

Differentiating between forms and grounds of discrimination – The ‘very weighty reasons’ test of the European Court of Human Rights

Prof. dr. J.H. (Janneke) Gerards, Radboud University of Nijmegen, the Netherlands

Equality for Everyone – Challenges Ahead
Brussels, 26 November 2012

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Luxembourg, Strasbourg and human rights



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Luxembourg, Strasbourg and non-discrimination



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Differences between grounds of discrimination

- CJEU – not much eye for differences between grounds and forms of discrimination
- EU Non-Discrimination Directives – different exemptions and limitation clauses for different grounds
- E.g. age – article 6 (1) Framework Directive:
 ... Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if ... they are objectively and reasonably justified by a legitimate aim, **including** legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.
 → seems a 'semi-open' exemption clause

Do differences in grounds of discrimination matter?

CJEU in *Prigge v. Lufthansa* (C-447/09, 2011):

80. In that regard, it must be noted that, while the list is not exhaustive, the legitimate aims set out in that provision are related to employment policy, labour market and vocational training.

...

82. It is apparent from that information that an aim such as air traffic safety does not fall within the aims referred to in the first paragraph of Article 6(1) of the Directive.

→ 'Closed' exemption clause?

Differences between grounds of discrimination:

- Race
 - Gender
 - Marital status
 - Immigration status
 - Income
 - Education
 - Talent
 - ...

'Benign' forms of unequal treatment?



The margin of appreciation doctrine

- Determines intensity of review
- Narrow margin = strict review
 - Compelling reasons needed → important societal aims
 - Less restrictive means test
 - Strict test of effectiveness
 - Burden of proof with the state
- Wide margin = judicial restraint
 - test of manifest arbitrariness or unreasonableness
- Non-discrimination cases: **very weighty reasons test**
 - justification hardly ever accepted



When does the very weighty reasons test apply?



- Immutability?
- Irrelevance?



Consensus and common ground

"... it can be said that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention."

Abdulaziz, Cabales and Balkandali v. UK (1985), para. 78

"... the question of equality between children born in and children born out of wedlock as regards their civil rights is today given importance in the member states of the Council of Europe..."

Marckx v. Belgium (1979), para. 41



The downside of consensus arguments

- "37. It is true that the advancement of the **equality of the sexes is today a major goal** in the member States of the Council of Europe and **very weighty reasons would be needed** for such a difference in treatment to be regarded as compatible with the Convention"
38. However, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law.
39. It is clear that at the material time, that is at the end of the 1980s, there was **no common standard in this field**, as the majority of the Contracting States did not provide for parental leave allowances to be paid to fathers.
43. The Austrian authorities' **refusal to grant the applicant a parental leave allowance has not, therefore, exceeded the margin of appreciation allowed to them.** ..."

Petrovic v. Austria (1998)

Towards a different approach?

"Discrimination on account of one's actual or perceived ethnicity is a form of racial discrimination ... **Racial discrimination is a particularly invidious kind of discrimination** ...

... [T]he Court considers that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified..."

Timishev v. Russia (2005), paras. 56 and 58

"Just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification."

L. & V. v. Austria (2003), para. 45

Alajos Kiss v. Hungary (2010)

42. ... If a restriction on fundamental rights applies to a **particularly vulnerable group in society**, who have **suffered considerable discrimination in the past**, such as the mentally disabled, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question. ... The reason for this approach, which questions certain classifications *per se*, is that such groups were **historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice may entail legislative stereotyping** which prohibits the individualised evaluation of their capacities and needs.

Kiyutin v. Russia (2010)

64. From the onset of the epidemic in the 1980s, people living with HIV/AIDS have suffered from widespread stigma and exclusion, including within the Council of Europe region In recent times, despite considerable progress in HIV prevention and better access to HIV treatment, stigma and related discrimination against people living with HIV/AIDS has remained a subject of great concern for all international organisations active in the field of HIV/AIDS. ... The Court therefore considers that **people living with HIV are a vulnerable group with a history of prejudice and stigmatisation** and that the State should be afforded only a narrow margin of appreciation in choosing measures that single out this group for differential treatment on the basis of their HIV status.

Relevant factors for 'very weighty reasons' test



- Prejudice, stereotyping, stigmatisation
- History of discrimination
- Social exclusion with lasting effects

Why these factors?

- Stronger rationale for intensified judicial review than immutability or 'choice grounds'
- Flexibility
 - measures that do not stem from prejudice can be allowed more easily
 - room for acceptance of 'benign' forms of discrimination

Conclusions

- Very weighty reasons test sets an important example
- CJEU may also vary intensity of review
- Intensity of review may depend on influence of stereotyping / history of discrimination on difference in treatment
- Warning: ECtHR's case law is not fully developed and still inconsistent!



Appendix

Which grounds are "suspect" according to the ECtHR?

Suspect:

- Gender / sex
Abdulaziz (1985)
- Birth (lawful / unlawful; abortion)
Inze (1987)
- Nationality (sometimes)
Gaygusuz (1996)
- Sexual orientation
L & V (2003)
- Race
Timishev (2005)
- Mental disability
Alajos Kiss (2010)
- HIV/Aids
Kyutin (2011)

Unknown:

- Age?
- Religion?

Not suspect:

- Marriage / marital status
Serife Yigit (2010)
- Immigration status
Bah (2011)






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Recent developments under Article 14 ECHR

Dr. Oddný Mjöll Arnardóttir
professor




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The classic approaches

- A principle of equality
 - ECtHR (GC), *Orsus and others v. Croatia*, 16. march 2010, paras. 149-150:
 - Direct discrimination
 - “According to the Court’s well-established case-law, discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations...”
 - Positive action
 - ... However, Article 14 does not prohibit a member State from treating groups differently in order to correct ‘factual inequalities’ between them;...
 - Reasonable accommodation
 - ... indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of Article 14.”
 - Indirect discrimination
 - “The Court has also accepted that a general policy or measure which is apparently neutral but has disproportionately prejudicial effects on persons or groups of persons [...] may be considered discriminatory notwithstanding that it is not specifically aimed at that group...”



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The classic approaches

- ‘Suspect’ discrimination grounds
 - ‘sex’, ‘race’, sexual orientation, birth inside or outside marriage, religion, nationality
- A more elaborate ‘vulnerable groups’ approach
 - ECtHR, *Kiyutin v. Russia*, 10 March 2011
 - ‘sex’, ‘sexual orientation’, ‘race or ethnicity’, ‘mental faculties’ and ‘disability’ (including positive HIV status)

Material Scope

- The relationship of Article 14 and Article 1 of Protocol 12
 - ECtHR (GC), *Sejdic and Finci v. Bosnia and Herzegovina*, 22 December 2009
 - Conceptually the same as A14
 - Right to stand for elections in choice of legislature
 - A14 + A3P1 (not necessary to review under P12)
 - Right to stand for elections in choice of president
 - A1P12
 - ECtHR, *Savez crkava "Riječ života" and Others v. Croatia*, 9 December 2010
 - A14 + A9 (not necessary to review under P12)
 - ECtHR, *Vuckovic and Others v. Serbia*, 28 August 2012
 - A14 + A1P1 (not necessary to review under P12)



Personal scope

- A non-exhaustive list of discrimination grounds
 - The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on **any ground** such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or **other status**
- The approach of the Court has always been very open towards the discrimination grounds
 - Listed discrimination grounds include
 - Personal characteristics and non-personal discrimination grounds (property)
 - Immutable and changeable characteristics alike (political opinion and religion)
 - Discrimination grounds linked with social marginalisation or not (property)



Personal scope

- The traditional doctrines and recent developments
 - ECtHR, *Engel v. the Netherlands*, 8 June 1976
 - 'A distinction based on rank may run counter to Article 14 (art. 14). The list set out in that provision is illustrative and not exhaustive, as is shown by the words "**any ground such as**" (in French "notamment"). Besides, the word "status" (in French "situation") is wide enough to include rank.' (para. 72)
 - ECtHR *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976
 - '...having as its basis or reason a **personal characteristic** ("**status**") by which persons or groups of persons are distinguishable from each other' (para. 56).
 - ECtHR (GC), *Carson v. the United Kingdom*, 16 March 2010
 - '...only differences in treatment based on an **identifiable characteristic**, or "**status**", are capable of amounting to discrimination within the meaning of Article 14 (*Kjeldsen, Busk Madsen and Pedersen*, cited above, § 56)' (para. 61).



Personal scope

- Post-Carson we still have examples of:
 - Discrimination grounds only loosely linked to personal characteristics, not inherent or immutable and not linked to social marginalisation, e.g.
 - ECtHR *Vucovic and Others v. Serbia*, 28 August 2012 (residence in different municipalities); ECtHR *Graziani-Weiss v. Austria*, 18 October 2011 (chosen profession); ECtHR *Bah v. the United Kingdom*, 27 September 2011 (different types of immigrant status); ECtHR (GC), *Stummer v. Austria*, 7 July 2011 (prisoner status), etc.
 - Non-personal discrimination grounds (cases brought by companies and associations)
 - ECtHR, *Granos Organicos Nacionales v. Germany*, 22 March 2012 (difference between natural and legal persons and difference between foreign and domestic legal entities) ECtHR, *Qao Neftyanaya Kompaniya Yukos v. Russia*, 20 September 2011 (the different treatment of the applicant company as compared with other companies allegedly using the same tax arrangements).
 - Non-personal discrimination grounds (cases brought by individuals)
 - ECtHR, *Valkov and Others v. Bulgaria*, 25 October 2011 (different salaries and different treatment of pension calculations of certain high-ranking officials and others); ECtHR, *Maggio and Others v. Italy*, 31. May 2011 (different points in time when pensions claims were liquidated).



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Personal scope

- The open and fluid approach towards the discrimination grounds makes a difference
 - Burden of proof
 - Otherwise there is a heavier burden to lift for the applicant before the onus to justify treatment is put on the respondent state
 - Multidimensional equality
 - Enables the applicant to claim composite discrimination grounds
 - A principle of equality
 - Even if most cases involving non-traditional discrimination grounds meet with lenient review and lead to findings of non-violation the human rights guarantee seems worth having
 - When blatantly arbitrary distinctions have been made
 - » E.g. ECtHR *Vucovic and Others v. Serbia*, 28 August 2012 (payments based on residence 'nothing short of arbitrary') and ECtHR *Beian v. Romania*, 6 December 2007 (diametrically opposed judgments in same type of cases being the discrimination ground)
 - When the consequences for the applicant would otherwise be severe
 - » E.g. ECtHR *Ponomarev v. Bulgaria*, 21 June 2011 (nationality and immigrant status, access to education)



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Conceptual elements

- The 'coming of age' of indirect discrimination?
 - ECtHR *Zarb Adami v. Malta*, 20 June 2006
 - „The Court considers that these [statistical] figures show that the civic obligation of jury service has been placed predominantly on men. Therefore, there has been a difference in treatment between two groups – men and women – which, with respect to this duty, were in a similar situation.” (para. 78). Violation A14 + 4(3)(d).
 - ECtHR (GC), *D.H. and others v. Croatia*, 13 November 2007
 - „...in more recent cases on the question of discrimination in which the applicants alleged a difference in the effect of a general measure or de facto situation (see *Hoogendijk*, cited above, and *Zarb Adami*, cited above, §§ 77-78), the Court relied extensively on statistics produced by the parties to establish a difference in treatment between two groups (men and women) in similar situations.” (para. 180). Violation A14 + A2P1
 - ECtHR (GC), *Orsus and others v. Croatia*, 16. march 2010
 - “However, indirect discrimination may be proved without statistical evidence [...]. In this connection the Court notes that the measure of placing children in separate classes on the basis of their insufficient command of the Croatian language was applied only in respect of Roma children in several schools in Medimurje County, including the two primary schools attended by the applicants in the present case. Thus, the measure in question clearly represents a difference in treatment.” (para. 153) Violation A14 + A2P1



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Conceptual elements

- Reasonable accommodation is still alive
 - ECtHR (GC), *Thlimmenos v. Greece*, 6 April 2000
 - "However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification **fail to treat differently persons whose situations are significantly different.**" (para. 44) violation A14 + A9
 - ECtHR, *B. v. the United Kingdom*, 14 February 2012, para. 58
 - "The Court considers the applicant's alternative formulation, namely that, as someone who did not have the capacity to understand the obligation to report, she should have been treated differently from someone who did, to be somewhat more persuasive. It appears to the Court that the situation of these two groups is **sufficiently different to require the respondent State to objectively and reasonably justify its failure to treat them differently.**" (para. 58) non-violation A14 + A1P1



Conceptual elements


- Positive obligations – obligation to investigate motives behind violence with overtones of racial hatred
 - ECtHR, *Angelova and Iliev v. Bulgaria*, 26 July 2007 (Roma)
 - "Moreover, when investigating violent incidents State authorities have the additional duty to **take all reasonable steps to unmask any racist motive** and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights." (para. 115) violation A14 + A2 procedural aspect
 - Also e.g. ECtHR *Makhashevy v. Russia*, 31 July 2012 (Chechen) violation A14 + A3 procedural aspect; ECtHR *Stolica v. Romania*, 4 March 2008 (Roma) violation A14 + A3 procedural aspect
 - ECtHR, *Mizigarova v. Slovakia*, 14 December 2010
 - "The respondent State's obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and not absolute [...]. The authorities must do what is reasonable in the circumstances..." (para. 120) No concrete information suggesting racist motives – no violation.
 - Also e.g. ECtHR *Beganovic v. Croatia*, 26 June 2009.



Conceptual elements

- Positive obligations – obligation to investigate motives and of due diligence with respect to violence with overtones of religious hatred
 - ECtHR, *Milanovic v. Serbia*, 14 December 2010
 - "The Court considers that, just like in respect of racially motivated attacks, when investigating violent incidents State authorities have the additional duty to **take all reasonable steps to unmask any religious motive** and to establish whether or not religious hatred or prejudice may have played a rôle in the events." (para 96) violation A14 + A3
 - ECtHR, *Members of Gdani Congregation of Jehovah's Witnesses and others v. Georgia*, 3 May 2007
 - "... the refusal by the police to intervene promptly at the scene of the incident in order to protect the applicants, and the children of some of their number, from acts of religiously-motivated violence, and the subsequent indifference shown towards the applicants by the relevant authorities, was to a large extent the corollary of the applicants' religious convictions."
 - "The Court considers that the **negligent attitude towards extremely serious unlawful acts, shown by the police and the investigation authorities** [...] enabled Father Basil to continue to advocate hatred through the media and to pursue acts of religiously-motivated violence accompanied by his supporters, while alleging that the latter enjoyed the unofficial support of the authorities [...]. This would suggest to civil society a reasonable doubt as to the criminals' complicity with the State representatives..." (para. 141) Violation A14 + A9 and A3






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Conceptual elements


- Positive obligations – obligation of due diligence with respect to domestic violence
 - ECtHR (GC), *Opuz v. Turkey*, 9. June 2009
 - "...the State's failure to protect women against domestic violence breaches their right to equal protection of the law..." (para. 191)
 - "...the Court considers that the violence suffered by the applicant and her mother may be regarded as gender-based violence which is a form of discrimination against women. Despite the reforms carried out by the Government in recent years, the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors, as found in the instant case, indicated that there was **insufficient commitment to take appropriate action** to address domestic violence..." (para. 200) violation A14 + A2 and A3



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Conceptual elements

- Positive obligations – indirect horizontal effect - effective legal protection against discrimination
 - ECtHR, *Danilenkov and others v. Russia*, 30 July 2009
 - Various techniques were used by the Kaliningrad seaport company in order to encourage employees to relinquish their trade union membership.
 - Russian courts refused to entertain the applicants' discrimination complaints, holding that the existence of discrimination could be established only in criminal proceedings which required proof "beyond reasonable doubt" of direct intent on the part of one of the company's key managers to discriminate against the trade union members.
 - "...the Court considers that the State **failed to fulfil its positive obligations to adopt effective and clear judicial protection against discrimination** on the ground of trade union membership" (para. 136) violation A14 + A11



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Conclusions

- There is a fundamental difference between Article 14 and the EU non-discrimination directives
 - A general principle of equality as opposed to specific legal rules of treatment in specific contexts
 - Material scope
 - Personal scope
 - Conceptual elements
 - Different dynamics regarding indirect discrimination
 - Different dynamics regarding reasonable accommodation
 - There are positive obligations developing under Article 14
 - Different dynamics regarding possibilities for justifications of different treatment
 - Cross-fertilisation is fine
 - But the aim should not be to erase the differences
