to harmonise and some key formulas will be tried to suggest on this topic.

2. PROHIBITION OF DISCRIMINATION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS[1]

Prohibition of discrimination is safeguarded in the Convention by two provisions: Article 14 of the Convention and Article 1 of Protocol No. 12 thereto, which was signed on 26 June 2000 and entered into force on 1 April 2005. According to Article 14 of the Convention:

"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."

According to Article 1 of Protocol No. 12:

"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."

Moreover, the importance of prohibition of discrimination was mentioned several times. On December 2005, Director General for Human Rights Pierre-Henri Imbert said that: "*In the Council of Europe, we believe that discrimination constitutes an offence against human dignity. It is like poison, destroying the very fabric of our societies. Very often, the victims of discrimination belong to the most vulnerable groups in our society, such as asylum seekers, immigrants, members of ethnic and national minorities, the elderly or persons with disabilities. Equality and non-discrimination are indivisible. While each form of discrimination has its own distinctive features and require specific attention, efforts to combat them must be rooted in the same fundamental principle*".[2]

However, against these two provisions and comments, there is no definition of 'discrimination' in the ECHR. In the legal sense, human rights treaties, including the ECHR, themselves do not define the term 'discrimination', it generally refers to differential treatment of an individual or a group of individuals which is based on their characteristics and results in

[1] Hereinafter, the Convention or the ECHR.
[2] Council of Europe, *Non-discrimination: A Human Right. Seminar to mark to entry into force of Protocol No. 12: Strasbourg*, 11 October 2005, at 5.

a disadvantage.[3] Nonetheless, the United Nation Human Rights Committee refers to the text of the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women and concludes that discrimination is *"any distinction, exclusion, restriction or preference"* based on the forbidden grounds *"and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms"* in its General Comment No. 18.[4]

2.1. The Structure of Article 14

2.1.1. Open-Ended Character of Article 14

Article 14 of the ECHR stipulates a general ban against discrimination. It provides that the rights and freedoms set forth in the 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.

Article 14 of the ECtHR has a very wide range as it entails an open-model non-discrimination clause, which is not limited to an exhaustive list of discrimination grounds. The open-endedness of the list of grounds of Article 14 induces that any possible characteristic that leads to potential unequal treatment falls under this article and can thus be subjected to the European Court of Human Rights'[5] scrutiny. New prohibited grounds of discrimination can be and have been developed in case law as social conditions in Europe change[6] and as ECHR is 'a living instrument'; the Court interprets the concept of non-discrimination in the light of today's society, according to 'evolutive interpretation'.[7]

This open-ended and non-exhaustive structure of Article 14 provides a great benefit for applicants. The applicant does not have to demonstrate that the difference in treatment is

[3] The Equal Rights Trust, *The Ideas of Equality and Non-Discrimination: Formal and Substantive Equality*, 8 November 2007, at 1, http://www.equalrightstrust.org/sites/www.equalrightstrust.org/files/ertdocs//The%20Ideas%20of%20Equality%20and%20Non-discrimination%2C%20Formal%20and%20Substantive%20Equality.pdf.

[4] United Nations Human Rights Committee, *General Comment No. 18: Non-Discrimination*, 10 November 1989, at para 6, http://www.refworld.org/docid/453883fa8.html.

[5] Hereinafter, the Court or the ECtHR.

[6] Haverkort-Speekenbrink, Sarah, *European Non-Discrimination Law: A Comparison of EU Law and the ECHR in the Field of Non-Discrimination and Freedom of Religion in Public Employment with an Emphasis on the Islamic Headscarf Issue*, Intersentia, School of Human Rights Research Series, Vol. 59, 2012, at 124.

[7] Brems, Eva, *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, Zeitschrift für Auslandisches Öffentliches Recht und Volkrecht, Vol. 56, 1996, at 306.

based on one of the characteristics included in the articles and that the applicant possesses this characteristic.[8]

However, Article 14 neither details on the criteria for specifying discrimination nor provides an express test of justification or exceptions. This open-ended structure of Article 14 has significant consequences as to its interpretation and application and provides for what may sometimes on the surface seem unstructured and conflicting case law.

2.1.2. Accessory and Autonomous Character of Article 14

Article 14 has the limited scope of being an accessory and not free-standing right applicable only in relation to the enjoyment of the rights and freedoms otherwise protected by the ECHR. According to this accessory and subsidiary character of Article 14, it cannot be invoked independently, but only *in conjunction* with other ECHR rights. It does not create an additional right not to be discriminated, but merely a principle that applies when the case at hand falls within the ambit of other rights in the ECHR.[9] The requirement that Article 14 only applies within the spheres, in which the Convention rights are enjoyed, has the potential to limit the application of Article 14.[10]

It should also be mentioned that the Court has been willing to accept that many situations fall within the "ambit" of a right and has gradually extended the ambit requirement to fields which do not, at first sight, fall under the scope of an ECHR right, such as social security and right to work.[11]

Nevertheless, the application of Article 14 does not presuppose a breach of one of the provisions but requires only that the facts at issue fall 'within the ambit' of one or more of the Convention articles.[12] In *Belgian Linguistics Case* decision, the Court stated that this article indeed has an accessory character, so that a self-supporting claim is not possible. However, it also held that Article 14 has a certain autonomous function.[13] A claim under this provision can be made even if the ECtHR has concluded that substantive Convention provisions have

[8] *Rasmussen v Denmark*, App. No. 8777/79, 7 EHRR 371, 28 November 1984, at para 34.
[9] Wintemute, Robert, *Within the Ambit: How Big is the "Gap" in Article 14 European Convention on Human Rights*, European Human Rights Law Review 4, 2004, at 366.
[10] O'Connell, Rory, *Cinderella comes to the Ball: Article 14 and the right to non-discrimination in the ECHR*, Legal Studies: The Journal of the Society of Legal Scholars, Vol. 29 Issue 2, 2009, at 212-3.
[11] *Stec and Others v UK*, App. No. 65900/01, 43 EHRR 47, 12 April 2006; *Sidabras and Dziautas v Lithuania*, App. Nos. 59330/00 and 55480/00, ECtHR, 27 July 2004.
[12] *Supra*, Wintemute, at 366.
[13] *Belgian Linguistics Case*, Series A 6 (1979-1980), 1 EHRR 252, 23 July 1968, at para 9.

not been violated. Even if national authorities have granted a more extensive protection of particular rights than is required by the ECHR, a difference in treatment can be assessed against this article.[14]

2.1.3. Is Article 14 a Cinderella Provision?

Article 14 is sometimes regarded as a Cinderella provision and has second class status in some ways.[15] The ECtHR often chooses to decide cases on the basis of articles other than Article 14 even where non-discrimination is central to the case. Also, it has a narrower scope of application and it has been described as a 'weakness' and even as 'parasitic' in some features. [16]

The Court established that it would not always consider the Article 14 claim in such cases. As the Court has since put it, *"where a substantive Article of the Convention has been relied on, both on its own and in conjunction 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"*.[17]

The Court's overall case law shows that the ECtHR has been disinclined to address Article 14 where another violation has been established or even to consider whether the other violation precludes Article 14 question.[18] Such as, in *Dudgeon v UK*, the Court decided that its ruling that the criminalization of adult, private homosexual acts was a breach of Article 8 absolved it from the need to adjudicate on the applicant's Article 14 allegations. It said that these concerned *"the same complaint, albeit seen from a different angle"*, as that underlying the Article 8 claim and that there was no useful legal purpose in deciding them.[19]

2.2. The Structure of Article 1 of Protocol No. 12

Article 1 of Protocol No. 12 guarantees a non-discrimination principle which is independent and free-standing from another right in the Convention.[20] Also, this article follows the open

[14] *Ibid.*
[15] *Supra*, O'Connell, at 212.
[16] *Ibid*, at 212-3.
[17] *Aziz v Cyprus*, App. No. 69949/01, 41EHRR 164, 22 September 2004, at para 35.
[18] Harris, O'Boyle, Warbrick, *Law of the European Convention on Human Rights*, 3rd edition, OUP, 2014, at 784.
[19] *Dudgeon v UK*, App. No. 7525/76, ECtHR, 22 October 1981, at para 69.
[20] Besson, Samantha, *Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?*, Human Rights Law Review, Volume 8 Issue 4, 2008, at 655.

structure of Article 14 and can be anticipated to be interpreted in line with the established interpretation of Article 14.[21] In the member states that have ratified this Protocol, individuals can invoke this non-discrimination article not only to combat discrimination related to the grounds mentioned in the provision, but on any ground. However, only a few contracting states have ratified this Protocol up to now.[22]

2.3. The Court's Discrimination Test

Article 14 does not prescribe a test of discrimination. However, from *Belgian Linguistic Case* judgement and subsequent judgements, the Court's jurisprudence has mostly clarified this article. In the first case concerning Article 14, *Belgian Linguistic Case*, the Court focused on a number of fundamental aspects of the assessment against that article. It expressed on the assessment method to be followed when judging claims of unequal different treatment and developed an assessment model that the ECtHR continued to use in cases on the prohibition of discrimination.[23] The Court's general assessment model consists of three criteria: First, it must be assessed whether there has been a difference in treatment of persons or groups of persons who are placed in a comparable situation.[24] After this test is satisfied, the legitimate aim and proportionality tests are applied. These mean that the contested measure should pursue *a legitimate aim* and it must be *a reasonable relationship of proportionality* between the means employed and the aim sought to be realised.[25]

2.3.1. Difference in Treatment

In *Thlimmenos v Greece*, the ECtHR considered that the right not to be discriminated against under Article 14 in the enjoyment of the rights guaranteed under the ECHR is violated *"when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different"*.[26] Not every difference in treatment will amount to a violation of Article 14, but *"an issue will arise under Article 14 when it is demonstrated that States treat differently persons in analogous situations without providing an objective and*

[21] Arnardottir, Oddny Mjöll, *Non-Discrimination under Article 14 ECHR: The Burden of Proof*, 51 Scandinavian Studies in Law, 2007, at 14.
[22] Burri, Susanne D., *Towards More Synergy in the Interpretation of the Prohibition of Sex Discrimination in European Law?: A Comparison of Legal Contexts and Some Case Law of the EU and the ECHR*, Utrecht Law Review, Vol. 9 Issue 1, 2013, at 82.
[23] *Supra*, *Belgian Linguistics Case*, at para 34.
[24] Jacobs, White and Ovey, *The European Convention on Human Rights*, 6th edition, OUP, 2014, at 413.
[25] Livingstone, Stephen, *Article 14 and the Prevention of Discrimination in the European Convention on Human Rights*, European Human Rights Law Review, 1997, at 29-30.
[26] *Thlimmenos v Greece*, App. No. 34369/97, ECtHR, 6 April 2000, at para 44.

reasonable justification, or when States without an objective and reasonable reason fail to treat differently persons whose situations are significantly different".[27]

There are four main factors for drawing the line between 'different treatment' and 'discrimination'. First, it must be displayed that the treatment in question was less favourable than that received by other comparable groups. Secondly, the state should prove that the practice is reasonable and rational.[28] Third, the effects of the different treatment have to be disproportionate in regard to the pursuit of the policy and must fail to strike *"a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention"*.[29] The second and third factors have provided the basis for variable margins of appreciation. Lastly, the practice in question should be regarded as non-discriminatory in other democratic states.[30]

In principle, each difference in treatment can be brought before the Court, as long as it relates to the exercise of one of the ECHR rights.[31] The ECtHR expressed this in *Engel and Others v Netherlands* that *"a distinction based on 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'. Besides, the word 'status' is wide enough to include rank"*.[32] Then, in *Rasmussen v Denmark*, the Court again held that *"there is no call to determine on what ground the difference was based, the list of grounds appearing in Article 14 not being exhaustive"*.[33] From these cases, it seems that every case of unequal treatment can be brought before the Court, regardless of the ground of discrimination.[34] On the other side, there is a parallel line of case law according to the ECtHR, which not every ground of discrimination comes within the reach of Article 14. In this line of case law, the Court seems to focus its attention on the meaning of 'other status'.[35]

[27] *Hoogendijk v the Netherlands*, App. No. 58641/00, ECtHR, 6 January 2005.
[28] *Abdulaziz, Cabalis and Balkandali v UK*, Series A 94 (1985), 7 EHRR 471, 28 May 1985, at paras 74-78.
[29] *Supra*, *Belgian Linguistics Case*.
[30] Schokkenbroek, Jeoren, *The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation*, 19 Human Rights Law Journal 20, 1998, at 21.
[31] Gerards, Janneke, *The Discrimination Grounds of Article 14 of the European Convention on Human Rights*, Human Rights Law Review, Vol. 13 Issue 1, 2013, at 104.
[32] *Engels and Others v Netherlands*, App. Nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, 1 EHRR 647, 8 June 1976, at para 72.
[33] *Supra, Rasmussen v Denmark*, at para 34.
[34] *Supra*, O'Connell, at 222.
[35] *Supra*, Gerards, *The Discrimination Grounds of Article 14 of the European Convention on Human Rights*, at 104.

2.3.2. Comparability

The Court did not at first have a clear idea as how to give substance to the comparability test and did not employ this as a starting point for its assessment. It was not until *Marckx v Belgium* case that the ECtHR accepted a comparability test as a requirement in the assessment of discrimination claims.[36] Only with this case, the Court accepted that comparability is a condition for the substantive examination of the justification of a different treatment.[37]

According to the comparability test, a judgement of the justification for a difference in treatment is only required if the persons or groups between whom a distinction is made are place in an analogous or similar situation. However, in the ECtHR's practice, there is the lack of identification of the source of a standard of comparability. Also, in the Court's decisions, the reasoning when establishing comparability is usually extremely short and there is no satisfying explanation.[38]

According to case law of the Court, the Court almost never pays explicit attention to the comparability case. A substantive investigation into the comparability is almost always lacking and in most cases the Court just assumes that the cases before it are comparable.[39] Only when there are reasons for doubt, either because it is likely that there are relevant differences between the cases or groups or because the context of the distinction creates uncertainty about it, the ECtHR deals specifically with the comparability.[40]

In other cases, the omission of the comparability test can be explained by the fact that, when judging the comparability, the same arguments and considerations play a role that are used when assessing against the justification model which giving a separate judgement on comparability then makes little sense.[41] Moreover, the reasoning for this omission may lie in considerations of procedural efficiency or a far-reaching investigation of national law.[42]

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[36] Arnardottir, Oddny Mjöll, *Equality and Non-Discrimination Under the European Convention on Human Rights*, Martinus Nijhoff, The Hague, 2003, at 52.
[37] *Marckx v Belgium*, App. No. 6833/74, 2 EHRR 330, 13 June 1979, at para 32.
[38] Gerards, Janneke, *Judicial Review in Equal Treatment Cases*, International Studies in Human Rights, Vol. 83, Martinus Nijhoff, 2005, at 128.
[39] *Sahin v Turkey*, App. No. 44774/98, ECtHR, 10 November 2005, at para 56.
[40] *Gaygusuz v Austria*, App. No. 17371/90, 23 EHRR 365, 16 September 1996, at para 46.
[41] *Supra*, *Rasmussen v Denmark*, at para 37.
[42] *Supra*, Gerards, *Judicial Review in Equal Treatment Cases*, at 133-4.

2.3.3. Legitimate Aim

Once it has been determined that there is a situation of comparable cases, the Court will first have to determine whether a 'legitimate aim' was pursued through making the distinction. However, the Court should not only look at the aims as stated by respondent state, but also examine whether there are other goals which underlie the distinction.[43]

The legitimate aim requirement of the Convention's non-discrimination provisions is open-ended. So, the state is not bound by a limited number of categories of aims and can provide any aim.[44] The states do not only show the nature of the legitimate aim they are pursuing, but also the link between the legitimate aim pursued and differential treatment challenged by the applicant.[45] States usually have no difficulty in convincing the Court of the legitimate aims of the measure in question.[46] Only when the applicant can indicate that the provided aim is not true, the ECtHR uses a stricter review.[47] Again, the Court has not always been very consistent in applying the legitimate aim test.[48]

2.3.4. Proportionality

According to the Court's decision model, the existence of a legitimate aim is not enough to be able to speak of a justified distinction. Also, there must be a reasonable relationship of proportionality between the goal sought and the interests affected by the distinction.[49] Article 14 and Article 1 of Protocol No. 12 do not specify any criterion for the proportionality test.[50] However, when the Court addresses the proportionality question, it usually states as a reasonable relationship between the means employed and the aim sought to be realised.[51] The Court explains the proportionality test by stating that the means of achieving the aim must be appropriate, necessary and proportionate.[52]

In general, it can be said that, the proportionality test is an interpretative tool that helps the Court to delimit the legal obligations imposed on the contracting parties and the rights of the

[43] *Supra*, *Belgian Linguistics Case*.
[44] *Supra*, Haverkort-Speekenbrink, at 155.
[45] *Supra*, Jacobs, White and Ovey, at 427.
[46] *Supra*, Livingstone, at 32.
[47] *Supra*, Janneke, *Judicial Review in Equal Treatment Cases*, at 139.
[48] *Supra*, *Thlimmenos v Greece*, at para 47.
[49] *Supra*, *Belgian Linguistics Case*, at para 10.
[50] Arai-Takahashi, Yutaka, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECtHR*, Intersentia, 2002, at 11-2.
[51] *Supra*, *Belgian Linguistics Case*, at para 10.
[52] *Orsus and Others v Croatia*, App. No. 15766/03, ECtHR, 16 March 2010, at paras 150 and 155.

ECHR in different contexts.[53] Also, a fair balance must be struck between the public interest in pursuing a certain policy and the private interests related to the enjoyment of the ECHR rights at stake.[54]

Nevertheless, the Court has not a coherent and uniform principle of proportionality in its non-discrimination cases[55] maybe because this principle was developed in the ECtHR's case law instead of being expressed in the text of the Convention.[56]

2.4. Other Status

The formulation of Article 14 shows that the grounds of distinction given there are not intended to be exhaustive. The list set out in Article 14 is illustrative and not exhaustive, as is shown by the words *"any ground such as"*.[57] This means that it is not necessary for an applicant to show that the disputed distinction is based on one of the named grounds in Article 14.[58]

There is a long list of discrimination grounds in Article 14 which may give rise to a complaint. Also, Article 14's list of grounds is open-ended as it includes *"any other status"*, it may include other grounds such as sexual orientation,[59] health,[60] or others that not listed in that provision. In the Court case law, it would seem that almost any distinction within the ambit of a Convention right may start a complaint under Article 14.

However, in *Kjeldsen, Busk Madsen and Pedersen v Denmark*, the Court stated that a difference in treatment must be based on *"a personal characteristic (status) by which persons or groups of persons are distinguishable from each other"*.[61] This approach was confirmed again in *Magee v UK*, which the Court found that *"the difference is not to be explained in terms of personal characteristics and for that reason, the difference in treatment did not amount to discrimination under Article 14"*.[62] Nevertheless, this 'personal status' line of case law has not replaced *Engel and Others v Netherlands* and *Rasmussen v Denmark*

[53] Christoffersen, Jonas, *Fair Balance: Proportionality, Subsidiarity, and Primarity in the European Convention on Human Rights*, Martinus Nijhoff, 2009, at 44 and 68-9.
[54] *Spadea and Scalabrino v Italy*, App. No. 12868/87, ECtHR, 28 September 1995, at para 33.
[55] *Supra*, Christoffersen, at 31-32.
[56] Letsas, George, *A Theory of Interpretation of the European Convention on Human Rights*, OUP, 2007, at 80.
[57] *Salgueiro da Silva Mouta v Portugal*, App. No. 33290/96, 31 EHRR 1055, 21 December 1999, at para 16.
[58] *Supra, Rasmussen v Denmark*, at para 34.
[59] *Supra, Salgueiro da Silva Mouta v Portugal*.
[60] *V.A.M. v Serbia*, App. No. 39177/05, ECtHR, 13 March 2007.
[61] *Kjeldsen, Busk Madsen and Pedersen v Denmark*, App. Nos. 5095/71, 5920/72, 5926/72, 1 EHRR 711, 7 December 1976, at para 56.
[62] *Magee v UK*, App. No. 28135/95, 31 EHRR 822, 6 September 2000, at para 50.

jurisprudence. Many judgments display that the precise definition of the ground of discrimination often is not relevant at all and are judgments in which the ECtHR held Article 14 to be applicable to a difference in treatment that is not based on a 'personal characteristic'.[63]

Until 2010, the Court followed its classic doctrine that all kinds of discrimination grounds are included in the scope of protection of Article 14. But, in *Carson and Others v UK*, state government argued that place of residence was not protected as *'other status'* under Article 14 as this was *"a matter of choice, rather than an inherent personal characteristic or deeply held conviction or belief"*.[64] The Court rejected this defence and expressed that *"only differences in treatment based on 'an identifiable characteristic or status' are capable of amounting to discrimination within the meaning of Article 14"*,[65] and held that residence was an aspect of personal status. The ECtHR noted that the reference to *'any ground'* in Article 14 indicated that the list of discrimination grounds is not exhaustive and in any case, the words *'other status'* had been given a wide meaning.[66]

Later, in *Clift v UK*, respondent state resubmitted that discrimination grounds in that case were not protected under Article 14. However, the Court stated that Article 14 *"does not prohibit all differences in treatment but only those differences based on 'an identifiable, objective or personal characteristic or status', by which persons or groups of persons are distinguishable from one another"*,[67] and discrimination grounds were not limited to personal characteristics in the sense that they had to be innate or inherent in the person concerned.[68] Also in *Bah v UK*, UK government tried the same defence that immigrant status *"was not an 'other status' within the terms of Article 14"*.[69] The ECtHR, again, dismissed argument that a large variety of statuses *"which could not be considered to be 'personal' in the sense of being immutable or innate to the person, amounted to 'other status' for the purposes of Article 14"*.[70]

It seems that a conflicting strand of cases is developing at the same time. In these cases, the position of the Court introduced in *Carson and Others v UK*, that *"only differences in*

[63] *Supra*, O'Connell, at 222-3.
[64] *Carson and Others v UK,* App. No. 42184/05, 51 EHRR 13, 16 March 2010, at para 68.
[65] *Ibid*, at para 61.
[66] *Ibid*, at para 70.
[67] *Clift v UK*, App. No. 7205/07, ECtHR, 13 July 2010, at para 55.
[68] *Ibid*, at para 59.
[69] *Bah v UK*, App. No. 56328/07, 54 EHRR 21, 27 September 2011, at para 25.
[70] *Ibid*, at para 45.

treatment based on an identifiable characteristic or status" come under the scope of protection of Article 14, has been applied in a different way than in *Clift v UK*, *Bah v UK* and the majority of the post-*Carson and Others v UK* case law. This might be beginning to have the intended effect of a stricter and more formal approach towards the discrimination grounds.[71]

Moreover, in *Springett, Easto-Brigden and Sheffield v UK*, the ECtHR argued that the time of acquisition of a certain social security benefit was not *"an aspect of personal status"* as it did not *"relate to a core or personal belief or choice"* and was not an *"innate characteristic which applies from birth"*[72] and it found inadmissible. In *Peterka v the Czech Republic*, the Court reasoned that the discrimination ground in question had to relate to a personal characteristic. According to this reasoning, employment status was not considered to come under the scope of protection of Article 14.[73] Then in *Cadek and Others v the Czech Republic*, which the discrimination ground claimed was the difference between the status of those who have restitution claims in relation to previously confiscated land and those who have acquired their claims by deeds, the ECtHR reasoned that this difference was neither based on a personal choice which should be respected as one of the *"elements of someone's personality"* nor on *"grounds of personal features in respect of which no choice at all can be made"*.[74] So, the discrimination ground in question was *"not a relevant ground for the purposes of Article 14"*.[75]

Apart from these three examples of new lines of reasoning, the Court also increasingly seems to be focusing its analysis on discrimination grounds at the lower end instead of applying the classic approach of focusing either on comparability or on objective and reasonable justification. In some cases, it seems to be beginning to make a difference for the findings of the Court. In these cases, instead of focusing its analysis on either comparability[76] or objective

[71] Arnardottir, Oddny Mjöll, *The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights*, Human Rights Law Review, Vol. 14, 2014, at 660.
[72] *Springett, Easto-Brigden and Sheffield v UK*, App. No. 34726/04, ECtHR, 27 April 2010.
[73] *Peterka v the Czech Republic*, App. No. 21990/08, ECtHR, 4 May 2010.
[74] *Cadek and Others v the Czech Republic*, App. No. 31933/08, ECtHR, 22 November 2012, at para 94.
[75] *Ibid.*
[76] *Fredin v Sweden*, App. No. 12033/86, 13 EHRR 184, 18 February 1991, at para 61.

and reasonable justification,[77] the Court seems to begin moving the centre of its analysis onto the scope of Article 14 *ratione materiae* in cases of this kind.[78]

2.5. Indirect Discrimination

Indirect discrimination results from a rule or practice that in itself does not involve impermissible discrimination but that disproportionately and adversely affects members of a particular group. There does not necessarily have to be discriminatory intent for indirect discrimination.[79]

The Court did not initially recognise that relying on the concept of indirect discrimination was possible.[80] Furthermore, despite some cases on indirect discrimination, the majority of the case law of the Court deals only with direct discrimination and it is not willing to accept indirect discrimination cases.[81]

Since *Thlimmennos v Greece*, the ECtHR has moved to deal with indirect discrimination. However, the concept of indirect discrimination was explicitly recognized for the first time in the case *D.H. and Others v the Czech Republic*. The case concerned 18 applicants of Roma origin who were placed in special schools for children with learning disabilities. By law, the criteria for placing a child in such a school were tests carried out in an educational psychology and child guidance centre and the consent of the child's legal representative. The applicants argued that they did not have to establish any intention to discriminate under a concept of indirect discrimination. They referred to the statistical disproportion in the number of Roma children placed in special schools, attributed this disproportion to a structural bias in the way the tests were designed, administered and interpreted and claimed that they had met their burden to establish beyond reasonable doubt the different treatment based on ethnic origin.[82] The ECtHR observed that several organisations had expressed concerns about the arrangements whereby Roma children living in the Czech Republic were placed in special schools and the difficulties they had in gaining access to ordinary schools, and acknowledged that the statistics disclosed 'worrying figures'.[83]

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[77] *Beian v Romania*, App. No. 30658/05, ECtHR, 6 December 2007, at para 64.
[78] *Supra*, Arnardottir, *The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights*, at 662.
[79] *Supra*, Harris, O'Boyle, Warbrick, at 815.
[80] *Supra*, *Abdulaziz, Cabalis and Balkandali v UK*, at para 85.
[81] *Supra*, O'Connell, at 221.
[82] *D.H. and Others v the Czech Republic*, App. No. 57325/00, 47 EHRR 3, 13 November 2007.
[83] *Ibid*, at para 52.

However, the Chamber did not perform a pure indirect discrimination analysis and held that as there was no express reference to the pupils' ethnic origin in the administrative practice of testing and as the tests were administered by qualified professionals, *"it would be difficult for the Court to go beyond this factual finding and to ask the Government to prove that the psychologists who examined the applicants had not adopted a particular subjective attitude"*.[84] In conclusion, the state never had to provide objective justification for the disproportionate effect in question.

Then, *D.H. and Others v the Czech Republic* has been referred to the Grand Chamber of the Court. It ruled that Article 14 may require efforts to correct factual inequality, even if this required differential treatment.[85] It held that it was not necessary to prove any intention to discriminate and that once a discriminatory effect was shown, the burden then switched to the state to justify it under the Court's proportionality test.[86] The *D.H. and Others v the Czech Republic* is important that it recognised Article 14 covers problems of indirect discrimination, rules that it is not necessary to demonstrate a prejudiced motivation.[87]

Also, in other cases, the Court's will to find an indirect discrimination situation can be seen. For instance, in the case of *Hoogendijk v the Netherlands*, the ECtHR accepted that the introduction of the income requirement in the Dutch AAW (General Invalidity Benefits Act) scheme did in fact have an *"indirect discriminatory effect in respect of married or divorced women having become incapacitated for work at a time when it was not common in the Netherlands for married women to earn an own income from work"*.[88] The Court first stated that *"where a general policy or measure has a disproportionately prejudicial effect on a particular group, it is not excluded that this may be regarded as discriminatory notwithstanding that it is not specifically aimed or directed at that group"*.[89] As regards the statistics submitted by the applicant, they demonstrated that a group of 5,100 persons had lost their entitlements to the *AAW* benefit because they did not meet the requirement income introduced in the amended law. This group consisted of about 3,300 women and 1,800 men. The Court, then, accepted the indirect discriminatory effect of the income requirement in respect of married or divorced women having become incapacitated for work at a time when it

[84] *Ibid*, at para 49.
[85] *Ibid*, at paras 175-6.
[86] *Ibid*, at paras 193-5.
[87] *Supra*, O'Connell, at 222.
[88] *Supra, Hoogendijk v the Netherlands*.
[89] *Ibid.*

was not common in the Netherlands for married women to earn their own income from work.[90]

In *Zarb Adami v Malta*, the ECtHR addressed the issue of indirect sex discrimination. The statistics showed that many more men than women had fulfilled the civic obligation of jury service, even if the relevant legislation did not make a difference between women and men in this respect. Without using the concept of indirect discrimination openly, the ECtHR held that the discrimination at issue was based on a well-established practice and characterised by a number of factors. According to the Court, potentially discriminatory measures might not only arise from a legislative measure, but also from a *de facto* situation.[91]

3. THE ECtHR'S MARGIN OF APPRECIATION DOCTRINE

The margin of appreciation is a doctrine that the ECtHR has developed when considering whether a member state has breached the ECHR. A member state is permitted a degree of discretion, subject to Strasbourg supervision, when it takes legislative, administrative or judicial action in the area of one of the Convention right. The doctrine allows the ECtHR to take into account the fact that the Convention will be interpreted differently in different member states, given their divergent legal and cultural traditions. The margin of appreciation gives the Court the necessary flexibility to balance the sovereignty of member states with their obligations under the Convention.

The margin of appreciation doctrine has been developed in the jurisprudence of the ECHR and in an attempt to strike a balance between national views of human rights and the uniform application of the ECHR values.

According to different scholars, the margin of appreciation doctrine suggests a 'latitude of deference or error',[92] 'room for manoeuvre',[93] given to national authorities in assessing

[90] *Ibid.*
[91] *Zarb Adami v Malta*, App. No. 17209/02, ECtHR, 20 June 2006.
[92] Yourow, Howard Charles, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, Martinus Nijhoff Publishers, 1996, at 13.
[93] Greer, Steven, *The Margin of Appreciation: Interpretation and Discretion under the European Convention of Human Rights*, Council of Europe Publishing, 2000, at 5.

appropriate standards of the ECHR rights, taking into account particular values and other distinct factors on national laws and practice.[94]

3.1. Origins and Uses of Margin of Appreciation Doctrine

The margin of appreciation term is neither found in the text of the ECHR itself nor in the *travaux préparatoires*.[95] It first appeared in *Greece v UK* case on alleged human rights violations in Cyprus in 1958[96] and since then it has been adopted in several cases.

Until the late 1970s, the application of the concept of margin of appreciation was far from being a "doctrine" and the underlying thought on the margin of appreciation was closely tied to the concept of subsidiarity. The Court first referred the margin of appreciation doctrine in the context of Article 14 in *Belgian Linguistic Case*, in which the Court indicated what criteria play a role in answering the question whether a distinction is justified.[97] In this case, the Court recognised the subsidiary nature of its European supervision.[98] The approach originated in the *Belgian Linguistics Case*, in which the Court stipulated that it cannot assume the role of the national authorities as it would lose the sight of the subsidiary nature of the Convention. The national authorities were said to be free to choose measures they consider appropriate in applying the Convention rights and the review of the Court was to be limited to scrutinising their conformity.[99]

Then, *Handyside v UK* judgement has provided the prototype of margin analysis in other contexts. The Court detailed the margin of appreciation doctrine in this case and noted that *"by reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements of morals as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them. The domestic margin of appreciation thus goes hand in hand with European supervision".*[100] Later, the Court stated in *Schalk and Kopf*

[94] Arai-Takahashi, Yutaka, "The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg's Variable Geometry", Follesdal, Andreas; Peters; Birgit; Ulfstein; Geir (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global* Context, Cambridge University Press, 2013, at 62.
[95] *Supra*, Yourow, at 14.
[96] *Greece v UK (Cyprus Case)*, 1958-9, 2 Yearbook of the European Convention on Human Rights 174, at 176.
[97] *Supra, Belgian Linguistics Case*, at para 10.
[98] *Ibid*, at para 5.
[99] *Ibid*, at para 10.
[100] *Handyside v UK*, App. No. 5493/72, 1 EHRR 737, 7 December 1976, at para 49.

v Austria that *"the scope of this doctrine vary according to the circumstances, the subject matter and its background"*.[101]

The margin of appreciation doctrine has a high profile in litigation relating to certain Convention articles –Article 1 of Protocol No. 1, Articles 8 to 11, Article 14 and Article 15 – but a lower profile with respect to others.[102] There is no consensus over whether the doctrine could be functioned on every kind of discretion by national institutions under the ECHR or not and whether the doctrine penetrates the whole ECHR or it is limited to some articles. Some commentators maintain that in theory the doctrine could be applied to all Convention articles.[103] On the other hand, others express that the doctrine has never been invoked in respect of Article 2, Article 3 and Article 4.[104]

3.2. Subsidiarity Principle

The margin of appreciation doctrine has different applications in ECtHR's case law. George Letsas described two main forms of the doctrine: *substantive* and *structural* uses of the concept. While substantive form focuses on '*the relationship between individual freedoms, and collective goals'*, the structural concept addresses *'the limits or intensity of the review of the Court in view of its status as an international tribunal'*.[105] The substantive form focuses on how two interests are balanced with each other and it can be described as the proportionality principle; the structural form can be described as the original concept of margin of appreciation.[106] In this second meaning, the margin of appreciation describes the relationship between the State and the ECtHR, which is also referred to as the principle of subsidiarity.[107]

In short, the principle of subsidiarity means that an international organisation can only intervene when the national states are not, or are insufficiently in a position to act

[101] *Schalk and Kopf v Austria*, App. No. 30141/04, ECtHR, 24 June 2010, at para 98.
[102] *Supra*, Greer, at 5.
[103] Macdonald, Ronald St. John, "The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights" in *International Law at the Time of its Codification, Essays in Honour of Roberto Ago,* Giuffre, 1987, at 192.
[104] Callewaert, Johan, *Is there a Margin of Appreciation in the Application of Articles 2, 3 and 4 of the Convention?*, Human Rights Law Journal, Vol. 19, 1998, at 6-9.
[105] Letsas, George, *Two Concepts of the Margin of Appreciation*, Oxford Journal of Legal Studies, Vol. 26, No. 4, 2006, at 706.
[106] Kratochvil, Jan, *The Inflation of the Margin of Appreciation by the European Court of Human Rights*, Netherlands Quarterly of Human Rights, Vol. 29, 2011, at 324.
[107] Carozza, Paolo, *Subsididiarity as a Structural Principle of International Human Rights Law*, American Journal of International Law, Vol. 97, 2003, at 40-9.

themselves.[108] This principle is aiming to find a balance between the sovereignty of contracting states and the Court's supervisory role.[109] This balance is based on the idea of the ECHR being the lowest common denominator, thus giving broad space for national diversity in the protection of human rights.[110] In this meaning, the margin of appreciation naturally derived from the original understanding that the Convention should serve as a system complementary but subsidiary to national systems.[111]

The Court is of the opinion that the states are in general better position than an international court to examine the national situation and to judge which measures are needed at a particular moment.[112] When there are different ways to satisfy the obligations under the Convention it is primarily for the state to choose between them and the Court may only examine whether the choice made does not conflict with the ECHR.[113]

3.3. The ECHR as a Living Instrument and Evolutive Interpretation

A distinction, exclusion or restriction of preference may be justified if it is based on reasonable and objective criteria, it has a legitimate aim and it is proportional between the means and the aim.[114] However, reasonableness is often contentious and depends on specific circumstances: the situation in the country in question, its cultural and religious background and specific social traditions with customs.

The Court has held that the Convention is *"an instrument designed to maintain and promote the ideals and values of a democratic society"*.[115] Further, it has detailed that such values include pluralism, tolerance and broadmindedness.[116] Nevertheless, it has been argued that as democratically elected bodies are the ones responsible for enacting law and deciding on policy, adherence to democratic governance requires that the Court has a limited discretion on

[108] *Supra*, Gerards, *Judicial Review in Equal Treatment Cases*, at 166-7.
[109] Ambrus, Monika, "The European Court of Human Rights and Standards of Proof: An Evidentiary Approach towards the Margin of Appreciation", in Gruszczynski, Lukasz; Werner, Wouter (eds), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, OUP, 2014, at 236.
[110] Council of Europe, *The Margin of Appreciation*, http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp.
[111] *Supra*, Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECtHR*, at 3.
[112] Mahoney, Paul, *Judicial Activism and Judicial Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 Human Rights Law Journal 57, 1990, at 78.
[113] *Ibid*.
[114] *Supra*, *Gaygusuz v Austria*, at para 42.
[115] *Supra*, *Kjeldsen, Busk Madsen and Pedersen v Denmark*, at para 53.
[116] *Supra*, *Handyside v UK*, at paras 47-9.

law-making.[117] In addition, the cultural diversity among contracting states has served as a legitimate concern under the Convention entailing that the Court should not try to impose uniform solutions for the culturally and ideologically varied states.[118] Still, a balance will always need to be struck between the cultural differences and the universal standards of the Convention.[119]

The Court has repeatedly affirmed the 'living instrument' nature of the ECHR, emphasising the need for progressive interpretation. It was *Tyrer v UK* case which first introduced the notion of the ECHR as a 'living instrument' to be interpreted in the light of present-day conditions[120] which means that it has to be given something of an activist interpretation.

Following the Vienna Convention on Law of Treaties (Articles 31 and 32), the Court has adopted 'evolutive interpretation' as one of its principal interpretative methods. While accepting this method, some commentators have raised concerns over judicial activism of the ECtHR when it interprets the ECHR in a way that requires changes in domestic law. Judicial activism is a label used to refer to a judicial approach which seeks to extend or modify existing law especially in cases where policy choices are before a court; while judicial restraint is a label used to refer to a judicial approach which focuses upon the judge applying existing case law and avoiding developing the law beyond its clearly established parameters.[121] Sometimes, it is suggested that judicial activism takes judges into the realm of the policy-maker, while judicial restraint recognizes the separation of law-maker and law-applier.[122] This counterbalance concern has been linked to margin of appreciation and sees the doctrine as an expression of judicial restraint. However, the ECtHR still has the overall power to ensure that national measures meet the ECHR requirements.[123]

[117] *Supra*, Mahoney, *Judicial Activism and Judicial Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, at 81.
[118] Mahoney, Paul, *Marvellous Richness of Diversity or Invidious Cultural Relativism*, Human Rights Law Journal, Vol. 19 Issue 1, 1998, at 2.
[119] *Supra*, Arnardottir, *Equality and Non-Discrimination Under the European Convention on Human Rights*, at 60.
[120] *Tyrer v UK*, App. No. 5856/72, 2 EHRR 1, 25 April 1978, at para 31.
[121] *Supra*, Jacobs, White and Ovey, at 74.
[122] *Supra*, Mahoney, *Judicial Activism and Judicial Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, at 58.
[123] Korkiamaki, Iina Sofia, *Legal Gender Recognition and (Lack of) Equality in the European Court of Human Rights*, The Equal Rights Review, Vol. 13, 2014, at 27.

3.4. Critics of the Margin of Appreciation Doctrine

The concept of margin of appreciation in international human rights law is frequently viewed as problematic. While some authors simply view it as unsatisfactorily confused,[124] others oppose what they regard as its pernicious connotations for human rights law: that the doctrine betrays the universality of human rights or that it undermines the protection of human rights according to common standards. [125]

There are two main approaches to the role of the Court in the interpretation and application of human rights. The first is a 'standard-unifying' approach, which states that the role of the Court is to harmonize human rights standards and practices with to police violations. On this account, the margin of appreciation is undesirable.[126]

The second approach is a 'diversity-permitting' approach, which recognizing that states are the primary protectors of human rights and allowing a limited differential protection of human rights by states, as well as setting standards where appropriate. This involves giving a margin of appreciation where suitable to states' democratically formed fundamental standards to common trends amongst the practice of contracting states and to states' greater expertise when setting these standards.[127] Moreover, it recognises that the margin of appreciation doctrine as a legitimate tool for interpreting the ECHR. This view is grounded on several rationales such as an 'inherent restraint on legitimate interpretation' or its role for the protection of "role on the protection of legitimate cultural variety".[128]

Furthermore, they argue that where the Convention is vague and the content of an article is open-textured, this leaves scope for the Court to develop the content of human rights, taking into account the intention of the states. Also, the Court has the final authority to decide on standards but the states have the primary task of interpreting and applying human rights

[124] Lester, Anthony, *Universality versus Subsidiarity: A Reply*, European Human Rights Law Review, Vol. 1, 1988, at 75.
[125] Benvenisti, Eyal, *Margin of Appreciation, Consensus, and Universal Standards*, New York University Journal of International Law and Politics, Vol. 31, 1998-9, at 844, 852 and 854.
[126] Legg, Andrew, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality*, OUP, 2012, at 38.
[127] *Ibid*.
[128] *Supra*, Mahoney, *Marvellous Richness of Diversity or Invidious Cultural Relativism*, at 4.

standards.[129] So, the Court should mediate this tension through its case law, in particular through the margin of appreciation doctrine.[130]

The first approach complains that the margin of appreciation leads to relativism about human rights and argues that given that relativism is both undesirable and contrary to the Convention. It is defended that universal human rights standards are largely compromised by the doctrine of margin of appreciation.[131] To say that each society is entitled to certain latitude in resolving internal human rights conflicts may promote moral relativism and it is against the concept of universal human rights. The doctrine has potential to undermine international enforcement of human rights that overcomes national considerations and to obstruct the external supervision required to ensure guarantees against human rights violation.[132] This kind of tendency would risk generating judicial double standard[133] and unfairness.[134]

In addition, opponents of margin of appreciation doctrine argue that fundamental problem with this doctrine is its inconsistency with the very idea of human rights, depriving individuals of that legal protection to which they are expressly entitled under the Convention. Its application is criticised as a self-serving justification by the supervisory bodies for their lax review. The doctrine introduces an element of judicial self-restraint without any express textual authorisation, but rather by judicial policy or expediency. The unsystematic fashion in which the doctrine is applied coupled with its vague nature also runs counter to the idea that clear and precise interpretation is essential for the effective enforcement of human rights.[135]

Also, advocates of the certainty of rules criticise the doctrine for weakening the normative guidance of substantive rights provisions of the Convention and to encourage normative vagueness.[136] They argue that this vagueness may cause a risk that the overall effectiveness in safeguarding the ECHR rights may be undermined. In addition, the standards of the rights

[129] *Supra*, Legg, at 58-9.
[130] Van Dijk, Pieter; van Hoof, Godefridus JH, *Theory and Practice of the European Convention on Human Rights*, 3rd edition, Kluwer Law International, The Hague, 1998, at 95.
[131] Marshall, Jill, *Personal Freedom through Human Rights Law?: Autonomy, Identity and Integrity under the European Convention on Human Rights*, Martinus Hijhoff, 2009, at 42.
[132] *Supra*, Benvenisti, at 843-4.
[133] *Ibid*, Benvenisti, at 844.
[134] Shany, Yuval, *Toward a General Margin of Appreciation Doctrine in International Law?*, European Journal of International Law, Vol. 16 Issue 5, 2005, at 912.
[135] *Supra*, Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECtHR*, at 233.
[136] *Supra*, Shany, at 937.

might be differently applied in similar cases, which can lead inconsistent standards and applications of human rights.[137]

Lastly, it is stated that excessive reliance on the margin of appreciation doctrine may risk promoting a habit of non-accountability and quitting the supervisory role of the Court.[138] In essence, the weakening normative guidance might yield an abrasive effect on the rule of law principle.[139]

4. THE ECtHR'S MARGIN OF APPRECIATION DOCTRINE ON PROHIBITION OF DISCRIMINATION

In this chapter, the Court's margin of appreciation doctrine in the context of prohibition of discrimination case-law and the emergent major problems in the Court's practice will be discussed. The ECtHR's strictness of review, factors that shape the width of margin of appreciation in Article 14 cases, suspect discrimination grounds and other policy grounds will be explained and assessed respectively.

4.1. Strictness of Review and the Width of Margin of Appreciation

The strictness of review concept refers to the intensity with which the Court examines the facts and claims submitted by the two parties and depends on different factors. 'Suspect' grounds, such as sex, race, religion, nationality, illegitimacy and sexual orientation will generally be subjected to a higher degree of review and a narrow margin of appreciation. Also the circumstances, the subject matter, the background and consensus are other major factors which are relevant in determining the strictness of review and the width of margin of appreciation.[140]

The scope of the margin of appreciation is not identical in each case but will vary according to the context. Relevant factors include the nature of the Convention right in issue, its importance for the individual and the nature of the activities involved.[141] When determining the presence of a fundamental character, the Court seems to start from an objective concept of

[137] *Supra*, Benvenisti, at 843.
[138] Brauch, Jeffrey, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, Columbia Journal of European Law, Vol. 11, 2004-5, at 148.
[139] *Ibid*, at 125.
[140] *Petrovic v Austria*, App. No. 20458/92, 33 EHRR 14, 27 March 1998, at para 38.
[141] *Buckley v UK*, App. No. 20348/92, ECtHR, 29 September 1996, at para 74.

the importance of the right or interested involved. It examines whether the right has a great value and whether objectively regarded it is of special interest for the individual.[142]

The sliding scale of discrimination grounds goes all the way from the suspect grounds at the higher end, through various other statuses that can in certain contexts make a real difference in a person's life, to non-personal or clearly irrelevant differences between persons and groups of persons. Also, other factors that come under the heading of 'the circumstances, the subject-matter and its background'[143] can intersect with the discrimination ground with a stricter or a more lenient approach depending on the specific circumstances of the case.[144]

The subject-matter of the Convention right commonly taken into account by the Court as an influencing factor in determining the width of the margin of appreciation between community interests and individual liberty. The Court stated that a narrower margin of appreciation should be allowed when the right is considered as fundamental, one would be confronted with a hierarchy of rights in the application the Strasbourg interpreters' make of the ECHR through the margin of appreciation doctrine.[145] Secondly, the legitimate aim or aims pursued by the restriction to ensure the right in question is also identified as one of the factors that influences how the ECtHR commonly applies the margin of appreciation doctrine. In weighing the community interest, the margin of appreciation is generally wider when the rights of others are at stake.[146]

Also dependent on the intrinsic weight of the community interest served and of the policy context where the contested measures take place, the 'European consensus' standard plays an important role in its effective determination. The 'European consensus' standard, which is used to describe the ECtHR's inquiry into the existence or non-existence of a common ground, usually in the law and practice of the contracting states, has played a major role in the wider or narrower character in application of the doctrine in practice. The existence of similar patterns of practice or regulation through different member states will legitimize a narrower margin of appreciation for the state that stays within that framework. On the other hand, the

[142] *Supra*, Gerards, *Judicial Review in Equal Treatment Cases*, at 191.
[143] *Supra*, *Rasmussen v Denmark*, at para 40.
[144] *Supra*, Arnardottir, *The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights*, at 655.
[145] De la Rasilla del Moral, Ignacio, *The Increasingly Marginal Appreciation of the Margin of Appreciation Doctrine*, German Law Journal, Vol. 6 No. 7, June 2006, at 615.
[146] Supra, Schokkenbroek, *The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation*, at 35-6.

non-existence of a European consensus on the subject-matter will be normally accompanied by a wider margin of appreciation. [147]

Lastly, it is important to note that the seriousness of the interference can have in narrowing the scope of the margin of appreciation allowed[148] and the extent to which this has been seen to be closely related to three interrelated factors: the nature of the convention right at issue, together with its importance for the individual and the nature of the activities concerned.[149] The Court has stated that the margin of appreciation shall be narrow when a particularly important facet of an individual's existence or identity is at stake or there exists a consensus among member states with regard to the relative importance of such interest.[150]

Problems on margin of appreciation arise if the various factors contradict each other. In practice, the Court states which intensity-determining factors play a role in the case but does not explain why a balancing of these factors leads to the conclusion that a particular intensity of assessment should apply.[151] In cases, when there are several strong factors that point in the direction of a narrow margin, while only one intensity-reducing factor points in the other direction, there is no need to explain balancing process.[152] On the other hand, the contradictory factors are strongly similar in weight; balancing them against each other is becoming much more difficult. In this kind of cases, the ECtHR usually opts without further discussion for the intensity of assessment that in a particular case it apparently considers the most appropriate.[153]

4.2. 'Suspect' Grounds

In many jurisdictions, difference between 'suspect' grounds and 'non-suspect' grounds of differentiation has resulted in a specific way of reviewing discrimination claims. This differentiated approach to the grounds on which a distinction is based rooted in United States constitutional law.[154] In its constitutional system, the Supreme Court employs three different tests to decide discrimination claims. The first strict scrutiny test is applied where really

[147] *Supra*, De la Rasilla del Moral, at 616-7.
[148] *Supra*, *Dudgeon v UK*, at para 52.
[149] Schokkenbroek, Jeoren, *The Basis, Nature and Application of the Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, 19 Human Rights Law Journal 30, 1998, at 34.
[150] *S.H. and Others v Austria*, App. No. 57813/00, ECtHR, 3 November 2011, at para 94.
[151] *Gillow v UK*, App. No. 9063/80, ECtHR, 24 November 1986, at para 55.
[152] *Supra*, *Dudgeon v UK*.
[153] *Supra*, Harris, O'Boyle, Warbrick, at 297.
[154] Loenen, Titia, *Conceptualizing Sexual Orientation as a "Suspect" Category in Non-Discrimination Law: Some Reflections on the Atala Judgment of the Inter-American Court of Human Rights*, Derecho y Humanidades Journal, No: 21, 2013, at 245.

suspect classifications are involved and requires the challenged classification to pursue a "*compelling state interest*" and to be "*necessary*" to achieve it. A broader second test is applied where semi-suspect classifications are concerned. For classifications to survive this level of intermediate scrutiny, the classification has to serve "*an important governmental objective*" and to be "*substantially related*" to that objective. The third "rational basis" test is applied to classifications which are not reckoned as (semi)suspect in any way. Such classifications generally comply with judicial process if they are not completely illogical.[155]

Prohibiting discrimination on suspect grounds expresses clear societal disapproval of acts that are based on irrational motives. The prohibition of discrimination helps to guarantee that important social goods are divided on rational grounds, not on grounds that are irrelevant or that express deeply rooted stereotypes or subjective feelings. It also express that it is not fair to (dis)advantage individuals for reasons that they cannot influence. The prohibition of discrimination based on suspect grounds is protective of human dignity, since such discrimination may give the message that an individual with a certain characteristic is second-class.[156]

4.2.1. Foundations for Identifying 'Suspect' Grounds of Differentiation

In scholar literature, there are four foundations for suspectness of a discrimination ground. While some of these foundations refer to the characteristics connected to the ground of differentiation; others descend from the social-economic positions of the groups that are affected.[157]

4.2.1.1. Immutable characteristics:

According to this first criterion, the immutability of certain personal characteristics, like sex or race, are biological facts, independent of free choice and cannot be changed at will. Differential treatment on grounds which is beyond a person's influence would seem to be unfair.[158]

However, this foundation is not enough to explain suspect grounds differentiation. First of all, every immutable personal characteristic does not reach this status. Also, assessing whether a

[155] *Ibid*, at 245-6.
[156] *Supra*, Gerards, *The Discrimination Grounds of Article 14 of the European Convention on Human Rights*, at 115.
[157] *Supra*, Loenen, at 249.
[158] *Ibid*.

characteristic is immutable to start with is another question on this foundation, such as sexual orientation. Medical and other scientists are not completely agreed on the answer whether a person is born with a specific sexual orientation or not.[159]

4.2.1.2. Identity markers:

Some certain characteristics have importance for the constitution of the personal identity and their life. In this approach, sexual orientation religion, belief or political conviction are regarded as identity markers.[160] Nonetheless, this foundation is also not in itself enough to determine a ground as in a suspect category.[161]

4.2.1.3. Structural and Pervasive Disadvantage:

In this third approach, classifications resulting in exclusion of specific groups in society are the problem against which non-discrimination articles intend to provide protection. This foundation takes historical and social experiences as its starting point. From this starting point; existence of disadvantaged groups anticipates non-discrimination on a specific ground and ensures its own foundation. This approach usually interests in groups, such as racial or ethnic minorities and women, who are lacking the influence or power to defend them against this kind of discrimination forms by other majority groups. Again, this third foundation is not regarded the only foundation for a classification to be included in the protection provided by the non-discrimination articles.[162]

4.2.1.4. Prejudice and Stereotyping:

According to this foundation, if a group is a victim of prejudice, stereotyping and stigmatisation because of their characteristics or faces hostility, a classification based on these characteristics should be defined as a suspect category. Negative characteristics which are attributed to these group members are usually used as justification for their exclusion from opportunities and it is difficult for these people to survive in this system.[163]

As it can be seen, no single foundation provides a wholly accepted conceptual basis in itself. Nevertheless, these four approaches together procure a very practical starting point for

[159] *Ibid*, at 250.
[160] *Ibid*.
[161] *Ibid*, at 251.
[162] *Ibid*, at 251-2.
[163] *Ibid*, at 252.

reflecting on the degree to which grounds should be considered suspect and deserve stricter inquiry.

4.2.2. Suspect Discrimination Grounds in the ECtHR Case Law and Its Approach

The Court interprets the ECHR in the light of social developments within the state parties to determine the general consensus. Thus, what might currently not be considered a suspect ground because it does not raise a suspicion of unreasonableness and prejudice, might be considered a suspect ground as a result of social developments in the future.[164] Moreover, the existence of a European consensus, prejudice and stereotypes are important signs that a ground can be defined as suspect.[165] Lastly, the Court applied the criterion of *"a particular vulnerable group in society that has suffered considerable discrimination in the past"* and reasoned that *"such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion"*.[166]

The list of suspect discrimination grounds has developed in the ECtHR case law. When developing the case law on suspect discrimination grounds, the Court has to a large extent relied on the evolutive and comparative methods of interpretation.[167] The 'common ground' identifiable in international, European and national law have influenced the Court's approaches in this field.[168]

With reference the advancement of the equality of the sexes is a major goal in the member states, the Court originally developed the 'very weighty reasons' test in cases involving discrimination based on sex or gender.[169] With the same reference to the common ground in the legislation of the contracting states, the ECtHR also applied the very weighty reasons test to 'illegitimate' birth outside of marriage.[170] This test, then, was extended to nationality.[171] In addition, it should also be noted that it has been disputable whether discrimination based on nationality is in suspect category list or whether *Gaygusuz v Austria* is more circumscribed as a precedent.[172] Later, the Court stated that 'particularly convincing and weighty reasons' are

[164] Supra, Gerards, *Judicial Review in Equal Treatment Cases*, at 86.
[165] *Ibid*.
[166] *Kiyutin v Russia*, App. No. 2700/10, 53 EHRR 26, 10 March 2011, at para 63.
[167] *Supra*, Christoffersen, at 57–66.
[168] *Supra*, *D.H. and Others v the Czech Republic*, at paras 81-102, 182 and 184.
[169] *Supra*, *Abdulaziz, Cabalis and Balkandali v UK*, at para 78.
[170] *Inze v Austria*, App. No. 8695/79, 10 EHRR 394, 9 December 1987, at para 41.
[171] *Supra*, *Gaygusuz v Austria*, at para 42.
[172] *Supra*, Arnardottir, *Equality and Non-Discrimination Under the European Convention on Human Rights*, at 150–1.

required to justify a difference in treatment based on sexual orientation.[173] Not referring expressly to this test, the Court has also identified the discrimination ground of race/ethnic origin as suspect in the sense that the states' margin of appreciation is considerably reduced. In *Timishev v Russia*, the ECtHR reasoned that racial discrimination *"is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction"*.[174] Recently, disability has been defined as one of the suspect discrimination grounds. With reference to the development of common standards in the law of the contracting states and the *"need to prevent discrimination against people with disabilities and foster their full participation and integration in society"*, the Court recently stated that the margin of appreciation for different treatment was *"considerably reduced"*.[175]

In *D.H. and Others v the Czech Republic*, the Court argued that *"as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority' and that 'they therefore require special protection"*.[176] The 'vulnerable groups' approach was first elaborated in *Kiss v Hungary*, which concerned the voting rights of persons with mental disabilities. The Court reasoned according to its case law on suspect discrimination grounds that if a restriction on fundamental rights applied to vulnerable groups in society, some very weighty reasons were needed in for limitation.[177] The ECtHR argued that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice may entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs.[178] This reasoning was used again in *Kiyutin v Russia*, which concerned discrimination against persons with positive HIV status. In addition to the reference to vulnerability, the 'widespread stigma and exclusion' experienced by people living with HIV/AIDS was mainly mentioned.[179]

This social context approach was continued to use in *Markin v Russia*, which revisiting the issue of parental leave allowances for fathers. The ECtHR referred to the evolution of legislation in the member states towards granting parental leave allowances to men[180] and

[173] *E.B. v France,* App. No. 43546/02, ECtHR, 22 January 2008, at para 91.
[174] *Timishev v Russia*, App. Nos. 55762/00 and 55974/00, 44 EHRR 37, 13 December 2005, at para 56.
[175] *Supra, Kiyutin v Russia*, at para 64; *Glor v Switzerland*, App. No. 13444/04, ECtHR, 30 April 2009, at para 84.
[176] *Supra, D.H. and Others v the Czech Republic*, at para 182.
[177] *Kiss v Hungary*, App. No. 38832/06, ECtHR, 20 May 2010, at para 42.
[178] *Ibid.*
[179] *Supra, Kiyutin v Russia*, at para 64.
[180] *Markin v Russia,* App. No. 30078/06, ECtHR, 22 March 2012, at para 140.

how the different treatment of fathers with respect to parental leave allowances unjustifiably perpetuates the gender stereotypes of the female as the primary caretaker of children and the male as the breadwinner.[181] In addition, it stated that gender stereotypes could not be used to justify different treatment 'any more than similar stereotypes based on race, origin, colour or sexual orientation'.[182] Lastly, in *Horvath and Kiss v Hungary*, which the case concerned the disproportionate placement of Roma children in special schools for children with mental disabilities, the Court again referred to the 'vulnerable groups' approach. The Court identified the Roma as 'a particularly vulnerable group'[183] and referred also to the vulnerability and the history of marginalisation of persons with mental disabilities.[184]

4.2.2.1. Sexual Orientation:

The ECtHR has recognized sexual orientation as being among the categories protected from discrimination under Article 14.[185] The Court stated that sexual orientation is not mostly a legitimate ground for discrimination and interferences to a private part of a person's life must be justified at a minimum by *"particularly convincing weighty reasons"*.[186]

Cases concerning sexual orientation discrimination before the ECtHR mostly involve individuals alleging that they had been subject to discriminatory treatment based on their sexual orientation in violation of their right to respect for their private and family life. These cases mostly have been asserted under Article 14 *in conjunction* with the right to privacy and family life under Article 8. The Court has repeatedly found that the emotional and sexual relationships of same-sex couples constitute a private or family life within the meaning of Article 8,[187] although it reaffirmed in those cases that the article does not guarantee either the right to create a family or to adopt.[188]

For instance, in the case of adoption by homosexual individuals, which was first addressed in the *Fretté v France*, the ECtHR considered the request for prior authorisation to adopt a child by a single homosexual man. The highest administrative court in France, the Conseil d'État, denied applicant's request on the basis that his 'lifestyle' could pose *"substantial risks to the*

[181] *Ibid*, at para 143.
[182] *Ibid*.
[183] *Horvath and Kiss v Hungary*, App. No. 11146/11, 57 EHRR 31, 29 January 2013, at para 110.
[184] *Ibid*, at para 128.
[185] *Frette v France*, App. No. 6515/97, 38 EHRR 21, 26 February 2002, at para 32.
[186] *Smith and Grady v UK*, App Nos. 33985/96 and 33986/96, 29 EHRR 493, 27 September 1999, at para 495.
[187] *Supra, Schalk and Kopf v Austria*, at para 92; *Gas and Dubois v France*, App. No. 25951/07, ECtHR, 15 March 2012, at para 37.
[188] *Supra, E.B. v France*, at para 41.

child's development".[189] The French domestic law otherwise permitted single or unmarried males to adopt and it was clear to the Court that the domestic authorities had rejected the application on the basis of applicant's sexual orientation.[190] In analysing whether the government had an objective and reasonable justification for the difference in treatment, the Court found that the domestic authorities had pursued a legitimate aim—the protection of the health and rights of children.[191] The ECtHR also expressed the absence of common ground between member states concerning adoption by unmarried, homosexual persons and concluded that there was a lack of consensus regarding the advisability or permissibility of such adoptions. It also took into account the lack of consensus in the scientific community. (However, the reference to scientific evidence seems to be based on the respondent Government's assertion and no scientific reports are actually cited).[192] The Court finally concluded that a wide margin of appreciation must be afforded to the government in determining the best interests of the child[193] and it found no violation.[194]

After *Fretté v France*, *E.B. v. France* marked a turning point in the issue of same-sex adoption on the Court's previous case law. *E.B. v France* concerned a request made by a single woman for prior authorisation to adopt her partner's child. Unlike in *Fretté v France*, the ECtHR found a violation of Article 14 taken *in conjunction* with Article 8.[195] It found that the refusal to grant the applicant authorisation to adopt on the basis of her sexual orientation amounted to a disparity in treatment by the domestic authorities *vis-a-vis* heterosexual individuals amounting to discrimination.[196]

It is interesting that, over the course of past years, nothing much has changed in the practice of states. There was a lack of common ground on member states regarding same-sex adoption, with the trend shifting in favour of extending the right to same-sex couples.[197] Instead of applying a wide margin of appreciation as it had in *Fretté v France*, the Court limited its analysis to the requirement of an *"objective and reasonable justification"* under Article 14. Also, the Court found that concern about the applicant's sexual orientation had contaminated the authorities' decision to reject her application, even where the reference to her

[189] *Supra*, *Frette v France*, at paras 11, 13, 16 and 32.
[190] *Ibid*, at para 32.
[191] *Ibid*, at para 35.
[192] *Ibid*, at para 42.
[193] *Ibid*, at paras 41-3.
[194] *Ibid*, at para 43.
[195] *Supra*, *E.B. v France*, at paras 94-8.
[196] *Ibid*, at para 93.
[197] *Ibid*, at paras 61 and 65.

homosexuality was not made explicitly.[198] Moreover, the Court's discussion of these issues does not even mention the margin of appreciation term.[199] The *E.B. v France* disapproves of the invocation of the margin of appreciation doctrine in *Frette v France.* Nevertheless, this does not mean that the margin of appreciation doctrine has no application.[200]

After the ruling of *E.B. v France*, the Court, in *Gas and Dubois v France*, found no violation of Articles 14 and 8.[201] This case involved two cohabiting, homosexual women who had entered into a civil partnership under French law. The first applicant sought to adopt the second applicant's biological child. The application was refused on the ground that only married couples were allowed to share parental rights in the case of simple adoption orders. According to the ECtHR's decision, the difference in treatment must concern persons in relevantly similar situations.[202] The Court looked at the rights afforded under civil partnerships related to second-parent adoption as a basis of comparison in this case and found no difference in treatment based on the applicants' sexual orientation, because heterosexual couples who had entered into civil partnerships were also prohibited from obtaining a simple adoption order.[203] In response to the claim that heterosexual couples could circumvent such prohibitions by changing their legal status through marriage while homosexual couples could not, the Court reiterated its ruling in *Schalk and Kopf v. Austria*, which held that contracting states were free to restrict access to marriage to heterosexual couples and were not obligated to grant access to marriage to homosexual couples with a wide margin of appreciation as to the status conferred by alternative means of recognition.[204]

The ECtHR further stated that the contracting states enjoy a wide margin of appreciation in considering whether and to what extent different treatment may be justified where the issue concerned *"general measures of economic or social strategy"*.[205] This is an important departure from *E.B. v France*, which closely scrutinised the decision by the national authorities to provide objective and reasonable justification for the discrimination. As in *E.B. v France*, the Court chose not to address the practice of states concerning second-parent adoption, even though the concurrent opinion found that the case fundamentally concerned

[198] *Ibid*, at paras 80 and 88-93.
[199] *Ibid*, at paras 72-98.
[200] *Supra*, O'Connell, at 227.
[201] *Supra, Gas and Dubois v France*, App. No. 25951/07, ECtHR, 15 March 2012, at para 73.
[202] *Ibid*, at para 58.
[203] *Ibid*, at para 68.
[204] *Supra, Schalk and Kopf v Austria*, at para 98.
[205] *Supra, Gas and Dubois v France*, at para 60.

issues on which no consensus exists in Europe, where second-parent adoption was only permitted in ten of the forty-seven state parties to the ECHR.[206]

In 2013, the Court revisited the issue of second-parent adoption in a different domestic context in *X and Others v Austria*, which involved a cohabiting lesbian couple in a stable relationship, wherein the biological mother's partner wanted to adopt her partner's child. The applicants claimed that they had been discriminated against in comparison to heterosexual couples -married or unmarried-, because second-parent adoption was closed to homosexual couples in Austria. The Austrian law in question made same-sex adoption legally impossible because a child could not have parentage divided between more than two parents: a father and a mother.[207] The Court found that there was a difference in treatment between the applicants and similarly-situated unmarried heterosexual couples, since second-parent adoption by the latter does not affect the legal relationship of the parent with the child.[208] The difference in treatment was therefore based solely on the applicants' sexual orientation and the government had not provided any convincing reasons showing that difference in treatment was necessary for the interests of the child. This case is distinguished from *Gas and Dubois v France*, which French law did not open the possibility of second-parent adoption to unmarried persons of different sexes. Eventually, the ECtHR found a violation of Article 14 and 8.

Since the early 1980s, the Court's jurisprudence has shown a progressive narrowing of the margin of appreciation afforded to states in respect of sexual orientation issues. However, the application of the margin of appreciation doctrine is still inconsistent. For example, *Schalk and Kopf v Austria* judgement demonstrated a strong reliance upon the absence of a European consensus as grounds for affording contracting states a wide margin of appreciation to exclude homosexual couples from civil marriage. Nonetheless, later, in *Oliari and Others v Italy* judgment the Court found that the respondent state has *"overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same sex unions"*.[209] These two judgments suggest an inconsistent use of margin of appreciation doctrine in concluding claims since there is no greater consensus across contracting states in respect of the same-sex marriage or civil unions.

[206] *Gas and Dubois v France*, Concurring opinion of Judge Spiellman joined by Judge Berro-Lefevre.
[207] Nozawa, Junko, *"Drawing the Line: Same-sex adoption and the jurisprudence of the ECtHR on the application of the "European consensus" standard under Article 14"*, Utrecht Journal of International and European Law, Vol. 29/77, 2013, at 72.
[208] *X and Others v Austria,* App. No. 19010/07, ECtHR, 19 February 2013, at para 12.
[209] *Oliari and Others v Italy,* App. Nos. 18766/11 and 36030/11, ECtHR, 21 July 2015, at para 185.

The inconsistency in the application of the margin of appreciation doctrine deepened with *Alekseyev v Russia*. On the one side, the ECtHR rebutted the Russian government's claim that a lack of consensus among contracting countries about the acceptability of homosexuality; national authorities were better placed to decide their own community interests. However, the ECtHR stated that a wide margin of appreciation was not available in light of the Court's *'ample case-law reflecting a long-standing European consensus'* on most matters relating to homosexuality.[210] The Court emphasised that any margin of appreciation afforded to contracting states reflects its ongoing assessment of European consensus claim that is in keeping with the Court's established principle that its jurisprudence is the outcome of interpreting the Convention *"in light of present day conditions"*.[211] The ECtHR suggested that the existence of a European consensus was decisive to its judgment. On the other hand, the Court openly stated that the ECHR rights of individuals can never depend upon the agreement of a majority. It recurred that it would not be compatible with values of the ECHR if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority.[212]

In *Alekseyev v Russia*, the Court sought to clarify its European consensus application as the basis for determining the margin of appreciation available to contracting states in relation to sexual orientation issues, by stating that its relevance differed in regard of particular ECHR rights. In relation to Article 11 of the Convention, the ECtHR stated that the question of consensus was of no relevance *"because conferring substantive rights on homosexual persons is fundamentally different from recognising their right to campaign for such rights"*.[213] According to this distinction some individual rights in the scope of the Convention may be granted 'in principle' while other rights need support of a European consensus.[214]

4.2.2.2. Sex and Gender:

The ECtHR first expounded its approach to sex discrimination claims in *Abdulaziz, Cabales and Balkandali v UK*. It held that the *"equality of sexes is ... one of the major goals in the Member States of the Council of Europe"* and that *"very weighty reasons would have to be*

[210] *Alekseyev v Russia*, App. Nos. 4916/07, 25924/08 and 14599/09, ECtHR, 21 October 2010, at para 83.
[211] *Supra, Tyrer v UK*, at para 31.
[212] *Supra, Alekseyev v Russia*, at para 81.
[213] *Ibid*, at para 84.
[214] Johnson, Paul, *Homosexuality, Freedom of Assembly and the Margin of Appreciation Doctrine of the European Court of Human Rights: Alekseyev v Russia*, Human Rights Law Review, Vol. 11 Issue 3, 2011, at 592.

advanced before the difference of treatment on the ground of sex could be regarded as compatible with the Convention".[215] The Court adopted the 'sameness approach' to sex equality and held that it would apply strict scrutiny. Nevertheless, the level of scrutiny has not always been strict.[216] For example, on cases concerning the different family roles of women and men, the Court undertook only a lenient scrutiny, leaving the states a wide margin of appreciation.

In *Rasmussen v Denmark* and *Petrovic v Austria*, the ECtHR gave governments a wide margin of appreciation in assessing whether 'difference in otherwise analogous situations' constitutes an objective and reasonable justification for different treatment. In both cases, the ECtHR held that states did not exceed its margin, taking into account that at the time in question there was no common ground among member states on the issues in question.[217] However, this argument has changed in *Markin v Russia*. The Court considered that *"the absence of a common standard cannot provide a justification, nor can the reference to the traditional perception of women as primary child carers. To the extent that the difference was founded on the traditional gender roles, that is on the perception of women as primary child-carers and men as primary breadwinners, these gender prejudices cannot, by themselves, be considered by the Court to amount to sufficient justification for the difference in treatment, any more than similar prejudices based on race, origin, colour or sexual orientation"*.[218]

Likewise, in *Stec and Others v UK*, which concern challenges to differential age requirements in respect of the enjoyment of social benefits linked to state pension age, the Court first stressed that different treatment may not merely be justified under Article 14, but may even be required when factual inequalities are at issue. Then, it restated the 'very weighty reasons formula' and emphasized that states generally have a wide margin of appreciation when it comes to 'general measures of economic and social strategy'.[219]

Same again, in *Runkee and White v UK*, which concerns a challenge to a denial of widow's pension to men where it would have been available to women in a similar situation, the Court recognized that historically there were differences between women's and men's economic positions which the measure aimed to address, and emphasized that states have a wide margin

[215] *Supra, Abdulaziz, Cabalis and Balkandali v UK*, at para 78.
[216] Radacic, Ivana, *Gender Equality Jurisprudence of the European Court of Human Rights*, The European Journal of International Law, Vol. 19 No. 4, 2008, at 844.
[217] *Ibid*, at 845.
[218] *Supra, Markin v Russia*, App. No. 30078/06, ECtHR, 22 March 2012, at paras 51 and 58.
[219] *Supra, Stec and Others v UK*, at para 52.

of appreciation when it comes to general measures of social and economic policy, and thus in deciding when the measure was no longer justified. In light of these reasons, no discrimination was found.[220]

In these last three cases, the wide margin was justified on account of the lack of common approach and on account of the fact that at issue were questions of socio-economic policy. In all other cases the Court started from presumption of the irrelevance of difference and applied strict scrutiny even where cases concerned socio-economic issues, and where justifications concerned allegedly different life patterns and biological characteristics.[221]

On the other side, the Court's approach in controversial 'Islamic headscarf' cases has been criticised by academic scholars and judges from the perspective of gender equality and the use of margin of appreciation doctrine. The Court's application of the principle of gender equality in the 'Islamic headscarf' cases was found simplistic and paternalistic. It is stated that the way the ECtHR linked wearing the headscarf and the hypothetical threat of fundamentalism in order to justify the prohibition on grounds of gender equality is problematic.[222] Also, the Court's approach has been criticised because of its inadequacy to explain the connection between the ban and sexual equality and lack of the opinion of women, both those who wear the headscarf and those who choose not to.[223]

In *Sahin v Turkey,* an adult woman challenged the prohibition on students wearing headscarves at university campuses. In that case, the Court held that the principle of gender equality was *"one of the key principles underlying the Convention"*.[224] However, the ECtHR found no violation of Article 14 and did not explicitly discuss the meaning of gender equality and how the applicant's actions threatened women's rights. It also failed to explore the consequences which the prohibition would have for the applicant and other women in Turkey who are in the same situation with applicant would not be able to access education.[225]

[220] *Runkee and White v UK*, App. No. 42949/98, 10 May 2007.
[221] *Supra*, Radacic, at 849.
[222] *Ibid*, at 853-4.
[223] *Sahin v Turkey*, Dissenting Opinion of Judge Tulkens.
[224] *Supra*, *Sahin v Turkey*, at paras 115-6.
[225] Human Rights Watch, *Memorandum to the Turkish Government on Human Rights Watch's Concerns with Regard to Academic Freedom in Higher Education and Access to Higher Education for Women Who Wear the Headscarf*, 29 June 2004, http://hrw.org/backgrounder/eca/turkey/2004/headscarf_memo.pdf.

Regrettably, the Court preferred to make use of the margin of appreciation doctrine to deem questions of religious aspirations of women as not fitting to its supervision and oversight.[226]

In another headscarf case, *Dahlab v Switzerland*, the Court found wearing a headscarf to be contrary to the principle of equality. In this case, the applicant was a primary school teacher and she was prohibited from wearing the headscarf while teaching. She argued that a prohibition on wearing the headscarf and other 'visible religious symbols' constituted discrimination on the basis of sex. She claimed that a man belonging to the Muslim faith could teach at a state school without being subject to any form of prohibition, whereas a woman holding similar beliefs had to refrain from practising her religion in order to be able to teach. The Court held that the measure was not directed at her as a member of the female sex but that it pursued the legitimate aim of ensuring neutrality, and that it could easily be applied to *"a man who ... wore clothing that clearly identified him as a member of a different faith"*.[227] The impacts on the prohibitions on Muslim women who wear the headscarf and the disadvantage they suffered were not enough for the ECtHR to constitute *prima facie* discrimination.[228]

4.2.2.3. Race, Ethnic Origin, Colour, National Origin, Nationality:

According to the ECtHR, *"racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment"*.[229] On the issues relating to race, ethnic origin or colour, the Court exercise strict supervision and states that *"no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures"*[230] and *"very weighty*

[226] Elkayam-Levy, Cochav, *Women's Right and Religion: The Missing Element in the Jurisprudence of the European Court of Human Rights*, University of Pennsylvania Journal of International Law, Vol. 35 Issue 4, 2014, at 1216.
[227] *Dahlab v Switzerland*, App. No. 42393/98, ECtHR, 15 January 2001, at para 464.
[228] *Supra*, Radacic, at 853.
[229] *Supra*, *Timishev v Russia*, at para 56; *Nachova and Others v Bulgaria*, App. Nos. 43577/98 and 43579/98, ECtHR, 6 July 2005, at para 145.
[230] *Ibid*, *Timishev v Russia*, at para 58.

reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of ethnic origin as compatible with the Convention".[231]

On the side of national origin and nationality, the ECtHR's formulated that *"very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention"*.[232]

4.2.2.4. Birth:

The Court has adopted a positive policy of review in trust on evolutive interpretation method as a principal tool as regards children born out of wedlock and related issues. To start with *Marckx v Belgium*, the ECtHR has worked towards the prohibition of discrimination on the ground of birth and specifically towards removing the discrepancies between the legal position of children of the marriage and that of children not of the marriage, whether illegitimate or adopted.[233] The high importance of the interests of children explains the Court's willingness to apply a meticulous of review and tightly to balance the scope of national discretion. According to the case law of the ECtHR, no differential treatment against children on the ground of 'illegitimacy' is permissible.[234]

4.2.2.5. Disability, Health, Genetic Characteristics:

According to the Court's point of view, it is needed to combat discrimination against disabled persons and to promote their dull participation and integration in society. Thus, the margin of appreciation is significantly reduced when establishing a different legal treatment for disabled individuals.[235] Moreover, the Court held that the difference in treatment applied, among persons infected with AIDS or hepatitis C following blood transfusions, between haemophiliacs, who were able to take advantage of out-of-court settlements to secure compensation and persons suffering from the genetic disease known as thalassaemia, who were unable to do so, was discriminatory.[236]

[231] *Supra*, *Orsus and Others v Croatia*, at para 149.
[232] *Supra*, *Gaygusuz v Austria*, at para 42.
[233] Edel, Frederic, *The Prohibition of Discrimination under the European Convention on Human Rights: Human Rights Files No. 22*, Council of Europe, 2010, at 127.
[234] *Supra*, Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECtHR*, at 66-7.
[235] *Supra*, *Glor v Switzerland*, at para 84.
[236] *G.N. and Others v Italy*, App. No. 43134/05, ECtHR, 1 December 2009, at paras 124-134.

In *Kiyutin v Russia*, the Court concluded that *"a distinction made on account of an individual's health status, including such conditions as HIV infection, should be covered – either as a disability or a form thereof – by the term 'other status' in the text of Article 14 of the Convention"*[237] and *"if a restriction on fundamental rights applies to a particularly vulnerable group in society that has suffered considerable discrimination in the past, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question. The reason for this approach, which questions certain classifications per se, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice could entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs"*.[238]

4.3. Policy Grounds Underlying the Margin of Appreciation Doctrine

4.3.1. European Consensus/Common Ground

One of the main criteria that the Court has used in determining the parameters of the margin of appreciation doctrine has been to find a common ground among the state parties as to the interpretation of rights.[239] The 'European consensus' approach looks at whether there is a degree of harmony in the practice of member states. In cases where there is consensus among state parties, the ECtHR applies a narrow margin of appreciation; where there is no consensus or a lack of consensus, the Court applies a wider margin of appreciation.

The general implication of the 'common ground' approach functions as an aid for the Court in its moral reading of the ECHR rights.[240] However, it cannot be denied that there is always a certain risk contained in this approach that the ECtHR accepts mainstream approaches without any critics and leaves the more difficult human rights issues untouched in the margins.[241] Nonetheless, the general logic of the 'common ground' approach seems to allow the Court to utilise developments by which certain types of prejudice and stereotyping have accepted internationally or across Europe as morally reprehensible. This has always been the

[237] Supra, *Kiyutin v Russia*, at para 57.
[238] *Ibid*, at para 63.
[239] *Supra*, Schokkenbroek, *The Basis, Nature and Application of the Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, at 34.
[240] Letsas, George*, Strasbourg's Interpretive Ethic: Lessons for the International Lawyer,* European Journal of International Law, Vol. 21, 2010, at 512.
[241] *Supra, Petrovic v Austria*, at para 39.

moral background to the Court's approach to differentiating between discrimination grounds when it comes to adjusting the margin of appreciation.[242]

There are two principle methods by which the ECtHR finds consensus on an issue. In first position, the Court makes a comparative survey of the practice of states and allows a narrow margin of appreciation where there is substantial consensus on an issue.[243] This position best reflects an evolutive reading of the ECHR, as it makes a direct reference to the existence of state practice.[244] At other times, the Court looks at the absence of consensus in an area to draw a different, negated proposition: where there doesn't appear to be consensus in the practice of states, the ECtHR gives wide deference to the state parties.[245] When the Court found that there was no consensus on morals in the domestic law of the various member states, consequently the state was afforded a wide margin of discretion to decide on issues.[246]

Although the principle of a common ground seems to be an objective criterion for determining the intensity of the assessment, its use can give rise to a number of questions such as, when a European consensus can be considered to exist? Is it necessary that all European states are in favour of a particular viewpoint in order to accept it or is it sufficient if only a majority follow a certain policy? To what extent account can be taken of special circumstances that apply in a particular country when controversial issues that touch on sensitive values and norms are involved?[247]

The most important indication for the existence or absence of a common ground can be found in the correspondence between the national legislation of the various states. The Court rarely uses this argument in order to carry out a more intensive test.[248] The ECtHR, in a larger number of the cases, appeals to the national law to display that a common ground was absent.[249]

Second, the ECtHR regularly pays attention to the existence of international or regional treaties. If there is diversity at the level of national legislation, the existence of an international treaty can indicate that there are clear indications towards a common ground.

[242] Supra, Arnardottir, *Equality and Non-Discrimination Under the European Convention on Human Rights*, at 188.
[243] *The Sunday Times v UK*, Series A 30 (1979-80), 2 EHRR 245, 26 April 1979, at para 49.
[244] *Supra*, Nozawa, at 69.
[245] *Supra, The Sunday Times v UK*, at para 59.
[246] *Supra, Handyside v UK*, at para 48.
[247] *Supra*, Gerards, *Judicial Review in Equal Treatment Cases*, at 173-4.
[248] *Supra, Marckx v Belgium*, at para 41.
[249] *Supra, Petrovic v Austria*, at para 22 and 24-5.

Nevertheless, the Court set less stringent requirements when using this standard than when looking for correspondence between national legislation and policy.[250]

Third, the Court, in some cases, found a common ground to exist, held that the case showed such weighty local or national interests that the accordance of a wide margin of appreciation and a less intensive assessment were justified.[251] Nonetheless, it can be argued that, a state finds itself in an isolated position; it is desirable to look critically at the position of this state and to consider whether the interference with a fundamental right is sufficiently justified and proportional.[252]

The ECtHR has sought a solution on the tension between the protection of national values and the importance of protecting fundamental rights. According to this solution, the limit of the respect for cultural and historical particularities lies where there is an interference that the Court considers to affect the essence of the fundamental right in question.[253]

Even though the Court has developed various methods of analysing the practice of nations, their application has not been consistent and has yielded variable jurisprudence. The ECtHR has afforded states a wide margin of appreciation even where there exists a directly relevant international instrument on the issue and where there is divergence in the practice of states.[254]

The ECtHR's consensus approach raises more questions than it answers: how is the comparative group defined? What number is sufficient to constitute a consensus? When does a disparity in the practice of states lead to a wider margin? In light of the absence of clear and consistent criteria to be applied, the Court adds uncertainty to its deliberations and a margin that is already woolly in its application. Also it is not clear when the Court decides to inquire into the existence of a consensus among member states.[255] Lastly, it is argued that the ad hoc application of a finding of European consensus in defining the margin of appreciation renders the standard an undesirable and unviable legal concept.[256]

[250] *Supra*, *Marckx v Belgium*, at para 41.
[251] *F. v Switzerland*, App. No. 14912/89, ECtHR, 27 November 1987, at para 33.
[252] *Supra*, Brems, at 285.
[253] *Campbell and Cosans v UK*, App. No. 7511/76 and 7743/76, ECtHR, 29 January 1982, at para 29.
[254] *Supra*, Nozawa, at 69-70.
[255] *Ibid*, at 73.
[256] *Ibid*, at 67.

4.3.2. Socio- Economic Policy

According to the Court, it is already difficult at a national level to determine what decisions are necessary to attain a good socio-economic policy, so that it will be even more difficult for an international court to give a far-reaching opinion of the matter. The national authorities, thus, obtain a very broad degree of freedom with a corresponding particularly marginal assessment by the Court.[257] This is generally applied in nearly all cases relating to socio-economic matters and the margin of appreciation can become narrower only in special circumstances.

The Court has shown a readiness to defer to the primary decisions of the national legislature regarding the question of policy choice. The Court has repeatedly stressed that national authorities should be given a wide measure of discretion in framing and implementing social, economic and fiscal policies pursuant to the general well-being of their society. Restrained review has been justified on the ground of subsidiarity, which may in turn be explained by democratic legitimacy and functional efficiency.[258]

However, the use of margin of appreciation based on socio-economic arguments is sometimes criticized. In *Stummer v Austria*, dissenting judges stated that *"with regard, firstly, to the legitimate aim pursued by the difference in treatment, the judgment refers to 'preserving the economic efficiency and overall consistency of the old-age pension system by excluding from benefits persons who have not made meaningful contributions'. Although it is of course reasonable to take economic realities into account, it must nevertheless be acknowledged that there has been a gradual trend in the Court's recent case-law towards attaching considerable importance to them, sometimes to the detriment of fundamental rights".*[259]

4.3.3. Moral Considerations

Considerations of public morality require the delicate assessment of sensitive or controversial values in national societies, conferring upon national authorities a wide margin of appreciation. For instance, the assessment of public morals arises in particular from issues relating to homosexuality. In evaluating the question whether homosexual couples should be entitled to family life, the Court have recognised a wide margin of appreciation, rejecting both

[257] *Supra*, Gerards, *Judicial Review in Equal Treatment Cases*, at 182.
[258] *Supra*, Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECtHR*, at 154.
[259] *Stummer v Austria*, App. No. 37452/02, ECtHR, 7 July 2011, Jointly Partly Dissenting Opinion of Judges Tulkens, Kovler, Gyulumyan, Spielmann, Popovic, Malinverni and Pardalos.

evolutive interpretation and the comparative method.[260] In view of direct access to and first-hand knowledge of the particular culture, morals and religion in their societies, national authorities are regarded as more suited than international judges to assess problems relating to these values. However, with recent cases, the morality concern may not retain validity and relevance in relation to treatment of homosexuals.[261]

Analysis of the case law suggests two reasons why the Court has most decisively employed the doctrine in the context of public morality. First, they have emphasised that in view of direct access to and first-hand knowledge of their particular culture, tradition, morality and religion in their societies, national authorities are considered more suited than international judges to assess such problems. Secondly, it has been argued that there is neither any uniform concept of morality among member states nor any static notion of morality in a modern age, as standards of values vary from one society to another and are changing over the course of time. The varying nature of morality both in time and space provides a cogent argument for the margin of appreciation when combined with democratic accountability.[262]

4.3.4. Better Placed Argument

The ECtHR has argued in case law that it must defer to the national authorities whenever they are '*better placed*' than an international judge to decide on human rights issues raised by the applicant's complaint. A popular reason that supports this argument is the fact that the ECtHR is an international court whose task is to protect human rights on a subsidiary basis.[263]

The Court has taken an extensive approach to advocate that decisions of national authorities have a normative priority over international authorities. This means that national authorities are the ones who have either more legitimacy or are better placed than an international body to decide on human rights issues. This is usually the case whenever the Court uses the phrase *'national authorities are in principle better placed than the international judge'*. The margin of appreciation in these cases is used to express the degree to which the Court will rely on an

[260] *Supra*, Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECtHR*, at 83.
[261] *Lustig-Prean and Beckett v UK*, App. Nos. 31417/96 and 32377/96, ECtHR, 27 December 1999*; Supra*, *Smith and Grady v UK*.
[262] *Supra*, Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECtHR*, at 206-7.
[263] Petzold, Herbert, "The Convention and the Principle of Subsidiarity" in Macdonald, Ronald St. John; Matscher, Franz; Petzold, Herbert (eds), *The European System For the Protection of Human Rights*, Martinus Nijhoff, 1993, at 41.

earlier decision of the national authorities and refrain from second guessing whether, in its own view, the right has been violated.[264]

According to the Court, when there is less consensus among member states on whether something counts as a human rights violation, national authorities are better placed to decide on the matter. This use of the margin of appreciation has largely been in particular restrictions based on public morals. However, this view has been criticized as lending weight to the idea of moral relativism and compromising the universality of human rights.[265]

The reason usually cited for relying on the judgment of national authorities in these cases, particularly in matters of fact, is the need to avoid *duplication of procedures* at the international level and the idea that the Court should not be turned into *a fourth instance* court.[266]

The rhetoric of supporting national margin of appreciation and the lack of corresponding emphasis on universal values and standards may lead national institutions to resist external review altogether, claiming that they are the better judges of their particular domestic constraints and hence the final arbiters of their appropriate margin. Thus, not only would universal standards be undermined, but also the very authority of international human rights bodies to develop such standards in the long run also may be compromised.[267]

5. CONCLUSION

Judge Wold in his dissenting opinion in *Belgian Linguistic Case* argued that every human right granted by the Convention must be the same in all the contracting states. However, the majority opinion contravened this view and stated that "*by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and the individuals"*.[268] On the other side, Judge Wold remarked that it would be a very dangerous if the articles of the Convention were to be interpreted in such a way as to allow the member states to regulate the human rights *"according to the needs*

[264] *Supra*, Letsas, *Two Concepts of the Margin of Appreciation*, at 722.
[265] *Supra*, Benvenisti, at 843.
[266] *Supra*, Letsas, *Two Concepts of the Margin of Appreciation*, at 723.
[267] *Supra*, Benvenisti, at 844.
[268] *Supra, Belgian Linguistics Case*.

and resources of the community"[269] and pointed out that *"it is true that the competent national authorities are frequently confronted with situations and problems which call for different legal solutions. But this fact has no relevance when we are interpreting the content of the different concepts of human rights in the Convention. We cannot have different concepts of human rights in the different member states. That applies ... to all the concepts of the Convention ... which must be interpreted in the same way for all European states. We must find a European interpretation"*.[270]

It can be suggested that the Court should wait for a consensus within contracting states to be established, before it judicially protects an aspect of a fundamental interest. Consensus, on this suggestion would be the test applied by the ECtHR in order to set the threshold for the judicial protection of those interests the international level. Moreover, it could be an argument about the fear that member states may denounce their membership from the Convention if the Court imposes on them human rights obligations without giving them a fair warning. So, consensus can operate as a warning light that a new standard is evolving and allows states time to reform their policies in line with present-day conditions.[271] However, the lack of European consensus should not have been the only factor in determining the width of the margin of appreciation. The same margin should be restricted when *"a particularly important facet of an individual's existence or identity is at stake"*.[272]

It is impossible to define the content of certain values and notions implied in the text of the Convention in a uniform way, as they vary in each culture within Europe. In *Müller v Switzerland*, the Court held that it was not possible to find in the legal and social orders of the contracting states a uniform European conception of morals.[273] In terms of morals, state authorities may be in a better position to give an opinion as to the prevailing standards of morals in their country. However, this power conferred thereon should not be unlimited, which gives rise to European supervision. Even if the Court is not best placed to resolve a certain question, its supervision should not be avoided and its authority on final ruling must be maintained by all means as its supervision can resolve controversial issues.

[269] *Belgian Linguistics Case*, Dissenting Opinion of Judge Wold.
[270] *Ibid.*
[271] *Supra*, Benvenisti, at 851.
[272] *Hämäläinen v Finland*, App. No. 37359/09, ECtHR, 16 July 2014, Joint Dissenting Opinion of Judges Sajo, Keller and Lemmens.
[273] *Müller v Switzerland*, App. No. 10737/84, 13 EHRR 212, 24 May 1988, at para 36.

Moreover, it should be noted that no one has the right to impose her own ethical beliefs on others or coerce others into abandoning their ethical views on the basis that they are inferior or degrading.[274] Otherwise, people who have a sex operation should not be granted legal recognition of their new gender because change of sex offends the institution of marriage. People who are in a homosexual relationship and wish to adopt should not be allowed this liberty because the majority discriminates against homosexual families and the adopted children will suffer from this prejudice.[275]

While in certain cases the ECtHR gave its reasons for adopting a wide or narrow margin of appreciation, in others there were neither clear explanations nor explanations. Moreover, the Court has not providing a convincing explanation for the application of the factors it identified as relevant to the determination of the level of scrutiny.[276] *"It is essential that the case law establish clear, objective and specific criteria that make it possible to identify in which cases it is appropriate to accord States a wide margin of appreciation or to limit it."*[277]

The Court should apply the rules in the same manner in similar cases in order to exclude arbitrariness.[278] Factors influenced the width of margin of appreciation, such as European consensus, the nature of the right and the policy field involved, have been applied in an inconsistent manner. These factors are not assessed systematically in every case and the effect of these factors is not always assessed consistently.

The Court has been using the margin of appreciation doctrine and trying to explain that use with clarity which it has failed. Today the doctrine remains broad, vague and largely undefined; leading to unpredictable results.[279] Undoubtedly recognizing the vagueness in its description of the margin of appreciation, the Court has identified certain factors that it believes bring clarity and precision to its application of the doctrine. Unfortunately, the use of these factors does not bring the doctrine into compliance with the rule of law.[280] Basic rule of law requirements of clarity, predictability, and non-arbitrariness are missing. There is nothing in the Court's analysis that gives certainty in the way a given case will come out given the interests at issue. In similar cases, the Court reached vastly different results without any real

[274] *Supra*, Letsas, *Two Concepts of the Margin of Appreciation*, at 729.
[275] *Ibid.*
[276] *Supra*, Ambrus, at 249.
[277] *Egeland and Hanseid v Norway*, App. No. 34438/04, ECtHR, 16 April 2009, Concurring Opinion of Judge Malinverni.
[278] Franck, Thomas, *Fairness in International Law and Institutions*, Clarendon Press, 1995, at 38 and 41.
[279] *Supra*, Brauch, at 125.
[280] *Ibid*, at 126-7.

explanation as to why one interference was upheld and another was not. One might think that a European consensus or trend was the deciding factor in one case. However, in similar cases, the fact that a consensus or trend existed in the rest of Europe contrary to the defending nation's position was not given significant weight.[281]

There are two ways for the Court to move forward from the current situation. It will either make the doctrine of the margin of appreciation history or it will develop it further and make good use of it. Both of these solutions have their advantages and disadvantages and people can reasonably disagree. What, however, does not seem reasonable is to continue with its black box magic. It only undermines the predictability of the Convention and eventually the authority of the Court. If the Court decides that it wants to continue to use the doctrine, it should firstly stop using it automatically but only when it serves a clear purpose and, secondly, it should establish clear criteria for when the margin is to be used and the tests that follow from it.[282]

[281] *Ibid*, at 133.
[282] Supra, Kratochvil, at 354.

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