

## Definition of key concepts

- Direct discrimination
- Indirect discrimination
- Harassment

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## Equality and Discrimination

- The function of the law is to distinguish among different situations:

“the purpose of practically every legal norm – whether it is command, proscription or authorisation – is to distinguish between different categories (classes) of legal subjects. Even criminal laws “discriminate” in this sense between those who continue to be presumed innocent and those who have been found guilty.”

(ECHR, judgment of the grand chamber of 29 April 1999, *Chassagnou and others v. France*, nos. 25088/94, 28331/95 and 28443/95, partly concurring and partly dissenting opinion of judge Zupančič)

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## So what is discrimination?

When we speak of discrimination, we do not mean any distinction, but a distinction that is negative in some way, a distinction that places a burden on a particular group of people, either in terms of a prohibited criterion or in terms of the way in which that distinction is made or implemented in practice (prohibited purpose, arbitrariness, etc.).

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## Prohibited criteria

Discrimination is linked to prohibited criteria

Expanding notions of what is considered prohibited criterion of distinguishing in the law

Understanding of equality in 1789 and beyond

Men and women, property, race, sexual orientation, today LGBTQ+ (transgender etc.)

How and why this evolves in the course of centuries, the problem of social consensus

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## Delimitations of prohibited criteria in constitutional law

Exhaustive list (EU directives)

List of examples (ECHR Art. 14 prohibits discrimination based on "sex, race, colour, language, religion, political or other opinions, national or social origin, association with a national minority, property, birth or other status"; EU Charter Art. 21)

General ban on discrimination without any examples (US Const. XIV Amendment; Latvian Const. Art. 89; Polish Const. Art. 32 etc.)

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## Definition of discrimination

Distinguishing based on some general criteria attributed to an individual

*"discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed."*

*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at 174 (per McIntyre, J.)

**Example:** renting an apartment (bad credit records of an individual X I assume an individual will not pay because of his race or nationality), hiring a new employee (from her records I see she will never stay at one job longer than few weeks X I assume because of her race she will not stay)

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## Definition of discrimination

*“Treating someone less well on the basis of reasons such as religious belief, age, disability and sexual orientation undermines this special and unique value that people have by virtue of being human. Recognising the equal worth of every human being means that we should be blind to considerations of this type when we impose a burden on someone or deprive someone of a benefit. Put differently, these are characteristics which should not play any role in any assessment as to whether it is right or not to treat someone less favourably.”*

*CJEU, Case C-303/06, Coleman, opinion of 31 January 2008, AG Maduro, para 10*

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## Direct discrimination

A person or group of persons is treated in a comparable situation in a less favourable way than other persons, if this is done for reasons that are not legally justifiable, i.e. either **(1)** on the basis of a prohibited criterion (race, sex, nationality, religion, etc.), **or (2)** it is done arbitrarily, i.e. without any possible reasonable justification (in relation to other "unqualified" grounds).

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- (a)** singling out an individual or group in comparison to a comparable group (comparability);
- (b)** which is to the detriment of the individual or group in question (whether by imposing an additional burden in comparison to a comparable group or by denying a good provided to another group); and
- (c)** which cannot be justified in light of the legal methodology

(different methodology with regards to different grounds of discrimination => raises the need for law to formulate tests for reviewing alleged discrimination).

In EU law: **prohibited grounds (criteria), listed in EU directives.**

Examples: “Gipsies not Welcome”, hiring men and not women (or vice versa) X gyms only for women etc.—

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## Indirect discrimination

- A typical definition in EU directives: an apparently neutral provision, criterion or practice would put persons having a particular protected characteristic (e.g. their religion or belief, gender, race, disability, age or sexual orientation) at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary
  - No need to establish intention to discriminate X see the original US approach in *Washington v. Davis*, 426 U.S. 229 (1976) (so-called disparate impact)
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## Indirect discrimination

- Examples: very often differences between the impact of practice on women and men at work (differences in treatment between part time employees and full time employees); claims to create **a new exception to a broad rule** which creates an undue burden on a specific group (e.g. school uniforms are in conflict with a religious demands of one group of students)
  - Indirect discrimination is facts sensitive ad contextual: see an example with limitations of operation for night bars X part time and full time employees. In both situations the law has a disparate impact on one sex, in the former we will never argue by indirect discrimination
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## Harassment and sexual harassment

harassment: where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment;

- 'sexual harassment': where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment;
- EU law proclaims that it is a form of discrimination
- Note: the purpose OR effect

(Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Art. 2)

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## Harassment

- Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1 [i. e. religion or belief, disability, age or sexual orientation as regards employment and occupation], when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.
  - (Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Art. 2)
  - Harassment shall be deemed to be discrimination ... when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment
  - (Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Art. 2)
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## Harassment: examples

- In Czech law: the case of a statue placed in the public area of a restaurant holding a baseball bat with the inscription "Against Gypsies....". Here, the Supreme Court held that it is harassment on racial grounds and *any* Roma who would enter that restaurant could sue the owner even though the individual "addressee" was not named (see the judgment of the Czech Supreme Court of 30 June 2005 no. 30 Cdo 1630/2004 or the judgment of the Czech Constitutional Court of 13 January 2010 no. II. ÚS 1174/09).
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