GUIDE ON
DISCRIMINATION GROUNDS

OSCE Organization for Security and Co-operation in Europe
Mission to Skopje

КОМИСИЈА ЗА ЗАШТИТА ОД ДИСКРИМИНАЦИЈА

GUIDE ON
DISCRIMINATION GROUNDS

Publication: Guide on Discrimination Grounds

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Designed, edited and printed by: Polyesteday, Skopje
Circulation: 1000 copies

CIP - Каталогизација во публикација
Национална и универзитетска библиотека "Св. Климент Охридски", Скопје

342.71/.73(100)(036)

KOTEVSKA, Biljana
Guide on discriminaton grounds / Biljana Kotevska ; translated Daniela Brajkovska. - Skopje : OSCE, 2013. - 68 стр. ; 23 см

Фусноти кон текстот. - Библиографија: стр. 60-68

Содржи и Annex:
Methodology

ISBN 978-608-4630-51-7

а) Дискриминација - Водичи
COBISS.MK-ID 95241994

Supported by:

OSCE Organization for Security and Co-operation in Europe
Mission to Skopje

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Abreviations

Guide, the Guide	Guide on Discrimination grounds
ECRI	European Commission against Racism and Intolerance
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ESC	European Social Charter (Revised)
ECtHR	European Human Rights Court
EU Charter	Charter of Fundamental Rights of the European Union
LPPD	Law on the Prevention of and Protection against Discrimination
IAD	International Anti-Discrimination Instrument
CEDAW	Committee on the Elimination of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESR	Committee on Economic, Social and Cultural Rights
CPD	Commission for Protection against Discrimination of the Republic of Macedonia
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CRMWF	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
HRC	Human Rights Committee
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
Ombudsperson	Ombudsperson of the Republic of Macedonia
Protocol No. 12	Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms
CJEU	Court of Justice of the European Union
UDHR	Universal Declaration of Human Rights
CC	Constitutional Court of the Republic of Macedonia

INTRODUCTION

The Guide on Discrimination grounds (the Guide) is a systematized and analytical review of discrimination grounds, based on consideration of existing definitions (and their integral parts) set forth under international and domestic law, international and national case law of courts and various treaty bodies, as well as in academic and grey literature.[1] The Guide clarifies their meaning, scope, evolutive development, open issues and discussions about their meaning and scope, while citing examples of the case law on discrimination on a specific ground with a view to helping practitioners (primarily legal practitioners) in comprehending, interpreting and applying the grounds.

The discrimination grounds elaborated in this Guide are those contained in Article 3 of the Law on the Prevention of and Protection against Discrimination (LPPD).[2] These are: sex, race, colour of skin, gender, belonging to a marginalized group, ethnic belonging, language, citizenship, social origin, religion or religious belief, other types of belief, education, political belonging, personal or social status, mental and physical disability, age, family or marital status, property status, health condition, or any other ground established by law or by a ratified international treaty.The Guide consists of three Chapters and one Annex:

Chapter I explains the meaning of the term "discrimination ground" and legal models for defininining discrimination grounds.

Chapter II contains a short review of the equality and non-discrimination concepts, which are of importance for comprehending the discrimination grounds, their interpretation and application in specific cases or situations.

Chapter III elaborates each of the discrimination grounds,[3] referred to in Article 3 of the LPPD.

The Annex briefly describes the methodology applied for the drafting of this Guide.

Existing literature review for drafting this Guide was mainly legal documents (international treaties and relevant authoritative interpretations, their *travaux préparatoires* and national laws); the case law of international and national courts, tribunals and treaty bodies;[4] academic literature (foreign and domestic academic papers); and grey literature. A major influence in the drafting of this Guides were the works of Sandra Fredman, Mark Bell, Evelyn Ellis and Oddný Arnardóttir, as well as many other works on specific discrimination grounds. Several

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1 "Grey literature" refers to materials such as reports, studies, papers, etc., informally published by organizations or institutions whose primary activity is not publishing.

2 Law on the Prevention of and Protection against Discrimination. *Official Gazette of the Republic of Macedonia,* No. 50/2010; Decision of the Constitutional Court No. U. 82/2010 (15 September 2010)

3 See the introduction to Chapter III for explanation of the joint consideration of the grounds sex and gender; race, colour and ethnic belonging; and religion or religious belief, and other types of belief.

4 The names of the cases considered by international courts and treaty bodies are provided in the original language in order to facilitate the consultation of additional literature with respect to these cases for the users of the Guide.

handbooks on equality and non-discrimination, and on the ECtHR case law have also been consulted, as well as the many thematic reports of the European Network of Legal Experts in the Non-Discrimination Field. The integral list of literature cited and/or consulted is given in the Bibliography.

This Guide is intended to serve as a tool for understanding the discrimination grounds. It does not purport to set forth final definitions, which practitioners would use in their work, but to suggest current manners of defining the discrimination grounds and to draw attention to certain aspects of importance for their identification, interpretation and application in specific cases. In addition, the Guide leaves room for flexibility and an evolutive interpretation of the discrimination grounds by the practitionersdiscrimination grounds.

The Guide has been prepared within the frame of the Project "Support for Further Development of an Effective Equality Infrastructure", which the Organization for Security and Cooperation in Europe - Skopje Mission is implementing in 2013. In addition to this Guide, under the same portfolio the following publications were also prepared: Handbook for Training Judges on Anti-discrimination Law (2012), Guidebook on the Role of the Commission for Protection against Discrimination in Court Procedures and on the Shifting of the Burden of Proof (2013), and Judgments on Discrimination from the Case-law of the European Court of Human Rights and of the Court of Justice of the European Union (2013).

I. DEFINING "DISCRIMINATION GROUND"

1. What is "discrimination ground"

There are various definitions of 'discrimination ground'. One of the most frequenetly quoted definitions is the one by the European Human Rights Court (ECtHR), according to which it is "a personal characteristic ("status")[5] by which persons or groups of persons are distinguishable from each other."[6] According to another definition, a 'protected ground' is a characteristic of an individual that should not be considered relevant to the differential treatment or enjoyment of a particular benefit. [7]

For the purposes of this Guide, the following working definition of a discrimination ground is used:

> *Discrimination ground is a protected characteristic upon which prohibited difference in treatment must not be based, which can be a personal characteristic or a status, or a presumed or associated personal characteristic or status, by which an individual or a group of individuals are identified with a certain race[8], colour of skin, ethnic belonging, language, citizenship, sex, gender, sexual orientation, religion, belief, education, mental or physical disability, age, family or marital status, health status, etc.*

Legislations prescribing discrimination grounds in the form of lists (see Chapter I-2) most often do not attempt to define what is basis of discrimination, but settle this issue either by listing the personal characteristic or status upon which the difference in treatment must not be based, or leave this to be defined under the case law. However, not every personal characteristic or status can be considered as a discrimination ground. The issue of whether a characteristic or a status upon which the difference in treatment is based can be considered a protected discrimination ground is explained below (Chapter I-2).

There are different terms used for " discrimination ground". In addition to this term, the following terms are also used: protected ground, protected characteristic, badge of differentiation, ground for protection, discriminatory ground, etc. They all have the same meaning as the term used in Article 3 of the LPPD, which is "discrimination ground". Considering the purpose of this Guide, i.e. that of expounding discrimination grounds referred to in this article, the Guide employes the term used in the LPPD, i.e. "discrimination ground".

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5 As opposed to the English term "status", the French term used in this context is "toute autre situation", which in literal translation would read as "any other situation."

6 Kjeldsen, Busk Madsen and Pedersen v Denmark (App., 5095/71, 5920/71, 5929/72), 7 December 1976, Series A No. 23 (1979-90), 1 EHRR 711 §56. In the Wagner and J.M.W.L. v Luxemburg case, the ECtHR explains that unequal treatment does not necessarily have to be linked with the ground that encourages prejudices and stereotypes and enjoys a high level of protection, but to any arbitrary action that resulted in unequal treatment. Source: Wagner and J.M.W.L. v Luxembourg, App. No. 76240/01, 28.06.2007. As cited in: O'Connell R, Cinderella comes to the Ball: Art 14 and the right to non-discrimination in the ECHR, 29 Legal Studies 2 (2009) 211, 223

7 'Handbook on European Non-discrimination Law'. EU FRA and CoE, 2010.97

8 See Chapter III-2 on the use of the term 'race' and on distancing from race theories.

2. Models for prescribing discrimination grounds

Different countries apply different models for prescribing discrimination grounds. One can seek for unified principles according to which a certain country opts for a model for prescribing discrimination grounds, but analyses show that in most cases their determination in national legislations is in fact a matter of a political decision, which reflects the public opinion prevailing at a given time.[9]

Depending on how the grounds are determined under the legislation of a country, there are three models[10] for prescribing discrimination grounds:

> **General prohibition model:** the main feature of this model is a general provision protecting the equality of all before the laws. In such countries, it is entirely left to the courts to determine which grounds will be protected. This model exists in the USA and in Canada.
>
> **Closed model:** discrimination is prohibited only with respect to strictly prescribed grounds. The expansion of the protection against discrimination on other grounds can be achieved only through legislative amendments, and not by courts and other bodies' case law. Such a model exists in the EU (in relation to the Directives) and in the United Kingdom and Sweden.
>
> **Open model:** discrimination is prohibited by listing several grounds and the list is left open by adding the provision "and any other ground or status", "grounds such as", etc. Under this model, courts and bodies have certain freedom in determining which personal characteristic or status may be considered protected under the open model. This is the model of the ECHR, the EU Charter and Macedonia.

It is important to keep in mind these three models in order to determine the importance of the definitions of the grounds in a given system of protection against discrimination, depending on the model, but also in order to determine the degree of freedom of interpretation, which courts, tribunals, or treaty bodies have depending on the model.

Aside from these three different models, a list of criteria may be compiled,[11] to which courts or bodies can refer to when deciding whether a certain characteristic or status may be considered protected:

> **Immutability, choice and autonomy:** are concerned persons able to change the characteristic or the status upon which the unequal treatment is based. Considering that such a characteristic or status is often inherent or permanent, the violations of the prohibition should be considered especially serious or grave.

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9 Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011), 111

10 *Ibid*. 110-130

11 This list was compiled by Sandra Fredman, while analyzing large number of international and domestic systems of determination, interpretation, and application of discrimination grounds.

Access to the political processes: whether the person or the group is or has been marginalized in the context of political processes. The absence of these persons or groups from processes for adoption of laws, which, *inter alia,* also regulate their rights and protection, may be considered as a reason to grant them protection.

Dignity (treating persons as less valuable members of society): does the unequal treatment based on the personal characteristic or status result in a violation of the dignity of the concerned persons or affects these persons significantly more than others.

History of inequality: does the person belong to a group that can be said to have been exposed to unequal treatment or prejudices for a longer period of time.[12]

Practitioners can use this list as a checklist in determining whether certain personal characteristic or status, that have not been explicitly referred to as protected ones in the laws, may be considered as a protected personal characteristic or status. The application of this list does not require that all these criteria be cumulatively fulfilled.

[12] *Ibid.* 130-139

II. DETERMINING, INTERPRETING AND APPLYING DISCRIMINATION GROUNDS

1. Approaches to determining discrimination grounds grounds

Courts and equality bodes may apply different approaches to determining discrimination grounds. Their approach will depend largely on the legislative framework within which they operate, and which provides for freedom of interpretation in considering cases of potential discrimination and in determining discrimination grounds.

Freedom of Interpretation

In determining, interpreting and applying discrimination grounds, the freedom of interpretation provides for the possibility that courts or equality bodies consider other discrimination grounds, in addition to the one stated by the applicants, or to change the grounds that the applicants are invoking, or to identify and consider discrmination grounds if the applicants have failed to do so. The freedom of interpretation is larger for quasi-judicial bodies than for courts. Quasi-judicial bodies may change or expand the list of grounds, or they can identify the discrimination grounds (if applicants have failed to do so). As different from such bodies, courts are strictly tied to the legislative provisions setting forth procedures they must follow, and therefore they adjudicate based on claims made by applicants.

Legal protection of equality and protection against discrimination at the national level are recent developments. Thus, the freedom of interpretation is especially instrumental for applicants and their representatives. Equality bodies need to assist applicants in formulating their claims as best as possible, of course fully considering their initially submitted allegations as well. For example, the applicants claimed discrimination on grounds of ethnic belonging, belonging to a marginalized group, and sex. The equality body may consider that in addition to ethnic belonging and belonging to a marginalized group, another relevant ground is age, but not sex. In such a case, the equality body will have to consider all four grounds in order to provide an answer to all claims made by the applicants, but at the same to identify and consider other grounds which it considers potentially violated, thus fulfiling its ultimate *raison d'être* – promoting the principle of equality and protection against discrimination.

Some jurisdictions go a step even further and envisage an *ex officio* obligation of the equality body to determine the discrimination ground. Thus, the Bulgarian Supreme Administrative Court has established that the equality body has the obligation to determine the discrimination ground, regardless of the grounds invoked by the applicant. In this case, the equality body did not find discrimination in an application filed on grounds of ethnic affiliation. The equality body found that in the specific case, there was no discrimination on grounds of ethnic affiliation, but on sex. As the applicants made no claims in relation to this ground, the body did not find discrimination.[13]

[13] Bulgarian Supreme Administrative Court decision: Ruling N 1177 of 24 January 2013 in case No. 12871/2010. As cited in: Ilieva, Margarita. "Supreme Court: Equality body should ex officio establish ground of discrimination [01.07.2013]". *Non-discrimination Network Website.* <http://www.non-discrimination.net/content/media/BG-Flash%20report-Ex%20officio%20judicial%20identification%20of%20protected%20ground.pdf>. Accessed: 10.10.2013

In the Macedonian context, the Commission for Protection against Discrimination enjoys a wide freedom of interpretation. In considering cases, it may determine the discrimination grounds if the applicant has failed to do so, then it may suggest a change of the aledged discrimination grounds, or consider additional discrimination grounds.

Determining the discrimination grounds in countries applying an open model or a general prohibition model requires openness from courts and equality bodies that act upon these provisions. In determining the grounds under these systems, it is important that relevant institutions take into consideration the social, political, economic and cultural development of the society. The open model and the general prohibition model give these institutions a possibility to evolutively interpret the grounds. In this respect, it is important to avoid trivializing the protection of equality and non-discrimination, by developing specific criteria on what may and what may not be considered as a discrimination ground (see Chapter I-2).

An important issue in relation to the interpretation of the grounds and to the degree of protection awarded to them is whether in a given system there are exceptions and /or positive action measures or affirmative measures tied to certain discrimination grounds. If there are, defining the grounds gains on importance because of the need to precisely delimit the scope of these exceptions and/or measures. This would be the case in Macedonia, considering that the national legislation, in Chapter III of the LPPD, sets forth an indeed extensive list of exceptions to discrimination referred to in three articles: affirmative measures, unequal treatment which is not considered discrimination and other protective mechanisms for certain categories of persons (Arts. 13 to 15, LPPD).

2. Challenges in applying and interpreting discrimination grounds

Relevant institutions encounter different challenges in determining and addressing the discrimination grounds. Some of those challenges include determining the belonging to a certain group, multiple discrimination, intersectional discrimination, cumulative discrimination, discrimination by association, presumed characteristic, comparator and the importance of the comparator, degree of protection of a discrimination ground, affirmative measures and positive action measures, reasonable accommodation, etc. All these institutes are of importance for comprehending, interpreting, and applying discrimination grounds. Therefore, they will be briefly elaborated here.

Discrimination Grounds v Discrimination Fields

It is important to highlight the difference between the ground and field of discrimination. Discrimination field is the area/field in which prohibited unequal treatment occurs. It can be in employment, education, goods and services, housing, health care, social protection, etc.

Understanding the discrimination field is important for understanding the scope of protection against discrimination on a given ground, depending on the field. A certain ground may be protected (1) in one field (for example the ground “age" may be protected only the field of "employment"), (2) in several fields (for example “sexual orientation” may be protected in the fields health and employment), or (3) in all fields for which there is legal ground (as it is the case with Article 4 of the LPPD, which refers to several fields, but ends the provision with the wording "and in other fields determined by law").

Group membership: If there is no justification for the difference in treatment, *the principle of self-identification* of a person with a certain group is to be taken as a determining principle in establishing whether the person belongs to a certain group. Group membership, or belonging to a group, can also be determined based on *possessing a personal characteristic or a status* affiliated with a certain group. *The perception of the potential discriminator* about the person's belonging to a certain group often is of great importance in cases of unequal treatment (see below "presumed characteristic").

Multiple discrimination, intersectional discrimination, compound (cumulative) discrimination: If one person is discriminated against on several different grounds at different times, it is a case of multiple discrimination. If the discrimination has occurred by several discrimination grounds adding to each other at one particular instance than it is a matter of compound (cumulative discrimination). If discrimination has occurred by concurrent indivisible interaction of several discrimination grounds, than it is a matter of intersectional discrimination.[14]

Discrimination by association: If the unequal treatment of a person is due to their connection with another person who possesses one of the protected personal characteristics or status, than the discrimination against that person is considered to be discrimination by association.

Presumed characteristic: The person does not have to really possess a given characteristic or status in order to be discriminated against on that ground. The perception of the potential discriminator, who presumes that the person belongs to a certain group possessing the concerned characteristic or status is of decisive importance in this respect, regardless of whether that is really the case or not.

Degree of protection: As it will be repeatedly underlined in cases discussed in the Guide, courts and equality bodies deliberating upon cases of discrimination often set a degree of protection under given discrimination ground. The degree of protection is set after the difference of treatment has been established, since in respect of some of the grounds, courts and equality bodies will look for "compelling reasons" or will apply stricter criteria in establishing reasonable justification for the difference in the treatment. In other cases, courts and equality bodies will apply a greater margin of appreciation (as for the example the ECtHR), leaving thus more room for the state or other potential discriminator to prove that the difference in treatment is justified, proportionate and serves a legitimate goal.

Affirmative measures and positive action measures: these measures[15] are applied with respect to certain discrimination grounds, with the specific purpose of promoting substantive equality, including through the introduction of quotas and other rules for representation of less represented or excluded groups**,** which by their nature are of limited duration and are aimed at correcting historical injustices against a certain group.[16] Such measures can be factually netural

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[14] Makkonen, Timo „Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore", Institute For Human Rights, Åbo Akademi University (April 2002). <http://cilvektiesibas.org.lv/site/attachments/01/02/2012/timo.pdf>. Accessed on: 20.09.2013

[15] The term "positive discrimination" used to be applied to designate all these measures.

[16] Summarized by: Sandra Fredman, 'Reversing Discrimination' (1997) 113 LQR 575, 575; Kristin Henrard, 'Non-discrimination and Full and Effective Equality' in Marc Weller (Ed) *Universal Minority Rights* (OUP 2007) 129

but purposefully inclusionary policies, outreach programmes to reach the discriminated groups, preferential treatment in employment and redefining of the necessary qualifications, as well as other specific activities for eliminating discrimination.[17] No possibility is left to claim unequal treatment in cases of consistent application of these measures. Moreover, the failure to introduce and apply such measures is to be considered discrimination.

Reasonable accommodation: Reasonable accommodation means necessary and appropriate modification and adjustments, where needed in a particular case, which will not impose a disproportionate or undue burden, in order to ensure that a person will be able to enjoy all human rights and fundamental freedoms on an equal basis with others .[18] Measures for reasonable accommodation cannot be considered as unjustified unequal treatment. On the contrary, the failure to make reasonable accommodation can amount to discrimination.

Criticism of Procedural Economy

In processing cases of discrimination, it is important to always keep in mind that the main task is to establish whether there has been prohibited unequal treatment. In this respect, it is of no relevance whether such treatment will be accompanied with a violation of some other right or not. This means that in cases of discrimination there is little room for applying procedural economy.

The ECtHR confirms this. After the great criticism[19] against the application of procedural economy in cases of potential discrimination, the case law of the ECtHR has evolved. Thus, this Court more often considers claims for a violation of the prohibition of discrimination, separately and regardless of the fact whether a violation of the substantive right has been established or not. [20]

This approach is justified by the fact that every act of discrimination is a separate violation which is not necessarily connected to a violation of some other right (the same as a violation of a right does not necessarily mean that there has been discriminatory treatment), or whether a violation of that other right has been remedied.

An additional argument against procedural economy is the fact that in cases of discrimination, a great satisfaction for persons who have suffered unequal treatment is the fact that the equality body/court has established that they have been discriminated against. Considering the preventive role that the legal practice can have[21], such an approach to discrimination cases additionally shows that a given unequal treatment on the basis of a personal characteristics or status is not allowed and will be considered prohibited in the future too.

17 Christopher McCrudden, 'Rethinking Positive Action', 15 Industrial Law Journal 1 (1986) 220-221, 223-225

18 Adapted from Article 2 of the CRPD.

19 Boyle, Kevin, 'Article 14 Bites At Last'. EHRAC Bulletin Summer 2006, Issue: 5.2; Leach, Philip. Taking a Case to the European Court (3rd edition).New York: OUP, 2011.399. See the Dissenting Opinion of Judge Evrigenis in the case of Airey v Ireland (1979) 2 EHRR 305, para. 1

20 The ECtHR explains in detail the need for such an approach in cases where unequal treatment is one of the main aspects of the violation in Chassagnou v France (2000) 29 EHRR 615. para.para. 89

21 During the field research, some of the respondents emphasized the preventive role of the legal practice.

III. DISCRIMINATION GROUNDS

This Chapter considers the discrimination grounds referred to in Article 3 of the LPPD. This Chapter elaborates upon all grounds separately with the exception of (1) sex and gender, (2) race, colour of skin and ethnic belonging and (3) religion or religious belief, and other types of belief. [22]

In absence of definitions of discrimination grounds, it is recommended that they are applied using the regular, every day meaning of the words designating the grounds, and in cases of doubts one should follow the interpretation given in the domestic and international law and practice.[23] This Chapter tries to systematize the hitherto legislation, case law, and discussions on the meaning and scope of the grounds, and the challenges in relation to their application. Thus, every ground is considered by giving its definition, review of the protection in international law, review of the protection under case law of courts and treaty bodies;[24] examples and frequent practices of prohibited treatment, and open issues and challenges in relation to their consideration. In light of the fact that definitions of the grounds are rare in international human rights instruments, the interpretation of their meaning and scope of protection is presented in this Guide through the case law of human rights bodies.

Table No. 1 below gives an overview of discrimination grounds in the major (universal and regional European human rights instruments), most of which are relevant for Macedonia. In addition to these instruments, one should take into consideration the instruments of the International Labour Organization (Conventions Nos. 100 and 111), Recommendations of the European Commission against Racism and Intolerance (especially Recommendations Nos. 2 and 7), and all Directives of the European Union, which regulate equality and non-discrimination (76/207/EC, 2000/43/EC, 2000/78/EC, 2002/73/EC, 2004/113/EC, 2006/54/EC, draft-Horizontal Directive).

[22] These grounds are considered in groups for a better comparative review of their similarities and differences, and because in major part of the international case law, cases in which one of these grounds have been considered, delimit at the same time the borders of the other grounds that are here elaborated together.

[23] Farkas Lilla and Simeon Petrovski, Handbook for training of judges on anti-discrimination legislation. OSCE: Skopje, 2012, p. 19

[24] Considering the recent adoption of the first comprehensive Law on the Prevention of and Protection against Discrimination (in 2010, entered into force on January 1, 2011) and the short period for developing a case law, it is not surprising that the practice does not yet provide guidelines as regards the definition of discrimination grounds . Therefore, the possibility in this Chapter to refer to this case law for purposes of offering further explanations and/or examples was limited.

Table No. 1: *Discrimination grounds in International Law*

Instrument	Grounds	Article(s)	Open list of grounds
UDHR	race, colour of skin, sex, language, religion, political or other opinion, national or social origin, property, birth	2(1)	Yes
ICERD	race, colour, descent, or national or ethnic origin	1	IAD
ICCPR	race, colour of skin, sex, language religion, political or other opinion, national or social origin, property, birth	2	Yes
	Sex	3	No
	race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth	26	Yes
ICESCR	race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth	2(2)	Yes
	Sex	3(3)	No
CEDAW	sex, gender, age, disability	/	IAD
CRC	race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth	2(1)	Yes
CRMWF	sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth	1(1)	Yes
ICRPD	disability, sex, age	/	IAD
ECHR	sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth	14	Yes
	equality between spouses	Protocol No. 7 Art. 5	No
	sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth	Protocol No. 12, Art. 1(1)	Yes
ESC (Revised)	race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth	E	Yes
EU Charter	sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation	21 *See also the entire Chapter III - Equality	Yes

1. Sex and gender

Selected International Case Law

Alyne da Silva Pimentel v Brazil , L.C. v Peru, A.S. v Hungary, S. W. M. Broeks v the Netherlands, Smith and Grady v the United Kingdom, Lustig – Prean and Beckett v the United Kingdom, Van Raalte v the Netherlands, Vertido v the Philippines, Petrovic v Austria, Barber v Guardian Royal Exchange Assurance Group, Burghartz v Switzerland, Ünal Tekeli v Turkey, Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v Mauritius, Abdulaziz, Cabales and Balkandali v the United Kingdom, A.T. v Hungary, Opuz v Turkey , Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena, Briheche v Ministre de l'Interieur, Commission v France, Carole Louise Webb v EMO Air Cargo (UK) Ltd, Rasmussen v Denmark, Andrius Kulikauskas v Macduff Shellfish Limited, Coleman v Attridge Law and Steve Law, P v S and Cornwall County Council, Richards v Secretary of State for Work and Pensions, Christine Goodwin v the United Kingdom, PV v Spain

There is a clear distinction between the terms sex and gender. **Sex** refers to the biological makeup, such as primary and secondary sexual characteristics, genes, and hormones. **Gender**, on the other hand, refers to people's internal perception and experience of maleness and femaleness, as well as the social understanding of behaviours that can be considered as male or female. These perceptions and experiences vary across history, societies, cultures, etc.[25]

This distinction, among the terms sex and gender, becomes blurred when discussing them as discrimination grounds in the legal practice, primarily because certain gender aspects have been considered within the frame of sex.[26] In some cases, the distinction is not clear because of lack of separate grounds under which sex and gender would be considered. Furthermore, this can also be attributed to the fact that in cases of difference in treatment, which occurs as a result of gender discrimination, the court/ equality body might find that the core determining category in the given case is sex, so it considers the case under this ground.

Sex and gender as discrimination grounds abound in specific characteristics, owing to which the level of protection afforded to these grounds is raised. This is evidently in the number of provisions on non-discrimination in international law, which explicitly include these grounds and explicitly envisage prohibition of difference in treatment on these grounds (except for affirmative measures or positive action measures), which is refelect in the requirement for very weighty reasons for a justification of the difference in treatment.

[25] Agius, Silvan and Christa Tobler "Trans and intersex people. Discrimination on the grounds of sex, gender identity and gender expression" European Network of Legal Experts in the Non-Discrimination Field. European Union, 2012, p. 12-13

[26] *Ibid.* p. 13

The Role of Tradition in Discrimination against Women

The traditional roles ascribed to women in a society, may that be in areas of employment, housing, etc., cannot be a justification for unequal treatment, nor can they be considered as reasonable arguments for justification of such treatment.[27] Thus, in the case of *S. W. M. Broeks v The Netherlands,* the state discriminated against the applicant by the fact that it granted unemployment social security benefits to women only if they were able to prove that they were the breadwinner in the family.[28] The HRC considered that this additional criterion is discriminatory because it is based on the traditional understanding of the role and skills of women to financially contribute to the family. Similarly, in the case *Vertido v the Philippines,* the CEDAW found that lack of appropriate action of the state upon a reported case of rape was to be attributed to the existing rules and practices that were discriminatory against women. The CEDAW established a positive obligation of the state to undertake measures to change the social and cultural matrix of relations between men and women with a view to eliminating prejudices and stereotypes.

With respect to **social protection,** the HRC underlined that despite the fact that under the ICCPR, states do not have the obligation to organize such a system, when they do, they have to establish a non-discriminatory system.[29] This has been confirmed by the ECtHR[30] and the CJEU.[31]

Disabling or preventing the exercise of **health and reproductive rights inherent to women only** is also considered discrimination. In such situations, the positive obligation of the state to counter this type of discrimination is raised. The state can fulfil this obligation by making structural changes, and by undertaking legislative and institutional measures. Thus, in the case of *Alyne da Silva Pimentel v Brazil,* the CEDAW found that states have the obligation to guarantee all women access to timely, non-discriminatory and appropriate health care services for pregnant and parturient women. This obligation applies even when the state has delegated competences for provision of these services to private health institutions, and it will be considered fulfilled by regulating and monitoring their work.[32] In the case of *L.C. v Peru,* the CEDAW found that the state must allow under law abortion on the grounds of sexual abuse and rape and to establish relevant mechanisms to provide legal and safe abortion for these women.[33] In *A.S. v Hungary,* the CEDAW established that the state discriminated by subjecting a Roma woman to forced sterilization.

No comparator is need in cases of discrimination in relation to **pregnancy.** Thus, in the case *Carole Louise Webb v EMO Air Cargo (UK) Ltd,* the CJEU underlined that pregnancy is not in any way comparable to a pathological condition, nor to the unavailability to work based on

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27 Interights, 'Non-discrimination in International Law – a Handbook for Practitioners (2011 Edition)' (Interights 2011). Available at: <http://www.interights.org/files/174/Non-Discrimination%20in%20International%20Law%20A%20Handbook%20for%20Practitioners%202011%20Edition.pdf>. Accessed on: 26.09.2013. p.124

28 The justification of these criteria was challenged in other similar cases considered by the HRC. The HRC found discrimination in all these cases.

29 *S. W. M. Broeks v The Netherlands*, Communication No. 172/1984, U.N. Doc. CCPR/C/OP/2 at 196 (1990)

30 See: *Petrovic v Austria, Stec v the United Kingdom* and Runkee *and White v the United Kingdom*

31 See: *Barber v Guardian Royal Exchange Assurance Group*

32 *Alyne da Silva Pimentel v Brazil*, Communication No. 17/2008, CEDAW/C/49/D/17/2008, 10 August 2011

33 *L.C. v Peru*, Communication No. 22/2009, CEDAW/C/50/D/22/2009, 4 November 2011

arguments that are of non-medical nature.[34] In the same case, the Court found discrimination in the case of dismissal from work of a woman employed to replace a pregnant worker. The issue of whether the husband of a pregnant woman can be protected against discrimination by association based on the sex of his wife remains open. This question was referred to the CJEU in *Andrius Kulikauskas v Macduff Shellfish Limited*, in which a husband and wife worked in the same fish factory. After the employer noticed that the husband carried the heavy objects that the wife should have carried, as part of her tasks, the employer fired both of them, claiming that the quality of their work was not satisfactory. The applicants of this case claimed that the employer knew the woman was pregnant, because they had informed their superior manager about her situation.[35] Relying on the findings in *Coleman v Attridge Law and and Steve Law,* they also claimed that the husband had been discriminated on grounds of sex, due to the pregnancy of his wife. Owing to amendments in the national legislation and procedure, the CJEU did not have the possibility to answer the question referred to it.

The ECtHR has decided on the issue of application of different criteria in proceedings determining **fatherhood and motherhood.** In the case *Rasmussen v Denmark,* it was considered whether the special procedure that men were to undergo in order to challenge fatherhood of children born in wedlock was discriminatory of the grounds of sex. The Court found that the measure the state undertook was proportionate (because of the specific links that women as mothers have with their children, compared to men), establishing further that the difference in the duration of the procedure does not amount to discrimination. [36]

Identity issues and legal status related issues also need to be settled without gender or sex discrimination. The deprivation of "aboriginal status" of the woman-applicant after her marriage to a non-aboriginal man, in a situation in which according to the same rule an aboriginal man would keep his aborigine status if he married a non-aboriginal woman, was considered discrimination in the case of *Sandra Lovelace v Canada*.[37] The ECtHR has also confirmed that persons cannot be discriminated with respect to their identity on the grounds of sex, by establishing discrimination in cases of unequal treatment in relation to change of surnames of spouses (see *Burghartz v Switzerland* and *Ünal Tekeli v Turkey*).

In the case of *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v Mauritius,* the HRC found that the immigration rules were discriminatory, since they limited the right to permanent residence to foreign nationals married to women from Mauritius, while this is not the case with foreign nationals - women who are married to men from Mauritius.[38] In the case of *Abdulaziz, Cabales and Balkandali v the United Kingdom,* the ECtHR established that there were no strong reasons with which the state could prove the reasonable justification of the rule according to which wives of husbands that immigrated to the United Kingdom could come and remain there, unlike husbands of wives who had immigrated. The Court considered that the different impact

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34 Case C-32/93 Carole Louise Webb v EMO Air Cargo (UK) Ltd

35 Case C-44/12 Reference for a preliminary ruling from Court of Session (Scotland), Edinburgh (United Kingdom) made on 30 January 2012 — Andrius Kulikauskas v Macduff Shellfish Limited, Duncan Watt

36 Rasmussen v Denmark (1984) 7 EHRR 371

37 Sandra Lovelace v Canada, Communication No. 24/1977: Canada 30/07/81, UN Doc. CCPR/C/13/D/24/1977

38 Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v Mauritius, Communication No. R.9/35, U.N. Doc. Supp. No. 40 (A/36/40) at 134 (1981)

of the immigration of men and women on the labour market is not a sufficient argument to justify the difference in treatment.[39]

Discrimination on grounds of sex also encompases **sexual harassment**. The same can be applied to **sexual violence** if there is statistical evidence that women and girls are most often victims of a certain type of violence, or if there are no appropriate laws and other measures and if they are not dully implemented by the state in countering such violence.

Gender and Domestic Violence as Forms of Discrimination

Domestic violence is one of the forms of sex and gender discrimination, if there is no effective protection provided by the state to victims of domestic violence, accompanied by lack of established relevant measures and/or their implementation, in which respect the position of the authorities towards the case of domestic violence is also taken into consideration. *Opuz v Turkey* is such a case. The applicant and her mother were victims of domestic violence for a longer period, having reported domestic violence with the police on several occasions, and there were several pending criminal procedures against the husband of the applicant. After a while, this violence resulted in the death of the mother of the applicant, who was shot by the husband of the applicant.[40] Taking into consideration arguments under international law and case law, reports of non-governmental organizations about domestic violence and the treatment of these cases by the police, as well as statistical evidence, the ECtHR found a violation of Article 14, in conjunction with Articles 2 and 3. The Court emphasized the positive obligation of the state to counter domestic violence, not only with laws but also in the practice.[41] The ECtHR found that the alleged discrimination at issue was not based on the legislation itself, but rather resulted from the general practice of the competent institutions (such as the manner in which women were treated at police stations when they reported domestic violence), and judicial passivity in providing effective protection to victims (although without direct intent).[42] The CEDAW has also determined domestic violence as a form of discrimination. In the *A.T. v Hungary* case, the Committee found that the state discriminated by failing to effectively protect the applicant even after four years of her repeatedly reporting violence.

In the EU context, the struggle for gender equality has been mostly focused and is still focused on **equal pay for equal work.** The landmark equal pay case is *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena.* According to the CJEU, retirement of female flight attendants earlier than male flight attendants prevented women from getting a pension in the amount that men get.[43]

39 Abdulaziz, Cabales and Balkandali v UK (1985) 7 EHRR 471

40 During the investigation and the court proceedings for the murder of the mother, he stated that he fired the gun because he wanted to defend his honour and the honour of his children. See para. 56 in Opuz v Turkey (2010) 50 EHRR 28

41 Abdulaziz, Cabales and Balkandali v UK (1985) 7 EHRR 471

42 Opuz v Turkey (2010) 50 EHRR 28. Para. 192

43 Case C-43/75 Defrenne v Sabena (1976) ECR 455

Measures aiming at substantive equality are not discriminatory

In respect of sex and gender discrimination, it is of special importance to differentiate between prohibited unequal treatment on one hand and **affirmative measures and positive action measures** on the other. Specific measures that states undertake with a view to enable women to equally and fully exercise their rights are not considered discrimination. On the contrary, absence of such measures, which on its part contributes to perpetuating the situation of inequality between men and women, can amount to discrimination, exactly due to the lack of appropriate reaction by the state.

The CJEU has discussed such positive action measures in several cases.[44] The Court's approach has evolved to date when its greater acceptance of substantive equality is evident.[45] Thus, in the *Briheche v Ministre de l'Interieur* case of access of widows to public services, the CJEU found that the European acquis "authorizes national measures relating to access to employment which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men. The aim of those provisions is to achieve substantive, rather than formal equality by reducing *de facto* inequalities, which may arise in society, and, thus, [.....] to prevent or compensate for disadvantages in the professional career of the persons concerned."[46]

The practice shows that any unequal treatment on grounds of sex and gender will be difficult to justify and that a rather strict approach will be applied in assessing whether the difference in the treatment is reasonable and justified. Unequal treatment can be justified when positive action measures are applied (see the examples elaborated above). There is no room to justify differences in treatment with arguments **of financial or managerial decisions and considerations.**[47] Furthermore, in cases of indirect discrimination on these grounds, it is of no relevance whether there was **intent to discriminate,**[48] as confirmed by the CJEU. The Court found indirect discrimination in a case of temporary employment because the less favourable difference in the pay and the related social benefits had a disproportionately more negative effect on women who were more often recruited for temporary employment. [49]

Gender Identity and Gender Expression

Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.[50] Under the international practice, if there are

44 See, for example: Commission v France, Kalanke, Marschall, Badeck, Abrahamson and Anderson.

45 Colm O'Cinneide, 'Positive Action and EU Law' (ERA Academy of EU Law, November 2011) <http://www.era-comm.eu/oldoku/SNLLaw/04_Positive_action/2011-111DV20-O'Cinneide_EN.pdf>. p.11

46 Case C-319/03 *Briheche v Ministre de l'Interieur* [2004] ECR I-8807, para. 25

47 'Handbook on European Non-discrimination Law'. EU FRA and CoE, 2010. p. 99

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

49 Also, see: Case C-243/95 *Kathleen Hill and Ann Stapleton v The Revenue Commissioners and Department of Finance* [1998] ECR 1998

50 Yogyakarta Principles. Yogyakarta Principles Website. <http://www.yogyakartaprinciples.org/principles_en.htm>. Accessed on: 28 September 2013

legal grounds or practice to treat gender identity as a separate ground, than it will be considered in that manner. Otherwise, gender identity is considered under the ground gender.[51]

Gender expression refers to peoples' manifestation of their gender identity, and the one that is perceived by others.[52] Gender expression is also not explicitly referred to in the LPPD. It is recommended to treat this issue similarly as gender identity.

The more significant case law on gender identity and gender expression relates to cases of sex change. Part of that case law considers issues of **dismissal from work** (*P v S and Cornwall County Council*), **welfare benefits** (*Richards v Secretary of State for Work and Pensions*), **birth certificates** (*Christine Goodwin v the Untied Kingdom*), **limited parental rights** (*PV v Spain*).

The Discrimination in Practice

Frequent examples of discrimination on the grounds of sex and gender are unequal access to work on grounds of possible pregnancy, or hiring at a of lower-level or part-time job based on the prejudice that women are not able to work as dedicated and responsible as men can.[53] In the practice, cases of discrimination on this ground often occur in combination with another ground,[54] resulting in multiple discrimination. For example, unequal treatment upon a health care request of a woman with a disability.

2. Race, colour of skin, and ethnic belonging

Selected International Case Law

L.R. et al. v Slovakia, Zentralrat Deutscher Sinti und Roma et al. v Germany, A.W.R.A.P. v Denmakr, P.S.N. v Denmark , Kamal Quereshi v Denmark, Murat Er v Denmark, Nacova and others v Bulgaria, Beganovic v Croatia, Timishev v Russia, D.H. and Others v the Czech Republic, Oršuš and Others v Croatia, Horváth and Kiss v Hungary, Lavida and Others v Greece, European Roma Rights Centre v Portugal, COHRE v Italy, Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV, Sejdić and Finci v Bosnia and Herzegovina

The most widely accepted definition of race is the definition contained in the International Convention on the Elimination of all Forms of Racial Discrimination. Article 1 of this Convention defines racial discrimination as any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and

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51 This ground is not explicitly referred to in the LDDP. In the context of the field research conducted in preparation of the Guide it was established that practitioners have different opinion about the question under which basis gender identity should be considered (gender or "other grounds"). Despite the fact that this question loses its relevance when it comes to procedures before the Commission for Protection against Discrimination and before the Ombudsperson, given their freedom of interpretation (See Chapter I), it is still relevant for procedures before the courts.

52 Agius, Silvan and Christa Tobler. "Trans and intersex people. Discrimination on the grounds of sex, gender identity and gender expression" European Network of Legal Experts in the non-discrimination field. European Union, 2012. p.13

53 General Comment No. 20 of the Committee on Economic, Social and Cultural Rights (UN), para. 20.

54 See: CRPD, Article 6, and General Recommendation No. 25 of the CERD (UN).

fundamental freedoms in the political, economic, social, cultural or any other field of public life.[55] An important definition in the regional European context is the one given by the European Commission against Racism and Intolerance (ECRI), according to which racism and racial discrimination are linked with the grounds race, colour, language, religion, nationality or national or ethnic origin.[56]

Thus, it can be concluded that race as a discrimination ground in international law is considered as a concept that encompasses a whole range of characteristics arising from biological, economic, social, cultural, and historical factors.[57] Racism is not based on objective characteristics, but on relations of dominance and subordination, on hatred towards the 'other' perpetrated or seemingly approved by creating an image about the 'other' as inferior, repulsive or even as a less human.[58] Hence, **race is a social construct, and not a real, existing difference between people.**

Race is the first ground that has been protected under a separate legally binding anti-discrimination UN instrument, which in addition to gender, enjoys the highest level of protection, both under international law and in national legislations. An important feature of instruments on protection against racial discrimination is that they **distance themselves from theories for existence of separate races**.[59] For example, this has been done in Recital 6 of the Directive on Racial Equality according to which "The European Union rejects theories which attempt to determine the existence of separate human races. The use of the term "racial origin" in this Directive does not imply an acceptance of such theories."[60]

Colour of skin most often relates to an alledged belonging to a certain race and is manifested as racial discrimination. Therefore, despite the fact that these two bases have been stated separately under the LPPD, this Guide considers them conjointly. Colour of skin means pigmentation of the human skin, which depends on biological, i.e. genetic factors. It can be fair or dark. [61]

Discrimination based on colour of skin can occur as multiple discrimination, due to the combination of personal characteristics that an individual can have. For example, persons with

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55 Convention on the Elimination of All Forms of Racial Discrimination, Article 1.

56 ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination. *Council of Europe Website*. <http://www.coe.int/t/dghl/monitoring/ecri/activities/gpr/en/recommendation_n7/ecri03-8%20recommendation%20nr%207.pdf>. Accessed on: 30 September 2013. I-1

57 Interights, 'Non-discrimination in International Law – a Handbook for Practitioners (2011 Edition)' (Interights 2011). Available at: <http://www.interights.org/files/174/Non-Discrimination%20in%20International%20Law%20A%20Handbook%20for%20Practitioners%202011%20Edition.pdf>.Accessed on: 26.09.2013, 151

58 Fredman, Sandra. Discrimination Law. Oxford: OUP, 2011. p.51

59 Such rejections of concepts of separate races can be found for example in the documents of the World Conference against Racism in Durban (para. 6), ECRI Recommendation No. 7 on national legislation to combat racism and racial discrimination and the explanation about the Austrian Equal Treatment Act. For more about racial theories, racism and arguments about the need to reject these theories see Bulmer, Martin and John Solomos (Eds.). *Racism – Oxford Reader*. Oxford: Oxford University Press, 1999

60 Racial Equality Directive, Recital 6

61 Najchevska, Mirjana and Bekim Kadriu. Terminology Glossary for Discrimination. OSCE and MCIC: Skopje, 2008, p. 13

albinism often face discrimination based on colour of skin, in access to employment or to health care. However, they can also face multiple discrimination. For example, a child with albinism cannot attend regular school because the child is not able to see the blackboard and is always seated in the back of the classroom. Such a child suffers unequal treatment in the filed of education, but also discrimination on grounds of disability, because this inherited genetic condition is often accompanied with impaired vision. [62]

Ethnic belonging is often considered as part of racial discrimination. CESCR considers ethnic belonging a protected ground, as part of the protection against discrimination based on race and colour of skin.[63] According to the ECtHR, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds.[64]

Rights of Minorities v their Protection against Discrimination in International Law and Practice

International law and practice, and academic literature discuss the protection of minorities, which is based on two pillars. It is important that practitioners have the differences between these two pillars in mind, so that they can correctly understand international law and practice, which is why they are discussed here briefly.

One pillar is the non-discrimination pillar, which covers enjoyment of human rights and equality before the law without discrimination, as well as application of affirmative measures and positive action measures for reaching substantive equality. The other is the identity pillar, which covers minority identity rights which have the purpose of providing minorities with necessary conditions to preserve, foster and develop their culture and other essential elements of their identity.[65]

The ECtHR has considered many cases on these grounds, applying **a high degree of protection.** The Court has never ceased to demand very weighty reasons for justifying the difference in treatment, considering racial discrimination as an especially invidious and deeply rooted form of discrimination. In the *Nachova and others v Bulgaria*, the Court concluded that "Racial violence is a particular affront to human dignity and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment".[66] However, the Court did not find that the killing of two Roma by the police was prompted by racial motives. A similar decision was adopted in the case of *Beganovic v Croatia,* in which according to the Court, racial motivation of the violence was not proven, and therefore violation of Article 14 could not be established.

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[62] There is still no consensus on the issue whether the protection of persons with albinism should be considered under the ground of colour of skin, health status or in some cases under the ground of disability. For more on discrimination against persons with albinism see: Persons with Albinism - Report of the Office of the United Nations High Commissioner for Human Rights. A/HRC/24/57. 12 September 2013.

[63] General Comment No. 20 of the Committee on Economic, Social and Cultural Rights (UN), para. 19

[64] *Timishev v Russia* (2007) 44 EHRR 776. para. 55

[65] Kristin Henrard, "Non-discrimination and full and effective equality". In Weller, Mark (Ed.). *Universal Minority Rights*. Oxford: Oxford University Press, 2007. 75; Zdenka Machnyikova and Lanna Hollo. "The Principles of Non-Discrimination and the Full and Effective Equality and Political Participation". In Weller, Mark (Ed.). *Political Participation of Minorities*. Oxford: Oxford University Press, 2010. 95

[66] *Nachova and Others v Bulgaria* (2006) 42 EHRR 933. para. 145

In the *Timishev v Russia case,* the ECtHR considered whether the applicant was discriminated against with respect to his right to **freedom of movement,** only because of his Chechen ethnic origin. In this case, the Court underlined that racial discrimination was a particularly invidious kind of discrimination and, in view of its perilous consequences, required from the authorities special vigilance and a vigorous reaction.[67]

The ECtHR has considered several cases of **segregation of Roma** in the field of education. The major cases in this context are *D.H. and Others v the Czech Republic*, *Oršuš and Others v Croatia,*[68] and *Horváth and Kiss v Hungary*. In the *D.H.* case, the ECtHR established the positive obligation of the state to correct inequalities, which arise in cases of long-term exclusion based on ethnic origin, as is the case of the Roma, by introducing measures to deal with such exclusion. The Court underlined that a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of Article 14.[69] In the *Horváth and Kiss v Hungary,* the Court deliberated whether enrolment of Roma children in special schools for children with mental disability amounts to indirect discrimination. The Court found that segregation of pupils showed that the state had not honoured its positive obligations to undo a history of racial segregation. Furthermore, the state provided them with access to education, which "might have compounded their difficulties and compromised their subsequent personal development instead of helping them to integrate into the ordinary schools and develop the skills that would facilitate life among the majority population".[70] Another recent case of segregation of Roma in education is the case of *Lavida and Others v Greece*. The Court found that the possibility allowing Roma children to enrol in primary education only in schools attended exclusively and only by Roma children amounts to discrimination in the field of education.[71]

The ECSR has considered several cases of discrimination on basis of ethic origin of Roma and Sinti. In the case of *European Roma Rights Centre v Portugal,* the ECSR established discrimination against the **right of the family to social, legal, and economic protection, the right to protection against poverty and social exclusion, and the right to adequate housing** (Articles 16, 30 and 31 of the ESC). The Committee considered that the fact that large proportion of Roma families live in poor housing conditions triggers the obligations of the state to undertake positive action measures with a view to remedying such a situation of inequality of this ethnic group and to enable them to exercise their right to housing on equal footing with other ethnic groups. The Committee found that the state failed to undertake appropriate action, which thus resulted in discrimination on basis of ethnic origin.[72] The Committee adopted a similar judgment in the case of *COHRE v Italy.* The Committee established discrimination on the basis of ethnic origin in the field of housing, in light of the treatment of the Roma and Sinti, i.e. the frequent cases of forced relocation of Roma settlements, including their relocation to places,

67 *Timishev v Russia* (2007) 44 EHRR 776. para. 56

68 This case is explained under the sub-section on language as discriminatory basis.

69 *DH and Others v The Czech Republic* (2008) 47 EHRR 3. para. 175

70 *Horváth and Kiss v Hungary*, ECtHR (CJ), App. No. 11146/11, 29.01.2013, para. 127

71 *Lavida and Others v Greece,* ECtHR (1st Division), App. No. 7973/10, 30 August 2013

72 *European Roma Rights Centre v Portugal*, Complaint No. 61/2010, ESRC - Decision on the Merits (30 June 2011)

which are not adequate to principles determining what can be considered as adequate housing.[73]

The CERD[74] has established that unequal treatment with respect to **effective legal remedy, reaction of the state** and conducting effective investigation amounts to racial discrimination.[75] Some of these cases are *L.R. et al. v Slovakia, Zentralrat Deutscher Sinti und Roma et al. v Germany, Kamal Quereshi v Denmark, and Murat Er v Denmark.*

The CJEU has considered cases of unequal treatment in **employment.** An interesting case in this context is the case of *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV.* This is a case of a potential employer that openly stated that he would not recruit persons of a certain racial or ethnic origin. According to the CJEU, such a statement had a strongly deterring effect on certain candidates to apply for some of the positions, by which their access to the labour market was prevented.[76]

As shown by the case law, unequal treatment on the grounds of race, colour of skin, or ethnic belonging **cannot be easily justified,** Furthermore, **it could hardly be considered that any goal would be legitimate** in order to justify a difference in treatment only on this ground. The ECtHR explicitly reaffirms this in the case of *Sejdić and Finci v Bosnia and Herzegovina*.[77] The applicants - a Roma and a Jew - claimed unequal treatment in their relation to their right to stand for elections. According to the applicable legislation in Bosnia and Herzegovina, only Bosniacs, Serbs, and Croats have the right to stand for elections for certain positions. In this case, the Court found that even the post-war arrangements reached to maintain the peace among the once belligerent ethnic groups, which in the present system represent the three constituent peoples of Bosnia and Herzegovina, cannot justify the difference in treatment based only on the ground of ethnic origin.[78]

The Discrimination in Practice

Examples of discrimination on these grounds are refusal to provide health care services to Roma, denying entry in catering facilities to Albanians, placing children belonging to a certain ethnic group in a separate class, without reasonable justification, or their placement in special schools, interference in the exercise of property rights under equal conditions as the majority population, etc.

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73 On the issue of adequate housing, see General Comment No. 4 of the Committee on Economic, Social and Cultural Rights.

74 It should be noted that in considering cases, this Committee has often decided not to process cases raising racial discrimination claims in relation to persons belonging to a certain religious group (for example, *P.S.N. v Denmark* and *A.W.R.A.P.v Denmark*).

75 The CERD has the task of processing individual communications about possible violations of the International Convention on the Elimination of All Forms of Racial Discrimination. Therefore, its entire case law is relevant in the context of racial discrimination. Generally, the HRC refrains from acting upon cases of racial discrimination since it considers that the CERD is the relevant body with the authority to process such cases.

76 Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*

77 This is the first case under Protocol 12. In this case, the Court affirmed that it will apply the same principles and tests it applied in processing cases under Article 14.

78 Sejdić and Finci v Bosnia and Herzegovina, ECtHR [GC], App. nos. 27996/06 and 34836/06 (22 December 2009)

3.Language

Selected International Case Law

Antonina Ignatane v Latvia, Ballantyne and others v Canada, Diergaardt v Namibia, Cyprus v Turkey, Case "Relating to Certain Aspects of the Laws On the Use of Languages In Education In Belgium" v Belgium, Mathieu-Mohin and Clerfayt v Belgium, Oršuš and others v Croatia, Bulgakov v Ukraine, European Commission v Belgium

According to the ordinary meaning of this term, language can be considered a system for communicating with words, signs and body movements, which has endless possibilities for combining words and sentences into a meaning, enabling thus articulating and exchanging ideas and thoughts. As a discrimination ground, language includes both spoken and written language. Furthermore, it includes not only standard languages, but also sign languages and dialects.[79] There should be a distinction made between discrimination on grounds of language and language rights of minorities.[80] These two belong to different pillars of protection of minorities – the non-discrimination pillar and the identity pillar.[81] Unequal treatment on grounds of language does not necessarily mean that the language rights of minorities have been violated and vice versa.

Language is one of the grounds explicitly referred to in major part of international instruments. Language is also part of identity rights of minorities as set forth in Council of Europe documents (Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages). None of these instruments defines the term language. The CRPD has come closest to defining language; Article 2 of this Convention prescribes that in the context of the Convention, language includes spoken and sign languages and other forms of non-spoken languages.[82]

In international law, this discrimination ground is most often considered as part of racial discrimination. However, the comparative review of the treatment of language in national legislations shows that in national systems language is considered as part of the grounds race and ethnic origin only if the discussed matter is a foreign language.[83] Ethnic origin has been linked to language and has resulted in an application against **identity rights discrimination.** This is the *Bulgakov v Ukraine* case. It is a case of "Ukrainianisation" of Russian names in personal identification documents issued to Russians in Ukraine. In this case, the ECtHR did not

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79 General Comment No. 20 of the Committee on Economic, Social and Cultural Rights (UN), para. 21

80 Interights, 'Non-discrimination in International Law – a Handbook for Practitioners (2011 Edition)' (Interights 2011) Available at: <http://www.interights.org/files/174/NonDiscrimination%20in%20International%20Law%20A%20Handbook%20for%20Practitioners%202011%20Edition.pdf>.Accessed on: 26 September 2013. p. 181

81 For more on the two pillars of protection see Chapter III-2.

82 The same article contains a definition of communication for the purposes of this Convention, which reads as follows: "'Communication' includes languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology." Source: CRPD, Article 2.

83 Dagmar Schiek and others (Eds) Non-discrimination Law – Cases Materials and Text on National, Supranational, and International (Hart Publishing 2007). p. 60

find discrimination, because the state had provided for a procedure, under which these persons could request a change of their "Ukrainianisated" name.

Language as a discrimination ground in the field of **education** is most often linked to education of minority groups.[84] There is a significant international case law on this matter. In *Cyprus v Turkey,* the ECtHR found that language was the main feature by which one ethnic group is distinguished from the others.[85] In the case *Relating to Certain Aspects of the Laws on the Use of Languages In Education In Belgium v Belgium,* a group of parents complained that their children were not able to study in their mother tongue, because the then legislation of Belgium provided for education in each part of the country either in the French or in the Dutch language, depending on the dominant numerical representation of a group in a given region. Parents of children, who spoke French and lived in a region where the education was organized in the Dutch language, considered that their children were victims of unequal treatment. The ECtHR found that evidently there was unequal treatment, but that it was justified, because the state could not organize education of the children in both languages. In addition, the Court underlined that these pupils had the possibility of attending private schools in their mother tongue.[86] A recent case considered by the ECtHR is the case of *Oršuš and others v Croatia.* This is a case of segregation of Roma children in separate "Roma" classes. The state wanted to justify this unequal treatment by referring to the low level of proficiency in the Croatian language of the pupils. However, the Grand Chamber of the ECtHR concluded that only Roma children were placed in separate classes, as different from children belonging to other ethnic groups. Furthermore, there were no tests for placement of children in these classes that would enable determining the level of proficiency in the Croatian language of these children, nor there was a clearly defined benchmark or possibility for transfer to another class, after the required level of proficiency had been attained. Considering the proportionality of this measure, the ECtHR established that the measure lacked proportionality, finding thus discrimination in this case.[87]

Language discrimination can occur also in the context of **voting rights,** by setting criteria, which cannot be considered objective or reasonably justified. In the case of *Mathieu-Mohin and Clerfayt v Belgium,* the ECtHR did not find discrimination on grounds of language in the context of voting rights at local elections of part of the French speaking population. The applicants did not convince the Court that some of the rules for elections in their unit of local self-government did not provide for the possibility of using the French language, nor do they provide for the possibility for election of French speaking candidates.[88] In the *Antonina Ignatane v Latvia case,* the HRC found there was no justification for the difference in the treatment suffered by the applicant with respect to her right to stand for elections, by which the state violated Article 25, in conjunction with Article 2 of the ICCPR. The state discriminated the applicant by not allowing her to stand for local elections, explaining that she does not have the needed level of proficiency

84 Jovanovska –Brezovska, Elena, Equality as a basic right (Еднаквоста како основно право). FIOOM: Skopje, 2011 p. 65

85 *Cyprus v Turkey* (2002) 35 EHRR 30. para. 316-317

86 Case *"Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v Belgium* (1979-80) 1 EHRR 252, para. 9

87 Oršuš and Others v Croatia (2009) 49 EHRR 26

88 Mathieu-Mohin and Clerfayt v Belgium (1987) 10 EHRR 1

in the Latvian language, despite the fact that the applicant possessed a language certificate stating that she achieved the highest level of proficiency in the Latvian language.[89]

In some cases, language cannot be the criterion for unequal treatment with reference to **access to administration or the public sector.** Thus, in *Diergaard v Namibia,* the applicants, *inter alia,* complained of unequal treatment by the state on the grounds of language. Namely, the state instructed civil servants not to reply to letters they received if the letters were written in the Afrikaans language, even if the civil servants knew the language. The HRC found that with this measure the state violated Article 26 of the ICCPR.[90] Recently, the European Commission took Belgium to court, claiming that language is an obstacle to access to the public sector. In this case, language was considered as the determining occupational requirement, and language proficiency would be considered proven only if the applicant submits a specific type of certificate, while any other certificate was rejected. Linking language to the grounds of citizenship, the European Commission considers that Belgium conducts unequal treatment and therefore the Commission has instituted the case against this state before the CJEU.

Language can also be an obstacle to **access to goods and services.** The applicants in the case of *Ballantyne and others v Canada,* citizens of Quebec, challenged the rule according to which all commercial signs and names of companies had to be in the French language only, claiming, *inter alia,* that they were subject to discrimination on grounds of language, because their language was English. Deciding on the part of the communication relating to a possible violation of Article 26, the HRC challenged the relevance of the comparator in the case, i.e. part of the French speaking population in Quebec. According to the Committee, this rule applies to French speakers, as well as to English speakers, so that a French-speaking person wishing to advertise in English, in order to reach the English speaking clientele, may not do so. Accordingly, the Committee did not find a violation of Article 26.

The Discrimination in Practice

In the practice, discrimination on grounds of language is often linked with unequal treatment on grounds of national or ethnic origin.[91] Unequal treatment can occur as unjustified accessibility of and possibility to communicate with state administration bodies only by using a certain language/languages or when language is a condition for access to employment or to enjoyment of voting rights, without reasonable and objective justification.

[89] Antonina Ignatane v Latvia, Communication No. 884/1999, CCPR/C/72/D/884/1999 (2005)

[90] J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v Namibia, Communication No. 760/1997, U.N. Doc. CCPR/C/69/D/760/1997 (2000). paras. 10(10) and 11

[91] General Comment No. 20 of the Committee on Economic, Social and Cultural Rights (UN), para. 21

4. Citizenship

Selected International Case Law

Ibrahima Gueye et al. v France, Gaygusuz v Austria, Luczak v Poland, Ponomaryovi v Bulgaria, Koua Perez v France

Citizenship pertains to the legal bond between a person and a state (it does not indicate the person's ethnic origin).[92] International law mainly does not limit human rights obligations of the state only to citizens, but envisages that the state must ensure human rights also for refugees, asylum seekers, stateless persons, migrant workers, victims of trafficking in human beings. Thus, citizenship must not be an obstacle for access to education, access to health care, etc., of all children in a country.[93]

However, the cases of unequal treatment on this ground are often justified in the legislation itself. Thus, Article 9 of the Constitution of the Republic of Macedonia establishes the general principle of equality, but only for citizens of the Republic of Macedonia. In addition, Article 14(1-1) of the LPPD envisages that it shall not be considered discrimination is the issue at stake is "different treatment of persons who are not citizens of the Republic of Macedonia related to the rights and freedoms granted with the Constitution, with the legislation and international agreements to which the Republic of Macedonia is a party, and which directly arise out of the citizenship of Republic of Macedonia".[94]

In major part of the case law of international courts and treaty bodies, citizenship is considered as a discrimination ground in the field of **social protection.** Thus, in the *Ibrahima Gueye et al. v France the* applicants complained to the HRC about differences in treatment in awarding pensions to former soldiers of the French Army who were French citizens and those who were not French citizens. The HRC found a violation of Article 26 of the ICCPR on grounds of nationality, since it did not consider that the difference in treatment is based on reasonable and objective criteria.

In *Gaygusuz v Austria,* the ECtHR found no justification for awarding unemployment pecuniary benefit only to citizens. Namely, the applicant was a foreign national with a regulated residence in Austria and regularly paid social insurance contributions. The applicant wanted to take the opportunity to receive an advance on his retirement pension in the form of an unemployment benefit. He was refused by the domestic institutions and courts, because he did not possess an Austrian citizenship. In light of the circumstances of the case, the Court found that the applicant fulfilled all conditions as Austrian nationals and the difference in treatment could not be justified in this case.[95] A similar case is *Koua Perez v France,* in which the applicant was not awarded disability benefit because he was a national of the Ivory Coast. In the *Luczak v Poland case*, the applicant was not granted a farmers' social security, because he was not a Polish

[92] Convention on Nationality, Article 2(1)

[93] General Comment No. 20 of the Committee on Economic, Social and Cultural Rights (UN), para. 30

[94] Law on the Prevention of and Protection against Discrimination. Official Gazette of the Republic of Macedonia No. 50/2010; Decision of the Constitutional Court No. U. 82/2010 (15 September 2010), Article 14(1-1)

[95] *Gaygusuz v Austria* (1997) 23 EHRR 364

citizen. The Court considered that there was no reasonable justification for this difference in treatment, finding thus a violation of Article 14.[96]

Nationality must not be a decisive criterion for access to **education** in certain cases. In the *Ponomaryovi v Bulgaria case,* the applicants, Russian citizens with legal residence in Bulgaria, complained that they were treated differently from Bulgarian citizens in access to secondary education. The Court took into consideration that the state faced dilemmas resulting from scare resources for all public services. However, in the specific case, the Court considered that there was no reasonable justification for the difference between Bulgarian citizens for whom secondary education was free and the applicants who as foreign citizen without a regulated residence in the country were requested to pay school fees. [97]

The Discrimination in Practice

The limitation of the right of non- citizens to form trade unions or associations in order to represent their rights, the limitation of the right to public assembly organized by non- citizens, the impossibility that foreign citizens rent real estate property.

5. Religion or belief and other types of belief

Selected International Case Law

Hoffmann v Austria, Canea Catholic Church v Greece, Thlimmenos v Greece, Milanovic v Serbia, Kontinen v Finland, Kosteski v Macedonia, Kose and others v Turkey, Dahlab v Switzerland, Leyla Şahin v Turkey, Savez Crkava Riječ zivota and Others v Croatia, McFeeley v the United Kingdom, Campbell and Cosans v the United Kingdom, Kokkinakis v Greece

There is no definition of religion either in international law or in any of the European countries. Therefore, usually the contents of the right to religion or belief are considered in order to establish whether in a specific case this ground could be applied. This ground includes the right to practice religion or belief of one's own choice, including the right not to affiliate oneself to any religion or belief, and can be manifested publicly or in private in worship, observance, practice and teaching.[98]

In treating this ground, it is important to take into consideration that the church or religious community with which the specific case is linked does not have to have a regulated status in the country. Furthermore, it is important to take into consideration the link of this ground with ethnic origin, but also with race and cultural practices. Namely, often definitions of ethnic origin include religious identity; persons belonging to certain religious groups can also belong to a

[96] *Luczak v Poland*, ECtHR (4th Section) App. No. 77782/01, 27.11.2007

[97] *Ponomaryovi v Bulgaria*, ECtHR (4th section), App. No. 5335/05, 21.06.2011

[98] General Comment No. 20 of the Committee on Economic, Social and Cultural Rights, para. 22

certain racial group; some religious groups may consider that religion includes cultural practices or rituals which otherwise would be considered as part of the ethnic identity.[99]

The HRC and the ECtHR have decided in many cases of discrimination on this basis.[100] Their case reflects the sensitivity of this ground and the problems arising from setting the limits as to the extent to which the state can regulate this area. It is important to understand their approach to cases of discrimination on these grounds in order to correctly interpret their case law.

In considering cases of discrimination on these grounds, the ECtHR assumes the position that establishment of a violation of Articles 9 and 11, because of lack of objective and reasonable justification, is at the same time a recognition of a discriminatory treatment. Therefore, the ECtHR holds that it would not be necessary to consider separately the possible violation of Article 14.[101] However, there are cases in which the Court has assumed a different position. *Milanovic v Serbia* is a case of an attack against a person belonging to the Hare Krishna community by private persons, in which there was no appropriate reaction and investigation by the authorities. The ECtHR found that the state had the positive obligation to provide protection against such attacks and that the state did not fulfil its obligation to investigate the case. Therefore, the Court found a violation of Article 14, in conjunction with Article 3.[102]

Another feature of the ECtHR case law is that the degree of protection of the ***forum internum*****,** (that is adhering to a certain religion, or a religious) is much higher as different from the degree of protection of **manifestations of religious affiliation or belief.**[103] The Court has considered a series of cases on wearing headscarves or other religious attire by students and/or by teachers. Such are the cases *Leyla Şahin v Turkey, Kose and others v Turkey and Dahlab v Switzerland.* In the *Leyla Şahin v Turkey* the applicant, a university student, challenged the ban on wearing headscarves at the university. In this case, the Court found no violation of Article 9, and therefore it did not consider the case under Article 14. According to the ECtHR, Turkey had a legitimate aim for limiting the right to wear religious attire and symbols in public education institutions (university),[104] the aim being protection of the secularity of the state.[105]

The consistency of the ECtHR approach to the protection of the principle of secularity was challenged in a later case of *Lautsi v Italy.* In this case, the presence of religious symbols in a public education institution (school) was challenged by an atheist parent, who considered that crucifixes on the walls of classrooms were in fact religiously indoctrinating her child. The Grand Chamber accepted the arguments of the state that it was a matter not only of a religious symbol, but also of an identity symbol of the state and a symbol of the state's historic development, a

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99 Vickers, Lucy (presentation). "The Relationship between Religion, Race and Ethnicity". LegalNet Website. <http://www.non-discrimination.net/content/media/Vickers_Lucy_Presentation.pdf>.

100 As different from the HRC and the ECtHR, the CJEU has still not considered a case of discrimination on this basis.

101 Jovanovska –Brezovska, Elena, Equality as a basic right. FIOOM: Skopje, 2011, p. 66

102 *Milanovic v Serbia*, ECtHR, App. No. 44614/07, 14 December 2010

103 Susanne Burri "Religious Discrimination (Discussion Paper)", Legal Seminar 4 October 2011, Approaches to Equality and Non-discrimination Legislation inside and outside the EU. p. 2

104 In the *Karaduman v Turkey* case, the Court found that limiting the activities of religious groups in higher education institution was not a violation of Article 9.

105 *Leyla Şahin v Turkey* (2007) 44 EHRR 5

symbol by which the state wished to preserve the tradition. Granting the state the margin of appreciation, the Court established that the issue of placing crucifixes in classrooms was a decision to be made by the state, with European supervision as to whether this or another measure in this respect is justified and proportionate.[106]

The ECtHR has considered many cases of discrimination on this ground in relation to violation of unequal treatment in relation to various freedoms and rights. In the *Hoffmann v Austria case,* the ECtHR considered allegations of violation discrimination in relation to **parental rights** of a mother, a Jehovah's Witness. The domestic courts had to decide whether to grant custody to the mother or to the father. The courts took into consideration the fact that the mother belonged to a minority religious group, which has strict rules of functioning, which include ban on cerebrating Christmas and Easter (while the father of the child was a Catholic), and banning blood transfusion. The mother agreed that the child celebrates Catholic holidays with the father and allow for blood transfusions. However, the domestic courts did not decide in her favour. The ECtHR underlined that any difference in treatment made solely on the grounds of religious affiliation, as it is in this case, could not be justified and amounted to discrimination.[107]

In the case of *Canea Catholic Church v Greece,* the issue of equal access to courts for protection of **proprietary rights** was challenged**.** After the demolition of the surrounding walls of the church, the *Canea Catholic Church* requested protection of proprietary rights before domestic courts, claiming that the church owned the wall. However, the domestic courts refused to process the case claiming that this church does not have legal personality. The applicants proved that in the practice, in similar cases, the Orthodox Church or the Jewish Community was not requested to fulfil the same formalities. Therefore, the Church considered that it was discriminated against on basis of religion. The ECtHR agreed with their claim.

Discrimination in **access to profession** was considered in the case of *Thlimmenos v Greece.* The applicant was a Jehovah's Witness who even after presenting a conscientious objection was not allowed to do military service by doing another type of service that did not require carrying arms. After this, he was sentenced to prison for not doing military service and because of this prison sentence he was not allowed to sit for an exam for the liberal profession of an accountant. The Court found this practice to be disproportionate and one that could not be objectively justified. The Court considered that the state must treat differently groups that are different, and that the state could not have equalized the applicant with other persons who had served a similar prison sentence for perpetrating other types of offences.[108]

In the case of *Continent v Finland,* the Court found that the ECHR does not cover a right to **non-working days to practice religious rites or celebrate religious holidays.** *Kosteski v Macedonia* is another case of non-working days for celebration of religious holidays. In this case, the applicant claimed that he suffered unequal treatment on grounds of religion since he was not allowed non-working days guaranteed by law to persons belonging to certain religions for certain religious holidays. The ECtHR established that there was no discrimination in this case,

106 *Lautsi & Others v Italy*, ECtHR [GC], no. 30814/06, 18 March 2011

107 *Hoffmann v Austria,* (1994) 17 EHRR 293

108 *Thlimmenos v Greece* (2001) 31 EHRR 411

as the applicant was not able to show that he truly belongs to a certain religion; the Court left the question as to how the applicant could prove this unanswered.

An important case in relation to **religious education** is the case of *Savez Crkava Riječ zivota and Others v Croatia.* In this case, the Court found that the state treated differently the churches represented by the applicants on one hand, and the other religious communities that have concluded agreements on issues of common interest with the state, which enabled them to conduct religious education and perform religious marriages with the effects of a civil marriage, on the other. The court found that there was no objective and reasonable justification to condition these additional rights with conclusion of an agreement on issues of common interest.[109]

As different from international law under which religion as discrimination ground is usually treated in combination with **belief,** under the Macedonian LPPD, they are set forth as separate grounds. According to the ECtHR, belief means more than just mere opinions or deeply held feelings. There must be a holding of spiritual or philosophical convictions, which have an identifiable formal content *(McFeeley v the United Kingdom*) that must denote a certain level of cogency seriousness, cohesion and importance *(Campbell and Cosans v the United Kingdom).* Other beliefs can be atheism, agnosticism, as well as positive non-religious beliefs. In the *Kokkinakis v Greece,* the ECtHR explained in detail freedom of thought, conscience, and religious belief, which is of key importance for religion and other religious belief, as well as for the ground other types of belief. According to the Court, in its religious dimension, this freedom is one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, sceptics, and the unconcerned.[110]

There remain many open issues with respect to this discrimination ground. The CJEU is yet to start building its case law on this ground. The scope of exceptions on this ground will have to be defined, in which respect it will be interesting to see how the Court will decide when to apply the genuine and determining occupational requirement for a certain profession. In the area of access to goods and services, the existence of separate male and female areas can be justified in order to ensure "decency". Hence the question whether religious arguments can be used to interpret the meaning of decency and whether these religious arguments could be defined with "secular terms".[111]

The Discrimination in Practice

Examples of discriminatory practices on this ground can be refusal to register a certain religious community, despite the fact that it fulfils all registration criteria; granting benefits to one church or religious community with respect to taxes and settling property issues, as different from another church or religious community.

[109] *Savez Crkava Riječ zivota and Others v Croatia*, ECtHR, App. No. 7798/08 (09 December 2010)

[110] *Kokkinakis v Greece*, (1994) 17 EHRR 397. Para. 31

[111] Susanne Burri "Religious Discrimination (Discussion Paper)", Legal Seminar 4 October 2011, Approaches to Equality and Non-discrimination Legislation inside and outside the EU. p. 4

6. Political belonging

Selected International Case Law

Redfearn v the United Kingdom, Handyside v the United Kingdom Feldek v Slovakia, Castells v Spain, Vajnai v Hungary, Fratanolo v Hungary, Viktor Korneenko, on his own behalf and on behalf of Aleksiandar Milinkievič v Belarus

The term usually used in international law is political and other opinion, which thus covers political belonging.[112] Political belonging should be interpreted to cover the association with a certain political option or party, while also including cases of formal belonging (i.e. membership), and other types of connections that can prove the affiliation with certain party or option. Political and other opinion covers all this[113], but it also covers holding or not holding an opinion about a certain political option or party (including about a specific policy, system or manner or rule) and expression of that opinion (individually or through organized forms). In order to provide for an all-ecompasing interpretation of this ground, and in a manner that would be in line with international law and case law, it is recommended that the discriminatory ground of political belonging covers cases of formal and informal membership and other types of links with political parties, as well as holding or not holding opinion about a political option or party (including about a specific policy, system or manner of rule) and the expression of the opinion (individually or through organized forms).

Discrimination on this ground is often interpreted in light of the contents of the **right to freedom of expression.** This is confirmed with the ECtHR case law in relation to cases of discrimination on this ground. It can be concluded that the Court would consider a case under Article 10, which guarantees this right[114] or under other articles that can be relevant, such as Article 11 (right to assembly and association), Article 2 (right to life), etc.[115] The scope of the right to freedom of expression is best described in the case of *Handyside v the United Kingdom.* According to the principles established with this case, freedom of expression is applicable not only to information or to ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. In this context, the Court demands pluralism, tolerance and broadmindedness without which there is no democratic society. This means, amongst other things, that every regulation expressed through formalities, conditioning, restriction or penalty imposed in this sphere must be proportionate to the legitimate aim pursued.[116]

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112 Political belonging may be considered as a translation of the English language term of "political affiliation", although the literal translation of this term in the Macedonian language would be "association with" and not belonging.

113 See also: General Comment No. 20 of the Committee on Economic, Social and Cultural Rights, para. 23

114 'Handbook on European Non-discrimination Law'. EU FRA and CoE, 2010. p. 129

115 Interights, 'Non-discrimination in International Law – a Handbook for Practitioners (2011 Edition)' (Interights 2011). Available at: <http://www.interights.org/files/174/Non-Discrimination%20in %20International% 20Law%20A%20Handbook %20for%20Practitioners%202011%20Edition.pdf>. Accessed on: 29 September 2013. p.209

116 Applying the margin of appreciation in this case, the Court did not find a violation of the right to freedoms of expression.

In considering these cases, the Court will assess whether such regulations could contribute to the protection of the morals, being thus necessary in a democratic society.[117] The Court pays special attention to the duties and responsibilities everyone assumes when exercising this right, the scope of which will depend on the specific situation and **means employed**. The case of *Castells v Spain* is a case of **public criticism of the government policy** on the Basque country. In this case, the ECtHR found that criminal prosecution of a member of a representative house for allegedly insulting the government was a serious threat to the freedom of expression, because the opinion of the candidate was expressed in a political context, which is essential to a democratic society. In the case of *Feldek v Slovakia,* violation of Article 10 was established in the case of **defamation by political opinion expressed in a publication**. Namely, the applicant claimed that a Minister in the Government had fascist past. The Court found a violation because with the expressed opinions, which the Court qualifies as value judgments that do not require that the person proves them with evidence, the applicant criticized a public figure - a minister, by which the guarantees for acceptable criticism are to be interpreted on wider basis. Despite this, the Court did not find sufficient grounds to establish a violation of Article 14.

Discrimination on the ground of political belonging in the area of **employment** is one of the most frequent discriminatory practices on this ground. Thus, in the case of *Redfearn v the United Kingdom*, the ECtHR deliberated whether the applicant suffered unequal treatment in the field of **employment** due to his affiliation with a political party. Namely, the applicant had worked for a year as a bus driver when he was elected as a councillor of the far right-wing party –the British National Party (BNP)at local elections. After the elections, the company dismissed the applicant, claiming that his well-known belonging to a far right party could have a negative impact on the image of the company, and that the applicant would not be able to perform his duties as usual since on the buss route he was driving there were often persons of Asian origin. Considering that under the UK legislation there is no explicit prohibition of discrimination on the ground of political belonging, the applicant was not able to seek protection against discrimination on this ground under the national legislation. He filed an application with the ECtHR. The Court decided that considering that it was incumbent on the respondent State to take reasonable and appropriate measures to protect employees from dismissal on grounds of political opinion or affiliation. As the United Kingdom legislation is deficient in this respect, the Court concluded that the facts of the present case gave rise to a violation of the Convention.[118]

Political belonging is important also in the context election rights, which would include political marketing activities. The HRC considered the case of *Viktor Korneenko, on his own behalf and on behalf of Aleksiandar Milinkievič v Belarus.* According to the facts of the case, during the Presidential elections in Belarus the applicants possessed electoral marketing material **to be used for the election campaign,** considering that one of the applicants was a candidate for a president at the elections. The car of one of the applicants was stopped by the police when he was transporting a significant quantity of this material, and the police seized the material. The applicants were not successful in their attempts to get protection from the domestic institutions

[117] *Handyside v United Kingdom* (1976) 1 EHRR 737

[118] *Redfearn v UK* (2013) 57 EHRR 2, para. 57

and therefore filed their case with the HRC. The HRC considered that the state treated the applicants differently on grounds of political affiliation. [119]

Series of Cases of Violation of the Right to Assembly and Association on the Gound of Political Belonging

The ECtHR has considered a series of cases of violation of the right to assembly and association on the ground political belonging of applicants. A portion of such applications have been filed versus Turkey with reference to dissolution of opposition parties. The other cases are against prohibitions on the registration of political parties or organizations of political parties or organizations by minorities with the explanation that these organizations were striving towards the violation of the constitutional orders of the concerned states. Therefore, these cases have been considered as cases of political affiliation. As different from these cases, cases that the ECtHR considered with reference to the conflicts in Northern Ireland were considered as cases filed by persons belonging to national minorities.[120]

The issue of the right to **display political symbols,** related to certain political opinions, has been considered on several occasions. In the *Vajnai v Hungary* and in the *Fratanolo v Hungary cases,* the Court deliberated on the extent of allowed interference in the exercise of this right guaranteed under Article 10, considering the prohibition of displaying the red star (symbol of communism and the communist movement). In both cases, the Court decided that such interference goes beyond what is allowed.

The Discrimination in Practice

Public opinion polls in Macedonia show that discrimination on the ground of political belonging is identified as one of the most frequent types of discrimination. Discrimination on this ground most often occurs in the field of employment, as dismissal from work or non-employment because of a certain political affilitation, as well as in areas of career promotion, dependent on the political party affiliation. Discrimination on this ground can also be encountered in the area of education, featured with selective political party based approach to providing education possibilities, enrolment in formal education institution, trainings, etc.

7. Mental and physical disability

Selected International Case Law

Farcas v Romania, Sonia Chacón Navas v Eurest Colectividades SA, Coleman v Attridge Law and Steve Law, Pretty v the United Kingdom, Glor v Switzerland, Price v the United Kingdom, Alajos Kiss v Hungary, Zsolt Bujdoso and Five Others v Hungary, Mandy Malone v the United Kingdom

[119] *Viktor Korneenko, on his own behalf and on behalf of Aleksiandar Milinkevich v Belarus*, 24 April 2009, CCPR/C/95/D/1553/2007

[120] See Interights, 'Non-discrimination in International Law – a Handbook for Practitioners (2011 Edition)' (Interights 2011) Available at: <http://www.interights.org/files/174/NonDiscrimination%20in%20International%20Law%20A%20Handbook%20for%20Practitioners%202011%20Edition.pdf>. Accessed on: 26.09.2013. p. 209-210, and 'Handbook on European Non-discrimination Law'. EU FRA and CoE, 2010.

The ICRPD defines discrimination on this ground as any "distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation."[121] In the *Sonia Chacón Navas v Eurest Colectividades SA case,* the CJEU defined disability as "a limitation which results in particular physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life".[122] Lack of reasonable accommodation[123] also amounts to discrimination on the ground of disability.

Unlike other protected characteristics that are fixed and permanent, mental and physical disability is not limited by clearly defined borders that distinguish them from the "other". Any person, at any point of their life could potentially acquire this protective characteristic.

This concept was first considered under the so-called **medical model,** according to which the difference in the treatment of persons with disabilities is a result of the functional limitations of the concerned individual.[124] The alternative to this model appeared later and was called the **social model**, which in fact represents the contemporary understanding of the concept of disability. According to this model, the root ot the disability is not in the health status of the concerned person, but in the obstacles that society creates by understanding physical and mental capacity as the basis for the socially acceptable standard. [125] This means that institutions, attitudes and the surrounding environment are the source of disability, since they are designed to fit the "able-bodied." Recognizing the role of society in creating obstacles for persons with disabilities, this model claims that the social difference ascribed to disability, and not the disability itself, should be a matter of legal regulation.[126] Accordingly, the problem of disability does not consist of personal limitations, but of the failure of society to ensure appropriate services and to ensure that the needs of persons with disabilities are fully taken into consideration in the decision-making processes in the society. [127]

Similarly to other discrimination grounds, the case law has shown that if the ECtHR finds a violation of some of the Convention rights, but does not consider that the violation of the principle of equality is of substantive importance in the given case, the Court might consider it unnecessary to deliberate the case under this Article (the ECtHR has proceeded in this way in

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121 ICRDP, Article 2.

122 When reading this definition, it should be taken into consideration that the Court has given this definition in the context of the Framework Directive (area of employment). Source: Case C-13/05 *Sonia Chacon Navas v Eurest Colectividades SA,* para. 43

123 On "reasonable accommodation", see Chapter II-2.

124 Fredman, S, Discrimination Law (2nd edn, OUP 2011), p.95

125 Adapted from: Activists and Advocates – program of training on rights of persons with disabilities. Source: Farkas Lila and Simeon Petrovski, Handbook for training of judges about anti-discrimination legislation, OSCE, Skopje, p. 21

126 Fredman, S, Discrimination Law (2nd edn, OUP 2011), p.95

127 „The legal protection of persons with mental health problems under non-discrimination law; Understanding disability as defined by law and the duty to provide reasonable accommodation in European Union Member States" FRA (2011). <http://fra.europa.eu/sites/default/files/fra_uploads/1797-FRA-2011-Legal-protection-persons-mental-health-problems-report_EN.pdf>. p. 9

the case *Alajos Kiss v Hungary)*. In some cases, the applicants themselves have not requested that discrimination be established, despite the fact that in the given case there has been an evident unequal treatment. Thus, in the case of *Price v the Untied Kingdom,* the applicant suffered from physical disability, owing to which she needed a wheelchair to move and she needed assistance from another person due to kidney malfunction. She was detained for several days and then she was transferred to prison, in the course of which no adjustments were made to the applicant's condition in order to accommodate for her disability. Hence, the applicant complained of violation of Article 3 (she did not request that a violation of Article 14 be established).

A key issue in the context of **voting rights** is the individual and clear independent assessment of the capacity of the person to vote. Considering the issue of a general ban on voting by persons placed under guardianship, in the case of *Alojos Kiss v Hungary,* the ECtHR raised concerns about the approach according to which all persons with intellectual or mental disability were treated as a group having the same faculties, without subjecting the limitation of their rights to individual and clear assessment, i.e. review. In this specific case, the application of such an approach would mean deprivation of the right to vote only due to the fact that a person with mental disability has been placed under partial guardianship, without individual and independent assessment of the capacity of the person to vote. The ECtHR considers that such treatment runs contrary to the ECHR.[128]

As mentioned above lack of reasonable accommodation[129] amounts to discrimination on grounds of disability. In the *Glor v Switzerland* case, the ECtHR found that the state did not fulfil its obligations to provide for a different treatment of the applicant who considering his diabetes condition could not do military service, but was still obliged to pay tax for not serving the army, the same as persons who chose not to serve the army.

The issue of **scope of protection** against discrimination on grounds of disability was discussed in the case of *Pretty v the United Kingdom.* In this case, the ECtHR established that the impossibility of the applicant suffering physical disability to commit suicide by herself did not place her in an unequal position compared to people who were able to commit suicide by themselves. In the *Farcas v Romania case*, the applicant[130] needed access to the building of domestic courts to institute legal proceedings against his dismissal after 20 years of employment, which resulted from the fact that the applicant was not able to access the new premises of the employer. The ECtHR found the application filed by the applicant – a person suffering from muscular dystrophy, complaining that because of his disability he cannot enjoy equal access to courts, inadmissible. The ECtHR was of the opinion that the person could exercise this right indirectly - through another person or by mail.

The CJEU considered the case of *Coleman v Attridge Law and Steve Law* as a case of **disability discrimination by association.** A mother of a disabled child was exposed to an onslaught of

[128] *The case of Zsolt Bujdoso and Five Others v Hungary* is a similar case with similar findings, considered by the CRPD.

[129] On "reasonable accommodation", see Chapter II-2.

[130] A case of unequal treatment in access to goods and services is the case of *Botta v Italy.* In this case, the Court considered that the impossibility of the disabled applicant to access the beach managed by a private owner, could not be linked to the right to private life, as claimed by the applicant. Consequently, the Court did not consider the case in detail under Article 14.

insults at her workplace, due to her frequent leaves of absence from work because of the condition of her child with a disability. After this, she left the job. Although she was not personally discriminated against and did not possess the protected characteristic, she felt that her dignity was violated. The Court found discrimination on grounds of disability.[131]

The Discrimination in Practice

Discrimination on this ground most often occurs in the form of lack of reasonable accommodation, for example, absence of ramps, lifts, hearing aids for safe movement and access, lack of accessible information for persons with impaired vision and hearing that would enable them to be involved in the decision making processes, lack of appropriate equipment and teaching staff enabling school attendance by disabled children, etc.

8. Health condition

Selected International Case Law

Kiyutin v Russia, I.B. v Greece, GN v Italy, S.H. and Others v Austria

According to the World Health Organization, health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.[132] This provision protects persons from unequal treatment on grounds of present, but also past health condition (for example, a former drug user may be discriminated against if he/she is dismissed from work because of his/her former health status). According to the CESCR health status as a ground of discrimination applies both to the physical and mental health of the person.[133]

The limitations that a state wishes to impose in relation to health status, by relying ion arguments such as **national security or the preservation of public order,** must be in accordance with international human rights standards, domestic law, and must be compatible with the nature of the rights protected by the Covenant, and should lead to the legitimate aims pursued, and should be strictly necessary for the promotion of the general welfare in a democratic society.[134]

In the *Kiyutin v Russia case*, the ECtHR confirmed that **persons living with HIV** were to be protected under Article 14, in light of the fact that health status is considered to be part of protected grounds covered by "other status". The applicant was denied a residence permit only because he tested positive for HIV. In this case, the Court for the first time recognized that such persons represented a vulnerable group that was to enjoy special protection and that in limiting their rights greater degree of protection was to be applied. Furthermore, in the *I.B. v Greece case,* the ECtHR explicitly stated that the problem of being HIV positive could not be regarded as

131 Case C-303/06 *Coleman v Attridge Law and Steve Law*

132 Constitution of the World Health Organization-WHO <http://www.who.int/governance/eb/who_constitution_en.pdf>. Accessed on: 28 September 2013

133 General Comment No. 14 of the Committee on Economic, Social and Cultural Rights.

134 *Ibid,* para. 28

medical issue only, but as a problem that profoundly affects the private lives of individuals. In this case, the ECtHR found discrimination in employment by an employer that under pressure from other employees in the company dismissed the applicant when it was made known that the applicant had HIV. Despite the fact that the employer undertook all measures to reassure the employees that there was no threat that the HIV virus be transmitted to the other employees, the employees continued their pressure. Ultimately, the employer decided to dismiss the applicant.[135]

GN v Italy[136] is a case of discrimination on grounds of health status in relation to a **genetic disease.** Patients with haemophilia and patients with thalassemia were infected with the HIV or hepatitis C virus during blood transfusion in a public health care institution. In an out-of-court settlement, the Ministry of Health paid damages only to persons with haemophilia (or to their inheritors), but not to people with thalassemia. Considering the that health status is not explicitly referred to in Article 14 (of the ECHR), the ECtHR relied on the open nature of this provision, arguing that genetic characteristics were a discrimination ground by referring to Article 21 of the EU Charter. The Court found such difference in the treatment to be unacceptable, awarding non-material damage in the amount of more than 2 million Euros to the seven applicants.

In *S.H. and Others v Austria,* the ECtHR established that the restrictive policy of the state regarding possibilities for **artificial insemination,** according to which the applicants could not undergo the procedure for artificial insemination could not be considered as unjustified. Despite the fact that the Court did not find a violation in this case, it clearly underlined that science and possibilities for artificial insemination were fast developing and therefore states needed to frequently review and update rules on artificial insemination.

The Discrimination in Practice

Discrimination on this ground could for example be denial of access to education (or to employment, health care, free movement, housing, asylum, etc.) for a person living with HIV; ban on entry into facilities for persons with leprosy or albinism, etc.[137]

[135] *I.B. v Greece,* ECtHR (1st Section), App. No. 552/10 (03.10.2013)

[136] *GN v Italy*, ECtHR, App. No. 43134/05 (2009)

[137] General Comment No. 20 of the Committee on Economic, Social and Cultural Rights, para. 33

9. Age

Selected International Case Law

Solis v Peru, Love v Australia, Schmitz-de-Jong v the Netherlands, Schwizgebel v Switzerland , D.G. v Ireland, Bouamar v Belgium, T. v the United Kingdom, V. v the United Kingdom , Werner Mangold v Rüdiger Helm, Félix Palacios de la Villa v Cortefiel Servicios SA, R (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform, Seda Kücükdeveci v Swedex GmbH & Co. KG, Joined cases C-250/09 and C-268/09 Vasil Ivanov Georgiev v Tehnicheski universitet - Sofia, filial Plovdiv, Domnica Petersen. v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe, Colin Wolf. v Stadt Frankfurt am Main

"Age" as ground refers to the years of age of the person who is a potential victim of discrimination. There is a difference between the genuine processes of aging as compared with the processes ascribed to aging. The beliefs about the characteristics and qualities that a person has depending on their age are deeply rooted in the general perception of people. Even more, the difference in treatment of this ground is often justified in the legislations. Ageism is the term that explains the deep discomfort young or middle-aged people feel (personal resentment) towards aging, illnesses, impairments, fear from the sense of powerlessness, death.[138] Protection under this ground covers not only persons who are ordinarily considered young or old, but also any person who potentially could suffer unequal treatment because of the age ascribed to them.

Despite the fact this basis is seemingly simple to define and apply, the fluid character of this ground makes its definition greatly dependent on the comparator in this specific case, while its application will depend on the specific circumstances of the case. The same as disability, it is difficult to establish a uniform designation of the "other" in the context of age as discrimination ground, because throughout their life all people can be part of one or another protected group.

Discrimination on the grounds of age is a recent development in the international setting, as it is in the context of domestic legislation. This ground has not been explicitly set forth in human rights treaties. However, human rights bodies have considered age discrimination cases in their case law, indirectly demonstrating that protection of equality and protection against discrimination is applied to this ground, as well. An exception to this is the ICRPD, which explicitly mentions age in its preamble and which by applying the "twin track approach" dedicates a separate article to a specific age group.[139] Such late development could be explained with the fact that the problem of demographic aging has become visible and attached significance only recently.[140]

In determining the scope of legal protection against discrimination on this gound, it is important to take into consideration **the relevant exceptions**. The exceptions need to be reasonably

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138 Butler, Robert. *Age-ism: Another Form of Bigotry*. The Gerontologist (1969), 9, 243-246

139 Interights, 'Non-discrimination in International Law – a Handbook for Practitioners (2011 Edition)' (Interights 2011) <http://www.interights.org/files/174/Non-Discrimination%20in %20International%20Law %20A%20Handbook %20for%20 Practitioners% 202011% 20Edition.pdf> 205.

140 General Comment No. 20 of the Committee on Economic, Social and Cultural Rights, para. 10

justified, necessary, and proportionate to the goal pursued. Furthermore, considering the continual changes in society and in the standard of living, including the continual increase of life expectancy, it is necessary to occasionally revise both the determined age limits, and the applicable scope of legal protection.

The practice shows that discrimination on this ground can occur in subtle forms. For example, the burden of company restructuring most often is carried by workers of older age, while the elimination of jobs of these workers is most often justified with the fact that the job has become obsolete, then with arguments about the need for renewal of the personnel, etc. Age discrimination can be direct or indirect. The case of *Solis v Peru* is such a case. In this case, the HRC found that taking age as one of the determining criteria for reorganization of the civil service was not a legitimate goal.

Determining age as a limit for **employment and compulsory retirement** are the most common practices. These practices are often justified.

The CJEU has decided on the issue of maximum age for **recruitment into a given profession.** In the *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* case, it decided on the dentists' profession, while in the case of *Colin Wolf. v Stadt Frankfurt am Main*, it decided on the profession of a fire fighter. In these cases, the Court stated that age discrimination is allowed when this was required by the nature of the profession (for example fire fighters), or if this was necessary for protection of the health, and if there was a legitimate goal (for example, employment policy, possibilities for continous learning and training, etc).

In the *Werner Mangold v Rüdiger Helm case,* the CJEU has deliberated whether the German law discriminated on grounds of age with respect to **protection of employment rights of workers.** Namely, the German law envisaged that fixed term contracts of more than two years, or fixed term contracts renewed for more than three times in a period of two years must be supported with an objective justification by the employer. However, there was an exception according to which for workers older than 58 years of age such justification did not have to be provided. This was set forth as a positive action that would stimulate employment of older persons. However, the applicant did not see this as positive measure; the applicant considered that this exception was in fact discriminatory against older persons since it provided for a lower level of protection in employment. According to the CJEU, the principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law, considering its link to the general principle of equal treatment, which is a common principle of Community law. The CJEU established a problem consisting of the fact that that during the transposition, i.e. during the period necessary to transpose the relevant Directive, Germany did not refrain from undertaking measures that would have a detrimental effect of the goal pursued with the Directive. In the case of *Seda Kücükdeveci v Swedex GmbH & Co. KG,* the CJEU established that despite the fact that the policy pursued under the national legislation according to which years of service before the age of 25, are not taken into consideration in calculating the minimum notice period pursued a legitimate goal, the means employed to pursue that goal were neither necessary nor proportionate.

In the *Joined cases C-250/09 and C-268/09 Vasil Ivanov Georgiev v Tehnicheski universitet - Sofia, filial Plovdiv* provisions on **compulsory retirement** of professors who reached the age of 68,

and provisions allowing employment of persons above the age of 65 only under fixed term contracts were challenged. The CJEU considered that these were justified measures in pursuance of a legitimate goal, which in this case was employment of younger staff as professors. In the case *Love v Australia,* the HRC considered that dismissal of a worker of an airline company on grounds of attained age by the worker owing to safety reason was objective and reasonable.

In the *Félix Palacios de la Villa v Cortefiel Servicios SA* case*,* the CJEU challenged provisions of the Spanish national legislation envisaging automatic compulsory retirement of workers who have attained the age of 65 and completed the minimum period of contributions entitlement to a retirement pension under their contribution regime. A similar case is the case of *R (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform*. In this case, the applicants, an alliance of several non-governmental organizations, challenged the amendments to domestic UK legislation according to which workers of 65 years of age or more may be retired (dismissed) and that the employment could continue only upon the request of the worker and approval by the employer.[141] The main issue challenged in this case is whether the tests of direct and indirect discrimination are equal, in which respect the Court stated that they were indeed not equal. The conclusion deriving from this case is that the threshold for justifying the exception from the rule prohibiting direct discrimination, i.e. for finding justification of direct discrimination is very high, considering that direct discrimination is to be considered as incompatible with the Community law.

There are age limits for utilization of **welfare benefits.** These limitations are not always discriminatory. Thus, in the case of *Schmitz-de-Jong v the Netherlands,* the HRC did not establish discrimination, i.e. it did not consider that the fact that pensioners' pass (allowing payment of reduced fees for public transport, museums etc.) could be used by partners of holders of this pass provided that they are 60 years of age and older was discriminatory.

Regulations on **adoption** could also be discriminatory on the basis of age. The case of *Schwizgebel v Switzerland* is a case of a 47-year-old woman who tried to adopt a second child. The state did not allow the adoption because of reasons, which *inter alia* included her age. The applicant brought her case to the ECtHR, claiming difference in treatment compared to younger women that could adopt a child. Despite the fact that the Court found evident unequal treatment on the basis of age, in the specific circumstances of the case, the Court found that such a difference in the treatment was justified, since the adoption could incur an additional financial burden.

The ECtHR has considered a series of cases about the treatment of **children (minor) prisoners.** Namely, in the *D.G. v Ireland case*, the applicant complained that the conditions in the prison were not appropriate to his age. The ECtHR did not agree and found that in the specific case and

[141] Despite the fact that the applicants refer to similarities with the case of *Félix Palacios dela Villa*, there are differences between these two cases. Namely, the UK Government referred to improving the conditions for work force forecast and management as basis for the introduction of the new policy, while in Spain the main reason was "changes in the employment policy". Furthermore, age is the only criterion in the UK case, as different from the Spanish case in which the condition of reaching a certain payment amount was also present. Despite this, the pensionable age and the accompanying conditions in Spain have not been agreed in a participatory process as in the United Kingdom.

considering the crime for which the applicant was convicted there was objective and reasonable justification for equalizing the treatment of the juvenile with that of adults. In the *Bouamar v Belgium* case, a juvenile, who was non-Belgium national, was detained until a guardian was asigned. Despite the fact that in the *T. v the United Kingdom* and in the *V. v the Untied Kingdom* cases the issue of age discrimination was raised, because two minors were not provided with a trial appropriate to their age, the ECtHR found a violation of Article 6 and thus did not consider the case under Article 14. This is a case of two juveniles whose trial received great publicity because of the crime they perpetrated (namely the applicants kidnapped a two year old child from a supermarket, beat up the child with bats and left the child on the railway tracks to be run over by a train).

The Discrimination in Practice

Examples of discrimination on grounds of age can be setting age as a condition for employment, and justifying this only with economic arguments or in cases in which age cannot be considered as a determining requirement for a certain profession; ensuring possibilities for additional training and education only to persons of a certain age; unequal access by adolescents to information about sexual and reproductive health or to health care services related to reproductive health,[142] etc.

10. Education

Education as a discrimination ground covers individual degree of education, education achievements, skills, certificates, and possibilities for education an individual has.[143] It covers both formal and informal education.

In absence of case law on this ground by international courts and treaty bodies, a useful starting point in understanding this ground could be three theories that consider the role and importance of education. These are the criticism of the credentialism theory, meritocracy and defence of public education.[144] All these theories consider the problem of discrimination on grounds of education from different viewpoints, depending on how they define education. Thus, according to the credentialism critique the problem consists of measuring education according to degrees or qualifications; according to the meritocracy critique the problem consists of understanding education as a skill or achievement, while according to the defence of public education critique, education is viewed through the concepts of equity and fairness in providing possibilities for acquiring education to all in society, yet ultimately this leads to concentration of limited resources on a small proportion of the population.[145]

[142] General Comment No. 20 of the Committee on Economic, Social and Cultural Rights, para. 29.

[143] Stuart Tannock (2008) The problem of education-based discrimination, British Journal of Sociology of Education, 29:5, 439

[144] *Ibid*, 443

[145] *Ibid*. 443

There is a great difference in the volume of literature about discrimination on grounds of education and literature about discrimination in the field of education.[146] This ground is often neglected in literature and is ranked low on the scale of protected grounds, which is most probably owed to its treatment as a proxy in establishing discrimination on some other ground.[147] An example in this context can be the US Voting Rights Act, according to which in order to exercise rights under this Act persons must prove that they are able to read, write, understand and interpreted a certain issue, to demonstrate some education achievement or knowledge in a certain area.[148] According to the analysis of the background of this provision, it has originated from the situation in the south of the USA, as a means to limit the voting rights for Afro-Americans.[149] Interpreting this provision in the *Lassiter case,* in 1959, the US Supreme Court underlined that illiteracy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters.[150]

It seems that discrimination on this ground is still easily accepted and justified and rarely there are in-depth analyses of the reasonable justification or of the proportionality and legitimate goal pursued in cases of unequal treatment on this ground. For example, Article 14(2) of the LPPD envisages that the "different treatment of the persons on the basis of characteristics related to any discriminatory ground, when the said characteristics, by the nature of the particular occupation or activity, or of the conditions in which it is carried out, constitute a genuine and determining requirement, the objective is lawful, and the requirement does not exceed the necessary level for its achievement" will not be considered as discrimination.[151] This means that it is left to courts to develop relevant case law regarding the application of this exception in the context of education as discrimination ground, by focusing and analysing practices that could potentially be discriminatory.

The Discrimination in Practice

Discrimination on this ground could occur as setting possession of a certain degree of formal education as a condition for applying for a certain job, which is unreasonable or not justified (for example requiring possession of a higher education diploma for the job of a janitor) or a public job advertisement setting strict criteria regarding certain level of education achievements that cannot be compensated for with years of experience (for example, a person who has completed secondary education and has worked 10 years in a given area or who has the same years of experience on a similar position cannot apply for a job for which exclusively higher education degree is required and significantly less years of experience in the area in which the job candidate has worked).

146 Convention against Discrimination in Education of the UNESCO, elaborates the issue of discrimination in education. For its own purposes, this Convention defines education as "all types and levels of education, and includes access to education, the standard and quality of education, and the conditions under which it is given." (Article 1(2)). Source: Convention against Discrimination in Education 1960, Paris, 14 December 1960.

147 Stuart Tannock (2008) The problem of education-based discrimination, British Journal of Sociology of Education, 29:5, 442

148 Voting Rights Act, 1965, Sections 4(a)(1) and 4(c)

149 Stuart Tannock (2008) The problem of education-based discrimination, British Journal of Sociology of Education, 29:5, 442

150 Lassiter, US Supreme Court 1959, 51–52. Available at: <http://supreme.justia.com/cases/federal/us/360/45/case.html>.

151 Law on the Prevention of and Protection against Discrimination. Official Gazette of the Republic of Macedonia No. 50/2010; Decision of the Constitutional Court No. U. 82/2010 (15 September 2010), Article 14(2)

11. Family or marital status

Selected International Case Law

Shackell v the United Kingdom, Burden and Burden v the United Kingdom, B. and L. v the United Kingdom, Petrov v Bulgaria, Serife Yigit v Turkey, Munos Diaz v Spain

Family or marital status covers marriage, consanguinity or parent relationship that a person has with other persons. A person may not be married, be married, divorced, widow/widower, live separate from his/her spouse, live in a registered partnership, live in a relationship, which is not legally regulated, be a single father/mother, be married and have or not have children and/or dependants, be a dependant, have or not have parents, have certain relatives, etc.

The unequal treatment that has been most often considered relates to different possibilities for access to **social protection** for persons who are in a marriage and those who are not. Such a difference in the treatment may be justified if it is based on reasonable and objective criteria. According to the ECtHR, the differentiation between persons in marriage and those out of wedlock is justified, since married persons have decided to be subject to a certain system of regulation. Thus, in the *Shackell v the United Kingdom* case, the Court decided that married couples and those who are not married were not in a comparable situation, in a case of welfare assistance for a widow/widower, since marriage was an institution, which is generally accepted to be granting special status to those who decide to enter this arrangement.

The Court has repeated this position in the *Burden and Burden v the Untied Kingdom* case. Marriage brings a corpus of contractual rights and duties of social, personal and legal nature (see *B. and L. v the United Kingdom)*. In this case, the Court deliberated whether the applicants, two sisters, who had been living together for a longer period, were discriminated against compared to married couples or to persons in civil partnership, because in case of inheriting property they would pay much higher taxes than married couples or registered partners. In this case, the ECtHR did not find discrimination, because it considered that the applicants could not be compared to such couples. The Court considered that the determining characteristic of the cohabitation of the applicants – their consanguinity- represented at the same time a prohibition for entering into marriage or for conclusion of a civil partnership. This makes the essential character of their cohabitation substantively different from the relationship of people who are married or live in a civil partnership. The Court did not find discrimination in this case.

The issue of difference in treatment has been raised with respect to the manner in which the marriage has been concluded, i.e. cases of **recognition of religious marriages or marriages concluded according to cultural traditions** (traditions of minorities). In the *Şerife Yiğit v Turkey* case, the ECtHR found that despite the fact that the applicant was subjected to a different treatment with respect to exercise of the right to survivor's pension on her late partner's entitlement with whom she entered only in a religious marriage, the difference in the treatment was justified since there were no other evidence of the interaction of the applicant with the legal system of the country where their marriage would be recognized. This is the key difference between this case and the case of *Munoz Diaz v Spain,* a case of a marriage concluded in

pursuance with cultural traditions of Roma. In this case, the relationship between the applicant and her spouse was recognized by the state, and her spouse paid special contributions for her, and they had children together. Thus, the ECtHR considered that the denial by the state to grant the applicant a survivor's pension was not justified and that Article 14 was thus violated.

In international case law, the difference in the treatment on this ground has also been considered with respect to **rights of prisoners.** Namely, in the *Petrov v Bulgaria* case, the ECtHR found that it was not justified to allow married prisoners telephone conversations with their spouses and not to allow telephone conversations to prisoners who live with their partners out of wedlock.

The Discrimination in Practice

Discrimination on this ground may occur for example as discrimination of persons who live out of wedlock with respect to adoption of children, if adoption is allowed only to persons who are married; or single parents who are forced to work overtime if they want to keep their job, etc.

12. Personal or social status

Selected International Case Law

Kjeldsen, Busk Madsen and Pedersen v Denmark, Magee v the United Kingdom, Carson and others v the United Kingdom, Laduna v Slovakia, Manuel Wackenheim v France, Van der Mussele v Belgium, Aurélio Chainho Gonçalves et al. v Portugal

Personal or social status is a protected ground, which is related to the physical appearance and characteristics, the origin, the affiliation with a certain profession, former or present status of a prisoner or an immigrant, etc. It is determined by a certain personal characteristic which the individual possesses or is presumed to possess, or by the status in society that the person has in relation to thesecharacteristics.[152]

There is no developed international case law that would be instrumental in delimiting the scope of this protected ground. The ECtHR case law does not clearly define the exact meaning of personal status.[153] Despite the fact that it is considered that this Court most often links personal status with inherent personal characteristics, the Court has applied this ground also in cases in which such inherent characteristics are lacking. In the case of *Mageen v the United Kingdom,* the ECtHR did not find an element according to which, it would consider cases of different treatment with respect to **geographic location of persons** under the ground personal status. Namely, in this case the Court did not find that determination of different procedural rights for persons detained in England and in Wales, compared to those detained in Northern Ireland amounted to unjustified unequal treatment. As different from this case, in the *Carson and others*

[152] Adapted from: Najcevska Mirjana and Bekim Kadriu. Terminology Glossary for Discrimination. OSCE and MCIC: Skopje 2008, p. 57

[153] For example, in the case of *Kjeldsen, Busk Madsen and Pedersen v Denmark,* the ECtHR decided that there was no room for application of the ground personal status, when deliberating the issue of a potentially unequal treatment because of the different status of religious and sexual education in schools.

v the United Kingdom case, the Court found that the different application of the same system in two different locations raises the issue of personal status in terms of the place of residence of a person. In this case, there was unequal treatment of pensioners depending on the place of their residence. Hence, pensioners residing outside the United Kingdom received fixed amount pensions, as different from pensioners residing in the United Kingdom.

The decision in the *Magee v the United Kingdom* case, however, does not mean that the ECtHR does not consider the status which a person might have because they **have been deprived of freedom** (either in prison or in detention) as part of the personal status ground. Namely, in the *Laduna v Slovakia case,* the ECtHR evidently underlined that the status of a prisoner should be considered as a personal status. According to the Court, "Detaining a person on remand may be regarded as placing the individual in a distinct legal situation, which even though it may be imposed involuntarily and generally for a temporary period, is inextricably bound up with the individual's personal circumstances and existence."[154]

In international case law, there are many cases in which applicants claimed to be victims of unequal treatment owing to the **profession** they were engaged in. In great number of the cases, courts and bodies have found that different treatment in taxation, access to a profession, etc. are justified and that they derive from the nature of the specific profession in question. For example in the *case of Vander Mussele v Belgium,* the ECtHR considered that different criteria for pupil avocat (lawyer) and other interns are justified. In the case of *Aurélio Chainho Gonçalvesetal v Portugal*, the ECtHR considered that the rule according to which taxes were levied for tips of croupiers only was reasonable and could be objectively justified.

Physical appearance and features covered by this ground were considered by the HRC. Thus, in the *Manuel Wackenheim v France* case, the Committee decided whether the introduction of a ban on circus acts of **dwarf** tossing constitutes unequal treatment because the ban interfered with the right of these persons to work and the possibility to earn their living. The state justified the introduction of the ban with the argument that such circus acts were a direct violation of Article 3 (ECHR) and that by introducing the ban the state wanted to protect these persons from such a treatment. The HRC considered that there was a reasonable justification for the ban and did not find discriminatory treatment of persons suffering from dwarfism in this case.[155]

In order to avoid undermining the protection against discrimination in its application on grievous forms of discrimination in a given case, not every possibility should be used to invoke protection on this ground, in order not to create a situation in which every case where this ground will be invoked becomes a case of multiple discrimination.[156]

The Discrimination in Practice

A former prisoner, who despite the fact that he/she possesses relevant qualifications and work permit, is not employed only because of his/her former prisoner status, without reasonable justification; different treatment in access to goods and services depending on the physical appearance or attire of a person, which is linked to a certain social status, etc.

154 *Laduna v Slovakia*, ECtHR, App No 31827/02, 13.12.2011, para. 55

155 *Manuel Wackenheim v France,* Communication No. 854/1999, CCPR/C/75/D/854/1999 (2002)

156 Comments from the First Conference on Discrimination Grounds.

13. Social origin

Social origin as a discrimination ground refers to **inherited** status of a person, position acquired through birth into a particular social class, or community, or social situation- such as poverty and homelessness.[157] The term origin itself points to the fact that the affiliation of a person is determined according to the affiliation of his/her ancestors,[158] which is the main difference between this discrimination ground and the ground social status.[159]

Birth into a certain family that has a certain status may mean birth in a home, which has been illegally built, or in an informal settlement or in a family that is internally displaced or has a nomadic life.[160] The social status of the person, which might bring poverty, segregation, etc., can result in pervasive discrimination, stigmatisation, and negative stereotyping, which can lead to the refusal or unequal access to the same quality of education and health care as others, as well as to the denial or unequal access to public places.[161]

The same as in the case of personal and social status, there is scarce international case law that would elaborate this ground in detail. Hence, this task is left to practitioners.

The Discrimination in Practice

Unequal access to food, water, health care institutions, educational institutions etc. because of the place of residence of the person and which might directly result from the person's social status; impossibility to apply for pecuniary assistance from the state to cover subsistence costs for persons that are in need of welfare assistance.

14. Property status

Selected International Case Law

Airey v Ireland, Chassagnou v France, James and others v the United Kingdom, Pine Valley Developments Ltd and others v Ireland

Property status includes real property (e.g., land ownership or tenure) and personal property (intellectual property, goods and chattels, and income), or the lack of it.[162] From the viewpoint of ownership, property status may refer to the status of person in relation to land or in relation to other property (tenant, owner, or illegal occupant, or illegally constructed buildings).[163] This

[157] 'Handbook on European Non-discrimination Law'. EU FRA and CoE, 2010. p. 129

[158] Najcevska Mirjana and Bekim Kadriu. Terminology glossary for discrimination. OSCE and MCIC: Skopje 2008, p. 93

[159] The issue of making a distinction between these two bases was raised at the Conference No. 1

[160] General Comment No. 20 of the Committee on Economic, Social and Cultural Rights, para. 34

[161] *Ibid*. para. 35

[162] *Ibid*. para. 25

[163] 'Handbook on European Non-discrimination Law'. EU FRA and CoE, 2010. p. 129; General Comments of the Committee on Economic, Social and Cultural Rights Nos. 15, 4 and 20

status is connected with the power deriving from the property of the person or of the person's family with which the person identifies himself/herself or is identified with by others, regardless whether the person has acquired such power by himself/herself or has inherited it.[164]

Persons may be connected with certain property status for example through ownership deeds for certain immovable or movable property, or through statements of the person or his/her family about the property status; then because of residing in an informal settlement; tenancy, amount of income, etc. Property status as a protected characteristic may be applied in a specific case regardless of the fact whether the person or his/her family really have that property power, if it is matter of a presumed characteristic or of discrimination by association.

Property status may have an impact on the enjoyment of rights by a person. Thus, in the case of Airey *v Ireland,* the ECtHR deliberated whether there was an unequal treatment in **access to courts** on grounds of property status. The applicant was unsuccessful in concluding a separation agreement with her husband, who subjected her to physical violence. Therefore, her only option was judicial separation. She did not have the required funds to pay for the court proceedings, and in absence of free legal assistance, she was not able to complete the judicial separation proceedings. The ECtHR found that the legal remedies the applicant had available could not be considered as effective, since her property status prevented hew from accessing such remedies. Defence without a legal representative in this case was not an option because of the complexity of the proceedings before the Supreme Court of Ireland. Therefore, the state was obliged to undertake measures that would enable the applicant to exercise the right to legal aid. The ECtHR found violation of Article 6, since the applicant did not have effective access to court, and in line with its then practice, the Court did not go over to considering the case under Article 14.[165]

In the *Chassagnou v France* case, the ECtHR established difference in treatment based on property status. This ground was considered in this case with respect to **owners of smaller and larger properties.** Owners of smaller properties were asked to transfer hunting rights over their land for purposes of creating public hunting grounds, while they wanted to protect their properties and prevent hunting on them. Owners of larger properties were not asked to transfer such rights. The ECtHR considered that the state did not have a legitimate goal that would justify this difference in the treatment.

The case law of the ECtHR shows that the difference in the treatment of smaller and large landowners is not always considered unjustified. In the case of *James and others v the United Kingdom,* the ECtHR established no unequal treatment between landlords of smaller and larger properties. Not considering property status as a ground which required greater level of protection, the Court did not find it difficult to establish that in respect of this issue the state has a wide margin of appreciation, and that the Government had a legitimate goal for the difference in the treatment, that being the public interest.

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[164] See a similar definition in Najcevska Mirjana and Bekim Kadriu. Terminology Glossary for Discrimination. OSCE and MCIC: Skopje 2008, p. 41

[165] For clarification of this approach of the ECtHR, see "Criticism of Procedural Economy" in Chapter II-B.

The Discrimination in Practice

Discrimination on this ground is most common as discrimination against persons with lower property status.[166] It can be in the form of unequal access to the water supply system, protection from forced eviction, unequal access to public service recruitment (conditioned by compulsory testing of candidates that they are to pay for by themselves, and that would be significant burden for them), disproportionate and unjustified more favourable treatment of owners of larger (or smaller) land properties. States can undertake various measures with a view to providing free of charge services or services with minimum charge to deal with discrimination on grounds of property status.[167] If these measures fulfil the criteria to be considered as affirmative measures or positive action measures, they should not be considered as prohibited unequal treatment.

15. Belonging to a marginalized group

Belonging to a marginalized group is defined in the LPPD as "a group of individuals that are united by a specific position in the society, which are subject to prejudices, which have special characteristics that make them favourable for certain types of violence have smaller opportunity for realizing and protecting their personal rights or are exposed to increased opportunity for further victimization" (Article 5 (1-11) LPPD). This is the only discriminration ground for which the LPPD offers a definition. The ground itself is not often found in international law, or in national legislations.[168]

In examining the possibility for application of this ground in a given case, the question arises of determining the exact meaning of several elements of this definition. These are primarily the elements of "specific position in the society" and "certain types of violence". The element of "specific position in the society" may be interpreted as a "possibility that the group or its characteristics be easily or relatively easily identified. This could be geographic position, smaller religious community, etc. These groups do not get equally the available resources in a society, for example infrastructure possibilities, or lack other possibilities in life which other groups usually have, for example opportunities for education, employment, etc."[169] The element of "certain types of violence", should be interpreted in accordance with the criminal law.[170]

In defining this ground, it is necessary to distinquish between marginalized and vulnerable groups.[171] Despite the fact that many of the characteristics of these two groups overlap,[172] what

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166 Najcevska Mirjana and Bekim Kadriu. Terminology Glossary for Discrimination. OSCE and MCIC: Skopje 2008, p. 41

167 *Ibid*. p. 41

168 There those who consider that this ground needs to be deleted from the Law, since whenever there is a discussion about a certain marginalized group, the core reason as to the marginalization of the group is always to be found in some other discrimination ground. Thus, it is considered that the group should be protected under that ground. Source: Interview No. 4- Kadriu, Bekim, Skopje, August 2013..

169 Interview No. 1- respondent from a judicial / quasi-judicial institution, Skopje, August 2013.

170 Interview No. 1- respondent form a judicial / quasi-judicial institution, Skopje, August 2013 and Interview No. 3- respondent from a judicial / quasi-judicial institution, Skopje, August 2013.

171 Comments from the Second Conference on Discrimination Grounds.

distinguishes marginalized groups is the continued tendency of the society and of the state to push these people at the margins of society.[173]

Persons that are protected under this ground are persons who are likely to be discriminated against on various grounds.[174] Most often, people falling into this group are people living with HIV, homeless people, refugees, sex workers, etc. and in some cases, ethnic communities or religious groups can be protected under this ground. In the *Kiyutin v Russia* case, the ECtHR for the first time explicitly confirmed that people living with HIVwere a vulnerable group that should enjoy special protection and that greater level of protection should be applied in limiting their rights.

Any unjustified treatment of these persons will be considered discrimination. For some of these persons, the claim for protection against unjustified unequal treatment on grounds of belonging to a marginalized group would best reflect the status that these persons have and which needs to be protected (for example sex workers), while for other groups this ground should be applied if in the circumstances of the specific case it can be concluded that the determining conditions will be the conditions of specific position in society and susceptibility to violence.

The Discrimination in Practice

Discrimination would consist for example of lack of reaction by the police to protect or effectively investigate a case of violence against a homeless person, refusal to provide health care to a sex worker, etc.

16. Other grounds established by the law or by ratified International treaties

The last provision of Article 3 of the LPPD is "any other grounds established by the law or by ratified international treaties." This means that the LPPD protects all other grounds not referred to in Article 3, and which are referred to in domestic laws and in ratified international treaties, but also grounds, which under the case law and authoritative interpretations of relevant international courts and treaty bodies have been recognized as part of the open lists of grounds.

In determining whether certain characteristic or status that have not been explicitly referred to as protected ground in laws may be considered as protected personal characteristics or status, the following criteria should be taken into consideration:

Immutability, choice, and autonomy: whether persons are able to change the characteristic or status that is the cause of the unequal treatment.

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172 Some authors consider these two terms as synonyms. See Najcevska Mirjana and Bekim Kadriu. Terminology Glossary for Discrimination. OSCE and MCIC: Skopje 2008, p. 61

173 Comments from the Second Conference on Discrimination Grounds

174 Najcevska Mirjana and Bekim Kadriu. Terminology glossary for discrimination. OSCE and MCIC: Skopje 2008, p. 61

Access to the political processes: is or has the person or the group been marginalized in political processes.

Dignity (treating persons as less valuable members of society): does the unequal treatment based on the personal characteristic or status result in a violation of the dignity of that person or it affects these persons much more than others.

History of inequality: does the person belong to a group that can be said to have been exposed to unequal treatment or prejudices for a longer period of time.[175]

When applying this list, the cumulative fulfilment of these criteria should not be required. Furthermore, it has to be born in mind that room should be left for evolutive interpretation of this list, in light of the changing nature of the social context in which discrimination occurs, but also in light of the changing nature of discrimination.[176]

Such approach has been applied in the ECHR, which is an exceptionally important document for the state. Article 14 of the ECHR and Article 1 of Protocol No. 12 are open provisions. Hence, it has been left to the ECtHR to determine which personal characteristic or status could be considered as protected. Considering this issue, the ECtHR refers to other international documents in support of its arguments. Thus, in the case of *GN v Italy,* the ECtHR additionally justified the treatment of genetic characteristic under "other grounds" by referring to Article 21 of the EU Charter, in a case of unequal treatment on grounds of genetic illness in an out-of-court settlement in case of contaminated blood transfusions.[177] Despite the fact that the ECtHR has been rather open in interpreting the scope of "other grounds", there is case law, which shows when the Court will not consider that in a given case there is a protected ground or status. In the case of *Jones v the United Kingdom*, the Court found no protected ground in a case in which setting photographs on gravestones were allowed in one graveyard and not in others.[178] It can also be considered that the ECtHR has clear positions that it will not look for personal characteristic or status when deliberating upon cases filed by legal entities, such as organizations or political parties. Thus, in *Özgürlük Ve Dayanişma Partisi v Turkey,* the ECtHR deliberated upon a provision according to which parties, which did not reach the minimal threshold of 7% of the votes, would not be given financial assistance from the state. However, the Court did not explicitly state under which protected ground it considered the case.[179]

Bases, which are not explicitly mentioned in Article 3 of the LPPD, and regarding which there is extensive international case law, including case law under ratified international treaties, are birth and sexual orientation. These two grounds will be considered here in greater detail. The fact that only these two grounds are considered in this section does not mean that they are the only basis that can be covered by the open provision. Quite the contrary. They have been separately elaborated because of the importance attached to their protection in international case law, and in light of the volume of case law about these two grounds. International courts

175 Sandra Fredman, Discrimination Law (2nd edn, OUP 2011), 130-139

176 General Comment No. 20 of the Committee on Economic, Social and Cultural Rights, para. 27

177 *GN v Italy*, ECtHR, App. No. 43134/05 (2009)

178 *Jones v UK,* ECtHR, App. No .42639/04, (2005)

179 *Özgürlük Ve Dayanişma Partisi (ÖDP) v Turkey*, ECtHR, App. No. 7819/03 (2012)

and treaty bodies grant the highest level of protection for both birth and sexual orientation, which means that they will demand very weighty reasons in order to justify unequal treatment on any of these grounds.

16.1. Birth

Selected International Case Law

Sahin v Germany, Marckx v Belgium, Mazurek v France, Inze v Austria

In international law, birth is treated as a separate ground, which may refer to one's status as born in wedlock, out of wedlock, or being adopted,[180] and covers descent, especially based on caste and analogous systems of inherited status.[181] Some authors consider the birth of a child in wedlock, out of wedlock or adopted child as part of family status,[182] while others under a separate ground - birth.

According to the definition of "birth" given here, and in the absence of a separate ground "birth" in the LPPD, this ground could be considered as a link between the grounds family and marital status and social origin. However, considering that in Macedonia there is no inherited status (such as casts) in the present context, the protection of this ground would be fully covered by treating it as part of the ground family or marital status. An additional argument in favour of such an approach is the fact under the domestic legislation, birth, as defined here (with the exception of inherited status) is regulated under the family law. In addition, the open character or Article 3 of the LPPD can be utilized, and birth can be treated under "other grounds", since this provision is part of some of the international treaties that the country has ratified.

Birth as protected ground has been considered in several ECtHR cases. Some of the issues the Court has considered with respect to this ground are: unreasonably greater possibilities for limiting rights of parents to access to their children if the children were born out of wedlock (*Sahin v Germany),* different treatment in recognizing parenthood for children born in and out of wedlock (*Marckx v Belgium*), different conditions for inheritance for children born in and out of wedlock (*Mazurek v France* and *Inze v Austria*). In all cases, the Court has underlined that very weighty reasons are required in order to justify unequal treatment only on grounds of (il)legitimacy of a child.

The Discrimination in Practice

Differences in access to survivor's pensions for children born out of wedlock; different immigration regime for children born in and out of wedlock.

[180] See also 'Handbook on European Non-discrimination Law'. EU FRA and CoE, 2010. p. 129

[181] General Comment No. 20 of the Committee on Economic, Social and Cultural Rights, para. 26

[182] Najcevska Mirjana and Bekim Kadriu. Terminology Glossary for Discrimination. OSCE and MCIC: Skopje 2008, p. 92

16.2. Sexual orientation

Selected International Case Law

Young v Australia, Tadao Maruko v Versorgungsanstalt der deutschen Bühnen, E.B. v France, X and others v Austria, Gas and Dubois v France, Toonen v Australia, Dudgeon v the United Kingdom, Interights v Croatia, Sutherland v the United Kingdom, Karner v Austria, Salgueiro Da Silva Mouta v Portugal, Fretté v France, L. and V. v Austria

Sexual orientation refers to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.[183] Despite the fact that sexual orientation has not been explicitly referred to in international documents as discrimination ground, it has been treated in the case law and in the authoritative interpretations of the international documents.

Difference in the treatment only on grounds of sexual orientation is considered unacceptable in international law and practice. Many cases, resolutions, comments and declarations of international courts and bodies clearly underline the need for protection on this ground, especially the need for protection of persons of homosexual orientation and for support to the equality of all persons regardless of their sexual orientation. Thus, in 2011, the High Commissioner for Human Rights published a report, which documents discriminatory laws, practices and acts of violence against persons on grounds of their sexual orientation and gender identity.[184]

Making a difference between same sex partners and opposite sex partners in the context of **welfare benefits** is considered unjustified. In the *Young v Australia* case, the HRC considered that the possibility that opposite sex partners get a survivor's veteran pension and the fact that same sex partners did not have the same possibility was unequal treatment without reasonable and objective justification. The CJEU adopted a similar decision in the case of *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen.*

The practice has shown that courts and bodies will demand very compelling reasons to justify the different treatment on this ground, in the context of **child adoption.** This issue has been considered on several occasions by the ECtHR. In the *E.B. v France* case and in *the X and others v Austria* case, the ECtHR found that the main and determining factor in limiting the right to adoption of the applicant in *E.B.* and the impossibility for adoption by the second parent in *X and others* was sexual orientation, for which there was no reasonable and objective justification. The ECtHR clearly underlines this in the *X and Others v Austria* case: "just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification or, as is sometimes said, particularly convincing and weighty reasons […]. Where a difference of treatment is based on sex or sexual orientation, the State's margin of appreciation is narrow. […] Differences based solely on considerations of sexual orientation are unacceptable

[183] Yogyakarta Principles. Yogyakarta Principles Website. <http://www.yogyakartaprinciples.org/principles_en.htm>. Accessed on: 28 .09.2013

[184] See: discriminatory laws, practices, and acts of violence against individuals based on their sexual orientation and gender identity, A/HRC/19/41, 17 November 2011.

under the Convention."[185] The Court reiterates the principle stated in the case of *Gas and Dubois v France*, according to which the relationship between two women who live together, which grew into civil partnership and the child the two women raise is considered as family life.[186]

The issue of **decriminalization of homosexual relationships** is one of the issues considered by international courts and bodies, and for which no objective and reasonable justification was found. In the *Toonen v Australia* case, the HRC decided that criminalization of consensual sexual relationships between full-aged persons is discrimination on grounds of sexual orientation. The lack of consensus within the state about decriminalization does not exempt the state from its obligation to take steps in this direction. In the *Dudgeon v the United Kingdom case*, the ECtHR found that criminalization of homosexual relations is violation of private life (in line with previous case law, after the Court established violation of Article 8, the ECtHR did not proceed with considering the allegations for violation of Article 14).

In the *Interights v Croatia case*, the ECSR decided on discrimination on grounds of sexual orientation in **education** in Croatia. The applicants claimed that part of the material used for the curriculum of an optional program for sexual education contained claims that homosexual relationships were deviant.[187] The ECSR established that states had the obligation of conducting sexual education for the young and that sexual education needed to be based on scientific evidence and be non-discriminatory. The non-discrimination principle and the principle of human rights promotion and protection apply to all education programs and other textbooks, whether compulsory or optional.

The Discrimination in Practice

Denying access to facilities to homosexuals, promoting intolerance towards all persons that are not heterosexual and spreading prejudices about all whose sexual orientation is not in line with the dominant heterosexual norm.

[185] *X and Others v Austria,* ECtHR, App. No. 19010/07 (2013). Para. 99.

[186] *Gas and Dubois v France,* ECtHR, App. No. 25951/07 (2010)

[187] The applicants also had other allegations, i.e. complaints about the education materials, such as complaints about statements according to which wearing a condom does not prevent HIV transmission, or that non-working mothers contribute towards better families. They also complained about absence of sexual education in schools, contrary to the ESC (revised) standards.

ANNEX: METHODOLOGY

In light of the purpose of the Guide, the chosen **form of research** was exploratory research. Exploratory research does not have the aim of testing a hypothesis, but of producing a detailed review of the subject of research[188] (in this case the discrimination grounds), and the purpose of the research is to contribute to understanding of the law.[189]

The data collection was conducted through a combined method of review of existing literature and field research. **The existing literature review** that was taken into consideration could be divided in the following categories: legal documents (domestic laws, international treaties and relevant *travaux préparatoires)*; case law of courts and treaty bodies (domestic courts, Commission for Protection against Discrimination, Ombudspreson, international courts and human rights bodies); academic literature; and grey literature. In this review, the focus was on literature that is of importance for the European regional context and for the discrimination grounds whose understanding has been problematic in the practice. This literature was collected through desk search, conducted in April and May 2013.

The field research consisted of two parts:

(1) Instead of the focus group method, two closed conferences were organized with invited participants (one group consisting of participants coming from state institutions and courts and the other group consisting of representatives of the civil society sector). This helped maintain the quality of interaction between the respondents, at the expense of a rigid setting, while group dynamic and privacy were the weaknesses. Such unstandard approach was chosen because of the specific features of the target groups, the time frame for preparation of the Guide and the need for a better quality comparison of data received from participants.

(2) Semi—structured interviews were conducted with selected respondents from courts, national human rights institutions and respondents from the academia, following an interview guide. The interviews were conducted in August 2013.

Data was processed through **qualitative content analysis.** This approach facilitates flexible and not very strictly determined general topic, which can be descriptively elaborated, which on its part enables preserving the context, and the meaning of the text from the viewpoint of the author, enabling thus hermeneutic analysis.[190]

The targeted number of pages for the Guide and the number of discrimination grounds contained in the LPPD that are elaborated in this Guide were the main (limiting) factors in designing the methodology for its preparation. The necessary conceptual limitations, both in collecting, in processing the required data, and in drafting the text of the Guide, were taken into consideration. These limitations are the result of the different terms used for the various discrimination grounds in the domestic legislation, in international law, in the case law of international courts and human rights bodies, and in the theory.

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188 Gary D Bouma and G.B.J. Atkinson, *A Handbook of Social Science Research* (OUP 1995) p.110

189 Gerhard Dannemann 'Comparative Law: Study of Similarities or Differences?' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law*, (OUP 2006) p. 405

190 Alan Bryman, *Social Research Methods* (4th edn, OUP 2012) pp. 560-561

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