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# The Enjoyment of Rights and Freedoms: a New Conception of the ‘Ambit’ under Article 14 ECHR

Aaron Baker\*

Article 14 of the European Convention on Human Rights, as applied by the UK judiciary under the Human Rights Act 1998, is in danger of becoming as ‘parasitic’ as it is often described. Judges have inappropriately narrowed the scope of the ‘ambit’ of other Convention articles, and thus limited the number of claims to which Article 14 can apply, by defining it according to considerations more properly weighed in a justification analysis incorporating proportionality. The emerging approach departs from Strasbourg jurisprudence, and fails to give full effect to the language and intent of Article 14. This trend need not continue. This article begins the process of fashioning a new conception of the ambit of Convention articles: one that could change the fortunes of Article 14 cases in the UK, but that flows naturally from the precedents of the European Court of Human Rights, and gives effect to the spirit of the HRA.

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\* Durham University School of Law. I would like to thank the Durham Human Rights Centre for nurturing this article, and Professor Hugh Collins and anonymous referees of the *Modern Law Review* for their invaluable suggestions. Any errors are of course my own.

Article 14 of the European Convention on Human Rights (ECHR), which guarantees the enjoyment of other Convention rights and freedoms without discrimination, is often unhelpfully described as being ‘parasitic’<sup>1</sup> or as having ‘no independent existence.’<sup>2</sup> Courts and commentators could describe the relationship between Article 14 and the other Convention rights with less loaded language, like ‘the primary function of Article 14, essentially, is in protecting the [non-discriminatory] distribution of the other human rights protected by the ECHR.’<sup>3</sup> The fashionable resort to more trenchant epithets suggests an impulse to scold Article 14 for its superfluity, as if to remind a poor relation of its dependence on its betters. While a need no doubt exists for courts and the legal community to remember that Article 14 provides no freestanding protection of discrimination, and to distinguish it from, for example, Protocol 12,<sup>4</sup> or the Equal Protection Clause of the 14<sup>th</sup> Amendment to the United States Constitution, overemphasising the contingent nature of Article 14 obscures its autonomous significance and contributes to an overly restrictive understanding of its scope and application. It is unfortunate that Article 14 cannot cover all discrimination by the state, especially because the gaps in its coverage are said to include the distribution of significant social

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<sup>1</sup> *Whaley v Lord Advocate* [2004] SC 78, para 93.

<sup>2</sup> *Chassagnou v France* (1999) 29 EHRR 615, para 18.

<sup>3</sup> C. McCrudden, ‘Equality and Non-Discrimination’ in D Feldman (ed) *English Public Law* (Oxford; OUP 2004), para 11.86.

<sup>4</sup> The Council of Europe has voted to add to the ECHR Protocol 12, which prohibits state discrimination without limitation to the enjoyment of other Convention rights and freedoms. It has not as yet been ratified by a sufficient number of signatory states to come into force; the UK, for instance, has not ratified it.

goods like employment<sup>5</sup> and, bizarrely, some aspects of education.<sup>6</sup> However, it does nothing for the cause of equality to bemoan the shortcomings of Article 14, and commiserate with judges who feel compelled to give unnecessarily short shrift to its protections.

This article argues for a thoroughly reworked conception of the scope of Article 14—specifically under the Human Rights Act 1998 (HRA) in the United Kingdom, but along lines that can and should be adopted in other signatory states and by the European Court of Human Rights (ECtHR) in Strasbourg. By ‘scope’ I refer to the heavily criticised circumscription of Article 14 within the area of ‘enjoyment of the rights and freedoms set forth in [the] Convention’. The Strasbourg Court employs the term ‘ambit’ to refer to this area of Article 14’s application: a shorthand for the idea that a subject of government regulation might fail to attract the direct protection of, say, Article 8 (the right to respect for private and family life), but that it could nevertheless involve the ‘enjoyment’ of the right ‘set forth’ in Article 8, and thus engage Article 14. The facts of a case must come within the ambit of another Convention right before Article 14 can apply at all. Many domestic judges appear to interpret the ambit in light of their perception of Article 14 as ‘parasitic,’ and hence conclude that Article 14 exists purely to ‘inform’ and ‘expand on’ the meaning of other rights.<sup>7</sup> This leads them to conceive of

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<sup>5</sup> S Livingstone, ‘Article 14 and the Prevention of Discrimination in the European Convention on Human Rights’ (1997) 1 EHRLR 25, 26; cf *Sidabras and Dziautas v Lithuania* [2004] ECHR 395.

<sup>6</sup> See, eg, *R (Douglas) v North Tyneside MBC* [2004] HRLR 14, para 56.

<sup>7</sup> See, eg, *Clarke v Sec’y State for Environment, Transport, and the Regions* [2001] EWHC Admin 800, para 5.

the ambit as a slightly extended version of the protective scope of the other more 'substantive' articles.

I contend that to understand the ambit courts must come to terms with what Article 14 protects, not with what other Convention articles protect. A case alleging discrimination in the enjoyment of the right to privacy set forth in Article 8 cannot be resolved through an understanding of what Article 8 guarantees by way of protection from state action alleged to invade privacy. A court must construct an understanding of what it means to suffer *discrimination in the enjoyment of* the right to privacy, which must draw from an appreciation of the difference between enjoying the right to privacy, as protected by Article 14, and being entitled to the specific protections, as against the state, provided for in Article 8. I seek in this article to begin the process of constructing that understanding.

The first section below introduces the problem of the ambit, outlining and illustrating four conceptions of the ambit, the fourth of which is my own proposed new conception. The second section lays down a foundation of principles to guide the application of Article 14. The next three sections employ these principles to critically evaluate the first three conceptions, explaining how and why they fail to give effect to the apparent aims of Article 14 and demonstrating their inconsistency with the weight of Strasbourg precedent. The article concludes by explaining and defending a proposed fourth conception of the ambit that is true to the aims of Article 14 and the HRA, and consistent with both Strasbourg learning and a UK conception of the rights set out in the Convention.

## **THE AMBIT, THE UK JUDICIARY, AND THE FOUR CONCEPTIONS**

The text of Article 14 does not provide clear instructions for a judiciary accustomed, before the HRA, to judicial review and the application anti-discrimination statutes:

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.

Nothing in the language of Article 14 unambiguously directs the focus of the judicial inquiry, leaving courts to decide several questions whose answers can radically change the outcomes of cases. What does it mean to ‘enjoy’ rights and freedoms? What is discrimination? Are we concerned with identifying state action that has the quality of being ‘discriminatory’, or are we concerned with experiences of state action that affect people as ‘discrimination’? It should not be surprising if UK judges have tended to answer such questions in ways that make Article 14 feel more like the statutory discrimination or judicial review cases more familiar to them.

Of course, domestic courts have not been called upon to answer these questions entirely without guidance. First, the ECtHR has made it clear that the area described by ‘the enjoyment of Convention rights’ is not the same as the area directly protected by other Convention articles. Strasbourg has recognised that it would render Article 14

superfluous and absurd to hold that it could only prohibit unequal treatment with regard to matters already guaranteed against state encroachment by other articles. Therefore, Article 14 has been found to prohibit, for example, the discriminatory provision of benefits related to family life, even if Article 8 would not by itself require the granting of such benefits as a matter of the core protection of the right to family life: if the state chooses to promote a Convention right beyond the requirements of the ECHR, Article 14 requires that it do so equally.<sup>8</sup> A great deal of disagreement remains as to how far the area of ‘enjoyment’ exceeds the protective scope of the other Convention articles—indeed that is what the entire ambit question is about—but there is no question that it does.

Second, Strasbourg precedent has clarified that discrimination means ‘unjustified discrimination’, which in turn means the use of a distinction that either does not pursue a legitimate aim, or does not satisfy ‘proportionality,’ in that it produces discriminatory effects disproportionate to the advancement of that aim secured by the measure.<sup>9</sup> This means that the Article 14 analysis, once engaged, involves a step in which the court may take account of issues such as whether the state intended to discriminate, or to affect Convention rights, and must determine whether these considerations can justify any

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<sup>8</sup> *Abdulaziz v United Kingdom* [1985] ECHR 7, para 82; *R (Carson) v Secretary for Work and Pensions* [2003] EWCA Civ 797, paras 36-41; R. Wintemute, ‘“Within the Ambit”: How Big Is the “Gap” in Article 14 European Convention on Human Rights?’ [2004] EHRLR 366, 370; A. Pedain, ‘The Human Rights Dimension of the *Diane Pretty* Case’ (2003) 62 CLJ 181, 195-198; S. Grosz, J. Beatson, and P. Duffy, *Human Rights: The 1998 Act and the European Convention* (London: Sweet & Maxwell, 2000), para 5-23.

<sup>9</sup> *Belgian Linguistics* (1968) 1 EHRR 252, 283; see also *A and Ors v Home Secretary* [2004] UKHL 56, para 50; *Ghaidan v Godin-Mendoza*, [2004] UKHL 30, para 133.

demonstrated burden on a claimant's equal enjoyment of Convention rights. The courts need not, therefore, constrict the ambit in order to screen out cases where the state acted 'innocently', and to do so short-circuits an important step in the discrimination analysis.

Finally, section 6 HRA makes it 'unlawful for a [court] to act in a way which is incompatible with a Convention right,' without express authority from Parliament; section 3(1) goes further to require judges '[s]o far as it is possible to do so' to read and 'give effect' to legislation in a way compatible with Convention rights. This tells the UK courts, in essence, that HRA cases must turn on whether state action has the effect of burdening the right protected by Article 14, not on whether the state intended or contemplated an effect on that or any other Convention right.<sup>10</sup> This provides another reason not to define the ambit according to the aims of the state.

UK judges have not, unfortunately, consistently acknowledged the implications of this guidance when giving content to the ambit. They have tended instead either to focus on the judicial review-like question of the quality of the impugned state decision, or on the anti-discrimination statute-like question of whether the challenged act or measure falls within clearly identified protected areas, determinable by reference to the wording of Convention articles and the body of precedent associated with their protections. These tendencies have led most UK judges to constrict the ambit by employing one of the

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<sup>10</sup> See, eg, F. Klug, 'The Human Rights Act—A "Third Way" or "Third Wave" Bill of Rights' [2001] EHRLR 361, 370-371; M. Elliott, 'The HRA 1998 and the Standard of Substantive Review,' (2001) 60 CLJ 301, 304-308; I. Leigh, 'Taking Rights Proportionately: Judicial Review, the Human Rights Act and Strasbourg,' [2002] PL 265, 282-286; J. Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review,' [2000] PL 671, 671-676, 682; P. Craig, *Administrative Law* (London: Sweet & Maxwell, 4<sup>th</sup> ed, 1999) 546, 556-557, 561.

following conceptions of its scope: (1) defining it as the area that would be protected by Convention rights before any exceptions, justifications, or margins of appreciation are applied (their *prima facie* protective scope), (2) confining the ambit to situations where the impugned state measure or decision intentionally concerns itself with another Convention right, or (3) allowing the ambit to exist beyond the *prima facie* scope of other articles, but tethering it to that protective area, and viewing the ambit as a mere modification of the protective scope of ‘substantive’ articles.

None of these approaches gives proper effect to Article 14, for reasons that this article makes clear below. The most glaring problem with these conceptions, however, is that none of them flow from an analysis of what Article 14 says or what it appears intended to achieve. Such an analysis leads to a fourth approach, which is the one that I propose and defend in this piece: the ambit is the area in which a person can be said to be ‘enjoying’ another Convention right; the boundaries of this area must be drawn only by reference to an ordinary understanding, in the relevant society, of when a person can be said to be enjoying, for example, privacy, liberty, or free expression, and without reference to the core of those rights as protected against state encroachment by the relevant Convention articles; and the facts of a case enter into the ambit any time a state decision or measure directly or indirectly, intentionally, accidentally, or even unforeseeably has the effect of impairing the ability of an individual or group to enjoy the right in question on a basis of equality with the rest of society. It must be kept in mind that satisfying this relatively expansive test would merely allow Article 14 to apply to a given case, and would not compel a finding of discrimination or preclude a decision that the state action was justified.

The next section lays a foundation for assessing the four conceptions set out above, by teasing out the principles for interpretation and application of Article 14 that emerge from its text and from Strasbourg case law. The sections thereafter will evaluate each conception in turn.

## FOUNDATION PRINCIPLES FOR THE AMBIT

### **Article 14 seeks equality above the line of core protection**

A reading of the words of Article 14 without reference to any other article indicates that the framers of the ECHR contemplated that the states party to the Convention might, in addition to encroaching on specific guaranteed rights, arrange things in such a way that some people would have advantages in their enjoyment of rights as against other people in the same society. ‘The enjoyment of [Convention] rights . . . shall be secured without discrimination . . .’ admonishes signatory governments to guarantee that no individual or group will experience discrimination—a disadvantage in the distribution of social goods<sup>11</sup>—involving their enjoyment of the benefits of living in a society protected by the

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<sup>11</sup> See, eg, A. McColgan, *Discrimination Law: text, cases and materials* (Oxford: Hart Publishing, 2000) 20-22; H. Collins, ‘Discrimination, Equality, and Social Exclusion,’ (2003) 66 MLR 16, 21-22; R. Singh, ‘Equality: The Neglected Virtue,’ [2004] EHRLR 141, 148-149; C. Barnard and B. Hepple, ‘Substantive Equality’ (2000) 59 CLJ 562, 564-567. Cf N. Bamforth, ‘Conceptions of Anti-Discrimination Law’ (2004) 24 OJLS 693,703-715, arguing, *inter alia*, that disadvantage cannot justify anti-discrimination regulation.

ECHR. ‘Discrimination’ has been defined, in international instruments, to include a ‘distinction, exclusion, or preference . . . which nullifies or impairs equality of opportunity or treatment.’<sup>12</sup> Read in this light, questions of the engagement of Article 14 should turn on whether the extent to which an individual can enjoy a Convention right on a basis of equality with the rest of society has been impaired, inadvertently or otherwise, by a government measure or decision.<sup>13</sup>

This formulation of course begs the question of what it means to ‘enjoy’ a Convention right. Article 14 facially furnishes no support for limiting the scope of ‘the enjoyment of the right set out in Article A’ by reference to the extent of protection afforded by Article A. Indeed, the very fact that we draw a line representing the limit of protection afforded by a given article suggests that there is an area below that line where we are not enjoying the right in question, and it is therefore ‘violated’, and an area above the line where it is not violated and we can be said to be ‘enjoying’ it. Thus the outer boundary of the area of enjoyment of Convention rights has no necessary relationship with the ‘protective scope’ boundary.

The temptation to tie the ambit to the areas protected by other Convention articles comes in part from the facile assumption that the only effects of the ECHR and the HRA on the enjoyment of rights must flow from the line-drawing exercise in which the courts engage. The fact that the UK honours the rights set out in the Convention means that concerns about, say, family life, freedom of expression, or liberty are taken into account

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<sup>12</sup> See, eg, the International Labour Organisation’s anti-discrimination provision, Convention 111 (stripped of labour-specific language).

<sup>13</sup> This refers only to what Robert Wintemute calls the ‘opportunity’ route into Article 14, as opposed to the ‘ground’ route. Wintemute, n 8 above, 370-371.

in the development of policy, in the enactment of legislation, in the state's executive decisions, and through 'mainstreaming' ECHR rights into public debate.<sup>14</sup> It is only when the courts get involved—when the other effects of respect for Convention rights fail to prevent the state from appearing to encroach too far into the area of, for example, privacy—that a line must be drawn representing the protected core of the right of privacy. When a court draws this line, and in so doing identifies the *prima facie* scope of protection afforded by Article 8(1), it is identifying only one part of the substance and meaning of the privacy right set out in the Convention. In other words, the *prima facie* coverage of Article 8 does not define the domestic conception of the right to privacy. Instead, it describes the area of privacy into which the state may not venture without being called upon, under the ECHR, to justify its actions. This is a singular inquiry which, because it is necessitated by a claim that the state has gone too far, must define the core of the right by reference to *the kinds of activities that should be secure from government intrusion*.

The courts must appreciate that this conception of privacy is fit only for the purpose that gave rise to it, and not for other purposes. If the government enacts a data protection measure that Article 8(1) could not require it to enact, we nevertheless see it as demonstrating respect for the 'right to privacy.' In basking in the secure feeling fostered by the measure I am enjoying my right to privacy even though the *prima facie* protections of Article 8 would not forbid its retraction. Thus there are at least two conceptions of

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<sup>14</sup> See generally Klug, n 10 above; J. Hiebert, 'Parliamentary Bills of Rights: an Alternative Model?' (2006) 69 MLR 7.

privacy—the ordinary one and the adjudicative, protective one—both of which have a legitimate place in the ECHR and HRA schemes.

Although privacy offers a particularly strong example of this point, it holds true for other Convention rights as well. In *Belgian Linguistics*, the first articulation of Strasbourg Article 14 jurisprudence, the Court cited, as examples of how the ambit extends beyond the protective scope of other articles, (1) a situation where the state offered an educational establishment not required by Article 2 of Protocol 1 of the Convention, yet Article 14 would prohibit discriminatory entrance exams and (2) a reference to the fact that Article 6 does not require appellate courts, but Article 14 would forbid the state to ‘debar’ some groups from appellate courts but not others.<sup>15</sup> Clearly, then, one enjoys the ordinary right to education in one’s own society under Article 2 Protocol 1 when one seeks an equal opportunity to enter an establishment that would not be viewed as a part of the ECHR protected core of education. Similarly, we can understand an ordinary right to a fair trial in the UK involving equal access to an appeal, despite the fact that the protected core of the right to a fair trial does not extend that far. More recently Lord Justice Laws was required by Strasbourg precedent to accept the, for him, distasteful notion that Article 14 together with Article 1 of Protocol 1 could apply to the distribution of existing pension benefits despite the fact that Article 1 could not require the state to provide the pension in the first place, as part of the core of the right to possessions.<sup>16</sup>

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<sup>15</sup> (1968) 1 EHRR 252, para 9.

<sup>16</sup> *Carson* (CA) [2003] EWCA Civ 797, paras 32-40.

Each of the foregoing examples could be explained, as some UK judges have sought to, as supporting the second conception of the ambit set out in the last section: a rule that courts should confine the ambit to areas where the state has intentionally sought to regulate in support of the right in question. Thus in *R (Erskine) v Lambeth London Borough Council* the court relied on the fact that the state sought to regulate health and safety, not home life, to preclude the engagement of Article 14 coupled with Article 8, despite evidence of an unintended impact on home life.<sup>17</sup> As I argue more fully below, such a rule flies in the face of Strasbourg teaching from such cases as *Thlimmenos v Greece*<sup>18</sup> and *Sidabras and Dziautas v Lithuania*,<sup>19</sup> and naively puts the state in possession of the perfect means of avoiding Article 14 scrutiny: disclaiming any intention to regulate ECHR rights. The fact that courts find the ambit to exist where the state supports Convention rights beyond the direct requirements of the relevant articles, regardless of whether they view this as necessary or merely sufficient to establish the ambit, demonstrates that they conceive of an area, beyond the protective core of ECHR rights, in which regulation can be said to promote the rights in ‘set out in’ the Convention.

Whether they articulate it or not, many judges clearly assume that beyond the boundary of the protective core of a Convention right lies an unprotected area nevertheless linked to the right. For example, in *Karlheinz Schmidt v Germany* the ECtHR carefully observed that paragraph 3 of Article 4 operated not to ‘limit’ the right

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<sup>17</sup> [2003] EWHC Admin 2479, para 34; see also *R (Morris) v Westminster CC* [2004] EWHC 2191, paras 10-15.

<sup>18</sup> [2000] ECHR 162.

<sup>19</sup> [2004] ECHR 395.

against forced labour, but to ‘delimit’ it, or describe the content of the right.<sup>20</sup> Having thus explained that paragraph 3 was not an ‘exception,’ but instead had the effect of excluding ‘normal civic obligations’ from the definition of the right protected by Article 4, it found that men-only compulsory fire service was a normal civic obligation and hence, by definition, not forced labour within the meaning of Article 4.<sup>21</sup> Despite this clear exclusion of the protections of Article 4, the Court held that the challenged measure, a compensatory payment in lieu of service imposed only on men, came within the ambit of Article 4 for Article 14 purposes. There could be no argument in *Karlheinz* that the state sought to regulate to ‘promote’ the right to unforced labour, or even to regulate Article 4 compulsory labour at all. The state simply decided to extract a normal civic obligation, outside the protective scope of Article 4, from men but not women and, when the need for the actual labour diminished, levied a compensatory fee on those who did not care to serve, to assure fairness among men. The Strasbourg judges, however, took the natural view that there is an ordinary idea of ‘compulsory labour,’ and as a compulsory levy in lieu of civic service clearly implicated this ordinary idea, the protections of article 14 should apply.

Other cases discussed in this article illustrate the point further. The dissent of Lord Justice Neuberger in *Home Secretary v Hindawi*<sup>22</sup> and the unanimous decision in *R (Clift) v Home Secretary*,<sup>23</sup> which receive greater attention in subsequent sections, exemplify judicial recognition of an ordinary understanding of liberty that exists beyond

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<sup>20</sup> (1994) 18 EHRR 513, para 22.

<sup>21</sup> (1994) 18 EHRR 513, para 23.

<sup>22</sup> [2004] EWCA Civ 1309, paras 57-83 (Neuberger, LJ).

<sup>23</sup> [2004] EWCA Civ 514, paras 14-18.

the protective scope of Article 5. *Thlimmenos v Greece*, also elaborated on below, illustrates an ordinary understanding of the right to freedom of religion only tenuously connected to the direct protections of Article 9. Although an article-by-article proof of the existence of the dichotomy exceeds the scope of this piece, the foregoing examples should suffice to demonstrate that judges understand that the conception of a right developed as a core defence against interference by the state is more constricted than the ordinary conception of that right. If an ordinary understanding of Convention rights exists outside the protective scope of Convention articles, then surely the ‘enjoyment’ of rights set out in the Convention must refer to activities within this ordinary understanding.

Article 14 cannot have been intended to allow the state to introduce measures that create inequalities in the area of ordinary privacy, freedom of religion, or liberty, simply because the protective core of Articles 8, 9, or 5 would not, theoretically, prevent the state from eliminating that area altogether in a non-discriminatory way. The protective conception is merely the core of the ordinary conception: the part any state must always justify invading. Therefore, there is no reason to define the ambit of a Convention right by reference, in any way, to the protective scope of the relevant article, because the latter is, in fact, a subset of the former, tightly circumscribed for reasons relating to the prerogatives of the state. The protective scope is derivative of the area of enjoyment of rights—not the other way around—so protective scope logic with its focus on state prerogatives has no place whatsoever in defining the contours of the ambit.

## **Justification is the place for state prerogatives and ‘protective scope’ logic**

If it seems that the aims of the state should, in some way, influence the application of Article 14, this is not the business of the ambit. Strasbourg jurisprudence has provided an analytical step, justification, where the prerogatives of the state can weigh in the analysis, but only proportionally. The ECtHR, in *Belgian Linguistics*, read the word ‘discrimination’ in the article to mean ‘unjustified discrimination’.<sup>24</sup> This interpretation means that a state distinction that affects the equal enjoyment of Convention rights is unlawful discrimination unless justified.<sup>25</sup> To justify *prima facie* discrimination the state must demonstrate that its measure does not produce discriminatory effects disproportionate to the advancement of government interests secured by the measure.<sup>26</sup> Every regulatory distinction that comes within the ambit must satisfy proportionality:

A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim; Article 14 is likewise violated when it is

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<sup>24</sup> (1968) 1 EHRR 252, 283-284.

<sup>25</sup> *Thlimmenos* [2000] ECHR 162, paras 39-49; *Gaygusuz* (1997) 23 EHRR 364, paras 36-42; D. Feldman, *Civil Liberties and Human Rights in England and Wales* (Oxford: OUP, 2<sup>nd</sup> ed, 2002) 144; Livingstone, n 5 above, 32-33; Grosz, Beatson and Duffy, n 8 above, paras C14-20-C14-23.

<sup>26</sup> *A and Ors* [2004] UKHL 56, para 50; *Ghaidan*, [2004] UKHL 30, para 133.

clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized.<sup>27</sup>

Here, then, is the natural analytical step by which courts can redeem government actions which, although they appear to leave an individual or group with a diminished enjoyment of a Convention right, do not pursue or perpetuate invidious bias, or have minimal impacts compared with the benefits achieved.

There is no reason to fear letting the disposition of most Article 14 cases turn on whether the state can justify its measure in light of the requirements of proportionality. Proportionality justification is a fundamental part of how Article 14 identifies what is and is not ‘unlawful discrimination.’ The fact that the state has used a distinction—has ‘discriminated’ in the generic sense—that burdens the equal enjoyment of a Convention right does not mean that any human right has been invaded at all. It is only where the unequal burden fails to satisfy a proportionality review that we say Article 14 discrimination has occurred.<sup>28</sup> Thus it is neither necessary nor appropriate to use a narrowed ambit to save the state’s blushes.

Moreover, the HRA appears to encourage the UK judiciary to analyse ECHR claims in a way that emphasizes the effects of measures on individuals, rather than the aims of those measures. It is well acknowledged that one of the purposes of the HRA is to call to account state actors for any impairment of Convention rights, intentional or

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<sup>27</sup> (1968) 1 EHRR 252, 283-284.

<sup>28</sup> Elliott, n 10, 330-331.

otherwise.<sup>29</sup> Section 6 HRA makes it unlawful for the courts to make decisions inconsistent with Convention rights except on clear Parliamentary authority, in which case the court is to issue a ‘declaration of incompatibility’ under section 4. Thus the courts have explicit responsibility for the life a decision or measure takes on after it has been made, which can only be understood through examining its impact.<sup>30</sup> Section 3(1) HRA requires UK courts to read domestic statutes consistently with Convention rights even where to do so might change the ‘natural meaning’ of the words used by Parliament.<sup>31</sup> In other words, the HRA intends not only that laws or decisions comply with human rights at the time of their birth, as it were, but that the end result of their interaction with the outside world—with other state institutions, with executive discretion, with the actual lives of individual people, and with the courts—does not ultimately violate human rights.<sup>32</sup> This means that where the analysis of an alleged violation of ECHR rights calls for a *prima facie* finding followed by a justification, as in Article 14 and Articles 8 to 11, then the *prima facie* analysis must exclude considerations that would tend to direct the focus to what the state meant to do, or to foreseeable effects

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<sup>29</sup> See, eg, Klug, n 10 above, 370-371; Elliott, n 10 above, 304-308; Leigh, n 10 above, 282-286; Jowell, n 10 above, 671-676, 682; Craig, n 10 above, 546, 556-557, 561.

<sup>30</sup> *Ghaidan* [2004] UKHL 30, para 22 (‘the compatibility of legislation with the Convention rights falls to be assessed when the issue arises for determination, not as at the date when the legislation was enacted or came into force’).

<sup>31</sup> A. Kavanagh, ‘The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998’ (2004) 24 OJLS 259, 274-277.

<sup>32</sup> Leigh, n 10 above, 287; Craig, n 10 above.

of an impugned measure. The *prima facie* analysis, including the ambit question, can only serve the aims of the HRA by focusing on the effects of regulation on claimants.

The ECtHR illustrated how to maintain this focus in *Thlimmenos v Greece*, where it found that a provision forbidding a person with a serious criminal conviction from receiving an appointment as a chartered accountant, violated the applicant's Article 14 rights by failing to distinguish between convictions based on the exercise of religious freedom and other convictions.<sup>33</sup> The claimant had earlier received a criminal conviction for refusing to serve in the armed forces because of his beliefs as a Jehovah's Witness. The Court in *Thlimmenos* approached the analysis from a direction markedly different from the run of UK decisions. Although the claimant alleged violations of Article 9 alone and of Article 14 taken together with Article 9, a situation in which a domestic court almost invariably would have analysed the Article 9 claim first,<sup>34</sup> the ECtHR addressed Article 14 first (as indeed it did in *Sidabras*).<sup>35</sup> It did so in a way that treated Article 9 as the 'informing' article, exploring the nature and intended effects of Article 14 before any mention of the scope of Article 9.

The Court noted, uncontroversially, that 'it suffices that the facts of the case fall within the ambit of another substantive provision of the Convention or its Protocols.' The choice of which facts must be found to have entered the ambit can determine the outcome of a case. If 'the facts' are the aims of the state in implementing the challenged measure, as could be appropriate in examining whether a measure invades the core of rights

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<sup>33</sup> *Thlimmenos* [2000] ECHR 162, paras 42-44.

<sup>34</sup> See, eg, *R (Pretty) v DPP* [2002] AC 800.

<sup>35</sup> *Thlimmenos* [2000] ECHR 162, paras 33-53.

protected against state action by Article 9, the Court might have found that the state's neutral intention to prevent criminals from securing sensitive accounting positions failed to encroach on the area of Article 9's engagement. Instead, the Court identified 'the facts' by reference to Article 14, not Article 9, which meant that it focused on the relative disadvantage suffered by the claimant.<sup>36</sup> The Court thus concluded that 'the facts' that must come within the ambit consisted of what happened to the claimant, specifically 'his being treated as a person convicted of a serious crime for the purposes of appointment to a chartered accountant's post despite the fact that the offence for which he had been convicted was prompted by his religious beliefs.'<sup>37</sup> Viewing the question in this way, the Strasbourg judges had no trouble finding that a person seeking an accounting position, despite having criminally unpopular religious views about military service, was trying thereby to 'enjoy' his right to freedom of religion, and that the challenged measure thus burdened that enjoyment as compared to those without such views.

Two clear principles emerge from this example: (1) the facts that must enter the ambit to engage Article 14 are the experiences of claimants, to the extent those experiences demonstrate an unequal governmental impact on claimants' enjoyment of Convention rights; and (2) it is neither necessary nor appropriate to tie the boundaries of the ambit—the area those facts must enter—to the protective boundaries of the substantive right invoked along with Article 14. The Court in *Thlimmenos* viewed the ambit question as turning on whether the state measure produced unequal effects within the area of 'enjoyment of the rights and freedoms of [the] Convention' which the state

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<sup>36</sup> *ibid* paras 39-42.

<sup>37</sup> *ibid* para 42.

was bound to ‘secure without discrimination.’ As a result, what would generally be referred to as ‘the ambit of Article 9’ was found to include activities not protected by Article 9 or any other article (seeking, as opposed to keeping, a particular job); state aims and methods not impugned by any Convention article (criminal convictions for conscientious objection, excluding criminals from professions to protect the public); and a burden connected to the practice of religion, as protected by Article 9, only in the most tenuous and indirect way, and apparently suffered only by a class of one.

What the *Thlimmenos* decision shows is that it makes no sense to talk about the ambit of Article 9 as a function of the protections afforded by Article 9. Article 9 does not require the state to guarantee, or justify the absence of, access to a particular occupation on the ground of religion; nor did it matter to the Court in *Thlimmenos* whether Article 9 requires the state to justify criminalising conscientious objection.<sup>38</sup> Similarly, the measure challenged in the case in no way encroached on any of the aspects of the practice of religion directly protected by Article 9.<sup>39</sup> How then can one derive the ambit recognised in *Thlimmenos* from Article 9? The answer provided by *Thlimmenos* is that one need not and should not try: one should derive the ambit from Article 14. According to the ECtHR in *Thlimmenos*, a person ‘enjoys’ the right set out in Article 9 without discrimination by arranging his or her life, private and public, according to his or her religious beliefs, without suffering burdens not imposed on other groups in the same society: the ordinary freedom of religion.

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<sup>38</sup> *Ahmad v UK* (1982) 4 EHRR 126; *Stedman v UK* (1997) 23 EHRR CD; *Thlimmenos* [2000] ECHR 162, paras 41, 43.

<sup>39</sup> *Ahmad* (1982) 4 EHRR 126; *Stedman* (1997) 23 EHRR CD.

A confusing aspect of the *Thlimmenos* case comes from the fact that the state imposed a differential burden on the claimant's enjoyment of his right to religion on the *ground* of his religion. In other words, religion provided both the basis for distinction and the right whose enjoyment suffered a distinct burden: the case might have been brought on the ground that only men received convictions for religious conscientious objection, and then the ground of distinction would have been gender.<sup>40</sup> In *Thlimmenos* it was the impairment of the ability to live life according to one's religious beliefs on a basis of equality with others, whether those others be of different genders, religions, or races, that engaged Article 14 according to Strasbourg.

This very open textured view of the ambit, derived without reference to the protective scope of the 'substantive' article, provides a model for the fourth, 'new' conception of the ambit, which the final section of this piece fleshes out and defends. The next three sections, however, demonstrate how the three more fashionable conceptions yield an inadequate ambit and undermine the proper application of Article 14.

## **AGAINST CONCEPTION (1): ARTICLE 14 IS NOT AN EXCEPTION TO EXCEPTIONS**

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<sup>40</sup> See Wintemute, n 8 above, 370-371, for an argument that Article 14 is engaged when the *ground* of discrimination (e.g. religion) falls within the ambit of a Convention article (e.g. Article 9), even if the activity affected does not fall within the ambit of a Convention right.

The first conception views the ambit as, for example, the area protected by Article 8(1), where a court feels that a measure would violate Article 8 but for the application of an Article 8(2) exception. The state would be permitted, on proof of justification, to penetrate that protected area, so long as it does not discriminate. Article 14 would therefore come into play only to prevent discriminatory exceptions to the *prima facie* guarantees of other Convention rights. With regard to rights without justification exceptions, Article 14 would operate only in areas where the protective requirements of the other article left some discretion to the state as to the precise content of its compliance. Thus, for example, where Article 6 would accept a variety of types of procedure as satisfying the right to a fair trial, Article 14 would require that the state's choices among those options not discriminate. This conception was articulated by Laws, LJ in *Carson*—and then rejected, as the Lord Justice was forced to acknowledge that ECtHR precedent required him to relinquish it in favour of a broader view of the ambit.<sup>41</sup> Nevertheless, many domestic judges approach the question of whether Article 14 can apply as turning on whether the other Convention article is *prima facie* 'engaged.'

The most immediate problem with this conception is that it is flatly contradicted by Strasbourg authority.<sup>42</sup> In addition, it would mean, in effect, that Article 14 only protects the individual against the discriminatory application of exceptions to Convention rights. If that had been what the framers intended, they could have put the point across much better. It seems a strained reading to derive 'the state shall only impair Convention

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<sup>41</sup> [2003] EWCA Civ 797, paras 32-40.

<sup>42</sup> See, eg, *Belgian Linguistics* (1968) 1 EHRR 252, 283; *Abdulaziz* [1985] ECHR 7, para 82; *Ghaidan* [2004] UKHL 30, para 135.

rights, in pursuit of public order, health, etc. in a non-discriminatory way’ from ‘[t]he enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination.’ In short, ‘discrimination in the enjoyment of a Convention right’ must mean more than ‘discriminatory application of an exception permitting encroachment on a Convention right.’

Antje Pedain views the ambit of Convention rights that have justification exceptions, such as Articles 8 through 11, as coextensive with their *prima facie* scope, but argues for a broader reach of that scope than the courts have recognised.<sup>43</sup> Pedain defines the *prima facie* coverage of Article 8 through the concept of ‘Hohfeldian’ liberties. Hohfeld differentiated rights and liberties according to the state of the law as it exists in a society, such that I have the ‘liberty’ to do what nobody can legally demand that I not do, and I have the ‘right’ to do what I can legally demand that others not prevent me from doing. Pedain argues that (I am paraphrasing broadly here) a Convention right like Article 8 enshrines all existing Hohfeldian liberties—things I am free to do because the law has not removed the liberty to do them—that come within the ordinary meaning of the right to privacy, family life, and so forth. Thus if I enjoy the Hohfeldian liberty to choose to watch particular television programmes at home with my son, and that liberty is part of the ordinary understanding of my privacy and my family life, then it would attract *prima facie* protection of Article 8.<sup>44</sup> In this conception, Article 8(2) would be the real battleground in most cases, and in the case of my son and the

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<sup>43</sup> Pedain, n 8 above, 187-192, 195-196.

<sup>44</sup> I do not claim that Pedain would agree with this example, but Pedain does contend that the *prima facie* reach of many Convention articles is drawn too narrowly and that, at least in the *Pretty* case, the House of Lords should have found Article 8 engaged, and focused its decision more on the justification exceptions.

television programmes, the state would need to make a (fairly minimal) showing of legitimate objective and proportionality to justify taking the programmes away. Were the courts to adopt this very sensitive understanding of the *prima facie* scope of Article 8 and other Convention rights, I would not object to drawing the boundaries of ‘enjoyment of the Article 8 right’ coterminously with the *prima facie* scope of that right.

There are, however, two problems with this. First, the *prima facie* scope of Article 8—as well as that of other articles—has not been drawn so sensitively by courts. For example, in (*R*) *Pretty v DPP* the House of Lords clearly saw the Article 8(1) analysis as calling upon them to distinguish, on the one hand, a core of privacy on which the state must justify placing burdens from, on the other hand, activities that people just happen to be allowed to engage in privately.<sup>45</sup> Many courts have noted that the established *prima facie* scope of Article 8 falls short of what they concede must be the more extensive ‘ambit’ of Article 8.<sup>46</sup> Thus some definition of the area of ‘enjoyment of a Convention right’ must be sought beyond the *prima facie* scope of the right in question as the courts currently interpret it.

Second, adopting the *prima facie* scope of a right as its ambit does not deal with unqualified rights or rights expressed in a negative way. For example, the idea that Article 14 could only prevent discrimination in the choices of procedures required to satisfy the protective core of Article 6 was precluded in *Belgian Linguistics*, where the ECtHR specifically referred to the example of Article 14 protecting against

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<sup>45</sup> *Pretty* [2002] AC 800, paras 17-26, 61-62, 98-101.

<sup>46</sup> *Petrovic* (2001) 33 EHRR 14, paras 26-29; *Gaygusuz v Austria* (1996) 23 EHRR 365, paras 36-41; *Malekshad v Howard de Walden Estates Ltd* [2001] EWCA Civ 761, para 54; *R (Hooper) v Secretary for Work and Pensions* [2002] EWHC 191, paras 14-26; *Ghaidan* [2004] UKHL 30, para 135.

discrimination in the provision of procedures above and beyond those required by Article 6.<sup>47</sup> Rights expressed negatively, such as the Article 2, Protocol 1 right to education, identify their *prima facie* protection according to what the state should not do (eg, deny the right to education). How can this help in understanding when a person can be said to be ‘enjoying’ that right? Article 14’s protection of the enjoyment of the right to education without discrimination should not mean that the state may discriminate through assistance, but not through obstacles.<sup>48</sup>

Despite the shortcomings of this conception, the UK House of Lords employed it in an assisted suicide case, *R (Pretty) v DPP*.<sup>49</sup> The severely disabled claimant alleged that a ban on assisted suicide resulted in violations of, among others, Article 8 alone and Article 14 together with Article 8. The Lords predictably analysed Article 8 by itself before reaching Article 14, almost certainly because it allowed them to dispose of the Article 14 claim by referring to their previous determination that the case did not ‘engage’ Article 8. It appears from the opinions of Lords Steyn, Hope, and Bingham that they concluded that if the facts did not ‘engage’ Article 8(1)—that is, the Article 8 right before the application of any of the exceptions found in Article 8(2)—then Article 14 could not apply.<sup>50</sup> Lord Hope’s discussion of why Article 8 was not *prima facie* engaged demonstrates the real danger of this approach. The claimant, who was physically

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<sup>47</sup> (1968) 1 EHRR 252, para 9.

<sup>48</sup> R. Singh, *Human Rights in the United Kingdom* (Oxford: Hart Publishing, 1999) 51-58; cf *Douglas* [2004] HRLR 14, para 56.

<sup>49</sup> [2002] AC 800.

<sup>50</sup> *Pretty* [2002] AC 800, paras 34, 35, 64, 104, and 106. These citations were first brought to my attention by Pedain, n 8 above, 196.

incapable of taking her own life—something she would be allowed to do under UK law if she were able—had argued that a prohibition on assisted suicide violated her right to privacy by effectively making it impossible for her to choose the time and process of her death, which she deemed a private choice. Lord Hope addressed this claim as follows:

The way [the claimant] chooses to pass the closing moments of her life is part of the act of living, and she has a right to ask that this too must be respected. In that respect [she] has a right to self-determination. In that sense, her private life is engaged even where in the face of a terminal illness she seeks to choose death rather than life. . . . it is an entirely different thing to imply into these words [those of article 8(1)] a positive obligation to give effect to her wish to end her own life by means of assisted suicide. I think that to do so would be to stretch the meaning of those words too far.<sup>51</sup>

By means of the foregoing argument Lord Hope concluded that Article 8 was not *prima facie* engaged, meaning that Article 8(1) did not require that the state bolster a person's privacy by helping her to commit suicide. He later relied on this conclusion—that Article 8 was not engaged—to find that the case could not therefore come within the ambit of the right to privacy for Article 14 purposes. Yet it is clear from his words that he believed that if the claimant had the physical capacity to choose suicide unassisted, she would in making that choice be enjoying her Article 8 rights. Indeed Lord Hope would say that an unassisted person, in making that choice, would *prima facie* engage

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<sup>51</sup> *Pretty* [2002] AC 800, para 100.

article 8(1), in that the state would need to invoke an Article 8(2) exception to interfere with that choice. However, he drew the limit of Article 8(1)'s protective scope such that it would forbid the state to interfere with unassisted suicide, but would not require it to allow assisted suicide.

This kind of reasoning cannot form the basis for a sound decision as to the applicability of Article 14. If, as Lord Hope said, in choosing suicide rather than slow, painful death an able-bodied person is enjoying the right to privacy, then surely a disabled person making the same choice, if allowed to do so with assistance, would also be enjoying that right. Article 14 prohibits a state measure that prevents one person from making that choice on a basis of equality with other members of society, unless the measure satisfies a justification inquiry. Article 14 is therefore clearly engaged according to Lord Hope's analysis, yet he found that it was not because he had found that Article 8 was not. Article 8(1) was not engaged because Article 8(1) alone could not require the state to help people take their own lives—at least a defensible position where no unequal treatment is involved. Yet if others are enjoying their right of privacy in choosing suicide, then the disabled would be enjoying the same right if they were allowed to make that choice. Article 14 requires that the state justify a prohibition which denies that choice to the disabled alone.<sup>52</sup>

A similar error is illustrated in *R(Marper) v Chief Constable of South Yorkshire Police*, where the court found that article 8(1) was not engaged by the taking and keeping

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<sup>52</sup> See, eg, *Thlimmenos* [2000] ECHR 162, paras 39-45 (requiring an exception, for convictions based on religion, to a prohibition on persons with serious criminal convictions receiving appointments as chartered accountants).

of DNA samples and fingerprints, because despite more privacy-protective cultural traditions in the UK than in other ECHR signatory nations, the protective scope of article 8(1) must be restricted to the ‘floor’ of protection prescribed by the Strasbourg jurisprudence.<sup>53</sup> Lord Steyn then observed, ‘If my conclusion is right that article 8(1) is not engaged, it follows that article 14 is not triggered.’ This of course meant that the court never asked whether the logic that required limiting the protective scope of Article 8(1) to a lowest common denominator ‘floor’ had any appropriate application to the question of whether selectively keeping DNA and fingerprint information unequally burdened the enjoyment of privacy as between people or groups in the UK.

The Article 8 engagement analysis does not smoothly transfer to the Article 14 analysis, because Article 8(1) asks what—assuming no inequality is present—the state could be called upon to provide to all people by way of privacy. On the other hand, Article 14 seeks to prevent discrimination with regard to, among other things, what privacy most people enjoy in a society protected by Article 8. It asks, in essence, what protections the state must provide to the few to keep their enjoyment of rights in line with that of the many, a question that cannot satisfactorily be answered by whether or not Article 8(1) alone is engaged. Ultimately, the mistake in *Pretty* and *Marper* was the Lords’ unwillingness to interpret and apply Article 14 as a guarantee in its own right, instead of as a mere exception to the exceptions built into Article 8.

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<sup>53</sup> [2004] UKHL 39, paras 27, 31, 44.

**AGAINST CONCEPTION (2): STATE AIMS SHOULD WEIGH  
ONLY PROPORTIONALLY**

The second conception essentially amounts to a requirement that the state must have intended to enter into the ambit in order to be found to have done so. This conception draws some legitimacy from the argument that, at least with regard to primary legislation, Parliament has a role in deciding the content of ECHR rights in the UK.<sup>54</sup> However, it does not follow from this that the only way Convention rights can be enjoyed outside the protective scope of Convention articles is for Parliament to exercise its prerogative to protect those rights beyond what is strictly required by the ECHR. If this were so, the state could avoid scrutiny under Article 14 simply by basing all legislation on objectives conceived and expressed in terms unconnected with human rights. Such a view would lead courts to reject, on ambit grounds, any complaint about measures directed at, for example, resource allocation or health and safety, regardless of their human rights impact.<sup>55</sup> To claim that the state can be called to account for discriminating in the enjoyment of Convention rights only when it intends its actions to affect human rights is like saying that I cannot be required to compensate the pedestrian I knocked down with my car because I did not operate my car for the purpose of interacting with pedestrians, but to get from one place to another.

Such an approach is worse than imprudent: it allows the state to cheat the Article 14 analysis. Reliance on this kind of regulatory mens rea requirement is misguided and

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<sup>54</sup> See, eg, Hiebert, n 14 above.

<sup>55</sup> See, eg, *Erskine*, [2003] EWHC Admin 2479, para 34.

problematic because (1) it uses the ambit analysis to do a job assigned to and perfectly well performed by the justification analysis and (2) this rerouting of functions allows ‘justificatory considerations’ to dispose of cases in favour of the state without satisfying the proportionality balancing required by the Strasbourg jurisprudence on Article 14. It seems obvious that if courts accept, as bearing on an ambit inquiry that does not require a proportionality balancing, considerations that are intended to bite only proportionally, they allow the state to circumvent the requirements of proportionality. A decision that the ambit of Article 8, for example, cannot encompass the use of assistance in taking one’s own life, if made on the basis that the state cannot reasonably be expected to endorse such assistance, has relied on a state aim—that of not endorsing practices allegedly inimical to public health and safety—and a state prerogative—that of being entitled not to assist people in activities with which it could be required not to interfere—in order to dispose of a claim. It has done so without assessing whether the use of a regulatory approach that makes suicide impossible for the severely disabled, but not for others, produces benefits in proportion to the burden placed thereby on the severely disabled.

Even if the court—and this is usually not the case—took proportionality into account in deciding the initial question of whether Article 8(1) could reach a ban on assisted suicide, it did not subject to a proportionality review the use of a scheme that distinguished on the basis of disability: it merely assessed whether a presumptively non-discriminatory prohibition on the use of assistance in suicide sufficiently advanced a legitimate state objective. Article 14, however, asks whether sufficient benefits flow from the choice to use a discriminatory measure—as opposed to a measure that avoids

the discriminatory impacts complained of—to justify the discriminatory effects of that choice.<sup>56</sup> Reasonable minds might differ as to whether it serves any legitimate state aim at all to, in effect, forbid a tiny, vulnerable minority from choosing a fate that is perfectly legal for the rest of UK society; but no dispute can exist as to the following fact: the House of Lords in *Pretty* never weighed the proportionality of discrimination against the disabled when it made its ruling on the Article 14 ambit of Article 8.<sup>57</sup>

The UK judiciary has nevertheless openly adopted this mens rea requirement in several cases. In *R (Douglas) v North Tyneside MBC*, for example, the court concluded that the ambit of Article 2 of Protocol 1, which guarantees that the right to education ‘shall not be denied,’ was not entered by age-restricted student loans. This conclusion relied on the observation that the restrictions were not ‘aimed’ at education, nor did they ‘necessarily’ affect the claimant’s ability to get an education.<sup>58</sup> In other words, if the state did not intend to involve itself with education rights, then any impairment experienced by the applicant could not have been in the enjoyment of his right to education.

The only support the court cited for this surreal test came from the ECtHR opinion in *Petrovic v Austria*, where the Strasbourg court, on its way to finding that discrimination against fathers in the granting of a family leave allowance engaged Article 14 with Article 8, noted that the allowance ‘intended to promote family life and

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<sup>56</sup> See, eg, *Singh*, n 11 above, 152.

<sup>57</sup> [2002] AC 800, paras 34-37, 64, 106.

<sup>58</sup> [2004] HRLR 14, paras 56, 60.

necessarily affects the way in which the latter is organised.’<sup>59</sup> However, the Court in *Petrovic* never suggested that this was the only way or even the usual way that facts might fall within the ambit of a Convention right. Other Strasbourg cases, like *Thlimmenos v Greece*, make it clear that the facts of a case can engage Article 14 even where the state, in enacting the impugned measure, had no intention of involving itself in the invoked right, and where the measure would have the effect complained of in only a handful of cases, completely by accident.<sup>60</sup> The objectives of the state and the kinds of measures it enacts are among the facts that can bring a case within the ambit of a Convention right. If the state seeks to promote a certain right, and in so doing discriminates, a court will properly recite the fact of the state’s intended engagement with the right as evidence that the activities affected by the measure are in the area of enjoyment of a Convention right, as the Court in *Petrovic* did. That in no way suggests that such an intention on the part of the state, or a direct relationship of necessity between the measure and the burden complained of, amount to ambit prerequisites.

The court in *Douglas* essentially imported, into the ambit analysis, information more suited to an inquiry into whether a discriminatory measure is ‘justified’: the state might properly defend a measure that discriminates on the basis of age in the provision of student loans on the ground that the measure pursues aims independent of education, and that negative impacts of the scheme are both rare and avoidable. It is the very existence of this justification step in the Article 14 analysis that makes it invidious to factor such

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<sup>59</sup> [2001] 33 EHRR 14, para 29. See also *Erskine* [2003] EWHC Admin 2479, para 34; *Morris* [2004] EWHC 2191, paras 10-15.

<sup>60</sup> *Thlimmenos* [2000] ECHR 162, paras 39-49.

considerations into the ambit question. For a court to exclude a case from the ambit of a Convention right using justificatory considerations not only pointlessly conflates the enjoyment of a right with unrelated government objectives, but it allows the state to make good its defense against discrimination without satisfying proportionality.

This kind of sleight-of-hand occurs in far more subtle ways than *Douglas's* outright reliance on the state's intentions. For example, in two Scottish foxhunting cases, *Whaley v Lord Advocate*<sup>61</sup> and *Adams v Scottish Ministers*<sup>62</sup> the courts concluded that a ban on foxhunting did not enter the ambit of Article 8 because foxhunting was not a private activity. However, several complainants in both cases alleged that the ban on foxhunting affected other areas of their lives dependent on foxhunting. The activities that they claimed the foxhunting ban burdened included the organisation of their home and family life, and their private choices about their lifestyle and vocations. Some of the claimants had been hunt managers their entire adult life, and thus claimed they were in situations analogous to dismissal from employment for reasons that burden a private lifestyle choice, which has received Article 14 protection.<sup>63</sup> The court in each case, however, would not look at whether the state inadvertently had affected other aspects of life with its ban. Foxhunting was the activity in question, and foxhunting was not the kind of activity protected by Article 8.

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<sup>61</sup> [2004] SC 78, paras 63-65, 93.

<sup>62</sup> [2002] SCLR 881, paras 102-103, 136.

<sup>63</sup> *Sidabras* [2004] ECHR 395, paras 42-50. For protection of employment by other ECHR articles see *Smith and Grady v United Kingdom* (2000) 29 EHRR 493, 494; *Vogt v Germany* (1996) 21 EHRR 205, 206-207.

Another example of this phenomenon appears in *X v Y*, where the judges focused on whether the reason identified by the employer for its decision to dismiss the claimant entered into the ambit, rather than on whether the claimant's burdened activity fell within the ambit.<sup>64</sup> The case involved the question of whether dismissal of an employee for receiving a police citation for engaging in a homosexual act in a public toilet was inconsistent with Article 14 taken together with Article 8. The Court of Appeal held that Article 8 could not possibly extend protection to acts in public places, so the ambit of Article 8 was not entered into by dismissal for such acts. This ignored the fact, however, that the employee would not have been cited, or dismissed, or even, probably, in a public toilet at all had he not made the private choice to engage in homosexual acts as opposed to heterosexual ones. The question for the court was whether the unfair dismissal laws—which on their own would have endorsed the employer's dismissal decision—as applied in this case imposed an unequal burden on the claimant's right to make private choices as compared to heterosexuals. The claimant's freedom to make choices as to his sexual orientation was in fact constrained by the tribunal essentially authorising his dismissal under circumstances where a heterosexual person would not be dismissed. The court did not, however, consider whether these facts entered into the ambit of Article 8. Instead, it decided that the relevant facts—the facts that must enter the ambit of Article 8 in order to engage Article 14—were the reasons of the employer for dismissing the employee.

It is clear that under the HRA, a court applying a Convention right must ask whether an individual's right has been burdened, regardless of whether the challenged measure aimed at that right per se. Banning foxhunting clearly has effects on activities

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<sup>64</sup> [2004] EWCA Civ 662, paras 52, 59.

involving the enjoyment of privacy and family life as ordinarily understood; sacking gay employees for police entanglements that would never happen to heterosexual employees clearly imposes unequal consequences on private choices. That the government or the employer did not intend to affect these activities; that these effects would not materialise for most people; that the challenged action only interfered with some but not all such activities; and that the claimants could avoid some of the negative effects of the challenged action, are all arguments that should have been directed to justification: a proper justification analysis would very likely find the foxhunting ban proportionate, and might find the dismissal proportionate. But that is not what the judges did. They held that if the challenged action aimed at something that did not engage Article 8 protection, Article 14 could not ward off ‘collateral damage’ to other protected activities.

### **AGAINST CONCEPTION (3): PROTECTIVE SCOPE LOGIC**

#### **TAINTS THE AMBIT**

The third conception is perhaps the most common. It is adopted by courts and commentators who acknowledge that Strasbourg precedent requires an ambit that extends beyond the *prima facie* reach of other articles, but who cannot avoid the fundamental mistake of the first conception—that of treating Article 14 as a gloss on other articles instead of a guarantee in its own right. Courts commonly address claims under Article 14—coupled, of course, with another non-parasitic ‘substantive’ article—by deriving the ambit of the substantive right from an antecedent interpretation of that article’s protective reach. Domestic judges typically ask first whether the challenged measure offends the

substantive article, and only if it does not do they move to consider the Article 14 claim. This method leads the courts astray because they nearly always take the thinking involved in deciding whether, for instance, Article 8 forbids the state to take a certain action, and apply that thinking to the question of whether the action affected the claimant's enjoyment of the right set out in Article 8.

I have already argued that the protective core of a Convention right is derivative of the area of its enjoyment, and that therefore the boundaries of that protective core can shed no light on where courts should draw the boundaries of the ambit. The fact that protective scope logic cannot really help identify when a person can be said to be 'enjoying' Convention rights is reason enough not to use it. However, there is an affirmative reason for working to keep protective scope thinking out of the ambit analysis: it inappropriately focuses the inquiry on the state. The process of delineating protective scope involves identifying those parts of privacy, for example, with regard to which one should expect to be free from government intrusion, or where one should not expect assistance from the state. This inquiry necessarily allows privacy to be defined—for protective purposes only—according to, for example, what the government intends to do with fingerprints it lawfully collects,<sup>65</sup> or what kind of support for autonomy the government might legitimately be expected to provide to those unable to act autonomously.<sup>66</sup> Fleshing out the ambit on this basis cannot give effect to a separate idea of enjoyment of a Convention right.

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<sup>65</sup> *Marper* [2004] UKHL 39, paras 28-31.

<sup>66</sup> *Pretty* [2002] AC 800, para 100.

For example, in *Home Secretary v Hindawi* Kennedy LJ and Sedley LJ of the Court of Appeal both, in different ways, found that Article 5's protective scope controlled the question of whether an alien prisoner's attempts to enjoy the procedures of an early release programme on a basis of equality with British nationals fell within the scope of Article 14.<sup>67</sup> Kennedy LJ linked the decision on whether the facts fell within the area of enjoyment of a Convention right to the original sentencing decision: so long as their sentences remained lawful, the prisoners had no Article 5 rights whatsoever, and therefore could not suffer discrimination in the enjoyment of any such rights. Kennedy LJ acknowledged that the ambit went beyond the area of Article 5's protection, and did not openly adopt the '*prima facie* engagement' conception, but he determined the scope of the ambit without reference to the prisoners' experience of liberty and the burdens placed on it. He concluded that because Article 5 would authorise the state, during the period of their sentences, to deprive the claimants of any liberty at all, then those crumbs of liberty the state happened to let fall to prisoners were *ex gratia* (my words), and could not constitute enjoyment of liberty in the Article 5 sense.

Sedley LJ more subtly avoided the implications of Article 14, and of the meaning of 'enjoyment of the right to liberty set out in Article 5,' by relying on the state's choice of procedural mechanisms. The prisoners complained of the discriminatory denial of parole board involvement in their release decisions. Sedley LJ concluded that because the prisoners sought what he called a mere 'Hohfeldian' right to a process, one that would not necessarily improve their chances of regaining the protections of Article 5 enjoyed by

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<sup>67</sup> [2004] EWCA Civ 1309, paras 9-22, 35-41.

non-prisoners, they could not be said to be enjoying a Convention right.<sup>68</sup> Because the procedure they craved might not bring them any closer to the fully protected liberty they would enjoy if they received early release, it was not *necessarily* linked to the area directly protected by Article 5, and fell outside the ambit. Neither Sedley LJ nor Kennedy LJ explored the possibility that there can exist a residuum of the liberty ‘set forth’ in Article 5 even where Article 5 cannot—in the performance of its function as a guarantor against state invasions of liberty—afford direct protection. A proper analysis would have (1) identified the ambit as the area of enjoyment of the right to liberty—as ‘set forth’ by Article 5, not as directly protected by it—(2) found that the distinctions at issue burdened the claimants’ equal enjoyment of what little liberty they retained—or burdened their equal enjoyment of what limited avenues to liberty remained to other persons in similar circumstances—and (3) weighed the lawfulness and extent of their existing sentences, and the limited and speculative impact on their future liberty of the procedure they sought, against the claimants in a justification analysis.

### **A NEW CONCEPTION: THE ‘ENJOYMENT’ OF CONVENTION RIGHTS**

The conception that I support in this article defines the ambit as the area in which a person is enjoying a right set out in the Convention, according to the ordinary understanding of the right in the relevant society. This formulation expresses what Buxton, LJ appeared to be getting at in *Ghaidan v Godin-Mendoza*, in the Court of

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<sup>68</sup> *ibid* paras 38-41.

Appeal, when he identified the ambit of Article 8 with ‘factual areas characteristic of those protected by Article 8.’<sup>69</sup> This view of the ambit essentially describes a society’s ‘Hofeldian liberties’ with regard to the relevant Convention right. It resembles what Antje Pedain argues should be—but has not been treated by the courts as—the *prima facie* protective scope of Convention rights like Articles 8 through 11.<sup>70</sup> According to this conception, the ambit encompasses those activities in which the state has opted to allow the majority to engage, even where it could choose not to allow the activities under the ECHR; it also includes any entitlement, benefit, privilege or other social good that the state introduces, subsidizes, or protects in an effort to promote a ‘right’ set out in the Convention. Thus if the state chooses to protect my email correspondence from interference in the interests of enhancing the privacy I enjoy, then it must do so in a non-discriminatory fashion regardless of the fact that under the protective scope of Article 8 it could not only refrain from offering the protection, but could directly invade this tenuous kind of privacy if it chose.<sup>71</sup> If the state permits and supports a state of affairs where my job or career can enable me to develop relationships and earn money to support private life, my existing job is part of my enjoyment of private life, even though Article 8 could not require the state to provide me with such a job, or prohibit it from taking my job through a non-discriminatory measure.<sup>72</sup> Such a conception is completely consistent

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<sup>69</sup> [2002] EWCA Civ 1533, para 12.

<sup>70</sup> Pedain, note 8 above, 185-187.

<sup>71</sup> See, eg, *Thlimmenos* [2000] ECHR 162, paras 43-45; *Petrovich* (1998) 33 EHRR 14, paras 26-29; *Gaygusuz* (1997) 23 EHRR 364, paras 36-41; *Belgian Linguistics* (1968) 1 EHRR 252, 283.

<sup>72</sup> *Sidabras* [2004] ECHR 395, paras 42-50.

with the often vague Strasbourg teaching on the ambit, and no ECtHR authority supports the focus on state aims or protective scope thinking so tempting to some UK judges.

This new conception has never been adopted in the precise terms I advocate, yet there are cases that exemplify its application, *Thlimmenos* being a notable example. Some elements of the judiciary, both in the UK and Strasbourg, grasp how Article 14 should work, and have made it do so, without waiting for a clear formulation to emerge. For example, the other judge on the panel in *Hindawi*, Neuberger LJ, disagreed with the majority, arguing that the very nature of liberty as a right suggested that people trying to secure their liberty must be seen as either enjoying or trying to enjoy their rights under Article 5, regardless of whether the claimants actually enjoyed any *protection, prima facie* or otherwise, from Article 5 at the time.<sup>73</sup> He relied in part on the conclusion of the unanimous Court of Appeal panel in the highly analogous case of *R (Clift) v Home Secretary* that the absence of any protective engagement of Article 5 could not preclude an Article 14 claim regarding the ordinary liberty represented by early release procedures.<sup>74</sup> Lord Justice Buxton in *Ghaidan* at the Court of Appeal went so far as to identify the ambit with ordinary factual situations ‘characteristic’ of the core of rights directly protected by Convention articles, even if their link with the core was of the ‘most tenuous’ kind.<sup>75</sup>

Several ECtHR decisions are simultaneously consistent with the new conception and inconsistent with the three conceptions more popular with UK judges. For example,

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<sup>73</sup> *Hindawi* [2004] EWCA Civ 1309, paras 57-83 (Neuberger, LJ).

<sup>74</sup> [2004] EWCA Civ 514, paras 14-18.

<sup>75</sup> [2002] EWCA Civ 1533, para 9.

in *Sidabras and Dziautas v Lithuania* the Court concluded that a ban on admission to civil service positions, imposed on the basis of former membership in the KGB, entered into the ambit of Article 8's protection of 'private life.'<sup>76</sup> There was no suggestion that the state *sought* to regulate private life, and it was well established that the *prima facie* scope of Article 8(1) alone did not protect the choice of a particular profession, and could not even require the state to offer a justification for the politically-motivated ban.

However, Article 14 changed the analysis, focusing it on the fact that the ban impaired the ability of people with a particular political background to enjoy the social benefits associated with a given career on a basis of equality with other people. The Court did not draw the ambit according to the aims of the state or the protective scope of Article 8, but according to what it means to enjoy, or suffer a burden on the enjoyment of, the ordinary right to organise one's private *and* social life as one sees fit.<sup>77</sup>

Such a broad conception of the ambit must of course avoid allowing the relationship with other Convention rights to be so tenuous that Article 14 would become indistinguishable from, for example, Protocol 12. As long as there is some principle for limiting the ambit, however, Article 14 is in no danger of obviating Protocol 12 because many activities affected by state action clearly do not have even a tenuous link to Convention rights.<sup>78</sup> Moreover, it would border on the perverse to argue that courts should not give Article 14 a robust interpretation—one consistent with its express terms—simply because it might make the legal community less desperate to bring

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<sup>76</sup> [2004] ECHR 395, paras 42-50.

<sup>77</sup> [2004] ECHR 395, para 50.

<sup>78</sup> Livingstone, n 5 above, 28.

Protocol 12 into effect. Similarly, a broad ambit, that would permit more complaints to satisfy the ambit inquiry, should not fall to a ‘floodgates’ objection because, as I argued above, the justification analysis is the appropriate mechanism for separating lawful and unlawful government distinctions. The bench and bar might find the ambit a more convenient tool for weeding out weak cases, in that they can more easily cast it as a purely legal—as opposed to factual—determination, but such a consideration cannot justify using a conception of the ambit that weeds out the strong cases along with the weak.

Any conception a court adopts for the scope of Article 14 requires deciding issues such as whether privacy encompasses the choice to die,<sup>79</sup> or whether sexual choices are private when implemented in public places.<sup>80</sup> Drawing lines is difficult, and the only conceptions that might make this job easier—requiring regulatory mens rea or identifying the ambit with the *prima facie* scope of other articles—are demonstrably wrong and distorting. There might, however, exist an approach that would keep the ambit broad, but less impressionistic. It has been suggested, for example, that the ambit ‘is not simply a case of “you will know it when you see it,” but that in fact the sort of subject matter that we are dealing with is also informed by other international instruments.’<sup>81</sup> This facially appealing idea, that the ambit of, for example, privacy can be tied to an internationally accepted set of principles about what people mean by privacy in a human rights context,

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<sup>79</sup> *Pretty* [2002] AC 800, para 100.

<sup>80</sup> *X v Y* [2004] EWCA Civ 662, para 52.

<sup>81</sup> This statement was made by a member of the bar at a seminar, put on as a part of the Durham Human Rights Centre’s project on Judicial Reasoning and the Human Rights Act, at the offices of Allen and Overy in London on 18 February 2005. A transcript of the proceedings is available from the author upon request.

unfortunately begs the question of whether Article 14 seeks to prevent discrimination only in an area defined by an international consensus on privacy or other Convention rights.

In one sense, there already exists an authoritative international consensus on privacy, relevant to the states signatory to the ECHR, represented by Article 8 and the body of precedent related to its application. As I have argued, the protective scope of Article 8 cannot flesh out the privacy ambit because it is a subset of that ambit. In every ECHR state the experience of privacy is likely to be at its most idiosyncratic above the line of Article 8's protective scope. It is here that cultural identity will find expression; it is here that one nation might more assiduously scrutinise, for example, the sexual orientation of putative adoptive parents<sup>82</sup> or the use of fingerprint or DNA records.<sup>83</sup> It is precisely in this area, where the ECtHR refuses to claim that a consensus exists, that Article 14 must prevent the enjoyment of rights from being secured more zealously for some than for others. Article 14 serves its most important function where the majority—the authors of any view of a right that would be characteristic of a particular nation—arranges things, in the area above direct protection from other Convention rights, in such a way that the greatest enjoyment of the right comes from integration, assimilation, or simple agreement with the majority.

It is difficult to imagine a set of international principles that would assist a UK court with the question of whether, for example, access to student loans for university study is part of the enjoyment of the right to education in the UK. Where the Strasbourg

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<sup>82</sup> *Frette v France* [2002] ECHR 156, paras 40-42.

<sup>83</sup> *Marper* [2004] UKHL 39, paras 25-27.

jurisprudence applying Article 2 of Protocol 1 can only tell the court that the ECHR does not require the provision of such loans, no international instruments, including the Convention, can inform the court as to whether people in the UK consider generally available student loans to be part of their enjoyment of the freedom of education. If Article 14 is to prevent the UK government from, say, systematically making the right to education easier to enjoy for people under 35 than for people 35 and over, it must apply to situations that no international consensus—for there can be none with regard to the place of university loans in the UK conception of educational freedom—can possibly illuminate. The HRA authorises and indeed encourages the UK judiciary to develop a domestic understanding of Convention rights, and nothing in Strasbourg jurisprudence prevents the UK from providing more protection under Article 14 than the ECtHR would itself require.<sup>84</sup>

It is necessary, therefore, that UK judges face up to a task that Ronald Dworkin would call Herculean: they must interpret the traditions, attitudes, and laws of their own community to arrive at an idea of what it means to enjoy a given right in UK society.<sup>85</sup> Judges must not shrink from this task in favour of shortcuts, especially those that cannot make their decisions any less impressionistic and will assure that Article 14 lives up to its parasitic reputation. They should approach the question of whether Article 14 is engaged without reference to (1) the aims, logic, or nature of the impugned state action or (2)

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<sup>84</sup> R. Masterman, 'Section 2(1) of the Human Rights Act 1998: Binding Domestic Courts to Strasbourg?' [2004] PL 725, 727; D. Bonner, H. Fenwick and S. Harris-Short, 'Judicial Approaches to the Human Rights Act' (2003) 52 ICLQ 549, 553; McCrudden, n 3 above, paras 11.86-11.109.

<sup>85</sup> See, eg, R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), 105-130; R. Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), 239-254, 379.

language, or judicial interpretations thereof, of other Convention articles, that exists to define the scope of protection under *those* articles. Hinging the application of Article 14 on such matters finds no support in the HRA, the ECHR, the Strasbourg jurisprudence, or well reasoned domestic cases. Instead, the language and logic of Article 14 call for an open textured consideration of whether the claimant's enjoyment of a Convention right or freedom on a basis of equality with other members of society has been impaired by a state measure or decision, where the court must presume that the area of enjoyment of the right in question extends well beyond the protection of the specific Convention article involved, but not beyond an ordinary understanding of the scope of that right in the relevant society.