

CONCEPTUALIZING SEXUAL ORIENTATION AS A “SUSPECT” CATEGORY IN NON-DISCRIMINATION LAW: SOME REFLECTIONS ON THE ATALA JUDGMENT OF THE INTER- AMERICAN COURT OF HUMAN RIGHTS

TITIA LOENEN*

UNIVERSITEIT LEIDEN, PAÍSES BAJOS
m.l.p.loenen@law.leidenuniv.nl

ABSTRACT: The judgment of the Inter-American Court of Human Rights in the case of *Atala Riffo and daughters v. Chile* of 24 February 2012 considers that sexual orientation is included in the protection provided by the right to equality and non-discrimination in the American Convention on Human Rights. In this contribution I will reflect on the conceptualization of sexual orientation as a “suspect” category in non-discrimination law and its implications. To do so, I will first address the core meaning and purpose of the right to equality and non-discrimination and the importance of the distinction to be made between “suspect” and “non-suspect” classifications or distinctions (section 2). The next section will explore the question how to draw the line between “suspect” and “non-suspect” classifications. What are the underlying foundations for approaching a ground of classification as suspect and how do these relate to approaching sexual orientation as a suspect ground (section 3)? I will conclude by returning to the *Atala* judgment and trying to answer the question how and to what extent this conceptual analysis is reflected in the Court’s considerations (section 4).

Keywords: *sexual orientation, suspect category, right to equality, non-discrimination Law*

CONCEPTUALIZANDO LA ORIENTACIÓN SEXUAL COMO CATEGORÍA “SOSPECHOSA” EN EL DERECHO DE LA NO-DISCRIMINACIÓN: ALGUNAS REFLEXIONES SOBRE EL CASO ATALA DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS

RESUMEN: El fallo de la Corte Interamericana de Derechos Humanos en el caso *Atala Riffo e hijas v. Chile* del 24 de Febrero del 2012 considera que la orientación sexual está incluida en la protección proveída por el derecho a la igualdad y a la no discriminación en la Convención Americana de Derechos Humanos. En esta contribución reflejaré la conceptualización de la orientación sexual como categoría “sospechosa” en el Derecho de la no-discriminación y sus

* Prof. Dr. M.L.P. Titia Loenen, professor of Human Rights and Diversity, Leiden University Law School. Email: m.l.p.loenen@law.leidenuniv.nl

implicancias. Para hacerlo, primero abordaré el significado central y el propósito del derecho a la igualdad y a la no discriminación, y la importancia de la distinción a hacer entre la clasificación o distinción “sospechoso” y “no-sospechoso” (sección 2). La siguiente sección explorará la pregunta sobre cómo dibujar la línea entre las clasificaciones “sospechoso” y “no-sospechoso”. ¿Cuáles son las bases subyacentes para aproximarse a un fundamento de clasificación de sospecha y cómo éstas se relacionan para abordar la orientación sexual como motivo sospechoso (sección 3)? Concluiré retornando al caso *Atala* e intentaré responder la pregunta relativa a cómo y hasta qué punto este análisis conceptual está reflejado en las consideraciones de la Corte (sección 4).

Palabras clave: *orientación sexual, categoría sospechosa, derecho a la igualdad, Derecho de la no-discriminación*

1. INTRODUCTION

Sexual orientation “is not relevant when examining aspects related to an individual’s suitability as a parent” and “[t]he child’s best interest cannot be used to justify discrimination against the parents based on their sexual orientation”.¹

These very principled statements lie at the heart of the judgment of the Inter-American Court of Human Rights in the case of *Atala Riffo and daughters v. Chile* of 24 February 2012. In this case Karen Atala had lost custody of her daughters because she had started living with a same-sex partner. Chile’s Supreme Court of Justice had held that having the daughters live with her and her female partner was not in the best interest of the children. The Inter-American Court of Human Rights rejected this approach as is born out by the quotations above: a parent’s sexual orientation is not an acceptable basis for a denial of custody.

To reach this decision, the Court considered that sexual orientation was included in the protection provided by the right to equality and non-discrimination in the American Convention on Human Rights (the Convention). Article 1.1. of the Convention obliges States Parties to ensure to all persons subject to their jurisdiction the free and full exercise of the rights and freedoms of the Convention “without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition”. Though sexual orientation is not listed as such, the Court considered it to be included in the category “any other social condition”. In this way sexual orientation is acknowledged as meriting similar protection as race, sex and the other enumerated grounds. Like sex and race, sexual orientation thus seems to share the status of what may be called a “suspect” ground for classification. With this I mean that a classification or distinction based on such a ground is presumed to be impermissible, exceptions only being allowed in exceptional cases.²

¹ Inter-American Court of Human Rights, 24 February 2012, *Atala Riffo and daughters v. Chile*, section 167 and 110, available online: http://corteidh.or.cr/docs/casos/articulos/seriec_239_ing.pdf.

² I use the term “suspect” in this rather general way, not in the very specific way in which it is used in United States case law. In the United States the notion of a “suspect” classification is much more rigid. Race is considered to be a suspect ground for classification, yet sex as “semi-suspect” only. I will get back to gradations of “suspectness” and their meaning in paragraph 2.3.

In this contribution I will reflect on the conceptualization of sexual orientation as a “suspect” category in non-discrimination law and its implications. To do so, I will first address the core meaning and purpose of the right to equality and non-discrimination and the importance of the distinction to be made between “suspect” and “non-suspect” classifications or distinctions (section 2). The next section will explore the question how to draw the line between “suspect” and “non-suspect” classifications. What are the underlying foundations for approaching a ground of classification as suspect and how do these relate to approaching sexual orientation as a suspect ground (section 3)? I will conclude by returning to the *Atala* judgment and trying to answer the question how and to what extent this conceptual analysis is reflected in the Court’s considerations (section 4).

2. EQUALITY, DISCRIMINATION AND “SUSPECT” CLASSIFICATIONS

2.1. *The paradox of legal equality*

A basic tenet of the modern state is the equality of all before the law. Historically, this represents a major achievement. For example, in Europe, inequality dominated the legal system until the 18th and 19th centuries, when the class society, based on the three states, was replaced by the liberal state, which only recognizes individual citizens who are all equal before the law. This means that lawful intervention by the state can take place only on the basis of legislation, which should be applicable to all without distinction. The state should not favour or disfavour specific individuals or groups.

A strict application of this approach in law’s everyday reality is impossible. The same, identical treatment of all people, always and everywhere, would practically prohibit legislation, as legislation classifies more or less by definition. This creates the so called “paradox of legal equality”: though all citizens are equal before the law, the law by its nature classifies and thus differentiates between the citizens.³ As the interventions of the state in social and economic life in modern society increase the paradox of legal equality becomes more and more problematic and harder to solve. The state classifies increasingly on a group by group basis: workers are protected by labour law against employers because of differences in power, the tax system differentiates according to the level of income, the elderly receive old age pensions from the state. In this system, some are favoured, others disfavoured. The solution to the paradox of legal equality is found in the demand that classifications should be reasonable and justified. At the same time, equal treatment remains the “default position” so to speak; differential treatment needs justification. This is where the prohibition of discrimination comes in.

In law, the requirement of equal treatment is often formulated in terms of a prohibition to discriminate. The main equality clauses in the major human rights declarations and conventions, such as article 2 of the Universal Declaration of Human Rights (UDHR), article 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR), article 14 of the European Convention on Human Rights (ECHR) and article 1 of the American Convention on Human

³ See SLOOT, B.P. *Positieve discriminatie*. (Positive discrimination; dissertation Leiden University 1986), Zwolle, Netherlands: Tjeenk Willink, 1986, pp. 16-19.

Rights (ACHR) are all similar in this respect.⁴ They provide that states parties should ensure the rights and freedoms guaranteed in the said documents to all “without discrimination” on a number of grounds, such as race, sex, and religion. The list of enumerated grounds is open-ended, that is it leaves room for additional grounds of discrimination to be included in the protection provided by the provision.⁵ So what does it mean for states “not to discriminate”?

2.2. *Non-discrimination and non-distinguishing*

Though consensus may exist about discrimination being impermissible, no consensus exists concerning the issue which situations constitute discrimination: is the exclusion of same sex couples from marriage discrimination? Is it discriminatory to have compulsory dismissal for people reaching pensionable age? And how to evaluate the practice in France of not allowing pupils in public schools to wear any ostensible religious symbols: does that discriminate on grounds of religion? In all these cases we are dealing with *distinctions* based on sexual orientation, age and religion respectively that disadvantage certain groups, but does each and every such distinction automatically entail impermissible *discrimination*? As mentioned above, an absolute requirement of non-distinguishing would be impossible and as such does not make sense. Distinctions become problematic only if they cannot be justified. Yet, what may constitute an acceptable justification is bound to be a bone of contention in many cases, as the examples show.

General non-discrimination provisions such as included in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights do not provide much to go by in deciding these issues. This means that, at the end of the day, courts or other supervising judicial bodies (courts for short) will have to decide whether discrimination is at stake or not. The question how courts do so thus becomes of paramount importance.

In general, courts indeed start from the premise that discrimination cannot be put on a par with non-distinguishing. Making distinctions turns problematic only if the distinctions cannot

⁴ Article 2 of the Universal Declaration of Human Rights: “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (...)”; Article 2.1 of the International Covenant on Civil and Political Rights: “[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”; Article 26 of the International Covenant on Civil and Political Rights: “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”; Article 14 of the European Convention on Human Rights: “[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”; Article 1.1 of the American Convention on Human Rights: “[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition”.

⁵ The open-endedness of the American Convention on Human Rights lies in the possibility of interpreting the ground “any other social condition” in a broad way, whereas in the other human rights documents the list of grounds is explicitly rendered unlimited by adding the words “such as”. See for the full text of the provisions *supra* note 4.

be properly justified. As the Human Rights Committee, the supervising committee to the International Covenant on Civil and Political Rights put it: “the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant”.⁶ Similarly, the European Court of Human Rights has consistently held that discrimination within the meaning of article 14 of the European Convention on Human Rights is engaged only if a difference in treatment “has no objective and reasonable justification”.⁷

Again, what may be considered to be “reasonable” and “objective” may differ widely. Yet, intuitively most people will share the feeling that some differentiations are in need of more thorough justification than others. Thus, in the Netherlands, a man who invoked the non-discrimination clause of article 26 of the International Covenant on Civil and Political Rights was met with a lot of ridicule when he took legal actions up to the Dutch Supreme Court to challenge the fact that the municipal authorities of his home town taxed dog owners but not owners of cats. Though this tax policy involves differential treatment, it is not associated with anything as serious as “discrimination”.⁸ Unequal treatment of owners of cats and dogs is not in any way sensitive. If, on the other hand, the municipality would have singled out its non-Dutch inhabitants to pay for the costs of, say, its integration policy, this would no doubt have created a very different debate: such a distinction is very sensitive indeed and would call for a thorough justification to be acceptable, if at all. In several jurisdictions this difference between “sensitive” or “suspect” grounds of differentiation and non-sensitive/non-suspect grounds has resulted in a specific way of reviewing discrimination claims.

2.3. *Some grounds of differentiation are more suspect than others*

The classic example of a differentiated approach to the grounds on which a differentiation or distinction is based can be found in United States constitutional law. The Supreme Court employs three different tests to decide discrimination claims under the Equal Protection Clause of the United States Constitution.⁹ The strictest one or so called “strict scrutiny” test is applied where truly “suspect” classifications are involved and requires the challenged classification to pursue a “compelling state interest” and to be “necessary” to achieve it. According to the Supreme Court, race surely belongs to this category and applying the “strict scrutiny” test is almost always fatal for the classification involved. A somewhat more lenient test is applied where “semi-suspect” classifications are concerned. Classifications based on sex are held to belong to this category. For classifications to survive this level of “intermediate scrutiny” the classification has to serve “an

⁶ UN Human Rights Committee, CCPR General Comment No. 18: Non-discrimination, 10 November 1989, available online: <http://www.unhcr.org/refworld/docid/453883fa8.html>.

⁷ The classic case in this respect is the *Belgian Linguistics* case, European Court of Human Rights, 23 July 1968, Publ. ECrtHR, Series A, no. 6.

⁸ The case was discussed in WATTEL, P.J. “De reikwijdte van fundamentele rechten in belastingzaken” (The scope of fundamental rights in tax cases), in: *Reikwijdte van fundamentele rechten, Preadviezen van de NJV 1995* (The scope of fundamental rights, Advisory opinions of the Dutch Association of Jurists 1995). Zwolle, the Netherlands: Tjeenk Willink 1995, pp. 175-221 at p. 186.

⁹ Though, the division between the three tiers may not be always as strict in practice. Besides, other aspects of the case, such as the other rights or interests affected, will also influence the intensity of the review to be applied, see for an overview GERARDS, J.H. *Rechterlijke toetsing aan het gelijkheidsbeginsel*, The Hague, the Netherlands: Sdu Uitgevers BV, 2002. (Also available translated into English as *Judicial Review in Equal Treatment Cases*, the Hague, the Netherlands: Martinus Nijhoff, 2005).

important governmental objective” instead of a “compelling interest” and to be “substantially related” to that objective, instead of being “necessary”. The test thus leaves more room for justifying the classification. The third or “rational basis” test is very deferential and is applied to classifications which are not deemed (semi)suspect in any way. Such classifications generally pass judicial muster unless they are utterly unreasonable.

In Europe, similar developments differentiating between grounds of discrimination are under way. First of all, the case law of the European Court of Human Rights merits attention. According to established case law, for the purposes of article 14 ECHR a difference of treatment is discriminatory if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.¹⁰ Under this test the Contracting States are generally left a wide margin of appreciation, yet certain distinctions have proven to merit closer scrutiny by the Court. Thus in a case involving a claim of sex discrimination the Court held that as “(...) the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe (...) *very weighty reasons* would have to be advanced before a difference in treatment on the ground of sex could be regarded as compatible with the Convention”.¹¹

This approach has been followed in other sex discrimination cases and has also been applied to distinctions on the basis of nationality and sexual orientation.¹² The latter is remarkable as neither nationality nor sexual orientation are enumerated in article 14 ECHR. The higher protection offered to sexual orientation has been affirmed in a consistent line of cases:

“(...) the Court has held repeatedly that, just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification.”¹³

Concerning discrimination on grounds of race the European Court appears to have taken an even stricter approach. In the case of *D.H and others v. the Czech Republic*, which concerned the treatment of Roma children in the education system, the Court held that racial discrimination is “a particularly invidious kind of discrimination” which entails the closest kind of scrutiny:

“Where the difference in treatment is based on race, colour or ethnic origin, the notion of

¹⁰ European Court of Human Rights, 23 July 1968, *Belgian Linguistics* case, Series A 6, par. 41. For an overview of the case law under article 14 see VAN DIJK, P., VAN HOOF, F., VAN RIJN, A. and ZWAAK, L. (eds), *Theory and practice of the European Convention on Human Rights*, Antwerp/Oxford: Intersentia 2006, pp. 1027-1051.

¹¹ European Court of Human Rights, 28 May 1985, *Abdulaziz, Cabalis and Balkandali*, Series A 94, par. 78. (emphasis added)

¹² For nationality see European Court of Human Rights, 16 September 1996, *Gaygusuz v. Austria*, appl. no. 17371/90; for sexual orientation see European Court of Human Rights, 9 January 2003, *L. and V. v. Austria*, appl. no. 39392/98 and 39829/98.

¹³ European Court of Human Rights, 24 June 2010, *Schalk and Kopf v. Austria*, appl. no. 30141/04. The Human Rights Committee took a different approach with a similar effect. In the landmark case *Toonen*, an Australian case, which was brought to the Human Rights Committee under the individual complaints procedure of the Optional Protocol to the ICCPR, the Committee held sexual orientation to be included in the protection against sex discrimination as provided for by the ICCPR in articles 2 and 26 ICCPR; see *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), specifically section 8.7.

objective and reasonable justification must be interpreted as strictly as possible”.¹⁴

In the Netherlands, Dutch highest courts also have clearly started to adopt a differentiated approach to discrimination claims depending on the ground of discrimination at stake. Already in 1993 the *Centrale Raad van Beroep* (the supreme court of appeal in administrative cases) explicitly formulated such an approach in a case involving age discrimination. In this case a law professor claimed that his mandatory retirement upon reaching the pensionable age of 65 violated, among others, article 26 of the International Covenant on Civil and Political Rights. This provision has direct effect in the Netherlands. The *Centrale Raad van Beroep* upheld his dismissal by accepting the arguments put forward for this policy.¹⁵ An important element in its assessment regarded the fact that age, contrary to, for instance, race or sex, is not enumerated among the grounds of discrimination mentioned in article 26. The *Raad* held that this suggests a “value difference” which affects the level of scrutiny to be applied by the reviewing court. So generally speaking, classifications on the ground of age are in need of a less exacting justification than, for instance, classifications on the basis of sex or race. Under this more lenient test the policy could be justified.

For quite some time, the *Hoge Raad*, the Dutch Supreme Court, has been much more implicit about the levels of scrutiny it applies, but now it seems to be firmly dedicated to a similar line of reasoning.¹⁶ To start with, the Supreme Court applies a lenient test in the many tax law cases it has to deal with under article 26 of the International Covenant on Civil and Political Rights. The far majority of those claims involve rather trivial distinctions or classifications, which seem to be far removed from the enumerated grounds of discrimination in article 26. Thus for instance, the distinction mentioned above between taxing owners of dogs and owners of other pets has been challenged, as well as differences in tax deductions between employees who make private use of a company car in excess of 1000 kilometres or less.

Interestingly, the supervising committee to the International Covenant on Civil and Political Rights, the Human Rights Committee, was presented with the opportunity to give its views on the latter Dutch tax case under the individual complaints procedure. Contrary to the Dutch Supreme Court, the Human Rights Committee did not get to the stage of applying any justification test at all, as the Committee deemed the claim as such to fall outside the scope of application of article 26 of the International Covenant on Civil and Political Rights: “(...) the Committee considers that the author has not substantiated how his different treatment was based on one of the prohibited grounds of discrimination enumerated in article 26, or on any comparable ‘other status’ referred to in that article”. Consequently, the complaint was held to be inadmissible.¹⁷ Apparently the Human Rights Committee did not consider the distinction to amount to an issue

¹⁴ European Court of Human Rights (Grand Chamber), 13 November 2007, *D.H. and others v. the Czech Republic*, appl.no. 57325/00.

¹⁵ Centrale Raad van Beroep, 4 November 1993, *Administratiefrechtelijke Beslissingen* 1994, 213 (m.nt. H.Ph.J.A.M. Hennekens).

¹⁶ For a brief overview see LOENEN, Titia. “Leeftijdscdiscriminatie” (Discrimination on grounds of age), in: BARKHUYSEN, T., POLAK, J.E.M., SCHUELER, B.J, and WIDDERSHOVEN, R.J.G.M., *AB-Klassiek - sixth edition-*, Deventer, the Netherlands: Kluwer 2009, pp. 317-326.

¹⁷ Human Rights Committee, 25 July 2005, communication no. 1192/2003. Available online through the website of the High Commissioner of Human Rights, <http://www.ohchr.org/>.

of “real” discrimination to start with, yet why this is the case is not fully explained. I would submit it is because the Committee indeed regarded the ground of differentiation as not being sensitive or suspect in any way; that is as too trivial to provide a basis for a discrimination claim.

When claims of age discrimination are at stake the Dutch Supreme Court also applies a rather lenient test. Like the *Centrale Raad van Beroep* it upheld the policy of mandatory retirement upon reaching pensionable age at 65.¹⁸ In a 2004 judgment dealing with a very similar issue it explicitly mentioned in this respect that it has to be born in mind that a distinction on the ground of age is not, by definition, a suspect distinction like a distinction based on grounds of race or sex.¹⁹ Thus it explicitly recognizes a difference in judicial review between suspect and non-suspect (or at least less suspect) classifications.²⁰

The next question to be answered is, of course: if not all grounds of discrimination are equally suspect, which ones are and on what basis can they be deemed to differ?

3. FOUNDATIONS FOR IDENTIFYING “SUSPECT” GROUNDS OF DIFFERENTIATION

As can be inferred from the above examples from the case law in several jurisdictions, legal listings of grounds of discrimination give some indication of “suspectness”, but apparently are not conclusive.

To start with, as the prohibition of discrimination in the major human rights documents mentioned is not limited to the grounds listed it may include other grounds as a matter of principle. As mentioned before, under the European Convention on Human Rights nationality and sexual orientation have been included as protected grounds. Any distinction that is based on those grounds is subject to stricter scrutiny than “ordinary” distinctions: only *very weighty* or *particularly serious reasons* can provide a justification.

The other way round, being one of the enumerated grounds in a non-discrimination provision does not automatically entail a strict review of a distinction based on that ground. For example, in the case law of the European Court of Human Rights classifications on grounds of religion have often been met with a very marginal review by the European Court of Human Rights. Instead of closely reviewing such cases, the Court often leaves the States Parties to the European Convention of Human Rights a very wide margin of appreciation in regulating religion and religious expressions. The cases concerning dress codes banning religious symbols in public education in Turkey and France provide a good illustration. The bans were easily upheld by a very

¹⁸ Hoge Raad 1 November 2002, *LJN*: AE7356.

¹⁹ Hoge Raad 8 October 2004, *LJN*: AP0424, consideration 3.4.2.

²⁰ Approaching distinctions on the ground of age as less suspect than those on grounds of race or sex is supported by the case law of the European Court of Justice. In the Spanish case *Palacios de la Villa* the European Court of Justice, by applying a rather lenient test, also upheld the policy of compulsory retiring employees who turn 65. See European Court of Justice (Grand Chamber), 16 October 2007, *Palacios de la Villa* (case C-411/05).

deferential court.²¹ In those cases, religion is clearly not approached as a ground of classification which requires as such close judicial scrutiny.

The conclusion would seem to be that being mentioned in the list of grounds is not in itself a determining criterion for the suspectness of a ground of discrimination and the accompanying stricter review of a classification based on that ground. Yet, being mentioned suggests the criterion is in some way “sensitive”; otherwise it would not seem to make sense to have it included in the list to start with. In this respect it seems better to think in terms of *degrees* of suspectness of certain classifications and *degrees* of closer judicial review than in terms of any rigid scheme of “suspect” and “non-suspect” grounds of discrimination.

This brief exploration of the meaning of being listed or not in the enumeration of discrimination grounds in non-discrimination provisions has so far evaded the question as to the underlying, *conceptual* foundation for qualifying a ground of differentiation as to some degree suspect in one way or another. In the following I discuss four foundations for “suspectness” that recur in scholarly literature. Some refer to the characteristics connected to the ground of differentiation itself; others derive from the social and economic position of the groups affected.

3.1. *Immutable characteristics*

A first criterion to mention here for identifying suspect grounds of differentiation focuses on the immutability of certain personal characteristics. This criterion is a familiar one in United States jurisprudence.²² Race and sex, for example, are biological facts, independent of free choice and as such cannot be changed at will. Differential treatment on grounds of something that is so clearly beyond a person’s influence would seem to be presumptively unfair and thus suspect. Even if nowadays no absolute barriers exist anymore to a change of sex, as is born out by the possibilities of gender reassignment, regarding sex as an immutable characteristic still holds true as long as sex change requires extremely intrusive and costly surgery. The same would be true of current possibilities to change the visible features of a person’s race. Though we may not be able to perceive sex and race as absolutely immutable categories anymore, they are still characterized by what has been termed “effective immutability”.²³

Taking the immutability of personal characteristics as the foundation for identifying suspect grounds of differentiation is not without its problems. Firstly, it seems evident that not each and every immutable personal characteristic merits this status. Intelligence, for instance, is a highly immutable and personal characteristic, yet it is generally not regarded as a suspect ground for differentiation. Quite the contrary, it is deemed highly relevant and accepted as a proper criterion

²¹ See for the Turkish ban European Court of Human Rights (Grand Chamber), 10 November 2005, *Sahin v. Turkey*, appl. no. 44774/98; for the French ban see European Court of Human Rights, 30 June 2009: on Muslim women’s complaints *Aktas v. France*, appl. no. 43563/08; *Bayrak v. France*, appl. no. 14308/08; *Gamaleddyn v. France*, appl. no. 18527/08; *Ghazal v. France*, appl. no. 29134/08; on complaints by Sikh pupils *Javir Singh v. France*, appl. no. 25463/08; *Ranjit Singh v. France*, appl. no. 27561/08.

²² SHAPIRO, M.R. “Treading the Supreme Courts murky immutability waters”, in: *Gonzaga Law Review*, vol. 38, 2002-2003, pp. 409-443.

²³ *Ibid.*

for access to all kinds of jobs, even if it entails the exclusion of less intelligent people. Apparently “immutability” in itself is not sufficient to render a personal characteristic into a suspect ground of differentiation.

Another problem concerns assessing whether a characteristic is immutable to start with. Sexual orientation provides a good example. Medical and other scientists are not agreed on the answer to the question whether one is born with a specific sexual orientation or not.²⁴ Regardless the right answer, sexual orientation tends to be a focal point of a person’s identity. Even if it could be considered the result of some kind of act of will, this means it would be extremely hard to change it; or at least not without great cost to the person involved. This brings us to a second foundation for distinguishing suspect from non-suspect grounds of classification: the ground constitutes an identity marker *par excellence*.

3.2. Identity markers

A much quoted characterization of discrimination in Dutch constitutional history reads as follows:

“Discrimination concerns groups that, as a group, are characterized by attributes the members of the group either cannot lay aside in any way (such as race or sex), or cannot lay aside without damaging their individual personality (such as religion, belief or political conviction)”.²⁵

This characterization highlights the importance of certain characteristics for the constitution of the very core of a person’s identity and for what a person may hold most dear or even sacred in his or her life and life project. Disregard for this pivotal importance of a characteristic for personal identity would seem to be unacceptable.

The description cited above provides an indication of the kind of characteristic to be regarded as an identity marker: religion or belief and political conviction. In addition to these characteristics several others would seem to qualify for belonging to the core of a person’s identity, such as race and sex. This shows a clear overlap may exist between the first and the second foundation for “suspectness” distinguished so far.

Sexual orientation no doubt also belongs to the category “identity marker”. As the Canadian Supreme Court put it:

“[W]hether or not sexual characteristics are based on biological or psychological factors, which may be a matter of some controversy, it is a deeply personal characteristic that is either

²⁴ See more extensively RICHARDS, D.A.J. *Identity and the case for gay rights. Race, gender, religion as analogies*. Chicago/London: University of Chicago Press, 1999.

²⁵ The original Dutch reads: “[d]iscriminatie heeft betrekking op groepen die als groep worden gekenmerkt door attributen die de leden van de groep óf überhaupt niet kunnen afleggen (zoals ras of geslacht) ófwel niet kunnen afleggen zonder daarmee schade te berokkenen aan de eigen persoonlijkheid (zoals godsdienst, levensovertuiging of politieke gezindheid).” (Translation by the author). Quoted in BURKENS, M.C., “Gelijke behandeling (art.1.1)” (Equal treatment), in: KOEKOEK, A.K., KONIJNENBELT, W. and CRIJNS, F.C.L.M., (red.), *Grondrechten: commentaar op hoofdstuk I van de herziene Grondwet* (Fundamental rights: a commentary on chapter I of the revised Constitution), Nijmegen, the Netherlands: Ars Aequi Libri, 1982, pp. 49-65.

unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of s. 15 protection”.²⁶

An important question concerns the scope of the category “identity marker”. If being an “identity marker” is decisive for regarding religion and belief as deserving the protection of the right to non-discrimination, should this protection not equally apply to less conventional identity markers? To give an example: if an orthodox Christian can bring a discrimination claim for being refused a job because he cannot meet the employer’s requirement to work on Sundays, as is the case in the Netherlands, should it not follow that a devoted soccer fan, say an Ajax-supporter whose entire life is organised around his favourite club, can do the same if he wants to attend all Sunday matches? Under Dutch non-discrimination law his chances of a successful claim would be nil and I would expect this to be the same in other jurisdictions. As was the case with the criterion “immutability”, apparently the importance of a characteristic for shaping a person’s identity is not in itself a sufficiently determining factor for rendering a ground of differentiation suspect.

3.3. *(A history of) structural and pervasive disadvantage*

A third conceptual foundation for identifying a classification as “suspect” is linked to the social and economic position of the group affected by the classification rather than to any characteristic of the ground as such. In this approach, classifications resulting in structural and pervasive disadvantage or exclusion of specific groups in society are the problem against which non-discrimination provisions intend to provide protection. This line of thinking in fact takes historical and social experience in the real world as its starting point, non-discrimination provisions being its legal response:

“Grounds of discrimination are not purely legal constructs. They reflect a political and social reality to which law has, belatedly, given recognition. Discrimination was a fact of life long before the law decided that it should intervene to prohibit it.”²⁷

This is to say that the existence of factual oppression and/or disadvantage of certain groups in society precedes the prohibition of discrimination on a specific ground and provides its very foundation. This foundation thus focuses on the members of vulnerable groups in society who share a certain characteristic that is the basis for their inferior position. It generally concerns groups lacking the influence or power to defend themselves against structural and pervasive forms of disadvantage and oppression by other, more dominant groups. The most obvious of such historically and structurally disadvantaged groups are racial or ethnic minorities (which exactly will of course depend on the context in any given society) and women.

This foundation for identifying specific grounds of classification as “suspect” plays a

²⁶ “Section 15” contains the Canadian constitutional prohibition of discrimination; Supreme Court of Canada, *Egan v. Canada* [1995] 2 S.C.R. 513.

²⁷ POTHIER, D., “Connecting grounds of discrimination to real people’s real experiences”, in: *Canadian Journal of Women and Law* 2001, pp. 37-73, at p. 41.

particularly prominent role in Canadian and South African jurisprudence.²⁸ As the South African Constitutional Court put it, the grounds of discrimination explicitly protected in the South African Constitution share the fact

“that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorize, marginalize and often oppress persons who have had, or who have been associated with these attributes or characteristics”.²⁹

At the same time, the Court acknowledges that historical disadvantage and oppression cannot be regarded as the one and only foundation for a classification to be included in the protection provided by the equality and non-discrimination provisions. Otherwise this would imply that whites in South-Africa would be deprived of this protection, which would be unacceptable. Thus the South-African Constitutional Court held that a municipality infringes the non-discrimination clause by taking action against white citizens only for not paying for certain services and letting black ones off the hook.³⁰

3.4. Prejudice, stereotyping and hostility

A fourth foundation for regarding a specific ground of classification “suspect” also ties in with the social position of the groups affected by it. If a group suffers from prejudice, negative stereotyping and/or stigmatisation attributed to the characteristic its members share, or encounters outright hostility due to it, a classification based on that characteristic should be approached with suspicion.³¹

The negative impact of group based prejudice and stereotyping on the individual members of the groups concerned has been abundantly researched in the social sciences.³² Members of the groups affected are perceived as inferior by the dominant ones on the basis of (mostly negative) characteristics that are attributed to them. This sets them apart from other people and is used as justification for their exclusion from all kinds of opportunities and advantages. It is extremely hard for individuals belonging to such groups to break through this mechanism. They may even start perceiving themselves as truly inferior. Thus, for example, women all over the world have suffered from being perceived as mothers and carers only, unfit for public life and public functions.

This foundation for regarding a ground of classification suspect is also most prominently

²⁸ See for an overview of the Canadian case law HOGG, P.W., *Constitutional law of Canada*, Scarborough, Ontario: Thomson/Carswell, 2007; for the South-African case law see MOTALA, Z. and RAMAPHOSA, C., *Constitutional law. Analysis and cases*, Oxford/Cape Town: Oxford University Press, 2002.

²⁹ *Harksen v. Lane and others*, 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC).

³⁰ *City Council of Pretoria v. Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC).

³¹ According to some authors, stigma constitutes the core of discrimination; see e.g. SOLANKE, I., “Stigma: a limiting principle allowing multiple consciousness in anti-discrimination law?”, in: SCHIEK, D., and CHEGE, V. (eds), *European Union non-discrimination law. Comparative perspectives on multidimensional equality law*, London/New York: Routledge-Cavendish, 2009, pp. 115-136.

³² See e.g. ELLEMERS, N., SPEARS, R. and DOOSJE, B. “Self and social identity”, in: *Annual Review of Psychology* vol. 53, 2002, pp. 161-186.

and explicitly referred to in Canadian and South African jurisprudence. To quote the Canadian Supreme Court, the purpose of the prohibition of discrimination is “to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice”.³³

This foundation is often closely linked to the foundation mentioned in the last section, but they do not always coincide or overlap completely. The prejudice and stereotyping encountered by older workers provides an example. Though this leads to specific forms of age based disadvantage and exclusion in the labour market, it would seem to be an overstatement to say that older workers as a group encounter pervasive and structural oppression and disadvantage.

To conclude, we might say that different elements or criteria may be relevant to identify a ground of classification as “suspect”. No single foundation seems to provide a generally accepted and satisfying conceptual basis in itself. Yet, the four foundations taken together seem to provide a very useful point of departure for reflecting on the degree to which grounds of classification should be considered “suspect” and merit stricter judicial review. I would say that the more a ground of differentiation meets the criteria for “suspectness” that flow from the four foundations mentioned taken together, the more reason to apply strict judicial scrutiny.

A final remark on the topic of foundations concerns the South-African Constitutional Court’s attempt to overcome the problematic questions raised by the various foundations explored in this section. The Court does so by identifying “the potential to impair human dignity” as the quintessence of accepting a differentiation as coming within the purview of discrimination analysis, whether it is an enumerated ground or not.³⁴ In line with one of the main points of criticism voiced against taking human dignity as a yardstick I would submit that the criterion of “human dignity” is too malleable and vague to provide a theoretically sound foundation in itself. Though human dignity no doubt is central to the notion of equality and non-discrimination, as it is to the very notion of human rights as such, the concept is too abstract to give much concrete guidance.³⁵ Nevertheless, the South African Court’s approach does bring across the message that discrimination is about something “serious” that strikes at the core of what human rights protection is about. In this respect a reference to dignity may help to ward off the danger pointed out in scholarly literature of “trivializing” the concept of discrimination by including more and more grounds in the list of protected grounds.³⁶ For sure, distinctions between owners of cats and dogs in local tax policies should not be put on a par with distinctions based on race or sex.

³³ *Law v. Canada* [1999] 1 S.C.R. 497, par. 51.

³⁴ For an overview of the relationship between human dignity and equality in the South-African legal context see GRANT, E. “Dignity and Equality”, in: *Human Rights Law Review*, 2007, pp. 299-329.

³⁵ See in addition to the literature mentioned in the previous note e.g. GRABHAM, E. *Law v. Canada: new directions for equality under the Canadian Charter?* In: *Oxford Journal of Legal Studies*, vol. 22, no. 4, 2002, pp. 641-661; RAO, N. *On the use and abuse of dignity in constitutional law.* In: *Columbia Journal of European Law*, vol. 14, no. 2, 2008, pp. 201-256; SMALL, J. and GRANT, E. “Dignity, discrimination, and context: new directions in South African and Canadian human rights law”, in: *Human Rights Review*, 2005, pp. 25-63.

³⁶ See e.g. HOLTMAAT, R. “Stop de inflatie van het discriminatiebegrip!” (Stop the inflation of the concept of discrimination!), in: *Nederlands Juristenblad*, 2003, vol. 78, no. 25, pp. 1266-1276.

4. GROUNDING SEXUAL ORIENTATION AS A SUSPECT CATEGORY IN *ATALA*

If we return to *Atala*, how are the conceptual approaches distinguished above reflected in the case and in the judgment of the Inter-American Court? On which of the four foundations is the status of sexual orientation as a strongly protected category under the non-discrimination clause of the American Convention on Human Rights based? Overall, the second and third foundations for according sexual orientation this status seem to stand out: sexual orientation is clearly seen as an identity marker and the Court fully acknowledges that homosexuals suffer from prejudice and negative stereotyping in many ways.

As far as sexual orientation as an important part of personality is concerned, the Inter-American Court refers with approval to the case law of the European Court of Human Rights in which sexual orientation is identified as a characteristic that is “innate or inherent to the person”.³⁷ Importantly, because of this prime importance of sexual orientation to an individual’s identity and life project it is not just *being* homosexual which is protected, but also expressing it, that is *living* in accordance with this identity. As a consequence, the Court does not accept the argument of the Chilean Supreme Court that Karen Atala should have refrained from living with her same-sex partner because this was allegedly in the best interest of her children:

“(...) the Court considers that the prohibition of discrimination due to sexual orientation should include, as protected rights, the conduct associated with the expression of homosexuality. Furthermore, if sexual orientation is an essential component of a person’s identity, it was not reasonable to require Ms. Atala to put her life and family project on hold in order to allegedly protect her daughters.”³⁸

The prejudice and negative stereotyping homosexuals suffer from is referred to in many places in the judgment. Firstly, the idea that growing up with same-sex parents leads to a “confusion of sex roles” that is detrimental to a healthy psychological development of children is put aside by the Court as based on an “unfounded preconception”.³⁹ In this context the Court refers to the fact that many social science research reports provide evidence that the identity formation and emotional well being of children raised by same-sex parents and by heterosexual parents is comparable. No evidentiary basis exists for speculations about future harm to a child’s development if it grows up in a lesbian or gay household.⁴⁰

In addition, the Court rejects in a principled way stereotypical and traditional notions of what constitutes a proper and “normal” family as alien to the American Convention on Human Rights. It finds

“(...) that the language used by the Supreme Court of Chile regarding the girls’ alleged need

³⁷ *Atala*-judgment, *supra* note 1, section 87.

³⁸ *Ibid*, section 139.

³⁹ *Ibid*, section 125.

⁴⁰ *Ibid*, sections 126-129.

to grow up in a ‘normally structured family that is appreciated within its social environment’, and not in an ‘exceptional family’, reflects a limited, stereotyped perception of the concept of family, which has no basis in the Convention, since there is no specific model of family (the ‘traditional family’).⁴¹

An interesting remark on stereotypical perceptions of the role of women is made as a response to the Chilean Supreme Courts’ argument that Karen Atala should have placed her own interests in living with her partner second to the interest of her children. The Court rejects this argument as implying a traditional concept of women’s social role as mothers, “according to which it is socially expected that women bear the main responsibility for their children’s upbringing and that in pursuit of this she should have given precedence to raising her children, renouncing an essential aspect of her identity.”⁴²

Most importantly of all, perhaps, the Court rejects giving in to prejudice and stereotyping even if this would perhaps indeed have a detrimental effect on the children because of the social discrimination suffered by Karen Atala’s children due to the persistence of negative attitudes towards homosexuals in society. On the contrary, the state should actively engage such attitudes and try to change them:

“While it is true that certain societies can be intolerant toward a person because of their race, gender, nationality, or sexual orientation, States cannot use this as justification to perpetuate discriminatory treatments. States are internationally compelled to adopt the measures necessary ‘to make effective’ the rights established in the Convention, as stipulated in Article 2 of said Inter-American instrument, and therefore must be inclined, precisely, to confront intolerant and discriminatory expressions in order to prevent exclusion or the denial of a specific status.”⁴³

Of the four possible foundations for rendering sexual orientation a suspect category, “immutability” and “a history of structural and pervasive disadvantage” hardly figure in the *Atala* case. The Court does not pronounce itself on the sensitive issue whether homosexuality is an immutable characteristic or a matter of some kind of choice. Apparently there is no need to do so, given the importance attached to sexual orientation as a crucial identity marker. As for the fourth foundation, the presence of “a history of structural and pervasive disadvantage” is referred to but does not play a prominent role in the *Atala* case.⁴⁴ This may be explained by the fact that even if it no doubt also applies to homosexuals (the worldwide prevalence of sodomy laws being a clear manifestation), it does so in a rather peculiar way. Women or racial minorities usually have not been able to escape structural and pervasive disadvantage simply because of the visibility of the characteristic that has been and often still is the basis for their oppression. Homosexuals, however, need not suffer from social or economic exclusion and disempowerment if they hide their sexual

⁴¹ *Ibid*, section 145.

⁴² *Ibid*, section 140.

⁴³ *Ibid*, section 119.

⁴⁴ For instance, in section 92 the Court remarks that alleged lack of consensus in some countries regarding full respect for the rights of homosexuals cannot be considered a valid argument “to perpetuate and reproduce the historical and structural discrimination that these minorities have suffered”.

orientation (and in fact many have done so in the past and still do). In that sense, homosexuals as a group do not constitute a socially and economically deprived class in the way we can say women and racial minorities in many societies do.

5. CONCLUDING REMARKS

In its first judgment on sexual orientation, the Inter-American Court has recognized the protected status of sexual orientation under the non-discrimination clause of the American Convention on Human Rights. Conceptually, sexual orientation is identified as a “suspect” ground of differentiation. To arrive at this conclusion two conceptual foundations mentioned in legal scholarship seem to have played a particularly important role in the Court’s approach. Sexual orientation is to be regarded as a suspect ground for differentiation because it is a core part of personal identity and of the way in which a person gives meaning to his or her life project. I would say this is the most important reason why sexual orientation is to be regarded as suspect ground. In addition, it is to be considered suspect because homosexuals have suffered all kinds of detrimental and damaging treatment due to the prejudice and stereotyping attached to this characteristic. Any distinction based on sexual orientation should therefore be regarded with great suspicion.

Apart from its principled message, the importance of this judgment lies in its consequences for judicial review of distinctions based on sexual orientation. Such distinctions are presumptively invalid and can only be accepted if the justifications provided meet a test of strict scrutiny.⁴⁵ This approach will surely not cut short all discussions on differential treatment of homosexuals and heterosexuals, but it does change the terms of the debate. The exclusion of homosexuals from all kinds of material and immaterial benefits requires a very thorough justification that cannot be based on presumed characteristics and stereotypical notions about them. The burden of proof lies with those who want to exclude homosexuals, not the other way round. This is what the non-discrimination clause in human rights treaties and declarations is indeed all about.

BIBLIOGRAPHY

BURKENS, M.C. “Gelijke behandeling (art.1.1)”, in: KOEKKOEK, A.K., KONIJNENBELT, W. and CRIJNS, F.C.L.M., (red.), *Grondrechten: commentaar op hoofdstuk I van de herziene Grondwet* (Jeukensbundel), Nijmegen, the Netherlands: Ars Aequi Libri, 1982.

VAN DIJK, P., VAN HOOF, F., VAN RIJN, A. and ZWAAK, L. (eds). *Theory and practice of the European Convention on Human Rights*, Antwerpen/Oxford: Intersentia 2006.

ELLEMERS, N., SPEARS, R. and DOOSJE, B. “Self and social identity”, in: *Annual Review of Psychology* vol. 53, 2002, pp. 161-186.

⁴⁵ The Court uses this specific term in section 131: “[t]he Inter-American Court concludes that the Supreme Court of Justice did not comply with the requirement to apply a strict scrutiny test (...)”.

- GERARDS, Janneke. *Rechterlijke toetsing aan het gelijkheidsbeginsel*, The Hague, the Netherlands: Sdu Uitgevers BV, 2002. (Also available translated into English as *Judicial Review in Equal Treatment Cases*, the Hague, the Netherlands: Martinus Nijhoff, 2005).
- GRABHAM, E. Law v. "Canada: new directions for equality under the Canadian Charter?", *in: Oxford Journal of Legal Studies*, vol. 22, no. 4, 2002, pp. 641-661.
- GRANT, E. "Dignity and Equality", *in: Human Rights Law Review*, 2007, pp. 299-329.
- HOGG, P.W. *Constitutional law of Canada*, 2006 student edition, Scarborough, Ontario: Thomson/Carswell, 2006.
- HOLTMAAT, R. "Stop de inflatie van het discriminatiebegrip!" (Stop the inflation of the concept of discrimination!), *in: Nederlands Juristenblad*, 2003, vol. 78, no. 25, pp. 1266-1276.
- LOENEN, Titia. "Leeftijdscriminatie" (Discrimination on grounds of age), *in: BARKHUYSEN, T., POLAK, J.E.M., SCHUELER, B.J., and WIDDERSHOVEN, R.J.G.M., AB-Klassie - sixth edition-* Deventer, the Netherlands: Kluwer 2009, pp. 317-326.
- MOTALA, Z. and RAMAPHOSA, C. *Constitutional law. Analysis and cases*, Oxford/Cape Town: Oxford University Press, 2002.
- POTHIER, D. Connecting grounds of discrimination to real people's real experiences. *In: Canadian Journal of Women and Law* 2001, pp. 37-73.
- RAO, N. "On the use and abuse of dignity in constitutional law", *in: Columbia Journal of European Law*, vol. 14, no. 2, 2008, pp. 201-256.
- RICHARDS, D.A.J. *Identity and the case for gay rights. Race, gender, religion as analogies*. Chicago/London: University of Chicago Press, 1999.
- SHAPIRO, M.R. "Treading the Supreme Courts murky immutability waters", *in: Gonzaga Law Review*, vol. 38, 2002-2003, pp. 409-443.
- SLOOT, Ben. *Positieve discriminatie*. (Positive discrimination; dissertation Leiden University 1986), Zwolle, Netherlands: Tjeenk Willink, 1986.
- SMALL, J. and GRANT, E. "Dignity, discrimination, and context: new directions in South African and Canadian human rights law", *in: Human Rights Review*, 2005, pp. 25-63.
- SOLANKE, I. "Stigma: a limiting principle allowing multiple consciousness in anti-discrimination law?", *in: SCHIEK, D., and CHEGE, V. (eds), European Union non-discrimination law. Comparative perspectives on multidimensional equality law*, London/New York: Routledge-Cavendish, 2009, pp. 115-136.

WATTEL, P.J. “De reikwijdte van fundamentele rechten in belastingzaken” (The scope of fundamental rights in tax cases), *in*: *Reikwijdte van fundamentele rechten, Preadviezen van de NJV 1995* (The scope of fundamental rights, Advisory opinions of the Dutch Association of Jurists 1995). Zwolle, the Netherlands: Tjeenk Willink 1995, pp. 175-221.