

Equality in Immigration Law: An Impossible Quest?

Jean-Baptiste Farcy*

ABSTRACT

The aim of this article is to discuss why the principle of equality and non-discrimination, although foundational to international human rights law, remains an unfulfilled promise in the context of immigration. Nationality is now widely considered as a suspect ground of discrimination, yet contemporary immigration and citizenship laws increasingly use meritocratic criteria to distinguish among migrants. Although framed in universal terms, these criteria create differences of treatment among migrants based on their income, level of education and economic worth. However, from a legal perspective such differences of treatment rarely amount to prohibited discrimination. Looking at the case law of the European Court of Human Rights, this article argues that the normative content of the equality and non-discrimination principle fails to challenge such differences of treatment. Moreover, the proportionality test is used as a judicial restraint mechanism which prevents the effective enforcement of the equality requirement by international and domestic courts in the context of immigration.

KEYWORDS: human rights, equality, non-discrimination, migrants, immigration law, European Court of Human Rights

1. INTRODUCTION

This article started from an interrogation: although the principle of equality is enshrined in many international human rights instruments, how does it remain to a large extent an unfulfilled promise in the field of immigration? Inequalities have long existed between citizens and non-citizens but, more importantly for the purposes of this article, among immigrants themselves.¹ Based on their immigration status, immigrants are treated differently for destination countries aim to attract and retain certain categories of immigrants, while excluding others. However, preferences and exclusions in immigration and citizenship laws are rarely found to be discriminatory in law.

* European Law and Migration Team (EDEM), UCLouvain, Belgium (jean-baptiste.farcy@uclouvain.be).

1 Ellermann and Goenaga, 'Discrimination and Policies of Immigrant Selection in Liberal States' (2019) 47 *Politics & Society* 87.

As discussed in this article, there seems to be an irreconcilable opposition between immigration law and equality law. On the one hand, due to the exclusionary nature of immigration law, equality is not a central concern in national immigration policies, if at all. On the other hand, the principle of equality is significantly restricted in the field of immigration. An often-quoted provision is Article 1(2) of the International Convention on the Elimination of All Forms of Racial Discrimination² according to which the Convention does 'not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.' Under European Union (EU) law, the Race Equality Directive similarly states that it does not cover 'difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned'.³ Under these instruments, nationality does not constitute a ground of racial discrimination, which is a significant limitation to their scope since nationality may be used as a proxy for racial differences of treatment. The European Court of Human Rights (ECtHR) nonetheless considers nationality as a suspect ground of differentiation. According to the Court in *Gaygusuz* of 1996, differences of treatment based on nationality will only be upheld if 'very weighty reasons' are put forward.⁴

As will be discussed below, nationality has increasingly been replaced by facially neutral meritocratic or income-related criteria and, as a consequence, *Gaygusuz* has lost most of its relevance. Differences of treatment among third-country nationals based on their immigration status or between regular and irregular migrants fall beyond the scope of that case. In fact, although it is widely considered as a landmark case, *Gaygusuz* has not led to a significant case law nor has it served to extend the equality requirement between nationals and non-nationals or between third-country nationals.⁵

The tension between the equality requirement grounded in international human rights law and the sovereign right of States to control the entry and stay of non-nationals under international law is at the core of this article. It aims to give explanations as to why liberal legal systems do not provide for greater equality between nationals and non-nationals, but more importantly among immigrants themselves. The article argues that the reason is to be found not only in the sovereign right of States but also in flaws in the

2 1965, 660 UNTS 195. See generally, Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (2016) at 158. The author nonetheless considers that a reading of that provision that rules out from the Convention any concern with non-citizens could be classified in the terms of the Vienna Convention on the Law of Treaties 1965, 1155 UNTS 331, as a 'manifestly absurd or unreasonable' reading of the Convention, and as not corresponding to its object and purpose.

3 Article 3(2) Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2002] OJ L 180/22.

4 *Gaygusuz v Austria* Application No 17371/90, Merits and Just Satisfaction, 23 May 1996 at para 42. See also *Karakurt v Austria* (965/2000), Views, CCPR/C/74/D/965/2000.

5 Dembour, 'Gaygusuz Revisited: The Limits of the European Court of Human Rights' Equality Agenda' (2012) 12 *Human Rights Law Review* 689. Reasons may be found in the circumstances of the case which concerned an allegation of direct discrimination based on nationality in the field of contributory social security benefits, which at the time of the ruling had already become exceptional. Following case law includes: *Koua Poirrez v France* Application No 40892/98, Merits and Just Satisfaction, 30 September 2003, and *Saidoun v Greece* Application No 40083/07, Merits and Just Satisfaction, 28 October 2010 (in French only).

legal transposition and judicial enforcement of the equality principle. Although States enjoy a wide discretion in the regulation of immigration, their sovereign right over immigration is not unfettered and immigration policies are not immune to the principle of equality. The ambition of the article is yet to explain why the right to equality and non-discrimination as construed in international law fails to challenge differences of treatment created by contemporary immigration and citizenship laws.

The article starts with a discussion about the exclusionary nature of immigration law. Through legal categorisation, immigration law produces inequalities and exclusions. [Section 2](#) argues that although overtly discriminatory policies using nationality as a selection criterion have progressively been replaced by universal policies, immigration law has never truly abandoned its exclusionary character. However, international human rights law has not proven to be an effective tool to foster equality in the field of immigration and to challenge the power of States to differentiate among immigrants. In [Section 3](#) and [Section 4](#), explanations as to why the promise of equality remains unfulfilled in this field are provided. For the purposes of this article, the case law of the ECtHR is used as a reference point. It is argued that legal factors and legal technicalities explain the limited number of verdicts of discrimination. On the one hand, the normative content of equality in liberal societies is limited and, on the other hand, judicial scrutiny, and the proportionality test in particular, suffers from a number of weaknesses. For these reasons, successful challenges of immigration policies on the ground of non-discrimination before judicial bodies are surprisingly few.

2. THE SELECTIVE NATURE OF IMMIGRATION LAW

Under international law, immigration is usually considered as a core power of States. As the European Court of Human Rights repeatedly puts it, the right of States to control the entry, the stay and the expulsion of non-nationals into their territory is ‘a matter of well-established international law’.⁶ That right is only limited by relevant treaty provisions, such as the 1951 Geneva Convention relating to the status of refugees,⁷ the ratification of which is an act of sovereignty in itself. With that limitation in mind, States adopt immigration laws and policies that define who is allowed to enter their territory, for how long and under what status.

In order to regulate immigration according to their own policy objectives, destination countries create legally-defined categories of immigrants. To be sure, the use of legal categories is not specific to immigration law but is arguably inherent to law. In order to grasp human activities and social realities, laws create much needed categories. Contract law, corporate law or tax law also rely on categories that are legally constructed. For instance, tax regimes differ from one revenue to another, although these are all incomes irrespective of their source. The same goes for immigration law. Distinctions are made between different categories of immigrants based usually on their motivations and purposes of entry and stay. For instance, Article 1 of the 1951 Geneva Convention

6 The prominence given by the Court to the principle of States’ sovereignty has led to what Dembour calls the ‘Strasbourg Reversal’. Accordingly, in the immigration context, Convention rights are relegated to the status of exceptions: see Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (2015) at 119.

7 1951, 189 UNTS 137.

relating to the status of refugees defines who is a refugee for the purposes of the Convention. In order to provide international protection to those in need, the drafters of the Convention had to define who qualifies as a refugee. Legally speaking not everyone at risk of persecution is a refugee. Most notably, under the Geneva Convention, fears of persecution resulting from economic or climatic conditions are not included.⁸ Although famines and natural disasters can be a source of persecution, these are not legally valid grounds to seek asylum. For a particular legal regime to be applicable, laws need to define to whom or to what activity it applies to.

The primary function of legal categories in immigration law is to distinguish among immigrants those who are allowed to enter and remain on their territory. Yet, in doing so, immigration laws block migratory movements which are considered illegitimate. Those that are deemed unwanted or undesirable because they do not fit within pre-defined legal categories are left with the scarce choices of either immobility or irregular immigration.⁹ As Spijkerboer rightly pointed out, law is part of the construction of a global mobility infrastructure to which access is not equal for all.¹⁰ While some people are enabled to move across borders with 'high speed, low risk and at low cost', others face ever increasing obstacles. Legal instruments such as visa liberalisation programmes, entry schemes for highly skilled workers and free trade agreements aim to facilitate the mobility of some. Others are facing a different set of laws, including visa and border policies used to prevent irregular movements or to protect the local labour force. These regulations are enforced by public and private agencies whose mission is to protect borders and societies therein from 'undesired' entries. As Bauman argued at the turn of the millennium, access to international mobility has become the main stratifying factor of our late modern or postmodern time.¹¹

Legal categories also produce hierarchies among immigrants. According to States' immigration strategies and policy objectives, legally constructed categories of immigrants are subject to different rights regime.¹² Depending on their status, immigrants have a differentiated access to the labour market, health care, permanent residency and some are also obliged to meet integration requirements. Non-compliance with mandatory integration programmes can be sanctioned by restricted access to social rights. Integration measures then become, paradoxically, instruments of exclusion.¹³

8 Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (2007); Akoka, 'Réfugiés ou migrants? Les enjeux politiques d'une distinction juridique' (2018) 25 *Nouvelle revue de psychosociologie* 15.

9 Schewel, 'Understanding Imobility: Moving Beyond the Mobility Bias in Migration Studies' (2019) *International Migration Review* 1. The word *irregular* immigration is used here for it shows that it is a legal construction: movements are irregular because legal provisions decided so.

10 Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control' (2018) 20 *European Journal of Migration and Law* 452 at 455; De Haas, Natter and Vezzoli, 'Growing Restrictiveness or Changing Selection? The Nature and Evolution of Migration Policies' (2016) 52 *International Migration Review* 1.

11 Bauman, *Globalization: The Human Consequences* (1998).

12 Anderson, *Us and Them? The Dangerous Politics of Immigration Control* (2013); Mourao Permoser, 'Redefining Membership: Restrictive rights and categorization in European Union migration policy' (2017) 43 *Journal of Ethnic and Migration Studies* 2536.

13 De Vries, 'The Integration Exception: A New Limit to Social Rights of Third-Country Nationals in European Union Law?' in Thym (ed.), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (2017) 267; des Places, 'The Integrated Person in EU Law' in Azoulay, Barbou des Places and Pataut

The resulting 'civic stratification' produces inequalities, exclusions and legal precariousness.¹⁴ For instance, the construction of temporary migration is associated with rights differentiation and the exclusion of low-skilled workers in particular.¹⁵ On the other end of the spectrum, the preference for highly skilled migrants in many industrialised countries has led to the adoption of more favourable provisions aimed at attracting and retaining 'talents'.¹⁶ Therefore, in order to meet public policy objectives, destination countries construct layers of status based on migrants' administrative status. Through the politics of categorisation, they create differences of treatment and exclusions.

It follows that in its very existence, or *raison d'être*, immigration law is exclusionary.¹⁷ As long as immigration laws are adopted and border controls are enforced, distinctions among would-be immigrants and lawfully residing immigrants will be in place. Through the inclusion of some, whose mobility is considered legitimate or desirable, all others are automatically excluded.

3. FROM ORIGIN TO MERIT-BASED SELECTION: FROM DIRECT TO INDIRECT DISCRIMINATION

Following the decolonisation movement and the progressive recognition of fundamental rights, the end of racial discrimination has taken central stage and the international community became increasingly intolerant of discrimination on the ground of nationality which was used as a proxy for racial or ethnic discrimination. In line with the liberal mantra, individuals are to be treated equally wherever they come from or whatever the colour of their skin. The impetus to end racial discrimination has led to changes in immigration laws. Previous immigration systems using nationality as the main selection criteria have progressively been replaced by non-discriminatory and universal policies.¹⁸ This evolution away from origin-based selection is most evident in settler societies such as Canada where the introduction of a point-based system in 1967 to assess candidates was meant to break away from previous discriminatory practices.¹⁹ Under a point-based system, candidates are selected according to universal and merit-based criteria. In European countries as well, where most guestworkers programmes

(eds), *Constructing the Person in EU Law: Rights, Roles, Identities* (2016) 179 at 197; Bonjour and Duyvendak, 'The "migrant with poor prospects": Racialised intersections of class and culture in Dutch civic integration debates' (2018) 41 *Ethnic and Racial Studies* 882.

- 14 Morris, *Managing Migration: Civic Stratification and Migrants' Rights* (2003); Goldring and Landolt, 'The Conditionality of Legal Status and Rights: Conceptualising Precarious Non-Citizenship in Canada' in Goldring and Landolt (eds), *Producing and Negotiating Non-Citizenship: Precarious Legal Status in Canada* (2013) 3.
- 15 Dauvergne and Marsden, 'The Ideology of Temporary Labour Migration in the Post-Global Era' (2014) 18 *Citizenship Studies* 224; Marsden, *Enforcing Exclusion: Precarious Migrants and the Law in Canada* (2018).
- 16 Shachar, 'Selecting by Merit: The Brave New World of Stratified Mobility' in Fine and Ypi (eds), *Migration in Political Theory: The Ethics of Movement and Membership* (2016) 175; Ellermann, 'Human-capital citizenship and the changing logic of immigrant admissions' (2020) 46 *Journal of Ethnic and Migration Studies* 2515; Menz, *The Political Economy of Managed Migration: Nonstate Actors, Europeanization, and the Politics of Designing Migration Policies* (2009).
- 17 Carlier, 'Les leçons inaugurales 2011: Stranger in the Night of Law' [2011] *Revue de la faculté de droit de l'Université de Liège* 251.
- 18 Joppke, *Selecting by Origin: Ethnic Migration in the Liberal State* (2005).
- 19 Kelley and Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy*, 2nd edn (2010) at 357.

were based on bilateral agreements, universal and meritocratic criteria are now in use. With the notable exception of visa policies, contemporary liberal immigration and citizenship laws no longer use nationality as a ground to distinguish among foreigners but rather use criteria such as education, income and skills. Contrary to collective and ascriptive characteristics, such as nationality which is akin to a 'birthright lottery',²⁰ meritocratic criteria are considered universal and non-discriminatory since individuals from any country in the world can apply.

Immigration is no longer a matter of origin but of human capital. Migrants are increasingly selected based on their individual merit and their expected economic contribution. This is first and foremost true for labour immigration. Industrialised countries that are supposedly competing to attract and retain a limited pool of qualified workers commonly use qualifications and skills as criteria to select labour immigrants. Accordingly, admission is facilitated for those qualified with a university degree and they are granted a more favourable status upon entry in the destination country, most notably in terms of security of residence, labour mobility and family reunification rights. Skills are also used to distinguish labour immigrants along the temporary continuum.²¹ Immigration laws thus produce differences of treatment among labour migrants based on their skill level, although they are arguably all in a similar situation since they are moving across borders in order to work. The economisation of immigration does not only concern economic entry streams. In recent years socio-economic criteria have been applied to family immigration as well.²² The right to family reunification, although couched as an individual right, is increasingly put under strain. Under EU law, for instance, Directive 2003/86 on the right to family reunification sets several conditions to family members who wish to exercise this right.²³ For their family members to join them, sponsors must show evidence of stable, regular and sufficient resources to maintain themselves and their family members. Moreover, their place of residence must be large enough to host them all. Regarding short-term visa policy, conditions imposed upon visa issuance are also closely related to income.²⁴ Applicants must provide evidence that they have sufficient means of subsistence and consulate agents must be satisfied that the applicant does not pose a risk of illegal immigration. It follows that socio-economic criteria have largely replaced origin-related ones which were regarded as discriminatory. Even for EU citizens who enjoy a right to free movement, restrictions are placed on economically inactive people who do not have sufficient resources.²⁵

20 Shachar, *The birthright lottery: Citizenship and global inequality* (2009).

21 Rajkumar et al., 'At the temporary-permanent divide: How Canada produces temporariness and makes citizens through its security, work, and settlement policies' (2012) 16 *Citizenship Studies* 483.

22 Kofman, 'Family Migration as a Class Matter' (2018) 56 *International Migration* 33; Ellermann, supra n 16 at 2521; Block, 'Regulating Membership: Explaining Restriction and Stratification of Family Migration in Europe' (2015) 36 *Journal of Family Issues* 1433 at 1442; Ganty, 'La situation socio-économique des couples mixtes et étrangers en Belgique: un obstacle dans le parcours migratoire' (2015) 85 *Revue de l'Institut de Sociologie* 85.

23 EU Directive 2003/86/EC on the right to family reunification [2003] OJ L 251/12.

24 Article 14 Regulation No 810/2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L 243/1. See also den Heijer, 'Visas and Non-discrimination' (2018) 20 *European Journal of Migration and Law* 470. Looking at the EU visa policy, the author argues that visa waivers are only granted to countries which have become economically interesting enough for the EU, thus perpetuating global economic inequalities.

25 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member

As for third-country nationals, the mobility of EU citizens is subject to economic conditions and a difference of treatment is created between them based on their income.

As opposed to origin-related criteria, socio-economic ones are based on individual rather than collective characteristics, and they are facially neutral since they apply to everyone irrespective of their origin. Accordingly they are considered less objectionable from a liberal point of view.²⁶ This is not to say that differences of treatment based on national or ethnic origin have disappeared from immigration policy, simply they take place in a different manner. The use of socio-economic criteria means that differences of treatment are now based on class, skills and education. Higher-income families can more easily be reunited than lower-income families. Not only can they be reunited more easily, higher-income families also have the means to send their children to university which could ultimately open them the doors of labour immigration. However, selection based on class is indirectly related to gender and ethnic origin. Previous researches have shown that so-called meritocratic admission policies continue to create hierarchies among migrants along non-meritocratic attributes such as gender, ethnicity and nationality.²⁷ For instance, preferences for highly-skilled workers negatively impact women since their socio-economic position is lower worldwide. Income conditions imposed on family reunification are mostly detrimental to low-skilled workers and citizens from the global South.²⁸ People from poorer countries also have fewer opportunities to migrate as labour migrants since they are less likely to have the qualifications required. Despite the use of facially neutral selection criteria, admission policies and citizenship laws are still, as Ellermann noted, closely mapped on to social group membership.²⁹ The situation remains that the majority of global South citizens are unable to access the global mobility infrastructure.³⁰

The fact that immigration laws and policies are worded in seemingly neutral terms does not prevent differences of treatment in practice since the effects of these laws are not equally distributed. Although ethnicity is now subordinate to other considerations such as skills or education, patterns of racial and intersectional exclusions remain. However, differences of treatment based on meritocratic criteria are rarely found to be

States amending Regulation (EEC) No 1612/68 and repealing Articles 7(1)(b), 14(2) and 24(2) of Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.

26 Joppke, *supra* n 18 at 223.

27 Abu-Laban and Gabriel, *Selling diversity immigration, multiculturalism, employment equity, and globalization* (2002); Kofman, 'Towards a Gendered Evaluation of (Highly) Skilled Immigration Policies in Europe' (2014) 52 *International Migration* 116; Cerna and Czaika, 'European Policies to Attract Talent: The Crisis and Highly Skilled Migration Policy Changes' in Triandafyllidou and Isaakyan (eds), *High-Skill Migration and Recession: Gendered Perspectives* (2016) 22; Boucher, *Gender, migration and the global race for talent* (2016); Ellermann and Goenaga, *supra* n 1; Bonjour and Chauvin, 'Social Class, Migration Policy and Migrant Strategies: An Introduction' (2018) 56 *International Migration* 5; Kriegbaum Jensen and Neilsen, 'Roadblocks to Citizenship: Selection Effects of Restrictive Naturalisation Rules' (2019) 45 *Journal of Ethnic and Migration Studies* (online).

28 Data from Belgium show that since the last reform of 2011 imposing economic criteria on family reunification, beneficiaries from Morocco have shrunk. According to data published by the Immigration Office, 7,816 Moroccans were admitted to Belgium in 2010, under family reunification, they were 3,433 in 2017.

29 Ellermann, 'Discrimination in migration and citizenship' (2020) 46 *Journal of Ethnic and Migration Studies* 2463.

30 Spijkerboer, *supra* n 10 at 458.

discriminatory. Looking at the normative content as well as the judicial enforcement of the equality principle, explanations are put forward in the rest of the article.

4. THE NORMATIVE CONTENT OF THE EQUALITY PRINCIPLE AND ITS LIMITS

The requirement of equality and non-discrimination has been at the centre of international human rights law since its origins. Human rights are based on the idea that individuals equally enjoy inalienable rights. Given the universal promise of human rights, the requirement of equality is unsurprisingly found in all core international human rights instruments. Equal treatment provisions usually relate to the substantive rights of these instruments, that is, equality must be guaranteed in the enjoyment of the rights set forth. Yet, the International Covenant on Civil and Political Rights (ICCPR)³¹ also contains an independent provision. The non-discrimination requirement enshrined in Article 26 of the ICCPR is not limited to the rights provided for in the Covenant. As the Human Rights Committee stated, it ‘prohibits discrimination in law and in fact in any field regulated and protected by public authorities.’³² Under that provision, the principle of equality is an autonomous right which can be enforced on its own. Under the European Convention on Human Rights,³³ although Article 14 on the prohibition of discrimination refers to the enjoyment of the rights and freedoms set forth in the Convention, the ECtHR ruled that its application does not presuppose the violation of a substantive right. To that extent it has an autonomous meaning. Additionally, Protocol No 12 to the European Convention on Human Rights provides for a general prohibition of discrimination, yet less than half of all Contracting Parties have ratified that Protocol.

Despite the centrality of the equality principle under international human rights law, the content of the equality requirement is not uncontested. What does equality require is subject to competing views and understandings. Before turning to the substance of the equality principle, I examine its breadth and question whether meritocratic criteria can be considered as prohibited grounds of discrimination.

A. The Uncertain Scope of Equality: Not Every Distinction is Discriminatory

Under international human rights instruments, prohibited grounds of discrimination are identified. Characteristics which ought to be protected against discrimination are legally defined which means that not every distinction is necessarily discriminatory.³⁴ Pursuant to Article 26 of the ICCPR, differences of treatment based on one of the following grounds are prohibited: ‘race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’. Article 14 of the European Convention on Human Rights contains a similar non-exhaustive list. The open-ended list of prohibited grounds of discrimination accounts for the relational and evolving nature of discrimination law: the type of distinctions that ought to be

31 1966, 999 UNTS 171.

32 Human Rights Committee, CCPR General Comment No 18: Non-discrimination, 10 November 1989, at 12.

33 European Convention on Fundamental Rights and Freedoms 1950, ETS 5.

34 Solanke, *Discrimination as Stigma: A Theory of Anti-discrimination Law* (2017). The author discusses whether stigma may provide the theoretical basis for understanding which characteristics deserve protection, in line with the purposes of anti-discrimination law.

considered illegitimate depends on the political and social context.³⁵ The drafters of these instruments have left the list of prohibited grounds of discrimination open for judges to extend where appropriate. Other grounds such as the place of birth, poverty, pregnancy, sexual orientation or immigration status could thus be added. Nonetheless, as will be explained below, not all grounds of discrimination are equal since the level of judicial scrutiny is lower in cases of alleged discrimination based on an ‘other status’.

As discussed above, in contemporary immigration policies differences of treatment most often derive from criteria such as wealth, education or skills, which are not spelled out in equality provisions contained in international human rights instruments. Although the list of prohibited grounds of discrimination found in the ICCPR or the ECHR is non-exhaustive, differences of treatment based on wealth, education or skills are usually considered as unproblematic in liberal legal systems.³⁶ Such differences of treatment do not fit well within the liberal definition of non-discrimination. The list of prohibited grounds of discrimination found in international human rights instruments supports the idea that differences of treatment cannot rest on immutable attributes deriving from the lottery of birth, such as ethnicity, gender, sexual orientation, disability or nationality, or core personal choices that ought to be respected, including political opinion or religion. The ECtHR invariably rules that only ‘differences based on an identifiable, objective or personal characteristic, or “status”, by which persons or groups of persons are distinguishable from one another are capable of amounting to discrimination’ for the purposes of the Convention.³⁷ Regarding immigration status, the ECtHR held that the fact that it is a status conferred by law, rather than one which is inherent to the individual, does not preclude it from amounting to an ‘other status’ for the purposes of Article 14 of the Convention.³⁸ Scholars have however shown that the case-law of the Court remains in flux as to whether non-personal characteristics fall within the scope of that provision.³⁹ It is therefore uncertain whether education, skills or wealth could be included. As opposed to ethnicity, nationality, or immigration status, meritocratic criteria are commonly viewed as a matter of personal autonomy and efforts.

This leads to the relational position of equality with other values. Equality is an important one but so is individual freedom. In liberal democracies, individuals ought

35 For instance, sexual orientation was not considered as a ground of discrimination at the time of the adoption of international human rights instruments. The ECtHR has however repeatedly held that, just like differences based on sex, differences based on sexual orientation require particularly convincing and weighty reasons by way of justification. See, for instance: *X. and Others v Austria* Application No 19010/07, Merits and Just Satisfaction, 19 February 2013 at para 99 [GC].

36 On the case of poverty as a ground of discrimination, see Atrey, ‘The Intersectional Case of Poverty in Discrimination Law’ (2018) 18 *Human Rights Law Review* 411.

37 *Clift v United Kingdom* Application No 7205/07, Merits and Just Satisfaction, 13 July 2010 at para 55; *Carson and Others v United Kingdom* Application No 42184/05, Merits, 16 March 2010 at para 61 [GC]; *Kjeldsen, Busk Madsen and Pedersen v Denmark* Applications Nos No 5095/71, 5920/72 and 5926/72, Merits, 7 December 1976 at para 56.

38 *Hode and Abdi v United Kingdom* Application No 22341/09, Merits and Just Satisfaction, 6 November 2012 at para 47; *Bah v United Kingdom* Application No 56328/07, Merits and Just Satisfaction, 29 September 2011 at para 46.

39 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; Gerards, ‘The Discrimination Grounds of Article 14 of the European Convention on Human Rights’ (2013) 13 *Human Rights Law Review* 99.

to be free to live the life they aspire to and to make deliberate choices for themselves. Non-discrimination is thus central to liberalism for it urges the removal of hindrances to free choice. As Khaitan argued, 'it is freedom rather than equality which provides a better foundation for discrimination law'.⁴⁰ Accordingly, the requirement of non-discrimination as embodied in international human rights instruments aims to ensure that individuals are equally free to choose and to act. Human rights do not however purport an egalitarian agenda. Associated with global sufficiency rather than distributive justice, it is argued that human rights only intend to offer minimum standards or a common set of 'capabilities', irrespective of the inequality gap.⁴¹ Interestingly, the legal principle of equality and non-discrimination is designed as a means to an end (individual freedom) rather than as an end in itself.

Equality being understood in that way, differences of treatment based on meritocratic criteria are less problematic. Merit is related to choices, agency and personal autonomy and, as such, it embodies individual freedom which, alongside equality, is an important value in liberal societies. The market is also considered as neutral and rewarding deserving people. Discrimination law thus fails to account for structural inequalities behind poverty and the associated deprivation of education and economic exclusion. Indeed, the liberal principle of equality does not challenge the unequal distribution of wealth and resources, not even within nation-states, let alone on a global level.⁴² Within that understanding, anti-discrimination does not conflict with, but instead supports individual freedoms.⁴³ Conflict only arises if a substantial conception of equality, such as equality of outcome, is adopted.

B. The Different Dimensions of Equality: How Far Does Equality Go?

Equality is a multipronged concept. Different understandings ranging from formal equality to equality of opportunities and equality of results are possible. Therefore, different dimensions of the equality and non-discrimination principle can be distinguished. The traditional division has been between direct and indirect discrimination, although it is increasingly blurred.⁴⁴ Laws and practices that openly differentiate between two similarly situated groups or individuals on the basis of a prohibited ground are referred to as direct discrimination.⁴⁵ Discrimination may also result from general and abstract rules which do not *prima facie* create differences of treatment. Although

40 Khaitan, *A Theory of Discrimination Law* (2015) at 113. See also Moreau, 'In Defense of a Liberty-based Account of Discrimination' in Hellman and Moreau (eds), *Philosophical Foundations of Discrimination Law* (2013) 71.

41 Moyn, *Not Enough: Human Rights in an Unequal World* (2018); Moyn, 'A Powerless Companion: Human Rights in the Age of Neoliberalism' (2014) 77 *Law and Contemporary Problems* 147 at 161.

42 International rules themselves foster global inequalities and international human rights norms have done little to offset this reality: see Linarelli, Salomon and Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (2018). See also Pogge, 'Recognised and Violated by International Law: The Human Rights of the Global Poor' (2005) 18 *Leiden Journal of International Law* 717.

43 Cartabia, 'The European Court of Human Rights: Judging Non-discrimination' (2011) 9 *International Journal of Constitutional Law* 808 at 810; Khaitan, *supra* n 40.

44 Fredman, 'Direct and Indirect Discrimination: Is There Still a Divide?' in Collins and Khaitan (eds), *Foundations of Indirect Discrimination Law* (2018) 31.

45 For a recent example of direct discrimination based on nationality, see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v UAE) Provisional Measures*, Order, ICJ Reports 2018, 47. Relying on the Convention on the Elimination of All Forms of Racial Discrimination 1965,

they apply to everyone irrespective of their origin or personal attributes, general rules may have indirect discriminatory effects in practice. Going beyond the promise of formal equality, the prohibition of indirect discrimination rests on the assumption that facially neutral rules may privilege certain groups over others due to existing social divisions.⁴⁶ The aim is to overcome inequalities resulting from socio-economic realities. As a result, provisions using neutral criteria are not immune since they may have a discriminatory impact, even in the absence of any intention to discriminate.

Through the use of meritocratic criteria immigration laws and policies arguably provide for procedural fairness and formal equality. Such criteria are facially neutral and universal. It can hardly be argued that they directly discriminate unless skills or qualifications are considered as prohibited grounds of differentiation which, for the reasons given above, is unlikely. A case for indirect discrimination could nonetheless be made since meritocratic criteria indirectly relate to ethnic origin or gender, also as discussed above. In practice, however, the concept of indirect discrimination is difficult to apply for evidence must be found that a rule disproportionately affects individuals based on a prohibited ground of discrimination. Moreover, the concept of indirect discrimination remains relatively new in the case law of the ECtHR,⁴⁷ and it is treated with greater wariness than direct discrimination.⁴⁸

660 UNTS 195, the Court awarded provisional relief to Qatar regarding the threatened collective expulsion of its nationals from United Arab Emirates. See also C-54/07 *Feryn* 10 July 2008.

46 Schiek, 'Indirect Discrimination' in Schiek, Waddington and Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (2007) 327.

47 In *D.H. and Others v The Czech Republic* Application No 57325/00, Merits and Just Satisfaction, 13 November 2007, the Grand Chamber of the ECtHR found for the first time that a treatment was indirectly discriminatory. In comparison, the Court of Justice of the European Union has been using the concept of indirect discrimination on the grounds of nationality for much longer, notably in the area of free movement of workers. According to the Court, the rules regarding equality of treatment 'forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result': see C-152/73 *Sotgiu* 12 February 1974 at para 11; C-237/94 *O'Flynn* 23 May 1996 at para 17. See Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law* (2005). The concept of indirect discrimination is now enshrined in EU legislation: see Article 2(2) Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2002] OJ L 180/22 provides: '[I]ndirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.

48 Collins and Khaitan, 'Indirect Discrimination Law: Controversies and Critical Questions' in Collins and Khaitan (eds), *Foundations of Indirect Discrimination Law* (2018) 1. See also Moreau, 'The Moral Seriousness of Indirect Discrimination' in Collins and Khaitan (eds), *ibid.* at chapter 6. The ruling of the Court of Justice of the European Union in *Jyske Finans*, C-668/15, 6 April 2017, illustrates the wariness of courts to apply the concept of indirect discrimination. The case concerned the practice of a Danish credit institution requiring those born outside the European Union or the European Free Trade Association (EFTA) to provide additional documents for identity checking. According to the Court (at para 33), 'the argument that the use of the neutral criterion at issue in the main proceedings, namely a person's country of birth, is generally more likely to affect persons of a 'given ethnicity' than 'other persons' cannot be accepted'. For the Court (at para 34), 'the same applies to the argument that the use of that criterion would place at a disadvantage persons whose ethnic origin is that of a country other than a Member State of the European Union or the EFTA'. For a critical analysis of the case, see Atrey, 'Race discrimination in EU law after *Jyske Finans*' (2018) 55 *Common Market Law Review* 625.

In fact, cases of indirect discrimination are less frequent than one might expect.⁴⁹ Overall, the concept of indirect discrimination is primarily used in relation to differences of treatment on the ground of gender⁵⁰ or religion⁵¹ and in the context of employment and access to social security benefits. Regarding differences of treatment based on race, it is almost exclusively applied in relation to Roma.⁵² In the field of immigration none but one verdict of indirect discrimination on the ground of race can be found in the case-law of the ECtHR. As such the Grand Chamber's ruling in *Biao v Denmark* stands out as a notable evolution.⁵³ The case can be summarised as follows. Under Danish law, family reunification was only open to couples who did not have stronger ties with another country. This 'attachment requirement' was however lifted for persons who had held Danish citizenship for at least 28 years, as well as for non-Danish nationals who were born in Denmark and had lawfully resided there for at least 28 years. The claimants whose application for family reunification was denied argued that such an exemption amounts to indirect discrimination on the ground of race or ethnic origin. In a reversal of the well-known *Abdulaziz, Cabales and Balkandali* case, the Grand Chamber found that the contested Danish immigration rule had an indirect discriminatory impact since it 'favours Danish nationals of Danish ethnic origin, and places at a disadvantage, or has a disproportionately prejudicial effect on persons who acquired Danish nationality later in life and who were of ethnic origins other than Danish'.⁵⁴ In broadening the material scope of indirect discrimination, the Court opens up new perspectives towards the elimination of racial discrimination underlying various immigration rules.⁵⁵ However, the relevance of this case is limited by the fact that the difference of treatment actually is between a state's own nationals. *Biao* is arguably less a case of ethnic discrimination than of discrimination among Danish citizens based

49 Havelková, 'Judicial Scepticism of Discrimination at the ECtHR' in Collins and Khaitan (eds), *ibid.* at 83. One reason might be that the ECtHR does not assess the violation of Article 14 of the Convention if a substantive right has been violated.

50 *Di Trizio v Switzerland* Application No 7186/09, Merits and Just Satisfaction, 2 February 2016. On the same issue, the case law of the Court of Justice of the European Union is actually more developed, see, among others, C-173/13 *Maurice Leone and Blandine Leone* 17 July 2014; C-123/10 *Brachner* 20 October 2011.

51 Regarding the question whether workplace regulations prohibiting workers from wearing religious symbols in the workplace amounts to indirect discrimination, the Grand Chamber of the Court of Justice of the European Union delivered two important rulings on 14 March 2017 (C-157/15 *Achbita* and C-188/15 *Boungaoui*). On this issue, the ECtHR has been reluctant to use the concept of indirect discrimination: see *Eweida and Others v United Kingdom* Application No 48420/10 et al., Merits and Just Satisfaction, 15 January 2013. See also with regards to the French ban on face covering: *S.A.S. v France* Application No 43835/11, Merits and Just Satisfaction, 1 July 2014 [GC]. The applicant complained of indirect discrimination but the Court found that the contested measure was objectively and reasonably justified.

52 Following *D.H. and Others v The Czech Republic*, *supra* n 47, indirect race discrimination has been applied with regards to Roma segregation in the education context: *Oršuš and Others v Croatia* Application No 15766/03, Merits and Just Satisfaction, 16 March 2010 [GC]; *Sampani and Others v Greece* Application No 59608/09, Merits and Just Satisfaction, 11 December 2012; *Horváth and Kiss v Hungary* Application No 11146/11, Merits and Just Satisfaction, 29 January 2013; *Lavida and Others v Greece* Application No 7973/10, Merits and Just Satisfaction, 30 May 2013. Before the Court of Justice of the European Union, see C-83/14 *CHEZ Razpredelenie Bulgaria AD* 16 July 2015.

53 *Biao v Denmark* Application No 38590/10, Merits and Just Satisfaction, 24 May 2016 [GC].

54 *Ibid.* at para 138.

55 Möschel, 'The Strasbourg Court and Indirect Race Discrimination: Going Beyond the Education Domain' (2017) 80 *The Modern Law Review* 121 at 131.

on the duration of citizenship.⁵⁶ It is doubtful whether the ECtHR would have found a violation of Articles 8 and 14 of the Convention if Denmark had not provided for any exemption from the generally applicable attachment requirement.⁵⁷ As Murphy stressed, 'it is notable that the Court does not reveal any discomfort with the basic principle of having an attachment requirement as part of the test for family reunification'.⁵⁸ For these reasons, the significance of *Biao* for future cases of indirect discrimination should not be overestimated.

Although the ECtHR, like other jurisdictions such as the Court of Justice of the European Union, is increasingly supporting a substantive conception of equality, the transformative dimension of equality and non-discrimination remains limited, *a fortiori* in immigration cases.⁵⁹ Moreover, the judicial enforcement of the principle of non-discrimination is hampered by the wide margin of discretion of States in the field of immigration and the extent of judicial scrutiny. Before analysing the weaknesses of the proportionality test in more detail, let us turn to the prerequisite test of comparability.

C. The Issue of Comparability

The legal concept of equality is a relative one since it is based on a comparison between groups or individuals. Claimants must show that they are treated differently than other individuals in a similar situation or, conversely, that they are treated in a similar manner although they are in a different situation.⁶⁰ For judicial review to be undertaken in non-discrimination cases, a precondition is that the situations compared are similar, or different, in relevant aspects.⁶¹ In practice, however, it is a complex operation, particularly in cases of intersectionality, and the choice of a comparator can have an impact on the issue of a case since narrowing down the comparator group usually diminishes the apparent difference of treatment.⁶²

The comparability test is significant for it is instrumental in deciding what type of treatment is due.⁶³ Deciding on the comparability of situations is not a value-free evaluation. Equal treatment is conditioned on 'likeness', however defined, which 'functions so as to grant less privileged actors access to the benefits enjoyed by the more privileged only to the extent that the former can prove 'sameness' with the latter'.⁶⁴

56 De Vries, 'Rewriting Abdulaziz: The ECtHR Grand Chamber's Ruling in *Biao v. Denmark*' (2016) 18 *European Journal of Migration and Law* 467 at 477.

57 *Biao v Denmark*, supra n 53. See the joint dissenting opinion of Judges Villiger, Mahoney, Kjølbro and Jäderblom, at para 50, and the dissenting opinion of Judge Yudkivska, who fear that to comply with the judgment Denmark will level down its law on family reunification.

58 Murphy, 'Membership without Naturalisation? The Limits of European Court of Human Rights Case Law on Residence Security and Equal Treatment' in Thym (ed.), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (2017) 287 at 305.

59 Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights' (2016) 16 *Human Rights Law Review* 273; O'Connell, 'Cinderella comes to the Ball: Art 14 and the right to non-discrimination in the ECHR' (2009) 29 *Legal Studies* 211; Schiek, supra n 455 at 332.

60 *Thlimmenos v Greece* Application No 34369/97, Merits and Just Satisfaction, 6 April 2000 at para 44 [GC].

61 Arnardóttir, supra n 39 at 657; Fredman, *Discrimination Law*, 2nd edn (2011) at 183.

62 Collins and Khaitan, supra n 48 at 14; Goldberg, 'Discrimination by Comparison' (2011) 120 *The Yale Law Journal* 728.

63 Arnardóttir, supra n 39 at 657.

64 McColgan, 'Cracking the Comparator Problem: Discrimination, 'Equal' Treatment and the Role of Comparisons' (2006) 11 *European Human Rights Law Review* 650 at 656.

Regarding differences of treatment among immigrants, should it be considered that they are all in a comparable situation given the fact that they are residing in a third-country? Are refugees and labour migrants alike in all respects? In the European Union, European citizens and third-country nationals are deemed to be in a different situation because the European Union forms a specific legal order.⁶⁵ Although tautological, the argument supports the idea that given their respective immigration status they are not in a comparable situation in all respects. Sociologically, however, a German and a Moroccan residing in Belgium are both third-country nationals. This does not mean that differences of treatment based on immigration status are never discriminatory. In *Hode and Abdi* for instance, the ECtHR considered that for the purpose of family reunification refugees are in a comparable position to international students and workers who also have a limited leave to remain on the territory.⁶⁶ For the Court, third-country nationals holding a temporary residence permit are in a comparable position with respect to family reunification, irrespective of the legal category to which they belong to.

Once comparability is found, for a difference of treatment to be discriminatory the aim of the contested measure must be illegitimate or its effects must be disproportionate. Under the proportionality test, the outcome of judicial review revolves around whether a fair balance between competing interests has been struck.

5. THE LIMITS OF JUDICIAL REVIEW: EQUALITY AS PROPORTIONALITY

It follows from the previous section that not every distinction is discriminatory and that equality is mostly understood in a formal way, even if developments towards greater substantive equality may be perceptible. Moreover, differences of treatment based on one of the prohibited grounds do not necessarily amount to discrimination. Legitimate differences of treatment are found in international legal instruments themselves. For example, the exclusion of non-citizens from political rights is widely considered legitimate. Article 25 of the ICCPR proclaims that the right to take part in the conduct of public affairs, to vote and to be elected, as well as to have access to public services may be limited to citizens. In other situations, courts usually rely on a proportionality test to find whether a measure is in breach of the equality and non-discrimination requirement. Differences of treatment may be upheld if the measure pursues a legitimate aim and if the means are proportionate to the achievement of that aim.

The proportionality test structures judicial review in important ways and opens up flaws in the enforcement of the principle of equality, particularly in the field of immigration. In assessing the legitimate aim of a measure, courts are most often—not to say always—lenient to political decisions. Moreover, the margin of appreciation of States varies according to the ground of discrimination. Judicial scrutiny is less strict in cases of discrimination based on grounds that are not suspect, such as immigration

65 *Moustaquim v Belgium* Application No 12313/86, Merits and Just Satisfaction, 18 February 1991 at para 49; *C. v Belgium* Application No 21794/93, Merits and Just Satisfaction, 7 August 1996 at para 38; Brouwer and de Vries, 'Third-Country Nationals and Discrimination on the Ground of Nationality: Article 18 TFEU in the Context of Article 14 ECHR and EU Migration Law: Time for a New Approach' in van den Brink, Burri and Goldschmidt (eds), *Equality and Human Rights: Nothing but Trouble? Liber Amicorum Titia Loenen* (2015) 123.

66 *Hode and Abdi v United Kingdom*, supra n 38 at paras 54-55.

status. At a structural level, judicial review is limited, for the proportionality of a measure is assessed on its own irrespective of the broader normative environment.

A. Unchallenged Policy Objectives

The proportionality test starts with an assessment of the aims of the contested measure. In general, courts are deferent to the stated aims for they consider these choices to be of a political nature. This is even more so in the field of immigration where the principle of sovereignty remains the starting point. Since *Abdulaziz, Cabales and Balkandali v United Kingdom*⁶⁷ of 1985, in every immigration case the ECtHR invariably starts its review by stating that ‘as a matter of well-established international law’ and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory.

Unequal treatments between nationals and non-nationals as well as among the latter are usually justified with regards to policy choices based on market-oriented concerns or macroeconomic objectives. Policy preferences based on economic goals such as the protection of the labour market or limiting access to non-contributory social security schemes are invariably considered legitimate. In *Ponomaryovi v Bulgaria*,⁶⁸ the ECtHR ruled that ‘a State may have legitimate reasons for curtailing the use of resource-hungry public services—such as welfare programmes, public benefits and health care—by short-term and illegal immigrants, who, as a rule, do not contribute to their funding’. In *Hode and Abdi v United Kingdom*,⁶⁹ the Court accepted that offering incentives to certain groups of immigrants, in that case students and labour migrants, may amount to a legitimate aim for the purposes of Article 14 of the Convention. In itself attracting defined categories of migrants and granting them a more favourable status is not illegitimate. Overall, controlling immigration and differentiating among migrants based on their expected economic contribution remain largely unchallenged. Even in *Biao v Denmark*,⁷⁰ where the Court found that the contested measure was based on ‘rather speculative arguments’ and biased assumptions, the Court did not establish that the aim was illegitimate. Had the measure been less disproportionate, it may have been upheld. As Arnardóttir argued, the legitimate aim test ‘has become a rhetorical and artificial assertion that has nothing to do with the issues truly deciding the case’.⁷¹

To some extent, the lenient position of judges with regards to the legitimacy of public policy objectives is understandable. Given the separation of powers, the role of the judiciary is not to contest policy preferences but to ensure that a fair balance has been struck between competing and legitimate interests. As a result, supranational, as well as domestic courts, do not usually challenge choices made by the executive or the

67 Application No 9214/80 et al., Merits and Just Satisfaction, 28 May 1985 at para 67 [GC]. In that case, the Court accepted (at para 81) the aim of advancing public tranquility in respect of immigration rules that discriminated against immigrant husbands as compared to immigrant wives. However, it was not persuaded that this aim was served by the distinction drawn between husbands and wives.

68 Application No 5335/05, Merits and Just Satisfaction, 21 June 2011 at para 54. For a similar finding, see: *Dhahbi v Italy* Application No 17120/09, Merits and Just Satisfaction, 8 April 2014 at para 52.

69 Supra n 38 at para 53.

70 Supra n 53 at paras 125–126. See the concurring opinion of Judge Pinto de Albuquerque at para 20 stating: ‘In my view, having already established that the 28-year rule was aimed at treating Danish citizens differently according to their racial and ethnic traits, this would have sufficed to find a violation of Article 14 in conjunction with Article 8.’

71 Arnardóttir, *Equality and Non-Discrimination under the European Convention on Human Rights* (2003) at 45.

legislative branches of government. In the case of the ECtHR, if taken seriously, the legitimate aim test would conflict with the principle of subsidiarity. An alternative would be for courts to assess whether the stated aims are genuine, and not only legitimate.⁷²

Since courts are reluctant to challenge public policy choices in a field related to sovereignty and security, judicial review is limited to the balance of interests, the outcome of which depends on the margin of appreciation States enjoy.

B. The Variable Margin of Appreciation: Inequalities Between Grounds of Discrimination

If the contested measure is based on a legitimate aim, courts engage in a balancing exercise between competing interests which cannot be resolved in a less restrictive way (necessity test). When there is a choice between several appropriate measures, the least onerous must be favoured. Courts then examine whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised (proportionality *senso stricto*).

In order to decide whether States have struck an acceptable balance between a fundamental right (equality and non-discrimination) and the competing public good (immigration management), the ECtHR relies on the doctrine of the margin of appreciation. As an expression of subsidiarity,⁷³ the margin of appreciation is intended to leave room for democratic decision-making, and it only requires that law-makers come forward with a reasonable (as opposed to correct) solution to a conflict of interests.⁷⁴ The leeway granted to the domestic branches of government defines the intensity of judicial review. The outcome of the proportionality test thus depends to a large extent on the scope of States' margin of appreciation, which varies according to the factual and legal circumstances of a given case.

The width of the margin of appreciation or the amount of deference to be accorded to the State is first and foremost affected by the nature and the content of the right in issue.⁷⁵ When the alleged discrimination relates to the right to family life⁷⁶ or education⁷⁷ judicial scrutiny is stricter than in cases relating to non-contributory social

72 A legislative measure may pursue other aims than those stated. Alternatively, the stated aims may not be applicable in a particular case: see *Ponmaryovi v Bulgaria*, supra n 68 at para 60.

73 *Handyside v United Kingdom* Application No 5493/72, Merits, 7 December 1976 at para 48. On the relationship between the margin of appreciation and the subsidiarity principle, see Arnardóttir, 'Rethinking the Two Margins of Appreciation' (2016) 12 *European Constitutional Law Review* 27. See also Protocol No 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, 24 June 2013.

74 Möller, *The Global Model of Constitutional Rights* (2012) at 201.

75 Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (2012) at 200.

76 *Biao v Denmark*, supra n 53 at para 138. See also the concurring opinion of Judge Pinto de Albuquerque, §24: 'there is clear and uncontested evidence of a continuing trend in general international law, which has evolved to a degree that it places family reunification well above immigration policy interests'. In *Anakomba Yula v Belgium*, Application No 45413/07, Merits and Just Satisfaction, 10 March 2009 at para 37 (in French only), the Court decided that in relation to the right to family life weighty reasons (*raisons particulièrement impérieuses*) were needed to justify a difference of treatment between third-country nationals based on the regularity of their stay.

77 *Ponmaryovi v Bulgaria*, supra n 68 at paras 54-58.

benefits.⁷⁸ The ECtHR also acknowledged that a wide margin is usually allowed to the State when it comes to general measures of economic or social strategy, of which immigration policy is a part of.⁷⁹ The absence of an individual right to migrate, and a corresponding obligation upon States to admit migrants, arguably widens their margin of discretion.⁸⁰ Under international law, individuals have the right to leave a country, including their own, but there is no corresponding right to enter a country.⁸¹ The right to family reunification is the only exception, but this right is conditional. Even asylum seekers are only protected from *non-refoulement* which is different from a right to enter a country to seek asylum. For the ECtHR, immigration status, with the notable exception of refugee status, involves an element of choice since the person has chosen to reside in a country of which she is not a national and, for that reason, the justification required for a distinction on the ground of immigration status to be upheld will not be as weighty as in the case of a distinction based, for example, on nationality.⁸²

Indeed, the margin of appreciation varies depending on the discrimination ground invoked. In *D.H. and Others v The Czech Republic* the ECtHR ruled that ‘where the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible.’⁸³ Differences of treatment based on suspect grounds may only be justified if weighty reasons are put forward. Discrimination grounds are not equal and judicial scrutiny is stricter in cases based on suspect grounds such as nationality or ethnic origins.⁸⁴ *A contrario*, a wider

78 *Bah v United Kingdom*, supra n 38; *Yeshtla v The Netherlands* Application No 37115/11, Admissibility, 15 January 2019.

79 *Carson and Others v United Kingdom*, supra n 37 at para 61.

80 A comparison can be drawn here with EU citizens who enjoy an individual right to free movement within the EU. This right to free movement implies a right to equality between EU citizens and the abolition of overt and covert discriminations on the basis of nationality. The extent to which the right to free movement can be restricted remains uncertain, especially with regards to access to social benefits. The case law of the Court of Justice on the issue whether Union citizens who do not belong to the category of economically active or post-active persons enjoy a right to reside on the territory of the host Member State and access to social assistance remains in flux. Most recent cases are increasingly restrictive with the risk of differences of treatment among EU citizens based on their income. Compare C-85/96 *Martinez Sala* 12 May 1998, C-22/08 *Vastouras and Koupatantze* 4 June 2009, C-184/99 *Grzelczyk* 20 September 2001 with C-140/12 *Brey* 19 September 2013, C-333/13 *Dano* 11 November 2014 and C-67/14 *Alimanovic* 15 September 2015. On this issue, see Minderhoud and Mantu, ‘Back to the Roots? No Access to Social Assistance for Union Citizens who are Economically Inactive’ in Thym (ed.), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (2017) 191; Spaventa, ‘Earned Citizenship—Understanding Union Citizenship through Its Scope’ in Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (2017) 204 at 221: ‘The Union’s economically inactive migrant is thus only one step above the ‘alien’ and her rights have to be earned’; Verschuere, ‘Free movement of EU citizens: including for the poor?’ (2015) 22 *Maastricht Journal of European and Comparative Law* 10.

81 Article 12(2) International Covenant on Civil and Political Rights; Article 2(2) Protocol No 4 to the ECHR, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto 1963: see Guild and Stoyanova, ‘The Human Right to Leave Any Country: A Right to Be Delivered’ [2018] *European Yearbook on Human Rights* 373.

82 *Bah v United Kingdom*, supra n 38 at paras 45 and 47.

83 Application No 57325/00, Merits and Just Satisfaction, 13 November 2007 at para 196 [GC].

84 In *Biao*, while the Grand Chamber decided that Denmark had a ‘very narrow margin of appreciation’ since the alleged indirect discrimination was based on ethnic origin, the Chamber had found that the 28-year rule only treated differently people on account of the length of their Danish citizenship, and a difference in treatment on grounds of ‘other status’ under article 14 of the Convention could more easily be justified than a difference in treatment on the ground of race or ethnic origin.

margin of appreciation is granted to States as regards to other grounds and judicial review is more lenient.⁸⁵ As a result, States enjoy a greater margin of discretion to differentiate among migrants based on their immigration status, wealth or education. A difference of treatment will be found discriminatory in a few cases only, either because the contested measure is disproportionate in a particular case⁸⁶ or arbitrary.⁸⁷ For instance, in *Hode and Abdi*, the distinction drawn between categories of migrants was found to be arbitrary since no justification for the particularly disadvantageous position that refugees had found themselves to be in when compared to students and workers was put forward.⁸⁸

Although the margin of appreciation is related to subsidiarity and democratic legitimacy, it can be used in a counter-productive way. If the margin of appreciation is too wide, the risk is that sovereignty claims of States over immigration go unchallenged to the detriment of migrants' rights protection. In other words, judicial deference and the margin of appreciation doctrine can prevent the Court from playing a meaningful role in countering the risk of a 'tyranny of the majority'.⁸⁹ The danger is particularly acute with regards to immigration for migrants are usually not democratically represented. More than in other contexts, adjudication and international supervision are central to the protection of their rights.

C. A Structural Shortcoming: The Absence of a Contextual Analysis

Last but not least, the proportionality test suffers from a structural limitation: judicial review is always exercised in relation to a particular measure. As explained above, courts assess whether the contested measure pursues a legitimate aim and whether it is proportionate to that aim. However, a legislative measure is scrutinised on its own merit, regardless of the surrounding normative environment. Assessed on its own, a measure may well be considered proportionate, but rules do not operate in a vacuum. The outcome of the proportionality test may be different if a contextual and systemic approach was adopted.

For example, in many destination countries family reunification is increasingly under strain, despite being depicted as an individual right. Ever increasing obstacles to the enjoyment of that right include, among others, higher administrative fees, a compulsory (and costly) DNA test in certain cases, higher income requirements, the introduction of a waiting period for certain categories of immigrants and integration requirements before or after arrival. Although each measure could possibly be justified on its own, the same can hardly be said if they are taken all together.

85 Arnardóttir, *supra* n 39 at 655; Fredman, *supra* n 61 at 111.

86 *Ponomaryovi v Bulgaria*, *supra* n 68 at paras 60 and 61.

87 *Niedzwiecki v Germany* Application No 58453/00, Merits and Just Satisfaction, 25 October 2005 at para 33; *Okpiz v Germany* Application No 59140/00, Merits and Just Satisfaction, 25 October 2005 at para 34; *Luczak v Poland* Application No 77782/01, Merits and Just Satisfaction, 27 November 2007 at para 59.

88 *Hode and Abdi v United Kingdom*, *supra* n 38 at paras 53-54.

89 Arai-Takahashi, 'The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg's Variable Geometry' in Follesdal, Peters and Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (2013) 62 at 96; Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin' (1990) 11 *Human Rights Law Journal* 57 at 82.

However, the proportionality test as currently conducted does not take into account the diversity of fine-tuning legislative reforms which, taken together, create a repressive and security-oriented legal environment. Proportionality remains blind to the larger picture of immigration laws and policies that may have a disproportionate impact on particular categories of immigrants. Judicial review is structurally unable to evaluate the proportionality of the legal framework as a whole.

6. CONCLUSION

Relying on a diversity of legal categories and status, States try to govern and shape the terms of immigration according to their own policy objectives. Accordingly, immigration law is used to allow and even attract different categories of people as well as to exclude others. Contemporary liberal immigration and citizenship laws have abandoned previous criteria based on nationality and ethnic origin in favour of universal and meritocratic requirements. The use of facially neutral criteria does not, however, mean the end of differentiation practices. The emergence of a 'market model', or 'human capital model', of immigration management does raise concerns in terms of equality and non-discrimination. Criteria related to merit and the socio-economic position of immigrants have the effect of preventing the entry of those with poor economic prospects. Access to the global mobility infrastructure is henceforth based on class, skills or education and indirectly on nationality, ethnic origin and gender.

This article modestly tries to find explanations as to why equality remains elusive for many immigrants. Despite the importance of the equality and non-discrimination principle, international law allows, rather than prevents, differences of treatment between citizens and non-citizens as well as among immigrants. The principle of States' sovereignty is one reason for this but other explanations are to be found in the normative content of the equality requirement itself. The legal principle of equality and non-discrimination suffers from conceptual and enforcement flaws. As discussed in this article, not every distinction is discriminatory and the structure, as well as the depth of judicial review, also explain why relatively few cases of discrimination, whether direct or indirect, are found in this particular field. States usually enjoy a relatively wide discretion in immigration matters and international courts, such as the ECtHR, rely on the doctrine of the margin of appreciation to refer to national authorities. As a result, the ability of international courts to set high standards is impaired and the strength of the equality and non-discrimination principle is diluted. However, the principle of subsidiarity, upon which the margin of appreciation is based, arguably has a positive dimension.⁹⁰ Domestic courts should take the principle of subsidiarity seriously and use it as an empowerment tool to go beyond the case law of international courts. In turn, rulings of domestic courts can feed into the decisions of those courts and increase their legitimacy.

In facilitating the mobility of some and preventing that of others, immigration and citizenship laws reproduce the unequal and hierarchical global economic order. The use of merit-related criteria perpetuates racial and gender-based socio-economic disparities within States and at a global level since members of disadvantaged groups have

90 Brems, 'Positive subsidiarity and its implications for the margin of appreciation doctrine' (2019) 37 *Netherlands Quarterly of Human Rights* 210.

limited opportunities to migrate legally. The resulting world of stratified mobility reproduces historically rooted conditions of injustice which largely remains unchallenged by international human rights law.⁹¹

ACKNOWLEDGEMENTS

I would like to thank Professor Delphine Nakache (Univeristy of Ottawa) for her support and for giving me the impetus to write this article. I also thank the reviewer for taking the time to read and comment on my work.

91 Owen, 'Migration, Structural Injustice and Domination On 'Race', Mobility and Transnational Positional Difference' (2020) 46 *Journal of Ethnic and Migration Studies* 2585 at 2589.