Nordic Journal of Human Rights

ISSN: 1891-8131 (Print) 1891-814X (Online) Journal homepage: http://www.tandfonline.com/loi/rnhr20

# The European Court of Human Rights, Ethnic and Religious Minorities and the Two Dimensions of the Right to Equal Treatment: Jurisprudence at Different Speeds?

Kristin Henrard

**To cite this article:** Kristin Henrard (2016) The European Court of Human Rights, Ethnic and Religious Minorities and the Two Dimensions of the Right to Equal Treatment: Jurisprudence at Different Speeds?, Nordic Journal of Human Rights, 34:3, 157-177, DOI: 10.1080/18918131.2016.1225656

**To link to this article:** http://dx.doi.org/10.1080/18918131.2016.1225656

NORDIC JOURNAL OF HUMAN RIGHTS, 2016
VOL. 34, NO. 3, 157–177
http://dx.doi.org/10.1080/18918131.2016.1225656

Routledge
Taylor & Francis Group



# The European Court of Human Rights, Ethnic and Religious Minorities and the Two Dimensions of the Right to Equal Treatment: Jurisprudence at Different Speeds?

Kristin Henrard

Professor of Fundamental Rights and Minorities, Erasmus School of Law, Rotterdam, the Netherlands

**ABSTRACT**

This article argues that it is no longer tenable to qualify the Court's non-discrimination jurisprudence overall as 'poor'. Indeed, a different speed of development is noted for the 'prohibition of invidious discrimination' track and the 'duties of differential treatment' track. In cases concerning invidious discrimination, the Court tends to engage explicitly with the complaint in terms of the prohibition of discrimination, while adopting high levels of scrutiny in regard to differentiations on the basis of ethnicity and religion. Admittedly, there are ongoing flaws in the jurisprudence on the allocation of the burden of proof, and particularly the identification of a *prima facie* case of direct discrimination. Nevertheless, the Court seems to be willing to test the boundaries. A markedly different picture emerges concerning duties of differential treatment. The analysis of the selected case law confirms that the Court avoids as much as possible non-discrimination analysis in cases on claims to official recognition of separate identities and ways of life of ethnic and religious minorities. The Court prefers to conduct its analysis of the related complaints about a lack of accommodation in terms of articles 8 and 9 of the ECHR respectively.

Arguably, demands for reasonable accommodation of different ethnic and religious identities are on the rise in the current era of globalisation. While the Court is not supposed to impose uniform standards, it remains important that it provides guidance about the benchmarks that contracting states need to take into account when developing policies, legislation, and practices, in order to live up to their commitment to respect fundamental rights. Consequently, the Court is urged to engage more explicitly and properly in non-discrimination analysis, also in relation to complaints about a lack of differential treatment (accommodation), while identifying and weighing the respective interests.

**KEYWORDS**

ECtHR; Ethnic Minorities; Religious Minorities; Prohibition of Invidious Discrimination; Duties of Differential Treatment; Margin of Appreciation; Level of Scrutiny; Burden of Proof; Church-State Relations

## I. Introduction

In the ever expanding literature on human rights, considerable attention tends to go to the ECHR and the jurisprudence of the ECtHR. This is not surprising given its standing

**CONTACT** Kristin Henrard henrard@law.eur.nl

as the most renowned international adjudicator of human rights.[1] Topics that have generated a rather extensive literature include the ECtHR and minorities[2] and the jurisprudence of the ECtHR in relation to the principle of equal treatment.[3]

This article aims to move beyond the usual critique of the Court's non-discrimination jurisprudence for being relegated to second-class status (a result of the Court's hesitance to conclude to a prohibited discrimination). The non-discrimination jurisprudence at the ECtHR is accused of not having significant bite, and article 14 has been named the 'Cinderella' of the ECHR.[4] It strives to provide additional insights to the existing literature, by discussing the different state of development ('speeds') of the Court's jurisprudence on the distinctive dimensions of the right to equal treatment, especially with regards to ethnic and religious minorities. These distinctive dimensions correspond to the two respects in which the right to equal treatment is important for persons belonging to minorities, namely the prohibition of invidious discrimination on the one hand and the right to differential treatment on the other.

On the one hand, persons belonging to minorities want an adequate protection against invidious discrimination, implying that they do not want to be treated differently, or disadvantageously, without reasonable and objective justification. On the other hand, they do want to be treated differently in a manner that takes into account their specific characteristics and needs, and accommodates their own, separate identity. When states fail to treat differently persons that are in substantially different situations, without reasonable and objective justification, they violate this second dimension of the right to equal treatment. The related state duties of differential treatment can and need to be further divided in two categories, namely (1) duties to stop and reverse invidious discrimination, and related duties of differential treatment aimed at levelling the playing field in terms of 'access', and (2) duties of differential treatment to accommodate the separate identity of minorities and their way of life.

This article refines the existing overall analysis of the Court's non-discrimination jurisprudence in two (interrelated) respects. First, it is argued that a closer look at the Court's non-discrimination jurisprudence reveals that several positive developments can be traced in the Court's jurisprudence pertaining to the prohibition of invidious discrimination. While criticisms about the Court's reasoning are still in order, inter alia in relation to the sharing of the burden of proof, it is important to acknowledge that in several respects

[1]Inter alia S Wheatley, 'Minorities Under the ECHR and the Construction of a "Democratic Society"' (2007) PL 770.

[2]Inter alia J Ringelheim, *Diversité culturelle et droits de l'homme. La protection des minorités par la Convention européenne des droits de l'homme* (Bruylant, 2006); G Gilbert, 'The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights' (2002) 24 Hum Rts Q 736.

The Court arguably embraces pluralism as an intrinsic characteristic of the ECHR. Nieuwenhuis argues that 'democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities': A Nieuwenhuis, 'The Concept of Pluralism in the Case-law of the ECtHR' (2007) 3 Eu Const 367, with reference to *Young, James and Webster v UK* (App no 7601/76) ECtHR 13 August 1981, para 63.

[3]OM Arnadottir, 'Cross-Fertilisation, Clarity and Consistency at an Overburdened European Court of Human Rights: The Case of the Discrimination Grounds under Article 14 ECHR' (2015) 34 iCourts Working Paper Series <http://ssrn.com/abstract=2666951>; T Thienel, 'The Burden and Standard of Proof in the European Court of Human Rights' (2008) 50 Ger YB Int L 543. Inter alia K Henrard, 'Non-discrimination and Full and Effective Equality' in M Weller (ed), *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Tribunals* (OUP, 2007) 75–147.

[4]Inter alia R O'Connell, 'Cinderella Comes to the Ball: Art 14 and the Right to Non-discrimination in the ECHR' (2009) 29 LS 212, and see other references there.

the Court is stepping up its protection, or is at least developing a more explicit and elaborate reasoning. In contrast, the Court tends to avoid an evaluation of complaints regarding the lack of differential treatment.

A second refinement of the analysis needs to be made in relation to the latter category. The Court's avoidance of an explicit non discrimination analysis is particularly visible when the demands for differential treatment directly concern the accommodation of a separate (ethnic or religious) identity (sub-category 2). Typical examples of such accommodation would include measures of reasonable accommodation in the workplace, facilitating different ways of life, inter alia in relation to housing, and dress code in the public sphere. The Court does seem more open to recognising state duties to stop and reverse invidious discrimination and duties of differential treatment that concern redressing past discriminatory practices concerning access rights (access to public functions, access to education).

In other words, it is important to recognise that the court's non-discrimination jurisprudence in relation to the two distinctive dimensions of the right to equal treatment has been developed at two different.[5] This is a more nuanced evaluation of the Court's practice, which enables the formulation of more targeted criticisms of and more specific recommendations for the ECtHR's non discrimination jurisprudence. The latter is beyond the confines of this article though.

The article consists of two parts. First, the Court's jurisprudence regarding the prohibition of invidious discrimination is assessed in terms of the effectiveness of the protection against discrimination. The analysis focuses on the levels of scrutiny adopted by the Court and the evolving jurisprudence on the sharing of the burden of proof. The second part of the article investigates the jurisprudence on state duties of differential treatment in terms of the prohibition of discrimination. An in-depth discussion of the landmark judgment, *Thlimmenos v Greece*, and its overall follow-up is followed by a critical analysis of three significant judgements concerning ethnic minorities and a range of judgments on religious minorities. While the analysis cannot be and does not claim to be exhaustive, the range of topics selected arguably form a representative spread: different ways of life (housing), Roma marriage, ritual slaughter, and reasonable accommodation in the work environment.

[5]This more nuanced analysis also allows to move beyond the argument that the 'poor state' of the ECtHR's non-discrimination jurisprudence and the Court's preference to deal with cases in terms of substantive rights, is in important respect due to the accessory nature of article 14 ECHR, meaning that article 14 needs to be invoked in combination with a substantive article. It is too early to tell whether the Court under the 12th Additional Protocol, complementing the ECHR with a general prohibition of discrimination, will be more ready to evaluate equality arguments, particularly in relation to duties of differential treatment. Indeed, none of the few cases decided so far under AP 12 turned on complaints about a lack of differential treatment or otherwise envisaged differential treatment aimed at the acoommodation of a minority identity.

Similarly, the analysis also second guesses another argument often heard about the Court's choice not to investigate the discrimination complaint when it has already concluded to a violation of the substantive article, namely that this would be perfectly understandable, and a matter of judicial efficiency. While the Court itself had – especially in early cases – acknowledged that the position is otherwise if a clear inequality of treatment in the enjoyment of the right is a fundamental aspect of the case (*Airey v Ireland* [App no 6289/73] ECtHR 9 October 1979), criticism abounds about the Court's narrow application of this 'saving clause'. Put differently, the ECtHR tends to opt for deciding cases on the basis of articles other than article 14, even when non-discrimination is central to the case: O'Connell (n 4) 212. As will be further demonstrated through the following analysis, the Court's choice not to evaluate the article 14 complaint is especially visible in relation to complaints about a lack of differential treatment.

## II. The ECtHR and the Prohibition of Invidious Discrimination

The prohibition of invidious discrimination dimension of the right to equal treatment targets treatment which is disadvantageous for a person, for which there is no reasonable justification. Invidious discrimination can take the form of direct or indirect discrimination. Direct discrimination concerns disadvantageous treatment on particular grounds that cannot be reasonably and objectively justified. Indirect discrimination refers to neutral measures with a disproportionate disadvantageous impact on a particular group, for which no reasonable and objective justification can be put forward.

There is abundant literature on the initial struggle of the ECtHR to give the concept of indirect discrimination a place in its non-discrimination jurisprudence.[6] It is actually through a spate of cases on separate education of Roma children (in several Eastern European states) that the Court gradually came to terms with the idea of 'indirect discrimination'.[7] These cases challenged the disproportionate presence of Roma children in separate schools and classes for mentally retarded children, in which the children received inferior education, including a reduced curriculum.[8] In some of these cases the Court also explicitly tied the prohibition of indirect discrimination to duties of differential treatment.[9]

Notwithstanding some ongoing flaws and lacuna in the Court's jurisprudence, the more recent case law reveals several promising developments, moving away from the traditional reluctance of the Court to identify instances of prohibited discrimination. The Court's jurisprudence reveals that complaints about invidious discrimination on grounds of race/ethnicity or religion are explicitly analysed in terms of the prohibition of discrimination. When assessing the effectiveness of the protection against discrimination provided through the Court's analysis, two topics merit closer investigation, namely the level of scrutiny adopted by the Court and the reasoning concerning the sharing of the burden of proof.[10]

The effectiveness of the protection against discrimination is closely related to the level of scrutiny adopted for the proportionality requirement, one of the two criteria in general international law to distinguish acceptable differentiations from those that amount to 'discrimination'.[11] When the level of scrutiny is high, the monitoring mechanism is more demanding in relation to justifications put forward by the state, and more likely to find an instance of prohibited discrimination. The criterion that carries most weight in the determination of the level of scrutiny for the prohibition of discrimination is the degree of suspectness of the ground of differentiation.[12] Differentiations on suspect grounds are scrutinised strictly, which implies that states only receive a narrow margin of appreciation.

[6] Inter alia O'Connell (n 4) 211–29. See also the analysis in K Henrard, 'The Council of Europe at the Rescue of a Paradigmatic Case of Failed Integration: About Roma, the Multidimensional Nature of Integration and How Promising Principles Can Meet Flawed Application in Practice' (2010–2011) *European Yearbook of Minority Issues* 271–316.

[7] Inter alia Henrard, 'The Council of Europe at the Rescue' (n 6).

[8] Some of these Roma-education cases also demonstrate that the dividing line between direct and indirect discrimination is not that crystal clear: the difference is to some extent one of degree, more particularly degree of directness of the causal link with the prohibited ground of differentiation.

[9] See the discussion of the *Horvath and Kiss* judgment below.

[10] Levels of scrutiny and the allocation of the burden of proof are indeed among the most salient themes when discussing the effectiveness of the protection against invidious discrimination.

[11] Note that in EU law, this general justification formula only applies to indirect discrimination, whereas for direct discrimination the acceptable legitimate aims are restrictively and explicitly laid out in EU law (often directives).

[12] See also JH Gerards, *Judicial Review in Equal Treatment Cases* (Martinus Nijhoff, Dordrecht 2005) 84–93.

In academic literature several factors are put forward to identify suspect grounds.[13] Such grounds tend to concern (virtually) immutable characteristics, such as gender, and skin colour. In addition, characteristics that are irrelevant for social performance (i.e. suitability for a job, entitlement to public services, etc.) are also considered 'suspect', when they are so fundamental to one's identity that one cannot expect this characteristic to be 'shed' simply in order to have equal access to goods, services, employment, etc. Furthermore, these grounds have a history of discrimination, and can usually be traced to deep-seated prejudice and stigmatisation.

Following the above criteria, both race/ethnic origin and religion would qualify as suspect grounds. The history of discrimination has been richly documented in relation to race/ethnicity, and religion was the most prominent marker for discrimination during the religious wars in the middle ages. Religion is furthermore an increasingly contentious marker in the current era of increasing religious diversity. Neither race nor religion should matter regarding one's functioning in society. While ethnicity/race are clearly immutable, religion is arguably de facto immutable as it concerns a fundamental identity characteristic for believers.[14]

The ECtHR's jurisprudence increasingly included signals about the special opprobrium attached to racial discrimination,[15] and, ever since its seminal *Timishev* judgment, explicitly recognised race and ethnicity as suspect grounds of differentiation.[16] In most cases regarding invidious discrimination against religious minorities, and in particular in cases concerning discriminatory violence, the Court adopts a de facto high level of scrutiny.[17] However, the Court's approach towards religion as suspect ground of differentiation is strikingly ambiguous. In its analysis of article 14 in combination with article 9 the Court carefully avoids talking about religion as a suspect ground.[18] In a 2013 case, the Court chose to ignore the explicit argument that religion should be considered a suspect ground of differentiation.[19]

[13]For a rather detailed discussion of factors that determine 'suspectness' see ibid 85–91.

[14]For a somewhat longer discussion see K Henrard, *The Ambiguous Relationship Between Religious Minorities and Fundamental (Minority) Rights* (Boom Eleven, 2011) 43–44.

[15]At times the ECtHR even qualifies particular instances of racial discrimination as inhuman and degrading treatment in violation of article 3, and thus absolutely prohibited. The European Commission did so the first time in ECommHR, *East African Asians v UK* (App nos 4403/70-4419/70, 4422/70, 5523/70, 4434/70, 4443/70, 4476/70-4478/70, 4486/70, 4501/70 and 4526/70-4530/70) ECtHR 76 (1973) 10 October 1970. The Court followed suit in a case on Roma, *Moldovan al and others v Romania* (App no 64320/01) no 2 ECtHR 12 July 2005, para 111. See also, *Cyprus v Turkey* (App no 25781/94) ECtHR 10 May 2001, paras 308–310. This has been considered as yet another pointer to race being a suspect ground of differentiation.

[16]In *Timishev*, the Court used the formula 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' (para 58). In more recent cases the Court explicitly talks about the need for strict or even the strictest scrutiny (concerning differentiations on the basis of race): see inter alia *Zornić v Bosnia and Herzegovina* (App no 3681/06) ECtHR 15 July 2014; *Georgia v Russia (I)* (App no 13255/07) ECtHR (GC) 3 July 2014, and the case law below on the sharing of the burden of proof.

[17]*97 Members of the Gldani Congregation of Jehovah Witnesses & 4 Others v Georgia* (App no 71156/01) ECtHR 3 May 2005; *Begheluri and others v Georgia* (App no 28490/02) ECtHR 7 October 2014.

[18]Note that the Court has actually hinted at the suspect nature of religion as ground of differentiation in some cases where the complaint was about discrimination in granting custody to a parent because of the religious affiliation of the parent concerned: *Hoffmann v Austria* (App no 12875/87) ECtHR 23 June 1993; *Vojnity v Hungary* (App no 29617/07) ECtHR 12 February 2013.

[19]See inter alia Stijn Smets, 'Eweida, Part II: The Margin of Appreciation Defeats and Silences All', Strasbourgobservers <http://strasbourgobservers.com/2013/01/23/eweida-part-ii-the-margin-of-appreciation-defeats-and-silences-all> accessed. 7 September 2016

The Court's reluctance to explicitly denote religion as a suspect ground of differentiation is arguably a result of the traditional line of jurisprudence under article 9 which grants states a broad margin of appreciation when it comes to 'religion-state relations'.[20] Nowadays religion-state relations always concern various religions and thus differentiations between religions. When assessing differentiations between religions, the Court cannot grant states a broad margin of appreciation in matters of church-state relations under article 9, and at the same time acknowledge that religion is a suspect ground under article 14, which entails a narrow margin of appreciation.

Interestingly, and as analysed in more detail elsewhere, the Court seems ready to reduce the margin of appreciation left to states in relation to religious matters (under article 9).[21] This would allow the Court to give explicit recognition of the suspect nature of religion as ground of differentiation. The Court has hinted at the suspect nature of religion in a few article 9 cases concerning particular regimes of recognition of and/or cooperation between religions and the state. In *Savez Crkava and others v Croatia* for example, the Court emphasised that criteria that need to be fulfilled by religious groups to obtain a special status, entitling them to particular rights and privileges, call for 'particular scrutiny'.[22] Similarly, in the *Magyar* case, the Court called attention to the fact that state churches are increasingly questioned as potentially in violation of the ECHR, and this message also points to religion as a suspect ground of differentiation.[23] However, the explicit recognition of religion as 'suspect' is still confined to the Court's analysis under article 9′s freedom of religion, and has not yet been included in the analysis of the prohibition of discrimination.

Overall, the Court adopts satisfactory levels of scrutiny in relation to complaints about invidious discrimination based on ethnicity and religion.[24] Still, an effective protection against discrimination also depends on the Court not imposing very high demands on the claimant's burden of proof. Over the years, various criticisms have been voiced about the high baseline standard of proof the ECtHR imposes on the applicant, namely 'beyond reasonable doubt'. The awareness of the difficulties to obtain proof of discrimination for a victim has triggered the development in international law of an alternative or special allocation of the burden of proof in discrimination cases. Instead of having to provide 'full' proof, the claimant only needs to establish a *prima facie* case, after which the burden of proof shifts to the government.[25] In cases which deal with the prohibition of indirect discrimination, the Court has fully incorporated this special allocation of the burden of proof.[26]

[20]This is indeed a formal, pragmatic answer which does not address the underlying question why the Court feels the need to grant states a broad margin of appreciation regarding state-church relationships. See Henrard, 'How the European Court of Human Rights' Concern Regarding European Consensus Tempers the Effective Protection of Freedom of Religion' (2015) OJLR 1.

[21]See ibid.

[22]*Savez Crkava and others v Croatia* (App no 7798/08) ECtHR 9 December 2010, para 88. For a more complete analysis, see Henrard, 'How the ECHR's Concern' (n 20).

[23]*Magyar Keresztény Mennonita Egyház and others v Hungary* (App nos 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12) ECtHR 8 April 2014.

[24]The Court becomes ever more demanding about investigatory duties of the public authorities, see inter alia *Begheluri et al v Georgia* (App no 28490/02) ECtHR 7 October 2014.

[25]Inter alia M Ambrus, *Enforcement Mechanisms of the Racial Equality Directive and Minority Protection: Theory and Four Case Studies* (Eleven, 2010) 27–30.

[26]The painstakingly slow acceptance of the concept of indirect discrimination went hand in hand with the use of this special allocation of the burden of proof: see S Besson, 'Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?' (2008) HRLR 670–71, 679; O'Connell (n 4) 222–23.

However, in relation to direct discrimination, and especially allegations of discriminatory violence, the Court has been reticent to adopt the special allocation of the burden of proof.[27] This reluctance was clearly visible in the Grand Chamber judgment in the *Nachova* case, concerning the killing of two fugitive Roma men by Bulgarian policemen.[28] In contrast to the Chamber,[29] the Grand Chamber rejected the special allocation of the burden of proof, because it would impose a too demanding burden of (negative) proof on the government (that no racial animus informed the killings).[30] The Grand Chamber did not accept that flawed police investigations as such were sufficient to constitute a *prima facie* case of racial discrimination. It proceeded to make a firm distinction between the procedural obligation to properly investigate such incidents, and investigate a potential discriminatory motive on the one hand and the substantive obligation to refrain from discriminatory killings on the other.[31] The Grand Chamber in *Nachova* did identify three relevant criteria for the use of the special allocation of the burden of proof: 'the specificity of the facts, the nature of the allegations made, and the Convention right at stake.'[32]

Interestingly, in 2014, the Court was confronted with three cases of alleged discriminatory violence, the comparison of which arguably provides insights into actual and potential developments in the Court's case law regarding the burden of proof. One of these cases concerned alleged discriminatory violence by public authorities (*Antayev*),[33] while the two others addressed a complaint about a lack of protection by the public authorities against racist violence by private parties (*Begheluri* and *Abdu*).[34]

*Antayev and others v Russia* concerns a case of alleged racial violence against Chechens by police officers. The Court noted the detailed allegations of racist abuse by the police officers concerned, as well as the more general picture of police abuse against Chechens, as evidenced by a number of cases brought by Chechens against Russia. According to the Court, these data trigger the special investigatory duty of the Russian authorities to investigate closely and where possible unveil discriminatory motives for this systemic police violence. However, the serious allegations of racist insults by the police notwithstanding, the police did not conduct any investigations into the possible racist motivation. Furthermore, the evidence presented to the court, internal police instructions which stipulated that Chechen suspects need to be treated in a special manner, were supported by the fact that in casu a special task force had been called for a minor offence.[35]

The combination of this direct and more indirect, contextual proof swayed the Court in finding that '*a prima facie* case of racially based ill-treatment has been made',[36] and in view of the lack of any (convincing) proof that the police violence was not tainted by discrimination. Arguably, the Court was presented with almost full proof of racist violence by the police; the internal instructions, the detailed account of the racist insults and the severe flaws in the investigations, in addition to the more general proof about the systemic

[27] See inter alia Henrard, 'The Council of Europe at the Rescue' (n 6) 281–83.
[28] *Nachova and others v Bulgaria* (App nos 43577/98 43579/98) ECtHR (GC) 6 July 2005.
[29] *Nachova and others v Bulgaria*, ECtHR 26 February 2004.
[30] ibid para 157.
[31] ibid.
[32] ibid para 147.
[33] *Antayev and others v Russia* (App no 37966/07) ECtHR 3 July 2014.
[34] *Begheluri and others v Georgia* (App no 28490/02) ECtHR 7 October 2014; *Abdu v Bulgaria* (App no 26827/08) ECtHR 11 March 2014.
[35] *Antayev and others v Russia* ECtHR, para 127.
[36] ibid para 128.

nature of the problem. While the Court did not explicitly rely on the *Nachova*-criteria for a *prima facie* case, in casu the 'specificity of the facts' was markedly stronger in comparison with the previous cases.[37] Furthermore, in its assessment of the alleged substantive discrimination in the *Antayev* case, the Court seemed to follow the Chamber-judgment in *Nachova*, and emphasised the authorities' failure to uphold their special investigatory duty. While the distinction between procedural and substantive obligations regarding the prohibition of discrimination has been firmly ingrained in the Court's jurisprudence, the Court seemed to acknowledge again that procedural and substantive matters are intertwined.

Also in *Begheluri and others v Georgia* the Court accepted a *prima facie* case of discrimination based on a similar combination of contextual information about systematic tolerance by the Georgian authorities of religious motivated violence against Jehovah's Witnesses, and the evidence in casu.[38] In *Begheluri*, a group of about 100 Jehovah's Witnesses registered a complaint about 30 instances of religious motivated violence by a group of Orthodox extremists. The Jehovah's Witnesses claimed that public officials that were present condoned this violence, and that the 160 complaints that were filed with the public prosecutor were not heard by the domestic courts, mainly due to the absence of proper investigations. The evidence in casu concerned not only derogatory remarks by the police officials, but also the severe flaws in the subsequent investigation, which added to the impression that the authorities condoned this religious motivated violence. In *Begheluri*, the Court clearly acknowledged the extent to which problems in terms of the procedural state obligation concerning discrimination point to a substantive discrimination. More particularly, the lack of protection against ongoing violence and the subsequent severe flaws in the investigation and prosecution of these violent acts are causally linked to prejudices by the public officials involved. The Court summarily dismissed the Georgian government's defence that the complaint would not be substantiated, and found that there had been a substantive violation of the prohibition of discrimination.[39]

In a third case on discriminatory violence, however, the Court refused to acknowledge a *prima facie* case of discrimination in the substantive sense. *Abdu v Bulgaria* concerned discriminatory violence by private persons against migrants. According to *Abdu*, several severe flaws in the investigations into possible racist motives behind the violence were due to prejudice among the police officials concerned. The Court was indeed critical in its analysis of the investigations and identified multiple procedural flaws (i.e. the two alleged perpetrators were skinheads well known by the police), and concluded to a violation of the prohibition of discrimination.[40] However, the Court dismissed the complaint about the discriminatory motivation for the flawed investigation as manifestly ill founded.

When comparing these three cases, the difference in outcome regarding the establishment of a *prima facie* case of racial discrimination seems to turn on the specificity of the case-specific proof that is available. In *Antayev* there is arguably almost full proof of racist violence and government inaction (lack of protection) that is racially motivated, while in *Begheluri*, the proof of a systemic problem, in combination with detailed information

[37] See also *Makhashevy v Russia* (App no 20546/07) ECtHR 31 July 2012.
[38] *Begheluri and others v Georgia* ECtHR, para 176.
[39] ibid para 179.
[40] *Abdu v Bulgaria* ECtHR, para 52.

about racist slurs uttered by the police and severe flaws in terms of the investigations seem persuasive enough for the Court to identify a *prima facie* case as well. In *Abdu* the Court neither had proof of internal instructions nor of slurs uttered by the police authorities. Nevertheless, the fact that the alleged perpetrators had police records, and strong contextual information about both systemic violence against migrants and the systemic lack of investigation in discriminatory violence arguably constitute sufficient evidence to establish a *prima facie* case of racial discrimination. Indeed, does this structural lack of investigation and prosecution of racist violence not qualify as condoning racist violence, and could this not be said to reflect a discriminatory attitude towards migrants among the police?[41] *Abdu* arguably shows the Court's reluctance to identify a *prima facie* case of racial discrimination when this rests predominantly on general contextual information and severe flaws in the investigations. Put differently, *Abdu* reveals that the Court is not yet ready to employ *Nachova I* reasoning, and is hesitant to formulate specific criteria for a *prima facie* case of discrimination. It may ultimately be very difficult to delineate and identify objective markers for a *prima facie* case of discrimination, but the Court is nevertheless urged to provide further indications about relevant criteria.[42] As the relevant 2015 and 2016 case law has not shown signs in that direction, it remains to be seen what 2017 and following years will bring in this respect.[43]

In sum, the Court's jurisprudence in relation to cases on alleged invidious discrimination arguably no longer reveals general reluctance to finding a prohibited instance of discrimination. Indeed, the Court appears to be stepping up its levels of protection in several respects. First of all, the Court has clearly developed a steady line of jurisprudence revealing a high level of scrutiny for disadvantageous treatment on the basis of race/ethnicity and religion. It may be more explicit about the suspect nature of race in comparison to religion, but de facto similar levels of scrutiny are evident. Second, the Court seems to be – slowly but surely – more willing to share the burden of proof in discrimination cases. In particular, more recent case law reveals that the Court is in some cases ready to identify a *prima facie* case of direct discrimination on grounds of ethnicity and/or religion. Admittedly, the Court still needs to develop further criteria in this respect, since the Court only accepts a *prima facie* case when there is very strong proof.

As the following analysis will reveal, a different picture emerges regarding duties of differential treatment. The relevant case law pertaining to ethnic and religious minorities reveals the Court's reluctance to identify duties of differential treatment, and investigate and evaluate such complaints under the prohibition of discrimination.

[41] In *Eremia v the Republic of Moldova* (App no 3564/11) ECtHR 28 May 2013, the Court was willing to impute discriminatory intent to the government because of the officials had been aware of the domestic violence against the complainant and had done nothing to protect her. See also D Petrova, 'Evolving Strasbourg Jurisprudence on Domestic Violence: Recognising Institutional Sexism', blog post, *Oxford Human Rights Hub: A Global Perspective on Human Rights*, 20 June 2013 <http://ohrh.law.ox.ac.uk/evolving-strasbourg-jurisprudence-on-domestic-violence-recognising-institutional-sexism/> accessed 9 September 2016..

[42] See also Oddný Mjöll Arnardóttir, 'Non-discrimination under Article 14 ECHR: The Burden of Proof' (2007) 51 Scandinavian Studies in Law 14, 17.

[43] For a discussion of relevant cases in 2016, see K Henrard, 'Noot bij *RB v Hungary* (12 April 2016), *Sakir v Greece* (24 March 2016) and *MC and AC v Romenia* (12 April 2016)', EHRM 12060/12, EHRC Doc No 2016/165. The Court becomes increasingly demanding about the investigatory duty of the state, but remains reluctant to establish a link between the deficient investigation and institutional discrimination within the police.

## III. Duties of Differential Treatment: The Impact of the *Thlimmenos* Case

The ECtHR was traditionally focused on scrutinising whether or not a differential treatment can be considered legitimate. The Court's baseline was thus a formal conception of equality, following which persons or situations that are analogously placed are to be treated identically.[44] Nevertheless, the Court had already indicated in the 1968 *Belgian Linguistics case* that the prohibition of discrimination does not prohibit states from treating groups differently in order to *correct factual inequalities*.[45] The Court even added that 'in certain circumstances a failure to attempt to correct inequality through different treatment may, without an objective and reasonable justification, give rise to a breach' of the prohibition of discrimination. Nevertheless, it is the Court's *Thlimmenos* judgment that is considered the landmark case establishing duties of differential treatment under the prohibition of discrimination.

Thlimmenos was a Jehovah's Witness who had studied to become a chartered accountant, but who could not obtain a licence, because of convictions for refusing to serve in the military for religious reasons. He argued that the Greek law on chartered accountants did not distinguish between convictions that are due to the exercise of one's fundamental right to manifest one's religion, and other convictions, and that the Greek state had therefore discriminated against him on grounds of religion. The Court follows this line of reasoning and opines that it:

> …has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification (see the Inze judgment cited above, p. 18, § 41). However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.[46]

Interestingly, in post-*Thlimmenos* cases the Court acknowledged the inherent link between the *Thlimmenos* line on duties of differential treatment to the duties to correct factual inequalities as found in the *Belgian Linguistics case*. The Court arguably considers the *Thlimmenos* rationale a corrective mechanism, similar to the 'redress of disadvantages from the past' rationale that underlies affirmative action measures. Sometimes, the Court identifies duties of differential treatment that aim at levelling the playing field, without mentioning either the *Thlimmenos* formula nor the 'correcting factual inequalities' line. In *Horvath and Kiss* for example, a case pertaining to Roma's disproportionate sidelining to separate and inferior education, the Court affirmatively identified duties of differential treatment, in response to the lingering effects of this indirect discrimination.[47] According to the Court:

[44] O'Connell (n 4) 212.

[45] Actually para 10 of the *Belgian Linguistics* ((App no 1474/62) ECtHR 23 July 1968) judgment states: 'the competent national authorities are frequently confronted with situations and problems, which, on account of differences inherent therein, call for different legal solutions, moreover, certain legal inequalities tend only to correct factual inequalities.' It is the Court itself that adds this paragraph to its references with 'duties to correct factual inequalities' line.

[46] *Thlimmenos v Greece* (App no 34369/97) ECtHR 6 April 2000, para 47.

[47] *Horvath and Kiss v Hungary* (App no 11146/11) ECtHR 29 January 2013.

> In the context of the right to education of members of groups which suffered past discrimination in education with continuing effects, structural deficiencies call for the implementation of positive measures in order, *inter alia*, to assist the applicants with any difficulties they encountered in following the school curriculum [ … ] The Court would note in this context Recommendation no. R(2000)4 of the Committee of Ministers (see paragraph 72 above) according to which appropriate support structures should be set up in order to enable Roma/Gypsy children to benefit, in particular through positive action, from equal opportunities at school.[48]

Overall, the Court has only in a few cases actually identified duties of differential treatment.[49] In the past it may have been reasonable to argue that the slow development of the *Thlimmenos* rationale is intrinsically related to the Court's longstanding uneasy relationship with indirect discrimination.[50] Indeed, there is a close connection between duties of differential treatment and indirect discrimination.[51] The disproportionate impact of neutral rules on particular groups tends to be related to their specific circumstances, the extent to which persons belonging to these groups are differentially situated. This disparate impact can be remedied by differential treatment, such as exemptions or special rules adapted to the particular circumstances of the group concerned.[52] These instances of 'differential treatment' would follow the *Thlimmenos* rationale to treat persons in substantively different situations differently (failing a reasonable, objective justification for the disparate impact). Notwithstanding the Court's firm stance on the prohibition of indirect discrimination, this has so far not entailed a significant increase in the use of the *Thlimmenos* rationale.[53]

A closer look at the Court's case law reveals that the Court is more likely to identify duties of differential treatment with 'levelling the playing field' as underlying rationale, than the need to accommodate the separate identity of ethnic and religious minorities. For example, in the *Thlimmenos* case, the duty of differential treatment did not directly concern the expression of a separate identity, a separate way of life,[54] and did not imply far reaching positive state obligations, nor entail an adaptation of structures or working hours.[55] Instead, the Court imposed a differentiation to ensure that the Greek Law did not overreach and adversely affect certain persons – someone convicted for refusing

[48]ibid para 104.

[49]It should be highlighted that sometimes the Court restates the 'correcting factual inequalities' formula in an empty way, without actually making use of it in the application of the facts, or in an obscure way where it is not clear what the quote is intended to convey. Three judgments on minorities do contain 'correcting factual inequalities' language but the cases actually concern instances of invidious discrimination against the minority group concerned: *Religionsgemeinschaft der Zeugen Jehovas and others v Austria* (App no 40825/98) ECtHR 31 July 2008, para 98; *Andrejeva v Lativa* (App no 55707/00) ECtHR 18 February 2009, para 87; *Orsus v Croatia* ((App no15766/03) ECtHR 16 March 2010, para 156 ff.

[50]Inter alia K Henrard, 'A Patchwork of "Successful" and "Missed" Synergies in the Jurisprudence of the ECHR' in K Henrard and R Dunbar (eds), *Synergies in Minority Protection* (CUP, 2008) 319–20.

[51]See also F Ast, 'Indirect Discrimination as a Means of Protecting Pluralism: Challenges and Limits' in Ast (ed), *Institutional Accommodation and the Citizen: Legal and Political Interaction in a Pluralist Society* (Council of Europe Publishing, 2009) 97.

[52]Admittedly, the disparate impact can also be remedied by reshaping the rules to make them inherently more flexible, so that they 'fit' persons with various profiles, or even by 'levelling down' so that even fewer people benefit. See also Ast, 'Indirect Discrimination' (n 51) 96.

[53]There is a slow, but certain development in cases on Roma and problems regarding access to quality education (versus separate education) and regarding housing/accommodation: inter alia Henrard, 'The Council of Europe at the Rescue' (n 6) 271.

[54]It is interesting to note that in *Thlimmenos* the Court, after having concluded to a violation of article 14 in combination with article 9, did not consider it necessary to also assess whether there has been a violation of article 9 taken on its own (para 53): compare with the argumentation on the avoidance of article 14 analysis in this article.

[55]See also below on duties of reasonable accommodation on religious grounds.

military service for religious reasons is not a person without moral virtue.[56] Similarly, the Court identified a special investigatory duty to unveil possible discriminatory motives of violence against vulnerable groups. This duty is clearly not about accommodating special identity-related needs, but rather about acknowledging the problematic nature of discriminatory violence in democratic societies. In order to effectively combat and prevent this type of violence the authorities must level the playing field by conducting thorough investigations into such incidents.

The language of (duties of) differential treatment to 'correct factual inequalities' in the *Belgian Linguistics case* also refers to affirmative action, understood as measures of redress for previously incurred disadvantages.[57] The Court applied the 'correcting factual inequalities' line in a string of cases regarding differentiations on the basis of gender; more particularly in cases of differential pension ages and the availability of pensions to the surviving spouse.[58] While these cases do not mention a duty to adopt these differential measures, it is striking that the Court accepted the differential treatment adopted by the national government because it aimed at compensating differences between men's and women's working lives, which is arguably the same rationale as 'levelling the playing field'. The identification in *Horath and Kiss* of positive action duties in order to address the long-lasting effects of past discrimination in education similarly fits this rationale.

The following paragraphs turn to the reasoning of the Court in some prominent cases in which ethnic and religious minorities complain about a lack of differential treatment that may accommodate their separate identity. The following section will focus on ethnic minorities, and section III(2) will discuss the Court's jurisprudence on cases with religious minorities. My analysis of the Court's reasoning in these cases will confirm that the Court has adopted different approaches to duties of differential treatment depending on their underlying rationale.

### *III(1)* Thlimmenos *and its 'non-use' in cases on ethnic minorities 'own way of life'*: Chapman, Winterstein *versus* Munos Diaz

This section will analyse three cases which concern Roma, an ethnic minority with distinctive cultural traits and its own way of life. A comparison of the three cases clearly reveals that on the one hand the Court is reluctant to evaluate Roma's demands about the recognition and accommodation of their own way of life (e.g. the custom of living in caravans) in terms of the prohibition of discrimination. On the other hand, the Court is willing to identify an unjustified differential treatment when in the evaluation of Roma marriages as marriages in good faith, the cultural specificities of the Roma minority are not duly taken into account. Put differently, as long as the separate identity is factored in for 'levelling the playing field', the Court is willing to engage in a non-discrimination analysis. However,

[56] *Thlimmenos* ECtHR, para 47.
[57] Inter alia O de Schutter, 'Three Models of Equality and European Anti-Discrimination Law' (2007) 57 NILQ 34.
[58] In several subsequent cases in which the Court use the 'correcting factual inequalities' and the possibility of duties of this type of differential treatment, this actually only features in the review of 'general principles' of the Court's case law, and is not followed by an application to the facts of the case concerned: Inter alia *DH and others v Czech Republic* (App no 57325/00) ECtHR 13 November 2007, para 175; *Andrejeva v Latvia* (App no 55707/00) ECtHR 18 February 2009, para 28; *Munoz Diaz v Spain* (App no 49151/07) ECtHR 8 December 2009, para 48; *Orsus ea v Croatia* ((App no 15766/03) ECtHR 16 March 2010, para 149.

when a case turns directly on the accommodation of the separate minority identity, the Court avoids an explicit non-discrimination analysis.

The Court's reluctance to engage with duties of differential treatment aimed at the accommodation of minorities' separate identity in terms of the prohibion of discrimination is strikingly visible in *Chapman*, pronounced only a few months after *Thlimmenos*. In *Chapman*, the Court identified de facto duties of differential treatment towards Roma so as to 'facilitate the Gypsy way of life', in accordance with article 8 of the ECHR.[59] According to the Court:

> …although the fact of belonging to a minority with a traditional lifestyle different from that of the majority does not confer an immunity from general laws intended to safeguard the assets of the community as a whole […] it may have an incidence on the manner in which such laws are to be implemented […] the vulnerable position of Gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in reaching decisions in particular cases.[60]

In other words, the Court hints at the need to adopt Roma-specific standards as part of the legislative framework and to make individual decisions that cater to their specific needs and vulnerabilities. However, both types of 'special measures' or differential treatment are only identified in terms of article 8 of the ECHR, and the Court summarily dismissed the discrimination complaint based on the *Thlimmenos* rationale. The Court found an objective and reasonable justification for not treating the Roma differently in the application of the UK's general planning framework: 'having regard to its findings above under Article 8 of the Convention that any interference of the applicant's rights was proportionate to the legitimate aim of preservation of the environment.'[61] Put differently, the Court did not conduct an explicit non-discrimination analysis, ostensibly based on the assumption that the non-discrimination analysis covers exactly the same ground as an analysis in terms of article 8.[62]

In *Winterstein v France*, a more recent judgment on *gens de voyage*, a population group in many respects similar to the Roma, in a case based on an expulsion order due to illegal placing of caravans, the Court further develops the jurisprudence from the *Chapman* case. The Court restates the guiding principles from *Chapman* that minorities are entitled to a traditional way of life in terms of article 8 ECHR, and that their needs and special lifestyle need to be taken into account both in the regulatory framework and in reaching decisions in individual cases. In several respects the Court's proportionality analysis in *Winterstein* sets a higher proportionality standard than in *Chapman*. In *Winterstein*, the Court de facto reduces the state's margin of appreciation of the state because the rights concerned are crucial for their identity. The Court further highlights that the national authorities, when balancing the rights of persons belonging to a minority with public interests, need to properly weigh the group dimension of the minority, and the history of peaceful residence. The illegality of the residence should not be decisive.[63] Furthermore, the Court

[59] *Chapman v UK* (App no 27238/95) ECtHR 18 January 2001.
[60] ibid para 96.
[61] ibid para 129.
[62] The Court had even suggested that 'to accord to a Gypsy who has unlawfully stationed a caravan site at a particular place different treatment from that accorded to non-Gypsies […] would raise substantial problems under Article 14 of the Convention' (*Chapman* ECtHR, para 95). For a critical analysis see J Ringelheim, 'Chapman Redux: The ECtHR and Roma Traditional Lifestyle' in E Brems (ed), *Diversity and European Human Rights: Rewriting Judgments of the ECHR* (CUP, 2013) 434.
[63] *Winterstein et al v France* (App no 27013/07) ECtHR 17 October 2013, para 150–52.

claimed that the state has a duty to offer alternative housing: the state should give due consideration to the needs of the Roma as a disadvantaged and vulnerable group and also of their needs as a minority with a separate identity and lifestyle.[64] Considering the flaws in respect of the above principles, the Court concluded that there had been a violation of article 8. The Court's evaluation of this case strengthens the extent to which article 8 protects the separate identity and lifestyle of the Roma, and is surely a welcome development. However, the Court still refused to discuss concerns about the accommodation of different lifestyles in terms of article 14′s prohibition of discrimination.[65] Seemingly, the Court prefers to pretend that an analysis of article 14 does not present any new questions to be deliberated by the Court, so that an analysis of the article 14 claim would not add anything to the case.

Interestingly, the *Munos Diaz v Spain* case[66] demonstrates that the Court follows the same reasoning as in the *Chapman* case in response to complaints about invidious discrimination, but does not engage in a non-discrimination analysis regarding a complaint that centrally revolves around a distinctive religious identity. The *Munoz Diaz* case concerns a double discrimination complaint by a widow because of the lack of recognition by the state of a marriage concluded according to Roma rites. The first complaint centred on the lack of recognition of her marriage as 'one in good faith', which meant that she was denied her right to a survivor's pension. The second complaint directly concerned the lack of official recognition of a marriage conducted in accordance with Roma traditions. Both complaints were framed as complaints about invidious discrimination, namely that the marriage in question was not treated the same as other comparable marriages, and there was no reasonable and objective justification for this differential treatment. Both complaints fundamentally turn around the question of comparability; should the complainant's marriage be recognised as a 'good faith marriage', and should it be officially recognised as a non-civil marriage. Surprisingly, the Court adopted two radically different reasonings in the two discrimination complaints.

In relation to the former complaint, the Court fully goes into the non-discrimination analysis, and into the question of comparability. It investigates closely the legislation and relevant jurisprudence and notes that the 'constitutional case-law has […] taken into account, in recognizing survivor's pensions, the existence both of good faith and of exceptional circumstances rendering the celebration of marriage impossible, even though no legally valid marriage had taken place'.[67] The Court then goes on to investigate whether the denial of the survivor's pension in casu

> …reveals discriminatory treatment based on her affiliation to the Roma minority, in relation to the manner in which the legislation and case-law have treated similar situations where the

[64] ibid para 88.
[65] ibid para 179. In *Yordanova (Yordanova et al v Bulgaria* [App no 25446/06] ECtHR 24 April 2012, para 129), the case concerned expulsions of Roma from illegal make-shift houses that did not respect planning and safety regulations. The Court only addressed the complaint about invidious racial discrimination under article 14 regarding the expulsion modalities. The Court explicitly referred to *Thlimmenos* in relation to state duties to correct factual inequalities suffered by socially disadvantaged groups, but only in terms of article 8 (para 129). In other words, the duties of differential treatment are explicitly linked to the *Thlimmenos* rationale but are still summarily dealt with in terms of the substantive article 8, and not considered in terms of article 14.
[66] *Munoz Diaz v Spain* ECtHR, 8 December 2009.
[67] ibid para 53.

> persons concerned believed in good faith that they were married even though the marriage was not legally valid.[68]

In this case, the Court highlights the fact that the Spanish authorities had issued the claimant with a number of official documents certifying her status as spouse of the deceased.[69] In addition, the Court argues at length the obligation of public authorities to take into consideration that the claimant belongs to a community within which the validity of the marriage, according to its own rites and traditions, has never been disputed.[70] According to the Court 'the force of the collective beliefs of a community that is well-defined culturally cannot be ignored'.[71] Strikingly, the Court incorporates two lines of argumentation from the *Chapman* judgment regarding article 8 within the assessment of the complaint of invidious discrimination under article 14. First, the Court observes 'the emerging international consensus among the Contracting States of the Council of Europe recognizing the special needs of minorities and an obligation to protect their security, identity and lifestyle'.[72] Second, it highlights the famous *Chapman* quote that 'the vulnerable position of Roma means that some special consideration should be given to their needs and their different lifestyle, both in the relevant regulatory framework and in reaching decisions in particular cases'.[73]

In light of the above considerations the Court holds that the refusal by the Spanish authorities to recognise the applicant's entitlement to a survivor's pension did not properly take into account the applicant's particular social and cultural situation when assessing the good faith of the marriage, and constituted a disproportionate difference in treatment in comparison to the treatment afforded 'to other situations that must be considered equivalent in terms of the effects of good faith'.[74] The Court thus concludes to a violation of article 14 of the ECHR.[75]

The other discrimination complaint in *Munoz Diaz* directly concerns the lack of official recognition of a marriage concluded according to Roma rites. The applicant argued that the non-recognition under Spanish law of Roma rites as a form of expression of consent to marry, did not take into account the specificities of the Roma minority. Indeed, Roma marriage consists of a form of expression of consent which was deeply rooted in the culture of her community, and had existed over five hundred years in Spanish history.[76] However, the Court summarily dismissed the discrimination complaint because the official recognition of certain religious forms of expression 'is a distinction derived from religious affiliation, which is not pertinent in the case of the Roma community'.[77] The Court's reasoning could be seen as an attempt to avoid the non-discrimination analysis, and the related complex questions. The prohibition of discrimination requires a reasonable and objective justification when comparable cases are treated differently. In

[68] ibid para 54.
[69] ibid para 61.
[70] ibid para 59.
[71] ibid.
[72] ibid para 60.
[73] ibid.
[74] ibid paras 64–65.
[75] ibid para 71.
[76] ibid para 76.
[77] ibid para 80. The Court adopts a formal equality approach when focusing on the civil marriage in Spain, which is open to everyone without distinction (paras 79–80).

this framework it would be important to discuss the comparability of religious marriages and Roma marriages, and identify the 'relevant' criteria to assess comparability.

Arguably, the focus of the first discrimination complaint, the socioeconomic implications of the expression of a separate identity, 'merely' requires the state to consider Roma marriage as a marriage in good faith. Given the fact that the Spanish authorities had de facto recognised the marriage on numerous occasions in public documents, this is a reasonable demand. The second discrimination complaint, however, directly concerns the expression of a separate minority identity, way of life and related norms, and would require an assessment of state obligations to officially recognise the minority marriage concerned. In this regard the Court is clearly not at ease in acknowledging, let alone addressing, the discrimination complaint. The reason the Court dismissed the non-discrimination complaint out of hand begs the question of the comparability of religious and Roma marriages. *Munos Diaz* reveals the Court's hesitation to explicitly engage in non-discrimination analysis regarding complaints directly concerning the expression of the separate minority identity. It seems the European consensus regarding minorities' separate identity and related rights, captured in the Framework Convention for the Protection of National Minorities and noted in the *Chapman* judgment, arguably does not extend to the question of the recognition of minority marriages.[78]

### *III(2) Religious minorities, claims for accommodation and the limited support of prohibition of discrimination*

In a discussion of duties of reasonable accommodation on grounds for religion, it is useful to analyse claims for the accommodation of religious practices and norms. Measures of reasonable accommodation are meant to address barriers to participation that particular (groups of) persons are confronted with in their physical or social environment. Reasonable accommodation measures can take various forms, but they always entail some adjusting of existing policies, rules, practices, or infrastructure.[79] Ultimately, these measures are about realising equal opportunities, equal access and thus substantive equality. They are often defined in relation to employment, public services, education and social services. These accommodation duties are not absolute, but limited to what can be considered 'reasonable' in the given circumstances.[80]

Duties of reasonable accommodation were actually conceptualised in the US and Canada in order to accomodate religious diversity after a period of high immigration. Furthermore, reviews of national regulations regarding duties of reasonable accommodation reveal that when grounds are specified, they most often include religion.[81] Admittedly, the current international treaties and EU legislation only explicitly identify duties of

[78]The Court tends to leave states a broad margin of appreciation in their regulation of marriages, as long as the very essence of the right is not impaired (in casu, para 78). See also *Schalk and Kopf v Austria* (App no 30141/04) ECtHR 24 June 2010.

[79]L Waddington, 'Reasonable Accommodation: Time to Extend the Duty to Accommodate beyond Disability?' (2011) 36 NJCM Bulletin 187.

[80]C Brunelle, *Discrimination et Obligation d'accommodement raisonnable en milieu de travail syndiqé* (Les Éditions Yvon Blais, Cowansville 2001) 248–51.

[81]K Henrard, 'Duties of Reasonable Accommodation in Relation to Religion and the ECtHR: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' (2012) 5 Erasmus L Rev 64.

reasonable accommodation on grounds of disability.[82] Nevertheless, and as always in human rights law, the limits of the explicit standards can be tackled through interpretation.

Duties of reasonable accommodation can roughly be based on two grounds.

Originally, duties of reasonable accommodation were developed as a particular manifestation of the right to equal treatment. These duties are interrelated with two manifestations of the prohibition of discrimination, namely the prohibition of indirect discrimination and duties of differential treatment. Given the interrelation with the prohibition of discrimination, duties of reasonable accommodation can in principle be defined on all grounds of discrimination, including religion. Second, reasonable accommodation can also be identified as positive state obligations aimed at the effective enjoyment of particular fundamental rights, such as the right to access to education. Interestingly, duties of reasonable accommodation on grounds of religion can – in addition to ensuring equal access to education, employment etc. – also be grounded in the effective enjoyment of the freedom of religion.[83]

As late as in February 2016, the ECtHR for the first time explicitly identified duties of reasonable accommodation in terms of article 14, in a case concerning a blind person.[84] This judgment makes explicit what was implicitly present in its preceding jurisprudence in relation to persons with a handicap, albeit confined to substantive rights.[85] Strikingly, in its 'new' interpretation of article 14, the Court relies heavily on the UN Convention on the Rights of Persons with Disabilities, which obliges contracting states to adopt duties of reasonable accommodation. It is therefore highly unlikely that the Court will identify duties of reasonable accommodation on the basis of article 9 any time soon, given the Court's tendency to grant states a wide margin of appreciation in matters pertaining to the elusive notion of 'religion-state relations' and considering the lack of a European consensus on duties of reasonable accommodation on religious grounds.[86]

Regarding the *Thlimmenos* case, it was already pointed out that the identification of a duty of differential treatment in favour of a Jehovah's Witness can be explained, and put in perspective, by the specific facts of that case.[87] The requested differential treatment did not entail an exemption, nor demand considerable action and efforts from the public authorities. It merely imposed a differentiation to ensure that the Greek Law excluding certain persons from the position of chartered accountant would not be over-inclusive: someone convicted for refusing military service for religious reasons is not a person

[82]UN Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3, art 5, 3; Council Directive (EC) 2000/78 'Establishing a General Framework for Equal Treatment in Employment and Occupation' [2000] OJL 303/16, art 5.

[83]See E Bribosia, J Ringelheim and I Rorive, 'Reasonable Accommodation for Religious Minorities: A Promising Concept for European Antidiscrimination Law?' (2010) 7 Maastricht J Eur Comp L Rev, 137–161, 147–48. See also S Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 SA J Hum Rts 163.

[84]*Çam v Turkey* (App no 51500/08) ECtHR 23 February 2016. See also *Guberina v Croatia* (App no 23682/13) ECtHR 22 March 2016.

[85]*Sentges v the Netherlands* (App no 27677/02) ECtHR 8 July 2003, para 7. The Court says it grants states a wide margin of appreciation regarding the assessment of priorities in the context of the allocation of limited state resources, it actually does scrutinise the decisions made closely, having regard to the full range of relevant considerations.

[86]For an article discussing the traditional line of jurisprudence regarding the ECtHR's approach towards duties of reasonable accommodation on grounds of religion and its relation to the Court's appreciation of the level of European consensus while underscoring the need to add more nuance, see Henrard, 'How the ECHR's Concern' (n 20) 398.

[87]It is interesting to note that in *Thlimmenos* the Court, after having concluded to a violation of article 14 in combination with article 9, did not consider it necessary to also assess whether there has been a violation of article 9 taken on its own (para 53): compare with the argumentation on the avoidance of article 14 analysis above.

without moral virtue. The type of accommodation concerned can be considered levelling the playing field, and the differential treatment does not amount to the active accommodation of a separate minority identity. Furthermore, *Thlimmenos* leaves the sensitive area of religious governance untouched since it neither changes the relative visibility of various religions in the public sphere, nor interferes in any way with the national choices regarding religion-state relations. The Court has been modest in identifying duties of differential treatment on grounds of religion subsequent to *Thlimmenos*. The only additional duty of differential treatment on religious grounds the Court has recognised so far is a special investigatory duty to unveil possible religious discriminatory motives of violent offences, and this arguably strengthens the prohibition of invidious discrimination, more than the duty of differential treatment.[88]

A comprehensive analysis of the Court's jurisprudence on duties of reasonable accommodation on grounds of religion has already been conducted elsewhere.[89] In this section, I will discuss a selection of cases that are most closely related to the different practices and ways of life of religious minorities. The selection clearly demonstrates that the Court, when evaluating complaints about insufficient accommodation of separate religious identities, either avoids a separate non-discrimination analysis, or adopts a very shallow reasoning, simply dismissing allegations of (indirect) discrimination.

Most complaints about failures to accommodate religious minorities in the work environment concern sanctions for not having respected working hours in order to attend religious services and/or respect religious holidays. In so far as the complainant argued[90] that the selection of religious holidays only accommodates the majority religion, the difference in treatment is either denied[91] or simply discarded because of consensus arguments: 'in most countries only religious holidays of the majority are celebrated as public holidays.'[92] In other words, de facto indirect discrimination complaints are glossed over. The case law shows the Court's reluctance to carve out exemptions from or adapt rules so as to avoid a disproportionate impact on adherents to a particular religion.

One notable exception is the Court's reasoning which holds that it is the duty of public authorities to make reasonable efforts to provide prisoners with a meal that conforms to their religious prescripts.[93] Nevertheless, this steady line of jurisprudence (since 1976) is based on article 9, while the Court opines that there would be no cause for a separate evaluation of article 14 because the inequality of treatment had already been taken into

[88] See *Milanovic v Serbia* (Application no 44614/07) ECtHR 14 December 2010. It has already been noted that the Court was furthermore rather slow in identifying this investigatory duty for violence with a religious discriminatory intent, in comparison with the one related to possible racist intent.

[89] K Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of Baby Steps forward and Missed Opportunities' (2016) ICON forthcoming.

[90] Note that in *Kosteski* the discrimination claim was not so much about indirect discrimination – he complained that he was the only person allegedly of the Muslim faith that needed to prove his allegiance in order to benefit from the accommodation that was provided to Muslims in terms of extra days off (so that they could honour their religious holy days): *Kosteski v the former Yugoslav Republic of Macedonia* (App no 55170/00) ECtHR 13 April 2006.

[91] *Konttinen v Finland*, EComHR Decision, 3 December 1996, DR 68, para 1; *Stedman v United Kingdom*, EComHR Decision, 9 April 1997, DR 89, para 3.

[92] *X v the United Kingdom*, EComHR Decision, 12 March 1981, DR 27, para 29.

[93] See inter alia EComHR Decision, *X v UK* (App no 5947/72) 5 March 1976; *Jakóbski v Poland* (App no 18429/06) ECtHR 7 December 2010, para 59. Note that a similar case, *Vartic v Romania (no 2)* (App no 14150/08) ECtHR 17 December 2013, is only decided under article 9. The other complaints that were raised, including a violation of article 14, were summarily dismissed by the Court as manifestly ill founded (para 69). Strikingly, these cases also do not feature the savings clause regarding cases where a clear inequality of treatment is a fundamental aspect of the case.

account in the analysis and finding of a violation of article 9. However, when the Court has taken the inequality of treatment into account when evaluating the substantive right, does this not imply that inequality is a central aspect of the case? The Court's case law clearly shows unwillingness to assess the discrimination complaint.

This lack of willingness is particularly visible and problematic in cases where the Court has not found a violation of article 8, and proceeds to dismiss the article 14 complaint for essentially the same reasons as those put forward to dismiss article 9. A good example is the only case so far on ritual slaughter, namely *Cha'are Shalom ve Tsedek v France*.[94] *Tsedek* concerns a refusal to grant a dispensation for ritual slaughter to an orthodox minority stream within Judaism because the national Jewish organisation had already obtained a dispensation. The Court's conclusion (that in so far as there was a difference of treatment, it was reasonably and objectively justified), simply refers back to the reasons it had given in the analysis under the freedom to manifest one's religion.[95] Significantly, seven judges dissented, who emphasised that the glaring differential treatment between religious streams is central to the case and thus merited an explicit discrimination analysis. While this case seems to rather fit the 'invidious discrimination' dimension of the right to equal treatment, it is a particular kind of invidious discrimination, more particularly against a minority within a minority. In other words, the case illuminates the Court's unwillingness to undertake a non-discrimination analysis when a case fundamentally turns around the separate minority identity and what can be expected from governments in terms of recognition of separate minority identities.

### *III(3) Evaluation of the ECtHR's jurisprudence on duties of differential treatment regarding ethnic and religious minorities*

The preceding section has demonstrated that the ECtHR is willing to identify a need for differential treatment of persons belonging to ethnic and religious minorities – in principle at least, but first and foremost in terms of substantive articles, and not in terms of the prohibition of discrimination.[96] The Court tends to opine that the analysis in terms of the substantive rights precludes the need to also evaluate the discrimination complaint, or simply repeats a finding of non-violation for the reasons set out in terms of the substantive rights. This is unfortunate, because it treats the discrimination analysis as if it does not have any independent value or does not have a distinct legal framework, which can be differentiated

[94] *Cha'are Shalom ve Tsedek v France* (App no 27417/95) ECtHR 27 June 2010. Another line of jurisprudence that merits discussion here is the string of cases concerning prohibitions of religious dress by students in public educational institutions and the more recent case on the burqa ban in the public space in France. In these cases the Court first established that there was no violation of article 9, due to the state's broad margin of appreciation in the matter, and then summarily dismissed the article 14 claim for the same reasons. In some of these cases the Court also dismissed the article 14 complaint because the contested measure was not aimed at a particular religion, without contemplating a possible instance of indirect discrimination. The most relevant cases here are *Leyla Sahin v Turkey* (App no 44774/98) ECtHR 10 November 2005, *Aktas v France* (App no 43563/08) ECtHR 17 July 2009, *Dogru v France* (App no 27058/05) ECtHR 4 December 2008 and *SAS v France* (App no 43835/11) ECtHR 1 July 2014. See also P Lenta, 'Cultural and Religious Accommodations to School Uniform Regulations: Case Comments' (2008) 1 *Constitutional Court Review* 259.

[95] *Cha'are Shalom ve Tsedek* ECtHR, para 87.

[96] This is inter alia visible in the line of the headscarf cases discussed more fully below. Traditionally, complaints about (de facto) indirect discrimination were countered by the statement that these rules were not targeted at a particular religious conviction. In the more recent *SAS v France* judgment the Court exhibits a good understanding of what 'indirect discrimination' is about. Nevertheless, in the latter case the Court still summarily dismisses the complaint by referring back to the reasoning under articles 8 and 9.

from the substantive rights framework. Furthermore, this type of reasoning also fails to explore and clarify the potential of *Thlimmenos*' duties of differential treatment for persons belonging to minorities. In so doing, it also fails to complement (give effect to) the *Chapman* state obligations to take into account the special needs and characteristics of minorities in devising relevant legislative frameworks and reaching decisions in particular cases.

Interestingly, in a few judgments on complaints that pertain to the accommodation of the separate minority identity, the Court did explicitly engage in a non-discrimination analysis. However, these complaints were actually complaints about unjustified disadvantageous differential treatment and thus about invidious discrimination. These judgements show that the Court seems (increasingly) willing to engage in a non-discrimination analysis which balances the respective interests but only to the extent that the complaint concerns primarily the socioeconomic access-rights of the expression of that separate identity (access to a job = *Thlimmenos*; access to a survivor's pension = *Munos Dias*), and does not imply a restructuring of the public sphere or the visibility of these distinctive ways of life of ethnic and religious minorities.These cases rather confirm the heightened reluctance of the Court to address complaints that directly concern the manifestation of a separate minority identity.

## IV. Conclusion

Throughout the preceding analysis of the Court's case law, the argument has been developed that the Court's non-discrimination jurisprudence reveals a different speed of development for the the 'prohibition of invidious discrimination' track and the 'duties of differential treatment' track. The more nuanced assessment of the Court's non-discrimination jurisprudence implies that it is no longer tenable to qualify this jurisprudence as 'poor' in general. Furthermore, this assessment also counters the argument that the Court's poor jurisprudence on non discrimination is due to the fact that article 14 ECHR is merely accessory. Indeed, if this was an important factor, it would need to play out similarly for both dimensions of the right to equal treatment, quod non.

In relation to cases regarding alleged invidious discrimination, the Court tends to engage explicitly with the complaint in terms of the prohibition of discrimination, while adopting high levels of scrutiny in regard to differentiations on the basis of ethnicity and religion. Admittedly, there are ongoing flaws in the jurisprudence on the allocation of the burden of proof, and particularly the identification of a *prima facie* case of direct discrimination. Nevertheless, the Court seems to be willing to test (and develop) the boundaries, even in regards to the latter.

A markedly different picture emerges concerning duties of differential treatment in terms of the prohibition of discrimination. The analysis of the selected case law confirms that the Court avoids as much as possible non-discrimination analysis in cases on claims to official recognition of separate identities and ways of life of ethnic and religious minorities. This transpires clearly from the cases on Roma's own way of life in caravans, since the Court chooses to identify de facto duties of differential treatment in terms of article 8, not in terms of article 14 (in combination with article 8).

Similarly, a range of cases on religious minorities and their complaints about a lack of accommodation of their separate religious identity show a Court that prefers to conduct its

analysis in terms of article 9 (or 2, protocol 1 for educational matters). Subsequently, the discrimination complaint is summarily dismissed, regularly not acknowledging that this complaint has independent value. Indeed, in the few cases in which the Court concluded to a violation of article 9 (or article 2, protocol 1) in itself, the Court argues that it would no longer be necessary to also consider the article 14 complaint. Admittedly, the Court had added in some of its judgments the proviso that it would still be important to assess the non-discrimination complaint in those instances where the clear inequality of treatment would be a fundamental aspect of the case. The preceding case law has nicely demonstrated, though, that the identification of the latter criterion is a question of interpretation about which different views (can) exist, also within the Court. More problematically, in the many cases where the Court had concluded that the substantive article is not violated, the Court invokes the same reasons (referring back to the reasoning in terms of the substantive article) to conclude that the prohibition of discrimination is also not violated.

Arguably, demands for reasonable accommodation of different ethnic and religious identities are on the rise in the current era of globalisation and ever diversifying migration streams. In line with the subsidiarity principle underlying the ECHR, the Court is not supposed to impose uniform standards on all states.[97] Nevertheless, it remains important that the ECtHR actually provides guidance about the benchmarks that member states need to take into account when developing policies, legislation, and practices, in order to live up to their commitment to respect fundamental rights. Consequenlty, the Court is urged to engage more explicitly and properly in non-discrimination analysis, also in relation to complaints about a lack of differential treatment (accommodation), while identifying and weighing the respective interests. This more explicit reasoning will also enable the Court to clarify the potential (and limits) of the *Thlimmenos* rationale for minorities, their separate identity and related practices and ways of life.[98]

[97]Inter alia J Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the ECHR* (Brill, 2009).

[98]It appears appropriate to highlight that these questions of accommodation of ethnic and religious minorties are arguably closely related to discussions on legal pluralism and human rights. Put differently, the potential for cross-fertilisation between these respective frames of analysis arguably merits a closer investigation. See for example, J Gadirov, 'Freedom of Religion and Legal Pluralism' in MLP Loenen and JE Goldschmidt (eds), *Religious Pluralism and Human Rights in Europe: Where to Draw the Line*? (Intersentia, 2007) 85; P Macklem, 'Militant Democracy, Legal Pluralism, and the Paradox of Self-determination' (2006) ICON 497; H Quane, 'Legal Pluralism and International Human Rights Law: Inherently Compatible, Mutually Reinforcing or Something in Between?' (2013) OJLS 688.