1 The Right to Equal Treatment and the Prohibition of Discrimination

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1.1 Introduction

Fundamental rights can only be enjoyed in a meaningful way if they are granted to everyone in an equal manner. It would be incompatible with the notion of equal value, dignity and autonomy of all human beings if, for example, only Christians could enjoy the freedom of religion, or if only men would have the right to vote. Moreover, unequal treatment of certain groups (such as religious groups, women or LGBTI+ people) often stems from prejudice, stigma or bias. As a result, groups or persons can be deprived of fundamental rights, access to important social goods or participation in public life on irrelevant or irrational grounds. It is for this reason that many fundamental rights catalogues in international treaties and national constitutions have a general equal treatment clause or a prohibition of discrimination as their very first provision.

Such provisions do not mean that all forms of unequal treatment are unacceptable and prohibited. Unequal treatment – or differential treatment – can often be reasonable and even may be desirable. Few people will think it unacceptable that income taxation is differentiated on the basis of one's salary, and most will agree that one's education may be relevant to getting a certain job. In a way, it even can be said that unequal treatment is inherent to law. Each piece of legislation and each legal norm necessarily contains classifications and differences in treatment, if only because their scope has to be defined and the various rules apply only to a certain category of persons or situations.

This makes the right to equal treatment and to non-discrimination into a highly complex right.[1] There is no clear maximum of enjoyment of the right to be granted, as may be the case for the right to freedom of expression or for privacy rights. Instead, unequal treatment (or rather, differentiation in line

[1] For a brief discussion of some main differences between the right to non-discrimination and the general equality principle, see e.g. Janneke Gerards, 'The discrimination grounds of Article 14 ECHR' (2013) 13 *HRLR* 99.

with one's capacities, needs, merits or wants) may be just as desirable as equal treatment. This may raise the question of how, then, the various European and international human rights instruments and their monitoring bodies have given shape to the relevant treaty provisions on equal treatment and non-discrimination. This constitutes the focus of the present chapter.

1.2 European Instruments

1.2.1 ECHR[2]

1.2.1.1 Article 14 ECHR and Article 1 Protocol 12 ECHR

The ECHR contains two separate provisions related to equal treatment and non-discrimination:

> **Article 14 ECHR**
> 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.

> **Article 1 Protocol 12 ECHR**
> 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.

Comparing the two provisions, it can be seen that Article 1 of Protocol 12 contains an independent non-discrimination clause, while Article 14 is a so-called 'accessory' provision.[3] This means that Article 14 can only be invoked in conjunction with one of the other rights and freedoms protected by the Convention, such as the right to freedom of expression or the right to respect for one's private life. It must be shown, for instance, that Article 3 of Protocol 1 is affected in a discriminatory manner by excluding persons of

[2] Some passages of this section have been retrieved from the present author's chapter on non-discrimination in Van Dijk and Van Hoof's *Law of the European Convention on Human Rights* (Intersentia 2018) chapter 30.

[3] Further on this, see e.g. Óddny Mjóll Arnardóttir, 'Discrimination as a magnifying lens: scope and ambit under Article 14 and Protocol No. 12' in Eva Brems and Janneke Gerards (eds) *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press 2013).

unsound mind from the right to vote,[4] or a tax exemption is withheld from one particular religious organisation while it is granted to others.[5] For the applicability of Article 14 it is not required, however, that a substantive right can be shown to have been violated.[6] In fact, the Court has given a particularly wide reading to the various Convention provisions for the purposes of the application of the non-discrimination clause. Decisive for the applicability of Article 14 is whether the facts of the case 'fall within the ambit' of one of the substantive provisions. This means that an applicant only needs to show that there is an objective connection with the substance of the provision.[7] This flexible 'ambit' test renders the non-discrimination clause of Article 14 applicable in a great many cases, including access to private employment, planning policy, social security and – to some extent – healthcare.[8] This can be illustrated by the case of *EB v France*,[9] which concerned a single, lesbian woman who had been refused permission to adopt a child. In its case law the ECtHR has held that the right to respect for one's family life does not encompass a right to adopt, so Article 8 ECHR would not apply to this case when taken on its own. However, since the French legislation otherwise allowed for adoption by single persons and there was a sufficiently clear connection between adoption and the applicant's family life, the ECtHR held that the facts fell within the wider 'ambit' of Article 8.[10] It therefore could apply Article 14 ECHR to the alleged discrimination based on sexual orientation and, having assessed the reasons for the refusal, it found a violation of Article 14 take in conjunction with Article 8.

The 'within the ambit' approach has allowed the Court to apply Article 14 ECHR to many cases. Nevertheless, as a result of the need to find a connection between a difference in treatment and the enjoyment of a substantive Convention right, the Court cannot deal with all cases of unequal treatment and discrimination under Article 14.[11]

[4] e.g. *Alajos Kiss v Hungary*, App no 38832/06 (ECtHR 20 May 2010); *Caamaño Valle v Spain*, App no 43564/17 (ECtHR 11 May 2021).

[5] e.g. *The Church of Jesus Christ of Latter-Day Saints v the United Kingdom*, App no 7552/09 (ECtHR 4 March 2014).

[6] See, however, *Prince Hans-Adam II of Liechtenstein v Liechtenstein*, App no 42527/98 (ECtHR 12 July 2001) para 92.

[7] See classically *Marckx v Belgium*, App no 6833/74 (ECtHR 13 June 1979) para 31.

[8] See e.g. *Sidabras and Džiautas v Lithuania*, App nos 55480/00 and 59330/00 (ECtHR 27 July 2004) paras 47–50; *Moreno Gómez v Spain*, App no 4143/02 (ECtHR 16 November 2004); *Pentiacova and 48 Others v Moldova*, App no 14462/03 (ECtHR 4 January 2005 (dec)).

[9] *EB v France*, App no 43546/02 (ECtHR 22 January 2008).

[10] *EB* para 49.

[11] For some more examples, see Janneke Gerards, 'Prohibition of discrimination' in Van Dijk and Van Hoof's *Law of the European Convention on Human Rights* (Intersentia 2018) chapter 30.

The *Balta* case, for example, related to a number of caravans that the applicants – who were Travellers ('gens de voyage') – had illegally parked in a French town.[12] The town's mayor had issued an order prohibiting the parking of caravans in any public places except for the areas specifically catering for them. According to the applicants, this order discriminated against Travellers in the exercise of their freedom of movement and the right to choose one's residence as protected by Article 2 of Protocol No 4 ECHR. The Court found, however, that the applicants were foreign nationals and did not have any legal entitlement to stay in France. Since Article 2 of Protocol 4 grants the right to freedom of movement only to persons 'lawfully within the territory of a State', the applicants could not claim the rights laid down in that provision. Consequently, the Court held, they could not successfully invoke the non-discrimination clause of Article 14 ECHR either.[13]

In addition to this, the accessory character of Article 14 has the effect that the Court may decide not to deal with the merits of a non-discrimination complaint. The Court normally decides on the various Convention complaints submitted in an application in the order of how the provisions are laid down in the Convention. This means it first decides on the complaints related to, for example, Articles 3, 8 and 10 and any protocols, and only then turns to the accessory provisions that have been invoked. In deciding the various complaints based on the substantive provisions, the Court often already considers some relevant aspects of discrimination. For example, it may find it relevant that legislation interfering with Article 8 was applied in a discriminatory manner, and may find a violation of Article 8 for that reason. When the Court then arrives at the complaints under Article 14, it frequently finds that it has already substantively addressed them and there is no reason for it to deal with them separately.[14]

As a consequence of this, Article 14 ECHR does not play a major role in the Court's case law. To mitigate the effects of the accessory nature, the Member States of the Council of Europe decided in the 1990s to define a new non-discrimination provision, which has been laid down in Protocol 12 ECHR.[15] Article 1 of the Protocol stipulates that the right

[12] *Balta v France*, App no 19462/12 (ECtHR 16 January 2018 (dec)).
[13] *Balta* para 26.
[14] e.g. *Orlandi and Others v Italy*, App no 26431/12 (ECtHR 14 December 2017) para 212. Sometimes the Court does recognise the added value of discussing the complaints on non-discrimination separately, however, especially because of the symbolic value of finding a violation of the prohibition of discrimination; e.g. *Bayev v Russia*, App no 67667/09 (ECtHR 20 June 2017) para 91.
[15] ETS No 177, opened for ratification on 4 November 2000.

to non-discrimination pertains to 'the enjoyment of any right set forth by law', which includes national law. Accordingly, this provision can be invoked independently from the Convention rights and has a much wider scope of application compared to Article 14. Article 1 of Protocol 12 is also different from Article 14 in that a second paragraph has been added which expressly provides that 'no one shall be discriminated against by any public authority'. Hence, Protocol 12 does not only clearly protect against discrimination by legislation,[16] but also against discriminatory acts and decisions by, for instance, police officers or administrative bodies.[17] This wider scope of application means that stronger protection can be offered against national cases of discrimination.[18] Nevertheless, the Protocol is not widely signed and ratified. In 2021, the Protocol was ratified by fewer than half of the Council of Europe States.[19]

Other than the scope of application, the clauses of Article 14 and Protocol 12 are nearly identical. In *Sejdić and Finci* the Court's Grand Chamber has expressly held that Article 1 of Protocol 12 should be applied in the same way as Article 14.[20] This makes it unlikely that the Court will read additional obligations and rights into Article 1 of Protocol 12 beyond those already recognised under Article 14.

1.2.1.2 Meaning of the Prohibition of Unequal Treatment and Discrimination

Both the notions of unequal treatment and of discrimination are often used in relation to Articles 14 ECHR and 1 Protocol 12. Generally, the Court uses the notions of unequal treatment, differentiation or classification rather neutrally to indicate that two persons, groups or situations have not been treated in the same way. The notion of 'discrimination' may also have this neutral meaning, but in the Court's case law it is often employed in a more pejorative sense. Discrimination then refers to a case of unequal or differential treatment which is considered unjustified and unacceptable, for instance because it is motivated by prejudice or irrational considerations. The notions of 'discrimination' and 'unequal treatment' therefore are not synonymous in the ECtHR's case law and cannot be used interchangeably. The ECtHR has recognised this by holding that the notion 'without discrimination' as it is contained in the text of Article 14 ECHR and Article 1 of

[16] But see *Sotir v Romania*, App no 68304/13 (ECtHR 13 November 2018 (dec)) paras 26–7.
[17] Explanatory Memorandum to Protocol No 12 (ETS No 177) para 22.
[18] For an application, see e.g. *Negovanović v Serbia*, App no 29907/16 (ECtHR 25 January 2022).
[19] For the status of ratifications, see https://conventions.coe.int.
[20] *Sejdić and Finci v Bosnia and Herzegovina*, App nos 27996/06 and 34836/06, para 55.

Protocol 12, must be read as referring to a distinction for which there is no objective and reasonable justification.[21]

1.2.1.3 When Does Unequal Treatment Constitute Discrimination?

The Court has formulated several standards to decide if a case of unequal treatment constitutes discrimination prohibited by the Convention. It often summarises the resulting test in the following manner:

> According to the Court's case-law, a distinction is discriminatory, for the purposes of Article 14, if it has 'no objective and reasonable justification', that is if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realized'. Moreover the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.[22]

In addition to this, the Court has acknowledged that unfair treatment cannot only be constituted by unequal treatment, but sometimes also by treating essentially different cases or persons in the same way (substantive unequal treatment):

> the right not to be discriminated against ... is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.[23]

These considerations show that a justification only needs to be given if a case either concerns a different treatment of 'otherwise similar situations', or similar treatment of situations that are 'significantly different'. This translates into a test of similarity or comparability of cases, which constitutes an important aspect of the Court's review in discrimination cases.[24] To judge if a case discloses a differential treatment of similar situations, the Court needs to establish a yardstick to judge the relevance of the differences and similarities between two situations, persons or groups. For example, in the case of *Kjeldsen and Others*, the applicable legislation allowed parents to have their children exempted from religious instruction classes held in State schools, but offered no similar possibility for integrated sex education.

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[21] See the *Belgian Linguistics* case, App no 1474/62 (ECtHR 23 July 1968), referring to the discrepancy between the official French text of the Convention ('sans distinction aucune' – literally this means 'without any distinction') and the English text version ('without discrimination').

[22] *Koua Poirrez v France*, App no 40892/98 (ECtHR 30 September 2003) para 46.

[23] *Thlimmenos v Greece*, App No 34369/97 (ECtHR 6 April 2000) para 44.

[24] See further Gerards, 'Prohibition of discrimination'.

The Court thus needed to decide if there were any relevant similarities and differences between religious education and sex education in schools. It reasoned that religious education 'of necessity disseminates tenets and not mere knowledge', while this was different for sex education.[25] Thus taking the nature of the education offered as its yardstick, the Court could hold that the distinction was 'founded on dissimilar factual circumstances' and therefore was consistent with the requirements of Article 14 without there being a need to examine a justification for it.[26]

Another example can be found in *Hachette Filipacchi Presse Automobile and Dupuy*.[27] In this case, a publishing company had complained about the prohibition of publishing Formula 1 photos which also showed the logos of sponsoring tobacco producers and cigarette brands, claiming that the print press was unfairly treated in comparison to broadcasting companies: they were allowed to show videos of the races where the cigarette brand logos could clearly be seen on the cars, drivers' suits or tracks. The Court considered that, at the time, it was not yet feasible, by technical means, to hide lettering, logos or advertisements on footage used by broadcasters, while the print media could more easily conceal or blur them, or refrain from publishing photographs of such symbols. Thus, the Court used the technical means to modify pictures or blur logos as its yardstick to hold that the print and audiovisual media were not in a similar situation. Accordingly, no further review of a justification was needed to decide that Article 14 ECHR had not been violated.

In cases that are sufficiently comparable in legal terms (or where a similar treatment of significantly different situations has been shown to exist), the Court examines whether there is an objective and reasonable justification for the disadvantageous treatment. As is clear from the above-cited consideration, it thereby examines if there is a legitimate aim for the difference in treatment and whether the State has sufficiently shown that there is a reasonable relationship of proportionality between the unequal treatment and its objectives.[28] The Court has further detailed these main standards in a long line of case law. It can be seen, for example, that it is not acceptable if a difference in treatment is based on negative attitudes towards a certain group (e.g. homosexuals or Roma),[29] or is motivated by overbroad gender

[25] *Kjeldsen, Busk Madsen and Pedersen v Denmark*, App nos 5095/71, 5920/72 and 5926/72 (ECtHR 7 December 1976), para 56.
[26] ibid.
[27] *Hachette Filipacchi Presse Automobile and Dupuy v France*, App no 13353/05 (ECtHR 5 March 2009).
[28] *Andrejeva v Latvia*, App no 55707/00 (ECtHR (GC) 18 February 2009) para 83.
[29] e.g. *Moldovan and Others v Romania*, App nos 41138/98 and 64320/01 (ECtHR 12 July 2005) paras 139–40; *Bayev and Others v Russia*, App no 67667/09 (ECtHR 20 June 2017).

stereotypes[30] or prejudice related to one's national or ethnic origin.[31] The Court's application of the test of proportionality is generally comparable to that of the general requirement of necessity in a democratic society, as is discussed in other chapters in this handbook.[32]

1.2.1.4 'Suspect' Grounds of Unequal Treatment

In some cases the Court holds that the respondent State does not just have to show a 'reasonable relationship of proportionality' between the differential treatment and its objectives, but has to advance 'very weighty reasons' as justification.[33] The Court then strictly reviews the arguments made by the respondent State to see if they are sufficiently convincing and objective to justify a difference in treatment.[34] For example, the applicant in *Timishev* was an ethnic Chechen who had been refused entry to the Kabardino-Balkar Republic of the Russian Federation.[35] The Court noted that the refusal had been essentially based on the applicant's Chechen origin. After having emphasised that discrimination on grounds of origin triggered the application of the very weighty reasons test, the Court held that 'no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures'.[36] Hence, if a case is purely or to a decisive extent based on a ground such as ethnicity, the very weighty reasons test implies that the Court will find a violation of Article 14 without conducting any justification review. However, the Court will not always find

[30] e.g. *Konstantin Markin v Russia*, App no 30078/06 (ECtHR (GC) 22 March 2012) para 143.
[31] e.g. *Biao v Denmark*, App no 38590/10 (ECtHR (GC) 24 May 2016) para 126.
[32] In more detail, see also Gerards, 'Prohibition of discrimination' and Fundamental Rights Agency and ECtHR, *Handbook on European Non-discrimination Law* (Publications Office of the European Union 2018).
[33] In more detail, see Janneke Gerards, 'The margin of appreciation doctrine, the very weighty reasons test and grounds of discrimination' in Marco Balboni (ed), *The Principle of Discrimination and the European Convention of Human Rights* (Editoriale Scientifica 2018) and Óddny Mjóll Arnardóttir, 'The differences that make a difference: recent developments on the discrimination grounds and the margin of appreciation under Article 14 of the European Convention on Human Rights' (2014) 14 *HRLR* 647.
[34] The very weighty reasons test thus is a special variety of the so-called margin of appreciation doctrine, which normally helps to determine the intensity and strictness of the Court's review; see further on this, among many others, Janneke Gerards, *General Principles of the European Convention on Human Rights*, 2d edn (Cambridge University Press 2023) chapter 8. For an illustration of the application of the margin of appreciation doctrine in Article 14 cases, see e.g. *Rasmussen v Denmark*, App no 9118/80 (ECtHR 26 May 1987) para 40; *Fábián v Hungary*, App no 78117/13 (ECtHR 5 September 2017) para 50.
[35] *Timishev v Russia*, App nos 55762/00 and 55974/00 (ECtHR 13 December 2005).
[36] *Timishev* para 58.

a violation if it applies the very weighty reasons test; this will depend on the nature of the case and the compelling nature of the reasons advanced by the State.[37]

The Court's choice to apply the very weighty reasons test depends on the ground of discrimination at stake in a particular case. In its case law the Court has identified several grounds that will trigger the application of the test because they are 'suspect' or 'suspicious', in the sense that it is very likely that unacceptably biased or prejudicial considerations are behind their use in decision-making or legislation. The grounds the Court has deemed 'suspect' so far are sex or gender,[38] unlawful birth,[39] nationality,[40] sexual orientation,[41] race or ethnicity,[42] (mental) disability,[43] chronical illness and HIV status[44] and religion[45]. On some other grounds, such as age, the Court has not yet clearly pronounced itself.[46]

The list of suspect grounds recognised by the Court does not fully correspond to the lists of grounds enumerated in Article 14 and Article 1 of Protocol 12. For example, the ground of sexual orientation is not mentioned in these provisions, while the Court has not yet recognised listed grounds such as property or social origin – which are listed – as suspect.[47] Thus, the text of the Convention is not leading in determining the applicability of the very

[37] See further Gerards, 'The margin of appreciation doctrine, the very weighty reasons test and grounds of discrimination'.

[38] See originally *Abdulaziz, Cabales and Balkandali v the United Kingdom*, App no 9214/80. See also, however, e.g. *Khamtokhu and Aksenchik v Russia*, App nos 60367/08 and 961/110 (ECtHR (GC) 22 March 2012) para 85, showing that even in cases on discrimination based on gender the margin of appreciation may be wide.

[39] Originally *Inze v Austria*, App no 8695/79 (ECtHR 28 October 1986); see also e.g. *Fabris v France*, App no 16574/08 (ECtHR (GC) 7 February 2013) paras 57–8.

[40] Originally *Gaygusuz v Austria*, App no 16574/08 (ECtHR 16 September 1996); see also e.g. *Andrejeva v Latvia*, App no 55707/00 (ECtHR (GC) 18 February 2009) para 87. The case law on this topic is complex, however, and the Court may not always require very weighty reasons in justification of a nationality-based discrimination; see e.g. *British Gurkha Welfare Society and Others v the United Kingdom*, App no 44818/11 (ECtHR 15 September 2016).

[41] Originally *L and V v Austria*, App nos 39392/98 and 39829/98 (ECtHR 9 January 2003); see also e.g. *X and Others v Austria*, App no 19010/07 (ECtHR (GC) 19 February 2013) para 99.

[42] Originally *Timishev v Russia*, App nos 55762/00 and 55974/00 (ECtHR (GC) 13 December 2005).

[43] Originally *Alajos Kiss v Hungary*, App no 38832/06 (ECtHR 20 May 2010) para 42.

[44] Originally *Kiyutin v Russia*, App no 2700/10 (ECtHR 10 March 2011) para 63.

[45] Originally *Vojnity v Hungary*, App no 29617/07 (ECtHR 12 February 2013) para 36. For a wider margin of appreciation, however, see *Eweida and Others v the United Kingdom*, App no 48420/10 (ECtHR 15 January 2013).

[46] See further Gerards, 'The margin of appreciation doctrine, the very weighty reasons test and grounds of discrimination'.

[47] On this, see also Fundamental Rights Agency and ECtHR, *Handbook on European Non-discrimination Law*, chapter 5.

weighty reasons test. Instead, the Court mainly determines the 'suspectness' of certain grounds based on the prevailing opinions and consensus in the European States,[48] the existence of a history of discrimination and stigma against a certain group or notions of prejudice or vulnerability.[49]

1.2.1.5 Special Cases of Discrimination and Unequal Treatment

When thinking of unequal treatment, most people will give examples of a clear difference in treatment of two persons or groups, with a tangible disadvantage for one person or group as a result. The notion of discrimination is wider, however, and can be applied also in other types of cases. The Court has recognised several types of discrimination in its case law and adopted special standards and criteria to deal with them.

Discriminatorily Motivated Acts Some discriminatory acts and decisions stem from racist, sexist, xenophobic, homophobic, sectarian or similar motives. In these cases it is not the *effect* of a certain decision (that is, a difference in treatment) that triggers the applicability of Article 14 as much as its *motive* (that is, the reason or ground for certain behaviour or decisions). Such acts or behaviour are committed simply because the perpetrators think that their victims are of a certain ethnic origin, adhere to a certain religion, are LGBTI+, etc. Such acts or decisions are regarded as unacceptable *per se*, not so much because they cause one person to be treated differently from another, but because of the inherently reprehensible motives, which – in the Court's words – entail 'a particular affront to human dignity'.[50]

Many discrimination cases of this category concern violence motivated by ethnic or national origin, sexual orientation or religion.[51] However, discriminatorily motivated acts or decisions may take various forms. Non-violent examples of discriminatory behaviour are highly stereotyped and discriminatory comments about homosexuals made in a television show,[52] the refusal by a national court to grant parental rights to a single parent

[48] See e.g. *Abdulaziz, Cabales and Balkandali v the United Kingdom,* App no 9214/80.
[49] *Kiyutin v Russia*, App no 2700/10 (ECtHR 10 March 2011) para 63.
[50] *Nachova and Others v Bulgaria*, App nos 43577/98 and 43579/98 (ECtHR (GC) 6 July 2006) para 145.
[51] e.g. *Milanović v Serbia*, App no 44614/07 (ECtHR 14 December 2010), paras 76–7; *PF and EF v the United Kingdom*, App no 28326/09 (ECtHR 23 November 2010 (dec)); *Begheluri and Others v Georgia*, App no 28490/02 (ECtHR 7 October 2014); *Identoba and Others v Georgia*, App no 28490/02 (ECtHR 12 May 2015); *MC and AC v Romania*, App no 12060/12 (ECtHR 12 April 2016); *Sabalić v Croatia*, App no 50231/13 (ECtHR 14 January 2021).
[52] *Sousa Goucha v Portugal*, App no 70434/12 (ECtHR 22 March 2016), although the Court dealt with the issue under Article 8 rather than Article 14.