

Summary

Unjustified unequal treatment and discrimination are persistent phenomena. In recent years, equal protection law has gained increasing attention by international human rights adjudication bodies.

In particular, the dynamic development of non-discrimination law under the European Convention on Human Rights (ECHR) in the past decade does not fall short of a “human rights’ revolution”. The Strasbourg Court is ever more willing to examine cases involving subtle forms of discrimination, such as indirect discrimination claims, and thereby takes the lead in developing a future-proof conception of non-discrimination under public international law. The Court has turned the long-neglected non-discrimination provision in Article 14 ECHR into a powerful tool to correct inequalities within what was formerly regarded as the impermeable ‘interior design’ of state and society, e.g. treatment of minorities in social and cultural affairs, or the protection against discrimination by private individuals. The conception of non-discrimination under the ECHR is likely to become a cornerstone in the emerging European Human Rights Constitution and to influence the jurisprudence of other international human rights bodies.

Because of the visible trend to apply international equal protection law (*menschenrechtliches Gleichheitsrecht*) to ever more complex and diverse factual situations, coupled with an increasing awareness for equality concerns, a more systematic and differentiated approach to international equal protection law is required. This in turn calls for a comprehensive analysis of the potential and limits of international equal protection law in general, and the non-discrimination conception under the ECHR in particular.

A study on international equal protection law faces various questions: What is “equality”, what is “discrimination”? How does “inequality” become a problem of human rights? What are the existing models of international equal protection law? How do international human rights bodies adjudicate in equality cases? How could a conception of international equal protection law benefit from insights of political philosophy? What distinguishes the legal and the philosophical problem of

equality? What constitutes “good” *praxis* of international equal protection law?

The study analyzes two models of international equal protection law: first, the equal protection clause-model, as e.g. contained in Article 26 of the International Covenant on Civil and Political Rights (ICCPR), and, second, the non-discrimination clause-model, as e.g. embodied by Article 14 ECHR. A key contribution of this study is that non-discrimination clauses are to be favored above a general equal protection clause at the international level. The argument for a non-discrimination conception of equality is based on its superior doctrinal rationality. This study proceeds in four steps: After illuminating the concept of equality (Part One), this study sets out two models of international equal protection law (Part Two). It then expounds the model of non-discrimination law by a reference to the practice of non-discrimination under the ECHR (Part Three). Finally, it concludes by an examination of the ethics of non-discrimination (Part Four).

The *first part* deals with the concept of equality which precedes international equal protection law. This pre-legal concept of equality is a term of political philosophy. Equality is an “essentially contested concept” (*William Gallie*), however, it can be further elucidated in three steps: First, one may describe the objects of equality claims (who or what is equal?) as either persons or conditions. A second determination differentiates between two modes of equality claims, as being either descriptive or prescriptive. In the prescriptive mode, the *tertium comparationis* is itself a normative one, e.g. the right to access to public office. Prescriptive equality claims entail a threefold, relational structure: “A is equal to B regarding the relevant characteristic of X.” The prescriptive mode and the application of a certain normative *tertium comparationis* lead to a “normative surplus”, which – in political philosophy – is expressed in different conceptions of equality, e.g. the conception of equality of basic goods (*John Rawls*), equality of resources (*Ronald Dworkin*) or equality of capabilities (*Amartya Sen*). These conceptions of equality answer on the question of “equality of what?”

The *second part* examines the models of international equal protection law. All norms of human rights’ character dealing with the problem of equality *as such* fall under “international equal protection law”, contrary to human rights norms which only indirectly concern equality issues, such as norms on “equal pay for equal work”.

From the perspective of the objective legal order, the principle of legal equality is the common point of reference for all norms of international

equal protection law. This principle of legal equality comprises two aspects: that of equality of rights (i.e. everybody shall have the same set of rights) and that of equal protection (i.e. everybody shall be treated equally). Some elements of the principle of legal equality, e.g. the prohibition of discrimination on the basis of race, ethnicity or sex, can be attributed the status of *ius cogens*.

From a subjective, claim rights-related perspective, the two models of international equal protection law mentioned above need to be kept apart: the equal protection clause-model and the non-discrimination clause-model. In this study, the international equal protection clause is analyzed by reference to Article 26 ICCPR. This clause embodies a subjective, modal right against a particular way of treatment by the state. The nature of the international equal protection clause is – in contrast to that of the non-discrimination norms – determined by its generality. As visible in Article 26 ICCPR, this generality entails, first, a generality in scope, i.e. that there is no restriction regarding the object of applicability (e.g. a limitation to inequalities regarding the right to vote or the right to access to public office). Second, a generality of status, by allowing for equal treatment claims independently from claims concerning other human rights norms. The generality of status relates to the relative autonomy of the equal protection provision; this is to be denied in cases of a mere accessory status of this right, i.e. where the equal protection provision may only be invoked if the facts also fall within the scope of a freedom-right. Third, a generality regarding the grounds of differentiation is discussed. This means that the activation of the equal treatment clause is not limited to unequal treatment based on specific, personal grounds of differentiation, but allows any treatment of a person based on an unreasonable differentiation between persons or things to be challenged under the equal treatment provision. Article 26 ICCPR embodies an international equal protection clause, because it fulfills all three criteria of generality mentioned above.

Three doctrinal approaches to the international equal protection clause can be distinguished. The first one is the two-pronged model of equality presumption (followed by the U.N. Human Rights Committee). According to this model, the legal analysis starts with establishing an unequal or equal treatment of similarly situated persons or conditions, which is then submitted to (different) justification tests (e.g. arbitrariness review or a proportionality test). Two other models which were originally designed for a national equal protection clause can be tested for their suitability for the international plane: The three-pronged encroachment-model advocated by *Stefan Huster* offers a more stringent

approach to equality, especially by allowing for specific scope of the international equal protection clause (consisting in the “right to be treated as an equal”), and a distinction between so-called “internal” and “external” purposes justifying unequal treatment. A third model, the so-called reduction-model by *Alexander Somek*, criticizes the extension of review in equal treatment cases beyond non-discrimination analysis. Equal treatment, according to this model, should not be stretched so far as to entail a general right to reasonable treatment.

None of these models is entirely convincing. As a discussion of these approaches suggests, the doctrinal design of the international equal protection clause is inherently problematic. The first equality presumption-model lacks a sufficient criterion for distinguishing relevant from irrelevant inequalities. A second shortcoming of the equality presumption-model is that no systematic approach to the justification-stage is offered. Huster’s encroachment-model proposes a superior theoretical approach to the equal protection clause. However, if this model is used on the international plane, the determination of what it means to be treated as an equal will – in the absence of an international constitutional law – often be difficult, if not illusory. Somek’s reduction approach is problematic in cases such as Article 26 ICCPR where a norm contains both equal protection models.

Keeping the shortcomings of these approaches to the equal protection clause-model in mind, this study then turns to the non-discrimination approach to international equal protection law. In legal terminology, “discrimination” in its pejorative meaning first appeared in U.S. law in the mid-19th century, especially in trade law and fundamental rights law. In public international law, “non-discrimination” as a legal concept only became established after the Second World War. The general concept of discrimination consists of five elements (*allgemeiner Diskriminierungstatbestand*):

1. a way of treatment,
2. a (particular) ground of differentiation,
3. the infliction of a (particular) disadvantage,
4. comparability,
5. non-justification of the treatment.

This general concept of discrimination provides the base line from which – in the *third part* of this study – the jurisprudence of the European Court of Human Rights on non-discrimination can be analyzed. Taking into account the jurisprudence of the Strasbourg Court, the general concept of discrimination can be reformulated as follows:

1. unequal-, equal- or non-treatment of a person,
2. in comparison to similarly situated persons,
3. a) where the treatment is based on a person-related ground of differentiation, or
b) where the treatment is based on a (seemingly) neutral ground of differentiation, but significantly burdens a protected group, or a general measure with the same effect, or
c) where the non-treatment violates a positive duty as against that person, and
4. the (non-)treatment leads to a disadvantage of that person,
5. and cannot be justified.

A distinguishing feature of the non-discrimination provision in Article 14 ECHR is its accessory nature, i.e. that it has no independent existence but its protection is only activated if the facts fall “within the ambit” of one or more of the substantive rights or freedoms of the Convention. The accessory nature of Article 14 ECHR serves to restrict the Court’s jurisdiction in politically sensitive areas (e.g., historically, the treatment of minorities), to exclude socioeconomic problems, and to reduce fears held by the contracting states about further encroachments on their sovereignty. There still is significant disagreement as to the ambit-doctrine. According to the (here) so-called interaction-approach favored by this study, the “ambit” of a substantive right or freedom should be determined in light of the meaning and purpose of the non-discrimination provision (which is discussed below).

A second feature of the non-discrimination conception under the ECHR concerns the grounds of differentiation. Here, the distinction between “simple” and “suspect” grounds (a terminology not used by the Court) is crucial. Both “simple” grounds (such as the grounds of language or political opinion) and “suspect” grounds (such as the grounds of sex, sexual orientation, religion or race and ethnicity) are person-related grounds of discrimination. Unequal treatment based on grounds which are in no way related to personal characteristics cannot be challenged under Article 14 or Article 1 Prot. 12 ECHR.

The question of justification of unequal treatment is crucial for the limits of equal protection. The model used for the justification of unequal treatment can be called relational-external, where the justification is drawn from external purposes (such as the protection of the traditional role of the family). At present, the Strasbourg Court’s does not employ a relational-individual model which in U.S. legal terminology is equiva-

lent to a model of accommodation. Applying this model would open up the possibility of justification by reducing the disadvantageous effects of unequal treatment in individual cases.

In the jurisprudence of the Strasbourg Court, three forms of non-discrimination as a claim right can be distinguished: the prohibition of direct, indirect and passive discrimination. 'Direct discrimination' occurs when a person is treated unequally or equally in comparison to similarly situated persons on the basis of a (personal) ground of differentiation which inflicts a disadvantage on the person and cannot be justified. Since the *Thlimmenos* case (2000), the Court has also accepted claims based on direct discrimination by *equal* treatment. As of now, the Court has assumed a duty to treat persons differently in cases involving norms of abstract and general character which do not sufficiently differentiate concerning religious matters. Such a duty was rejected in cases involving a difference in lifestyle (e.g. due to ethnicity in the *Roma cases*).

The two areas in which the Strasbourg Court has been particularly innovative in recent years concern the more subtle forms of discrimination: indirect and passive discrimination. Here, the Strasbourg jurisprudence offers by far the most advanced approach compared to other regional and international human rights adjudication bodies.

'Indirect discrimination' under the ECHR means unequal treatment of a person in comparison to similarly situated persons where the treatment is based on a (seemingly) neutral ground of differentiation, but significantly burdens a protected group, or a general measure with the same effect, which inflicts a disadvantage on that person and cannot be justified. One doctrinal problem concerns the question what constitutes a "significant burden" of a protected group. The Court follows a case-by-case approach, but will usually require a statistical disparity between the privileged and the non-privileged group to exceed 20 %.

The prohibition of 'passive discrimination' is a very recent development in ECHR jurisprudence. The basic notion behind passive discrimination is that there can be violations of the non-discrimination provision in Article 14 and Article 1 Prot. 12 ECHR in cases where the state remains inactive despite a duty to act. These so-called equal protection duties are positive duties of the state geared towards the protection against (some instances of) discrimination by private individuals, equal access to certain goods or services, and the effective investigation of discrimination cases involving grave forms of violence. 'Passive discrimination' can be understood as non-treatment of a person, in comparison to similarly situated persons, where the non-treatment violates a posi-

tive duty as against that person, leads to a disadvantage of that person, and cannot be justified.

The doctrine of positive obligation to protect a person against discrimination by private individuals under the ECHR is still at an early stage. Two forms of such a duty to protect can be distinguished: first, the positive duty to ensure a minimum level of protection against unequal treatment by private individuals, second, the duty to consider the equality interest in balancing exercises. The first duty to ensure a minimum level of protection against unequal treatment is primarily directed against the legislature. The density of this duty varies according to the affected sphere, the so-called sphere of inner privacy (or core personal privacy sphere, e.g. invitation of friends to a private party), the extended privacy sphere (e.g. the sale of a car by a private individual) and the quasi-public sphere (e.g. access to a public restaurant). The *Danilenkov case* (2009) is the first case in which the Strasbourg Court has, albeit cautiously, touched the problem of a legislative duty to protect against private discrimination. In the *Opuz case* (2009) the Court recognized the duty of the executive to take effective measures against certain acts of discrimination by private individuals. The second duty to consider the equality interest in balancing exercises concerns human rights in multi-polar relations (*mehrpole Grundrechtsverhältnisse*). Typically, in these multi-polar relations the equality interest is to be balanced against the liberty interest. For the purposes of balancing, this study suggests the following criteria:

- severity of the ground of differentiation,
- degree of publicity of the discriminatory act,
- intensity of disadvantage suffered by the discriminatory act,
- effect of the discrimination on the general public (intimidation effect, stigmatizing effect).

However, the Strasbourg Court has so far missed the opportunity to establish a workable doctrine for this second positive duty, even though the opportunity arose in the cases *Associated Society of Locomotive Engineers & Firemen (ASLEF)* (2006) or *Pla and Puncernau* (2004).

A further, in the case-law of the Court well-established positive duty is the duty to grant equal access to goods and services. If the Contracting State grants a right, which is not called for by the ECHR but which falls into the ambit of a Convention right, it must be granted in a non-discriminating fashion. In this regard, the Strasbourg Court saw a violation of Article 14 and Article 8 ECHR where the right to adoption was

granted to heterosexual, but not to homosexual couples (*E.B. v. France*, 2008).

It is not yet clear whether the concept of passive discrimination also encompasses the right to positive measures by the state, enabling individuals to a material equal access to certain goods or services. For example, the right to equal access to court may be interpreted in the case of disabled persons to encompass the positive duty to safeguard special access facilities (*Farcas v. Romania*, 2010).

A last positive duty concerns the duty to investigate discrimination cases involving grave forms of violence (*Nachova et al. v. Bulgaria*, 2005). This procedural duty commands the investigation of possible discriminatory motives. This duty aims to mitigate the problem of evidence in discrimination cases: In cases of severe violence where there is reason to believe that discriminatory intent may be involved, the state has the positive duty to effectively investigate the case. If it fails to do so, the Court will assume a violation of Article 14 ECHR under its procedural aspect.

The final, *fourth part* of the study is dedicated to the question of what constitutes a “good” *praxis* of equal protection law. This question needs to be addressed from the perspective of legal ethics. However, a few preliminary steps require consideration. The field of equal protection law has a particular affinity towards philosophical conceptions; and thus the danger of an uncritical reference to these philosophical conceptions arises. Therefore, first, one has to disentangle the legal and the philosophical problem of equality. Second, the pre-legal concept of equality must be put in the legal context by transforming it into two legal principles, the principle of formal and the principle of substantive equal treatment. The principle of formal equality demands a respect for equality, i.e. relevantly equal facts are to be submitted to equal legal consequences, whereas relevantly unequal facts must be treated unequally. In the context of the legal order, this principle of formal equality leads to the requirement of objective consistency in decision-making, the requirement of impartiality in norm-application, the neutrality in norm-giving, and it mandates to provide reasons for unequal treatment. The principle of substantive equal treatment requires “to be treated as a equal” (*Ronald Dworkin*). Adherence to this principle may entail formally unequal treatment, e.g. concerning body fitness requirements female firefighters should be treated differently from their male counterparts. The principle of substantive equal treatment is *output-sensitive*, it takes factual consequences of norms and legal acts into consideration. However, the principle of substantive equal treatment

remains highly abstract, it constitutes a “perspective of judgment” (*Stefan Huster*).

On the basis of these preliminary remarks, this study then lays out a method of ethical reconstruction of legal *praxis* (*Methode der rechtsethischen Rekonstruktion*) by which to reconcile ethical principles and legal judgment. This approach is ‘reconstructive’ in that it examines a certain type of social practice, embodied in the landmark judgments by the Strasbourg Court on non-discrimination law. It is an ‘ethical’ approach by viewing an ethical rationality as underlying the legal *praxis*. The term ‘*praxis*’ draws on Aristotle’s understanding of this concept in his ethics. In the literature, diverse principles are viewed as ethical principles underpinning equal treatment, e.g. human dignity, recognition, political or social inclusion, efficiency or justice. Not all of these principles are equally apt to serve as ethical principle of the legal *praxis* of non-discrimination. According to the method of ethical reconstruction the appropriateness of a principle is established by satisfying three criteria: adequacy (ability to state the end of a legal *praxis*), coherence (ability to provide a unified understanding of *praxis* consisting of complex phenomena) and conceptual orientation (ability to make the relevant structural elements of a legal *praxis* visible).

If the method of ethical reconstruction is applied to the non-discrimination jurisprudence of the Strasbourg Court, it can be established that this legal *praxis* (consisting, as outlined above, of the Court’s landmark decisions on non-discrimination law) is best to be reconstructed under the ethical principle of *justice*. To this end, the concept of justice needs further elaboration. By reference to Aristotle’s basic distinction between corrective and distributive justice, two principles of justice can be formulated which differ regarding its underlying equality-relation: in the case of corrective justice, an arithmetical notion of equality, and in the case of distributive justice, a proportional notion of equality. An important contribution of this study is that the non-discrimination law of the ECHR can only be ethically reconstructed by reference to both principles of justice. On the basis of this, the end of non-discrimination law under the ECHR can be viewed to protect the individual against unjust curtailment of and against unjust distribution of the means enabling self-being (*Mittel des So-Sein-Könnens*). These means encompass the material and immaterial goods necessary for the realization of one’s own *Lebensplan* (individual conception of a meaningful life). The means enabling self-being constitute the object of the non-discrimination claim in ethical reconstruction, i.e. what is being unjustly curtailed or unjustly distributed in cases of discrimination. By

further differentiating the means enabling self-being, altogether three ends of non-discrimination law under the ECHR can be distinguished:

1. protection of the individual against unjust curtailment of her rights,
2. protection of the individual against unjust curtailment of her freedom of being as she is or wants to be,
3. protection of the individual against unjust distribution of other means enabling self-being.

After this abstract exposition of principles, it can be shown that by this understanding of justice the non-discrimination jurisprudence of the Strasbourg Court can best be reconstructed in an ethical sense. 'Direct discrimination' can be reconstructed by reference to a corrective principle of justice, 'indirect' and 'passive discrimination' can be reconstructed by reference to a distributive principle of justice.

In conclusion, a 'good' legal *praxis* of non-discrimination law is the one informed by a corrective and a distributive principle of justice where the object of the non-discrimination right is viewed in the means enabling self-being.