

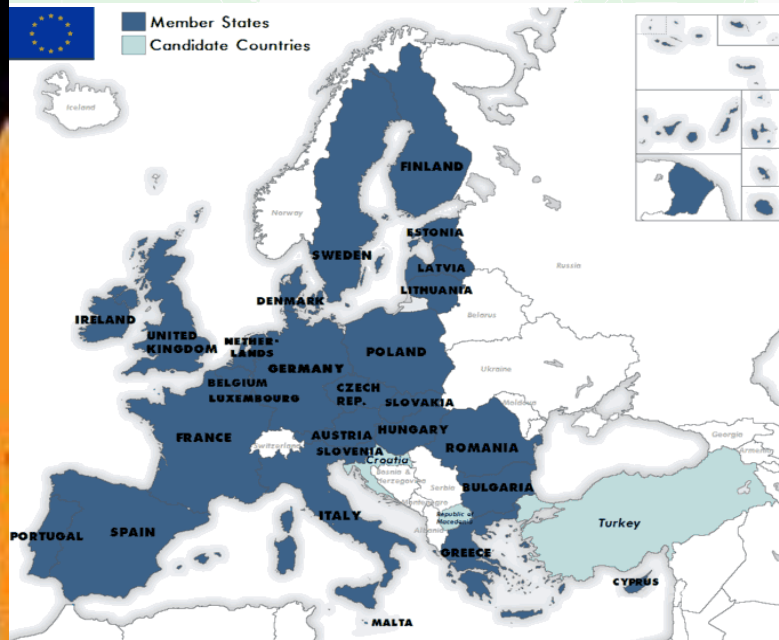
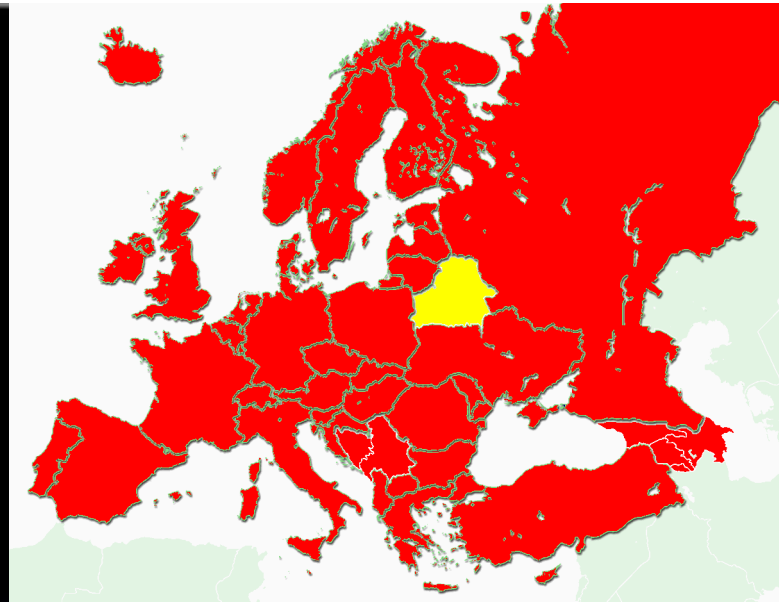
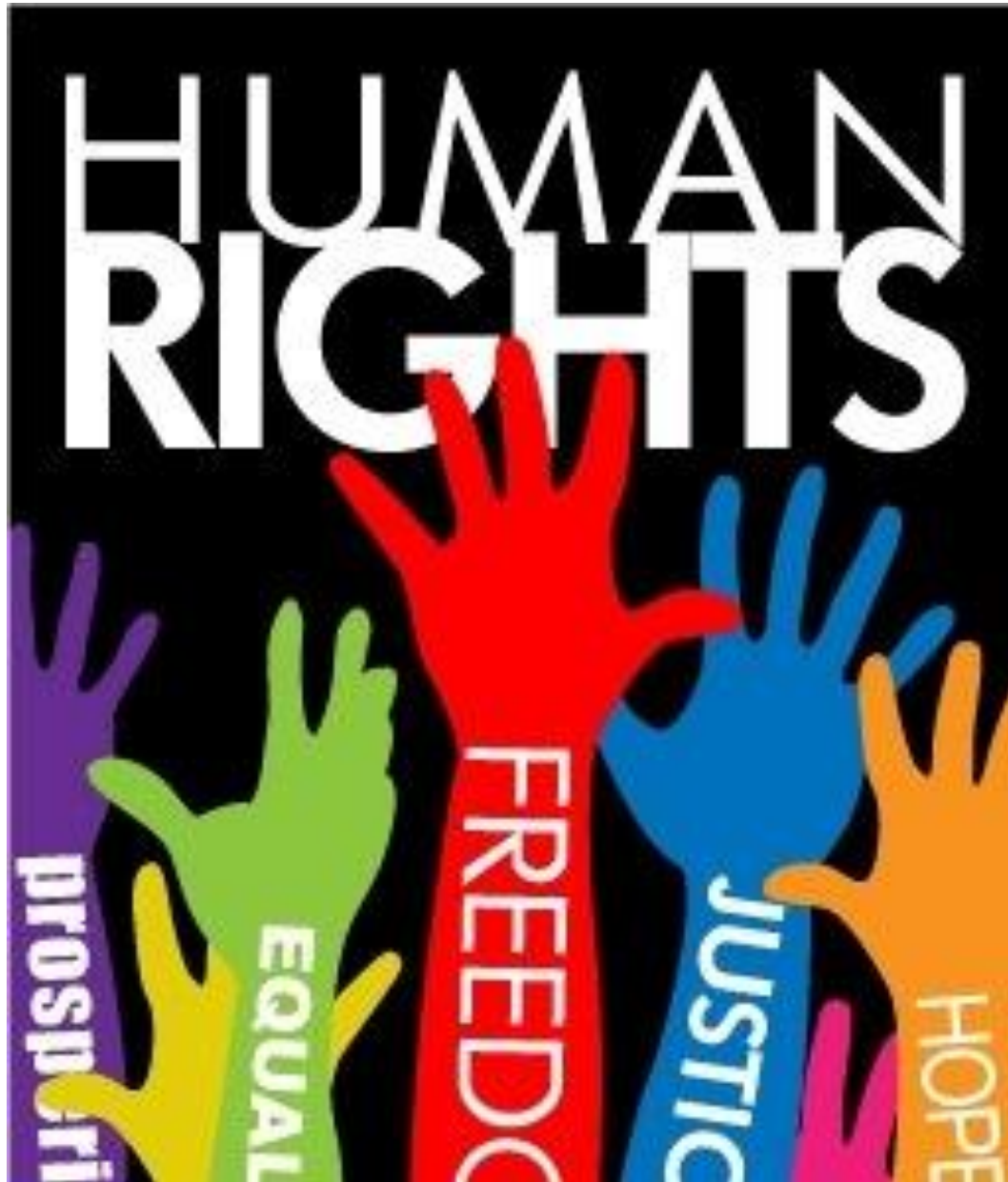
Differentiating between forms and grounds of discrimination –

The ‘very weighty reasons’ test of the European Court of Human Rights

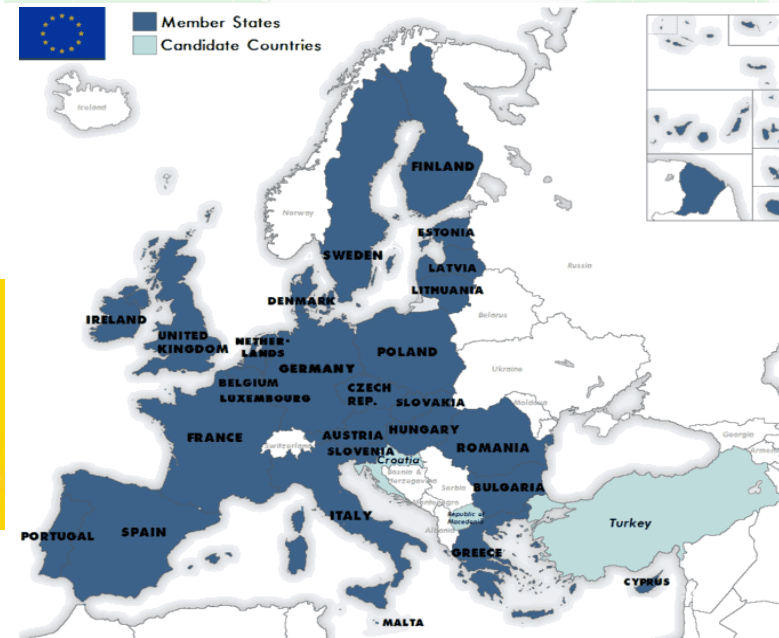
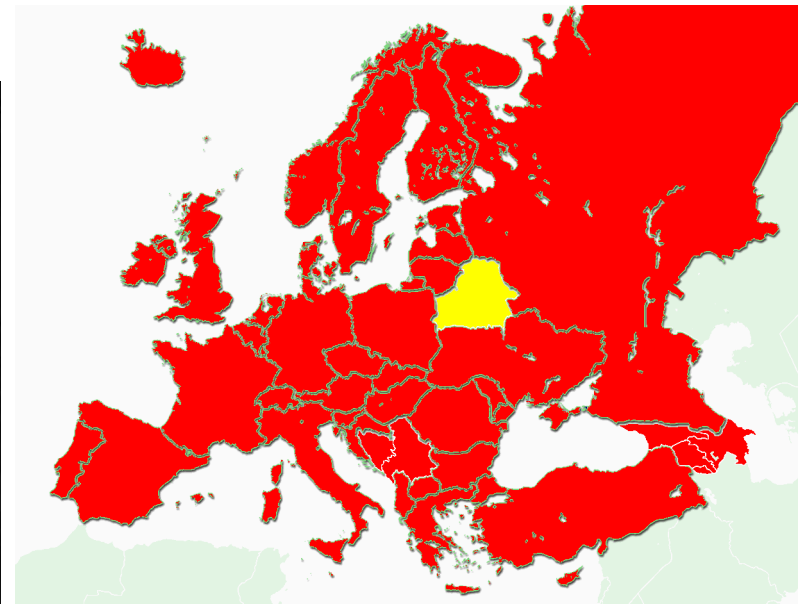
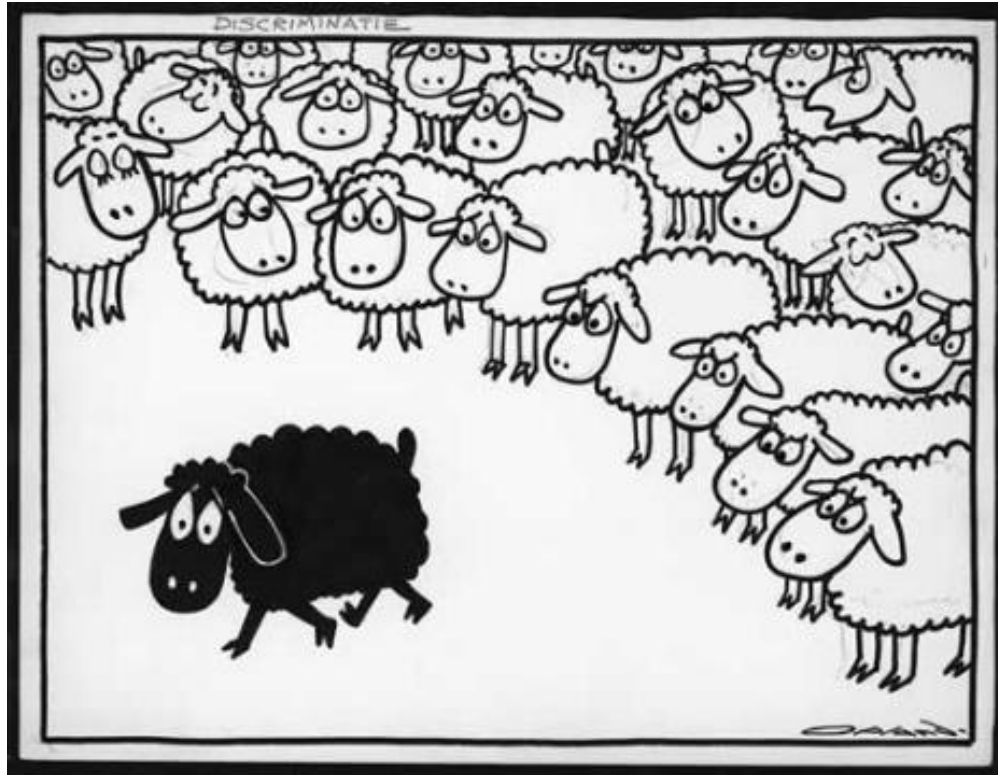
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Equality for Everyone – Challenges Ahead
Brussels, 26 November 2012

Luxembourg, Strasbourg and human rights



Luxembourg, Strasbourg and non-discrimination



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
Kiyutin (2011)

Unknown:

- Age?
- Religion?

Not suspect:

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