



Discrimination and the principle of equality before the law in contemporary law

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Abstract

The principle of equality before the law is one of the fundamental principles of the modern legal order and an indispensable element of human rights protection. The prohibition of discrimination, as its key aspect, is regulated in numerous international and national legal instruments. Of particular importance is Article 14 of the European Convention on Human Rights, which prohibits discrimination in the enjoyment of the rights guaranteed by the Convention. This paper analyzes the concept and forms of discrimination, with a special focus on the distinction between direct and indirect discrimination, and examines the case law of the European Court of Human Rights and the application of these standards in Bosnia and Herzegovina. The aim of the paper is to highlight the challenges in achieving the principle of equality in contemporary legal systems.

Keywords: Equality before the law, Discrimination, Direct and indirect discrimination, European Court of Human Rights, Bosnia and Herzegovina

1. Introduction and methodology

Write the content here. Line spacing 1.15 The principle of equality before the law is one of the fundamental principles of the modern legal order and a key pillar of human rights protection. It implies that all individuals, regardless of their personal characteristics, should be treated equally within the legal system, and that law must be applied in the same manner in comparable situations. An inseparable part of this principle is the prohibition of discrimination, which represents one of the most important means of achieving substantive, rather than merely formal, equality. In contemporary international and domestic law, the prohibition of discrimination is comprehensively regulated through numerous international conventions and national legal instruments, among which the European Convention on Human Rights holds a particularly important place. Its provision on the prohibition of discrimination plays a central role in the development of European human rights standards, while the case law of the European Court of Human Rights has significantly contributed to the interpretation and expansion of the content of this principle. In legal theory and practice, discrimination appears in various forms, with a particular distinction being made between direct and indirect discrimination. While direct discrimination is manifested through clear and openly less favourable treatment of individuals or groups, indirect discrimination arises through seemingly neutral rules or measures that in

practice produce disproportionately adverse effects on certain categories of persons. Due to its complexity, indirect discrimination represents a particular challenge in modern legal systems.

This paper is based on a doctrinal legal research methodology, which represents the dominant approach in legal theory for the systematic analysis and interpretation of legal norms, institutions, and judicial practice. Doctrinal research involves a structured examination of applicable legal sources, their interpretation, and their interrelation in order to determine the content, scope, and practical application of legal rules.

In this context, the paper analyzes relevant international legal instruments, primarily the European Convention on Human Rights, as well as its Protocols, which further develop and expand the standards of protection regarding the prohibition of discrimination and the principle of equality. Particular attention is devoted to Article 14 of the European Convention on Human Rights, as the central normative basis for the prohibition of discrimination within the European human rights system.

In addition to normative sources, a significant part of the research is based on the analysis of the case law of the European Court of Human Rights, which plays a crucial role in interpreting and developing standards of equality and non-discrimination. Through the examination of selected judgments, particularly those concerning different forms of discrimination, the paper analyzes how the Court operationalizes key concepts such as “comparable situations,” “legitimate aim,” “objective and reasonable justification,” and “proportionality.”

The methodological framework also includes the use of secondary academic sources, namely relevant domestic and international scholarly literature in the fields of constitutional law, international human rights law, and the legal theory of discrimination. These sources provide a deeper theoretical understanding of the concept of discrimination, the distinction between formal and substantive equality, and contemporary challenges in their implementation.

Furthermore, a comparative legal approach is applied, allowing for the comparison of different legal standards and solutions in international and domestic law, with the aim of identifying similarities, differences, and the degree of harmonization of the legal system of Bosnia and Herzegovina with European anti-discrimination standards. This approach is particularly important for analyzing the implementation of international standards within the domestic legal order.

In addition, an analytical approach is employed, which enables the breakdown of complex legal concepts into their fundamental elements and their systematic interpretation within the framework of the principle of equality before the law. This allows for an examination not only of the normative framework of the prohibition of discrimination, but also of its practical application and the challenges encountered in the real legal and social context of Bosnia and Herzegovina.

By combining these methodological approaches, the paper provides a comprehensive analysis of the topic, simultaneously addressing the theoretical concept of discrimination, relevant international standards, case law, and their implementation within the domestic legal system.

2. Concept and legal framework of discrimination

In contemporary law, discrimination is defined as any unjustified distinction, exclusion, restriction, or preference based on certain personal characteristics, which results in an individual or group being denied or hindered in the enjoyment of fundamental human rights and freedoms. This definition encompasses both formal and substantive aspects of inequality, emphasizing that discrimination does not necessarily stem

from direct intent, but may also be the result of structural, institutional, or socially embedded inequalities. The modern approach to discrimination therefore goes beyond a purely formal understanding of equality and focuses on analyzing the actual effects produced by certain legal norms or social practices in reality.

The normative framework for the prohibition of discrimination is established in numerous international human rights instruments, among which a central place is held by Article 14 of the European Convention on Human Rights, which provides that the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. This provision represents a key mechanism for protecting the principle of equality within the European human rights system.

It is important to emphasize that Article 14 of the European Convention on Human Rights has an accessory character, meaning that its application is linked exclusively to the enjoyment of other rights and freedoms guaranteed by the Convention. However, the case law of the European Court of Human Rights shows that its interpretation has evolved towards a broader and more flexible application, enabling more effective recognition of different forms of discrimination in practice. An additional strengthening of protection standards has been achieved through Protocol No. 12 to the European Convention on Human Rights, which introduced a general prohibition of discrimination in the enjoyment of any right provided by law, thereby significantly expanding the scope of equality protection.

The subject of this paper concerns the analysis of discrimination as a legal and social phenomenon, with a particular focus on the principle of equality before the law in the contemporary legal order. The paper examines the distinction between direct and indirect discrimination, as well as the role of international standards in their identification and sanctioning, with special emphasis on the case law of the European Court of Human Rights and the legal framework of Bosnia and Herzegovina.

The aim of the paper is to systematically analyze the legal concept of discrimination, identify its basic forms, and examine the effectiveness of existing mechanisms for protecting the principle of equality. A particular objective is to highlight the difference between formal and substantive equality, as well as the challenges in their practical implementation.

The hypothesis of this paper is based on the assumption that, despite a well-developed normative framework prohibiting discrimination, there are still significant discrepancies between formally guaranteed equality and the actual protection of rights in practice, particularly in complex legal and social systems such as Bosnia and Herzegovina. An additional hypothesis is that the case law of the European Court of Human Rights is a key factor in the evolution and effective application of standards prohibiting discrimination.

2.1. Direct and indirect discrimination

Direct discrimination occurs when an individual or a group is placed in a less favorable position compared to other persons in a comparable situation, due to a personal characteristic, which will be further analyzed in this paper through its concept, legal elements, and typical examples from practice. This form of discrimination is the most easily recognizable because it is based on open and explicit differential treatment, and therefore the criteria for establishing it in judicial practice will be examined in detail. In addition, attention will be given to the legal standards used to determine whether such unequal treatment is justified or constitutes a violation of the principle of equality before the law.

In contrast, indirect discrimination arises when seemingly neutral rules, criteria, or measures produce a

disproportionately adverse impact on certain groups, which requires a deeper legal analysis of their actual effects rather than their formal content. In the following sections, this form of discrimination will be explained in comparison to direct discrimination, with particular emphasis on the way it is identified and proven through standards developed in international law. Special focus will be placed on the importance of distinguishing between these two forms of discrimination for the correct application of the principle of equality before the law.

Direct discrimination exists when an individual is placed in a less favorable position compared to another person in the same or a similar factual and legal situation, solely or predominantly on the basis of a personal characteristic, such as sex, race, language, religious or political affiliation, or national or social origin. This form of discrimination is characterized by a clear and immediate distinction between individuals, where unequal treatment is evident at first glance, without the need for a more complex analysis of the effects of a particular norm or practice. Due to its apparent nature, direct discrimination is considered in legal theory and judicial practice as a “classic” form of unequal treatment, which is relatively easier to identify and prove compared to indirect forms of discrimination.

In practice, direct discrimination most commonly appears through legal provisions, administrative decisions, or institutional policies that explicitly exclude certain groups or restrict their rights. Such cases include situations in which different categories of individuals are granted different rights or obligations without objective and reasonable justification, representing a direct deviation from the principle of equality before the law. Although modern legal systems formally prohibit this form of discrimination, it may still occur in more subtle ways through the practices of public authorities or individual decisions.

An example of direct discrimination would be a law or practice that explicitly differentiates between individuals on the basis of nationality or sex, in a way that grants a specific right or privilege to one group while excluding another group from the same right without a legitimate and proportionate reason. Such examples are particularly important in legal analysis, as they clearly demonstrate a violation of the principle of formal equality and constitute grounds for legal protection before competent domestic and international bodies.

Indirect discrimination represents a more subtle and complex form of unequal treatment, which arises when an apparently neutral provision, criterion, or practice is applied equally to all, but in reality results in a particular group being placed at a disadvantage compared to others. Unlike direct discrimination, it does not manifest through explicit differentiation, but rather through the effects that a specific measure produces in practice. For this reason, it is often less visible and requires a thorough legal and factual analysis.

It is particularly significant in contemporary law because its existence cannot be determined solely on the basis of the wording of a norm; instead, it is necessary to examine its actual impact on different social groups. In this sense, the focus shifts from formal equality to substantive equality, that is, to the question of whether an equal rule truly produces equal outcomes for all subjects to whom it is applied. Consequently, indirect discrimination is considered one of the key challenges of modern legal systems, especially in areas such as employment, education, and access to public services.

In legal practice, particularly within the jurisprudence of the European Court of Human Rights, standards have been developed for its identification and proof. The Court has emphasized that, in order to establish discrimination, it is sufficient to demonstrate that a measure, although formally neutral, has a disproportionately negative effect on a protected group, unless the state can show that such a difference in treatment has an objective and reasonable justification. In this way, indirect discrimination becomes a central instrument for the protection of substantive equality in contemporary international human rights

law.

3. Case law of the European Court of Human Rights

The case law of the European Court of Human Rights plays a crucial role in the development and clarification of standards related to the prohibition of discrimination under Article 14 of the European Convention on Human Rights. Through its extensive jurisprudence, the Court has gradually shaped the criteria used to determine whether discriminatory treatment has occurred in a particular case, thereby significantly contributing to the development of a substantive, rather than merely formal, understanding of equality.

One of the fundamental steps in the analysis of discrimination is establishing the existence of differential treatment between individuals in comparable situations. The Court first examines whether the relevant circumstances of the case are sufficiently similar to allow for a finding of unequal treatment, with the comparability of situations representing a key preliminary issue in every discrimination analysis. Subsequently, it considers whether such a difference in treatment has an objective and reasonable justification.

Within this framework, the Court specifically assesses whether the difference in treatment pursues a legitimate aim and whether there is a reasonable proportionality between the means employed and the aim sought to be achieved. These elements together form a structured test that enables a consistent and predictable application of the prohibition of discrimination across various legal contexts.

One of the most significant contributions of the European Court of Human Rights' case law is the development of the concept of "objective and reasonable justification," according to which a difference in treatment will not constitute discrimination if the state demonstrates that such differentiation is based on a legitimate aim and that there is a reasonable relationship of proportionality between the means used and the aim pursued. This standard constitutes the foundation of the contemporary European approach to the prohibition of discrimination and enables a balance between the protection of individual rights and the legitimate interests of the state.

4. Discrimination in Bosnia and Herzegovina

Bosnia and Herzegovina has established a relatively developed normative framework for protection against discrimination through the adoption of the Law on Prohibition of Discrimination, which is largely harmonized with European legal standards and the principles enshrined in Article 14 of the European Convention on Human Rights. This law aims to ensure equal protection for all individuals within the territory of the state, clearly defining forms of discrimination, protection mechanisms, and procedures before competent courts and institutions.

However, despite the existence of an adequate legal framework, practice shows that there are significant challenges in its consistent implementation. These challenges primarily stem from the complex constitutional structure of Bosnia and Herzegovina, which affects the efficiency and uniformity of legal protection, as well as from pronounced ethnic divisions within society and limited institutional and judicial capacities for effectively handling discrimination cases. Taken together, these factors result in a situation where legally guaranteed equality is not always fully realized in everyday life.

A particularly important role in the development of anti-discrimination standards is played by the judgment in *Sejdić and Finci v. Bosnia and Herzegovina* before the European Court of Human Rights, in which it was

established that the constitutional system of Bosnia and Herzegovina discriminates against citizens who do not belong to the constituent peoples, as it prevents them from running for certain of the highest political offices. In this way, a violation of Article 14 of the European Convention on Human Rights, in conjunction with the right to free elections, was established, clearly pointing to the structural nature of discrimination within the constitutional order of the state.

This judgment has broader significance, as it demonstrates that discrimination does not necessarily arise only from individual decisions or isolated cases, but may be embedded within the very foundations of the legal and political system. It thus highlights the gap between formally guaranteed equality and its actual implementation, which represents one of the key challenges in achieving the principle of non-discrimination in Bosnia and Herzegovina.

5. Challenges in the implementation of the principle of equality

In contemporary law, the realization of the principle of equality faces a number of complex legal, institutional, and social challenges that hinder its full and consistent application in practice. Although the prohibition of discrimination is clearly established normatively through international and national legal sources, including Article 14 of the European Convention on Human Rights, its practical implementation depends on the capacity of legal systems to recognize and effectively sanction various forms of unequal treatment.

One of the fundamental challenges relates to the difficulty of proving indirect discrimination, which does not manifest through explicit and direct forms of differentiation, but rather through the effects of seemingly neutral legal norms or practices. For this reason, many cases require a complex analysis of statistical data, social impacts, and the actual consequences of the application of certain measures, which significantly complicates judicial proceedings and increases the burden of proof for the injured parties.

Another important challenge is the need to strike a balance between the principle of equality and the legitimate aims of the state, such as public interest, security, economic stability, or the protection of other rights and freedoms. In this context, courts, including the European Court of Human Rights, often apply the proportionality test to determine whether a particular difference in treatment is justified or constitutes discrimination. This balancing approach demonstrates that the prohibition of discrimination is not absolute in every case, but rather requires a careful weighing of competing interests.

In addition to legal aspects, the broader social and political context in which the principle of equality is applied represents a significant challenge. Prejudices, historical inequalities, and institutional weaknesses may result in formally guaranteed rights not being fully realized in practice, thereby deepening the gap between normative and actual equality.

In this sense, the modern understanding of equality before the law increasingly goes beyond the concept of formal equality and includes the obligation of the state to undertake active measures aimed at achieving genuine, substantive equality among individuals and social groups.

6. Conclusion

The principle of equality before the law and the prohibition of discrimination represent fundamental values of the contemporary legal order and are key instruments for the protection of human rights. The analysis of the concept of discrimination shows that it encompasses a wide range of conduct, from direct and explicit

unequal treatment to subtle and often difficult-to-detect forms of indirect discrimination, which manifest through the actual effects of the application of legal norms.

Particular importance in the development of protection standards is attributed to Article 14 of the European Convention on Human Rights, as well as its interpretation in the case law of the European Court of Human Rights, which has contributed to the establishment of clear criteria for determining discrimination, including the comparability of situations, the existence of differential treatment, a legitimate aim, and the proportionality of the measure. The development of the concept of objective and reasonable justification has further enabled a flexible, yet legally grounded, assessment of the limits of permissible differentiation.

An overview of the legal system of Bosnia and Herzegovina shows that, although a normative framework for protection against discrimination exists and is largely aligned with European standards, its practical implementation continues to face serious challenges. The complex constitutional structure, social divisions, and institutional limitations affect the extent to which formally guaranteed equality is realized in practice, as confirmed by judgments such as *Sejdić and Finci v. Bosnia and Herzegovina*.

In this context, the modern understanding of equality goes beyond a purely formal approach and increasingly focuses on achieving genuine, substantive equality. This implies not only the prohibition of discrimination in a legal sense, but also an active role of the state in eliminating structural inequalities and ensuring equal opportunities for all individuals.

In conclusion, the principle of equality can be seen as a dynamic category that continuously evolves through judicial practice and social change, and its full realization remains one of the key challenges of contemporary legal systems.

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