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Poverty-based discrimination

- Does International Human Rights Law care?

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Summary

In a world where the growth of economic inequalities does not seem to slow down the relevance of International Human Rights Law (IHRL) is questioned. Equality and non-discrimination are core principles of IHRL, but what do they have to offer people living in poverty?

In spite of the centrality of equality and non-discrimination to IHRL the meaning of these concepts is contested. The question "equality of what?" remains unanswered. However, a tendency to move from a formal to a substantive understanding of equality can be identified in relation to IHRL. This builds on the understanding that equality does not only require the state to refrain from treating people differently because of their sex, ethnicity, religion or other ground for discrimination. Rather, some situations actually require that individuals be treated differently for discrimination to be avoided. Moreover, discriminatory structures require the state to take positive measures to accommodate for difference beyond the majority norm but also to take action to correct de facto inequality. This development brings with it an enhanced potential for IHRL to address the "real" inequalities experienced by individuals.

This development has lead poverty to be recognized as an effect of discrimination. However, poverty is more than an effect of discrimination, it is also a source of discrimination. Poverty is connected to prejudice, negative stereotyping and stigma. This "povertyism" can be compared to racism, homophobia and sexism and is in a similar way often the source of discrimination.

The grounds for discrimination in IHRL are not static. The dynamic nature of IHRL has allowed it to recognize "new" grounds for discrimination such as sexual orientation, sexual identity and disability. Can a similar development take place in relation to discrimination against people living in poverty? What would such prohibition entail in a society where the rationale of the market economy makes financial resources a determining factor for opportunities and outcome of individuals?

Sammanfattning

I en värld där inget tycks kunna stoppa de växande ekonomiska klyftorna ifrågasätts även relevansen av internationella regleringar av mänskliga rättigheter. Trots att jämlikhet och icke-diskriminering utgör grunden för mänskliga rättigheter så verkar dessa regelverk oförmögna att adressera ekonomiskt betonad ojämlikhet. Gör diskrimineringsförbud och garantier om jämlikhet egentligen någon skillnad för människor som lever i fattigdom?

Jämlikhet och icke-diskriminering utgör grunden för mänskliga rättigheter. Trots detta finns det inte direkt någon konsensus kring vad dessa garantier egentligen innebär. Längre var icke-diskriminering begränsat till ett förbud för stater att behandla människor annorlunda på vissa diskrimineringsgrunder. Detta har dock förändrats och koncept så som indirekt diskriminering och positiv särbehandling har vidgat förståelsen av vad jämlikhet egentligen är. Till följd av detta har även fokus skiftat från endast negativa skyldigheter för stater att avstå från att behandla individer olika till skyldigheter att aktivt agera för att förhindra diskriminering även när sådan uppkommer till följd av strukturell ojämlikhet. Formell jämlikhet är inte längre tillräckligt utan jämlikhet måste även uppnås i praktiken, något som gjort att fattigdom har fått erkännande som en av de tydligaste effekterna av diskriminering.

Fattigdom är dock inte bara en effekt av diskriminering. I många situationer är det just det faktum att en individ uppfattas som fattig som genererar diskriminering. Fattigdom är nämligen, liksom andra diskrimineringsgrunder, nära kopplat till stigma, fördomar och negativa stereotyper. Sådana fördomar leder till diskriminering på samma sätt som rasism, homofobi och sexism. Trots detta benämns de rättighetskränkningar som människor som lever i fattigdom upplever sällan i dessa termer.

Genom historien har nya diskrimineringsgrunder kontinuerligt vunnit erkännande. Diskriminering på grund av sexuell läggning, sexuell identitet och funktionsvariationer är några sådana exempel. Skulle fattigdom på ett liknande sätt kunna erkännas som en grund på vilken diskriminering är förbjuden? Vad skulle ett sådant förbud innebära i det samhälle baserat på en marknadsekonomi där ekonomiska tillgångar är en helt grundläggande faktor i vilka möjligheter vi har?

SUMMARY	I
SAMMANFATTNING	II
PREFACE	1
ABBREVIATIONS	2
1. INTRODUCTION	3
1.1. BACKGROUND.....	3
1.2. PURPOSE AND RESEARCH QUESTION.....	4
1.3. THEORETICAL FRAMEWORK.....	4
1.3.1. <i>Human rights and equality</i>	4
1.3.2. <i>Human rights universality, generality and indivisibility</i>	6
1.4. METHOD AND MATERIAL.....	7
1.5. LITERATURE REVIEW	8
1.6. DISPOSITION.....	9
1.7. DELIMITATIONS	10
2. THEORETICAL FRAMEWORK	11
2.1. FORMAL OR SUBSTANTIVE EQUALITY	11
2.1.1. <i>Equality of treatment, opportunity, result or dignity?</i>	11
2.1.2. <i>Fredman’s multidimensional framework</i>	14
2.2. POVERTY AND DISCRIMINATION	15
2.2.1. <i>What is poverty?</i>	15
2.2.2. <i>Discrimination leading to poverty</i>	16
2.2.3. <i>Poverty leading to discrimination</i>	17
2.3. SUMMARY CHAPTER 2	19
3. EQUALITY AND NON-DISCRIMINATION IN IHRL	21
3.1. THE RELATIONSHIP BETWEEN EQUALITY AND NON-DISCRIMINATION	21
3.2. DEFINING DISCRIMINATION.....	22
3.3. THE “TREATMENT”	24
3.3.1. <i>Direct/Indirect discrimination</i>	24
3.3.2. <i>Positive duties</i>	26
3.4. RELATION TO OTHER RIGHTS	30
3.4.1. <i>Independent or subordinate</i>	30
3.4.2. <i>Autonomy</i>	31
3.5. GROUNDS FOR DISCRIMINATION	32
3.5.1. <i>Non-exhaustive</i>	32
3.5.2. <i>Intersectional discrimination</i>	35
3.6. JUSTIFICATION.....	36
3.6.1. <i>Stricter scrutiny</i>	37
3.6.2. <i>Suspect grounds</i>	38
3.6.3. <i>Indicators of “suspectness”</i>	39
3.7. SUMMARY CHAPTER 3	40
4. POVERTY-BASED DISCRIMINATION	42
4.1. POVERTY AS A GROUND FOR DISCRIMINATION.....	42
4.1.1. <i>Property/fortune/economic status</i>	42
4.1.2. <i>Social origin</i>	43

4.1.3. "Other status"	44
4.2. JUSTIFYING DISCRIMINATION ON THE GROUND OF POVERTY	46
4.2.1. <i>Is poverty a suspect ground?</i>	47
4.3. ASSESSMENT OF DISCRIMINATION.....	49
4.3.1. <i>Housing example</i>	49
4.3.2. <i>Criminal legislation example</i>	50
4.3.3. <i>Access to court example</i>	51
4.4. SUMMARY CHAPTER 4	52
5. CONCLUSION	54
5.1. WHAT IS NON-DISCRIMINATION UNDER IHRL?	54
5.2. IS POVERTY A (SUSPECT) GROUND UNDER IHRL?	54
5.3. OUTLOOK.....	55
BIBLIOGRAPHY	58
PRINTED SOURCES.....	58
ELECTRONIC SOURCES	61
PUBLICATIONS FROM INTERNATIONAL ORGANISATIONS.....	61
TABLE OF CASES.....	63
ECtHR.....	63
UN TREATY BODIES	64

Preface

Dryga 6 års studier har nu kommit till sitt slut. Detta examensarbete markerar slutet både på mina studier vid juristprogrammet och min mastersexamen i folkrätt och mänskliga rättigheter. Jag är väldigt tacksam över att ha fått ägna så mycket tid åt att fördjupa mig i de frågor jag brinner allra starkast för, även om jag kommer stå i evig skuld till CSN för detta.

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Stockholm, den 15 mars 2020

Julia Eriksson

Abbreviations

CEDAW	Convention on the Elimination of Discrimination of Women
CoE	Council of Europe
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
HR-committee	The UN Human Rights Committee
ESCR-committee	The UN Committee on Economic, Social and Cultural Rights
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant of Civil and Political Rights
ICERD	International Convention on Elimination of Racial Discrimination
ICESCR	International Covenant of Economic, Social and Cultural Rights
IHRL	International Human Rights Law
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme

1. Introduction

1.1. Background

Does International Human Rights Law (IHRL) care about inequality? This is a question that has stirred debate for a long time but it is no less relevant today. Growing inequalities is the major concern of the latest UNDP report, which emphasises that it is not enough to lift people out of the most extreme forms of poverty; the goal of equality also has to be to enhance the capabilities of all individuals.¹ However, whether this “real” equality is something that can be achieved within the framework of IHRL is controversial. Some considers IHRL irrelevant, and possibly even as an obstacle, in the fight for equality. Samuel Moyn has for example suggested that even the most extreme forms of inequality are compatible with IHRL. Others, such as Philip Alston, do not agree with this. Alston argue that while IHRL has not up until today been able to eliminate inequality in practice, it does care about it in theory.²

The UNDP report further shows how economic resources of a parent is a determinate factor for the opportunities accessible to the child.³ This is not hard to imagine since economic resources is an important factor in determining the opportunities open to individuals. However, it is not only market prices that limit the opportunities of people living in poverty. Prejudice, negative stereotyping and stigma against people living in poverty exist all over the world and constitute structural obstacles in the realisation of capabilities of people living in poverty.

To what extent can the disadvantage experienced by people living in poverty be addressed by IHRL? Equality and non-discrimination are core commitments in all regulations of IHRL. However, how does these frameworks understand equality? Can status-based prohibitions of non-discrimination protect a groups or individuals defined by their poverty? Demands for recognition of poverty as a ground for discrimination are not new, however the question continues to be controversial. Does the dynamic nature of IHRL, which has lead to the recognition of discrimination on grounds such as sexual orientation, sexual identity and disability, open for a similar recognition of discrimination based on poverty? These are all questions that will be discussed and analysed in this thesis.

¹ UNDP, *Human Development Report 2019 : Beyond income, beyond averages, beyond today: Inequalities in human development in the 21st century*, 2019.

² See debate Moyn and Alston described in chapter 1.5. below.

³ UNDP (2019), p.10f.

1.2. Purpose and research question

The concept of poverty and human rights can be addressed from many angles. The angle chosen in this thesis is to examine poverty in relation to equality and non-discrimination. This is a subject that has been widely debated and what primarily has been the focus is that discrimination leads to poverty. It is for example widely acknowledged that status-groups are overrepresented in poverty. However, the subject explored in this thesis takes a different approach and examines the other side of this coin; that poverty also leads to discrimination. The focus will thus be on poverty-based discrimination and “povertyism”⁴. This is an aspect that scholars, who address the relationship between poverty and discrimination in IHRL, often mention but rarely examine in depth. The general approach is instead to mention this in passing, either suggesting that poverty should be recognized as a ground for discrimination or simply stating that poverty does or does not constitute a ground for discrimination.⁵ The background of this thesis is however my understanding of this being an over-simplified way to handle the question of whether poverty is a ground for discrimination. Such approach seem to ignore the controversy around acknowledging poverty as a ground for discrimination and the uncertainty as to what effects such recognition would have. Therefore, this thesis seeks to map out the protection IHRL grants people living in poverty in respect of equality and non-discrimination. The research question is therefore:

- Does IHRL prohibit discrimination on the ground of poverty?

To be able to answer that question the following sub-questions will be examined:

- How are IHRL prohibitions of non-discrimination structured?
- What treatment constitutes discrimination?
- Is poverty a protected ground for discrimination?
- What situations could constitute a violation of a prohibition of poverty-based discrimination?

1.3. Theoretical framework

1.3.1. Human rights and equality

Equality and non-discrimination is central to human rights. The Universal Declaration on Human Rights (UDHR) emphasises that all human beings are born free and equal in dignity and rights but also that all human rights belong to everyone without

⁴ “Povertyism” is a term describing the negative stereotypes and prejudice against people living in poverty. “Povertyism” can be compared with racism, sexism and homophobia.

⁵ See for example MacNaughton, Gillian, “Untangling Equality and Nondiscrimination to Promote the Right to Health Care for All.” *Health & Human Rights: An International Journal*, vol. 11, no. 2, Dec. 2009, pp. 47–63.

discrimination and that everyone is entitled to equal protection of the law.⁶ Yet, equality in itself does not have much normative content and can be differently defined depending on the ideology and values that are allowed to inform the principle.⁷ Scholars have thus tried to answer the question “equality of what?” - a task that has been shown to be nearly impossible. Even when consensus has been found in relation to that question, new questions have appeared regarding definitions or different opinions on how such equality should be achieved.

The different understandings of what equality is, and how it should be achieved, are sometimes described by the contrasts of formal and substantive equality. Formal equality, or equality as consistency, focuses on equal treatment.⁸ Substantive equality can instead be described as a critique of formal equality. It builds on the understanding that equal treatment does not guarantee equality since it fails to take into account the relevant differences and different preconditions due to previous or on-going discrimination of individuals. Equal treatment is thus understood as insufficient to achieve “real” equality or *de facto* equality, which needs to be achieved in social reality.⁹

The divide between substantive and formal equality is simplified and there are many different theories within these two categories. Above, the substantive understanding of equality was negatively defined; the answer to the question “equality of what?” is *not* “equality of treatment”. Or at least focus on equal treatment is not always sufficient to achieve substantive equality. However, it has been shown to be much more difficult to provide a positive definition of substantive equality. This has also been one of the main reasons of critique against the ideas of substantive equality; that it is such a wide concept that has proven hard to define.

Attempts to answer the question “equality of what” from a substantive equality perspective have been made, suggesting “equality of result”, “equality of opportunity” or “equality of dignity”. However, substantive equality, as it will be understood in this thesis, cannot be defined by either of these concepts on their own. Rather, these values need to be taken together and be carefully balanced for substantive equality to be achieved. This complexity is widely recognized by scholars addressing substantive equality.

Sandra Fredman is a strong voice in developing concepts of substantive equality. She has addressed the difficulties in finding one coherent definition of equality. Instead of trying to find one such simple definition she suggests a multidimensional framework that can be used as an analytical tool for addressing questions of inequality. The

⁶ UDHR, art. 1, 2 and 7.

⁷ Arnardóttir, Oddný Mjöll, *Equality and Non-Discrimination under the European Convention on Human Rights*, Kluwer Law International, 2003, p. 9f.

⁸ Fredman, Sandra, *Discrimination Law*, Oxford University Press, 2002, p. 7f.

⁹ Schiek, Dagmar et al., *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law : Ius Commune Casebooks for the Common Law of Europe*, Hart Publishing, 2007, p. 28.

dimensions of her framework are, redressing disadvantage; addressing stigma, stereotyping, prejudice and violence; enhancing voice and participation and accommodating for differences and achieve structural change.¹⁰

This thesis understands equality, qua substantive equality, as a fundamental feature of human rights. The thesis largely draws upon Fredman's ideas of substantive equality and uses that terminology when examining poverty and discrimination in IHRL. The main purpose for outlining this theoretical framework here in the introduction is for the reader to have a point of reference for the terminology used throughout the thesis. This since questions of equality and discrimination are complex and the terminology used in scholarly writings are not always properly explained. These theories are widely used in IHRL scholarship and serves well to explain the IHRL as it is understood in this thesis.

1.3.2. Human rights universality, generality and indivisibility

Recognizing the centrality of equality for human rights also indicates the general and universal nature of human rights. Human rights are general since they belong to everyone on the sole premise of them being human, other categorisations such as citizenship, group membership, merit etc. are not determinative in this aspect.¹¹ This is complemented by human rights universality meaning that human rights belong to every individual regardless of where that person finds her self geographically. This does not mean that states are required to guarantee the rights of individuals all over the world, that responsibility is divided between states. Nor should human rights universality be understood as an assumption that human rights need to be implemented in the same way across the world, the rights are however the same at their core.¹²

This thesis will approach questions of discrimination in IHRL generally. IHRL will thus be understood as one legal regime and human rights as one category of norms. This entails an understanding that human rights are indivisible and that there are no hierarchy between rights. This understanding is reflected in the UDHR and is part of the official UN policy.¹³ The indivisibility of rights was also explicitly formulated and recognized in the Vienna Declaration and Programme of Action adopted in 1993.¹⁴ However, this is not uncontroversial and not all scholars agree with indivisibility as

¹⁰ Fredman, Sandra, "Substantive Equality Revisited: A Rejoinder to Catharine MacKinnon" *International Journal of Constitutional Law*, vol. 14, no. 3, July 2016b, pp. 747–751, p. 713.

¹¹ Besson, Samantha, *Sources of International Human Rights Law: How General Is General International Law?* Oxford University Press, 2017, p. 862; Fredman, Sandra, "The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty," *Stellenbosch Law Review*, vol. 22, no. 3, 2011, pp. 566–590, 578f.

¹² See for example Mutua, Makau, *Human rights: a political and cultural critique*, University of Pennsylvania, 2002.

¹³ UN OHCHR, "What are human rights?," available at <<https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>> (accessed 2020-03-10).

¹⁴ UN GA, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23.

an adequate description of human rights.¹⁵ This said, it should also be recognized that in practice, human rights are not always equally accessible.¹⁶

1.4. Method and material

When doing legal research in the field of IHRL it is important to set out an understanding of this area of law and which sources it builds on. The sources of IHRL are in some aspects distinct from the sources of other fields of international law and thus have their own logic.¹⁷ IHRL is of a non-contractual nature, which is indicated by that it does not primarily regulate the relationship between states but between state and individuals, other indicators of this special nature is non-reciprocity, the restricted possibility of reservations, the fact that violation or succession does not impact the continuity and the erga omnes effect.¹⁸

Above from treaty law, general principles and customary international law are important sources of IHRL. General principles as a source of IHRL relies heavily on principles develop on the domestic level.¹⁹ When examining the content of IHRL it is thus not only relevant to look to how these questions have been handled at an international level or in international institutions but also at the domestic level.²⁰

This special character of IHRL is sometimes used to undermine the legal value of these norms and to describe them as moral rather than legal. However Samantha Besson rejects this argument and explains that the relationship between moral norms and IHRL does not make the later less legal or less “positive”.²¹

This understanding of IHRL together with the universality, generality and indivisibility described above, will be the foundation of this thesis. It allows for an analysis of the content of IHRL, and specifically the right to equality and non-discrimination, from a grand variety of sources derived both from the international, regional and domestic level. It also allows a critical examination of how human rights norms have been codified and implemented through various instruments and by different institutions.

This thesis will thus draw upon, and analyse, everything from international conventions, jurisprudence from international institutions as well as documentation from international organisations as indicators of the content of IHRL. Also scholarly writings and other suggestions of how IHRL should be interpreted, understood and

¹⁵ Nickel, James W. “Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights.” *Human Rights Quarterly*, no. 4, 2008, p. 984.

¹⁶ Lavrysen, Laurens "Strengthening the Protection of Human Rights of Persons Living in Poverty under the ECHR," in *Netherlands Quarterly of Human Rights* 33, no. 3 (2015): 293-325, p. 294.

¹⁷ Besson (2017), p. 838; De Schutter, Olivier de. *International Human Rights Law : Cases, Materials, Commentary*, Third edition, Cambridge University Press, 2019, p. 13.

¹⁸ Besson (2017), p. 847.

¹⁹ Besson (2017), p. 853f.

²⁰ De Schutter (2019), p. 1, 36f.

²¹ Besson (2017), p. 844f.

applied will be used to build an understanding what the prohibition of non-discrimination in IHRL entail.

1.5. Literature review

As indicated above, the relationship between poverty, inequality and human rights has been widely debated amongst scholars. The debate between Samuel Moyn and Philip Alston can be used to illustrate this. While they seem to agree about that IHRL has not in practice been able to achieve equality they disagree on the explanation for this. Moyn argues that human rights do not care about inequality and that the whole system is too closely connected to neoliberalism and market fundamentalism to have any potential in addressing redistributive equality.²² Alston on the other hand sees potential in IHRL and argues that the failure to address inequalities in practice should be attributed to the approach taken by states but also other human rights actors.²³ Alston argues that separation between economic inequality and human rights in practice is not inherent in IHRL as a system but rather a separation upheld by the actors operating within the system.²⁴

Moyn is critical of the human right movement for its focus on sufficiency instead of equality. He to some extent holds Amartya Sen accountable for this development.²⁵ Moyn is right about this to the extent that capability theory, developed by Sen, focus on a minimum rather than a ceiling on equality.²⁶ However, Sen's capability theory has also been celebrated for providing a more nuanced understanding of inequality and poverty. When used to define poverty the capability approach allows a move away from focus only on income-poverty to a more multifaceted understanding of poverty relating to human rights and operating in both a social, cultural, political and economic sphere.²⁷

The critique launched by Moyn also largely seems to overlook the substantive understanding of equality that has been developed, and to large extent also informed, the understanding and application of human rights and especially guarantees of equality and non-discrimination. Substantive equality describes an equality that is not only formal or de jure but substantive and de facto. It is impossible to list all the scholars that have contributed to this debate. However, this thesis has had particular use of the work of Sandra Fredman and Oddný Mjöll Arnardóttir to conceptualise substantive equality in relation to IHRL.

²² Moyn, Samuel, Human rights and the age of inequality, Open Global Rights, 2015-10-27, available at: <<https://www.openglobalrights.org/human-rights-and-age-of-inequality/>> (accessed 2020-03-11)

²³ Alston, Philip, *Extreme inequality as the antithesis of human rights*, Open Global Rights, 2015-08-27, available at: <<https://www.openglobalrights.org/extreme-inequality-as-the-antithesis-of-human-rights/>> (accessed: 2020-03-11).

²⁴ Alston (2015).

²⁵ Moyn, Samuel, *Not Enough: Human Rights in an Unequal World*, The Belknap Press of Harvard University Press, 2018, p. 136f.

²⁶ Sen, Amartya, *Inequality Reexamined*, Oxford University Press, 1995; Moyn (2018) p. 136f.

²⁷ See chapter 2.2.1.

Close to theories of substantive equality lie vulnerability theories. In one way vulnerability theorists can be said to also strive for substantive equality, something that is illustrated by Martha Albertson Fineman's approach to this subject.²⁸ The difference between these approaches, as understood in this thesis, is that vulnerability theorists are more critical to the focus on status-equality in IHRL and has less belief in that real equality can be achieved within such system. This critique is highly relevant and a reflection such as that status-groups does not adequately reflect real disadvantage and vulnerability is an important input into this thesis.²⁹

As for the exact research question of this thesis there is not, to my knowledge, any extensive writing on whether IHRL prohibits discrimination on the ground of poverty. This is not to say that this question has never been addressed. Several scholars have touched upon the subject, as will be shown throughout the thesis, however, the question is generally handled quite briefly.³⁰ Moreover there seems to be radically different understandings of poverty as a ground for discrimination, the idea has been arbitrarily rejected by some and arbitrarily accepted by some. In relation to domestic law the situation is different and there are more examples of scholars concentrating on the question of poverty as a ground for discrimination, often arguing for the inclusion of such ground into constitutions or anti-discrimination legislation. These scholars often build their arguments at least partially on a human rights rationale.³¹

1.6. Disposition

The second chapter of this thesis will focus on developing the theoretical framework that will underpin this thesis. Focus will be on these theoretical underpinnings as expressed by scholars and these will not so much be related to specific regulations of human rights and discrimination. This chapter will also elaborate on the relationship between poverty and discrimination and specifically look at situations of potential poverty-based discrimination.

The third chapter will be dedicated to different regulations of discrimination in IHRL, particular weight will be given to the International Bill of Rights and the European Convention of Human Rights (ECHR). This chapter is necessary for the analysis that will be conducted in the fourth chapter in two ways. The main purpose of this section

²⁸ Fineman, Martha Albertson "Vulnerability and Inevitable Inequality" *Oslo Law Review*, no. 03, 2017, pp. 133–149.

²⁹ Fineman, Martha Albertson "Beyond Identities: The Limits of an Antidiscrimination Approach to Equality" *Boston University Law Review*, vol. 92, no. 6, Dec. 2012, p. 1713.

³⁰ See for example: Lavrysen (2015), p. 317f; Craven, Matthew C. R., *The International Covenant on Economic, Social, and Cultural Rights : A Perspective on Its Development*, Clarendon Press, 1998, p. 170; Fredman, Sandra. "Providing Equality: Substantive Equality and the Positive Duty to Provide." *South African Journal on Human Rights*, vol. 21, no. 2, 2005, pp. 163–190, p. 172.

³¹ See for example; Peterman Danieli Evans, "Socioeconomic Status Discrimination" *Virginia Law Review*, vol. 104, no. 7, 2018, p. 1283; Malleson, Kate, "Equality Law and the Protected Characteristics" *Modern Law Review*, vol. 81, no. 4, July 2018, pp. 598–621.

will be to establish the role of discrimination grounds in IHRL; which grounds for discrimination that are recognized and how they impact the assessment of discrimination. However, for the analysis in chapter four to be meaningful it is also important to understand what constitutes discrimination under IHRL and how these regulations have been interpreted and applied, something that will also be addressed in this chapter.

Chapter four most clearly address the research question of this thesis; whether IHRL prohibits poverty-based discrimination. The chapter will thus draw upon the standards developed in chapter three to examine whether poverty is a ground for discrimination but also whether it has the potential of being a suspect ground for discrimination. The final section of this chapter will seek to concretise the analysis that has been made through a couple of examples. These examples illustrate potential situations that, with a substantive understanding of equality, would be considered to violate a prohibition of poverty-based discrimination.

The fifth and final chapter will conclude and summarize the findings of this thesis. It will also provide an outlook on what potential the prohibition on non-discrimination in IHRL has in addressing inequalities in society today and tomorrow.

1.7. Delimitations

This thesis is not a thesis on substantive equality per se. There are many different understandings of what the most efficient way to achieve substantive equality is, something that has been touched upon in the literature review above but which will not be examined in further detail. Instead this thesis primarily uses substantive equality terminology to describe and understand discrimination and examine whether there is a human rights rationale for recognizing poverty as a ground for discrimination.

Similarly this thesis does not claim to cover all the human rights implications of living in poverty. This thesis will focus on framing poverty-related human rights violations as potential cases of discrimination. Thus it is the connection between poverty and discrimination that is examined in this thesis, with particular focus on discrimination against individuals on the ground of their poverty.

The thesis will not cover all regulation on non-discrimination; it will touch upon the different aspects of non-discrimination that is most relevant for the research question. Focus will be on general prohibitions of non-discrimination due to the focus on discrimination on the ground of poverty. Thus, specific regulations in relation to only some status-groups, such as CEDAW, ICERD and CRPD or corresponding instruments on regional level, will not be examined in detail. Such instruments will however be addressed to the extent they impact the general understanding of discrimination in IHRL.

2. Theoretical framework

This chapter will set out the theoretical framework for this thesis. The first part will explore different theoretical understandings of equality. Special focus will be dedicated to theories of substantive equality, which, as will be shown in the third chapter, have been allowed to largely influence the understanding of equality and non-discrimination in IHRL. Although substantive equality is often referred to as the end goal of IHRL and non-discrimination the exact meaning of substantive equality is contested. This will be addressed in this chapter and special focus will also be on the understanding of substantive equality as it has been developed by Sandra Fredman.

The second part of this chapter will set out a theoretical understanding of poverty that will be used throughout the thesis. It will also examine the relation between poverty and discrimination, focusing specifically on discrimination occurring on the ground of poverty. This section does not intend to describe all forms of human rights violations that can be related to a situation of poverty but will focus on some examples of potential poverty-based discrimination and how these can be described with help of Fredman's analytical framework.

2.1. Formal or substantive equality

"Equality" is central to human rights, yet there is no real consensus concerning how it should be defined or achieved. The definition, or "content", of "equality" has been differently understood depending on what values and ideologies that have been allowed to inform it. To fill "equality" with substance scholars have attempted to answer the question "equality of what?" A classic answer to this question has been "equality of treatment" which represents a formal understanding of equality. Coming from a more substantive understanding of equality the answer is more ambiguous. Suggestions have been "equality of results", "equality of opportunity" or "equality of dignity".

2.1.1. Equality of treatment, opportunity, result or dignity?

Formal equality values equal treatment and consistency and thus has a strong focus on sameness. This understanding entail that to be treated differently, especially on grounds such as race, sex, religion etc., constitutes a violation of the individual right to equality. This conclusion builds upon the assumption that discrimination grounds never can be relevant factors for treating individuals differently. Prohibiting consideration of such grounds is thus a way of ensuring that individuals are treated

according to their own merit. This is sometimes described as applying a “colour or gender-blind” approach.³²

When the principle of equality and non-discrimination is informed by a formal understanding of equality it focuses on symmetrical prohibitions of different treatment. Formal equality has historically, and still today, been allowed to largely guide the interpretation and application of legal prohibitions of non-discrimination. The strength of this approach is that it has the potential of ensuring that individuals are treated according to their own merit.

The equal treatment that is guaranteed by formal equality is in many situations desirable. However, equal treatment can also be detrimental for the individual, that is the case when relevant differences between individuals are ignored, leading to unequal, and unfair result. Formal approaches to equality cannot address those situations since equal treatment is considered neutral even in situations when it is adapted to the prevalent norm and leaves a clear disadvantage for one or several groups to which it is applied.³³ Many feminist legal scholars, contesting that prohibitions of discrimination only allow women to demand to be treated in the same way as men, have addressed this deficit in formal understandings of equality. Such treatment will require women, where their situations are relevantly different from that of men, to adapt to a male norm or be refused de facto equality.

In contrast to formal approaches to equality, substantive approaches allow for a more critical approach to structural disadvantage of groups that does not fit the societal norm.³⁴ Equal treatment is thus considered discriminatory if it has discriminatory effect.³⁵ This might be the case either when individuals are relevantly different or in relevantly different situations because of previous or on-going discrimination and disadvantage. Substantive equality is thus not achieved in the formal or de jure sense but with de facto equality in social reality.³⁶

Acceptation of that equal treatment is sometimes insufficient to achieve equality has led to the suggestion that the focus should instead be equality of outcome or result. However, applying equality of result as an end goal can be problematic, especially if focus is on objectively equal result. First of all such approach focuses solely on the result of the status-group collectively and does therefore not take enough regard of the individual preferences or choices. Moreover, depending on how equality of result is understood it can also be misleading from an equality perspective, for example; the result might seem equal if women are allowed to enter a previously male dominated

³² O’Connell, Rory. “Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR.” *Legal Studies*, vol. 29, no. 2, June 2009, p. 211, p. 4.

³³ Arnardóttir (2003), p. 22f.

³⁴ Arnardóttir (2003), p. 23.

³⁵ Arnardóttir (2003), p. 24f.

³⁶ Schiek, Dagmar et al., *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law : Ius Commune Casebooks for the Common Law of Europe*. Hart Publishing, 2007, p. 28.

workplace. However, if the opening up of this workplace for women has also led to a decline in the status and salaries for this job then substantive equality has not been achieved.³⁷ Another aspect is that equality of result might not indicate at what cost women (or other status-groups) have been included, for example having had to conform to male norms by for example giving up caring roles.³⁸

To provide a better balance between group and individual interests and take into account individual autonomy equality of opportunities has been suggested to be an aim for substantive equality.³⁹ Focusing on opportunity recognizes differences and past disadvantage and considers it necessary to level the playing field in relation to such aspects. The metaphor of a race is often used to illustrate this thought; in this race individuals have different starting points because of differences and disadvantage, something that shall be remedied by giving everyone equal opportunities at the start. This approach differs from focusing on equality of result since it does not require that everyone reach the finish line at the same time. To determine what constitute equal opportunities is however much more complicated in reality, where does the race start and where does it end? What constitutes equal opportunities is therefore highly contested. Having a procedural understanding of this concept only requires that formal obstacles be taken away. However, taking a more substantive approach this requires that the opportunities are genuinely equal.⁴⁰

Sometimes the suggested approaches however seem insufficient to address cases that feel clearly discriminatory. Segregation is one such example. Race segregation in schools feels inherently discriminatory but does not necessarily constitute differences in opportunities or outcome, a division between black and white students gives both groups access to one school each. If such schools provide the same quality of education the opportunities or result can be said to be equal. Here something like equality of dignity seems a more accurate guide for substantive equality. Dignity has been used to undermine the argument of “separate but equal” in segregation cases.⁴¹ The discriminatory element of stigmatisation is thus recognized through the guarantee of dignity. However, also dignity is a contested concept, it is not only hard to define but has also in case law placed a heavier burden on individuals trying to access remedy for discriminatory treatment by requiring them not only to show that they have been disadvantaged but also that such disadvantage has been an assault of their dignity.⁴²

All of these concepts; equality of result, opportunity and dignity, are necessary to describe substantive equality. While equality of result is inappropriate as an end-goal in itself it is a good indicator of whether there are genuinely equal opportunities for

³⁷ See for example: Fredman, Sandra, *Discrimination Law*, Oxford University Press, 2002, chapter 1.

³⁸ Fredman, Sandra, “Human Rights Transformed: Positive Rights and Positive Duties”, Oxford University Press, 2008, p. 179.

³⁹ Schiek et al, (2007), p. 31.

⁴⁰ See for ex, Fredman (2002), chapter 1.

⁴¹ Fredman (2016b), p. 724.

⁴² Fredman (2016b), p. 726.

everyone.⁴³ Moreover the recognition of discriminatory effects of stigma and negative stereotyping is an important aspect since equality is not only about distribution but also has a social dimension. Moreover these are all closely interlinked, for example stereotyping and stigmatization is often the reason for maldistribution of resources or opportunities. This complexity is recognized by most substantive equality scholars.

2.1.2. Fredman's multidimensional framework

Instead of trying to find one definition of what substantive equality should achieve Fredman has suggested a multidimensional framework through which equality can be analysed. This multidimensional framework contains elements of both equality of treatment, result, opportunity and dignity but allows these dimensions to interact rather than choosing one and letting it trump the other.⁴⁴

The first dimension is redistribution, which aims at redressing disadvantage. Such disadvantage can be both material, for example income, education or housing, and non-material, such as subordination or lack of power. Different treatment per se is thus not always considered problematic, but can instead be positive if it aims at redressing disadvantage.⁴⁵

The second dimension is the recognition dimension, which emphasise the importance of dignity for equality, however, instead of focus on dignity it focuses on stigma, stereotyping, prejudice and violence. This can be experienced separate from distributive wrongs (even though it is often closely interrelated, as will be developed on below).⁴⁶ These negative effects are not only “wrong” when they are related to immutable characteristics but also when the ground to which these prejudices relate is (perceived to be) the result of own choices.⁴⁷

The third dimension is the participative dimension, which aim to address the democratic disadvantage of marginalised groups. Equality and non-discrimination in this sense aim to provide a protection for these groups against the majority. It also addresses social exclusion which can be dependant on age, poverty, disability etc.⁴⁸

The fourth dimension is the transformative dimension, which strives for equality to move beyond sameness and instead accommodate for difference, both between and within groups. This builds on the understanding that “not seeing” identities in practice

⁴³ See UN Sub-commission on Human Rights, *The concept and practice of affirmative action, Final report submitted by Mr. Marc Bossuyt, Special Rapporteur, in accordance with Sub-Commission resolution 1998/5*, 17 June 2002, E/CN.4/Sub.2/2002/21, 32§; Fredman (2005), p. 167.

⁴⁴ Fredman, Sandra, “Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights” *Human Rights Law Review*, vol. 16, no. 2, June 2016a, pp. 273–301, p. 283.

⁴⁵ Fredman (2016a), p. 282.

⁴⁶ Fredman (2008) p. 179.

⁴⁷ Fredman (2016a), p. 282, 284.

⁴⁸ Fredman (2016a), p. 282f.

requires everyone to conform to the dominant norm, often called assimilation.⁴⁹ This dimension therefore requires change of structures that are adapted only to one group in society.⁵⁰

As indicated above these four dimensions need to be considered together, for example, measures that aim at redressing disadvantage should not do so in a way that might reinforce stigma or negative stereotypes, for example welfare systems should not reinforce harmful gender stereotypes nor should they stigmatize dependence on welfare.⁵¹

2.2. Poverty and discrimination

2.2.1. What is poverty?

Traditionally poverty has been defined in absolutist terms, for example as an income below a certain threshold.⁵² The problems with such definition has been emphasised by, amongst others, Amartya Sen. One of the problems with such a bright line definition of poverty is that it does not take account of inequalities amongst people living in poverty. Moreover Sen emphasises that income-level is not necessarily a good indicator in itself of the capabilities of individuals. Sen illustrates with an example with X and Y where Y has a higher income than X, however, Y is also sick and needs to pay for expensive healthcare which leads to his/hers capabilities being more restricted than those of X.⁵³ Sen has therefore suggested that a definition of poverty must allow for a relative element to be able to reflect the capabilities of an individual in the situation that persons finds itself in.⁵⁴

Sen's capability approach to poverty has not been developed in a legal context but rather in relation to political, ethic and economic theory. It has however inspired a new understanding of poverty also within IHRL. There has been a move away from understanding poverty as only lowness of income towards an understanding of that the relevant question is whether such income can support individual capability to live in dignity.⁵⁵

There has also been an increased understanding of poverty not only consisting in economic deprivation but also deprivation in a social, cultural and political dimensions.⁵⁶ This has lead to the use of more multifaceted definitions of poverty,

⁴⁹ Fredman, Sandra, "Substantive Equality Redistribution and Recognition: Reconciling Inequalities" *South African Journal on Human Rights*, vol. 23, no. 2, 2007, pp. 214–234, p. 216.

⁵⁰ Fredman (2016a), p. 283.

⁵¹ Fredman (2016b), p. 714, 737.

⁵² UN Sub-commission on Human Rights (2002), 7§.

⁵³ Sen (1995), p. 107.

⁵⁴ Sen (1995), p. 102.

⁵⁵ UN Sub-commission on Human Rights (2002), 7§.

⁵⁶ UN Human Rights Council, Final draft of the guiding principles on extreme poverty and human rights, submitted by the Special Rapporteur on extreme poverty and human rights, 18 July 2012, A/HRC/21/39, 2§.

illustrated for example by the definition adopted by the ESCR-committee that defines poverty as:

*“... a human condition characterised by sustained or chronic deprivation of resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights.”*⁵⁷

This definition has later also been endorsed by the UN Guiding Principles on Extreme Poverty and Human Rights which have been adopted by consensus in the UN Human Rights Council.⁵⁸ It should be emphasised that lack of financial resources is still a core element of poverty, such resources are generally necessary to avoid capability deprivation. However this more multifaceted approach recognizes that economic resources are not always enough to avoid capability deprivation. Other factors impact the possibilities of individuals to “convert” economic resources into realisation of capabilities in practice.⁵⁹

This is the understanding of poverty that will be applied in this thesis. This broad definition is also in line with the definition of other grounds for discrimination, which are also broad in their scope.⁶⁰

2.2.2. Discrimination leading to poverty

Poverty and discrimination are closely interlinked and discrimination causes different forms of capability deprivations.⁶¹ This is indicated by the overrepresentation of status-groups amongst people living in poverty.⁶² Fredman describes how women’s poverty is specifically gendered; it is caring roles, but also stereotypes and sexual violence that lead women into poverty.⁶³ Above from women other status-groups such as children or older persons, persons with disabilities, ethnic minorities, indigenous peoples and persons living with HIV/AIDS are over-represented amongst people living in poverty.⁶⁴

It is not difficult to understand that discrimination has the potential of having detrimental economic effects for individuals since it excludes people from taking part in society, either directly or indirectly. For example discrimination might take the form of pay discrimination or complete exclusion from job opportunities because of prejudice against status-groups of the potential employer. The causality between

⁵⁷ UN ESCR-committee, *Substantive issues arising in the implementation of the ICESCR: poverty and the ICESCR*, 4 May 2001, E/C.12/2001/10, 8§.

⁵⁸ UN Human Rights Council, Guiding principles on extreme poverty and human rights, 21 September 2012, A/HRC/21/L.20.

⁵⁹ Lavrysen (2015), p. 295.

⁶⁰ Atrey, Shreya, “The Intersectional Case of Poverty in Discrimination Law” *Human Rights Law Review*, vol. 18, no. 3, Sept. 2018, pp. 411–440, p. 414f.

⁶¹ UN Human Rights Council, A/HRC/21/39, 3§.

⁶² UN Human Rights Council, A/HRC/21/39, 8§.

⁶³ Fredman (2011), p. 567, 575.

⁶⁴ UN Human Rights Council, A/HRC/21/39, 8§.

discrimination and disadvantaged economic position in these cases are relatively obvious. However, in many other situations patterns of discrimination are less tangible and causality harder to explain. Systems based on the majority norm, together with negative stereotypes and prejudice, creates patterns of disadvantage which both increase the risk of ending up in poverty and the obstacles for escaping from such situation.⁶⁵

This does however not mean that people living in poverty can be equated with or reduced to a list of status-groups.⁶⁶ Discrimination is not the only reason for poverty, nor is poverty inevitable. The extent to which people should be considered responsible for their poverty in relation to how much should be accorded to structural factors beyond the control of the individual is controversial.⁶⁷ It is however clear that in many situations individuals are unable to escape poverty because of structural obstacles.⁶⁸ Measures combatting poverty should seek to remove such obstacles to allow individuals to use their agency, something that relates to the transformative dimension in Fredman's framework.⁶⁹ Above from the discrimination on well-recognized grounds, discrimination on the ground of poverty is one such factor. The extent to which such discrimination is prohibited under IHRL will be examined in this thesis.

2.2.3. Poverty leading to discrimination

Living in poverty is connected to similar disadvantages that are experienced by other status-groups such as lack of recognition, social exclusion and insufficient political participation.⁷⁰ Stigma related to poverty and socioeconomic status is much similar to stigma generated by homophobia, racism or sexism.⁷¹ This is sometimes described with the term "povertyism".⁷²

People living in poverty are perceived as "others" and associated with negative values such as moral contamination, a threat or an "undeserving" economic burden.⁷³ This kind of stigma is not necessarily confined to people living in poverty but also exist in relation to people generally of a "low" socioeconomic status, for example prejudice connected with dependence on welfare.

⁶⁵ Fredman (2002), chapter 2.

⁶⁶ UN Human Rights Council, A/HRC/21/39, p. 8§.

⁶⁷ See for example Fineman, (2017), p. 147.

⁶⁸ UN GA, *Report of the Special Rapporteur on extreme poverty and human rights*, 4 August 2011, A/66/265, 5§.

⁶⁹ Fredman (2011), p. 579.

⁷⁰ Fredman (2011), p. 567.

⁷¹ Fredman (2011), p. 576.

⁷² Roman, Diane, "Guaranteeing human rights in situations of poverty" in *Redefining and combating poverty Human rights, democracy and common assets in today's Europe*, Council of Europe Publishing, 2012, p. 90.

⁷³ Fredman (2011), p. 579.

Since these things are not generally framed in terms of equality and discrimination a couple of examples will be given below to give the reader a more substantial understanding of the problem that this thesis intends to address. The intention is that this will help the reader to attach the theoretical assessments developed in chapters three and four to practical examples.

2.2.3.1. Employment example

There are many testimonies to discrimination experienced in relation to employment situations, something that applies also to people living in poverty. Danieli Evans Peterman explains how indicators of poverty such as having missing teeth or not nice enough shoes generates discrimination and arbitrary rejection, no matter the merits of a candidate employee.⁷⁴ However these prejudices do not only take the form of arbitrary rejection in individual cases, it is also allowed to influence qualification requirements. One such example is employees screening and excluding candidates depending on their area of residence, something that is often a good indicator of the socioeconomic situation of an individual.⁷⁵

2.2.3.2. Housing example

In housing policies the prejudice connected with dependence on welfare is particularly prominent. This is not only something that is reflected in arbitrary rejection in individual cases, rather it is an accepted part of many systems. Studies in the US have for example shown the unwillingness of landlords to accept tenants with vouchers.⁷⁶ Similar practices have been pointed out as problematic in Sweden where potential tenants are required to fulfil income requirements of earning X times the annual rent. Income of welfare is however not considered relevant in such calculations, thus individuals that would be able to pay the rent are rejected on the bases of where their income comes from.⁷⁷ Similar questions have been addressed in a Canadian context where courts have clarified that excluding potential tenants solely on the ground of them receiving social assistance is unacceptable discrimination because it is based on prejudice and stereotypes about the lacking ability of such individuals to respect their financial obligations.⁷⁸ Instead landlords should make an assessment of the ability to pay of a specific tenant, for example references from past landlords or credit checks are suggested as factors that may be taken into account.⁷⁹

⁷⁴ Peterman (2018), p. 1322f.

⁷⁵ Peterman (2018), p. 1286f.

⁷⁶ U.S. Department of Housing and Urban Development, "A Pilot Study of Landlord Acceptance of Housing Choice Vouchers", 2008, available at: <<https://www.huduser.gov/portal/portal/sites/default/files/pdf/Landlord-Acceptance-of-Housing-Choice-Vouchers.pdf>> (accessed: 2020-01-26).

⁷⁷ Lind, Hans, et al., *Åtkomliga Bostäder : Så Gör Vi Det Möjligt För Hushåll Med Låga Inkomster Att Hitta En Bostad*, SNS förlag, 2016.

⁷⁸ MacKay, Wayne and Kim, Natasha, *Adding Social Condition to the Canadian Human Rights Act*, February 2009, available at: <<http://publications.gc.ca/pub?id=9.695572&sl=0>> (accessed 2020-03-11), p. 42.

⁷⁹ MacKay (2009) p. 40f.

Income requirements have also been addressed when they are set at too high levels. In the Swedish context Hans Lind has argued that such levels are too high when they require an income of more than three times the annual rent.⁸⁰ Also the Canadian courts have found that such blanket policies are indirectly discriminatory since individuals with a low income tend to dedicate bigger part of their income to housing.⁸¹

2.2.3.3. Criminalizing legislation example

Some states have legislation which to different extent criminalize being poor. Such legislation ranges from criminalization of barely appearing in public areas if you can be perceived to be living in poverty to criminalization of begging, vagrancy or sleeping in public spaces.⁸² Even though such regulations might serve legitimate aims they have been argued to have a disproportionate impact on people living in poverty that are homeless and thus have no option but sleeping in the streets or who have no other means for surviving than begging.⁸³ These measures have thus been criticised for being expression of a penalization of people living in poverty, enhancing the stigma and prejudice against individuals in such situations.⁸⁴

2.2.3.4. Detention example

People living in poverty are often arbitrarily detained, something that can be explained by negative stereotypes connecting attributes of poverty with criminality. Moreover it is often close to impossible for individuals living in poverty to make use of systems for bail pending trial since such systems generally require an economic guarantee, fixed address and permanent employment.⁸⁵ Moreover the financial loss of people living in poverty is often proportionally bigger than for other individuals.⁸⁶ This is both because people living in poverty are more likely to loose the job they have, for example if such job is in the informal sector. But also because they are unlikely be successful in claiming compensation for loss of income because of the difficulties in proving the size of the economic harm caused by such detention without a permanent employment.⁸⁷

2.3. Summary chapter 2

This chapter has elaborated on the substantive understanding of equality. This has a twofold purpose; firstly it serves to provide an understanding of equality and

⁸⁰ Lind (2016), 110ff.

⁸¹ MacKay (2009), p. 42.

⁸² UN GA, A/66/265, 29-31§§.

⁸³ UN GA, A/66/265, 31§.

⁸⁴ UN GA, A/66/265

⁸⁵ UN GA, A/66/265, 68§.

⁸⁶ UN GA, A/66/265, 68§.

⁸⁷ UN GA, A/66/265, 68§.

discrimination beyond formal equality and equal treatment. Secondly it provides a framework for explaining disadvantage experienced by people living in poverty and how this, like other forms of discrimination, generates stigma, social exclusion and loss of autonomy. The following chapters will analyse to what extent this understanding of poverty and discrimination can be, and has been, accommodated for within IHRL.

The second part of this chapter has elaborated on the complexities in defining poverty. It concluded that a definition inspired by Sen's capability approach is most appropriate for the purpose of this thesis. This section also illustrated some examples of poverty discrimination in practice. These examples are not intended to cover all possible human rights violations experienced by people living in poverty, rather it is intended as a help for the reader and these examples will be used as illustrations also later in the thesis. This exemplification also serves to show that poverty discrimination does not only occur in relation to rights classically qualified as economic, social and cultural but also in relation to classic civil and political rights such as democratic rights or right to life and liberty.

3. Equality and non-discrimination in IHRL

Equality and non-discrimination are core principles in IHRL and constitute rights that belong to every human being. However, the interpretation and application of these principles varies and the exact content of these rights are controversial. This chapter will provide a structured analysis of these regulations and an outline of what treatment that constitutes discrimination. Firstly the relationship between guarantees of equality and non-discrimination in IHRL will be assessed. Thereafter suggested definitions of discrimination will be analysed. The core of these definitions will be broken down into four parts and analysed in the following sections. These four parts will be addressed in sections 3.3-3.6.

3.1. The relationship between equality and non-discrimination

Instruments of IHRL generally contain provisions of both equality and non-discrimination. These provisions are sometimes presented in the same and sometimes in different articles or paragraphs. A reoccurring debate has thus been what the relationship between equality and non-discrimination is and whether they should be interpreted as joint or separate guarantees.

Those who argue for these guarantees to be kept separate generally understand equality to entail positive obligations while non-discrimination is restricted to negative obligations and restrain from the state. With this understanding, concepts such as right to different treatment (non-assimilationist treatment) and affirmative action are considered to be relevant for equality but not for non-discrimination.⁸⁸ Those who argue for this understanding do not necessarily negate the relevance of substantive equality completely but think that it should be achieved outside the framework of non-discrimination. One example of this approach is the work of Opsahl and Eide who argue that non-discrimination only is one possible way to achieve equality.⁸⁹ Equality, they argue, also needs to be achieved outside the framework of non-discrimination.⁹⁰ This indicates that they hold a limited, formal, understanding of what non-discrimination is and should be. Such approach has however been rejected within IHRL.

⁸⁸ Arnardóttir (2003), p. 7f.

⁸⁹ Opsahl, Torkel and Eide, Asbjorn, Law and equality : selected articles on Human Rights, 1996, p. 173f.

⁹⁰ Opsahl (1996), p. 173f.

The prevalent approach within IHRL is instead to consider equality and non-discrimination as two sides of the same coin. Olivier de Schutter emphasises that equality and non-discrimination semantically has the same meaning. He suggests that the explanation for the fact that the terms are sometimes used differently is that non-discrimination describes a specific action or omission while equality rather describes an ideal.⁹¹ Sometimes equality and non-discrimination are also described as positive and negative statement of the same principle.⁹² This should however not be confused with positive and negative obligations, it is clear that regulations of non-discrimination also entail positive obligations, something that will be elaborated in section 3.3.2. below.

This integrated approach has also been confirmed in relation to the ECHR and additional protocol number 12, something that is especially important since these instruments do not explicitly refer to “equality” in their operative articles (except for article 5 about equality between spouses). In its case law the European Court of Human Rights (ECtHR) has however referred to the principle of equality assuming that such principle is guaranteed by the convention.⁹³ This clearly indicates that the ECtHR considers equality and non-discrimination inseparable. This interpretation has also been confirmed in the explanatory report to the additional protocol, which explicitly states that the guarantee of non-discrimination in these instruments entail a guarantee of equality.⁹⁴

3.2. Defining discrimination

In spite of the centrality of equality and non-discrimination in IHRL the concept of discrimination is not explicitly defined in some of the most central IHRL instruments. The International Bill of Right as well as the regional instruments all lack explicit definitions of discrimination. Such definitions have however been incorporated into some of the thematic UN conventions such as CEDAW, ICERD and CRPD. The lack of definition of discrimination has been acknowledged and addressed by the UN committees to the both covenants in their general comments. The HR-committee, drawing upon CEDAW and ICERD, defines discrimination as:

“...any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the

⁹¹ Schiek et al (2007), p. 26.

⁹² Schiek et al (2007), p. 26; Arnardóttir (2003), p. 7f.

⁹³ See for example Belgian Linguistic (Case "relating to certain aspects of the laws on the use of languages in education in Belgium") v. Belgium, Application no, 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, ECHR, 23 July 1968, 10§.

⁹⁴ CoE, Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.2000, 15§.

purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."⁹⁵

The ESCR-committee has come with a similar definition in its general comment stating that;

*"discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights"*⁹⁶

The fact that these definitions are slightly differently formulated does not reflect a practical difference in their application or interpretation. The HR-committee's comment is from 1989 while the ESCR-committee's comment is more recent, from 2009. This is for example reflected in the reference made by ESCR-committee not only to ICERD and CEDAW but also to CRPD, an instrument that has had major impact on the discourse around disability rights but also in relation to the general discourse around positive obligations of states due to its focus on reasonable accommodation.⁹⁷ The ESCR-committee's general comment further refers explicitly to both direct and indirect discrimination, however both these forms of discrimination are widely accepted to be a part of the prohibition of discrimination under the ICCPR as well (section 3.3.1 below). The relevant difference between the instruments that can be drawn from these definitions is that the ICCPR has a free-standing guarantee while the ICESCR guarantee is subordinate to the rights in the convention (section 3.4.1 below).

To find out whether a situation is discriminatory or not several elements needs to be assessed. There needs to be (1) a distinction, exclusion, restriction or preference (treatment), such treatment need to (2) have the intention or effect of restricting equal enjoyment of rights (relation to other rights) and (3) be connected to a ground for discrimination. Moreover (4) prima facie discrimination can be justified, even though this is not explicitly indicated by the definitions provided above it is widely accepted in practice.

This thesis will treat these four elements of discrimination as separate entities to be able to provide a structured analysis of the prohibition on non-discrimination. However, in practice the assessment of these four elements is often hard to separate and disentangle. For example; to establish that there is a distinction one needs to formulate the ground on which such distinction is made. Moreover the assessment of

⁹⁵ UN HR-committee, *General Comment No. 18: Non-discrimination (GC18)*, 10 November 1989, 7§.

⁹⁶ UN ESCR-committee, *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) (GC20)*, 2 July 2009, E/C.12/GC/20, 7§.

⁹⁷ Kayess, Rosemary, and French, Phillip, "Human Rights Law Review Out of Darkness into Light - Introducing the Convention on the Rights of Persons with Disabilities" *Human Rights Law Review*, vol. 8, no. 1, 2008, pp. 1–34.

justification is closely connected to the nature of the treatment (the severity) as well as what the ground for discrimination. The reader should keep in mind that even though the establishment of a case of discrimination is here described in four steps these steps might often turn into a circular argument where one cannot be established without the other.

3.3. The “treatment”

”Different treatment” was for long understood as the only treatment that constituted discrimination. Thus the only claim that could be made with reference to regulations of non-discrimination was to receive equal treatment to that of another status-group. However, as has been indicated above, the move towards a more substantive understanding of equality has changed this approach, leading to recognition of indirect discrimination and the right to different treatment. This is something that in turn has led to a greater recognition of the positive obligations that equality and non-discrimination in IHRL impose on states. This section will elaborate on this development and the different forms of treatment that constitute prima facie discrimination. Firstly the differences between direct and indirect discrimination will be addressed. Thereafter different ”layers” of positive duties will be examined. This also means that these two sections will overlap since direct and indirect discrimination also entail positive obligations.

3.3.1. Direct/Indirect discrimination

It is common to distinguish between direct and indirect discrimination. Simply put; direct discrimination refers to discrimination that is directly or obviously linked to a protected ground, for example systems of apartheid that explicitly discriminate on the ground of race. Indirect discrimination instead refers to situations where a rule, practice, criteria or procedure seems neutral but has the same or similar effects as direct discrimination.⁹⁸

IHRL prohibits both direct and indirect discrimination, something that is indicated by the definition of discrimination adopted in relation to the UN system, for example with the formulation ”*purpose or effect*”.⁹⁹ Discriminatory effect is what indicates indirect discrimination even though indirect discrimination can be both intentional and non-intentional.¹⁰⁰ The committees have confirmed this interpretation and it is explicitly recognized in the definition of discrimination adopted by the ESCR-committee.¹⁰¹

⁹⁸ de Schutter (2018), p. 722.

⁹⁹ See above chapter 3.2.

¹⁰⁰ de Schutter (2018), p. 723.

¹⁰¹ ESCR-committee, GC20, 10§.

In relation to the ECHR the notion of indirect discrimination was for a long time not explicitly recognized in the case law of the ECtHR, something that generated much critique.¹⁰² The ECtHR had thus applied a formal approach, focusing on different treatment in situations perceived to be relevantly similar.¹⁰³ The move away from this formal, towards a more substantive, understanding of equality is generally attributed to the cases of *Thlimmenos v. Greece*¹⁰⁴ and *DH and others v. The Czech Republic*¹⁰⁵. In *Thlimmenos* the court stated that article 14 is not only violated by denial of equal treatment but also when “... states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different”.¹⁰⁶ The applicant in this case had a criminal record for having refused military service due to his religious belief. This criminal record barred him from becoming an accountant, which the court found discriminatory under the convention. The court argued that the state should have accommodated for this difference by not treating all individuals with a criminal record in the same way.¹⁰⁷

The *D.H.* case is quite different from the *Thlimmenos* case. This case concerned the fact that children with Roma origin were significantly overrepresented in “special schools”. The placement of children into these schools was based on a test, which the court found to be possibly biased. This bias consisted in that the test did not take into account the relevant differences of children with Roma origin.¹⁰⁸ This resulted in Roma children with average or above average intellectual capacity also being placed in special schools.¹⁰⁹ These students thus received inferior education. However, the court also emphasised that the segregation of Roma population into separate schools was problematic independently of the quality of education in such schools.¹¹⁰ The court also explicitly stated in *DH* that discriminatory intent is not a precondition for a violation of article 14.¹¹¹ In this case the court thus touched upon several of the dimensions of Fredman’s substantive equality framework. The ECtHR praised the Czech republic for attempting to accommodate for children with special educational needs, however, it found that this had lead to a disadvantage in form of inferior education and possibly also a violation of the recognition dimension because of the racial segregation.

An important aspect of the *D.H.* case was the statistical evidence that showed the disproportionate effect that the seemingly neutral test had for Roma children. No similar evidence was required in the *Thlimmenos* case, the practice of excluding everyone with a criminal record was thus considered a “suspect measure”

¹⁰² See for example O’Connell (2009), p. 3.

¹⁰³ Arnardóttir (2003), p. 41.

¹⁰⁴ *Thlimmenos v. Greece*, Application no. 34369/97, ECHR, 6 April 2000.

¹⁰⁵ *D.H. and Others v. the Czech Republic*, Application no. 57325/00, ECHR, 13 November 2007.

¹⁰⁶ *Thlimmenos v. Greece* (2000), 44§.

¹⁰⁷ *Thlimmenos v. Greece* (2000), 47-48§§.

¹⁰⁸ *D.H. and Others v. the Czech Republic* (2007) 201§.

¹⁰⁹ *D.H. and Others v. the Czech Republic* (2007) 200§.

¹¹⁰ *D.H. and Others v. the Czech Republic* (2007) 198§.

¹¹¹ *D.H. and Others v. the Czech Republic* (2007) 179§.

immediately.¹¹² In cases where the applicants cannot convince the court of the viciousness of a “neutral” practice the possibility to provide evidence might be a good opportunity to shift the burden of proof to the state. However, the analysis of statistical evidence is not always as straight forwards as in the D.H. case. De Schutter has described the complexity with a disparate impact approach in detail.¹¹³

3.3.2. Positive duties

There is a habit of differing between positive and negative obligations under IHRL, a debate that has been particularly connected to the dichotomy between civil and political rights on the one hand and economic, social and cultural rights on the other hand. While there is something to this division it is also to a large extent an artificial division and much about framing. Civil and political rights will not be guaranteed only by restraint from the state, especially not in a non-discriminatory manner.¹¹⁴ The same complexity applies to the debate about positive obligations in the context of equality and non-discrimination. As indicated above non-discrimination has sometimes been argued to contain solely negative obligations on behalf of the state. With a more substantive understanding of equality there has however been a move away from this and positive obligations are widely recognized as necessary to achieve human rights in general and equality in particular. There are however different understandings of how extensive these obligations are. This section will therefore provide an overview of the different layers of positive obligations and the terminology used.

3.3.2.1. Positive duties to protect

Besson separates positive duties of protection on the one hand and positive duties in relation to realising equality on the other hand. States have obligations under IHRL to respect, protect and fulfil human rights. Positive duties to protect refer to obligations to ensure non-discrimination, for example to take action to prohibit non-state actors to discriminate under certain circumstances.¹¹⁵

It is clear that IHRL prohibits states from discriminating against individuals. However, the extent to which states are obliged to protect individuals from discrimination by private actors is more complex. When private actors operate on behalf of the state these actions can be directly attributed to the state. However also when private actors operate independently in the public sphere the state has obligations to protect individuals from discrimination. This is the case when discrimination occurs in for example workplace, housing, access to restaurants or other services.¹¹⁶ The more “private” a situation becomes the less obligations the state

¹¹² De Schutter (2018), p. 731-737.

¹¹³ de Schutter (2018), p. 729f.

¹¹⁴ See for example Fredman (2005), p. 175.

¹¹⁵ Besson, Samantha, ”The Principle of Non-Discrimination in the Convention on the Rights of the Child” in *The International Journal of Children s Rights*, vol. 13, no. 5, 2005, 433-461, p. 437.

¹¹⁶ CoE, Explanatory report, prot 12 (2000), 27-28§§.

has to protect against discrimination. The human rights rationale behind this is that the right to equality and non-discrimination needs to be balanced against the right to private life. It is however important to note that situations of violence are not to be considered private in this regard, the state has an obligation to protect individuals from violence or other forms of assault of discriminatory nature. Rather, “private” situations entail that the state should not interfere with for example if people of a certain age or sex are not invited to a dinner.¹¹⁷ An indicator of whether a situation is considered within the sphere of private life can be whether such situation is normally regulated by law, this is for example the case for both public activities in relation to work, housing and services but also criminal activities.¹¹⁸

3.3.2.2. Right to different treatment

Recognition of indirect discrimination has led to requirements on the state to not only refrain from treating equal situations differently but also an obligation to ensure different treatment for relevantly different situations.¹¹⁹ This has entailed a move from more negatively formulated obligations of restraint to more positively connoted obligations to accommodate for differences.

This can be seen in the cases of indirect discrimination described above, the state is required to adapt, for example education, not only for the majority or the “norm” but also for minorities or individuals otherwise in relevantly different situations. These obligations are sometimes framed as obligations to provide “reasonable accommodation”, a concept that is primarily used in relation to rights of persons with disabilities, but which has also come to influence general argumentation around equality and non-discrimination.¹²⁰ This relates to the “transformation” dimension of Fredman’s equality framework and opposes forced assimilation.¹²¹

3.3.2.3. Affirmative action

The third “layer” of positive obligations or measures is what is referred to as affirmative action or temporary special measures. Such positive measures are generally understood as actions targeting disadvantaged groups to compensate for, and correct, existing de facto inequalities. Sometimes terms such as “positive discrimination” have been used to describe these kind of measures, such terminology has however been considered inappropriate and misleading.¹²² Within the UN system

¹¹⁷ CoE, Explanatory report, prot 12 (2000), 27-28§§.

¹¹⁸ CoE, Explanatory report, prot 12 (2000), 28§.

¹¹⁹ See section 3.3.1 above.

¹²⁰ See for example Schabas, William A., *The European Convention on Human Rights: A commentary*, Oxford University Press, 2015, p. 569; de Schutter, IHRIL, p. 739f; Arnardóttir, Differences that makes a difference, p. 657.

¹²¹ See section 2.1.2. above.

¹²² UN Sub-commission E/CN.4/Sub.2/2002/21, 5§; Saul, Ben, et al. *The International Covenant on Economic, Social and Cultural Rights : Commentary, Cases and Materials*. 1. ed., Oxford University Press, 2014, p. 209f.

the expression “temporary special measures” is preferred.¹²³ The UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities has defined affirmative action as:

*“...a coherent packet of measures, of a temporary character, aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality.”*¹²⁴

Affirmative action has primarily been developed in relation to thematic conventions addressing equality and non-discrimination in relation to specific status-groups such as ICERD and CEDAW. These instruments have a more asymmetrical nature than general human rights instruments since they focus on the specifically disadvantaged category within a status-group, for example equality of women rather than of all sexes (even though these go hand in hand). However affirmative action has also been recognized in relation to general human rights instruments such as the International Bill of Right and regional instruments.¹²⁵

Affirmative action can come in very different forms, what characterizes it is that it targets disadvantaged groups. Outreach activities and training are some examples of affirmative actions, other examples are quotas and preferential treatment. Measures aiming at capacity building are generally less controversial than quotas or different or lowered requirements.¹²⁶ The later of these two risk, depending on how they are constructed, violating the right to equality of other individuals. Measures of special treatment can also be found to be discriminatory in themselves as they risk reinforcing negative stereotypes and stigma of the group they seek to protect.¹²⁷ Such measures will not be in compliance with the requirement of equality and non-discrimination.

Thus, for special measures to be justified they need to be temporary, and they are only legitimate for as long as is necessary to achieve substantive equality. Special measures also need to be reasonable, objective and proportional to achieve substantive equality.¹²⁸ The requirement of proportionality is largely what serves to exclude measures that would amount to “reverse” discrimination.¹²⁹

International instruments such as ICCPR and ICESCR not only allow but also require affirmative action to be taken.¹³⁰ The ECtHR has approached this subject more carefully but has clarified that affirmative action is not contrary to the ECHR, something that has been addressed in the case law of the court. The court has

¹²³ De Schutter (2018), p. 742.

¹²⁴ UN Sub-commission E/CN.4/Sub.2/2002/21, 6§.

¹²⁵ De Schutter (2018), p. 747.

¹²⁶ Saul et al. (2014), p. 209f.

¹²⁷ Fredman (2016b), p. 714, 737.

¹²⁸ ESCR-committee GC20, 9§.

¹²⁹ De Schutter, Olivier, “Positive action” in *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law : Ius Commune Casebooks for the Common Law of Europe* edited by Schiek, Dagmar et al. Hart Publishing, 2007, p. 793.

¹³⁰ Saul et al. (2014), p. 208f.

examined several cases of pension schemes that differentiated between men and women with the aim of correcting de facto inequalities.¹³¹ These schemes were challenged for constituting discrimination against men, something that was rejected by the court. The pension schemes did constitute a prima facie case of discrimination, however, the distinction was found justified due to the de facto inequalities between men and women reflected in the financial hardship of older widows.¹³² The court however emphasised that this difference in treatment was only justified for as long as the de facto inequalities persisted. At what exact time such de facto inequalities could no longer justify the difference in treatment was left for the state to decide within its margin of appreciation.¹³³ The fact that the ECtHR has tolerated affirmative action does not mean that states are required to take such action under the convention, something that has been clarified in the explanatory report to the additional protocol. This is however not done with reference to a human rights rationale but rather with reference to the mandate of the court and the justiciability of the instrument.¹³⁴

3.3.2.4. Conclusion

Both the concepts of “right to different treatment” and “affirmative action” build on the recognition of discriminatory structures which perpetuate disadvantage of certain groups in society, structures that consist of social behaviour and organisation and can have effect through legislation, policies, practices and predominant cultural attitudes.¹³⁵ Ignoring these structures will leave such inequalities intact or even exacerbate them.¹³⁶ This indicates the strong influence of a substantive understanding of equality and non-discrimination in IHRL.

It is hard to draw a bright line between the right to different treatment as a part of recognition of indirect discrimination on the one hand and affirmative action on the other hand. Such distinction is not always made. For example the ESCR-committee seems to conflate the concepts in its general comment. This conflation is indicated by the statement that affirmative action can be permanent, something that seems incompatible with the definition otherwise adopted in IHRL. This statement is better understood as referring to what is in this thesis called “reasonable accommodation” or “right to different treatment”, something that has also been emphasised by de Schutter.¹³⁷

The difference between the right to different treatment and affirmative action, as understood in this thesis, can be explained by the focus on difference on the one hand

¹³¹ *Andrle v. the Czech Republic*, Application no. 6268/08, ECHR, 17 February 2011; *Runkee and White v. United Kingdom*, Applications nos. 42949/98 and 53134/99, ECHR, 10 May 2007.

¹³² *Andrle v. the Czech Republic* (2011), 36§;

¹³³ *Runkee and White v. United Kingdom* (2007), 41§.

¹³⁴ CoE, Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4.XI.2000, 16§.

¹³⁵ ESCR-committee GC20, 12§.

¹³⁶ Saul et al, (2014), p. 184.

¹³⁷ de Schutter, (2018), p. 744.

and disadvantage on the other. Relating this to Fredman's framework the first of these primarily relates to the transformative dimension while the later relates more to the dimension of redistribution.

3.4. Relation to other rights

The second aspect of discrimination in IHRL is the relation to other rights. This is an aspect where there are significant differences between different IHRL instruments. Some instruments guarantee equality and non-discrimination only in relation to substantive rights in the instrument itself while other guarantee a general, independent, right to non-discrimination. These differences will be assessed here, as well as the question of whether discrimination requires a violation of a substantive right.

3.4.1. Independent or subordinate

The guarantee of equality and non-discrimination in the ICCPR is independent, something that is indicated by the formulation of article 26. The HR-committee has also confirmed the general character of the guarantee in the case of *Broeks v. Netherlands*.¹³⁸

The *Broeks* case concerned domestic legislation of unemployment benefits, which disadvantaged married women in relation to married men based on stereotypical assumptions of the man as the breadwinner. The state argued that the HR-committee did not have jurisdiction over this question since unemployment benefits fell under the jurisdiction of the ESCR-committee.¹³⁹ However, the HR-committee clarified that overlapping jurisdictions was not a problem and thereby confirmed that discrimination in relation to unemployment benefits could be examined under article 26 ICCPR.¹⁴⁰ This means that article 26 can be invoked also when discrimination has occurred in relation to an area that is not covered by the other operational articles of the covenant. A similar independent guarantee of non-discrimination has been incorporated in the 12th additional protocol to the ECHR, which prohibits discrimination in relation to all rights set forth by law and in relation to all public authorities.¹⁴¹ The protocol has however not been widely ratified and the effect that it will have in practice thus remains to be seen.

Other international instruments, such as the ICESCR and ECHR have regulations of non-discrimination with a subordinate character, and thus “only” guarantee non-

¹³⁸ *Broeks v. the Netherlands*, HR-committee, Communication No. 172/1984, final views adopted 9 April 1987 at the 29th session.

¹³⁹ *Broeks v. the Netherlands* (1987), 8.3§.

¹⁴⁰ *Broeks v. the Netherlands* (1987), 12.1§.

¹⁴¹ Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1.

discrimination in relation to the rights set forth in their respective conventions, something that follows from the formulation of these provisions.

The subordinate character of the ECHR has been considered a great weakness of the convention.¹⁴² Especially since the convention has a limited list of rights in comparison with the UDHR and primarily cover rights of a civil and political nature. The ECtHR does however not tend to apply this requirement very strictly and rights that are not expressly guaranteed in the convention can still be used to claim a violation of article 14 if they have a close enough connection to one of the conventions rights. This is sometimes referred to as the “ambit requirement” and entails that as long as discrimination falls within the ambit of a convention right it can be examined under article 14.¹⁴³ One such example is the right to social security, which, although not expressly guaranteed in the convention, has been considered under article 14. This has been done in several cases where social security benefits have been considered within the ambit of the right to property in the 1st protocol to the ECHR.¹⁴⁴ This more generous approach does however not make the provision independent and if the relation to a convention right is too far fetched a claim can be dismissed.¹⁴⁵ The ESCR-committee has taken a similar approach and has, as long as a matter concerns questions of economic, social and cultural rights in general, been generous in commenting the discriminatory nature.¹⁴⁶

The dependant nature of article 14 has, although that dependency is not as strict as it might seem at a first glance, had a restricting effect on the extent to which the ECtHR has examined claims of discrimination.¹⁴⁷ The fact that the discriminatory treatment must have related to a substantive right mean that the court will first examine a potential violation of that substantive right, if a violation is found at this stage the court generally will not consider it necessary to examine the question of discrimination as well. The exception is in cases where discrimination “*in the enjoyment of the right in question is a fundamental aspect of the case...*”¹⁴⁸, an approach that was established in the *Airey v. Ireland*.¹⁴⁹

3.4.2. Autonomy

The dependant character of some regulations of equality and non-discrimination should however not be confused with the question of autonomy. Guarantees of non-discrimination in IHRL are autonomous which means that they do not pre-suppose a

¹⁴² See for example O’Connell (2009), p. 3.

¹⁴³ De Schutter (2018), p. 666.

¹⁴⁴ O’Connell (2009), p.6f; 1st Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1.

¹⁴⁵ O’Connell (2009), p.6f.

¹⁴⁶ Saul et al (2014) p. 186f.

¹⁴⁷ Gerards, Jannike (2013) “The Discrimination Grounds of Article 14 of the European Convention on Human Rights”, *Human Rights Law Review*, 13(1), pp. 99–124, p. 100.

¹⁴⁸ *Airey v. Ireland*, Application no. 6289/73, ECHR, 9 October 1979, 30§.

¹⁴⁹ Arnardóttir (2003), p. 173f.

violation of a substantive right.¹⁵⁰ It is enough that there is a “*distinction, exclusion, restriction or preference or other differential treatment (...) which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing (...)*”¹⁵¹ of a substantive right. Thus, if a state chooses to grant individuals under its jurisdiction rights or benefits beyond its IHRL obligations it still needs to ensure that such rights or benefits are provided in a non-discriminatory way. When concerned with dependant provisions of non-discrimination this is only the case of such benefits falls within the general scope of a convention right.¹⁵² For example the right to freedom of religion in article 9 of the ECHR does not generally require states to provide religious communities or organisations with certain privileges or benefits, however, if the state chooses to provide such benefits they should be provided without discrimination.¹⁵³ Similarly article 8 of the ECHR has been considered not to involve a right to adopt a child, if the state despite this creates such right it should be accessible for everyone without discrimination.¹⁵⁴

3.5. Grounds for discrimination

IHRL regulations of non-discrimination are status-based and less-favourable treatment will only be addressed if it is related to a ground for discrimination, either in its purpose or effect. There are different ways of structuring prohibitions of non-discrimination, in IHRL such guarantees usually list grounds upon which discrimination is prohibited. Such list can further be exhaustive or non-exhaustive. General guarantees of non-discrimination such as those found in the International Bill of Rights and the regional instruments are non-exhaustive. However, what “new” grounds that should be accepted is controversial, the following section will seek to assess the different approaches that can be taken to this.

It should also be emphasised that whether discrimination on a specific ground has occurred or not is not dependant on the factual identity or situation of the individual that has experienced discrimination. This is to say that membership of a status-group include also individuals associated with such ground, for example parents of a child with a disability or a person that is perceived to have certain ethnicity or religion.¹⁵⁵

3.5.1. Non-exhaustive

The non-exhaustive character of regulations of non-discrimination is often indicated by stating that discrimination on grounds “such as” the listed grounds are

¹⁵⁰ O’Connell (2009), p. 6; Arnardóttir (2003), p. 35f.

¹⁵¹ ESCR-committee GC20, 7§.

¹⁵² Schabas (2015), p. 563.

¹⁵³ Schabas (2015), p. 563.

¹⁵⁴ For example *A.H. and Others v. Russia*, Applications nos. 6033/13, 8927/13, 10549/13, 12275/13, 23890/13, 26309/13, 27161/13, 29197/13, 32224/13, 32331/13, 32351/13, 32368/13, 37173/13, 38490/13, 42340/13 and 42403/13, ECHR, 17 January 2017.

¹⁵⁵ CoE and EU FRA (2018), p. 58.

prohibited.¹⁵⁶ The non-exhaustive character can further be confirmed by the inclusion of "other status" as a possible ground for discrimination. The fact that for example the ICESCR does not refer to discrimination on "such as" but instead discrimination "as to" does not mean that this provision is exhaustive.¹⁵⁷ The inclusion of "other status" further affirms the illustrative character of the list, something that has been confirmed by the committee and is widely accepted.¹⁵⁸ This non-exhaustive character is in line with the dynamic nature of IHRL generally and reflects a substantive understanding of equality that focuses on structural disadvantage, something that can shift over time.

Even though the non-exhaustive character in itself is indisputable it is controversial to determine what can be included under these open-ended definitions. One interpretation of this is that virtually any ground or status can be examined as a ground for discrimination while other interpretations set up some kind of threshold. Such thresholds are generally understood as requiring that "new" grounds should be analogous to the explicitly listed grounds. However, that is not an indicator that is easily applied since the listed grounds for discriminations are also very different in their nature. This has led to an inconsistency in the case law of the ECtHR and a similar ambiguity can be identified in relation to the International Covenants. The HR-committee has not provided any clear definition of how "other status" should be defined or what is required for something to constitute a ground for discrimination.¹⁵⁹

It has sometimes been suggested that a ground for discrimination needs to be a personal characteristic. One such case is the *Kjeldsen, Busk Madsen and Pedersen v Denmark* where the ECtHR stated that "...Article 14 (art. 14) prohibits, within the ambit of the rights and freedoms guaranteed, discriminatory treatment having as its basis or reason a personal characteristic ("status") by which persons or groups of persons are distinguishable from each other."¹⁶⁰ This approach has however not been consistently followed in the case law. There are two lines of case law in relation to this; one that has not interpreted the reference to personal characteristics as excluding discrimination on non-personal discrimination grounds.¹⁶¹ Some very "non-personal" statuses that have been accepted as "other status" in this line of case law are military rank¹⁶², length of prison sentences¹⁶³ and large or small landowners¹⁶⁴. Focus in these

¹⁵⁶ See for example ICCPR and ECHR.

¹⁵⁷ Craven (1998), p. 168.

¹⁵⁸ ESCR-committee GC 20, 15§; Saul et al. (2014), p. 180.

¹⁵⁹ Joseph, Sarah, and Castan, Melissa, *The International Covenant on Civil and Political Rights : Cases, Materials, and Commentary*, 3rd ed., Oxford University Press, 2013, p. 771.

¹⁶⁰ *Kjeldsen, Busk Madsen and Pedersen v. Denmark* (Application no. 5095/71; 5920/72; 5926/72), ECHR, 1976, 56§.

¹⁶¹ Arnardóttir, Oddný Mjöll, "The Differences That Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights" *Human Rights Law Review*, vol. 14, no. 4, Dec. 2014, pp. 647–670, p. 665.

¹⁶² *Engel and others v. the Netherlands*, Application. nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, ECHR, 8 June 1976.

¹⁶³ *Clift v. United Kingdom* Application. no. 7205/07, ECHR, 13 July 2010.

¹⁶⁴ *Chassagnou and Others v. France*, Applications nos. 25088/94, 28331/95 and 28443/95, ECHR, 29 April 1999.

cases have been more practical, requiring only that the discriminatory treatment can be connected to a distinction between identifiable individuals or groups.

The other line of case law has understood article 14 as only protecting against discrimination based on personal characteristics. However, the interpretation of “personal characteristics” has not been consistent which has made this case law inconsistent as well. The general approach has been to understand personal characteristics as characteristics that are innate or inherent. However, in the Carson-case a different approach was taken where “personal characteristics” was given a wide meaning so as to include place of residence.¹⁶⁵ The Carson case can be seen as an attempt to reconcile the stricter line with the more generous one by giving “personal characteristics” a wide definition. This does however not seem to have been successful since also after the Carson case the court has from time to time found applications inadmissible for not concerning a ground that is innate or inherent.¹⁶⁶

Gerards and Arnardóttir have both provided detailed descriptions of the case law of the ECtHR in this area.¹⁶⁷ They both criticise the tendency of the court to in some cases apply the criteria of innate or inherent characteristics in relation to identification of grounds. They hold that this is inconsistent with the majority of cases where the court has taken a more open approach but also that it is illogical since recognized grounds such as property and place of residence cannot qualify as innate or inherent characteristics. Thus they both, although in different ways, argue that the traditional approach should not be abandoned. This also seems to be what has happened over the last years, something which can be seen in the approach taken in the European Handbook when it summarizes the case law:

*“(…) ‘other status’ is broadly defined by the ECtHR as “differences based on an identifiable, objective, or personal characteristic, or “status”, by which individuals or groups are distinguishable from one another.” Moreover, the interpretation of this notion “has not been limited to characteristics which are personal in the sense that they are innate or inherent”.*¹⁶⁸

This traditional approach is in line with the approach taken by the HR-committee, which has not limited itself to grounds of an innate or immutable character. Examples of other grounds that the committee has examined are place of residence¹⁶⁹, students in public versus private schools¹⁷⁰ and time at which fishing quotas have been obtained.¹⁷¹

¹⁶⁵ Carson and others v. United Kingdom, Application no. 42184/05, ECHR, 16 March 2010.

¹⁶⁶ Springett and Others v United Kingdom, Application Nos. 34726/04, 14287/05 and 34702/05, ECHR, 27 April 2010.

¹⁶⁷ Gerards (2013); Arnardóttir (2014).

¹⁶⁸ CoE and EU FRA, *Handbook on European non-discrimination Law 2018 edition*, 2018, p. 224.

¹⁶⁹ Pohl et al v. Austria, Communication No. 1160/2003, Views adopted on 9 July 2004 at the 85th session.

¹⁷⁰ Blom v. Sweden, Communication No. 191/1985, Views adopted on April 1988 at the 32nd session.

¹⁷¹ Haraldsson and Sveinsson v. Iceland, Communication No. 1306/2004, Views adopted on 24 October 2007, 91st session.

However, this does not mean that any infringement on rights will constitute discrimination. Discriminatory treatment needs to be attributable to a status or group that is “identifiable” or “distinguishable”. The consequences of this can be seen in the case *B.d.B. et al v. the Netherlands* where the claim of discrimination due to an administrative error was found inadmissible since the applicants had not claimed that they belonged to an “*identifiably distinct category*”.¹⁷²

The ESCR-committee on the other hand stated in its general comment that additional grounds are recognized “*when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization.*”¹⁷³ It is however hard to determine whether this is followed practice, the court has for example not limited itself to examine discrimination against women but also against men.¹⁷⁴ This ambiguity shows that the division of the prohibition of discrimination into four elements is not always upheld in practice. Factors such as disadvantage, marginalization and vulnerability are generally brought up not in relation to identification of grounds but in the assessment of potential reasonable and objective justification, which will be treated in section 3.6 below.

The analysis in this section shows that the threshold for identification of grounds is generally not set at a high level. The suggestion is that in the cases where a higher threshold is set, that assessment is instead a part of the assessment of justification.¹⁷⁵ In this sense the identification of grounds merely requires that the discriminatory treatment can be connected to an identifiable or distinguishable group or status.

3.5.2. Intersectional discrimination

Recognition of intersectional discrimination acknowledges that one ground for discrimination is not always sufficient to describe the discrimination experienced by individuals. The recognition of intersectional discrimination apart from multiple discrimination is important. Multiple discrimination describes a situation when an individual experience discrimination on several grounds at the same time. Intersectional discrimination describes a situation when different grounds intersect and create new, specific, patterns of discrimination.¹⁷⁶

On the international level intersectional discrimination is recognized and it can be accommodated under the open-ended character of “other status”. This has been explicitly done by the ESCR-committee in its general comment.¹⁷⁷

¹⁷² *B.d.B. et al v. the Netherlands* Communication No. 273/1989, Decision of 30 March 1989 at the 35th session.

¹⁷³ ESCR-committee GC20, 27§.

¹⁷⁴ Craven (1998), p. 168ff.

¹⁷⁵ Joseph et al. (2013), p. 776.

¹⁷⁶ See for ex. CoE and EU FRA, (2018), p. 60.

¹⁷⁷ ESCR-committee GC20, 27§.

In the European context intersectional discrimination is also recognized, however, the ECtHR has been reluctant to use the terminology of intersectionality.¹⁷⁸ Yet it has been argued that an intersectional perspective has been applied in for example *B.S. v. Spain* where the court found a violation of article 14 since the state had failed to take into account the applicants “*particular vulnerability inherent in her position as an African woman working as a prostitute*”¹⁷⁹. Similarly the intersection of sex and age in discrimination of older women based on stereotypical assumptions about their sexuality was addressed in the case of *Carvalho Pinto de Sousa Morais v. Portugal*.¹⁸⁰

As indicated above, the open-ended character of regulations of non-discrimination in IHRL makes identification of an intersectional ground for discrimination relatively unproblematic. In this context formal recognition of intersectional discrimination has been more important to in relation to closed definitions of discrimination, often found in domestic discrimination law. However, this does not mean that an intersectional understanding of discrimination is not important in IHRL in other aspects.

Intersectionality is for example important to understand the disadvantage, the right to different treatment or affirmative action of an individual or group. It has also been suggested that this has importance for the strictness in the review of possible justifications for such discrimination, something that will be elaborated on below.

3.6. Justification

A prima facie case of discrimination does not necessarily entail a violation of IHRL. Prima facie discrimination can be justified if there is an objective and reasonable justification. This test originally derives from the ECtHR and the *Belgian Linguistics* case but has been widely accepted in IHRL and is applied in the context of ICCPR, ICESCR as well as regional instruments.¹⁸¹ The ECtHR, in the *Belgian Linguistics* case, established that article 14 is not violated if there is an “*objective and reasonable justification*”¹⁸² and that there is “*a reasonable relationship of proportionality between the means employed and the aim sought to be realized*”.¹⁸³ In other words this requires that a legitimate aim be pursued in a proportional manner.¹⁸⁴

¹⁷⁸ CoE and EU FRA (2018), p. 60f.

¹⁷⁹ *B.S. v. Spain*, Application no. 47159/08, ECHR, 24 July 2012, 62§.

¹⁸⁰ *Carvalho Pinto de Sousa Morais v. Portugal*, Application no. 17484/15, ECHR, 25 July 2017.

¹⁸¹ *Belgian Linguistics v. Belgium* (1968).; Saul et al. ICESCR commentary, p. 179; Gonza, Alejandra, and Thomas M. Antkowiak. *The American Convention on Human Rights: Essential Rights*. Oxford University Press, 2017, p.41; Murray, Rachel, *The African Charter on Human and Peoples Rights: A Commentary*, Oxford University Press, 2019, p. 57.

¹⁸² *Belgian Linguistics v. Belgium* (1968).

¹⁸³ *Belgian Linguistics v. Belgium* (1968).

¹⁸⁴ De Schutter (2007), p. 795.

How the “reasonable and objective” test will be interpreted and applied is not always easy to predict and it has been suggested to be a potentially subjective test.¹⁸⁵

Sometimes this test is pre-empted already at the stage of identifying a ground with arguments such as that the ground for the prima facie discrimination is not “relevant”, that the situations are not “analogous” or that there is no “comparability”.¹⁸⁶ Such statements generally build on a similar analysis to that made under the “reasonable and objective” test and will thus not be separately treated in this thesis.

The previous section suggested that it is sometimes hard to separate the identification of a ground from the assessment of justification. While the identification of a ground for discrimination does not set up a high threshold, such threshold is determinative for the outcome of the justification test. Grounds that are classified as “suspect” require stricter scrutiny.¹⁸⁷

3.6.1. Stricter scrutiny

The question of whether a prima facie case of discrimination pursues a legitimate aim is usually not a source of disagreement.¹⁸⁸ The fact that such treatment pursues a legitimate aim does however not mean that the way in which this aim is sought to be realised is reasonable and proportionate.

Completely arbitrary treatment where there is no connection between the measures taken and the aim sought to be realised will never fulfil the criteria. This, whether something is completely arbitrary, will be the assessment made in relation to grounds that are non-suspect.¹⁸⁹ However, in relation to suspect grounds a stricter scrutiny is applied, the measures taken then needs to be necessary to achieve the aim.

Moreover it is not enough that the aim is legitimate, it also needs to be important enough to justify the interference with the right not to be discriminated against, in other words; there needs to be proportionality.¹⁹⁰

The ECtHR indicates that stricter scrutiny is applied when it requires “weighty reasons” as justification or when it states that the margin of appreciation for the state is slim.¹⁹¹ Sometimes the stricter approach is actualized through a shift in burden of proof with a presumption for that such ground does not fulfil the “objective and

¹⁸⁵ Gerards, Jannike, “Discrimination grounds” in *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law : Ius Commune Casebooks for the Common Law of Europe* edited by Schiek, Dagmar et al. Hart Publishing, 2007, p. 36.

¹⁸⁶ Harris et al *Law of the European Convention on Human Rights*, 4th ed., Oxford University Press, 2018, p.770.

¹⁸⁷ The terminology of suspect grounds derives from the US constitutional context, however the which grounds that are considered suspect and what scrutiny that is applied is not necessarily the same as in the US constitutional context, see for ex, Gerards (2013) p. 114.

¹⁸⁸ Harris et al (2018), p. 773f.

¹⁸⁹ See for example Harris et al (2018), p. 774; Gerards (2007), p. 36.

¹⁹⁰ CoE and EU FRA (2018), p. 93.

¹⁹¹ CoE and EU FRA (2018), p. 93; Arnardóttir, (2003), p. 50.

reasonable” test since it “*immediately raise a suspicion of unreasonableness and prejudice*”.¹⁹²

3.6.2. Suspect grounds

As indicated above, the character of the ground for discrimination is determinative for the assessment of justification, it seems “*intrinsically more important to guard against discrimination on some ‘grounds’*.”¹⁹³ It has sometimes been suggested that all explicitly listed grounds for discrimination in IHRL are such, “suspect” grounds.¹⁹⁴ That is however not uncontroversial, mainly since the ground of property in IHRL is often used as an example of a non-suspect ground.¹⁹⁵ Moreover it is widely accepted that also grounds that are not explicitly listed in IHRL can be considered suspect. That is for example the case with sexual orientation, age and disability, grounds that have been widely recognized as “other statuses”.¹⁹⁶

Also within the grounds that are considered suspect there are some grounds that are sometimes suggested to be more suspect than others. Race, ethnicity and related grounds are examples of this. Sometimes it has even been suggested that discrimination on such ground never can be justified, an approach that however has generally been rejected.¹⁹⁷ Also sexual orientation has been given recognition as a ground on which discrimination is close to impossible to justify, something that can be seen in the case law of the ECtHR over the latest years.¹⁹⁸ Other examples of widely accepted suspect grounds are gender, religion, disability and birth outside marriage.¹⁹⁹

Examples of other suspect grounds that are sometimes suggested to be a little bit less suspect are age²⁰⁰, nationality²⁰¹ and marital status, which Gerards refers to as a “semi-suspect” ground.²⁰² The more ambivalent status of these grounds might be explained by the fact there are more examples of situations where such grounds can be used to justify less favourable treatment. Age is for example considered a relevant factor restricting things such as right to vote or possibility to enter to labour market.²⁰³ Similarly nationality²⁰⁴ is often the ground for distinction in relation benefits that a

¹⁹² Arnardóttir, (2014), p. 654; Gerards (2007), p. 36.

¹⁹³ Joseph et al. (2013), p. 776.

¹⁹⁴ Joseph et al, ICCPR commentary (2013), p. 776;

¹⁹⁵ De Schutter (2018), p. 708.

¹⁹⁶ Arnardóttir (2014), p. 649f; CoE, Explanatory report, prot 12 (2000), 20§; ESCR-committee GC20, 28-32§§;

¹⁹⁷ Schabas (2015), p. 574f.

¹⁹⁸ Arnardóttir (2014), p. 649.

¹⁹⁹ See for example De Schutter, p. 708; Arnardóttir (2003), p. 50.

²⁰⁰ Joseph et al. (2013), p. 793.

²⁰¹ Arnardóttir (2014), p. 651; Joseph et al (2013), p. 776.

²⁰² Gerards, (2013), p. 122

²⁰³ Fredman (2005), p. 173.

²⁰⁴ Nationality should however not be confused with national origin, a ground that is related to ethnicity, race and other highly suspect grounds, see for example CoE and EU FRA (2018), p. 202.

state chooses to offer its nationals. At the same time there are situations where these grounds are also used to motivate less favourable treatment in ways that are reinforcing stigma or disadvantage, something that might require strict scrutiny.²⁰⁵

3.6.3. Indicators of “suspectness”

It is hard to objectively establish exactly what makes grounds “suspect”.²⁰⁶ Suggestions have been that it is characteristics of innate or immutable character. The reference to immutability as an indicator of “suspectness” has primarily been used in relation to grounds such as race and gender. It has however also been suggested as a description of disability and age.²⁰⁷ Although immutability has been widely used to classify grounds as suspect its relevance has also been questioned, pointing to the fact that characteristics that for long have been understood as static are becoming more fluent and fragmented.²⁰⁸ Grounds that were previously understood in biological terms are no longer fit for such essentialist definitions but can also be understood as socially constructed or relational.²⁰⁹

Religion, political opinion or similar grounds for discrimination are often grouped together with grounds that are perceived as immutable. A more accurate description of these grounds might however be that they are inherent in the sense that they are so closely interlinked with the personal sphere or ego that an individual cannot be required to give up or change.²¹⁰

Other suggestions have been that suspect grounds should be defined in a more asymmetric manner. For example that suspect grounds should be identified by that there are negative stereotypes, prejudice or stigma connected to a characteristic or group.²¹¹ Which groups or categories that fall within these definitions might change over time but also depending on context. For example there might be more stigma attached to a certain religion depending on what is the majority norm in society. A similar approach is that focus should be on groups that due to previous discrimination experience disadvantage putting them in a more vulnerable situation.²¹² Such disadvantage can be multifaceted and have political, social and economic character.²¹³

This approach has been applied in case law from the ECtHR, for example in the case of *D.H. and Others v. the Czech Republic* where the court acknowledged the vulnerable and disadvantaged situation of the Roma population because of “*their turbulent history and constant uprooting*”²¹⁴. In the case of *Alajos Kiss v. Hungary*

²⁰⁵ CoE and EU FRA (2018), p. 205; Fredman (2005), p. 172f.

²⁰⁶ Joseph et al (2013), p. 776.

²⁰⁷ Gerards (2013), p. 114; Craven (1998), p. 176.

²⁰⁸ Malleon (2018), p. 609-611.

²⁰⁹ Malleon (2018), p. 609-611.

²¹⁰ Malleon (2018), p. 609-611; Joseph et al (2013), p. 776.

²¹¹ Gerards (2013), p. 116.

²¹² Joseph et al (2013), p. 776.

²¹³ Atrey (2018), p. 417.

²¹⁴ *D.H. and Others v. the Czech Republic* (2007), 182§.

the court applied this approach also in relation to discrimination on the ground of disability. The court in that case clarified the rationale behind the stricter scrutiny it had applied in relation to grounds such as race, sexual orientation and gender stating: *“the reason for this approach, which questions certain classifications per se, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion.”*²¹⁵

Similarly, the importance of stigma and prejudice in recognizing the vulnerability of a status-groups was emphasised in the case of *Kiyutin v. Russia* where the court stated that *“people living with HIV are a vulnerable group with a history of prejudice and stigmatisation and that the State should be afforded only a narrow margin of appreciation in choosing measures that single out this group for differential treatment on the basis of their HIV status.”*²¹⁶

The recognition of suspect grounds logically lead to the conclusion that grounds that are not suspect does not presuppose a strict review. There has however been concern as to how intersectional discrimination will be handled under this doctrine.²¹⁷ It has been suggested that intersectional grounds should be subject to strict scrutiny.²¹⁸ This seems reasonable, both in cases with intersection between one or more suspect grounds and in cases where the intersectional character of non-suspect grounds make them suspect. There has also been concern as to the ability for the court to recognize the suspectness of intersectional discrimination.²¹⁹ One indicator of that this concern might be well-founded is the outcome in the *S.A.S. v. France* case²²⁰ where a prima facie case of indirect discrimination against women adhering to a minority religion was recognized but where the court found the justification to be within the margin of appreciation of the state, a decision that has been heavily criticised.²²¹

3.7. Summary chapter 3

This chapter has provided a broad overview of the guarantee of non-discrimination in IHRL, seeking to summarize the common ground but also point out some relevant differences between the instruments and different practices. To be able to do this the

²¹⁵ *Alajos Kiss v. Hungary*, Application no. 38832/06, ECHR, 20 May 2010, 42§.

²¹⁶ *Kiyutin v. Russia*, Application no. 2700/10, ECHR, 10 March 2011, 64§.

²¹⁷ Arnardóttir (2014), p. 656, 667; Timmer, Alexandra, “American Journal of Comparative Law Judging Stereotypes: What the European Court of Human Rights Can Borrow from American and Canadian Equal Protection Law” *American Journal of Comparative Law*, vol. 63, no. 1, 2015, pp. 239–284.

²¹⁸ Schiek et al. (2007), p. 183.

²¹⁹ Arnardóttir (2014), p. 656.

²²⁰ *Case of S.A.S. v. France*, Application no. 43835/11, ECHR, 1 July 2014.

²²¹ Berry, Stephanie, “SAS v France: Does Anything Remain of the Right to Manifest Religion?”, EJIL:Talk!, 2 July 2014, available at: <<https://www.ejiltalk.org/sas-v-france-does-anything-remain-of-the-right-to-manifest-religion/>> (accessed 2020-03-13); Chaib, Saïla Ouald and Peroni, Lourdes, “S.A.S. v. France: Missed Opportunity to Do Full Justice to Women Wearing a Face Veil”, Strasbourg Observers, 3 July 2014, available at: <<https://strasbourgobservers.com/2014/07/03/s-a-s-v-france-missed-opportunity-to-do-full-justice-to-women-wearing-a-face-veil/>> (accessed 2020-03-13).

chapter has divided the concept of discrimination into four different elements. These elements are, as has been pointed out, however closely interlinked and hard to separate in practice, especially in judicial reasoning.

It has been established that equality and non-discrimination can be considered to be two sides of the same coin. A substantive understanding of equality has thus led the prohibition of discrimination to not only focus on negative obligations and equal treatment but also to recognize indirect discrimination and positive duties on states to take action against structural discrimination. Such positive measures might either be to accommodate for difference or to take affirmative action to correct de facto disadvantage of status-groups.

In relation to some instruments of IHRL a claim of discrimination can only be made in relation to one of the substantive rights, or when the concern of discrimination falls within the ambit of such right. Other regulations, most notably article 26 of the ICCPR, contain a more wide-ranging, independent prohibition of discrimination.

The third element of discrimination is that there needs to be a connection to a prohibited ground for discrimination. There are different understandings of what threshold there is for a new ground or status to be recognized under this open-ended provision. The main tendency is to include virtually any ground of discrimination as long as it is identifiable. This generous approach has however led the focus on suspectness of such grounds to impact the assessment of justification instead. The focus on suspect grounds is an expression of that IHRL considers it more important to protect against discrimination on some grounds. Taken together, the generous approach in identification of grounds and the stricter approach in the assessment of potential justification can be understood as creating a sliding scale where the suspectness of the ground impact the possibility to justify a prima facie case of discrimination.

The purpose of this chapter has been twofold; firstly to assess what constitutes discrimination under IHRL and thus, what protection that would be provided in relation to poverty based discrimination. The second purpose has been to establish the criteria for identification of grounds for discrimination under IHRL and to assess the suspectness of such ground.

4. Poverty-based discrimination

This chapter will examine how the guarantees of equality and non-discrimination in IHRL can be applied to poverty-based discrimination. First there will be an assessment of whether poverty constitutes a prohibited ground for discrimination under IHRL, building on what has been established in chapter 3.5 above. Secondly, the potential suspectness of such ground will be assessed, relating to chapter 3.6.

Since the question of poverty as a ground for discrimination has been addressed a limited amount of times in judicial decisions there will be an analysis of the theoretical possibility of applying the criteria established above in chapter 3 to the potential ground of poverty. After that, examples of where this has actually been addressed in practice will be examined to see if the analysis can be verified by such jurisprudence and scholarly arguments. This approach will be taken with background of the position established in the introductory chapter as to the sources of IHRL.

4.1. Poverty as a ground for discrimination

Although IHRL generally lists grounds on which discrimination is prohibited it is unusual that such grounds are more closely defined. Thus these grounds have been interpreted in a wide manner and in light of IHRL as a dynamic area of law, this is especially true for “other status” but also explicitly listed grounds have been given a wide meaning.²²²

There are some grounds recognized under the main IHRL instruments that show some similarities to the ground of poverty. Both property and social origin are such grounds. These are included in the International Bill of Rights as well as in the ECHR. Within the regional HR-systems in America and Africa the grounds of “economic status”²²³ respectively “fortune”²²⁴ are also relevant.

The following sections will examine to what extent poverty is accommodated for as a ground for discrimination, either under the explicitly listed grounds or under the ground of “other status”.

4.1.1. Property/fortune/economic status

The explicit grounds for discrimination referred to as property, fortune or economic status are very similar. From the early debates around the development of the UDHR one question of discussion was the inclusion of property as a ground for discrimination. There was no extensive debate on what situations this would aim at

²²² Atrey (2018), p. 414f.

²²³ Art. 1.1 American Convention on Human Rights.

²²⁴ Art 2 African Charter on Human and Peoples' Rights.

protecting.²²⁵ The representative of the Soviet Union however pushed for the inclusion of property as a ground for discrimination to ensure that rights would belong to both rich and poor.²²⁶

First of all, even though statuses such as property, fortune and economic status have some potential in addressing and overlapping questions of discrimination on the ground of poverty there seems to be a limitation in this approach due the one-dimensional approach it takes to poverty. As has been described above, economic situation or income is an important factor in defining poverty, however, also other social factors are important aspects of poverty.

The extent to which such multifaceted understanding of poverty can be accommodated for under these grounds for discrimination is a question that has largely been left unanswered. Despite the intention of the Soviet representative in the drafting of the UDHR these grounds have not primarily been used to assess discrimination against people in poverty. Instead it is relatively “non-suspect” cases that have been examined under these grounds. For example, distinction between groups depending on when they acquired their fishing quotas was found to constitute discrimination on grounds “equivalent” to those of property according to the HR-committee.²²⁷ Similarly the ECtHR has used this ground to examine discrimination between large and small land-owners where the discriminatory treatment consisted in an obligation to transfer hunting rights for the smaller land-owners.²²⁸

4.1.2. Social origin

While property, economic status and fortune primarily has potential of addressing discrimination based on economic resources, social origin focuses more on the social aspects of poverty. Social origin has not been closely defined but the ESCR-committee has suggested that it includes the “economic and social status” of an individual.²²⁹ Despite this many scholars have also emphasised that social origin is a more limited ground than poverty.²³⁰ The terminology used confirms this risk since it refers to social *origin*, a textual interpretation might thus not cover all situations of poverty. Even though many people living in poverty have also been born into poverty, something that indicates the structural discrimination that faces individuals in poverty, these are not the only individuals in need of protection against discrimination. Such discrimination effect individuals no matter what lead them into poverty.

²²⁵ MacNaughton (2009), p. 49.

²²⁶ UN Commission on Human Rights, Third Session, Summary Record of the Fifty-Second Meeting, UN Doc. No. E/CN.4/SR.52, June 8, 1948, p. 5.

²²⁷ Haraldsson and Sveinsson v. Iceland (2007).

²²⁸ Chassagnou and Others v. France (1999).

²²⁹ ESCR-committee GC20, 24§.

²³⁰ Fredman (2011), p. 582.

In relation to the ECHR the content of this ground has not been clarified, and according to Schabas “*there does not appear to be any case law from the court concerning discrimination based on social origin.*”²³¹

Even though statuses relating to property and social origin lies close to poverty they seem to be under inclusive in relation to an individual or group identified by living in poverty as understood in this thesis.²³² The interpretation and application of these grounds also vary between the different instruments of IHRL. The insufficiency of these grounds to comprehensively address poverty-based discrimination is also confirmed by the many or scholarly articles asking for recognition of poverty as a ground for discrimination, especially in relation to the ECHR.²³³ The next section will therefore examine whether poverty can be accommodated under the open reference to “other status”.

4.1.3. “Other status”

As has been mentioned above it is widely accepted that IHRL instruments guarantee equality and non-discrimination in relation to a non-exhaustive list of grounds, something that is generally illustrated with the inclusion of “other status”. This section will assess whether poverty can be accommodated under “other status”.

As outlined above the understanding of other status as only encompassing personal characteristics that are inherent and immutable seems to have been abandoned. Thus there seems to be somewhat of a consensus on the international level that what is relevant for something to qualify as a ground is either that it falls within the wider definition of personal characteristics or that it presents an “identifiable distinct category”.²³⁴ This is a very low requirement which “poverty” can be considered to fulfil. One strong indicator of poverty is of course income and financial resources, however, other factors such as education, place of residence but also existence of prejudice and stereotyping might also be indicators in a multifaceted understanding of poverty.²³⁵

That poverty can be understood as a ground for discrimination has also been addressed by some international institutions. One example of such international recognition is the ESCR-committee which has suggested that economic and social situation or group or “strata within society” constitutes a ground for discrimination recognized under “other status”.²³⁶ Similarly the Inter-American Commission on

²³¹ Schabas (2015), p. 580f.

²³² See section 2.2.1. above.

²³³ See for example Lavrysen (2015), p. 317f (about ECHR); Fredman (2011) p. 567 (about general IHRL).

²³⁴ See section 3.5. above.

²³⁵ See section 2.2.1. above.

²³⁶ ESCR-committee GC20, 35§.

Human Rights has stated that “*the poverty or extreme poverty of a person, group or collective may be regarded as a prohibited ground of discrimination*”²³⁷.

However, both the ECtHR and the HR-committee have been a bit more hesitant to explicitly recognize poverty as a ground for discrimination in their jurisprudence. Two cases where this question has been raised in front of the ECtHR but where the court has avoided taking a stance are the case of *Airey v. Ireland* from 1979 and the case of *Garib v. the Netherlands* from 2017.²³⁸

The *Airey* case concerned a woman who was unable to obtain a judicial separation from her husband because she lacked the financial means to pay for a solicitor. The court found that this constituted a violation of article 6 and article 8, and thus recognized that the state had positive obligations to provide legal aid if that was necessary to guarantee these rights.²³⁹ However, the court clarified that since it had found substantive violations of these rights there was no need to examine the question of discrimination.²⁴⁰ This case has been celebrated for the recognition of positive obligations with economic implications on states. However, it constitutes a missed opportunity in relation to the aspect of discrimination, something that two dissenting opinions emphasised in the case. Judge Thór Vilhjármsson, in his opinion, seemed to accept poverty as a ground under the convention, however he concluded that since this was a case of inequality in fact and not in law, no discrimination was at hand, something that represents a very formal, and out-dated, idea of equality and non-discrimination.²⁴¹ Judge Evrigenis on the other hand limited himself to saying that the question of discrimination should have been examined since it constituted a “fundamental aspect” of the case.²⁴² Judge Evrigenis did however not provide any further suggestion of how such assessment should be made in substance.²⁴³

The *Garib* case concerned the requirement for a housing permit to take up residence in specific areas of Rotterdam, a measure that was introduced by the Dutch state as an attempt to come to term with “problems” in impoverished areas of the big cities. Housing permits were only granted to individuals with an income above 120% of statutory minimum wage and thus effectively excluded individuals with low income of work, or who were dependants on social security, from taking up residence in these areas. Ms. Garib claimed that her freedom to choose her place of residence in article 2 of the 4th protocol to the ECHR had been violated together with the prohibition of discrimination in article 14. The court dismissed her claim and found no violation of the substantive right and did not examine the merits of the question of discrimination

²³⁷ IACHR, *Compendium on Equality and non-discrimination Inter-American Standards*, 12 February 2019, OEA/Ser.L/V/II.171, p. 63f.

²³⁸ *Garib v. the Netherlands*, Application no. 43494/09, ECHR 6 November 2017.

²³⁹ *Airey v. Ireland* (1979).

²⁴⁰ *Airey v. Ireland* (1979), 30§.

²⁴¹ *Airey v. Ireland* (1979), dissenting opinion of Judge Thór Vilhjármsson.

²⁴² *Airey v. Ireland* (1979), dissenting opinion of Judge Evrigenis, 1§.

²⁴³ *Airey v. Ireland* (1979), dissenting opinion of Judge Evrigenis.

with reference to procedural obstacles.²⁴⁴ The decision was reached with twelve votes to five and three highly critical dissenting opinions were attached to the case, several of them arguing that there was no procedural obstacles to trying the question of discrimination.²⁴⁵ Judge Albuquerque developed this critique and argued that this was a clear case of discrimination based on social and economic situation, which disproportionately effected persons living in poverty.²⁴⁶ He further emphasised the intersectional disadvantage experienced by the applicant because of her being a woman in poverty.²⁴⁷

The only conclusion that can be drawn from this case law in relation to poverty as a ground for discrimination is that the ECtHR has not closed the door to a formal recognition of poverty as such ground under the convention. Why the court seems to avoid this question is hard to know. There has earlier been a tendency, which has also been confirmed by the court itself, to await consensus within the European community before taking steps to develop case law in more controversial areas.²⁴⁸ Whether that is the correct analysis in this case is hard to know, a more thorough analysis of this would require looking close at the mandate of the court, something that will not be done in this thesis. To the extent that the hesitant approach is due to an uncertainty as to what such recognition would lead to this thesis seeks to be a contribution in clarifying the content of poverty-based discrimination and what situations it applies to.²⁴⁹

4.2. Justifying discrimination on the ground of poverty

Chapter 4.1 has suggested that there is room for recognition of poverty as a ground for discrimination in IHRL because of its open-ended character. However, chapter 3.6 has also emphasised the importance of whether a ground for discrimination is considered “suspect” or not. This suspectness is vital to the question of whether a prima facie discrimination will be considered justified. This section will therefore address the potential suspectness of poverty and how this might impact the assessment of justification different forms of poverty discrimination.

²⁴⁴ Garib v. the Netherlands (2017), 102, 167§§.

²⁴⁵ Garib v. the Netherlands(2017), dissenting opinion of judge Pinto de Albuquerque joined by judge Vehabovic 24§.

²⁴⁶ Garib v. the Netherlands (2017), dissenting opinion of judge Pinto de Albuquerque joined by judge Vehabovic 22§, 40§.

²⁴⁷ Garib v. the Netherlands (2017), dissenting opinion of judge Pinto de Albuquerque joined by judge Vehabovic 22§, 40§.

²⁴⁸ See for example Gerards (2007), p. 36.

²⁴⁹ See further discussion on this in the conclusions, section 5.3.

4.2.1. Is poverty a suspect ground?

As indicated above there is a tendency to apply a stricter scrutiny in relation to “suspect” grounds when assessing the objective, reasonable and proportional justification for a prima facie case of discrimination. Suggestions of how “suspect grounds” should be identified have been that they are either immutable, inherent or innate, a core choice or belief or that they are connected to stigma, negative stereotyping and prejudice or de facto disadvantage. This section will seek to analyse whether poverty can be described in such terms and thus be considered suspect.

4.2.1.1. Traditional approach

Suggesting that poverty is an innate or immutable characteristic is likely to be controversial and it has both been suggested and rejected by scholars.²⁵⁰ Even though characteristics such as gender and race have been suggested to be more fluid than previously understood it is clear that these have a more static character than poverty.²⁵¹ That a person is at one time living in poverty does not mean that that individual will always live in poverty. Nor does it mean that someone who is currently in a stable socioeconomic situation will not experience poverty later in life.

The suggestion that age and disability are immutable or innate indicates that such characteristics does not necessarily have to be permanent. While age is not something that the individual can impact, it is something that is not permanent; one’s age will inevitably change. In relation to disability the character of such can vary, one might be born with a disability and live with that throughout life. It is however also possible to have a disability for a period of one’s life. However, when one has a disability it is not possible to change that by choice. It thus seems as the amount of agency the individual have over the characteristic that constitutes a ground for discrimination impacts the assessment in these cases.

Even though poverty is often, or to big part, the result of factors beyond the control of the individual, for example structural discrimination, the character of poverty seems hard to place under the umbrella of immutable or innate characteristics even when such definitions are slightly less strict, including not only race and gender but also age and disability. Doing so might also risk undermining the agency of individuals living in poverty. However, analysing this from the perspective of children is slightly different. Children being born into poverty do not have any influence over such situation. For children poverty might thus more accurately be described as innate or immutable.²⁵²

Can poverty be considered suspect on the same grounds as political opinion or religion? Some scholars have suggested an affirmative answer to that question. Joseph

²⁵⁰ Craven (1998), p. 176 (rejects the classification of poverty as a inherent); Peterman (2018), p. 1330f (suggests that poverty is in some situations effectively immutable).

²⁵¹ See section 3.6.3. above.

²⁵² See for example Peterman (2018), p.1330f.

et al. have for example suggested that “*wealth*” and “*class*” are comparable to religion and political opinion in that they all reflect “*inherent characteristics of one’s ego*”.²⁵³ Peterman has similarly suggested that poverty might be the result of “respect-worthy” personal choices.²⁵⁴ However, this does not always seem like an accurate understanding of poverty. The inability of people to change their situation of poverty is generally not due to core choices or beliefs but rather to external factors. Therefore it is questionable whether the suspectness of poverty can be established by a comparison with religion and political opinion.

4.2.1.2. Prejudice or disadvantage

It has also been suggested that grounds are “suspect” when they are closely related with negative stereotyping, stigma and prejudice. As has been illustrated in chapter 2 above such prejudices are clearly connected to people living in poverty, something that can be described with the term “povertyism”.

In the Kiyutin case the ECtHR has described how the stigma connected to persons with HIV/AIDS was reinforced by the association between such condition and practices such as drug use, prostitution etc that were already highly stigmatised in many societies.²⁵⁵ This created a “*false nexus between the infection and personal irresponsibility*”²⁵⁶. Being infected with HIV/AIDS and living in poverty are obviously very different situations in many aspects. However, the description of the multifaceted nature of the stigma related to these status groups can be compared. The prejudice of individual irresponsibility or failure as explanation for these conditions can be compared to that of people living in poverty. It is thus reasonable to argue that stigma attached to living in poverty should generate a strict scrutiny in a similar way that HIV/AIDS does.

Negative stereotyping and stigma is also closely connected to having experienced historical disadvantage in a way that puts such individuals or groups in a situation where they are more vulnerable to discrimination today. As poverty in itself is a strong indicator of disadvantage, often to some extent due to previous discrimination, the situation of people living in poverty can easily be framed in these terms.²⁵⁷

It has been suggested that these two later definitions are the best indicators of where stricter scrutiny should be applied.²⁵⁸ This understanding is also in line with the substantive understanding of equality that requires specific focus on these groups. The analysis made in this chapter also indicates that prejudice and stereotyping as well as

²⁵³ Joseph et al, (2013), p. 776.

²⁵⁴ Peterman (2018), p. 1333.

²⁵⁵ Kiyutin v. Russia (2011), 64§.

²⁵⁶ Kiyutin v. Russia (2011), 64§.

²⁵⁷ See for example Atrey (2018), p. 413.

²⁵⁸ Gerards (2013), p. 114.

disadvantage are the most accurate way to describe the suspectness of poverty as a ground for discrimination.²⁵⁹

Poverty is however different from for example race or ethnicity in the sense that society is largely built on division between people depending on income. That is the case for example in taxation systems where a higher income might place you in a higher tax bracket. Similarly market prices make it impossible for everyone to attain the same life standard; people living in wealth or in a stronger socioeconomic situation will access higher standard housing, food etc. Such situations will not be considered discriminatory. First of all it might be worth emphasising what was established in the third chapter of this thesis; that distinction or different treatment per se does not necessarily constitute discrimination. However, also in situations where there is a prima facie case of discrimination that might be justified. This indicates that while poverty is in some situations highly suspect it will in other situations serve to justify less favourable treatment or outcome.²⁶⁰ In an attempt to concretise how potential cases of discrimination would be assessed the next section will draw on examples of potential poverty discrimination that have been touched upon in this thesis.

4.3. Assessment of discrimination

The analysis above has shown that “poverty” as a ground for discrimination has a character that makes it “suspect” and thus require strict scrutiny. To try to concretize this the following section will provide a hypothetical assessment of how the objective and reasonable justification test would be applied in relation to practical examples of potential poverty discrimination that have been touched upon in this thesis. This exemplification is intended to illustrate the effect of recognizing poverty as a suspect ground as well as what forms poverty discrimination can take and how it will be fitted into the analytic framework of non-discrimination in IHRL.

4.3.1. Housing example

Practices of landlords to exclude potential tenants because they perceive of them as poor are common. These might be single instances of arbitrary decision-making but are also systematically established, for example through rejection of tenants who have social security as a source of income or who have a low income of work.²⁶¹

When such exclusion is only based on prejudice against people living in poverty it will not be justified. Such prejudice does not constitute a legitimate aim and neither can it be used as a justification. However, it has been suggested that courts are

²⁵⁹ See for example Fredman (2002), p. 79f.

²⁶⁰ See Craven (1998), p. 175; Joseph et al. (2013), p. 769.

²⁶¹ See section 2.2.3.2 above.

generally bad at detecting prejudice and negative stereotypes.²⁶² The fact that poverty qualifies as a suspect ground might thus in practice help the court in this regard since suspectness should “*immediately raise a suspicion of unreasonableness and prejudice*”.²⁶³

Many landlords would also suggest that these requirements are economically motivated, that demanding a certain level of income is necessary to secure that the rent will be paid. Such arguments do however not seem to be rationally connected to the practice of not considering social security as an income at all. Moreover many scholars have pointed to the lack of evidence that the high income requirements actually correspond to a lowering of economic risk.²⁶⁴ Thus these economically motivated justifications should either be rejected for being false or overbroad stereotypes.

A false stereotype can never serve as a justification for discrimination since it is arbitrary in the sense that it is not rationally connected to the legitimate aim.²⁶⁵ An over inclusive generalisation might in some instances be able to serve as justification. However, when such generalisation target individuals on a ground that is considered suspect there needs to be an examination of whether it is necessary and proportionate. The income requirements are not necessary for the economic security of landlords, something that has also been emphasised in Canadian jurisprudence.²⁶⁶ More proportionate measures would for example be to use references from earlier landlords to get a more accurate indication of the reliability of a potential tenant.²⁶⁷

4.3.2. Criminal legislation example

Criminal legislation targeting practices of people living in poverty is another form of potential discrimination against people living in poverty. This kind of discrimination is distinct from that of housing. Housing is a resource that everyone values and need access to, where people perceived to be poor are excluded. In this case people living in poverty are not directly targeted in the same way. Prohibitions of sleeping in public spaces, vagrancy or begging applies to everyone, no matter whether they live in poverty or not. However, the only ones that are negatively affected of such regulations are people living in poverty.

A formal understanding of discrimination would not see a problem with this, everyone is treated equally since no one is allowed to beg or sleep under bridges. However a substantive understanding of equality sees the disadvantage of people living in poverty in these situations since they have no other choice and thus are the only ones affected. This can be compared to prohibitions of covering ones face in

²⁶² Arnardóttir (2014), p. 656

²⁶³ Gerards (2007), p. 36.

²⁶⁴ See for example Lind (2016).

²⁶⁵ See for example Timmer (2015), p. 245.

²⁶⁶ MacKay (2009), p. 40f.

²⁶⁷ MacKay (2009), p. 40f.

public. Such prohibitions are general; no one is allowed to cover their face. However, the individuals with a strong interest of covering their faces in certain ways, namely women wearing religious clothing, are significantly more negatively effected by such regulations.

Moreover, the stigma that this causes would in itself be a discriminatory treatment with a substantive understanding of equality, relating to the recognition dimension Fredman's framework.²⁶⁸ In an assessment of the objective and reasonable test these measures are likely to be considered disproportionate and therefore discriminatory, something that is indicated for example in the UN guiding principles of extreme poverty.²⁶⁹

4.3.3. Access to court example

Discrimination on the ground of poverty is also distinct to other grounds of discrimination since we live in a society built on different opportunities depending on economic resources. People living in poverty will inevitably be placed in a disadvantaged position due to this. The assessment of potential discrimination in these situations make poverty based discrimination distinct from discrimination based on many other statuses.

It has been suggested that in cases where basic human rights are not accessible to everyone because of high costs for such rights this will entail both a violation of that substantive right as well as of the right to equality and non-discrimination.²⁷⁰ One such example was discussed above in relation the Airey case, even though the majority of the court never addressed the question of discrimination. The case concerned the right to a fair trial and the court clarified that such right, in some situations, might require the state to provide for legal aid.²⁷¹ It was shown in the case that in practice the process to obtain a judicial separation was only accessible for those who could afford to pay for a lawyer. The court thus concluded that the right to a fair trial was not guaranteed to everyone.

Framing this as a case of discrimination it could be argued that the discrimination consisted in indirect discrimination.²⁷² This since the system was adjusted for the majority norm for whom the need to pay for a lawyer would not be a problem. The fact that the state had not taken into consideration the disadvantaged situation this would leave people living in poverty in could thus be considered discriminatory. That would require the state to change its practices and accommodate for a judicial procedure that was accessible for everyone.

²⁶⁸ Fredman (2011), p. 579.

²⁶⁹ UN Human Rights Council A/HRC/21/39, p. 17.

²⁷⁰ See for example Craven (1998), p. 175.

²⁷¹ Airey v. Ireland (1979), 26-28§§.

²⁷² See for example Lavrysen (2015), p. 317f.

Alternatively this could be framed as discrimination due to a failure to take affirmative action. As has been indicated above it has however been controversial for courts and institutions to require state to take affirmative action. Much of the critique of affirmative action in relation to status groups is however that the most well recognized discrimination grounds are not perfect indicators of disadvantage. This problem is however less relevant for affirmative action based on poverty since poverty is in itself a concept describing disadvantage. This is especially true when poverty is defined as deprivation of capabilities since that indicates the “real” disadvantage in a different way than only focusing on static criteria’s such as level of income. This also provides an opportunity to reflect different levels of disadvantage due to intersectional discrimination. It thus seems that affirmative action targeting people living in poverty would be potentially less controversial than affirmative action targeting for example women or ethnic minorities.

The UN special rapporteur has explicitly addressed this type of affirmative action stating:

*“Therefore, affirmative actions in favour of persons living in poverty directed towards addressing social and economic imbalances are not only permitted, but are compulsory for States under human rights law. There is discrimination only if a difference in treatment has no legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim to be realized.”*²⁷³

Another critique against affirmative action is that it risks enforcing negative stereotypes and stigma.²⁷⁴ This risk exists also in relation to affirmative action targeting people living in poverty. The report of the special rapporteur shows, for example, how welfare systems are sometimes constructed in a way that is diminishing and penalizing, for example with excessive surveillance of the individual and restriction of autonomy.²⁷⁵ This makes it necessary to ensure that measures of affirmative action does not only take into consideration the redistributive dimension but also other dimensions, such as that of recognition, of Fredman’s framework. Affirmative action thus needs to respect the dignity and autonomy of people living in poverty and seek to empower and support them in a way that enhances their capabilities.²⁷⁶

4.4. Summary chapter 4

Even though there is a great controversy around recognition of discrimination on the ground of poverty the analysis in this chapter shows that this dilemma is not reflected

²⁷³ UN GA A/66/265, 15§.

²⁷⁴ Fredman (2016b), p. 714, 737.

²⁷⁵ UN GA A/66/265, 49-64§§.

²⁷⁶ UN Human Rights Council A/HRC/21/39.

in the legal framework. The interpretation of the prohibition of discrimination in IHRL is applicable also to cases of discrimination based on poverty. This has been shown above through the applying the interpretation of “grounds” to poverty, an interpretation that has also been confirmed by various scholars and international organisations. However, international judicial institutions have been reluctant to address this question.²⁷⁷ The ESCR-committee is one of the institutions that have actually done so while poverty as a ground for discrimination has only explicitly been addressed in separate opinions of the HR-committee and the ECtHR.

The potential suspectness of poverty as a ground for discrimination has also been addressed in this chapter. It might be difficult to consider poverty suspect for the same reasons that ethnicity or sex have traditionally been considered suspect, having immutable or innate character. Nor does it seem accurate to describe the suspectness of poverty in the same way as religion or political opinion, being a core choice or aspect of one’s ego. Instead the disadvantage experienced by people living in poverty, as well as the stigma, prejudice and negative stereotypes connected to this group gives it a suspect character. This means that strict scrutiny should be applied in situations where poverty is the ground for discrimination.

Thus, prima facie discrimination against people living in poverty will never be justified if it is based on false stereotypes or prejudice since such situations are characterised by arbitrariness. This has been exemplified with housing and employment examples in this thesis.

The discriminatory harm of poverty-based discrimination might also consist in stigmatization of people living in poverty, for example through criminalization of practices related to living in poverty. For those situations to be justified there needs to be very weighty reasons motivating the legislation or practice.

In some situations the prima facie discrimination is caused by purely economic factors; that people living in poverty are not be able to access certain goods or services because of lack of sufficient financial means. These situations are probably the most controversial. To eliminate this kind of discrimination the state has to take positive measures. Such measures might either be framed as an obligation to avoid indirect discrimination or as an obligation to take affirmative action. It has however been suggested that affirmative action targeting a group living in poverty might be less controversial than other forms of affirmative action. This since these kind of special measures are already relatively widely accepted as a part of welfare systems.

²⁷⁷ Atrey (2018), p. 412.

5. Conclusion

The purpose of this thesis has been to examine whether IHRL prohibits discrimination on the ground of poverty and how strong such protection is. To be able to assess this the thesis has provided an overview of the regulation of non-discrimination in IHRL and established the common core as well as emphasised the instances where different instruments or practices diverge in their protection.

The most determinative question for the research of this thesis has been whether poverty can be considered a ground for discrimination under IHRL. However, the general analysis of non-discrimination in IHRL has shown that there are other important considerations to be made to meaningfully answer that question. Two such considerations are whether poverty is a suspect ground for discrimination and whether IHRL takes a formal or substantive approach to equality.

5.1. What is non-discrimination under IHRL?

This thesis has described how a substantive understanding of equality has been allowed to inform the content of the principle of non-discrimination in IHRL. This has led to the understanding that IHRL does not only guarantee formal equality but also de facto equality. Recognition of concepts such as indirect discrimination and affirmative action has shifted the focus from negative obligations and restraint from the state to focus also on positive duties.

This shift has been vital for the effectiveness of the principle of non-discrimination in addressing discriminatory structures and thus, for the ability to address inequality in social reality. Such discriminatory structures, often motivated by prejudice and negative stereotypes, are prevalent in relation to people living in poverty in a similar way as for other status-groups. “Povertyism” can thus be compared with racism, sexism, homophobia and similar prejudice.

Moreover the substantive understanding of equality has also influenced the process of identifying grounds for discrimination and the potential suspect nature of such grounds. This has been vital for the understanding of poverty not only as an effect of, but also as a ground for, discrimination.

5.2. Is poverty a (suspect) ground under IHRL?

The possibility to seek protection for discrimination occurring on the ground of poverty seems to be controversial. Adopting a substantive understanding of equality

however shows that IHRL does no longer only protect against discrimination based on grounds that are perceived to be immutable or inherent. Rather, focus has moved to an asymmetric understanding of which grounds that are particularly important to protect from discrimination. This allows special focus on groups subject to disadvantage and prejudice rather than the strict assumption of symmetry in formal approaches. This leads to the conclusion that poverty is not only a ground for discrimination but also a suspect ground that requires enhanced protection.

This means that IHRL prohibits discrimination based on the ground of poverty, both when such discrimination is direct and indirect. Moreover, to ensure the right to non-discrimination the state might also be obliged to take affirmative action to correct de facto disadvantage.

5.3. Outlook

The findings of this thesis indicate that poverty-based discrimination is prohibited under IHRL. This is also a position that has support in scholarly literature as well as from human rights institutions. However, this is still controversial, something that is indicated by the very limited times this has been addressed in judicial proceedings on the international level. The lack of such case law might of course have many explanations but one of them seems to be a fear that an explicit recognition of poverty as a ground for discrimination would open the floodgates to an endless stream of cases. This is understandable, the modern society is largely built on distinctions based on socioeconomic situation, being a core part of both the welfare state as well as the market economy.

On the other hand, it has also been suggested that recognition of poverty as a ground for discrimination would not make any real difference. This because, when an individual is unable to access basic rights because of lack of economic means this will constitute a violation of the substantive right concerned. For example as was the case in the *Airey v. Ireland* case. Contrary, this suggestion entails that, when the right at stake does not fall within the frame of minimum human rights but instead concern higher social goods, the exclusion of people living in poverty will not in the end be considered discriminatory.²⁷⁸

With background of the assessment made in this thesis I would however suggest that the truth of what recognition of poverty as a ground for discrimination would mean lies somewhere in between these two extremes.

Addressing the first proposal; equality, as understood in this thesis, does not require equal end result for everyone. Recognizing discrimination on the ground of poverty can be balanced with the current society where economic resources impact for example the standard of living. The state will not be required to ensure equal end-

²⁷⁸ Craven (1998), p. 175f.

result for everyone. However, where lack of economic resources is a real barrier to the life of individuals there might be an obligation to take action, either through accommodation or affirmative action. Non-discrimination thus has a redistributive potential.

As to the second proposal; that a claim of discrimination because of lack of economic resources will only succeed in cases where there is also a violation of a substantive right. This should however not be understood in a literal meaning. A violation of the prohibition of discrimination does not presuppose a violation of a substantive right. This is merely an indication of in which situations the state will have positive obligations to accommodate for people living in poverty or take affirmative action to compensate for such disadvantage.

This proposal however seem to overlook the practical effect that a recognition of poverty as a ground for discrimination could have for the justiciability of some rights. Such effect would be easier to detect in a system such as the European where the court only has jurisdiction over a limited number of rights. At the regional level, it would thus not be possible for an individual to claim a violation of a substantive right because of economic barriers if such right was not listed in the ECHR. However, the 12th protocol and its independent prohibition of discrimination could change this. If poverty would be recognized as a ground for discrimination this would allow individuals to bring cases in front of the ECtHR where their poverty has denied them access to a right that is not enumerated in the convention, for example many economic, social and cultural rights.

Even more importantly, discrimination that does not consist in factual economic barriers but in prejudice, stigma and negative stereotypes will constitute discrimination even in situations where such interference would not amount to a violation of another substantive right. This has been illustrated with the housing example above. Even though the state might not be obliged under IHRL to provide everyone with housing, and especially not housing of certain standard, it has a positive obligation to ensure that people living in poverty are not arbitrarily excluded from accessing such housing. The state therefore needs to ensure that landlords do not use criteria for exclusion that are built on prejudice and negative stereotyping.

It is thus clear that recognizing poverty as a ground for discrimination would not be without effect, and *"at the very least, the addition of this ground would ensure there is a means to challenge stereotypes about the poor in the policies of private and public institutions."*²⁷⁹ Such negative stereotyping and stigma is also what, throughout the thesis, has been emphasised as a core concept of both discrimination and poverty. This is probably the most straightforward effect of recognition of poverty as a ground for discrimination.

²⁷⁹ Fredman (2011), p. 584.

To conclude I will return to the question posed in the very beginning of this thesis; does IHRL care about inequality? The analysis done in this thesis answers that question in the affirmative. It has been shown that a substantive understanding of equality allows non-discrimination to address de facto inequalities that matters in the lives of individuals. Moreover, accommodation for poverty as a ground for discrimination under IHRL allows IHRL to address disadvantage suffered by people living in poverty as a structural problem, something that requires positive action from the state. The state is thus required to ensure that human rights and other benefits are not only accessible to those with certain level of financial resources, something that requires certain level of redistribution. However, this does not necessarily mean that IHRL is the only, or even the best, system within which equality can be achieved.

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