

Affirmative action

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Terminology

- Affirmative action = positive action
- Not = positive discrimination
(*contradictio in terminis*)

Forms of affirmative action

- **I. Affirmative mobilization:** targeted groups are aggressively encouraged and sensitized to apply for a social good
- **II. Affirmative fairness:** make sure that members of target groups have been treated fairly in the attribution of social groups (complaint procedures etc.)

Forms of affirmative action

- **III. Affirmative preference:** preference given to the person belonging to a designated group
- A. when two equally qualified persons apply
- B. even when less qualified

III. B is controversial

- Inflicts an injury on members of a group in order to promote the welfare of another group, usually
 - - in areas protected by human rights treaties and
 - - based on ground expressly mentioned in non-discrimination clauses.

Terminology

- Principle of equality = principle of non-discrimination
- A. Discrimination: arbitrary, unfair, unjust
- B. Distinction: a neutral term
- C. Differentiation: a lawful difference in treatment

ECtHR, *Linguistic case* (1968)

- If the distinction has no objective and reasonable justification
- In relation to the aim and effects of the measure under consideration
- If no reasonable relationship of proportionality between the means employed and the aim sought to be realized.

Grounds of discrimination

- UN Charter: 4 grounds (race, language, religion, sex)
- Universal Declaration: 12 (“such as”)
- European Convention: 13

Non-exhaustive enumeration -> the ground is not in itself decisive, but has to be *relevant* for the specific right in regard to which the distinction is practised.

Conclusions

- A persistent policy in the past of systematic discrimination may justify – and in some cases even require – special measures intended to overcome the sequels of a condition of inferiority which still affects members belonging to such groups.

However, a legal rule is not necessarily legitimate because it pursues a legitimate goal. A good intention or a legitimate objective is not sufficient to justify any distinction based on whatever ground in any matter.

- In matters of human rights, a preference is only justified if based on a ground relevant to the right at stake.
- - in matters of employment and education: the principal criterion is competence;
- - in the public sector: proportional representation may be relevant (“representativity”).

- The prohibition of discrimination would become meaningless if measures depriving persons of a right on a ground not relevant to that right were justified by labelling such measures as affirmative action.

- It is not justified to provide social benefits to persons who do not need them but belong to a formerly disadvantaged category and to deny them to persons who do not need them but belong to a category which previously enjoyed better conditions in society.
- Substituting the descendants of the victims of the past for the descendants of the oppressors of the past does not legitimate a discrimination.

- It is through the choice, timing and location of the measures that the policy may favour the target category without violating the rights of persons not belonging to that category.

Final conclusion

- Affirmative action is no exception to the principle of discrimination. It is the principle of non-discrimination that establishes limits to each affirmative action.