THE FORGOTTEN PROHIBITIONS OF DISCRIMINATION

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Abstract:
The European Convention on Human Rights and the Charter of Fundamental Rights of the European Union provide an extensive catalogue of features that must not be used as a ground for discriminatory treatment. However, some of these features have received little attention so far ~~and have been largely overlooked~~. In this study, we propose to analyse some of these forgotten prohibitions of discrimination, focusing on the following grounds for discrimination: "political or any other opinion", "social origin", "property" and "other status".

1. Introduction

If one were to ask a German legal expert where to look for the German anti-discrimination law, he or she might spontaneously – maybe a bit surprised at being asked – refer to the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz, hereinafter AGG). Notwithstanding initial resistance[2], this has now become a

[1] The present article was translated from German by André Holzer.

[2] For example, SÄCKER, *ZRP* 2002, 286 ff. which is entitled "Vernunft statt Freiheit!" – Die Tugendrepublik der neuen Jakobiner ("Reason instead of

recognised integral part of German law. It refers to a total of eight "disallowed features" that must not be used as a ground for discriminatory treatment: "race" and ethnic origin, gender, religion and belief, disability, age, and sexual identity. Discriminations on other grounds like union activity, social origin, or infringement of the general principle of equal treatment are not covered. Prohibitions provided elsewhere, however, remain unaffected in accordance with Article 2(3) AGG.

The Charter of Fundamental Rights of the European Union (hereinafter CFR) recognises numerous other features that must not serve as grounds. In its Article 21(1), in addition to "race" it alludes to colour, although this is basically just for clarification purposes. However, besides the ethnical origin, "social origin" is also covered, the latter being absent in AGG. "Genetic features" must also not serve as grounds, and likewise "language". Apart from belief, "political or any other opinion" is also mentioned. Membership of a national minority is another disallowed feature. And, lastly, no person must be discriminated against on the grounds of "property" or "birth". Furthermore, this catalogue of features is not of ultimate significance since it starts with the little words "such as". The question remains open which characteristics or behaviours might be covered additionally.

The CFR is applicable to the organs of the Union, in accordance with Article 51(1), but to the Member States only when they are implementing Union law. For example, it should be taken into consideration regarding the relevant directive[3] for the procedure of

Freedom!" – The Virtue Republic of the New Jacobins). In contrast, with pleasant objectivity, REICHOLD/HAHN/HEINRICH, *NZA* 2005, 1270, and REICHOLD *JZ* 2004, 384 ff.

[3] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws

collective redundancy, but not prima facie as part of an examination as to the substance of individual dismissals. The scope of application of Article 21 thus turns out to be relatively narrow – so far, in the practical experience of labour law protection against discrimination, it leads a shadowy existence.

Article 14 of the European Convention on Human Rights (hereinafter ECHR) includes an almost identical catalogue. There is a difference insofar as no mention to "belief" is made. Moreover, the non-exhaustive character of the feature catalogue is emphasised in the way that also "other status" is explicitly included among the protected features. The ECHRs importance is furthermore enhanced by the first sentence of Article 52(3) CFR, whereupon corresponding rights in the CFR have the same "meaning and scope" as the human rights guaranteed by the ECHR. An interpretation given by the European Court of Human Rights (hereinafter ECtHR) is thus binding upon the jurisdiction within the European Union. In accordance with the second sentence of Article 52(3) CFR, the Union has the only option to provide more extensive protection, i.e. to adopt more favourable provisions.

Article 14 ECHR, like the other rights conferred by that convention, applies on the domestic level with the status of a statutory right . However, there is a restriction to the extent that only discriminations regarding the "enjoyment of the rights and freedoms" of the ECHR are recognised. In this respect, Article 14 is of an accessory nature. Since the ECHR makes no mention of a fundamental right to freedom of occupation, neither – unlike Article 2(1) of the Basic Law for the German Federal Republic (Grundgesetz,

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of the Member States relating to collective redundancies, *OJ* L 225/16, changed by directive by 6 October 2015, *OJ* L 263/1

hereinafter GG) – of a general freedom of action, as a result the prohibition of discrimination, particularly as far as paid employment is concerned, may turn out to be of little practical importance. This, however, is counteracted by ECtHR case law, in which the right to respect for private and family life, in accordance with Article 8 ECHR, is interpreted widely. For instance, the exclusion from access to Bar membership is regarded as an interference in private life[4] according to Article 8 ECHR, because this influences the building of social relations and the social identity of the individual. The same was even more assumed when a Lithuanian law deprived a specific group of persons – namely former employees of the Soviet KGB – of the possibility of seeking employment in various parts of the public service and the private economy.[5] An unlawful interference into the right of Article 8 ECHR is not required; it is sufficient that "private life" is affected in one way or another.[6] Contrary to first appearances, Article 14 ECHR thus gains considerable scope.

2. Focus on specific prohibitions of discrimination

It is not intended here to simply "work off" the catalogues of Articles 21 CFR and 14 ECHR in a sort of commentary. This would be quite useless simply because some individual features can easily be subsumed under the commonly recognised ones; for example,

[4] ECtHR judgement of 28 May 2009 – no. 26713/05, NJW 2010, 3419 - Bigaeva

[5] ECtHR judgement of 27 April 2004 – no. 55480/00, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-61942%22]} - Sidabras

[6] ECtHR judgement of 7 October 2010 – 30078/06, *OstEurR* 2010, 457 Ls 1 - Markin: "Although Article 14 ECHR does not require any infringement of another right of the Convention, it is only applicable if the relevant facts fall into the scope of another human right".

"colour", and presumably "language" too, are comprised by the "ethnic origin". Hence, in the following a focus shall be given to four features that fall at least partially outside the range so far considered.

- The "political or any other opinion" included in both catalogues does not fall, at least partly, within the domain of "religion and belief". This applies also if, when considering the text of EU Directive 2000/78/EC in languages other than German, political convictions are included in "belief",[7] but even in this case it is deemed necessary that it is about a "firm conviction" like that of a pacifist; less strongly anchored conceptions are not enough.[8]
- The "social origin" is not included, not even partially, in the catalogue of AGG, a feature that can be found both in Article 21 CFR and in Article 14 ECHR. Here the main issue is a relatedness with the social standing of the forebears,[9] in particular the parents.
- The "property" feature constitutes also a "novelty". The term refers especially to the general prohibition to make certain entitlements dependent on certain property, e.g. to exclude indebted persons from the usage of certain means of transport or to deprive them of suffrage.
- Finally, the "other status" as set out in Article 14 ECHR is

[7] DÄUBLER, NJW 2006, 2608. Cf., for example, French "convictions", Spanish "convicción", Portuguese "convicções", Italian "convinzioni personali"

[8] In this regard, cf. DÄUBLER, in: DÄUBLER/BECK (eds.), *Allgemeines Gleichbehandlungsgesetz mit Entgelttransparenzgesetz und Berliner LADG*, 5th ed., Baden-Baden 2022, Article 1 AGG recitals 74 with further references.

[9] MOHR, in: FRANZEN/GALLNER/OETKER (eds.), *Kommentar zum europäischen Arbeitsrecht* (European Labour Law Commentary, hereinafter: *EuArbRK*), 4th ed., München 2022, Article 21 CFR recitals 64

dealt with, a feature that should also not be an issue. Does this concern only personal characteristics, like a (less charming) appearance, or are other circumstances included as well?

3. Reach of the prohibitions of discrimination

Prior to focussing on the possible practical significance of the aforementioned prohibitions of discrimination, some preliminary questions which are relevant for all the features referred to in Articles 21 CFR and 14 ECHR, respectively, have to be addressed.

3.1. Inclusion of indirect discrimination?

An "indirect discrimination" exists if no allusion to specific features according to Articles 21 CFR or 14 ECHR is made, but when a "neutral" rule exists that nevertheless is predominantly to the detriment of certain bearers of a feature. The best-known example is a bias against part-time employees, which mainly affects (in a negative way) women. It is also necessary to consider cases where schematic equal treatment (without reference to disallowed features) is observed, but where nonetheless certain bearers of features are particularly discriminated. For instance, as a result of a "school entry test" equal for all children, Roma gypsy children turn out to be placed in special schools quite frequently, thus restricting significatively their educational opportunities.[10] Indirect

[10] Example according to ECtHR judgment of 13 November 2007 – 57325/00, *NVwZ* 2008, 533 – D.H.

discrimination as a concept has been recognised early on by the Court of Justice of the European Union (hereinafter CJEU)[11] and is today considered a safe asset within the anti-discrimination law.[12] It was justified by the notion of the "effet utile" and protection against avoidance.[13] The ECtHR has also followed – albeit with some delay – this concept~~notion~~.[14] Other human rights systems share the same notion.[15] This does not rule out the possibility of delimitation problems in particular cases.[16]

3.2. Justification of unequal treatment

Although the prohibitions of discrimination in accordance with Article 21 CFR and Article 14 ECHR do not recognise a legal reservation, there is consensus on the need for grounds of justification for unequal treatment. If, for example, any age-related regulation was to be declared inadmissible, then quite a few unintended effects would be felt, like the cessation of the age of majority or the statutory retirement age. Uncertainties exist only with respect to the requirements for such a justification. For instance – to make use of some wording of German law –, is a "genuine and determining occupational requirement" according to Article 8 AGG required, or is any "objective ground" enough?

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[11] CJEU 12 February 1974 – 152/73, AP no. 6 regarding Article 177 of the Treaty establishing the European Economic Community (EEC) – Sotgiu, item 11

[12] See, for example, CJEU 24 November 2016 – C-443/15, *NZA* 2017, 233.

[13] CJEU 8 July 1999 – C-203/98, Slg. 1999, I-4899 – Commission v Belgium

[14] ECtHR 6 January 2005 – No. 58641/00 - Hoogendijk

[15] Cf. the references in PETERS/ALTWICKER, in: DÖRR/GROTE/MARAUHN (eds.), *EMRK/GG Konkordanzkommentar*, 3rd ed., Tübingen 2022, chapter 21 recitals 94.

[16] See the instructive note on the judgment by REICHOLD/REBSTOCK, *ZESAR* 2021, 520

Regarding the CFR, Article 20 contains an explicit guarantee of the universal principle of equal treatment, couched in the words "Everyone is equal before the law". If the limits prescribed and taken for granted therein were to be applied to the features referred to in Article 21 CFR, the latter, alongside Article 20, would cease to have its own scope of application. Article 21 only retains its significance if greater demands are being placed on unequal treatments.[17] It seems reasonable to suppose a succession of stages in such a way that an indirect discrimination on grounds of one of the features according to Article 21 CFR depends on less serious requirements than a direct connection with a disallowed feature.[18] However, the requirements still need to be (slightly) stricter than under the general principle of equal treatment. All this is considered exactly in this way regarding Article 14 ECHR.[19]

The gradation in itself does not yet specify which circumstances may justify an unequal treatment. In the first place, a precondition is that the norm-setter pursues a "legitimate aim" which for its part has nothing to do with the prohibitions of discrimination. Here any concern of common interest can be considered (e.g. road safety).[20] The purpose does not necessarily need to be identified explicitly, but rather may be deduced from the context.[21] In the second place, the purpose in question must be pursued through proportionate measures. In case it can also be achieved by means of a

[17] Appropriately GRASER/REITER, in: VON DER GROEBEN/SCHWARZE/HATJE (eds.), *Europäisches Unionsrecht*, 7th ed., 2015, Article 21 CFR recitals.
[18] In this sense, GRASER/REITER (see above fn.16) Article 21 CFR recitals 7 ff.
[19] Cf. ECtHR 15 February 2001 – No. 42393/98, *NJW* 2001, 2871
[20] **CJEU 22 May 2014 – C-356/12, juris - Glatzel**
[21] **JARASS, *Charta der Grundrechte der EU*, 4th ed. 2021, Article 21 recitals 27**

comparatively minor deviation from the principle of equal treatment, then this less far reaching option must be applied.[22] This complies with the principle of necessity and presupposes the appropriateness of the measure. In addition, a reasonable relationship must exist between the pursued purpose (e.g. protection against infectious diseases) and the unequal treatment. From this, it is clear that a differentiation has to be made between the individual prohibitions of discrimination. While a reference to an unchangeable personal feature such as skin colour is hardly conceivable, this is clearly different in the case of property.[23] For instance, according to the ECtHR, there was clearly a lack of sufficient reasons to restrict the German child allowance to those foreign citizens who held a limited or unlimited residence permit.[24] Legal goods at stake were also weighed up in the case of a complainant who plainly failed to show up for work due to a Muslim holiday and was unwilling to provide proof of his Muslim faith.[25]

3.3. Prohibitions of discrimination in private law relationships

EU law can rely on a comparatively long tradition according to which prohibitions of discrimination apply to private persons too, especially in the workplace. The principle of equal pay for men and women, which came into mandatory effect in 1976 through CJEU also

[22] CJEU 22 November 2005 – C-144/04, *NZA* 2005, 1345 – Mangold; CJEU 29 April 2015 – C-528/13, *EuGRZ* 2015, 287 - Léger
[23] GRASER/REITER (see above fn. 16) Article 21 CFR recitals 8
[24] ECtHR 25 October 2005 – No. 59140/00, *NVwZ* 2006, 917 - Okpisz
[25] ECtHR 13 April 2006 – No. 55170/00, *NZA* 2006, 1401 - Kosteski

in the relation between employer and the individual employee, played a pioneering role.[26] The prohibition of discrimination based on nationality~~citizenship~~ of a different Member State was also extended to private subjects at an early stage, insofar as fundamental freedoms such as the free movement of workers[27], the freedom of establishment[28] or the freedom to provide services across borders[29] were at issue. Where prohibitions of discrimination were laid down in directives, no direct effect on the relationship between the employer or another private law entity and the employee could take place, except for the principle of interpretation of national legal standards in accordance with the directive. In a number of cases, however, the CJEU relied on general principles of Community law, where, amongst others, the generally effective prohibition of discrimination on the grounds of age was also included.[30] Recently, in the context of employment relationships in the Church, the prohibition of discrimination according to Article 21 CFR was applied to the ecclesiastical employer, with remarkable clearness: "As regards its mandatory effect, Article 21 of the Charter is no different, in principle, from the various provisions of the founding Treaties prohibiting discrimination on various grounds, even where the discrimination derives from contracts between individuals."[31]

[26] CJEU 8 April 1976 – 43/75, *NJW* 1976, 2068 – Defrenne II

[27] CJEU 12 December 1974 – 36/74, *NJW* 1975, 1093 – Walrave and Koch; CJEU 15 December 1995 – C-415/93, NZA 1996, 191 - Bosman

[28] CJEU 11 December 2007 – C-438/05, *NZA* 2008, 124 - Viking

[29] CJEU 18 December 2007 – C-341/05, *NZA* 2008, 159 - Laval

[30] Paradigmatically, CJEU 22 November 2005 – C-144/04, *NJW* 2005, 3695 - Mangold

[31] CJEU 17 April 2018 – C-414/16, *NZA* 2018, 569 recitals 77 – Egenberger; the wording was repeated verbatim in CJEU 22 January 2019 – C-193/17, *NZA* 2019, 297 recitals 77 – Cresco Investigation

As far as Article 14 ECHR is concerned, its accessoriness comes into evidence here: if human rights apply also to relations between private persons, the prohibition of discrimination of Article 14 shall also be applicable in this respect. Concerning the freedom of association (implicitly) guaranteed by Article 11, this includes amongst others the right to be heard by the respective private or public employer.[32] Private legal relations are equally affected when a trade union is engaged in collective wage negotiations with the employer, thus exercising its right to conclude collective negotiations.[33] According to recent case law, Article 11 ECHR also comprises the right to strike.[34] Individual union members are equally protected against their respective employer by Article 11.[35]

Regarding the protection of privacy (in a broad sense) in accordance with Article 8 ECHR, in particular video surveillance at the workplace should be considered. In this respect, it is the ECtHR's view that the State's protection obligation comes into play, the expression of which is specified in detail: especially important are the prior information about the possibility of surveillance, the degree of invasion of privacy, the employer's interest and the availability of less intrusive means, the consequences of the surveillance for the employee and the possibility of an effective verification of whether the employer's behaviour met those criteria and was hence lawful.[36]

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[32] ECtHR 2 July 2002 – 30668/96, ÖJZ 2003, 729 Tz. 42 – Wilson et al.

[33] ECtHR 12 November 2008 – No. 34503/97, *NZA* 2010, 1425 – Demir and Baykara, Tz.147 ff.

[34] ECtHR 21 April 2009 – No. 68959/01, *NZA* 2010, 1423 – Enerji Yapi-Yol Sen, Tz. 24

[35] ECtHR 24 March 2015 – No. 36807/07, *NVwZ* 2016, 1230 - Sezer

[36] ECtHR 5 September 2017 – No. 61496/08, NZA 2017, 1443 – Barbulescu; ECtHR 17 October 2019 – No. 1874/13, *AuR* 2020, 131 – López Ribalda. With reference to the whole topic, see LÖRCHER, *AuR* 2020, 100 ff.

The results obtained via the protection obligation are approaching those which would lead to an immediate third-party effect. This has an impact also on legislation on protection against dismissal, which is why there are first attempts to develop a "ECtHR dismissal protection law" and subsequentially systematise it.[37]

Something similar can be stated regarding the dealing with the freedom of expression following Article 10 ECHR. Also in this respect, no third-party effect against the employer is attributed to it, however, in certain cases, the State is obliged to protect the freedom of expression against private persons as well.[38] As an outcome – similarly to what occurs in German law –[39], the employer's conflicting interests protected by fundamental rights must be taken into consideration, which is done in the context of the proportionality assessment.

4. "Political or any other opinion"

The prohibition of discrimination on the grounds of political or other opinion is stated in Article 21 CFR immediately after "religion or belief", thus covering features not comprised by the latter. In comparison, Article 14 ECHR lacks the reference to "belief", thus including a wider scope.

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[37] DULLINGER, "Die Judikatur des EGMR als Grundlage eines (umfassenden) individuellen Kündigungsschutzes", in: FREYLER/GRÄF (eds.), *Arbeitsrecht als Richterrecht?* Baden-Baden 2023, p. 151 ff.

[38] ECtHR 12 September 2011 – No. 28955/05 inter alia, *NZA* 2012, 1421 recitals 59 – Palomo Sánchez; ECtHR 29 February 2000 – No. 39293/98 – Fuentes Bobo

[39] BAG (Federal Labour Court) 24 June 2004 – 2 AZR 63/03, *NZA* 2005, 158.

Articles 21 CFR and 14 ECHR do not only comprise the "possession" of an opinion, but also acting based on it. In this regard, the same applies as to religion and belief. Membership of a political party and other political organisations, as well as trade unions, is therefore included. Furthermore, the expression of a certain conviction is also protected – be it as an individual or in an organisational context.[40] In such cases, however, mostly the freedom of expression according to Article 10 ECHR or the freedom of assembly and association according to Article 11 ECHR will take effect. If its limits are exceeded by the individual, then the question of discrimination no longer arises.[41] If the person in question acts within the scope of the freedom of expression or assembly/association, but is nevertheless discriminated, then this constitutes a breach of the ECHR. An assessment whether an additional discrimination under Article 14 ECHR has occurred will normally not be conducted.[42]

The prohibition of discrimination applies also for those who do not hold a particular political or other opinion but behave indifferently or "neutrally"; any compulsion whatsoever to adopt a particular opinion or to become a member of an organisation with an orientation would equally constitute a breach of Article 21 CFR or Article 14 ECHR, respectively.

[40] Cf. PETERS/ALTWICKER (above fn. 14), recitals 182, also for the following.

[41] See case Handyside ECtHR 7 December 1976 – 5493/72, concerning the proscription of a schoolbook on the grounds of (at that time deemed unacceptable) sexual references.

[42] Symptomatic for instance: ECtHR 6 November 2012 – No. 47335/06 - Redfearn, wherein a dismissal on political grounds was described as an infringement of Article 11 ECHR, having been thereupon explained with reference to Article 14 ECHR: "Having regard to its findings under Article 11, the Court does not find it necessary to examine whether or not there has also been a violation of Article 14 of the Convention read together with Articles 10 and 11."

The ECtHR's case law in this regard is not particularly extensive. In one case from Armenia, the applicant failed because according to the Court he had not submitted in a sufficiently substantiated manner that he was ill-treated by the police as a member of an opposition party on the grounds of his political opinion.[43] Worth mentioning, however, is the Redfearn case:[44] a driver of white skin was responsible for transporting children with physical and/or mental disabilities, the majority of which were Asian in origin; furthermore, he had been nominated for the award of "first-class employee" by his supervisor, who was of Asian origin, too. When he stood as a candidate as a local councillor for the British National Party and was elected in a forthcoming local election, he was dismissed by his employer: his continued employment could give rise to "considerable anxiety" among passengers and their carers. Concern was also expressed that this circumstance could possibly lead to the loss of the employer's contract with Bradford City Council. No specific allegation of misconduct has been made; nor were there any complaints about his working behaviour. The English Courts confirmed the dismissal, but not the ECtHR: in the given case, the freedom of association was threatened in its substance, hence the State's obligation to protect the individual concerned. Since the State failed to do so, there has been a violation of Article 11 ECHR. However, it was expressly left out if there was also a breach of Article 14 ECHR.

Even though the ruling followed a path based on the right to freedom rather than on the right to equality, it is remarkable in that it

[43] ECtHR 2 October 2012 – No. 40094/05 - Virabyan
[44] ECtHR 6 November 2012 – No. 47335/06 - Redfearn

allows for drawing conclusions about political opinions worthy of protection. In this respect, there is clearly a great deal of openness, which also includes positions that are taboo in the national context. This becomes clear from this and other rulings.[45] Only Article 17 ECHR represents a limitation according to which the rights under the ECHR must not be used as a means of abolishing the rights and freedoms set out in the Convention. This was assumed in relation to an organisation which not only denied the right to existence of the State of Israel, but also propagandised its violent destruction and the expulsion or killing of its inhabitants.[46]

The political opinions thus defined must not originate disadvantages at least if there are no actions that would endanger the legal interests of third parties or the general public. This obviously did not hold true in the case of the driver Redfearn, which is why the Court of Justice emphasised in a comparatively plain manner: "The Court is struck by the fact that these complaints were in respect of prospective problems and not in respect of anything that the applicant had done or had failed to do in the actual exercise of his employment".[47] Even in the case of the Turkish Communist Party[48] there was no underlying concrete behaviour. Contrary to what at times happened in German case law,[49] the ECtHR only sees as a

[45] See for example ECtHR 30 January 1998 – 133/1996/752/951 – United Communist Party of Turkey: the dissolution constituted a breach of Article 11 ECHR, since the party had not even started its activities; whether there was an infringement of Article 14 was not elaborated.

[46] ECtHR 12 June 2012 – 31098/08 – Hizb ut-Tahrir

[47] ECtHR 6 November 2012 – No. 47335/06 – Redfearn recitals 45

[48] See fn. 445 above.

[49] in the case of civil servants, sufficient grounds for dismissal were that, in addition to being a member of the DKP (German Communist Party), they had to present an undisputed legal candidacy for that party in municipal or state elections: BVerwG (Federal Administrative Court) 10 May 1984 – 1 D 7/83, *NJW* 1985, 503 – Meister.

reason for restrictions – apart from the extreme situation of Article 17 ECtHR – if a particular action is present; the abstract suspicion that members of certain organisations might do bad or evil things is not sufficient.

While the concept of political opinion generally does not raise many doubts, this may be different for "other" opinions. Certainly, these comprise convictions which exist in the society and are related with political opinions, but do not have the view on the "whole" as do the latter: the animal rights activist is covered, as is the pro-life activist[50] or the promoter of German dialects. But the boundaries are not always evident. Whoever considers Bayern Munich to be the best football club in the world, manifests this believe in their spare time through clothes and words, and for this reason is not given a job in Dortmund: can Article 14 ECHR be invoked, because there has been a discrimination on the grounds of an opinion? It would be no surprise, if this question – should it ever arise in practice – were to be definitively decided only by the CJEU or by the ECtHR.

5. Social Origin

The discrimination feature "social origin" has received little attention so far. The commentaries either contain "explanations" without an own meaning[51] or restrict themselves to stating that it is only about the "social status" of the forebears.[52] Often reference is

[50] See ECtHR 21 June 1988 – No. 10126/82 – "Ärzte für das Leben" (Doctors for the right to life)

[51] LEHNER, in: MEYER-LADEWIG/NETTESHEIM/RAUMER (eds.), *EMRK Kommentar*, 5th ed., 2023, Art. 14 recitals 29: The feature of social origin corresponds to that of origin in Article 3(3) GG.

[52] HÖLSCHEIDT, in: MEYER/HÖLSCHEIDT (eds.), *Charta der Grundrechte der*

made to times when origin from nobility conferred great and inalienable advantages, stating also that such unjust privileges do not longer exist nowadays. No mention is made regarding the possible consequences of a different social background in the present.

Not long ago, a quite simple case was made up in the German legal literature.[53] A bank clerk with "very humble background" has to look after a considerable number of wealthy customers who often had inherited their assets. Unfortunately, he does not really master the necessary casual "small talk": he has no relation with golf, prefers folk music over classical music, and never has he taken a sea voyage to the Caribbean. The communication remains therefore emotionless and at times a bit monosyllabic; two customers want a different consultant. He is then transferred to a position that entails less responsibility but also less payment. Could he defend himself against this before the labour court by arguing that he had been discriminated against in violation of Article 14 ECHR, furthermore restricting him also in his social relations protected by Article 8 of the ECHR?

Cases such as these, linked directly with circumstances that arise from social origin will be relatively rare and even rarer to prove. But to ignore them completely would nevertheless be inappropriate. What is of incomparably more significance, however, are indirect discriminations. A recent study conducted by the Hans Böckler Foundation has shown that 74 percent of children whose parents

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Europäischen Union, 5th ed., Baden-Baden 2019, Article 21 recitals 45; JARASS (above fn. 20) Article 21 recitals 20

[53] JENS SCHUBERT, *NZA* 8/2019 p. III

went to university attend university as well, compared to only 21 percent of working-class children.[54]

The study describes equally the specific obstacles which the second group has to overcome, and which start well before the university entrance level. Thus, 81 percent of children of parents with academic background achieve upper secondary education (usually the secondary school leaving examination "Abitur"), while only 45 percent of the children of non-academic families obtain the same qualification.[55] During the course of study further difficulties arise related to social background.[56]

This is only the most frequently cited and possibly also the most thoroughly studied example. In addition to education, nationality and gender, social origin also plays an important role in the composition of the top manager ranks.[57]

In all cases, the question is not if there are binding rules that require a social selection. Rather, rules are, in principle, equal for all – but taking into account different starting conditions, affect in a negative way certain people which originate from the lower 50 or 60 percent of society. There are no discernible justifications for this indirect discrimination. The removal of discrimination on the grounds of social origin is probably an even bigger undertaking than achieving equality for women in working life, as this would call into question positions of influence and dominance that are even stronger than in

[54] https://www.boeckler.de/de/boeckler-impuls-arbeiterkinder-an-der-uni-huerdenlauf-zum-akademiker-7688.htm

[55] *Böckler Impuls* issue 07/2010

[56] BARGEL/BARGEL, *Ungleichheiten und Benachteiligungen im Hochschulstudium aufgrund der sozialen Herkunft der Studierenden*, Düsseldorf 2010, available at https://www.boeckler.de/pdf/p_arbp_202.pdf

[57] HARTMANN, in: STICHWEH/WINDOLF (eds.), *Inklusion und Exklusion: Analysen zur Sozialstruktur und zur sozialen Ungleichheit*, 2009, p. 71 ff.

the latter case, meaning that countless measures would be needed to address structural deficits.

What is not admissible is a strategy of concealing within the legal scholarly discussion. After all, the problems exist and cannot be simply retouched away. If the discrimination shows through in a particularly visible manner on a case-by-case basis, one should not shy away from taking the matter to the courts and awake the prohibition of discrimination from its slumber.

6. Property

The prohibition of being discriminated on the grounds of "property" is considered a "peculiarity" of Article 14 ECHR without major importance in case law.[58] Others point out that property is an "ambiguous term" which nevertheless would include also immaterial values.[59] In the case of property-related decisions by the State, property must be "adequately taken into account".[60] Typically, it does not appear that concrete consequences are discussed.

Certainly, the observation that property is not identical to tangible assets, but comprises all goods with economical value, is true. That is not a matter of protecting wealthy people in relation to those without (significant) wealth. As with other prohibitions of discrimination, the aim is to protect the potentially weaker: lack or modest amount of property must not lead to discrimination. The ECtHR, for instance, maintains that, in principle, everyone must have

[58] LEHNER, in: MEYER-LADEWIG, (above fn.50), Article 14 recitals 29
[59] HÖLSCHEIDT, in: MEYER/HÖLSCHEIDT, (above fn.51) Article 21 CFR recitals 50
[60] *EuArbRK*-MOHR, Article 21 recitals 74; equally JARASS (above fn.20) Article 21 recitals 23

access to the courts, notwithstanding the possibility of the Member State to provide for exceptions for certain areas, such as libel actions, based on limited resources; legal aid or other means are, in principle, necessary, but not without exception.[61] To completely forego them would imply a discrimination on the grounds of (insufficient) property.

The ECtHR also considers that favouring particularly well-off citizens may, too, constitute discrimination. In one case, the ECtHR proved to be quite generous.[62] The island of Guernsey had enacted legislation which resulted in 90 percent of all housing being available only to those persons who had received a residence entitlement by the islands Housing Authority, in particular persons who were born on Guernsey or had otherwise strong connections or associations with the island. The most expensive 10 percent of housing (calculated according to their rateable value) were exempted from this legislation, thus being available to other people too. This did especially benefit wealthy interested parties, however, this did not lead to the presumption of discrimination against other interested parties: by means of the system of residence entitlements, State policy would protect the poorer sections of the population; given the State's broad margin of discretion, it seemed not unreasonable to exclude the upper 10 percent from the scheme. The actual problem of discrimination – referring to the financial situation of interested parties – was not addressed.

A case decided much later dealt with the forced exchange of Greek government bonds for bonds with lower nominal value ("debt

[61] ECtHR 5 May 1993 - No. 21325/93 – Steel and Morris
[62] See judgment ECtHR 24 November 1986 – No. 9063/80 - Gillow

relief"), where no distinction was being made between private persons and institutional investors.[63] The indirect discrimination of small investors was justified in view of the circumstances: It would have been difficult to identify all the investors concerned and to make a clear and detailed distinction between the two groups. Moreover, the announcement of the exclusion of small investors could have led to circumvention schemes; besides, quick action would have been necessary. Here, too, one can see a certain reluctance to alter the existing situation, especially since it was understandable also for the private investor that they had embarked on a risky business.

In a third ruling, the court reached a different conclusion, and considered the favouring of major owners a discrimination set out in Article 14 ECHR.[64] In this particular case, owners of landholdings up to 20 hectares were forced to be members of a hunters' association, even though they themselves would not have exercised their hunting rights, on ethical grounds for instance. Owners of landholdings with more than 20 hectares were not subject to this constraint, but could freely dispose of their hunting rights, exercise them or establish a wildlife sanctuary instead. According to the ECtHR, no objective or reasonable justification had been given for this difference in treatment, which is why the rule was considered a violation of the Convention.

Therefore, Article 14 prohibits, in principle, treating the big ones better than the small ones, the rich better than the less rich or the poor. According to this approach, the progressive tax system is definitely in conformity with the Convention, since it places a

[63] ECtHR 21 July 2016 – 63066/14, *NVwZ-RR* 2017, 849 - Mamatas

[64] ECtHR 29 April 1999 – 25088/94, *NJW* 1999. 3695 recitals 118 ff. – Chassagnou inter alia.

greater burden in terms of percentage on people with higher incomes than those with lower incomes. The question of where to draw the upper limit from which there is no further tax rate increase is at the discretion of the national legislator.

However, further discussion is required regarding the regulation of Section 13b of the German Inheritance and Gift Tax Act (*Erbschaftsteuer- und Schenkungsteuergesetz*, hereinafter *ErbStG*): any shareholder of more than 25 percent of a public limited company is largely exempt from inheritance tax, provided that the company continues for at least five years. Persons who hold less than 25 percent must pay the full inheritance tax rate even if they, conjointly with others, successfully attempt to continue the business (or if anyway the continuation is obvious for every economically minded person). In such a case, what is the objective reason for excluding smaller or small shareholders from preferential treatment?

7. Other status

Features not expressly referred to in Article 14 ECHR or in Article 21 CFR have not played so far a major role in case law and literature. It is generally agreed that at least person-related features are covered which are comparable to those explicitly referred.[65] For instance, the obligation for trainee lawyers to undertake gratuitously criminal defence, which exists in Belgium, was assessed by the ECtHR in the light of Article 14 ECHR. The court concluded, however, that the absence of such obligations in the case of physicians, pharmacists, veterinarians, and dentist was not discriminatory

[65] JARASS, (above fn. 20), Article 21 recitals 24

against trainee lawyers, since the situation of the other liberal professions was different.[66] Another important application was the weaker status of unmarried fathers compared to divorced fathers, regarding their biological children: the parental access rights under German law at the time, in the case of children born out of wedlock, were fundamentally dependant upon the mother's goodwill and could only be imposed if this was demonstrably in the best interests of the child. This was qualified as a violation of Article 14 ECHR, without considering which of the features mentioned therein was affected.[67] The case where the landlord of residential premises is in a worse position than the landlord of other premises with regard to the exclusion of the enforceability of eviction orders is included, according to German understanding, to the general principle of equality – in this respect, Article 14 was not violated.[68]

In this context, also the external appearance of a person should be considered. For example, in examinations, the type of clothing must not, in principle, exert influence on the evaluation,[69] the same possibly being relevant for the assessment of applicants. Furthermore, a ruling of the Marburg Labour Court should be recalled,[70] according to which it may constitute an infringement of the general right of personality if someone is not retained as an employee after expiration of their temporary work contract, on the grounds of their corpulence, even though no doubts exist about their

[66] ECtHR 23 November 1983 – No. 8919/80, *EGMR-E* 2, 295 ff. recitals 42 ff. – van der Mussele

[67] ECtHR 11 October 2001 – No. 34045/96 – Hoffmann; equally ECtHR 8 July 2003 – 30943/96 - Sahin

[68] ECtHR 28 September 1995 – No. 12868/87 – Spadea und Scalabrino

[69] Berlin Administrative Court (VG Berlin) 19 February 2020 – VG 12k 529.18, *AuR* 2020, 233

[70] 13 February 1998 – 2 Ca 482/97, *NZA-RR* 1999, 124

suitability for the work performed hitherto, which is still necessary. In extreme cases, obesity may amount to a (simple) disability if – unlike the case mentioned before – participation in working life is impaired.[71] In this respect, the French law is more precise in its contours, where discriminations on the grounds of "physical appearance" are expressly prohibited.[72] The same could easily be defended within the framework of Article 14 ECHR and Article 21 CFR.

Little attention has been paid until now to the question which decision-making criteria actually remain if the existing catalogue of grounds of discrimination was to be significantly expanded, considering its openness. Ultimately this depends on the nature and scope of limits; if an "objective reason" or a "non-arbitrary decision" is enough, then the status quo remains virtually unchanged. If the requirements of justification were to be set much higher, or even demanded "indispensability", selection decisions would be legally unassailable only in case they are made anonymously and based exclusively on performance criteria. By doing so, market principles would be taken to extremes, for it would ultimately be the market who decides what to qualify as "performance". The individuality of the individual and its specific value would fall by the wayside. Considering the level of protection against discrimination outlined here, we are far from such dangers: it is all about establishing equal opportunities for those who are potentially disadvantaged.[73]

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[71] CJEU 16 October 2014 – C-354/13, *NZA* 2015, 33, confirmed by CJEU 18 January 2018 – C-270/16, *NZA* 2018, 159

[72] LE FRIANT, *AuR* 2003, 53; AUZÉRO/BAUGARD/DOCKÈS, *Droit du travail*, 31st ed., Paris 2018, recitals 725 ("apparence physique")

[73] WENDELING-SCHRÖDER, *NZA* 2004, 1320 (regarding AGG)

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