Who should we accommodate?

Opening the grounds for reasonable accommodation under the European Convention on Human Rights

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A thesis submitted for the degree of

Doctor of Philosophy in Human Rights

School of Law & Human Rights Centre

University of Essex

December 2022

Abstract

The thesis examines who can and should benefit from the right to reasonable accommodation under the European Convention on Human Rights ("the Convention"). Reasonable accommodation is often presented as a concept characteristic for disability or religion. The thesis challenges this framing, arguing that it is an inherent requirement of the right to substantive equality for all. The ensuing doctrinal analysis demonstrates that the European Court of Human Rights ("the Court") implicitly uses reasonable accommodation as such, covering a wide range of grounds, including gender and gender identity, race and ethnicity, religion, disability, sexual orientation, or age. However, the Court's covert approach makes the relevant standards untransparent and, at times, inconsistent.

The thesis demonstrates how to make the Court's approach to selecting the target group of reasonable accommodation more consistent. It relies on the Court's two-tiered grounds doctrine that covers a wide range of grounds but offers a specific protection to some. This approach is adjusted to reasonable accommodation, distinguishing two sets of grounds: open grounds for an *unintended, constructed disadvantage linked with status;* and suspect grounds, often defined by *vulnerability*. A wide range of people can thus demand to be reasonably accommodated as part of their right to equality under the Convention. However, the Court should review the claims of those complaining about denial of reasonable accommodation on suspect grounds and vulnerability with more stringency.

Acknowledgements

Most of this thesis was written during the strange pandemic years of 2020-2021, and it is owing to my Essex supervisors' support, flexibility, and thoughtful advice that it sees the light of day. I would like to thank Dr Charilaos Nikolaidis for encouraging me to pursue this research topic and guiding me in asking the right questions. His work on substantive equality and our discussions about reasonable accommodation have inspired my research greatly. I am also most grateful to Professor Lars Waldorf, whose insights were essential in helping me structure the argument of the thesis and present its contributions. Dr Nikos Vogiatzis, my supervisor for the last few months of the research, was a great source of encouragement, and I would like to thank him for guiding me through the final stages in such a thoughtful manner.

My thanks also belong to Professor Sabine Michalowski for her useful feedback at the outset of the research and to Professor Carla Ferstman, whose supporting words while serving on my supervisory board were incredibly helpful. I am also grateful to Professor Ferstman for engaging me in researching the impact of the Essex Human Rights Centre's work. Albeit brief, this work made me greatly appreciate the value of the research conducted at Essex. This research would also be impossible without the support received from the CHASE doctoral scholarship of the Arts and Humanities Research Council. I much appreciate the integral support throughout the doctoral programme, especially the incredibly helpful advice of Dr Catherine Pope.

The Essex Human Rights Centre has not been my only academic home. I owe much of this thesis to the intellectual friendship and support of doc. Pavel Molek from my original alma mater, Masaryk University in the Czech Republic. He was a great influence in my decision to pursue an academic career in human rights, and I thank him from all my heart for his continuing

encouragement. Dr Kateřina Šimáčková from the same university has been a great role model and inspiration to me, and I am most grateful for her insightful comments on my work, and for all the uplifting words and messages of support I have received from her.

Many other people helped me throughout the research. I want to specifically thank my friends and colleagues Vanda Durbáková and Kristýna Molková Foukalová, who patiently read through my drafts and gave me much helpful feedback. My colleagues from the Validity Foundation also deserve my heartfelt thanks for the many discussions about my research topic and for their patience with me throughout this period.

Most of all, however, I would like to thank my family for constantly reminding me of what is important and creating the comfort and space in which writing this thesis was possible. Jean-Augustin was not only the first reader of my drafts but also a life force which lifted my spirit when needed. This thesis would never be possible without his ceaselessly kind, patient, and thoughtful support. Thank you.

Contents

Chapter 1

Introduction

1. The aims of the thesis

This thesis is about reasonable accommodation, an equality law concept which facilitates adjustments, modifications, or assistance to those who otherwise experience barriers in exercising their rights or opportunities.[1] Legal systems most often associate reasonable accommodation with persons with disabilities.[2] But there is an ongoing academic and policy debate about whether it should extend to other social groups.[3] The question is particularly relevant in Europe as the European international courts (the European Court of Human Rights and the Court of Justice of the European Union) have implicitly required reasonable accommodation as a part of the right to equality on different grounds for not clearly specified

[1] This definition draws on Articles 2 and 5 of the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD), adopted by a United Nations General Assembly Resolution on the *76th plenary meeting* (A/RES/61/106, 13 December 2006**);** UN CRPD Committee, 'General Comment no. 6 on Equality and Non-discrimination' (24 April 2018, CRPD/C/GC/6), paras 24–26. <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no6-equality-and-non-discrimination> accessed 30 November 2022.

[2] See the most current information from the European network of legal experts in gender equality and non-discrimination, 'A comparative analysis of non-discrimination law in Europe' (2019) 24. <https://op.europa.eu/cs/publication-detail/-/publication/a88ed4a7-7879-11ea-a07e-01aa75ed71a1> accessed 30 November 2022.

[3] See for instance, Erika Howard, 'Reasonable Accommodation of Religion and Other Discrimination Grounds in EU Law' (2013) 38 European Law Review; Emmanuelle Bribosia and others, *Reasonable Accommodation Beyond Disability in Europe?* (Publications Office 2013); Lisa Waddington, 'Time to Extend the Duty to Accommodate Beyond Disability?' (2011) 36 NTM|NJCM-Bull. 186; Kristin Henrard, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' (2012) 5 Erasmus Law Review 59. The Council of Europe Commissioner on Human Rights or the Equinet (the European Network of Equality Bodies) voiced such recommendation more than decade ago. See the Council of Europe Commissioner on Human Rights, 'Opinion on National Structures for Promoting Equality' (2011) 12, point 3.2. <https://rm.coe.int/16806da939> accessed 8 December 2022; European Network of Equality Bodies, 'Opinion on National Structures for Promoting Equality' (2008) 8. <https://www.archive.equineteurope.org/IMG/pdf/EN_-_Beyond_the_Labour_Market_-_Opinion_2008.pdf> accessed 8 December 2022.

reasons.[4] Still, the proposals to legislate it beyond disability have not been adopted.[5] Currently, there is thus no clarity in Europe as to who can successfully claim the right to be reasonably accommodated. This creates space for confusion for the intended beneficiaries, the duty-bearers, the courts, and the legislatures debating regulating the issue.

This thesis addresses the question by providing a comprehensive analysis of the European Court of Human Rights (hereinafter "the Court") reasonable accommodation case law. The Court's jurisprudence has significant influence over the European national jurisdictions,[6] which are often compelled to rely on it to interpret the Convention rights and duties they are bound by.[7] Following the case law analysis, the thesis argues that reasonable accommodation in Europe should be available beyond disability because the Court's jurisprudence requires it. The main aim is to clarify what grounds should be covered and demonstrate how to make the Court's s reasonable accommodation case law more transparent and predictable. The thesis thus provides a roadmap not only to the Court but also to the intended beneficiaries and states responsible for implementing the relevant standards into domestic legal systems.

The European Convention on Human Rights (the "Convention") has been chosen for several reasons. To ensure the feasibility of the research, it was necessary to choose a contained jurisdiction which nevertheless provides a sufficiently extensive reasonable accommodation

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[4] Charilaos Nikolaidis, *The Right to Equality in European Human Rights Law: The Quest for Substance in the Jurisprudence of the European Courts.* (Routledge 2015); Emmanuelle Bribosia, Julie Ringelheim and Isabelle Rorive, 'Reasonable Accommodation for Religious Minorities: A Promising Concept for European Antidiscrimination Law?' (2010) 17 Maastricht Journal of European and Comparative Law 137; Bribosia and others (n 3); Howard (n 3); Kristin Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (2016) 14 International Journal of Constitutional Law 961.

[5] The Council of Europe Commissioner on Human Rights or the Equinet (the European Network of Equality Bodies) voiced such recommendation more than decade ago. See the Council of Europe Commissioner on Human Rights (n 3); European Network of Equality Bodies (n 3).

[6] Fiona de Londras, ''Dual Functionality and the Persistent Frailty of the European Court of Human Rights' (2013) 38 European Human Rights Law Review; Laurence R Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 The Yale Law Journal 273, 293–297.

[7] Geir Ulfstein, 'Transnational Constitutional Aspects of the European Court of Human Rights' (2021) 10 Global Constitutionalism 151, 151; Helen Keller and Alec Stone Sweet (eds), 'Assessing the Impact of the ECHR on National Legal Systems', *A Europe of Rights* (1st edn, Oxford University PressOxford 2008); Eirik Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees* (Oxford University Press 2015).

practice not confined to one ground. The academic literature has affirmed that the Court requires reasonable accommodation implicitly as a part of the Convention's right to equality.[8] There is, therefore, likely to be extensive case law is to be analysed in terms of how grounds for reasonable accommodation are chosen. Moreover, the Convention system has been known for its unusually broad approach to discrimination grounds,[9] which allows the recognition of many different statuses as potential grounds for reasonable accommodation. Analysis of the Court's case law is thus likely to provide a comprehensive understanding of who can be meaningfully covered by reasonable accommodation without being limited to selected discrimination grounds.

2. The problem: restricted personal scope of reasonable accommodation

Imagine a country with two streams of education. The first one is for children deemed to be of *average intellect*. The second one is for those who are below this level. Before going to school, all children are tested to decide which of the two education streams the child should attend. The tests are identical. Nevertheless, all children with learning disabilities are sent to the second educational stream. The same happens to many children belonging to an ethnic minority. Education in these schools is of demonstrably lower quality, and children who leave them have close to no chance of being admitted to or finishing high school, let alone university. If they

[8] Bribosia, Ringelheim and Rorive (n 4); Howard (n 3); Bribosia and others (n 3); Waddington (n 3); Nikolaidis (n 4); Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4); Pierre Bosset and Marie-Claire Foblets, 'Accommodating Diversity in Quebec and in Europe: Different Legal Concepts, Similar Results?', *Institutional accommodation and the citizen: legal and political interaction in a pluralist society* (Council of Europe Publishing 2009); Jennifer Jackson Preece, 'Emerging Standards of Reasonable Accommodation towards Minorities in Europe? Institutional Accommodation and the Citizen', *Institutional accommodation and the citizen: legal and political interaction in a pluralist society* (Council of Europe Publishing 2009).

[9] Sandra Fredman, *Discrimination Law* (2nd ed., Oxford University Press 2011) 125–127.

succeed in a job market, it will likely be at a low-paid job with high volatility and instability. There is a relatively high chance that their children will repeat the same cycle.[10]

One could argue that the resulting inequality is merely a natural and justified outcome of a society which values skills, merit and achievement.[11] But in fact, there is nothing natural about it.[12] Society designed an educational system and curricula to correspond to the *average, typical* pupil. It also decided that whoever cannot pass a test supposedly examining their ability to integrate into such a system will be educated separately and provided lower quality education. These and other social practices, rules, and environments (later, I will be referring to these as "social and environmental structures" or "structures") determine people's life options. And they are not neutral. They represent a decision inevitably made by those in relative power, following what they consider *normal* or *typical*.[13] Those who diverge may be seriously disadvantaged by these decisions. Sometimes, social structures may represent a well-justified, efficient, and generally most rational solution and nevertheless be profoundly unfair to those neglected in their design.

Equality philosophers and law theorists have long engaged with the negative impact of non-inclusive structures. Some authors say that the artificial exclusion they create must be remedied in the name of equality and justice. [14] Some even consider the transformation of our structures

[10] This example is loosely based on the European Court of Human Rights Grand Chamber judgment *D.H. and others v. the Czech Republic* (ECHR 2007-IV).
[11] See, for instance, the initial debate about "luck egalitarianism" in Elizabeth S Anderson, 'What Is the Point of Equality?' (1999) 109 Ethics 287.
[12] For a thorough exploration of the question inequality and the idea of merit, see Michael J Sandel, *The Tyranny of Merit: What's Become of the Common Good?* (First edition, Farrar, Straus and Giroux 2020).
[13] This is evidenced by works of sociologists, such as Anthony Giddens, *Central Problems in Social Theory: Action, Structure and Contradiction in Social Analysis* (Macmillan 1979) 96.
[14] Michael Ashley Stein, 'Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination' (2004) 153 University of Pennsylvania Law Review 579, 579; Frédérique Ast, 'European Legal Frameworks Responding to Diversity and the Need for Institutional Change. Indirect Discrimination as a Means of Protecting Pluralism: Challenges and Limits.', *Institutional accommodation and the citizen: legal and political interaction in a pluralist society* (Council of Europe Publishing 2009) 92.

to be the key aim of the right to equality.[15] Nevertheless, practical legal tools are not always readily available to redress the barriers these structures create. In the example above, one solution would be to cancel the two streams of education and educate all children together. But such a solution is only partial. A child with a learning disability or a child from an ethnic minority may still have a problem *fitting* into the learning system designed around an *average* pupil from whom they differ. And making the education systems fully inclusive for all children, no matter their differences, is a long-term process, not an immediately accessible solution.

Reasonable accommodation provides such an immediate solution. Reasonable accommodations are adjustments, modifications, or different forms of assistance that immediately modify the problematic rule, practice, or environment to enable the individual to enjoy their rights or opportunities on an equal basis with others.[16] It is a right and a corresponding duty to treat selected persons differently and absorb the increased costs associated with the differential treatment unless they represent an undue burden.[17] In the example above, the right to reasonable accommodation would ensure that the child with a learning disability and the one from the ethnic minority are provided teaching assistants, adjusted teaching methods, more frequent breaks, and other measures so they can follow the requirements of a mainstream school which is not yet fully inclusive. Even in an inclusive

[15] Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 International Journal of Constitutional Law 712, 732–734. The submission of the Oxford Human Rights Hub, led by Sandra Fredman, for the draft UN CRPD General Comment no. 6 on Equality and Non-Discrimination (n 1), calls the framework proposed in the cited article "transformative". Oxford Human Rights Hub, 'Achieving Transformative Equality for Persons with Disabilities: Submission to the CRPD Committee for General Comment No.6 on Article 5 of the UN Convention on the Rights of Persons with Disabilities' <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no6-equality-and-non-discrimination > accessed 8 December 2022.

[16] This is how reasonable accommodation is understood in Article 2 of the UN CRPD and the UN CRPD Committee's 'General Comment no. 6 (n 1), paras 23–24.

[17] Christine Jolls, 'Antidiscrimination and Accommodation' (2001) 115 Harvard Law Review 642, 648.

school, reasonable accommodation would ensure that the practices are adjusted to each pupil individually.[18]

Many legal systems now include a duty to adopt reasonable accommodations in some form.[19] Nevertheless, only in rare jurisdictions would it be available equally for the Roma child as well as for the child with a learning disability. According to current research, no European country apart from the Flemish authority in Belgium explicitly legislates the right to be reasonably accommodated for anyone other than for persons with disabilities.[20] Although the denial of reasonable accommodation is commonly legislated as a form of discrimination, in Europe it will only protect the one discrimination ground of disability.[21] A woman experiencing barriers in a workplace because of man-made rules, a member of a cultural minority disadvantaged by the majority school dress codes, or an older person unable to keep pace with the constantly changing technologies at a workplace, will not be covered. Even though other norms potentially alleviating their disadvantage may apply,[22] they will not benefit from the individualised and immediate solution to their situation provided by reasonable accommodation. This is problematic both practically and theoretically, and the academic literature has not yet provided a coherent and convincing answer to why this is the case.[23]

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[18] See, for instance, Shivaun Quinlivan, 'Reasonable Accommodation: An Integral Part of the Right to Education for Persons with Disabilities' in Gauthier de Beco, Shivaun Quinlivan and Janet E Lord (eds), *The Right to Inclusive Education in International Human Rights Law* (1st edn, Cambridge University Press 2019).
[19] Sometimes called „reasonable adjustments", as in the United Kingdom, or „reasonable measures" in Czechia. Different jurisdictions often use differing scope of the duty or standards for associated tests. Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press 2015) 77; Fredman, 'Substantive Equality Revisited' (n 15) 214. See also United Nations General Assembly, Department of Economic and Social Affairs, Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 'The Concept of Reasonable Accommodation in Selected National Disability Legislation' (A/AC.265/2006/CRP.1, 2005). <https://www.un.org/esa/socdev/enable/rights/ahc7report-e.htm> accessed 11 November 2022
[20] European network of legal experts in gender equality and non-discrimination (n 2) 24. Flemish authority in Belgium legislates the duty to reasonably accommodate on all protected grounds but the duty has not yet been well developed in legal practice. Bribosia and others (n 3) 11–21; Léopold Vanbellingen, 'L'accommodement Raisonnable de La Religion Dans Le Secteur Public : Analyse Du Cadre Juridique Belge Au Regard de l'expérience Canadienne' (2016) 75 Revue interdisciplinaire d'études juridiques 221.
[21] European network of legal experts in gender equality and non-discrimination (n 2) 25–26.
[22] Such as specific positive measures, protective regulations, or the general prohibition of discrimination.
[23] As also argued by Khaitan (n 19) 77.

3. The research gap: who should be reasonably accommodated in Europe?

The peculiar way in which the right to reasonable accommodation in Europe only appears for persons with disabilities has not escaped academic attention. It is especially contrasted with the United States and Canada, where reasonable accommodation emerged in the context of religion.[24] Several authors discuss whether the right to reasonable accommodation should also be available based on religion in Europe.[25] Others debate the advantages it would bring to specific groups because of their age[26] or pregnancy.[27] Some also consider whether Europe should adopt a similar approach to reasonable accommodation as Canada, where it extends to all protected discrimination grounds.[28]

It has been noted that legislating reasonable accommodation beyond disability would be beneficial.[29] Tomas Hammarberg, the then Council of Europe Commissioner for Human Rights, in his 2011 Opinion on National Structures for Promoting Equality, recommended states to consider "extending the provisions on reasonable accommodation to the other grounds", including "gender or sex, age, religion or belief, racial or ethnic origin, sexual orientation, gender identity and socioeconomic status."[30] A similar recommendation was

[24] Bribosia and others (n 3) 11–21.
[25] Katayoun Alidadi, *Religion, Equality and Employment in Europe: The Case for Reasonable Accommodation* (Hart Publishing 2017); Bribosia, Ringelheim and Rorive (n 4); Henrard, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' (n 3); Howard (n 3).
[26] Malcolm Sargeant, 'Older Workers and the Need for Reasonable Accommodation' (2008) 9 International Journal of Discrimination and the Law 163, 168–180.
[27] Maurice Drapeau, 'La Considération de l'obligation d'accommodement Même En Cas de Discrimination Directe' (2005) 39 Les Cahiers de droit 823.
[28] Howard (n 3); Foblets (n 8); Jane Wright, 'European Legal Frameworks That Respond to Diversity and the Need for Institutional Change: To What Extent Are the Canadian Concept of "Reasonable Accommodation" and the European Approach of "Mutual Accommodation" Reflected in Those Frameworks? Which Conceptual Approach Provides the Better Way Forward in the European Context?', *Institutional accommodation and the citizen: legal and political interaction in a pluralist society* (Council of Europe Publishing 2009).
[29] Waddington (n 3).
[30] (n 3) 12.

voiced by the European Network of Equality Bodies (Equinet) in their 2008 Opinion concerning the then-discussed horizontal directive.[31] Both documents argue that explicitly legislating reasonable accommodation would better equip European states to respond to human diversity.[32]

Although there is some consensus that it would be useful to have reasonable accommodation available on other grounds,[33] it has also been argued that other concepts, such as indirect discrimination, already play a comparable role in Europe.[34] Indeed, a body of literature explains how reasonable accommodation is effectively implied in the prohibition of discrimination[35] and it has even been argued that it always constitutes a secondary duty, preventing or remedying discrimination.[36] If that is indeed the case, reasonable accommodation does not need to be explicitly legislated for a legal system to effectively require it. Being implied in the general prohibition of discrimination, it should also logically cover all discrimination grounds protected in the given jurisdiction.[37]

Despite the voices calling for extending reasonable accommodation in Europe to all protected grounds, uncertainty remains as to whether this should be done explicitly if a reasonable accommodation requirement implied in the right to equality as a corollary achieves the same aims.[38] The implicit approach is more easily implemented because it does not require

[31] (n 3) 8.
[32] Council of Europe Commissioner for Human Rights (n 3) 12 and Equinet (n 3) 8.
[33] ibid, see also Waddington (n 3).
[34] ibid 197–198; Foblets (n 8) 56.
[35] Among others, Jolls (n 17); Stein, 'Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination' (n 14); Nikolaidis (n 4); Mary Crossley, 'Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project' (2004) 35 Rutgers Law Journal 861; Foblets (n 8); Howard (n 3); Henrard, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' (n 3); Waddington (n 3); Olivier De Schutter, 'Reasonable Accommodation and Positive Obligations in the European Convention on Human Rights' in Lawson, A., Gooding, C. (ed), *Disability Rights in Europe: From Theory to Practice.* (Hart Publishing 2005).
[36] Khaitan (n 19) 77.
[37] ibid.
[38] As argued by Howard (n 3); Waddington (n 3).

legislative activity.[39] But it has at least two problems. The first one is that each jurisdiction requires clarification to what extent other legal concepts indeed imply a duty to reasonably accommodate to the same extent as if it was independently legislated. For example, it has been noted that reasonable accommodation can be effectively read into in the prohibition of indirect discrimination only in jurisdictions that do not define indirect discrimination through a negative impact on a whole protected group.[40] If independently legislated, the reasonable accommodation duty also arises if the negative impact is only experienced by an individual.[41]

In addition, some jurisdictions only prohibit discrimination caused by an individually attributable action or treatment.[42] In contrast, an independent right to reasonable accommodation also arises when structural barriers appear spontaneously in a way not clearly attributable in such a manner.[43] There may be other jurisdiction-specific reasons why an independent right to reasonable accommodation may cover a different set of cases than a general prohibition of discrimination.[44] In such cases, an implied reasonable accommodation can appear in the legal system now and then but does not cover as many problematic situations as a separate right to reasonable accommodation.

The second problem with relying on an implied reasonable accommodation is the possible lack of transparency and predictability. If the right and the corresponding duties are not explicit, their beneficiaries and duty-bearers may not be clearly aware of them. And confusion may also appear around the legal standards a decision-making body applies. It has been noted that this is the case of the Court's jurisprudence. Commentators show that the Court has been de facto

[39] Waddington (n 3) 194.
[40] Howard (n 3) 367–377.
[41] ibid.
[42] Khaitan (n 19) 146–148; Elisa Holmes, 'Anti-Discrimination Rights Without Equality' (2005) 68 Modern Law Review 175.
[43] UN CRPD Committee (n 1), paras 23–24.
[44] Henrard, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' (n 3) 69.

requiring reasonable accommodation quite widely, especially in relation to religion[45] or ethnicity and culture.[46] But because the requirement is not explicit, it does not always follow a coherent set of standards to establish and justify it.[47] Without such a consistent set of standards, there is no legal certainty for the applicants or the states as to when and for whom the requirement to reasonably accommodate arises. This also raises problems with correct implementation into the domestic legal systems, which may not always recognise the right to reasonable accommodation for all those covered by the Court's jurisprudence.[48] And so, although the Court arguably requires reasonable accommodation beyond disability, it may remain virtually unattainable for its intended beneficiaries, as in the example earlier in this introduction.

Despite the body of literature dedicated to the topic,[49] the two problems associated with the implicit requirement of reasonable accommodation in the Court's jurisprudence have not been addressed in sufficient detail. It is thus still unclear how to determine for whom the right to reasonable accommodation exists under the Convention. This thesis makes the first comprehensive exploration of reasonable accommodation in the Court's case law intending to clarify to whom it extends. It is also the first analysis that joins this exploration with the Court's grounds doctrine to explain what other grounds can be covered in the future and what standards of review the Court should apply for reviewing denials of reasonable accommodation on different grounds.

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[45] For example, Bribosia, Ringelheim and Rorive (n 4); Henrard, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' (n 3); Howard (n 3); Alidadi (n 25).
[46] Bribosia, Ringelheim and Rorive (n 4); Nikolaidis (n 4).
[47] Nikolaidis (n 4) 180; Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4).
[48] Compare, for example, with European network of legal experts in gender equality and non-discrimination (n 2) 25-26.
[49] (n 3) and (n 4).

4. The method and structure: grounding reasonable accommodation

The thesis answers two main research questions:

1) *Who can benefit from the right to reasonable accommodation under the Convention?*
2) *How can the Court improve the clarity and foreseeability of its approach to grounds in reasonable accommodation cases?*

The main research question is divided into four sub-questions, which define the focus and scope of each substantive chapter.

a) *What does the evolution of reasonable accommodation tell us about its role in equality law and the selection of its target group?*
b) *How should we theoretically define the target group of reasonable accommodation to fit its role in equality law?*
c) *How does the Court determine the target group of the implicit requirement of reasonable accommodation?*
d) *How should the Court's grounds doctrine apply to reasonable accommodation cases?*

The thesis' focus is predominantly doctrinal, as it aims to explain the Court's fragmented case law. However, the first two chapters also combine the historical legal approach and theoretical approach to develop a background framework for jurisprudence analysis. The below paragraphs explain how each method is used in the thesis' four substantive chapters, each answering one research sub-question.

Chapter 2 uses historical legal approach to answer the first research sub-question. It examines *what the evolution of reasonable accommodation tells us about its theoretical underpinnings and the selection of its target group.* Understanding the concept's development should uncover the common threads across jurisdictions and the possible reasons behind its currently

fragmented use. Historical legal research was chosen for this purpose as a study of the roots and development of legal concepts to help explain current-day issues.[50] The chapter demonstrates that although reasonable accommodation is commonly framed as a positive measure for selected social groups, typically persons with disabilities or religious minorities, it initially aimed to be used as a corollary to non-discrimination. It also shows that there were various extra-legal reasons behind the fact that only rare jurisdictions now indeed use it as such for all protected discrimination grounds.

The chapter first follows the development of reasonable accommodation in the United States and Canada as a corollary to the prohibition of religious-based discrimination. It discusses the socio-political reasons why this form of reasonable accommodation never explicitly gained more traction worldwide. It then examines how and why reasonable accommodation based on disability developed differently and spread worldwide. The chapter also demonstrates the challenges brought by framing reasonable accommodation as a predominantly disability rights concept. Lastly, the chapter examines how Canada and South Africa began to use reasonable accommodation as an integral aspect of the right to equality applicable on all grounds and what role the concept has been given in these jurisdictions. Specific focus is placed on these two jurisdictions because the academic literature considers them the only ones with an explicit and extensive reasonable accommodation practice on all grounds.[51]

Chapter 3 builds on the historical chapter to provide a theoretical framework *for defining the target group of reasonable accommodation considering its role in equality law.* It has been highlighted that the predominant European practice limiting reasonable accommodation only to persons with disabilities is theoretically inconsistent.[52] But there has not yet been a

[50] Bhat, 'Historical Legal Research: Implications and Applications', *Idea and Methods of Legal Research* (2020) 198.
[51] Khaitan (n 19) 77.
[52] ibid.

theoretical inquiry defining grounds for reasonable accommodation in general terms. Existing literature mostly focuses on arguments for extending reasonable accommodation to specific groups[53] or on explaining that it implicitly already does.[54] Chapter 3 fills this gap by explaining why and under what conditions reasonable accommodation can be implied in the right to equality and discussing how to define its target group accordingly.

The chapter first explains the role of reasonable accommodation in equality law. It examines how its role aligns with the prohibition of discrimination and the proportionality requirement of interferences with human rights. It then defines under what conditions reasonable accommodation can be read into these concepts without being explicitly legislated. Although reasonable accommodation can be required implicitly, the chapter also emphasises that it plays a separate, independent role to that of non-discrimination or proportionality: it redresses the prejudicial impact of structures which was *unintended*, in that it was not an intentional or inherent implication of generally accepted rules, practices, or policies. This distinguishes it from other legal concepts and sometimes allows it to address a wider range of problematic situations. The chapter thus highlights the advantages of legislating reasonable accommodation independently or at least using it as an explicit framework for assessing impermissible discrimination or human rights interferences.

The chapter concludes that, as a corollary to the right to equality, reasonable accommodation should be applicable on all protected grounds. But many jurisdictions, including the Convention, contain an open or semi-open list of discrimination grounds, allowing the courts to determine protected grounds beyond those listed. Defining who should be reasonably accommodated under the Convention thus requires describing basic principles according to

[53] Alidadi (n 25); Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4); Sargeant (n 26).
[54] Nikolaidis (n 4); Bribosia and others (n 3); Waddington (n 3); Howard (n 3).

which relevant analogous grounds should be chosen. The chapter argues that a relational approach, defining grounds as characteristics associated with *constructed, unintended* disadvantage, is most appropriate in reasonable accommodation cases.

Chapter 4 moves into the doctrinal realm to analyse *how the Court determines the target group of reasonable accommodation*. Because the Court does not explicitly refer to the term reasonable accommodation beyond several judgments concerning disability, the chapter relies on the theoretical framework presented in Chapter 3 to identify which Court decisions and judgments that imply the requirement of reasonable accommodation. Such cases are identified both under the Convention's right to equality (Article 14 and Article 1 of Protocol no. 12) and other articles of the Convention, such as the right to privacy (Article 8), the freedom of religion (Article 9) and others. The cases are examined chronologically to demonstrate how the Court's evolved over the years. The target group is first defined in terms of *significant difference*, which is in the second stage often represented by *vulnerability* or other *factual inequalities*. In the third stage, the Court joins these approaches and specifies that a significant difference is a situation of factual inequality caused by *a prejudicial impact* of measures.

Chapter 5 builds on the doctrinal analysis to demonstrate how to *improve the clarity and foreseeability of the Court's approach to grounds in reasonable accommodation cases*. The chapter develops the Court's two-tiered grounds doctrine, which protects any recognisable status as a discrimination ground but affords specific protection to grounds considered suspect. It shows how to apply the doctrine to reasonable accommodation, especially when distinguishing between general and suspect grounds. The Court does not make the choice of grounds explicit in most reasonable accommodation cases, and the justification thus needs to be drawn from the context. To overcome this lacuna, the chapter relies on the framework presented in Chapter 3, which usefully clarifies some of the Court's choices regarding who could benefit from reasonable accommodation. It shows that the Court indeed implicitly relies

on a *constructed, unintended* disadvantage to determine when status becomes grounds for reasonable accommodation. *Vulnerability* is often used as a proxy for such a disadvantage, typically prompting a stricter review of the denial of reasonable accommodation. The chapter thus shows that the framework presented in Chapter 3 provides a solid basis for interpreting the Court's reasonable accommodation case law and, if applied consistently, also predicting its course in the future.

5. The contribution of the thesis, limits, and future questions

The thesis brings the first systematic inquiry into the Court's reasonable accommodation case law. It is firmly anchored in the historical and theoretical analysis of the concept, building on a body of literature that explains that reasonable accommodation can be read into the right to equality and other human rights as a duty to remedy a negative impact of general structures by means of differential treatment. Following this analysis, the thesis does not merely argue that reasonable accommodation under the Convention should extend beyond disability. It demonstrates that it already implicitly does. It also explains how to determine all the beneficiaries to whom reasonable accommodation should apply in line with the Court's doctrine and make the case law more predictable and transparent. These conclusions are highly relevant for the Court's practice but also for the European national jurisdictions bound by the Convention, which rely on the Court's case law to interpret their Convention obligations.

The main recommendation is that the requirement of reasonable accommodation should be acknowledged consistently in all relevant cases and assessed under the right to equality to make sure that the Court follows a consistent set of standards, including the analysis of grounds for reasonable accommodation. Nevertheless, the Court may not be compelled to explicitly recognise the existing requirement of reasonable accommodation also because it may be guided

by other considerations than doctrinal consistency. For instance, the Court may be hesitant to explicitly use the term reasonable accommodation for religious minorities because of the backlash certain accommodation cases provoked in the United States and Canada.[55] The thesis shows that a proper grounds analysis in reasonable accommodation cases can set meaningful limits also to accommodating religious practices which clash with other important rights or interests. But a comprehensive exploration of how to prevent a possible backlash against religious-based accommodations goes beyond its scope. It thus leaves the question to be addressed in the wide body of referenced literature on the topic, which discusses available strategies, including awareness-raising or properly modelling the reasonable accommodation duty.[56]

As a primarily doctrinal thesis, the chapters also do not address other practical issues related to recognising the right to reasonable accommodation beyond disability. It has been noted that the right to reasonable accommodation has significant redistributive implications for the duty-bearers.[57] The implications may justify a careful approach and an attempt to prioritise providing reasonable accommodation for those who particularly need it; persons with disabilities who have globally faced profound and long-term denial of rights and social exclusion.[58] Requiring duty-bearers to accommodate other groups risks overstretching the obligations, compromising

[55] Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4) 978.
[56] See, for instance, Henrard, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' (n 3); Veit Bader, Katayoun Alidadi and Floris Vermeulen, 'Religious Diversity and Reasonable Accommodation in the Workplace in Six European Countries: An Introduction' (2013) 13 International Journal of Discrimination and the Law 54; Sujit Choudhry, 'Rights Adjudication in a Plurinational State: The Supreme Court of Canada, Freedom of Religion, and the Politics of Reasonable Accommodation' (2013) 50 Osgoode Hall Law Journal 575; Alidadi (n 25); Marta Cartabia, 'The Many and the Few: Clash of Values of Reasonable Accommodation' (2018) 33 American University International Law Review 667.
[57] Mark Kelman, 'Market Discrimination and Groups' (2001) 53 Stanford Law Review 833; Stein, 'Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination' (n 14).
[58] Stein, 'Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination' (n 14) 636–660.

the little advances so far achieved by disability rights.[59] It has also been pointed out that because people with disabilities have a very diverse set of needs, an individualised immediate duty is particularly useful for them,[60] whereas indirect discrimination sufficiently addresses the disadvantages for others.[61] It could thus be contended that it is justifiable to focus on properly implementing reasonable accommodation for persons with disabilities, for whom it is still often not sufficiently ensured, rather than extending it to others.[62]

While acknowledging the above issue, the thesis does not abord it comprehensively. This is because its central argument is that reasonable accommodation already extends beyond disability in the Court's case law, albeit implicitly. Obscuring the documented fact by not referring to the concept explicitly in any case only blur the obligations that already exist. Such covert approach compromises the legal certainty and transparency of the law, which can, in turn, harm the quality of its practical implementation.[63] Moreover, Chapter 2 shows that one of the principal problems with the practical implementation of disability-based reasonable accommodation is that jurisdictions struggle to really understand and implement it as an essential non-discrimination duty. It is often perceived as a special benefit for persons with disabilities.[64] This inevitably weakens their accommodation claims. If reasonable accommodation was well integrated as an inherent element of equality and non-discrimination, it could not be understood as a special benefit related to disability. The change of narrative associated with applying reasonable accommodation as an integral non-discrimination duty may thus eventually be favourable also to persons with disabilities.

[59] See, for instance, Frédéric Mégret and Dianah Msipa, 'Global Reasonable Accommodation: How the Convention on the Rights of Persons with Disabilities Changes the Way We Think About Equality' (2014) 30 South African Journal on Human Rights 252.
[60] Waddington (n 3).
[61] ibid.
[62] Mégret and Msipa (n 59); Waddington (n 3).
[63] See also Waddington (n 3).
[64] Chapter 2, Section 2.

Lastly, this thesis proceeds from the assumption that reasonable accommodation is a useful tool for advancing substantive equality, and it is thus beneficial to discuss extending the requirement beyond disability. Chapter 3 explains the motives for this assumption. Nevertheless, many factors influence whether a legal concept practically achieves the goals given to them. There is a body of literature questioning the value of relying on reasonable accommodation to challenge non-inclusive structures[65] and emphasising the key importance of how the measure is designed and implemented.[66]

For instance, it has been pointed out that reasonable accommodation in the form of exceptions may undermine its aim to increase the inclusiveness of our societies.[67] Similarly, the undue burden defence, which says that a duty-bearer does not need to adopt reasonable accommodation when it would be too difficult or too costly,[68] is a serious limitation which may prove to be an even bigger obstacle for individuals needing reasonable accommodation to overcome the experienced barriers. It can be the decisive factor in whether reasonable accommodations have a real-life impact they intend to. In practical terms, having grounds for reasonable accommodation is thus only the first necessary but not a sufficient step for practically having the right to be reasonably accommodated. The undue burden defence. The same considerations apply to reading the Convention's case law. Even if reasonable accommodation is applicable on all protected grounds, it does not necessarily mean that many applicants will be successful in claiming a Convention violation for its denial.

[65] Shelagh Day and Gwen Brodsky, 'The Duty to Accommodate: Who Will Benefit' (1996) 75 Canadian Bar Review 433; De Schutter (n 35) 63.
[66] Cartabia (n 56); Vrinda Narain, 'Gender, Religion and Workplace: Reimagining Reasonable Accommodation' (2017) 20 Canadian Labour and Employment Law Journal 307.
[67] Bouchard, Taylor 'Building the future. A time for reconciliation. Abridged Report.' (Gouvernment du Québec Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles, 2008) <https://red.pucp.edu.pe/wp-content/uploads/biblioteca/buildingthefutureGerardBouchardycharlestaylor.pdf> accessed 19 November 2022.
[68] Khaitan (n 19) 76–77.

The shape of the duty and the construction of the undue burden defence thus largely influence the practical value reasonable accommodation brings to equality law. Nevertheless, this thesis's dedicated scope cannot comprehensively address these important questions. The case law analysis only engages with them tangentially while discussing the standards of review of the denial of reasonable accommodation associated with different grounds. Further research is needed to understand the practical impact of requiring reasonable accommodation beyond disability and the factors which influence its ability to advance the inclusiveness of our societies.

6. Definitions

This thesis consistently relies on several key concepts. Defining these at the outset is useful because they are used across all chapters. *Reasonable accommodation,* as used in this thesis, is an exception, adjustment or modification aimed at helping an individual overcome a barrier in enjoying their rights or opportunities. The barriers emerge when our environments, rules, or practices do not reflect the diversity of human beings and their legitimately different needs. Reasonable accommodation constitutes an individual right and a corresponding obligation of a duty-bearer. However, the duty to adopt reasonable accommodations is limited by the relevant duty-bearers' possibilities through an undue burden defence[69] or similar construction.[70] To the extent that it does not constitute an undue burden, the right to reasonable accommodation is immediately enforceable.[71] Other aspects, such as the material scope, duty-bearers, and specifics of the associated tests, vary across jurisdictions and are not discussed in

[69] ibid 77; Fredman, *Discrimination Law* (n 9) 215.
[70] Foblets (n 8) 63–65.
[71] Khaitan (n 19) 77; Fredman, *Discrimination Law* (n 9) 215.

the thesis.[72] This thus thesis uses reasonable accommodation in the *technical sense* of the term,[73] referring to a specific tailor-made measure associated with the right to equality, reacting to the individual's needs in a specific context.[74] Specific rules, positive measures, cultural defences, or other measures generally associated with diversity management or redistribution applicable to the whole social group in a pre-defined fashion are not considered to be reasonable accommodations.[75]

As understood in this thesis, reasonable accommodation derives from the *right to equality*, which is protected by those norms which guarantee equality, equal treatment, or non-discrimination.[76] These norms contain different partial rights and correlative duties of the state or other duty-bearers.[77] They are typically said to be guided by equality as a legal principle.[78] This thesis does not discuss the potential differences between equality and non-discrimination as the question is not integral to its argument. Many legal norms, including those in the Convention, use these terms interchangeably.[79]

Lastly, this thesis often refers to *social and environmental structures* or *structures* to denote the physical environments, such as buildings or infrastructure, or social and legal norms, rules, criteria, or practices. The word *structures* encompasses the fact that these were made by people and intentionally or unintentionally follow a certain human design.

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[72] Andrea Broderick and Lisa Waddington, *Disability Law and Reasonable Accommodation beyond Employment A Legal Analysis of the Situation in EU Member States* (European Commission 2016). See also Khaitan (n 19) 77–78.
[73] Foblets (n 8) 40.
[74] Khaitan (n 19) 77; Fredman, *Discrimination Law* (n 9) 215.
[75] Compare with Bribosia and others (n 3); Roger Blanpain and others (eds), *Reasonable Accommodation in the Modern Workplace: Potential and Limits of the Integrative Logics of Labour Law* (Kluwer Law International 2016).
[76] Similar approach is taken in Khaitan (n 19), Chapter 1.
[77] Nikolaidis (n 4) 26–27.
[78] ibid 26–28.
[79] See for a similar approach Fredman, 'Substantive Equality Revisited' (n 15) 715.

Chapter 2

From religion through disability

to reasonable accommodation on all grounds

Introduction

The right to reasonable accommodation is now a standard part of many jurisdictions around the world.[80] Countries typically legislate it for persons with disabilities and do not explicitly extend the right to anyone else.[81] Only a few jurisdictions legislate reasonable accommodation on the basis of religion.[82] The literature also often gives us the impression that reasonable accommodation ultimately appears in only two shapes: disability accommodation or the less common religious accommodation. However, two significant legal systems challenge this narrative: Canada and South Africa.[83] Both countries use reasonable accommodation as a non-discrimination duty applicable on all protected grounds.[84] The inconsistent approach to reasonable accommodation's beneficiaries across jurisdictions raises questions. Canadian and South African practice show that reasonable accommodation is implied within a certain understanding of discrimination on all grounds. It is unclear why other jurisdictions treat it as a disability or religion-specific duty.

This chapter maps the extent of the problem addressed in this thesis – the limited personal scope of reasonable accommodation. It aims to demonstrate the viability and value of extending

[80] Mégret and Msipa (n 59) 254–262; Khaitan (n 19) 77; Jarlath Clifford, 'The UN Disability Convention and Its Impact on European Equality Law' (2011) 6 Equal Rights Review 15, 33.
[81] Khaitan (n 19) 76-77.
[82] Lisa Waddington, 'Reasonable Accommodation' in D. Schiek, L. Waddington and M. Bell (ed), *Cases, Materials and Text on National, Supranational and International Non-discrimination Law* (Hart Publishing 2007) 701.
[83] Khaitan (n 19) 76-77.
[84] ibid.

reasonable accommodation across a variety of discrimination grounds but also to convey the common theoretical underpinnings of the concept, whether used for religion, disability, or other grounds. To this end, the chapter presents a historical analysis of reasonable accommodation mapping the jurisdictions explicitly using the term *reasonable accommodation*, whose practice is significant for understanding the selection of grounds and the reasons for restricting or opening them.

The first section follows the development of reasonable accommodation as a corollary to the prohibition of religious-based discrimination. The second section examines the different trajectory of a disability reasonable accommodation which spread worldwide. The third section then explores how Canada and South Africa began to use reasonable accommodation as an integral aspect of the right to equality applicable on all grounds. Their practice also demonstrate the value of extending reasonable accommodation to other grounds than religion and disability. The last section discusses the reasons behind the fragmented development of reasonable accommodation and argues that despite the differences in practical implementation, religious and disability reasonable accommodations should be seen as the same duty, merely applied on different grounds.

1. The rise of reasonable accommodation: religion

Reasonable accommodation for religious minorities first appeared in the United States of America and only explicitly spread to several other jurisdictions, including Canada, South Africa, Israel, and New Zealand.[85] Only two jurisdictions – United States of America and Canada – will be examined in this section because they are key to understand the development

[85] Lisa Waddington (n 82) 701; Henrard, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' (n 3) 62.

of the concept.[86] The section will show that religious-based accommodations are either used as a corollary to indirect discrimination or as a complement to the proportionality requirement of interference with religious freedom. Both uses of reasonable accommodation have common theoretical roots but may differ in their practical application. Beyond surveying the original conception of reasonable accommodation and its theoretical framing, the section also argues that the conflation of reasonable accommodation as a non-discrimination concept and as a facilitator of religious freedom could have contributed to the limited spread of religious-based reasonable accommodation worldwide.

1.1. The origins: preventing the adverse impact of workplace rules

The United States of America ("the US") is considered a birthplace of reasonable accommodation.[87] The obligation to reasonably accommodate religious practice first appeared in the *Guidelines on Discrimination Because of Religion* adopted by the federal Equal Employment Opportunity Commission ("EEOC") in 1967.[88] The Guidelines' purpose was to describe and explain the forms of discrimination prohibited under Title VII of the 1964 Civil Rights Act.[89] The EEOC considered the duty to reasonably accommodate to be implied in the prohibition of discrimination,[90] obliging employers to reasonably accommodate their employees' religious practices unless they can prove that to do so would create an "undue hardship".[91]

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[86] See the same approach adopted, for example, in Bribosia and others (n 3); Howard (n 3); Mégret and Msipa (n 59); Bribosia, Ringelheim and Rorive (n 4).
[87] Leticia de Campos Velho Martel, 'Reasonable Accommodation: The New Concept from an Inclusive Constitutional Perspective' (2011) 14 Sur - International Journal on Human Rights 85, 89.
[88] Equal Employment Opportunity Commission, 'The Guidelines on Discrimination Because of Religion' (1967), para 1605.2. <https://www.govinfo.gov/content/pkg/CFR-2016-title29-vol4/xml/CFR-2016-title29-vol4-part1605.xml> accessed 19 November 2022.
[89] This part of the Civil Rights Act prohibits employment discrimination. Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII) <https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964> accessed 19 November 2022.
[90] Dadakis and Russo, 'Religious Discrimination in Employment: The 1972 Amendment – A Perspective' (1975) 3(2) *Fordham Urban Law Journal* 327 at 336-338.
[91] Equal Employment Opportunity Commission (n 88), para 1605.2.

The Supreme Court confirmed that reasonable accommodation duty is implied in the prohibition of discrimination in *Trans World Airlines v. Hardison* (*TWA v. Hardison*, 1977).[92] The judgment reiterated the EEOC's interpretation of the Title VII of the Civil Rights Act and broadened the scope of religious discrimination prohibited by Section 703(a).[93] In the new reading, employers may be liable for discrimination even if the workplace rules cannot be considered discriminatory *per se*, as they were adopted without a discriminatory intent and with an objective and legitimate aim, but their negative impact on a religious employee could have been prevented by reasonably accommodating them.[94]

The case concerned a conflict between an airline company and an employee whose faith did not allow him to work on Saturdays.[95] The employer insisted that they could not respect this preference as it would demand significantly changing the established system of shifts and revoking the existing seniority system, bringing high additional costs.[96] Even though the Supreme Court acknowledged the duty to reasonably accommodate the employee, the prospective costs of the employer played a decisive role in the court's decision not to side with the plaintiff. It concluded that:

> (t)o require TWA to bear more than a *de minimis* cost in order to give respondent Saturdays off would be an undue hardship, for, (…) [it would] involve unequal treatment of employees on the basis of their religion. Absent clear statutory language or legislative history to the contrary, the statute, the paramount concern of which is to eliminate discrimination in employment, cannot be construed to require an employer to discriminate against some employees in order to enable others to observe their Sabbath.[97]

[92] *Trans World Airlines v. Hardison*, 432 US 63 (1977).
[93] Equal Employment Opportunity Commission (n 88), para 1605.2.
[94] *Trans World Airlines v. Hardison* (n 92), para 45.
[95] ibid, paras 3-4.
[96] ibid, para 9.
[97] ibid, para 49.

While recognising the duty, *TWA v. Hardison* thus also gave it quite stringent limits which are applicable to this day.[98] Moreover, its justification remains somewhat puzzling. The Supreme Court acknowledged that reasonable accommodation is required to uphold the prohibition of discrimination. It recognised that because of their religion – or lack of – some people must be treated differently to be treated equally. This is because the differential treatment remedies a prior, existing inequality. Such differential treatment always implies that the beneficial rules apply to some and not to others – thus seemingly treating people without the specific protected reasons *unequally*. Yet precisely this less beneficial treatment of others was given by the Supreme Court as the reason for the very restricted scope of the reasonable accommodation duty. Surely, there is a legitimate discussion to be had about the limits of the right to accommodation, especially the extent of the required costs and the impact on the rights of others. But by introducing the *de minimis* standard for undue burden in *TWA v. Hardison*, the Supreme Court restricted the discussion to a minimum.

The strict limits of the duty did not change even after 1972, when the US amended the wording of Title VII of the Civil Rights Act to include the duty to reasonably accommodate explicitly.[99] Section 701(j) of Title VII of the Civil Rights Act introduced the following specification:

> (t)he term "religion" includes all aspects of religious observance and practice, as well as belief unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance practise without undue hardship on the conduct of the employer's business.

In the words of the Bureau of National Affairs, the reasonable accommodation duty was supposed to "ensure that religiously motivated employees are given as much chance as possible to have the same employment opportunities as employees who do not have religious barriers

[98] Alan D Schuchman, 'The Holy and the Handicapped: An Examination of the Different Applications of the Reasonable-Accommodation Clauses in Title VII and the ADA' (1998) 73 Indiana Law Journal 745, 761–762.
[99] ibid 758; Bribosia and others (n 3) 12.

to employment."[100] And while the Title VII protection applies to religious beliefs, it also covers alternative belief systems,[101] cultural practices based on traditional beliefs,[102] or atheism.[103] At its conception, reasonable accommodation was thus not meant to facilitate freedom of religious expressions. Rather, it was meant to extend the protection against discrimination some people face because of their religion – or lack of – by redressing the unintended negative impact of general rules. [104]

It has never been properly clarified why such expansion of the prohibition of discrimination has not been applied to other grounds. After all, workplace rules may have a disadvantageous impact also on other protected groups. One possible explanation is that this non-discrimination accommodation duty soon began to be conflated with religious-based exceptions made in the name of freedom of religion. As the paragraphs below show, reasonable accommodation was commonly associated with upholding this specific constitutional right, facilitating religious diversity management rather than non-discrimination.

1.2. The broader use: preventing unnecessary interferences with freedom of religion

When writing about reasonable accommodation, rather than the specific Title VII concept referred to above, much of the US academic literature uses the term accommodation to refer to the exemptions afforded to religious minorities in the name of freedom of religion enshrined in the First Amendment of the United States Constitution, the so-called Free Exercise Clause.[105] As put by one author, the "technical" legal term reasonable accommodation is often

[100] Bureau of National Affairs, Religious accommodation in the workplace 37 (1987) 72, as cited in Schuchman (n 98) 758.
[101] *Cloutier v. Costco Wholesale Corp*., 390 F.3d 126 (1st. Circ., 2004).
[102] *A. A. v. Needville Independent School District*, 611 F.3d 248 (5th Cir. 2010).
[103] Equal Employment Opportunity Commission (n 9), para 1605.1.
[104] Bribosia, Ringelheim and Rorive (n 4) 139–143.
[105] Philip A Hamburger, 'Constitutional Right of Religious Exemption: An Historical Perspective Constitutional Right of Religious Exemption: An Historical Perspective' (1992) 60 George Washington Law Review 915; Mark Storslee, 'Religious Accommodation, the Establishment Clause, and Third-Party Harm' (2019) 86 University of Chicago Law Review 871; Jeremy Waldron, 'One Law for All? The Logic of Cultural Accommodation' (2002) 59 Washington and Lee Law Review 35.

used in a "generic" sense to cover constitutionally mandated exemptions, cultural defences and other adaptations of legal rules, or even in a "popular" sense to describe all cases involving multicultural or religious management.[106] Accommodations are then thought of as a "natural and legitimate response to the tension between law and religious convictions".[107]

The constitutionally mandated exceptions in the name of the freedom of religion reportedly have a rich history in US constitutional jurisprudence.[108] With reference to the right to religious accommodation derived from the Free Exercise Clause, the Supreme Court affords exceptions from generally applicable rules in case they disproportionately interfere with religious freedoms. It confirmed exceptions allowing the Amish community to use horse-drawn buggies without slow-moving-vehicle signage in the *State v. Hershberger case* (1990).[109] In the *Holt v. Hobbs* (2015) case, it acknowledged the right of a Muslim prison inmate to be exempt from the no-beard rule and to maintain a half-inch beard.[110] In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* (2006), it afforded an exception from the criminalisation of hallucinogenic drugs to a Brazilian religious group which used hallucinogenic tea in its rituals.[111]

Some authors contend that these cases are essentially about freedom of conscience and the right to mental integrity which should be free of unnecessary interference.[112] But they can also be thought of as concerning equality and non-discrimination. If the general rules regulating road traffic, prisons, or crime, have a disproportionately negative impact on certain religious groups, treating these groups equally requires protecting them from this negative impact, if reasonably

[106] Foblets (n 8) 39–40.
[107] Michael W McConnell, 'The Origins and Historical Understanding of Free Exercise of Religion' (1990) 103 Harvard Law Review 1409, 1466.
[108] Hamburger (n 105); Bribosia, Ringelheim and Rorive (n 4) 141.
[109] 462 NW2d 393, 399 (1990).
[110] 574 U.S. 352 (2015).
[111] 546 U.S. 418, 423 (2006).
[112] Martha C Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality.* (Perseus Books Group 2010); Paul Bou-Habib, 'A Theory of Religious Accommodation' (2006) 23 Journal of Applied Philosophy 109.

possible. To this extent, accommodations derived from the freedom of religion follow the same logic as the non-discrimination accommodations. Nevertheless, they may practically cover different situations. While the US non-discrimination accommodations concern employment and call on the employer as the responsible duty-bearer,[113] the constitutional accommodations have a far wider reach and often call on the state as the duty-bearer responsible for accommodations. Moreover, the constitutionally mandated accommodations are not bound by the restrictive precedent of undue burden established in *TWA v. Hardison* in the context of the Title VII reasonable accommodations. They can thus go further in balancing the interests of the religious practitioners(s) and the competing interests represented by the rights of others or the legitimate aims pursued by state policies.

In recent years, it has been debated whether the US indeed managed to find such balance. Two US Supreme Court cases are particularly illustrative from this perspective: *Burwell v. Hobby Lobby Stores, Inc* (2014)[114] and the *Masterpiece Cakeshop, Ltd., et al., Petitioners v. Colorado Civil Rights Commission* (2018).[115] In the first case, the Supreme Court affirmed religious-based exceptions for employees who refuse to cover contraceptives in their health insurance plans. The second judgment allowed a religious cakeshop owner to refuse to bake a wedding cake for a same-sex couple, essentially condoning discrimination on the basis of sexual orientation. This is a significant leap from the *de minimis* undue hardship limit allowed for the Title VII reasonable accommodations, which does not even allow for negative impact on others, let alone intentional discrimination.[116] In both cited Supreme Court judgments, religious accommodation overruled important fundamental rights of others, provoking serious

[113] Section 703(a) of the Title VII of the Civil Rights Act (n 89).
[114] 573 U.S. 682 (2015). See also Gedicks and Van Tassell, 'RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion' (2014) 49(2) Harvard Civil Rights-Civil Liberties Law Review 343; Storslee, supra n 46 at 875.
[115] *Masterpiece Cakeshop, Ltd., et al., Petitioners v. Colorado Civil Rights Commission, et al.,* 584 U.S. ___ (2018).
[116] As per the test established by *Trans World Airlines v. Hardison* (n 92).

discomfort in part of the society seeing it as compromising the values of a liberal society.[117] The public discourse about religious accommodations is arguably heavily influenced by this discomfort. Religious accommodations are sometimes criticised for allowing non-liberal religious practices or facilitating discrimination of others in the name of religion.[118]

The US experience shows the complicated trajectory of religious-based reasonable accommodations. Even though the constitutionally mandated accommodations follow similar fundamental logic and aim, seeing reasonable accommodation as a measure facilitating freedom of religion rather than an implicit non-discrimination duty justifies limiting it to this particular social group. Their conflation with constitutionally mandated religious exceptions whose limits have not been clearly established then associated this term with social controversies, possibly explaining why other countries rarely took inspiration from the US religious accommodation practice.

1.3. The hesitant spread to other jurisdictions

Only a handful of states, Canada, South Africa, and New Zealand, have legislated the right to reasonable accommodations for religious practitioners as in the US.[119] The Canadian practice of religious-based reasonable accommodations stands out among these for how it attempted to overcome the challenges experienced by the US. The duty also appeared there in the 1980s through the interpretation of the prohibition of discrimination.[120] The first Supreme Court case, *Commission Ontarienne des Droits de la Personne (O'Malley) c. Simpsons-Sears* (*Simpsons-Sears*, 1985), also concerned an employee who had to undertake part-time employment because

[117] Storslee (n 105) 873; Pamela S Karlan, 'Just Desserts?: Public Accommodations, Religious Accommodations, Racial Equality, and Gay Rights' (2019) 2018 The Supreme Court Review 145.
[118] Storslee (n 105) 942–943; Schuchman (n 98) 759–760; Henrard, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' (n 3) 70–71.
[119] Henrard, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' (n 3) 62.
[120] Bribosia and others (n 3) 14.

otherwise she would be obliged to work on Saturdays, contrary to her religious belief.[121] The Canadian Supreme Court considered the disadvantageous impact she experienced as discriminatory. Referring to the US Civil Rights Act jurisprudence, it added that the employer should have adopted reasonable accommodations to prevent such negative impact. No Canadian law at the time included the duty to reasonably accommodate,[122] which was merely derived from the general duty not to discriminate.

Canada dealt with some of the central issues concerning the limits of religious accommodation significantly differently than the US. It explicitly rejected the *de minimis* standard for undue hardship used for the Title VII accommodations. Instead, the Supreme Court decided that the duty-bearer is expected to make "more than a negligible effort to accommodate", which inevitably carries some costs.[123] On the other hand, Canada also established quite clear limits on how religious accommodations may interfere with the rights of others or important public interests. It clarified that reasonable accommodation cannot be used to justify deliberate discrimination of others with reference to religious freedom.[124] In fact, any significant interference with the rights of others will arguably constitute an undue hardship.[125] The right to reasonable accommodation can also be overridden by competing safety or security interests.[126]

Despite setting clearer limits to the duty than the US, Canada also experienced its "reasonable accommodation crisis".[127] As in the US, the term began to be commonly used to denote various

[121] [1985] 2 R.C.S. 536. <https://scc-csc.lexum.com/scc-csc/scc-csc/fr/item/101/index.do> accessed 30 November 2022.
[122] ibid, paras 3-4.
[123] *Renaud v. BST, Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970.
[124] *Law Society of British Columbia v. Trinity Western University*, [2018] 2 SCR 293 and *Trinity Western University v. Law Society of Upper Canada*, [2018] 2 SCR 453.
[125] Nicol Barnett Walker, 'An Examination of the Duty to Accommodate in the Canadian Human Rights Context' (2012) <https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201201E> accessed 20 November 2022.
[126] *K.S. Bhinder, Canadian Human rights commission v. Canadian Railway company* (1985) 2 S.C.R. 561.
[127] Pierre Bosset, 'Complex Equality, Ambiguous Freedoms' (2011) 29 Nordic Journal of Human Rights 4, 18–20.

forms of religious or cultural exceptions or cultural defences.[128] Especially in Quebec, parts of the public articulated their discomfort with the vision of a society where different rules apply to different people and where some religious practitioners seemingly receive special treatment at the expense of others.[129] The fears (supported heavily by the media[130]) related mainly to potential clashes of religious exemptions with the values of a liberal society, such as gender equality, the rule of law or the separation between the Church and the state.[131] Once again, the non-discrimination origins of the concept were underplayed, and the aspect of multicultural management was emphasised.[132]

Canada faced the challenge head-on and established a dedicated commission to examine religious accommodation in the light of the liberal concerns. In 2008, the Bouchard-Taylor Commission published a report *Building the future, a time for reconciliation*[133] which concluded that the so-called clash of values and reasonable accommodation crisis was a problem of perception rather than a problem of practice.[134] The report explains how the institutions failed to explain to properly communicate to the public the purpose of reasonable accommodation; overcoming the existing structural discrimination, not creating a separate set of rules for religious minorities.[135] Reasonable accommodations facilitate a differential, not preferential treatment.[136] But in this spirit, adjustments and modifications are preferable over blanket exemptions because they can be used for careful balancing of interests in each case.[137] If reasonable accommodations are used to find flexible, creative solutions which limit the

[128] ibid.
[129] Bosset (n 128) 16–20; Narain (n 66) 326.
[130] As explained in Maryse Potvin and Marika Tremblay, *Crise Des Accommodements Raisonnables: Une Fiction Médiatique?* (Éditions Athena 2008).
[131] Bosset (n 128) 18–20.
[132] ibid 16–20; Foblets (n 8) 39–42.
[133] Bouchard, Taylor 'Building the future. A time for reconciliation. Abridged Report.' (n 67).
[134] ibid, 17-22.
[135] ibid, 23-27.
[136] ibid, 24.
[137] ibid, 51-53.

interference with all relevant interests,[138] the potential clashes of values that appear unavoidable in theory can be creatively overcome in practice.[139]

In some ways, Canadian practice provides a useful example of using reasonable accommodations without avoiding the controversies seen in the US. Yet other jurisdictions do not appear to take much inspiration from it. Most countries avoid using the term *reasonable accommodation* even if they require a similar form of differential treatment for religious practitioners with reference to the prohibition of discrimination,[140] possibly because of the controversies associated with the term.[141] In addition, the conflation with accommodations facilitating freedom of religion did not help to consistently communicate that reasonable accommodation is required to prevent or remedy an existing discrimination, rather than establish special rights for religious practitioners.[142]

The next section shows that the failure to emphasise the non-discrimination roots of the concept is also apparent in the introduction and development of disability reasonable accommodation. Disability reasonable accommodation was justified as remedying a long-lasting exclusion of persons with disabilities from the job market and openly given more favourable standards of the undue burden test. Instead of religious and disability reasonable accommodation being presented as the same concept applied on different grounds, they are being treated as separate tools. The fragmented approach allowed disability reasonable accommodation to spread worldwide, while keeping religious reasonable accommodation largely in its original jurisdictions.

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[138] See also Cartabia (n 56) 675–676.
[139] ibid 675–677.
[140] Henrard, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' (n 3) 61–63; Bribosia, Ringelheim and Rorive (n 4).
[141] See above, 32-38.
[142] ibid.

2. The expansion of reasonable accommodation: disability

Disability accommodation appeared soon after religious accommodation in the same jurisdiction as its religious counterpart. However, it is now significantly more widespread.[143] This section examines the development of reasonable accommodation based on disability across key jurisdictions. It first focuses on the US and Canada, the first legal systems where it was used, and continues to map its spread worldwide, including into international and European law. It does not cover all relevant jurisdictions, as the concept has now been incorporated in many of them globally.[144] By mentioning a variety of countries, it nevertheless aims to demonstrate the width of the concept's influence and the differences in how the legal systems justify and theoretically frame this form of accommodation. Even though the worldwide practice clearly continues the narrative of reasonable accommodation as a special measure used separately for persons with disabilities, the section demonstrates the discernible conceptual links between religious and disability reasonable accommodations rarely accentuated in legal practice.

2.1. The origins: cost-profitable inclusion

The United States introduced reasonable accommodation for persons with disabilities in 1973, shortly after incorporating religious accommodation in the Civil Rights Act. Initially, it was included in the Rehabilitation Act[145] and was only relevant for federal employment programmes directed by federal agencies or for those receiving federal financial assistance. In

[143] Khaitan (n 19) 77; Dagmar Schiek and others, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law.* (Hart 2007) 701; Mégret and Msipa (n 59) 255; Bribosia and others (n 3).
[144] Khaitan (n 19) 77. See also United Nations General Assembly, Department of Economic and Social Affairs (n 19).
[145] Rehabilitation Act of 1973 (Pub. L. 93-112) <https://www.eeoc.gov/statutes/rehabilitation-act-1973> accessed 11 November 2022.

1988, the duty was extended to housing.[146] Finally, in 1990 the United States Congress adopted the Americans with Disabilities Act ("ADA"),[147] which extended the duty to reasonably accommodate persons with disabilities to private employers, schools, transportation and other areas of public life, including the provision of services.[148]

ADA establishes denial of reasonable accommodation as a form of discrimination.[149] It also specifies it as a duty to ensure accessibility[150] by adopting workplace modifications, including job restructuring, part-time or modified work schedules, and other similar adjustments.[151] To prevent unduly limiting the accommodation duty as happened with the Title VII religious accommodations,[152] the Congress gave clear guidelines for interpreting the *undue hardship* test under ADA. It rejected the *de minimis* standard used for religious accommodation and opted for a *significant expense* standard instead.[153] Undue hardship is an accommodation which would require significant difficulty or expense in light of its costs and the resources of the duty-bearer.[154]

The evident change in the scope of the reasonable accommodation marks a change in the understanding of its role. The narrative was evidently influenced by the paradigm change that the ADA brought for disability rights. It was the first legal document in the world based on the

[146] Fair Housing Amendment Acts of 1988 (Pub. L. 100-430) <https://www.govinfo.gov/content/pkg/USCODE-2009-title42/html/USCODE-2009-title42-chap45-subchapI.htm> accessed 11 November 2022. See, for example, the United Spinal Association, 'Understanding the Fair Housing Amendments Act' (2004) <https://www.unitedspinal.org/pdf/fair_housing_amendment.pdf> accessed 11 November 2022
[147] United States Americans with Disabilities Act of 1990 (Pub. L. 101-336) <https://www.govinfo.gov/content/pkg/STATUTE-104/pdf/STATUTE-104-Pg327.pdf> accessed 11 November 2019; see also explanatory notes on the website of the National Network on Information, 'Guidance and Training on the Americans with Disabilities Act' <https://adata.org/learn-about-ada> accessed 11 November 2019.
[148] ibid.
[149] Section 102 5(A) of the ADA (n 147). See also Schuchman (n 98) 763.
[150] Section 101 9(a) of the ADA (n 147).
[151] Section 101 9(b) of the ADA (n 147).
[152] See Chapter 2, Section 2, 30-31.
[153] ibid.
[154] Section 12111 (10) of the ADA (n 147).

so-called social model of disability,[155] which explains that disability arises as an interaction between impairment and barriers caused by our rules, practices, or physical environments ("social and environmental structures" or "structures").[156] Impairment is a health or body-related difference, a personal characteristic that is a source of valuable diversity.[157] It entails a disadvantage only in a society that does not properly accommodate it. This understanding constitutes a radical break with the so-called medical model prevalent at the time, according to which disability is a misfortune, a problem to be cured.[158] The social model shifts the responsibility from an individual who is disabled to a society which is not inclusive. If the disadvantage is not created by impairment per se but by the barriers in our society, removing them is a clear demand of justice.[159] The social model of disability thus explained why removing social barriers through reasonable accommodation is a matter of equality rather than special treatment of persons with disabilities.[160]

Disability accommodation has been commonly framed as remedying the long-lasting, pervasive, and unnecessary exclusion of persons with disabilities from society and the job

[155] See, among others, National Network on Information, Guidance and Training on the Americans with Disabilities Act, 'ADA - Findings, Purpose, and History. ADA 30. Celebrate the ADA!' <https://www.adaanniversary.org/home accessed 11 November 2019> See also Richard K Scotch, 'Models of Disability and the Americans with Disabilities Act' (2000) 21 Berkeley Journal of Employment & Labor Law 214.

[156] Thomas Shakespeare, 'The Social Model of Disability' in Lennard J. Davies (ed), *The Disability Studies Reader* (Routledge 2013) 214–222; Mike Oliver, 'The Social Model of Disability: Thirty Years On' (2013) 28 Disability & Society 1024; Thomas Shakespeare, 'Critiquing the Social Model' in Michael Ashley Stein and Elizabeth Emmens (eds), *Disability and Equality Law* (Routledge 2013).

[157] Anna Lawson and Angharad E Beckett, 'The Social and Human Rights Models of Disability: Towards a Complementarity Thesis' (2021) 25 The International Journal of Human Rights 348, 361.

[158] Shakespeare, 'The Social Model of Disability' (n 154) 214–222; Gerard Goggin, Linda Steele and Jessica Robyn Cadwallader, 'Normality and Disability: Intersections among Norms, Law, and Culture' (2017) 31 Continuum - journal of media & cultural studies 337, 337–340.

[159] George Bush, 'Remarks at the Signing of the Americans with Disabilities Act' (Washington, 26 July 1990) <https://www.eeoc.gov/eeoc/history/35th/videos/ada_signing_text.html> accessed 11 November 2019.

[160] Adam Samaha adds, however, that the social model of disability carries a normative implication only when combined with the principle of substantive equality. Adam M Samaha, 'What Good Is the Social Model of Disability?' (2007) 74 The University of Chicago Law Review 1251.

market specifically.[161] Such exclusion is costly and so pragmatic concerns also played a role in legislating disability reasonable accommodation.[162]

The Congress apparently assumed that disability accommodation would bring significant costs[163] for assistive devices, equipment, interpreters, and similar adjustments. These were expected to be balanced by the economic benefits of workplace inclusion.[164] Ultimately, the redistribution of costs was supposed to pay off by increasing the working productivity of this social group. [165] This narrative was missing from the discussions about religious accommodation because it arguably targeted people who were already mostly in the workforce.[166]

Even though disability reasonable accommodation appeared alongside the religious one, it was thus justified differently, as a measure facilitating inclusion and opportunities for the most excluded members of society. The duty-bearers were by law required to bear much higher costs and efforts to accommodate persons with disabilities than religious practitioners. However, the economic focus of disability accommodation's justification also clearly shaped how it began to be framed in the academic literature. Disability accommodation generates what some call *hard costs*.[167] Hard costs are visible monetary resource demands for acquiring the equipment or allowing times off, different from the soft costs brought by job restructuring or shift modifications, which are more associated with religious accommodation.[168] In this context, a rather influential academic narrative suggests that reasonable accommodation should be seen

[161] Stein, 'Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination' (n 14) 636–660.
[162] Schuchman (n 98) 754–755; Kelman (n 57) 834.
[163] Sec. 12111, para 10 of ADA (n 147). National Network on Information, Guidance and Training on the Americans with Disabilities Act, 'Findings and Purpose.' <https://www.ada.gov/pubs/adastatute08.htm#12101> accessed 11 November 2019.
[164] Schuchman (n 98) 755.
[165] ibid 763; Stein, 'Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination' (n 14) 645–660.
[166] Schuchman (n 98) 763.
[167] Michael Ashley Stein, 'The Law and Economics of Disability Accommodations' (2003) 53 Duke Law Journal 79, 88–89; Schiek and others (n 141) 739.
[168] Stein, 'The Law and Economics of Disability Accommodations' (n 165) 88–89.

as a specific redistributive policy claim rather than a non-discrimination duty.[169] The nature of reasonable accommodation duties has been intensely debated among US academics[170] and as we will see in the following sub-sections, the discussions still continue both in the theory and practice of disability accommodation worldwide.[171]

2.2. The proliferation: non-discrimination or a special positive duty

Canada was again the first jurisdiction which followed the US in introducing reasonable accommodation based on disability. In 1985, the Saskatchewan Court of Appeal decided the first disability accommodation case, before the duty was introduced into Canadian federal Human Rights Act in 1998.[172] *Saskatchewan Human Rights Commission and Huck v. Canadian Odeon Theatres Ltd*[173] concerned a wheelchair user who could not visit a theatre because there were no appropriate seating arrangements. The Supreme Court judged that this inaccessibility of itself was prima facie discrimination. It recalled that, in line with Canadian equality doctrine, discrimination might be a product of a de facto situation rather than individual actions.[174] Establishing discrimination also does not necessarily rely on motivations; sometimes, it is caused by consequences, even unforeseen ones.[175] And lastly, identical treatment may have discriminatory consequences.[176] In line with these principles, the Supreme Court confirmed that reasonable accommodation is an implicit requirement of the prohibition of discrimination. Failing to reasonably accommodate the theatre's wheelchair user thus amounted to discrimination.

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[169] Bonnie Poitras Tucker, 'The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm' (2001) 62 Ohio State Law Journal 335; Pamela S Karlan and George Rutherglen, 'Disabilities, Discrimination, and Reasonable Accommodation' (1996) 46 Duke Law Journal 1; Kelman (n 57).
[170] Jolls (n 17) 688; Mark S Stein, 'Nussbaum: A Utilitarian Critique' 50 44; Crossley (n 35).
[171] Jennifer Jackson Preece (n 8) 119–120.
[172] Human Rights Act (R.S.C., 1985, c. H-6) <https://laws-lois.justice.gc.ca/eng/acts/h-6/ > accessed 30 November 2022. See also Bribosia and others (n 3) 14.
[173] *Canadian Odeon Theatres Ltd. v. Huck* [1985], 39 Sask.R. 81 (CA).
[174] ibid.
[175] ibid.
[176] ibid.

Disability reasonable accommodation then spread to many other countries. A number of them follow the narrative of a cost-profitable inclusive measure rather than non-discrimination. For instance, Zimbabwe included reasonable adjustments in its Disabled Persons Act of 1992 as a separate duty to that of non-discrimination.[177] Similarly, New Zealand's Human Rights Act 1993 frames reasonable accommodation as a kind of special measure for persons with disabilities and for religious practitioners. It is understood as an "exception" from the non-discrimination duty.[178]

The European Union ("the EU") also legislates the duty to reasonably accommodate persons with disabilities in its Employment Equality Directive (2000)[179] but does not frame it as a non-discrimination measure. Reasonable accommodation is enshrined in Article 5 of the directive as a tool to "guarantee compliance with the principle of equal treatment".[180] But the denial of reasonable accommodation is not included in the otherwise rather broad definition of discrimination enshrined in Articles 2 or 5 of the directive. Rather, it is understood as a separate duty related to equal treatment [181] Following the EU Employment Equality Directive, all 27 European Union member states must incorporate the duty to adopt reasonable accommodations in employment. An overwhelming majority of member states did so only in relation to persons with disabilities.[182] In addition, states remain divided when it comes to the legal framing of the

[177] Disabled Persons Act, Act 5/1992, 6/2001 (s. 151), 22/2001 (s. 4). <https://www.justice.gov/sites/default/files/eoir/legacy/2013/11/08/disabled_persons_act.pdf> accessed 22 November 2022. See also United Nations General Assembly, Department of Economic and Social Affairs (n 61).
[178] Sections 28 and 29, both entitled as „exceptions". Human Rights Act, Public Act 1993 No 82. <https://www.legislation.govt.nz/act/public/1993/0082/latest/DLM304212.html > accessed 22 November 2022.
[179] Council Directive (EC) 2000/78/EC stablishing a general framework for equal treatment in employment and occupation [2000] OJ L 303 (Employment Equality Directive).
[180] ibid.
[181] Frédérique Ast (n 14) 90; Schiek and others (n 141) 701.
[182] European network of legal experts in gender equality and non-discrimination (n 2) 24; Bribosia and others (n 3) 11–21; Vanbellingen (n 20) 221–248.

duty. In 2019, a good third of them did not treat the denial of reasonable accommodation as a type of discrimination and regulate it rather as a form of individualised special measure.[183]

The approach of the EU is somewhat surprising because already in the mid-1990s, denial of reasonable accommodation began to be framed as a disability-based discrimination in international soft-law. The *Standard Rules for Equalization of Opportunities to Persons with Disabilities*, a policy document adopted by the United Nations in 1994, required states to encourage employers to adopt reasonable adjustments.[184] A year later, the UN Committee on Social, Cultural and Economic Rights (UN CESCR), a body responsible for monitoring and assisting with the implementation of the International Covenant on Social, Cultural and Economic Rights (ICESCR), incorporated the denial of reasonable accommodation as a form of discrimination in its General Comment no. 5 on Persons with Disabilities.[185] According to the UN CESCR, lack of reasonable accommodation leads to the denial of recognition, enjoyment or exercise of economic, social or cultural rights by persons with disabilities and thus implies discrimination.[186]

Many other countries reflected the non-discrimination framing of disability-based reasonable accommodation introduced in the US and Canada. Australia, for instance, introduced it in the Disability Discrimination Act of 1992 as a measure preventing direct discrimination on the basis of disability.[187] In Israel, the Equal Rights for People with Disabilities Law of 1998 also incorporated reasonable accommodation as a preventive measure required by the prohibition

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[183] European network of legal experts in gender equality and non-discrimination (n 2) 30–31.
[184] United Nations General Assembly, 'Standard Rules for Equalization of Opportunities to Persons with Disabilities' (20 December 1993) <https://www.un.org/development/desa/disabilities/standard-rules-on-the-equalization-of-opportunities-for-persons-with-disabilities.html> accessed 30 November 2022.
[185] United Nations Committee on Social, Economic and Cultural Rights, 'General Comment No. 5 on Persons with Disabilities' (E/1995/22, 9 December 1994), para 15. <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11> accessed 30 November 2022.
[186] ibid.
[187] Section 5 of the Disability Discrimination Act, No. 135, 1992. <https://www.legislation.gov.au/Details/C2018C00125> accessed 30 November 2022. See also United Nations General Assembly, Department of Economic and Social Affairs (n 61).

of discrimination.[188] The Philippines incorporated the denial of reasonable accommodation in its Magna Carta for Disabled Persons of 1992 as a specific kind of discrimination with reference to social barriers which limit the fullest possible participation of disabled persons in the life of the group.[189] The United Kingdom also legislated the right to reasonable adjustments for persons with disabilities in its Disability Discrimination Act of 1995 and later in its Equality Act of 2010.[190] The duty to make adjustments is regulated separately from the prohibition of discrimination, but the Equality Act specifies that a failure to make reasonable adjustments amounts to discrimination.[191] A number of countries thus understood reasonable accommodation as a part of the non-discrimination duty. However, they still reserved this understanding only for the ground-specific, disability-based discrimination.

2.3. The globalisation: *sui generis* non-discrimination duty

Disability accommodation started to spread truly globally after the adoption of the United Nations Convention on the Rights of Persons with Disabilities (the "UN CRPD", or "the disability convention") in 2006[192] and its entry into force in 2008.[193] The disability convention defines reasonable accommodation in its Article 2 as a "necessary and appropriate modification and adjustments to ensure to persons with disabilities enjoy all human rights on an equal basis with others." According to the same provision, denial of reasonable accommodation is a type of discrimination unless it constitutes an undue burden. Article 5 para 3 then specifies that reasonable accommodation's purpose is to "promote equality and eliminate discrimination".

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[188] Section 8 of the Equal Rights For Persons With Disabilities Law, 5758-1998. <https://www.gov.il/en/departments/legalInfo/equal_rights_persons_disabilities_law> accessed 30 November 2022. See also United Nations General Assembly, Department of Economic and Social Affairs (n 61).
[189] Magna Carta for Disabled Persons, S.B.No. 2313. <https://legacy.senate.gov.ph/lisdata/74466662!.pdf> accessed 30 November 2022.
[190] Section 20 of the Equality Act of 2010. <https://www.legislation.gov.uk/ukpga/2010/15/contents> accessed 30 November 2022.
[191] ibid, Section 21.
[192] (n 1).
[193] United Nations, Department of Economic and Social Affairs, Convention on the Rights of Persons with Disabilities (2022) <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html> accessed 30 November 2022.

The UN CRPD does not list the duty-bearers, nor does it limit the reasonable accommodation duty to any specific area of life. It is applicable everywhere where it is needed for the equal enjoyment or exercise of all human rights and fundamental freedoms of persons with disabilities.[194] Like in the ADA, the framing of reasonable accommodation in the UN CRPD reflected a change of paradigm.[195] For the first time, an international convention explicitly adopted a version of the social model of disability as its theoretical foundation.[196] The Preamble declares that "disability is an evolving concept and results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others."[197] Seeing disability as predominantly a result of social barriers made a strong case for demanding the structural changes advocated for by disability rights activists.[198] The UN CRPD Committee, the treaty body responsible for monitoring the treaty's implementation, thus soon explained in its General Comment no. 6 that the disability convention strives to achieve inclusive equality, a new vision of substantive equality emphasising structural change.[199] Reasonable accommodation is seen as a central element of this vision of equality.[200]

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[194] See Article 2 of the UN CRPD for the definition of reasonable accommodation.

[195] Andrea Broderick, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities* (Intersentia 2015) 63; Tara J Melish, 'The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify' (2007) 14 Human Rights Brief 4–6.

[196] Lawson and Beckett (n 155) 351; Rosemary Kayess and Phillip French, 'Out of Darkness into Light - Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 Human Rights Law Review 1, 7.

[197] While the UN CRPD does not include a definition of disability, it explains in Article 1 that "(p)ersons with disabilities include those who have long-term physical, mental, intellectual, or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."

[198] Kayess and French (n 196) 6–11; Melish (n 195) 6–9; Theresia Degener, 'A New Human Rights Model of Disability' in Valentina Della Fina, Rachele Cera and Giuseppe Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities* (Springer International Publishing 2017) 43–46.

[199] UN CRPD Committee (n 1).

[200] ibid, para 24-25. See also Jessica Lynn Corsi, 'Art.5 Equality and Non-Discrimination' in Ilias Bantekas, Michael Ashley Stein, Dimitris Anastasiou (ed), *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press 2018) 74–75; Paul Harpur, 'Embracing the New Disability Rights Paradigm: The Importance of the Convention on the Rights of Persons with Disabilities' (2012) 27 Disability & Society 1.

The UN CRPD Committee specified its understanding of reasonable accommodation in General Comment no. 6.[201] According to the UN CRPD Committee, reasonable accommodation is both a proactive and reactive non-discrimination duty, as it arises from the moment of request or from the moment the duty-bearer must have realised it would be needed.[202] Accommodations must be targeted to the specific needs of an individual and negotiated together with them.[203] But they may also become a collective good.[204] In this sense, reasonable accommodation is intimately linked with other important principles the convention introduced to facilitate inclusive equality: accessibility[205] and universal design.[206] While the UN CRPD Committee insists that reasonable accommodation is different as it is an immediate, legally enforceable and individualised duty, it often complements both these concepts.[207] Accommodations created for one person, such as the construction of a ramp, facilitate accessibility for other persons. Proactively implementing accommodations for different people also means thinking about their needs while designing structures, thus facilitating universal design.

Despite this detailed guidance, the UN CRPD Committee makes no reference to the conceptual origins of the duty derived from the prohibition of discrimination. Even though the General Comment No. 6 extensively describes why structural change is key to achieving equality and how reasonable accommodation advances such change, there is no clear explanation as to why its denial constitutes discrimination and not, for instance, a failure to uphold equality.[208] No

[201] UN CRPD Committee (n 1).
[202] ibid, para 24(b).
[203] ibid.
[204] ibid.
[205] ibid, para 24. See Article 9 of the UN CRPD.
[206] ibid. See also Article 4(f) of the UN CRPD.
[207] UN CRPD Committee (n 1), paras 24-25, 42. See also a series of UN CRPD Committee decisions concerning reasonable accommodations to ensure informational and communicational accessibility of court proceedings to enable persons with disabilities to perform jury duty. UN CRPD cases *JH v. Australia* App no 35/2016 (31 August 2018); *Michael Lockrey v. Australia* App no 13/2013 (8 April 2016); *Beasley v. Australia* App no 11/2013 (1 April 2016).
[208] UN CRPD Committee (n 1), para 23.

link with the reasonable accommodation based on religion is made. Reasonable accommodation is thus not presented as a general duty applied on different grounds, including disability, but rather as a disability-specific, *sui generis* non-discrimination duty.[209]

The *sui generis* conception of reasonable accommodation in the UN CRPD also arguably influences how other national and international jurisdictions approach the concept.[210] In 2022, the UN CRPD had 185 state ratifications, including the first transnational entity to ratify an international treaty, the European Union.[211] Only five countries have neither ratified nor signed the convention.[212] This should make the disability convention very influential in guiding the national and international standards associated with the right to reasonable accommodation. For example, the United Nations Committee on the Rights of the Child has been recommending state parties to adopt reasonable accommodations for children with disabilities as a non-discrimination duty since 2012.[213] The Council of Europe system, including the European Court of Human Rights,[214] has also been requiring member states to legislate reasonable accommodation for persons with disabilities in line with the UN CRPD.[215] But again, neither of the two international bodies explicitly require reasonable accommodation for anyone else than persons with disabilities.

Following this trend, the right to reasonable accommodation now appears in many national jurisdictions but only for persons with disabilities.[216] Moreover, many states demonstrably

[209] See also Lisa Waddington (n 82) 631.
[210] Mégret and Msipa (n 59) 260–261.
[211] United Nations Office of the High Commissioner for Human Rights, 'Ratification of 18 International Human Rights Treaties' <https://indicators.ohchr.org> accessed 5 May 2020.
[212] ibid.
[213] United Nations Committee on the Rights of the Child, 'Concluding Observations towards Algeria' (CRC/C/DZA/CO/3-4, 2012), para 56(e); 'Concluding Observations towards Cyprus' (CRC/C/CYP/CO/3-4, 2012), para 39.
[214] See, for instance, the *Cam v. Turkey* App no 51500/08 (ECtHR 23 February 2016), para 67; *Enver Şahin v. Turkey*, App no 23065/12 *(*ECtHR 30 January 2018), para 61.
[215] Council of Europe, 'Disability Strategy 2017-2023'(2017), para 36 <https://rm.coe.int/16806fe7d4> accessed 30 November 2022.
[216] Khaitan (n 19) 77.

struggle with understanding how the duty relates to discrimination. A number do not frame denial of reasonable accommodation even as a *sui generis* type of discrimination, let alone as an inherent non-discrimination duty.[217] Rather, it is often employed as disability specific positive measure.[218] Even though the UN CRPD demonstrably helped spread reasonable accommodation worldwide, it thus also seems to have helped to frame it as a disability-specific

The following section demonstrates what the story of reasonable accommodation could have been if it had not remained nearly monopolised in disability rights law. From an implicit requirement of the prohibition of discrimination on the grounds of religion it could have developed into an implicit requirement of non-discrimination on all grounds, including disability. Two jurisdictions have most notably followed this path: Canada and South Africa.

3. The potential of reasonable accommodation: all protected grounds

Canada and South Africa understand reasonable accommodation as an implicit requirement of the prohibition of discrimination on all protected grounds. According to existing comparative research, they are the only jurisdictions which developed such extensive legal practice of explicitly applying reasonable accommodation on the grounds of religion, disability, age, gender, race, other markers, or a combination of those.[219] Such comprehensive use of reasonable accommodation provides a good basis for demonstrating and clarifying its intimate link with non-discrimination, as well as the merit of using reasonable accommodation on all grounds. This section first explains how reasonable accommodation entered the Canadian legal system by being read into the discrimination test. The second part then shows the role and place

[217] Mégret and Msipa (n 59) 261.
[218] See above, 43-50.
[219] With the exception of the Flemish part of Belgium which, however, does not yet have a developed reasonable accommodation practice. Bribosia, Ringelheim and Rorive (n 4) 45; Vanbellingen (n 20).

of reasonable accommodation in South Africa where the denial of reasonable accommodation is seen as a specific but cross-cutting form of discrimination.

3.1. Integral part of the discrimination test

Canada now arguably has the most diverse reasonable accommodation practice, even though it initially followed the United States in the concept's introduction.[220] The first reasonable accommodation Supreme Court judgment, the above-cited *Commission Ontarienne des Droits de la Personne (O'Malley) v. Simpsons-Sears (Simpsons-Sears*, 1985),[221] indicated that reasonable accommodation was an integral aspect of the right to equality. As such, it is not specific to a disability or a religion but applies to all potential grounds of equality law.

Neither the Canadian federal Human Rights Act,[222] the Charter of Rights and Freedoms[223] nor the Ontario Human Rights Code[224] explicitly enshrined the right to reasonable accommodation at the time this duty was read into them. Only afterwards did the 1986 amendment of the Ontario Human Rights Code introduce reasonable accommodation on the grounds of disability,[225] as well as age, sex, a record of offences and marital status.[226] The Canadian Human Rights Act was then amended to incorporate a reasonable accommodation duty in 1998, covering all grounds protected in this act, including race or ethnicity, sex, gender identity and expression, sexual orientation, age, marital or family status, and others.[227]

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[220] de Campos Velho Martel (n 87) 89.
[221] (n 121).
[222] Human Rights Act (R.S.C., 1985, c. H-6) <https://laws-lois.justice.gc.ca/eng/acts/h-6/ > accessed 30 November 2022.
[223] Contained in the Constitutions Acts 1867 to 1982.<https://laws-lois.justice.gc.ca/eng/Const/page-12.html> accessed 30 November 2022.
[224] Human Rights Code, R.S.O. 1990, c. H. 19. <https://www.ontario.ca/laws/statute/90h19 > accessed 30 November 2022.
[225] ibid, Section 17 para 2.
[226] ibid, Section 24 para 1.
[227] Human Rights Act (n 222). Section 2 covers the following grounds: national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability, or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

The Canadian Supreme Court's *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* judgment (*Meiorin*, 1999)[228] first comprehensively explained the Canadian perception of the role and place of reasonable accommodation. The applicant was a woman who worked as a forest firefighter but was dismissed after failing to meet the required physical fitness tests. The tests followed the typical performance standards of the existing pool of forest firefighters, an overwhelming majority of whom were men. They thus effectively excluded most women from the profession.[229] In the view of the Canadian Supreme Court, the applicant suffered prima-facie discrimination based on her gender because of the disparate impact of these male-inspired standards. Even though the physical fitness requirements were objective, legitimate and reasonably connected with the job, their discriminatory impact was not necessary because it was preventable by reasonably accommodating the applicant. This decision did not imply that the tests would have to be cancelled in general. But the applicant, as a woman, was entitled to an exception or an adjustment in their assessment. Excluding the applicant from the job without attempting to accommodate her amounted to discrimination by denial of reasonable accommodation.[230]

Moreover, in this judgment the Supreme Court took a step further by reimagining the existing discrimination test around reasonable accommodation. The unified discrimination test, applied from then on by the Canadian courts, departs from the finding of prima facie discrimination, i.e., the disadvantageous impact of a treatment, rule, or practice on an individual.[231] If no clear intention to discriminate is identified, the duty-bearer must prove that the impugned measure has an objective and legitimate aim.[232] If this requirement is fulfilled, such rules or practices might be kept in place in general. However, as a next step, the duty-bearer must also prove that

[228] [1999] 3 SCR 3. <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1724/index.do> accessed 30 November 2022.
[229] ibid, para 2.
[230] ibid, para 83.
[231] ibid, para 50-52.
[232] ibid, para 54.

it was not possible to accommodate the individual claimant without undue hardship.[233] Canada essentially reimagined the proportionality requirement typically used for assessing the permissibility of discrimination by complementing it with reasonable accommodation: if a disadvantage was preventable by reasonable accommodation, it was not necessary to uphold the sought legitimate aim. Such disadvantage then represents discrimination.

The reasonable accommodation-centred proportionality test has several benefits. It abandons the problematic divide between direct and indirect discrimination and focuses on discriminatory impact rather than discriminatory intent.[234] An individual negative impact establishes a prima facie discrimination, without the need to show a disproportionate disadvantage (potentially) experienced by the whole protected group.[235] In the Supreme Court's view, both these factors enable the discrimination analysis to better target the systemic forms of discrimination that may not result from acts or omissions of a concrete person.[236] Incorporating reasonable accommodation in the discrimination analysis then allows the courts and duty-bearers to be more flexible in finding solutions to such complex forms of discrimination. It allows them to go beyond simply judging some rules or practices as discriminatory and demanding their abolishment. Instead, they can carefully weigh countering rights, interests, and values and find a balanced compromised solution.[237] Reasonable accommodation thus brings a significant value to this unified discrimination analysis.

Since the *Meiorin* judgment, the Canadian Supreme Court has applied reasonable accommodation in cases related to sex, gender, or gender identity as well as family status or national origin.[238] It has been used in cases which could otherwise be judged as direct as well

[233] ibid.
[234] ibid, paras 60-61.
[235] ibid, paras 32-36.
[236] ibid, paras 39-42.
[237] Pierre Bosset and Myriam Jézéquel (eds), *Les Accommodements Raisonnables: Quoi, Comment, Jusqu'où?: Des Outils Pour Tous* (Éditions Y Blais 2007) 6; Cartabia (n 56) 676–677.
[238] ibid, also Bosset (n 128).

as indirect discrimination.[239] For instance, in *Dominion Colour Corp. v. Teamsters, Local 1880 (Metcalfe Grievance,* 1999), the Supreme Court judged that if the job performance is potentially dangerous for an unborn child, employers should accommodate the pregnant employee by reallocating work tasks or reassigning the employee to another position.[240] A similar obligation was found in the case of breastfeeding, where the Canadian Human Rights Tribunal obliged the company to develop a policy on reasonably accommodating breastfeeding employees.[241] In other cases, gender-based accommodations required enabling trans persons to access bathrooms of their choice.[242]

In *Whyte v. Canadian National Railway* (2010) and several other cases, accommodation was required due to child-care responsibilities.[243] The case concerned a single mother whose employer requested her to relocate for work. She was unable to do so due to her child's health issues. The company only allowed her to postpone the relocation by four months, arguing that having a child was her personal choice for which the employer cannot be required to bear costs. The Canadian Human Rights Tribunal did not accept this argument and required the company to find a solution that would enable the employee to continue working without relocation.[244] In the *Desroches c. Commission des droits de la personne du Québec* case (*Desroches,* 1997), reasonable accommodation was applied on the grounds of age and family status. The case concerned a mother of two children who was not rented an apartment because the owner had a one-person-only policy. The Quebec Court of Appeal found the policy discriminatory. It effectively denied accommodation to all children because they could not live alone. As a

[239] Nicol Barnett Walker (n 125). Pierre Bosset, 'Les fondaments juridiquest et l'évolution de l'obligation d'accommodement raisonnable' in Pierre Bosset, Myriam Jézéquel (ed), *Les accommodements raisonnables: quoi, comment, jusqu'où? : des outils pour tous* (Éditions Y Blais 2007) 13–14.
[240] [1999] O.L.A.A. No. 688. See also Drapeau (n 27).
[241] *Cole* v. *Bell*, 2007 CHRT 7. <https://www.tbs-sct.canada.ca/dpr-rmr/2007-2008/inst/ptp/ptp-eng.pdf> accessed 30 November 2022.
[242] Nicol Barnett Walker (n 125).
[243] *Kasha Whyte v. Canadian National Railway*, 2010 CHRT 22; *Cindy Richards v Canadian National Railway*, 2010 CHRT 24; *Denise Seeley v. Canadian National Railway*, 2010 CHRT 23.
[244] *Kasha Whyte v. Canadian National Railway* (n 243).

reasonable accommodation, the owner had to offer a suitable alternative apartment.[245] Reasonable accommodation was also found to apply on the grounds of national origin in a case of a prospective student of an immigrant background who could not produce the required official documents from the country of origin.[246]

In many cases, reasonable accommodation enabled flexible balancing of competing interests in some of the most delicate discrimination issues.[247] This was especially important in religious accommodation cases where reasonable accommodation could be used to find creative solutions instead of negatively perceived blanket exceptions.[248] The *Multani* judgment is a good illustration of this approach.[249] The case concerned a Sikh student who wished to carry a kirpan, a ceremonial dagger, to school. In many previous cases, the prohibition of kirpans at schools was seen as justified because it had a clear public security aim.[250] However, in the *Multani* case, the Canadian Supreme Court exploited the potential of reasonable accommodation for finding a creative compromise solution. It decided that as reasonable accommodation, the Sikh student should be allowed to bring the kirpan to school, but the kirpan had to be always sewn to his clothes. The accommodation allowed the Sikh student to respect his cultural obligations but also found a way to protect the safety of other students.[251] The *Multani* case has been referred to as a good example of reasonable accommodation through partial concessions, a kind of mutual accommodation enabling inclusion while protecting important public interests.[252]

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[245] *Desroches c. Commission des droits de la personne du Québec*, [1997] R.J.Q. 1540 (C.A.).
[246] *Commission des droits de la personne et des droits de la jeunesse c. Collège Montmorency,* J.E. 2004-966 (T.D.P.).
[247] Bosset (n 128) 16.
[248] Cartabia (n 56) 676–677; Emilio Santoro, '"Ha Da Pasasa" "a Nuata": Reasonable Accommodation, a Tool for Defending Coexistence Based on Respect for Rights in a Pluralist Society', *Institutional accommodation and the citizen: legal and political interaction in a pluralist society* (Council of Europe Publishing 2009) 216.
[249] *Multani* v. *Commission scolaire Marguerite-Bourgeoys*, [2006] S.C.J. No. 6.
[250] *Nijjar* v. *Canada 3000 Airlines Ltd.,* [1999] C.H.R.D. No. 3.
[251] Cartabia (n 56) 676.
[252] ibid 672–677; Narain (n 66) 335–336; Emilio Santoro (n 248) 215; Jane Wright (n 28) 147.

Reasonable accommodation has also been required as a preventive and proactive measure. On multiple occasions, the Canadian courts insisted that duty-bearers must actively assess the potential impact of their rules and policies on some groups and ensure that they will not contribute to exclusion.[253] One such case was the *Council of Canadians with Disabilities* v. *VIA Rail Canada Inc*. (2007), where the Supreme Court judged that service providers, a rail company in this case, have a duty to examine whether the imposed rules may have an exclusionary effect. They must forecast what reasonable accommodations might be needed and plan for them.[254] The option of reasonable accommodation should become an inherent feature of all rules and policies and thus contribute to more inclusive environments. In this sense, reasonable accommodation in the Canadian practice became a measure for collective inclusion, not only an individualised adjustment.

Arguably, among the factors why the reasonable accommodation practice developed in such a diverse way was Canada's explicit adoption of a substantive vision of equality.[255] This vision of equality involves redressing some existing inequalities, including those caused by non-inclusive structures. Reasonable accommodation is then understood as a natural extension of the prohibition of discrimination. The Canadian practice shows that its added value lies in its ability to find a balanced compromise between different legitimate aims. Simply finding discrimination typically does not have similar effects. It can lead to abolishing rules or practices as discriminatory, but it does not always flexibly facilitate striking a balance between competing interests. This is a significant contribution that reasonable accommodation brings to equality law.

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[253] This has been established by two Canadian Supreme Court judgments, the *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3, para 68; and *British Columbia* (*Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights),* [1999] 3 R.C.S. 868, para 19. Foblets (n 8) 45–46.

[254] *Council of Canadians with Disabilities v VIA Rail Canada Inc.*, [2007] 1 SCR 650. < https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2352/index.do> accessed 30 November 2022.

[255] Fredman, 'Substantive Equality Revisited' (n 15) 713; Bosset (n 239) 3.

3.2. Factor in assessing the *fairness* of discrimination

The incorporation of reasonable accommodation had a slightly different trajectory in South Africa. It was first understood as a type of affirmative action and applied to designated groups, including Black people, women, and people with disabilities.[256] The Promotion of Equality and Prevention of Unfair Discrimination Act of 2000, a statute incorporating a broader non-discrimination duty beyond employment, then extended reasonable accommodation to the grounds of race, gender, disability, or old age.[257] Similarly to Canada, South Africa explicitly adheres to a substantive vision of equality.[258] Correspondingly, the statutes' understanding of discrimination is broad. It includes structural discrimination,[259] recognises its link with the historic operation of apartheid, patriarchy, and colonialism, and establishes an obligation to remedy it. [260] In this context, denial of reasonable accommodation is legislated as a specific type of discrimination.[261]

The South African Constitutional Court gave a more thorough explanation of the role of reasonable accommodation in the country's non-discrimination legislation in *MEC for Education: Kwazulu-Natal and Others v Pillay (Pillay*, 2008), a case concerning cultural diversity in a school environment.[262] The case was brought by a girl of Indian descent who

[256] Section 1 of the Employment Equity Act no. 55 of 1998, definitions. <https://www.labour.gov.za/DocumentCenter/Acts/Employment%20Equity/Act%20-%20Employment%20Equity%201998.pdf> accessed 30 November 2022.
[257] Promotion of Equality and Prevention of Unfair Discrimination Act no. 4 of 2000. < https://www.justice.gov.za/legislation/acts/2000-004.pdf> accessed 30 November 2022.
[258] Fredman, 'Substantive Equality Revisited' (n 15) 713.
[259] Section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act (n 257) states that "discrimination results also from an omission and operation of policies, laws, rules, practices, conditions or situations which have an effect of imposing burdens, obligations or disadvantages, or on the contrary, withholds benefits, opportunities or advantages."
[260] The Preamble and Section 4, Guiding principles, of the Promotion of Equality and Prevention of Unfair Discrimination Act (n 257).
[261] Section 7 on the basis of race, Section 8 on the basis of gender, Section 9 on the basis of disability, Section 29 including reasonable accommodation for the elderly and reasonable accommodation of diversity in education. Promotion of Equality and Prevention of Unfair Discrimination Act (n 257).
[262] *MEC for Education: Kwazulu-Natal and Others v. Pillay* CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007).
<https://collections.concourt.org.za/handle/20.500.12144/3050> accessed 30 November 2022.

wore a nose stud, in line with her family's cultural tradition. Her school, which practised a strict no facial jewellery policy, threatened to expel her if she did not remove it. The Constitutional Court examined the case from the perspective of discrimination based on culture. The South African constitutional assessment of discrimination is a complex contextual analysis of the vulnerability of the victim and the impact of the discrimination.[263] The notion of *fairness* is key to determining whether the discrimination was unlawful. In this case, the court explained that "reasonable accommodation will always be an important factor in the determination of the fairness of discrimination."[264] Defining the role of reasonable accommodation, it stated:

> At its core is the notion that sometimes the community, whether it is the state, an employer or a school, must take positive measures and possibly incur additional hardship or expense to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms.[265]

This quote clearly expresses the South African Constitutional Court's expectations from reasonable accommodation: remedying unnecessary exclusion of people who do not correspond to *mainstream* attributes.[266] Reasonable accommodation is an exercise of proportionality between the interests of mainstream society and the rights of the individual with different needs.[267] In this spirit, the court also explained to whom it should apply:

> (the) exclusion is inflicted on all those who are excluded by rules that fail to accommodate those *who depart from the norm* [emphasis added]. Our society which values dignity, equality, and freedom, must therefore require people to act positively to accommodate diversity. Those steps might be as simple as granting and regulating an

[263] Joan Small and Evadne Grant, 'Equality and Non-Discrimination in the South African Constitution' (2000) 4 International Journal of Discrimination and the Law 47, 61.
[264] *MEC for Education* (n 262), para 76.
[265] ibid, para 73.
[266] ibid, para 74.
[267] ibid, para 76: „Reasonable accommodation is, in a sense, an exercise in proportionality that will depend intimately on the facts."

> exemption from a general rule, or they may require that the rules or practices be changed, or even that buildings be altered, or monetary loss incurred.[268]

The South African Constitutional Court specified that the reasonable accommodation angle is most relevant when discrimination occurs by an application of mainstream rules and practices which otherwise serve a legitimate purpose.[269] This is because reasonable accommodation can prevent or remedy this kind of discrimination. Discrimination caused by stigma, prejudice, or stereotype, on the other hand, will require a different approach.[270]

Some other interesting South African reasonable accommodation cases concern gender.[271] For instance, in *Jade September v. Mr Subramoney n.o., the Ministry of Justice and Correctional Facilities and others* (2019), the Equality Court (Western Cape Division) decided that denial of reasonable accommodations for a trans person in a male prison constitutes discrimination based on gender identity.[272] Due to alleged safety concerns, the inmate was not allowed to express her gender identity, such as wearing female clothing, long hair and make-up. The prison officials also kept addressing her as a male. The case could have been examined from the perspective of direct or indirect discrimination based on gender identity.[273] However, the court thought it more appropriate to adopt the reasonable accommodation lens. This perspective allowed it to demonstrate that even if there might have been legitimate reasons for such treatment, there were other more appropriate and less restrictive means to achieve them.[274] Similarly to the above-cited Canadian *Meiorin* case, reasonable accommodation here entered the test as a specification of the necessity requirement. The court then judged that denial of the

[268] ibid, para 75.
[269] ibid, para 78.
[270] ibid, para 77.
[271] South African Human Rights Centre, 'Research Brief on Gender Equality in South Africa 2013-2017'(2017). <https://www.sahrc.org.za/home/21/files/RESEARCH%20BRIEF%20ON%20GENDER%20AND%20EQUALITY%20IN%20SOUTH%20AFRICA%202013%20to%202017.pdf> accessed 30 November 2022.
[272] *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC) (23 September 2019), para 156.
[273] ibid, para 149.
[274] ibid, para 150-152.

possible reasonable accommodations amounted to discrimination and recommended concrete accommodations the prison could have adopted.[275]

In South Africa, similarly to the United States, the reasonable accommodation logic was sometimes also applied to assessing infringements with the constitutional right to freedom of religion. In *Christian Education South Africa v Minister of Education* (*Christian Education*, 2000) for example, the Constitutional Court specified that the proportionality test must also examine the possibility of reasonably accommodating the believer.[276] The case concerned a religious school following a particular Christian doctrine that used physical punishment for children as a means of education.[277] The pupils' parents requested an exception from the legal prohibition of corporal punishments in educational settings. In this case, the Constitutional Court decided that refusing the exemption was well justified. The required exemption would compromise the state policy of eradication of corporal punishment, which would constitute a disproportionate hardship. The parents, on the other hand, could still bring their children up in line with their faith. They were only limited in authorising corporal punishment at the school.[278] As the literature suggests, through this and other cases, South Africa set limits to the accommodation duty when it involved violating the rights of others.[279] Unlike in Canada, the use of reasonable accommodation across the wide spectrum of beneficiaries does not appear to have provoked wider controversies.[280]

South Africa, similarly to Canada, demonstrates the intimate relationship between reasonable accommodation and non-discrimination. Reasonable accommodation enters the discrimination

[275] ibid, para 156.
[276] *Christian Education South Africa v Minister of Education* (CCT4/00) [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 (18 August 2000).
[277] ibid, the introduction.
[278] ibid, para 51.
[279] See the analysis of religious accommodation in South Africa in Kristin Henrard, 'The Accommodation of Religious Diversity in South Africa against the Background of the Centrality of the Equality Principle in the New Constitutional Dispensation' (2001) 45 Journal of African Law 51.
[280] ibid.

analysis to make sure that the disadvantageous impact some general rules have on those who *depart from the norm*[281] is avoided even if the rules themselves cannot or should not be abolished because they are, in general terms, rational and legitimate. Reasonable accommodation facilitates balancing between the interests of the mainstream society represented in these rules and the rights of the individual.[282] It ensures that an individual only needs to bear the impact which was indeed necessary because it was not preventable.

Both jurisdictions also demonstrate that if a legal system recognises that discrimination may also be caused by a negative impact of seemingly neutral rules, possibly unintended, reasonable accommodation duty is a logical extension of the discrimination analysis on any protected ground. The last section of this chapter explains why the Canadian and South African understanding of reasonable accommodation most appropriately reflects its conceptual roots. Despite the differences highlighted in practice, reasonable accommodation for religion, disability, and on other grounds share the same underlying logic.

4. Formulating a common vision for reasonable accommodation

One of the most striking things about reasonable accommodation is how divergent its practice is across jurisdictions. Its conceptualisation ranges from an implied non-discrimination duty, a *sui generis* non-discrimination measure, a constitutionally mandated exception or a specific positive or redistributive duty.[283] Legal systems do not agree on who should benefit from it, either. Most of them cover only religious practitioners or persons with disabilities.[284] Yet the two countries which apply reasonable accommodation widely as an automatic part of their

[281] *MEC for Education* (n 262), para 76.
[282] ibid.
[283] See Chapter 2, Sections 1-2.
[284] ibid; also Bribosia and others (n 3); Khaitan (n 19) 76–78; Howard (n 3).

discrimination analysis cover a whole range of protected groups.[285] This section argues that despite the difference in practical implementation, there are conceptual convergences between the reasonable accommodation practices among jurisdictions.

The first part of this chapter showed that reasonable accommodation was originally conceived as an extension of the prohibition of discrimination based on religion.[286] It was first not specifically legislated but read into the non-discrimination duty to prevent the disadvantageous impact certain workplace practices had on religious practitioners because they diverged from the *norm*.[287] It is widely accepted that, in this sense, reasonable accommodation complements the prohibition of discrimination.[288] If the workplace rules are not illegitimate or irrational, their discriminatory impact can be prevented or alleviated through reasonable accommodation. In a very similar fashion, reasonable accommodation was used also to specify the proportionality requirement of interference with freedom of religion.[289]

Until this point, the aim and role of reasonable accommodation at its conception are strikingly similar to how the duty is imagined and applied in Canada and South Africa, even though limited to religion. Nevertheless, due to different factors, the non-discrimination roots of reasonable accommodation remained under-emphasised. Instead, the public or academic discourse often highlighted freedom of religion and conscience as the core underlying value, fortifying the specific connection with believers and their religious rights.[290]

When disability accommodation came on the scene in the United States, it was not presented as an extension of the already established religious reasonable accommodation to other

[285] Chapter 2, Section 3.
[286] Chapter 2, Section 1.
[287] Chapter 2, 59-60.
[288] Howard (n 3); Bribosia and others (n 3); Jolls (n 17); Crossley (n 35).
[289] Chapter 2, 32-35.
[290] Bou-Habib (n 112); Nussbaum (n 112); Storslee (n 105); Hamburger (n 105). Chapter 2, Section 2, 33-34, 37-38.

grounds.[291] Rather, it was introduced as specific concept bringing a cost-efficient solution for including persons with disabilities in the workplace.[292] The United States disability regulation was highly influential, and a similar model of reasonable accommodation soon began to be legislated worldwide, including in international law.[293] Following the US model, many countries treated reasonable accommodation as a *sui generis* concept for persons with disabilities.[294] The global disability convention, the UN CRPD, did not make a link with the historical origins of the duty, which emanated from the prohibition of discrimination based on religion.[295] Even in the academic literature, religious accommodation and disability accommodation sometimes appear to be two distinct concepts playing different roles and justifiably targeting different social groups.[296]

Admittedly, in certain aspects, religious and disability accommodations developed differently. At least in the United States, the literature mentions that religious accommodation often consisted of exemptions, thus prompting the impression that general rules do not apply to religious practitioners.[297] Disability accommodation, on the other hand, typically requires assistances, adjustments, or modifications.[298] It was also applied more generously because of the different interpretation of the undue hardship standard and also because it was seen as remedying the profound, unfair and costly exclusion of persons with disabilities from the workforce.[299] Disability accommodation was also more framed as a redistributive measure

[291] Chapter 2, Section 2.
[292] ibid, 40-42.
[293] ibid, 41-42.
[294] ibid.
[295] UN CRPD Committee (n 1), paras 24-25.
[296] For instance, Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4); Alidadi (n 25); Stein, 'Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination' (n 14); Mégret and Msipa (n 59). Compare, for example, with Schuchman (n 98).
[297] Hamburger (n 105); Dadakis and Russo (n 90).
[298] Schuchman (n 98) 747.
[299] ibid 755–756. Schuchman (n 98).

because it seemingly generates different costs. It requires *hard costs* from the duty-bearer but needs not, at least not as visibly as religious accommodation, impact the rights of others.[300]

The differences in the visible costs between disability and religious reasonable accommodation have likely played a large role in the different perception of the two types of accommodation. The costs that impact on the rights of others associated with religious-based reasonable accommodations prompted controversies and social discussions about the limits of freedom of religion.[301] And disability-based reasonable accommodation, generating monetary costs on the duty-bearer, contributed to framing reasonable accommodation in some countries as a redistributive positive measure.[302] The UN CRPD then supported the narrative by highlighting reasonable accommodation as a *sui generis* disability-specific measure.

But focusing on the rationales and logic behind the reasonable accommodation duties demonstrates that both religious and disability-based accommodations have common conceptual roots. Even though laws often do not explain this explicitly, disability accommodations remove barriers which would otherwise imply the discrimination of persons with disabilities.[303] Inaccessible school premises or rigid working hours, for instance, cause a negative impact on a person with a disability which can be considered discriminatory. Prohibition of discrimination, likewise, typically implies that it is not possible to dismiss someone due to their disability – and reasons associated with it – without objective and

[300] (n 167).
[301] Chapter 2, Section 2, 37-39. Karlan (n 117); Cartabia (n 56); Storslee (n 105); Henrard, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' (n 3).
[302] Mégret and Msipa (n 59) 46–48. See also Chapter 2, Section 3, particularly 43-46.
[303] As per Article 2 of the UN CRPD (n 1).

proportionate justification.[304] Assessing such justification will typically revolve around whether it was possible to reasonably accommodate the job applicant.[305]

Disability reasonable accommodation thus also functions as a corollary to non-discrimination. It helps prevent unnecessary discriminatory impact or even rationally motivated discriminatory treatment. And it also helps determine when discrimination is justified. If discrimination caused by non-inclusive structures could have been prevented by reasonable accommodation without an undue burden, it cannot be justified. It can only be justified if reasonable accommodation without an undue burden was not possible. This logic corresponds to the use of religious-based reasonable accommodation described above. In this sense, the differences in the application of religious and disability accommodation appear more of a practical and less of a conceptual nature.

The links between religious and disability reasonable accommodation are, after all, highlighted by the Canadian and South African practices. The same reasonable accommodation duty is applied on all grounds and represents an integral feature of the prohibition of discrimination. South African and Canadian case law also usefully clarify that reasonable accommodation plays the corollary role in specific types of discrimination cases – those concerned with the disadvantageous impact of general norms or practices rather than with prejudicial motives.[306] They also illustrate the added value it brings to the discrimination analysis by finding a compromise solution allowing alleviation of an individual discriminatory impact in cases where the general structures can otherwise stay in place.[307]

[304] Sandra Fredman, 'Disability Equality: Challenge to the Existing Non-Discrimination Paradigm?' in Elizabeth Emens, Michael Ashley Stein (ed), *Disability and Equality Law* (Routledge 2013); Fredman, *Discrimination Law* (n 9).
[305] ibid.
[306] Chapter 2, Section 3.
[307] ibid.

The two jurisdictions also offer useful guidance in implementing reasonable accommodation on all grounds and avoiding some of the challenges experienced there. For instance, the *Taylor-Bouchard Commission* in Canada concluded that lack of awareness about its purpose and role is reasonable accommodation's biggest challenge.[308] It recommended the Government to focus on explaining to the public that reasonable accommodation is not a *special measure* favouring certain social groups but rather a measure which remedies existing inequalities and possibly discrimination.[309] It also emphasised that reasonable accommodation should be used to facilitate compromise solutions rather than blanket exceptions.[310] Accommodations as exceptions from general rules, especially if they severely impact the rights of others or even allow their discrimination, may be viewed more negatively than negotiated pro-inclusive modifications and adjustments.[311] The preferred shape of reasonable accommodation is that of mutual concessions allowing the balancing between seemingly irreconcilable interests.[312] These lessons can usefully guide other jurisdictions in implementing reasonable accommodation beyond disability.[313]

[308] Bouchard, Taylor (n 67).
[309] ibid, 5, 17, 23-27.
[310] ibid, 51-53.
[311] Cartabia (n 56) 766–767; Narain (n 66) 311–312; Bosset (n 128) 15–17.
[312] Cartabia (n 56) 672–677; Narain (n 66) 335–336; Jane Wright (n 28) 147; Emilio Santoro (n 248) 215.
[313] Henrard, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' (n 3) 76–77; Waddington (n 3) 194.

Conclusion

This chapter demonstrated that reasonable accommodation on the grounds of disability, religion, or other grounds have common conceptual roots, no matter the differences in their application. They expand the prohibition of discrimination by redressing the disadvantageous impact of general structures on specific individuals, not necessarily only because of their disability or religion. The Canadian and South African practice show how useful the concept can be also in relation to gender, pregnancy or care-giving obligations, culture, age, or other grounds. If jurisdictions consider that a negative impact of structures may constitute discrimination, reasonable accommodation should be understood as its corollary on all protected grounds.

The chapter discussed the possible extra-legal reasons why Canada and South Africa remain isolated with their conception of reasonable accommodation as an integrated non-discrimination duty. The social tensions provoked by religious-based accommodations in North America may motivate countries to avoid using the term *reasonable accommodation* for the adjustments or exceptions they afford to their religious or cultural minorities by virtue of non-discrimination. And other countries demonstrably struggle with understanding disability-based reasonable accommodation as a non-discrimination concept due to the redistributive narrative often associated with it.

Nevertheless, explicitly limiting reasonable accommodation to disability and/or religion does not necessarily mean that the right to reasonable accommodation is not present on other grounds implicitly. As a corollary to the prohibition of discrimination, the reasonable accommodation duty may be implied on other grounds even though the norms do not mention the term. The following chapter explains how to identify such implied reasonable accommodation requirement in legal systems.

Chapter 3

Grounding reasonable accommodation

Introduction

Historically, grounds for reasonable accommodation have been understood in an isolated fashion. The previous chapter showed that reasonable accommodation emerged in the context of religion and spread mostly only on the grounds of disability, where it also typically stayed. Only rarely do jurisdictions apply reasonable accommodation on other grounds or across all discrimination grounds. This inconsistency deserves a sound theoretical explanation which the academic literature has not yet provided. The key argument of this chapter is that limiting reasonable accommodation to selected grounds is not theoretically consistent. On the contrary, it would be warranted to extend reasonable accommodation to all those typically protected by equality law. The main question addressed in this chapter is how to define the target group of reasonable accommodation in a general terms, relying on current legal theory.

The chapter first examines the theory of reasonable accommodation. Engaging with the current academic debates about the concept's role and place in law, it concludes that reasonable accommodation aligns with substantive equality and advances its inclusive, as opposed to the anti-stereotyping, aim. The theoretical framework provides a basis for the second section which shows reasonable accommodation can be implicitly read into the right to equality because it is, under certain circumstances, a remedy to both direct and indirect discrimination and implied in their prohibition. Nevertheless, the section also shows that there are several advantages of recognising reasonable accommodation as an independent right. The last section then builds on the recognition of reasonable accommodation as an implied but independent requirement of

the right to equality, explaining how to use discrimination grounds theory and doctrine to fit its specific role.

1. What role for reasonable accommodation in equality?

Understanding the concept's theoretical justification and its role in law is a necessary first step to analyse to whom should reasonable accommodation apply. It is commonly accepted that reasonable accommodation advances equality as a legal principle.[314] But equality is an often-contested concept.[315] Proper theoretical grounding of reasonable accommodation requires a precise definition of the type of equality we refer to. So far, the academic literature has not been entirely clear on this answer. After engaging with the existing debates, this section advances the argument that reasonable accommodation aligns with a substantive vision of equality and plays a particular role in it: alleviating the disadvantageous impact of social and environmental structures which do not accommodate the diversity of human beings. The theoretical basis will serve to identify the specific place of reasonable accommodation in equality law in the following section.

1.1. Substantive over formal equality

The principle of equality, however many shapes it can take, typically derives from the ancient Aristotelian maxim that *equals should be treated equally and unequals unequally.*[316] Reasonable accommodation facilitates the second part of the principle: differential treatment of those who are different in such a significant way that treating them equally would be unjust. Law typically interprets this abstract rule either according to the logic of formal equality, or

[314] Article 5 of the Employment Equality Directive (n 179); Article 5 of the UN CRPD; or Title I of the ADA (n147).
[315] Peter Westen, 'The Empty Idea of Equality' (1982) 95 537; Fredman, 'Substantive Equality Revisited' (n 15).
[316] Nicomachean Ethics, as cited in Nikolaidis (n 4) 15.

the logic of substantive equality. Even though this divide has long been criticised,[317] for our purposes it still offers a good illustration of how significantly different implications the term *equality* can have.

One of the key distinctions between formal and substantive equality is their understanding and treatment of *difference*. Formal equality only takes into account the differences strictly relevant for the treatment at hand (such as qualifications for a job interview).[318] The underlying premise is that people are basically equal. Treating them equally thus demands overlooking all their seemingly irrelevant differences, including the disadvantages and inequalities they experience in the broader social context.[319] In this spirit, formal equality allows different treatment for those in relevantly different situations, when identical treatment would be inconsistent or irrational.[320] But it does not require such differential treatment to remedy the seemingly irrelevant inequalities of fact.[321]

Substantive equality, on the other hand, requires differential treatment to remedy those existing inequalities even though they do not appear to be strictly connected to the situation. [322] This is because the substantive vision of equality does not aim only for consistency and rationality in treatment but seeks to achieve some form of reciprocal relation between people. Recognising and treating each other *as equals* is thus a key aspect of substantive equality.[323] Such recognition implies also considering certain inequalities to ensure that they do not translate into

[317] Aileen McColgan, *Discrimination, Equality and the Law* (Hart 2011) 9–19; Holmes (n 42) 175–194; Khaitan (n 19); Fredman, *Discrimination Law* (n 9) 203–214.
[318] Fredman, *Discrimination Law* (n 9) 8–14; Nikolaidis (n 4) 15; McColgan (n 317) 20.
[319] Sandra Fredman (n 304) 202–203; Oddný Mjöll Arnardóttir, 'A Future of Multidimensional Disadvantage Equality?' in Oddný Mjöll Arnardóttir, Gerard Quinn (ed), *The UN Convention on the Rights of Persons with Disabilities, European and Scandinavian Perspectives* (Martinus Nijhoff Publishers 2009) 47–49.
[320] ibid.
[321] ibid, see also Nikolaidis (n 4) 15.
[322] Fredman, *Discrimination Law* (n 9) 26–27; McColgan (n 317) 22; Sandra Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 South African Journal on Human Rights 163.
[323] Fredman, 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23 *South African Journal on Human Rights* 214 at 216; Fraser and Honneth, *Redistribution or Recognition?: A Political-Philosophical Exchange* (2004).

inequality in dignity and rights.[324] *Unequals* in the *treat unequals unequally* part of the Aristotelian maxim then refers to the social groups who have historically not been treated with recognition, and their social position thus factually lacks equality. [325]

Both in academia[326] and legal practice,[327] it is commonly considered that reasonable accommodation aligns with the substantive vision. Reasonable accommodation does not merely facilitate a rationally different response to a different situation. Its aim is to remedy certain existing inequalities.[328] Nevertheless, some authors warn that the connection with substantive equality may be more complicated.[329] Because reasonable accommodation typically only facilitates exceptions, modifications, or adjustments of the existing structures, it does not really challenge them.[330] As an individualised reaction to an individual problem, it essentially allows the wider patterns of inequality to stay in place. In this sense, it falls short of the aspirations of substantive equality. The contention even is that the individual nature of reasonable accommodation brings it closer to formal equality.[331]

These arguments are vital because they expose the potential limits of reasonable accommodation in achieving structural change. But although it may sometimes seem that reasonable accommodation practically only facilitates a rational response to different

[324] Article 1 of the Universal Declaration of Human Rights adopted by the United Nations General Assembly during its 183rd plenary meeting (GA 217 A, 10 December 1948):"All human beings are born free and equal in dignity and rights". This understanding of equality joins forces with other values underlying human rights, such as dignity, or autonomy. Fredman, *Discrimination Law* (n 9) 33; Nikolaidis (n 4) 11–14.
[325] Nikolaidis (n 4) 13; ibid 23–25; Iris Marion Young, 'Equality of Whom? Social Groups and Judgments of Injustice' (2001) 9 Journal of Political Philosophy 1; Sophia Moreau, 'Discrimination and Subordination' in Sophia Moreau, *Oxford Studies in Political Philosophy Volume 5* (Oxford University Press 2019).
[326] Among others, Nikolaidis (n 4) 183; Delia Ferri, 'Reasonable Accommodation as a Gateway to the Equal Enjoyment of Human Rights: From New York to Strasbourg' (2018) 6 Social Inclusion 40, 40; Jenny E Goldschmidt, 'New Perspectives on Equality: Towards Transformative Justice through the Disability Convention?' (2017) 35 Nordic Journal of Human Rights 1, 13; Fredman, 'Substantive Equality Revisited' (n 15) 733–734; Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4) 963.
[327] See UN CRPD Committee (n 1), para 11, the UK Equality Act of 2010 (n 190), Section 20, or the National Network on Information (n 163) concerning the Americans with Disabilities Act of 1990.
[328] UN CRPD Committee (n 1), para 24-25.
[329] Day and Brodsky (n 65) 461–463; Narain (n 66) 329–330.
[330] ibid.
[331] Day and Brodsky (n 65) 461–463.

situations, as required by formal equality, the *differences* on account of which reasonable accommodation is required nevertheless bring it closer to the substantive understanding. Its role is to alleviate certain barriers to equality, not to facilitate a rational response to all relevantly different situations.[332] This is a domain of substantive equality, which, as opposed to formal equality, demands levelling up some of the disadvantages to ensure people have factually equal starting positions.[333]

For instance, in the context of hiring, formal equality would demand that people fulfilling the relevant criteria are treated the same way. Those not fulfilling the criteria should be treated differently in that they may not be hired. But nobody qualifies for positive differential treatment because the hiring criteria are unfavourable to them. Substantive equality, on the other hand, would call for reasonable accommodations to assist a candidate with a disability to help overcome the disadvantage they may be facing in fulfilling the criteria.[334] Reasonable accommodation thus theoretically aligns with a substantive rather than formal vision of equality. The following sub-section delves into the specific role it plays in advancing it. It proposes a framework which will later help us distinguish when reasonable accommodation overlaps with other legal concepts and where lays its specific contribution.

1.2. *Inclusive* over *anti-stereotyping* angle of substantive equality

The many existing theories of substantive equality testify to the fact that it is a robust concept which resists being captured by a single principle.[335] A useful way of thinking about substantive equality in law is as a set of principles aiming to ensure that people are not only

[332] Chapter 2.
[333] Substantive equality is thus most often concerned with social groups in which patterns of disadvantage replicate. See Fredman, *Discrimination Law* (n 9) 26–28; ibid 138–139; McColgan (n 317) 58–59.
[334] See Chapter 2, Section 3.
[335] Michael Walzer described the idea of complex and interrelated spheres of equality in Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (M Robertson 1983). A multi-dimensional approach to equality is used also in Nancy Fraser, 'From Redistribution to Recognition? Dilemmas of Justice in a `post-Socialist' Age' [1995] New Left Review 68; Anderson (n 11); Anne Phillips, *Which Equalities Matter?* (Polity Press 1999).

treated equally but also recognised and treated *as equals*.[336] Theorists often explain that this means ensuring they are free of social oppression.[337] This implies both protecting them against coercion and ensuring some form of positive freedom to make their own valued choices in life.[338] But law cannot remedy all conceivable disadvantages which impair this positively defined freedom.[339] It will not, for instance, influence the inherent differences in abilities, motivation, preferences, or decisions which enhance or limit equality among people.[340] The right to substantive equality thus has a more limited scope than guaranteeing the ability to pursue own valued life choices. It only ensures that this freedom is not impeded by disadvantages caused by misrecognition, the failure to treat people *as equals*.[341] Display of misrecognition is a major determinant of when the right to equality intervenes against disadvantages and when it does not.

For our purposes, it is practical to separate two angles such misrecognition practically assumes: negative or stereotypical perceptions (*anti-stereotyping angle*)[342] and non-inclusiveness of our structures (*inclusive angle*).[343] The *anti-stereotyping angle* is concerned with prejudice, stigma, or stereotypes as irrational assumptions related to someone's identity.[344] Prejudice and stigma imply intolerance and disrespect.[345] Stereotyping denies people their autonomous self-representation and proper recognition of their complex identity.[346] Treating someone with

[336] Substantive equality is thus commonly said to be intimately linked with upholding other values, such as dignity and autonomy. Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury 2013) 227; Nikolaidis (n 4) 33.
[337] Nikolaidis (n 4) 24; Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 2011) 33; Anderson (n 11); Phillips (n 335); Moreau, 'Discrimination and Subordination' (n 325).
[338] Nikolaidis (n 4) 24–25.
[339] Khaitan (n 19) 131; Holmes (n 42) 192.
[340] Khaitan (n 19) 131–133.
[341] Sandra Fredman, 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23 South African Journal on Human Rights 214, 216.
[342] Nikolaidis (n 4) 24–25; Fredman, 'Substantive Equality Revisited' (n 15) 730–731.
[343] Nikolaidis (n 4) 25–26; Fredman, 'Substantive Equality Revisited' (n 15) 732–733.
[344] Nikolaidis (n 4) 175.
[345] ibid.
[346] ibid. Also Alexandra Timmer, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' (2011) 11 Human Rights Law Review 707, 708–709.

prejudice, stigma, or stereotypically thus means failure to see them *as equals* and is a prominent sign of misrecognition.[347]

The lack of inclusiveness of social and environmental structures, targeted by the *inclusive angle*, represent a slightly different form of misrecognition; not the one caused by unfair assumptions about someone's identity but by a lack of recognition of a social group's needs in the design of our structures.[348] Our society is full of measures automatically and unconsciously adopted to conform to those in relative power and their idea of *a typical person*.[349] They are usually shaped by non-disabled persons, ignoring and thus excluding those who have a disability.[350] Feminist literature is flooded with accounts of how our institutions, standards, and rules are shaped by male norms, silently disadvantaging women.[351] The neglectful lack of recognition of human beings' diversity may, in effect, result in disadvantages just as impactful as in the case of wilful misrecognition represented by the anti-stereotyping angle.[352]

The two key angles of substantive equality are intimately connected. Stereotypes, prejudice, or stigma often cause socio-economic disadvantage and denial of social and political participation and voice, which affect who gets to decide the design of our social and environmental structures.[353] Non-inclusive structures then cause further disadvantage and exclusion, which in turn prompts further stereotypes, prejudice, or stigma.[354] Some theorists argue that dismantling this vicious cycle is a central role of substantive equality.[355] And so while the *anti-stereotyping*

[347] ibid, at 24–25.
[348] Nikolaidis (n 4) 25–26; Fredman, 'Substantive Equality Revisited' (n 15) 732–733.
[349] Sophia Moreau speaks in this sense of "structural accommodations" suggesting that we always unconsciously accommodate the majority. Moreau, 'Discrimination and Subordination' (n 325).
[350] Goggin, Steele and Cadwallader (n 156) 337–340.
[351] Georgina Ashworth, 'The Silencing of Women' in Timothy Dunne and Nicholas Wheeler (eds), *Human Rights in Global Politics* (Cambridge University Press 2012) 259; Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1989 University of Chicago Legal Forum 139, 139.
[352] Nikolaidis (n 4) 25–26.
[353] Fredman, 'Substantive Equality Revisited' (n 15) 730–733.
[354] ibid.
[355] ibid 734–738.

angle of substantive equality is still arguably one of the most common manifestations of the substantive approach in equality law, [356] the *inclusive* angle is also growing in practical recognition.[357] This trend reflects a realisation that it is the social arrangements that turn natural diversity among humans into oppressive hierarchies. It also reflects the the acceptance of the law's important role in redressing the disadvantage associated with them.[358] If equality law was not concerned with this dynamic, people who are different from what is *typical* would either be forced to conform to the dominant norm or bear the disadvantage associated with their difference.[359] Both options imply not respecting their different identity *as equals*.

As demonstrated in the previous chapter, reasonable accommodation entered legal systems as a part of the trend framing non-inclusive social structures as a problem to be addressed by equality law.[360] It was supposed to supplement the legal concepts used to guarantee formal equality or redress stereotypes, prejudice, or stigma because these were not always sufficient to also redress the disadvantageous impact of our structures.[361] Reasonable accommodation thus primarily advances the *inclusive angle* of substantive equality. Nevertheless, through the interrelatedness of its two key dimensions, it eventually also helps address stereotypes, stigma and prejudice against those neglect in their design.

Having situated the key role of reasonable accommodation in advancing the right to equality, the following section examines what this role implies for its position in equality law. It first demonstrates that it occasionally shares this role with the prohibition of discrimination and can be considered its corollary. This way, it can be implicitly read into the right to equality even if

[356] See, for example, Deborah Hellman, *When Is Discrimination Wrong?* (Harvard University Press 2008); Richard J Arneson, 'What Is Wrongful Discrimination' (2006) 43 San Diego Law Review 775; Iyiola Solanke, *Discrimination as Stigma: A Theory of Anti-Discrimination Law* (Hart Publishing 2017).
[357] Fredman, 'Substantive Equality Revisited' (n 15) 732–733; Nikolaidis (n 4) 179–184; Sophia Reibetanz Moreau, *Faces of Inequality: A Theory of Wrongful Discrimination* (Oxford University Press 2020).
[358] This is an argument advanced in Anderson (n 11) 336–337.
[359] Sandra Fredman (n 304) 203.
[360] Chapter 2, Section 2, 29-31, 47-50, and Section 3.
[361] See the emphasis on this aspect in Fredman, 'Substantive Equality Revisited' (n 15) 737.

not explicitly legislated. The second argument of the section is that there are nevertheless clear advantages of applying reasonable accommodation as an independent right, treating it on par with other equality law concepts.

2. Reasonable accommodation as a remedy and as a right

Reasonable accommodation plays a specific role in the right to substantive equality by advancing its inclusive aim. It addresses the disadvantages or barriers to equality caused by non-inclusive social or environmental structures. Despite this clear aim, the historical chapter uncovered that its place and shape in equality law differs across jurisdictions, influencing also to whom it applies.[362] This section relies on legal theory and doctrine to explain that, in principle, reasonable accommodation can assume two general roles: an implied corollary to the right to equality and an independently legislated right. The principal argument is that implied in the right to equality, the requirement of reasonable accommodation on all protected grounds is already tacitly present in many jurisdictions. This first part of this section details why and when this is the case. Nevertheless, there are important and tangible advantages of legislating the right to reasonable accommodation independently. The second part of this section thus explains why it is beneficial to extend reasonable accommodation to all protected grounds explicitly.

2.1. A remedy: reading reasonable accommodation into the right to equality

The right to substantive equality can redress the negative impact of non-inclusive social structures through different legal tools. Sometimes, such impact is prohibited as a form of discrimination.[363] Sometimes, it hinders equal enjoyment of rights and can be seen as a

[362] See Chapter 2.
[363] See, for instance, Chapter 2, 29-31.

disproportionate interference.[364] Reasonable accommodation has been practically read into both angles.[365] This sub-section uses legal theory to explain when this equivalence may occur and the value of using reasonable accommodation as a complement to these concepts.

2.1.1. Corollary to non-discrimination

Equality law contains several concepts prohibiting specific manifestations of discrimination, typically classified either a form of direct or indirect discrimination.[366] Generally, direct discrimination is understood as a less favourable treatment linked with a protected ground.[367] Indirect discrimination, or disparate impact discrimination as it is called in the United States,[368] is a disadvantageous impact linked to the person's protected ground caused by a seemingly neutral criterion or practice.[369] As argued in the previous section, the aim of both these concepts is either to safeguard formal equality by ensuring rationality and consistency of treatment, or to advance substantive equality in its anti-stereotyping aim, or in its inclusive aim.[370]

The central argument of this section is that if the prohibition of direct or indirect discrimination advance the *inclusive aim* of the right to equality equality by targeting the disadvantageous impact of social and environmental structures, the requirement of reasonable accommodation can be effectively read into both.[371] Imagine a school which refuses to educate children with autism because the teachers feel unprepared to respond to their specific needs. This intentionally unfavourable treatment of a child with disability can be judged as a direct discrimination. Yet it is a rational concern and is not necessarily motivated by prejudice or stereotype. The teachers may be genuinely unprepared to accommodate the needs of a child

[364] See Chapter 2, 32-35 and 58. See also Foblets (n 8).
[365] See, for instance, Chapter 2, Sections 1-2.
[366] Fredman, *Discrimination Law* (n 9) 153–154.
[367] ibid 166; Khaitan (n 19) 69.
[368] Fredman, *Discrimination Law* (n 9) 170.
[369] Khaitan (n 19) 74.
[370] Above, 73-75.
[371] Khaitan (n 19) 74.

with autism because they lack the skills, and the school environment is non-inclusive. They may need training, specialised teaching assistants, ability to adjust the curriculums, and other necessary changes to be able to meaningfully include children with autism. All these changes are types of reasonable accommodations. They prevent the unintended and preventable impact of the non-inclusive school environment. Therefore, reasonable accommodation can be a corollary to direct discrimination if the direct discrimination is caused by the failure to ensure inclusive structures.[372]

The relationship between reasonable accommodation and non-discrimination is even more obvious in the case of indirect discrimination. The prohibition of indirect discrimination targets the disadvantageous impact of seemingly neutral criteria.[373] Disadvantage caused by non-inclusive structures is a typical manifestation of such an impact[374] and can often be remedied by reasonable accommodation.[375] This is why reasonable accommodation is commonly said to constitute a corollary to indirect discrimination.[376] More specifically, reasonable accommodation can be used to complement the justification test typically associated with indirect discrimination. Indirect discrimination is commonly unlawful when the disadvantageous impact was not necessary because it was possible to achieve the otherwise lawful and legitimate aims of the criteria by less detrimental means.[377] If it was conceivable to adopt reasonable accommodation, which would effectively prevent the disadvantageous

[372] Denial of reasonable accommodation is, correspondingly, framed as a form of direct discrimination in Australia. See Chapter 2, 46.
[373] Khaitan (n 19) 74.
[374] ibid.
[375] M.S. Stein argues that reasonable accommodation is a reasonable anti-discrimination remedy. Stein, 'Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination' (n 14) 591–594.
[376] Reasonable accommodation is understood as corollary to indirect discrimination in many publications, including Nikolaidis (n 4) 27; Bribosia and others (n 3) 38–40; Henrard, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' (n 3) 67–69; Jennifer Jackson Preece (n 8) 124; Jolls (n 17); Crossley (n 35); Howard (n 3); Frédérique Ast (n 14).
[377] Howard (n 3) 364; Foblets (n 8) 59–61.

impact, the disadvantageous impact can be judged as unnecessary. Denial of reasonable accommodation then effectively constitutes indirect discrimination.[378]

The test used in Canadian Constitutional discrimination analysis cases illustrates well the complementarity of non-discrimination and reasonable accommodation.[379] *Prima facie* discrimination is established when there is a disadvantageous impact of a seemingly neutral rule or practice.[380] This impact may be justified if the rules or practices are rationally connected and reasonably necessary to accomplish the desired aim.[381] The last step of the test says that the impact may not be justified if it was possible to reasonably accommodate the individual without undue hardship.[382] It thus explicitly specifies the *necessity* through reasonable accommodation. Canadian practice shows that reasonable accommodation can be effectively employed as an integral requirement of non-discrimination remedying the unintended and preventable disadvantageous impact of otherwise legitimate structures. And as noted by multiple scholars, Canada is not the only country which effectively uses reasonable accommodation for this purpose.[383] After all, the previous chapter described that reasonable accommodation first appeared in the United States as a corollary to indirect discrimination.[384]

Nevertheless, it must be noted that not in all cases will reasonable accommodation be implied within the prohibition of indirect discrimination. It is key to distinguish which of the aims of substantive equality the prohibition of discrimination addresses in the given case. The focus on disadvantageous impact in indirect discrimination cases sometimes merely helps uncover

[378] See also Waddington (n 3).
[379] *Meiorin* (n 228), see Chapter 2, 52.
[380] ibid paras 32–36 and 39–42.
[381] They constitute a bona fide occupational requirement, BFOR.
[382] *Meiorin* (n 228), paras 54-68.
[383] See, for instance, n (4).
[384] It has been noted that this is potentially also the case of Sweden, Germany, Austria, Czechia, or Slovakia, see Bribosia and others (n 3) 44–45.

unexpressed discriminatory motives.[385] For instance, indirect discrimination may be caused by hiring criteria which secretly aim to exclude women due to irrational, prejudiced or stereotypical assumption. Intended discriminatory impact, whether openly or covertly, requires a negative, prohibiting norm, not a simple adjustment or exception.[386] Reasonable accommodation will thus not be a corollary of indirect discrimination in similar cases.

The possibility to read reasonable accommodation into indirect discrimination may sometimes be challenging also because certain jurisdictions require a proof of a potentially disadvantageous impact on the whole protected group to establish indirect discrimination.[387] If a group impact is required, the duty to reasonably accommodate can only be derived from the prohibition of indirect discrimination if the concerned individuals prove that others with the same protected ground would have been similarly disadvantaged.[388] An independent duty to reasonably accommodate, on the other hand, typically arises even if only one individual faces this negative impact.[389] In the jurisdictions which require a group impact to establish indirect discrimination, an independent right to reasonable accommodation would thus cover a much wider range of cases. The overlap with indirect discrimination would be only partial.

A requirement of reasonable accommodation is thus a logical extension of the prohibition of discrimination in those jurisdictions that accept that discrimination may also be caused by an unintended individual negative impact of social and environmental structures, addressing primarily the *inclusive* angle of substantive equality, as opposed to the *anti-stereotyping* one. In this spirit, some commentators explain that even if a country does not legislate reasonable accommodation beyond disability, it may be required on other grounds by virtue of the

[385] For differentiation between the two types of indirect discrimination, the "real adverse impact" and the "smoke-screen adverse impact" one, see Olivier De Schutter, 'Three Models of Equality and European Anti-Discrimination Law' (2006) 57 Northern Ireland Legal Quarterly 1, 9.
[386] As noted in *MEC for Education* (n 261), para 77.
[387] Howard (n 3) 367–368.
[388] ibid.
[389] Waddington (n 3) 194.

prohibition of direct[390] or indirect discrimination.[391] It has been shown that this day, the duty to reasonably accommodate beyond the ground of disability can be effectively read into the jurisdictions of many European states,[392] the European Union legislation,[393] as well as the jurisprudence of the European Court of Human Rights,[394] although these jurisdictions do not recognise it explicitly. The following sub-section will explain that similar considerations apply when assessing the unintended negative impact of non-inclusive structures from the perspective of equal enjoyment of human rights.

2.1.2. Facilitating effective access to human rights

The inclusive angle of right to substantive equality implies recognising that the same rules, norms, or practices may sometimes cause interferences with human rights unique to some social groups. And while the disadvantageous impact may be assessed as a form of discrimination, it may also be looked at as a possible violation of a human right.[395] In some cases, both angles of assessment are possible, and the courts may decide which one they adopt. In other cases, there may be jurisdiction-specific reasons why a disadvantageous impact cannot be assessed as discrimination but can constitute a violation of a human right other than equality. The previous chapter showed, for example, that for reasons specific to the United States

[390] Pregnancy is sometimes used as an example. See, for instance, Drapeau (n 27); Nikolaidis (n 4) 114; ibid 179.
[391] (n 376).
[392] Bribosia and others (n 3) 21–32; ibid 38–40; Frédérique Ast, 'Indirect Discrimination as a Means of Protecting Pluralism: Challenges and Limits', *Institutional Accommodation and the Citizen* (Council of Europe Publishing 2009) 95–99; Jennifer Jackson Preece (n 8) 122–125.
[393] Jennifer Jackson Preece (n 8); Erica Howard, 'The Case for a Considered Hierarchy of Discrimination Grounds in EU Law' (2006) 13 Maastricht Journal of European and Comparative Law 445; Bribosia, Ringelheim and Rorive (n 4); Nikolaidis (n 4) 136–139.
[394] Bribosia and others (n 3) 21–32; Nikolaidis (n 4) 75–82; Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4).
[395] Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4) 964.

constitutional protection, denial of reasonable accommodations based on religion were often framed as an interference with freedom of religion rather than discrimination.[396]

The possibility of reading a reasonable accommodation requirement into the duty to ensure effective enjoyment of human rights or assessing the permissibility of interference can be likened to reading it into the prohibition of indirect discrimination. Human rights interferences are typically assessed through a proportionality test which determines whether it also constitutes a human rights violation.[397] The proportionality requirement stipulates that interference can be justified only if it was incurred as a necessary side-product of an otherwise legitimate practice.[398] All reasonably preventable interferences thus cannot be justified.[399] Reasonable accommodation here enters as a useful specification of what interferences could have been prevented.[400] If it was possible to reasonably accommodate the person without undue hardship, the interference was unnecessary. Reasonable accommodation thus complements the requirement of proportionality.[401] Similar considerations then apply when assessing the justifiability of the failure of the state to uphold its positive duties to protect human rights, which often follows a similar proportionality assessment.[402] If it was possible to adopt reasonable accommodations without an undue burden, the state's failure to adopt such positive steps should not be justifiable.

When it comes to the substantive equality's aim of redressing the disadvantage that our non-inclusive structures impose on some people, the obligation to reasonably accommodate may

[396] Chapter 2, 32-35.
[397] See, for example, Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (1st edn, Cambridge University Press 2012) 131; J Mathews Stone Sweet, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Columbia Journal Transnational Law.
[398] ibid.
[399] This is the typical construction of the proportionality requirement typically used for assessing permissibility of interference with basic rights. While jurisdictions use slightly different versions of the test, the basic elements and logic remain. See, Stone Sweet (n 397).
[400] Howard (n 3) 364; Nikolaidis (n 4) 181; Fredman, *Discrimination Law* (n 9) 183.
[401] Fredman, *Discrimination Law* (n 9) 183; Nikolaidis (n 4) 181.
[402] Nikolaidis (n 4) 182.

thus be an implied requirement of non-discrimination as well as the proportionality requirement assessing violations of human rights. Nevertheless, even if reasonable accommodation needs not be explicitly legislated to be de facto required, the independent right to reasonable accommodation has a specific construction which makes it stand out among other concepts. Adopting a reasonable accommodation angle adds *something* to the equality law: it gives an individual a clear entitlement to demand immediate and tailor-made adjustments, and it facilitates finding a compromise response to seemingly irreconcilable interests. This added value may help some individuals achieve redress against non-inclusive structures easier than through other legal concepts. The following section is dedicated to exploring this added merit of reasonable accommodation as an independent concept. It can be used as an argument for why reasonable accommodation should be adopted and used explicitly, albeit in a fashion complementary to the other tools, such as the prohibition of direct and indirect discrimination.

2.2. A right: the merits of an independent reasonable accommodation

One of the arguments raised in the literature for why reasonable accommodation need not explicitly apply to all grounds is that it overlaps with other legal concepts, such as indirect discrimination, which may make such extension in some jurisdictions unnecessary.[403] As shown in the previous sub-section, reasonable accommodation can sometimes indeed be effectively read into other legal concepts even if not explicitly legislated. However, such a covert approach may raise issues with predictability and transparency of the law. If the duty to reasonably accommodate is only established after a complicated legal analysis, those who should implement accommodations or those who should benefit from them may not necessarily be aware of it.[404]

[403] Waddington (n 3); Howard (n 3).
[404] As also argued in Waddington (n 3) 194; Henrard, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' (n 3) 69.

Apart from this practical issue with an implied reasonable accommodation requirement, this section outlines other theory-based reasons for acknowledging reasonable accommodation as an independent right. The first argument for independent reasonable accommodation, explored in the first sub-section, is that framing it as an individual right gives a person a clear entitlement to demand immediate and custom-made positive changes. Such individualised solution is not always readily available through non-discrimination or other duties. The second argument is that the construction of reasonable accommodation helps find a compromise response to seemingly irreconcilable interests. It strikes in between having to dismantle the otherwise legitimate structures or keeping them in place without concern for their possibly negative impact on an individual. Again, this angle may be lost if reasonable accommodation is not used explicitly as an independent concept. The academic literature has highlighted that both the individualised focus and the compromise nature of reasonable accommodation also represent its limits in achieving structural change.[405] Both sections also debate this concern, underlining that the inclusive potential of reasonable accommodation is contingent on its correct practical application and interplay with other legal tools.

2.2.1. Individualised and immediate solutions

The right to reasonable accommodation establishes a positive duty to adopt necessary modifications, adjustments, or other measures needed to ensure equal enjoyment of human rights or access to other valuable choices.[406] The emphasised signature features are that it provides individualised positive solutions, and that a person can legally demand its immediate adoption if it does not constitute an undue burden.[407] In both aspects, reasonable accommodation brings something in addition to other equality law concepts.

[405] Day and Brodsky (n 65); Narain (n 66).
[406] Fredman, *Discrimination Law* (n 9) 214–221.
[407] UN CRPD Committee (n 1), paras 24–25.

As an individualised positive duty, the right to reasonable accommodation is a call for finding a solution, not attributing blame.[408] It does not presume the individual's willingness or ability to first claim discrimination or another human rights violation, as would be the case when reasonable accommodation was merely implied. Asserting discrimination is almost inevitably contentious and research shows that many victims chose to avoid such a conflict.[409] For jurisdictional-specific reasons, it may also sometimes be difficult to claim or prove discrimination arising from non-inclusive social structures.[410] For example, discrimination must sometimes be linked with action or a treatment,[411] and situations which cannot be clearly linked with those are thus difficult to challenge.[412] Sometimes, as discussed earlier, structures must cause a disadvantageous impact on a protected group, rather than an individual, to be seen as discriminatory.[413] The burden of proof in claiming discrimination may also constitute a significant barrier.[414] Independently legislated right to reasonable accommodation may thus be applicable in a broader range of situations than would otherwise be practically covered by the prohibition of discrimination.[415]

[408] Karlan and Rutherglen argue that the duty to accommodate arise as a liability without fault. Karlan and Rutherglen (n 167). Similar argument is raised in Jolls (n 17) 648; Sophia Moreau, 'Discrimination as Negligence' (2010) 36 Canadian Journal of Philosophy Supplementary Volume 123.
[409] Council of Europe Parliamentary Assembly, 'Equality and Non-Discrimination in the Access to Justice' (2015) 11-12 <https://pace.coe.int/en/files/21619#trace-2> accessed 2 December 2022; European Union Fundamental Rights Agency, 'Access to justice in cases of discrimination in the EU' (2012) 17 <https://fra.europa.eu/sites/default/files/fra-2012-access-to-justice-social.pdf> accessed 2 December 2022.
[410] See, for example, Barbara Havelková, 'The Pre-Eminence of the General Principle of Equality over Specific Prohibition of Discrimination on Suspect Grounds in Czechia' in Barbara Havelková, *Anti-Discrimination Law in Civil Law Jurisdictions* (Oxford University Press 2019) 77.
[411] Khaitan (n 19) 146–148; Holmes (n 42).
[412] See the related criticism in Iris Marion Young, *Responsibility for Justice.* (Oxford University Press 2013); Moreau, 'Discrimination as Negligence' (n 408).
[413] Howard (n 3) 367–368.
[414] European Union Fundamental Rights Agency (n 409) 46; Havelková (n 410).
[415] Henrard, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' (n 3) 69.

For its demand to *adopt appropriate measures*, reasonable accommodation is sometimes likened to other positive duties, such as specific positive measures,[416] including the so-called positive of affirmative action[417] or the disability-specific accessibility duty.[418] Positive or affirmative action measures, such as quotas, preferential hiring processes or other benefits, are regulations or policies adopted to benefit a social group, typically for a designated period of time until a certain kind of equality is achieved.[419] Accessibility is a duty to progressively implement inclusive structures.[420] All these legal tools aim to remedy pervasive inequality between social groups, are informed by data and policy choices, typically pre-designed and appliable to the whole social group.[421] They can thus be said to advance equality between social groups on a macro level.

Reasonable accommodation addresses individual barriers, rather than a macro situation. The solution it provides is tailor-made and developed in negotiation between the individual and the provider.[422] This individualised approach is necessary to uphold substantive equality because even if our structures are made as inclusive as reasonably possible, there will always be people whose situation requires a tailored solution.[423] Even if a building is made generally accessible, a person with a sight impairment may nevertheless require specific accommodations, such as allowing the entrance of an assistance animal. Indeed, typical examples of reasonable

[416] Guy Davidov and Guy Mundlak, 'Accommodating All? (Or: "Ask Not What You Can Do for the Labour Market; Ask What the Labour Market Can Do for You")' in Roger Blanpain and Frank Hendrickx (eds), *Reasonable Accommodation in the Modern Workplace Potential and Limits of the Integrative Logics of Labour Law* (Wolters Kluwer 2016) 194–195.
[417] UN CRPD Committee (n 1), paras 25 c).
[418] UN CRPD Committee (n 1), paras 23–24, para 42.
[419] Khaitan (n 19) 215.
[420] UN CRPD Committee Article 9 and the UN CRPD Committee 'General Comment no. 2 on Accessibility' (CRPD/C/GC/2 22 May 2014), para 24-25 <https://www.ohchr.org/en/treaty-bodies/crpd/general-comments> accessed 30 November 2022; UN CRPD Committee (n 1), para 42.
[421] Khaitan (n 19) 215.
[422] UN CRPD Committee (n 1), para 42.
[423] Mike Oliver, 'Philosophical Issues in the Definition and Social Response to Disability' in Michael Ashley Stein and Elizabeth Emens (eds), *Disability and Equality Law* (Routledge 2013). Similar argument is put forth by the UN CRPD which stipulates that reasonable accommodation complements accessibility duties. UN CRPD Committee (n 1), para 42.

accommodations for persons with disabilities in practice are those which complement the accessibility duty.[424]

It has been argued that this tailored individualised approach may justify limiting the independent right to reasonable accommodation to persons with disabilities and potentially older persons.[425] The argument is that the prohibition of discrimination which is capable of implicitly incorporating reasonable accommodation, or other group measures, can effectively redress the barriers for most people.[426] Persons with disabilities and older persons comprise of people with such diverse set of needs that only an individualised approach may help them overcome the barriers they experience.[427] But similar concerns may certainly also arise when a person's situation is very specific due to a combination of protected reasons, such as gender, race and age. Sometimes, an individualised solution is needed also because the problem only concerns one person, and the context does not justify adopting a larger scale positive measure. Imagine, for example, the barriers faced at a school by a child who does not speak the majority language but is also the only speaker of their language at the school. Only an individualised measure will be capable of effectively including them in the school curriculum.

The second important additional value of reasonable accommodation, as opposed to accessibility duties and some other positive measures, is that reasonable accommodation is an immediate and enforceable right.[428] The beneficiary does not need to wait with their claim until the unconditional accessibility duty is progressively implemented.[429] Reasonable accommodations must be adopted immediately upon request.[430] Admittedly, making our

[424] In a series of cases, the UN CRPD Committee required Australia to provide reasonable accommodations to ensure informational and communicational accessibility of court proceedings to enable persons with disabilities to perform jury duty (n 207).
[425] As argued by Waddington (n 3).
[426] ibid 197.
[427] ibid.
[428] UN CRPD Committee (n 1), para 42.
[429] ibid.
[430] ibid, para 24 b).

structures more inclusive is a long-term project requiring significant resources which is why the implementation of corresponding positive obligations is can be seen as a long-term progressive goal rather than an immediate duty. Instead of allowing time for implementation, as does the accessibility obligation, reasonable accommodation solves the resource problem by being limited to those accommodations which do not constitute an *undue burden*.[431] As shown in the second chapter, the undue burden defence may sometimes seriously limit the right to reasonable accommodation.[432] The undue defence limitation thus also highlights the compromise reasonable accommodation makes in exchange of providing an immediate positive solution to non-inclusive structures. It only addresses an individual situation, not a larger-scale problem, and only within the available means of the duty-bearer.

An independent right to reasonable accommodation thus may make the remedy to exclusionary structures more readily available to those who experience their negative impact. However, the compromise approach of reasonable accommodation, represented by the individual focus and the undue burden limits, explains why the literature sometimes disputes the concept's potential to achieve structural change.[433] To be sure, even an individualised reasonable accommodation can easily become a collective good.[434] A ramp for a person in a wheelchair can further be used by others. Similarly, an exception to a rule, such as allowing an employee time off work for a religious holiday, establishes a precedent for those who come later requesting similar accommodations. Reasonable accommodation duty should thus motivate all duty-bearers to preventively reflect on the potential impact of their practices. Pre-emptively designing structures inclusively helps avoid having to provide numerous individual modifications. Canadian courts, for instance, have insisted that reasonable accommodation is incorporated

[431] ibid, paras 41-42.
[432] Chapter 2, 30-31.
[433] As argued by Day and Brodsky (n 65).
[434] This way, reasonable accommodation complements the accessibility duty or the principle of universal design. UN CRPD Committee (n 1), para 24 b).

automatically in the relevant rules and procedures, making it widely accessible for those who need it.[435] A pre-emptive reasonable accommodation, widely available to anyone by being incorporated in all procedures, also actively contributes to making our societies more inclusive.[436]

Nevertheless, the concerns that reasonable accommodation cannot of itself bring structural change are valid and highlight the need to think about the measure in the context of other larger-scale measures. The following sub-section shows that while the role of some of these measures is to dismantle the exclusionary structures, the role of reasonable accommodation is to find an individual redress for their negative impact even if there is no sufficiently legitimate reason to dismantle them as a whole. This is the second principal added value an explicit right to reasonable accommodation brings to equality law.

2.2.2. Balanced response maintaining legitimate structures

Explicitly adopting a reasonable accommodation angle in certain cases also allows finding solutions which strike a balance between an individual and broader social interest.[437] Assessment of violation of human rights generally, and the prohibition of discrimination specifically, commonly rely on a proportionality test.[438] This test seeks to determine whether the impact was permissible or constitutes a human rights violation. It is equipped to attribute responsibility. But it much less clearly identifies solutions when active steps are needed. At best, if the test determines that a negative impact of structures could not be properly justified, it will require the replacement of the practices.[439] But this may not always be needed nor

[435] See Chapter 2, 56-57.
[436] Foblets (n 8) 56; Fredman, *Discrimination Law* (n 9) 219.
[437] Cartabia (n 56) 676–679.
[438] While jurisdictions use slightly different versions of the test, the basic elements and logic remain. Christopher McCrudden and Sacha Prechal, *The Concepts of Equality and Non-Discrimination in Europe: A Practical Approach* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, Unit G2 2009) 13–14; ibid 19–22; Barak (n 397).
[439] Bribosia, Ringelheim and Rorive (n 4) 138–139.

sufficient to uphold the promise of substantive equality. A negative answer to the proportionality test may still leave us wondering what exactly needs to be done in the specific situation to make sure that the interference does not replicate.[440]

The difference between the violation and reasonable accommodation approaches is well illustrated on the following example. Consider a hospital that prohibits patients from bringing their pets. The rule is very well-justified by hygienic or even safety concerns for other patients.[441] But it inevitably has an unintended negative effect on patients with disabilities who use service animals. Assessing the case without the reasonable accommodation approach as discrimination or, for instance, a violation of the right to private life, puts the courts in a dilemma. Either they uphold the legitimate practice and fail to address the problem it poses for individuals who need their pets as assistance. Or they focus on the negative impact on some persons with disabilities and find discrimination or a human rights violation. But then the legitimate hygienic or safety basis for the requirement gets lost in the process. The court's decision would not make it any clearer to the employer what they should do to respect the relevant hygienic norms and not discriminate at the same time. Either it goes too far by requiring removal of structures which may generally be legitimate, or it does not go far enough by failing to remedy their unintended negative impact. In the first case, it is an impractical solution. In the second case, it is an insufficient one.

Reasonable accommodation facilitates a solution which may uphold both legitimate interests. If the aim is to remove an individual barrier, it does not necessarily mean reversing practices and changing rules if they are otherwise generally legitimate and functional.[442] Ideally, as learnt from the Canadian practice, accommodation should be negotiated in the form of mutual

[440] Fredman, *Discrimination Law* (n 9) 182–183.
[441] See a version of the same problem in *Eweida and others v. the United Kingdom*, App no 48420/10 (ECtHR 15 January 2013).
[442] See, for a similar argumentation, Fredman, *Discrimination Law* (n 9) 182–183.

concessions.[443] The individual who requests accommodation is best placed to identify what they need to overcome the barriers they face. The duty-bearer, on the other hand, is best placed to determine their possibilities. If well-designed, reasonable accommodation should identify context-sensitive solutions which respect the beneficiaries' autonomy, needs, and wishes and the duty-bearers' limits.[444]

Recognising the benefits of the balancing nature of reasonable accommodation does not imply that non-inclusive structures should always be upheld. On the contrary. But dismantling them is not necessarily reasonable accommodation's role. As noted throughout this section, reasonable accommodation complements the larger scale measures, such as the accessibility duty or universal design, whose aim is to advance the inclusiveness of our structures. Reasonable accommodation addresses their *unintended* negative impact which would otherwise not get remedied through these measures because the structures would be considered sufficiently legitimate to be kept in place. It is thus reasonable to argue that reasonable accommodation does not alone dismantle the exclusionary structures.[445] But if it explicitly complements other measures, it allows for striking a more nuanced balance between the needs of an individual and the wider social interests.[446] This complementarity is key for understanding the value of reasonable accommodation and appreciating its limits.

This section showed that there are clear advantages of recognising an independent right to reasonable accommodation even if it can be effectively read into the right to equality. Because of its immediate individual enforceability and ability to facilitate compromise solutions, reasonable accommodation as an independent right may be more readily accessible to an

[443] Bouchard and Taylor (n 67); Cartabia (n 56) 676–679.
[444] For a similar reason, Charilaos Nikolaidis suggested that the approach of reasonable accommodation might also be usefully employed in assessing permissibility of positive action measures. Nikolaidis (n 4) 181–182.
[445] As argued by Day and Brodsky (n 65).
[446] Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 International Journal of Constitutional Law 712, 733–734.

individual experiencing disadvantage through non-inclusive structures. Nevertheless, even as an independent right, it still effectively constitutes a corollary to non-discrimination. This means that it should logically cover all those normally targeted by the inclusive aspect of the right to equality. The final section of this chapter is dedicated to analysing what legal theory says about how such a target group should be defined. Instead of justifying why reasonable accommodation should extend to specific protected groups, it focuses on how to define this target group generally, relying on current legal theory.

3. Grounds for reasonable accommodation

This chapter has argued that because reasonable accommodation is a corollary to right to equality, it should normally extend to all protected grounds. A similar argument has been voiced in the academic literature.[447] But while some authors have specifically engaged with the merits of extending reasonable accommodation to selected social groups because of their religion,[448] old age,[449] or pregnancy,[450] no one has explained how to determine and apply grounds in reasonable accommodation cases generally as is fitting for a traversal non-discrimination measure. Understanding the theory of grounds for reasonable accommodation is desirable especially for jurisdictions which have an open or semi-open list of protected discrimination grounds, and the courts thus determine who is protected on a case-by-case basis, often with view of the protected interest at hand.[451]

This section dives into the trends in legal doctrine and theory of protected grounds to show that grounds for reasonable accommodation are best defined as recognisable characteristics

[447] Howard (n 3); Bribosia and others (n 3); Nikolaidis (n 4).
[448] Henrard, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' (n 3); Alidadi (n 25); Bribosia, Ringelheim and Rorive (n 4).
[449] Sargeant (n 26); Waddington (n 3).
[450] Drapeau (n 27).
[451] Fredman, *Discrimination Law* (n 9) 125–130.

associated with an unintended, constructed disadvantage. The first sub-section explains that substantive equality calls for a *relational* reading of grounds which reflects the inequalities and power dynamics in a given legal context. It then distinguishes the *anti-stereotyping* dimension of such approach, and the *disadvantage*-oriented one, most relevant for reasonable accommodation. The last section specifies the kind of *disadvantage* which defines grounds for reasonable accommodation; socially constructed and unintended.

3.1. Grounds as a proxy: irrelevance, identity, and social relations

Equality law typically defines its target group in terms of grounds.[452] Grounds represent characteristics (or statuses) that divide people into socially salient groups – groups recognisable by others.[453] These protected characteristics serve as proxies helping equality law identify those social groups who typically experience the relevant inequalities.[454] They function as an alert system telling us to pay attention whenever a differential treatment (or an unfavourable impact) is linked to them.[455] The challenge of this simplified alert system is that the different aims of the right to equality discussed in the previous section may need to target slightly different protected groups.[456] In legal practice different types of equality law norms may thus approach grounds differently.[457] For instance, norms aligned with formal equality, guaranteeing mostly consistency and rationality of treatment, may aim to protect a wider range of people than those aligned with substantive equality, which puts a spotlight on how inequalities replicate among

[452] McColgan (n 317) 49–50; Fredman, *Discrimination Law* (n 9) 125; Khaitan (n 19) 49.
[453] Khaitan (n 19) 49–50; Michael P Foran, 'Grounding Unlawful Discrimination' (2022) 28 Legal Theory 3.
[454] Dianne Pothier, 'Connecting Grounds of Discrimination to Real People's Real Experiences' (2001) 13 Canadian Journal of Women and the Law 37, 41; McColgan (n 317) 58–59; Foran (n 453) 15–16.
[455] For a thought-experiment illustrating this claim and discussing the reasons behind it, see Khaitan (n 19) 25–30.
[456] Janneke Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights' (2013) 13 Human Rights Law Review 99, 113–122.
[457] McCrudden and Prechal (n 438) 23–25.

certain social groups.[458] Grounds for reasonable accommodation need to follow the approach which best suits its aims and role in equality law.

A practical way to understand the different methods of defining grounds according to their underlying aim is by classifying them into three broad approaches: *irrelevance,*[459] *identity*,[460] and *social relations*.[461] The first approach understands most differences as irrelevant and calls for overlooking them. It typically covers a wide range of characteristics, focuses on the comparability of individuals, and demands rational, consistent treatment for those in the same situations.[462] The second approach affords specific protection to some differences, highlighting that instead of attempting to make differences irrelevant, they must be positively recognised to achieve equality.[463] Therefore, it typically covers a narrower set of characteristics understood as categories of inherent difference, defining a group identity.[464] The third approach also facilitates protection for specific social groups but understands grounds as indicators of difference created through disadvantages in social relations.[465] It is aim-driven in that grounds are defined through the inequalities they should help redress.[466] Each of these approaches have their merit but for the reasons explained below, the relational one is most fitting for reasonable accommodation.

[458] ibid 15–20; Gerards (n 456) 117–122.
[459] This approach corresponds to what Arnardóttir calls "universal sameness" and Sandra Fredman "individualist" approach. Arnardóttir (n 319) 47–49; Sandra Fredman (n 304) 203–204.
[460] Or "significant difference" by Arnardóttir and "minority" model by Fredman. Arnardóttir (n 319) 49–54; Sandra Fredman (n 304) 204–205.
[461] "Substantive multidimensional disadvantage" " by Arnardóttir or "universal" model by Fredman. Arnardóttir (n 319) 54–64; Sandra Fredman (n 304) 206–208.
[462] Arnardóttir (n 319) 47–49.
[463] ibid 49–54; Sandra Fredman (n 304) 204–205.
[464] Arnardóttir (n 319) 49–54.
[465] Colleen Sheppard, 'Grounds of Discrimination: Towards an Inclusive and Contextual Approach' (2001) 80 Canadian Bar Review 893; McColgan (n 317) 59–60; Emily Grabham, 'Law v Canada: New Directions for Equality Under the Canadian Charter?' (2002) 22 Oxford Journal of Legal Studies 641, 651–653; Pothier, 'Connecting Grounds of Discrimination to Real People's Real Experiences' (n 454).
[466] Sheppard (n 465) 910.

Norms following the *irrelevance* approach often contain a wide and open list of grounds.[467] They safeguard equality for all, provided that they show that they are in a sufficiently similar position to legitimately expect the same treatment as their respective comparator.[468] The *irrelevance* approach thus typically treats the individual as a separate entity, demanding that they are treated the same as others if the opposite would be irrational or inconsistent.[469] The advantage of this approach is that it facilitates some form of equality for everyone.[470] The disadvantage is that their common focus on comparability and rational and consistent treatment may fail to acknowledge the specific situation of certain social groups and address more complex forms of discrimination caused by factual inequalities.[471] As these are the inequalities reasonable accommodation aims to redress, such approach to grounds is not best suited for its role in equality law.

Norms following the *identity* or *social relations* approach typically operate with a narrower, exhaustive or semi-exhaustive list of protected grounds.[472] The semi-open approach allows judicial incorporation of other grounds, typically if they are sufficiently similar to those listed.[473] There is a somewhat established cross-jurisdictional consensus on protecting certain grounds, such as race and ethnicity, sex and gender, religion, and disability.[474] But otherwise, jurisdictions may manifest vast differences in the markers they chose to protect.[475] Legal theory explains that grounds in the second, narrower sense express the systemic and collective

[467] McCrudden and Prechal (n 438) 23–25; Gerards (n 456) 113–118. See, for instance, also the 14th Amendment to the United States Constitution, or the Article 9 of the Bill of Rights of the South African Constitution.
[468] McCrudden and Prechal (n 438) 23–25; Gerards (n 456) 113–118.
[469] Sandra Fredman (n 228) 203–204.
[470] Sandra Fredman (n 304) 203–204; Arnardóttir (n 319) 47–49.
[471] Arnardóttir (n 319) 47–49.
[472] McCrudden and Prechal (n 438) 25–28; Gerards (n 456) 113–117; Fredman, *Discrimination Law* (n 9) 113. Christopher McCrudden and Prechal (n 438) 25–28; Gerards (n 456) 113–117; Fredman, *Discrimination Law* (n 9) 113.
[473] Fredman, *Discrimination Law* (n 9) 110.
[474] ibid 113–129.
[475] ibid 110.

dimension of discrimination.[476] The protected characteristics delineate misrecognised communities who require specific protection to be treated *as equals*.[477] They thus connect the individual who experienced discrimination with their social group, history, and context, recognising the de facto unequal position they experience.[478]

Nevertheless, while both the *identity* and the *disadvantage* approach are group-centred and reflect a more substantive understanding of equality, they manifest significant differences. The *identity* approach centres around group identity.[479] It is common to protect certain personal characteristics an individual cannot change[480] or could only change at an unacceptable personal cost.[481] Harms incurred on this basis are seen as particularly problematic because they replicate the existing pervasive inequalities which the individual could hardly have prevented.[482] The *identity* approach often leads the discrimination analysis to focus on whether a characteristic can be seen as inherent in an individual, or whether their claim of discrimination is indeed based on an expression typical for the group identity.[483]

The newer *social relations* approach frames protected grounds as characteristics associated with different forms of social disadvantage.[484] In the relational reading, which defines grounds through existing inequalities, difference is not seen as an inherent feature of an individual or

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[476] McColgan (n 317) 49–53; Dianne Pothier, 'Connecting Grounds of Discrimination to Real People's Real Experiences' (2001) 13 37, 57; Gerards (n 456) 116.
[477] See the explanation of misrecognition above, 74-75.
[478] Pothier, 'Connecting Grounds of Discrimination to Real People's Real Experiences' (n 476) 57.
[479] Arnardóttir (n 319) 49–54; Sandra Fredman (n 304) 204–205; Lauren Sudeall Lucas, 'Identity as Proxy' (2015) 115 Columbia Law Review 1605.
[480] This is typically expressed in the requirement of "immutability". See, for example, McColgan (n 317) 53; Fredman, *Discrimination Law* (n 9) 129–130.
[481] Grounds thus typically also cover fundamental or valuable life choices. Khaitan (n 19) 56–59; Fredman, *Discrimination Law* (n 9) 131–132. Canadian practice developed a specific term "constructive immutability" to cover both elements. See Jessica Eisen, 'Grounding Equality in Social Relations: Suspect Classification, Analogous Grounds and Relational Theory' (2017) 42 Queen's Law Journal 41, 83.
[482] Foran (n 453) 24–25; McColgan (n 317) 60–62; Gerards (n 456) 114.
[483] See, for instance, the extensive criticism in Lucas (n 479); McColgan (n 317) 52–54.
[484] This approach is broadly linked to relational theories. In law, it is often called "contextual" or socio-contextual". See, for instance, the work of Eisen (n 481) 53; McColgan (n 317) 49–54; Pothier, 'Connecting Grounds of Discrimination to Real People's Real Experiences' (n 476); Sheppard (n 465); Lucas (n 479); Nitya Iyer, 'Categorical Denials: Equality Rights and the Shaping of Social Identity' (1993) 19 Queen's Law Journal 179.

their group, but rather as constructed through social relations.[485] The role of equality law is then seen in remedying such constructed disadvantage.[486] It follows that rather than classifying prohibited distinctions, this approach formulates who needs specific protection of equality law, including through differential treatment.[487]

The *social relations* approach has gained increasing traction in several national and international jurisdictions.[488] The literature also highlights that this approach has multiple advantages over the identity-based one. First, it prevents firm association of group identity with disadvantage, avoiding possible perpetuation of further stigma.[489] Individuals do not need to base their claims on showing that they were treated differently because of the supposedly key elements of the group identity, and so need not rely on group stereotypes.[490] This approach thus better avoids essentialism, which means presenting certain traits and experiences as defining and paradigmatic of an identity, downplaying less typical manifestations.[491] For example, in a relations approach, women are not motivated to overemphasise their biologically and socially different nature from men and rely on stereotypical social roles in describing their experiences.[492] Non-binary, intersex or trans people do not need to claim discrimination relying on stereotypical notions of the gender dichotomy.[493]

[485] ibid. See also Arnardóttir (n 319) 54–64; OM Arnardóttir, 'The Differences That Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights' (2014) 14 Human Rights Law Review 647, 663–665.
[486] McColgan (n 317) 90–95.
[487] ibid. It denotes "the general idea that non-discrimination analysis should be conscious of how structural patterns of social disadvantage and exclusion function to keep marginalised groups in the margins." Arnardóttir (n 485) 664.
[488] See Arnardóttir (n 319) 54–56; Sheppard (n 465) 909–910; Eisen (n 481).
[489] McColgan (n 317) 52–54; Lucas (n 479) 1618–1834; Iyer (n 484) 191–193; Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Cornell University Press 2016) 40–47.
[490] McColgan (n 317) 95–96; Arnardóttir (n 319) 62–63; Sheppard (n 465) 913–915; Lucas (n 479) 1666.
[491] Anne Phillips, 'What's Wrong with Essentialism?' (2010) 11 Distinktion: Journal of Social Theory 47; McColgan (n 317) 95.
[492] McColgan (n 317) 57.
[493] Lucas (n 479) 1623–1630.

The second advantage is that this aim-oriented approach to grounds has been said to help address more complex and structural forms of discrimination.[494] This argument has been voiced by the Canadian Supreme Court Justice Claire L'Heureux-Dubé, a pioneer of the *social relations* approach in legal practice.[495] She gives an example of a legislation that has a negative impact on domestic workers, who are, in the given context, predominantly migrant women.[496] An identity-focused approach would require comparing between them and other groups without their key traits to see whether the migrant women were treated less favourably because of their gender, migrant status, or employment status.[497] This is problematic because such comparison may be impossible or may capture only a small part of the problem. The *social relations* approach would require focusing on the impact on the social group rather than comparison. This way, it comes closer to engaging with the core issue: whether the negative impact perpetuates the disadvantage related to the migrant status, gender, and the type of work inseparably.[498]

In fact, a relational approach has been said to be an inevitable requirement of substantive equality.[499] If substantive equality's aim is to redress misrecognition to make sure people are treated *as equals,*[500] the definition of grounds needs to pay attention to how inequalities are produced and reproduced through social relationships[501] instead of examining innateness of characteristics or personal identity.[502] Rather than merely prohibiting certain categorisations

[494] Eisen (n 481) 93–94; McColgan (n 317) 59–60; Sheppard (n 465) 911–914; Pothier, 'Connecting Grounds of Discrimination to Real People's Real Experiences' (n 454) 44–45. See also Justice Thurgood Marshall, Dissent to the Supreme Court judgment *Cleburne v. Cleburne Living* Ctr., 473 U.S. 432 (1985) para 473.
[495] Justice L'Heureux-Dubé in *Egan v. Canada*, [1995] 2 S.C.R. 513 at 551-2. 562. Eisen (n 481) 95; Pothier, 'Connecting Grounds of Discrimination to Real People's Real Experiences' (n 454) 41–43.
[496] ibid.
[497] ibid.
[498] ibid: "It is easier and more intellectually honest to examine the effect of the distinction on the group affected."
[499] "Substantive equality not only invites relational analysis - it requires it." Eisen (n 481) 61. See also Pothier, 'Connecting Grounds of Discrimination to Real People's Real Experiences' (n 476) 49.
[500] See above, 73-74.
[501] Eisen (n 481) 60.
[502] McColgan (n 317) 60–63; Eisen (n 481) 60; Lucas (n 479) 1641–1643; Jack M Balkin, 'The Constitution of Status' (1997) 106 The Yale Law Journal 2313, 2323–2324.

and comparing groups, it should prohibit the perpetuation of certain unfair disadvantages.[503] By analysing the impact of social relations to define protected characteristics, a *relational* approach to grounds targets those who most relevantly need equality law protection in a given context.

It follows, however, that the approach may also be required to target different social groups to uphold the different aims of substantive equality. An earlier section of this chapter explained substantive equality as principally aiming at disadvantages caused by two different sources: prejudice, stigma, stereotypes (*anti-stereotyping angle*) and non-inclusiveness of our structures (*inclusive angle*). The *anti-stereotyping angle* and *inclusive angle* may require a slightly different grounds analysis. For example, it has been shown that Canadian jurisprudence works with three approaches to determining analogous discrimination grounds: *relevancy* approach, defining grounds as irrelevant personal characteristics, *stereotyping* approach, protecting characteristics prone to being subject to prejudice or stereotypes, and a *group disadvantage* approach, selecting characteristics associated with disadvantages caused by other structural reasons.[504] In a given context, the *group disadvantage* approach may protect different markers than the *anti-stereotyping* one.[505]

Following the *anti-stereotyping* angle, grounds analysis should mostly focus on the markers prevailingly associated these perception-related harms (prejudice, stigma, stereotype). However, reasonable accommodation primarily addresses the disadvantage associated with the impacts of non-inclusive structures, not wilful misrecognition.[506] In some contexts, the same markers may not necessarily be associated with both kinds of disadvantages.[507] The social

[503] McColgan (n 317) 90–95.
[504] Eisen (n 481) 78; Pothier, 'Connecting Grounds of Discrimination to Real People's Real Experiences' (n 476) 41.
[505] Eisen (n 481) 78–80.
[506] As noted in the South African Constitutional Court judgment *MEC for Education* (n 262). See Chapter 2, 58.
[507] Eisen (n 481) 78–80.

relations approach aiming at the inclusive angle of substantive equality is thus most fitting for reasonable accommodation.

The social relations *inclusive* approach is currently probably most visible in many jurisdictions' approach to disability.[508] Equality laws typically define persons with disabilities along the lines of the so-called social, or socio-contextual, model.[509] Broadly said, this model defines disability as an evolving situation arising from an interaction between a person's impairment and non-inclusive social structures.[510] It is thus a combination of a recognisable characteristic (impairment) and the social context which disadvantages those who carry it. For the purpose of this definition, people with impairments who do not experience these barriers do not have a *disability*. This is often demonstrated with the example of deaf people from Martha's Vineyard village, where most people spoke sign language and the community was structured along the needs of people with hearing impairments.[511] Despite having an impairment, the inhabitants did not have a disability as long as they were in this inclusive context.[512] This is not to say that people with impairments in inclusive societies cannot or do not identify as *disabled*. But for the purposes of the right to equality, their identity is divorced from their disadvantage they experience and the relevant protected ground is defined contextually. People with disabilities thus get to formulate the narrative of their identity independently of their claims for equality.

Disability as a discrimination ground also highlights other important elements of the *relational* approach. The ground's construction is clearly linked with the inclusive aim of the right to

[508] Oddný Mjöll Arnardóttir, 'Vulnerability under Article 14 of the European Convention on Human Rights: Innovation or Business as Usual?' (2017) 4 Oslo Law Review 150, 165; Pothier, 'Connecting Grounds of Discrimination to Real People's Real Experiences' (n 476) 46; Rannveig Trausdóttir, 'Disability Studies, the Social Model and Legal Developments' in Oddný Mjöll Arnardóttir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (Martinus Nijhoff Publishers 2009) 13.
[509] This also includes the UN CRPD human rights model of disability. See chapter 2, 47-48. Lawson and Beckett (n 155).
[510] ibid.
[511] Stein, 'Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination' (n 14) 642; Samaha (n 158) 1259–1260.
[512] ibid.

equality. It protects against structural barriers those who *experience structural barriers* due to their impairment. And because substantive equality demands that people with impairments should not be disadvantaged for their body or mind-related difference, it is the structures which must change.[513] The right to reasonable accommodation is then implied and explained by this understanding of disability. At the same time, the protected group is fluid as a person may have a disability in a certain context and not in others. And it is also temporal because disability may appear, disappear, or re-appear during a lifetime.[514] The definition is thus sufficiently flexible to respond to changing social and individual dynamics, and cover all those who relevantly need the protection of equality law.

Disability as a concrete example of the social relations *inclusive* approach highlights its usefulness for defining grounds for reasonable accommodation. And a comparable approach is applicable to other grounds. As socially constructed, gender could mirror the approach we currently apply towards disability.[515] As a personal characteristic, it would only become a ground for reasonable accommodation when its interaction with non-inclusive structures perpetuates disadvantage for some social groups, such as women, trans or gender nonconforming people.[516] Similar construction is envisageable towards ethnicity, culture, language, or religion. In *relational, inclusive* terms, these characteristics become a ground not merely due to their distinguishable group identity, but because such identity interacts with structures which do not accommodate it.[517] The examples may go further, especially in jurisdictions which have an open or semi-open list of grounds. The following section

[513] ibid 637–640; Trausdóttir (n 508) 10.
[514] Sandra Fredman (n 304) 206.
[515] Arnardóttir (n 319) 59; McColgan (n 317) 54; Flora Renz and Davina Cooper, 'Reimagining Gender Through Equality Law: What Legal Thoughtways Do Religion and Disability Offer?' (2022) 30 Feminist Legal Studies 129; Jessica Roberts, 'Accommodating the Female Body: A Disability Paradigm of Sex Discrimination'; Trausdóttir (n 508) 5–7.
[516] According to Oddný Mjöll Arnardóttir, if CEDAW were also drafted in the 21st century, it would be likely phrased in terms of the social construction of gender, mirroring the social construction of disability in the UN CRPD. Arnardóttir (n 319) 55–59.
[517] McColgan (n 317) 54.

demonstrates how to formulate such approach to grounds for reasonable accommodation in more general terms.

3.2. Reasonable accommodation grounds as markers of disadvantage

Following the *relational* approach, grounds for reasonable accommodation should be framed as recognisable characteristics associated with disadvantage when interacting with non-inclusive structures. Having established the main principle in the previous sub-section, this sub-section relies on legal theory to discuss how to conduct grounds analysis in reasonable accommodation cases. It explains how to identify the protected social groups without relying on stereotypes, and while being mindful of overlapping layers of disadvantage. It also explains how to use grounds analysis to give a reasonable accommodation duty meaningful limits.

For this purpose, the section identifies two qualities of a disadvantage which should establish grounds for reasonable accommodation when associated with a personal characteristic (status): it was caused by social or environmental structures, and it was an unintended outcome of otherwise legitimately followed aims. The framework draws on trends in legal grounds theory and the theory of reasonable accommodation, presenting reasonable accommodation as aiming to alleviate the unintended prejudicial impact of otherwise legitimate structures.[518] Whether or not the impact was *unintended* distinguishes situations remediable by reasonable accommodation from others,[519] and thus defines grounds specific to reasonable accommodation.

3.2.1. Constructed disadvantage

Reasonable accommodation targets disadvantages caused by a negative impact of otherwise legitimate structures. Only a disadvantage caused by social and environmental structures is

[518] Chapter 3, Section 1.2.
[519] Chapter 3, Section 2.1.1.

remediable by modifying or adjusting them. For instance, reasonable accommodation will never be able to alleviate some disadvantages associated with lack of hearing per se.[520] We can only remedy those disadvantages which arise for people with hearing impairment due to our social arrangements, such as the choice of communication channels. To explain when disadvantage is socially constructed in this relevant manner, this section illustrates the reproduction of disadvantage through structures designed according to a background, dominant *norm*. The argument advanced in the below paragraphs is that an *inclusion*-oriented approach to grounds may delineate people into protected groups along different lines and protect different social groups in different contexts.

At the outset, it is important to acknowledge that nothing is ever different per se. As Martha Minow puts it: "I am no different from you than you are from me."[521] Differences among people gain social or legal significance when we, as a society, assign meaning to a particular trait.[522] Disadvantages associated with those differences are thus always a product of a social choice. The first section of this chapter explained how this disadvantage can also be a by-product an otherwise rational choices in our social and environmental structures.[523] The design commonly reflects what is *normal* or *typical*, which makes those who diverge appear different.[524] The difference is not natural or inherent. An unstated point of reference creates it:

> Unstated points of reference may express the experience of a majority or express the perspective of those who have had greater access to the power used in naming and assessing others. Women are different in relation to the unstated male norm. Blacks, Mormons, Jews, and Arabs are different in relation to the unstated white Christian norm. Handicapped persons are different in relation to the unstated norm of able-

[520] In other words, only when the "external" strategy is possible. Jonathan Wolff, 'Disability among Equals' in Kimberley Brownlee and Adam Cureton (eds), *Disability and Disadvantage* (Oxford University Press 2009).
[521] Minow (n 489) 111.
[522] ibid 50.
[523] Just as the social model of disability was impactful in framing the inclusive paradigm of the UN CRPD. See above, 47-50.
[524] Minow (n 489) 70. Similar point is made in McColgan (n 317) 53–54; Iyer (n 484) 186–191.

> bodiedness or, as some have described it, the vantage point of "Temporarily Able Persons".[525]

The often-invisible background norm follows a quality or a preference prevalent among the group dominant in the given context, be it numerically or in terms of its decision-making power.[526] It is thus, in fact, the unstated *background norm* which makes all the difference.[527] This realisation carries a powerful explanatory potential.[528] The background norm is often invisible for those who correspond to it. Hidden, it is accepted as the natural state of things.[529] The disadvantage it creates for those who diverge then may seem like a natural consequence of their difference. Unless the background norm is exposed, the reason why the social group should require accommodations as a matter of equality remains unapparent. Reasonable accommodation may then seem like an unjustifiably beneficial treatment.

Grooming rules and dress codes are typical examples.[530] In 2021, the international swimming body refused to certify a swimming cap made to cover hairstyles typical for Black swimmers: thick and curly hair, afros, braids, or dreadlocks.[531] The justification was that these caps do not "follow the natural form of the head".[532] But Black hair, being often thicker, is not as easy to make stick to the head as white hair. It thus does not easily follow the head's shape. By the *natural form of the head*, the swimming body, in fact, meant the *natural form of the head of a white person*. But before this prompted a heated discussion because the smaller swimming caps kept sliding off the head of Black swimmers, causing a considerable disadvantage in the

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[525] Minow (n 489) 51.
[526] ibid 89.
[527] ibid. "(…) and this point of comparison must be so taken for granted, so much the "norm," that it need not even be stated." See also ibid; Trausdóttir (n 508) 7.
[528] McColgan (n 317) 56–58; Iyer (n 484) 186–191.
[529] Minow (n 489) 56–70.
[530] Jolls (n 17) 653–654.
[531] Alice Evans. 'Soul Cap: Afro swim cap Olympic rejection.' (BBC News, 2 July 2021) <https://www.bbc.com/news/newsbeat-57688380> accessed 19 November 2022.
[532] ibid.

competition, the background norm which influenced these policies was seen as neutral and unproblematic.[533]

Exposing the background norm to name the source of the disadvantage thus helps identify situations when reasonable accommodation should be at play. At the same time, we must acknowledge that the disadvantage caused by an invisible background norm to those who diverge may impact different people in different contexts. For instance, it is clear that the dominant gender norm does not merely disadvantage women, but also trans, intersex, non-binary people, or even men.[534] Just as the non-disabled norm creates inaccessible environments disadvantaging people with various impairments, the (generally) dominant male norm disadvantages those who diverge from it.[535] Focusing the grounds analysis on how the background norm disadvantages those who differ enables trans or non-binary people, for instance, to formulate their claims of gender discrimination without having to claim they are either men or women.[536] In important ways, they may differ from both the male and female dominant norms.[537]

Similarly, male perspectives are the dominant norm in many contexts. But when it comes to caregiving situations, for example, men may well be disadvantaged because the dominant norm associates caregiving status with women. Changing facilities located only in women's restrooms, regulations of maternity leave excluding fathers or that are unfavourable to them or

[533] ibid.
[534] Arnardóttir (n 319) 55–59.
[535] Dianne Pothier makes parallels between ablism and sexism. Dianne Pothier, 'Miles To Go: Some Personal Reflection on the Social Construction of Disability' (1992) 14 Dalhousie Law Journal 526, 542. The similarities between social construction of gender and disability are also pointed out throughout Trausdóttir (n 508) 5–7; Douglas C Baynton, 'Disability and the Justification of Inequality in American History' in Lennard Davis (ed), *Disability Studies Reader* (Taylor & Francis 2016) 17; Renz and Cooper (n 515); Roberts (n 515).
[536] Many jurisdictions protect trans people under the marker "sex and gender". Both the European Court of Human Rights and the Court of Justice of the European Union have included trans people in the respective category in their jurisprudence. See *Christine Goodwin v. The United Kingdom* App no 28957/95 (ECtHR 11 July 2002), and Case C-13/94 *P. S. and Cornwall County Council* [1996] E.C.R. I-2143. It is uncertain how such an approach would include intersex or non-binary people, who could not or would not want to claim discrimination as women vis-a-vis men, or as men vis-a-vis women.
[537] Lucas (n 479) 1623.

missing child-care arrangements in male-dominated workspaces are a few examples among many. It has thus been noted that discrimination may occasionally occur within the dominant group when a dominant group member departs from behavioural norms for a dominant group member.[538] Admitting that reasonable accommodation may also be required for individuals who are members of otherwise dominant social groups, if they experience disadvantage because they diverge from the dominant norm, is practical. It avoids clear division between protected and unprotected social groups, which may be stigmatising and potentially further marginalising.[539]Such approach also helps avoid stereotyping and problematic essentialism.

Some jurisdictions, for instance, addressed the need to remedy the disadvantage associated with child-care responsibilities or pregnancy by protecting these temporary life situations under the characteristic of sex or gender as exclusively associated with women.[540] This may be seen as a welcome development; at least it addresses the disadvantages associated with child-care or pregnancy in a world not accommodating of these situations. But this construction also perpetuates stereotypes because it equates pregnancy and child-care with womanhood, an association generating the ongoing disadvantage of women in the job market.[541] Furthermore, the construction is inaccurate. Trans or non-binary people who are not women may also become pregnant. In jurisdictions that prohibit discrimination based on pregnancy because it is understood as a discrimination against women, they may fail with their discrimination claim unless they also claim that they were women. Such an approach thus appears both impractical and badly targeted. The real problem is not women becoming pregnant but the hidden

[538] Pothier, 'Connecting Grounds of Discrimination to Real People's Real Experiences' (n 476) 67–70.
[539] ibid.
[540] See, for example, *Napotnik v. Romania* App no 33139/13 (ECtHR, 20 October 2020).
[541] Lucas (n 479) 1633; McColgan (n 317) 57.

background norm of the *typical* worker who never becomes pregnant and carries primary care-giving responsibilities.[542] This norm may disadvantage men, too.

> (A) deeper problem had produced this conundrum: a work world that treats the model worker as the traditional male employee who has a full-time wife and mother to care for his home and children. The very phrase "special treatment," when used to describe pregnancy or maternity leave, posits men as the norm and women as different or deviant from that norm. The problem was not women or pregnancy, but the effort to fit women's experiences and needs into categories forged with men in mind.

Identifying how the dominant norm disadvantages those who become pregnant or care for children appears to be a better strategy than only specifically protecting women. The US Supreme Court showed how such grounds analysis may look in *California Federal Savings & Loan Association v. Guerra* (1987).[543] In this pregnancy discrimination case, it did not compare women against men. It compared both against the unspoken background norm of a child-less worker: "California's pregnancy disability leave statute allows women, as well as men, to have families without losing their jobs."[544] This is a good example of how grounds analysis can be approached in a relational and aim-driven manner, covering all those who are made different by the structures which exclude those who have children.[545] When establishing grounds for reasonable accommodation, it is thus more fitting to focus on the background norm and how it perpetuates disadvantage rather than a group identity.

Contextualised background norms as the backbone of grounds analysis also better incorporates intersectional perspectives. Black women[546] or disabled women,[547] for instance, point out that

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[542] Minow (n 489) 58; Lucinda M Finley, 'Transcending Equality Theory: A Way out of the Maternity and the Workplace Debate' (1986) 86 Columbia Law Review 1118.
[543] 479 U.S. 272 (1987).
[544] ibid.
[545] Minow (n 489) 88.
[546] Celina Romany, 'Black Women and Gender Equality in a New South Africa: Human Rights Law and the Intersection of Race and Gender' (1996) 21 Brook Journal of International Law 881; Crenshaw (n 351); Nitya Duclos, 'Disappearing Women: Racial Minority Women in Human Rights Cases' (1993) 6 Canadian Journal of Women and the Law 25.
[547] Pothier, 'Connecting Grounds of Discrimination to Real People's Real Experiences' (n 476) 59.

approaching gender-based discrimination as protecting women as a category underplays their experience as minority women.[548] Their gender cannot be divorced from their race, culture, or disability. These perspectives may radically change the ways through which womanhood is experienced.[549] Even if law recognises this through the prohibition of intersectional discrimination, it still risks framing their experiences as variations of the *female norm*.[550] It may "view race and ethnicity as "additive" elements of gender."[551] Even the female gender norm may then be a source of disadvantage. A *relational, inclusion*-oriented account of grounds for reasonable accommodation approaches these categories differently. It must consider all relevant barriers caused by the overlapping dominant norms in their complexity. For instance, a grounds analysis for reasonable accommodation of a disabled Muslim woman must examine the barriers created by the non-disabled, secular (or Christian), and the male background norms jointly.[552] Reasonably accommodating her will require both gender and religion-sensitive adjustments or assistances.

The relational account of grounds for reasonable accommodation as constructed disadvantage bears considerable resemblances to the concept of *vulnerability* as articulated by Martha Fineman.[553] Fineman's vulnerability approach represents an attempt to reconstruct a legal term which aimed to facilitate heightened protection to certain social groups but has often been associated with paternalism and denial of agency.[554] It thus sometimes perpetuated the same

[548] Minow (n 489) 231.
[549] ibid; Nancy Fraser and Linda Nicholson, 'Social Criticism without Philosophy: An Encounter between Feminism and Postmodernism' [1989] Social Text 83, 35. Minow (n 489) 231; Fraser and Nicholson 35.
[550] Minow (n 489) 231–232.
[551] Celina Romany (n 546) 881.
[552] See, generally, Narain (n 66).
[553] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law and Feminism 1, 16; Loudres Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 International Journal of Constitutional Law 1056, 1062; Alexandra Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' in Fineman and Grear (ed), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Routledge 2013) 149.
[554] Alexandra Timmer (n 553) 152.

problems it aimed to solve; marginalisation, stigmatisation, and victimisation.[555] Fineman's reconstruction of vulnerability attempts to give it a meaning of a universal susceptibility to harm as well as the particular, individual condition of those made more vulnerable than others by social arrangements.[556] Fineman presented her vulnerability theory as an alternative to the US categorical model of grounds, emphasising that "privilege is not tethered to identity neither is disadvantage."[557] Being grounded in a relational (or socio-contextual) analysis, her vulnerability analysis turns focus to the "institutional practices that produce the identities and inequalities".[558] This way, it identifies instances when the responsive state – responsible for bringing about substantive equality – has to intervene.[559] In many instances, practices which render people or social groups vulnerable result from the operation of social structures,[560] a disadvantage relevant for reasonable accommodation. Vulnerability conceived this way may thus also serve as a device identifying grounds for reasonable accommodation.[561]

3.2.2. Unintended disadvantage

The above sub-section explained why a characteristic should become a ground for reasonable accommodation when linked with a constructed disadvantage. This aspect ensures a flexible approach to reasonable accommodation grounds, possibly targeting a wide array of people. The second aspect explored in this sub-section is a limiting one. It explains which disadvantages, even if socially constructed, should not establish grounds for reasonable accommodation. By

[555] Fineman (n 553) 8.
[556] ibid 17; Peroni and Timmer (n 553) 1058. Fineman (n 553) 17; Peroni and Timmer (n 553) 1058.
[557] Fineman (n 553) 17.
[558] ibid 18.
[559] ibid 19–22. See also Kate Brown, Kathryn Ecclestone and Nick Emmel, 'The Many Faces of Vulnerability' (2017) 16 Social Policy and Society 497, 500.
[560] As noted by Peroni and Timmer, people are rendered particularly vulnerable due to a complex set of causes. Peroni and Timmer (n 553) 1078.
[561] A suggestion in this spirit has also been made in Livio Rubino, 'Reasonable Accommodation beyond Disability and the Concept of Vulnerability in Europe' (2022) 20 Z Problematyki Prawa Pracy i Polityki Socjalnej 1.

examining both aspects of the relevant disadvantage, grounds analysis should set meaningful boundaries to the right to reasonable accommodation.

Such limits have traditionally been set by grounds' doctrines' reliance on immutability, which typically covers also valuable choices people should be free to pursue.[562] The idea behind this constraint is that it is only illegitimate to require people to bear the disadvantage associated with their difference if they could not change what makes them different or should not be required to do so.[563] It expresses a legitimate concern for limiting collectivisation of disadvantage.[564] But the immutability requirement has also long been criticised because it puts too much emphasis on the individual characteristic rather than on the structures and norms which create inequality.[565] Several authors argue that grounds analysis should not be burdened by discussing whether the individual could have changed their characteristics to avoid disadvantage.[566] What we really need to ask is whether there are sufficiently legitimate reasons to require the person to alone bear the disadvantage constructed by our rules, practices, and institutions.[567] This shift in focus has been partially discussed in the Canadian Supreme Court *Corbiére* judgment:

> the thrust of identification of analogous grounds […] is to reveal grounds based on characteristics that we cannot change or that the government *has no legitimate interest in expecting us to change* to receive equal treatment under the law [emphasis added].[568]

The key question should not be whether the characteristic associated with disadvantage is immutable or even whether it constitutes a valuable choice. It should be whether an individual has a legitimate interest to maintain their difference without incurring disadvantage. Some

[562] Khaitan (n 19) 59–60; Fredman, *Discrimination Law* (n 9) 131–133; Foran (n 453) 22–27.
[563] McColgan (n 317) 53; Khaitan (n 19) 57–58.
[564] Moreau, 'Discrimination as Negligence' (n 408) 146; Fredman, 'Substantive Equality Revisited' (n 15) 734.
[565] McColgan (n 317) 53; Balkin (n 502) 2366; Khaitan (n 19) 58–60; Fredman, *Discrimination Law* (n 9) 131–133; Foran (n 453) 23–25.
[566] Balkin (n 502) 2366; Lucas (n 479) 1640–1642.
[567] Moreau, 'Discrimination as Negligence' (n 408) 146; Fredman, 'Substantive Equality Revisited' (n 15) 734.
[568] *Corbiére v. Canada* (Minister of Indian and Northern Affairs), [1999] 2 SCR 203, Introduction, and para 13.

authors thus contend that in this respect, it is thus more fitting to inquire about the "moral irrelevance"[569], "normative irrelevance"[570] of the trait, or its "irrelevance for functioning in a society".[571] All forms of this requirement aim to distinguish between traits which are deemed as deserving of equality law protection (pregnancy) from those which are not (status as a sex offender). Their role is to determine which statuses should not affect how successful our lives are.[572] But while they theoretically explain some of the choices of equality law, they are also rather elusive when it comes to showing where to draw the line between the deserving and undeserving statuses.

Because this thesis focuses on requirements for grounds for reasonable accommodation, which is a tool addressing the disadvantage created by surrounding structures,[573] it makes sense to understand this requirement through the aims followed by these structures. If the structures follow an aim which clearly requires individuals to bear the disadvantage associated with their difference, or such disadvantage is an inherent outcome of following such aim, the disadvantage experienced by the individual is an intended one. In such a case, the structures are either legitimate – and the disadvantage along with them – or illegitimate – and need to be dismantled as a whole, not merely individually adjusted or modified.[574] Other legal tools, such as the general prohibition of discrimination, may challenge them. But the imposed disadvantage – as an intended outcome of legitimate aims – is not remediable by reasonable accommodation.

If, on the other hand, the incurred disadvantage was an *unintended* outcome of a legitimate policy, and it not inherent in its execution, it is possible to alleviate a negative impact

[569] Foran (n 453) 19–22.
[570] Khaitan (n 19) 56.
[571] Henrard, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' (n 3) 71.
[572] Foran (n 453) 20.
[573] See Chapter 3, Sections 1.2 and 2.
[574] See also Chapter 3, Section 2.1.1.

experienced by an individual by modifications, adjustments, or exceptions.[575] Such *unintended* disadvantage thus establishes grounds for reasonable accommodation. And it also sets limits to the requirement of reasonable accommodation by acknowledging that some constructed disadvantages may be borne by an individual legitimately. For example, school dress-code rules may require that students wear smart clothes and appear neat and orderly.[576] Wearing visible facial piercings may be perceived as contrary to this image, expressing a form of rebellion or extravagance. Prohibiting such piercings may then be seen as a legitimate expression of the above aim. But such a rule also has a negative impact on students for whom wearing facial jewellery is a form of cultural expression of their identity, such as for some women of Indian origin. The rules did not aim to regulate cultural expressions but rather manifestation of potential misbehaviour. In this sense, the disadvantage incurred by the women of Indian descent was *unintended*. This is why it would establish grounds for reasonable accommodation.

A similar argument can be made, for instance, in relation to child-care obligations. They often associate with workplace disadvantage in a society which is constructed around the norm of a child-less worker.[577] But the disadvantage is not necessarily an intended or inherent outcome of legitimately followed aims. To the contrary, a state that wishes to support families and workplace inclusion alike is not likely to pursue policies which intentionally impose disadvantage on those with child-care obligations. If a disadvantage occurs, it is then rather an *unintended* outcome of existing structures. This explains why the disadvantage associated with child-care obligations should establish grounds for reasonable accommodation.

On the other hand, the state may pursue a legitimate policy of LGBTI equality which places a limit on some religious communities because they are required to respect it even if it clashes

[575] ibid.
[576] The example is inspired by the South African Supreme Court judgment *Pillay* (n 262), Chapter 2, 58.
[577] See, for instance, the case *Whyte v. Canadian National Railway* (n 243), discussed in Chapter 2, 55.

with their religious beliefs. This may limit them in their choice of jobs, for instance, because employment rules might require them to act contrary to their beliefs.[578] However, this disadvantage is an intended and inherent outcome of the legitimately pursued aims. Accommodating the religious expressions would directly compromise them. Such religious expressions thus should not become a ground for reasonable accommodation, even though other forms of religious manifestations might. A religious group requesting accommodations to be able to perform otherwise illegal corporal punishment on children would also not have legitimate grounds for reasonable accommodation. The disadvantage they experience – inability to discipline children in line with their religious teaching – is intended and inherent in the legitimately pursued state policy of zero tolerance towards violence against children.[579] Both situations can be challenged from other perspectives, such as indirect discrimination or the constitutionally protected freedom of religion. But they should not establish grounds for reasonable accommodation as understood in this thesis.

This approach presented in this section rightfully turns the focus on the social arrangements and the manner in which they produce disadvantage. It clarifies that a characteristic should become grounds for reasonable accommodation only if associated with a socially constructed disadvantage which was unintended in that it was not an inherent outcome of legitimately pursued aims. And it also explains that a wide range of people can theoretically claim reasonable accommodation on grounds understood this way, not merely those belonging to traditionally protected groups. For instance, there are situations where a man can claim the right to be reasonably accommodated in relation to his child-care obligations.

However, it is important to note that grounds analysis does not alone determine whether reasonable accommodation must indeed be provided. Whether or not the incurred disadvantage

[578] This example draws on the ECtHR case *Eweida and others v. the United Kingdom* (n 441).
[579] This example builds on a South African Constitutional Court *Christian Education* (n 276), discussed in Chapter 2, 61.

may also be considered unjustified should be a subject to the undue burden analysis, which represents the duty-bearer's opportunity to legitimise the failure to reasonably accommodate.[580] An individual, even though having grounds for reasonable accommodation, can thus still be required to individually bear their disadvantage if reasonably accommodating them would be an undue burden.

Conclusion

This chapter explained that understanding reasonable accommodation as a special measure for selected social groups is inaccurate. The requirement of reasonable accommodation is implied in the right to equality as a corollary to non-discrimination prohibiting the disadvantageous impact of social and environmental structures. Limiting reasonable accommodation to a target group defined differently than the general prohibition of discrimination would thus be inconsistent. In line with the equality law theory and similarly to other non-discrimination concepts, reasonable accommodation should be available on all relevant protected grounds.

The key role of this chapter was to draw on legal theory to give a general definition of grounds for reasonable accommodation, which will be workable also for identifying analogous grounds. The central argument is that to practically fulfil their role in reasonable accommodation cases, grounds should be defined in *relational*, disadvantage-oriented terms. A relational reading of discrimination grounds represents a trend in the current grounds doctrine and is closely linked with a substantive vision of equality. It means defining the protected group in terms of the inequality they face that is to be redressed through equality law. Following this principle, grounds for reasonable accommodation should be established by an interaction of a socially recognisable characteristic (or a status), which is the primary requirement of grounds,[581] and

[580] See Introduction, Definitions, 26.
[581] Foran (n 453) 9–18.

an associated *unintended*, socially constructed disadvantage. The second part of that grounds formula ensures appropriate and context-sensitive targeting of reasonable accommodation to all those who relevantly need it to be able to equally enjoy their rights and opportunities.

The chapter explained that there are grounds for reasonable accommodation when an individual's socially recognisable characteristic prompts a disadvantage when interacting with structures created according to a dominant norm. To establish grounds for reasonable accommodation, the disadvantage must also be unintended because an intentional disadvantage is not remediable by reasonable accommodation and calls for other interventions. The chapter noted that a specific understanding of *vulnerability* as a legal concept may encapsulate the same principles and thus establish grounds for reasonable accommodation. Depending on the context, many different characteristics can thus become grounds for reasonable accommodation. Nevertheless, it must be noted that even if there are grounds for reasonable accommodation, it may still be legitimately denied using the undue burden defence. As with other cases of discrimination, establishing grounds needs to be separated from examining the possible legitimate justifications for the denial of reasonable accommodation.

Chapter 4

The evolution of a reasonable accommodation requirement under the European Convention on Human Rights

Introduction

Reasonable accommodation is an integral requirement of the right to substantive equality, a remedy to the unintended disadvantageous impact of social and environmental structures. The previous chapter explained that it constitutes a corollary to the prohibition of discrimination and may also be implied in the proportionality requirement under other human rights. As such, the duty to reasonably accommodate may also be effectively read into the European Convention on Human Rights ("the Convention").[582] This argument has been advanced in the academic literature, showing that the European Court of Human Rights ("the Court") implicitly applies reasonable accommodation on grounds of disability,[583] religion,[584] or ethnicity and culture.[585] Nevertheless, the Court is rarely transparent about this requirement, creating confusion for the applicants as well as the member states and other duty-bearers who may be required to implement it.[586]

[582] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (ETS No. 005, 3 September 1953).
[583] Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4) 967; De Schutter (n 35).
[584] Bribosia and others (n 3) 22–29; Howard (n 393) 11–15; Kristin Henrard, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' (2012) 5 59; Alidadi (n 25).
[585] Bribosia and others (n 3) 29–31.
[586] Henrard, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' (n 584) 69; Waddington (n 3) 194–195.

This chapter aims to make sense of the Court's inconsistent practice and to clarify to whom it extends the right to reasonable accommodation. It presents a chronological analysis of the Court's judgments and decisions which imply a requirement of reasonable accommodation according to this thesis' framework, assessed either under the right to equality (Article 14 and Article 1 of Protocol no. 12) or other articles of the Convention. The chapter distinguishes three phases in which the Court's approach to the beneficiaries of reasonable accommodation developed: the phase of *significant difference*, the phase of *vulnerability*, and the last phase of *particularly prejudicial impact* linked with a protected ground, which combines the two previous approaches. The chapter thus shows that Court has been implicitly using reasonable accommodation for all grounds, albeit not always in a transparent and predictable fashion.

1. Subtle introduction: differential treatment for *significantly different situations*

The previous chapter, just like the existing literature, shows that there are two principal ways in which reasonable accommodation can be read into legal systems despite not being explicitly legislated: the right to equality and non-discrimination, and the proportionality requirement used to assess the permissibility of interference with human rights.[587] Even though the right to reasonable accommodation is not explicitly mentioned in the text of the Convention, it can thus still make its way into the Court's case law in this implicit fashion, either under the right to equality provisions (Article 14 and Article 1 of Protocol no. 12) or other Convention rights.[588] If a case discusses a differential treatment to redress the unintended disadvantageous impact of

[587] See the detailed explanation in Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4) 968–969; De Schutter (n 35).
[588] Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4).

structures on those who diverge from the norm,[589] a requirement of reasonable accommodation is implicitly present.

This section follows the introduction of reasonable accommodation in the Court's equality case law and its ambiguous use under other Convention articles. It first demonstrates that until the Court began to understand equality in a more substantive sense, a requirement of accommodation was virtually non-existent. The second section shows the introduction of reasonable accommodation as a form of differential treatment for those in *significantly different situations* under the right to equality (Article 14). The section also shows that the requirement remained elusive because it was not applied consistently. While it was recognised under the right to equality, it often remained lost when cases were examined under other Convention articles.

1.1. Hesitant move beyond formal equality

The Convention system dealt with the first cases where applicants requested religion-based accommodations in the 1960s. It was approximately at the same time when similar cases began appearing in the United States or Canada.[590] They included demands for religious-based exceptions from military service,[591] helmet-wearing exceptions for the Sikhs,[592] adjustment to work or school hours to enable religious practice[593] or exceptions from religious instruction for

[589] As explained in MEC for Education (n 262), para 78.
[590] Compare Chapter 2, Section 1.
[591] *Grandrath v. Germany* App no 2299/64 (Commission Decision, 12 December 1966), *X v. Germany* App no 7705/76 (Commission Decision, 5 July 1977), *Conscientious Objectors v. Denmark* App no 7565/76 (Commission Decision, 7 March 1977), *A. v. Switzerland* App no 10640/83 (Commission Decision, 9 May 1984), *N. v. Sweden* App no 10410/83 (Commission Decision, 11 October 1984), *Autio v. Finland* App no 17086/90 (Commission Decision, 6 December 1991).
[592] *X. v. United Kingdom* App no 7992/77 (Commission Decision, 12 July 1978), concerned a Sikh requesting an exemption from the helmet obligation while riding a motorcycle.
[593] *X. v. United Kingdom* App no 8160/78 (Commission Decision, 12 March 1981), concerned a Muslim schoolteacher who requested adjustments of teaching hours so he could fulfil his religious duty and pray in a nearby Mosque on Friday afternoons. See also *Konttinen v Finland* App no 24949/94 (Commission Decision, 3 December 1996); *Martins Casimiro and Cerveira Ferreira v. Luxemburg* App no 44888/98 (ECtHR Decision, 27 April 1999). A similar request for exemption was made by parents on behalf of their son who had to attend Saturday school (*Stedman v. UK* App no 29107/95 (Commission Decision, 09 April 1997).

non-religious students.[594] The Commission[595] or the Court also received numerous complaints from linguistic minorities requesting accommodations to facilitate political participation.[596] Most of these cases were not examined from the perspective of the Convention's equality provision, Article 14, and all were considered manifestly ill-founded.[597] This was consistent with the predominantly formal understanding of equality in the European human rights system at the time.[598] Applying the same rules and criteria to everyone despite their differences corresponded to the demand of *equal treatment*. Even if the Court acknowledged that different situations may call for different legal solutions,[599] there was no obligation of differential treatment as a matter of equality.

The first time the Court considered that people's different situations might also give rise to the state's duty to treat them differently was arguably in trans rights cases. Even though these complaints were not treated under the right to equality (Article 14), their assessment nevertheless reflects a changed understanding of the importance of addressing a negative impact of seemingly neutral legal rules for human rights protection. *B. v. France* (1992)[600] concerned a trans person who could not legally change their registered gender because the French legal system did not allow it at the time. The core claim, argued under the right to privacy (Article 8), was that legal systems should treat trans people differently than others.

[594] *Angelini v. Sweden* App no 10491/83 (Commission Decision, 3 December 1986), concerned an atheist mother seeking exemption for her daughter from compulsory religious education in Sweden.
[595] The European Commission on Human Rights was a Council of Europe institution which dealt with the admissibility stage of applications and had the power to initiate proceedings before the European Court of Human Rights on behalf of the applicants. This system changed with the coming into effect of Protocol no. 11 in 1998. Since then, applicants turn directly to the Court.
[596] *Fryske Nasjonale Partij and Others v the Netherlands* App no 11100/84 (Commission Decision, 12 December 1985), *Association 'Andecha Astur' v. Spain* App no 34184/96 (Commission Decision, 7 July 1997), *Birk-Levy v. France* App no 39426/0 (ECtHR Decision, 21 September 2010).
[597] Henrard, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' (n 3) 64.
[598] Arnardóttir (n 319) 47–49.
[599] The case *Relating to certain aspects of the laws on the use of languages in education in Belgium* App no 1474/62 (ECtHR 23 July 1968), para 10: "certain different situations call for different legal solutions and certain legal inequalities merely correct factual inequalities."
[600] *B. v. France* App no 13343/87 (ECtHR 25 March 1992).

They should register their actual, current gender, not the sex identified at birth, as is the widespread practice.[601] The claim did not principally challenge this widespread practice or the corresponding social and legal norm that assumed one's gender corresponds to the sex identified at birth. It challenged the unintended impact this practice had on trans people. This is why the case essentially concerns a claim for reasonable accommodation. France would not have to dismantle the whole state register. It would only need to legislate corresponding exceptions for trans people who wished to change their registered gender. The French register was flexible enough to allow such adjustments, and the state failed to explain why implementing them would be too difficult. Examining the case from the perspective of the state's positive obligation to uphold the applicant's right to privacy, the Court concluded that a *fair balance* had not been struck between the general interest and the individual interest of the applicant.[602]

Several other complaints against the United Kingdom raised a similar issue,[603] except that the British system issued birth certificates as unalterable documents, not allowing changes in the registered data. These cases also demonstrate the de facto reasonable accommodation logic applied by the Court in these cases. The same considerations as in *B v. France* applied, except that there was a much bigger burden required for the state which would have to redo their whole registration system. The margin of appreciation typical for assessing states' positive obligations tilted the decision in favour of the UK Government, claiming that the costs would be too high.[604] In other words, while an accommodation of trans people did not constitute an undue burden for France, it was an undue burden for the United Kingdom in the given context.

[601] ibid, para 43.
[602] ibid, para 63. See Chapter 3, Section 2.1.1. and 2.1.2. for a discussion on how reasonable accommodation facilitates such balancing.
[603] *Rees v. the United Kingdom* App no 9532/81 (ECtHR 17 October 1986), *Cossey v. the United Kingdom* App no 10843/84 (ECtHR 27 September 1990), both pre-dating *B. v. France*; *X., Y. and Z. v. the United Kingdom* App no 21830/93 (ECtHR 22 April 1997), *Sheffield and Horsham v. the United Kingdom* Apps no 31–32/1997/815–816/1018–1019 (ECtHR 30 July 1998), which were issued after *B. v. France*.
[604] *Sheffield and Horsham v. the United Kingdom* (n 603), paras 58-59.

Needless to say that with a change of the context, and emerging international trends on the standards of protection of the right of trans people, later case law also demanded similar accommodations from the United Kingdom. [605]

1.2. Elusive accommodation requirement: between equality and proportionality

The first time the Court acknowledged that the Convention's right to equality required redressing the discriminatory impact of otherwise legitimate general rules was in the Grand Chamber judgment of *Thlimmenos v. Greece* (2000).[606] Mr Thlimmenos was a Jehovah's Witness who served a criminal sentence for his refusal to do compulsory military service. He then wanted to become a chartered accountant but was denied the licence because of his criminal record. The Grand Chamber here dealt with an issue that had already appeared before the Court decades before: the consequences of religious-based objections to serving in the army.[607] All previous cases were assessed as interferences with freedom of religion and dismissed as manifestly ill-founded.[608] This time, the Court focused on the equality aspect of the case, which significantly changed the outcome.

The central issue in the case was the impact of the chartered accountants' licensing regulation on Mr Thlimmenos because of his religious belief. Mr Thlimmenos did not argue that the legislation prohibiting convicted persons from becoming chartered accountants was per se illegitimate.[609] The Court also concluded that it was not. The state had "a legitimate interest to exclude some offenders from the profession of a chartered accountant" [610] because convictions for criminal offences can imply dishonesty or moral turpitude likely to undermine the ability to exercise the profession.[611] But Mr Thlimmenos' conviction did not imply untrustworthiness

[605] *Goodwin v. the United Kingdom* (n 536), paras 84-85.
[606] *Thlimmenos v. Greece*, 2000-IV; 31 EHRR 15.
[607] See *Grandrath v. Germany* and other cases cited in (n 591) which were considered manifestly ill-founded.
[608] ibid.
[609] *Thlimmenos v. Greece* (n 606), para 42.
[610] ibid, para 47.
[611] ibid.

or dishonesty. He was convicted for merely following his religious belief. In this sense, his situation was *significantly different* than that of others.[612] The legitimate aim the state sought by limiting access to the profession could have been achieved without the negative impact it had on Mr Thlimmenos – in this sense, the impact on him was *unintended*.

Thlimmenos v. Greece was arguably the first time the Court admitted that a prejudicial impact of a neutral rule on a person amounts to discrimination contrary to Article 14.[613] It marked a significant evolution in the Court's understanding of equality.[614] Since then, equal treatment did not imply merely the duty to apply the same rules to everyone despite their differences. It also implied the duty to consider how these rules impact certain individuals. It is also significant that the Court was satisfied with the applicant showing how the rules disadvantaged him individually and did not require him to show that they did/would have negatively impacted the whole protected group.[615] The duty to remedy an individual impact caused by otherwise legitimate structures all the more emphasises that the judgment de facto required reasonable accommodation.[616] It did not imply that the rules themselves need to be abolished. It established that discrimination may occur even by failure to introduce individual exceptions or modifications to those otherwise legitimate rules.

The Court concluded explicitly that the state discriminated by "failing to introduce appropriate exceptions to the rule".[617] The exceptions required to prevent this discriminatory impact may be seen as a remedy to what could otherwise be considered indirect discrimination.[618] Chapter

[612] ibid.
[613] Nikolaidis (n 4) 75; Bribosia, Ringelheim and Rorive (n 4) 153–154; Waddington (n 3) 195; De Schutter (n 35) 52.
[614] Nikolaidis (n 4) 75.
[615] Howard (n 3) 11.
[616] ibid; Nikolaidis (n 4) 75.
[617] *Thlimmenos v. Greece* (n 606), para 48.
[618] For this reason, *Thlimmenos* is often also framed as an indirect or adverse impact discrimination case. Nikolaidis (n 4) 75; Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4) 966; Bribosia and others (n 3) 24.

3 explained that requiring – as opposed to allowing – differential treatment is typically considered to be a manifestation of substantive equality.[619] The judgment thus evidently followed the substantive equality's aim of remedying the unintended disadvantageous impact of social and environmental structures.

Most importantly, however, the Court for the first time in *Thlimmenos v. Greece* explained what constitutes grounds for reasonable accommodation. It coined the rule that discrimination contrary to Article 14 occurs also when states fail, without an objective and reasonable justification, to *treat differently persons whose situations are significantly different.*[620] *Significant difference* in this construction effectively formulates grounds for the requirement of reasonable accommodation. Mr Thlimmenos was significantly different because he incurred a disadvantage due to the lack of concern the general rules showed to his legitimate needs as a religious practitioner.

A reasonable accommodation requirement was then similarly read into the first couple of cases concerning disability. *Pretty v. the United Kingdom* (2002)[621] is especially interesting because it was an opportunity to illustrate the limits of an accommodation requirement. The central issue of the case was the criminalisation of assisted suicide. Ms Pretty had a serious illness which caused her a considerable amount of suffering.[622] Because of her disability, she could not end her life without assistance, as most other people could.[623] However, English law criminalised assisted suicide no matter the circumstances. Among others, relying on *Thlimmenos v. Greece*, Ms Pretty complained before the Court that the law was discriminatory because if failed to treat her *significantly different situation* differently.[624] The disadvantageous

[619] Chapter 3, Section 1.
[620] *Thlimmenos v. Greece* (n 606), para 44.
[621] ECHR 2002-III.
[622] ibid, paras 7-9.
[623] ibid.
[624] ibid, para 85.

impact the law had specifically on Ms Pretty was likely unintended because the law did not criminalise suicide; everyone was allowed to end their lives voluntarily unless they needed assistance, as Ms Pretty did. And Ms Pretty also did not challenge the criminalisation of assisted suicide per se. She complained of the specific impact it had on her.[625] The case was thus clearly about reasonable accommodation: allowing Ms Pretty as a person with disability to get assistance in ending her life, a decision which was otherwise accessible to others.[626]

The Court accepted that in principle, the disadvantage Ms Pretty experienced because of the general rules puts her in a *significantly different situation*.[627] But it followed by concluding that the state had an "objective and reasonable justification *for not distinguishing in law* [emphasis added] between those who are and those who are not physically capable of committing suicide".[628] This conclusion was the basis of rejecting Ms Pretty's discrimination claim. However, the Court's explanation is confusing because it seems to mix the justification for establishing grounds for the right to differential treatment (*significantly different situation*) and the reasons for its denial (*objective and reasonable justification*). The formulation suggests that, in principle, Mr Pretty had the right to be accommodated as a person with disability in a significantly different situation, but the state had a legitimate reason to deny accommodation because it would be an undue burden on its legitimately pursued policies.

However, the Court also said that there were legitimate grounds *for not distinguishing* the applicant from others, in other words, not seeing her as being in a *significantly different situation*. The implication would be not only that the state would not be required to accommodate her because it would be too big a burden. Her situation would not even establish grounds for reasonable accommodation. The failure to clearly distinguish between the stage of

[625] ibid, para 85.
[626] De Schutter (n 35) 36–37.
[627] ibid, para 89.
[628] ibid, para 89.

establishing grounds for reasonable accommodation, and the state of reviewing the state's objective and legitimate justification for its denial – the undue burden test – complicates the analysis of who has the *prima facie* right to reasonable accommodation. The ensuing analysis shows that the Court has not yet sufficiently addressed this problem.

In another disability judgment, *Glor v. Switzerland* (2009),[629] the requirement of reasonable accommodation is implicitly present in a case assessed as direct discrimination. The case concerned a man with a disability who was not allowed to serve in the army because of his impairment. Unlike others with "a major disability",[630] he had to pay military-service exemption tax. And unlike conscientious objectors, he could not opt for a civilian service instead.[631] He especially disagreed with the taxation because he was willing to do the service, whether military or civilian.[632] The Court compared the applicant's treatment with the treatment of others, assessing de facto whether there was a direct discrimination on the grounds of disability.[633] There is no doubt that allowing the applicant to do either military or civilian service would require reasonable accommodations.[634] But the Court emphasised that "special forms of civilian service tailored to the needs of people in the applicant's situation (were) perfectly envisageable".[635] To prevent discriminating Mr Glor on grounds of disability, the state thus should have accommodated him to enable him to conduct an alternative service. What is more, the Court also iterated that if differential treatment functions as prevention of discrimination against persons with disabilities, the states have a "considerably reduced" margin of appreciation in deciding whether to adopt it. [636]

[629] ECHR 2009-III.
[630] ibid, para 79.
[631] ibid.
[632] ibid, para 3.
[633] ibid, para 80.
[634] As noted in Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4) 967.
[635] ibid, para 95: "special forms of civilian service tailored to the needs of people
in the applicant's situation (were) perfectly envisageable."
[636] ibid, para 84.

Reasonable accommodation as an implied requirement of the right to equality enters even more clearly into *B. v. the United Kingdom* (2012),[637] a case of a single mother with a severe learning disability who had omitted to inform the authorities about circumstances that influenced the calculation of her benefits. As a person with intellectual disability, she did not properly understand her obligations, written in regulations with inaccessible language.[638] In the Court's view, this put her in a *significantly different situation* and engaged the right to equality.[639] Because the regulations had an unintended disadvantageous impact, they could be judged as indirectly discriminatory. The applicant would require active assistance, such as a support from a social worker, to be able to fulfil her legal duties on an equal basis with others.[640] Such assistance is a typical form of disability-based reasonable accommodation. Here again, reasonable accommodation would thus be implied in the prohibition of indirect discrimination. Nevertheless, the Court did not eventually find a violation in this case because it considered that denying accommodations had a sufficiently legitimate aim of ensuring smooth administration of benefits.[641] Implicitly, the Court considered that reasonably accommodating the applicant in the given context would constitute an undue burden. In this case, the Court was much clearer than in *Pretty* as to why the denial of accommodation was justified – not because there would be no grounds for reasonable accommodation but because its denial had a sufficiently legitimate justification.

The implicit requirement of reasonable accommodation also extended to other grounds than religion and disability. In *Taddeucci and McCall v. Italy* (2016),[642] homosexuality was considered a *significant difference* implying a requirement of differential treatment.[643] The case

[637] App no 36571/06 (ECtHR 14 February 2012).
[638] ibid, para 8.
[639] ibid, para 58.
[640] ibid, para 8.
[641] ibid, para 59.
[642] App no 51362/09 (ECtHR 30 June 2016).
[643] ibid, para 85.

concerned a man who could not obtain a family residence permit because he was not married to his male partner. The same rules applied to heterosexual unmarried couple. But while a heterosexual couple could have gotten married to fulfil the requirements for obtaining it, a homosexual couple could not have.[644] The legitimate requirement of a stable legal recognition of a partnership thus had a negative impact on homosexual couples. The impact was likely unintended because the stability of a partnership can be shown differently than by a marriage certificate. This means that the disadvantage experienced by Mr Taddeucci and his partner was preventable while maintaining the legitimate aims the state pursued by the legislation. As in *Thlimmenos*, alleviating such disadvantage did not necessarily require abolishing the whole norm. Introducing individual exceptions or a modification to include registered partnerships or other forms of family-like co-habitation was a more practical solution. Remedying the indirect discrimination caused by the impact of seemingly neutral rules in this case thus also de facto required adopting reasonable accommodations on grounds of sexual orientation.[645]

The *significantly different situation* standard established in *Thlimmenos v. Greece* thus introduced a tacit requirement of reasonable accommodation in the Court's case law. All the above cases were assessed under the right to equality (Article 14) and implicitly required accommodation to as a corollary to non-discrimination. However, confusion appeared when the Court opted for assessing similar cases under other articles of the Convention, most notably the freedom of religion (Article 9).[646] Omitting the equality angle of the following cases, the Court did not consistently apply the established standards of *significantly different situations* requiring differential treatment.[647] This further blurred the already implicit requirement of

[644] ibid, paras 85, 95.
[645] Compare Chapter 3, Section 2.1.1.
[646] *Bayatyan v. Armenia* ECHR 2011-IV, a case very similar to *Thlimmenos v. Greece* (n 606) illustrates the confusion. Even though the case explicitly talks about "accommodations", it was not assessed under the right to equality and does not refer to the standards introduced in *Thlimmenos v. Greece*.
[647] Kristine Henrard notes that this is a common problem in the freedom of religion cases. Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4) 965.,

reasonable accommodation, especially when it came to determining what constitutes its grounds. In the following cases, it was often unclear whether no violation means that there was no ground for reasonable accommodation or that the state successfully claimed overriding competing interests.

This unclarity manifests, for instance, in the inadmissibility decision in *Pichon and Sajous v. France* (2001).[648] The complaint was filed by pharmacists penalised under domestic law for refusing to sell contraceptive pills due to their Christian beliefs.[649] They argued that they should have been exempted from the relevant Consumer Code provisions because even though the rules were legitimate, they had a disadvantageous impact on them because of their religion.[650] The case thus concerned a very similar issue as that in *Thlimmenos*. But this time, the Court did not even consider the case to raise an issue under the Convention and dismissed it as manifestly ill-founded. The conclusion was that Article 9, the freedom of religion, does not protect religious practices which imply imposing those beliefs on others.[651] If assessed under the right to equality, or at least under comparable standards, the Court could have used the opportunity to clarify the confusion around establishing limits to reasonable accommodation discussed earlier in relation to *Pretty v. the United Kingdom*. It could have explained that the disadvantage the applicant clearly experienced because of the general rules was an intended one, because it was necessary and inherent in upholding their legitimate aims. Even though they were in a prima facie *significantly different situation*, their disadvantage thus did not establish grounds for reasonable accommodation.[652]

The confusion about the existence of the implicit right to reasonable accommodation on a religious basis continued with other cases. Two other dismissed cases, *Phull v. France*

[648] ECHR 2001-X.
[649] ibid.
[650] ibid.
[651] ibid.
[652] Compare with Chapter 3, Section 3.2.2.

(2005)[653] and *El Morsli v. France* (2008),[654] are worth mentioning because they illustrate well the difference a reasonable accommodation angle can make in an assessment of a case. Mr Phull complained that as a Sikh person, he was required to remove his turban for an airport security check.[655] Ms El Morsli complained that she was denied entry to a consulate to apply for a family reunification visa because she refused to remove her religious veil for the purposes of an identity check.[656] In both cases, the Court was contented with concluding that the rules which disadvantaged Mr Phull and Ms El Morsli had a clearly legitimate and objective aim – ensuring safety of others. Referring to the wide margin of appreciation the state has in determining measures to achieve such an aim, the complaints were then found manifestly ill-founded.

The Court could have also looked at the case through the right to equality, adopting the *Thlimmenos v. Greece* standards. It would then necessarily have to go a step further – assessing whether the disadvantageous impact those otherwise legitimate rules had was indeed necessary in that it was not possible to prevent it through individualised adjustments or exceptions. In both *Phull v. France* and *El Morsli v. France*, the impact was an unintended outcome of otherwise legitimate rules,[657] and so it was preventable by reasonable accommodation.[658] If the Court adopted this angle, the discussion would be about whether the reasonable accommodations would have constituted an undue burden, not whether the applicants even had the right to be reasonably accommodated. Such an approach would help clarify that in general

[653] ECHR 2005-I.
[654] App no 15585/06 (ECtHR 4 March 2008).
[655] *Phull v. France* (n 653).
[656] *El Morsli v. France* (n 654).
[657] This distinguishes El Morsli from the vast number of other Muslim veil cases which concerned rules either explicitly or implicitly directed at religious head-coverings. As explained in Chapter 3, Section 3.2.2., because the impact on Muslim women was intentional remedying it would require more than a mere accommodation. *Dahlab v. Switzerland* App no 42393/98 (ECtHR 15 February 2001), *Leyla Şahin v. Turkey* ECHR 2005-XI, *Koşe and others v. Turkey* ECHR 2006-II, *Dogru v. France* App no 27058/05 (ECtHR 4 December 2008), *Kervanci v. France* App no 31645/04 (ECtHR 4 December 2008), or *S.A.S. v. France* ECHR 2014-III.
[658] Compare with Chapter 3, Section 2.1.1.

terms, the applicant had grounds for reasonable accommodation. And it would also have led the Court to examine if there were other compromise solutions which would strike a better balance between the individual and the legitimate general interest.[659]

That a reasonable accommodation angle may change the assessment of the case was emphasised in a similar manner in the dissenting opinion to *Francesco Sessa v. Italy* (2012),[660] a case of a Jewish lawyer who was denied an adjournment of a court hearing scheduled on Yom Kippur. The interference with the freedom of religion was considered legitimate because it was needed to maintain order in the administration of justice.[661] But as emphasised in the dissenting opinion of Judges Tulkens, Popovic, and Keller, the Court omitted to examine how the court rules unequally impacted the Jewish believer, and whether such impact was indeed necessary for maintaining the legitimate aim. They iterated that proportionality requires that the interference was necessary, meaning that it was not preventable by other means. In their view, this implies examining whether it was possible to reasonably accommodate the applicant. This is arguably the first time the term *reasonable accommodation* was used in the Court's case law, and it was used to specify the proportionality requirement. As explained in the previous chapter, such an approach has clear advantages.[662] It allows the Court to consider whether there were solutions enabling both respecting the legitimate interest of proper administration of justice and preventing the unintended negative impact on the applicant. In the given case, it could have even changed the outcome of the judgment.

However, several earlier judgments demonstrate that reasonable accommodation logic can enter the Court's assessment also implicitly within the proportionality requirement under freedom of religion (Article 9). A series of cases concerning religious instruction at schools

[659] Compare with Chapter 3, Section 2.2.2.
[660] App 28790/08 (ECtHR 3April 2012).
[661] ibid, para 38.
[662] Chapter 3, Section 2.2.

confirmed the right to accommodation for those who did not follow the dominant religion that was reflected in the school curriculums.[663] This included atheists who refused the Christian religious classes[664] or Alevites opposing religion and ethics classes predominantly focused on the Sunni version of Islam and its rites.[665] Several judgments also implicitly recognised the right to reasonable accommodation for religious practitioners in state detention, either facilitating their specific diet[666] or allowing them perform their religious rites.[667] In all these cases, the Court considered the failure to relevantly adjust the rules for the complainants as an interference with the freedom of religion even though the legitimacy of the general rules was not questioned. Rather, the proportionality balancing exercise focused on whether possible reasonable accommodations would pose an undue burden for the authorities.[668]

A decade after the ground-breaking *Thlimmenos v. Greece* judgment, the Court's reasonable accommodation case law thus remained volatile and somewhat unpredictable.[669] Certain judgments clearly implied the right to reasonable accommodation while others omitted the angle completely, although it would have been relevant. Many thus had high expectations[670] from *Eweida and others v. the United Kingdom* (2013),[671] where the Court was called to

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[663] Compare with Howard (n 3); Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4).
[664] *Folgero and others v. Norway* ECHR 2007-III and *Grzelak v. Poland* App no 7710/02 (ECtHR15 June 2010). These judgments mark an evolution in the Court's jurisprudence because a decade before that, the Court considered two very similar complaints as manifestly ill-founded: *C.J., J.J. and E.J. v. Poland* App no 23380/94 (ECtHR decision 16 January 1996) and *Saniewski v. Poland* App no 40319/98 (ECtHR decision 26 June 2001).
[665] *Hasan et Eylem Zengin v. Turkey* App no 1448/04 (ECtHR 9 October 2007).
[666] *Jakóbski v. Poland* App no 18429/06 (ECtHR 7 December 2010).
[667] *Korostelev v. Russia* App no 29290/10 (ECtHR 12 May 2020), *Vartic v. Romania* (No. 2) App no 14150/08 (ECtHR 17 December 2013).
[668] *Korostelev v. Russia* (no 667), paras 62-63*; Vartic v. Romania* (no 667), para 49*; Jakóbski v. Poland* (no 667), para 52.
[669] See the analysis in Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4) 977–978.
[670] ibid 961–963. Loudres Peroni, 'Eweida and others v. the United Kingdom (Part I): Taking freedom of religion more seriously' (Strasbourg Observers, 17 January 2013) <https://strasbourgobservers.com/2013/01/17/eweida-and-others-v-the-united-kingdom-part-i-taking-freedom-of-religion-more-seriously/> accessed 30 November 2022.
[671] App no 48420/10 (ECtHR 15 January 2013).

examine reasonable accommodation claims of four religious employees filed both under the freedom of religion (Article 9) and the right to equality (Article 14). The cases presented an opportunity for the Court to explicitly accept or reject the right to religious reasonable accommodation under the Convention and establish its clear limits.[672] The case contained four different claims related to expressions of Christianity. Two of them concerned the wearing of a Christian cross in the workplace: an airline company that explicitly prohibited the open wearing of religious symbols for employees in contact with customers[673] and a hospital that did not allow nurses to wear jewellery with reference to hygienic safety.[674] The two other cases concerned refusal of services to same-sex couples: registering of civil partnerships and confidential sex therapy and relationship counselling.[675]

Even though the comparative law part and the third-party interventions presented an extensive analysis of the United States and Canadian case law on reasonable accommodations,[676] neither the language nor the logic eventually properly translated into the judgment.[677] The Court found a violation of freedom of religion only in relation to Ms Eweida's claim. Incidentally, her claim was the only one which effectively concerned a direct discrimination, not a claim for accommodation due to the unintended disadvantageous impact of general rules, but intentional differential treatment of religious practice. Even so, separate assessment under the right to equality was considered unnecessary.[678] In all other cases, the Court examined the issue primarily from the perspective of interference with freedom of religion[679] and emphasised that

[672] See the 12 third party interveners, many of whom emphasized that the case is essentially about the right to reasonable accommodation. *Eweida and others v. the United Kingdom* (n 441), paras 78 of the judgment.
[673] *Eweida and others v. the United Kingdom* (n 441), para 10, Ms Eweida.
[674] ibid, paras 18 etseq., Ms Chaplin.
[675] ibid, paras 23 etseq., Ms Ladele and Mr McFarlene.
[676] ibid, para 78. See also Loudres Peroni (n 590).
[677] Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4) 982–983.
[678] *Eweida and others v. the United Kingdom* (n 441), para 95.
[679] Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4) 972–977.

the state had a wide margin of appreciation in determining which interferences were necessary, either with reference to important public interests, such as safety management[680] or conflicting Convention rights.[681] The *Thlimmenos* requirement to treat differently people in significantly different situations did not practically translate into the assessment of any of the four applicants' claims.

Eweida and others v. the United Kingdom was a good illustration of the unpredictable nature of the reasonable accommodation requirement under the Convention. It is clearly tacitly present but the failure to introduce it transparently and consistently, combined with a wide margin of appreciation, make it very hard to establish when and for whom it arises. The *Thlimmenos v. Greece* standard of *significantly different situations* thus helped introduce the requirement as implied in the right to equality for religious minorities, persons with disabilities[682] or sexual minorities.[683] However, the failure to engage with the standards consistently – also due to the reluctance to examine certain accommodation cases under the right to equality[684] and the margin of appreciation afforded to states in some of these matters – made it difficult to clearly distinguish when a situation constitutes grounds for reasonable accommodation.[685] The following section explains how the Court gradually filled this gap by using *vulnerability* as the significant difference triggering the right to accommodation.

[680] *Phull v. France* (n 653), *El Morsli v. France* (n 654).
[681] Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4) 982–983.
[682] *Pretty v. the United Kingdom* (n 621), *Glor v. Switzerland* (n 629), *B. v. the United Kingdom* (n 637).
[683] *Taddeucci and McCall v. Italy* (n 642).
[684] Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4) 965.
[685] ibid 972–982. *Glor v. Switzerland* (n 629), para 74.

2. Strengthening the accommodation requirement: *vulnerability*

The implicit requirement of reasonable accommodation made its way into the Court's case law through the duty to treat *significantly different situations* differently. In another stream of case law, this standard was replaced – or sometimes complemented – by a reference to *vulnerability*. This development played two important roles. First, it explained that the Court's reasonable accommodation requirement does not merely facilitate a rational response to relevantly different situations, as per the formal equality approach. It redresses some existing inequalities expressed through the notion of vulnerability. Vulnerability thus creates a presumption of a *significantly different situation*. Second, the link with vulnerability often led the Court to narrow the margin of appreciation, making its assessment of denial of reasonable accommodation more thorough. Through the references to vulnerability, the reasonable accommodation requirement in this line of jurisprudence became clearer and stronger.

The section first maps the Court's initial tendency to dismiss reasonable accommodation cases linked with vulnerability as cases about a state's social policies and redistribution, where the state has a wide margin of appreciation. The second sub-section then illustrates that this began to change approximately at the same time when the *Thlimmenos v. Greece* judgment signalled the Court's growing attachment to the substantive model of equality. Requirements of accommodation then appeared in cases concerning Articles 2 or 3 of the Convention, protecting against arbitrary deprivations of life or ill-treatment.[686] The last section then shows how the Court made a clear link with the reasonable accommodation requirements under the right to equality (Article 14) for *significantly different situations* and the adjustments required under other articles due to people's *vulnerability*.

[686] See section 2.2. below.

2.1. Unsuccessful cases: reasonable accommodation as a special positive measure

The first stream of cases concerning claims for accommodations linked with applicants' vulnerability were dismissed, similarly to the initial religious accommodation claims. They began to appear in the case law in the late 1990s and mainly touched on the accessibility of public spaces for persons with disabilities.[687] In various contexts, including public facilities,[688] voting stations,[689] private housing,[690] the workplace,[691] or court proceedings,[692] the applicants demanded accommodation of their specific needs to gain access. The applicants did not typically challenge the structures per se but claimed the right to remedy the unintended disadvantageous impact they had on them due to their disability. The Court approached these cases as demanding fulfilment of the state's positive obligations under the right to private life where the states enjoy a broad margin of appreciation.[693] A long list of these applications was considered manifestly ill-founded for going beyond what is expected from the state in this area, without actually examining the possible discrimination.[694]

The same cautious approach is also apparent in the first accommodation claims of members of ethnic or cultural minorities. In a series of complaints, the Court was called to examine requests for exemptions from general planning or construction rules made by members of the Roma or the Travellers community.[695] These rules made it difficult to park a caravan for longer periods, even on one's own land, leading to precarious situations for some Roma following a traditional

[687] The cases coincided with the international trend of diffusion of disability accommodations in the 1990s, as described in Chapter 2, Section 2.
[688] *Botta v. Italy* App no 153/1996/772/973 (ECtHR 24 February 1998), *Zehnalová and Zehnal v. the Czech Republic* App no 38621/97 (ECtHR decision 14 May 2002).
[689] *Molka v. Poland* App no 56550/00 (ECtHR decision 11 April 2006).
[690] *Marzari v. Italy* App no 36448/97 (ECtHR decision 4 May 1999).
[691] *Farcaş v. Romania* App no 32596/04 (ECtHR decision, 14 September 2010).
[692] ibid.
[693] *Stec and Others v. the United Kingdom* App nos 65731/01 and 65900/01 (ECtHR 12 April 2006), para 52; see also Nikolaidis (n 4) 74.
[694] See above (n 688-691).
[695] *Buckley v. the United Kingdom* App no 20348/92 (ECtHR 25 September1996), and the later *Chapman v. the United Kingdom* ECHR 2001-I, *Coster v. the United Kingdom* App no 24876/94, *Jane Smith v. the United Kingdom* App no 25154/94, *Lee v. the United Kingdom* App no 25289/94, *Beard v. the United Kingdom* App no 24882/94 (all ECtHR 18 January 2001.

lifestyle. As above, the rules need not necessarily be dismantled. The negative impact they had on the Roma community could have been remedied by accommodating their needs by exempting them from these rules or at least modifying them for their benefit.

The cases concerning the Roma also examined under the right to private life (Article 8) rather than equality (Article 14).[696] And even though the Court officially admitted that the *vulnerability* of the Roma as members of a cultural minority requires special consideration in applying general rules,[697] it did not translate such consideration in its assessment. The negative impact the otherwise legitimate rules had on the applicants' private life – de facto depriving them of a home – was seen as a "humanitarian consideration".[698] In the Court's view, such consideration did not imply a duty to exempt the applicants from the implementation of national law.[699] In *Chapman v. the United Kingdom* (2001),[700] the Court even suggested that accommodating the applicants might be interpreted as discrimination against the non-Roma because the applicants were in a comparable situation to anyone who had their caravans unlawfully stationed.[701] This conclusion is especially paradoxical because the same judgement refers to *Thlimmenos v. Greece*, which specifies that a differential treatment is a requirement of equality for those in significantly different situations, not a preferential treatment.[702]

The long list of cases assessed in the 1990s demonstrates how long the Court was reluctant to effectively require differential treatment to redress factual inequalities, potentially due to concerns for the political and economic impact of such decisions.[703] The following sub-section

[696] K. Henrard also notes the Court's reluctance to examine cases concerning ethnic minorities as discrimination. Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4) 965.
[697] *Buckley v. the United Kingdom* (n 695), paras 76, 80 and 84. See also *Coster v. the United Kingdom* (n 695), para 110.
[698] *Buckley v. the United Kingdom* (n 695), para 127.
[699] ibid.
[700] (n 695).
[701] ibid, para 95.
[702] ibid, para 129.
[703] Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4) 968.

shows that this cautious approach began to change in cases where a factual inequality of people in detention – represented by their *vulnerability* – touched upon the interests protected by the right to life (Article 2) and the right to be free of torture and ill-treatment (Article 3). Several years after *Thlimmenos v. Greece*, the Court then demonstrated its readiness to implicitly require reasonable accommodations also in other contexts than detention.

2.2. Accommodation in proportionality: *vulnerability* as a key factor

Vulnerability first significantly contributed to introducing the requirement of reasonable accommodation in cases concerning ill-treatment in detention. *Price v. the United Kingdom* (2001)[704] is often mentioned as the first one of these cases.[705] The applicant, a wheelchair user with multiple impairments and health problems, was detained for seven days in conditions that caused her considerable suffering, humiliation, and some longer-term health problems.[706] Her suffering was clearly an unintended impact of conditions which were generally acceptable, but which were experienced considerably differently by the applicant due to her disability.[707] Ensuring appropriate adjustments in the prison setting would have prevented her humiliation and suffering – and thus the violation of Article 3 which the Court eventually found.[708] Even though vulnerability as a concept is not explicitly referred to in the judgment, the Court's assessment clearly comes from a vulnerability reasoning, repeatedly referring to the applicant's specific needs related to her disability.[709]

[704] ECHR 2001-VII.
[705] Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4) 968; Waddington (n 3) 196; De Schutter (n 35) 54–55.
[706] *Price v. the United Kingdom* (n 704), para 22.
[707] ibid, paras 25, 27.
[708] ibid, para 30.
[709] ibid, paras 22, 23, 26, 27. This is also clarified in subsequent judgments, where *Price v. the United Kingdom* is used to explain the obligations related to the position of vulnerability of persons with disabilities in detention. See, for instance, *Jasinskis v. Latvia* App no 45744/08 (ECtHR 21 December 2010), para 59.

The judgment dates only about a year after *Thlimmenos v. Greece*[710] and Judge Grève's concurring opinion specified that at its core, the case undeniably concerned the duty to accommodate, as introduced there: "the applicant [was] different from other people to the extent that treating her like others [was] not only discrimination but [brought] about a violation of Article 3."[711] This was the first time the Court's case law contains an explanation of the link between the right to equality's requirement of differential treatment for *significantly different situation* and the adjustment of its proportionality assessment under other Convention articles. It is thus now clear that both are two sides of the same coin: responding to the specific impact general structures have on some individuals.

The suffering experienced by Ms Price and the visible nature of her physical disability made an obvious case for the need for accommodations for persons with disabilities in prison. But it is important to note that the same logic is applicable also to disabilities of psychosocial nature. Even prior to *Price*, the Court applied similar standards in *Keenan v. the United Kingdom* (2001),[712] where it Court found the state responsible for the applicant's ill-treatment because the applicant killed himself after the authorities' failure to adequately respond to his serious mental health issues.[713] The applicant's vulnerability again played an important role in the Court's s conclusion that the authorities had a specific obligation to treat him differently than others.[714] After these judgments, the Court replicated the approach in many other cases concerning detainees with a disability, of older age, or to the contrary, young age.[715] In *Z.H. v.*

[710] (n 606).
[711] ibid, Separate opinions.
[712] ECHR 2001-III.
[713] ibid, para 116. Similar conclusions later applied in *M.S. v. the United Kingdom* App no 24527/08 (ECtHR 3 May 2012).
[714] ibid, paras 91, 111.
[715] The similar conclusions as to the need to accommodate detainees with disabilities were repeated in other cases, including *Mouisel v. France* App no 67263/01 (ECtHR 14 November 2002), *Farbtuhs v. Latvia* App no 4672/02 (ECtHR 2 December 2004), *Engel v. Hungary* App no 46857/06 (ECtHR 20 May 2010), *Hüseyin Yıldırım* v. Turkey App no 2778/02 (ECtHR 3 May 2007), or *Vincent v. France* App no 6253/03 (ECtHR 24 October 2006. In all cited cases, failure to provide disability-based accommodations in prison amounted to violation of Article 3. See other similar cases cited in Andrea Broderick, 'The United Nations Convention on the

Hungary (2012), the Court also made a link between the adjustments required to prevent ill-treatment of a person with disability and reasonable accommodation by citing the UN CRPD definition of reasonable accommodation in the judgment.[716] This time, it also explicitly referred to the applicant's *vulnerability* to explain why the denial of accommodations must be reviewed with a strict scrutiny.[717]

In some cases, the failure to accommodate the detained applicants' specific needs related to their disability amounted to a violation of the right to life for failure to uphold the related positive obligations. *Jasinskis v. Latvia* (2010)[718] concerned a young man who died after the police officers did not accommodate his communicational needs, and thus failed to reveal that he had suffered a head injury requiring immediate medical attention.[719] The failure to accommodate the applicant thus essentially lead to his death. The steps needed to protect the applicant's life were understood as requirements of reasonable accommodation. This is clear from the Court's reference to the UN CRPD Article 14 para 2, which establishes the right to reasonable accommodations in places of deprivation of liberty.[720] The Court also emphasised the applicant's *vulnerability* to explain why the authorities should have paid a specific attention to his situation.[721]

In cases concerning detainees of older age, the Court acknowledged that, in principle, old age in the context of detention may raise similar issues as disability.[722] However, the relevant cases of alleged ill-treatment, even if emphasising vulnerability, were typically considered as not

Rights of Persons with Disabilities and the European Convention on Human Rights: A Tale of Two Halves or a Potentially Unified Vision of Human Rights?' (2018) 7 Cambridge International Law Journal 199, 209–210.

[716] App no 28973/11 (ECtHR, 8 November 2012). Similar conclusions, including the reference to the UN CRPD reasonable accommodation were reiterated in *Grimailovs v. Latvia* App no 6087/03 (ECtHR 25 June 2013).

[717] ibid, para 31.

[718] *Jasinskis v. Latvia* (n 709).

[719] ibid, para 68.

[720] ibid, para 40.

[721] ibid, para 59.

[722] *Sakkopoulos v. Greece* App no 61828/00 (ECtHR 15 January 2004), para 38-39.

reaching the requisite severity level to be examined under Article 3.[723] Applicants of young age have been more successful with similar claims. In a series of cases concerning immigration detention of children, the failure to reasonably accommodate the needs associated with their particularly vulnerable situation was central to the Court's conclusion of an Article 3 violation.[724] In *Mubilanzila Mayeka and Kaniki Matunga v. Belgium* (2006),[725] the Court specifically emphasised that the applicant was detained in the same conditions as adults, which were "not adapted to the [child's] position of extreme vulnerability".[726] These cases make it clear that by default, detention environments not adjusted to needs of children in *vulnerable* situations are harmful. Similar conclusions were then reached in relation to children in pre-trial detention. In *Blokhin v. Russia* (2016),[727] the Court concluded that a failure to accommodate a child with disability in pre-trial detention by providing specific medical care amounted to ill-treatment, also because the child was in a situation of specific *vulnerability*.[728] Moreover, the specifically vulnerable situation also lead the Court to conclude under the right to a fair trial (Article 6) that accommodations should have been adopted in his pre-trial proceedings, especially the provision of legal assistance.[729]

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[723] ibid, also *Papon v. France* (No 1) App no 64666/01 (ECtHR decision 7 June 2001), *Sawoniuk v. the United Kingdom* App no 63716/00 (ECtHR decision 29 May 2001), or *Priebke v. Italy* App no 48799/99 (ECtHR decision 5 April 2001), and others.

[724] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* App no 13178/03 (ECtHR 12 October 2006), *Muskhadzhiyeva and others v. Belgium* App no 41442/07 (ECtHR 19 January 2010), *Rahimi v. Greece* App no 8687/08 (ECtHR 5 April 2011), *Popov v. France* App no 39472/07 and 39474/07 (ECtHR 19 January 2012), *A. B. and others v. France* App no 11593/12 (ECtHR 12 July 2016), *R. M. and others v. France* App no 24587/12 (ECtHR 12 July 2016), *R. K. and others v. France* App no 68264/14 (ECtHR 12 July 2016), *R.C. and V.C. v. France* App no 76491/14 (ECtHR 12. July 2016).

[725] (n 724).

[726] The Court was even more specific in its accommodation demands in subsequent jurisprudence. In *Muskhadzhiyeva,* (n 724), it added that there were no facilities or personnel in the centre for adults, such as pedagogues or psychologists, to ensure children's occupation. In *Popov*, (n 724), the Court criticised the authorities for not having examined children's individual needs and did not consider alternatives to detention, even though the children were detained with their parents in a special wing of the detention centre for families.

[727] *Blokhin v. Russia* App no 47152/06 (ECtHR 23 March 2016). Similar conclusions were adopted in relation to a child victim of violence in *Okkali v. Turkey* App no 52067/99 (ECtHR 17 October 2006).

[728] *Blokhin v. Russia* (n 727), para 148.

[729] ibid, paras 198 - 199.

The above cases demonstrate that reasonable accommodation may prevent ill-treatment if caused by unintended consequences of otherwise acceptable practices on those in vulnerable situations, especially related to disability, or old and young age. Adopting the reasonable accommodation lens in the above cases could have helped the relevant authorities properly assess what steps needed to be done to remedy the specific disadvantages. Naturally, the reasonable accommodation logic must be adjusted to the nature of Article 3, which does not permit proportionate interferences.[730] This means that if prevention of ill-treatment by adjusting the practices for individuals in vulnerable situations is reasonably possible, the obligation to adopt reasonable accommodation should not be limited by the undue burden defence. It should always be adopted. This is not the case when reasonable accommodations remedy unnecessary interferences with other rights, such as the right to family, privacy, or a fair trial.

Nevertheless, vulnerability also facilitated the introduction of a reasonable accommodation requirement into other Convention articles. *Schlumpf v. Switzerland* (2009)[731] *Komnatskyy v. Ukraine* (2009)[732] concerned the length of court or administrative proceedings, which were specifically worrisome for the applicants of older age. In *Komnatskyy,* they concerned enforcement of a judgment conferring upon the applicant ownership rights to an apartment. The Court found a violation of the right to a fair trial (Article 6) because the authorities did not consider his higher age and associated *vulnerability*[733] in prioritising the matter and speeding up the process.[734] In *Schlumpf,* the Court found a violation of the right to private life (Article 8) because the authorities did not exempt the applicant – an older trans woman – from the administrative requirement to undergo a two-year waiting period before a sex affirmation

[730] Stephanie Palmer, 'A Wrong Turning: Article 3 ECHR and Proportionality' (2006) 65 The Cambridge Law Journal 438.
[731] App no 29002/06 (ECtHR 8 January 2009).
[732] App no 40753/07 (ECtHR 15 October 2009).
[733] ibid, para 18.
[734] ibid, para 21.

surgery could be covered by health insurance.[735] In both cases, the court did not challenge the relevant rules per se but rather the authorities' failure to treat the applicants' situation individually and consider the needs associated with their higher age.[736] In essence, violations were found for failing to accommodate the applicants' old age (and gender identity in the case of Ms Schlumpf).

In the above judgments, the requirement of reasonable accommodation was implicit in the Court's assessment of proportionality and was triggered by the recognition that the applicants were in a situation of *vulnerability*. This is a different angle than the one in the initial cases described at the outset of this section, where accommodation claims were seen as concerning the state's positive obligations and socio-economic policies.[737] While the margin of appreciation largely prevented a closer examination in the older cases, no such barrier existed when denial of accommodations was seen to cause ill-treatment in detention, a situation over which the applicants clearly had little control themselves.[738] The acceptance of the reasonable accommodation reasoning then eventually reappeared in cases concerning the state's positive obligations under the right to private life, where it was typically denied before.

This is visible in *Kacper Nowakowski v. Poland* (2017), a case concerning a father with a hearing impairment who was denied extended visiting rights to his son because the two used different communication methods.[739] While the father used sign language, the son did not, and the possible communication barriers were cited as the reason for denying their extended contact.[740] This appeared impermissible to the Court. The judgment emphasised that before denying contact, states' positive duties under Article 8 required that all appropriate steps be

[735] ibid, paras 115-116.
[736] *Schlumpf v. Switzerland,* (n 731), para 115, *Komnatskyy v. Ukraine* (n 732), para 21.
[737] Above, Section 2.1.
[738] See this argument developed in relation to religion in Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4) 973–974.
[739] App no 32407/13 (ECtHR 10 January 2017).
[740] ibid, para 20.

taken to help the father and son overcome the communication barriers.[741] In essence, the Court required the authorities to reasonably accommodate the father to facilitate the communication with his son, rather than restricting his visiting rights, as a part of the state's positive obligations. The judgment demonstrates the Court's evolution in realising the importance of differential treatment – represented by reasonable accommodations -– for upholding human rights. As fittingly emphasised in the separate opinions of Judges Motoc and Sajó, this realisation should have prompted the Court to also consider the case from the perspective of the right to equality: "(t)he domestic authorities treated the disabled person as equal to people without the impairment. The rights of the disabled cannot be effectively protected without acknowledging the positive obligation of the state to provide a differentiated treatment."[742]

Through the use of *vulnerability* in cases concerning interferences with human rights, the Court apparently moved away from insisting that a concern for a disadvantageous impact of general structures is merely a "humanitarian" issue.[743] Vulnerability played a key role in introducing the de facto accommodation requirement within the assessment of cases under Articles 2, 3 and 6. But although *Pretty v. the United Kingdom*[744] acknowledged that the increased concern essentially constitutes a requirement of differential treatment – introduced earlier in *Thlimmenos v. Greece* under the right to equality (Article 14) – none of these cases were also considered as concerning this provision. Still, *vulnerability* in these cases plays a similar role otherwise reserved for the recognition that an applicant was in a *significantly different situation* which required differential treatment. Establishing the right to differential treatment thus appears to be one role vulnerability plays in de facto reasonable accommodation cases assessed

[741] ibid, paras 80, 96.
[742] ibid, Separate opinion of Judge Sajó.
[743] As above in *Buckley v. the United Kingdom* (n 695), para 127.
[744] (n 621).

beyond Article 14. The following sub-section examines the role *vulnerability* plays in reasonable accommodation case law assessed under the right to equality.

2.3. Narrowing the margin: defining *significant difference* through *vulnerability*

A key case in which the implicit requirement of reasonable accommodation under the Convention's right to equality combines with vulnerability is *D.H. and Others v. the Czech Republic* (2007).[745] The Grand Chamber judgment was the first of a series targeting the segregation of Romani children in education, sometimes referred to special education systems[746] and sometimes physically separated from others in the mainstream one.[747] In all cases, the Court found discrimination in access to education because the states failed to correct the factual inequalities the Roma children faced because of their different needs as members of a "disadvantaged and vulnerable minority".[748]

In *D.H. and Others v. the Czech Republic,* specifically, the Court took an issue with the way the schools used tests to determine the children's school aptitude. Their results were not analysed in the "light of the particularities and special characteristics of the Roma children who sat them".[749] The Court did not disapprove of the tests in general but rather criticised their specifically negative effect on Romani children. [750] This effect stemmed mainly from the design of the tests: assuming a level of knowledge and skills of a *typical* child in the country, whose first language is Czech and whose families teach them skills assumed important in the majority

[745] (n 10).
[746] *D.H. and Others v. the Czech Republic* (n 10), and *Horváth and Kiss v. Hungary* App no 11146/11 (ECtHR 29 January 2013).
[747] *Sampanis and others v. Greece* App no 32526/05 (ECtHR 5 June 2008). The list of cases is usually completed by another Grand Chamber judgment concerning segregation of Roma children in access to education, *Oršuš v. Croatia* ECHR 2010-II. However, this time the Court did not accept the Government's explanation that the segregation of Roma children followed a legitimate purpose of remedying their insufficient knowledge of Croat language. The Court considered that this justification only served as a 'smoke-screen' to hide the actual intent of the authorities - respond to the calls of the majority parents who disagreed with their children being educated together with the Roma on account of stigma and prejudice associated with them. Rather than an accommodation cases, therefore, *Oršuš* is a case about discrimination with hidden intent.
[748] *D.H. and others* (n 10), para 182.
[749] ibid, para 201.
[750] ibid, paras 60, 104, and 200-201 of the judgment.

culture.[751] As in *Thlimmenos v. Greece*,[752] which is repeatedly cited in the judgment, preventing the disadvantage faced by the Roma children did not necessarily imply abolishing all school aptitude tests. Rather, it required accommodating the specific needs of Romani children in designing and assessing them. Even without the explicit wording, *D.H. and Others v. the Czech Republic* thus clearly implies the duty to reasonably accommodate Romani children as a key aspect of the case.[753]

D.H. and Others took a rather radical turn from the Court's earlier conclusions in *Chapman v. the United Kingdom*[754] and similar cases in which the Court saw the claims for accommodations of the Roma as requests for special treatment, potentially implying the discrimination of others. This Grand Chamber judgment clarified that the accommodation was needed to redress an existing "factual inequality".[755] It details that the Roma children were *significantly different* because they were a "disadvantaged and vulnerable minority"[756] who faced "turbulent history and constant uprooting, entrenched by the history of oppression, discrimination, and exclusion".[757] The wording of *Horváth and Kiss v. Hungary* (2013)[758] then emphasised that the vulnerability of the Roma children was not their inherent quality, but rather caused by the "structural deficiencies"[759] of the existing unequal educational systems, which perpetuated disadvantages for "members of groups which suffered past discrimination in education with continuing effects".[760] These judgments thus combine the acknowledgement of the right to reasonable accommodation as a key aspect of the right to equality with the recognition that *significantly different situations* which give rise to it are primarily defined by

[751] ibid, paras 66, 200.
[752] (n 606).
[753] Nikolaidis (n 4) 76–77; Bribosia and others (n 3) 30–31.
[754] (n 695).
[755] *D.H. and others* (n 10), para 183.
[756] ibid, para 182.
[757] ibid, *Sampanis* (n 747), paras 71-72, *Horváth and Kiss* (n 746), para 102.
[758] App no 11146/11 (ECtHR 29 January 2013).
[759] ibid, para 104.
[760] ibid.

the *vulnerability* incurred by unaccommodating social and environmental structures.[761] Under the right to equality, just like in other articles discussed in the previous section, *vulnerability* may thus play the role of establishing the right to differential treatment.

In *Munoz Díaz v. Spain* (2009),[762] the Court extended the requirement of accommodation of the Romani cultural specifics beyond educational settings to the general normative framework. The case concerned a widow who was refused a survivor's pension because the state did not recognise the traditionally sanctioned Roma marriage, even though the applicant and her late husband had been considered a family for most other administrative purposes.[763] The state's failure to accommodate the Romani cultural differences in the legal process amounted to discrimination in the applicant's enjoyment of property.[764] The judgment references the *vulnerable situation* of the Roma[765] and the duty to treat them differently in applying general laws if the opposite would amount to a disadvantage.[766] But the justification then heavily relies on the applicant's good faith that she had been married and understands her situation as comparable to that of legally married persons.[767] The formulation thus appears to suggest that the Court found discrimination because the applicant was treated differently than others even though she legitimately expected similar treatment.[768] Nevertheless, the essence is similar as in the education cases. The applicant's discrimination under Article 14 was caused by the unintended negative impact of general rules that ignored Romani cultural habits.[769] Reasonably accommodating the applicant by modifying the interpretation of the relevant rules, or exempting the applicant from them, would have prevented her discrimination.

[761] *Horváth and Kiss* (n 746), para 102, *D.H. and Others* (n 10), paras 181-182.
[762] ECHR 2009-VI.
[763] ibid, paras 62-63.
[764] ibid, para 71.
[765] ibid, para 61.
[766] ibid, para 48-49, 60.
[767] ibid.
[768] ibid, para 65.
[769] ibid, para 48-49.

Vulnerability also played a role in reversing the older case law concerning the Romani traditional lifestyle, especially the problematic conclusions presented in *Chapman v. the United Kingdom*.[770] In two cases concerning denial of planning permissions and the ensuing risk of forced evictions, *Yordanova and Others v. Bulgaria* (2012)[771] and *Winterstein and others v. France* (2013),[772] the Court found a violation of the right to private life (Article 8) because the authorities did not allow the Roma to stay in their makeshift houses or caravans even though these were stationed in violation of the planning, safety, or natural preservation regulations.[773] The Court acknowledged that these regulations followed an important legitimate aim. There was nothing wrong with them per se.[774] But when considering the *necessity* of interference, it concluded that the disadvantageous impact on the applicants was preventable.[775] Failing to prevent such impact amounted to the violation of the applicants' private life.

Even though the Court did not examine the discrimination claim separately in these cases, it explicitly rejected the idea expressed in earlier judgments that accommodating the Roma would imply discrimination against others.[776] It emphasised that the Roma were in a factually unequal situation, associated with their *vulnerability*.[777] To insist on treating them the same way as others would only perpetuate these inequalities: "[they] need assistance to be able effectively to enjoy the same rights as the majority population".[778] The Court even listed several possible

[770] (n 695).
[771] App no 25446/06 (ECtHR 24 April 2012).
[772] App no 27013/07 (ECtHR 17 October 2013).
[773] *Yordanova* (n 771), paras 29 and 66; *Winterstein* (n 772), para 144. In the older cases, such as *Chapman* (n 695), *Buckley* (n 695), and others, this reasoning sufficed for concluding that the state had sufficiently legitimate grounds for refusing the Roma applicants the requested accommodations.
[774] *Yordanova* (n 771), para 116; *Winterstein* (n 772), paras 145-146.
[775] *Yordanova* (n 771), para 149; *Winterstein* (n 772), para 103.
[776] *Yordanova* (n 771), paras 29 and 66; *Winterstein* (n 772), para 144
[777] *Winterstein* (n 772), paras 128, 148, *Yordanova* (n 771), para 130.
[778] *Yordanova* (n 771), para 129. This argument is reiterated later in *Hudorovič and others v. Slovenia* App nos 24816/14 and 25140/14 (ECtHR 10 March 2020), a case concerning the lack of access to safe drinking water to vulnerable Roma populations. The Court reiterated that the Roma may need 'assistance in order to be able effectively to enjoy the same rights as the majority population.' (para 142). In this concrete case, however, it concluded that the authorities did what could have reasonably been expected of them to help the applicants.
[778] *Yordanova* (n 771), para 129.

accommodations that would have helped the applicants maintain their housing, none of which were considered by the domestic authorities.[779] In *Winterstein and others v. France,* the *vulnerable position* of the Roma was explicitly referred to as one of the factors in determining the width of the state's margin of appreciation,[780] emphasising that "some special consideration should be given to their needs and their different lifestyle" implying that "there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the way of life of the Roma and travellers".[781]

In both cited cases, the reasonable accommodation requirement was, as in many earlier cases, read into the proportionality test as a specification of the necessity requirement.[782] But *Yordanova v. Bulgaria* marks an important step in recognising the Article 14 standards concerning the right to differential treatment as a part of the proportionality assessment:

> In certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of Article 14 (…) in the context of Article 8, in cases such as the present one, the applicants' specificity as a social group and their needs must be one of the relevant factors in the proportionality assessment that the national authorities are under a duty to undertake.[783]

The differential treatment duty established in *Thlimmenos v. Greece*[784] thus indeed mirrors the accommodation requirement implied in the proportionality assessment. The angle changes, but the obligation remains the same. This conclusion is significant because it confirms that there exists a matching reasonable accommodation requirement both under the right to equality as a corollary to discrimination and under other Convention's articles as implied in assessing proportionality. The above-cited cases are also significant for clearly recognising *vulnerability*

[779] ibid, para 132.
[780] *Winterstein* (n 772), para 148.
[781] ibid.
[782] *Yordanova* (n 771), paras 29 and 66; *Winterstein* (n 772), para 144
[783] *Yordanova* (n 771), para 129.
[784] (n 606).

as a *significantly different situation* which calls for reasonable accommodation as a differential treatment required under the Convention's right to equality.

Throughout this chapter, the equation between *reasonable accommodation* and the Convention's requirement of differential treatment under the right to equality and implied in proportionality under other articles has so far been made only on a conceptual basis, deriving from this thesis' theoretical framework. In the subsequent disability cases, this link is made explicit. Moreover, these cases demonstrate another role *vulnerability* plays in reasonable accommodation case law; narrowing the margin of appreciation afforded to the state for justifying the denial of differential treatment.

The first time the Court explicitly stated that *reasonable accommodation* facilitated the differential treatment to remedy a factual inequality was in Ç*am v. Turkey* (2016),[785] a case concerning inclusive education. The complaint was filed by a Turkish lute (baglama) player with a sight impairment who was denied enrolment in a state music academy. The Court decided that the failure to consider reasonable accommodations to facilitate her study at the music academy amounted to discrimination in access to education: "reasonable accommodation helps to correct factual inequalities which are unjustified and therefore amount to discrimination".[786] The Court relied on the emerging consensus in Europe[787] where at the time the European Union legislation[788] as well as the dominantly ratified UN CRPD[789] already required the national jurisdictions to reasonably accommodate persons with disabilities

[785] (n 214).
[786] ibid, para 65. This link was first mentioned, albeit not so clearly in *Guberina v. Croatia* App no 23682/13 (ECtHR 22 March 2016), para 92.
[787] ibid, paras 64-65. The Court suggests a consensus based on a ratified international treaty, as explained in Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (1st edn, Cambridge University Press 2015) 45–49.
[788] Employment Equality Directive (n 179).
[789] Article 2 of the CRPD: "Discrimination on the basis of disability' means (…) all forms of discrimination, including denial of reasonable accommodation."

as a matter of equality. The term *reasonable accommodation* was used with explicit reference to the UN CRPD:

> Article 14 of the Convention must be read in the light of the requirements of those texts regarding reasonable accommodation (…) which persons with disabilities are entitled to expect in order to ensure "the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms" (Article 2 of the Convention on the Rights of Persons with Disabilities ...).[790]

The judgment thus confirms the argument presented throughout this chapter: the right to reasonable accommodation corresponds to the requirement of differential treatment under the Convention's right to equality. In this and other inclusive education cases, the conclusion was presented with reference to the UN CRPD representing a ratified international treaty which marks an emerging consensus in the European jurisdictions.[791] This reference also explains why only in disability cases is the requirement of differential treatment to correct factual inequalities called reasonable accommodation, despite clearly mirroring the same obligation already introduced in relation to religion, ethnicity, and other grounds.[792]

However, the inclusive education cases are important also because they make another use of *vulnerability*. In *Çam v. Turkey*,[793] vulnerability is primarly used to establish the right to reasonable accommodation.[794] In *Enver Şahin v. Turkey* (2018),[795] on the other hand, the Court refers to vulnerability to reiterate that even though the state enjoys a certain margin in organising its educational systems, they need to be particularly mindful in providing reasonable accommodations to people with disabilities with view of the negative impact its denial has.[796]

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[790] (n 214), para 67.
[791] Chapter 3 of Dzehtsiarou (n 787).
[792] Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4) 978.
[793] (n 214).
[794] ibid, para 65.
[795] (n 214).
[796] ibid, para 61.

And in *G.L. v. Italy*,[797] the Court makes a full use of *vulnerability* as a magnifying lens for assessing human rights interferences.[798] It reiterates that "if a restriction on fundamental rights applies to a particularly vulnerable group (…), then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restriction in question."[799] Vulnerability can thus be used to establish the right to differential treatment[800] but also to require the state to provide weighty reasons for denying it.

The second stage of the Court's reasonable accommodation case law thus brought three important pieces of the puzzle. First, it clarified that vulnerability is a *significantly different situation* and can effectively establish the requirement of differential treatment both under the Convention's right to equality and under other articles. Vulnerability also plays a significant role in determining the width of the state's margin of appreciation. Second, it demonstrated that the same requirement of differential treatment appears both in the right to equality and the proportionality requirement under other articles. And third, it confirmed that the requirement of differential treatment indeed means a requirement of *reasonable accommodation*. The last section of this chapter shows how the latest stream of case law builds on these elements to define when and why a requirement of reasonable accommodation arises.

3. Refining the reasons for accommodation: *prejudicial impact* on a protected ground

The two stages of the Court's reasonable accommodation case law discussed above showed the Court's reluctant acceptance of the requirement of reasonable accommodation, and then its gradual clarification. The last phase marks the Court's attempts to synthetise under the right to equality the standards developed in the two earlier phases. This section shows that it builds on

[797] App no 59751/15 (ECtHR 10 September 2020, para 73.
[798] See Peroni and Timmer (n 553) 1079.
[799] (n 796), para 54.
[800] As in *D. H. and others v. the Czech Republic* (n 10) or Ç*am v. Turkey* (n 214).

two key standards: the requirement of differential treatment for *significantly different situations* and the later specification that such situations represent factual inequalities[801] often expressed by *vulnerability*.[802] The latest cases specify that the factual inequalities are created by unaccommodating social and environmental structures. *Significantly different situations* are defined as a situation when there is a *particularly prejudicial impact of a general measure linked with a protected ground*.

The first reasonable accommodation case where the Court links *vulnerability* as a *factual inequality* more clearly with the unaccommodating structures rather than an individual situation or a group characteristic is *J. D. and A. v. the United Kingdom* (2019).[803] The case concerned the reduction of housing benefits to two single-mother families, a victim of domestic violence and another with a child with a disability. The decrease followed a state policy motivating the recipients to take up employment or move to a house with fewer bedrooms.[804] The applicants' families could not do either due to their specific circumstances. In one case, this was because of the daughter's care needs.[805] In the other one, the extra room was a panic room specially designed for her and her son as victims of extreme domestic violence.[806]

The Court examined both complaints under the right to equality (Article 14) and the right to property (Article 1 of the Protocol no. 1). In principle, the housing benefits regulation was considered legitimate.[807] But it clearly had an unintended negative effect on the applicants. As the Court noted, they were *particularly prejudiced* by the measure because they had a specific need for the extra room and were unable to mitigate the measures' negative effect because of their *vulnerable* status.[808] The particularly prejudicial impact of the measures together with

[801] *D.H. and others v. the Czech Republic* (n 10), para 175.
[802] See above, Section 2.2.
[803] App nos 32949/17 and 34614/17 (ECtHR 24 October 2019).
[804] ibid, paras 96-98.
[805] ibid, para 101.
[806] ibid, para 103.
[807] ibid, para 98.
[808] ibid, para 93, 96.

their vulnerability thus established their right to be exempted from the regulation, or have the regulation adjusted for their benefit – a typical reasonable accommodation. Moreover, vulnerability is also used here to justify the state's narrowed margin of appreciation whether reasonable accommodation is indeed provided.[809]

It is striking that even though this judgment was adopted three years after *Çam v. Turkey*[810] which explicitly recognised the right to *reasonable accommodation* for persons with disabilities for precisely such situations requiring a differential treatment,[811] the Court does not mention the term even in relation to the applicant who required it on account of her child's disability. This suggests that the Court's reluctance to explicitly use the term reasonable accommodation does not only apply to other grounds; the Court appears to omit using the term generally.[812]

The prejudicial impact of general measures was even more clearly linked with the right to differential treatment in *Ádám and others v. Romania* (2020)[813] and *Napotnik v. Romania* (2020),[814] both examined under Article 1 of Protocol no. 12. The Court first explained that a "general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory" and that "discrimination potentially contrary to the Convention may result from a *de facto* situation."[815] It then confirmed that the right to equality implies the duty to remedy such discrimination through differential treatment for persons whose circumstances are relevantly and significantly different.[816] Finally, it specified that a

[809] ibid.
[810] (n 214).
[811] ibid, para 67.
[812] As noted also in Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4) 978.
[813] App no 81114/17 (ECtHR 20 October 2020).
[814] App no 33139/13 (ECtHR 20 October 2020).
[815] *Ádam and others* (n 813), para 86.
[816] *Ádam and others* (n 813), para 87, *Napotnik* (n 814), para 73.

measure must produce a *particularly prejudicial impact* on certain persons as a result of a *protected ground* for such relevant and significant difference to be found.[817]

Ádám and others v. Romania[818] concerned Hungarian speaking nationals who had to sit additional exams in the Romanian language and literature even though they were educated in Hungarian. The applicants argued they should have been exempted from this requirement, or the requirement should have been modified for them. Without such accommodations, they had to endure an unfair disadvantage.[819] As framed both by the applicants and the Court, the central issue was whether the right to equality implies accommodation of cultural and linguistic minorities.[820] The Court acknowledged that, in principle, it does.[821] But in its view, the applicants in the given case were not really in a situation of a *particularly prejudicial impact*. Their disadvantage was not significant enough because they chose to undergo education in the Hungarian language voluntarily and had, in fact, sufficient time to prepare for the exams.[822] The Court thus eventually did not find a violation of the Convention.

A similar conclusion recurred in *Napotnik v. Romania*,[823] which contains the same formula for establishing grounds for reasonable accommodation but eventually does not find a violation, despite the narrow margin of appreciation afforded to the state in this case.[824] The applicant was an ex-diplomat who was reassigned from her diplomatic contract to work at the Ministry of Foreign Affairs due to frequent pregnancy-related absences. The case essentially concerns a claim for accommodation because the applicant asked to be treated differently than other employees absent from work for reasons other than pregnancy.[825] Pregnancy was a

[817] ibid.
[818] (n 813).
[819] ibid, paras 71-72.
[820] ibid, see para 70 for the applicant's argument and, notably, the references to national legislation regulating linguistic accommodations, paras 95-97.
[821] ibid, paras 92-94.
[822] ibid, para 102-103.
[823] (n 814).
[824] ibid, para 75.
[825] See also Chapter 3, Section 2.1.1.

significantly different situation in this context because the workplace rules had an unintended prejudicial impact on her as a pregnant woman.[826] The Court eventually did not find a violation of the right to equality because it considered that the diplomat was sufficiently accommodated by being given another post at the Ministry.[827]

In the two judgments, the Court used the same rule specifying that a significantly different situation occurs when a measure or a situation produces a "particularly prejudicial impact on certain persons as a result of a protected ground, attaching to their situation and in light of the ground of discrimination invoked."[828] The formula draws on the developments in the previous phases of reasonable accommodation case law. It specifies that a *significantly different situation* is a factual inequality (or *vulnerability*) and adds that such inequality must be socially constructed: caused by a prejudicial impact of general measures. Its significant contribution lies in clarifying that the factual inequality is not a personal quality. Rather, it is caused by the prejudicial impact of the structures around. In this sense, the formula reflects the aim of reasonable accommodation defined in Chapter 3; remedying the disadvantages caused by our social and environmental structures.[829] Similarly as proposed in Chapter 3, it defines grounds for reasonable accommodation through a construction which simultaneously justifies the need for this measure.[830] There is no exhaustive list of those who should be reasonably accommodated and those who should not. The decision is made in a concrete context after an assessment of how an individual situation interacts with the structures around it.[831]

The formula is thus open-ended but brings one more important focus to determining who should be accommodated: *discrimination grounds*. Article 14 of the Convention, as well as

[826] (n 814), paras 73, 77.
[827] ibid, para 84.
[828] *Napotnik* (n 814), § 75, *Ádám and others* (n 813), § 87.
[829] See Chapter 3, Section 1.2.
[830] Chapter 3, Section 3.2.
[831] A contextual approach was apparent also in the earlier case law which clarified that a constructed vulnerability or social disadvantage, rather than membership in an ethnic group per se, which triggers the right to accommodation. See, for example, *Yordanova* (n 771), para 129.

Article 1 of Protocol no. 12, prohibit discrimination on any grounds 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. The Court has included an array of vastly different analogous grounds under *other status*, leaving an open door for just about any socially recognisable status.[832] This means that the answer to who should be accommodated under the Convention cannot rely simply on a list of selected discrimination grounds. Instead, it must allow for the inclusion of different identities or life situations experiencing a situation of factual inequality because of the prejudicial impact of our structures.

If the Court followed the standard established in *Napotnik v. Romania*[833] and *Ádam and others v. Romania*[834] in all future de facto reasonable accommodation cases, continuing the trend of assessing such cases under the right to equality (Article 14 or Article 1 Protocol no. 12) discernible since *D.H. and others v. the Czech Republic*,[835] the future jurisprudence could see a significant improvement of the predictability and transparency of the requirement of reasonable accommodation under the Convention. Nevertheless, it is unclear whether this is likely to happen. The Court admitted that reasonable accommodation is implicitly required both under the right to equality and other Convention rights[836] and is notoriously reluctant to examine especially the religious or ethnic/cultural accommodation cases under the right to equality.[837] Other Convention articles do not rely on protected discrimination grounds. In those cases, it was most often *vulnerability* which played the role of de facto establishing grounds for reasonable accommodation.[838] In addition, different standards applied for reviewing the

[832] Heightened scrutiny is applied for selected grounds, such as race, sex or gender, nationality, or sexual orientation. Arnardóttir (n 485) 649; Nikolaidis (n 4) 452.
[833] (n 814).
[834] (n 813).
[835] (n 10).
[836] *Yordanova v. Bulgaria* (n 771), para 129.
[837] Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4) 969.
[838] Chapter 4, Section 2.2.

denial of reasonable accommodation on different grounds and/or vulnerability.[839] Despite the clarification provided in the latest case law, there is still thus a lot to be explained in terms of establishing grounds for reasonable accommodation.

Conclusion

The Convention implicitly recognises the right to reasonable accommodation for those who experience a *particularly prejudicial impact of a certain measure linked with a protected discrimination ground*. This conclusion is an outcome of an analysis of the Court's fragmented and at times inconsistent reasonable accommodation case law. The analysis confirms that the Court requires reasonable accommodations for a broad range of social groups without explicitly saying so. While this has been suggested in the academic literature before, this chapter offered a clear and comprehensive systematisation of the relevant jurisprudence. It brings an improved understanding of who can successfully claim reasonable accommodation under the Convention and, correspondingly, for whom states must facilitate such differential treatment.

To clarify the background of the above rule, the chapter presented the case-law in three distinct phases demonstrating the evolution in the Court's approach to what constitutes grounds for reasonable accommodation. In the first phase, the Court specified that people in *significantly different situations* must be treated differently as a requirement of the right to equality. The second phase clarified that the requirement of differential treatment effectively implies the right to reasonable accommodation and can be found both under the Convention's right to equality and in the proportionality assessment under other articles. It also explained that reasonable accommodation is called for to remedy certain existing inequalities, often defined in terms of

[839] Chapter 4, Sections 2.2. and 2.3.

vulnerability. In the third phase, the Court established that the existing inequalities giving grounds to reasonable accommodation are caused by a *prejudicial impact* of measures or situations on a *protected ground*. The definition of reasonable accommodation's target group was thus combined with the role ascribed to it in equality law: remedying the disadvantageous impact of general structures.

In principle, defining the target group of reasonable accommodation through a socially constructed disadvantage as the Court did through the *prejudicial impact of measures* corresponds to the theoretical proposals of Chapter 3. The Court effectively arrived at a relational, context-sensitive definition of what gives grounds to reasonable accommodation, possibly requiring reasonable accommodation for a wide range of people. Moreover, the chapter showed that different grounds, especially if linked with *vulnerability*, may prompt a different standard of review. This also influences for whom the requirement is effectively available.

Nevertheless, despite the discernible evolution and clearer recent standards, the case law still misses more concrete and explicit guidance as to who should be reasonably accommodated. The reference to protected grounds is not an entirely solid indication because of the Court's famously wide and problematic grounds doctrine.[840] On the other hand, such a wide and relaxed doctrine arguably better incorporates relational perspectives,[841] allowing the Court to rely on an unintended, socially constructed disadvantage as proposed in Chapter 3. The last chapter will elaborate on how the Court's reasonable accommodation case law and the grounds doctrine can be navigated using the theory from Chapter 3. It aims to provide both a more

[840] Gerards (n 456); Arnardóttir (n 485); Charilaos Nikolaidis, 'Rethinking Likeness and Comparability in Equality Claims Brought Before the European Court of Human Rights' [2020] Public Law 448.
[841] Pothier, 'Connecting Grounds of Discrimination to Real People's Real Experiences' (n 476) 49.

concrete guidance both for determining what constitutes a ground for reasonable accommodation and what level of stringency should be applied for reviewing its denial.

Chapter 5

Reasonable accommodation grounds under the Convention: wide access and nuanced review

Introduction

The previous chapter showed that the right to reasonable accommodation in the Court's case law has had a long and bumpy history. While reasonable accommodation has not been explicitly used in other cases than those concerning disability, it is clearly implicitly required for a rather broad range of individuals. It was tacitly recognised through a stream of connected case law, relying on the notions of significant difference, vulnerability and, finally, a particularly prejudicial impact linked with a protected ground. The problem with such an unacknowledged but broad accommodation duty is that it may be untransparent and unpredictable. The beneficiaries may be unclear as to when they can successfully claim a violation of the Convention for failure to reasonably accommodate. The state parties can be, correspondingly, uncertain as to the extent of their obligations.

The task of this chapter is to clarify *who should be accommodated under the Convention*, relying on the Court's grounds doctrine and the theory presented in Chapter 3. The first section illustrates a framework to understand the Court's two-tiered grounds doctrine, where some statuses require a proof of *irrelevance*, while others establish an assumption of it and prompt a more thorough review. The second section then demonstrates what this doctrinal approach implies for grounds for reasonable accommodation. In this section, the theory from Chapter 3 helps clarify some of the choices the Court has made in earlier case law in terms of defining grounds for reasonable accommodation. It shows that the latest formula of a *prejudicial impact*

linked with a protected ground is their logical consequence. The theory is also used to demonstrate some of the inconsistencies or lacunae the case law exhibits.

The key argument of the chapter is that there should be two sets of grounds for reasonable accommodation: open grounds established by an *unintended prejudicial impact linked with a status,* and more narrowly construed suspect grounds, typically defined by *vulnerability*. A wide range of people can thus demand to be reasonably accommodated as a part of their right to equality under the Convention. But the Court should review the claims concerning denial of reasonable accommodation on suspect grounds and/or vulnerability with more stringency, narrowing the state's margin of appreciation. The second key argument of this chapter that the Court should more clearly distinguish between the *intended* and *unintended* prejudicial impact to establish grounds for reasonable accommodation. As explained in Chapter 3, this distinction sets meaningful limits for reasonable accommodation. It also distinguishes situations requiring reasonable accommodations from those better addressed by other measures.

1. Two-tiered grounds doctrine: more than a personal characteristic

The previous chapter demonstrated that the Court's case law implicitly requires reasonable accommodation for people in a significantly different situation, which is defined as a *particularly prejudicial impact* on certain persons because of a *protected ground*.[842] The link with protected grounds is a new development. After all, many relevant cases were not examined under the Convention's equality provisions, which are the only ones relying on protected grounds. And even in the older cases examined under the right to equality, grounds of discrimination were not raised as an important factor determining who gets to be

[842] *Ádám and others v. Romania* (n 814), *Napotnik v. Romania* (n 813).

accommodated. *Napotnik v. Romania* (2020)[843] and *Ádam and others v. Romania* (2020)[844] seem to have shuffled the cards: now discrimination grounds appear to be the decisive factor determining to whom reasonable accommodation extends.

This section shows that despite this seeming revolution, protected grounds need not be a very limiting factor in deciding who gets to be reasonably accommodated. Instead, the Court's grounds doctrine may usefully explain some of the choices the Court has made in terms of reviewing de facto reasonable accommodation claims. The section first explains the basic principles of the Court's two-tiered grounds doctrine. It shows that any recognisable characteristic (or status) can become a discrimination ground if the applicant shows that the characteristic was an *irrelevant* reason for a differential treatment. Certain suspect grounds, however, receive a heightened protection by the Court which manifests in an adjusted process of review.

1.1. Ground as an *irrelevant* characteristic

The texts of Article 14 of the Convention and Article 1 of Protocol no. 12 prohibit 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. The reference to *any ground* has traditionally prompted the court to consider just about anything to be a discrimination ground,[845] including military rank,[846] the size of a union,[847] a type of advertising,[848] or residence for pension calculation.[849] At the same time, the ground is only protected against unjustified differential treatment if the applicant shows that they were,

[843] (n 814).
[844] (n 813).
[845] For an overview see, for instance, Arnardóttir (n 485) 648.
[846] *Engel and Others v. The Netherlands* App Nos 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 (ECtHR 8 June 1976).
[847] *Swedish Engine Drivers' Union v. Sweden* App no 5614/72 (ECtHR 6 February 1976).
[848] *Verein gegen Tierfabriken (VgT) v. Switzerland* ECHR 2009-IV.
[849] *Carson and Others v. United Kingdom* App no 42184/05 (ECtHR 16 March 2010).

except for the ground, in a relevantly similar situation.[850] In other words, many different statuses could be considered as a protected ground if the applicants show that the status was as a reason for differentiation despite being *irrelevant*.[851] But even though the Court accepted many characteristics or life situations as potentially protected grounds, it also placed a burden on the applicant to show that these statuses were indeed *irrelevant* for the treatment they complained of.[852] In addition, most of these statuses only prompted a relaxed standard of review.[853] The state was then typically left with a margin of appreciation in justifying the differential treatment the applicant complained of.[854] This approach has traditionally been linked with a formal understanding of equality, making the Convention's equality provision mostly focus on consistency and rationality but not at redressing more structural inequalities.[855]

In a stream of case law, the Court attempted to shift its grounds doctrine to offer a more substantive protection to certain social groups, arguably to catch up with the European trends of adopting a more anti-discrimination reading of equality.[856] This attempt has roots in the Grand Chamber judgment *Carson v. the United Kingdom* (2010),[857] where the Court refers to an almost buried older case law to remind that discrimination grounds must be an identifiable characteristic, or a *status*.[858] In Carson, a place of residence was accepted as a *status*, subject to the applicant showing that it was used as a reason for differentiation despite being *irrelevant*.[859] The term status was thus still interpreted quite liberally. But later on, several judgments and decisions relied on *Carson v. the United Kingdom* to advance a more restrictive reading of *status* to dismiss discrimination complaints because they relied on grounds which

[850] ibid, para 61.
[851] Corresponding to the relevance approach to discrimination grounds, as discussed in Chapter 3, Section 3.1.
[852] Arnardóttir (n 485) 656–657.
[853] ibid.
[854] ibid.
[855] Gerards (n 456) 117–118.
[856] ibid 113–114; Arnardóttir (n 485) 650.
[857] *Carson and Others v. United Kingdom* (n 849).
[858] ibid, para 61.
[859] ibid, paras 70, 72.

were not innate characteristics applicable from birth,[860] core or personal beliefs or choices,[861] or sufficiently alike those listed.[862]

While this partial shift in the Court's grounds doctrine has been interpreted as potentially bringing a more focus into the Court's equality analysis,[863] it also brought a lot of confusion,[864] not least because it contradicted the ordinary meaning of the Convention's text. Even if the term *any ground* - used both in Articles 14 and Article 1 of Protocol no. 12 - was interpreted narrowly as covering only the grounds alike those listed, the explicitly included ground of property is neither innate, immutable, nor a fundamental choice. In addition, while the English version refers to an ambiguous *other status* as a discrimination ground, the French text reads *toute autre situation* meaning *any other situation*. The restrictive reading thus clearly contradicted the preceding case law but also the text of the Convention.[865]

In later case law, the Court eventually abandoned the requirement of innateness, valuable choice, or analogy, used above to dismiss discrimination complaints.[866] It continued to require the existence of a *status* but interpreted it broadly as a characteristic through which a person is distinguishable from others, but necessarily innate, inherent, or alike those listed.[867] A status becomes a protected ground when the applicant shows that they were otherwise in a relevantly similar situation, and the status thus became a reason for distinction despite being *irrelevant*. Moreover, the Court allows the state a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.[868] For instance,

[860] *Peterka v. Czech Republic* App no 21990/08 (ECtHR decision 4 May 2010).
[861] *Springett, Easto-Brigden and Sheffield v. United Kingdom*, App no 34726/04 (ECtHR decision 27 April 2010).
[862] *Čadek and Others v. Czech Republic* App no 31933/08 (ECtHR 22 November 2012), para 94.
[863] Gerards (n 456) 115.
[864] Arnardóttir (n 485) 660–663.
[865] In conflict with Article 31 para 1 of the Vienna Convention on the Law of Treaties (Treaty Series, vol. 1155, p. 331, 23 May 1969).
[866] Arnardóttir (n 485) 662–663.
[867] *Clift v. the United Kingdom* App no 7205/07 (ECtHR 13 July 2010), paras 56-59.
[868] *Carson* (n 849), para 61.

because *Carson* concerned a socio-economic policy, the state had a wide margin in justifying the differential treatment on the ground of the place of residence.[869]

At the same time, the Court found a different way of developing a more substantive grounds jurisprudence – not through limiting access to a review but by nuancing the standards of review for different grounds. This is especially visible on a recent judgment *P.C. v. Ireland* (2022),[870] concerning discrimination alleged on multiple grounds. The Court here drew a line between the inadmissible grounds, open grounds with a relaxed standard of review, and *suspect* grounds prompting a more thorough review. Source and level of income was not accepted as being a status capable of constituting a ground at all because the Court concluded that it does not constitute a recognisable characteristic.[871] Status as a prisoner was accepted as a ground subject to the applicant showing that it was *irrelevant* (otherwise the applicant was in a relevantly similar situation).[872] And lastly, age was accepted as a ground in relation to which the applicant did not even need to show its *irrelevance* because it was assumed.[873] The Court did not require a proof that the applicant was otherwise in a relevantly similar situation.

The Court thus maintained its traditionally wide and relaxed grounds approach for defining discrimination grounds. At the same time, some statuses clearly receive a more heightened protection than others. The following section explains how the Court currently choses these *suspect* grounds and what consequences such distinction has.

1.2. Suspect grounds as characteristics linked with established inequalities

The doctrine of *suspect grounds* which are associated with a more stringent discrimination analysis has been developing alongside the Court's traditional wide and relaxed grounds

[869] ibid.
[870] *P. C. v. Ireland* App no 26922/19 (ECtHR 1 September 2022).
[871] ibid, paras 78-79.
[872] ibid, paras 80-81.
[873] ibid, para 74.

doctrine.[874] So far, suspect grounds include sex or gender,[875] birth outside of a marriage,[876] nationality,[877] sexual orientation,[878] race or ethnic origin,[879] and disability.[880] There are also some indications that religion[881] or age[882] are considered at least as semi-suspect grounds. The choice of suspect grounds clearly does not mirror the grounds enumerated in the Convention's equality provisions. Reviewing the Court's justifications for their selection rather suggests that they are specifically protected because they define social groups associated with an established disadvantage. Using such status as a reason for differentiation is thus not only presumably irrelevant but also potentially more harmful because it perpetuates existing inequalities.[883]

For instance, in relation to sex and gender, the Court clarified that differential treatment needs to be based on "weighty reasons" because it goes against the "important common goal of advancing equality between sexes".[884] Similarly, the need to protect against discrimination based on race or ethnic origin was justified by "its perilous consequences"[885] and the aim to reinforce "democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment".[886] Concerning Roma specifically, the protection is justified by their "turbulent history and constant uprooting, entrenched by the history of oppression, discrimination, and exclusion,"[887] turning them into a "disadvantaged and vulnerable minority".[888] A comparable explanation was given when including disability among suspect

[874] Arnardóttir (n 485) 649–652.
[875] *Abdulaziz, Cabales and Balkandali v. United Kingdom* App nos 9214/80; 9473/81; 9474/81 (ECtHR 28 May 1985).
[876] *Inze v. Austria* App no 8695/79 (ECtHR 28 October 1987), 10 EHRR 394, para 41.
[877] *Gaygusuz v. Austria* App no 17371/90 (ECtHR 16 September 1996), para 42.
[878] *E. B. v France* App no 43546/02 (ECtHR 22 January 2008), para 91.
[879] *Alajos Kiss v Hungary* App no 38832/06 (ECtHR 20 May 2010), para 42.
[880] *Glor v. Switzerland* (n 629), para 84; *Kiyutin v. Russia* ECHR 2011-II, para 64.
[881] Arnardóttir (n 485) 650.
[882] Mjöll Arnardóttir (n 508) 167. Compare the justification in *P. C. v. Ireland* (n 870).
[883] Gerards (n 456) 114.
[884] *Abdulaziz, Cabales and Balkandali v. United Kingdom* (n 875), para 78.
[885] *D.H. and Others v. the Czech Republic* (n 10), para 176.
[886] ibid.
[887] *D.H. and others* (n 10), para 182, *Sampanis and others* (n 747), paras 71-72, *Horváth and Kiss* (n 746), para 102.
[888] *D.H. and others* (n 10), para 182.

grounds, emphasising their vulnerability,[889] history of discrimination[890] and the need to foster their "full participation and integration in society."[891] Similar justifications have been given to grounds of sexual orientation,[892] or birth outside of marriage.[893] The choices of suspect grounds and their justification indicate that the need for the specific protection arises from the social context in which these statuses are associated with existing disadvantage. The Court's explanation why certain grounds are more suspect than others thus demonstrates a clear *relational* understanding of grounds.[894] To explain why a characteristic is specifically protected, the Court refers to the existing inequalities and to social power dynamics. Rather than prohibited classifications, it delineates social groups specifically protected because of how social interactions associate them with disadvantage.[895]

According to Oddný Mjöll Arnardóttir, who explained the Court's two-tiered grounds doctrine, explicitly or implicitly accepting a ground as suspect may have two principal consequences. It a) raises a presumption of *irrelevance*,[896] and b) prompts a more thorough review of the justification of differential treatment.[897] For instance, in cases concerning race,[898] gender,[899] sexual orientation,[900] or disability,[901] the Court has clearly often applied the presumption of *irrelevance* of the status, which meant that the applicants did not need to first show that they were – except for the status – in a relevantly similar situation. Rather, the Government was required to rebut the claim of unjustified differential treatment. The Court's reasoning also

[889] *Cam v. Turkey* (n 214), para 67. *Enver Şahin v. Turkey* (n 214), para 61.
[890] *G.L. v. Italy* (n 797), para 73.
[891] *Glor v. Switzerland* (n 629), para 84.
[892] *E.B. v France* (n 878), para 91
[893] *Inze v. Austria* (n 876), para 41
[894] Or similarly defined socio-contextual terms, as noted in Arnardóttir (n 485) 663–665. For an explanation of the term, see Chapter 3, Section 3.1.
[895] ibid.
[896] ibid 656–658.
[897] ibid 654–656.
[898] ibid 649–650.
[899] *Abdulaziz, Cabales and Balkandali v. United Kingdom* (n 875).
[900] *E.B. v. France* (n 878), para 89.
[901] *Enver Şahin v. Turkey* (n 214), para 56.

shows that the goal was not to examine whether the applicant was treated inconsistently compared to someone else in a similar situation. Rather, the justification focused on whether perpetuating further disadvantages linked with this ground can be sufficiently justified.[902]

The heightened protection also translates in the strictness of the Court's review.[903] The state has a "considerably reduced"[904] margin of appreciation or has to provide "very weighty reasons"[905] for differential treatment. Sometimes, because of the strength of the underlying aim, e.g., combatting racial inequality, the margin is so narrow that it is almost inexistent. For instance, the Court concluded that it is hardly imaginable that differential treatment directly linked with ethnicity would ever be seen as reasonable.[906] Race or ethnicity will almost inevitably be an irrational proxy for any legitimate aim such treatment may seek. Correspondingly, findings of violation are more common when discrimination claims relate to *suspect* grounds.[907]

It has been noted that the Court has not been entirely consistent in applying the above-described approach in all relevant cases.[908] It nevertheless represents a framework partly explaining the evolution of the Court's case law, but most importantly providing a consistent theoretical basis for its future development.[909] It is thus useful to rely on it in this chapter whose main task is to explain and help predict the trends in the case law concerning grounds for reasonable accommodation. At the same time, the suspect grounds developments have mostly been put into context with an increased emphasis of the *anti-stereotyping* aim of the Convention's equality provision.[910] A slightly different approach may be called for to implement the

[902] *E.B. v. France* (n 878), para 89; *Abdulaziz, Cabales and Balkandali v. United Kingdom* (n 875), para xx.
[903] Arnardóttir (n 485) 649–650.
[904] *Glor v. Switzerland* (n 629), para 84.
[905] *Abdulaziz, Cabales and Balkandali v. United Kingdom* (n 875), para 78.
[906] *Timishev v. Russia* 2005-XII, para 58.
[907] Arnardóttir (n 485) 655.
[908] ibid 669–670.
[909] ibid.
[910] Arnardóttir (n 485) 652–654; Gerards (n 456) 101. See also generally Timmer (n 346).

inclusion-oriented approach appropriate for defining grounds for reasonable accommodation.[911] The following section examines what the Court's case law currently tells us about its approach to reasonable accommodation grounds, how it fits within the grounds doctrine explained in this section, and how the theory presented in the third chapter can help clarify some of the lacunes or inconsistencies.

2. Grounds for reasonable accommodation

The previous section explained that the Court uses two sets of standards for reviewing discrimination claimed on different grounds. Applicants can claim discrimination on any socially recognisable characteristic as long as they show that it was used as a reason for distinction despite being irrelevant (as the applicants were otherwise in a *relevantly similar situation*).[912] Applicants showing discrimination on selected suspect grounds, however, receive heightened protection. The irrelevance of the suspect characteristic is typically presumed, and the state also often has a narrowed margin of appreciation for justifying the differential treatment.[913]

This section applies the same doctrinal framework to explain the Court's case law concerning grounds for reasonable accommodation. The first part of the section shows that reading grounds for reasonable accommodation in line with the doctrine implies, as suggested in the third chapter,[914] that a status becomes grounds for reasonable accommodation only when linked with a constructed disadvantage, represented by the explicit or implicit requirement of *particularly prejudicial impact.* The second part of the section then explains that *vulnerability* often serves as a shortcut for such relevant disadvantage and serves a similar role as suspect grounds. It

[911] See Chapter 3, Section 3.1.
[912] Arnardóttir (n 485) 652–654.
[913] ibid 652–652; Gerards (n 456) 114.
[914] Chapter 3, Section 3.2.

raises the presumption of a *significantly* different situation, without the applicant having to show it, and often also prompts a narrowed margin of appreciation for the state.

The section also shows how relying on the theory from Chapter 3 may help improve the clarity of the case law. It argues that although the constructed disadvantage which gives grounds to reasonable accommodation was indeed *unintended* in all analysed cases, making this requirement clear and consistent would usefully distinguish between claims of reasonable accommodation and, for instance, indirect discrimination. The section also also demonstrates that the Court could use the basic requirement of constructed disadvantage more flexibly in a way which avoids perpetuating existing stereotypes.

2.1. Status linked with *unintended, constructed* disadvantage

The requirement of reasonable accommodation spread in the Court's case law mainly through the obligation to treat differently people in significantly different situations, as a part of the Convention's right to equality.[915] This obligation was not explicitly referred to in many of the de facto reasonable accommodation cases examined in the last chapter because these cases were assessed under other articles.[916] Nevertheless, the Court has made it clear that whether under the right to equality or other articles, the requirement is one and the same.[917] The following section will thus proceed under the assumption that comparable standards as to deciding who gets to be reasonably accommodated should apply in all cases, whether assessed under the right to equality or other Convention provisions.

The key element for establishing a claim for reasonable accommodation has been whether it is a *relevant and significant difference.* In later case law, the Court occasionally explained that a such significant difference is a situation of factual inequality, often manifesting in the

[915] *Thlimmenos v. Greece* (n 606), para 44.
[916] Chapter 4, Sections 1.2., 2.2.
[917] Chapter 4, Sections 2.2., 2.3.

applicant's *vulnerability*.[918] In this case law, the Court clarified that grounds for reasonable accommodation were, in fact, characteristics associated with existing disadvantage. The latest case law defining *significant difference* as a *particularly prejudicial impact* of a certain measure[919] is thus a logical step in the Court's evolving, increasingly *relational* reading of grounds for reasonable accommodation. The following sub-sections show that the Court indeed relied on a socially constructed and unintended disadvantage to define grounds for reasonable accommodation, as suggested in Chapter 3. The last sub-section then demonstrates how to apply these requirements to determine what other statuses beyond those already referred to, may establish further grounds for reasonable accommodation. In the cases discussed in this last part, the onus was typically on the applicant to show that they were in a *significantly different situation* and the state has typically enjoyed a wide margin of appreciation. These statuses can thus be said to constitute open grounds for reasonable accommodation. They ensure wide access but only a lenient review by the Court.

2.1.1. Constructed disadvantage

When the Court concluded that the requirement of differential treatment arises when there is a *particularly prejudicial impact* linked with a protected ground, it did not only indicate a *relational* reading of grounds. It also effectively explained that grounds for the de facto reasonable accommodation requirement are defined with reference to constructed disadvantage.[920] If a seemingly neutral measure produces disadvantage, it is because it was created and designed in a way that advantages some and disadvantages others. The incurred disadvantage is thus not in any way inherent in the applicant's difference; it is created by this measure. So far, the Court applied the construction equating relevant difference with a

[918] Chapter 4, Section 2.3.
[919] *Ádám and others v. Romania* (n 813), and *Napotnik v. Romania* (n 814).
[920] In line with the theory from Chapter 3, Section 3.2.

particularly prejudicial impact of a measure explicitly only to language[921] and pregnancy.[922] In the case concerning pregnancy, the employment conditions of a diplomatic mission caused a disadvantage for those diverging from the norm of a child-less diplomat. In the case concerning language, it was the examination rules which constructed a disadvantage for anyone not educated in Hungarian.

Nevertheless, the implied reasonable accommodation has been effectively linked with such socially constructed disadvantage since it first entered the Court's case law. In fact, framing the applicant's claim in terms of a socially constructed disadvantage likely played a decisive role in introducing reasonable accommodation into the case law. This is first visible in *B. v. France* (1992), a case about the right to a correct gender registration for trans people.[923] Trans people diverge from the dominant norm stipulating that people's gender corresponds to the sex identified at birth. Their difference from this background norm disadvantages them when confronted with rigid state gender registers which insist on binary and irreversible sex registration. The Court discussed the disadvantage legal systems create for people whose real gender identity is different than the registered one[924] and was ready to conclude that in such case, the states may be required to apply different rules to trans people than to others. The constructed disadvantage caused by the state registers' design prompted the need to reasonably accommodate the applicant.

When it came to disability, many initial cases in the 1990s concerning requests for accommodation,[925] whether it was to access public facilities, voting stations, the workplace, or even court proceedings, were dismissed because the Court understood them as concerning

[921] *Ádám and others v. Romania* (n 813).
[922] *Napotnik v. Romania* (n 814).
[923] (n 600).
[924] ibid, paras 59-62.
[925] Chapter 4, Section 2.1.

social policies helping people in need where the state holds a wide margin of appreciation.[926] This began to change in the early 2000s in the cases concerning people with disabilities in detention. In those cases, it was clear that the applicants' disadvantage was imposed by the state, and thus artificially constructed.[927] These were the first cases where the requirement of reasonable accommodation on the basis of disability appeared.[928] When the requirement emerged outside of the detention context in *Glor v. Switzerland* (2009),[929] it was still concerning a state-imposed measure, but already clearly under the influence of the UN CRPD referenced in the judgment, which understands disability as socially constructed by the interaction of an impairment with non-inclusive structures.[930] This understanding of disability, with reference to the UN CRPD, then clearly translated into the first explicit reasonable accommodation cases concerning education, including at private schools.[931] In these cases, the Court stated that reasonable accommodation is needed to remedy an unjustified factual inequality – inequality unjustifiably maintained by our structures.[932]

When it came to the de facto reasonable accommodation cases concerning ethnic or cultural minorities, the Court was also very cautious at first. When in 2001 it came to the requests of the Roma for planning permissions so they could continue living in caravans on their land, the Court referred to the applicants' vulnerability,[933] but considered their request for exemptions literally a "humanitarian consideration"[934] rather than a matter of equality. In fact, it even warned that it is not possible to act on this humanitarian consideration because it would mean

[926] ibid.
[927] See a similar argument advanced in relation to religion in Henrard, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' (n 3) 978.
[928] See Chapter 4, Section 2.3.
[929] (n 629), para 53.
[930] UN CRPD Committee (n 1), para 9.
[931] *Cam v. Turkey* (n 214).
[932] Chapter 4, 149-150.
[933] *Buckley v. the United Kingdom* (n 695), paras § 76, 80 and 84. See also *Coster v. the United Kingdom* (n 695), para 110.
[934] *Buckley v. the United Kingdom* (n 695), para 127.

that others not receiving such preferential treatment may be treated unequally.[935] The disadvantaged position of the Roma was thus still seen as a natural occurrence, a result of their own doing. The approach changed in *D.H. and others v. the Czech Republic* (2007),[936] when the Court first accepted that the disadvantage of the Roma children in education was socially constructed. It appeared because the seemingly neutral school aptitude tests were in fact designed for the *typical* child, completely ignoring Romani cultural and linguistic specificities.[937] It was because of this constructed disadvantage that the Court for the first time implicitly accepted the right of Romani children to be reasonably accommodated in educational settings.[938] A similar development can also be seen in *Taddeucci and McCall v. Italy* (2016), which concerned homosexuality. The requirement of accommodation of a same-sex couple was also introduced there because the legal regulation, following a heterosexual dominant norm, created a disadvantage for those who diverged.[939]

Even before the Court explicitly defined a *significantly different situation* through a *particularly prejudicial impact* of structures, it thus implicitly relied on constructed disadvantage to justify the requirement of reasonable accommodation. Nevertheless, the religious accommodation cases are much less clear as to how the Court understands the disadvantage associated with religious practice. The Court was clearly more willing to conclude that the applicant had the right to be reasonably accommodated when their disadvantage was caused by state measures without giving the applicant a choice – i.e., clearly constructed by the state.[940] For instance, the Court found a violation of the Convention because

[935] *Chapman v. the United Kingdom* (n 695), para 129.
[936] (n 10).
[937] ibid, paras 66, 200.
[938] See Chapter 4, 143-146.
[939] *Taddeucci and McCall* (n 642), paras 85 and 95.
[940] Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4) 978.

of the denial of accommodation of dietary needs[941] or religious rituals[942] in state detention. Similarly, the Court also supported reasonable accommodation claims concerning imposition of religious instruction at schools.[943]

On the other hand, when it came to religious accommodation cases where the disadvantage might have appeared as the applicants' choice – rather than imposed by social or environmental structures – the Court was much less willing to find a violation when accommodation was not provided.[944] Cases such as *Phull v. France* (2005),[945] *El Morsli v. France* (2008),[946] *Pichon and Sajous v. France* (2001),[947] *Francesco Sessa v. Italy* (2012),[948] or *Eweida and others v. the United Kingdom* (2013),[949] where the applicants could have changed their practice or a profession to avoid the disadvantage, illustrate this argument.[950] These cases do not offer a clear guidance as to what establishes the right to reasonable accommodation on the basis of religion and there lie its limits. But this gap can be usefully filled by the requirement of unintended disadvantage explored in the following sub-section.

2.1.2. Unintended disadvantage

This section argues that despite the lack of explicit reference to the concepts, reasonable accommodation requirement has always been required on account of disadvantages which were *unintended*, in that they were unplanned result of otherwise legitimate structures.[951] The third chapter explained that this means that the state does not pursue a legitimate aim which directly

[941] *Jakóbski v. Poland* (n 666).
[942] *Korostelev v. Russia* (n 667), *Vartic v. Romania* (n 667).
[943] *Folgero and others v. Norway* (n 664) and *Grzelak v. Poland* (n 664).
[944] Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4) 978.
[945] (n 653).
[946] (n 654).
[947] (n 648).
[948] (n 660).
[949] (n 441).
[950] Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4) 978.
[951] See Chapter 3, Section 3.2.2.

requires individuals to bear such disadvantage, or such disadvantage is an inherent outcome of following such an aim.[952] This is well visible on the flagship reasonable accommodation case, *Thlimmenos v. Greece* (2000),[953] or a similar disability oriented *Glor v. Switzerland* (2009).[954] Mr Thlimmenos was considered to be in a *significantly* different situation because the disadvantage he incurred was not intrinsically connected with the legitimately followed aim of the regulation. As the Court noted, the regulation's aim was to ensure that only morally apt and reliable persons can become chartered accountants.[955] But, unlike for other persons, Mr Thlimmenos' conviction for an offence could not imply dishonesty or moral turpitude because it was motivated by religious reasons.[956] His disadvantage was thus an *unintended* outcome of the otherwise legitimate rules, and Mr Thlimmenos had the right to be reasonably accommodated.

Similarly, Mr Glor had to pay an increased tax whose aim was to sanction those who refused to serve in the army or do a civilian service.[957] But Mr Glor wanted to serve in the army, he just was not allowed to because of his disability.[958] He was not allowed to do a civilian service, either, because he was not a conscientious objector. The disadvantage he incurred was thus not inherent in the legitimate aim the state was pursuing because he was not punished for his decision not to do a military service. He was essentially punished for his disability. It was thus an *unintended* disadvantage – an outcome of otherwise legitimate rules which simply did not consider his specific situation.

All reasonable accommodation cases concerning detention, whether linked with disability or with young age, migrant status, or victim status, also clearly aimed at disadvantages which

[952] ibid.
[953] (n 606).
[954] (n 629).
[955] (n 606), para 47.
[956] ibid.
[957] (n 629), para 77.
[958] ibid, para 79.

were unintended outcomes of detention conditions which were generally considered unproblematic.[959] In the disability-related detention cases specifically, the Court ruled that a violation of Article 3 will be assessed by examining whether the level of suffering of the applicant exceeded the "unavoidable level of suffering inherent in detention".[960] In other words, reasonable accommodation for detainees with disability was called for due to the disadvantage not inherent in the detention itself but because it was caused by the neglect of the specific needs of disabled detainees.

The reasonable accommodation cases concerning housing benefits regulations,[961] general benefits regulations,[962] or housing planning regulations[963] also demonstrate that the requirement arises when a status links with unintended disadvantage created by social structures. In all these cases, the Court acknowledged that the regulations were following a clearly legitimate aim and were rational; they just failed to consider the specific impact they would have on individuals with different needs. The disadvantage incurred by the applicants who had different needs because they had a disability,[964] had a minority cultural lifestyle,[965] or were victims of domestic violence,[966] was not an inherent requirement of attaining those legitimate aims the regulations sought. It thus established grounds to reasonable accommodation because it was both constructed and unintended.

The cases concerning the segregation of the Roma children in education are an especially good example in this respect because they well demonstrate how the requirement of unintended disadvantage draws a line between the cases where a status establishes grounds for reasonable accommodation and where the situation calls for another intervention. The school aptitude

[959] Chapter 4, Section 2.2.
[960] *Mouisel v. France* (n 715), para 40.
[961] *J.D. and A. v. the United Kingdom* (n 803).
[962] *B. v. the United Kingdom* (n 637).
[963] *Yordanova v. the United Kingdom* (n 771).
[964] *B. v. the United Kingdom* (n 637).
[965] *Yordanova v. the United Kingdom* (n 771).
[966] *J.D. and A. v. the United Kingdom* (n 803).

tests which disproportionately disadvantaged Roma children in *D.H. and others v. the Czech Republic* (2007)[967] supposedly followed a legitimate aim and were a generally rational solution.[968] Their problem was that by following an unexpressed background norm, they ignored the needs of Roma children and thus had an unintendedly negative impact on them. This was different in the otherwise similar *Oršuš and others v. Croatia* (2010),[969] where Roma children were also segregated from their non-Roma peers by means of seemingly neutral criterion, a lack of command of the Croatian language. But in this case, the Court also indicated that there likely was an alternate motive behind the measure – the pressure of the non-Roma parents who disagreed with mixed education due to prejudice and stereotypes against Roma children.[970]

Whereas in *D.H. and others* ethnicity linked with an unintended constructed disadvantage, in *Oršuš and others*, it likely linked with an intended, albeit hidden, disadvantage represented by prejudice against the Roma. This is why in *D.H. and others* ethnicity was a ground for reasonable accommodation but not in *Oršuš and others*. If the disadvantage was indeed motivated by prejudice, such disadvantage is not remediable by reasonable accommodation. The practice itself, motivated by underlying prejudice, is illegitimate. It must be addressed as a whole and dismantled. The *unintended* quality of the disadvantage thus effectively distinguished situations when Roma ethnicity established grounds for reasonable accommodation to prevent discrimination from situations which required other interventions.

The condition that the incurred disadvantage should be *unintended* can thus be deduced from the Court's reasonable accommodation case law, and it can be a useful way of distinguishing situations when status becomes grounds for reasonable accommodation and where other legal

[967] (n 10).
[968] ibid, paras 60, 104, and 200-201.
[969] (n 747).
[970] ibid, para 154.

tools are at play. It could also help clarify one more issue present in the case law: the blur between the determination of grounds for reasonable accommodation and examining the justification of its refusal. The last chapter showed that these stages are often blended together, which makes it difficult to determine when a status did not become grounds for reasonable accommodation and when a violation was not found simply because its denial was well justified.[971] Clarifying this distinction is demonstrably important, especially in religious accommodation cases.

Eweida and others v. the United Kingdom (2013),[972] as a case typically seen as concerning four reasonable accommodation claims, is a good example of how the requirement of *unintended* may help clarify the decision-making. The case discussed four claims. Ms Eweida and Ms Chaplin complained of workplace rules prohibiting them from wearing religious symbols at work. For Ms Eweida, it was because of airline company dress code rules which prohibited religious symbols in order to appear neutral and business-like. In Ms Chaplin's case it was because of hygienic rules in a hospital which did not regulate religious symbols per se but prohibited all jewellery. Ms Ladele and Mr McFarlane had issues with performing their work tasks because, as practising Christians, they refused to officiate same-sex civil partnerships and facilitate therapy sessions for same-sex couples, respectively.

Only Ms Eweida's claim under the freedom of religion was successful.[973] But her claim did not in fact even concern reasonable accommodation in the way defined in this thesis. The airline company dress code rules were directly targeting religious symbols,[974] and Ms Eweida's disadvantage was thus an *intended* outcome of the workplace rules. Accommodating employees wearing religious symbols would empty these rules of meaning. The key question

[971] Chapter 4, 124-125, 128.
[972] (n 441).
[973] ibid, para 95.
[974] ibid, para 10.

thus really was whether these rules themselves were legitimate. If they were not, accommodating Ms Eweida was not a sufficient response – the rules themselves would have to be replaced. If they were, the disadvantage inherent in them would have to be legitimised, too.

Ms Ladele's and Mr McFarlane's claims could have been framed similarly. A legitimately followed principle of LGBTI equality would have been directly compromised if religious practitioners were allowed to openly discriminate against same-sex couples. If the disadvantage experienced by Ms Ladele and Mr McFarlane was inherent in this legitimate policy, it was not its *unintended* outcome. Their religious expression should thus not establish grounds for reasonable accommodation, even though questions could surely be asked about their freedom of religion and possible indirect discrimination. Only in Ms Chaplin's case was the disadvantage incurred an *unintended* one – the hygienic rules did not aim at regulating religious symbols but had a separate, legitimate, and rational aim. The prejudicial impact they had on Ms Chaplin thus could have effectively established grounds for reasonable accommodation.

The usefulness of relying on the requirement of *unintended* disadvantage for distinguishing when a religious expression constitutes grounds for reasonable accommodation can also be demonstrated in *Francesco Sessa v. Italy* (2012),[975] *El Morsli v. France* (2008),[976] and *Phull v. France* (2005),[977] in contrast with *Pichon and Sajous v. France* (2001),[978] or *S.A.S. v. France* (2004).[979] The first three cases concerned religious practitioners who incurred a disadvantage as a side-product of general rules. *Francesco Sessa* concerned court procedural rules, and *El Morsli* and *Phull* considered embassy and airport security rules, respectively. Accommodating the applicants would not inevitably compromise the otherwise legitimate rules, because

[975] (n 660).
[976] (n 654).
[977] (n 653).
[978] (n 648).
[979] (n 657). The arguments applies to other cases concerning religious veil at (n 657).

alternative individualised solutions could have been found. In *El Morsli*, for instance, a female security guard could have been called to conduct the control. In *Phull*, a separate private check of the applicant without a turban was also envisageable. In *Francesco Sessa*, one adjournment would hardly compromise the running of the court. The disadvantage these applicants incurred was thus a result of legitimate and rational rules but was not inherent in these rules; it was their *unintended* outcome.

The situation was different in *Pichon Sajous* and *S.A.S.*, because in both cases the disadvantage was intended, or inherent in the relevant rules. In *Pichon and Sajous*, Christian pharmacists were legally obliged to sell contraceptives. Accommodating their religious belief would go against the very intention of the rules – to ensure that contraceptives are without stigma widely accessible to all women who may need them. The disadvantage incurred by the pharmacists was thus inherent in the legitimate rules. In *S.A.S.*, on the other hand, the disadvantage incurred by Muslim women who were prohibited from wearing full religious covering was intended. The rules clearly targeted this type of religious covering.[980]

If, as the Court ruled,[981] the rules themselves were considered legitimate from the perspective of freedom of religion or equality, then the disadvantage incurred by the Muslim women inherent in them had to be considered legitimate, too. Accommodating the Muslim women would empty those rules of any content. Surely, they can (and should)[982] be challenge from the perspective of gender and religious equality and/or freedom of religion. But they do not cause

[980] (n 657), paras 16-17.
[981] ibid, paras 113-122.
[982] See, for instance, the discussion on Strasbourg Observers by Eva Brehms, Saïla Ouald Chaib and Lourdes Peroni. Eva Brehms, 'S.A.S. v. France as a problematic precent' (9 July 2014) <https://strasbourgobservers.com/2014/07/09/s-a-s-v-france-as-a-problematic-precedent/> accessed 2 November 2022; Saïla Ouald Chaib and Lourdes Peroni, 'Missed opportunity to do full justice to women wearing a face veil' (3 July 2014) <https://strasbourgobservers.com/2014/07/03/s-a-s-v-france-missed-opportunity-to-do-full-justice-to-women-wearing-a-face-veil/> accessed 2 November 2022.

such disadvantage which would establish grounds for reasonable accommodation as understood in this thesis.[983]

The above cases were a missed opportunity from this perspective. Making a clear distinction between religious expressions which constitute grounds for reasonable accommodation and those which do not would help the Court set clear limits to the requirement of reasonable accommodation and thus possibly avoid some of the pitfalls associated with the concept in other jurisdictions where it was sometimes seen as having gone too far.[984] And it would also help to consistently apply the reasonable accommodation logic where it is indeed suitable, distinguishing it from the roles of the prohibition of indirect discrimination and religious freedom.

Moreover, an unclarity remains in the case law as to whether denial of reasonable accommodation does not constitute a Convention violation because there was no grounds for reasonable accommodation, and when it was so because the state sufficiently justified that accommodation would constitute an undue burden. This means that it is very difficult to clarify when exactly a status establishes grounds for reasonable accommodation because the Court simply does not focus its reasoning on this stage of the decision-making. Distinguishing between the *intended* and *unintended* prejudicial impact would also be a useful way to make this distinction.

The previous chapter suggested that a version of this requirement was indicated in *Pretty v. the United Kingdom* (2001),[985] where a person with disability asked for accommodations to be able to end her life. The Court concluded that even though the applicant's disability put her in a

[983] Which does not, as emphasized above, preclude challenging them on grounds of discrimination or religious freedom.
[984] See Chapter 2, Section 1.2.-1.3. See also Henrard, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' (n 3) 76–77.
[985] (n 621).

significantly different situation to others, the Government also had a sufficiently legitimate reason not to see her situation as different.[986] This may have indicated that her disability did not become grounds for reasonable accommodation in the given case because the incurred disadvantage was inherent in the state's legitimately followed aim of reducing suicides.[987] In other words, the disadvantage was *intended,* and thus did not establish grounds for reasonable accommodation. Another possible reading of the judgment is that the Court simply meant that the state had a sufficient justification to deny the applicant the requested differential treatment. A argued throughout this section, the first interpretation would help the Court implement a clear standard specifying when a status becomes a ground for reasonable accommodation, and distinguishing this step from the justification phase, where the state can explain that the incurred disadvantage, albeit unintended, was legitimate – because accommodating the applicant would constitute an undue burden.

Apart from implicitly relying on constructed, unintended disadvantage to establish grounds for reasonable accommodation, *Ádam and others v. Romania* also seems to have relied on one more requirement – that the incurred disadvantage is sufficiently significant.[988] The students educated in Hungarian had to take two additional exams than the Romanian speakers also have as part of their literature exams in Romanian, which was difficult for them.[989] But studying in Hungarian was voluntary and the Court also submitted that the success rates among students did not show any difference between the Hungarian and the Romanian speaking students.[990] This made the Court conclude that there was no significant disadvantage experienced by the Romanian speakers.[991] Rather than establishing a new requirement, this suggests that the Court simply concluded that even though there was a different regulation for the Hungarian-educated

[986] ibid. See Chapter 4, 123-124.
[987] ibid.
[988] (n 813).
[989] ibid, para 1.
[990] ibid, para 105.
[991] ibid, para 107.

students, this regulation did not have a prejudicial impact on their rights and opportunities – this is why their status as a language minority in the given case did not establish grounds for reasonable accommodation.

2.2. Open grounds: wide access but more lenient review

The outset of this chapter reminded that any socially recognisable characteristic, or status, may under certain conditions establish grounds for reasonable accommodation. The previous sub-sections then explained why these conditions are best defined through the experience of an unintended, constructed disadvantage. The open approach of the Court's grounds doctrine then allows it to cover a wide range of statuses as grounds for reasonable accommodation. This sub-section briefly reflects on other statuses the Court may be called upon to examine in the future. It also discusses some of the principles the Court should be mindful of when choosing further grounds for reasonable accommodation.

Poverty, social exclusion, or lack of education, for instance, are statuses which do not receive much attention in equality law practice because they are often understood as legitimate outcomes of differences in talent or hard work.[992] Nevertheless, education is one of the most powerful determinants of social class and is often used to justify inequalities among social groups.[993] Poverty and social exclusion are also crucial proxies for the ability to effectively enjoy human rights.[994] Even though they are often seen as issues to be targeted by redistribution policies, they are clearly linked with misrecognition.[995] Moreover, much of their negative impact is replicated through social structures which take as the background norm a person of a certain education and income. Such structures unintentionally single out people who do not correspond to this norm. These statuses can thus also be associated with unintended constructed

[992] Sarah Ganty, 'Poverty as Misrecognition: What Role for Antidiscrimination Law in Europe?' (2021) 21 Human Rights Law Review 962, 980–982.
[993] For an in depts analysis of this phenomenon, see, for instance, Sandel (n 12).
[994] Ganty (n 997) 963–967.
[995] ibid.

disadvantages. Under these conditions, they can become grounds for reasonable accommodation.

Hudorovič v. Slovenia (2020),[996] a case concerning access to water to a community living in informal settlements, is illustrative in this respect. Slovenian law effectively denied the inhabitants of these settlements access to the public water network because they did not have building permits. It can be argued that the legislation followed a legitimate aim of promoting regularity and safety of housing.[997] But denying access to water was not a necessarily inherent in pursuing such legitimate aim, especially considering the fact that obtaining building permits was a hardly accessible enterprise for the poor and socially excluded families. The rules, assuming a level of income and opportunities allowing people to live in legal housing, thus exacerbated the already existing disadvantage of those living in the poor, socially excluded community. In effect, it denied the inhabitants access to a basic life resource, even though it was likely their unintended outcome. In such a case, the applicant's socio-economic status could have established grounds for reasonable accommodation. The Court's judgment saw it similarly, discussing several measures the local municipality could have adopted to alleviate the applicant's situation.[998]

Migrant status,[999] or nationality,[1000] for instance, may also become grounds for reasonable accommodation under this construction. For example, in *Rana v. Hungary* (2020),[1001] an Iranian trans man, a refugee, was refused a change his name and sex marker in identity documents because he could not present a Hungarian birth certificate. The regulation of administrative sex change had a prejudicial impact on him as a non-Hungarian, but this impact

[996] App no 24816/14, 25140/14 (ECtHR 10 March 2020).
[997] ibid, para 144.
[998] ibid, paras 156-157. Nevertheless, the Court eventually concluded that the state adopted all steps that could have reasonably been requested of them and did not find a violation of the Convention.
[999] *Bah v. the United Kingdom* ECHR 2011-VI.
[1000] *Gaygusuz v. Austria* (n 877).
[1001] App no 40888/17 (ECtHR 16 July 2020).

was likely not intended; it simply omitted the possibility of foreign nationals wanting to undergo this administrative change in Hungary as their resident state. Under these circumstances, his status could have become grounds for reasonable accommodation.

The above cases only illustrate how far can the open grounds doctrine extend when it comes to establishing grounds for reasonable accommodation. As noted above, in these cases it is the applicant who bears the burden of showing that there indeed was a constructed and unintended disadvantage associated with their status.[1002] But the wide and less stringent approach also has advantages. A key advantage is that it allows it to avoid essentialism, perpetuating stereotypes by interpreting some situations as paradigmatically connected with people's identity.[1003] For instance, Chapter 3 explained that pregnancy associates with disadvantage because it differentiates a person from the dominant workplace norm of a child-less worker, even though this disadvantage is often unintended.[1004] Pregnancy is also clearly a socially recognisable status. Under the Court's doctrine, nothing thus prevents the Court to consider it a ground for reasonable accommodation. Nevertheless, in *Napotnik v. Romania*,[1005] the Court justified the protection of pregnancy by the claim that "only women can be treated differently on grounds of pregnancy".[1006] As discussed in the third chapter, such framing risks denying a comparable protection to trans, non-binary or other people, who can also become pregnant.[1007] It may also perpetuate work-place stereotypes against women. It could have been preferable to simply protect pregnancy as a status which in some contexts associates with disadvantage.[1008]

[1002] Chapter 5, Section 2.
[1003] Chapter 3, Section 3.2.
[1004] ibid.
[1005] (n 814).
[1006] ibid, para 77.
[1007] Chapter 3, Section 3.2.
[1008] Nevertheless, the following sub-section shows that the link with gender as a suspect ground changes the stringency of the assessment.

A similar issue arose in *J.D. and A. v. the United Kingdom* (2019),[1009] where the Court agreed that a victim of domestic violence was entitled to reasonable accommodation but justified the conclusion by pointing out that victims of domestic violence are overwhelmingly women.[1010] Even though this factual conclusion is justified,[1011] it is unclear why a male victim of the same kind of intimate partner violence should not be entitled to similar accommodations. Being a victim of domestic violence is, by the Court's standards, a socially recognisable status. In fact, victims of domestic violence are themselves seen as a particularly vulnerable group.[1012] The disadvantage experienced by the victim in this case would materialise irrespective of their gender. Moreover, associating the victimhood status automatically with women may be seen as a stereotypical depiction of women as a group. Instead of specifically requiring accommodations for victims because they are women, the Court could have recognised it for victims of domestic violence irrespectively of their gender.

The open grounds doctrine for reasonable accommodation also facilitates incorporation of a variety of different situations without having to rely on sometimes tedious links with more commonly recognised grounds. Body weight, for instance, has sometimes been protected under the discrimination ground of "disability".[1013] But in the open reading of grounds under the Convention, body weight or shape can be a ground for reasonable accommodation without the need to prove that it constitutes a disability. Body size is an easily recognisable status. And diverging from the dominant body size norm may create prompt a negative impact of many social and environmental structures, for instance, in the context of public transport, public or cultural facilities, or healthcare.

[1009] (n 803).
[1010] ibid, para 70.
[1011] ibid, paras 78-79.
[1012] Mjöll Arnardóttir (n 508) 166.
[1013] See, for instance, the CJEU Case C-354/13 *Kaltof* [2014] where the court decided that obesity may constitute disability within the meaning of the Employment Equality Directive (n 179).

However, choosing whether to base a reasonable accommodation claim on the ground of body weight or on disability, on being a victim or on gender, may potentially have an impact on how clearly and explicitly the right to reasonable accommodation is established and how strictly the denial of accommodation is reviewed by the Court. The Court demonstrably applies more favourable standards for reasonable accommodation claims based on certain grounds and is more ready to find a violation if accommodation was denied. The following section examines which grounds can be considered as *suspect* under the current reasonable accommodation case law.

2.3. Suspect grounds: stricter review for statuses linked with *vulnerability*

The previous chapter showed that apart from requiring reasonable accommodation when applicants show that they were in a *significantly* different situations, the Court has often justified the accommodation requirement with reference to *factual inequalities*,[1014] and especially *vulnerability*.[1015] Vulnerability represents a more intense or enduring form of unintended, constructed disadvantage, which prompts a more stringent assessment by the Court.[1016] The cases referring to an applicant's vulnerability more often resulted in finding a violation of the Convention, also because the state's margin of appreciation was often narrowed.[1017] This section argues that vulnerability assessment plays a similar role to the *suspect* discrimination grounds, with similar implications for reviewing denial of reasonable accommodation as a form of discrimination.

That the Court's approach changes when an unintended, constructed disadvantage is associated with vulnerability is well visible in the disability cases, especially *Cam v. Turkey* (2016),[1018]

[1014] Chapter 4, Section 2.2.
[1015] ibid.
[1016] See the social construction of vulnerability explained in Chapter 3, Section 3.2. See also Peroni and Timmer (n 553) 1062.
[1017] Chapter 4, Section 2.3. See also ibid 1081–1082; Mjöll Arnardóttir (n 508) 166–169.
[1018] (n 214).

Enver Şahin v. Turkey (2018),[1019] and *G.L. v. Italy* (2020).[1020] Reasonable accommodation entered here not merely to react to a significantly different situation but to correct a *factual inequality*,[1021] linked the specific vulnerability of persons with disabilities.[1022] It was explicitly introduced to remedy these factual inequalities as a requirement of equality.[1023] The applicants did not need to show they were in a significantly different situation to establish their right to reasonable accommodation, as is otherwise typically the case. Instead, their vulnerability was taken as a sufficient indication that a differential treatment is needed.[1024] In addition to creating the presumption of their *significant difference*, the applicants' vulnerability was also directly linked with a narrowed margin of appreciation for the state.[1025] The denial of reasonable accommodation was assessed with more stringency. Vulnerability, as a specific form of unintended and constructed disadvantage, thus effectively played the same role for a review of the denial of reasonable accommodation as suspect grounds generally play for reviewing alleged discrimination.[1026]

Under specific circumstances, the Court accepted that similar considerations may apply also in relation to age.[1027] However, the consideration did not often translation into Court's judgments,[1028] except for *Komnatskyy v. Ukraine* (2009).[1029] The case concerned the impact of the length of court proceedings on a person of a higher age, where the applicant's vulnerability played a significant role in establishing his right to reasonable accommodation.[1030] Nevertheless, the way vulnerability changes assessment of cases concerning denial of

[1019] (n 214).
[1020] (n 979).
[1021] *Cam v. Turkey* (n 214), para 54, *Enver Şahin v. Turkey* (n 214), para 60.
[1022] *Cam v. Turkey* (n 214), para 67, *Enver Şahin v. Turkey* (n 214), para 61.
[1023] *Cam v. Turkey* (n 214), para 54.
[1024] ibid, paras 66-67.
[1025] *Enver Şahin v. Turkey* (n 214), para 60.
[1026] See also the conclusions of Mjöll Arnardóttir (n 508).
[1027] ibid 18.
[1028] Chapter 4, Section 2.2.
[1029] (n 732).
[1030] ibid.

accommodations was clearly visible in the cases concerning children in detention. In some cases, reasonable accommodations were clearly required on account of their specific vulnerability and the children as applicants did not need to show they were significantly different or *particularly prejudiced* by the measures.[1031] That the detention had a particularly negative impact on them was assumed because of their specific vulnerability. For instance, in *Mubilanzila Mayeka and Kaniki Matunga* (2006),[1032] the Court emphasised the "extremely vulnerable situation"[1033] and expressed "no doubt that (…) [their] detention in the conditions (…) caused her considerable distress".[1034]

The increased strictness of assessment is especially visible in the child detention cases concerning a compound vulnerability caused by multiple layers of disadvantage.[1035] In several cases, children were considered to be in a situation of "extreme vulnerability" due to their age and situation of detention and migration alike.[1036] In another case, a "particular vulnerability" of a child with disability in a detention was also emphasised when assessing the compatibility of treatment with Article 3 of the Convention.[1037] These cases almost inevitably resulted in the finding of a violation because the Government did not show that the authorities accommodated the vulnerable children's needs.[1038] It has been noted that in these cases, assessed under Article 3 of the Convention[1039] that does not allow a margin of appreciation,[1040] vulnerability plays the role of a "magnifying glass" which makes the Court's assessment of the possible violation more detailed and stricter.[1041] Again, this is a role which is normally attributed to suspect

[1031] (n 724).
[1032] (n 724).
[1033] ibid, para 55.
[1034] ibid, para 58.
[1035] Alexandra Timmer (n 553) 161.
[1036] (n 724).
[1037] *Blokhin v. Russia* (n 727), para 148
[1038] See Chapter 4, Section 2.2.
[1039] See (n 724).
[1040] Johan Callewaert, 'Is There a Margin of Appreciation in the Application of Articles 2, 3 and 4 of the Convention?' (1998) 19 Human Rights Law Journal.
[1041] Peroni and Timmer (n 553) 1084.

grounds.[1042] Relying on vulnerability in the above cases plays a particularly important role because there is not yet a consensus as to whether age constitutes a suspect discrimination ground under the Convention.[1043] The stricter assessment of these cases is thus clearly attributable to the applicants' vulnerability.

Nevertheless, neither establishing a ground as suspect nor vulnerability is not a guarantee that a margin of appreciation will indeed be narrowed.[1044] Other important factors, such as the fact that the issue concerns a state's socio-economic policy, may turn the outcome. This is apparent in certain Roma accommodation cases. Even though vulnerability plays a significant role and ethnicity is considered a suspect ground, the state was allowed a margin of appreciation in *D.H. and others v. the Czech Republic* (2007),[1045] the case condemning disproportionate placement of Roma children into special schools. The judgment made it clear that the required differential treatment was meant to correct a *factual inequality*.[1046] The special consideration Roma children were supposed to be awarded in the school aptitude testing was also justified by their situation as a vulnerable minority.[1047] Still, the Court proceeded with review of the discrimination as if it was based on any other ground. It first established the prejudicial impact of the tests under the right to equality (Article 14), and then admitted that the state has a margin of appreciation in arranging its educational policies, even if they may have discriminatory impact.[1048] Discrimination was eventually established because while arranging these policies, the state omitted to introduce appropriate safeguards against discrimination.[1049]

The strictness of assessment was only slightly modified in a subsequent similar case *Horváth and Kiss v. Hungary* (2013), where the Court reiterated the margin of appreciation in organising

[1042] Mjöll Arnardóttir (n 508) 169.
[1043] Arnardóttir (n 485) 18.
[1044] Peroni and Timmer (n 553) 1082.
[1045] *D.H. and others v. the Czech Republic* (n 10).
[1046] ibid, para 183.
[1047] ibid, para 181, 182.
[1048] ibid, para 207.
[1049] ibid, para 206-207.

education,[1050] only to mention – without a clear indication of its implications – the vulnerable situation of the Roma, which in the case of persons with disabilities implied a narrower margin.[1051] Nevertheless, no similar conclusions were clearly drawn in this case.[1052] In newer cases not concerning education but the right to privacy, such as in *Yordanova and others v. Bulgaria* (2012),[1053] or *Munoz Díaz v. Spain* (2009),[1054] the Court did not narrow the margin of appreciation either, despite clearly emphasising the applicants' vulnerability.[1055] Even so, because the denial of reasonable accommodation in all above cases resulted in the violation of the Convention, vulnerability still likely influenced the stringency with which the Court assessed the interferences. Nevertheless, the lack of clarity in the Court's s reasoning blurs the applied standards.

The Court's failure to clarify the implications of vulnerability in the above reasonable accommodation cases is regrettable, even more so as it itself recognises that racial discrimination is "a particularly invidious kind of discrimination"[1056] and its prevention requires the state to "use all available means"[1057] to reinforce "democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment".[1058] It has been established that the Roma specifically experience replicating, profound disadvantage and vulnerability due to the lack of inclusiveness of our structures.[1059] Their right to reasonable accommodation should thus be presumed, and its denial vigorously examined.

[1050] (n 746), para 103.
[1051] ibid, para 128.
[1052] ibid.
[1053] (n 771).
[1054] (n 762).
[1055] *Yordanova and others v. Bulgaria* (n 771), para 118, *Munoz Díaz v. Spain* (n 762), para 48-49.
[1056] *D.H. and Others* (n 10), para 176.
[1057] ibid.
[1058] ibid.
[1059] *D.H. and Others* (n 10), para 176.

In the gender accommodation cases, on the other hand, vulnerability is used to make a further distinction within a suspect ground.[1060] This can be demonstrated in *J.D. and A. v. the United Kingdom* (2019)[1061] where the Court emphasised that the state needs to give very weighty reasons to justify the treatment with reference to the important aim of advancing the equality between sexes.[1062] The automatic link between victims of domestic violence and women was criticised above as potentially further stigmatising but, in this case, it served a practical purpose. The reference to gender, as a suspect ground, narrowed the margin of appreciation allowed for the state in justifying the denial of differential treatment. Vulnerability related to the applicant's status as a victim of domestic violence, on the other hand, was used to justify why the applicant was indeed in a significantly different situation than others.[1063] Establishing the link with the suspect ground in this case thus served to narrow the margin, and vulnerability served to raise a presumption of a significantly different situation. Vulnerability also led the Court to dedicate a more focused assessment on the impact of the treatment, and her ability to use own resources to mitigate it.[1064]

Vulnerability, on the other hand, was not referred to in a reasonable accommodation case concerning an LGBTI status, even though people belonging to this social group may commonly find themselves in a situation of vulnerability due to social marginalisation or prejudice.[1065] The Court rather relied on the status as s suspect ground to demand "particularly convincing and weighty" reasons for denying differential treatment to a same-sex couple for the purposes

[1060] Mjöll Arnardóttir (n 508) 139–141.
[1061] (n 803).
[1062] *Napotnik v. Romania* (n 814), para 75, *J.D. and A. v. the United Kingdom* (n 803), para 97.
[1063] Mjöll Arnardóttir (n 508) 139–141.
[1064] Peroni and Timmer (n 553) 1059.
[1065] ibid 1070; Oddný Mjöll Arnardóttir, 'Vulnerability under Article 14 of the European Convention on Human Rights: Innovation or Business as Usual?' (2017) 4 Oslo Law Review 150, 163.

of obtaining a family residence permit.[1066] However, as their vulnerability was not established, the applicants had to show that they were indeed in a significantly different situation.[1067]

Mapping the reasonable accommodation case law in which the Court linked the protected grounds to vulnerability leaves one more blank spot on the map: religion. Even though religious minorities may be considered vulnerable in a variety of contexts,[1068] and religion is also considered a suspect or at least semi-suspect ground,[1069] the Court has not referred to these concepts to narrow a margin of appreciation or establish a presumption of significant difference in religious accommodation cases.[1070] As shown in the previous chapter, this demonstrates the Court's careful and hesitant approach to establishing the right to reasonable accommodation for religious minorities, possibly motivated by controversies the concept was associated with in other jurisdictions.[1071] The previous section explained that a better way to deal with this sensitive question might be to clearly distinguish between religious expressions which do establish grounds for reasonable accommodation from those which do not. The requirement of *unintended* disadvantage was shown to be a practical tool in this respect.

However, in many of the above cases, vulnerability did play a significant role. It created a short-cut, a presumption that the applicant was indeed in a significantly different situation to have the right to be reasonably accommodated. Using vulnerability in this manner is consistent with the role the concept has been playing in the case law so far. It has been shown that the Court typically uses the notion of vulnerability, or a particular vulnerability, to denote the applicant's particular susceptibility to harm caused by the social or institutional context

[1066] *Taddeucci and McCall v. Italy* (n 642), para 93.
[1067] ibid, para 83.
[1068] Peroni and Timmer (n 553) 1059; Mjöll Arnardóttir (n 1070) 156–157.
[1069] Mjöll Arnardóttir (n 508) 156–157.
[1070] See Chapter 4, Section 1.2.
[1071] See also Henrard, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' (n 3); Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4).

surrounding them.[1072] Vulnerability has been referred to as a product of an interaction between individual and social circumstances, as a constructed and unintended disadvantage.[1073] If an applicant is deemed to have been made vulnerable by social arrangements, the right to be reasonably accommodated can be presumed – without placing the burden on the applicant to show that they indeed were in a significantly different situation.

Similarly as proposed by Martha Fineman, vulnerability in the Court's case law extends beyond personal quality or group identity[1074] and is understood as a consequence of how our social arrangement reproduces privilege and disadvantage rather than an inherent quality.[1075] The Court's use of vulnerability in reasonable accommodation cases can be described as an "identity plus" approach, where certain statuses receive heightened attention based on a relational assessment of the applicant's existing disadvantage.[1076] But it is also construed as open-ended, meaning that vulnerability can establish grounds for reasonable accommodation beyond the social groups discussed above.[1077] Asylum-seeking or migrant status, for instance, are associated with a constructed and unintended disadvantage often denoted as vulnerability,[1078] and can in some situations become grounds for reasonable accommodation.

Therefore, vulnerability is often used for the same aim as as marking a ground as *suspect* for the purposes of reasonable accommodation.[1079] Sometimes, vulnerability strengthens the standards even within a suspect ground. But vulnerability's advantage is that it is used beyond the boundaries of the Convention's right to equality, unlike suspect discrimination grounds. It

[1072] Peroni and Timmer (n 553) 1060.
[1073] ibid 1062.
[1074] Fineman (n 553) 18; Peroni and Timmer (n 553) 1060.
[1075] Fineman (n 553) 10; Martha Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 Emory Law Journal 274; Peroni and Timmer (n 553) 1059; Ivona Truscan, 'Considerations of Vulnerability: From Principles to Action in the Case Law of the European Court of Human Rights' (2013) 36 Nordic Journal of Law and Justice 20, 70.
[1076] Mjöll Arnardóttir (n 508) 170.
[1077] This is documented in Peroni and Timmer (n 553) 1061–1064; Truscan (n 1081) 70.
[1078] *M.S.S. v. Belgium* App no 30696/09 (ECtHR 21 January 2011).
[1079] Peroni and Timmer (n 553) 1081–1082; Mjöll Arnardóttir (n 1070) 169–171.

can thus bring a heightened attention to a specific unintended, constructed disadvantage even in those cases assessed under articles other than the Convention's right to equality, and play the same role as suspect grounds there. Because de facto accommodation cases continue to be assessed under these articles, there lies a specific potential of vulnerability in iterating the right to reasonable accommodation under the Convention.

Conclusion

This chapter demonstrated that reasonable accommodation in the Court's case law implicitly extends to many different grounds. Any status which sufficiently distinguishes an individual as a member of a social group can become grounds to reasonable accommodation, if the applicant also shows that they experienced prejudicial impact of social or environmental structures. The relaxed and broad approach to discrimination grounds in the Court's case law allowed this chapter to test how far reasonable accommodation can meaningfully extend if it is not limited by the restrictive grounds doctrine. It can cover a wide spectrum of grounds including age, gender identity, but also socio-economic status, education, or, for example, single parenting.

At the same time, some grounds demonstrably receive a heightened attention. For disability, gender, and age, especially because these statuses are linked with *vulnerability*, the duty to reasonably accommodate has been assumed. Applicants in such situations did not carry the onus of showing their situation is relevantly and significantly different and the state typically had a narrowed margin of appreciation in explaining why reasonable accommodation was denied. This is a role otherwise typically played by denoting a discrimination ground as suspect. As in the general Court's grounds doctrine, there should thus be two sets of grounds for reasonable accommodation: an open set of grounds which places more burden on the

applicant in demonstrating their claim, and suspect grounds – often defined by *vulnerability* – for which denial of reasonable accommodation should be reviewed with more stringency.

The chapter also showed that reading the case law through the prism of the theory from Chapter 3 improves the clarity of the case law. Socially constructed disadvantage was effectively a guiding factor for introducing reasonable accommodation as part of the right to equality in the Court's case law. Understanding the underlying inequality as socially constructed explains why reasonable accommodation is called for as a matter of equality. Making this perspective clearer may thus help the Court justify a more transparent expansion of reasonable accommodation to other grounds. Clarifying that only an unintended disadvantage establishes grounds for reasonable accommodation may effectively assist in giving it meaningful limits, especially in the religious accommodation cases. The chapter demonstrated that relying on this requirement would also help the Court delineate a currently blurred boundary between the grounds stage and the justification stage of reviewing reasonable accommodation cases.

Chapter 6

Conclusion

1. Defining grounds for reasonable accommodation under the Convention

The thesis' first goal was to analyse *who can benefit from the right to reasonable accommodation under the Convention*. The answer is that a wide range of individuals can benefit from it tacitly. Reasonable accommodation is implied in the right to equality[1080] as well as other Convention rights[1081] and arises for those who experience disadvantage due to the prejudicial impact of a measure linked with a protected ground.[1082] So far, the Court has required the de facto reasonable accommodation on the grounds of gender,[1083] gender identity,[1084] religion,[1085] disability,[1086] ethnicity and culture,[1087] language,[1088] sexual orientation,[1089] old and young age,[1090] status as a detainee[1091] or a victim of crime,[1092] and a combination of these.[1093] Because any socially recognisable status can become a protected ground under the Court's doctrine,[1094] many other statuses may be covered in the future, including a situation of migration,[1095] socioeconomic status,[1096] and others. The applicants just

[1080] Chapter 4, Section 1.1.
[1081] Chapter 4, Section 2.2.
[1082] *Napotnik v. Romania* (n 814), para 75; *Ádám and others v. Romania* (n 813), para 87.
[1083] *J.D. and A. v. the United Kingdom* (n 803), *Napotnik v. Romania* (n 814).
[1084] *Schlumpf v. Switzerland* (n 731), para 115.
[1085] *Thlimmenos v. Greece* (n 606), para 42.
[1086] *Cam v. Turkey* (n 114), para 65.
[1087] *D.H. and Others v. the Czech Republic* (n 10), para 182.
[1088] *Ádám and others v. Romania* (n 813), para 87.
[1089] *Taddeucci and McCall v. Italy* (n 642).
[1090] *Komnatskyy v. Ukraine* (n 732), para 21.
[1091] *Price v. the United Kingdom* (n 704), *Blokhin v. Russia* (n 727), *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (n 724), *Muskhadzhiyeva and others v. Belgium* (n 724), and others.
[1092] *Okkali v. Turkey* (n 727), *J.D. and A. v. the United Kingdom* (n 803).
[1093] *J.D. and A. v. the United Kingdom* (n 803), *Price v. the United Kingdom* (n 704), *Blokhin v. Russia* (n 727), *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (n 724).
[1094] Chapter 5, Section 1.1.
[1095] *Bah v. the United Kingdom* (n 999), para 45.
[1096] Ganty (n 997).

have to show that they experienced a disadvantage because of a *prejudicial impact of a measure* linked with the status.[1097] However, the Court typically allows a margin of appreciation to the states in justifying their failure to treat them differently.[1098]

The standard of review is different for certain specifically protected statuses which receive heightened attention. Applicants who claim accommodation because of their *vulnerability*[1099] or on certain *suspect grounds*, such as gender,[1100] have their claims reviewed with more stringency. Establishing the vulnerability of the applicants often creates the presumption of the right to be reasonably accommodated, without the applicant having to bear the burden of proof in showing a prejudicial impact of the relevant measures.[1101] Both vulnerability and suspect grounds are commonly associated with a narrowed margin of appreciation for the state when justifying the failure to reasonably accommodate.[1102]

Both the open and stricter approaches to grounds in reasonable accommodation cases have advantages. The open approach, requiring, under certain conditions, reasonable accommodation on any recognisable status, can help the Court address some systemic inequalities without resorting to group stereotypes. For instance, status as a victim of intimate partner violence[1103] or pregnancy[1104] can become grounds for reasonable accommodation without necessarily associating these situations with womanhood, as has happened in the case law.[1105] However, the link with vulnerability, or with gender as a suspect ground, may, in the relevant cases, justify stricter scrutiny, emphasising the specific importance of redressing replicating inequalities.

[1097] Chapter 5, Section 1.1.
[1098] ibid.
[1099] Chapter 5, Section 2.3.
[1100] ibid.
[1101] ibid.
[1102] ibid.
[1103] *J. D. and A. v. the United Kingdom* (n 803).
[1104] *Napotnik v. Romania* (n 814).
[1105] Chapter 5, Section 2.2.

Nevertheless, while the thesis demonstrated that the Court implicitly requires reasonable accommodation on many protected grounds, reasonable accommodation is rarely mentioned explicitly. The Court uses the term only in certain disability cases, referring to the emerging consensus on the legal standards concerning the equality of persons with disabilities[1106] established by an international treaty, the UN CRPD.[1107] In other cases, reasonable accommodation is merely implied. Many relevant cases are not even assessed under the Convention's right to equality (Article 14 or Article 1 of Protocol no. 12). To be sure, the Court has made clear links between the right to reasonable accommodation and the requirement of differential treatment under the right to equality.[1108] And it has also clarified that the requirement of differential treatment to correct a *factual inequality* mirrors an adjusted assessment of proportionality under other Convention articles.[1109] It has thus been established, through this complicated construction, that the requirement of reasonable accommodation indeed appears implicitly in all these situations and should be protected through the same set of standards.[1110] Nevertheless, the covert approach creates confusion.

Many judgments implicitly concluding that denial of reasonable accommodation *did not* amount to a violation of the Convention do not sufficiently explain why. Assessing the claim under other articles than the right to equality, they do not engage in a grounds analysis.[1111] It is then unclear whether the denial of accommodations was justified because there were no grounds for reasonable accommodation or because the state had a legitimate undue burden defence.[1112] One way to engage with this problem would be for the Court to ensure that all

[1106] *Cam v. Turkey* (n 214), para 64-65, *Enver Şahin v. Turkey* (n 214), paras 59-60, *G. L. v. Italy* (n 797), paras 61- 63.
[1107] See Chapter 3 of Dzehtsiarou (n 787). The treaty was ratified by all Council of Europe member states with the exception of Lichtenstein. United Nations Office of the High Commissioner for Human Rights, 'Ratification of 18 International Human Rights Treaties' < https://indicators.ohchr.org> accessed 5 May 2020.
[1108] *Cam v. Turkey* (n 214), *Enver Şahin v. Turkey* (n 214), *G. L. v. Italy* (n 797).
[1109] *Yordanova v. Bulgaria* (n 771).
[1110] For instance, *Yordanova v. Bulgaria* (n 771), paras 29 and 66.
[1111] See Chapter 4, Sections 1.2. and 2.2.
[1112] ibid.

cases implicitly concerning the right to reasonable accommodation because they require differential treatment to correct a factual inequality are assessed under the right to equality, following the established standards and explicitly engaging with the grounds analysis. The inclination to do that is visible in the latest case law, where the equality aspect of the denial of differential treatment was typically recognised, albeit not always fully analysed.[1113] Still, the Court's approach to grounds in reasonable accommodation cases needs to be clarified.

In response to the second main research question - *how the Court can improve the clarity and foreseeability of its approach to grounds in reasonable accommodation cases* - the thesis demonstrated how the concepts of *vulnerability*, and otherwise defined *constructed and unintended disadvantage*, can be employed to help the Court be more transparent and predictable. Vulnerability and disadvantage can be relied on both within and outside of the Court's equality jurisprudence. The concepts thus allow the Court to develop its reasonable accommodation case law consistently also under other articles of the Convention as it has done until now. And both also logically fit into the developments in defining who should be accommodated, demonstrated in this thesis.

The analysis demonstrated that the Court already defines grounds for reasonable accommodation in *relational* terms, representing characteristics associated with the kind of disadvantage which reasonable accommodation aims to redress.[1114] The requirement of reasonable accommodation arises when there is a prejudicial impact of a measure linked with a protected ground.[1115] Because a protected ground under the Court's ground doctrine can be just about any socially recognisable status,[1116] the prejudicial impact of a measure becomes the decisive qualifier of what constitutes grounds for reasonable accommodation. As shown in the

[1113] Chapter 4, Sections 2.3. and 3.
[1114] Chapter 3, Section 3.
[1115] *Napotnik v. Romania* (n 814) para 75; *Ádám and others v. Romania* (n 813) para 87.
[1116] Chapter 5, Section 1.1.

thesis, this approach is an outcome of decades-long evolution of the Court's tactic in deciding who should be accommodated. The accommodation requirement was first introduced as a differential treatment for people in *significantly different situations*,[1117] later often defined with reference to *factual inequalities* and *vulnerability*.[1118] The latest judgments specified that to establish the requirement of reasonable accommodation, the inequalities must represent a significant disadvantage and be socially constructed, i.e., caused by *a prejudicial impact of measures*.[1119]

The latest standards thus clarify that the Court relies on finding a *constructed disadvantage* as a key factor for deciding when a status becomes grounds for reasonable accommodation. In fact, the thesis shows that the reasonable accommodation requirement was not practically present until the applicants' disadvantages which called for reasonable accommodation were understood as socially constructed.[1120] *Vulnerability* is often used as a shortcut for identifying this constructed disadvantage, raising a presumption of the right to reasonable accommodation and prompting a stricter review.[1121] Moreover, identifying a constructed disadvantage may – as happened in the past[1122] – indicate situations which imply reasonable accommodation even if the case is not assessed under Article 14 or Article 1 of Protocol no. 12. Employing the concepts of constructed disadvantage and vulnerability may thus be consistently used to identify grounds for reasonable accommodation across the Court's case law.

However, the Court also needs to meaningfully limit the reasonable accommodation target group. Such limits cannot be effectively expected from discrimination grounds which are construed very widely and flexibly.[1123] The thesis argued that this aim could be practically

[1117] Chapter 4, Section 1.1.
[1118] Chapter 4, Section 2.2., 2.3.
[1119] Chapter 4, Section 3.
[1120] Chapter 5, Section 2.1.1.
[1121] Chapter 5, Section 2.3.
[1122] For instance, in *Winterstein v. France* (n 772), or *Yordanova v. Bulgaria* (n 771).
[1123] Chapter 5, Section 1.1.

achieved by limiting the reasonable accommodation requirement to those disadvantages and/or vulnerabilities which were *unintended* in that they were an avoidable side-product of otherwise legitimately pursued aims.[1124] If a measure pursues an aim that inevitably and inherently brings disadvantage to a certain group, reasonably accommodating the group would empty the policies of meaning. The real question, then, is about the legitimacy of the policies, not about the possibility of accommodation. Other measures, such as the prohibition of indirect discrimination or the assessment of the proportionality of the interference, are then more appropriate to address the problem.[1125] Illegitimate policies must be repealed, not merely allow for exceptions. Legitimate policies in which a disadvantage is inherent, on the other hand, also justify the disadvantage.

Religious accommodation cases demonstrate the value of this requirement. For example, a ban on religious expressions at the workplace clearly *intends* a disadvantage towards religious practitioners. Requiring reasonable accommodations for these practitioners would challenge the measure as a whole, which is not the role of reasonable accommodation as understood in this thesis. The intention to disadvantage religious practitioners can be challenged on the grounds of discrimination or freedom of religion. But if the measures are upheld as legitimate, this also justifies the disadvantage they inherently bring to religious individuals. Only a disadvantage incurred as an *unintended* outcome of a legitimate policy and not inherent in its execution can be remedied by individual exceptions or modifications without compromising the aims behind them. The requirement of unintended disadvantage thus effectively

[1124] Chapter 3, Section 3.2.2. Kristine Henrard and Tarunabh Khaitan rely on a similar criterion to define grounds for reasonable accommodation: irrelevance for one's functioning in a society [Henrard, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' (n 3) 71] and normative irrelevance [Khaitan (n 19) 56].
[1125] Chapter 3, Sections 2.1.1. and 3.2.2.

distinguishes the specific role of reasonable accommodation from the role of other legal tools addressing similar issues.

The thesis demonstrated how to read this requirement in the Court's case law to practically distinguish reasonable accommodation cases from those that concern indirect discrimination or, for instance, interference with religious freedom. It also showed how to establish meaningful limits to reasonable accommodation.[1126] For example, according to this thesis' framework, a request of a Christian believer to be exempt from the duty to treat same-sex couples equally to others is not a reasonable accommodation request.[1127] The underlying legitimate interest – the dignity and equality of LBGTI people - would be directly compromised had the religious believer been accommodated. In other words, the disadvantage incurred by the religious believers is intended and inherent in the legitimate pursued interest. It can be questioned on the grounds of freedom of religion or indirect discrimination but should not allow for exceptions which directly compromise its legitimate aim.

The requirement of *unintended* disadvantage thus effectively specifies when religion becomes grounds for reasonable accommodation, clarifying which practices should not be exempted from general rules through this specific legal tool.[1128] As the controversies which arose in other jurisdictions in relation to religious-based accommodations with unclearly defined limits may have been a reason why the Court has been avoiding using the same term in its case law,[1129] defining the conditions and limits for the duty in a transparent fashion, as proposed in the thesis, may be a step forward in an explicit acknowledgement of reasonable accommodation in the Court's case law.

[1126] Chapter 5, Section 3.2.2.
[1127] As represented by the cases of Mr McFarlane and Ms Ladele in *Eweida and Others v. the United Kingdom* (n 441).
[1128] Albeit they still may be exempted from them by virtue of freedom of religion, for example.
[1129] Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4) 978.

Defining grounds for reasonable accommodation as the conditions under which the requirement of reasonable accommodation arises bears significant importance for the applicants as well as states parties to the Convention. The implicit presence of reasonable accommodation in the Court's case law has been academically acknowledged but rarely translates into the language with which claims are presented and argued before the Court.[1130] Similarly, comparative research from recent years does not indicate that European jurisdictions would be inclined towards extending reasonable accommodation beyond disability,[1131] despite the requirement being implied in the Court's case law. Without more transparency, the right to reasonable accommodation beyond disability risks remaining hidden, fragmented and thus possibly little helpful for those who should be able to benefit from it.

2. The findings in the context of history and theory of reasonable accommodation

The thesis findings were built on the historical and theoretical analysis of grounds and reasonable accommodation presented in the first two substantive chapters. The second and third chapters thus provided a framework for the doctrinal analysis conducted in the fourth and fifth chapters, whose conclusions were presented above. The second chapter, discussing *what the evolution of reasonable accommodation tells us about its theoretical underpinnings and the selection of its target group*, allowed us to understand whether there were foundational reasons for the failure to legislate reasonable accommodation on all grounds in more jurisdictions. It demonstrated that although the legal practice[1132] and sometimes also academia[1133] supports the narrative of separate aims of disability and religious

[1130] Compare, for instance, *Ádam and others v. Romania* (n 813), *Napotnik v. Romania* (n 814), or *J.D.* and *A. v. the United Kingdom* (n 803).
[1131] European network of legal experts in gender equality and non-discrimination (n 2) 24.
[1132] Chapter 2, Section 2.
[1133] Compare Henrard, 'Duties of Reasonable Accommodation on Grounds of Religion in the Jurisprudence of the European Court of Human Rights: A Tale of (Baby) Steps Forward and Missed Opportunities' (n 4); Alidadi

accommodations, these different forms of reasonable accommodation have common conceptual roots. They expand the prohibition of discrimination to the unintended and preventable disadvantageous impact of social and environmental structures.[1134] The analysis of Canadian and South African practice specifically showed the role and value reasonable accommodation brings when applied to complement the prohibition of discrimination on all grounds.[1135]

In response to the second research sub-question, the third chapter *outlined the role of reasonable accommodation in equality law and theoretically defined its target group accordingly*. It specified when the requirement of reasonable accommodation is implied in other legal concepts to provide a framework for analysis of the Court's case law. The conclusion was that reasonable accommodation safeguards the right to substantive equality by redressing the unintended negative impact of social and environmental structures. Other legal concepts - direct and indirect discrimination or the proportionality requirement – sometimes follow the same aim. To the extent that this is the case, reasonable accommodation may be implied in them. Nevertheless, the chapter also explained that the overlaps do not make reasonable accommodation as an independent right redundant. If legislated independently or at least explicitly used in relevant legal standards, it makes for a more accessible individual remedy against non-inclusive structures.

Having concluded that reasonable accommodation is inherent in the right to equality implies that it should indeed apply on all protected discrimination grounds.[1136] The chapter outlined the principles for deciding on what grounds reasonable accommodation should apply, including the determination of analogous grounds. It explained that the most practical approach in

(n 25); Stein, 'Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination' (n 14); Mégret and Msipa (n 59).

[1134] Chapter 2, Sections 1.1. and 3.

[1135] Chapter 2, Section 3.

[1136] Khaitan (n 19) 77; Howard (n 3).

reasonable accommodation cases is defining grounds in *relational*, disadvantage-oriented terms.[1137] Grounds should represent recognisable characteristics,[1138] which are in the given context associated with an *unintended*, constructed disadvantage. *Constructed* disadvantage represents situations which are remediable by reasonable accommodation. This aspect reminds us that the relevant disadvantage occurs through an interaction of the individual's characteristics with structures created according to a different, dominant norm. The chapter noted that a specific understanding of *vulnerability* as a legal concept might encapsulate the same principles and thus establish grounds for reasonable accommodation.[1139] *Unintended* disadvantage distinguishes situations which call for reasonable accommodation from those which require a different intervention, such as dismantling the rules as illegitimate per se. This aspect also sets limits for reasonable accommodation because it clarifies that a disadvantage will not give grounds for reasonable accommodation if it is an intended outcome of a legitimately pursued policy or inherent in it. In such a case, the individual cannot claim a legitimate interest to maintain their difference without incurring a disadvantage. If, on the other hand, the pursued policy cannot be considered legitimate, reasonable accommodation will not be a sufficient remedy. Only an *unintended* disadvantage thus establishes grounds for reasonable accommodation.

Both factors – the *constructed* and *unintended* nature of the disadvantage, which builds grounds for reasonable accommodation – are also interpretative in that they explain why an individual should be accommodated. Understanding that a characteristic is protected because it associates with a socially constructed disadvantage helps explain why such inequality is not a natural consequence of their difference but a result of non-inclusive structures and, therefore, a concern for justice. And analysing whether the state had a legitimate interest in requiring the individual

[1137] Chapter 3, Section 3.1.
[1138] Which is the basic requirement of discrimination grounds. See, for instance, Foran (n 453).
[1139] Chapter 3, Section 3.2.1.

to bear the disadvantage alone or it was merely an unintended and preventable outcome of otherwise legitimate structures clarifies why reasonable accommodation and not other legal tools should come into play. The theory of reasonable accommodation allowed us to determine which Court's cases *de facto* concern reasonable accommodation despite the lack of explicit mention of the concept. It also provided a framework for critically analysing the Court's approach to reasonable accommodation grounds whose conclusions were presented above.

3. The implications for the Court's case law and national jurisdictions

The thesis' findings confirm that individuals under the Convention's jurisdiction are entitled to reasonable accommodations on many grounds, including gender, religion, sexual orientation, age, and others. The recommendations of the Council of Europe Commissioner for Human Rights[1140] or Equinet,[1141] proposing the extension of the right to reasonable accommodation to all typically protected discrimination grounds, have thus partially found reflection in the Court's case law. Applicants can successfully turn to the Court complaining that they were discriminated by being denied reasonable accommodations if they show that they experienced a prejudicial impact of social or environmental structures because of their status. Those who were in a situation of *vulnerability*, or raised the claim on a suspect ground, may not even have to show such a disadvantageous impact to be able to claim the right to accommodations. They should also have their claims examined with more stringency.

The conclusions are significant for those turning to the Court with their cases and for the states bound by the Convention. States in relation to whom the Court found a violation for failure to provide reasonable accommodations need to implement a corresponding solution in their legal

[1140] (n 3) 12.
[1141] (n 3) 8.

system. But beyond the individual cases, the Court's debated (quasi)constitutional function[1142] lends its jurisprudence a great influence over all Council of Europe jurisdictions[1143] whose courts often rely on its case law to interpret the Convention rights invoked at the domestic level. [1144] A number of European jurisdictions should thus be compelled to introduce reasonable accommodation beyond disability also domestically, either implicitly, as it is currently inferred in the Court's case law, or explicitly.

This thesis argued that it is preferable to legislate the right to reasonable accommodation openly. An explicit, independent right offers a more readily available individual remedy than other concepts within which it may be implied.[1145] But even if states refuse explicit incorporation of reasonable accommodation on all protected grounds, this thesis' theoretical framework explains that similarly as under the Convention, reasonable accommodation requirement may be read into the right to equality in their jurisdiction. The theoretical conclusions of this thesis are thus also relevant for European national jurisdictions. The theoretical framework may usefully assist in determining when, why, and for whom the requirement of reasonable accommodation arises. Explaining that it remedies a constructed and unintended disadvantage may help justify the existence of an extended right to reasonable accommodation as an inherent part of the right to equality also in those legal systems.

[1142] S Greer and L Wildhaber, 'Revisiting the Debate about "constitutionalising" the European Court of Human Rights' (2012) 12 Human Rights Law Review 655; Ulfstein (n 7); Wojciech Sadurski, 'Quasi-Constitutional Court of Human Rights for Europe? Comments on Geir Ulfstein' (2021) 10 Global Constitutionalism 175.
[1143] de Londras (n 6).
[1144] Keller and Stone Sweet (n 7).
[1145] See Chapter 3, Section 2.2. Henrard, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' (n 3) 69.

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