The Principle of Non-discrimination in the European Convention on Human Rights and in EU Fundamental Rights Law

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1 Introduction

The demand that everybody should be treated equal before the law seems to be one of the central requirements of the rule of law. However, while the postulate of equal protection is intuitively plausible, its application is not straightforward. Instead, norms necessarily discriminate.¹ They only apply to a certain group of people and grant them benefits or impose obligations on them. For this reason, there is a discussion in legal scholarship on the essence of equal protection clauses.²

In principle, there are two ways to deal with this tension. First, differentiations are not prohibited as such. Instead, they can be justified. The question then becomes under which conditions differentiations between two individuals or social groups are justified. However, there is a certain fear that a simple two-step test that asks first whether there is a differentiation and second whether this differentiation can be justified gives judges too much discretion.³ For this reason, there are attempts to restrict the scope of equal protection clauses. Such restrictions may either be contained in the text of the provision or they may be imposed by the jurisprudence.

The most influential approach to restrict the scope of an equal protection clause is the system of tiered scrutiny that has been developed by the US Supreme Court. The Supreme Court has identified three levels of scrutiny. Under the strict scrutiny

¹Sunstein (1982, p. 129), Farrell (1999, p. 358) and Chemerinsky (2016, p. 4).

²See e.g., Hellman (2008) and Khaitan (2015).

³See Yoshino (2011, p. 759) (arguing that “courts simply cannot perform the Sisyphean task of independently testing the fairness of every governmental distinction”).

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test, distinctions are only justified “if they are necessary to promote a compelling government interest.”⁴ At the other end of the scale is the rational basis test. Under the rational basis test, a distinction is justified if it has a rational connection to a legitimate aim.⁵ It is a rare exception that a legislative act is declared unconstitutional under the rational basis test.⁶ Finally, the Court has developed an intermediate scrutiny test for distinctions which are not serious enough to merit strict scrutiny, but which demand for a more searching inquiry than the rational basis test.

While the tiered scrutiny model of the US Supreme Court has rarely been fully adopted in other legal systems, the idea that equal protection clauses need some kind of restrictive application has been very influential. This contribution will analyze two European solutions to the problem and the interplay between restrictions imposed by the text and their interpretation by the competent courts. First, I will look at the European Convention of Human Rights. Art. 14 ECHR contains two types of restrictions. On the one hand, the scope or application of the provision is limited. It only applies to discriminations occurring in the context of other convention rights. On the other hand, it is supposed to protect, in particular, against discriminations based on specific grounds, listed in Art. 14 ECHR, even though this list is not exclusive.

Second, I will analyze the case of the European Court of Justice. While the EU treaties contain a number of different equal protection guarantees, I will focus on two of them: the prohibition of discriminations based on nationality contained in Art. 18 TFEU and the general prohibition of discrimination in Art. 21 (1) of the EU Charter of Fundamental Rights. Both also have two qualifications, one concerning the scope and one concerning the criterion of distinction.

2 The European Convention on Human Rights

Art. 14 ECHR contains two explicit qualifications regarding its scope. First, Art. 14 ECHR does not prohibit all kinds of discriminations, but only discriminations that occur during the “enjoyment of the rights and freedoms set forth in this convention.” There has been a recent attempt to abolish this restriction. Art. 1 of Additional Protocol No. 12 contains a general prohibition of discrimination that does not presuppose a connection with any other convention right. However, the practical relevance of this new provision has been limited. It has been ratified by only 19 member states. Consequently, the European Court of Human Rights has, as of yet, rarely referred to it in its jurisprudence so that the restriction contained in

⁴See *Reno v. Flores*, 507 U.S. 292, 301-02 (1993); *Washington v. Glucksberg*, 521 US 702, 720-21 (1997).

⁵See *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952); *Williamson v. Lee Optical*, 348 U.S. 483 (1955); *Allied Stores v. Bowers*, 358 U.S. 522 (1959); *U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980); *Pennell v. City of José*, 485 U.S. 1 (1988).

⁶Yoshino (2013, p. 333), Holoszyc-Pimentel (2015, p. 2071) and Chemerinsky (2016, p. 2).

Art. 14 ECHR stays very relevant. Second, the textual restriction regarding the criterion of distinction *prima facie* looks like a rather weak one. Art. 14 ECHR is not per se limited to specific reasons for discrimination. Certainly, the provision contains a list of grounds of distinction that are considered to be particularly problematic, such as sex, race, religion or origin. However, the list is not exclusive.

2.1 The Scope of Application of Art. 14 ECHR

The ECtHR has interpreted the scope of application of Art. 14 ECHR rather broadly. The Court does not require the violation of another guarantee of the Convention for Art. 14 ECHR to be applicable.⁷ It does not even demand that the alleged discrimination falls within the scope of application of another convention right. Instead, it is sufficient that “the facts at issue fall within the ambit” of a provision of the ECHR or one of its additional protocols.⁸

One of the paradigmatic cases to illustrate the meaning of this interpretation is *Karlheinz Schmidt v. Germany*.⁹ The applicant had been asked to pay a yearly fire service levy of 75 Deutsche Mark (approx. 38.35 EUR). In the region where he lived, such a fire service levy was seen as a compensation for not performing fire service duty. However, in the region in question only males were required to serve the fire service so that the levy only applied to male residents. The applicant argued that this provision imposed a discrimination based on sex.

The Court ruled that the fire service levy fell into the ambit of Art. 4 (2) ECHR, which prohibits forced or compulsory labor.¹⁰ It referred to Art. 4 (3) lit. d ECHR, which stated that normal civic obligations should not fall under the term ‘forced and compulsory labor’.¹¹ It argued that the levy was closely connected to these civic obligations because of its compensatory function for the obligation to serve in the fire brigade.¹² While Art. 4 (3) lit. d explicitly excluded such civil obligations from the scope of application of Art. 4 (2) ECHR, it also showed that they were close enough to fall into the ambit of the provision.¹³

This tendency to consider certain facts as part of the ambit of a convention guarantee even though they explicitly do not fall into the scope of application can also be observed in other decisions. This concerns in particular the application of

⁷*Abdulaziz, Cabales and Balkandali v. U.K.*, 28 May 1985, Series A No. 94, at para. 71.

⁸*Rasmussen v. Denmark*, 28 Nov. 1984, Series A No. 87, at para. 29; *Inze v. Austria*, 28 Oct. 1987, Series A No. 126, at para. 36; *Karlheinz Schmidt v. Germany*, 18 July 1994, Series A No. 291-B, at para. 22; *Van Raalte v. the Netherlands*, App. No. 20060/92, ECHR 1997-I, at para. 33.

⁹*Karlheinz Schmidt*, supra note 8.

¹⁰*Id.*, at para. 22.

¹¹*Id.*

¹²*Id.*, at para. 23.

¹³*Id.*, at para. 22.

Art. 14 ECHR to taxes, public contributions and social benefits. The Court argues, for example, that the obligation to pay taxes falls into the ambit of Art. 1 of the Additional Protocol even though the provision explicitly states that it does not “impair the right of a State [...] to secure the payment of taxes or other contributions or penalties.”¹⁴ In *Darby*, the Court regarded a Swedish rule according to which only Swedish residents who were not member of the church could be exempted from church taxes, while non-residents did not qualify for an exemption, as a violation of Art. 14 ECHR.¹⁵ When analyzing the scope of application, the Court referred to the second paragraph of Art. 1 AP, which excludes taxes from the protection of the norm, but argued that it put them into the “field of application” of Art. 1 AP.¹⁶

In other decisions, the Court regarded social benefits for families to be part of the ambit of Art. 8 ECHR even if member states were not obliged to grant benefits under the Convention.¹⁷ For example, the decision in *Okpiz* concerned a German rule according to which child benefits were only granted to permanent residents, but not to individuals with a provisional residence permit.¹⁸ The Court argued that, even if states were not obliged to grant child benefits under Art. 8 ECHR, they showed “their respect for family life” through them so that they fell under the ambit of the provision.¹⁹

This short review on the applicability of Art. 14 ECHR shows that the ECtHR interprets the scope of application of the provision rather extensively. In particular, Art. 8 ECHR and Art. 1 AP serve as ‘door openers’ for the application of the equal protection guarantee. With this extensive interpretation, almost any facts have some kind of connection to a convention right. In its effects, therefore, Art. 14 ECHR does not differ that much from a general prohibition of discrimination as established by Art. 1 AP XII.

2.2 *Criteria of Distinction*

While the ECtHR interprets the scope of application of Art. 14 ECHR rather broadly, it does not show the same tendency with regard to the criteria of distinction. While the wording of Art. 14 ECHR, which is not restricted to specific

¹⁴*Darby v. Sweden*, 23 Oct. 1990, Series A No. 187, at para. 30; *van Raalte*, *supra* note 8, § 34; *P. M. v. UK*, App. No. 6638/03, 19 July 2005, at paras. 26–29; *Driha v. Romania*, App. No. 29556/02, 21 Feb. 2008, at paras. 34–39.

¹⁵*Darby*, *supra* note 15.

¹⁶*Id.*, at para. 30.

¹⁷*Okpiz v. Germany*, App. No. 59140/00, 25 Oct. 2005, at para. 32; *Weller v. Hungary*, App. No. 44399/05, 31 March 2009, at para. 29; *Fawsie v. Greece*, App. No. 40080/07, 28 Oct. 2010, at paras. 31–40.

¹⁸*Okpiz*, *supra* note 18.

¹⁹*Id.*, at para. 32.

criteria of distinction would allow for an extensive interpretation, the Court shows self-restraint. It argues that

Article 14 does not prohibit all differences in treatment but only those differences based on an identifiable, objective or personal characteristic, or 'status', by which persons or groups of persons are distinguishable from one another.²⁰

This approach also shows in the jurisprudence. When the ECtHR finds a violation of Art. 14 ECHR, the distinction in question is usually based on a suspect classification even if the criterion of distinction is not always explicitly mentioned in the catalogue of the provision. Discriminations based on race or ethnicity,²¹ sex,²²

²⁰*Clift v. UK*, App. No. 7205/07, 13 July 2010, at para. 55.

²¹See e.g., *Aziz v. Cyprus*, App. No. 69949/01, ECHR 2004-V; *Nachova and others v. Bulgaria* [GC], App. No. 43577/98, ECHR 2005-VII; *Moldovan and others v. Romania*, App. No. 41138/98, ECHR 2005-VII; *Bekos and Koutropoulos v. Greece*, App. 15250/02, ECHR 2005-XIII; *Šečić v. Croatia*, App. No. 40116/02, 31 Aug. 2007; *Cobzaru v. Romania*, App. No. 48254/99, 26 July 2007; *Angelova and Iliev v. Bulgaria*, App. 55523/00, 26 July 2007; *Petropoulou-Tsakiris v. Greece*, App. No. 44803/04, 6 Dec. 2007; *Sampanis and others v. Greece*, App. No. 32526/05, 5 June 2008; *Turan Cakir v. Belgium*, App. No. 44256/06, 10 March 2009; *Muñoz Díaz v. Spain*, App. No. 49151/07, ECHR 2009; *Sejdic and Finci v. Bosnia and Herzegovina*, App. No. 27996/06, ECHR 2009; *Oršuš and others v. Croatia*, App. No. 15766/03, ECHR 2010; *Paraskeva Todorova v. Bulgaria*, App. No. 37193/07, 25 March 2010; *B.S. v. Spain*, App. No. 47159/08, 24 July 2012; *Makhashevy v. Russia*, App. No. 20546/07, 31 July 2012; *Fedorchenko and Lozenko v. Ukraine*, App. 387/03, 20 Sept. 2012; *Yotova v. Bulgaria*, App. No. 43606/04, 23 Oct. 2012; *Lăcătuș v. Romania*, App. No. 12694/04, 13 Nov. 2012; *Sampani and others v. Greece*, App. No. 59608/09, 11 Dec. 2012; *Horváth and Kiss v. Hungary*, App. No. 11146/11, 29 Jan. 2013; *Lavida v. Greece*, App. No. 7973/10, 30 Mai 2013; *Abdu v. Bulgaria*, App. No. 26827/08, 11 March 2014; *Antayev v. Bulgaria*, App. No. 37966/07, 3 July 2014; *Zornić v. Bosnia and Herzegovina*, App. No. 3681/06, 15 July 2014; *Ciorcan and others v. Romania*, App. No. 29414/09, 27 Jan. 2015; *Balázs v. Hungary*, App. No. 15529/12, 20 Oct. 2015; *Boacă and others v. Romania*, App. No. 40355/11, 12 Jan. 2016; *Biao v. Denmark* [GC], App. No. 38590/10, ECHR 2016.

²²See e.g., *Abdulaziz*, supra note 8; *Schuler-Zraggen v. Switzerland*, 24 June 1993, Series A No. 263; *Karlheinz Schmidt*, supra note 9; *van Raalte*, supra note 9; *Wessels-Bergervoe v. Netherlands*, App. No. 34462/97, ECHR 2002-IV; *Willis v. UK*, App. No. 36042/97, ECHR 2002-IV; *Ünal Tekeli v. Turkey*, App. No. 29865/96, ECHR 2004-X; *Zarb Adami v. Malta*, App. No. 17209/02, ECHR 2006-VIII; *Zeman v. Austria*, App. No. 23960/02, 29 June 2006; *Paulik v. Slovakia*, App. No. 10699/05, 2006-XI; *Hobbs, Richard, Walsh and Geen v. UK*, App. No. 63684/00, 14 Nov. 2006; *Weller*, supra note 18; *Opuz v. Turkey*, App. No. 33401/02, ECHR 2009; *Losonci Rose and Rose v. Switzerland*, App. No. 664/06, 9 Nov. 2010; *Konstantin Markin v. Russia*, App. No. 30078/06, ECHR 2012; *Huela v. Romania*, App. No. 33411/05, 2 Oct. 2012; *Garcia Mateos v. Spain*, App. No. 38285/09, 9 Feb. 2013; *Leventoglu Abdulkadiroglu v. Turkey*, App. No. 7971/07, 28 May 2013; *Eremia v. Moldova*, App. No. 3564/11, 28 May 2013; *Mudric v. Moldova*, App. No. 74839/10, 16 July 2013; *Tanbay Tüten v. Turkey*, App. No. 38249/09, 10 Dec. 2013; *Cusan and Fazzo v. Italy*, App. No. 77/07, 7 Jan. 2014; *T.M. and C.M. v. Moldova*, App. No. 26608/11, 28 Jan. 2014; *Emel Boyraz v. Turkey*, App. No. 61960/08, 2 Dec. 2014; *Vrontou v. Cyprus*, App. No. 33631/06, 13 Oct. 2015; *Di Trizio v. Switzerland*, App. No. 7186/09, 2 Feb. 2016; *M.G. v. Turkey*, App. No. 31740/96, 22 March 2016.

sexual orientation²³ or religion²⁴ amount to more than half of all decisions in which the Court held that Art. 14 ECHR was violated. The remaining decisions predominantly concern situations in which specific social groups typically are not sufficiently represented in and thus protected by the political process. These relate, for example, to discriminations based on nationality,²⁵ birth out of

²³See e.g., *Salgueiro da Silva Muta v. Portugal*, App. No. 33290/96, ECHR 1999-IX; *L. and V. v. Austria*, App. No. 39392/98, ECHR 2003-I; *Karner v. Austria*, App. No. 40016/98, ECHR 2003-IX; *B.B. v. UK*, App. No. 53760/00, 10 Feb. 2004; *Bączkowski v. Poland*, App. No. 1543/06, 3 May 2007; *E.B. v. France*, App. No. 43546/02, 22 Jan. 2008; *Kozak v. Poland*, App. No. 13102/02, 2 March 2010; *P.B. and J.S. v. Austria*, App. No. 18984/02, 22 July 2010; *J.M. v. UK*, App. No. 37060/06, 28 Sept. 2010; *Alekseyev v. Russia*, App. No. 4916/07, 21 Oct. 2010; *Genderdoc-M v. Moldova*, App. No. 9106/06, 12 June 2012; *X v. Turkey*, App. No. 24626/09, 9 Oct. 2012; *X and others v. Austria*, App. No. 19010/07, 19 Feb. 2013; *E.B. and others v. Austria*, App. No. 31913/07, 7 Nov. 2013; *Vallianatos v. Greece*, App. No. 29381/09, ECHR 2013; *Identoba v. Georgia*, App. No. 73235/12, 12 May 2015; *Pajić v. Croatia*, App. No. 68453/13, 23 Feb. 2016; *M.C. and A.C. v. Romania*, App. No. 12060/12, 12 Apr. 2016; *Taddeucci and McCall v. Italy*, App. No. 51362/09, 30 June 2016.

²⁴See e.g., *Hoffmann v. Austria*, 23 June 1993, Series. A No. 255-C; *Thlimmenos v. Greece*, App. No. 34369/97, ECHR 2000-IV; *Palau-Martinez v. France*, App. No. 64927/01, ECHR 2003-XII; *97 Members of the Gldani congregation of Jehova's Witnesses v. Georgia*, App. No. 71156/01, 3 May 2007; *Religionsgemeinschaft der Zeugen Jehovas v. Austria*, App. No. 40825/98, 31 July 2008; *Löffelmann v. Austria*, App. No. 42967/98, 12 March 2009; *Sâmbata Bihor Greek Catholic Parish v. Romania*, App. No. 48107/99, 12 Jan. 2010; *Grzelak v. Poland*, App. No. 7710/02, 15 June 2010; *Savez crkava "Riječ života" and others v. Croatia*, App. No. 7798/08, 9 Dec. 2010; *Milanović v. Serbia*, App. No. 44614/07, 14 Dec. 2010; *O'Donoghue and others v. UK*, App. No. 34848/07, ECHR 2010; *Manzanas Martín v. Spain*, App. No. 17966/10, 3 Apr. 2012; *Jehovas Zeugen in Österreich v. Austria*, App. No. 27540/05, 25 Sept. 2012; *Vojnity v. Hungary*, App. No. 29617/07, 12 Feb. 2013; *Begheluri v. Georgia*, App. No. 28490/02, 7 Oct. 2014; *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v. Turkey*, App. No. 32093/10, 2 Dec. 2014; *İzzettin Doğan v. Turkey*, App. No. 62649/10, 26 April 2016.

²⁵See e.g., *Koua Poirrez v. France*, App. No. 40892/98, ECHR 2003-X; *Luczak v. Poland*, App. No. 77782/01, 27 Nov. 2007; *Andrejeva v. Latvia*, App. No. 55707/00, ECHR 2009; *Weller, supra* note 18; *Fawsie v. Greece*, App. No. 40090/07, 28 Oct. 2010; *Ponomaryovi v. Bulgaria*, App. No. 5335/05, ECHR 2011; *Rangelov v. Germany*, App. No. 5123/07, 22 March 2012; *Kurić and others v. Slovenia* [GC], App. No. 26828/06, ECHR 2012; *Dhabhi v. Italy*, App. No. 17120/09, 8 Apr. 2014.

wedlock or adoption,²⁶ health issues or disability,²⁷ or discriminations related to prisoners.²⁸

Nevertheless, there are certain cases that do not fit under this general rule. In *Chassagnou*, the ECtHR held that a French provision that obliged the owners of small pieces of farm- or wood-land to enter into a municipal hunters' association, while owners of larger estates were excluded from this obligation, violated Art. 14 ECHR.²⁹ In *Driha*, it qualified a Romanian practice, according to which the old-age allowances of some soldiers were subject to taxation while the allowances of other soldiers in similar circumstances were not taxed, as discrimination.³⁰ Finally, in *Altınay*, the Court found a violation because the rules for access to university had been changed without further notice and without providing transitional arrangements for individuals who had made investments according to the old rules.³¹

However, these cases are exceptions. In general, the Court indeed only finds violations if the law or state measure in question makes a distinction based on a suspect criterion. These criteria are not necessarily only the ones explicitly mentioned in Art. 14 ECHR. Rather, the Court has also identified other criteria, such as sexual orientation, which are, in its view, equally problematic. Nevertheless, the observations demonstrate that the Court shows considerable restraint when it comes to the criteria of distinction that can be a basis for discrimination.

²⁶See *Marckx v. Belgium*, 13 June 1979, Series A No. 31; *Inze*, *supra* note 9; *Mazurek v. France*, App. No. 34406/97; ECHR 2000-II; *Hoffmann v. Germany*, App. No. 34045/96, 11 Oct. 2001; *Sahin v. Germany* [GC], App. No. 30943/96, ECHR 2003-VIII; *Merger and Cros v. France*, App. No. 68864/01, 22 Dec. 2004; *Pla and Puncernau v. Andorra*, 69498/01, ECHR 2004-VIII; *P.M. v. UK*, *supra* note 15; *Brauer v. Germany*, App. No. 3545/04, 28 May 2009; *Zaunegger v. Germany*, App. No. 22028/04, 3 Dec. 2009; *Sporer v. Austria*, App. No. 35637/03, 3 Feb. 2011; *Negrepontis-Giannisis v. Greece*, App. No. 56759/08, 3 May 2011; *Genovese v. Malta*, App. No. 53124/09, 11 Oct. 2011; *Fabris v. France*, App. No. 16574/08, ECHR 2013; *Topčić-Rosenberg v. Croatia*, App. No. 19391/11, 14 Nov. 2013.

²⁷See e.g., *Glor v. Switzerland*, App. No. 13444/04, ECHR 2009; *G.N. and others v. Italy*, App. No. 43134/05, 1 Dec. 2009; *Kiyutin v. Russia*, App. No. 2700/10, ECHR 2011; *I.B. v. Greece*, App. No. 552/10, ECHR 2013; *Çam v. Turkey*, App. No. 51500/08, 23 Feb. 2016; *Novruk and others v. Russia*, App. No. 31039/11, 15 March 2016; *Guberina v. Croatia*, App. No. 23682/13, ECHR 2016.

²⁸See e.g., *Clift*, *supra* note 21; *Laduna v. Slovakia*, App. No. 31827/02, ECHR 2011; *Gülray Cetin v. Turkey*, App. No. 44084/10, 5 March 2013; *Varnas v. Lithuania*, App. No. 42615/06, 9 July 2013; *Costel Gaciu v. Romania*, App. No. 39633/10, 23 June 2015; *Martzaklis v. Greece*, App. No. 20378/13, 9 July 2015.

²⁹*Chassagnou and others v. France*, App. No. 25088/94, ECHR 1999-III.

³⁰*Driha v. Romania*, App. No. 29556/02, 21 Feb. 2008.

³¹*Altınay v. Turkey*, App. No. 37222/04, 9 July 2013.

3 EU Fundamental Rights Law

The treaties establishing the European Union and, formerly, the European Communities have contained non-discrimination clauses from the beginning. However, these prohibitions of discrimination have been very specific in their scope. First, Art. 157 TFEU and its predecessors established the principle of equal pay for male and female workers for equal work or work of equal value. This prohibition of discrimination only concerned distinctions based on the sex of the employee and only with reference to the remuneration. Second, the fundamental freedoms implicitly contained a prohibition to discriminate based on nationality. Again, this prohibition contains a double restriction: It only concerns direct or indirect discriminations with regard to the nationality of the concerned individual or company, and the discriminatory measure has to fall into the scope of application of the respective fundamental freedom. Third, the treaties contained, from the beginning, a general prohibition to discriminate based on nationality, which is contained in Art. 18 TFEU. While this norm is, in principle, more extensive than the non-discrimination principles of the fundamental freedoms, its application is also restricted. It only applies to situations “within the scope of application of the Treaties”.

An explicit general prohibition of discrimination has, for the first time, been introduced by Art. 21 (1) of the EU Charter of Fundamental Rights, which has been part of European primary law since the entry into force of the Treaty of Lisbon. Like Art. 14 ECHR, Art. 21 (1) of the Charter lists certain grounds of discrimination that are particularly problematic. However, these grounds are not exclusive. Art. 21 (2) repeats the prohibition to discriminate on the basis of nationality which is already contained in Art. 18 TFEU. In the following analysis, I will restrict myself to these latter two prohibitions of discrimination.

3.1 *The Prohibition of Discrimination Based on Nationality*

The European Court of Justice (ECJ) has developed the prohibition to discriminate on the basis of nationality contained in Art. 18 TFEU and Art. 21 (2) of the Charter into a powerful instrument of judicial review. As already mentioned, the norm contains two explicit restrictions: On the one hand, it only prohibits discriminations based on nationality, not on other grounds, such as gender, race or sexual orientation. On the other hand, it only has normative force within the scope of application of the European treaties. Outside the scope of the treaties, member states are, in principle, free to discriminate based on nationality.

However, the ECJ has interpreted the scope of Art. 18 TFEU extensively. Concerning the ground of distinction, the Court not only targets direct discriminations, but also indirect discriminations, in which an apparently neutral distinction has the effect of favoring nationals of the home state over nationals of

other member states.³² In particular, it has on several occasions qualified residency requirements as indirect discriminations.³³ Furthermore, it has also seen distinctions based on the country of secondary education,³⁴ the membership in the national public social security scheme,³⁵ the place of registration of a motor vehicle,³⁶ the reception of certain national social benefits³⁷ or the country of origin of an operating license³⁸ as indirect discriminations. Nevertheless, the prohibition of indirect discriminations is not absolute. The Court has on several occasions accepted justifications if the distinction pursued a legitimate objective and was proportionate.³⁹

The Court did not only interpret Art. 18 TFEU extensively with regard to the criterion of distinction, nationality, but also with regard to the scope of application. In the early years of the European Communities, the general prohibition to discriminate based on nationality only played a marginal role next to the non-discrimination principles contained in the fundamental freedoms. After all, economic integration was the main purpose of the European Communities so that activities falling into the scope of the treaties were usually also covered by the fundamental freedoms. However, this changed considerably after the introduction of the union citizenship with the treaty of Maastricht in 1993.⁴⁰

One of the landmark cases in which the ECJ developed the connection between the prohibition of discrimination in Art. 18 TFEU and the general right to freedom of movement, which was newly introduced through the union citizenship, was the decision in *Martínez Sala*.⁴¹ The applicant in the case was a Spanish national who had come to Germany as a child and worked there for several years before receiving social assistance payments. After the birth of her child, she applied for a child-raising allowance. Her application was refused because she did not have a formal residence permit, which was, under the German law, a precondition for receiving the allowance. The Court argued that Art. 18 TFEU was applicable because every union citizen who lawfully resided in another member state took

³²Cases C-29/95, *Pastoors* [1997] ECR I-300, para. 16; C-411/98, *Ferlini* [2000] ECR I-8126, para. 57; C-224/00, *Commission v. Italy* [2002] ECR I-2981, para. 15; C-628/11, *International Jet Management GmbH*, EU:C:2014:171, para. 64.

³³*Pastoors*, *supra* note 7, at para. 17; C-209/03, *Bidar* [2005] ECR I-2151, para. 52–53; C-155/09, *Commission v. Greece* [2011] ECR I-65, para. 46; C-73/08, *Bressol* [2010] ECR I-2735, para. 42–46; C-382/08, *Neukirchinger* [2011] ECR I-139, para. 34.

³⁴Cases C-224/98, *D'Hoop* [2002] ECR I-6212, para. 31–34; C-65/03, *Commission v. Belgium* [2004] ECR I-6429, para. 29; C-147/03, *Commission v. Austria*, [2005] ECR I-5992.

³⁵*Ferlini*, *supra* note 7, at para. 58.

³⁶*Commission v. Italy*, *supra* note 7, at para. 16.

³⁷Case C-75/11, *Commission v. Austria*, EU:C:2012:605, para. 50–51.

³⁸*International Jet Management GmbH*, *supra* note 7, at para. 65–67.

³⁹*Bressol*, *supra* note 8, para. 48.

⁴⁰On the union citizenship, see Shaw (1998), Hailbronner (2005), Bellamy (2008), Spaventa (2008), Kadelbach (2010) and Wollenschläger (2011).

⁴¹Case C-85/96, *Martínez Sala* [1998] ECR I-2708.

advantage of the guarantee of freedom of movement contained in Art. 21 TFEU. Therefore, the case fell under the provision of European citizenship and thus under the scope of application of the treaty.⁴²

The Court confirmed this principle in *Grzelczyk* where it ruled that students had the same right to social assistance as member state nationals even if they did not fall under the scope of the freedom of movement for workers according to Art. 45 TFEU.⁴³ The fact that they were lawfully resident in another member state and thus exercising their right under Art. 21 TFEU was sufficient to open the scope of application of Art. 18 TFEU.⁴⁴ In *Bickel and Franz*, the ECJ extended the protection of Art. 18 TFEU to union citizens on short-term trips to another member state for professional purposes or as tourists. As such individuals exercised their rights to move and reside freely in another member state pursuant to Art. 21 TFEU, they could also enjoy the equal protection guarantee of Art. 18 TFEU.⁴⁵

If we accept this interpretation of the ECJ, there are hardly cases imaginable, in which Art. 18 TFEU does not apply. At least to the extent that a union citizen is lawfully present in the territory of another member state, he also enjoys the protection of Art. 18 TFEU. The restrictive character of the qualification that a situation has to be “within the scope of application of the Treaties” only has practical significance if a union citizen resides within its home state. A Romanian or Bulgarian citizen residing in his home country cannot claim social assistance in France or Belgium.

However, to reach that result the qualification is not necessary because, in principle, the ECJ accepts residency requirements for the reception of social benefits as justified.⁴⁶ In other cases, the ECJ has recently also shown a more restrictive tendency when it comes to the payment of social benefits to union citizens who are not actively working or studying in their host state in order to prevent social benefits tourism.⁴⁷ However, these cases are rather a specification of the ECJ’s previous jurisprudence than a deviation from it. After all, despite the broad interpretation of the scope of application of Art. 18 TFEU, the Court has never established an absolute prohibition of discrimination.

⁴²*Id.*, at para. 61.

⁴³Case C-184/99, *Grzelczyk* [2001] ECR I-6229.

⁴⁴*Id.*, at para. 31–33.

⁴⁵Case C-274/96, *Bickel and Franz* [1998] ECR I-7650, para. 16.

⁴⁶See Cases C-137/02, *Collins* [2004] ECR I-2735, para. 67–72; C-158/07, *Förster* [2008] ECR I-8507, para. 45–58.

⁴⁷See Cases C-22/08 and C-23/08, *Vatsouras and Koupatantze* [2009] ECR I-4585; C-333/13, *Dano*, EU:C:2014:2358; C-67/14, *Alimanovic*, EU:C:2015:597.

3.2 *The General Prohibition of Discrimination in Art. 21 (1) of the EU Charter on Fundamental Rights*

Art. 21 (1) of the Charter, establishing a general prohibition of discrimination regardless of the ground of distinction is also restricted in its scope of application. According to Art. 51 of the Charter, the fundamental rights of the Charter are binding for the member states only to the extent that they implement EU law. The ECJ has interpreted the term “implementation of EU law” broadly so that it also covers situations in which member states have a margin of appreciation in the implementation of directives⁴⁸ or in which they restrict the fundamental freedoms of the EU treaties.⁴⁹ Nevertheless, its scope of application is not as broad as the scope of Art. 18 TFEU because the mere fact that a union citizen is present in another member state does not yet constitute the implementation of EU law by a member state. Such an interpretation would make the Charter applicable to all interactions between member states and citizens of other member states on their territory. However, the ECJ has not decided on the issue, yet.

The existing case law on Art. 21 (1) of the Charter is scarce. The two most important cases concern age discrimination.⁵⁰ In *Mangold*, the ECJ had to decide on a German labor law provision concerning fixed-term employment contracts.⁵¹ In principle, a fixed-term employment contract could only be concluded for a specific reason. However, the law allowed for an exception for employees of more than 52 years of age. In order to facilitate their reintegration into the labor market, fixed-term contracts with employees over 52 years could be concluded without a specific reason. The ECJ regarded the provision to be in violation of Art. 6 (1) of the Directive 2000/78 because it went beyond what was necessary to promote the reintegration of older employees into the labor market.⁵² However, it could not apply the directive directly because the period for transposition had not yet expired. Therefore, the Court argued that the “principle of non-discrimination of age” had to be regarded as a general principle of EU law⁵³ and that the national court had to set aside national provisions violating this principle.⁵⁴

The decision in *Kücükdeveci* also concerned a German labor law norm.⁵⁵ According to the provision in question, employment periods before the age of

⁴⁸See Cases 5/88, *Wachauf* [1989] ECR 2633; C-117/06, *Möllandorf* [2007] ECR I-8390, para. 78–79; C-411/10 and C-493/10, *N.S.* [2011] ECR I-13905, para. 60–68; C-617/10, *Åkerberg Fransson*, EU:C:2013:105.

⁴⁹See Cases C-260/89, *ERT* [1991] ECR I-2951; C-368/95, *Familiapress* [1997] ECR I-3709, para. 24–25; C-60/00, *Carpenter* [2002] ECR I-6305.

⁵⁰Cases C-144/04, *Mangold* [2005] ECR I-10013; C-555/07, *Kücükdeveci* [2010] ECR I-365.

⁵¹*Mangold*, *supra* note 26.

⁵²*Id.*, at para. 58–65.

⁵³*Id.*, at para. 75.

⁵⁴*Id.*, at para. 77.

⁵⁵*Kücükdeveci*, *supra* note 26.

25 years were not taken into account for the calculation of the notice period for terminating an employment relationship. The Court held that the provision was not in conformity with directive 2000/78. However, even though the transposition period had now expired, the Court could again not apply the directive directly because there is no horizontal direct application of directives.⁵⁶ Nevertheless, the Court argued that the directive opened the scope of application of Art. 21 (1) of the Charter and that it was the latter which was applicable in the case at hand.⁵⁷

4 Conclusion

General prohibitions of discriminations are often considered to be problematic because they give courts a large amount of discretion. For this reason, the drafters of equal protection guarantees often include qualifications and limitations in order to avoid judicial activism. Sometimes, courts also exercise self-restraint. This contribution analyzed equal protection guarantees in the European Convention of Human Rights as well as the EU treaties and the interpretation of these guarantees by the respective courts.

Art. 14 ECHR and the analyzed equal protection guarantees of the EU treaties contain two types of qualifications and limitations. The first concerns the scope of application. Art. 14 ECHR only applies to facts that also fall in the ambit of other convention rights. Art. 18 TFEU exclusively extends to situations within the scope of application of the EU treaties. Art. 21 (1) of the Charter imposes obligations on member states to the extent that they are implementing EU law. Both analyzed courts have tendencies to interpret the scope of application rather broadly. The ECtHR defines an ambit of each convention right, which is wider than the scope of application and sometimes also includes situations that are explicitly excluded from the latter. Similarly, the ECJ uses the general freedom of movement in Art. 21 TFEU as a ‘door opener’ for Art. 18 TFEU. Consequently, there are hardly any relevant situations, in which the courts refuse to find a discrimination because of the limited scope of Art. 14 ECHR or Art. 18 TFEU. With regard to Art. 21 of the Charter, the evidence is rather scarce. But the ECJ has also shown a general tendency to interpret the scope of application of the Charter rather generously.⁵⁸

The second criterion concerns the criterion of distinction. The most specific provision in this respect is Art. 18 TFEU, which only prohibits distinctions based on nationality. The ECJ has interpreted the criterion of distinction broadly as it does not only include direct, but also indirect discriminations. However, this doctrinal

⁵⁶*Id.*, at para. 46.

⁵⁷*Id.*, at para. 50.

⁵⁸On this issue see Lenaerts (2012), Matz-Lück (2012), Jarass (2012), Kadelbach (2013) and Ward (2014), para. 51.49. For a critique of this jurisprudence, see Cremer (2003), Huber (2008) and Sauer (2012), pp. 28–29.

move is necessary in order not to deprive the guarantee of its effectiveness. By contrast, the ECtHR has exercised restraint when it comes to the criteria of distinction in Art. 14 ECHR. Even though the provision does not contain a *numerus clausus* of prohibited distinctions, the ECtHR has argued that not any distinction be covered by Art. 14 ECHR. Instead, it has generally only applied the provision to problematic distinctions suggesting that a measure may have been the result of an intentional discrimination. The case law on Art. 21 of the Charter is not sufficiently developed to draw any definitive conclusions on the position of the ECJ in this respect.

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