

Abstract

The Prohibition of Discrimination as a Legal Problem in the Case Law of the European Court of Human Rights

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This dissertation thesis is focused on the examination of the prohibition of discrimination in the European system of the protection of human rights as based on the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to it as the „European Convention“). The European Court of Human Rights (hereinafter referred to as the „European Court“), in its role as a component of this system of protection, acts as an international judicial organ that reviews individual applications concerning an alleged breach of the European Convention by a Member State. In the area of the protection of human rights such prohibition of discrimination is based on the fundamental principle of equality, and constitutes an integral part of all important international instruments for the protection of such rights, and of the modern national legal orders of states. Inevitably, however, the legal systems of modern-day states are built upon distinctions, categorizations and classifications inherent to their societies, creating unintentional opportunities for discrimination. The problem of the prohibition of discrimination consists in delimiting the circumstances where differential treatment of an individual or group becomes discrimination as defined by law. The search for this delimitation from the perspective of the decision-making practice of the European Court in the course of the examination of alleged discrimination further raises the question of judicial discretion and the extent to which it should be limited according to suitably documented criteria.

In order to solve this problem the European Court created - in the form of a binding scheme of argumentation which has to be included in the reasoning of its decision – a set of criteria (the so called anti-discrimination test) on the basis of which it is to decide whether a given case of differential treatment is justifiable or not. The reasoning behind decisions of the European Court taken on the basis of this anti-discrimination test should serve to render its decisions transparent and to provide a measure of predictability to the European Court's application of the prohibition of discrimination to future cases by highlighting the principles upon which such decisions are based; such principles can serve as guidance to both citizens and supreme courts within the jurisdiction of the Member States of the Council of Europe in resolving disputes.

It is not surprising that the decisions of the European Court adopted on the basis of the use of the anti-discrimination test are often criticized by both legal scholars and dissenting judges. Determining what constitutes discrimination vs differentiation is complex, indefinite, and subject to the asymmetry of the perspectives of the persons who are “differentiating” as opposed to those being “discriminated” against. Moreover, the inexhaustible number of variables inherent to human matters and cultural differences within each national society increases the difficulty of determination in individual cases. Given this indeterminacy, the interpretation and application of the prohibition of discrimination included with the decisions of the European Court do not and cannot offer direct and clear guidelines as to how the European Court will review future alleged violations of the prohibition of discrimination; the determination of the guidelines likely to be used in the future must be arrived at through critical interpretation of these decisions. With respect to this fact this dissertation presents such a systematic critical interpretation of the decisions of the European Court

in applying anti-discrimination provisions. The basic research question of this dissertation thesis is how the current model of the anti-discrimination test contributes to the transparency of decision-making practice, what guidelines it offers, and how available they are in the application of the anti-discrimination test. Finally, with respect to the frequent criticism of decisions of the European Court, this thesis looks at which factors should be taken into consideration in evaluating the case law of the European Court regarding applications alleging the violation of the prohibition of discrimination.

On the grounds of the qualitative contentual analysis of the normative formulation and especially the interpretation and application of the prohibition of discrimination in the system based by the European Convention, this dissertation thesis reveals a stable standardized system of argumentation¹ and decision-making rules stemming from it used in the European Court's decisions on merits in cases of alleged discrimination. This dissertation thesis then organizes the resultant findings in such a way as to provide a comprehensive analysis of the concept of the prohibition of discrimination and of the anti-discrimination test applied by the European Court, and to enable its evaluation and the contemplation of future development of the prohibition of discrimination.

In this thesis the anti-discrimination test is regarded from the perspective of the indeterminacy and complexity of human matters which confronts judges in their application of the prohibition of discrimination. The anti-discrimination test of the European Court renders judicial discretion effective by stating the boundaries where standardized procedure should apply thus also determining the areas

¹ *Stable standardized argumentation is understood in this dissertation thesis as argumentation from which it is possible to deduce general rules that are applicable to similar future cases, i.e. having precedential potential. In other words, normative sentences are considered to be stable standardized argumentation, i.e. sentences that are applicable to other similar cases.*

where decision on merits are not to be (should not be) based on the application of a stable rule, but rather on judicial discretion of a panel of judges of the European Court. The anti-discrimination test thus contributes to the prevention of arbitrariness and unpredictability of decision-making while not eliminating it completely; total predictability would necessitate mechanical decision-making not likely to serve justice in the area of discrimination. The decision-making practice of the European Court thereby cumulatively helps to create an anti-discriminatory culture in European societies. Such a contribution (or to its absence) of the European Court in reducing discriminatory behaviour in Member States can be the vantage point from which the importance of the findings of the analysis of this dissertation thesis can be measured.

From this perspective the following problems related to the European Court's examination of applications alleging the violation of the prohibition of discrimination should be mentioned:

- (a) the difficulty in deducing the general rules governing the application of certain stages of the anti-discrimination test (for example: in some cases of "generous" application of the ambit test it is difficult to determine the boundary line between a violation of a substantive right stipulated in the European Convention as compared to a case falling outside the ambit of such a substantive provision; or, in applying the test of proportionality it is difficult to deduce from the more general guidelines what in fact constitutes proportionality or the lack thereof);
- (b) the lack of thorough application of anti-discrimination test principles (i.e. the unsubstantiated breach of the rules governing the anti-discrimination test or of insufficient argumentation);
- (c) the lack of principle-based argumentation vs political argumentation in the reasoning of some decisions;

(d) the unstated implicit deviation from existing stable case law without proper argumentation.

In addition to the above-mentioned problems it is necessary to draw attention to other troubles related to more procedural aspects in examining applications alleging the violation of the prohibition of discrimination, such as:

- (a) the not entirely clear status of Article 14; in many recent cases the procedure concerning the review of Article 14 has not been in accordance with the stable rules resulting from the subsidiary character of Article 14;
- (b) the insufficient clarification of the rules governing the transfer of the burden of proof;
- (c) the requirement of a too strict „beyond a reasonable doubt“ standard of proof in some cases of alleged discrimination.

Based on the analysis of the procedure of the review of applications alleging the violation of Article 14, this dissertation thesis presents problems that are caused by the construction and application of particular stages of the anti-discrimination test; these problems, however, are considered to be a necessary trade-off for the higher degree of predictability of the procedure of the European Court that this test brings. On the other hand, this thesis points out that some of the above-mentioned problems of the anti-discrimination test could be reduced and a more stable standardized argumentation adopted, setting up more general rules of its procedure whereby contributing to a higher degree of predictability of the case law of the European Court. However, many of the shortcomings of the case law are regarded in this dissertation thesis as resulting from a lack of thorough application the anti-discrimination test rather than from its construction. A more exact application of the anti-discrimination test and a more precise exposition

of the deliberation of the ruling judges in their judgment could help increase the authority of the European Court's decisions. With respect to the "*untrustworthy ease*" with which these decisions are sometimes criticized, this dissertation emphasizes that in evaluating the case law of the European Court it has to need be taken into consideration that cases decided by the European Court often raise ethically and politically controversial questions, as well as the fact that the European Court has to fulfil the difficult task of reflecting the social changes and actual prevailing values of individual Member States of the Council of Europe - the prohibition of discrimination is typically one of the areas that is broadly affected by changes in social attitudes in dynamically developing societies. Inspired by Dworkin, this dissertation thesis accentuates the necessity of more principal-based argumentation as compared to political argumentation.

As far as future development of the prohibition of discrimination is concerned, this dissertation thesis draws attention to the importance of the clarification of the ambit of the application of Article 14 and its status in the light of the recent case law. With respect to Protocol No. 12 this dissertation emphasizes that it is very difficult to predict its future; as long as the number of ratifying states does not increase it cannot be expected to have the opportunity to play a more significant role in the protection against discrimination. Beside the problem of the paradoxically "*two-tier protection against discrimination*"² introduced into the framework of the Council of Europe by Protocol No. 12, this thesis points out this Protocol brings an expansion of the ambit of the prohibition of discrimination rendering it even more indeterminate.

The acceptance of the concept of indirect discrimination is regarded in this thesis as a turning point in the case law of the European Court. Nonetheless, its effectiveness cannot be overestimated, as many

² „*Two-tier protection against discrimination*” means that a subset of states uses a stricter anti-discrimination provision than the rest.

questions related to its application have not yet been clearly answered by the European Court. As far as positive measures are concerned, this thesis notes that the European Court has demonstrated a progressively more open attitude in applying them.

The analysis of the prohibition of discrimination in the case law of the European Court presented in this dissertation thesis shows that the European Court has unquestionably helped many victims of discrimination and positively influenced the case law and the legislation of Member States of the Council of Europe. Therefore, the European Court's practice can be seen as a respectable effort in creating a culture respecting the differences of others.