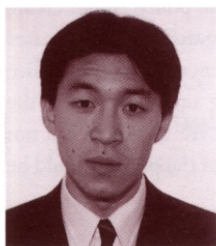


# The ECHR and non-discrimination

by Yutaka Arai



The Strasbourg-based Court and Commission of Human Rights have both attached great importance to the prohibition of discrimination. In this article, Yutaka Arai examines their approach, which leaves national authorities with only the narrowest margin of appreciation on the issue.

The importance of the prohibition of discrimination is witnessed by the variety of human rights treaties which have enunciated this principle as one of the fundamental aspects of human dignity. The issue of non-discrimination has attracted careful attention from the Strasbourg organs (the European Court and Commission of Human Rights). It is one of the areas where the Strasbourg organs have left the narrowest margin of appreciation to national authorities.

The list of grounds of discrimination prohibited under art. 14 is not exhaustive. According to art. 14, discrimination is prohibited 'on any grounds such as ...', and at the end of the list, 'other status' is added (K J Partsch, 'Discrimination', in *The European System for the Protection of Human Rights*, ed. R St J Macdonald, F Matscher and H Petzold (1993), p. 575).

Unlike art. 26 of the International Covenant on Civil and Political Rights (ICCPR), which prohibits discrimination in all the areas which states regulate, the reach of prohibition under art. 14 of the European Convention is limited to those substantive rights embodied in the Convention. In that sense, the prohibition of discrimination is complementary and ancillary. (Article 2 (1) of the ICCPR, art. 2 of the Universal Declaration of Human Rights as well as art. 2 (1) of the Convention on the Rights of the Child are also of complementary nature. These provisions must be contrasted to art. 26 of the ICCPR, which clearly lays down an independent 'equality' right. In this respect, see A F Bayefsky, *The Principle of Equality or Non-discrimination in International Law* (1990) 11 HRLJ 3–4 and the footnotes attached.) However, the complementary character of art. 14 must be qualified in two respects. First, a breach of art. 14 can be found even where no violation of a substantive right exists. In the case *Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* (the 'Belgian Linguistic' case (judgment of 23 July 1968, Series A6, European Court of Human Rights (hereinafter A6); (1979–80) 1 EHRR 252), the court emphasised that:

'... a measure which in itself is in conformity with the requirements of the Article enshrining the right of freedom in question may however infringe this Article when read in conjunction with Article 14 for the reason that it is of a discriminatory nature'. (s. IB, para. 9)

Secondly, as a result, issues of discrimination arise even in areas where states are not obliged to provide specific protection. In other words, if states choose to create a certain right or benefit, this measure must be implemented in a non-

discriminatory manner. The court observed as follows:

'Thus, persons subject to the jurisdiction of a Contracting State cannot draw from Article 2 of the Protocol the right to obtain from the public authorities the creation of a particular kind of educational establishment; nevertheless, a State which had set up such an establishment could not, in laying down entrance requirements, take discriminatory measures within the meaning of Article 14.

'To recall a further example . . . Article 6 of the Convention does not compel States to institute a system of appeal courts. A State which does set up such courts consequently goes beyond its obligations under Article 6. However it would violate that Article, read in conjunction with Article 14, were it to debar certain persons from these remedies without a legitimate reason while making them available to others in respect of the same type of actions.'

## THE 'AMBIT' TEST

Since art. 14 is complementary in nature, it is first necessary to consider whether an alleged breach of a right falls within the ambit of the convention. As noted, a right in relation to which art. 14 is invoked, does not need to be the one a state is obliged to guarantee under the Convention (*Belgian Linguistic* case, at s. I B, para. 9), but it must at least be related to a substantive right under the Convention. In *X v Netherlands* 5763/72, decision of 18 December 1973, 16 *Yearbook of the European Convention on Human Rights* (hereinafter Ybk) 274, the Commission noted as follows:

'Although it is not necessary first to establish the existence of a violation of any of the rights and freedoms set forth in the Convention, the allegations under Article 14 must be related to such rights and freedoms' (at 296, emphasis added).

The question is then how close a relation is required between an art. 14 claim and a protected right. Issues of 'ambit' are relevant to assessing the strictness of the Commission's review at the admissibility level.

On this matter, it is however difficult to identify any coherent policy behind the Commission's decision-making. While the Commission has frequently used the language of 'sufficient relation' in assessing whether an issue of discrimination arises in conjunction with a substantive right, it is difficult to regard this as an objectively identifiable test. In a Dutch case concerning alleged sex discrimination (*Family K and W v Netherlands* 11278/84, decision of 1 July 1985, 43 *Decisions and Reports of the European Commission on Human Rights* (hereinafter DR) 216), the Commission considered that the right to acquire a particular

nationality was

'... neither covered by, nor sufficiently related to either Article 14 or other substantive provisions of the Convention' (at 220).

On the other hand, in a German case concerning alleged discrimination against male homosexuals (*X v Germany* 5935/72, decision of 30 September 1975, 19 Ybk 276), the Commission simply assumed that art. 14 was implicated, and decided to examine the case under art. 14 read together with art. 8. It emphasised that:

'... it is sufficient that the "subject matter" falls within the scope of the article in question' (at 286).

In this case, the Commission considered that the age of consent for legal male homosexual acts, which was fixed higher than that for heterosexual and lesbian acts, fell within the reasonable margin. The Commission observed as follows:

'It can therefore be admitted that the age alone which homosexual relationships are no longer subject to the criminal law may be fixed within a reasonable margin and vary depending on the attitude of society. In the instant case it would not seem that the age limit of 18-21 although relatively high and since lowered can be considered as going beyond this reasonable margin.'

Moreover, in cases concerning social security, the Commission has consistently held that social benefits cannot be considered 'possessions' within the meaning of art. 1 of the First Protocol. Thus rights to receive a pension under the national insurance scheme are not guaranteed by the Convention (*X v Netherlands* 4130/69, decision of 20 July 1971, 38 *Collection of Decisions of the European Commission of Human Rights* (hereinafter CD) 9, at 13). Nevertheless, the tendency is readily to find a 'sufficient relation', and to carry out a separate evaluation of discrimination under art. 14 in social security cases. For example, in a Dutch case where the applicant complained of the reduction of her pension benefit in view of her additional receipt of a Norwegian pension, the Commission found that her allegations of discrimination were 'related' to the right to peaceful enjoyment of possessions within the meaning of art. 1 of the First Protocol, and decided to examine the merits under art. 14 in conjunction with that provision (*X v Netherlands* 5763/72, decision of 18 December 1973, 16 Ybk 274, at 296).

## ASSESSING DIFFERENTIAL TREATMENTS

Contrary to the implication of the French text, '*sans distinction aucune*', art. 14 does not prohibit all kinds of distinction or differential treatment (P Van Dijk and G J H Van Hoof, *Theory and Practice of the European Convention on Human Rights*, 2nd ed. (1990), p. 539, Kluwenter, Deventer). States are confronted with situations which inevitably or inherently involve differentiation. They are thus obliged to take different legal measures which respond in one way or another to factual inequalities. For example, progressive income tax may be justified to achieve equitable distribution of wealth in a capitalist society, which inevitably entails economic disparity. States are allowed a certain margin of appreciation in evaluating whether the conditions on which and the manner in which a certain measure is set up and implemented are discriminatory.

If not all differences in treatment amount to 'discrimination' within the meaning of art. 14, what are the criteria for distinguishing between legitimate and illegitimate differences in treatment? The first attempt to answer this question came in the *Belgian Linguistic* case, which concerned a difference in treatment

between Flemish and French speakers in relation, *inter alia*, to the language of instruction at school. The court implicitly recognised the national margin of appreciation, noting that its review remained subsidiary to the national authorities' evaluation of fundamental rights:

'... the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.

In attempting to find out in a given case, whether or not there has been an arbitrary distinction, the Court cannot disregard those legal and factual features which characterise the life of the society in the State which, as a Contracting party, has to answer for the measure in dispute. In so doing it cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measure which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention' (para. 10).

To summarise, a difference in treatment constitutes discrimination:

- (a) unless it has a legitimate aim and;
- (b) unless there exists a reasonable relationship of proportionality between the means employed and the aim pursued.

Apart from these criteria, the Strasbourg organs have consistently emphasised that art. 14 safeguards individuals, or groups of individuals, 'placed in comparable situations' (*National Union of Belgian Police* case, judgment of 27 October 1975, A19, para. 44) or 'placed in analogous situations', (*Van der Musselle v Belgium*, judgment of 23 November 1983, A70, para. 46; *Lithgow & Ors v UK*, judgment of 8 July 1986, A102, para. 177) from discrimination in the enjoyment of the rights embodied in the Convention. This means that an individual or a group claiming a violation of art. 14 must show that the situations, as regards which difference in treatment exists, are comparable or analogous. This requirement can be illustrated by the *Van der Musselle* case, where a pupil *avocat* was required to defend an accused without receiving remuneration or reimbursement of expenses. The applicant complained of a violation of art. 14 taken together with art. 4, alleging that only the pupil *avocats* are subject to a 'forced or compulsory labour' as compared with other professions. The court found no violation of these provisions, considering that between the Bar and other professions cited by the applicant, there existed 'fundamental differences' (para. 46).

### *Legitimate aim*

States rarely attempt to justify difference in treatment on an arbitrary ground. The national authorities are quite aware that any difference in treatment requires rationalisation. As a result, as in the case with other provisions, very rarely has the legitimacy of the aims pursued been denied under art. 14. (However, see *Darby v Sweden*, judgment of 23 October 1990, A187, in which the court found that the refusal to exempt a non-registered foreign worker, as opposed to a registered foreign worker, from



a church tax did not pursue a legitimate aim).

### Proportionality

Throughout the case-law of various provisions under the Convention, the Strasbourg organs have consistently required a proportionate balance to be established between the means employed and the aim pursued. Because of the importance of the principle of non-discrimination, they have stressed that close regard should be had to the 'effects' of the interference (*Belgian Linguistic* case, para. 10). In the case of difference in treatment, it must be ascertained whether the:

'... disadvantage suffered by the applicant is excessive in relation to the legitimate aim pursued.' (*National Union of Belgian Police* case, para. 49)

The assessment of proportionality is influenced by the variety of factors involved. For example, considerations of national security and emergency may lead to a relaxed evaluation of proportionality: in these areas, the 'effects' of interference on individuals tend to be neglected (see, for instance, *Ireland v UK*, judgment of 18 January 1978, A25, para. 230). In addition, the types of discrimination are an important factor in determining the vigour with which proportionality is assessed. Difference in treatment on the ground of race, sex or illegitimacy will invite the most rigorous evaluation of proportionality. On the other hand, with respect to other grounds of difference in treatment, e.g., the status of trade unions, the Strasbourg organs' evaluation of proportionality may be criticised as cursory. Here the evaluation of proportionality is substituted by a reference to the national margin of appreciation. For instance, in the *Swedish Engine Drivers Union* case, judgment of 6 February 1976, A20, the finding that national power of appreciation was not overstepped led the court to conclude that the proportionality principle was met (para. 47–48; see also *Schmidt and Dahlström*, judgment of 6 February 1976, A21, para. 40–41). The better view is to treat the proportionality principle as a yardstick rather than as the reasoning for assessing whether national authorities have exceeded their margin of appreciation.

## THE NATIONAL MARGIN OF APPRECIATION

The Strasbourg organs have allowed a 'margin of appreciation' to the national authorities:

'... in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law ... The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background' (*Rasmussen v Denmark*, judgment of 28 November 1984, A87, para. 40; *Abdulaziz & Ors v UK*, judgment of 28 May 1985, A94, para. 72 and 78; *Lithgow & Ors v UK*, judgment of 8 July 1986, A102, para. 177; *Inze v Austria*, judgment of 28 October 1987, A126, para. 41; *Karlheinz Schmidt v Germany*, Commission's Report of 14 January 1993, A291-B, para. 43)

Another factor that the court has recognised as 'relevant' to the variation of the national margin is:

'... the existence or non-existence of common ground between the laws of the Contracting States'. (*Rasmussen v Denmark*, para. 40)

But despite the national margin of appreciation, the Strasbourg organs have repeatedly mentioned that the national decisions must be subject to the review of the Commission and Court (*Abdulaziz & Ors v UK*, para. 72).

## ASSESSING THE POLICY OF REVIEW

The survey of the case-law reveals the application of a 'dual standard'. Where difference in treatment is based on the ground of race, sex or illegitimacy, the Strasbourg organs assume a *prima facie* need for a separate examination of art. 14 and apply a strict standard of proportionality. On the other hand, where discrimination is alleged on other grounds, the tendency is to be satisfied with the finding of a breach of a substantive right alone. The standard of proportionality may also be lowered.

In relation to differences in treatment on the ground of sex, the Strasbourg organs have consistently applied a heightened standard of proportionality. In the *Abdulaziz* case, sex discrimination was alleged on the ground that the UK authorities allowed a resident foreign husband to be joined by his foreign wife or fiancée while refusing the same treatment to a resident foreign wife. The respondent state strongly pleaded for the national margin of appreciation in the area of immigration policy (para. 75). While recognising 'a certain margin of appreciation' in assessing difference in treatment (para. 78), the court stressed the importance of gender equality and required 'very weighty reasons' justifying a difference in treatment solely on the ground of sex. Since no such strong rationalisation was adduced by the respondent state, a violation of art. 14 was found in conjunction with art. 8.

### Stringent standards

The policy of applying a stringent standard of examination is consistently followed in subsequent cases involving differences on the ground of sex. In *Schuler-Zraggen v Switzerland*, judgment of 24 June 1993, A263, para. 67, a Swiss woman complained that a pension granted on the basis of invalidity was cancelled after she gave birth to a child. The decision to withdraw her pension was based solely on the assumption that women gave up work when they gave birth to a child. Again, the standards of 'reasonable and objective justification' required of the national authorities was heightened, as evidenced by the requirement that the national authorities must put forward 'very weighty reasons' justifying differences on the ground of sex. Since no such reasons existed, there was a breach of art. 14 taken together with art. 6 (1).

The same heightened scrutiny was seen in *Burghartz v Switzerland*, judgment of 22 February 1994, A280-B, where the court found discrimination under art. 14 read together with art. 8 in relation to the refusal of the Swiss authorities to allow a man to place his surname before his wife's, which was taken as their joint family name. Under the then Swiss Civil Code such a possibility was open only to women. The court apparently modified the policy of reticence that the commission had previously adopted and took an affirmative step in respect of the choice of names and gender equality. (See, for instance, *Hagmann-Hüsler v Switzerland* 8042/77, decision of 15 December 1977, 12 DR 202 (as regards the use of the maiden name for the purpose of standing in a parliamentary election); and *X v Netherlands* 9250/81, decision of 3 May 1983, 32 DR 175 (with respect to the requirement that the registration of married women on the electoral list refer to their husbands' names).)

### Reverse sex discrimination

Stringent scrutiny has also been seen in two recent cases involving reverse sex discrimination. Thus the Strasbourg organs have found that the national authorities overstepped the margin of appreciation in relation to the exemption of women from compulsory service for a fire brigade (*Karlheinz Schmidt v*

Germany, judgment of 18 July 1994, A291-B) or of unmarried childless women over a certain age from the contribution to the child benefit scheme (*Van Raalte v Netherlands*, judgment of 21 February 1997, (1997) 24 EHRR 503). In these cases, while expressly recognising the ‘margin of appreciation’, the Strasbourg organs have rejected the distinction based on a general assumption of physical fitness or biological procreation. It remains to be seen whether such an assertive policy of review may be consistently applied in the future case-law.

### Illegitimacy

On issues of illegitimacy as well, since the leading case of *Marckx v Belgium*, judgment of 13 June 1979, A31, the Strasbourg organs have consistently rejected pleas for the national margin of appreciation. (See also, *Inze v Austria*, judgment of 28 October 1987, A126; and *Vermeire v Belgium*, judgment of 29 November 1991, A214-C.) In the *Marckx* case, while considering the support and encouragement of the traditional family as legitimate (para. 40), the court repudiated the justification for placing ‘illegitimate’ mothers at a disadvantaged position in comparison to legitimate mothers with respect to the right to establish the affiliation of their children. No convincing evidence was adduced which would prove why ‘illegitimate’ mothers were more prone to abandon their children (para. 38–39).

### Race

Another ‘suspect category’, of course, is any distinction on the ground of race. *East African Asians v UK*, (1970) 13 Ybk 928, at 994; Commission’s Report of 14 December 1973, 78-ADR5, involved the immigration legislation imposing the so-called ‘ancestral’ or ‘place of birth’ rule on the immigrants. Under the legislation at issue, a person had a right to enter the UK only if he or one of his parents or grandparents had been born in the UK. This was alleged to be discriminatory on the ground that those affected by the relevant legislation were mostly non-white immigrants. The issue of alleged discrimination in relation to the right of entry of the nationals was rejected in that the UK had not ratified the Fourth Protocol (as of 2 April 1998, the UK has not ratified the Fourth Protocol; see <http://www.coe.fr/tab/conv/46t.htm>), which guarantees the right to enter one’s own state. Article 14 applies only in cases where discrimination is connected to the enjoyment of any right or freedom provided for in the Convention or its Protocols. Nonetheless, the Commission declared the complaint admissible, holding that:

... quite apart from any consideration of Article 14, discrimination based on race could, in certain circumstances, of itself amount to degrading treatment within the meaning of Article 3 of the Convention’ (para. 188–95).

To describe the mere refusal of entry on the ground of race as amounting to ‘degrading treatment’ as proscribed by art. 3 shows the vigour with which racial differences will be treated by the Strasbourg organs.

### Nationality

Similarly, difference in treatment based on the ground of nationality may also call for strict scrutiny in some areas. The Strasbourg organs have required the national authorities to adduce ‘very weighty reasons’ which would justify such a differential treatment (*Gaygusuz v Austria*, judgment of 16 September 1996, (1997) EHRR 364, para. 42). Such a distinction is likely to be held as arbitrary, having no ‘objective and reasonable justification’. Thus in the *Gaygusuz* case, both the Commission and court found a violation of art. 14 taken

together with art. 1 of the First Protocol as regards the refusal to offer a social welfare benefit to a legal worker of Turkish nationality, who contributed to the insurance scheme on the same basis as Austrian nationals.

In the foregoing areas, in particular, with respect to distinction on the ground of race, sex and illegitimacy, the Strasbourg organs have adopted an approach similar to the concept of ‘suspect classifications’ developed in the jurisprudence of the US Supreme Court. (See D J Harris, M O’Boyle and C Warbrick, *Law of the European Convention on Human Rights* (1995), p. 481, Butterworths, London). As to the ‘suspicious classification’ in the jurisprudence of the US Supreme Court, see, in particular, J H Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980), p. 145–170, Harvard Univ Press, Cambridge, Massachusetts) In addition, the phrases used in the relevant passages by the Convention organs are reminiscent of those rights provided in art. 8–11, which, as ‘fundamental rights in a democratic society’, call for strict scrutiny.

As for art. 8, see, in particular, *X & Anor v Netherlands*, judgment of 26 March 1985, A91, para. 27. With respect to art. 9, see, for example, *Kokkinakis v Greece*, judgment of 25 May 1993, A260, para. 31; and *Otto-Preminger-Institut v Austria*, judgment of 20 September 1994, A295-A, para. 47. Note also that in a number of cases, the Strasbourg organs have held that freedom of expression constitutes one of the ‘essential foundations’ of a democratic society and that any restriction on this right is subject to the most stringent scrutiny, however inflammatory and objectionable it may be according to the prevailing view of the society: see, inter alia, *Handyside v UK*, judgment of 7 December 1976, A24, para. 49; *Müller & Ors v Switzerland*, judgment of 24 May 1988, A133, para. 36 and 43; *Scherer v Switzerland*, judgment of 25 March 1994 (struck out of the list), A287, Commission’s Report of 14 January 1993, para. 224.

Under the European Convention, the classifications based on race, sex or illegitimacy are decidedly ‘suspect’. Whether these so-called ‘suspect categories’ may be extended is difficult to predict. The Strasbourg organs have not treated other bases of discrimination with the same rigour as they have these grounds.

A difficult question is how to identify the ‘suspect categories’. The existence of a European consensus may be a clue. In this respect, an evolving standard among the contracting states must be taken into account. For instance, when the Convention was first drafted in 1950, differential treatment between legitimate and illegitimate children was prevalent among the member states especially in relation to inheritance rights. Now, however, the growing tendency in Western Europe is to remove such discriminatory barriers against children born out of wedlock.

### AIREY FORMULA

Although the Convention organs recognise that an issue of discrimination arises under art. 14, they may refrain from carrying out a separate examination under this provision in view of a finding of a breach of a substantive right. On the other hand, to engage in a separate examination of art. 14 claims shows the Strasbourg organs’ strict policy of review and their determination not to readily concede to states a margin of appreciation.

Whether an associated inquiry into the question of art. 14 is needed must be distinguished from the issue of an ‘ambit’ test raised at the admissibility stage, i.e., whether an art. 14 complaint falls within the ambit of a protected right. No issue of art. 14 may be addressed to the Court if the Commission has



already declared the complaint relating to art. 14 inadmissible.

In *Airey v Ireland*, judgment of 9 October 1979, A32, the Court summarised the standard rule concerning the question of whether a separate examination is necessary under art. 14 in conjunction with a substantive provision:

*'If the Court does not find a separate breach of one of those art.s that has been invoked both on its own and together with art. 14, it must also examine the case under the latter art.. On the other hand, such an examination is not generally required when the Court finds a violation of the former art. taken alone. The position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case ...'* (para. 30).

### THE 'EVOLUTIVE' INTERPRETATION

The 'evolutive' interpretation was affirmed in *Tyrer v UK*, judgment of 25 April 1978, A26, in which the use of judicial corporal punishment against a juvenile was complained of under art. 3. The court emphasised that:

*'... the Convention is a living instrument which ... must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.'* (para. 31)

Thus a separate examination of the art. 14 point is necessary where 'a clear inequality of treatment' relates to 'a fundamental aspect of the case'.

However, the application of the 'Airey formula' is hardly consistent. The court has not given any explanation why in some cases it abstains from judicial review under art. 14 while in other cases it engages in a separate examination. For instance, in the *Burghartz* case, discrimination was alleged as regards the refusal of Swiss authorities to allow the applicants to place a husband's surname in front of his wife's, which was adopted as their family name, and the Court decided to examine the case directly under art. 14 by reason of 'the nature of the complaints' (para. 21). In contrast to other cases, in this case, the Court did not find it necessary to make a separate examination under art. 8 (para. 30). As pointed out by the leading authors, it is not any principle derived from the rule of law but merely 'a policy of judicial abstention' which has inclined the Strasbourg bodies to avoid any associated examination of art. 14 (Harris, O'Boyle and Warbrick, p. 469).

The 'Airey formula' may be more aptly explained by the application of the 'dual standard'. Where differences in treatment are based on the ground of race, sex (*Abdulaziz & Ors v UK*; and *Schuler-Zgraggen v Switzerland*), and illegitimacy (*Marckx v Belgium*; *Inze v Austria*; and *Vermeire v Belgium*), the Strasbourg organs assume a prima facie need for a separate examination of art. 14 and engage in an assertive policy of review. On the other hand, their passive policy of review has been particularly conspicuous in relation to the cases of differential treatment of homosexuals. For instance, in *Dudgeon v UK*, A45, the Court was asked to decide among other things whether the fact that, in contrast to heterosexual and lesbian relationships, only male homosexual activities, even in private between consenting adults, were subject to criminal sanctions, amounted to discrimination. The court did not find it necessary to decide on this matter in view of the finding of a separate breach of art. 8, noting that:

*'... there is no call to rule on the merits of a particular issue which is part of and absorbed by a wider issue'*,

and hence that there was 'no useful legal purpose' in deciding this question (para. 69); however see the dissenting opinion of Judge Matscher that the issue of discrimination must be decided by the court. He examined the merits under art. 14 together with art. 8, and found no violation of these provisions (p. 35–37). The claim of discrimination was also not dealt with before the Commission and court, in virtually the same circumstances, in the later *Norris* case (*Norris v Ireland*, judgment of 26 October 1988 and Commission's Report of 12 March 1987, A142).

### EVALUATION OF PROPORTIONALITY

The dual standard is well-illustrated in the evaluation of proportionality as well. Where difference of treatment is based on the ground of race, sex or illegitimacy, the Strasbourg organs have carried out a close scrutiny of the merits, taking into account the effects of the measure. In such areas, they may rely on 'evolutive' interpretation and shift the burden of proof to the national authorities.

#### *Evolutive interpretation*

The rigorous assessment of proportionality may be evidenced by reliance on the so-called 'evolutive' interpretation. The Strasbourg organs have consistently recognised that the Convention must be interpreted in the light of social developments and attitudes. Closely related to this method is the so-called comparative method (see W J Ganshof van der Meersch *Reliance, in the Case-law of the European Court of Human Rights, on the Domestic Law of the States* (1980) 1 HRLJ 13; Harris, O'Boyle and Warbrick, p. 9–11; E Kastanas *Unité et Diversité: notions autonomes et marge d'appréciation des Etats dans la jurisprudence de la Cour européenne des droits de l'homme* (1996), p. 186–224, 306–329, Bruylant, Brussels; F Matscher, 'Methods of Interpretation of the Convention', in *The European System for the Protection of Human Rights*, ed R St J Macdonald, F Matscher and H Petzold, (1993), p. 74–5 and the footnotes therein).

The Strasbourg organs have often taken into account the law and practice of other member states as relevant factors in the evaluation of proportionality. These affirmative methods of interpretation have been seen where differences in treatment are based on the ground of sex or illegitimacy. Recognising the need for evolutive interpretation, the Strasbourg organs have found discrimination, for example with respect to an obligation imposed solely on men to serve in the fire brigade or pay a financial contribution in lieu. (In *Karlheinz Schmidt v Germany*, the Commission expressly relied on the 'evolutive' interpretation:

*'... the Convention is a living instrument to be interpreted in the light of current circumstances. It follows that the need for appropriate legal measures should be kept under review ... The Government base their case on traditional attitudes prevalent in one particular region. But it is not impossible for a distinction which might have been thought legitimate when first drawn to lose its reason for existence, and thus its justification, in the course of time'. (Commission's Report of 14 January 1993, A291-B, para. 45)*

The court also found a breach of art. 14 read together with art. 4(3)(d), but without any reference to the 'evolutive' interpretation.

Similarly, in the *Inze* case, where the complaint of

discrimination was raised with respect to the precedence given to the younger 'legitimate' son over the older 'illegitimate' son in attributing hereditary farms on intestacy, the court emphasised the need for 'evolutive' interpretation, refusing to recognise the national authorities any margin of appreciation:

'... the Convention is a living instrument, to be interpreted in the light of present-day conditions ... The question of equality between children born in and children born out of wedlock as regards their civil rights is today given importance in the member States of the Council of Europe ... Very weighty reasons would accordingly have to be advanced before a difference on the ground of birth out of wedlock could be regarded as compatible with the Convention.' (para. 41)

On the basis of evolutive interpretation, the court rejected the respondent state's submission that:

'... the birth criterion reflected the convictions of the rural population and the social and economic condition of farmers', (para. 42)

and found a violation of art. 14 taken together with art. 1 of the First Protocol.

Differences in treatment on the ground of military rank in disciplinary spheres may need to be reformed in accordance with the development towards equality, which is taking place even in this area. In *Engel & Ors v Netherlands*, judgment of 8 June 1976, A22, the court recognised that:

'... the respective legislation of a number of Contracting States seems to be evolving, albeit in various degrees towards greater equality in the disciplinary sphere between officers, non-commissioned officers and ordinary servicemen'. (para. 72)

It did not, however, find the difference in treatment in the disciplinary sphere to be discriminatory on the basis that such inequality was traditionally recognised by the law of the member states and by international humanitarian law. The national authorities were allowed 'a considerable margin of appreciation' in this respect. One may wonder whether the social developments that took place since the *Engel* judgment would now lead the Strasbourg organs to adopt an 'evolutive' interpretation as regards differential treatment on the basis of rank in disciplinary offences.

### **Burden of proof**

A stringent policy of review with respect to differences in treatment on the ground of race, sex or illegitimacy may also be revealed by the onus imposed on the national authorities to prove the necessity of a measure. As regards differences on the ground of sex, the Strasbourg organs have consistently emphasised that:

'... the advancement of the equality of the sexes is today a major goal in the Member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention. (*Abdulaziz & Ors v UK*, para. 78)

The tendency to shift the onus of proof may also be seen in relation to discrimination on the ground of illegitimacy. In the *Inze* case, the court emphasised the emerging European consensus towards the elimination of discrimination against 'illegitimate' children, and hence the need for evolutive interpretation. It pointed out that:

'... very weighty reasons would accordingly have to be advanced before a difference of treatment on the ground of birth out of wedlock could be regarded as compatible with the Convention'. (para. 41)

Such a heavy burden of proof may also be placed on the national authorities in case of discrimination on the ground of

national origin (*Gaygusuz v Austria*, para. 42).

## **CONCLUSION**

The criteria established by the Strasbourg organs may be summarised as follows. First, an individual or a group complaining of discrimination must be placed in a situation comparable or analogous to that of other groups who are better treated. Second, a difference in treatment constitutes discrimination if there is no legitimate aim and no reasonable relationship of proportionality between the means employed and the aim sought. Third, the national authorities are allowed a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law.

The scope of the margin of appreciation depends on the circumstances, the subject-matter and its background, as well as the existence or non-existence of European consensus. Macdonald notes that in assessing the margin of appreciation in the context of art. 14, the court engages in a 'particularly detailed' analysis of the factual background of the case (Macdonald, p. 119). The existence of consensus among the member states is likely to justify strict scrutiny, which may include close attention to the effects of the interference and reliance on evolutive interpretation. Moreover, the language adopted in the case-law of art. 14 suggests that the scope of any margin left to national authorities in respect of differences on the ground of race, sex and illegitimacy has been reduced to almost nothing.

As regards review in the context of discrimination, a survey of the case-law reveals the application of a dual standard. Where differences in treatment are based on the ground of race, sex or illegitimacy, the suspicion that the national authorities have overstepped the margin of discretion is unallayed. The tendency is to carry out a separate examination of the merits under art. 14 and a substantive provision even though a breach of the latter provision is already established. In these areas, another tendency is to apply a heightened standard of proportionality. This may be seen in the reliance on the affirmative methods of interpretation, such as evolutive interpretation and comparative method, as well as in the shifting of the onus of proof to a respondent state. On the other hand, differences of treatment on other grounds have yet to invite the same degree of stringent scrutiny under art. 14. The Strasbourg organs tend to be satisfied with the finding of a violation of a substantive right, and they do not consider it necessary to carry out a separate examination under the heading of art. 14. In these areas, reliance on the affirmative methods of interpretation is lacking as well.

The change in the social attitudes may render untenable the grounds of distinction which have so far been regarded as inoffensive to the Convention's values. It is thus important that the Strasbourg organs should not apply any categorical distinction between what they regard as 'suspect' categories and those which are not. It is desirable that every time they feel the need to draw such a line, they should always articulate the underlying reasons for doing so. 🇯🇵

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