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Recent case-law of the ECtHR on Non-Discrimination

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Gender as a suspect ground?

1. Consensus rationale (*Abdulaziz, Cabales and Balkandali v the United Kingdom*, 28 May 1985, nos. 9214/80 et al.)

- Usually results in 'very weighty reasons test'
- But: lack of consensus on a specific topic? → wider margin of appreciation for the state (eg *Petrovic v Austria*, 27 March 1998, no. 20458/92)

2. Anti-stereotyping rationale (*Konstantin Markin v Russia*, 22 March 2012, no. 30078/06)



Gender not a suspect ground? (1/6)

***Khamtokhu and Aksenchik v. Russia*, 24 January 2017 (GC), nos. 60367/08 and 961/11**

78. On the one hand, the Court has repeatedly held that **differences based on sex require particularly serious reasons by way of justification** and that references to traditions, general assumptions or prevailing social attitudes in a particular country cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation



Gender not a suspect ground? (2/6)

***Khamtokhu and Aksenchik v. Russia*, 24 January 2017 (GC), nos. 60367/08 and 961/11**

78. ... On the other hand ... it is **not its role to decide what is the appropriate term of detention** applicable to a particular offence or to pronounce on the appropriate length of detention or other sentence which should be served by a person after conviction by a competent court ...

79. An additional factor relevant for determining the extent to which the respondent State should be afforded a margin of appreciation is the **existence or non-existence of a European consensus**.



Gender not a suspect ground? (3/6)

***Khamtokhu and Aksenchik v. Russia*, 24 January 2017 (GC), nos. 60367/08 and 961/11**

82. ... the Court has taken note of various European and international instruments addressing the **needs of women for protection against gender-based violence, abuse and sexual harassment in the prison environment, as well as the needs for protection of pregnancy and motherhood** The Government provided **statistical data** showing a considerable difference between the total number of male and female prison inmates They also pointed to the relatively small number of persons sentenced to life imprisonment



Gender not a suspect ground? (4/6)

***Khamtokhu and Aksenchik v. Russia*, 24 January 2017 (GC), nos. 60367/08 and 961/11**

82. ... In the particular circumstances of the case, the available data ... provide a sufficient basis for the Court to conclude that there exists a **public interest** underlying the exemption of female offenders from life imprisonment by way of a general rule.

...

86. It therefore appears **difficult to criticise the Russian legislature** for having established, in a way which reflects the evolution of society in that sphere, the exemption of certain groups of offenders from life imprisonment. Such an **exemption represents**, all things considered, **social progress in penological matters** ...



Gender not a suspect ground? (5/6)

***Khamtokhu and Aksenchik v. Russia*, 24 January 2017 (GC),
nos. 60367/08 and 961/11, concurring opinion Judge
Nussberger**

'Sometimes "**better is the enemy of good**".'



Gender not a suspect ground? (6/6)

***Khamtokhu and Aksenchik v. Russia*, 24 January 2017 (GC),
nos. 60367/08 and 961/11, concurring opinion Judge Sajó**

'One could argue that the most serious crimes women commit differ from those committed by male offenders ...'

'Female crime is far less common than male crime; therefore there can be less need for deterrence.'

'... the same period of **imprisonment for a woman is more painful than for a man, perhaps because, typically, a woman is deprived of the possibility of giving birth to a child, and in particular raising a child ...**'



Gender stereotyping as justification? (1/2)

Alexandru Enache v. Romania, 3 October 2017, no. 16986/12

66. ... la Cour a conclu, sans ignorer les différences qui pouvaient exister entre le père et la mère dans leur relation avec l'enfant que, pour ce qui est des soins à apporter à l'enfant pendant la période correspondant au congé parental ..., **les hommes et les femmes étaient placés dans des situations analogues.**

68. ... bien qu'il puisse y avoir des différences dans leur relation avec leur enfant, **tant la mère que le père peuvent apporter cette attention et ces soins ...**



Gender stereotyping as justification? (2/2)

Alexandru Enache v. Romania, 3 October 2017, no. 16986/12

76. ... le but des normes légales en question était de tenir compte de situations personnelles spécifiques, dont la grossesse de la femme détenue et la période précédant le premier anniversaire du nouveau-né, ayant notamment regard aux **liens particuliers qui existent entre la mère et l'enfant pendant cette période**

77. En effet, la Cour accepte que **la maternité présente des spécificités qu'il convient de prendre en compte, parfois par des mesures de protection.**

78. À la lumière de ce qui précède, la Cour estime que, compte tenu de **l'ample marge d'appréciation** qu'elle reconnaît à l'État défendeur dans ce domaine, il existe un **rapport raisonnable de proportionnalité** entre les moyens employés et le but légitime recherché.



Age a suspect ground?

***Khamtokhu and Aksenchik v. Russia*, 24 January 2017 (GC), nos. 60367/08 and 961/11**

85. The Court considers it quite natural that the national authorities ... should enjoy **broad discretion** when they are asked to make rulings on sensitive matters such as **penal policy**. Moreover, the area in question should still be regarded as one of evolving rights, with no established consensus, in which States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes Since the delicate issues raised in the present case touch on areas where there is **little common ground** amongst the member States of the Council of Europe and, generally speaking, the law appears to be in a transitional stage, **a wide margin of appreciation must be left to the authorities of each State**.



Nationality-based discrimination

***A.H. and Others v. Russia*, 17 January 2017 (Grand Chamber), nos. 6033/13 and others**

411. ... there was a difference between the treatment of US applicants and that of other foreign nationals who were candidates for intercountry adoption of Russian children **on the grounds of the nationality** of the former ...

407. ... **very weighty reasons** would have to be put forward before the Court could regard a **difference in treatment based exclusively on the ground of nationality** as compatible with the Convention ...



Nationality-based discrimination and adoption

***A.H. and Others v. Russia*, 17 January 2017 (Grand Chamber), nos. 6033/13 and others**

426. ... the Government have failed to show that there were compelling or very weighty reasons to justify the **blanket ban applied retroactively and indiscriminately** to all prospective adoptive parents from the United States, irrespective of the status of the adoption proceedings already started and their individual circumstances. It thus constituted a **disproportionate measure** in relation to the aims stated by the Government. The Court therefore concludes that the difference in treatment was discriminatory in breach of Article 14 in conjunction with Article 8.



Nationality based discrimination and deportation

***Ndidi v. the United Kingdom*, 14 September 2017, no. 41215/14**

86. The complaint that he was treated differently from a British national sentenced to more than four years' imprisonment [The Court] has found that **in expulsion cases non-nationals cannot be compared to nationals who have a right of abode in their own country and cannot be expelled from it** Accordingly, the Court considers that the Article 14 complaint based on this ground must be rejected as manifestly ill-founded



Discrimination by association

***Škorjanec v. Croatia*, 28 March 2017, no. 25536/14**

66. ... under the Convention the obligation on the authorities to seek a possible link between racist attitudes and a given act of violence exists not only with regard to acts of violence based on the victim's actual or perceived personal status or characteristics but **also with regard to acts of violence based on the victim's actual or perceived association or affiliation with another person who actually or presumably possesses a particular status or protected characteristic** Indeed, some hate-crime victims are chosen not because they possess a particular characteristic but because of their association with another person who actually or presumably possesses the relevant characteristic.



Discrimination by association

***Škorjanec v. Croatia*, 28 March 2017, no. 25536/14**

67. In the case in issue, the prosecuting authorities confined their investigation and analysis to the hate-crime element of the violent attack against Š.Š. **They failed to carry out a thorough assessment of the relevant situational factors and the link between the applicant's relationship with Š.Š. and the racist motive for the attack on them.**

71. ... [T]he Court cannot but conclude that the domestic authorities **failed to comply with their obligations under the Convention** when they rejected the applicant's criminal complaint of a racially motivated violent attack on her without conducting a further investigation in that respect prior to their decision.



So-called 'homo propaganda'

***Bayev and Others v. Russia*, 20 June 2017, nos. 67667/09 and 2 others**

67. ... the Government advanced the alleged **incompatibility** between **maintaining family values** as the foundation of society and acknowledging the **social acceptance of homosexuality**. The Court sees no reason to consider these elements as incompatible, especially in view of the growing general tendency to include relationships between same-sex couples within the concept of "family life" It may be added that – **far from being opposed to family values – many persons belonging to sexual minorities manifest allegiance to the institutions of marriage, parenthood and adoption, as evidenced by the steady flow of applications to the Court from members of the LGBT community who wish to have access to them ...**



So-called 'homo propaganda'

***Bayev and Others v. Russia*, 20 June 2017, nos. 67667/09 and 2 others**

70. The Court takes note of the Government's assertion that **the majority of Russians disapprove of homosexuality** and resent any display of same-sex relations. It is true that **popular sentiment may play an important role in the Court's assessment** when it comes to the justification on the grounds of morals. ...

The Court reiterates that it would be **incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority**. Were this so, a minority group's rights to freedom of religion, expression and assembly would become merely theoretical rather than practical and effective as required by the Convention



So-called 'homo propaganda'

***Bayev and Others v. Russia*, 20 June 2017, nos. 67667/09 and 2 others**

68. The Court has consistently **declined to endorse policies and decisions which embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority**

69. **The legislation at hand is an example of such predisposed bias**, unambiguously highlighted by its domestic interpretation and enforcement, and embodied in formulas such as “to create a distorted image of the social equivalence of traditional and non-traditional sexual relationships” ... and references to the potential dangers of “creating a distorted impression of the social equivalence of traditional and non-traditional marital relations” Even more unacceptable are the attempts to draw parallels between homosexuality and paedophilia.’