

# Exploring the Potential (Contribution) of Multi-Disciplinary Legal Research for the Analysis of Minorities' Rights

Kristin Henrard\*

## Abstract

This article sets out to contribute to the special issue devoted to multi-disciplinary legal research by discussing first the limits of purely doctrinal legal research in relation to a particular topic and second the relevant considerations in devising research that (inter alia) draws on non-legal, auxiliary disciplines to 'fill in' and guide the legal framework. The topic concerned is the (analysis of the) fundamental rights of minorities.

The article starts with a long account of the flaws in the current legal analysis of the European Court of Human Rights regarding minorities' rights, particularly the reduction in its analysis and the related failure to properly identify and weigh all relevant interests and variables. This 'prelude' provides crucial insights in the causes of the flaws in the Court's jurisprudence: lack of knowledge (about the relevant interests and variables) and concerns with the Court's political legitimacy.

The article goes on to argue for the need for multi-disciplinary legal research to tackle the lack of knowledge: more particularly by drawing on sociology (and related social sciences) and political philosophy as auxiliary disciplines to identify additional interests and variables for the rights analysis. The ensuing new analytical framework for the analysis of minorities' rights would benefit international courts (adjudicating on human rights) generally. To operationalise and refine the new analytical framework, the research should furthermore have regard to the practice of (a selection of) international courts and national case studies.

**Keywords:** minorities' fundamental rights, international courts, European Court of Human Rights, lack of knowledge, multi-disciplinary legal research

## 1 Introduction and Setting the Scene

The appropriate treatment of persons belonging to ethnic, religious, or linguistic minorities tends to be controversial in most states. As diversity in states is increasing,

also due to the effects of globalisation and related migration streams, the tensions concerning minorities are expected to rise. These tensions imply challenges for public authorities, inter alia in view of liberal democracies' commitment to respect fundamental rights, also of persons belonging to minorities. The recurring criticisms of decisions by public authorities and (international) courts that affect fundamental rights of minorities, as failing to do justice to the complexities involved and the related multitude of relevant interests, point to the limits of pure legal doctrine in this respect. An article for a special issue dedicated to multi-disciplinary (legal) research obviously focuses on the ways in which this research method could contribute to tackling flaws in the analysis of minorities' rights. In other words, this article's central research question reads: in what way can the findings of non-legal research be incorporated in legal doctrinal research, so as to improve the identification and weighing of all relevant interests for the analysis of minorities' rights.

The analysis here will focus on the importance of multi-disciplinary legal research for the analysis of minorities' rights, which would ideally feed into the judicial practice of international courts. Liberal democracies globally share a commitment to fundamental rights, which implies that they accept the need to respect these rights when developing policies, legislation, and practice, also in relation to minorities. When states fail in their primary responsibility to respect fundamental rights,<sup>1</sup> subsidiary protection and human rights leadership of international courts, and related guidance for states, is crucial.<sup>2</sup> The problem analysis in this article will zoom-in on the jurisprudence of the European Court of Human Rights (ECtHR), undoubtedly the international court adjudicating on human rights issues par excellence in Europe.<sup>3</sup> Furthermore, over the years, the ECtHR has become the international human rights court with the

\* Professor of minorities and fundamental rights at the Erasmus School of Law.

1. The concept 'courts' includes quasi-judicial bodies.
2. J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, Martinus Nijhoff (2009), at 255-57; M. Kumm, 'Democracy is Not Enough: Rights, Proportionality and the Point of Judicial Review', *NYU School of Law Public Law Research Paper No 09-10*, at 3-5 (2009).
3. All member states of the Council of Europe have ratified the convention, thus accepting the Court's ultimate jurisdiction on questions pertaining to human rights (enshrined in the convention). CJEU's Opinion 2/2013 may have dismissed the draft agreement on EU accession to the ECHR; the Lisbon treaty still requires the EU to ratify the ECHR.

most extensive and rich jurisprudence on minorities, both in terms of range of topics and numbers of judgments.<sup>4</sup>

### 1.1 Human Rights, Limitations, Interpretation Principles, and Judicial Activism

It is generally accepted that the law, and certainly human rights law, is not only determined by the text of the legal provisions concerned, but also by the interpretation of that text. Since the formulation of human rights is open to a range of different interpretations, the interpretation principles, or maxims adopted are often decisive. The effective enjoyment of fundamental rights<sup>5</sup> is an overarching concern for international courts monitoring the compliance of fundamental rights. In the words of the ECtHR, the convention must be interpreted in a manner which renders its rights practical and effective, not theoretical or illusory.<sup>6</sup> This implies that the scope of application of rights should be interpreted broadly, generously. Since most fundamental rights are not absolute, their effective protection does not require their absolute realisation. Nevertheless, *limitations* by public authorities need to respect particular requirements.<sup>7</sup> Indeed, the requirements that states need to meet when they want to limit the enjoyment of rights are of paramount importance to safeguard their effective protection. In this respect, an interpretation maxim has developed following which limitations need to be construed restrictively.<sup>8</sup> In line with the overarching rationale of human rights conventions, the protection of human rights is the baseline, and thus limitations need to be interpreted restrictively.<sup>9</sup> Consequently, when something is accepted to fall within the scope of application of a right, states have to respect and protect this right,

and they need to have very good and concrete reasons to limit its enjoyment. The maxim arguably points to a rather high baseline level of scrutiny by international courts, which in turn implies that these courts do not leave considerable discretion to the contracting states.

The overarching concern with the effective enjoyment of fundamental rights has influenced the development in the framework of international conventions on human rights of *sui generis* interpretation principles, more particularly the teleological and the evolutive interpretation principle.<sup>10</sup> While the former implies a consideration of the underlying ratio of rights, the evolutive or dynamic interpretation of human rights reflects that these rights are not static. The latter characteristic of fundamental rights is nicely captured in the ECtHR's living instrument doctrine, following which 'the European convention is a living instrument ... [that] should be interpreted in the light of "present day conditions"'.<sup>11</sup>

It may be obvious that different opinions can and do exist not only about the most decisive interpretation principle but also on what 'effective enjoyment', 'telos', etc. mean and imply. The ensuing different interpretations also reflect different visions about the role of international courts and the appropriateness of judicial activism. While different interpretations of the law can be defended, ultimately a choice needs to be made by the adjudicator.<sup>12</sup> Admittedly this choice is *subjective* to some extent.<sup>13</sup> Nevertheless, the generally recognised maxim that limitations to fundamental rights need to be interpreted restrictively has already been argued to point to the appropriateness of a rather high level of scrutiny as baseline. The latter, in turn, implies a strong case for judicial activism, for the appropriateness of a rather 'active' court, in the sense of one that does not easily 'follow' the arguments of the states. Furthermore, given the generally recognised importance of the maxims of legal certainty and predictability for the rule of law, it is arguably important that courts adopt explicit and transparent reasoning regarding the interpretation they adopt.<sup>14</sup> This explicit reasoning can, in turn, contribute to a certain sense of *objectivity*.

### 1.2 Human Rights, Interpretation, Limitations, and Multi-Disciplinary Legal Research

Multi-disciplinary legal research investigates the extent to which non-legal disciplines can function as auxiliary disciplines to guide the interpretation of the legal norms

4. *Inter alia* G. Gilbert, 'The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights', *Human Rights Quarterly*, at 736-80 (2002). See also S. Akermark, 'Limits of Pluralism-Recent Jurisprudence of the European Court of Human Rights with Regard to Minorities: Does the Prohibition of Discrimination Add Anything?', *Journal on Ethnopolitics and Minority Issues in Europe*, at 1-24 (2002).
5. Minorities' fundamental rights encompass both general rights (for everyone) and minority-specific rights. Notwithstanding differences in formulation, for both general human rights (including the prohibition of discrimination) and minority-specific rights proportionality considerations, is key. See *inter alia* K. Henrard, 'Non-Discrimination and Full and Effective Equality', in M. Weller (ed.), *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies*, OUP (2007), at 94-5; J. Ringelheim, 'Minority Rights in a Time of Multiculturalism – The Evolving Scope of the Framework Convention on the Protection of National Minorities', *Human Rights Law Review*, at 114, 116, 121 (2010). The analysis in this article is focused on general rights.
6. ECtHR, *Airey v. Ireland*, Series A No. 32, 2 EHRR (1979-1980), at 305.
7. R. Dworkin, *Taking Rights Seriously*, Harvard University Press (1977), at 133, 188, 223; K. Henrard, 'A Critical Analysis of the Margin of Appreciation Doctrine of the ECtHR, in Particular about Rights to a Traditional Way of Life and to a Healthy Environment: A Call for an Alternative Model of International Supervision', *Yearbook on Polar Law*, at 388 ff.; D. Réaume, 'Limitations on Constitutional Rights: The Logic of Proportionality', *University of Oxford Legal Research Series No. 26/2009*, at 1-2.
8. G. Letsas, *A Theory of Interpretation of the ECHR*, OUP (2007), at 83.
9. *Inter alia* N. Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, CUP (2002), at 184.

10. *Inter alia* Letsas, 2007, Chapter 3 in particular.
11. ECtHR 25 April 1978, 5856/72 (*Tyrer v. The United Kingdom*), para. 183.
12. See also J. Pauwelyn and M. Elsig, 'The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals', in J.L. Dunoff and M.A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations*, CUP (2012), at 445-69; M. Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism', *EJLS*, at 3 (2007).
13. *Inter alia* Poiares Maduro, 2007, at 3; R.H. Fallon, 'A Constructivist Coherence Theory of Constitutional Interpretation', *Harvard Law Review*, at 1223 and 1247 (1987).
14. See also D.L. Faigman, 'Madisonian Balancing: A Theory of Constitutional Adjudication', 88 *Northwestern University Law Review*, at 642-3 (1993-1994).

and thus ‘fill in’ the legal framework.<sup>15</sup> An article on multi-disciplinary legal research inevitably explores whether these interpretation principles for human rights also imply openings to other disciplines. Teleological interpretation, and its reflection on the ratio of norms, invites input from moral and political philosophy and, depending on the concept, also other disciplines such as psychology. The evolutive or dynamic interpretation of human rights, and the need to take into account changes in society, calls for a consideration of sociological theories and data. In other words, the input of these other disciplines can be argued to be necessary for the proper (doctrinal) analysis of human rights, in relation to both the determination of the scope of application of human rights, and the limitation analysis.

A central requirement for a limitation to a fundamental right to be legitimate is that the limitation is proportionate to the legitimate aim invoked by the state.<sup>16</sup> This proportionality requirement depends, following the Court’s steady jurisprudence, on all relevant circumstances of the case. In other words, complying with the proportionality requirement is intrinsically related to a balancing of all relevant interests, according to each interest’s relative weight. Proper balancing is essential for the effective protection of fundamental rights by international courts, and arguably requires that the respective weight of all relevant interests is considered and discussed.<sup>17</sup> Put differently, only when all relevant interests are taken into consideration and given their appropriate weight can the legal standards be *correctly* applied.

Arguably, identifying all relevant interests, as well as the relevant variables – determining the relative weight of the interests concerned – cannot be realised with a purely legal perspective. Especially in complex cases, the perspectives of non-legal disciplines, and particularly social sciences and political philosophy, provide additional insights and information about the interests in play, including historical and collective dimensions thereof. Indeed, confirming the preceding argumentation concerning interpretation principles, human rights is a field of law which almost per se requires input from non-legal disciplines in order to obtain the doctrinally

correct application of the law.<sup>18</sup> Not surprisingly, legal doctrinal research on human rights increasingly turns to non-legal disciplines, as auxiliary disciplines to guide the interpretation of the legal norms.

Exploratory research shows that such multi-disciplinary research is especially called for concerning the fundamental rights of persons belonging to (ethnic, religious, and linguistic) *minorities*. The effective protection of rights, hinted at above, is particularly important for persons belonging to minorities, given their vulnerable position.<sup>19</sup> However, and notwithstanding the principled commitment of liberal democracies, the rights of persons belonging to ethnic, religious, and linguistic minorities tend to present a challenge for public authorities in light of other policy concerns, including pursuing ‘an integrated society’, tackling economic crises, and terrorism threats.<sup>20</sup> As the problem analysis below will confirm, courts confronted with cases on minorities’ rights encounter difficulties in identifying and weighing all relevant interests concerned. These cases are often complex, not only in terms of the range of different interests in play, but also in terms of the historical and collective layers of these interests. Systemic discrimination against a group deeply affects a society’s structure, with discrimination in the field of education, entailing discrimination in the employment sphere and so on. Traditional, ingrained dominance of particular groups, and/or prolonged periods of discrimination against others, in turn, implies that the status quo reflects the majority norm. Disproportionate impact on minority groups of the related apparently neutral rules is not always detected by (international) courts.<sup>21</sup> Hence – returning to the central research question of this article – it merits investigating in what way the findings of non-legal research can be incorporated in legal doctrinal research, and feed into judicial practice, so as to improve the identification and weighing of all relevant interests for the analysis of minorities’ rights.

The analysis of this article proceeds in three sections. Section 2 discusses the jurisprudence of the ECtHR concerning minorities and argues that the Court in several respects reduces cases and fails to properly balance

15. S. Taekema and B. Van Klink, ‘On the Border: Limits and Possibilities of Interdisciplinary Research’, in B. Van Klink and S. Taekema (eds.), *Law and Method*, Mohr Siebeck (2011), at 11.

16. In principle one has to have regard to the formulation of each right and the stipulations of its limitation clause. Nevertheless, the jurisprudence of the supervisory organs reveals that the proportionality requirement is key.

17. See *infra* on the argument that ‘proper balancing’ also requires a critical review of the justifications put forward by the state. The level of scrutiny adopted by the courts is in any event important for the effective protection of fundamental rights.

18. K. de Feyter, ‘Treaty Interpretation and the Social Sciences’, in F. Coomans et al. (eds.), *Methods of Human Rights Research*, Intersentia (2009), at 218, 231. See also the argument from Vranken restated by Elaine Mak in her contribution to this issue, emphasising that interdisciplinary insights are required when arguments with an empirical connotation play a role in legal reasoning (Elaine Mak, ‘Watch Out for the Under Toad: The Challenge of Contextualisation in Comparative Legal Analysis’, [5]). The examples given, such as arguments concerning reasonable and context-oriented interpretation, and effective legal protection play a central role in human rights reasoning (see also *infra*).

19. A.S. Akermark, *Justifications of Minority Protection in International Law*, Martinus Nijhoff (1997), at 23-8; K. Henrard and R. Dunbar (eds.), *Synergies in Minority Protection: European and International Law Perspectives*, CUP (2008), introduction; R. Medda-Windscher, *Old and New Minorities: Reconciling Diversity and Cohesion*, Nomos (2008), introduction.

20. *Inter alia* R. Rubio-Marin, ‘Integration in Immigrant Europe: Human Rights at a Crossroads’, in R. Rubio-Marin (ed.), *Human Rights and Immigration*, OUP (2014), at 73-5.

21. See below for further elaboration, also through the discussion of particular cases.

all relevant interests and variables. Two major causes are identified for these jurisprudential flaws, namely lack of knowledge and concerns about its own political legitimacy. This article focuses on multi-disciplinary legal research as a means to tackle the lack of knowledge of the ECtHR (and other international courts). Furthermore, it is anticipated that when the Court would address the lack of knowledge by relying on non-legal disciplines, this could possibly have indirect beneficial effects for its concerns about its political legitimacy.

Section 3 focuses on ways in which multi-disciplinary legal research could tackle the lack of knowledge and the related uncertainty regarding the identification of all relevant interests and variables for the analysis of minorities' rights. It discusses how and in what ways the findings of non-legal disciplines can enrich the analysis of minorities' rights, and what disciplines could function as 'auxiliary disciplines'. Section 4 goes on to discuss how the findings of non-legal disciplines could feed into the judicial practice of the ECtHR and other international courts in a way which alleviates concerns for its own political legitimacy.

In other words, in this article multi-disciplinary legal research is discussed as a means to address both causes of the current flaws in the ECtHR's jurisprudence on minorities, the lack of knowledge, and the concerns about its own political legitimacy. More generally, international courts' use of data of non-legal disciplines will not only contribute to the identification and proper weighing of all relevant interests in cases on minorities' rights, but their explicit and transparent reasoning could also bring objectivity and predictability to judicial decision making, and indirectly address legitimacy concerns.

## 2 ECtHR Case Law: A Problem Analysis

Turning to the European Court of Human Rights, this Court is increasingly confronted with cases on (ethnic and religious) minorities that trigger heated debates throughout Europe. Admittedly, the text of the European Convention on Human Rights does not include rights for (persons belonging to) minorities. Nevertheless, the teleological and evolutive interpretation principles used by the ECtHR clearly carry potential to address specific minority concerns pertaining to their separate identity (and substantive equality). In terms of the scope of application of rights, the Court's willingness to do so and to interpret the scope of rights generously is visible in several jurisprudential lines.<sup>22</sup> For

22. Note though the Court's restraint in relation to language rights that pertain to communications with the public authorities: K. Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination*, Kluwer (2000), at 125-28; an analysis confirmed in L. Peroni, 'Erasing Q, W and X, Erasing Cultural Differences' in E. Brems (ed.), *Diversity and European Human Rights: Rewriting Judgments of the ECtHR*, CUP (2013), at 445-68.

example, the Court easily recognises that the wearing of the headscarf is a manifestation of one's religion and thus covered by the freedom of religion. Similarly, the Court's acknowledgement that respect for a traditional way of life is a component part of the right to privacy is beneficial for ethnic minorities. However, a different picture emerges when assessing the Court's limitation analysis. The following critical assessment focuses on the Court's reasoning in its analysis of limitations to these fundamental rights.

Notwithstanding its overall outstanding reputation,<sup>23</sup> it has been noted – also by other academics – that the ECtHR's jurisprudence on minorities and their rights is flawed because it does not identify and weigh all relevant interests in the limitation analysis, thus often inappropriately 'reducing' cases regarding minorities.<sup>24</sup> The Court can be argued not to take 'all relevant circumstances' into account, as it proclaims to do. More particularly, the Court in several respects fails to acknowledge the various layers and the group-character of disadvantage and discrimination suffered by minorities. Consequently, when balancing the respective interests, the Court does not accord sufficient weight to the interests on the minorities' side. Insights from social sciences and political philosophy would arguably help 'complete' the picture, and enable the Court to identify all relevant interests and variables. As will be demonstrated in the more in-depth analysis below, this 'reduction' of cases by the Court is visible in several cases on Roma, the paradigmatic example in Europe of a group who has been the victim of prolonged systemic discrimination. Similarly, in cases regarding religious minorities, the Court can be seen to often disregard structural advantages of majorities, related to the extent to which the dominant religion's values are ingrained in society, thus glossing over the related disadvantages of religious minorities.<sup>25</sup>

Prior to the discussion of a selection of judgements that provides paradigmatic examples of the flaws in the ECtHR's jurisprudence,<sup>26</sup> the parameters for a critical analysis of the Court's case law are set out. In order to explain the criticisms regarding the Court's analysis, we need to return to the doctrine of legitimate limitations and more particularly the central requirement that limi-

23. *Inter alia* A. Timmer, 'Towards an Anti-Stereotyping Approach for the European Court of Human Rights', *Human Rights Law Review*, at 708 (2011). See also H. Keller and A. Stone Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, OUP (2008).

24. The term 'reducing' was used explicitly in the (title of) Julie Ringelheim's article on the ECtHR's *Chapman* case (J. Ringelheim, 'Chapman Redux: The European Court of Human Rights and Roma Traditional Lifestyle', in E. Brems (ed.), *Diversity and European Human Rights: Rewriting Judgments of the ECtHR*, CUP (2013), at 426-44). Similar ideas were already visible in earlier writings, *Inter alia* by Olivier de Schutter, Sia Spiliopoulou Akermark, and Kristin Hennard, and when focused on religious rights Javier Martinez Torron and Lucy Vickers.

25. P.G. Danchin, 'Islam in the Secular Nomos of the European Court of Human Rights', *Michigan Journal of International Law*, at 693 (2011); J. Martinez-Torron, 'Limitations on Religious Freedom in the Case Law on the European Court of Human Rights', *Emory International Law Review*, at 607 (2005).

26. It is indeed beyond the scope of this article to conduct a comprehensive analysis of the relevant case law of the ECtHR.

tations need to be proportionate to the legitimate aim pursued by the state, and the related balancing of the respective interests.<sup>27</sup> As acknowledged above, different opinions about the role of international courts translate in different stances about the appropriateness of judicial review. Nevertheless, the basic tenets of the human rights paradigm, more particularly the maxim that limitations need to be interpreted restrictively, point towards the appropriateness of a rather high baseline level of scrutiny by international courts when evaluating the proportionality requirement.<sup>28</sup> Arguably, the ECtHR's margin of appreciation doctrine invites a critical assessment in this respect. As will be developed in Section 4 of this article, a turn to the multi-disciplinary legal perspective could, over time, also have beneficial effects on the Court's concerns about its political legitimacy, underlying the use of the margin of appreciation doctrine.

It is first of all important to clarify that this doctrine concerns one form of state discretion in relation to fundamental rights among several others.<sup>29</sup> Several of those forms of discretion are not at all problematic but simply reflect the nature of human rights. One form of discretion flows from the fact that human rights' standards are not set at the level of the best possible protection, but rather denote a bottom line, a minimum that needs to be realised. Obviously, there are many degrees of realisation above that bottom line, and the choice states make in this respect falls fully within their discretion. The choice of means/methods to reach the bottom line is similarly a matter of acceptable state discretion.<sup>30</sup> However, the margin of appreciation doctrine as developed by the Court concerns the demarcation of the bottom line in a particular case, more particularly the question whether a particular limitation is proportionate to the legitimate aim invoked.

While in some respects the ideas underlying the margin of appreciation seem sound and acceptable, in the end leaving states a margin of appreciation sits uneasily with adopting a serious level of scrutiny by way of baseline, as argued above. Indeed, the bottom line is case specific, and depends each time on all relevant circumstances. National authorities can be said to be better placed to make this case-specific assessment as they are 'closer' to their societies. In this respect, the margin of appreciation is said to reflect that international courts are subsidiary to the national authorities, who bear the primary responsibility to respect fundamental rights (in their

jurisdiction).<sup>31</sup> Nevertheless, the fact that states have the primary responsibility to respect human rights does not guarantee that they also do so. Indeed, the assumption is challenged on a daily basis by accounts of human rights' violations in the contracting states. Hence, it is essential that the system of international supervision actually assesses whether the national authorities have respected 'the bottom line'. This would confirm the appropriateness of a rather high level of scrutiny by way of baseline. However, the margin of appreciation is inversely related to the level of scrutiny (review) adopted by the Court. Hence, the wider the margin left to states, the lower the level of scrutiny adopted by the Court. Put differently, the more generous the Court is in the margin it leaves states, the less likely that the level of scrutiny it adopts will attain the baseline level advocated here. Furthermore, when states ratify the Convention, they accept that the European Court has the competence to review their actions and inactions for compliance with the Convention, and has the final word in this respect.<sup>32</sup> Granting states a margin of appreciation concerning the 'bottom line' appears to downgrade the international supervision system set up by the Convention.

Returning to the argumentation about 'proper balancing', this baseline level of scrutiny is also intrinsically related to – to some extent implicit in – 'proper balancing'. 'Proper balancing' arguably implies meticulous balancing: all relevant interests and variables should be suitably identified and appropriately weighed.<sup>33</sup> When setting out to identify all relevant interests and variables for the proper analysis of minorities' fundamental rights,<sup>34</sup> the two overarching concerns of minority protection, namely (substantive) equality and the right to (a separate) identity, are a logical starting point.<sup>35</sup> The right to equal treatment<sup>36</sup> concerns both a right to substantive or real equality and an effective protection against invidious discrimination, which shields against disadvantageous treatment for which there is no reasonable and objective justification. An effective protection against invidious discrimination is an essential precondition for a proper treatment of persons belonging to minorities. Substantive equality builds on this, and goes further in that it may require differential treatment so as

27. Kumm, 2009, at 3; T.A. Aleinikoff, 'Constitutional Law in the Age of Balancing', *Yale Law Journal*, at 943 (1987); Christoffersen, 2009, at 107-8; J.H. Gerards, *Belangenafweging bij rechterlijke toetsing aan fundamentele rechten*, Kluwer (2006), at 7-26.

28. Henrard, 2012a, at 372, 388 ff.

29. J. Rivers, 'Proportionality and Variable Intensity Review', *Cambridge Law Journal*, at 191-201 (2006).

30. See also state obligations in relation to the implementation of EU directives.

31. *Inter alia* P.G. Carozzo, 'Subsidiarity as a Structural Principle of International Human Rights Law', *AJIL*, at 69 (2003); Letsas, 2007, at 83; P. Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism?', *Human Rights Law Journal*, at 3 (1998).

32. Articles 19, 32, and 46 (in relation to Article 1) ECHR.

33. Kumm, 2009, at 3-4; Henrard, 2012a, at 370-3.

34. See *inter alia* R. Alexy, *A Theory of Constitutional Rights*, OUP (2002), at 178, 184, 192. This problem analysis focuses on the jurisprudence of the ECtHR. However, minorities are entitled not only to general fundamental rights (as in ECHR) but also to minority specific rights (as in the Framework Convention for the Protection of National Minorities – FCNM): K. Henrard, 'The Added Value of the Framework Convention for the Protection of National Minorities: The Two Pillars of an Adequate System of Minority Protection Revisited', in Verstichel et al. (eds.), *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?*, Intersentia (2008), at 91-3.

35. Henrard, 2008, at 92; Medda-Windischer, 2008, at 96-7.

36. For an extensive analysis see Henrard, 2007.

to do justice to the specificities of the case. In so far as this differential treatment aims to take into account (accommodate) the specific identity characteristics of minorities, substantive equality is actually interlinked with the right to identity. The latter implies a prohibition of forced assimilation.<sup>37</sup> Fundamental rights that contribute to the realisation of the right to identity include rights that protect the minorities' own way of life, the expression of one's separate identity, and its maintenance (through education). Of course, everything depends on the interpretation of these rights and the balancing of the respective interests in case of limitations to these rights.<sup>38</sup>

### 2.1 A Selection of ECtHR Judgments Pertaining to Minorities – Paradigmatic Examples of Flawed Balancing

The following examples of cases on systemic discrimination of ethnic minorities and on claims for accommodation by religious minorities explain and clarify how the Court can be and has been seen to 'reduce' cases concerning minorities.<sup>39</sup> Throughout the analysis, the flaws in the Court's jurisprudence will be related to the major causes hinted at above, namely lack of knowledge and concerns about the Court's political legitimacy, while clarifying the role of the margin of appreciation doctrine. The possible improvement of the Court's reasoning through the use of non-legal disciplines will be hinted at as well.

It is generally recognised that Roma suffer systemic discrimination. The Court, however, often does not give due weight to the decades of neglect and discrimination that this group had to endure, the groups' special needs in relation to its separate, own way of life, and at times even a case-specific background of racist incidents.<sup>40</sup> The related 'reduction' of the cases is visible in cases on police violence against Roma, and Roma evictions from

caravans and townships because of the illegality of the accommodation.<sup>41</sup>

In cases of alleged discriminatory violence by police officers against Roma, the Court is strikingly reticent in the sharing of the burden of proof. In EU law (and general non-discrimination law), a special allocation of the burden of proof for discrimination cases<sup>42</sup> has been developed: because it is virtually impossible to prove discriminatory intent, the claimant only needs to prove facts that allow a presumption of discrimination to arise, making a *prima facie* case. The government then needs to prove that no discrimination took place. The ECtHR, however, has been most reticent in accepting a *prima facie* case which would shift the burden of proof to the government.<sup>43</sup> Arguably the Court does not take all relevant circumstances into account, thus reducing the case, when it discounts – in the allocation of the burden of proof – the broader context of decades of police abuse in particular countries/regions, even when this is combined with racial slur uttered by policemen. Findings of non-legal disciplines, particularly social sciences, could point to the relevance of the broader contextual information when deciding whether or not a presumption of discrimination is made out.

A second line of cases on Roma, which point towards the Court's 'reduction' of the cases regarding minorities, concerns evictions from caravans and townships because of the illegality of the residence.<sup>44</sup> Several cases concern Roma living in caravans on plots of land that are – according to general land planning rules – not allowed

37. Y.M. Donders, *Towards a Right to Cultural Identity?*, Intersentia (2002), at 3, 8, 41-2; Henrard and Dunbar, 2008, at 11-4; A. Xanthaki, 'Multiculturalism and International Law: Discussing Universal Standards', *Human Rights Quarterly*, at 24 (2010).

38. Donders, 2002, at 329-34; Henrard, 2008, especially at 101-4.

39. See also E. Brems (ed.), *Diversity and European Human Rights: Rewriting Judgments of the ECHR*, CUP (2013), chapters 7, 8, 9, 16, and 17. Similar mechanisms are at play in cases involving linguistic minorities: Henrard and Dunbar, 2008, throughout the chapters as one of the synergies studied, see p. 14.

40. O. de Schutter, 'Le droit au mode de vie tzigane devant la Cour européenne des droits de l'homme: droits culturels, droits des minorités, discrimination positive, note sous CEDH Buckley c. Royaume-Uni arrêté du 25 septembre 1996', *Revue Trimestrielle de droits de l'homme*, at 81 (1997); K. Henrard, 'The Council of Europe at the Rescue of a Paradigmatic Case of Failed Integration. About Roma, the Multidimensional Nature of Integration, and How Promising General Principles Can Meet Flawed Applications in Practice', *European Yearbook on Minority Issues*, at 271-316 (2010-2011) [*de facto* out in 2013. they are indeed running behind in terms of years] (throughout the article, conclusion p. 316).

41. *Inter alia* Henrard, 2013, at 303, 308, 310. A third line of cases concerns Roma's relegation to separate and sub-standard education (in several Eastern European states). Notwithstanding the striking overrepresentation of Roma children in schools/classes for children with mental disabilities, the Court for a long time ignored this disproportionate impact of at first sight neutral rules on a vulnerable minority group. The related disregard by the Court for questions of overall impact on effective and actual access to a right (education) constituted another form of 'reduction' of the related cases. In the meantime, the Court seems to have firmly incorporated indirect discrimination in its non-discrimination jurisprudence and, in a range of cases, goes rather far in acknowledging the systemic nature of the misdiagnosis of Roma children, and the danger of cultural bias in the tests used. Nevertheless, it can still be questioned whether the Court attaches proper weight to all interests in play when it classifies the problem as one of indirect discrimination and not of direct discrimination. Indeed, when public authorities hold in place a system of which is known that it disadvantages Roma pupils, would this not reflect an intent to maintain the system and thus disadvantage Roma? See also M. Davidovic and P.R. Rodriguez, 'Roma Maken School in Straatsburg', 34 *NJCM Bulletin*, at 155-72 (2009).

42. *Inter alia* M. Ambrus, *Enforcement Mechanisms of the Racial Equality Directive and Minority Protection: Theory and Four Case Studies*, Eleven International Publishing (2011), at 27-30.

43. ECtHR (GC), *Nachova e.a. v. Bulgaria*, 6 July 2005. For references to other similar cases, see the ECtHR's Factsheet on Roma and Travellers ([www.echr.coe.int](http://www.echr.coe.int)). The recent case on a religious minority with a similar history of systemic discrimination, *Begheluri e.a. v. Georgia*, 7 October 2014, seems to denote a certain relaxation in establishing a *prima facie* case of discrimination.

44. The *Yordanova* case (ECtHR, 24 April 2012) concerns the expulsion of Roma from a township of self-made shacks and the destruction of these shacks against a background of racist incidents. Strikingly the Court glosses over the latter background and focuses on the legitimate aim of safeguarding safety and security in relation to housing, without however acknowledging the possibility of a mixed motive, namely also one of racial discriminations (based on deep-seated prejudice against Roma).

for habitation, while there are too few official caravan sites to cater for the Roma. The Court does acknowledge the interest of Roma to lead an own way of life. However, in all these cases, the Court easily allows general planning policy considerations of the state to outweigh the Roma's interest, granting states a broad margin of appreciation in the matter.<sup>45</sup> In other words, the Court does not seem to (want to) be aware of the severe ramifications for Roma of these hurdles in terms of accommodation, and the broader ramifications it has for their physical and psychological well-being and for their integration in society. In this case, the lack of knowledge is most likely compounded by concerns about the Court's legitimacy when it would curtail states' freedom to develop their own policy in light of local circumstances. Indeed, the European consensus about the need to improve the situation of Roma (visible in numerous documents of the EU, Council of Europe, and the Organisation for Security and Cooperation in Europe (OSCE) has not yet translated in a common policy in terms of caravans and caravan sites.

Similarly, in cases concerning religious minorities, the Court disregards structural advantages enjoyed by the majority, related to the extent to which the dominant religion's values and symbols are ingrained in society. Consequently, it glosses over the ensuing disadvantages of religious minorities.<sup>46</sup> A striking example of this type of 'reduction' is visible in the *Lautsi* case in which the Grand Chamber holds that a crucifix in a public school class room is merely a passive symbol: this reasoning arguably 'reduces' the interests of pupils not to be inappropriately exposed to the symbols of one religion to the exclusion of all others.<sup>47</sup> More generally, the Court has a steady line of jurisprudence granting states a wide margin of appreciation in relation to the way in which they organise 'church-state relations'.<sup>48</sup> The grant of a wide margin to states in the broad range of religious matters covered by 'church-state relations', reflects the Court's weariness to impinge on an area that is since the middle

ages considered to be a core aspect of state sovereignty.<sup>49</sup>

The preceding overview of case law and related analysis reveals that 'discrimination' themes tend to play an overarching role in cases on minorities. As was highlighted above, discrimination complaints by minorities are often complex, due to the systemic and structural nature of the discrimination concerned. The invidious discrimination is always related to their separate identity and ensuing prejudices. Protection against this type of discrimination would thus *indirectly* also protect their right to identity. In so far as the differential treatment aims at protecting or promoting minorities' separate identity, the goal of substantive equality also contributes *directly* to minorities' right to identity.<sup>50</sup>

Unfortunately, precisely in cases on ethnic, religious, and linguistic minorities, the ECtHR seems to avoid non-discrimination analysis as much as possible,<sup>51</sup> particularly when it ultimately concerns requests for suitably adapted measures and policies.<sup>52</sup> It may be that complaints of minorities often pertain to complex situations, but this complexity actually requires a well-considered development of the non-discrimination analysis, rather than avoidance. The proper identification and weighing of all relevant interests and variables in the rights analysis, where necessary having regard to social sciences and political philosophy, is equally essential here. Furthermore, avoiding non-discrimination analysis stifles the consistent and coherent development of non-discrimination law.

Similarly, in relation to minorities' right to identity, the Court has not moved beyond the general recognition that states have a duty to facilitate the minority way of life, and take minorities' separate identity into account when devising and implementing laws.<sup>53</sup> The Court has indeed been reluctant to identify concrete state obligations in this respect, presumably also because it is uncertain on how to identify and quantify all the relevant interests involved.<sup>54</sup> Similar concerns play in rela-

45. *Inter alia* ECtHR [GC] 18 Januari 2001, 27238/95 (*Chapman v. The United Kingdom*); ECtHR, *Winterstein e.a v. France*, 17 oktober 2013.

46. J. Temperman, 'State Neutrality in Public School of Education: An Analysis of the Interplay Between the Neutrality Principle, the Right to Adequate Education, Children's Right to Freedom of Religion or Belief, Parental Liberties, and the Position of Teachers', *Human Rights Quarterly*, at 885-6, 893-4 (2010); L. Zucca, 'Lautsi: A Commentary on a Decision by the ECtHR Grand Chamber', *International Journal of Constitutional Law*, at 218-29 (2013).

47. See also J. Temperman (ed.), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public Classroom*, Martinus Nijhoff (2012), particularly the chapters in part V.

48. For a more detailed analysis which demonstrates that in certain religious matters the Court de facto is narrowing the margin of appreciation it leaves states: see K. Henrard, 'How the European Court of Human Rights' Concern Regarding European Consensus Tempers the Effective Protection of Freedom of Religion', *Oxford Journal on Law and Religion*, at 23 (2015).

49. In the middle ages this understanding was captured in the latin adagium 'cujus regio, ejus religio'. See also K. Henrard, *The Ambiguous Relationship between Religious Minorities and Fundamental (Minority) Rights*, The Hague, Eleven (2011), at 20-4. The *Lautsi* case clearly demonstrated the strong concern about the Court's political legitimacy that underlies the Court's grant of a wide margin of appreciation to states regarding the way in which they organise 'church-state relations'. The Grand Chamber reversed the finding of a violation by the Chamber following a public outcry and interventions by thirty three parties in the Grand Chamber proceedings.

50. This needs to be related to the two overarching concerns of minority protection, being the right to equal treatment and the right to identity: see above.

51. L. Claridge, 'Protocol 12 and *Sejdić and Finci v. Bosnia and Herzegovina*: A Missed Opportunity?', *European Human Rights Law Review*, at 82-6 (2011); J. Maher, 'Eweida and Others, a New Era for Article 9?', *International and Comparative Law Quarterly*, at 216 (2014).

52. Henrard and Dunbar, 2008, at 351-52; Ringelheim, 2013, at 427.

53. ECtHR, *Chapman*, para. 96. See also Henrard, 2012a, at 379-80; Ringelheim, 2013, at 431-3.

54. de Schutter, 1997, at 82-3. This uncertainty is at times reflected in contradictory judgements and reasoning in particular cases between Chamber and Grand Chamber as in the *Lautsi v. Italy* judgement, discussed below.

tion to the recognition of cultural, religious, and linguistic dimensions to effective access to education, and public (health care) services.<sup>55</sup>

These examples show the ECtHR discounting the prolonged and group nature of discrimination against minorities, not properly acknowledging the full range of relevant interests on the side of minorities, and the myriad and often accumulated layers of disadvantage that they are confronted with. This lack of proper identification and weighing of the relevant interests and variables compromises the effective protection of minorities' fundamental rights.<sup>56</sup> Furthermore, the related superficial reasoning by the Court implies that no guidance is given to the contracting states for their policy development.<sup>57</sup> In the preceding analysis, the existing flaws in the ECtHR's analysis of minorities' fundamental rights have been argued to stem from a combination of *two major causes*: lack of knowledge on the one hand and concerns about the Court's own political legitimacy on the other. To some extent, the flaws in the Court's reasoning can be explained by a lack of knowledge about all the relevant parameters that influence the respective weights of minorities' interests. To some extent, the Court might prefer (choose) not to get too deep into these often controversial matters. This 'preference' ties in with more overarching concerns that the Court might jeopardise its political legitimacy when it would pronounce itself on cases that are intertwined with contracting states' perceptions of national identity and/or of conceptions about state sovereignty in relation to the place of religion in society.<sup>58</sup>

The preceding analysis of the ECtHR case law has also hinted at the way in which the Court seems to navigate its lack of knowledge and concerns about its political legitimacy through the application of *the margin of appreciation doctrine*; more particularly, by granting states in several cases pertaining to minorities a *broad margin of appreciation*.<sup>59</sup> The Court has indeed clarified that the breadth of the margin of appreciation is not

always equally broad, while identifying several relevant factors.<sup>60</sup> Two of these factors merit further discussion as they tend to lead to unsatisfactory results for persons belonging to minorities, due to the particularly wide margin of appreciation granted to states. Firstly, the Court often uses the factor of the European consensus, referring to a consensus among European states.<sup>61</sup> A high level of European consensus entails a narrow margin of appreciation for states, while a lack of consensus widens the margin considerably.<sup>62</sup> Whereas the former seems perfectly justifiable, the latter is not at all obvious. The absence of European consensus could also be considered to invite guidance by the Court, instead of leaving the matter (almost) entirely to the contracting states themselves.<sup>63</sup> Since policies concerning minorities tend to concern complex, and often controversial matters, it will come as no surprise that little consensus can be detected. Consequently, states are invariably granted a particularly wide margin of appreciation.<sup>64</sup> Secondly, the Court tends to leave states also a very broad margin of appreciation concerning general policy choices. Again, minorities are often strongly affected by general policy choices, such as planning regulations (housing) and curriculum content (education). Leaving states a broad margin of appreciation in these matters tends to mean that the Court formulates little or no evaluation, and does not even seem to try to identify all relevant interests, let alone weigh them. In other words, the Court more or less 'hides behind' the broad margin it leaves states.

In the end, Court's use of the margin of appreciation doctrine enables it to avoid taking a stance on many complex and mostly controversial minority questions. Without advocating that the judiciary should disrespect the separation of powers and take the place of the executive/legislator, it remains the task of the ECtHR to supervise that states respect their human rights obligations under the ECHR in the development of their policies and practices. Whereas the lack of knowledge as such could in theory also induce the Court to adopt a more 'searching' level of scrutiny, the combination with the concern about political legitimacy seems to tilt the Court towards the 'safer', more prudent route of not evaluating at all, or at least less. Leaving states a broad margin of appreciation in cases concerning minorities means that the Court virtually abdicates its own supervisory role and leaves the matter largely to the states concerned.<sup>65</sup> This, in turn, tends to entail a protection of the status quo and the existing dominance of the

55. K. Henrard, 'Minorities, Identity, Socio-Economic Participation and Integration: About Interrelations and Synergies', in K. Henrard (ed.), *The Interrelation Between the Right to Identity of Minorities and Their Socio-Economic Participation*, Brill (2012c), at 56-8, 60-2.

56. A. Farahat, 'The Exclusiveness of Inclusion on the Boundaries of Human Rights in Protecting Transnational and Second Generation Migrants', *European Journal of Integration and Law*, at 254 (2009); Henrard, 2012a, at 372-3.

57. A similar lack of guidance is visible when the Court grants states a broad margin of appreciation and does not actually analyse the case, nor engage in a weighing of the respective interests: Henrard, 2012a, at 372-3; J. Kratochvil, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights', *Netherlands Quarterly of Human Rights*, at 330, 332 (2011).

58. Similar uncertainty exists for public authorities, this time in confrontation with national backlashes against minority-tailored rights and policies. Rubio-Marin, 2014, at 90-3; S. Vertovec and S. Wessendorf (eds.), *The Multiculturalism Backlash: European Discourses, Policies and Practices*, Routledge (2011), at 1-31.

59. Y. Arai-Takahashi, 'The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg's Variable Geometry', in A. Follesdal, B. Peters & G. Ulfstein (eds.), *Constituting Europe: The ECtHR in a National, European and Global Context*, CUP (2013), at 96-7; Brems, 2013, chapters 7, 8, 9, 16, and 17; Henrard, in Foblets, 2012, at 59-86.

60. However, these factors are not used in a consistent, let alone systematic way: Kratochvil, 2011, at 345-7; Mahoney, 1998, at 3.

61. D. Shelton, 'Subsidiarity and Human Rights Law?', *Human Rights Law Journal*, at 4-11 (2006).

62. *Inter alia* Kratochvil, 2011, at 329-30.

63. *Inter alia* Henrard, 2012a, at 374-5.

64. Henrard, 2012a, at 376-80; Ringelheim, 2013, at 440.

65. N. Bratza, 'Living Instrument or Dead Letter – The Future of the ECHR', *European Human Rights Law Review*, at 116-28 (2014); Henrard, 2012a, at 371.

majority.<sup>66</sup> Leaving this broad margin to states also implies that the Court does not provide guidance to the state parties on how to analyse cases on minorities' rights and balance the respective interests. In both respects, the effective protection of minorities' rights is compromised.<sup>67</sup>

### 3 Lack of Knowledge to Identify and Weigh All Relevant Interests and Variables Pertaining to Minorities and Their Rights: A Turn to Multi-Disciplinary Legal Research

The selection of cases discussed above confirmed that cases pertaining to minorities and their fundamental rights are often complex. One of the important causes for the flaws in the jurisprudence of the ECtHR on minorities, and more particularly the way in which the Court reduces these cases, concerns the impossibility to identify all relevant interests and variables with a purely legal lens. Since the effective protection of minorities' rights depends on proper balancing of all the relevant interests and variables, it merits exploring what non-legal disciplines can contribute in terms of additional insights about these interests and their relative weight.<sup>68</sup> This multi-disciplinary legal research would then ideally feed into judicial practice.<sup>69</sup>

This research has indeed not yet been fully conducted. However, the preliminary research in relation to the above cases has provided the first indications about what disciplines could function well as auxiliary disciplines for the analysis of minorities' fundamental rights, more particularly in light of the underlying complexities of cases on minorities' rights. Subsequently, some thoughts are put forward on the way in which the data/findings of the non-legal disciplines can be incorporated in the legal (fundamental rights) frame.

The preceding analysis of the ECtHR's case law criticised the Court's reduction of the cases, inter alia by not

sufficiently taking into account the group dimension of disadvantage suffered by minorities and the layers of disadvantage resulting from systemic discrimination. Another line of criticism focused on the Court's glossing over the extent to which a particular religion has infused the social fabric of a state, thus disadvantaging adherents to other religions. Arguably, these various layers of disadvantage that minorities experience are important components of 'all relevant circumstances' the Court says it needs to take into account when evaluating cases. Indeed, these layers of disadvantage imply ever so many barriers to effective enjoyment of rights, whereas the effective enjoyment of rights is an overarching concern of the ECtHR.

Non-legal disciplines that are particularly apt to unveil relevant interests and layers of disadvantage that have been missing so far from the Court's analysis are political philosophy and (empirical) social studies. The justice perspective in political philosophy uncovers, for example, relevant (group-related) interests for the rights analysis.<sup>70</sup> In terms of relevant variables, the philosophical and sociological (social science) perspectives bring to the fore and highlight (inter alia) the group dimension of the disadvantage suffered,<sup>71</sup> the accumulation of various layers of disadvantage, and also the systemic nature of disadvantage and discrimination.<sup>72</sup> These additional interests and/or variables that determine the relative weight of an interest all refine one way or the other the quantification of disadvantage (damage) suffered.

Similarly, the attention for the interrelation between various integration dimensions in social sciences allows to identify and quantify additional layers of disadvantage (harm) suffered by the members of the minority concerned. Indeed, several integration dimensions have been distinguished in social sciences, which all relate and interrelate for full integration:<sup>73</sup> structural integration, social integration, cultural integration, and identificational integration. Structural integration is undoubtedly most relevant in terms of law and rights as it concerns rights, status, and (non-discriminatory) access to the labour market and core institutions in society. Nevertheless, sociological theories emphasise the interrelation with the other integration dimensions. Hence, hav-

66. Arai-Takahashi, 2013, at 96-7; S.E. Berry, 'A Tale of Two Instruments: Religious Minorities and the Council of Europe's Rights Regime', *Netherlands Quarterly of Human Rights*, at 34 (2012); K. Henrard, 'A Critical Appraisal of the Margin of Appreciation Left to States Pertaining to 'Church-State Relations' under the Jurisprudence of the ECtHR', in M.C. Foblets et al. (eds.), *A Test of Faith? Religious Diversity and Accommodation in the European Workplace*, Ashgate (2012d), at 68-9.

67. M.R. Hutchinson, 'The Margin of Appreciation Doctrine in the European Court of Human Rights', *International and Comparative Law Quarterly*, at 638-50 (1999). See also D. Xenos, 'The Human Rights of the Vulnerable', *International Journal of Human Rights*, at 591-614 (2009).

68. See supra for broader usefulness of the findings of this project, namely to guide the supervisory practice of international courts generally and policy development of public authorities globally.

69. See infra in Sections 4 and 5.

70. See inter alia J.H. Carens, *Culture, Citizenship and Community: A Contextual Exploration of Justice as Evenhandedness*, OUP (2000); B. Parekh, *A New Politics of Identity: Political Principles for an Interdependent World*, Palgrave Macmillan (2008).

71. Inter alia W. Kymlicka, 'The Internationalization of Minority Rights', *International Journal of Constitutional Law*, at 4 (2008).

72. J. Apap, 'The Relationship Between Integration and Citizenship', in S. Carrera (ed.), *The Nexus between Immigration, Integration and Citizenship in the EU. CHALLENGE Collective Conference Paper*, April 2006: <<http://www.ceps.be>, 13>; A. Favell, *The Europeanisation of Immigration Politics*, European Integration Online Papers (1998); R. Koopmans, I. Michalowski & S. Waibel, 'Citizenship Rights for Immigrants: National Political Processes and Cross-National Convergence in Western Europe, 1980-2008', *American Journal of Sociology*, at 1202-1245 (2012).

73. Inter alia F. Heckmann et al., *Effectiveness of National Integration Strategies towards Second Generation Migrant Youth in a Comparative European Perspective*, EFFNATIS Final Report to the EU Commission, Bamberg 2001.

ing regard to these other integration dimensions and the related disadvantages suffered there by persons belonging to minorities are important to identify layers of disadvantage that have been neglected in the human rights analysis so far. More particularly, discrimination in terms of structural integration has considerable negative repercussion for the other integration dimensions as well. When one is de facto excluded from access to quality education, as was visible in a range of Roma cases before the ECtHR, one is not only barred from higher education and thus the better jobs, but one also has less chances to interact with members of other social groups. Lack of social contacts hampers social integration and, in turn, inhibits mutual behavioural and attitudinal adaptations, while flawed structural, social, and cultural integration hinders the emergence of a sense of belonging and commitment (identificational integration). This more extensive and explicit consideration of layers of disadvantage, and their interaction and mutual reinforcement, arguably invites a reassessment of the weight of the respective interests concerned.

A more general reason why it is important to have regard to social science integration studies for a more comprehensive identification of relevant interests and variables for the analysis of minorities' fundamental rights is that striking parallels exist between the 'target' groups of integration and fundamental rights of (persons belonging to) minorities.<sup>74</sup> Integration (goals) evidently concern population groups that are different from the majority or the dominant groups in society.<sup>75</sup> Hence, integration concerns seem to be targeted at minorities in the broad sense of the word, encompassing traditional minorities and indigenous peoples as well as new or immigrant minorities.<sup>76</sup> Relatedly, the search for the optimal balance between unity and diversity is equally key in relation to integration as to minority policies.<sup>77</sup> Furthermore, a preliminary investigation reveals

that at least some of the foundational values for integration and fundamental rights overlap,<sup>78</sup> namely equality and participation. Actually, the recent and much debated judgement of the ECtHR in *SAS v. France* (1 July 2014) shows the pressing need for the Court to incorporate the integration perspective in a more principled manner in its jurisprudence. Indeed, the abrupt way in which the Court introduced 'living together' and the underlying integration argument as decisive arguments in its rights analysis triggered several critical remarks. The introduction of the integration argument was not only not explained, it furthermore did not do justice to the complexities involved.<sup>79</sup>

When exploring the further question how multi-disciplinary research can feed in the analysis of minorities' fundamental rights, it should be highlighted that, as Theunis Roux nicely formulates in his article for this special issue: the incorporation of non-legal disciplines into doctrinal research necessarily occurs on laws' terms.<sup>80</sup> In other words, the standard for incorporation is an internal legal standard: the translation and incorporation of other disciplines is geared towards the coherent development and improvement of legal doctrine.<sup>81</sup> Multi-disciplinary legal research for the analysis of minorities' rights specifically aims to enrich and improve this analysis by identifying additional relevant interests for this analysis, as well as relevant parameters. This implies that the non-legal disciplines 'feed' into the human rights paradigm, and more particularly human rights doctrines concerning interpretation principles, legitimate limitations, the proportionality principle, balancing of interests, and also the margin of appreciation doctrine.<sup>82</sup> Put differently, these other disciplines would not be decisive, hence it does not matter so much that within these non-legal disciplines there are differences of opinion about the relevance of particular interests and/or variables. The different disciplines considered in this respect may highlight different interests and/or different variables, but these differences are not something that compromises the usefulness of multi-disciplinary legal research, rather to the contrary. Indeed, the findings of these non-legal disciplines are merely used to point to the possible relevance of additional interests, and to obtain insights about possibly relevant variables that otherwise would be overlooked. In the end, in so far as this multi-disciplinary legal research would feed into judicial practice, courts would still (have to) consider all

74. M. Pentikainen, 'Integration of Minorities into Society: How It Is Reflected in International Documents and in the Work of ECRI and the Advisory Committee of the Framework Convention', in M. Scheinin and R. Toivanen (eds.), *Rethinking Non-discrimination and Minority Rights*, Institute for Human Rights, Åbo Akademi University (2004), at 97-133.

75. K. Henrard, 'The Intractable Relationship Between the Concepts "Integration" and "Multiculturalism": About Conceptual Fluidity (Substantive) Context Specificness and Fundamental Rights Perspectives', in M. Podunavac (ed.), *The Challenges of Multiculturalism; the South-Eastern European Perspectives in the European Discourse*, Heinrich Böll Foundation (2013), at 107-24; Henrard, 2011, at 338.

76. *Inter alia* G. Alfredsson, 'Minorities, Indigenous and Tribal Peoples, and Peoples: Definitions of Terms as a Matter of International Law', in N. Ghanea and A. Xanthaki (eds.), *The Minorities, Peoples and Self-Determination: Essays in Honour of Patrick Thornberry*, Martinus Nijhoff (2004), at 169; W. Kymlicka, 'Beyond the Indigenous/Minority Dichotomy', in St. Allen and A. Xanthaki (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Hart (2011), at 187-8; R. Penninx, D. Spencer & N. van Hear, *Migration and Integration in Europe: The State of Research*, Oxford (2008). See also K. Henrard, 'Tracing Visions on Integration and/of Minorities: An Analysis of the Supervisory Practice of the FCNM', *International Community Law Review*, at 338-9 (2011) (special issue).

77. *Inter alia* T. Hadden, 'Integration and Separation: Legal and Political Choices in Implementing Minority Rights', in N. Ghanea and A. Xanthaki (eds.), *Minorities, Peoples and Self-Determination*, Martinus Nijhoff (2005), at 174-7.

78. Ch.R. Beitz, *The Idea of Human Rights*, OUP (2011); G. Engbersen, 'Spheres of Integration: Towards a Differentiated and Reflexive Ethnic Minority Policy', in R. Sackmann, B. Peters & Th. Faist (eds.), *Identity and Integration: Migrants in Western Europe*, Ashgate (2003), at 59-76. See also Hadden, 2005, at 180.

79. E. Brems, '*S.A.S. v. France* as a Problematic Precedent', blog 9 July 2014, <<http://strasbourgobservers.com/2014/07/09/s-a-s-v-france-as-a-problematic-precedent/>>.

80. Th. Roux, 'The Incorporation Problem in Interdisciplinary Legal Research: Some Conceptual Issues and a Practical Illustration', [7].

81. See also B. Van Klink and S. Taekema, 'Limits and Possibilities of Interdisciplinary Research into Law: A Comparison of Pragmatist and Positivist Views', [Repub.eur.nl], at 12.

82. For the possible 'impact' over time on the use of the margin of appreciation doctrine, see also under 4 below.

relevant circumstances of the case before them, and decide what factors and variables to consider in the concrete case before them. In other words, the legal framework remains key in framing the analysis, the non-legal disciplines are ‘merely’ considered to expand the range of interests and variables that can be relied upon, ultimately by courts, for the analysis of minorities’ rights. Overall, the preceding analysis has arguably demonstrated that further (multi-disciplinary legal) research is warranted about the way in which non-legal findings and theories about layers of disadvantage encountered by minorities, also in terms of the various integration dimensions, can be translated into (additional) interests and variables relevant for the analysis of minorities’ rights.<sup>83</sup>

#### 4 Influencing the Practice of the ECtHR and International Courts More Generally: From Knowledge to ‘Courage’?

This more developed multi-disciplinary legal research *could* subsequently feed into judicial practice, in the sense that (international) courts generally could consult the resulting more complete overviews of potentially relevant interests and variables. One cannot expect courts, judges, to do themselves all the multi-disciplinary legal research, but they might be willing to draw on the findings of such research conducted by academia.<sup>84</sup> The courts would then decide case by case which interests and variables to include in their legal assessment and reasoning, in light of the special circumstances of each case. In other words, courts’ *in concreto* weighing would remain, but they could draw on a ‘richer’, more complete, toolkit. To the extent that courts would have doubts about the way in which the findings of non-legal disciplines would need to be weighed, they could draw on the assistance of experts (in these disciplines) as is already the practice in a number of fields.

As was acknowledged before, courts’ interpretation of the law and analysis essentially involves making a choice from a variety of plausible alternatives. Arguably, the ECtHR and other international courts would only use the multi-disciplinary legal research findings, in so far as they would be willing to review (the case and the

respective interests) seriously and adopt a rather searching level of scrutiny. Courts may be concerned about their political legitimacy when adopting these higher levels of scrutiny, leaving less discretion to the contracting states. Nevertheless, it is opined that when courts can rely on multi-disciplinary legal research which allows them to chart the quantum of the disadvantage suffered by vulnerable minority groups in a more comprehensive manner, these courts may actually be swayed to do so. International human rights courts’ readiness to do so is not unlikely especially in view of the potential contribution to the effective protection of minorities’ fundamental rights, which remains their overarching concern after all.

This is exactly what is argued to lay behind the US Supreme Court reliance on social sciences in its seminal judgement in *Brown v. Board of Education* that underscored that segregation itself meant inequality.<sup>85</sup>

Furthermore, it may very well be that expanding international courts’ explicit reasoning, and attempting to tackle lack of knowledge outright by relying on multi-disciplinary legal research, would actually enhance their legitimacy and also states willingness to comply. Indeed, while there is always a question of choice and thus subjectivity in the way in which a court would use the multi-disciplinary legal research findings, making this choice explicit and arguing it in light of ‘all relevant circumstances of the case’ arguably objectivises the court’s reasoning. Ultimately, when courts makes this choice, and the related reasoning, explicit, a body of jurisprudence can emerge, that bring still more ‘objectivity’ to the balancing.<sup>86</sup> In this respect, the ECtHR might feel gradually more confident and ‘courageous’ to have less recourse to a broad margin of appreciation for states, while also other international courts adjudicating on fundamental rights might find the ‘courage’ to reduce the amount of discretion they leave states.

#### 5 Conclusions

This article sets out to contribute to this special issue devoted to multi-disciplinary legal research by discussing first the limits of purely doctrinal legal research in relation to a particular topic, and second the relevant considerations in devising research that (inter alia) draws on non-legal, auxiliary disciplines to ‘fill in’ and

83. J. Friedrichs and W. Jagodzinski, ‘Theorien Sozialer Integration’, *Kolner Zeitschrift für Sociologie und Socialpsychologie* (1999); Henard, 2013, at 107-24.

84. See also *infra* on the US Supreme Court judgement in *Brown v. Board of Education* (347 U.S. 483 (1954) which has been hailed for its for fuelling an increasing multidisciplinary law: *Inter alia* M. Heise, ‘*Brown v. Board of Education*, Footnote 11, and Multidisciplinarity’, 90 *Cornell Law Review*, at 307-8 (2005). At the same time the judgement was criticised for relying on one particular study whose methodology gave rise to substantial technical criticism (*Ibid.*, at 294-5).

85. J.M. Wisdom, ‘Random Remarks on the Role of Social Sciences in the Judicial Decision-Making Process in School Desegregation Cases’, 39 *Law and Contemporary Problems*, at 138, 142 (1975), underscoring that ‘the social science evidence was the kind of support a court likes to find in a record to lend factual and scientific aura to a result ... dictated by the moral necessity of changing social attitudes’.

86. This phenomenon of ‘objectivisation’ is already visible in highly sensitive and controversial instances of conflicting rights of, for example, the right to respect for privacy and the freedom of expression: see *inter alia* K. Henard, ‘Botsende grondrechten en het EHRM: een pleidooi voor meer zorgvuldige argumentatie en minder “margin of appreciation” voor staten’, in E. Brems, R. de Lange & K. Henard (eds.), *Botsing van Grondrechten*, BJU 2008, 29-61.

guide the legal framework. The topic concerned is the (analysis of the) fundamental rights of minorities.

The introduction highlights the generally acknowledged truth that law, also human rights law, is open to multiple plausible interpretations. Courts, when adjudicating, need to make a choice what interpretation to adopt. This choice depends on the interpretation principles relied upon and also on the position taken in relation to the role of courts, and the degree of activism that would be appropriate. Relying on foundational principles of fundamental rights, the case is made for human rights courts to adopt a rather activist approach, adopting a baseline level of scrutiny which is rather high. Furthermore, while acknowledging the inherently subjective nature of the interpretation of fundamental rights, it is opined that when courts would develop extensive explicit reasoning, this would facilitate the emergence of lines of jurisprudence, and thus predictability and a certain objectivity.

The article starts maybe somewhat a-characteristically with a critical assessment of the jurisprudence of the European Court of Human Rights regarding the analysis of minorities' rights, more particularly the failure to properly identify and weigh all relevant interests and variables and the related reduction of minorities' cases its analysis operates. This 'prelude' is necessary because it provides crucial insights in the causes of these alleged flaws in the Court's jurisprudence: lack of knowledge (about the relevant interests and variables for the analysis of minorities' rights) and concerns with the Court's political legitimacy. At the same time the critical analysis of the Court's jurisprudence allows already for the identification of possible contributions from findings from sociology (related social sciences) and political philosophy. The article goes on to argue for the need for further multi-disciplinary legal research, drawing on social sciences and political philosophy as auxiliary disciplines that could ultimately assist courts in tackling the lack of knowledge when analysing minorities' rights. Subsequently, these researches (findings) could feed into judicial practice, possibly with the help of experts.

The ECtHR and other international human rights courts are not unlikely to draw on this multi-disciplinary legal research when it would enable them to really take into account 'all relevant circumstances' of the case before them and thus identify and properly weigh all relevant interests in cases on minorities' rights. In addition to the significant contribution to the effective protection of fundamental rights, the courts' ensuing explicit and transparent reasoning will over time crystallise into lines of jurisprudence, thus bringing further objectivity and predictability to judicial decision making.

Furthermore, the ensuing more explicit reasoning by international courts will offer better guidance to public authorities, ending their often disturbing uncertainty, thus making them more 'at ease' when ruling on minorities' rights, knowing that they can justify the choices made in light of a broad panoply of relevant interests and variables. This in turn might further contribute to a

positive cooperation between contracting states and international courts, and thus reduce the latter's (perceived) legitimacy problems.