



Human rights in Europe - Treating like alike and different differently: Prohibition of discrimination

Pavel Molek

Human Rights in a Comparative
Perspective 7 - Prohibition of
discrimination

Preliminary thoughts

- Literal trailer
- Which inequalities are fair and which unfair and which are the worst?
- Discrimination: Treating subjects that are in a similar situation differently without a rational and objective reason.

Instruments

- Another quotation: „1. **Men** are born and remain free and equal in rights. Social distinctions may be founded only upon the general good.“
- „L'homme est né libre, et partout il est dans les fers. - **Man** is born free; and everywhere he is in chains.“
- Declaration of the Rights of Man and of the Citizen (1789) + The Social Contract, Or Principles of Political Right (1762)

Instruments

- UDHR:

„Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."

Instruments

- Art. 26 ICCPR:

„Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Instruments

■ Article 14 ECHR:

- Prohibition of discrimination: *„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.“*
- Accesoric (secondary) nature. Do we need it? Is it superfluous?
- *Marckx v. Belgium 1979* (rights of legitimate and illegitimate heirs)
- What is the importance of enumerations?

Instruments

- Protocol No. 12 to ECHR:

- Article 1 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.“

- Autonomous. Does it make a difference?

Instruments

- And many more.....
 - 1952: Convention on the Political Rights of Women
 - 1965: International Convention on the Elimination of All Forms of Racial Discrimination
 - 1979: Convention on the Elimination of All Forms of Discrimination against Women
 - 1981: Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief
 - 1993: Standard Rules on the Equalization of Opportunities for Persons with Disabilities
 - Many ILO conventions....

Definitions

- Direct v. indirect discrimination
- 'direct discrimination': where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation – any examples?
- 'indirect discrimination': where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary; - any examples?

D.H. v. Czech Republic

- What are the facts?
- What levels of HRs protection were mentioned?
- Arguments of Roma v arguments of the government? Are they different and do they need a different treatment?
- What was the burden of proof?
- Was it direct discrimination, indirect discrimination or affirmative action?

D.H. v. Czech Republic

- Definition of discrimination:

„175. The Court has established in its case-law that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations.“

- Burden of proof

„189. Where an applicant alleging indirect discrimination thus establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent State, which must show that the difference in treatment is not discriminatory. Regard being had in particular to the specificity of the facts and the nature of the allegations made in this type of case, it would be extremely difficult in practice for applicants to prove indirect discrimination without such a shift in the burden of proof.“

D.H. v. Czech Republic

- Result in the first phase:

„195. In these circumstances, the evidence submitted by the applicants can be regarded as sufficiently reliable and significant to give rise to a strong presumption of indirect discrimination. The burden of proof must therefore shift to the Government, which must show that the difference in the impact of the legislation was the result of objective factors unrelated to ethnic origin.

Objective and reasonable justification

196. The Court reiterates that a difference in treatment is discriminatory 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 realised. Where the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible." – Why?

D.H. v. Czech Republic

- Result in the second phase:

„207. The facts of the instant case indicate that the schooling arrangements for Roma children were not attended by safeguards that would ensure that, in the exercise of its margin of appreciation in the education sphere, the State took into account their special needs as members of a disadvantaged class. Furthermore, as a result of the arrangements the applicants were placed in schools for children with mental disabilities where a more basic curriculum was followed than in ordinary schools and where they were isolated from pupils from the wider population. As a result, they received an education which compounded their difficulties and compromised their subsequent personal development instead of tackling their real problems or helping them to integrate into the ordinary schools and develop the skills that would facilitate life among the majority population. Indeed, the Government have implicitly admitted that job opportunities are more limited for pupils from special schools.

208. In these circumstances and while recognising the efforts made by the Czech authorities to ensure that Roma children receive schooling, the Court is not satisfied that the difference in treatment between Roma children and non-Roma children was objectively and reasonably justified and that there existed a reasonable relationship of proportionality between the means used and the aim pursued. In that connection, it notes with interest that the new legislation has abolished special schools and provides for children with special educational needs, including socially disadvantaged children, to be educated in ordinary schools.”

D.H. v. Czech Republic

- Dissents: Jungwiert – fighting with political correctness?
 - parental consent,
 - recommendations of the educational psychology centres,
 - a right of appeal,
 - an opportunity to transfer back to an ordinary primary school from a special school

Borrego Borrego:

„This, then, is the Court's new role: to become a second ECRI (European Commission against Racism and Intolerance) and dispense with an examination of the individual applications, for example the situation of applicants nos. 9, 10, 11, 16 and 17, in complete contrast to the procedure followed by the Chamber in paragraphs 49 and 50 of its judgment.

18. Any departure by the European Court from its judicial role will lead it into a state of confusion and that can only have negative consequences for Europe. The deviation from the norm implicit in this judgment is substantial and the fact that all Roma parents are deemed unfit to educate their children is, in my view, insulting. I therefore take my place alongside the victims of that insult and declare: "Jsem český Rom" (I am a Czech Roma)."

New level - EU

- Different reasons for non-discrimination in EEC - Article 119 EEC Treaty

„Each Member State shall in the course of the first stage ensure and subsequently maintain the application of the principle of equal remuneration for equal work as between men and women workers.

For the purposes of this Article, remuneration shall mean the ordinary basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the workers' employment.

Equal remuneration without discrimination based on sex means:

(a) that remuneration for the same work at piece-rates shall be calculated on the basis of the same unit of measurement; and

(b) that remuneration for work at time-rates shall be the same for the same job."

New level - EU

- Judgment of ECJ of 8 April 1976 in Case 43/75 Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena
- Use of Convention No 100 on equal pay concluded by the ILO in 1951, Art. 2 establishes the principle of equal pay for work of equal value.

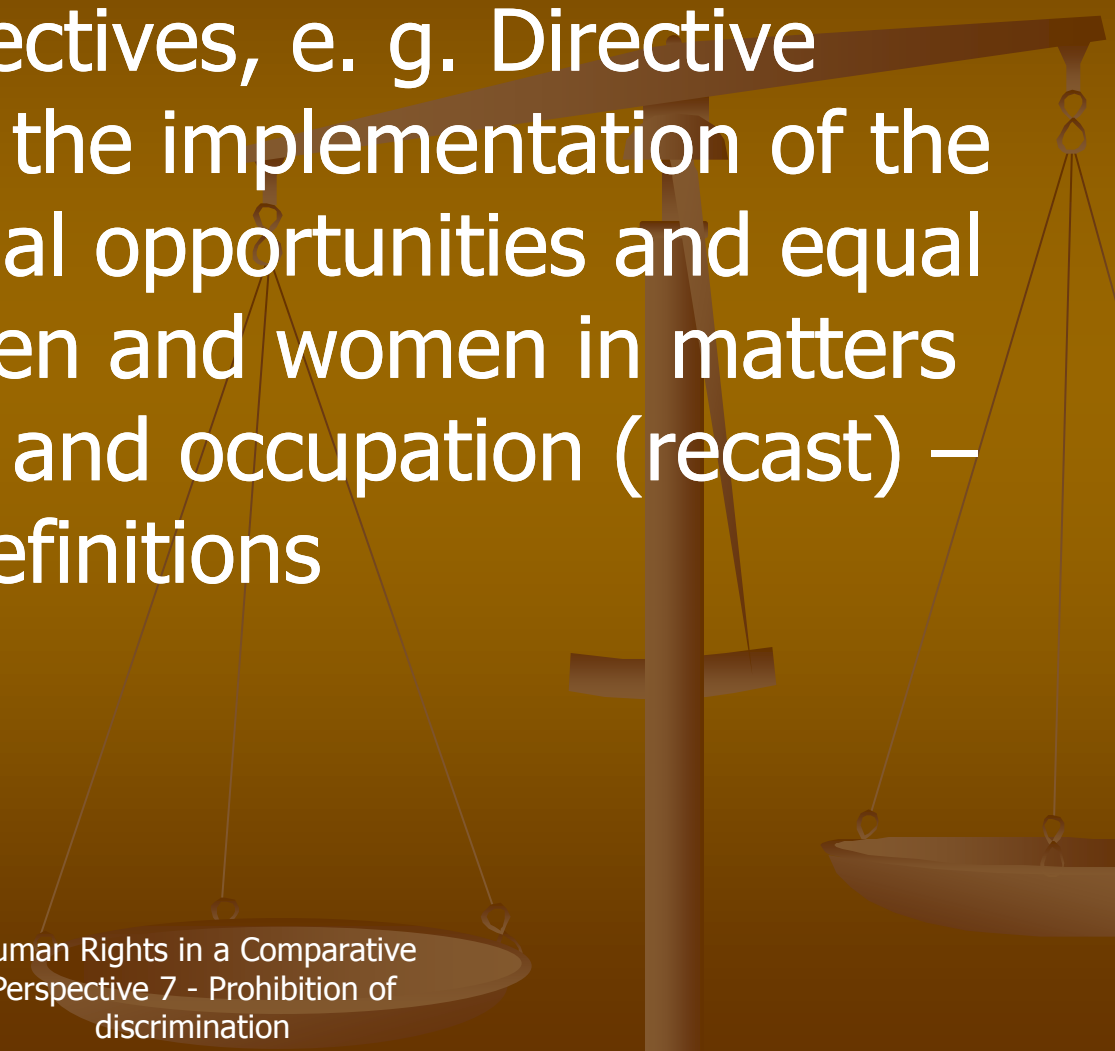
New level - EU

- Direct effect here means horizontal effect...Who can discriminate?
- What is horizontal effect?
- *„39 IN FACT , SINCE ARTICLE 119 IS MANDATORY IN NATURE , THE PROHIBITION ON DISCRIMINATION BETWEEN MEN AND WOMEN APPLIES NOT ONLY TO THE ACTION OF PUBLIC AUTHORITIES , BUT ALSO EXTENDS TO ALL AGREEMENTS WHICH ARE INTENDED TO REGULATE PAID LABOUR COLLECTIVELY , AS WELL AS TO CONTRACTS BETWEEN INDIVIDUALS. ”*

New level - EU

- Later many Directives, e. g. Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) – source of my definitions

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New level – EU Charter

- EU Charter:

*„TITLE III
EQUALITY*

Article 20: Equality before the law

Article 21: Non-discrimination

Article 22: Cultural, religious and linguistic diversity

Article 23: Equality between women and men

Article 24: The rights of the child

Article 25: The rights of the elderly

Article 26: Integration of persons with disabilities”

