



STANDING FOR EQUALITY? PERSPECTIVES OF NON-DISCRIMINATION IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE EUROPEAN COURT OF JUSTICE

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HR LL.M. THESIS

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Abstract

The thesis draws from what I feel to be an important human rights problem on the European scene. It is an exploratory effort, seeking to discern the standards for equality and non-discrimination protection, as spelled out by Europe's top hierarchy Courts in their case-law. The thesis looks into classic and peculiar decisions of the two Courts, as far as equality and non-discrimination understandings are concerned, to essentially argue that although neither the ECtHR, nor the ECJ are bound by the doctrine of stare decisis, looking into their case-law is an invaluable source of knowledge in ascertaining the ambit of European human rights protection.

The thesis further questions the view that Europe is an area of the rule of law, with ample opportunities to fight discrimination, but at the same time the analysis and findings of the work entrust positive hopes with recent legislative developments that will allow the Courts to enlarge upon the protection of human rights through the equality and non-discrimination lens.

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Introduction

The notions of equality and non-discrimination are foundational for human rights thinking. The present work examines those principles and their development and transformation into important values, protected by the decisions of the highest judicial courts in Europe – the European Court of Human Rights and the European Court of Justice. Although existent in the European philosophical, political and judicial context for eras, the notion of equality and the more recent one of non-discrimination would have remained vague, uncertain, promising, but unrealized and empty of concrete application terms, if it was not for the role of the Courts. It is through the legitimizing work of Europe's top hierarchy adjudicative bodies that these notions have undergone a substantial development and have succeeded to emerge as powerful legal tools that can positively change the lives of people by protecting their fundamental rights and safeguarding democratic values.

In choosing the topic for the thesis work, I understand that I am not a pioneer, but a follower. Naturally, the thesis steps on the shoulders of major works in the field. Oddný Mjöll Arnardóttir discusses in detail equality and non-discrimination under the ECHR. Her findings about the mechanics of analysis of a non-discrimination claim, as well as the designed charts of relevant cases comprise a valuable insight into the topic, accentuating on new possibilities that are opening up for more effective protection against discrimination under the ECHR. A firm foundation for the present research is Evelyn Ellis' 'EU Anti-Discrimination Law', where the author offers a useful and comprehensive understanding of the equality and non-discrimination principles in EU law in the light of its economic rationale. Her careful analysis of the legal provisions, on which non-discrimination claims can be based in the EU legal order, as well as the conclusion that much discretion is left to the Court, have become a strong motivation in shaping the direction of the present work. The thesis also largely relies on the

insightful ideas of several articles from the compendium ‘Non-discrimination law: comparative perspective’ that came out as a result from the international conference held in Utrecht, the Netherlands in 1998. The comprehensive nature of the articles, giving rise to issues from the philosophical foundations of equality, to specific grounds for discrimination, to enforcement, have equipped the present thesis with a handful of critical tools to approach the current topic. In addition, the study has resorted to the reasoning and findings of European judges that have taken a stand on the topics of equality and non-discrimination in articles or speeches on different occasions. More precisely, the opinions of ECtHR Justices Tsatsa-Nikolovska, Tulkens and Wildhaber have been taken into account. A very practical resource tool, contributing to the understanding of the issues at stake has been the ‘Non-discrimination in International Law Handbook’, published and disseminated by Interights. Furthermore, the equality and non-discrimination marketplace of ideas confined to the boundaries of this work has been strongly influenced by relevant literature produced by both scholars and practitioners. Appropriate credit has been given to their findings and opinions at relevant places throughout the work. Last but not least, the depth and innovative spark of two separate works - Frédéric Edel’s doctoral thesis on the principle of equality under the ECHR and Elisabeth Holzleithner’s article Mainstreaming equality: Dis/Entangling grounds of discrimination, have immensely inspired the thesis.

As obvious from the enumerated literature, much has been said and done in the equality and non-discrimination field of human rights, to the extent that perhaps it seems there is nothing left to write. This thesis, however, has the aim to gain a certain place among all sources as it is intended to directly target the questions about the logic and sequence of development of the equality and non-discrimination notions as objectified in the case-law of the ECtHR and the ECJ, concluding with a finding as to where exactly current European judicial thinking stands on the issues of equality and non-discrimination. It also plans to

critically examine the latest Strasbourg and Luxembourg case-law development that is not covered by any major work, the latest at this point being published in 2005. Furthermore, it must be noted that much of the existent literature has limited itself to focusing on the notions of equality and non-discrimination in only one of the contexts – either that of the ECtHR or that of the ECJ. Very few pieces have established a parallel reading of the equality and non-discrimination jurisprudence of the two courts and thus this still remains an underestimated area. The work will attempt to arrive at a finding, based on such a comparative approach.

The methodological issues, which I would like to outline from the outset, concern my intent to center the work around selected cases critical to the understanding of equality and non-discrimination, developed by the respective jurisdiction. Attention will also be paid to decisions, in which the Courts add a novelty element and a clarification to the legal nature and the application of the two notions. In this respect, the work aims to answer in the European judicial context to the questions: what is equality and non-discrimination and how judges from the ECtHR and the ECJ reason and adjudicate in areas of law involving those notions.

The study will not dive into the complexities of the mechanics of the two Courts' work in terms of the tests adopted and utilized when looking into issues involving problems of equality and non-discrimination. Rather it will aim at uncovering the state of understanding reached at the highest European judicial arena of the notions as they unfold through landmark cases. In this sense, where possible the thesis will provide the opinions of the judiciary themselves, as well as will adhere to the very wording of the case decisions.

The present writing should, therefore, be read as an attempt of a general European juridical theory of equality and non-discrimination, or better as a case-law constructed theory of equality and non-discrimination, based on the reasoning of the European judges in their decisions. Due to the subject of the research, this theory will inevitably also include larger,

broader aspects of philosophical, political and juridical ideas about equality and inequality, democracy, difference, heterogeneity, social values, the exigencies of contemporary life.

In the larger context, the approach to the topic has the humble intent to serve as a contribution to the dialogue of universality and individuality of human rights, as well as to situate itself as part of the political talk about liberal modernity and community. The discourse will also discuss the role of the judges in establishing and sustaining a just society, in bridging law and society¹.

In this line of thoughts, the following chapter introduces several, sometimes contradicting theoretical approaches towards the vast topic of equality and non-discrimination, which serve as a ground for understanding the area of law at stake, as well as the development of both Courts' jurisprudence.

Chapter three will exclusively concentrate on the equality and non-discrimination jurisprudence of the European Court of Human Rights, following its inception and development over the years, with the aim of pointing out crucial progress and reaching the current state of inclusion and enlargement of the Court's understanding of the two concepts.

Chapter four will then turn to the case-law of the European Court of Justice with the similar task of evolutionary follow-up of the development of the Court's application of the two notions.

Chapter five will converge the two previous chapters as it will look into the ongoing thought, objectified in the decisions and reasoning of the judges in the two European courts with the aim of exploring whether there is a common European ground and development in the application of the principles of equality and non-discrimination.

In chapter six, a summary of the research results will be discussed, as well as a critical outlook will be adopted towards the development of the European Courts' appreciation and

¹ Barak, Aharon: *The Judge in a Democracy*, Princeton University Press, Princeton, 2006, 3

application of the notions of equality and non-discrimination. In this way it will build the foundations for further research and follow-up monitoring of the developments in the equality and non-discrimination case-law of the two Courts.

Theoretical approaches to equality and non-discrimination

Any work about human rights necessarily implies some sort of theoretical commitment. In the case of the topic of this thesis, it must be noted from the outset as a baseline observation that understanding equality and non-discrimination in their judicial case-law aspect cannot do without evoking the necessary philosophical convictions, embedded in a certain political will and context.

The idea of equality from antique times has been connected with justice and considered as one of its defining elements. However, there is no such thing as a unanimously agreed upon definition of equality. From the Aristotelian formula in reference to Plato ‘treat like cases as like’, to the clear-cut definitions of discrimination that EU law hosts, there is major room for adopting understandings, for interpretation and for encountering life situations that do not necessarily fall under any theoretical scheme. Even pairing up equality and non-discrimination poses conceptual difficulties as according to some equality and non-discrimination can be used interchangeably², and according to others³, this is not the case, as the relation between the two ideas is different and more complicated than taking them as just positive and negative formulation of the same principle.⁴

Contemporary European scholarship about equality inevitably starts with differentiating the concept into two: formal equality, or the basic idea that alike situations should be treated alike and substantive equality as a reference to the vision that different

² Arnardóttir, Oddný Mjöll, *Equality and Non-discrimination under the European Convention on Human Rights*, Martinus Nijhoff Publishers, 2003, 6

³ Asbjørn Eide and Torkel Opsahl, *Equality and Non-discrimination*, Selected Articles on Human Rights, Oslo: Ad Notam Gyldendal, 1990

⁴ To the contrary: Anne F. Bayefsky, *The Principle of Equality and Non-Discrimination in International Law*, 11 H.R.L.J, 2 no. 1, 1990; also Stourzh, Gerald: ‘...égaux en droits’: *The place of non-discrimination in the history of human rights*, Human rights law journal, Vol.25, No. 1-4, 2004

situations should be treated differently. Then again, other formulations appear, and some of them are taken up in Constitutions and legislations, adding to the richness of the concept: distinction, different treatment, identical treatment, equality before the law, equality between the laws, equality in the law, material equality, abstract equality, real equality, relative equality, proportional equality, arithmetic equality, equality in effect, equality of opportunity, equality as to the result, equality in access to law, equal benefits under the law, without the list even being close to an exhaustive one.

One can also encounter theoretical views in the opinions of some ECtHR judges: ‘It is inherent to the rule of law that the law should be applied in an equal manner’⁵ and on the topic of non-discrimination, reasoning that: ‘Universality is not synonymous to uniformity and even less so to neutrality.’⁶

The question then that one has to pose in relation to the theoretical foundations of equality and non-discrimination is why equality, equality among whom and equality of what. Confined and limited to the texts, adopted by the legislative branch, on the European scene, the ECtHR and the ECJ’s carry the unique role and responsibility to break down the abstract rule and apply it to various situations, ascertaining where the principles of equality and non-discrimination stand.

⁵ Wildhaber, Luzius Protection against discrimination under the European Convention on Human Rights – a second-class guarantee?, address by the President of the ECtHR, Riga, 8 March 2001, Seminar: Discrimination issues – new trends in the European legal framework

⁶ Tulkens, Françoise: *Droits de l’homme, droits des femmes: les requérantes devant la Cour européenne des Droits de l’Homme*, in Liber amicorum Luzius Wildhaber: Human Rights, Strasbourg, eds. Lucius Caflisch ...[et al.] – Kehl; Strasbourg; Arlington, Va: N.P. Engel, 2007 at 429: ‘L’universalité n’est pas synonyme d’uniformité et encore moins de neutralité’

Equality and Non-Discrimination in the Case-law of the European Court of Human Rights

‘...reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of its enrichment.’

Nachova and others v Bulgaria, ECtHR Grand Chamber 6 July 2005

Legal foundation

Like most declarations and major contemporary human rights treaties, the ECHR, signed by the Council of Europe member states on 4 November 1950 and entered into force on 3 September 1953 prohibits discrimination. More precisely, the Convention guarantees equality through prohibiting discrimination in two texts: Article 14 of the main convention text and Article 1 of the 12th additional Protocol, which was signed in June 2000 and entered into force on 1 April 2005, to be enforced by the states that have ratified it⁷.

The interdictions posed by those two texts are essentially the same: they forbid member states the practice of discrimination. In a comparative perspective with other international instruments, whereas Article 7 of the Universal Declaration of Human Rights⁸ establishes a general principle of equality before the law, Article 14 of the European Convention prohibits only discrimination affecting the rights in the Convention. In further comparison, Article 26 of the ICCPR also goes beyond the meaning of the ECHR in human rights protection. Whereas Article 26 establishes an independent and encompassing right to

⁷ As of 22 November 2007 those are: Albania, Armenia, Bosnia and Herzegovina, Croatia, Cyprus, Finland, Georgia, Luxembourg, Montenegro, the Netherlands, Romania, San Marino, Serbia, “the Former Yugoslav Republic of Macedonia” and Ukraine

⁸ “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination”

non-discrimination, Article 14 is limited to outlawing only discrimination that occurs in the enjoyment of human rights as protected in the ECHR.⁹

Looking at the provisions in the ECHR itself, in comparison with Article 14 of the Convention¹⁰, the text of the additional Protocol 12 widens the scope of the prohibition. The texts are simple, but in reality, the problems related to the interpretation and application of the principle of equality, as well as the matter of the juridical methods involved in the exercise are of quite complicated a nature, that has been expanding and varying with different cases.

We should seek the explanation for this difference in the large period of time between the adoption of Article 14 and Protocol 12. At the time of the ECHR's main text adoption it was simply established that equality means identical treatment for all. Viewed in those terms, equality consisted in according everyone exactly the same legal status – “a utopian notion that was totally unrealistic from a legal point of view”¹¹. At the same time, however, the notion of equality inevitably should be taken into the light of the well-established view of the Court that the ECHR is a “living instrument”, which must be interpreted dynamically.

The prohibition of discrimination (Article 14) before the introduction of Protocol No. 12

Often referred to as ‘almost parasitic provision’¹² and as one that could be said to ‘lack enthusiasm’¹³ Article 14 is not framed in general terms of equality before the law or equal

⁹ Orlin, Theodore S., Rosas, Allan and Scheinin, Martin eds.: *The jurisprudence of human rights law: a comparative interpretive approach*, Institute for Human Rights, Abo Akademi University, Turku, Finland, 2000, 263

¹⁰ “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.”

¹¹ Head, Michael, *The genesis of Protocol No. 12*, Non-discrimination: a human right, seminar to mark the entry into force of Protocol No. 12, Council of Europe publishing, 2005, 35

¹² Wildhaber, Luzius: *Protection against discrimination under the European Convention on Human Rights – a second-class guarantee*, address by the President of the ECtHR, Riga, 8 March 2001

protection of the law. It simply guarantees to everyone the enjoyment of rights and freedoms protected by the Convention alone. Thus Article 14 dictates a general obligation for states and constitutes an accessory, “not a free-standing clause”¹⁴ to the obligation to secure to every individual each of the substantive rights and freedoms protected by the Convention, such as life, liberty, security, privacy, etc. Other commentators¹⁵ find it “weak in many aspects”, but at the same time “symbiotic” and serving to “enhance other provisions”.

The Convention organs have established that although the accessory nature of Article 14 does not provide it with an independent existence, it nevertheless enjoys an autonomous meaning.¹⁶ The autonomous meaning status of Article 14 signifies that even if none of the substantive provisions of the Convention has been violated, a violation of the prohibition against discrimination in the application of the provision at issue may still be found¹⁷.

At the same time, another theoretical stand has been firmly established and applied by the ECtHR: differences in treatment do not per se constitute discrimination contrary to Article 14. Not every difference in treatment is caught by the prohibition set out in Article 14.¹⁸

Despite these clarifications, and according to the scholars analyzing the case-law of the ECtHR, the jurisprudence arising under Article 14 is both complicated and inconsistent¹⁹,

¹³ McCafferty, Charlotte: *General prohibition of discrimination: the new protocol to the Human Rights Convention*, Human rights, March 2002, 22

¹⁴ Head, Michael, *The genesis of Protocol No. 12*, Non-discrimination: a human right, seminar to mark the entry into force of Protocol No. 12, Council of Europe publishing, 2005, 39

¹⁵ For instance Black-Branch, Jonathan L., *Equality, non-discrimination and the right to special education; from international law to the Human Rights Act*, E.H.R.L.R Issue 3, 2000

¹⁶ Gomien, Donna Harris, David Zwaak, Leo: *Law and practice of the European Convention on Human Rights and the European Social Charter*, Council of Europe Publishing, 1996

¹⁷ P. van Dijk and G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 2nd edition, Deventer: Kluwer, 1990, 532-548

¹⁸ Tsatsa-Nikolovska, Margarita: *Protection against Discrimination under the European Convention on Human Rights*, Non-discrimination: a human right, seminar to mark the entry into force of Protocol No. 12, Council of Europe publishing, 2005, 8

¹⁹ Gomien, Donna Harris, David Zwaak, Leo: *Law and practice of the European Convention on Human Rights and the European Social Charter*, Council of Europe Publishing, 1996

as Article 14 falls short of a general prohibition of discrimination. What is more, the Court is often accused of being “conservative in its interpretation of Article 14”²⁰

In reality, the Court has been struggling to define and ascertain which situations fall under the ambit of protection guaranteed by Article 14. The two main dilemmas that recur in the case-law relate precisely to the accessory nature and the autonomous status of the Article.

In this regard, the thesis argues that based on the cases it was seized with, the Court has created an evolving understanding of equality and non-discrimination, quite in line with the generally accepted concept of the Convention as a living instrument. And here comes the interesting moment: as the provision is open-ended, it is up to the Court to define what discrimination is – there is much room for judicial discretion and the legal problem becomes one of interpretation and application of the reached understanding.

It is also interesting to observe that the traditionally cautious attitude of the Court has been changing over time and although restricted in its nature, Article 14 has not remained a dead letter. Although some instances of discrimination fall outside of its protection, as for example, discrimination in relation to access to employment or social security²¹, for example (an inevitable contrast with ECJ case-law that strongly addresses such issues), the Court has been bold enough in its efforts and adamant in reaffirming that the grounds of discrimination listed in Article 14 are not exhaustive.

The Court has frequently formulated its restriction on Article 14 stating that: “although the application of Article 14 does not necessarily presuppose a breach of those provisions – and to this extent it has an autonomous meaning, there can be no room for its application

²⁰ McCafferty, Charlotte: *General prohibition of discrimination: the new protocol to the Human Rights Convention*, Human rights, March 2002, 24

²¹ An example of case-law in this respect is the decision of *Botta v Italy* App. No. 21439/93 (ECtHR 24 February 1998)

unless the facts at issue fall within the ambit of one or more of the latter”.²² This formulation can be repeatedly found in the Court’s case-law.²³ Thus, in *X and Y v. the Netherlands*, the Court noted: “Article 14 has no independent existence; it constitutes one particular element (non-discrimination) of each of the rights safeguarded by the Convention.”

Although Article 14 has a limited scope of application, this is in part compensated by the broad interpretation of the substantive provisions, which extends the requirement of non-discrimination to a diversity of situations which would have been excluded under a formalistic and more restrictive reading of the Convention.

In further reasoning about the practical dimensions of Article 14, and in the absence of any clear explanations in the *travaux préparatoires* of the ECHR, we inevitably need to turn to the case-law for further explanation of the equality and non-discrimination principles in the Convention law and its practical realization.

Belgian Linguistic case²⁴

The *Belgian Linguistic* case constitutes the very first instance, in which the ECtHR was called upon to consider the application of Article 14. In its decisions in the case, also referred to as “Relating to Certain Aspects of the Laws of the Use of Languages in Education

²² Tsatsa-Nikolovska, Margarita: *Protection against Discrimination under the European Convention on Human Rights*, Non-discrimination: a human right, Seminar to mark the entry into force of Protocol No. 12, Council of Europe publishing, 2005, 27

²³ Examples in this respect are: *Abdulaziz, Cabales and Balkandali v. the UK*; *Inze v. Austria*; *Karlheinz Schmidt v. Germany*; *Van Raalte v the Netherlands*; *Petrovic v. Austria*; *Haas v. the Netherlands*

²⁴ *Belgian Linguistic case*, judgment of 23 July 1968, Series A no. 6

The applicants were a group of French-speaking parents whose children were denied access to the French-language schools in some predominantly Dutch-speaking suburbs of Brussels, on the grounds that the French speaking families did not live in those districts. The Dutch-speaking schools in the same districts, however, were open to anyone irrespective of his or her place of residence.

in Belgium”, in finding a violation of Article 2 of Protocol No. 1 (guaranteeing the right to education) in conjunction with Article 14, the Court articulated the following:

While it is true that this guarantee has no independent existence in the sense that under the terms of Article 14 it relates solely to “rights and freedoms set forth in the Convention”, a measure which in itself is in conformity with the requirements of the Article enshrining the right or freedom in question may however infringe this Article when read in conjunction with Article 14 for the reason of its discriminatory nature.

Thus, persons subject to the jurisdiction of a Contracting State cannot draw from Article 2 of the Protocol the right to obtain from the public authorities the creation of a particular kind of educational establishment; nevertheless, a state which had set up such an establishment could not, in laying down entrance requirements, take discriminatory measures within the meaning of Article 14...

In such cases there would be a violation of a guaranteed right or freedom as it is proclaimed by the relevant Article read in conjunction with Article 14. It is as though the latter formed an integral part of each of the Articles laying down rights and freedoms. No distinction should be made in this respect according to the nature of these rights and freedoms and of their correlative obligations, and for instance as to whether the respect due to the right concerned implies positive action or mere abstention.²⁵

In its argumentation to the case the Belgian government argued that Article 14 “served no practical legal purpose and that its presence was purely psychological in intention”. The Court, however, set aside this statement, holding that a measure, which in itself was in conformity with the requirements of the Article enshrining the right or freedom in question, might infringe that Article when read in conjunction with Article 14 on account of its discriminatory measure.²⁶ Thus, the Court at this early stage of its jurisprudence, pointed out that it sees Article 14 as a living, applicable one, forming an integral part of each of the rights and freedoms, laid down in the Convention.

The first ECtHR decision of a case involving Article 14 further includes several crucial notions that will be sustained and developed by the Court in its future jurisprudence: the conjunction of Article 14 to another Convention article, so that the two will form an integral part; that discrimination could be inflicted both through positive action and through

²⁵ *Belgian Linguistic* case judgment of 23 July 1968, Series A no.6, 33-34, para. 9

²⁶ Wildhaber, Luzius: *Protection against discrimination under the European Convention on Human Rights – a second-class guarantee?*, address by the President of the ECtHR, Riga, 8 March 2001

abstention; the richness of the concept of equality and non-discrimination was grasped by the Court at this early stage by the establishment of the test for measuring unlawfulness under the Convention of a discrimination measure or treatment.

The test essentially consists in the assumption that difference of treatment is not discriminatory within the meaning of the Convention if it has a reasonable and objective justification, in other words if it pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be realized. Thus, in its decision of the *Belgian Linguistic case*, the Court laid down the standard test for the scope of discrimination. It did not however spell out the mechanics of the relationship between Article 14 and the other substantive rights.

Another important side to the issues of equality and non-discrimination to be found in the same decision is the following finding of the Court: not all differential treatment amounts to “discrimination”. The pair “differential treatment” and “discrimination” is established through the following reasoning of the Court²⁷:

In spite of the very general wording of the French version (‘sans distinction aucune’), Article 14 does not forbid every difference in treatment in the exercise of the rights and freedoms recognized. This version must be read in the light of the more restrictive text of the English version (‘without discrimination’). In addition, and in particular, one would reach absurd results were one to give Article 14 an interpretation as wide as that which the French version seems to imply. One would, in effect, be led to judge as contrary to the Convention every one of the many legal or administrative provisions which do not secure to everyone complete equality of treatment in the enjoyment of the rights and freedoms recognized. The competent national authorities are frequently confronted with situations and problems which, on account of differences inherent, therein, call for different legal solutions; moreover certain legal inequalities tend only to correct factual inequalities. The extensive interpretation mentioned above cannot consequently be accepted.

...The Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification.

It is important, then, to look for the criteria which enable a determination to be made as to whether or not a given difference in treatment, concerning the exercise of one of the

²⁷For further details on this see McColgan, Aileen: *Principles of Equality and Protection from Discrimination in International Human rights law*, 2003 E.H.R.L.R., Issue 2

rights and freedoms set forth, contravenes Article 14. On this question the Court, expressly holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification – a notion that will develop and receive more concrete clothing in subsequent case-law.

The *Belgian Linguistic* case is valuable for yet another concept: the so-called “positive discrimination” where the redress of a pre-existing situation of inequality has been accepted as a legitimate objective of different treatment. More precisely, in the decisions to the case the Court stated that: “the competent national authorities are frequently confronted with situations and problems which, on account of differences inherent therein, call for different legal solutions: moreover, certain legal inequalities tend only to correct factual inequalities.” It is thus the inequality of particular treatment that is at stake under Article 14, and not the comparison of different options a state chooses among when restricting the exercise of a given substantive right.²⁸

It must be noted that Article 14 of the ECHR does not define “discrimination” but in the *Belgian Linguistic* case the ECtHR in clarifying the concept referred to the “aims and effects” of the measure challenged, implying (from our contemporary standpoint of terms knowledge and analysis) that indirect as well as direct discrimination could be contrary to the provision. In truth, the application of Article 14 to indirect discrimination has been “very slow in its development”²⁹.

Last but not least, the *Belgian linguistic* case decision was important in establishing that in order to invoke Article 14 not only is it not necessary to make out a violation of one of

²⁸ Other cases include *Burghartz v. Switzerland*, App. No, 16213/90 (ECtHR 22 February 1994), a case in which a man was not permitted to put his name in advance of that of his wife, whose name had been taken as a family name. Had they chosen to use his name as the family name, the option would have been open to her to place her name before it.

²⁹ McColgan, Aileen: *Principles of Equality and Protection from Discrimination in International Human rights law*, 2003 E.H.R.L.R., Issue 2

the substantive articles, but it is not even necessary to claim such a violation, that is to rely on the substantive Article in isolation, as well taken together with Article 14.

Rasmussen v. Denmark³⁰

The mechanics of the relationship between Article 14 and the other substantive rights were most explicitly spelled out in the *Rasmussen v. Denmark* decision, where the Court reiterated that the article had no independent existence since it had effect only in relation to “the enjoyment of the rights and freedoms” set out in the other substantive provisions, but at the same time made clear that it did have a degree of autonomous meaning in so far as it did not necessarily presuppose a breach of those provisions.

The same decision also was instrumental in clarifying the test used by the Court as to the prongs that judges use when deciding upon the existence of a discrimination practice³¹:

1. Do the facts fall within the ambit of one or more of the other substantive provisions of the Convention?
2. Was there a difference in treatment?
3. Did the difference of treatment have a reasonable justification? In other words, did it pursue a legitimate aim and was there a reasonable relationship of proportionality between that aim and the means employed to attain it?³²

³⁰ *Rasmussen v. Denmark*, 28.11. 1984, Series A no. 87

The case concerned a husband's complaint that he could contest the paternity of a child born during the marriage only within certain time-limits, whereas it was open to his wife to institute paternity proceedings at any time.

³¹ Wildhaber, Luzius: *Protection against discrimination under the European Convention on Human Rights – a second-class guarantee?*, address by the President of the ECtHR, Riga, 8 March 2001; see also Tsatsa-Nikolovska, Margarita: *Protection against Discrimination under the European Convention on Human Rights*, Non-discrimination: a human right, Council of Europe publishing, 2005, 28

³² For further depth into this and comprehensive tables of ECtHR cases regarding the analytical test of the ECHR and the different approaches and scrutiny, see Arnardóttir, Oddný Mjöll: *Equality and non-discrimination under the European Convention on Human Rights*, Martinus Nijhoff Publishers, The Hague, New York, 2003, 191 onwards

An interesting aspect of the jurisprudence of the ECtHR is its development of a test of justification which varies with the ground of discrimination. In the *Belgian linguistic* case the Court set the standard of justification at low level: discrimination would contravene the Convention only if it had no legitimate aim, or there was no reasonable relationship of proportionality between the means employed and the aim sought to be realized. In subsequent cases³³ the Court took a different approach to Article 14, asking only whether the treatment at issue had a justified aim in view or whether the authorities pursued “other and ill-intentioned designs”. What is more, over the years the ECHR developed a hierarchy of grounds covered by Article 14, a much higher level of justification being required in respect to: sex, race, nationality, illegitimacy, sexual orientation. The European Court thus will permit States a much narrower margin of appreciation in relation to discrimination on the enumerated grounds above than it will in relation to other distinction designed by the states.³⁴

Abdulaziz, Cabales and Balkandali v the United Kingdom³⁵

Laid down in the early *Belgian Linguistic case*, an important approach was developed by the Court and specifically spelled out in the case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*. In essence, the important understanding of the Court lies in that Article 14 could apply even when the State in question had gone beyond what was required of it

³³ See *National Union of Belgian Police v Belgium* (1979-80) E.H.R.R. 578 and *Swedish Engine Drivers' Union v Sweden* (1979-80) E.H.R.R. 617

³⁴ Arnardóttir, Oddný Mjöll: *Equality and Non-discrimination under the European Convention on Human Rights*, Martinus Nijhoff Publishers, 2003, 2

³⁵ *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28.5. 1985, Series A, no. 94
Under immigration rules the applicants, who were lawfully resident aliens, were not allowed to have their husbands join them in the UK, whereas alien husbands lawfully settled in the country could be joined by their wives. The Court found a violation of the right of family life guaranteed under Article 8 in conjunction with discrimination on the basis of sex prohibited under Article 14.

under the Convention. This decision affirmed that the notion of discrimination within the meaning of Article 14 included general cases where a person or a group was treated, without proper justification, less favourably than another, even though the more favourable treatment was not called for by the Convention.

In furtherance, this was one of the cases, where the Court paid special attention to sex discrimination and its presence on the political agenda of the CoE: ‘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 have to be put forward before such a difference of treatment could be regarded as compatible with the Convention.’³⁶

Looking into its further jurisprudence, the approach of the Court when encountered with an Article 14 application may be installed into four categories:

1. Cases where the Court examines the main article, finds no violation, but concludes that the same article is breached when read in conjunction with Article 14³⁷
2. Cases where the Court finds a violation of the main Article and does not examine the Article 14 complaint³⁸
3. Cases where the Court finds a violation of the main Article, but also examines the Article 14 complaint and finds a second violation on that basis³⁹
4. Cases where the Court prefers to examine the discrimination complaint first, finds a violation and leaves aside the main Article taken in isolation⁴⁰

³⁶ At p. 38 § 78 of the decision; also mutatis mutandis see *Schuler-Zgraggen v. Switzerland*, App. No. 14518/89 (ECtHR, 24 June 1993), para. 67

³⁷ *Abdulaziz, Cabales and Balkandali v. the United Kingdom* is the typical example

³⁸ See *Airey v. Ireland*, 9.12.1979, Series A.no.32; *Dudgeon v. the UK*, 22.10.1981, Series A no. 45; *Lustig-Prean and Beckett v. the UK* An approach that has been criticized in a number of dissenting opinions by some of the ECtHR judges. In essence, the dissents explain that if this restrictive approach is undertaken, such a judgment deprives the fundamental provision in great part of its substance and its function in the standard-setting system established under the Convention.

³⁹ Landmark case in this respect is *Marcks v. Belgium*, 13.6.1979, Series A no. 31. See also *Chassagnon and Others v. France*, 29. 4. 1999, ECHR 1999-III

Article 14 strengthens the case at hand, serving not only a useful purpose, but indeed, a necessary function that is symbiotic in its relationship⁴¹. Thus, in the given case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom* the Court was unwilling to find the government in violation of Article 8 (right to respect for family life) alone, in relation to its immigration rule, but was prepared to find a breach of the same rules in conjunction with Article 14.

Thlimmenos v Greece⁴²

A milestone case in the overall jurisprudence of the ECtHR, the *Thlimmenos v. Greece* judgment added a new dimension to the interpretation of the equality principle by expressly stating that the guarantee under Article 14 does not only encompass **formal equality** – equal treatment of equal cases, but also **substantive equality** - unequal treatment of unequal cases. More precisely, in the language of the judgment:

The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and

⁴⁰ *Hoffman v. Austria*, 23.6.1993, Series A no. 255-C; See also *Salgueiro da Silva Mouta v. Portugal*, 21.12.1999, ECHR 1999-IX.

⁴¹ Black-Branch, Jonathan L., *Equality, non-discrimination and the right to special education; from international law to the Human Rights Act*, E.H.R.L.R Issue 3, 2000, 463

⁴² *Thlimmenos v. Greece*, App. No. 3469/97 (ECtHR, 6 April 2000)

The applicant in the *Thlimmenos* case was a Jehovah's witness who had been convicted of insubordination in 1983 for refusing to perform unarmed military service, at a time of general mobilization, on account of his religious beliefs. He was sentenced to four years imprisonment, and was released on parole after two years. In 1988, he passed a public examination to become a chartered accountant, a liberal profession, which until 1993, could be exercised only by those who became members of the Greek Institute of Chartered accountants. In spite of his successful examinations – he became second among sixty candidates – the Executive Board of the Institute refused to appoint him because according to the law, a person who did not qualify for the civil service could not be appointed a chartered accountant, and a conviction of felony constituted a disqualification for the civil service. The ECtHR considered that the Greek state violated Article 14 in conjunction with Article 9. It was true that the authorities were bound to apply the law in force and deny the applicant's appointment, but the legislation itself had failed to make the appropriate distinction: there existed no objective and reasonable justification for not treating the applicant differently from other persons convicted of a felony, and his exclusion from the profession of chartered accountants did not pursue a legitimate aim.

*reasonable justification...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.*⁴³

This way, the Court took its analysis of discrimination a step further, explicitly and for the first time stating that the guarantee under Article 14 also encompasses treating people in significantly different situations differently. The value of this finding could be seen through the assessment given by Judge Wildhaber: “The recent judgment of *Thlimennos* is evidence of a new approach and ... takes the Court’s case-law on discrimination into new territory.”⁴⁴

In concrete terms, using the facts of the case, the Court essentially expressed this new stance as follows⁴⁵:

The Court considers that, as a matter of principle, States have a legitimate interest to exclude some offenders from the profession of chartered accountant. However, the Court also considers that, unlike other convictions for serious criminal offences, a conviction for refusing on religious or philosophical grounds to wear the military uniform cannot imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise this profession. Excluding the applicant on the ground that he was an unfit person was not, therefore, justified. The Court takes note of the Government's argument that persons who refuse to serve their country must be appropriately punished. However, it also notes that the applicant did serve a prison sentence for his refusal to wear the military uniform. In these circumstances, the Court considers that imposing a further sanction on the applicant was disproportionate. It follows that the applicant's exclusion from the profession of chartered accountants did not pursue a legitimate aim. As a result, the Court finds that there existed no objective and reasonable justification for not treating the applicant differently from other persons convicted of a serious crime.

From another analytical standpoint, the decision is also valuable and could be credited for its uniqueness at the time because it is a case in which the link between the main article and the alleged discrimination (Article 14) is the most remote. This constitutes quite a

⁴³ *Thlimennos v. Greece*, App. No. 3469/97 (ECtHR, 6 April 2000), para. 44., later used in other cases, for example *Hoogendijk v the Netherlands*, App. No. 58641/00 (declared inadmissible); *Chapman v. the United Kingdom*, App. No. 27238/95 (ECtHR, 18 January 2001), § 129

⁴⁴ Wildhaber, Luzius: *Protection against discrimination under the European Convention on Human Rights – a second-class guarantee?*, address by the President of the ECtHR, Riga, 8 March 2001

⁴⁵ para. 47 of the Decision

breakthrough, especially in cases involving freedom of religion.⁴⁶ For comparison, previous decisions of the Court involving freedom of religion necessitated the establishment of a direct connection with the principle of equality enshrined in Article 14 of the Convention. Thus in *Hoffmann*⁴⁷, the Court held that there cannot be a difference in treatment on the sole ground of religion when a national court rules on the custody of children in the case of divorce.

But the doctrine of the court was not conclusive on this point.⁴⁸ Again in the realm of freedom of religion, a broad interpretation of the principle of equality was adopted in the case of *Canea Catholic Church*⁴⁹ and more recently in the decision *Metropolitan Church of Bessarabia*⁵⁰. By contrast, an example of restrictive interpretation of the equality principle is the decision *Chea'are Shalom Ve Tsedek*.⁵¹

In addition, it is interesting to note that the equality and non-discrimination rhetoric may be put to use by the Court in relation to its own argumentation regarding completely different Convention texts and issues. Probably one of the most interesting instances in this

⁴⁶ See: Lindholm, T.; Durham, W. Tahzib-Lie G. eds.: *Facilitating Freedom of Religion or Belief: A Deskbook*, Martinus Nijhoff Publishers, 2004

⁴⁷ *Hoffmann v. Austria*, 17 EHRR 293 (1994)

⁴⁸ See *Riera Blume and Others v. Spain*, App. No. 37680/97 (ECtHR, 14 October 1999)

⁴⁹ *Canea Catholic Church v. Greece* Appl. No. 143/1996/762/963 (ECtHR 16 December 1997)

The Court held that every religious denomination has the right not only to be accepted as existing de facto but also to be granted legal personality under conditions that are fair and similar to those applied to other denominations.

⁵⁰ *Metropolitan Church of Bessarabia and Others v. Moldova* Appl. No. 45701/99 (ECtHR 13 December 2001) The Court has unanimously reaffirmed that Article 9 ECHR includes the right to new religious denominations to obtain legal personality in conditions equal to recognized churches, especially when the refusal to register a group causes unjustified restriction on the exercise of religious freedom in its collective dimension.

⁵¹ *The Jewish Liturgical Association Cha'are Shalom Ve Tsedek v. France*, App. No. 27417/95 (ECtHR, 27 June 2000)

A complex case regarding the ritual slaughter of animals, the Court held that neither the right to religious freedom nor the equality principle had been violated by the fact that French authorities granted authorization to issue administrative permits for ritual slaughter exclusively to the Jewish Consistorial Association in Paris, while denying such authorization to a minority Jewish association of ultraorthodox orientation. The Court found that the principle of equality had not been infringed and recognized that French authorities had a margin of appreciation allowing them to determine that only a single institution representing all Jewish communities would be empowered to authorize ritual slaughtering.

respect is the Courts reference to Article 14 when deciding upon a freedom of assembly and association case under Article 11 of the Convention body⁵²:

...the principle of non-discrimination between individuals as regards their enjoyment of public freedoms [which] is one of the fundamental principles of democracy. A difference in treatment between individuals in all fields of public and private law according to their religion or beliefs manifestly cannot be justified under the Convention, and more particularly Article 14 thereof, which prohibits discrimination. Such a difference in treatment cannot maintain a fair balance between, on the one hand, the claims of certain religious groups who wish to be governed by their own rules and on the other the interest of society as a whole, which must be based on peace and on tolerance between the various religions and beliefs (see, mutatis mutandis, the judgment of 23 July 1968 in the “Belgian linguistic” case, Series A no. 6, pp. 33-35, §§ 9 and 10, and the Abdulaziz, Cabales and Balkandali v. the United Kingdom judgment, Series A no. 94, pp. 35-36, § 72).

D.H. and others v the Czech Republic⁵³

Literally, the latest decision in the realm of equality and non-discrimination, issued by the Strasbourg Court, is significant in many ways. To begin with, it is extremely there is an absolute discrepancy between the findings and result of the case between the decisions of the ordinary Chamber composition of the Court and the final one of the Grand Chamber.

The Chamber decision⁵⁴ that came out a year earlier stated no violation of Article 14 of the Convention. The reasoning in the judgment is as follows: the Court began by reaffirming that discrimination means treating differently those in relevantly similar situations

⁵² *Refah Partisi (The Welfare State Party) and others v. Turkey*, App. Nos. 41340/98, 41342/98, 41343/98 and 41344/98 (ECtHR 13 February 2003)

⁵³ *D.H. and others v the Czech Republic*, App. No. 57325/00 (ECtHR 13 November 2007)

The applicants – 18 Czech nationals of Roma origin, living in the Ostrava region were assigned to special schools (zvláštní školy) for children with learning disabilities who were unable to follow the ordinary school curriculum. Under the law, the decision to place a child in a special school was taken by the head teacher on the basis of the results of tests to measure the child’s intellectual capacity carried out in a psychology centre, and requiring the consent of the child’s legal representatives. The applicants sought a review of their situation arguing that their placement in special schools amounted to general practice that had resulted in segregation and racial discrimination through the coexistence of two autonomous educational systems, namely special schools for the Roma and “ordinary” schools for the majority of the population. In its decisions of 2007, the Grand Chamber of the ECtHR reversed the decision of the Chamber composition of the Court and found a violation of Article 14 of the Convention, read in conjunction with Article 2 of Protocol I in that on account of their Roma origin, the applicants had suffered discrimination in the enjoyment of their right to education.

⁵⁴ Chamber Judgment of 7 February 2006

without an objective and reasonable justification. It also restated that states enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment. Further, the Court found that the rule relating to the placement of children in special schools did not refer to the children's ethnic origin, but to their psychological and intellectual capacities, that the rules served the legitimate aim of differentiation according to the needs and aptitudes in the state school system, that the representatives of the children failed to appeal the placement decisions in due time despite notification, and last that the placement situation was not irreversible.⁵⁵ Thus, while noting that the situation in the Czech Republic regarding the education of Romani children was "by no means perfect", the Court found no violation of Article 14 in conjunction with Article 2 of Protocol 1 by a 6-1 majority.

Quite to the contrary, in examining the facts of the same case, the Grand Chamber decision found a violation of Article 14 read in conjunction with Article 2 of Protocol No. 1. The Grand Chamber established that the relevant Czech legislation at the time has had a disproportionately prejudicial effect on the Roma community and the applicants as members of that community had suffered discriminatory treatment. This final decision constitutes a landmark example in the equality and non-discrimination jurisprudence of the ECtHR for a number of important reasons:

1. For the first time in its practice the ECtHR finds a violation of Article 14 of the Convention in relation to a pattern of racial discrimination in a particular sphere of public life – namely in the case, public primary schools.

2. The Court expressly pronounced that segregation equals discrimination, more concretely that racial segregation, which disadvantages members of a particular racial or ethnic group amounts to discrimination in breach of Article 14.

⁵⁵ *D.H. and Others v. the Czech Republic*, App. No. 57325/00 (ECtHR 7 February 2006) paras. 49-51

3. The Court further established its understanding for indirect discrimination: ‘a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a racial or ethnic group.’ What is really spectacular is that for the first time the Court clarifies that such a situation may amount to “indirect discrimination” in breach of the Convention’⁵⁶

4. The Court proclaimed that intent is not a necessary component of the discrimination analysis. Thus, where it has been shown that legislation produces an unjustified discriminatory effect, it is not necessary to prove any discriminatory intent on part of the authorities.

In furtherance, commentators from the NGO sector⁵⁷ find the new decision to bring the ECtHR Article 14 jurisprudence in line with principles of antidiscrimination law that prevail within the EU.

Development of the non-discrimination jurisprudence with the introduction of Protocol No. 12?

Practitioners and scholars unanimously agree that Article 14 leaves a gap in the protection, promised in the ECHR.⁵⁸ In its jurisprudence the ECtHR has already applied Article 14 in relation to discrimination grounds not explicitly mentioned in the Article’s provision⁵⁹. With the adoption and entry into force of Protocol No. 12, the opportunities for

⁵⁶ Earlier in the case of *Hugh Jordan v the United Kingdom*, App. No. 24746/94 (ECtHR 4 May 2001) at para. 154 gives a similar definition of indirect discrimination in substance

⁵⁷ The case was part of the unified strategic litigation efforts of several key NGO players on the European scene, led by the European Roma Rights Centre

⁵⁸ For a very useful graph regarding the application of Article 14 and the ‘gap’ left please see Wintemute, Robert: ‘*Within the ambit*’: How big is the ‘gap’ in Article 14 European Convention on Human Rights?, European human rights law review, issue 4, 2004, 366-382

⁵⁹ For instance see *Salgueiro da Silva Mouta v. Portugal*, Judgment of 21 December 1999, where the ground concerned is sexual orientation

protection against discrimination are expected to evolve substantially. One of the main factors that paved the way for Protocol 12 was the Court's case-law on discrimination being "both reassuring and disappointing".⁶⁰ Reassuring in that the Court's interpretation of the concepts of equality and non-discrimination was reasonable and realistic; but disappointing in that the Court has rarely found against a state for discrimination.

Article 1 of Protocol No. 12 provides:

General prohibition of discrimination

- (1) *The enjoyment of any right set forth by law 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.*
- (2) *No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.*

The Explanatory Note which the European Steering Committee on Human Rights produced for the draft Protocol states that: "Article 1 [of Protocol 12] ...affords a scope of protection which extends beyond the "enjoyment of the rights and freedoms set forth in [the] Convention""⁶¹

As an analysis remark, it is worth pointing out that Protocol 12 and Article 14 both prohibit discrimination on the same specified and non-exhaustive grounds. The Protocol does not add to the list of grounds. The new moment here is that Protocol 12 stands alone and allows applications to be made without having to invoke other Convention rights. It also prohibits discrimination in the enjoyment of any right set forth by law.

The explanatory report to the Protocol makes it clear that the combined effect of the two paragraphs of Article 1 of the Protocol is that all situations where an individual might be discriminated against by a public authority are covered. The Protocol further retains

⁶⁰ Head, Michael: *The genesis of Protocol No. 12*, from Non-discrimination: a human right, Seminar to mark the entry into force of Protocol No. 12, Council of Europe publishing, 2005, 39

⁶¹ <http://www.humanrights.coe.int/Prot12/Protocol%2012%20and%20Exp%20Rep.htm>

the non-exhaustive list of discrimination grounds already found in Article 14. The drafters however did not opt for a positive equality clause, but nor does the formulation exclude positive obligations, particularly when read in the light of *Thlimmenos*.⁶² Actually, as it turned out later in another decision, the ECHR's judges have engaged in a dialogue as to whether the *Thlimmenos* decision was written in expectation of the entry into force of the Protocol 12.⁶³

In any case, it is envisioned that Protocol No. 12 provides protection against discrimination across the entire public sphere and in respect of an unlimited range of grounds.⁶⁴ Organizations like the ECRI (European Commission against Racism and Intolerance) regard Protocol 12 as a legal instrument of paramount importance.⁶⁵

The judges of the ECtHR themselves entrust positive hopes with the relatively new Protocol No.12, setting down a general and free-standing prohibition of discrimination: it will “no doubt extend the scope of the protection against discrimination afforded by the Convention”.⁶⁶ Others, outside of the bench similarly believe that Protocol 12 will strengthen the fight against discrimination in Europe as the ECHR stands as the strongest regional/international human rights convention in the legal and popular perception.⁶⁷

⁶² Ibid

⁶³ In the case of *Fretté v France*, Appl. No. 36515/97, (ECtHR 26 February 2002): Judge Costa, also writing for Judges Jungwiert and Traja claiming that their position was influenced by the anticipated implementation of Protocol No. 12. To the opposite – the position of Judges Bratza, Fuhrmann and Tulkens.

⁶⁴ Bell, Marc: *The relationship between EU law and Protocol No. 12*, from Non-discrimination: a human right, seminar to mark the entry into force of Protocol No. 12, Council of Europe publishing, 2005, 69

⁶⁵ Head, Michael: *The genesis of Protocol No. 12*, from Non-discrimination: a human right, seminar to mark the entry into force of Protocol No. 12, Council of Europe publishing, 2005, 35

⁶⁶ Wildhaber, Luzius: *Protection against discrimination under the European Convention on Human Rights – a second-class guarantee?*, address by the President of the ECtHR, Riga, 8 March 2001

⁶⁷ Kjaerum, Morten: *Protocol No. 12 and the UN Convention on the elimination of all forms of racial discrimination*, Non-discrimination: a human right, seminar to mark the entry into force of Protocol No. 12, Council of Europe publishing, 2005, 47

However, there has been a considerate body of criticism and distrust towards the practical significance of the Protocol. Frequent argument against the introduction of a general prohibition of discrimination is that this would introduce uncertainty into the Court's case-law. It is interesting to observe the answers to several of the recommendations that the Council of Europe's Parliamentary Assembly put forward asking the Committee of Ministers to widen the scope of the prohibition. For instance, Recommendation 234 from 1960 requesting the adoption of a general provision "All persons shall be equal before the law" to be included in the Convention, provoked the Committee of experts to point out the risk that such a wide provision would result in very different legal interpretations. On another occasion, when in 1970 the Assembly suggested extending the non-discrimination clause in a limited way, to the application of law in areas like elections, employment, social housing and the public service, the reply was that a protocol of that kind "did not seem at present advisable".

Other concerns, that have remained on the agenda, even with the adoption of Protocol 12 are those of the equality principle under the ECHR acquiring horizontal effect, as well as the opening up of the area of positive obligation. These are outstanding actual questions that remain to be answered by the Court in its future judgments.

On the optimistic side, it is generally viewed that Protocol 12 offers the chance for a progressive concept of non-discrimination, and opens the door to a comprehensive range of litigation opportunities in the equality and non-discrimination field. However, as commentators point out, the Protocol *ab initio* suffers from the shortcomings of the Article 14 provision in that it maintains silence upon the subtle types of discrimination, indirect and passive discrimination⁶⁸ and is only a "sensitive compromise", with a text lacking conceptual

⁶⁸ Altwicker, Tilmann: *Potential and limits of Non-discrimination Law under the New Protocol No. 12 of the European Convention on Human Rights*, CEU Thesis, 2006, 104

definitions and containing ambiguities.⁶⁹ This being so, it is again the ECtHR that is empowered with the important mission to decide as to where equality and non-discrimination standards will grow on the European human rights scene. One thing is for certain – applicants and their lawyers are now better equipped to launch their discrimination claims, so that equality will be further and perhaps fully protected and non-discrimination will be ascertained. Judges, on their side are certainly invited to embark upon a more proactive judicial approach to equality and non-discrimination cases.

Due to the recent entry into force of Protocol No.12, no jurisprudence has yet arisen under its cap, thus the development of the equality and non-discrimination standards, coming out of Strasbourg in the future, will definitely be worth looking into. Last but not least, an important shortcoming to this gazing into the future should be noted – only fifteen countries members of the Council of Europe have ratified the Protocol that came into force on 1 April 2005, another 22 have signed, but not yet ratified it, and 10 have not yet see fit to sign⁷⁰. To ensure the combat of discrimination in Europe and to provide Protocol No.12 with a full-fledged membership into the ECHR family, it remains to encourage all CoE states to adopt the standard by ratifying the text of the Protocol.

⁶⁹ Khaliq, Urfan: *Protocol 12 to the European Convention on Human Rights: a step forward or a step too far?*, Public Law, 2001, 457-464

⁷⁰ Data from <http://conventions.coe.int/Treaty/Commun/ListeTableauCourt.asp?MA=3&CM=16&CL=ENG>, last accessed 22 November, 2007

Equality and Non-Discrimination in the Case-law of the European Court of Justice

“Europeans have a right to enjoy equal treatment and a life free of discrimination. The European year [2007] aims to ensure they all know this”

Vladimir Špidla, EU Commissioner for equal opportunities

Legal basis

Equality and non-discrimination comprise a subject of great practical importance to EU law. The EU anti-discrimination legislation is considered one of the most extensive in the world. These notions have been recognized as inherent to the economic rationale of the common market – discrimination is economically irrational and reduces productivity, minimizing the competitiveness of the environment.⁷¹ This being said, it must be also noted that in the EU context, the economic rationale is enhanced through the growing emphasis placed on the protection of fundamental rights as part of EU law. However, some critics still maintain that “the equality ambitions of the EU have always been incomplete” as in the context of the EU equality is “having a rather limited meaning: it is the equality of competitors in a marketplace who must not be discriminated against while striving for success”⁷².

Even with this in mind, it is inevitable to notice the extraordinary amount of activity in the field of EU antidiscrimination law, which from legislation, has also become a focal point of the ECJ’s attention, too. Both EU legislation and ECJ’s jurisprudence have been primarily and traditionally concerned with the grounds of sex and nationality (of one of the EU member

⁷¹ In this sense Ellis, Evelyn: *EU anti-discrimination law*, Oxford University Press, Oxford; New York, 2005; also Kochenov, Dimitry: Lectures, Summer school “Take attitude, stop discrimination” Sibiu, July 2007

⁷² Holzleithner, Elisabeth: *Mainstreaming equality: Dis/Entangling grounds of discrimination*, Transnational law and contemporary problems, Spring 2005, Vol. 14: XXX

states) as key bases for the understanding of equality and non-discrimination. In recent years, however, legislative attempts have arrived at an extension of those grounds and it is expected that relevant jurisprudence will follow, too. Consequently, the real ambit of the extension is yet to be expected in future cases, arising before the ECJ/CFI.

Currently, the legal basis for the principles of equality and non-discrimination is comprised by several main Articles of the EC Treaty:

Article 39 (ex Article 48) of the EC Treaty – abolition of any discrimination regarding movement for workers and based on nationality

Article 141 (ex Article 119) of the EC Treaty – principle of equal pay for male and female workers for equal work or work of equal value; more specifically into the three areas of equal pay, equal treatment and social security

Article 6 Treaty of the European Union – respect for human rights principle, foundational to the Union

In furtherance, **Article 13 of the EC Treaty** has been established with the amendments evoked by the Amsterdam Treaty, to allow the EU specific powers to combat discrimination on grounds of sex, racial or ethnic origin, religion or belief, age, disability or sexual orientation, thus expanding upon the protection in the realm of equality.

Analysis of the most recent developments

The evolution of EU equality law is multi-structured, and definitely more complicated compared to the developments under the ECHR regime. Until the Amsterdam Treaty developments, only nationality and sex were grounds recognized to be encompassed by EU anti-discrimination law. With the introduction of Article 13 EC⁷³, the scope of the prohibition

⁷³ “Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting

and respective protection has grown immensely. One of Article 13 equality-expanding best features is that it is not strictly confined to work relationships, which in itself comprises an enormous step forward in enlarging the equality and non-discrimination understanding under EU law. Despite its promise, however, the Article is recognized to have weak points in the protection that could be extracted from its existence: the Article does not have direct effect and its meaningful existence is conditioned upon the adoption of secondary legislation, which on its turn can be a very difficult process as the legislative procedure envisioned in order to put forward legislation based on Article 13 is the least democratic possible⁷⁴ (unanimity requirement).

In 2000 two important and in a sense unique to EU law Directives were adopted under the possibility offered by Article 13: Directive 2000/78/EC (Framework Directive) and Directive 2000/43/EC (Race Directive). Both Directives are in essence very wide-ranging laws that prohibit discrimination based on racial or ethnic origin (in the case of the Race Directive), and based on religion or belief, disability, age or sexual orientation in the workplace (in the case of the Framework Directive). As far as racial and ethnic origin are concerned, the application also extends to other aspects of daily life, outside the confinement of employment.

The Racial Equality Directive⁷⁵ requires states to prohibit discrimination on grounds of racial or ethnic origin in a wide range of social activities, such as employment, education, healthcare and housing. What is important to note here is the specificity of the ground, which the Directive centres around, and its, by all means, human rights motivation and language.

The Race Directive covers the fields of employment, social protection, education, social

the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

⁷⁴ Kochenov, Dimitry: Lectures, Summer school “Take attitude, stop discrimination” Sibiu, July 2007

⁷⁵ Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22

advantages and access to publicly available goods and services, including housing. The Directive's scope is further expanded by the fact that its prohibition stretches to cover discrimination in both the public and private sphere by all individuals.

The Employment Equality Directive⁷⁶ requires states to prohibit discrimination on the grounds of religion and belief, disability, age and sexual orientation in employment and vocational training. In comparison to the Framework Directive prohibits discrimination on the basis of more grounds but in respect of a more limited scope – only that of employment relations. What is more, the Framework Directive has limitations such as it doesn't cover state social security and social protection schemes.

Both Directives systematically use common definitions of equal treatment and discrimination, outlawing direct and indirect discrimination⁷⁷, as well as harassment. Uniformly, direct discrimination⁷⁸ is defined as the treatment of a person that is less favourable than the treatment of another person “is, has been or would be” in a comparable situation. The category of the *comparator*, then becomes a crucial concept that has no precise definition, thus leaving considerable level of discretion in the hands of the Court to ascertain it on a case-by-case basis. In addition, both Directives embrace and spell out the definition of indirect discrimination⁷⁹: it occurs when a practice, rule, requirement or condition is neutral on its face but impacts disproportionately upon particular groups, unless that is justified. As a new legal development, the Directives also outlaw harassment⁸⁰, an undesirable conduct related to the respective ground of discrimination.

⁷⁶ Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16, also known as the Framework Directive

⁷⁷ The distinction between direct and indirect discrimination first appeared in Article 2(1) of the Equal Treatment Directive 76/207/EEC

⁷⁸ Article 2(2a) of the Race Directive and Article 2(2a) of the Framework Employment Directive

⁷⁹ Article 2(2b) of the Race Directive and Article 2(2b) of the Framework Employment Directive

⁸⁰ Racial Equality Directive Art. 2(3); Framework Directive Art. 2(3); also Equal Treatment Directive Art. 2(3)

It is important to note that both Articles 3(2) of the Framework Directive and Article 3(2) of the Racial Equality Directive contain one limitation that has been vigorously criticized – the Directives do “not cover differences of treatment based on [third country] nationality, thus keeping the level of protection established in previous EU legislation – only member states’ nationality counts.

Nevertheless, the Directives have embarked upon a significant development of equality as whereas action against discrimination on grounds of gender and nationality dates back to the beginning of the European Community, European legislation covering discrimination on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation was introduced by those two Directives in 2000 only.

Last but not least, the development, envisioned in the EU Charter of Fundamental Rights should be noted, although to this point, the Charter has not been institutionalized as a source of law. The equality and non-discrimination provisions as proclaimed in the text of the Charter, by far reaches further beyond the scope and intent of any other provisions on the European level. Articles 20 and 21 are extremely far-reaching in that they establish an open-ended prohibition of discrimination of all forms of discrimination and list 17 grounds. In furtherance, the Charter envisions that national measures designed to implement Directives may be subject to the Charter’s prohibition on discrimination, as they fall within the scope of EU law. Moreover, equality between men and women is brought even further:

*Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.*⁸¹

Key case-law

As recognized in literature, the judicial activity of the ECJ has played and is expected to continue to play, an extremely important role in shaping the EU stand in the areas of

⁸¹ Article 23 of the Charter

equality and non-discrimination, as it puts flesh and bones to the principles⁸². Although in comparison to the ECHR, EU legislation is far more ascertained and legally defined, the ECJ has played an important role in articulating and establishing certain understandings in the realm of equality and non-discrimination, in drawing boundaries to non-discrimination claims, as well as to extending equality opportunities.

It must be noted from the outset that the core of prohibited instances of discrimination lies within labour law and there is an impressive load of cases adjudicated by the ECJ in this respect.

Defrenne v. Sabena⁸³

The case represents a landmark decision not only in EU equality law, but in general as well. Its key finding, relevant to the present work is that the Court established that the elimination of sex discrimination is fundamental to EU law and that it is grounded in the respect for fundamental rights that is foundational for community law. The reasoning of the ECJ is crucial to this understanding: the principle relates to an important objective for the community:

*The Court has repeatedly stated that respect for fundamental personal human rights is one of the general principles of community law⁸⁴, the observance of which it has a duty to ensure. There can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights.*⁸⁵

⁸² Ellis, Evelyn: *EU anti-discrimination law*, Oxford University Press, Oxford; New York, 2005, 18

⁸³ Case 43/75 *Defrenne v. Sabena*, [1976] ECR 455, also known as the Second Defrenne case
The case reached the ECJ as part of a reference by the Belgian Court of Cassation for a preliminary ruling with the question relating to the scope of the principle prohibiting discrimination between men and women workers laid down by Article 119 of the Treaty. Among other issues, the applicant Miss Defrenne, a former air hostess, brought an action against her former employer Sabena following the termination of her employment, in accordance with the terms of her contract, when she reached the age-limit of 40 years. Miss Defrenne was requesting a compensation by the reason of the fact that as a woman worker she had suffered discrimination in the matter of pay as compared with her male colleagues carrying out the same work as cabin stewards.

⁸⁴ Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125 is taken as the starting point of such a reference being made by the ECJ. Subsequent cases in the same sense and often quoted by the ECJ in its jurisprudence include Case 4/73 *Nold Kohlen- und Baustoffgroßhandlung v. Commission* (1974) ECR 491; Case 36/75 *Rutili v. Minister of the Interior* (1975) ECR 1219, among others

⁸⁵ paras. 26 and 27 of the Decision

However, in assessing the facts of the case, the ECJ refused to give Article 119 a wider interpretation and instead held that the Article's text cannot be interpreted as prescribing, in addition to equal pay, equality in respect of the other working conditions, applicable to men and women. More specifically, the Court refused to bring into play age as a factor, and established that it recognizes only the close connection between the nature of the service provided and the amount of remuneration.

In subsequent years and with the issuing of various decisions, however, the principle of non-discrimination based on sex was also ascertained by the ECJ to extend to non-discrimination based upon pregnancy⁸⁶, maternity leave⁸⁷, and even to discrimination based on gender reassignment.⁸⁸

Bilka-Kaufhaus GmbH v Weber Von Hartz⁸⁹

The *Bilka* case at hand is extremely valuable for equality and non-discrimination analysis purposes as it is an example of the 3-fold justification test of simple proportionality, established by the Court to measure cases concerning discrimination issues. The test is spelled out by the Court as follows:

It is for the national court, which has sole jurisdiction to make findings of fact, to determine whether and to what extent the grounds put forward by an employer to explain the adoption of

⁸⁶ *Dekker v Stichting Vormingscentrum Voor Jonge Volwassen Plus*, Case 177/88 [1990] ECR I-3941

⁸⁷ *Handels-OG Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening*, Case 179/88 [1990] ECR I-3979

⁸⁸ *P. v. S. & Cornwall County Council*, Case 13/94 [1996] ECR I-2143 to be discussed below

⁸⁹ Case 170/84 *Bilka-Kaufhaus GmbH v Weber Von Hartz* [1986] ECR 1607

The Case originated in the application of Ms. Weber Von Hartz, who had for a number of years been working for Bilka – a part of a chain of department stores in Germany. Ms. Weber challenged the legality of Bilka's refusal to pay her a pension, claiming that the company's occupational pension scheme was contrary to Article 119 in that it discriminated against female employees because of the conditions it imposed for entry into the scheme – a minimum period of full-time employment requirement. Ms. Weber found this discriminatory claiming that women were more likely than their male colleagues to take part-time work as to be able to care for their family and children.

a pay practice which applies independently of a worker's sex but in fact affects more women than men may be regarded as objectively justified economic grounds. If the national court finds that the measures chosen by Bilka correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued and are necessary to that end, the fact that the measures affect a far greater number of women than men is not sufficient to show that they constitute an infringement of Article 119.⁹⁰

The formula that could be extracted from the decision consists of the following 3 prongs:

1. Is the measure in the needs of the enterprise?
2. Is it appropriate and suitable for attaining the objective?
3. Is it necessary for attaining the objective?

The Court went on to state that the undertaking could demonstrate an exclusion and this will be lawful, but if the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex.

Another merit of the decision in helping to ascertain the Court's attitude towards non-discrimination is the stand, adopted by the ECJ, that Article 119 does not have the effect of requiring from an employer to organize their pension scheme taking into account family responsibilities. Thus, the Court took a relatively slim stand on the way it looks into discrimination cases, finding further characteristics than the sex ground alone to be irrelevant for the rationale of the protection.⁹¹

⁹⁰ para. 36 of the Decision

Although seemingly logical, the test could be also seen as sheltering a rather formal approach towards equality by the ECJ. In another case, adjudicated later - Joined cases C-399/92, C-409/92, C-425/92, C-50/93, C-78/93 *Angelika Helmig v Stadt Lengerich*, [1994] ECR I- 5727, the ECJ did not recognise a difference in treatment regarding part-time and full-time workers, refusing to take its reasoning a step further and take into account the position of women in a link with the employment issue.

⁹¹ The ECJ arrived at a similar finding in Joined cases C-399/92, C-409/92, C-425/92, C-50/93, C-78/93 *Angelika Helmig v Stadt Lengerich*, [1994] ECR I- 5727

P. v S. & Cornwall County Council⁹²

In dealing with the case, the ECJ again restated its view, previously established in *Defrenne* that the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure.⁹³

In this case the Court for the first time had to deal with a discrimination claim, regarding the issue of gender reassignment. What is interesting to observe is the broad stance the ECJ adopted towards the understanding of sex and what discrimination based on this ground represents:

*[T]he scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned.*⁹⁴

In declaring this, the ECJ endorsed and followed Advocate General Tesaro's conviction that a universal value is at stake, which he had described as indelibly etched in modern legal traditions and constitutions, namely the irrelevance of a person's sex with regard to the rules regulating relations in society. Thus, the ECJ in fact upheld the principle of effective protection, intertwining non-discrimination with it. By far, it is important to note the human rights language used by the Court in analysing the case at hand. Not surprisingly,

⁹² Case 13/94 *P. v. S. & Cornwall County Council* [1996] ECR I-2143

The case arose out of a preliminary ruling regarding two questions on the interpretation of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40 hereinafter "the directive"). The applicant P. used to work as a manager in an educational establishment operated at the material time by Cornwall County Council. In early April 1992, a year after being taken on, P. informed S., the Director of Studies, Chief Executive and Financial Director of the establishment, of the intention to undergo gender reassignment. This began with a "life test", a period during which P. dressed and behaved as a woman, followed by surgery to give P. the physical attributes of a woman. At the beginning of September 1992, after undergoing minor surgical operations, P. was given three months' notice expiring on 31 December 1992. The final surgical operation was performed before the dismissal took effect, but after P. had been given notice. P. brought an action against S. and the County Council before the Industrial Tribunal on the ground that she had been the victim of sex discrimination. S. and the County Council maintained that the reason for her dismissal was redundancy.

⁹³ para. 19 of the decision. Reference is also made to Joined Cases 75/82 and 117/82 *Razzouk and Beydoun v Commission* [1984] ECR 1509, para. 16

⁹⁴ para. 20 of the Decision

according to some commentators, the Court has gone beyond the requirements of the Equal Treatment Directive and has applied a human rights unwritten understanding of equality and non-discrimination.⁹⁵ This position, however, is an exception rather than the rule to the way the ECJ looks into discrimination cases.

Grant v South-West Trains Ltd⁹⁶

The width of argumentation that ran across the issues at stake in the given case is clearly exemplified in the position of Advocate General Elmer, expressing the following view:

There is nothing in either EU Treaty or the EC Treaty to indicate that the rights and duties which result from the EC Treaty, including the rights not to be discriminated against on the basis of gender, should not apply to homosexuals, to the handicapped, to persons of a particular ethnic origin or to persons holding particular religious views. Equality before the law is a fundamental principle in every community governed by the rule of law and accordingly in the Community as well. The rights and duties which result from Community law apply to all without discrimination and therefore also to the approximately 35 million citizens of the Community depending on the method of calculation used, who are homosexuals.

Despite this ardent plea for a broad understanding of where equality in the EU should stand, the Court held that the refusal by the employer to allow travel concessions to the person of the same sex with whom a worker has a stable relationship, where such concessions are allowed to a worker's spouse or to the person of the opposite sex with whom a worker has a

⁹⁵ In this sense, for example, Tridimas, *The General Principles in EC Law*, Oxford University Press, 1999

⁹⁶ Case C-249/96 *Grant v South-West Trains Ltd*

The case originated as a preliminary ruling on the interpretation of Article 119 of the EC Treaty, Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19), and Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. Those questions were raised in proceedings between Ms Grant and her employer South-West Trains Ltd concerning the refusal by SWT of travel concessions for Ms Grant's female partner. Ms Grant thereupon made an application against SWT to the Industrial Tribunal, Southampton, arguing that that refusal constituted discrimination based on sex. She submitted in particular that her predecessor in the post, a man who had declared that he had had a meaningful relationship with a woman for over two years, had enjoyed the benefit which had been refused her.

stable relationship outside marriage, does not constitute prohibited discrimination under EC law.⁹⁷

The decision is rich in many concepts and the arguments brought about by the ECJ towards reaching a holding rejecting discrimination are worth looking into more detail.

It is truly interesting to observe the position that could be qualified as an act of judicial restraint, exercised by the ECJ in approaching the issues at stake. First, the Court brought about references to jurisprudence under the ECHR:

*The European Commission of Human Rights for its part considers that despite the modern evolution of attitudes towards homosexuality, stable homosexual relationships do not fall within the scope of the right to respect for family life under Article 8 of the Convention.*⁹⁸

Based on that the ECJ concluded that ‘in the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex.’⁹⁹

Then, the ECJ went on to restate its unwillingness to recognize the factual situation at stake by inviting the legislature to take a stand, before the Court could do it.¹⁰⁰ What is more, the ECJ found the case fit to make a reference to its previous jurisprudence and to further

⁹⁷ para .51, Holding of the decision

⁹⁸ para. 33 of the Decision. Reference is made to *X. and Y. v the United Kingdom*, 3 May 1983, *S. v the United Kingdom*, 14 May 1986, *Kerkhoven and Hinke v the Netherlands*, 19 May 1992, among others. Interestingly, the ECJ demonstrates a particularly selective stand on which comparative material to adopt in its reasoning as further in its argumentation, it refuses take into account as valid the standard regarding sexual orientation, established by the Human Rights Committee, claiming that the HRC ‘is not a judicial institution’ and its’ findings have no binding force in law’.

⁹⁹ para. 35 of the Decision

¹⁰⁰ para. 36 of the Decision: ‘In those circumstances, it is for the legislature alone to adopt, if appropriate, measures which may affect that position.’

In para. 48 the ECJ continues with what could be called a line of reasoning, that can only be qualified as judicial cautiousness: ‘It should be observed, however, that the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed on 2 October 1997, provides for the insertion in the EC Treaty of an Article 6a which, once the Treaty of Amsterdam has entered into force, will allow the Council under certain conditions (a unanimous vote on a proposal from the Commission after consulting the European Parliament) to take appropriate action to eliminate various forms of discrimination, including discrimination based on sexual orientation.’

explain what was meant in adjudicating the *P. v S.* case (already analysed above). The conclusion that made a reference to the case at hand was that the protection against discrimination on the ground of sex does not extend to sexual orientation.¹⁰¹

Köbler v Republik Österreich¹⁰²

The *Köbler* case relatively new case is valuable to the understanding that the ECJ has for equality and non-discrimination, as it comprises several important notions, regarding those principles. In concrete terms, the case concerns indirect discrimination¹⁰³, and the field of application is discrimination regarding movement for workers, based on the ground of nationality.

The case clearly demonstrates the well-established in legislation and by the ECJ jurisprudence view of nationality as referring only to citizens of the EU member states. As such, it as a ground of discrimination is invariably linked to the freedom of movement for workers within the Community.

In its holding, the ECJ thus found that the established by Austrian law regime, concerning professorship, is clearly likely to impede freedom of movement for workers: both from the point of view of detriment of migrant workers who are nationals of Member States

¹⁰¹ paras. 37-42 of the Decision

¹⁰² Case C-224/01 *Köbler v Republik Österreich*

The case originated out of a preliminary ruling by the Austrian Court on the interpretation of Article 48 of the EC Treaty (after amendment, Article 39 EC). The applicant Mr Köbler has been employed since 1 March 1986 under a public-law contract with the Austrian State in the capacity of ordinary university professor. Mr Köbler applied under national for the special length-of-service increment for university professors. He claimed that, although he had not completed 15 years' service as a professor at Austrian universities, which was the law requirement at the time, he had completed the requisite length of service if the duration of his service in universities of other Member States of the European Community were taken into consideration. He claimed that the condition of completion of 15 years service solely in Austrian universities — with no account being taken of periods of service in universities in other Member States — amounted to indirect discrimination unjustified under Community law.

¹⁰³ Recent prominent cases, where the ECJ deals with indirect discrimination include: Case C-187/00 *Helga Kutz Bauer Freie v Hansestadt Hamburg* and Case C-285/02 *Edeltraud Elsner-Lakeberg v Land Nordrhein-Westfalen*

other than the Republic of Austria¹⁰⁴, and national of Austria, as well because of the deterring effect it will have on them to leave the country and exercise the freedom of movement of workers.

The ECJ's holding in para. 75 of the decision then naturally came to ascertaining that the Austrian law effected unequal treatment.

Outstanding issues

It is interesting to note that the Race and Framework Directives have not yet given rise to any substantive case-law at the ECJ/FCI level. With the rare exceptions of literally several preliminary ruling inquiries¹⁰⁵ and actions by the European Commission against member states for failing to implement the Directives¹⁰⁶, there has been little litigation based on the Directives and the protection they provide. It will be interesting to observe how national courts have adjudicated in areas involving the Directives and whether respective litigation is centred there, but this, of course, could be the centre of a separate research work.

The full potential of Article 13 is yet to be unfolded and it will be certainly interesting to observe the role that the ECJ will play in this respect. The Directives leave out the arduous problem of multi-leveled characteristics. Just to picture the variety and hierarchy of problems that the Court could be presented with in the future, we can for a moment resort to the example given by Holzleithner¹⁰⁷: in the realm of employment a white heterosexual Christian

¹⁰⁴ para. 73 of the Decision

¹⁰⁵ For instance Case C-13/05 *Sonia Chacón Navas v Eurest Colectividades SA*, preliminary ruling procedure, where a Madrid Court is inquiring about the interpretation of Directive 2000/78/EC (Framework Directive) and the ECJ ascertained that sickness cannot as such be regarded as a ground in addition to those in relation to which Directive 2000/78 prohibits discrimination.

¹⁰⁶ Case C-70/05 *Commission of the European Communities v the Grand Duchess of Luxembourg*, where the Court found that Luxembourg failed to adopt the laws, regulations and administrative provisions necessary to comply with Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. The same action has been taken against Austria, Germany and Finland. In the case of the Race Directive, the Commission has institutioned actions against the same four countries plus Greece.

¹⁰⁷ Holzleithner, Elisabeth: *Mainstreaming equality: Dis/Entangling grounds of discrimination*, Transnational law and contemporary problems, Spring 2005, Vol. 14: XXX

woman, unmarried with no children, competes with a man of Turkish descent who has been naturalized, who is Muslim, married, and has two children. We could further complicate the situation by rendering her a lesbian. But even without the need to complicate things further, we can simply see that discrimination as EU legislation and jurisprudence now stand could be difficult to adjudicate upon ‘intersectional discrimination’: discrimination against a black woman in promotion, when the employer can demonstrate that there is no race discrimination since he promotes black men and there is no sex discrimination since he promotes white women. Such hypothetical but quite probable to exist situations could be expected to be taken to Court in the future. Similar challenges certainly invite the ECJ to take a further, more complicated in its analysis stand on the principles of equality and non-discrimination.

Policy endeavours

The earlier legislative efforts in the realm of equality and non-discrimination, as well as the ongoing work of the ECJ in adjudicating equality cases, is currently further triggered with specific policy and campaign endeavours on part of the EU authorities. 2007 is designated as a European Year of Equal Opportunities for All. This essentially is an initiative leading the way to a broader strategy seeking to give momentum to the fight against discrimination in the EU, as the Commission explained in its 2005 document called “Framework strategy for non-discrimination and equal opportunities for all”. The Year aims to¹⁰⁸:

- make people more aware of their rights to enjoy equal treatment and a life free of discrimination – irrespective of sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation
- promote equal opportunities for all

¹⁰⁸ http://ec.europa.eu/index_en.htm

- launch a major debate on the benefits of diversity both for the European societies and individuals

In respect to that, the European Commission has released a number of surveys to feed in the debates at the European and national levels.¹⁰⁹ Such endeavours are to be welcomed as valuable to EU institutional work and it will be interesting to see if they will produce feasible results in the area of equality and non-discrimination.

¹⁰⁹ Eurobarometer surveys: Mapping study on existing national legislative measures and their impact in tackling discrimination – outside the field of employment and occupation – on the grounds of sex, religion or belief, disability, age and sexual orientation and Study on mainstreaming Community policies and legislations in the field of non-discrimination; Study on the social and labour market integration of ethnic minorities; Study on multiple discrimination in the European Union; Study to improve the understanding of issues related to the risks of various forms of discrimination in relation to disabled people with complex needs and/or high dependency; Detailed statistical analysis on the data on the situation of disabled persons; Study on a conceptual framework for the purpose of measuring progress in combating discrimination and promoting equality; Handbook on the measurement of discrimination.

Comparative observations

Rationale underlying the protection against discrimination

It is clear from the outset of any comparison between Europe's supranational Courts that whereas the ECtHR was set up as a freestanding human rights court to protect individuals against human rights abuses by Member States to the ECHR, the ECJ as the adjudicating body of community law is mostly concerned with economic matters, underlying the rationale of the EU. Although fundamental human rights have been continuously acquiring a prominent place in the jurisprudence of the ECJ as an important part of EU law, inevitably the principles of equality and non-discrimination play a different role and have a different place in the two systems¹¹⁰, due to the very ideas underlying the Courts' existence and the functions they perform, being confined to the respective legislation.

Consequently, in concrete terms, some rights are not protected under the EU regime, nor discrimination litigation can be attempted in their defence - for example the right of respect for private life. In terms of grounds of discrimination covered, the ECJ jurisprudence clearly holds sex on top of the hierarchy and this protection is imminently connected with the area of employment, which in turn is part of the formation and operation of the common market and the freedom of movement. In contrast, as was already discussed, with the new developments with Protocol 12 the ECtHR should be able to eliminate any particular hierarchy or preference between discriminatory grounds and areas of life protected.

Terminology, grounds and scope

There can be no doubt that with the years of existence and application of the ECHR and the relevant EU legislation, what is meant by discrimination has altered significantly. The

¹¹⁰ Martin, Danise: *Strasbourg, Luxembourg et la discrimination: influences croisées ou jurisprudences sous influence?*, Revue trimestrielle des droits de l'homme, 18e année, n° 69, (1er janv. 2007)

perception of discrimination as, primarily, intentional unfavourable treatment has given way to a broader notion, embracing unintentional and indirect discrimination. Both the ECtHR and the ECJ adjudicate within the limits of their legal environment as outlined by the respective legislation that they are bound to interpret and apply. Thus regarding our field of interest, whereas Article 14 and Protocol 12 do not contain a definition of discrimination, the EU has established precise definitions that guide the ECJ in its work. It could be concluded that the ECHR regime leaves room for more judicial discretion and activism in the interpretation and application of equality and non-discrimination understandings.

On the other hand, EU law and its detailed nature of terms and definitions, which in the non-discrimination field includes direct and indirect discrimination, as well as harassment, equips the ECJ to freely work with those concepts and readily and legitimately apply them to situations it has been seized with, which in turn facilitates non-discrimination cases and the protection given to applicants. In contrast, it usually takes the ECtHR quite some time and caseload to develop and reach through its practice such understandings. For example, the distinction between direct and indirect discrimination is not something that the ECtHR jurisprudence focuses on. The Court still has limited practice involving indirect discrimination claims, and although in substance this type of discrimination is covered under the Convention¹¹¹, the term is not used in the decisions that come out of Strasbourg.

Regarding the scope of protection that could be afforded by the two Courts, as already discussed above, EU law and the ECJ in its jurisprudence have made clear that EU countries must apply the non-discrimination provisions in the Treaty of Amsterdam and the respective legislation in both the public and private realms. In contrast, even with the adoption of

¹¹¹ For instance in *D.H. and others v the Czech Republic*, App. No. 57325/00 (ECtHR, 13 November 2007): ‘A difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a racial or ethnic group. For the first time the Court clarifies that such a situation may amount to “indirect discrimination” in breach of the Convention’.

Protocol 12 to the ECHR, the question of horizontal effect regarding equality and non-discrimination claims it is still dubious.

Similar clarifications, lead some commentators to conclude that there is a 'complementary nature of the two areas of law'¹¹², which eventually leads to an opportunity for better protection against discrimination. Such claims are strengthened by the recent legislative developments in the ECHR legal area, as the more comprehensive vision of discrimination found within Protocol No.12, namely its non-exhaustive list of discrimination grounds plus the establishment of prohibition of discrimination in the enjoyment of any right set forth by law, are seen as advancing the general protection against discrimination. These conclusions, however, are too future-oriented as at the moment in practical terms, such complementarity is extremely limited, taking into account the number of countries that have ratified Protocol 12, not to mention the number of member states to the ECHR that are not member states of the EU and consequently are not bound by EU legislation.

Cross-fertilization between the jurisprudence of the ECtHR and the ECJ

The ECJ's fundamental rights case-law is generally in line with Strasbourg¹¹³. In comparison, the contrary influence - of the ECJ jurisprudence over the ECHR one is more recent in appearance. Nevertheless, given the expansion of the scope of EC law and EC human rights law, and in view of the growing influence of the Charter of Fundamental Rights, and as similar issues and cases tend increasingly to arise before the ECtHR and the ECJ/CFI,

¹¹² Bell, Mark: *The relationship between EU law and Protocol No. 12*, in Non-discrimination: a human right, seminar to mark the entry into force of Protocol No. 12, Council of Europe publication, 2005, 66

¹¹³ Douglas-Scott, Sionaidh: *A tale of two courts: Luxembourg, Strasbourg and the growing European human rights acquis*, Common market law review Vol. 43, No. 3, 2006, 639

there is certainly a tendency and a determination between the two sets of Courts to avoid conflict between their case-law.¹¹⁴

Although the Luxembourg courts refer to Strasbourg far more often than does Strasbourg to Luxembourg, the two sets of Courts' case-law regarding discrimination could be a source of inspiration¹¹⁵. In practice, the ECtHR has resorted to ECJ jurisprudence in key cases such as *Marckx v Belgium* (referencing to *Defrenne*) and in *Goodwin v the United Kingdom* (quoting the case of *P. v S.*¹¹⁶). Another good example of "cross-fertilization" is provided in *Nachova v Bulgaria*, where the ECtHR made reference to the provisions on the burden of proof in both the Racial Equality Directive and the Employment Equality Directive and what is more, accepted that this principle could apply in future cases under the Article 14 of the ECHR.¹¹⁷

Recent example of similar cross-fertilization presents *Stec v the United Kingdom*, where the ECtHR referred to the 'strong persuasive value' of an ECJ ruling on the question of sex discrimination in social security.¹¹⁸

As more than half of the of the Member States of the CoE and bound by the ECHR are also members of the EU, it could be expected every time more often that the Strasbourg Court will have to deal with discrimination claims involving an EU law element as part of the

¹¹⁴ Craig and De Búrca, *EU law: text, cases, and materials*, OUP, Fourth edition, 2007, 426

¹¹⁵ prof. R. Wintemute during a discussion at the Seminar marking the entry into force of Protocol No. 12, Strasbourg, 2005

¹¹⁶ Interestingly, before that, in the *P. v S.* decision, the ECJ had already looked into the Strasbourg jurisprudence and cited the definition of transsexualism, established in *Rees v the United Kingdom* [1986] 9 EHRR

¹¹⁷ para. 157 of the Decision

¹¹⁸ *Stec v the United Kingdom*, App. Nos. 65731 and 65900/01, (ECtHR 12 April 2006), para. 58: 'In reaching a conclusion on this issue which, while not determinative of the issue under Article 14 of the Convention, is nonetheless of central importance, particular regard should be had to the strong persuasive value of the ECJ's finding on this point.'

legislative foundation of the case. Consequently and inevitably then, the concepts, developed in the ECJ jurisprudence, will have to be taken into account by the ECtHR.¹¹⁹

¹¹⁹ For a more detailed picture of the non-discrimination cases, involving cross-fertilization between the two European Courts, please see Martin, Danise: Strasbourg, Luxembourg et la discrimination: influences croisées ou jurisprudences sous influence?, *Revue trimestrielle des droits de l'homme*, 18e année, n° 69, (1er janv. 2007), 116

Conclusions and further research

It is really difficult to conclude upon a work, dealing with a topic that keeps the promise of an exciting evolution in the near future. Out of this perspective, instead of concluding remarks, I feel that a disclaimer and an extension are necessary first.

Due to legitimate restrictions, the present thesis could not pay due attention and, regarding certain points, did not even mention several issues of importance that could certainly be the focus of separate campus of research efforts. Those include inquiries about refining the mechanics of the work of the Courts when looking into discrimination claims with an emphasis on the rules about intensity of review and burden of proof; research into human rights and equality and non-discrimination cross-fertilization between the two sets of Courts; analysis of the influence that Europe's supranational Courts have over the work of national adjudicating bodies; measuring the impact that equality and non-discrimination decisions have in bringing about legal change as to legislative innovations and amendments; and identifying possibilities for strategic litigation efforts to better ascertain the European human rights standards in the field of equality and non-discrimination.

The present thesis looked into the ECHR and EU legislation opportunities for equality and non-discrimination protection, as they are ascertained and expounded upon by the work of Europe's two supranational Courts. Encountering systematic approaches and classic decisions, alongside peculiar understandings and their applications on part of the ECtHR and the ECJ, best demonstrates the complexity and variety of the problems involved in adjudicating upon cases, involving an element of the principles of equality and non-discrimination. This outcome inevitably leads to the conclusion that despite both Courts' extensive jurisprudence in the field, there is a twilight zone of gaps to be filled and problems to be looked into further and in more details.

The positive finding that Europe is an area of the rule of law, offering a high-level of human rights protection, with ample opportunities to fight discrimination, especially in comparison with other regional systems for human rights protection, is mitigated by the nature of the problems and injustice, revealed by recent cases that the two Courts had to resolve. Apparently, European governments still need to live up to the promises they have made in the ECHR and relevant EU legislation, alongside their priorities for achieving economic progress and excellent performance in other policy areas. In furthering human rights protection and providing solutions and enforceable remedies to positively change the lives of people, Europe's supranational Courts should continue to perform their important legitimizing role.

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