(Conference Draft)

"A Fundamental Right to Equality of Opportunity in Europe? - Poverty as a Prohibited Ground in the Antidiscrimination Law of the European Court of Human Rights"

Dr. Amalie Frese*

2021 Law and Development Conference

Hamburg, Germany
November 2021

* Dr. Amalie Frese is affiliated with University of Copenhagen. Email: amalie.frese@jur.ku.dk

[This article is a preliminary draft. The objects of analysis are sketched rather than analysed and developed in detail and the data is still incomplete. I would like to welcome any feedback suggestions or comments.]

"While inequalities of gender, race and sexual orientation have been made visible the last forty years, other inequalities of class and income have dropped out of the registers of indignation".

(Michael Ignatieff, *The Rights Revolution* (Toronto: Anansi, 2000)

1 Introduction

For the highly influential European Court of Human Rights (ECtHR or the Court), a key driver in development of fundamental rights norms in Europe and beyond, social-economic rights generally constitute a sensitive domain where the Court is cautious to not impose obligations on states, which they did not commit to. This domain is generally under the auspices of the European Social Charter and thus The European Committee of Social Rights. Nonetheless, for example within the legal area of equal treatment socio-economic issues do present themselves to the ECtHR, due the wording of Art. 14 ECHR, which states that one must not be discriminated on the basis of ones 'social origin'.

This paper explores how and to what extent the ECtHR has developed norms of discrimination on the grounds of specifically 'social origin' in the open-ended discrimination prohibition in Article 14 ECHR. While Article 14 and the spirit of the Convention emphasizes equality as central to democracy and enjoyment of fundamental rights, social class as a prohibited discrimination ground is rarely seen as part of this equation. Hence, it is undetermined to which extent, and in which way, the Court operates with a notion of discrimination on the ground of 'social origin'.

Article 14 ECHR states that the enjoyment of rights and freedoms in the Convention must be ensured without discrimination on a number of grounds namely, sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status[1]. Article 14 ECHR, like most other antidiscrimination provisions, is a status-based provision. In other words, the provision clearly sets out a number protected characteristics or statuses, on the basis of which it is prohibited to discriminate. Among these is 'national or social origin' as it is phrased. Yet, it is not clear what the meaning of social origin is. Social origin could be another term for

[1] European Convention of Human Rights, Art. 14

ethnicity. On the other hand, the cases that concern ethnicity e.g. the Roma cases have all relied on the ground of race and ethnic origin[2]. Moreover, the Article also mentions 'association with a national minority' as a prohibited ground, which suggests that social origin denotes a distinct trait. Also, it cannot be synonymous to nationality since the wording of Article 14 literally is 'national *or* social origin', i.e. with the use of the conjunction 'or'.

As will be seen in the subsequent sections, looking to other antidiscrimination instruments for clues about the meaning of social origin, shows that it is most plausible that social origin denotes what the Canadian Human Rights Act Review Panel[3] has called 'social condition' and which is defined as a person's standing in society determined by occupation, income or educational level, or family background. In other words, social origin covers a socio-economic status. If a person is treated differently on the basis of their social-origin, it may be discrimination on the basis of their socio-economic standing i.e. differential treatment *based* of their income, their occupation or their fortune inherited from family. This also means that social origin is a different type of protected characteristic than the other protected characteristics or statuses in Article 14 ECHR in the sense that it essentially concerns economic inequalities whereas the other protected grounds, such as sex, race, colour, language, religion, political or other opinion concern inequalities of the symbolic status or valuation of people belonging to such groups vis-à-vis other groups.

Assessments by the Court of the distribution and redistribution of economic resources in the member states of the Council of Europe would reach into the social and economic policies of the member states, usually within their margin of appreciation. This is a very likely explanation for why the Court has ignored social origin as a protected ground. Nevertheless, the Court has in a significant number of cases dealt with discrimination in relation to social security, which would constitute the same very sensitive area of adjudication.

Based on these considerations, and the fact that social origin is absent from the case law of the ECtHR, I propose to look within the approach of the Court and the existing case law, which in relation to Article 14 primarily operates with a concept of formal equality. Formal equality is here understood in the sense that it has focussed on deconstructing differences and replacing it by merit whereas the adjudication of social origin as a protected characteristic would requires an approach to discrimination, which relies on a concept of substantive equality, which rather preserves differences but deconstructs hierarchies[4]. Identification by this paper of the shortcomings, but also potential of the reasoning of ECtHR in regard to how social class, poverty and economic inequality is

[2] See for example 57325/00 *DH v. Czech Republic*, European Court of Human Rights 2007
[3] Mackay, W., Kim, N., Adding Social Condition to the Canadian Human Rights Act, 2009
[4] Fredman, Sandra, Redistribution and Recognition: Reconciling Inequalities. 2 South African Journal on Human Rights 23, 214-234 (2007)

assessed in the case law provide a needed perspective on norm development and judicial paths of anti-poverty law and compatibility with the existing framework of fundamental rights norms.

I proceed as follows: in section 2 I account for the existing criteria for Article 14 applicability developed by the Court and which indicate what meaning that has been attributed to the Articles as well as reach to other international instruments for possible clarification of the meaning of social origin and thirdly I propose to perceive the ground of social origin through the lens of Amartya Sen's capability approach. In section 3 I analyse how the formal equality model manifests in the Article 14 case law, specifically in how the Court's criteria for the case falling within the ambit of the Convention, the extent to which the protected grounds in Article 14 are taken literally and how indirect and covert discrimination has been dealt with and fourthly the role of the comparator. In section 4 I propose a substantive equality model originally developed by Sandra Fredman to replace the approach of ECtHR and discuss how its four-dimensions can lay the basis for recognition of social origin discrimination under Article 14. I section 5 I draw some preliminary conclusions.

2 The meaning of social origin as a protected ground in Article 14 ECHR

There is no doctrine of discrimination of the basis of social origin in the case law of the ECtHR. This is evident both from searches in the HUDOC database, but also from existing scholarship. But this still raises the question of what we should take the explicitly mentioned ground of 'social origin' to mean in the context of Article 14 ECHR. In order to discuss the reasons for the absence of a doctrine of social origin discrimination in the case law of ECtHR, we would benefit from at least a preliminary outline of the quality of social origin discrimination. For this purpose I will in the following provide a brief account of what conditions Article 14 cases in general, how social origin figures in other legal instruments and how it may theoretically be understood.

2.1 The criteria of Article 14

The non-discrimination provision in Article 14 ECHR is characterized by some criteria some of which are developed through the case law. Firstly, Article 14 consists of a non-exhaustive list of protected grounds, which entails that since it ends with the wording 'or other status'; there is scope for the Court to consider whether other grounds than the explicitly mentioned are incompatible with Article 14.

Moreover, Article 14 is occasionally called a parasitic provision[5]. This expression describes the status, which the article has vis-à-vis the other articles in the Convention. It also stems from the formulation of Article 14, which reads that the enjoyment of the rights and freedoms in the Convention must be secured without discrimination. Hence, it is not any rights or freedoms, which are guaranteed without discrimination, but only those in the Convention. The more adequate name for this criterion is the 'ambit requirement' and entails that the discriminatory claim concerns a right guaranteed by any of the other articles in the Convention. In other words, the claim must be within the ambit of the Convention.

The status and meaning of social origin as a ground in Article 14 is affected in several ways by how the Court has approached these criteria in its adjudication.

The wording of Article 14 states that the enjoyment of rights in the Convention must be secured without discrimination on national or social origin. Hence, national or social origin appears as two distinct discrimination grounds as they are separated by the conjunction 'or'. The case law on Article 14 ECHR reveals, however, that it is only national origin, which has been used as a discrimination ground interpreted as nationality discrimination. Examples of cases are many, famous cases count *Gaygusuz v. Austria*[6], *Koua Poirrez v. France*[7] and *Andrejeva v. Latvia*[8], which also introduced the doctrine that very weighty reasons were required for discrimination on the ground of nationality to be compatible with the Convention. Common to these cases is that they solely concern discrimination on national origin.

One would maybe expect social origin discrimination to mean the way that some forms of social security fall within the scope of the Convention. While there is no right to social security under ECHR, this area has been assessed by the Court several times in relation to Article 1 of Protocol 1(P1-1) on the right to property and where social security has been perceived as forms of properties. In this line of case law payments of pensions (again for example *Andrejeva v. Latvia*), employment benefits (often exemplified by *Gaygusuz v. Austria*), disability benefits (for example *Belli and Arquier-Martinez v. Switzerland*[9]), housing benefits (*Vrountou v. Cyprus*[10]) and child benefits (*Okpisz v. Germany*[11]) have been found to constitute possessions and the Court assessed whether the applicants were discriminated in their access to these. Yet, even if these cases concern access to social security, they are considered under Article 14 as discrimination on another ground than

[5] O'Connell, Rory, *Cindarella Comes to the Ball: Art 14 and the right to non-discrimination in the ECHR,* 29 Legal Studies 2 (2009)
[6] 17371/90 *Gaygusuz v. Austria,* European Court of Human Rights 1996
[7] 40892/98 *Koua Poirrez v. France,* European Court of Human Rights 2003
[8] 55707/00 *Andrejeva v. Latvia,* European Court of Human Rights 2009
[9] 65550/13 *Belli and Arquier-Martinez v. Switzerland,* European Court of Human Rights 2018
[10] 33631/06 *Vrountou v Cyprus,* European Court of Human Rights 2015
[11] *59140/00 Okpisz v. Germany,* European Court of Human Rights 2005

social origin. They are all assessed as discrimination on the ground of nationality, on the ground of sex or other status interpreted as place of residence. Even if this amount of case law has in fact increased significantly over the last years with the consequence that social security in several instances is considered within the ambit of the Convention, this does not amount to recognition of discrimination on the ground of social origin or social status. Rather, the cases show that the Convention protects against discrimination *in the context of* social security if the applicant is treated differently on the basis of one of the protected grounds and the circumstances of the case otherwise falls within the ambit of the Convention.

Social origin could also be protected through the backdoor, so to speak, in the case law under the formulation of 'other status'. The Court has recognised that several characteristics, which are not explicitly mentioned within Article 14 falls within 'other status', such as age, sexual identity, gender identity, marital status, health and disability, immigration status and employment. Some of the cases that fall under other status could be considered as proxies for social origin or at least that they are overlapping with social status, such as disability in *Glor v Switzerland*[12] where the court stressed the need to protect and ensure full social inclusion of people with disabilities. Cases like *Weller v Hungary*[13] shows that the Court considered discrimination on the ground of parental status violated Article 14 as a father was denied a benefit which mothers were granted.

Employment status seems immediately to potentially come closest to constituting a proxy for social origin to the extent that the case law would concern discrimination on lower paid workers. However, the case law reveals exactly the opposite as they concern high social status positions like military rank in *Engel and Others v. The Netherlands*[14], obligations of practising lawyers and notaries in *Graziani-Weiss v. Austria*[15] and holding high office as a protected ground in relation to differential treatment regarding a statutory cap in pensions in *Valkov and Others v. Bulgaria*[16].

Cases concerning immigrant status could also be a proxy to social origin seen e.g. in *Bah v. the United Kingdom*[17] and *Ponomaryovi v. Bulgaria*[18] where the status as immigrant was the basis for differential treatment in relation to access to social services and education.

Hence, cases concerning other status often concern the applicants disadvantage in access to certain services and benefits, but the protected ground considered by the court is not in

[12] 13444/04 *Glor v. Switzerland*, European Court of Human Rights 2009
[13] 44399/05 *Weller v. Hungary*, European Court of Human Rights 2009

[14] 5370/72 *Engel And Others v. The Netherlands*, European Court of Human Rights 1976
[15] 31950/06 *Graziani-Weiss v. Austria*, European Court of Human Rights 2011
[16] 2033/04 *Valkov and Others v. Bulgaria*, European Court of Human Rights 2011

[17] 56328/07 *Bah v. the United Kingdom*, European Court of Human Rights 2011

[18] 5335/05 *Ponomaryovi v. Bulgaria*, European Court of Human Rights 2011

itself social origin or social status, but rather statuses like immigrant status is at best associated with also having a certain social-economic status.

2.2 Social origin in other antidiscrimination instruments

There are no examples of case law from ECHR that uses social origin as a discrimination ground as asserted above. However, ECHR is not alone in as a fundamental rights instrument guaranteeing the protection against discrimination on the ground of social origin. Social origin is also mentioned in other international legal instruments. In the UN's main human rights instruments, the International Covenant on Civil and Political Rights (ICCPR), Article 2(1) requires all state parties to ensure the rights in the Covenant without discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The prohibited grounds are almost identical to those in Article 14 ECHR, including the wording of 'national or social origin'. This guarantee is restated in Article 26 of the ICCPR, which however guarantees equality before the law and equal and effective protection before the law against discrimination on the basis of the same statuses as those in Article 2(1).

The other UN Covenant, the International Covenant of Economic, Social and Cultural Rights (ICESCR)'s Article 2(2) is identical in its guarantee of non-discrimination in the enjoyment of the rights of the Covenant on the basis of the same grounds as those stated in ICCPR Art. 2(1) including social origin.

Moreover, the European Charter of Social Rights in its Preamble also states that the rights in the Charter must be ensured without discrimination on the ground of, among other grounds, social origin.

Similarly, the Charter of Fundamental Rights of the European Union Article 21 prohibits discrimination on the basis of social origin, as opposed to other antidiscrimination provisions in EU law, which concern either race discrimination or discrimination in employment on the basis of the grounds gender, religion and belief, disability, age and sexual orientation.

Finally, also ILO's Discrimination (Employment and Occupation) Convention, 1958 (No. 111) similarly requires elimination of distinctions, exclusions or preferences on the basis of social origin, which have the effect of impairing equality of opportunity in employment.

From the preparatory works, Travail Preparatoires, of the European Convention of Human Rights and specifically on the preparatory work of Article 14, it appears that the discussion of which discrimination grounds were to be included in the Convention mostly focused on the protection of national minorities and women against discrimination. In a proposal on 29th of August 1949 for an article prohibiting discrimination in the European Convention of Human Rights by Mr. Teitgen (France) as Rapporteur for the legal committee, social origin was included. Subsequently, the discussion focused more on

whether this article should employ the phrases 'guarantee' or 'secure' the rights in the Convention. Hence, it is not apparent or even implicit from the preparatory works why the ground of social origin was included in Article 14 ECHR.

Another relevant source, which in fact reveals most about what social origin means, is

The Committee on Economic, Social and Cultural Rights General Comment No. 20 on Non-discrimination in Economic, Social and Cultural Rights. Here the Committee writes that social origin means 'a persons inherited social status' and that a person's inherited social status relates to property-status, which is real property, intellectual property as well as e.g. water sources. Moreover, it relates to birth, which is concerns descent and parentage. Finally, it says in the General Comment that it relates to economic and social situation as 'belonging to a certain economic or social group or strata within society'. In other words, social origin is according to the General Comment No. 20 an inherited status; the social origin of a person is accordingly the properties and material resources that a person has inherited through birth.

This seems however to leave out many other real life situations in which a person falls through the social security system due to a number of other reasons like accidents destroying their material fortune or family ties being broken.

Furthermore, in paragraph 35 of General Comment No. 20 the Committee writes: "*A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places*"[19]. In other words, the consequences of life in poverty or homelessness can reinforce further disadvantaged access to the benefits due to existing discrimination and stigmatization, benefits which people living in higher socio-economic strati enjoy. What is important to this context is that the Committee explicitly writes that social and economic situation relates to poverty. Hence, social origin as a discrimination ground is understood as being treated differently in a disadvantageous way based on a person's low socio-economic status. However, if social origin is about low socio-economic status, i.e. economic deprivation or in other words poverty, how can we understand this in a human rights law context?

2.3 Social origin discrimination as capability deprivation

It seems necessary to qualify the possible relation between social origin as socio-economic status and the human rights instrument of ECHR, which guarantees political and civil rights.

[19] Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) paragraph 35

I propose to regard the issue in light of the scholarship, which I am far from the first to draw into a discrimination law context, on capabilities as basis for social justice and equality as pioneered by Sen and Nussbaum[20]. The strength of the capability theory is that not only does it provide a solid theory of justice involving discussions of inequality and poverty, but it also provides us with a meaningful link between social origin understood as low socio-economic conditions and a human rights law instrument like ECHR as I will show in the following section.

Firstly, the central concept of capabilities is essentially a person's freedoms or opportunities to achieve certain valuable conditions and functions as a human being[21]. This means that capabilities according to this theory equals freedoms, i.e. peoples' real opportunities to live according to what they value. It is not the means in themselves, e.g. income, which according to the theory should be the basis of an evaluation of a relevant policy (let us say a policy that was suspected of being discriminatory on the ground of social origin), but on the freedom that people through a given policy gain to utilize their means. Hence, scarcity of economic means consequently that a person has fewer capabilities (real freedoms or opportunities) to make choices valuable to them such as a certain education, health insurance etc. The capabilities approach is thus not concerned with low income in itself and the amount of resources in themselves, but rather the result: the inadequacy of economic resources as capability depriving i.e. obstacles to the real freedom to start a family, to choose a job and career, to get support from the state etc.[22]. As such, capability-theory is focussed on the outcome, the consequences of having a low income, rather than what constitutes low income as such[23]. One of the advantages of this is that it avoids the highly complex discussion of how low an income should be to qualify as poverty because the theory is concerned with the inadequacy of resources, which hinders other possibilities of achieving capabilities[24]. It is not the low income in itself, which is problematic from the point of view of capability theory, but that low income entails inadequate capabilities to achieve other values. According to capability theory, poverty is deprivation of capability to lead a good life of value to the individual. The capability approach has reached rather far in both academic scholarship as well as development practice where the UN as a supplement to purely economic metrics of poverty and inequality has employed it[25].

Applied to a legal context, we want to know which capabilities that are necessary or fundamental in order for us to apply this to a fundamental rights context and to concretize responsibility and duties in relation to these capabilities. Here the theory suggests that

[20] Sen, Amartya, *Inequality Re-examined,* Harvard University Press 1992 pp. 107-112 and "Capability and Well-being," in Nussbaum and Sen (eds.), 1993, *The Quality of Life*, Oxford: Clarendon Press, pp. 30–53
[21] See for example Sen, Amartya, *Inequality Re-examined,* Harvard University Press 1992 pp. 39-42
[22] Importantly, freedom in this context is not market-freedom
[23] Lavrysen, Laurens, Strenthening the Protection of Human Rights of persons Living in Poverty under the ECHR, 33 Netherlands Quarterly of Human Rights 3 (2015)
[24] Sen, Amartya, *Inequality Re-examined,* Harvard University Press 1992 pp. 103-109
[25] See for example the Basic Need Programme of the World Bank

whether a legally protected human right is breached in light of the capability-approach depends on whether these are capability-rights[26]. Hence, capability rights can be translated as the basic or fundamental rights that must be secured for a person to have capabilities, i.e. real opportunities or freedoms to make valued choices about how to live one's life.

In other words, if capabilities are the real freedoms to live according to what we value, then the fundamental political and civil rights in the ECHR represent capability rights as they must be secured in order for people to be free to live social lives, i.e. to have our basic capabilities intact. The alternative is what may be termed capability deprivation. This interpretation of the rights and freedoms in the ECHR as capability rights offers a difference contrary to simply stating that they are fundamental rights in the sense that they as capability rights have an instrumental value towards guaranteeing a certain quality of life.

The notion of discrimination on the basis of social origin would translate into a capability right in the sense that comparative disadvantageous treatment on the basis of socio-economic status may amount to deprivation in the enjoyment of the political and civil rights of the Convention. In other words, it is not possible to exercise the other real freedoms, e.g. to lead a private life and a family life, one's right to property etc. if one's lower socio-economic status puts one in the back of the queue in regard to enjoyment of these rights. As such a discriminatory treatment on the ground of social origin can amount to comparative disadvantage based on socio-economic status in people's capability to enjoy their political and civil rights in the Convention or simply discrimination on social origin becomes 'comparative capability deprivation'.

This is important to emphasize how discrimination on the ground of social origin is a fundamental political and civil right that belong in the ECHR and which the Court can adjudicate without being beyond its commitment to the political and civil rights. There are also a number of other approaches to discrimination on the ground of socio-economic status or poverty, which interprets the right not to be discriminated against on such basis in light of vulnerability approaches to victims of discrimination or inter-sectionality approaches to discrimination etc.

Such translation of the meaning of discrimination on the ground of social origin requires some examples of how it may manifest. The examples of discrimination on the ground of social origin are in fact many, however, they are usually what we would call structural discrimination. It is structural discrimination in the sense that it manifests through norms, traditions and habits, which we do not necessarily contemplate or question. Moreover, the actions that result in this kind of discrimination are not necessarily suspect in themselves. Consider the following examples: in Denmark many pharmaceuticals are subsidised by the state and the persons in need of such medicines pay only 38% of the full price of the

[26] Sen, Amartya, *Inequality Re-examined,* Harvard University Press 1992 pp. 107-112

product. However, some types of medicine are not subsidised, but doctors in general practice can apply to the Danish Medicines Agency who can grant a single reimbursement for patients who they consider are in need of the medicine. Statistics from Denmark's Statistics show that the shares of persons who suffer strong pain and who get a single reimbursement correlates significantly with their income group. The high-end income group who earn between 400.000-500.000 DKK per year (equivalent of 54.000-68.000 euros) are successful in getting a single-time subsidised prescription for pain relief medicine in 41,2% of the times that individuals from this group requests such prescription whereas the lowest income group who earn between 0-100.000 DKK per year (up to 13.500 euros) are only successful in 24.3% of the requests. How can this variation be explained? One explanation could be that for a GP's to proceed with an application for a single reimbursement for the Danish Medicines Agency he or she must assessment whether the medicine in question has a special significance for the treatment of the patient which is proportionate to the price of the drug and whether other rational treatment methods in the relevant case have been found to be insufficient, not tolerated by the patient or inappropriate[27]. Hence, in the application the doctor describes the patient's needs and medical history. The extent to which the GP feels convinced about the patient's needs fulfils the criteria accounted for above depends on a conversation with the patient and ultimately the patient's persuasiveness in terms of his or her needs and the arguments in own favour. It is possible to imagine that the income groups here correlate with both argumentative forces of the patients as well as some biases held by doctors.

Other examples count the obstacles to obtaining credit or a bank loan if one is already at the lower end of the socio-economic spectrum in society. As it is required to show a good credit history for obtaining further credit, this puts those with fewer economic means at a disadvantage. Another example of how social origin discrimination manifests as a structural and covert type of differential treatment is access to higher education where children of the well educated and high-earners are over-represented.

3 Tentative explanations for the absence of case law on social-origin discrimination

It is my argument that one explanation for the absence of cases that concern discrimination on the ground of social origin, i.e. discrimination on the ground of poverty or capability deprivation, is through identifying what kind of equality, which the ECtHR operates with

[27] See the Danish Medicines Agency's criteria for Single Reimbursements: https://laegemiddelstyrelsen.dk/en/reimbursement/individual-reimbursement/single-reimbursement/

when adjudicating cases concerned with question of discrimination under Article 14 in its case law.

The conception of equality is not apparent in the antidiscrimination provisions we know including ECHR. Here the list of protected grounds only tells us who should and can be protected against discrimination in the enjoyment of rights guaranteed by the Convention. But how should the Court interpret what kind of equality that is the basis of this guarantee of rights? Is it that everyone should be equal in a material and formal sense or that everyone should have equal opportunities for reaching a certain good? Or is it rather that we should all have our dignity intact and that discrimination infringes our dignity? None of these questions are answered by the provision itself and only partly by the case law as will be seen in the following.

The simplest conception of equality is what is known as formal equality. Based on an Aristotelian formula[28] it essentially requires that likes should be treated alike, i.e. if two people are in relevantly similar situations they should be treated the same. This simple version of the principle of equality is a prevalent idea reflected in many antidiscrimination instruments especially prohibitions of direct discrimination. The principle has also raised a great deal of critique firstly for its conceptual meaning and secondly for its implications. The underlying value of a principle of formal equality appears to be equality as constancy or consistency, in other words that people should be treated the same for the sake of constancy or consistency in our treatment of people[29]. While this may appear like a sound underlying value it causes a number of problems for the use of the principle in adjudication. Firstly, when are people in relevantly similar situations and what kind of sameness in treatment is required for the principle to be fulfilled? Are men and women always in relevantly similar situations, for example in relation to pregnancy where only women can give birth? And what about workers that are in different income groups, are they in relevantly similar situations as workers? The problem with the principle of formal equality principle is that it does not rely on other external values to determine when people are in relevantly similar situations and ought to be equal when the underlying value is simply consistency. This contributes to some conceptual muddle, which leaves the principle difficult to employ practically in adjudication.

Secondly, its application can result in what is called the 'levelling-down' problem. This problem entails that where equality between two groups can be achieved by removing the privilege of one group the equality principle is as such fulfilled. This has given rise to many criticisms particularly as judgments by the US supreme court appeared to follow the logic of levelling down in the case of *Palmer v. Thompson*[30] where a city in Mississippi was required to integrate formerly race segregated swimming pools and chose instead to simply close all public swimming pools rather than desegregate. The argument was that

[28] Aristotle, *Nicomachean Ethics*, V.3. 1131a10-b15; *Politics*, III.9.1280 a8-15, III. 12. 1282b18-23
[29] Fredman, Sandra, Substantive equality revisited, 14 ICON (2016) 712-738
[30] Palmer v Thompson 403 US.217 (1971).

as everyone was treated the same after the swimming pools closed, the equality principle was adhered to. The result however is of course that it has a levelling down effect as everyone is worse off even if no groups appears to be worse off than others. This line of arguments has been held to be a reason why judges may have avoided questions based on equality and anti-discrimination and rather turned towards other issues as seen in another US Supreme Court case, *Lawrence v. Texas*[31], where the Court stroke down a prohibition in the state of Texas against sexual intercourse between two persons of the same sex. Rather than applying the Equal Protection Clause[32], which potentially could have been (mis-)used as a levelling down strategy holding that as long as sexual intercourse also was prohibited between different-sex persons the Equal Protection Clause was adhered to, the Court adjudicated the case under a right to due process light. These examples from US jurisprudence clearly show the limitations in a simple formal equality principle.

Formal equality is still predominantly the underlying principle and methodology of ECtHR when receiving and adjudicating Article 14 cases. In the following I will account for how this manifests in the Court's case law and how this functions as explanations for the absence of social origin discrimination case law.

3.1 The ambit requirement

The so-called ambit requirement, as discussed above, entails that the complaint falls within the scope of the substantive articles in the Convention. This can be an obstacle to which kind of discrimination-complaints that can be brought and adjudicated by the Court as some claims will fall outside the scope of the Convention articles. However, the ECtHR has interpreted the ambit requirement rather liberally. From an early point in the history of Article 14 case law, the Court developed this doctrine in one significant direction. In the case of *Belgian Linguistics*[33] from 1968 the Court confirmed that even if the alleged discrimination must pertain to a substantive right in one of the other Articles, it is not necessary that the substantive article is violated for Article 14 to apply. As such, Article 14 can be described with what almost seems like the contradicting terms of parasitic but autonomous.

The way in which the ambit requirement has been broadened is illustrated by cases where for example social security benefits have been considered falling within P1-1 (the right to property) in e.g. *Gaygusuz v. Austria*[34] where the ECtHR stressed the relevant benefits as based on contributions rather than taxation and thus amounting to property but also in *Lucza v. Poland*[35] where the Court found that the relevant benefit was in fact primarily based on public financing rather than contributions.

[31] Lawrence v Texas, 539 U.S. 558 (2003)
[32] Amendment 14 US Constitution
[33] 1474/62 Case "Relating to certain aspects of the laws of the use of languages in education in Belgium", European Court of Human Rights, 1968, in B. Interpretation adopted by the Court § 9.
[34] 17371/90 *Gaygusuz v. Austria*, European Court of Human Rights 1996
[35] 77782/01 Lucza v. Poland, European Court of Human Rights 2007

The willingness to interpret the meaning of the substantive articles as covering welfare benefits under property and the right to work under the right to private life (in the sense of sustaining a family life) indicates that the practice of the Court in this aspect does not conflict with the possibility of realising a social origin discrimination doctrine under ECHR.

3.2 ECtHR's adjudication of protected grounds

Article 14 lists the following protected grounds: sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. This is a non-exhaustive list of grounds due to the last mention of 'or other status'. These formulations means that as a matter of principle, any claim concerning differential treatment, regardless of the ground of discrimination, can be brought before the Court - as long as it relates to any of the substantive rights in the Convention as Article 14 states[36].

The question is of course whether the ECtHR also has followed this rationale in its case law. Has the Court used the non-exhaustive character of Article 14 to broaden the scope of the protection to also cover other groups who are not specifically mentioned in the Article, such as for example groups that are affected by poverty as being covered by the ground of social origin?

It appears that there are different trends in the Court's Article 14 case law. One of these emphasizes that Article 14 is a status-based antidiscrimination provision in the sense that it is only a personal status or characteristic that can be considered to fall within the meaning of 'or other status' in the non-exhaustive formulation of Article 14. This cluster of case law involves e.g. the case of *Magee*[37] and the case *Kjeldsen, Busk Madsen and Pedersen*[38]. In the latter case, the Court held that there was no relevantly similar situation between not being exempted from sex education in Danish State schools while it was possible to be exempted from religious instruction. In other words, religion is a status, which justifies certain treatments, while preferences for sex education of one's children, based on beliefs the parents held is not a personal characteristic and status[39].

Conversely, another cluster of cases indicate a much more open approach to the protected ground, such as the cases of *Engel*[40] and *Rasmussen*[41], which were in fact delivered very closely in time to the judgment in the case *Kjeldsen, Busk Madsen and Pedersen.* In *Engel* the Court held that differential treatment on the basis of military rank could be contrary to Article 14 (but in this case due to the specific circumstances it was not). The main take-

[36] Gerads, Janneke, *The Discrimination Grounds of Article 14 of the European Convention of Human Rights*, 13 Human Rights Law Review 1 (2013), 99-124
[37] 28135/95 *Case of Magee v United Kingdom*, European Court of Human Rights 2000
[38] 5926/72 *Case of Kjeldsen, Busk Madsen and Pedersen v Denmark*, European Court of Human Rights 1976
[39] Ibid. paragraph 56
[40] 5370/72 *Case of Engel and others v the Netherlands*, European Court of Human Rights 1976
[41] 8777/79 *Case of Rasmussen v Denmark*, European Court of Human Rights 1984

away from *Engel* was, however, that the Court explicitly confirmed the point that as a matter of principle any differential treatment can be brought under Article 14 due to the non-exhaustive formulation which ends which 'or other status'. Similar reasoning is found in *Rasmussen*, which concerned a limitation in the right of a father to institute proceedings, which did not apply to the mother according to the relevant national laws. The Court wrote explicitly that the protected grounds in Article is not exhaustive and moreover did not examine whether the father and mother were in relevantly similar situations, but relied on the fact that they were *placed* in relevantly similar situations instead.

Finally, a third cluster of cases does not consider whether there in fact is a personal characteristic as the basis of the claim of Article 14. Cases in this cluster count for example *Fredin*[42] and *Lithgow*[43], which concerned respectively a claim of arbitrary differential treatment where Swedish authorities had stopped gravel exploitation only in one incident and not others and differential treatment in the amount paid as compensation for naturalisation of interests in companies. These cases do not even discuss whether the facts of the cases concerning Article 14 were based on personal characteristics or status[44]. A number of other cases fall within this cluster.

All in all, these three clusters which the Court's methodology concerning the status-based aspect of the antidiscrimination provision in Article 14 gives an impression of a rather inconsistent case law as regards the scope of the provision. In other words, it is not clear based on this inconsistency who are really covered by Article 14 and can its scope be extended beyond the specifically mentioned statuses and if so how far.

Moreover, this fragmentation also shows that at least some of the case law relies on a principle of formal equality. The concern about personal status and characteristics reveals that the ECtHR does consider Article 14 to be protecting individuals against discrimination only if the differential treatment concerns a personal status and if the applicants are relevantly alike because this is the criteria for qualifying for equal treatment.

3.3 Indirect, covert and structural discrimination

The fourth way in which the Court has primarily operated with a formal principle of equality is in the area of indirect discrimination. Indirect discrimination can be defined as discrimination, which occurs as a side effect of actions or a piece of legislation. An helpful example is how women are indirectly discriminated against if employers' contributions to pension schemes are contingent on full-time employment as more women than men work part-time and consequently, over a working life, women will accumulate less pension savings. Indirect discrimination is therefore based on a neutral criterion and not on any

[42] 12033/86 *Fredin v Sweden* (no 1), European Court of Human Rights 1991
[43] 9405/81 *Lithgow and Others v United Kingdom*, European Court of Human Rights 1986
[44] Gerads, Janneke, *The Discrimination Grounds of Article 14 of the European Convention of Human Rights*, 13 Human Rights Law Review 1 (2013), 99-124

specific ground or legislation and not occurring through a direct causal relation, which makes it problematic to identify.

While it is generally the perception that indirect discrimination is and has been covered by Article 14, the proof of indirect discrimination has been causing some difficulties for the ECtHR it seems and the case law is not very advanced in this area[45].

The Court was rejecting to use statistical evidence of indirect discrimination for a long time, which makes it particularly difficult to examine such claims[46]. However, the case of *DH v. Czech Republic*[47] became the key point of development in terms of the ECtHR's doctrine of indirect discrimination. The case concerned the educational system in the Czech Republic where the applicants complained that there was a discriminatory disproportionately number of Roma children placed in special schools for children with special needs including mental handicaps. The applicants complained that this put them at a significant disadvantage in terms of their learning outcome. The Court here referred to the Race Directive 2000/43 of the EU and accepted, in very unambiguous terms, that it can be difficult to prove discrimination and that less strict rules should apply to evidence in cases that concern indirect discrimination[48]. Moreover, statistical evidence was according to the Court important and referred to that such information had been brought into consideration in two previous cases[49]. Importantly, the Court here defines indirect discrimination as "*a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure*"[50] and acknowledges that the burden of proof shifts once an applicant has put forward a rebuttable presumption that the effect of a law is discriminatory and subsequently it is up to the respondent state to disprove that this effect is discriminatory.

Consequently, *DH* became a turning point for the doctrine of indirect discrimination as the Court properly engaged with both a definition and the criteria with which such allegations are treated by the Court. *DH* is however mostly famous for its take on ethnicity and particularly Roma-based discrimination, but it represented a crucial step for indirect and prejudice-based discrimination where extremely strong evidence has generally been required by the applicants before.

---

[45] Besson, Samantha, *Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?*, 8 Human Rights Law Review (2008) p.663

[46] Besson, Samantha, *Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: It Takes Two to Tango in the Council of Europe*, 60 American Journal of Comparative Law 1 (2012)

see also the cases Ahmad v. United Kingdom 4 EHRR 126 (1981) and Stedman v. United Kingdom 23 EHRR CD 168

[47] 57325/00 *DH v. Czech Republic*, European Court of Human Rights 2007
[48] Ibid § 186
[49] 17209/02 *Zarb Adarmi* v. Malta ECtHR 2006 and 58641/00 *Hoogendijk v.The Netherlands* ECtHR 2005
[50] 57325/00 *DH v. Czech Republic*, European Court of Human Rights 2007 §184

Despite these advancements, which also appeared rather late in the development of Article 14 case law, it is nonetheless problematic that the approach to indirect discrimination has been so hesitant because of how indirect discrimination is tied to related types of differential treatment like structural and covert discrimination.

Structural and covert discrimination is typically also indirect and cannot necessarily be traced back to one act. Rather this type of discrimination is typically driven by biases, prejudice or traditions. Naturally, it is particularly problematic for a judicial body to hold a state liable for general inequalities that cannot be traced back to a law adopted by the state. Nonetheless, the recognition that inequalities exist which are indirect, structural and covert are extremely important for combatting social-economic inequalities, such as that of social origin based discrimination.

3.4 The problematic comparator

A discrimination claim essentially consists in an alleged difference in treatment compared to other individuals or another group. However, for a court to assess such claim it often engages in a search for a comparator, which the disadvantaged can be compared to in order to illuminate if and how they are in fact disadvantaged. What or who constitutes the comparator in a given case depends on the underlying equality model. With an underlying principle of formal equality, the guiding principle of which is that likes should be treated alike, the question arises; who are in fact alike?

A useful example that illustrates the problems tied to the comparator as criteria for assessing a discrimination claim is that of pregnancy rights. Because it is only women that can get pregnant the appropriate comparator is extremely difficult to point out. In the US discrimination related to pregnancy has been compared to treatment of sick men. This is problematic for a number of reasons, one being that pregnancy is not a sickness and thus there is not a very useful analogy there[51].

In this context, parts of scholarship have raised critiques of formal equality models for relying on a cognitive bias by employing comparators in discrimination cases that are based on the dominant norm[52]. Often this is alleged to be a white male. Essentially this argument leads to the point that there is no neutral or universal comparator but if such universal comparator is the measuring stick in discrimination cases, then a judicial body falls into the trap of comparing a person who claims to be discriminated against to what we perceive as normality, which is often the dominant culture, gender, religion and social class[53]. Referring again to the example of pregnancy rights, while men and women may

[51] This argument is further unfolded in Fredman, Sandra, *A Difference with Distinction: Pregnancy and Parenthood Reassessed*, 110 Law Quarterly Review 106 (1994)
[52] See for example Mackinnon, Catharine, *Feminism Unmodified: Discourses on Life and Law*, Harvard University Press (1987)
[53] Fredman, Sandra, Substantive equality revisited, 14 ICON (2016) p. 719

be in a comparable situations for example in relation to their work qualifications, they may on the other hand not be an entirely comparable situation in relation to how their biology situates men and women in the workplace, for example given the fact that only women can get pregnant and during pregnancy and after may need special circumstances that factors in the physical challenges of childbearing and birth. In other words, the needs of the group, which is disadvantaged, may be completely different, but according to the formal equality model's comparator focus, the treatment, which they can claim, is to be treated the same way as the cultural norm or dominant group[54]. As such, the interest of the formal equality approach is whether there is a difference in treatment without taking into account whether this is in fact reflecting the *different situations* for the people who experience the differential treatment.

This ties to the argument proposed by Sandra Fredman, namely that the underlying principle of formal equality is in fact merits[55]. According to such argument, formal equality is only concerned with peoples' qualifications whereas people's identities should be disregarded and kept out of the equality-equation. However, the argument from substantive equality, which I will return to, is on the other hand that difference and different situations matters and that it is not the difference in itself but whether the differential treatment has detrimental effects on people that should count when we assess discrimination and inequality claims.

The ECtHR does seem to operate with a rather aloof concept of comparison, which to a large extent can explain the lack of a social origin discrimination doctrine: in so far as there is no clear conceptualisation of the way in which people or people's situations should be equal, then it is also difficult to go beyond the basis on which discrimination claims are assessed, i.e. discrimination grounds, which are unambiguous to the judges.

The case of *Burden & Burden v The United Kingdom* illustrates this problem. The case from 2008 concerned two sisters who had been co-habiting for more than thirty years in a house they both owned in joint-names as well as together owning two other properties, yet, upon the death of any of the sisters they would be liable to pay inheritance tax which married couples or civil partnership couples would be exempted from despite the claim of the sisters that they in fact were in identical situations. When the ECtHR Grand Chamber assessed the alleged violation of Article 14 in conjunction with P1-1, the Court summarized its own criteria for Article 14 namely that there must be a difference in treatment of people in relevantly similar situations, but then focussed on the qualitative difference between siblings and married couples where the former's bond is of

[54] Arnardottir, Oddny, Equality and Non-discrimination Under the European Convention on Human Rights, the Hague, Kluwer (2002), p. 182
[55] Fredman, Sandra, *Substantive equality revisited*, 14 ICON (2016)

consanguinity, which excludes the possibility to enter into a marriage. Hence, in formal equality terms the sisters were indeed different from married couples, but substantively, i.e. considering their actual situation, they were indeed in an identical situation to married couples owning property together. The difference in terms of their actual situation was the law, which defines the different implications for inheritance for these situations.

This approach has been repeated in for example *Carson v. United Kingdom* in a case concerning the index linking (linking the value of the pension to inflation with possibility for increased value) of pensions for pensioners living in the UK as opposed to pensioners resident abroad. The case was brought by pensioners resident in countries with which the UK did not have reciprocal agreement on the uprating of pensions, and their argument was that they were in a relevantly similar situation to pensioners resident in the UK and in countries with a reciprocal agreement as they had been working in the UK their entire working life and paid contributions to the National Insurance Fund. The Court found that there was no relevantly similar situation between the pensioners living in the UK, in countries with a reciprocal agreement to the UK and those resident in countries without such agreement. The ECtHR based its reasoning on the argument that since there is a variety of methods of funding welfare benefits the contributions to the National Insurance Fund were not a sufficient reason to equate the position of pensioners who received uprating and those, like the applicants, who did not. Moreover, the Court emphasized that in those countries with which an agreement has been entered into, the existence of such agreement made all the difference and was there for the reason of the interest of the UK. This argument relies on formal circumstances, the legal bilateral agreements and legislation for welfare benefits, for which there indeed can be documented a difference, which can justify differential treatment on formal equality grounds, but without considering the broader circumstances of the pensioners.

Essentially, the formal equality and the narrow comparator conception presumes symmetry, in other words that persons in comparable situations should be treated exactly the same. Formal equality assumes that sameness is always the aim to achieve equality. However, Amartya Sen has also pointed out that equality may sometimes require unequal treatment as people circumstances differ and it may require different actions to level them[56].

4 Substantive equality as a path to cases on social origin discrimination

[56] Sen, Amartya, *Inequality Re-examined,* Harvard University Press 1992

It is equality in a substantive sense, which is necessary if social origin is to have a role as an effective discrimination ground in art. 14 ECHR. But what is substantive equality?

First of all, substantive equality cannot be reduced to one theory; on the contrary, there are many proposals for what it should encompass. However, there are some conceptual constants: theories of substantive equality provide an answer to the question '*equality of what*?'. Substantive equality theories can take outset in equality of opportunities, equality of outcomes, equality of dignity or worth or a combination of these. Above all, substantive equality, across all its versions, differs from formal equality by not identifying equality with sameness in treatment.

It is my argument here that through the approach of substantive equality, the ECtHR would be able to embrace a concept of social origin discrimination in its case law, and conversely, by relying too much on a formal equality model, it has not done so yet. While this does not offer any exhaustive explanation of the lack of cases on social origin discrimination, it may offer an explanation from a theoretical perspective.

In the following, I will account for what version of substantive equality that could cover social origin discrimination under ECHR and how it expands the notion of equality.

Substantive equality means shifting the focus from *who* is protected, e.g. which status groups that are protected, and to *what kind of equality* is meant to be achieved with the relevant antidiscrimination provision. In other words, it is the disadvantage, which is the focus in a substantive equality principle rather than the group characteristic in itself.

The version of substantive equality, which I propose here, has been developed by Sandra Fredman. It is a four-leg version of substantive equality as underlying antidiscrimination law, which is aimed at addressing 'real social wrongs'[57]. As mentioned above, it is the disadvantageous consequences, i.e. socio-economic disadvantage (such as underrepresentation in jobs, under-payment, limitations in property, benefits and rights and also dominance as imbalance of power structures, which is considered the aims and objectives of this substantive equality concept rather than the achievement of equality for consistency sake.

The four dimensions in Sandra Fredman's convincing proposal for a substantive equality are that equality laws, to be effective and counter real inequalities, should 1) redress disadvantage 2) counter prejudice 3) enhance participation and 4) accommodate differences.

In the following I will discuss these four dimensions and how this substantive principle of equality as a baseline for ECtHR's adjudication of socio-economic inequalities on the protected characteristic of social origin, could facilitate advancements in the case law.

[57] Fredman, Sandra, Substantive equality revisited, 14 ICON (2016) 712-738, p. 728

4.1 Disadvantage, not dissimilarity

The element of redressing disadvantage is at the core of this substantive equality principle. By redressing disadvantage is essentially meant that contrary to the formal equality model, the focus here is not on sameness in treatment and symmetry, but on what disadvantage that is suffered. It also means that the group identity element of the formal equality model where the focus in ECtHR case law has been to identify the protected ground (at least in a large part of the case law), the focus according to substantive equality is the detrimental effects, which arises for example through differential treatment sometimes based on group identity. This focus also entails that there is more work done to identify what disadvantage is. Fredman proposes together with other scholars that the focus on disadvantage opens our eyes towards its real manifestations: disadvantage is both material and it is symbolic, i.e. it is lack of means and it is lower social capital and thus power. Perceiving the type of disadvantage that can be suffered as both material as well as symbolic opens up for a much broader range of situations that can come within Article 14. The *Zarb Adarmi*-case is a helpful example where the Court acknowledged that the relevant situation where discriminatory in practice even if not in law[58]. The *Zarb Adarmi*-case is a rarity in the case law of the ECtHR though and for the adjudication of discrimination cases in general and for the possibility of recognizing social origin discrimination in the case law of the ECtHR there are a number of concrete advantages. As a start the focus on disadvantage gets us beyond the protected grounds-focus. However, even more importantly, the disadvantage-aspect removes the comparator focus because it places emphasis on disadvantage rather than on whether there is a clear analogy between the situation in the case and other relevantly similar situations. As seen from the discussion of the role of the comparator in ECtHR Article 14 case law, this is probably the most problematic aspect of the doctrine and also one of the least consistent. A change towards a more disadvantage-focussed approach would therefore be a welcome and constructive turn in the discrimination doctrine and it would open up for recognising discriminatory situations where people are disadvantaged relative to others even if their situations are not perfectly comparable.

The only problem is that by focussing on disadvantage, substantive equality can ultimately blur the distinction between discrimination and social injustice not caused by differential treatment as such.

4.2 Countering prejudice

The second aspect of the substantive equality model concerns countering prejudice and stigmatization. In this regard the main concern is that the antidiscrimination legislation or principle also covers inequalities in social recognition. The underlying theoretical assumptions here are that group identities are social constructs, which means that the lack of recognition here synonymous to prejudice, denigration, stereotyping and failure to

[58] 17209/02 *Zarb Adarmi* v. Malta ECtHR 2006 and 58641/00 *Hoogendijk v.The Netherlands* ECtHR 2005

value individuals of identity groups can lead to a socially constructed disadvantage. In other words, the social constructions, which builds group identities and the esteem of such can also through negatively loaded attitudes and practices lead to the deconstruction of the same groups. Low social status is problematic in itself, but in this perspective it is also instrumental for potentially reproducing further disadvantage as lower status if groups are subject to prejudiced practices.

A substantive equality model as underlying Article 14 is therefore important for the potential of the adjudication to counter indirect, covert and structural discrimination, the manifestation of which are often not legal acts, but perceptions underlying certain practices. Examples of the Court's approximation of countering prejudice is seen in the case of *DH v. Czech Republic* as representative for the Court's work with racial and ethnicity based discrimination. Another useful example of how important this aspect of an equality model is comes from the US Supreme Court and the landmark case of *Brown v. Board of Education* where the decisive reasoning was that segregation of children in public schools on the basis of race led to inferiority both in the eyes of other groups and in their own eyes[59].

For social origin discrimination this aspect of an equality model is crucial since many doors are closed to people of lower socio-economic status, not in law, but in practice. The examples provided in section 2 above illustrate how such structural disadvantage suffered by people of fewer means, for example in access to health and medicine and to quality housing, exist in welfare societies, but are very complex as objects of judicial process under a traditional equality model where a single liable action or act are presumed.

4.3 Enhancement of participation

The third aspect of the substantive equality model is enhancement of participation. As past discrimination has hindered participation and influence in political life and decision-making, the enhancement of political participation has, according to Fredman, a role of compensation for past injustices[60]. Additionally I argue that enhancing participation simultaneously has a restorative and preventive function in the sense that those that write the laws are in a position to protect their own. Hence, for the sake of equally shared influence a substantive equality model must involve enhancement of participation in political decision-making. Equality here is important for the sake of diversity, not consistency as in the formal equality model. For an anti-discrimination instrument to strengthen participation is necessary because lacking in political power means vulnerability to having ones' interests and values discounted.

For social origin discrimination under Article 14 the importance of enhancement of participation is straightforward: by the awareness of this aspect of equality generally, the Court will be sensitive to how the political elite is also formed by the socio-economic elite

[59] *Brown v. Board of Education*, 347 U.S. 428 (1954)
[60] Fredman, Sandra, Substantive equality revisited, 14 ICON (2016) 712-738, p. 731

and the imbalances this creates in the law-making process. This should not necessarily be understood as a determined effort to push the least well off into political office, but rather to show attention to the fact that laws and norms are developed by those who are in power and law-making and decision-making therefore risks having blind-spots in regard to the interests, values and what constitutes real opportunities for people at the other end of the socio-economic spectrum.

4.4 Accommodating difference

The fourth leg of the substantive equality model requires accommodation of difference rather than removing difference. As the first leg focussed on redressing disadvantage as the negative effects of differential treatment rather than on sameness of groups, the fourth leg also moves the focus from removing the differences between groups to acknowledging the inherent diversity and difference between groups in a society and accommodating those. The formal equality model requires that people be treated on the basis of merit. Merit is as such the constitutive value underlying the consistency principle. This means that when we ask to obtain a loan in the bank or apply for health care insurance we are assessed on the basis of the relevant merits, in this case the history of credit and health. However, according to Fredman's model of substantive equality, this is a very conformist mechanism which locks-in the existing social and economic hierarchies and inequalities. It is therefore not the group differences that should be changed, but some of the social structures which institute material and symbolic inequalities between the groups and thereby accommodation of the differences that necessarily exist in a society. The substantive equality model has a transformative potential in this regard[61].

The case law of the ECtHR does contain some aspects of accommodation of difference in the disability cases[62] where the notion of reasonable accommodation has been employed as well as concerning parental status, where the Court has asked to correct discriminatory acts for example where marital status is a precondition for parental status[63]. For cases that concern social origin discrimination, the fourth leg of the substantive equality model would enable challenges of the criteria for receiving certain goods and services, e.g. the criteria for receiving unemployment benefits, which are defined according to the dominant norm and where people who are really in need of such public help have different needs.

For social origin discrimination the accommodation of difference would mean that, even if we do not consider poverty or low socio-economic status a difference between classes that should be accommodated, the first step to combat socio-economic inequality and disadvantage may be to *recognise* that many societal structures are based on the better off (similarly to argument above). In this light, what Fredman calls accommodation of

[61] Fredman, Sandra, Substantive equality revisited, 14 ICON (2016) 712-738, p. 733
[62] See for example 13444/04 *Glor v. Switzerland* 2009 and 51500/08 *Cam v Turkey* 2016
[63] See for example 3976/05 *Serife Yigit v. Turkey* 2010

difference, is particularly salient to social origin discrimination because it allows for addressing structural barriers to the socio-economically worse off, rather than searching for the institution or act liable for the specific discriminatory act or practice.

Naturally it also complicates the feasibility of legal proceedings against a state institution and raises the question of whether a state can be held liable for general, structural and economic inequalities.

5 Conclusions

The case law of the ECtHR shows some, but generally little potential for realizing social origin discrimination despite the fact that social origin does feature in the Convention text. The case law reveals that national origin is a well-developed doctrine, but that social origin has not been employed in any cases brought before the Court. Building on the presence of social origin in a number of other international legal instruments, I deduced a meaning of social origin in Article 14 ECHR and proposed that it is to be understood as socio-economic status. This raises a number of problems and I discussed the formal equality model with which the ECtHR operates as the main source of obstacles to the absence of any discrimination on the ground of social origin and furthermore proposed a substantive equality model as a more useful underlying model of equality for Article 14 adjudication.

The main hindrances in ECtHR's approach so far have been the rather inconsistent approach to which discrimination grounds that are included in Article 14, the Court's approach to indirect and covert discrimination and most of all its comparator-criteria. The substantive equality model can respond to these shortcomings in the existing approach, which could allow for social origin discrimination becoming recognized in the case law of the Court (if cases are brought). The substantive equality model proposes to focus on the disadvantage suffered rather than the relevantly similar situation between groups, hence the focus shifts from the groups characteristics to the effects of the treatment in question. This is relevant for social origin discrimination as acts and practices that furthers socio-economic inequalities will be identifiable through their effects rather than through the group membership. Moreover, the substantive equality model suggests to focus on prejudice as practices rather than solely legal acts as discriminatory, to enhance participation in political life and thereby ensure that the worse off obtain influence and self-determination and finally that differences are accommodated in the sense of recognizing the different needs and situations rather than requiring conforming to the dominant norms of the dominant class.

The substantive equality model requires a drastic change in the approach of the Court. While this surely is possible over time and the case law shows the Court's propensity e.g.

towards further recognition of prejudice, indirect discrimination and less strict ambit requirement the formal equality model does prevail particularly concerning the comparator criteria. Indeed this is exactly the most complex of the criteria to change, because with a shift away from identifying a comparable group against which the disadvantaged is measured, also discrimination as a distinct form of action is shifted. By removing the comparator, rather than defining discrimination as differential treatment relative to others in comparable situation, the definition will merely be 'socially unjust treatment'.