



Equal Rights versus Special Rights?

Minority Protection and the Prohibition of Discrimination



European Commission

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Kristin Henrard
Associate Professor, University of Groningen¹

European Commission

Directorate-General for Employment, Social Affairs and Equal Opportunities
Unit G.2

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¹ Kristin Henrard is an Associate Professor in Human Rights, Minority Protection, Refugee Law and Constitutional Law at the University of Groningen, Netherlands. From 1 May 2007 onwards she is working at the Erasmus University of Rotterdam. Henrard has written several books and articles on minority protection themes since her graduation at the Catholic University of Leuven in 1994 and her LL.M at Harvard Law School. During her Ph.D. Research she spent considerable time in South Africa, inter alia clerking for a judge of the Constitutional Court. She is currently working on a VIDI project about the implications of the Racial Equality Directive for minority protection, sponsored by the Dutch Council for Scientific Research (N.W.O.).

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human european consultancy

Hooghiemstraplein 155
3514 AZ Utrecht
Netherlands
Tel +31 30 634 14 22
Fax +31 30 635 21 39
office@humanconsultancy.com
www.humanconsultancy.com

The Migration Policy Group

Rue Belliard 205, Box 1
1040 Brussels
Belgium
Tel +32 2 230 5930
Fax +32 2 280 0925
info@migpolgroup.com
www.migpolgroup.com

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The Action Programme has three main objectives. These are:

1. To improve the understanding of issues related to discrimination
2. To develop the capacity to tackle discrimination effectively
3. To promote the values underlying the fight against discrimination

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Alen | 1969

Executive summary

In regard to minorities and the adequate treatment of persons belonging to minorities, a central issue has been whether this would require 'equal' rights or 'special' rights. The resulting, central question seems to be whether one needs in addition to the prohibition of discrimination, also 'special' minority rights, which requires an assessment of the extent to which the prohibition of discrimination caters for the specific needs of minorities and contributes to an adequate minority protection.

While 'special' rights seem at first sight the opposite of 'equal' rights, everything depends what conception of equality one embraces. Several distinctive conceptions of equality can be distinguished. An important distinction needs to be made between formal equality (or equality as consistency), which sets out to treat everybody in exactly the same way on the one hand, and substantive, or real or full equality on the other hand. Full equality acknowledges differences in starting positions which might necessitate differential treatment in order to reach real, effective equality. To the extent that reaching substantive equal treatment might necessitate differential treatment or special rights, these are not meant to be privileges in the sense that they should not go beyond what is necessary to obtain genuine equal treatment.

Whether or not the prohibition of discrimination would suffice for an adequate minority protection, depends to a great extent on the way in which this prohibition is conceived (interpreted), and more particularly on the degree to which it embraces substantive equality considerations. It may be obvious that also the actual reach of this prohibition of discrimination, and particularly to what extent it can reach the typical areas of concern of minorities, matters. In view of the central importance of the right to identity of minorities, these areas of concern surely include identity related matters, in addition to equal access and effective participation in economic, social and cultural life and public affairs.

The relationship between minority protection and non discrimination is actually an on-going debate, and it is therefore unsurprising that it has also arisen in the context of the EU Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (of 29 June 2000, Directive 2000/43/EC; hereinafter: Racial Equality Directive or RED), because of the obvious link between racial and ethnic groups on the one hand, and minorities on the other hand.

This report consists of five chapters, resulting finally in the formulation of conclusions. In the first chapter the theoretical framework about minority protection within which the central question needs to be addressed, is mapped out. After an identification of the relevant (interpretation) issues in the Racial Equality Directive (chapter 2), it is investigated whether guidance can be deduced from the supervisory practice in terms of other international equality provisions (chapter 3), as well as from certain approaches adopted by EU member states (chapter 4). Chapter 5 will provide an overall assessment of the potential of the Racial Equality Directive's contribution to minority protection, in relation to the practice under the Framework Convention for the Protection of National Minorities (FCNM).

Discussing and evaluating measures of relevance to minority protection presupposes that the meaning of the concept 'minority' is clear. However, until the present day there is no generally accepted legal definition of the term in question. Still there seems broad agreement about the requirement of stable ethnic, religious or linguistic characteristics which are different from the rest of the population, a numerical minority position, non-dominance and the wish to preserve the own, separate cultural identity. Notwithstanding some ongoing resistance, an international trend can be identified away from a nationality requirement and towards the acceptance of the identification of minorities at regional level.

In view of the fact that instruments of the Council of Europe and the OSCE are focusing on 'national' minorities, while in the United Nations on 'ethnic, religious or linguistic' minorities, it seems important to point out that the adjectives 'national' and 'ethnic, religious or linguistic' can be understood as covering more or less the same load. This is also important in view of the fact that the EU, in so far as it explicitly addresses minorities in its internal policy (at least in terms of the European Employment Strategy and the Process of Social Inclusion), tends to focus on 'ethnic minorities'.

Two essential goals and themes of minority protection are substantive, real or full equality (as opposed to mere formal equality) and the right to identity. While the right to identity remains a rather amorphous concept, which is not neatly circumscribed, it can be argued that when addressing minority protection, the right to identity refers to the various possible distinctive minority characteristics, like language, culture, and religion.

It is widely accepted that an adequate system of minority protection is constructed on two pillars, the first of which concerns non-discrimination in combination with individual human rights of special relevance for minorities, the second minority specific standards aimed at protecting and promoting the right to identity of minorities. Considering the changing (not static) interpretation of human rights, the argument can be made that if certain jurisprudential developments in relation to the first pillar in favour of substantive equality and the right to identity can be identified (get stronger and consolidate), this might have an impact on the relative importance of the two pillars in relation to the construction of an adequate system of minority protection. In relation to the central question of this report this implies that certain interpretations of non-discrimination (also relating to its reach) could accommodate/allow or even impose a duty to adopt special minority measures, and hence would go a long way in providing minority protection.

As was already highlighted, when analysing the extent to which non-discrimination norms can contribute to minority protection, this should be done in terms of openings towards substantive equality and protection and promotion of the right to identity (and the various relevant themes identified above). This can in turn be sub-divided into two broad categories of relevant issues, namely the extent to which the interpretation of the prohibition of discrimination opens to substantive equality on the one hand, and the reach of the prohibition of discrimination on the other hand. In relation to the former, several sub-issues can be determined, which will be elaborated upon *infra*. Without claiming to be exhaustive, the following are particularly important in this respect: the acknowledgement of indirect discrimination, the identification of a duty to differentiate in terms of non-discrimination, a broader duty to promote equality and equal treatment, and the acceptance of positive action measures.

In view of the special importance of the prohibition of discrimination for minorities, it seems self-evident that the broader the reach of the prohibition of discrimination, the better this would be from a minority protection perspective. The reach of the prohibition of discrimination is determined by multiple factors, which can be grouped together under scope *ratione personae* and scope *ratione materiae*.

In relation to the former, a distinction should be made between prohibitions of discrimination with an open versus a closed list of prohibited grounds (of discrimination). The grounds of special importance to minorities obviously concern the minority identity features: language, religion and ethnicity/race. It is obvious that language and ethnicity/race as well as religion and ethnicity/race intersect and overlap and it is widely understood that there is a considerable overlap between minority ethnic communities and foreigners and non-nationals. The supervisory practice of the Committee on the Elimination of all Forms of Racial Discrimination (CERD/C) underscores this, and specifically guards against differentiations on the basis of nationality which would amount to indirect racial discrimination. It is to be hoped that the European Court of Justice (ECJ) will follow suit and will carefully scrutinize whether differentiations on the basis of nationality, religion and language amount to indirect racial discrimination.

A second dimension of the scope of application *ratione personae* concerns the question whether the prohibition is limited to the public sphere or also enters the private sphere. While the RED explicitly stipulates that it reaches the private sector, it remains to be seen whether (and to what extent) this would include the purely private sphere, as is also hinted at by one of the provisions of the RED which adds the qualification 'available to the public' (access to and supply of goods and services). The analysis of the supervisory practice of the human rights bodies in terms of positive state obligations to fight (prevent, sanction) discrimination by private parties arguably acknowledges that this is not an absolute obligation either.

The scope of application *ratione materiae* is determined by the question whether a prohibition of discrimination is accessory or not. An accessory prohibition of discrimination is limited in that discrimination is only prohibited in relation to the other rights enshrined in that instrument. The prohibition of discrimination in terms of EU law (in whatever instrument it is contained) is always limited to the powers and competences conferred upon the Union, and hence cannot have an all encompassing reach.

The general understanding that the prohibition of discrimination allows certain forms of differential treatment (and thus special measures) already implies a certain opening to substantive equality. It clarifies in any event that special minority rights do not necessarily violate the prohibition of discrimination. To the extent that the prohibition of discrimination also includes a prohibition of indirect discrimination, this implies an inclusion of important substantive equality considerations. Indirect discrimination gets at rules and practices that may be neutral on their face but (are likely to) have a disproportionate impact on certain groups. To the extent that it is easier to establish a *prima facie* case of indirect discrimination, this undoubtedly benefits the victims (often persons belonging to minorities) of these measures.

The ECJ has played an important role in incorporating indirect discrimination in EC equality law, and has a good track record, especially in comparison with the case law of the European Court of Human Rights (ECtHR) or the UN Human Rights Committee (HRC). The analysis in chapter 3 has revealed that the supervisory practice of CERD/C and the European Committee of Social Rights takes a rather progressive stance in this respect. However, the potential guidance of especially the practice of CERD/C is diminished by the fact that the EC's competence sphere is limited (which also has repercussions for the Racial Equality Directive). It should in any event be highlighted that the definition in the Racial Equality Directive seems to strengthen the protection against indirect discrimination, by facilitating the case of the victims.

While a duty to differentiate (between substantively different situations) as flowing from the prohibition of discrimination has been firmly acknowledged by the ECtHR, the ensuing case law has not been promising in terms of minority specific rights. The case law of the European Committee of Social Rights, however, has more potential in the sense that it appears to acknowledge that an effective non-discriminatory enjoyment of rights imposes an obligation on the state to accommodate relevant differences, where necessary through the adoption of special measures. In so far as these special measures are not remedial, there is no need for them to be temporary. However, the scope (both in substance and in duration) should be in line with the proportionality principle.

Considering the fact that the prohibition of discrimination constitutes the limit for acceptable positive action measures, the interpretation (and application) of the former determines the scope of the latter. While the case law of the ECJ is developing in relation to positive action, and increasingly seems to acknowledge the substantive equality goal, it remains rather restrictive towards forms of positive action aimed at equality of results. The practice of CERD/C (and even the HRC) seems more flexible in this respect. As the ECJ seems to give more weight to the proportionality principle in its recent case law, it might follow the path of the former, especially in relation to the Racial Equality Directive. This directive does not only explicitly acknowledge the substantive equality goal of positive action, but also concerns a different social context than that of gender. It should furthermore be highlighted that article 5 Racial Equality Directive does not limit positive action to remedial measures (of a temporary nature) but also includes the possibility of preventive measures.

While the Racial Equality Directive does not contain explicit duties to promote equality, the inclusion of numerous such positive obligations in the International Convention on the Elimination of all forms of Racial Discrimination, as further elaborated in the practice of CERD/C, might be instructive for the ECJ, particularly the extent to which the far reaching positive state obligations intrude into the private sphere.

In regard to the reach of the prohibition of discrimination in the Racial Equality Directive, it was already mentioned that the definition in ICERD would be a good reference point. The practice of CERD/C has also clearly shown the potential to reach differentiations on the basis of language and religion through the prohibition of indirect racial discrimination. Furthermore, it is to be hoped that the ECJ will follow General Recommendation no 30 of CERD/C in relation to the exclusion of differentiations on the basis of nationality as this is extremely circumscribed in the Recommendation so that indirect racial discrimination would not be condoned.

Finally, a closer comparison of the Racial Equality Directive and the FCNM points to the extent to which the FCNM has added value (compared to the Directive) in relation to the goals of minority protection.

Notwithstanding the fact that their respective overarching goals and themes seem very different, the interpretation of the relevant concepts in relation to the scope of application *ratione personae*, *ratione materiae* and the inclusion of substantive equality considerations might imply a higher level of convergence. The competence limit of the EC should nevertheless be taken into account.

The FCNM has the obvious benefit that it is resolutely geared towards substantive equality, and that it is explicit about the kinds of special rights that are particularly relevant for minorities, especially as related to their right to identity. These special measures are furthermore not intrinsically limited to temporary ones.

The Racial Equality Directive, on the other hand, may be less explicit on identity issues, but it does explicitly address very important issues for the day to day integration of minorities which are not covered explicitly and in the same degree of detail in the FCNM, more specifically access to employment, health care, goods and services available to the public etc. The interpretation by the ECJ is eagerly awaited, to determine its actual potential as a source of special measures in favour of minorities, including the question whether these special measures can also be enduring (and not merely temporary).

It should in any event be emphasised that the Racial Equality Directive does not prohibit all kinds of differential (or special) measures (adopted under the FCNM). Not only is the scope of application of the RED *ratione materiae* and *personae* limited, but special measures can also flow from the prohibition of indirect discrimination, from a duty to promote equality or can be acceptable as positive action (also aimed at preventing disadvantage). Nevertheless these measures have to be in line with the proportionality principle, and here (again) everything depends on the interpretation (and the level of scrutiny) adopted.

Introduction

In regard to minorities and the adequate treatment of persons belonging to minorities, a central issue has been whether this would require 'equal' rights or 'special' rights. The resulting, central question seemed to be whether one needs in addition to the prohibition of discrimination, also 'special' minority rights; or in other words to what extent does the prohibition of discrimination cater for the specific needs of minorities and contributes to an adequate minority protection.²

This concerns is actually an on-going debate, and it is hence unsurprising that it has also arisen in regard to the EU Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (29 June 2000, Directive 2000/43/EC; hereinafter: Racial Equality Directive), because of the obvious link between racial and ethnic groups on the one hand, and minorities on the other hand.

This study will demonstrate that there is no black and white answer to this question because everything depends on how the concepts are interpreted. Indeed, everything depends on how 'equality' and 'non-discrimination' are interpreted and approached.

While this study is triggered because of a concern to understand the position of the Racial Equality Directive in this regard, the possible relevance of the position in terms of international law (instruments) is acknowledged and investigated as well.

It should furthermore be highlighted that some member states of the EU expressed concern about the implications of the Racial Equality Directive's prohibition of discrimination for the special minority rights they have in their national legal systems. In other words, they want to know whether having special minority rights in the national legal system, would be contrary to the demands of the Racial Equality Directive. While this study is mainly constructed around the central question identified in the first paragraph, this additional question will be addressed in the process.

This report consists of five chapters, resulting finally in the formulation of conclusions. In the first chapter the theoretical framework within which the central question needs to be addressed, is mapped out. After an identification of the relevant (interpretation) issues in the Racial Equality Directive (chapter 2), it is investigated whether guidance can be deduced from the supervisory practice in terms of other international equality provisions (chapter 3), as well as from certain approaches adopted by EU member states (chapter 4). Chapter 5 will provide an overall assessment of the potential of the Racial Equality Directive's contribution to minority protection, in relation to the practice under the Framework Convention for the Protection of National Minorities (FCNM).

² See also *infra* chapter 1, on the two pillars of an adequate system of minority protection.

Cheryl | 1973

Part I

Theoretical framework

A few considerations about the concept 'minority' are followed by a discussion of the central themes of minority protection and the two basic principles or pillars of an adequate system of minority protection. An outline of the special needs of minorities and the way these are translated in the existing minority specific rights leads, finally, to the determination of the relevant issues in terms of the relationship between the prohibition of discrimination on the one hand, and minority protection on the other hand.

1.1. Definition of 'minority' and an introduction to specific minority concerns

Discussing and evaluating measures of relevance to minority protection presupposes that the meaning of the concept 'minority' is clear. However, until the present day there is no generally accepted legal definition of the term in question.³ Nevertheless, when scrutinising the various proposals of definition by academics and from within international organisations, a certain core of objective and subjective elements for such definition emerges.⁴ There is broad agreement about the requirement of stable ethnic, religious or linguistic characteristics which are different from the rest of the population, a numerical minority position, non-dominance and the wish to preserve the own, separate cultural identity.⁵ Notwithstanding some ongoing resistance, an international trend can be identified away from a nationality requirement and towards the acceptance of minorities identified at regional level.⁶

In view of the fact that instruments of the Council of Europe and the OSCE are focusing on 'national' minorities, while in the United Nations on 'ethnic, religious or linguistic' minorities, it seems important to point out that⁷ the adjectives 'national' and 'ethnic, religious or linguistic' can be understood as covering more or less the same load. This is also important in view of the fact that the EU, in so far as it explicitly addresses minorities in its internal policy (at least in terms of the European Employment Strategy and the Process of Social Inclusion⁸), tends to focus on 'ethnic minorities'.

³ With the exception of the 1994 Convention of the Central European Initiative for the protection of minority rights (article 1), not a single international legally binding document contains a definition of this concept, which is wrought with sensitivities. See also A. Meijknecht, *Towards International Personality: The Position of Minorities and Indigenous Peoples in International law* (Antwerp: Intersentia, 2002), 69.

⁴ See also G. Pentassuglia, *Minorities in International Law* (Strasbourg: Council of Europe, 2003), 57-58.

⁵ It should be underscored that these discussions played in regard to both 'national minority' (Europe) and 'ethnic ... minority' (UN). For a more in depth discussion, which cannot be fully repeated here, see K. Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self Determination* (The Hague: KLI, 2000), 30-48.

⁶ Venice Commission, Opinion on Possible Groups of Persons to which the Framework Convention for the Protection of National Minorities Could be Applied in Belgium, March 2002, CDL-AD (2002) 1. See also P. Thornberry & M.A. Martin Estebanez, *Minority Rights in Europe* (Strasbourg: Council of Europe, 2004), 93 and 95.

⁷ As was fully argued in: Henrard, *Devising an Adequate System of Minority Protection...*, 53-55. Certain arguments were put forward that 'national minority' would have an extra dimension as compared to 'ethnic minority'. Nevertheless, analogous discussions materialized about and similar definitions were put forward of these concepts in the framework of international organisations. See also G. Pentassuglia, *Minorities in International Law* (Strasbourg: Council of Europe, 2002), 63; P. Thornberry & M.A. Martin Estebanez, *Minority Rights in Europe* (Strasbourg: Council of Europe, 2004), 93-94.

⁸ In the framework of the European Employment Strategy (EES) every member state has to draw up a National Reform Program (previously National Action Plan) indicating how they are implementing the Employment Guidelines. These Employment Guidelines have from 1999 onwards expressly referred to ethnic minorities (guideline number 9 in 1999 and 2000, guideline number 7 since 2001). See also inter alia the Joint Report on Social Inclusion 2004 (Brussels: Council of the European Union, 2004), 8-9; Communication from the Commission to the Council, the EP, the EESC and the Committee of the Regions: Joint Report on Social Protection and Social Inclusion (SEC (2005)69), 5, 6, 10; Joint Report on Social Protection and Social Inclusion (Brussels: Council of the European Union, 2006), 8, 10, 14, 16.

In view of the fact that the 'separate' characteristics of minorities are language, religion, and/or culture, it is not surprising that issues of special relevance for minorities concern language rights (in many different settings including education, media, and communications with authorities), rights relating to culture and an own, traditional way of life. In addition, education, media and political participation are of special relevance to minorities, as these concern important 'instruments' to protect and promote their own identity.⁹

1.2. Central themes of minority protection

Two essential goals and themes of minority protection are substantive, real or full equality (as opposed to mere formal equality) and the right to identity.

1.2.1. Substantive equality

Several distinctive conceptions of equality can be distinguished. An important distinction needs to be made between formal equality (or equality as consistency), which sets out to treat everybody in exactly the same way on the one hand, and substantive, or real or full equality on the other hand. Full equality acknowledges differences in starting positions which might necessitate differential treatment in order to reach real, effective equality. The latter, namely the need to treat formally differently in order to obtain substantive equal treatment is coined 'the paradox of the equality principle'. The latter was already nicely captured by Aristotle who argued that likes should be treated alike, while different things should be treated differently to the extent of the difference. In other words, 'special' rights or differential rights are not necessarily a contradiction of 'equal' rights. Nevertheless, the goal of substantive equality does not allow just any kind or degree of differential treatment.¹⁰ In this regard real or substantive equality can also be seen as a limit to 'special' rights. To the extent that reaching substantive equal treatment might necessitate differential treatment or special rights, these are not meant to be privileges in the sense that they should not go beyond what is necessary to obtain genuine equal treatment. At the same time, the vulnerable position of persons belonging to minorities also necessitates heightened attention for equal access to employment, public services and effective participation in economic, social and cultural life as well as in public affairs.

While the requirement that 'like should be treated alike' is rather important and positive from a minority perspective in that it tackles formal exclusionary rules, minorities ultimately want to obtain substantive equal treatment in comparison with the rest of the population.

It should be highlighted that minorities tend to be in a disadvantaged position, which cannot all be traced to explicit distinctions but often has to do with negative stereotypes (e.g. in relation to employment, access to services etc.) and decision making processes that simply do not take into account minority concerns in relation to language, culture, religion etc., inter alia because minorities are not guaranteed a voice.

⁹ See inter alia Henrard, *Devising an Adequate System of Minority Protection...*, 64-68.

¹⁰ The limits to differential treatment are inter alia captured in 'to the extent of' in Aristotle formula, and can be related to the centrality of the proportionality principle, see *infra*.

1.2.2. The right to identity

While the right to identity remains a rather amorphous concept, which is not neatly circumscribed, it can be argued that when addressing minority protection, the right to identity refers to the various possible distinctive minority characteristics, like language, culture, and religion.¹¹

It should in any event be highlighted that the concept 'minority identity' has strong group connotations, in line with the minority phenomenon itself. Hence, the extent to which a certain mechanism implies a recognition and protection of this group dimension is important to gauge the potential contribution of that mechanism to an adequate minority protection.

1.3. Two pillars of an adequate system of minority protection

It is widely accepted that an adequate system of minority protection is constructed on two pillars, the first of which concerns non-discrimination in combination with individual human rights of special relevance for minorities, the second minority specific standards aimed at protecting and promoting the right to identity of minorities. The idea that an adequate system of minority protection (in view of substantive equality and identity considerations) would be constructed on these two pillars can actually be traced back to an opinion of the Permanent Court of International Justice,¹² operative during the League of Nations. This thinking has been confirmed by the United Nations¹³ and also broadly by the academic literature.¹⁴

Nevertheless, it needs to be acknowledged that this position is not universally accepted. There are indeed still academics and states that argue that an effective protection of the first pillar (general human rights) would suffice (hence, discarding the need for the second pillar with 'special' minority rights).¹⁵

In view of the fact that to some extent this rejection of the second pillar is related to concerns about these 'special rights', it should be emphasized that minority rights are not situated outside the human rights framework but are considered to be part and parcel of it. This is recognised explicitly (inter alia) in article 1 FCNM which reads 'the protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights...'¹⁶ This statement is important as it denies that 'minority rights' are 'foreign' to that framework and belong to a totally different universe.¹⁷

¹¹ See infra for a succinct overview of how this right to identity has been translated so far in minority specific rights.

¹² PCIJ, Advisory Opinion regarding Minority Schools in Albania, 6 April 1935, *PCIJ Reports, Series A/B no 64*, 1935, 17.

¹³ In this respect reference can be made to the establishment of the UN Sub Commission on the Prevention of discrimination and the Protection of Minorities in 1952, the inclusion of article 27 in the ICCPR in addition to the general human rights and the prohibition of discrimination and the proclamation of the 1992 UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities.

¹⁴ *Inter alia* F. Benoit-Rohmer, *The Minority Question in Europe: towards a coherent system of protection of national minorities* (Strasbourg: International Institute for Democracy, 1996), 16; Henrard, *Devising an Adequate System of Minority Protection...*, 8-11; G. Pentassuglia, *Minorities in International Law* (Council of Europe, 2002), 91-93.

¹⁵ *Inter alia* C.C. O'Brien, 'What Rights Should Minorities Have?', in B. Whitaker (ed.), *Minorities: A Question of Human Rights?* (Oxford: Pergamon, 1984), 21; J. Raïkka (ed.), *Do we Need Minority Rights? Conceptual Issues* (The Hague: Martinus Nijhoff, 1996); N.S. Rodley, 'Conceptual Problems in the Protection of Minorities: International Legal Developments', (1995) H.R.Q., 64.

¹⁶ Hilpold, 'Article 23', in M. Weller (ed.), *The Rights of Minorities: A Commentary on the FCNM* (New York: OUP, 2005), 568.

¹⁷ See also H.J. Heintze, 'Article 1', in M. Weller (ed.), *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities* (New York: OUP, 2005), 86-87; P. Hilpold, 'Article 23', 568; T. Malloy, 'The Title and the Preamble', in M. Weller (ed.), *The Rights of Minorities: A Commentary on the FCNM* (New York: OUP, 2005), 70-72; W. Schwimmer, 'Opening Speech', in *Filling the Frame* (Strasbourg: Council of Europe Publishing, 2005), 13.

Nevertheless, the fact that minority rights are a component part of the broader human rights framework, does not imply that minority rights are necessarily the same as general human rights. As will be further developed *infra*, a lot depends on the actual interpretation of the respective rights. Still, the fact that it was felt necessary to add article 27 to the International Covenant on Civil and Political Rights (ICCPR) arguably means that the rights for persons belonging to minorities were considered to go beyond the other, general human rights in the sense that otherwise article 27 would be redundant. In addition to this redundancy argument, it can also be pointed out that minority rights should be considered as one of several sets of category specific human rights for persons belonging to especially vulnerable groups. Other well known examples of these type of 'special' rights can be found in the Convention on the Rights of the Child, the various instruments on rights of migrant workers, of incarcerated persons, and of disabled persons. Because of their vulnerable position, these persons need 'special' rights in order to obtain substantively equal levels of protection of their human dignity (the founding principle of human rights).

1.4. Argument about possible shift in relative importance of two pillars

While numerous contributions have already been written in previous years about the question whether an adequate minority protection can suffice with general human rights and the prohibition of discrimination or needs in addition minority specific rights,¹⁸ it is not superfluous to investigate this again since the norms concerned contain concepts and expressions the exact scope of which is determined through interpretation. The latter is not (necessarily) static, as is often emphasized by the European Court of Human Rights (ECtHR).¹⁹

In this respect, the argument can be made that if certain jurisprudential developments in relation to the first pillar in favour of substantive equality and the right to identity can be identified (get stronger and consolidate), this might have an impact on the relative importance of the two pillars in relation to the construction of an adequate system of minority protection. In relation to the central question of this report this implies that certain interpretations of non-discrimination (also relating to its reach) could accommodate/allow or even impose a duty to adopt special minority measures, and hence would go a long way in providing minority protection.

1.5. Special needs of minorities, minority (specific) rights and relevant issues in terms of the relationship between non-discrimination and minority protection

The following special needs of minorities can all be related to the two central themes of minority protection, namely substantive or real, effective equality and the right to identity, and should be understood against the background of their disadvantaged position.

Since minorities are by definition keen to preserve and promote their identity, they would like to see the recognition of minority language rights (*inter alia* in relation to public authorities, the recognition of names and topographical indications), and the right to an own lifestyle. A proper preservation and promotion of the minority identity is also dependent on the regulation of education (language in education, religion in education, culture in education, broader curriculum issues) and the media (minority access to the media, minority languages in the media, minority programs etc.). The instrumental value of education and media is arguably even surpassed by that

¹⁸ See *inter alia* the references in the footnotes *supra* and *infra*.

¹⁹ The interpretation of case law is furthermore not always identical either, as is exemplified by the differences between the papers of Hoffmann and the author.

of political participation. Political participation has potentially a very broad reach, but surely includes ‘participation in decision-making’, which does not only concern election systems, and a voice in the legislative process but also representation in the civil service, the police and the judiciary.²⁰

The existing minority specific standards address these specific minority concerns and the underlying principle of substantive equality and right to identity, in different degrees of explicitness and detail. *Article 27 ICCPR* remains very general and vague and only states that minority members shall not be denied the right to enjoy their own culture, to profess and practice their own religion or to use their own language, without further specifications as to what this might imply. The Human Rights Committee’s (HRC) General Comment on article 27 (no 23) provides a little more substance and highlights inter alia that culture includes a particular way of life.²¹ According to the HRC states have a duty to adopt positive measures of protection also in the horizontal relations between private parties.²² The HRC furthermore remarks that the actual enjoyment of the individual rights of article 27 depend on the ability of the minority group to maintain its culture, language or religion. This acknowledgement of the group dimension of the minority phenomenon goes hand in hand with the recognition that ‘positive measures by States may be necessary to protect the identity of a minority’²³ The General Comment also underlines that article 27 ICCPR should be distinguished from the non discrimination provisions of the ICCPR,²⁴ and that it enshrines a right which is ‘distinct from and additional to all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant’,²⁵ which arguably acknowledges the two pillar structure. Similar arguments can be formulated in terms of the statement in paragraph 5.3 of the same General Comment that the language rights under article 27 ICCPR should be distinguished from the other (general human) language rights in the Covenant.

The *1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (UN Minorities Declaration), is inspired by article 27 ICCPR but contains more detailed provisions. In addition to underscoring the need to realize full and effective equality and the resulting positive obligations,²⁶ the Declaration addresses explicitly the right to participate in cultural, religious, social, economic and public life,²⁷ the right to participate effectively in decisions on the national and regional level concerning the minority to which they belong²⁸ and several educational issues of special relevance to minorities.²⁹ Interestingly, the Declaration also highlights specifically the importance of the full participation by persons belonging to minorities in the economic progress and development in their country.³⁰

²⁰ Inter alia K. Henrard, ‘‘Participation’, ‘Representation’, and ‘Autonomy’ in the Lund Recommendations and their Reflections in the Supervision of the FCNM and Several Human Rights Conventions’, 12 *IJMG* 2005, 134-140.

²¹ HRC, General Comment no 23 (The Rights of Minorities), para. 7.

²² HRC, General Comment no 23, para 6.1.

²³ HRC, General Comment no 23, para 6.2.

²⁴ HRC, General Comment no 23, para 4.

²⁵ HRC, General Comment no 23, para 1.

²⁶ UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (GA Resolution 47/135, hereinafter UN Minorities Declaration), articles 4(1) and 4(2).

²⁷ UN Minorities Declaration, article 2(2).

²⁸ UN Minorities Declaration, article 2(3).

²⁹ UN Minorities Declaration, articles 4(3) and 4(4).

³⁰ UN Minorities Declaration, article 4(5).

The same themes (with the exception of the last one) were addressed in the *OSCE Copenhagen Declaration of 1990*.³¹ This declaration in addition addresses the important question of minority language use in communication with the public authorities.

Unsurprising, the *1995 Framework Convention for the Protection of National Minorities* elaborated in the framework of the Council of Europe similarly takes up these themes (again with the exception of an explicit reference to the full participation by persons belonging to minorities in the economic progress and development).³² It should be acknowledged though that the FCNM is much more elaborate than any of the previous minority specific instruments, and in addition also contains a provision on names and topographical indications in the minority language.³³

Another typical feature of the FCNM is that it not only enshrines special minority rights but also explicitly takes up general human rights of special relevance to minorities, while making certain dimensions of these rights explicit which are of special relevance to minorities.³⁴ However, it needs to be repeated here that the exact dividing line between general human rights and special minority rights is not crystal clear, as it depends on the interpretation adopted.

The importance of interpretation is also of crucial importance in relation to the minority specific standards themselves, since these are often shot through with conditional clauses like 'if there is sufficient demand', 'where appropriate', 'as far as possible', 'if those persons so request and where such a request corresponds to a real need', while the state obligations are often framed in terms of 'endeavour to ensure'. At first sight these provisions seem to point to extremely weak state obligations, leaving extensive scope for state discretion. The supervisory practice of the Advisory Committee under the FCNM nevertheless shows that this state discretion is not as boundless as it seems.³⁵ A similar demonstration of 'strong' interpretations of the existing minority specific standards can be found in several sets of Recommendations (and Guidelines) formulated by independent experts and endorsed by the HCNM.³⁶ Again, the topics of these Recommendations take up several of the themes highlighted above: The Hague Recommendations regarding the Education Rights of National Minorities (1996), the Oslo Recommendations regarding the Linguistic Rights of National Minorities (1998), the Lund Recommendations on the Effective Participation of National Minorities in Public Life (1999), the Guidelines on the use of Minority Languages in the Broadcast Media (2003), and the Recommendations on Policing in Multi-ethnic Societies (2006).³⁷

As was already highlighted supra, when analysing the extent to which non-discrimination norms can contribute to minority protection, this should be done in terms of openings towards substantive equality and protection and promotion of the right to identity (and the various relevant themes identified above). This can in turn be subdivided in two broad categories of relevant issues, namely the extent to which the interpretation of the prohibition of discrimination opens to substantive equality on the one hand, and the reach of the prohibition

³¹ Document of the Copenhagen Meeting of the Conference on the Human Dimension of the OSCE, 29 June 1990, respectively para 31, 33, 35 and 34.

³² Framework Convention for the Protection of National Minorities, 1 February 1995, ETS no 157 (hereinafter FCNM), respectively articles 4, 5, 15, 12-14 and 10.

³³ FCNM, article 11.

³⁴ See FCNM, articles 7-9; 10(3); 12(3) and 13. See also K. Henrard, 'The added value of the FCNM: the two pillars of an adequate system of minority protection revisited', to be published by Intersentia in an edited volume edited by B. de Witte et al.

³⁵ Inter alia K. Henrard, 'Ever-increasing Synergy towards a Stronger Level of Minority Protection between Minority-Specific and Non-Minority Specific Instruments', *European Yearbook of Minority Issues* 2003/4, 19-20; R.M. Letschert, *The Impact of Minority Rights Mechanisms* (The Hague: TMC Asser Press, 2005), 168-169, 175.

³⁶ Inter alia Letschert, *The Impact of Minority Mechanisms*..., 73-74.

³⁷ These thematic recommendations can be retrieved at [<http://www.osce.org/hcnm/documents.html>].

of discrimination on the other hand. In relation to the former, several sub-issues can be determined.³⁸ Without claiming to be exhaustive, the following are particularly important in this respect: the acknowledgement of indirect discrimination, the identification of a duty to differentiate in terms of non-discrimination, a broader duty to promote equality and equal treatment, and the acceptance of positive action measures.

When evaluating the relationship between positive action and the prohibition of discrimination, it is essential to realize that 'positive action' concerns a broad gamma of measures, some of which are geared towards the creation of equal opportunities, others go beyond that and are aimed at equality of results.³⁹ While the latter are more resolutely geared towards substantive equality, they also tend to be more controversial and are often ill-received (inter alia by the European Court of Justice).⁴⁰ Prior to elaborating on the second category of relevant issues in relation to non-discrimination and minority protection, it seems important to emphasize that several of these 'openings towards substantive equality', especially indirect discrimination and positive action, imply special attention for the group dimension in that they have an inherent group focus.⁴¹

In view of the special importance of the prohibition of discrimination for minorities, it seems self-evident that the broader the reach of the prohibition of discrimination, the better this would be from a minority protection angle. The reach of the prohibition of discrimination is determined by multiple factors, which can be grouped together under scope *ratione personae* and scope *ratione materiae*. In relation to the former, a distinction should be made between prohibitions of discrimination with an open versus a closed list of prohibited grounds (of discrimination). The grounds of special importance to minorities obviously concern the minority identity features: language, religion and ethnicity, race. It should already be highlighted here the systems with closed grounds can be 'broken' open through the use of 'indirect discrimination', in the sense that a differentiation on a ground which is not covered can be recast as an indirect discrimination on a covered ground.⁴² A second dimension of the scope of application *ratione personae* concerns the question whether the prohibition is limited to the public sphere or also enters the private sphere. The scope of application *ratione materiae* is determined by the question whether

³⁸ See inter alia K. Henrard, 'Non-Discrimination and the Equality Principle', in M. Weller (ed.), *Jurisprudence Digest: Minority Protection*, to be published by OUP (October 2006), 57 p. See also the two reports I recently completed for the Council of Europe: DH MIN (2006) 020 and DH MIN (2006) 021 on the impact of international non-discrimination norms in combination with general human rights for minority protection (the ECHR and several UN Conventions).

³⁹ See also M. Bell & L. Waddington, 'Reflecting on Inequalities in European Equality Law', *EL Rev* 2003, 353; K. Wentolt, 'Formal and Substantive Equal Treatment: the Limitations and the Potential of the Legal Concept of Equality', in T. Loenen & P.R. Rodriguez (eds.), *Non –Discrimination Law: Comparative Perspectives* (The Hague: Martinus Nijhoff, 1999), 58-M. Bossuyt, Final Report to the UN Sub-Commission: *The Concept and Practice of Affirmative Action*, 61E/CN.4/Sub.2/2002/21. 8-9.

⁴⁰ Inter alia D. Caruso, 'Limits of the Classic Method: Positive Action in the EU after the New Equality Directives', *Harvard International Law Journal* 2003, 332; L. Waddington, 'The New Equality Directives: Mixed Blessings', in C. Costello & E. Barry (eds.), *Equality in Diversity: The New Equality Directives* (Irish Centre for European Law, 2003), 51; L. Waddington & M. Bell, 'More Equal than Others: Distinguishing European Union Equality Directives', *CML Rev* 2000, 601. For references to and a discussion of the relevant case law, see infra.

⁴¹ Inter alia Caruso, 'Limits of the Classic Method ...', 357; Ch. McCrudden, 'Theorising Equality Law', in C. Costello & E. Barry (eds.), *Equality in Diversity: The New Equality Directives* (Irish Centre for European Law, 2003) 23-24..

⁴² A proto-typical example would be a differentiation between part-time and full-time workers which would, at first sight, not to be covered by a prohibition of discrimination on the basis of either race, sex or religion. However, such a differentiation can be reformulated as indirect gender discrimination due to its disproportionate negative impact on women, who are much more often part-time workers.

a prohibition of discrimination is accessory or not. An accessory prohibition of discrimination is limited in that discrimination is only prohibited in relation to the other rights enshrined in that instrument. In case of the EU, the prohibition of discrimination (in whatever instrument it is contained) is always limited to the powers and competences conferred upon the Union, and hence cannot have an all encompassing reach.⁴³

⁴³ *Inter-alia* M. Bell, *Anti-Discrimination Law and the European Union*, (Oxford: OUP, 2002), 122-124; E. Ellis, *EU Anti-discrimination Law* (Oxford: OUP, 2005), 253-254.



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Part II

Racial Equality Directive

This chapter does not intend to provide a comprehensive discussion of the Racial Equality Directive, but identifies relevant issues in relation to the focus of this report, namely to what extent does the Racial Equality Directive cater for minorities and their specific needs. Consequently, the text of the Directive will be evaluated in terms of 1/ an opening towards substantive equality and 2/ the reach of the prohibition of discrimination (as related to the right to identity, and the relevant themes in that respect).⁴⁴ It should be pointed out that while the title of the Directive refers to the principle of equal treatment, this is equated in article 2(1) with the prohibition of discrimination.

As there is no case law yet of the ECJ which clarifies the actual meaning of provisions of the Racial Equality Directive, relevant interpretative questions will be identified, and likely scenarios will be outlined, based on the existing case law in terms of the prohibition of gender discrimination. It is generally accepted that the ECJ will base its reasoning vis-à-vis other grounds, like racial and ethnic origin, on its gender jurisprudence, while it is also acknowledged that the textual divergencies and the different social contexts provided by these different grounds, might make it unlikely that the case law can (and will) be transposed just like that.⁴⁵

2.1. Reach of the prohibition of discrimination: scope of application *ratione personae* and *ratione materiae*

2.1.1. Scope of application *ratione personae*

As the full title of the Racial Equality Directive demonstrates, it is concerned with equal treatment on the basis of racial or ethnic origin. It is striking though that neither the Directive itself, nor the Explanatory Memorandum⁴⁶ contains a definition of these concepts. The preamble only indicates that the Union rejects theories with attempt to determine the existence of separate human races. Since 'ethnic origin' is also explicitly addressed, the relevance of the Racial Equality Directive for ethnic groups, including ethnic minorities is however obvious and is confirmed by the reference to ethnic minorities in recital 8. Nevertheless, the failure to define these concepts in the Racial Equality Directive has been criticized, *inter alia* because it would play in the cards of member states that deny the existence of races (and racism) at a conceptual level.⁴⁷

⁴⁴ In view of the special importance of the prohibition of discrimination for minority protection, measures contributing to the effectiveness of the protection are crucial (M. Bell, 'Beyond European Labour Law? Reflections on the EU Racial Equality Directive', *European Law Journal* 2002, 393). In this respect several provisions in the Racial Equality Directive can be highlighted that clearly aim at the enhanced protection against discrimination, including the provision on a reversal of the burden of proof (article 8), effective and dissuasive sanctions (article 15), protection against victimization (article 9), and broad standing (article 7). Similarly the obligation under article 13 to establish national bodies for the promotion of unequal treatment of all persons without discrimination on the grounds of racial or ethnic origin (article 13) is equally important in view of concerns about effective enforcement. While these characteristics of the Racial Equality Directive can be seen as part of a wider trend in international anti-discrimination law to emphasize and enhance state obligations to provide effective remedies and redress (see also McCrudden, 'International and European Norms regarding national legal remedies for racial inequality', in S. Fredman (ed.), *Discrimination and human rights – the case of racism* (OUP, 2001), 289), this report focuses on the more substantive issues related to the prohibition of discrimination, covering an extensive range as it is.

⁴⁵ *Inter alia* O. De Schutter, European Union Legislation and the Norms of the Framework Convention on the Protection of National Minorities, report for DH-MIN September 2006, under A.2.c; Ellis, *EU anti-discrimination law...*, 220.

⁴⁶ COM(1999)566 final.

⁴⁷ F. Brennan, 'The Racial Equality Directive: Recycling Racial Inequality', *Cambridge Yearbook of European Legal Studies* 2004, 321.

Since minorities are often defined in terms of own language and/or own religion, it is important to determine to what extent differentiations on the basis of language or religion are qualified as indirect racial discrimination by the ECJ. The fact that religion as prohibited ground of discrimination is taken up in Directive 2000/78 and has been left out of the Racial Equality Directive may make it 'more difficult to argue that discrimination which is primarily based on religion can be formulated as racial or ethnic origin discrimination.'⁴⁸ Nevertheless recital 10 acknowledges that religion may play a part in defining ethnicity.

In regard to the scope of application *ratione personae* it should be highlighted that recital 13 of the preamble explicitly states that it applies to third country nationals. However, article 3(2) shows that when sensitive issues arise, like immigration, states are getting anxious, potentially problematic exclusions are made. Article 3(2) reads as follows: 'this directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to entry into and residence of third-country nationals and stateless persons on the territory of the Member States, and to any treatment which arises from the legal status of third-country nationals and stateless persons'. In relation to the exclusion of differentiations on the basis of nationality it is generally known that there is an extensive overlap in most countries between ethnic origin (and race) and foreign nationality. Hence, targeted restrictions on the basis of nationality could amount to indirect discrimination on grounds of race and ethnicity. Arguably, to the extent that there would not be an objective and reasonable justification for differentiations on the basis of nationality, they should be qualified as indirect racial discrimination.⁴⁹

Overall, it is to be hoped that article 3(2) Racial Equality Directive will be interpreted narrowly by the ECJ, which would be in line with the general rule concerning exceptions to fundamental rights.⁵⁰ This rule of narrow interpretation should also imply that 'private entities and private acts within a member state should not be permitted to invoke the exception of discrimination on the basis of nationality in the first sentence of article 3(2).'⁵¹ In regard to the fact that according to the last sentence of article 3(2) the Racial Equality Directive would be without prejudice to any treatment which arises from the legal status of the third-country nationals and stateless persons, it is essential that no indirect racial discrimination is condoned in the process.⁵²

The question to what extent the prohibition of discrimination reaches the private sphere, at first sight seems to have a clear, and positive answer. Article 3(1) explicitly states that the Racial Equality Directive shall apply to all persons, as regards both the public and private sectors' However this needs to be seen in light of the preceding 'within the limits of the powers conferred upon the Community', and the subsequent exhaustive enumeration of the material fields of application of the Racial Equality Directive.⁵³ Discrimination in the purely private sphere does not seem to be covered, as is also borne out by the qualification 'available to the public' in article 3(1)(h) concerning 'access to and supply of goods and services... including housing'. The case law of the ECJ will have to clarify the exact reach of the scope of application of the Racial Equality Directive in this respect.

⁴⁸ E. Guild, 'The EC Directive on Race Discrimination: Surprises, Possibilities and Limitations', *Industrial Law Journal* 2000, 418.

⁴⁹ E. Guild, 'The EC Directive...', 210.

⁵⁰ E. Guild, 'The EC Directive...', 210.

⁵¹ G. Von Toggenburg, 'The Racial Equality Directive: A New Dimension in the Fight against Ethnic Discrimination in Europe', *European Yearbook of Minority Issues*, 2001/2, 238.

⁵² *Inter alia* Brennan, 'The Racial Equality Directive: Recycling...', 325; Guild, 'The EC Directive...', 211.

⁵³ Also in article 3(1) Racial Equality Directive. See for further discussion immediately *infra*.

2.1.2. Scope of application *ratione materiae*

The Racial Equality Directive has a notorious broad material scope, which resolutely extends beyond the employment sphere, and seems to cover most governmental action in relation to the welfare state.⁵⁴ However, there seems to be a certain degree of tension between the limited competence base of the Community, which is referred to in the first sentence of article 3(1), 'within the limits of the powers conferred upon the Community', and some of the areas enumerated subsequently, like education, health care and housing.⁵⁵ Furthermore, the exact scope of other areas, like 'social advantages' and 'access to and supply of goods and services, which are available to the public, including housing' is everything but clear.

The reach of 'social advantages' is potentially very extensive. The Explanatory Memorandum of the Racial Equality Directive explicitly refers to article 7 of Regulation 1612/68 and the related jurisprudence by the ECJ concerning the free movement of workers. At first sight this concept seems to target financial contributions, granted by both private and public institutions in relation to economic integration. However, the case law of the ECJ has demonstrated that the *de facto* goal of 'social advantages' is the promotion of integration, not only economically but also socially and even culturally. Financial measures enabling *de facto* access to education and cultural activities, and more generally the overarching goal of promoting integration in the country of residence is of course also relevant for minorities, even though these grants might not be directly related to the right to identity of minorities.⁵⁶

The interpretation of the concept 'social advantages' in the context of the prohibition of racial discrimination by the ECJ is eagerly awaited, and *inter alia* the question whether and to what extent the Court will be willing to qualify also language rights (and not merely financial grants) in relation to public authorities and media (etc.) as social advantages, in view of their importance for the overarching goal of integration. Indeed, the language used is often an important factor determining whether or not access to a service or good is effective and real.⁵⁷

Finally, it also remains open to speculation what the reach will be of 'services available to the public'. Particularly relevant questions here are what dimensions of policing (if any) would be covered,⁵⁸ to what extent political participation in (other) public institutions would be included, whether this would have a bearing on 'integration obligations' imposed by certain states etc.

⁵⁴ Ch. Brown, 'The Racial Equality Directive: Towards Equality for All the Peoples of Europe', *Yearbook of European Law* 2002, 213 who underlines that various areas of every day life which are important for the integration of ethnic minorities are covered.

⁵⁵ Considering the limited legislative powers that have been granted to the Community in relation to health care, education, housing and social welfare, it is questionable to what extent the Community can impose obligations on Member States to combat discrimination (*inter alia* M. Bell, 'Beyond European Labour Law? Reflections on the EU Racial Equality Directive'... 386-390; Brown, 'The Racial Equality Directive...', 214. Note however that it has been argued that article 13 TEC, the treaty basis for the Racial Equality Directive, would be a functional competence base, which would enable to impose restrictions in policy domains which actually belong to member states. The prohibition of racial discrimination would have to be respected when member states exercise their powers (in whatever domain): A.P. van der Meij, 'Het Verbod van Onderscheid op grond van Ras bij Sociale Bescherming en Sociale Voordelen', *CGB Oordelenbundel* (Utrecht: CGB, 2005), 188.

⁵⁶ Brown, 'The Racial Equality Directive ...', 213-214; van der Meij, 'Het Verbod van Onderscheid op grond van Ras...', 186-189. See ECJ, Cristini, C-32/75 and ECJ, Even, C-207/78.

⁵⁷ See also *supra* in relation to the duties 'flowing' from the prohibition of indirect discrimination on the basis of race, and this has similar repercussions for 'access to goods and services available to the public'.

⁵⁸ See also Brown, 'The Racial Equality Directive: ...', 215. For a comprehensive overview of relevant dimensions of policing in relation to minorities, see Recommendations on Policing in Multi-Ethnic Societies (The Hague: HCNM, 2006).

2.2. Opening towards substantive equality?

Prior to reviewing the provisions of the Racial Equality Directive, it seems appropriate to point out that it is widely agreed that the prohibition of discrimination does not require identical treatment, in other words, not every differentiation amounts to a prohibited discrimination.⁵⁹ Consequently, it is important to know what are the criteria used to determine whether a differentiation amounts to a prohibited discrimination or, in other words, what is an acceptable justification for a differential treatment. By way of starting point,⁶⁰ it can be put forward that a differentiation of treatment would amount to a prohibited discrimination when and in so far as there would not be a reasonable and objective justification for this differentiation.⁶¹ Such a justification is often further broken down in a requirement of a legitimate aim and a proportionality test. The proportionality test in the broad sense has at least two components.⁶² First, proportionality requires there to be a reasonable relation between the legitimate aim on the one hand and the differential treatment (and the underlying interests which it interferes with) on the other hand. In other words, the differential treatment should not go beyond what is necessary in order to achieve the goal.⁶³ This first component is also called the proportionality test in the narrow sense. A more specific aspect of the proportionality test concerns the subsidiarity test. This test implies an investigation of whether there are no alternatives which can achieve the desired legitimate aim while implying less of an interference with the right to equal treatment.

This already clarifies that not all differential treatment, and thus not all special minority provisions, are necessarily contrary to the prohibition of discrimination. This understanding of the prohibition of discrimination thus implies in itself an opening towards substantive equality. It may be obvious though that a lot depends on how strict this proportionality test is, which is *inter alia* determined by the level of scrutiny adopted.⁶⁴

It should be highlighted that in terms of EU law, the above general justification possibility is only accepted in relation to indirect discrimination. Direct differentiations are only considered to be legitimate (in that they would not amount to a prohibited discrimination) when there is an explicit ground in the treaties or secondary legislation, and in addition the demands of the proportionality principle would be met.⁶⁵ In view of the fact that the Racial Equality Directive only allows two exceptions to the prohibition of direct discrimination,⁶⁶ the protection against explicit differentiations on the basis of racial or ethnic origin is considerable.⁶⁷

⁵⁹ For a more detailed analysis of the various universal and regional non-discrimination provisions as well as the concomitant (quasi-)jurisprudence of the supervisory bodies, see K. Henrard, 'Non-Discrimination and the Equality Principle...', at 14-18. See *inter alia* HRC, General Comment no 18, para 8 and 13.

⁶⁰ See *infra* for the particular stance of EC law in this respect, as well as for the various refinements that have been made to this understanding of the prohibition of discrimination.

⁶¹ HRC, General Comment no 18, para 13.

⁶² J.H. Gerards, *Rechterlijke Toetsing aan het Gelijkheidsbeginsel* (The Hague: Sdu, 2002), 102.

⁶³ ECtHR, *Karner v Austria* (24 July 2003), para 41.

⁶⁴ J.H. Gerards, *Rechterlijke Toetsing aan het Gelijkheidsbeginsel...*, 79-84.

⁶⁵ However, it should be noted that occasionally this narrow possibility of direct differentiations has felt to be unreasonable, leading to a discussion about the (limited) possibility of justifying direct discrimination (see *inter alia* Ellis, *EU Anti-Discrimination Law...*, 111-113).

⁶⁶ See article 4 Racial Equality Directive on genuine and determining occupational requirements and article 5 on positive action. While the formulation of article 5 indeed still seems to qualify positive action as an exception to the principle of equal treatment, subsequent directives on equal treatment of men and women seem to reflect a departure from that position, see *infra*.

⁶⁷ This can also be seen as proof of a high level of scrutiny in relation to differentiations on the ground concerned. Henrard, 'Equality and non-discrimination...', 26. While this high level of scrutiny seems beneficial for minorities, this might be different if a similar high level of scrutiny is adopted *v-à-v* positive action measures in favour of minorities.

2.2.1. Indirect Discrimination

Notwithstanding the absence of a generally accepted definition of indirect discrimination in terms of international law, there is a broad understanding of the core of this concept, which addresses measures that without differentiating explicitly on a certain ground, (are likely to) have a disproportionate impact on a group defined according to that ground, without objective justification.⁶⁸

There are arguably two related reasons why indirect discrimination is relevant for minorities and an adequate minority protection. First of all, and this is inherent in the description of the phenomenon, the prohibition of indirect discrimination reflects a concern for the underlying reality, or better for the actual effect of certain policies and rules. When the effects of an at first sight neutral rule are disproportional, in the sense that it has a disparate negative impact on a particular group without reasonable and objective justification, this would be illegitimate. In other words, prohibiting such indirect discrimination tends to contribute to the realization of full or real equality, of crucial importance for minorities. The prohibition of indirect discrimination tends to further the accommodation of diversity, by revealing that apparently neutral criteria *de facto* favour the dominant culture.⁶⁹ A second reason why this prohibition of indirect discrimination is important, is because of the inherent group focus it has, as also perspires in the above description.

The extent to which a legal system provides protection against indirect discrimination, arguably depends on several issues, including whether the concept of indirect discrimination is acknowledged, and what is needed for a *prima facie* case of indirect discrimination.⁷⁰ In the framework of EC equality law, the concept of indirect discrimination was early on accepted, and the case law of the ECJ has acknowledged several times that the concept of indirect discrimination is vital for the effective protection against discrimination. However, ample confusion and uncertainty remained as to the latter issue.⁷¹

The case law of the ECJ in terms of gender discrimination was essentially codified in Article 2(2) of the Burden of Proof Directive (Council Directive 97/80/EC on the Burden of Proof in cases of Discrimination based on Sex) and required proof of actual disparity, while this 'disparity' would have to concern a 'disadvantage of a substantially higher level'.⁷² The definition of indirect discrimination in the Racial Equality Directive (article 2(2)(b)) in several respects represents an improvement in that it facilitates the burden (of proof) on the victim (claimant).⁷³

⁶⁸ Compare S. Joseph, J. Schultz and M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford, 2004), 694 with C. Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC law* (Antwerp, 2005), 57. It seems not conceptually helpful to make a strict distinction between different forms of indirect discrimination as suggested by De Schutter (*The Prohibition of Discrimination under European Human Rights Law: Relevance for EU Racial and Employment Equality Directives* (European Commission, 2005), 16) between measures that have a disparate impact and measures that in themselves appear disadvantageous to the members of a certain category (but have not yet(?) resulted in a disparate impact).

⁶⁹ Fredman, Introduction ..., 24.

⁷⁰ A third factor concerns how the justifications by the governments are assessed (what level of scrutiny is adopted).

⁷¹ Ellis, *EU Anti Discrimination Law...*, 91; Tobler, *Indirect Discrimination...*, 239.

⁷² *Ibid.*, 283-284.

⁷³ The justification test in the Racial Equality Directive also shows more obvious parallels with the general justification test outlined above. The justification test in the Burden of Proof Directive was 'unless the provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex', while the justification test in the Racial Equality Directive reads 'unless that provision... is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.

First of all, the level of disparate impact required has been lowered in that there is no longer a reference to specific proportions. It suffices that it concerns a 'particular disadvantage'. Furthermore, and this is really a remarkable progress, it is no longer necessary to prove that this disadvantage has actually occurred.⁷⁴ It suffices that the measure is of such a nature that would put a certain group at a disadvantage. This seems to negate the need for statistical evidence in terms of EC law, which is especially important in regard of racial or ethnic origin as statistics are unlikely to be obtainable.⁷⁵

Unfortunately, recital 15 of the Directive indicates that national legislation or practice concerning proof may still provide 'in particular for indirect discrimination to be established by any means including on the basis of statistical evidence'. This arguably implies that the directive still allows national legislation to require statistical evidence.⁷⁶ The ECJ's future case law⁷⁷ will reveal to what extent this new approach to indirect discrimination actually facilitates the case for victims and leads to higher levels of protection against indirect discrimination.

2.2.2. Duty to Differentiate?

An obligation to differentiate in terms of the demands of equality can be traced back to Aristotle's formula that unequal or different things should be treated differently to the extent of the difference. The underlying vision of equality is clearly substantive equality. To the extent that more recently such an obligation to differentiate is being identified in terms of non-discrimination,⁷⁸ this development would equally imply an opening towards substantive or real, full equality.

There is a steady line of jurisprudence of the ECJ in terms of both the general principle of equal treatment which it has developed in its case law and which is argued to be embodied in the Racial Equality Directive,⁷⁹ and of the prohibition of discrimination, that when people find themselves in substantially different circumstances, they

⁷⁴ Contra de Schutter (The Prohibition of Discrimination under European Human Rights Law..., 7 and his report for DH-MIN 2006, 6), who stresses that in terms of the Racial Equality Directive disparate impact discrimination is no longer explicitly included in the definition of indirect discrimination, while the new formulation should be understood as (and only as) an attempt to ease the burden of proof for the victims. See also Ellis, *Anti-Discrimination Law...*, 94; Waddington & Bell, 'More Equal than Others: Distinguishing European Union Equality Directives', 38 *Common Market Law Review* 2001, 593-594.

⁷⁵ Ellis, *EU Anti Discrimination Law* .. 94; E. Guild, 'The EC Directive on Race Discrimination: Surprises, Possibilities and Limitations', *Industrial Law Journal* 2000, 20; Tobler, *Indirect Discrimination...*, 287. See also D. Houtzager, *Changing Perspectives : Shifting the Burden of Proof in Racial Equality Cases* (Brussels : ENAR, 2006), 11.

⁷⁶ Tobler, *Indirect Discrimination...*, 287-288. Note however that this sentence is also interpreted differently, namely emphasizing the fact that it only allows, not requires states, to accept statistical data as admissible evidence (T. Makkonen, *Measuring Discrimination: Data Collection and EU Equality Law* (Luxemburg: European Communities, 2007) 29).

⁷⁷ It should be noted that this new approach to indirect discrimination is also taken up in the 2002 revision of the Equal Treatment Directive or ETD (article 2(2) of Directive 76/207 as amended by Directive 2002/73). Hence, interpretations by the ECJ in terms of that provision will also cast light on the meaning of the similar concept in the Racial Equality Directive. For an assessment of this definition in the ETD as facilitating the burden of proof by the victim while still revealing an important group focus, see M. Finlay, 'Indirect Discrimination and the Article 13 Directives', in C. Costello & E. Barry (eds.), *Equality in Diversity: The New Equality Directives* (Irish Centre for European Law, 2003), 150.

⁷⁸ See also *infra* on the European Court of Human Rights and its judgement in *Thlimmenos v Greece*.

⁷⁹ See also but that in terms of the Employment Equality Directive (Directive 2000/78/EC): ECJ C-144/4, *Mangold v Helm*, para 74-75.

should be treated differently, unless 'same' treatment is objectively justified by the pursuit of a legitimate aim and is appropriate and necessary to achieve that aim.⁸⁰

It should be pointed out that there seems to be a very close, even intrinsic relation between the concept of indirect discrimination and the duty to differentiate flowing from the prohibition of discrimination.⁸¹ Indeed, to the extent that no differential rules would be adopted for persons in substantially different situations the application of the neutral rules would (be likely to) have a disproportionate negative impact on the group concerned and would thus amount to indirect discrimination.

The famous *Groener* case already showed that a general application of language requirements (affecting the free movement of workers) can be denounced as indirectly discriminatory on the basis of nationality, when these requirements do not pursue a legitimate objective and/or are not proportionate to that objective.⁸² According to de Schutter, 'a similar obligation to treat differently situations which are substantively different may be derived from the definition of indirect discrimination in article 2(2)(b) of the Racial Equality Directive'.⁸³

In this respect it should be highlighted that in terms of article 5 of the Employment Equality Directive employers have a duty of reasonable accommodation with respect to candidates or employees with a disability. While this directive does not contain a similar provision in relation to persons belonging to a minority religion,⁸⁴ and the Racial Equality Directive does not contain a provision on the reasonable accommodation of the specific needs of the members of certain ethnic groups, the duty to differentiate that can be deduced from the prohibition of (indirect) discrimination could go a whole way in remedying this lacuna.⁸⁵ Interestingly, the ECJ has been willing to accept, already in 1976, a duty to reasonably accommodate also minority religions in the adoption of generally applicable measures as flowing from the general principle of equality.⁸⁶

It is important to realize that this type of differential measures are not necessarily temporary (in contrast to affirmative action measures⁸⁷).⁸⁸ In view of the need for enduring differential treatment in order to protect and promote the separate identity of minorities, this jurisprudential line is especially relevant for minorities, for example in relation to language rights in communications with public authorities.

⁸⁰ Case C-56/94, SCAC [1995] ECR I-1769, para 27; Case C-15/95, EARL de Kerlast [1997] ECR I-1961, para 35; Case C-354/95, National Farmers Union and Others [1997] ECR I-4559, para 61; C-292/97, Karlsson [2000] ECR I-2737, para 39. See also E. Guild, 'The EC Directive on Race Discrimination: Surprises, Possibilities and Limitations', *Industrial Law Journal* 2000, 419. See however, J.H. Gerards, *Rechterlijke Toetsing aan het Gelijkheidsbeginsel* (The Hague: Sdu, 2002), 229.

⁸¹ See Fredman, Introduction..., 32-36 who discusses the question 'when a state is required to differentiate between groups' entirely through the prism of indirect discrimination or disproportionate/disparate impact. See also Tobler, *Indirect Discrimination...*, 218.

⁸² Case C-379/87, *Groener* [1989] ECR 1967, para 19 and 23.

⁸³ De Schutter, *Report for DH-MIN 2006...*, 7.

⁸⁴ See *infra* on the relation between the concepts 'religion' and 'race'.

⁸⁵ *Inter alia* De Schutter, *The Prohibition of Discrimination under European Human Rights Law...*, 39 and 45-46.

⁸⁶ ECJ, case C-130/75, *Viven Prais v Council* [1976] ECR 1589, para 19, where the Court identifies an obligation to take reasonable steps to avoid fixing a date for a test (competition for a position) which would make it impossible for a person of a particular religious persuasion to undergo the test, but only when the authority was informed of this requirement beforehand.

⁸⁷ In view of the ECJ's reluctant stance towards affirmative action measures (but see analysis immediately following), it is unlikely that the ECJ will be willing to stretch the 'obligation to differentiate' for persons in substantively different situations, to an obligation to adopt affirmative action measures.

⁸⁸ M. Freeman, 'Temporary Special Measures: How Long is Temporary and What is Special?', in I. Boerefijn et al (ed.), *Temporary Special Measures* (Antwerp, 2003), 100.

2.2.3. Positive Action

The starting point needs to be that there is not one set definition of the concepts 'positive action' and 'affirmative action',⁸⁹ let alone of the relationship between the two concepts. Sometimes positive action is seen as the broader category, including affirmative action, sometimes affirmative action is seen as the wider category.⁹⁰ While both concepts concern 'special' measures which are aimed at addressing historical and/or structural disadvantages and reaching a higher degree of real or substantive equality, the basic issue seems to be to what extent these measures remain within the realm of 'equal opportunities' or go beyond that to the realm of 'equality of results', which tends to be controversial.⁹¹ In this report the concept 'positive action' will be used as the umbrella concept. It should be pointed out that 'positive action' is not necessarily limited to redressing historical disadvantage but can also concern more preventive measures which aim at a workforce, student body etc. which is representative of the population diversity in a state. The aim to address historical and/or structural disadvantages in any event implies an attention for groups and an incorporation of the group justice model.⁹²

It is generally accepted that the prohibition of discrimination determines the outer limits of legitimate positive action measures.⁹³ In terms of the general justification model this would require a legitimate aim and measures which are proportionate to that aim. While the legitimate aim of affirmative action measures seems a given, namely to contribute to the achievement of substantive equality, there is still the additional need for the measures concerned to be proportional. The latter tends to be the most contentious factor, and the situation in terms of EC law is further complicated by the fact that direct differentiations require an explicit legislative basis.

The rather restrictive approach of the ECJ in relation to positive action measures in the field of EC law on gender equality has been amply assessed.⁹⁴ So far there is no positive action case law in terms of the Racial Equality Directive or any of the other post 1999 legal provisions.⁹⁵ The existing case law is virtually entirely⁹⁶ in terms

⁸⁹ Various other terms are also used to cover a similar load, like 'temporary special measures', 'positive discrimination' etc. See also Ch. McCrudden, 'International and Legal Norms Regarding National Legal Remedies for Racial Equality', in S. Fredman (ed.), *Discrimination and Human Rights: the Case of Racism* (Oxford, 2001), 277.

⁹⁰ Compare in this respect Caruso, 'Limits of the Classic Method...', 332 with McCrudden, 'Rethinking Positive Action', 1986 *ILL*, 219.

⁹¹ For a more refined vision of equality of opportunity, see Bell and Waddington, 'Reflecting on Inequalities in European Equality Law'..., 353. See also Thematic Comment no 3 of the EU Network of Independent Experts on Fundamental Rights, April 2005, 25, where it is argued that special measures aimed at equal opportunity would be 'affirmative action' or 'positive action sensu strictu' but would rather be the other side of the coin of the prohibition of indirect discrimination.

⁹² Caruso, 'The Limits of the Classic Method...', 357; Waddington & Bell, 'Reflecting on inequalities in European Equality Law...', 354-355.

⁹³ See also *infra* the discussion in chapter 3.

⁹⁴ See *inter alia* Caruso, 'The Limits of the Classic Method...'; S. Pager, 'Strictness and Subsidiarity: An Institutional perspective on affirmative action at the ECJ', *Boston College International and Comparative Law Review* 2003; C. Costello, 'Positive Action', in C. Costello & E. Barry (eds.), *Equality in Diversity: the new equality directives* (Irish Centre for European law, 2003), 177-212. This restrictive approach can also be related to a symmetrical approach to non-discrimination.

⁹⁵ See *infra*.

⁹⁶ There is one judgement in which the ECJ also analysed the matter in terms of article 141(4) TEC (see *infra* C-407/98).

of article 2(4) of the Gender Equal Treatment Directive (ETD)⁹⁷ prior to its amendment in 2002. In that case law, positive action measures are seen as exceptions to the principle of formal equal treatment, and hence restrictively interpreted, despite the opening clause in article 2(4). The most relevant case law in this respect is captured in *Kalanke* and *Marshall*. The Court ruled that the affirmative action measure at hand in *Kalanke v Hansestadt Bremen* was illegitimate because it automatically gave priority to women when they were equally qualified as men.⁹⁸ In *Marshall v Land Nordrhein Westfalen* the Court added an important qualification by indicating that a state law that gave preference to a woman in a tiebreak situation is acceptable as long as an apparently equally qualified man was considered on his individual merits.⁹⁹ In other words, quota (in relation to access to employment) are only acceptable in so far as they contain a savings clause which ensures that the candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates.

While this formula has been repeated in subsequent case law, important shifts were realized and further refinements were added concerning the treatment of positive action.¹⁰⁰ *Badeck* revealed that once the priority does not amount to the actual award of a position of employment (only consisting in measures ranging from vocational training up to the selection of candidates for interviews), quite strong preferences may be employed.¹⁰¹

Abrahamsson concerned the application of a national rule which gave automatic priority to a person of the under-represented sex who had qualifications which were adequate but inferior in minor respects to those of the person who would otherwise have been appointed. In this judgement the measure is assessed both in terms of article 2(4) ETD and of article 141(4) TEC. In terms of the former the above formula is used and the Court could easily conclude that the conditions for article 2(4) ETD were not met.¹⁰² In terms of the latter however, it has been argued persuasively that the ECJ has elevated the proportionality test to the central test, which would imply a departure from the previous strict scrutiny test.¹⁰³ Since *Lommers* concerns a 'soft measure' of preferential access for women to subsidized childcare, the softer scrutiny visible in *Badeck* was not surprising. The Court furthermore extended its emphasis on the proportionality test which it had announced in *Abrahamsson*.¹⁰⁴

Schnorbus is particularly interesting as it confirms the fact that the prohibition of discrimination determines the outer limits of positive action measures. It concerns a rule which benefited men because compulsory military service (only existing for men) was taken into account in decisions on admission for legal training. Notwithstanding the Court's acknowledgement that this relates to article 2(4) ETD, it does not use the formula it has developed for article 2(4) but the milder objective justification test (for indirect discrimination) instead. This seems to indicate that narrowly tailored positive action measures, which seek to remedy specific disadvantages through indirectly rather than directly discriminatory measures, are not subject to the rigors of a review under article 2(4).¹⁰⁵

⁹⁷ Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39, 14.2.1976, p.40. That provision states: "This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1 (1)."

⁹⁸ C-450/93, [1995] ECR I-3051.

⁹⁹ C-409/95, [1997] ECR I-6363, para 29-30.

¹⁰⁰ See *inter alia* Costello, 'Positive Action'..., 185-196.

¹⁰¹ C-158/97, [2000] ECR I-1875, para 53-54.

¹⁰² C-407/98, [2000] ECR I-5539, para 45-53.

¹⁰³ Caruso, 'The Limits of the Classic Method...', 344.

¹⁰⁴ C-476/99, [2002] ECRI-2891, para 38-47.

¹⁰⁵ Costello, 'Positive Action...', 195.

Since the Amsterdam Treaty the TEC has a formulation which acknowledges the aim of positive action as being full, substantive equality¹⁰⁶ (article 141(4) TEC).¹⁰⁷ The new formulations also clearly indicate that not only measures redressing but also preventing disadvantages would be covered. This formulation has been taken up in the two directives of 2000. Article 5 of the Racial Equality Directive stipulates: 'with a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin'.¹⁰⁸

It is expected that the various developments described above, including the acknowledgement of the goal of substantive equality, the further openings towards strategies of equality of results in regard to the 'softer' positive action measures, and the dominant place for the proportionality test, will be continued in terms of the Racial Equality Directive. It has been argued that the Court might even adopt a more lenient approach concerning positive action measures in terms of race or ethnic origin, because of the different social context.¹⁰⁹

2.2.4. Duty to Promote Equality: Positive obligations

Because pro-active models of equality are clearly more effective in tackling systemic and structural discrimination, they can also be connected to substantive equality.¹¹⁰ Positive duties in relation to equality have already been identified in relation to indirect discrimination,¹¹¹ but so far the ECJ has not yet identified a duty to adopt positive action measures.¹¹² While there are a few traces of pro-active approaches towards equality in the EU,¹¹³ more could and should be done.¹¹⁴ A duty to mainstream equality considerations would be important in this respect. However, this has so far been confined to the gender sphere.¹¹⁵ Bell highlights the potential of the Constitution in this respect¹¹⁶ since it introduces a general duty to mainstream equality, also in relation to racial or ethnic origin. It should also be highlighted that the latter mainstreaming provision goes beyond a duty to merely taking into account, but also includes a duty to actually integrate equality as an aim of all EU policies.¹¹⁷

¹⁰⁶ See also *Briheche* (C-319/03), which acknowledges for the first time that article 2(4) ETD is aimed at achieving substantive equality.

¹⁰⁷ J. Swiebel, 'What could the EU learn from the CEDAW convention?', in I. Boerefijn et al (eds.), *Temporary Special Measures* (Antwerp, 2003), 55.

¹⁰⁸ See also article 7(1) Employment Equality Directive and Directive 2002/73/EC.

¹⁰⁹ Waddington & Bell, 'More Equal than others ...', 603.

¹¹⁰ R. Holtmaat & Ch. Tobler, 'CEDAW and the EU's Policy in the Field of Combating Gender Discrimination', 12 *MJ* 2005, 408.

¹¹¹ See above. See also EU Network of Independent Experts on Fundamental Rights, Thematic Comment no 3, p 22, where the duty to promote full and effective equality in terms of article 4 FCNM is related to the duty to differentiate in terms of the prohibition of discrimination. The absence of special measures in order to achieve full and effective equality would amount to a failure to provide effective accommodation to meet the specific needs of certain categories which would be indirectly discriminatory.

¹¹² Holtmaat & Tobler, 'CEDAW and the EU ...', 414.

¹¹³ See S. Fredman, 'Changing the Norm: Positive Duties in Equal Treatment Legislation' 12 *MJ* 2005, 391-398.

¹¹⁴ Holtmaat & Tobler, 'CEDAW and the EU ...', 401.

¹¹⁵ Inter alia Fredman, 'Changing the Norm ...', 374. See article 3(2) TEC.

¹¹⁶ M. Bell, 'Equality and the EU Constitution', *Industrial Law Journal* 2004, 252. He also emphasizes the potential of the national equality bodies that need to be established in terms of *inter alia* the Racial Equality Directive (*ibid.*).

¹¹⁷ *Ibid.*, 254-255.

The Racial Equality Directive does not contain any explicit positive, pro-active duties. It remains to be seen whether the ECJ will become more active in the identification of duties to promote equality, inter alia through a progressive interpretation of the prohibition of indirect discrimination.¹¹⁸

2.3. Relevance of international law (versus the autonomous nature of EC law)

The most extensive body of case law and doctrine concerning autonomy of EC law has been written in relation to the national legal systems of the member states.¹¹⁹ However, the autonomy of EC law is also invoked in relation to international law and the interpretation by other supervisory bodies. The basic idea behind the autonomy of EC law lies in the indivisible nature of its system of law, which means that the normative content of Community law is independent from any other rule or system of law. This in turn implies that the nature, scope and legal effects of Community Law cannot be modified in any way by national or international law, unless Community Law itself provides otherwise, either in its legal documents or through the case law of the ECJ.¹²⁰ The ECJ has always acknowledged that general international law (international customary law and general principles of law) is binding on the Community. However, the actual legal effects to be given to these international law norms are not that clear.¹²¹ This is even less the case for international agreements concluded by the Member States. Nevertheless, it can be argued that article 53 of the Charter of Fundamental Rights of the European Union implies that when all member states have ratified international agreements (on human rights), these are meant to influence the interpretation of related provisions of EC law.¹²²

International conventions are not irrelevant for the Community legal order, but the ECJ is not bound by them, and certainly does not need to follow the jurisprudence by their supervisory bodies. These conventions and related supervisory practice should rather be seen as source of inspiration, of a possible persuasive character for the ECJ, as has been the case for the case law of the European Court of Human Rights for decades.¹²³ Considering the practice of the ECJ of referring fairly frequently to the case law of other international supervisory bodies, it can be argued that 'the ECJ seems to give special relevance to the case law of international courts and tribunals, if the court or tribunal in question constitutes a generally accepted adjudicatory body set up to interpret rules of international law that have a special significance for the EU legal order'.¹²⁴

¹¹⁸ The ECJ might be inspired by the acknowledgement of the need for pro-active measures to combat discrimination in article 1(a) of the ETC Directive 2002/73.

¹¹⁹ *Inter alia* R. Barents, *The Autonomy of Community Law* (The Hague: KLI, 2004); Th. Schilling, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations', 37 *Harvard International Law Journal* 1996, 389-409; J.H.H. Weiler & U. R. Haltern, 'The Autonomy of the Community Legal Order – through the Looking Glass', 37 *Harvard International Law Journal* 1996, 411-448.

¹²⁰ Barents, *The Autonomy of Community Law*, 261.

¹²¹ P. Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford: OUP, 2004), 324.

¹²² Article 53 'Level of Protection': 'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.' See also K. Henrard, 'An investigation into the desirable, and possible role of the Language Charter in expanding on article 22 of the EU's Charter of Fundamental Rights', www.ciemen.org/mercator.

¹²³ Eeckhout, *External Relations of the EU*, 262.

¹²⁴ A. Rosas, 'The European Court of Justice: Sources of Law and Methods of Interpretation', in G. Sacerdoti et al (eds.), *The WTO at ten: the Contribution of the Dispute Settlement System* (Cambridge: CUP, 2004), 488-489.

In other words, it is not unlikely that the ECJ will be influenced by steady lines of jurisprudence in relation to non-discrimination provisions of other supervisory organs. Notwithstanding the fact that the supervisory bodies of the UN Human Rights treaties are not courts or tribunals, and the few supervisory mechanisms that are in place in relation to minority specific standards do not have the power to receive complaints, their supervisory practice might still be influential in the areas of their respective expertise. Nevertheless, as will be further explained *infra*, the level of technical analysis of these non-tribunals is rather low, with the exception maybe of the Human Rights Committee (ICCPR). It remains in any event to be seen to what extent the ECJ, who has itself a rich and technical jurisprudence in relation to equality and non-discrimination, will be influenced by the practice of other supervisory bodies.

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Part III

International law provisions on non discrimination and minorities¹²⁵

¹²⁵ This chapter heavily draws on two reports I wrote for the Council of Europe: DH M IN (2006) 020 and DH MIN (2006)021 on the impact of international non-discrimination norms in combination with general human rights for minority protection (the ECHR and several UN Conventions); as well as an article entitled 'Non-Discrimination and the Equality Principle', to be published in the book edited by M. Weller, *Jurisprudence Digest: Minority Protection*, OUP, 2006, 57 p.

This chapter consists of two parts. While it is focused on the international provisions on equality and non-discrimination, a division is made between the relevant provisions as they appear in non-minority specific instruments (A) and provisions in minority specific instruments (B).

3.1. Non discrimination provisions in non-minority specific instruments

The assessment in this part will follow the thematic structure used in relation to the evaluation of the Racial Equality Directive in chapter 2. Per theme reference will be made to the text and/or the supervisory practice of the following conventions:¹²⁶ the International Covenant on Civil and Political Rights (ICCPR, articles 2 and 26)¹²⁷, the International Covenant on Economic, Social and Cultural Rights (ICESCR, article 2), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the European Convention on Human Rights (ECHR, article 14 and the 12th additional protocol)¹²⁸, and the European Social Charter (article 1(2) of the 1961 version¹²⁹ and article F of the revised version).¹³⁰

¹²⁶ While ECRI General Policy Recommendation no 7 on National Legislation to Combat Racism and Racial Discrimination does not have an intergovernmental origin, and is not legally binding, it is still adopted by a body of Council of Europe with specific expertise in the matter and hence carries de facto authority. It is relevant to refer to it because it draws not only on the same instruments which are also taken into account by the Racial Equality Directive but also to that Directive itself (see also G. Cardinale, 'The Preparation of ECRI General Policy Recommendation no 7 on National Legislation to Combat Racism and RD', in J. Niessen & I. Chopin (eds.), *The Development of Legal Instruments to Combat Racism in a Diverse Europe* (The Hague: Martinus Nijhof, 2004) 83-84). For a more extensive discussion, see E. Howard, 'Anti Race Discrimination Measures in Europe: An Attack on two fronts', *European Law Journal* 2005, 468-486. Interestingly, ECRI's Recommendation (and the Explanatory Memorandum) is more explicit on a couple of issues which could be particularly relevant for the interpretation of certain concepts. Examples here are the definition of racism, and the inclusion of 'public services', which are said to encompass the activities of police and other law enforcement officials. It should also be noted that the Recommendation underlines that criminal sanctions cannot be left out. See also CERD/C, *Lacko v Slovakia*, Communication 11/1998, para 6.3; *Dragan Durmic v Serbia-Montenegro*, Communication 29/2003, para 9.3. In view of the persistent problems (since 2001) in the adoption of a Framework Decision on combating racism and xenophobia a similar development under the Racial Equality Directive is not likely. However, the landmark decision of the ECJ (C-176/03) should be kept in mind.

¹²⁷ It should be noted that in article 2 ICCPR, the word discrimination does not feature – only the word 'distinction'. Nevertheless, it is obvious, and also is clear in General Comment no 18 (paragraph 1 and following) that the HRC understands 'distinction' as 'discrimination'. There are also other articles on equality, which are however not included in this evaluation, as they seem beyond the scope of this report: Article 3 focuses on equal rights for men and women, and thus concerns only the gender dimension Article 23, para 4 ICCPR is also relevant in this respect as it concerns the equality of rights of spouses. Note also that article 24 contains a non-discrimination provision in relation to children and their right to be protected as minors: HRC, General Comment no 18, para 5.

¹²⁸ In regard to the ECHR, it should be highlighted that so far ECtHR has not yet pronounced a judgment in terms of the 12th protocol. Consequently, the only document that can be drawn upon for further clarifications is its Explanatory Memorandum. It is expected that the principles developed so far in relation to the prohibition of discrimination will be followed as well in relation to Protocol No. 12.

¹²⁹ Article 1(2) may not be an explicit non-discrimination provision, it has been interpreted as such by the supervisory body, the European Committee of Social Rights.

¹³⁰ It should be acknowledged though that the supervisory practice of the European Committee of Social Rights in relation to the European Social Charter is not consistently addressed.

3.2. Reach of the prohibition of Discrimination

3.2.1. Scope of application *ratione personae*

A first distinction that needs to be made is between open and closed systems in relation to the grounds of discrimination included in a certain provision. Most regional instruments have an open enumeration of prohibited grounds of discrimination, ending with a catch-all provision like 'or other status'.

At UN level there are in addition to the general human rights conventions, ICCPR and ICESCR, also issue specific conventions that focus on the prohibition of discrimination on a single ground, namely race (ICERD) and gender (CEDAW).

While there are differences between the grounds that are explicitly enumerated in the open models, the following are usually present and are of special relevance to minorities: race, and religion or belief. Others, that are equally relevant but do not feature in the majority of conventions are language (ICCPR and ICESCR), and association with a national minority (ECHR and the European Social Charter).¹³¹ While ethnic origin or ethnicity and colour are also not consistently present, they are largely understood as being encompassed by the concept 'race' (see *infra*). One might argue that it does not really matter, because open models are open and have a catch- all expression, like 'or other status' which would cover the ones that are not mentioned.

The fact that article 14 ECHR includes as ground of prohibited discrimination 'association with a national minority' seemed to reflect, right from the start, a concern that the contracting states should not neglect the minority issue. Nevertheless, traditionally the ECtHR was rather restrictive in its assessment of claims put forward by members of minorities.¹³² In regard to claims of discrimination on this ground, it should be pointed out that the Court sometimes does not address that ground, and even if it does, it chooses not clarify it in any way.¹³³

In regard to the prohibited ground of discrimination 'race', it should be highlighted that ICERD includes under racial discrimination, discrimination on the basis of race, colour, descent, and national or ethnic origin. Arguably this implies that 'race' is interpreted as encompassing 'colour, descent and national or ethnic origin'. The Committee on the Elimination of All Forms of Racial Discrimination (CERD/C) has in its practice, especially in relation to concluding observations to periodic state reports, also addressed issues pertaining to language. It has for example urged states to maintain the possibility for the various ethnic groups of receiving instruction in their languages¹³⁴ as well as of using their mother tongue in private and in public.¹³⁵

¹³¹ It should be highlighted that Protocol no. 12 also has an open enumeration of prohibited grounds of discrimination, which is identical to the one in article 14 ECHR.

¹³² *Inter alia* A. Fenet, 'Europe et les Minorités', in A. Fenet et al (eds), *Le Droit et les Minorités: Analyses et Textes* (Bruxelles, 1995) 97, 102; Gilbert, 'The Legal Protection Accorded to Minority Groups in Europe', N. Y.B. I.L. 1992, 90.

¹³³ ECtHR, *Ozgur Gundum v Turkey* (16 March 2000), para 75.

¹³⁴ UN Doc. CERD/C/304, Add.51, para 13 (Armenia); UN Doc. CERD/C/304/Add.46, para 13 (Netherlands).

¹³⁵ UN Doc. CERD/C/304/Add.38, para 15 (Macedonia).

Similarly CERD/C has indicated that in terms of the Convention specific legislation may be required on the status of languages.¹³⁶ Also in its views it is obvious that CERD/C is of the opinion that language requirements for employment could amount to (indirect) racial discrimination, to the extent that there would not be a reasonable and objective justification for these requirements.¹³⁷

It is equally obvious that 'race' and 'religion' intersect and overlap,¹³⁸ giving rise to several borderline cases, especially since 9/11 and the rise of Islamophobia.¹³⁹ Similarly, it is widely understood that there is a considerable overlap between minority ethnic communities and foreigners or non-nationals.¹⁴⁰ In other words, differential treatment on the basis of nationality could possibly hide a differential treatment on the basis of race, which could be revealed by a disproportionate impact on a racial (or ethnic) group. This underscores again the importance of the concept 'indirect discrimination'. Nevertheless, ICERD (article 1, par 2) explicitly exclude differentiations on the basis of nationality from the scope of the prohibition of racial discrimination. However, it should be highlighted that in its General Recommendation no 30 of 2004 on discrimination against non-citizens, CERD/C drastically reduces the permissibility of differential treatment on the basis of nationality.¹⁴¹ It is explicitly highlighted that article 1, para 2 of ICERD should not undermine the basic prohibition of racial discrimination, which indirectly acknowledges the link with indirect discrimination on the basis of race.¹⁴² This position can also be identified in the supervisory practice of other bodies, albeit in different degrees. CESCR/C's statement in its General Comment on Education and Water that nationality should not be the basis of differentiation,¹⁴³ arguably indicates that differentiation on the basis of nationality is only in very limited circumstances justified. Similarly, the HRC underlines that the relevant circumstances in each case should be carefully reviewed to determine whether a differentiation on the basis of nationality is objective and reasonable. It seems rather critical towards the justifications offered for such differentiation.¹⁴⁴

¹³⁶ UN Doc.CERD/C/65/CO/3, para 12 (Kazakhstan).

¹³⁷ CERD/C, Emir Sefic v Denmark, (communication 032/2003), para 7.2.

¹³⁸ M. Bell, 'Setting Standards in the Fight against Racism: a Comparison of the EU and the Council of Europe', in J. Niessen & I. Chopin (eds.), *The Development of Legal Instruments to Combat Racism in a Diverse Europe* (Dordrecht, 2004), 219.

¹³⁹ P.Thornberry, 'Confronting Racial Discrimination: A CERD Perspective', 5 *Human Rights Law Review* 2005, 259.

¹⁴⁰ *Inter alia* Bell, Setting Standards..., 218-219.

¹⁴¹ W. VandenHole, *Non-Discrimination and Equality in the view of the UN Human Rights Treaty Bodies* (Antwerp: Intersentia, 2005), 91.

¹⁴² CERD/C, General Recommendation no 25, para 2, and also 4.

¹⁴³ UN Doc. HRI/GEN/1/Rev. 7, General Comment no 13 (1999), The Right to Education, para 30 and 34; UN Doc. HRI/GEN/1/Rev.7, General Comment no 15 (2002), The Right to Water, para 16(f).

¹⁴⁴ See *inter alia* HRC, Karakurt v Austria (Communication 965/00), para 8.4. See also HRC, Kriz v Czech Republic (communication 1054/2002, 1 November 2005), para 7.3. See also HRC, Adam v Czech Republic (Communication no 586/1994, 23 July 1996), para 12.6; HRC, Blazek v Czech Republic (Communication 857/1999), para 5.8; HRC, Marik v Czech Republic (Communication 945/2000), para 6.4.

The ground of ethnic origin features prominently in the framework of ICERD and it should be highlighted that the Committee pays specifically attention to problems of minorities in terms of this ground of differentiation. Strikingly, CERD/C even draws conclusions concerning the definition of minorities, which should not be too restrictive.¹⁴⁵ The special attention for minorities in terms of ICERD, is also visible in its elaboration of a General Recommendation on Roma.¹⁴⁶ At the same time this special attention for Roma also reflects substantive equality considerations in the sense that their particularly vulnerable situation requires extra attention.¹⁴⁷

In relation to the extent to which the prohibition of racial discrimination reaches into the private sphere, this depends on the extent to which the positive state obligations imposed on the state require it to ensure the respect of the prohibition of discrimination also in the relations between private parties (see *infra*).

3.2.2. Scope of application *ratione materiae*

The scope of application *ratione materiae* of the international conventions is not affected by similar competence limitation as the EU documents. However, limitations ensue in case a prohibition of discrimination would not be general but would be accessory, because this means that the prohibition of discrimination would only apply in relation to the other rights enshrined in the instrument concerned. The non-discrimination provision of the ICESCR and the European Social Charter is accessory, while both the ICCPR¹⁴⁸ and the ECHR contain an accessory (article 2 ICCPR and 14 ECHR¹⁴⁹) as well as a general prohibition of discrimination (article 26 ICCPR and the 12th Additional Protocol to the ECHR).

In relation to ICERD, it should be pointed out that article 2 reveals that the contracting states accept a general obligation to eliminate racial discrimination in all its forms. The enumeration of rights in article 5, the non-discriminatory enjoyment of which has to be ensured, does not restrict the generality of this obligation as it concerns very broad categories of rights (political rights, civil rights, economic, social and cultural rights). Furthermore the enumeration is not exhaustive, as is reflected in the words 'notably' and 'in particular'.¹⁵⁰

¹⁴⁵ See also CERD/C, Concluding Observations on Estonia, A/57/18, para 356; and CERD/C, Concluding observations on Ukraine, A/56/18, para 376.

¹⁴⁶ CERD/C, General Recommendation no 27: Discrimination against Roma.

¹⁴⁷ See also the identification of various shortcomings of the Racial Equality Directive in relation to an adequate protection and integration of the Roma, which leads the EU Network of Independent Experts on Fundamental Rights to argue for the indispensability of a Directive specifically aimed at Roma: Thematic Comment no 3: The Protection of Minorities in the European Union, 2005, 52-55.

¹⁴⁸ HRC, General Comment no 18, para 12.

¹⁴⁹ The lack of a general prohibition of discrimination had given rise to ample criticism, *inter alia* by academics concerned about minority protection, which is now remedied by the 12th Additional Protocol. It should be acknowledged that the Court has nuanced the rigidity of the accessory nature of article 14 by not requiring that these other articles needed to be breached in themselves. Nevertheless, there can be no room for the application of article 14, unless the facts at issue fall within the ambit of one or more of the substantive rights of the ECHR. See *inter alia* ECtHR, *Sha'are Shalom ve Tsedek v France* (27 June 2000), para 29. The Court has tended to interpret this requirement loosely, in the sense that it rather easily accepts that the facts of a case fall within the ambit of one of the substantive provisions.

¹⁵⁰ CERD/C, General Recommendation no 20: Non discriminatory implementation of rights and freedoms (article 5), para 1.

3.3. Openings towards Substantive Equality

When comparing the justification test used by the various supervisory organs, it emerges that this is broadly similar and tends to demand a reasonable and objective justification¹⁵¹ for a differential treatment to be justified. This tends to be broken down in a requirement of a legitimate aim and a requirement that the differential treatment is proportionate¹⁵² to that legitimate aim.¹⁵³

In relation to the ICCPR it should be highlighted that General Comment no 23 gives a clear indication of the relationship between minority specific, special measures under article 27 and the prohibition of discrimination. After pointing out that states might, on the basis of article 27, have positive obligation to take special measures to protect the identity of a minority, the HRC emphasizes that ‘such positive measures must respect the provisions of articles 2, paragraph 1 and 26 of the Covenant, both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population. However, as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria’.¹⁵⁴ Arguably, the special measures concerned are not inherently temporary.

3.3.1. Indirect discrimination

When considering the UN Treaty Bodies, the practice in relation to indirect discrimination is very uneven. Both CERD/C and CEDAW/C have adopted from the beginning a very positive stance in regard to indirect discrimination.

¹⁵¹ Until 2005 the CESCR/C had never explicitly stated that distinctions made on the basis of objective and reasonable criteria did not amount to discrimination (vandenHole, *UN Human Rights Treaty Bodies...*, 63). However in its General Comment no 16 on the Equal Rights of Men and Women to the enjoyment of all Economic, Social and Cultural Rights, the Committee explicitly included the criterion of objective justification (para 12).

¹⁵² It should be underscored that this proportionality test can be more or less strict, depending on the actual level of scrutiny adopted. For a further elaboration on the level of scrutiny in relation to the prohibition of discrimination and minority protection, see inter alia K. Henrard, *The Impact of International non-discrimination norms in combination with general human rights for the protection of national minorities: The European Convention on Human Rights*, October 2006, DH-MIN (2006)021prov, 11-13, 17-18.

¹⁵³ The ECtHR has in any event a long line of established jurisprudence since the Belgian linguistics case (23 July 1968, para 10). The HRC does not use the terms legitimate aim and proportionality, but does investigate whether the distinction is objective and reasonable, the latter implying proportionality considerations (HRC, Lahcen BM Oulajin and Mohammed Kaiss v the Netherlands, Communication 406/1990 and 426/1990, 23 October 1992, para 7.4; HRC, Sister Immaculate Joseph and 80 teaching sisters of the Holy Cross of the Roder of Saint Francisco in Menzinger v Sri Lanka, Communication 1249/2004, 21 October 2005, para 7.4.) In its General Comment no 18 (para 13) and its quasi case law the Committee emphasizes that the prohibition against discrimination does not make all differences of treatment discriminatory since a ‘differentiation based on reasonable and objective criteria does not amount to a prohibited discrimination’ (see also R. Hanski & M. Scheinin, *Leading Cases of the Human Rights Committee* (Abo, 2003), 326). The General Comment does explicitly add that the aim of the differentiation is to achieve a purpose which is legitimate under the covenant (which is actually also subsumed under the requirement of ‘reasonable and objective criteria’ for a differentiation).

¹⁵⁴ HRC, General Comment no 23, para 6.2.

CERD/C acknowledges explicitly in its General Recommendation no 14 on the definition of the concept 'racial discrimination':

'In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin'.¹⁵⁵

This clearly amounts to an acknowledgement that the inclusion of 'effect' in addition to 'purpose' in the definition in article 1 is meant to refer to the phenomenon 'indirect discrimination'. Similarly, CEDAW/C underscores in relation to the extensive definition in article 1 of the Convention that the prohibition includes both direct and indirect discrimination, by public as well as private actors.¹⁵⁶

The supervisory practice of CERD/C confirms this acknowledgement of the concept indirect discrimination. The Committee tends to address concerns of indirect discrimination directly,¹⁵⁷ and regularly makes statements in this regard which are of specific relevance for minorities. In its concluding observations regarding Denmark for example, it stated that 'the reported prohibition of the use of the mother tongue in some of these establishments may, though aimed at facilitating integration, lead to indirect discrimination against minorities'.¹⁵⁸

The supervisory practice of the HRC for a long time lacked consistency in regard to the acceptance of the idea of 'indirect discrimination'.¹⁵⁹ This is peculiar since General Comment no 18 explicitly refers to 'effect', while the words 'or effect' have been generally understood as implying an opening towards indirect discrimination.¹⁶⁰ The HRC seems to have fully acknowledged the phenomenon of (and the prohibition of) indirect discrimination only relatively recently,¹⁶¹ more particularly in the *Althammer v Austria*¹⁶² and the *Derksen v the Netherlands*¹⁶³ decisions. Both decisions reveal a clear acknowledgement of the concept of 'indirect discrimination'.¹⁶⁴

¹⁵⁵ CERD/C, General Recommendation no 14, para 2.

¹⁵⁶ Vanden Hole, UN Human Rights Treaty Bodies..., 71.

¹⁵⁷ *Idem*, 42.

¹⁵⁸ CERD/C/60/CO/5, para 12.

¹⁵⁹ Scott Davidson, 'Equality and Non-discrimination', in Conte, Davidson and Burchill (eds.), *Defining Civil and Political Rights* (Ashgate, 2004), 167; Joseph, Schultz and Castan, *Cases, Materials and Commentary* ..., 696. Compare for example HRC, *Ballantyne et al v Canada*, para 11.5 with HRC, *Diergaardt v Namibia*, para 10.10. In the *Ballantyne* decision the HRC totally disregarded the fact that the prohibition of outdoor advertising in languages other than French would have a disproportionate impact on English traders in the province of Quebec, which is predominantly French. The Committee focused on the fact that the rule would apply equally to both French and English speaking traders. However in the *Diergaardt* decision, the HRC found a violation of article 26 ICCPR because the prohibition to civil servants not to use Afrikaans in communications over the phone or in writing would have a deleterious impact on Afrikaans speakers. Also in this case, the measure applied to everyone irrespective of ethnic background though.

¹⁶⁰ Joseph, Schultz and Castan, *Cases, Materials and Commentary* ..., 694.

¹⁶¹ Since 2002 the CES/C has also explicitly referred to covert forms of discrimination, while its General Comment no 16 (2005) includes in paragraph 13 an explicit definition of indirect discrimination, in line with the more general understanding of this concept: 'indirect discrimination occurs when a law, policy or program does not appear to be discriminatory on its face, but has a discriminatory effect when implemented'.

¹⁶² HRC, *Althammer v Austria* (Communication no 998/2001), para 10.2.

¹⁶³ HRC, *Derksen v the Netherlands* (Communication no 976/2001), para 9.3.

¹⁶⁴ While the Committee starts by remarking that a certain measure is neutral on its face and does not have any intent to discriminate, it goes on to conclude that this measure nevertheless results in discrimination because of its exclusive or disproportionate adverse effects on a certain category of persons.

The case law of the ECtHR cannot be said to embrace indirect discrimination and shows that it is still profoundly struggling with the concept of indirect discrimination. The Court's reluctance to even accept the notion of indirect discrimination was very visible in *Abdulaziz, Cabales and Balkandali*.¹⁶⁵ The Court's reasoning in that case demonstrated that it would be virtually impossible to successfully rely on indirect discrimination since it classified as irrelevant the disparate impact on certain groups (because of their typical characteristics) of at first sight neutral rules.¹⁶⁶

Only since May 2001, the Court explicitly acknowledged that 'where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group'.¹⁶⁷ Although this acknowledgement is to be welcomed, its importance should not be overrated as the Court immediately adds: '[h]owever, even though statistically it appears that the majority of people shot by the security forces were from the Catholic or nationalist community, the Court does not consider that statistics can in themselves disclose a practice which could be classified as discriminatory within the meaning of Article 14' (ibid). It is obvious that the Court seems to require a heavy burden of proof, while not identifying what that should be exactly.

The admissibility decision in *Hoogendijk v the Netherlands* (6 January 2005) seemed promising since it expressed a more positive attitude in relation to this type of evidence as it is no longer ruled out that statistical evidence (convincing official statistics) would do in order to establish a '*prima facie*' case.¹⁶⁸ The next 'indirect discrimination' case was eagerly awaited in expectation of further clarifications of the Court's stance in *Hoogendijk*. However, the Court's judgement in *D.H. et al v. Czech Republic* everything but lives up to these expectations. This case concerns the pervasive problem of Roma children being side-lined to special schools for mentally retarded children in several Eastern European countries, *in casu* the Czech Republic. The Court in several respects seems to go back on the 'promise' in *Hoogendijk*.¹⁶⁹ First of all it seems to question again the whole idea of 'indirect discrimination', by putting so much emphasis on the importance of 'intent',¹⁷⁰ while the 'major strength of the concept of indirect discrimination lies in its denial of the relevance of any discriminatory intent as a prerequisite for bringing a successful claim'.¹⁷¹ Moreover, the Court does not confirm its positive stance regarding 'convincing official statistics' and rather goes back to its old formulation that statistics in themselves are not sufficient. While this case above all

¹⁶⁵ Eur. Ct. H.R., *Abdulaziz, Cabales and Balkandali*, Series A no 94, § 85.

¹⁶⁶ See also J. H. Gerards, *Rechtelijke Toetsing aan het Gelijkeheidsbeginsel* (2002) 114. Cf. De Schutter, *Le Droit au Mode de la Vie Tsigane ...*, 79-85. The Court's unwill to consider the broader context, contributes to this situation. This furthermore makes it difficult to address systemic discrimination. ECtHR, *Buckley v UK* (25 September 1996) is paradigmatic case of this restrictive attitude of the Court as regards claims by Gypsies. See also de Schutter, *Le Droit au Mode de la Vie Tsigane ...*, 84-85.

¹⁶⁷ ECtHR, *Kelly v UK* (4 May 2001), para 148; ECtHR, *Hugh Jordan v UK* (4 May 2001), para 154; ECtHR, *McShane v UK* (28 May 2002), para 135. The 'founding' cases all concerned the claim that the activities of the security services in the conflict in Northern Ireland entailed a disproportionate high number of deaths on one particular religious group, which would amount to a violation of article 14 in combination with article 9. This principle has also been (*inter alia*) repeated in cases concerning the Roma: ECtHR, *Nachova v Bulgaria* (26 February 2004), para 167.

¹⁶⁸ See also Art Hendriks, 'Noot bij Hoogendijk t Nederland (EHRM 6 January 2005)', *NJCM Bulletin* 2005, 452. It should be acknowledged though that this case does not concern minorities.

¹⁶⁹ See also K. Henrard, 'Noot bij D.H. en overige t. Tsjechië', EHRM 7 February 2006, ECHR 2006/43, 392-393.

¹⁷⁰ ECtHR, *D.H et al v Czech Republic* (7 February 2006), para 48, 52, 53.

¹⁷¹ T. Loenen, 'Indirect discrimination: Oscillating between Containment and Revolution', in T. Loenen & P. R. Rodriguez (eds.), *Non-Discrimination Law: Comparative Perspectives* (Martinus Nijhoff, 1999), 201; Tobler, *Indirect Discrimination ...*, 114.

appeared to confirm the unease the ECtHR has v.à.v. the concept indirect discrimination,¹⁷² the recent judgement in *Zarb Adami v Malta* (20 June 2006) shows that (at least in cases on indirect discrimination against men) the Court can also show a different face. The Court, without much ado, deduced from the fact that statistics show a huge discrepancy of women versus men called for compulsory jury service, that there had been ‘a difference in treatment between two groups in a similar situation.’¹⁷³ A strict assessment of the availability of a reasonable and objective justification leads to a finding of a violation of article 14.¹⁷⁴

The supervisory body of the European Social Charter, the European Committee on Social Rights, has been markedly more willing to understand the prohibition of discrimination as also implying indirect discrimination. Particularly interesting is its recognition of the close link between the prohibition of indirect discrimination on the one hand and the importance of an obligation to differentiate in terms of the prohibition of discrimination on the other hand.¹⁷⁵

3.3.2. Obligation to differentiate

Despite the reluctant attitude of the ECtHR v.à.v. indirect discrimination, *Thlimmenos v Greece* (6 April 2000) reveals that the Court is willing to significantly expand its non-discrimination jurisprudence in favour of substantive equality by acknowledging that:

‘The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification ... However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is *also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.*’¹⁷⁶ (emphasis added)

¹⁷² See also *Podkolzina v Latvia* (more fully discussed *infra*), where the Court did not even look into the possible violation of article 14, while a key issue of the case concerned harsh language requirements in Latvian electoral legislation with their possible discriminatory indirect effects. This is the more regrettable since such language requirements are at the heart of the problem vis-à-vis linguistic minorities. See also A. Spiliopoulou-Akermark, *Justifications of Minority Protection in International Law* (London, 1997), 6.

¹⁷³ ECtHR, *Zarb Adami v Malta*, 20 June 2006, para 77-78.

¹⁷⁴ ECtHR, *Zarb Adami v Malta*, para 80-83.

¹⁷⁵ The European Committee of Social Rights held explicitly in its decision on *Autism-Europe v France* that the prohibition of discrimination implies a duty to adopt differential measures: ‘indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all’ (Collective Complaint no 13/2002, *Autism-Europe v France*, decision on the merits, 4 November 2003, para 52). See also EU Network of Independent Experts on Fundamental Rights, Thematic Comment no 3, 2005, p 23.

¹⁷⁶ ECtHR, *Thlimmenos v Greece*, para. 44.

In other words, the prohibition of discrimination can, in certain circumstances, entail an obligation! for states to treat persons differently 'whose situations are significantly different'. Depending on how far the Court would be willing to stretch this rational, it could be the basis for the recognition of positive obligations on the state to adopt certain special minority rights, attuned to the specific needs and position of the members of the minority concerned. In this particular case, the Court agreed that someone who is convicted for being a conscious objector, exercising his freedom to manifest his religion, could not be treated the same as someone who had committed another type of conviction unrelated to the exercise of fundamental rights. However, in so far as the Court has used the *Thlimmenos* rational in other cases related to (ethnic or national) minorities, the results have been rather modest.¹⁷⁷ The Court is clearly very careful to 'impose' exceptions to the application of general norms, when it is not related to the exercise of the freedom to manifest one's religion.¹⁷⁸ *Chapman v UK* might have established the important rule that states have a positive obligation to facilitate the gypsy way of life,¹⁷⁹ the Court was not willing to find that the Roma should not be treated like other people as regards the application of the general planning regulations and policies in view of their particular needs arising from their tradition of living and travelling in caravans.¹⁸⁰

The Human Rights Committee has not developed this second dimension of the prohibition of discrimination as such, but its practice arguable reveals that an obligation to take affirmative action measures, as well as other 'special' measures (not necessarily temporary backward looking measures), could be argued to be inherent in the prohibition of discrimination, in the sense that a failure to take such measures 'to elevate such groups to a level of equality with other members of society could be regarded as the perpetuation of systematic discrimination and thus states would not be complying with their obligation to ensure equal and effective protection against discrimination as required by Article 26'¹⁸¹

The CESCR/C seems to have a similar take on the prohibition of discrimination in article 2 ICESCR, in the sense that the Committee has indicated that the state obligations to facilitate (the prohibition of discrimination) would require them to adopt measures to ensure equal opportunities. Furthermore, the Committee has highlighted the obligation to ensure equal opportunities for minorities, including Roma, in several fields but especially in relation to employment, housing, health and education.¹⁸²

¹⁷⁷ In *Nachova v. Bulgaria* the Court did establish the principle, which has been confirmed many times since (*Inter alia*, ECtHR, *Bekos & Koutropoulos v Greece* (13 December 2005), para 73; ECtHR, *Ognyanova and Choban v Bulgaria* (23 February 2006), para 14) that state authorities have a special duty 'to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events' (ECtHR, *Nachova v Bulgaria* (26 February 2004), para 158).

¹⁷⁸ See however the dissenting opinion of Judge Cabral in *D.H. et al v Czech Republic* who emphasizes that '[t]hese pupils who, for various reasons – whether cultural, linguistic or other – find it difficult to pursue a normal school education should be entitled to expect the State to take positive measures to compensate for their handicap and to afford them a mean of resuming the normal curriculum' (para 2).

¹⁷⁹ See *infra*.

¹⁸⁰ ECtHR, *Chapman v UK*, para 127-129.

¹⁸¹ S. Davidson, 'Equality and Non-Discrimination', in A. Conte, S. Davidson & R. Burchill (eds.), *Defining Civil and Political Rights: the jurisprudence of the UN Human Rights Committee* (Aldershot: Ashgate, 2004), 178.

¹⁸² VandenHole, *UN Human Rights Treaty Bodies...*, 234.

Both in terms of CEDAW and ICERD, the supervisory Committees mainly identify an obligation to adopt differential treatment in terms of an obligation to adopt affirmative action measures¹⁸³ (as can be found explicitly in article 2, 1 ICERD and is said to be inherent in CEDAW). This has led to the criticism that ICERD does not contain a safeguard against assimilationist policies because the approach of the convention would be integrationist at best, not providing for structural, institutional measures in addition to the temporary affirmative action ones.¹⁸⁴ Nevertheless, it should be underscored that the Committee seems to have taken on board the broader international law developments recognizing that minorities have a right to an own identity which should be protected, maintained and promoted. CERD/C has even put forward that:

‘Governments should be sensitive towards the rights of persons belonging to ethnic groups, particularly their right to lead lives of dignity, to preserve their culture... Governments should consider, within their respective constitutional frameworks, vesting persons belonging to ethnic or linguistic groups ... where appropriate, with the right to engage in activities which are particularly relevant to the preservation of the identity of such persons or groups.’¹⁸⁵

This reasoning would seem in line with at least an encouragement (if not the establishment of a clear obligation) to adopt special, ‘differentiating’ measures (see immediately above) in order to abide by the prohibition of discrimination of racial discrimination, being the focal point of ICERD.

The text of CEDAW seems to allow for ‘temporary special measures’ without really containing an obligation for states to adopt such measures. Nevertheless it has been argued persuasively that also article 4(1) CEDAW would imply an obligation to adopt ‘temporary special measures’ aimed at real, substantive equality.¹⁸⁶ Indeed, the overall goal of CEDAW is to eliminate discrimination against women and the effective elimination of direct and indirect discrimination might well require the use of temporary special measures.¹⁸⁷

¹⁸³ H.B. Schöpp-Schilling, ‘Reflections on a General Recommendation on Article 4(1) of the Convention on the Elimination of all forms of discrimination against women’, in I. Boerefijn et al (ed.), *Temporary Special Measures* (Antwerp, 2003), 28. See also VandenHole, *UN Human Rights Treaty Bodies...*, 219. HRC, General Comment no 18, para 10.

¹⁸⁴ K. Boyle and A. Baldaccini, ‘A Critical Evaluation of Human Rights Approaches to Cases of Racism’, in S. Fredman (ed.), *Discrimination and Human Rights: The Case of Racism* (Oxford, 2001), 158.

¹⁸⁵ CERD/C, General Recommendation no 21: The Right to Self-Determination, para 5. This has been taken up and further refined in General Recommendation 30 on Discrimination against non-citizens, where the CERD/C underlined that contracting states should ensure the preservation of the culture and the cultural identity of these racial groups (of non-citizens).¹⁸⁵ In this light the previous references to suggestions by ICERD/C to adopt language laws etc. should be recalled.

¹⁸⁶ R. Cook, ‘Obligations to Adopt Temporary Special Measures under the Convention on the Elimination of All Forms of Discrimination against Women’, in I. Boerefijn (ed.), *Temporary Special Measures* (Antwerp, 2003), 129.

¹⁸⁷ Cook, ‘Obligations to adopt temporary special measures’..., 134. CEDAW underlines in this respect that ‘it is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences’ (CEDAW, General Comment 25 on article 4, par 1 on temporary special measures, para 8. See also *ibid*, par. 11).

Importantly, the obligations to take special measures aimed at realizing substantive equality are not restricted to 'temporary measures'. A subsequent General Recommendation on article 4, par 1 CEDAW clearly emphasizes that 'state parties should clearly distinguish between temporary special measures taken under article 4, paragraph 1 to accelerate the achievement of a concrete goal for women of *de facto* or substantive equality, and other general social policies adopted to improve the situation of women and the girl child. Not all measures that potentially are, or will be, favourable to women are temporary special measures. The provision of general conditions in order to guarantee the civil, political, economic, social and cultural rights of women and the girl child, designed to ensure for them a life of dignity and non-discrimination, cannot be called temporary special measures'¹⁸⁸ This arguably hints at an obligation to take differential measures for women in order to abide by the prohibition of discrimination.

3.3.3. Positive Action

The practice of the supervisory bodies generally confirms that the prohibition of discrimination constitutes the outer limit of positive action measures.¹⁸⁹ While there is no explicit provision in the ICCPR, the HRC clearly accepts the legitimacy of positive action, since it even points to an obligation to adopt such measures in certain circumstances, 'in order to diminish or eliminate conditions which cause or help to perpetuate discrimination'.¹⁹⁰ The focus on remedial measures implies that these have to be temporary in order to be proportionate. The views of the HRC in *Jacobs v Belgium* of 7 July 2004.¹⁹¹ clearly indicate that the Committee is rather open to positive action measures, in the sense that it highlights that the goal of positive action is substantive equality and hence is not an exception to the equality principle.¹⁹² These views furthermore confirm that the HRC sees positive action and non-discrimination as intrinsically related in the sense that the latter constitutes the limits for justifiable positive action.¹⁹³ Be that as it may, the HRC seems rather permissive in relation to one of the most sensitive positive action measures, more specifically the use of quota.¹⁹⁴ This can also be gleaned from some of its Concluding Observations.¹⁹⁵

The supervisory practice of CESCR/C also reveals that the Committee not only allows positive action measures in so far as they abide by the principle of non-discrimination,¹⁹⁶ but in certain circumstances even considers them obligatory. In its 2005 General Comment on women CESCR/C makes a statement pointing to an obligation to adopt positive action measures ('temporary special measures') in order to achieve real, substantive equality. Despite the

¹⁸⁸ CEDAW, General Comment no 25, para 19.

¹⁸⁹ The level of scrutiny adopted is essential, especially v.a.v. grounds which are suspect. Differentiation on suspect grounds tends to trigger heightened scrutiny, which does not appear appropriate for positive action in view of its substantive equality considerations.

¹⁹⁰ HRC, General Comment no 18, para 10. See also Joseph, Schultz and Castan, *Cases, Materials and Commentary...*, 738. In this respect, reference should also be made to General Comments no 4 and no 28 on article 3 since these indicate (in respectively paragraph 2 and 3) that the principle of non-discrimination in all three articles of the ICCPR 'requires not only measures of protection but also affirmative action designed to ensure the positive enjoyment of rights'.

¹⁹¹ HRC, *Jacobs v Belgium* (Communication 943/2000, 7 July 2004).

¹⁹² HRC, *Jacobs v Belgium*, para 9.3: 'states may take measures in order to ensure that the law guarantees to women the rights (contained in article 25 ICCPR) on equal terms with men'.

¹⁹³ HRC, *Jacobs v Belgium*, para 9.4 – 9.5.

¹⁹⁴ HRC, *Jacobs v Belgium*, para 13.11.

¹⁹⁵ in its Concluding Observations on India (1998) the HRC explicitly accepted the use of quota for improving the representation of women and people belonging to the scheduled casts.

¹⁹⁶ CESCR/C, General Comment no 5 on 'Temporary special measures', para 32.

focus of the General Comment this particular statement was not limited to gender issues as it reads: 'temporary special measures may sometime be needed in order to bring disadvantaged or marginalized groups of persons to the same substantive level as others.'¹⁹⁷ Similarly, in its General Comment on Discrimination against Roma the obligation to take special measures for this disadvantaged group is underlined. At the same time it is clear though that this is not an absolute obligation of result in the sense that the contracting states are urged to take measures in order to realize an 'equality of opportunities' (and not equality of results) *inter alia* in regard to participation in public life. The focus is again on temporary measures.

In regard to both CERD/C and CEDAW/C it should be underlined that both conventions and related supervisory practice are open towards positive action¹⁹⁸ measures, in so far as these measures abide by the prohibition of discrimination.¹⁹⁹ This would exclude permanent measures.²⁰⁰ Both these conventions as well as the practice by the supervisory bodies embraces positive action to the extent of making it obligatory in certain circumstances. While this obligation is explicit in article 2(2) ICERD, the practice of CEDAW/C seems to indicate that it can be argued that also under CEDAW the adoption of such measures would be obligatory if they can be shown to be necessary and appropriate in order to accelerate the achievement of the overall, or a specific goal of, women's *de facto* or substantive equality.²⁰¹

In relation to the evaluation of the use of quota, the practice of CERD/C is not very illuminating,²⁰² while CEDAW/C seems particularly permissive. In its concluding observations it has often not only recommended positive action measures²⁰³ but even advocated the use of quota to achieve gender balance in public and political bodies.²⁰⁴ The Committee does not only explicitly qualify positive action as an exception to the equality principle but as an application thereof;²⁰⁵ it also clearly promotes equality of results, and not merely equality of opportunities. In this respect it is telling that General Comment no 23 seems to indicate that the Committee considers equality of results as the logical corollary of substantive equality.²⁰⁶

The European Court on Human Rights, on the other hand, has not taken a clear, explicit position on this matter because it only had to rule twice on positive action measures, neither of them dealing with hard measures of access to employment. In both cases, the measures concerned entailed treatment which benefited women, while excluding men. In *Petrovic v Austria*²⁰⁷ parental leave allowance were only granted to women and in *Van Raalte v the Netherlands*²⁰⁸ only women above 45 could be exempted from paying a children related levy. While the

¹⁹⁷ CESCR/C, General Comment no 16, para 15.

¹⁹⁸ J. Swiebel, 'What could the EU learn from the CEDAW convention?', in I. Boerefijn et al (eds.), *Temporary Special Measures* (Antwerp, 2003), 52.

¹⁹⁹ Thornberry, 'Confronting Racial Discrimination...', 256; VandenHole, *UN Human Rights Treaty Bodies...*, 265.

²⁰⁰ ICERD/C, General Comment no 16, para 15. See also H.B. Schöpp-Schilling, 'Reflections on a General Recommendation on Article 4(1) of the Convention on the Elimination of all forms of discrimination against women', in I. Boerefijn et al (ed.), *Temporary Special Measures* (Antwerp, 2003), 28.

²⁰¹ CEDAW/C, General Recommendation no 25, para 24.

²⁰² K. Boyle and A. Baldaccini, 'A Critical Evaluation of International Human Rights Approaches to Racism', in S. Fredman (ed.), *Discrimination and Human Rights: The Case of Racism* (Oxford, 2001) 157.

²⁰³ For a more detailed overview of instances in which the Committee on the Elimination of Discrimination against Women has called on states to adopt affirmative action measures, see VandenHole, *UN Human Rights Treaty Bodies...*, 267-271.

²⁰⁴ CEDAW/C, General Comment no 23, para 29.

²⁰⁵ CEDAW/C, General Recommendation no 25, para 14.

²⁰⁶ Schöpp-Schilling, 'Reflections on...', 27.

²⁰⁷ ECtHR, *Petrovic v Austria* (27 March 1989).

²⁰⁸ ECtHR, *Van Raalte v the Netherlands* (21 February 1997).

Court seemed inclined to adopt as strict a scrutiny v.à.v. these positive action measures as in regards to measures disadvantaging women, it did modulate its position in *Petrovic* because of the lack of a common European standard v.à.v. parental leave allowance.²⁰⁹ In the more recent judgement in *Stec et al v UK* concerning differential rights to social security entitlements related to and because of differences in pensionable ages between men and women, the Court did state explicitly that ‘article 14 does not prohibit a Member State from treating groups differently in order to correct ‘inequalities’ between them; indeed in certain circumstances a failure to attempt to correct inequalities through different treatment may in itself give rise to a breach of the article. ... at their origin... the differential pensionable ages were intended to correct ‘factual inequalities’ ... and appear therefore to have been objective justified under Article 14’.²¹⁰ Arguably, the Court does not only seem to accept positive action measures as being related to substantive equality, while acknowledging that non-discrimination determines the limits of these measures, but even hints at an obligation to adopt such positive action measures.²¹¹ It remains to be seen though how ‘accommodating’ the Court will be in relation to hard forms of positive action.²¹²

The European Committee on Social Rights has in any event deduced from the prohibition of discrimination an obligation to adopt positive action measures in order to reach full, effective equality.²¹³

It can be concluded that in relation to positive action, the supervisory organs have demonstrated rather divergent attitudes and approaches. Arguably, the position of supervisory organs that have the power to pronounce binding legal judgements is more careful and restrained than those of the other bodies.

3.3.4. Duty to Promote Equality: positive obligations

The supervisory practice of CESCR/C clearly embraces substantive equality considerations when it indicates that the state obligations to facilitate (the prohibition of discrimination) would require them to adopt measures to ensure equal opportunities. More specifically, the Committee has highlighted the obligation to ensure equal opportunities for minorities, including Roma, in several fields but especially in relation to employment, housing, health and education.²¹⁴ Similarly, the Committee underlines the need to ‘undertake the necessary measures to combat patterns of *de jure* and *de facto* discrimination against all minority groups’ in its concluding observations in respect of Japan.²¹⁵

Under ICERD, CEDAW and the ICCPR the pro-active obligations of states are mainly identified in relation to positive action, while the practice of CERD/C and CEDAW/C has also identified positive obligations to adopt special measures flowing from the prohibition of discrimination. CERD/C has actually urged states to adopt also more enduring ‘special’ measures for minorities explicitly in order to protect their own identity.²¹⁶ It is furthermore remarkable that several of CERD/C’s General Recommendations focus on specific types of minority groups, more specifically indigenous peoples, the Roma and descent-based groups. These Recommendations all underscore

²⁰⁹ Gerards, *Rechterlijke Toetsing...*, 210.

²¹⁰ ECtHR, *Stec et al v UK*, 12 April 2006, para 51 and 61.

²¹¹ It should be highlighted that the Court explicitly refers to its Thlimmenos rational (para. 44) when making this statement.

²¹² See also A. Hendriks & F. Wegman, ‘Straatsburg ziet onderscheid naar geslacht bij pensioenen door de vingers’: noot bij EHRM, *Stec et al v UK*, 31 *NJCM Bulletin* 2006, 892.

²¹³ European Committee on Social Rights, Concl. XVI-1, 125-129; Concl. XVI-1, vol. 2 (Norway), 485-487.

²¹⁴ VandenHole, *UN Human Rights Treaty Bodies...*, 234.

²¹⁵ CESCR/C, Concluding Observations: Japan, 2001, para. 40. The Committee similarly expresses the need to work towards equality of opportunities in its concluding observations on the UK (2001, para. 31) and on Brazil (2003, para. 44).

²¹⁶ CERD/C, General Recommendation No. 21: The Right to Self-Determination, para 5. See also CERD/C, Concluding Observations: Ecuador, 2003, para. 11. See also CERD/C Concluding Observations: Russian Federation 2003, para. 27.

(in various degrees of positiveness) the multiple positive obligations of states in respect of the protection and promotion of the right to identity of these groups, including the adoption of special measures in this regard. CERD/C even explicitly calls on states to ensure that these communities can exercise their rights to practice and revitalize their culture and to preserve and to practice their language, that they have adequate levels of political participation (including representation in the police, enforcement agencies), and sometimes also that mother tongue education, bi-lingual and/or multicultural education (implying adapted textbooks and the like) are guaranteed.²¹⁷

Since the practice of CRC/C also emphasizes the obligation to adopt special measures for persons belonging to minority groups in order to guarantee the enjoyment of their fundamental rights,²¹⁸ the practice of this treaty body confirms the substantive equality approach of the UN treaty bodies.

One particular positive obligation which merits special attention in this respect, is the one in relation to the fight against discrimination by private actors. The text of ICERD already contains clear stipulations about the existence of such a positive obligation, more specifically in Article 2(1)(d). This provision indeed imposes an obligation on states to prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, race discrimination by any persons, groups or organisation.²¹⁹ This obligation would be reinforced by the provisions in *inter alia* articles 4 and 5 (pertaining to employment and housing). Nevertheless, it does not seem to be all that clear-cut (and far reaching).²²⁰

It has been noticed that despite the HRC's acceptance of the principle of positive state obligations in this respect, 'compared to the attention CERD/C has paid to discrimination by private actors in its concluding observations, the HRC seems to be much more hesitant in systematically addressing states' obligations to protect against discrimination by third parties.'²²¹

CESCR/C clearly acknowledges that states would have a duty to protect against discrimination by private actors, particularly in relation to race (and gender).²²² Similarly, it has indicated the need to take legislative measures, *inter alia*, for the protection of Roma²²³ and to penalize certain forms of racial discrimination.²²⁴ There are no further indications though that would clarify how far this positive obligation would reach.

²¹⁷ CERD/C, General Recommendation No. 23 on Indigenous Peoples, paras. 4(a) (e); General Recommendation No. 27 on Discrimination against Roma, paras. 15, 18, 26, 28-9, 41; General Recommendation No. 29 on Descent, paras. 6, 24, 27-8, 36, 48.

²¹⁸ CRC/C, Concluding Observation: Bangladesh, 2003, para. 79; Concluding Observations: Israel, 2002, para. 55.

²¹⁹ Fredman, 'Introduction...', 192-3; Thornberry, 'Confronting Racial Discrimination ...', 251.

²²⁰ See also the concluding observations of CRC/C in which it has taken the position that states have an obligation to outlaw racial discrimination by private persons in education and employment.²²⁰ While this doctrine is not as elaborated as in terms of ICERD, it is unlikely that this would imply a strict obligation of result.

²²¹ VandenHole, *UN Human Rights Treaty Bodies...*, 217.

²²² *Inter alia* CESCR/C, Concluding Observations: Croatia (UN Doc. E/C.12/1/Add.73), para 9.

²²³ CESCR/C, Concluding Observations: China (UN Doc. E/C.12/1/Add.58), para 30.

²²⁴ *Inter alia* CESCR/C, Concluding Observations: Belgium (UN Doc. E/C.12/1/Add.54), para 21.

In terms of the ECHR and the jurisprudence of the Court, it is not really clear whether (and to what extent) there would be a positive obligation on states to eradicate private forms of discrimination. This contrasts with the identification of positive state obligations to ensure the other (substantive) rights also in relations between private parties,²²⁵ and can be related to the generally broad margin of appreciation allowed to states in regard to the prohibition of discrimination.²²⁶

Notwithstanding the wording used in Protocol no 12 'shall be secured' which hints at far reaching positive obligations for states, the explanatory report underscores that it was not intended to impose a general positive obligation.²²⁷ Nevertheless, such positive obligations could arise in specific circumstances, since 'a failure to provide protection from discrimination in [private] relations may be so clear-cut and grave that it might engage clearly the responsibility of the State'.²²⁸ It will be interesting to see throughout the development of jurisprudence, where the line will be drawn by the ECtHR.

3.4. Equality provisions in minority specific instruments

Chapter 1 provides a succinct overview of the kind of minority specific rights that can be found in minority specific instruments (or single provisions in instruments). The focus here is on the equality provisions in these instruments, more specifically paragraphs 31, and 33(2) of the OSCE Copenhagen Document, article 4 FCNM²²⁹, and articles 2(1), 3, 4(1) and 8(3) of the UN Minorities Declaration (quoted above).

Since there is no proper supervisory mechanism for the UN Declaration and the Copenhagen Document, there is no supervisory practice in the proper sense of the word to draw upon. Nevertheless certain other documents have been developed in relation to these instruments, which shed light on their meaning and implications. Since the UN Working Group of Minorities was set up by ECOSOC inter alia to promote the rights in the Declaration, the Commentary on the UN Minorities Declaration²³⁰ which was finalized in this gremium obviously has a certain *de facto* authority.

²²⁵ For an extensive discussion: A.R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart, 2004).

²²⁶ As Goedertier points out, in relation to those grounds of discrimination that are considered to be 'suspect', it cannot be excluded that in the future the Court will indeed identify positive state obligations to eradicate discrimination on these grounds also in the private sphere ('Verbod van discriminatie' in J. Vande Lanotte & Y. Haecck (eds.), *Handboek EVRM: Deel 2 Artikelsgewijze Commentaar* (Antwerp: Intersentia, 2004), 146-148).

²²⁷ Explanatory Report to the 12th AP, nr 24.

²²⁸ *Idem*, nr 26.

²²⁹ Article 6(2) FCNM should also be mentioned as it contains a positive obligation to protect persons belonging to minorities against threats or acts of discrimination. This can be seen as closely related to article 4(1) which obliges states to prohibit any discrimination based on belonging to a national minority.

²³⁰ E/CN.4/Sub.2/AC.5/2001/2.

The High Commissioner on National Minorities, established in the framework of the OSCE, may not be a supervisory mechanism²³¹ but he has endorsed several Recommendations on particular recurrent themes he was confronted with in his activities.²³² The Explanatory Notes to these Recommendations that were developed by independent experts tend to refer to relevant 'source' material, which includes the Copenhagen Document. The latter references tend to contain further clarifications of the actual content of the paragraphs in that Document.²³³

The supervisory mechanism in relation to the FCNM omits a complaints procedure and is limited to a periodic reporting procedure.²³⁴ The value of this procedure should not be underestimated, for various reasons, one of which is that the study of the opinions formulated by the Advisory Committee, and generally confirmed by the Committee of Ministers,²³⁵ clearly reveal certain patterns which elucidate the often vague wording of the text of the Framework Convention.²³⁶

3.4.1. Reach

The reach of the prohibition of discrimination in the minority specific instruments is as wide as can be, in the sense that it is not limited in terms of grounds or competences and is non-accessory in nature.²³⁷ As was pointed out supra, the themes of special relevance to minorities are all (to some extent) taken up in the minority specific instruments, both in terms of the right to identity and the focus on substantive equality. As will be developed infra, the positive obligations imposed on states also reach into the private sphere.

Nevertheless, it remains interesting to analyse the equality provisions more closely. More particularly regarding the relationship between special measures and full equality, and role of the prohibition of discrimination in this respect.

3.4.2. Opening towards Substantive Equality

In view of the central importance of the goal of substantive equality for minority protection, it is not surprising that these minority specific instruments are dominated by substantive equality considerations.

It should be highlighted that article 4 FCNM contains, in addition to a prohibition of discrimination in paragraph 1, also an obligation in paragraph 2 to adopt 'special' differential measures aimed at the realization of full or real, substantive equality.

²³¹ R.M. Letschert, *The Impact of Minority Rights Mechanisms* (The Hague: TMC Asser, 2005), 53.

²³² See also *supra*, page 17.

²³³ See also Letschert, *The Impact of Minority Rights Mechanisms...*, 73-74.

²³⁴ Articles 24-26 FCNM.

²³⁵ *Inter alia* AC/FCNM, Third Activity Report, 1 November 2000 to 31 May 2002, ACF/INF(2002) 1, 7.

²³⁶ *Inter alia* Letschert, *The Impact of Minority Rights Mechanisms...*, 175.

²³⁷ In this respect it should be pointed out that even though the Advisory Committee has often linked Article 4 with other provisions of the FCNM, it is absolutely clear from the wording of Article 4 FCNM that it must be considered as a general, non-accessory right to non-discrimination. See also R. Hofmann, *The Added Value and Essential Role of the Framework Convention for the Protection of National Minorities*, DH-MIN(2006)018prov, 12.

In view of the fact that the FCNM was meant to translate the political commitments of the OSCE in relation to minorities into legally binding norms, it is not surprising that similar wording can be found in the Copenhagen document of the OSCE.²³⁸ Also article 4(1) UN Minorities Declaration demonstrates that states have extensive positive obligations to adopt special measures to ensure that persons belonging to minorities can enjoy their rights in full equality.

In contrast to ICERD and CEDAW, the 'special' measures in the minority specific instruments are not necessarily temporary, in the sense that as long as they are required in order to achieve full equality they can endure. In other words, the focus here is not exclusively on redressing historical disadvantages but could also include some kind of institutionalized measures. It should be highlighted though that the obligation to adopt 'special' measures in the minority specific instruments is not seen as a dimension of the prohibition of discrimination, but rather as an 'additional' principle.²³⁹

The third paragraph of article 4 FCNM goes on to state that measures adopted in accordance with paragraph 2 shall not be considered an act of discrimination. This qualification does not seem in line with the generally accepted criteria to distinguish a legitimate differentiation from discrimination because it only seems to require a certain legitimate goal (full equality) without any reference to proportionality. The Explanatory Report to the FCNM, however, 'adds' that these 'special' measures should be 'adequate', that is in line with the proportionality principle, in order not to violate the prohibition of discrimination.²⁴⁰

The text of the UN Minorities Declaration is more accurate itself as it states that the special measures that are required to ensure the effective enjoyment of their human rights in full equality before the law²⁴¹ 'shall not *prima facie* be considered contrary to the principle of equality'.²⁴² The Commentary to this Declaration clarifies in this respect that it is essential 'that such measures do not go beyond what is reasonable under the circumstances and are proportional to the aim sought to be realized'.²⁴³ The Copenhagen document of the OSCE also underlines that the special measures adopted for minorities should not violate the prohibition of discrimination.²⁴⁴

²³⁸ Paragraph 31 of the Copenhagen Document refers both to the prohibition of discrimination and full equality before the law. It also identifies a obligation to adopt 'where necessary, special measures in order to achieve full equality for persons belonging to minorities. This paragraph is explicitly referred to in the Explanatory Note to the Guidelines on the Use of Minority Languages in the Broadcast Media (2003), more particularly guideline 4 on Equality and Non-discrimination (which traces closely the wording of paragraph 31). See also the Explanatory Note to the Hague Recommendations regarding the Education Rights of National Minorities, more particularly recommendation 4 regarding the positive duty to adopt special measures to implement minority language education rights.

²³⁹ See also G. Alfredsson, 'Article 4', in M. Weller (ed.), *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities* (Cambridge, 2005), 145-146.

²⁴⁰ Framework Convention for the Protection of National Minorities and Explanatory Report (Council of Europe Press, 1995), para 9.

²⁴¹ UN Minorities Declaration, article 4(1).

²⁴² UN Minorities Declaration, article 8(3).

²⁴³ Commentary to the UN Minorities Declaration, paragraph 83. See also article 4(1) of the Declaration and paragraph 55 of the Commentary.

²⁴⁴ Copenhagen Document, paragraph 33 (2).

The supervisory practice of the Advisory Committee (FCNM) confirms this emphasis on substantive equality, which entails far reaching positive obligations on states to achieve substantive equality. It emphasizes throughout its opinions that full, real or substantive equality requires the adoption and implementation of special measures for persons belonging to national minorities. For example, in its opinion on Austria, the Advisory Committee underlined that even for very small groups a considerable number of determined measures on the part of the competent authorities is required.²⁴⁵ In line with the practice in terms of (various) human rights conventions, these positive obligations also reach the private sphere, in that the Advisory Committee has consistently called on States parties to ensure that private actors may not apply discriminatory practices against persons belonging to national minorities.²⁴⁶

The Commentary to the UN Minorities Declaration has similarly underlined that the rights of persons belonging to minorities to enjoy their rights without any form of discrimination (article 2,1) shows that is ‘not enough for the State to abstain from interference or discrimination. It must also ensure that individuals and organisations of the larger society do not interfere or discriminate’.

Overall, the reasoning of the Advisory Committee (FCNM) is not very technical, in the sense that it does not refer to levels of scrutiny and does not qualify certain practices (potentially) as indirect discrimination. Nevertheless, occasionally more technical reasoning can be detected. More specifically, in the Advisory Committee’s Opinion on Slovakia, the Advisory Committee made two important points. First of all, it underscored that ‘special measures are not only legitimate but may even be required under certain circumstances in order to promote full and effective equality in favour of persons belonging to national minorities’.²⁴⁷ Secondly, and here the Advisory Committee does make use of the typical criteria to distinguish a prohibited discrimination, it remarked that these special measures cannot be considered an act of discrimination provided that they are in conformity with the proportionality principle.²⁴⁸ This emphasis on the proportionality principle in determining the limits of acceptable ‘special’ measures is actually a consistent element of the practice of the Advisory Committee, which is in line with the general understanding about the relationship between special minority measures and the prohibition of discrimination.²⁴⁹ The principle of proportionality extends both to the time during which such positive measures might be applied as well as to their substantive scope.

It should be underlined that the ‘special’ measures envisaged under the Framework Convention, the UN Declaration and the Copenhagen Document are not necessarily temporary, because they are not exclusively focused on redressing historical disadvantages. Consequently, these measures could also include a kind of institutionalized²⁵⁰ and other types of ‘enduring’ measures.²⁵¹ Indeed, as long as these non-temporary measures are required in order to achieve full, real equality, they should remain.

²⁴⁵ Advisory Committee, Opinion on Austria (I), para 82.

²⁴⁶ See *supra* text accompanying note 23.

²⁴⁷ Advisory Committee, Opinion on Slovakia (II), ACFC/OP/II(2005)004, para 38.

²⁴⁸ *Idem*.

²⁴⁹ See, e.g., para. 18 of the (first) Opinion on Italy where it expressly stated that legislative provisions applicable in South Tyrol and which constitute such positive measures should “allow for developments over time and not be rigidly set in time.”

²⁵⁰ *Inter alia* Advisory Committee, Opinion on Bulgaria (I), ACFC/OP/I(2006)001, para 45, in which it calls on the state to give stronger state support to the reinstatement of traditional cultural institutes and to the provision of more Turkish or Roma cultural centres.

²⁵¹ Unfortunately the Commentary to the UN Declaration refers in paragraph 55 (in relation to article 4(1) only to remedial (and hence temporary) measures. Paragraph 34 of the Commentary points to positive obligations (to adopt special measures) that are not remedial and hence not necessarily temporary.

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Part IV

Country studies²⁵²

²⁵² This overview is based on information obtained from the 2005 National reports provided by the EU Network of Independent Experts on Fundamental Rights in relation to arts 20-22 of the EU Charter; the 2005 annual reports of the EU Network of Legal Experts in the Non-discrimination Field (hereinafter: Legal Experts), and information provided by this Network.

This chapter does not focus on particular countries, but rather on certain themes (focus points) which can be related to the relevant non discrimination themes identified in chapter 1, as being of special relevance for minority protection purposes. This seemed preferable over a selection of a few countries, since certain countries have adopted interesting or remarkable stances in regard to one of these issues but not necessarily in relation to the others. The chapter consists of two parts, one providing information on national legislative texts, the other on particular judgments. In each part various relevant points in relation to the reach of the prohibition of discrimination and openings towards substantive equality are addressed.

4.1. Legislative Texts

4.1.1. Reach of the Prohibition of Discrimination²⁵³

In view of the absence of a definition of the concept ‘race’ in the Racial Equality Directive, it is to be welcomed that certain countries use (incorporate) the broad definition in article 1 of the International Convention on the Elimination of all forms of Racial Discrimination (ICERD), including colour, descent and national or ethnic origin.²⁵⁴ While suggestions were made to consider the extensive UK case law on the meaning of ‘ethnic group’, this seems questionable in view of the problematic distinctions this has entailed: Jews and Gypsies are considered to be ethnic groups, while Muslims and Rastafarians are not.²⁵⁵ The fact that in the Austrian legal system a more culturally oriented view of racial and ethnic discrimination prevails,²⁵⁶ is arguably in line with recital 6 of the Racial Equality Directive, in which the existence of separate legal races is rejected.

As was highlighted in Chapter 2, it seems commendable that the exclusion of differentiations on the basis of nationality from the scope of the Racial Equality Directive (and implementing legislation) should be narrowly constructed because of the danger that an important category of indirect discrimination on the basis of race ‘escapes’ scrutiny. Fortunately, this is a position which is acknowledged and taken on board in various countries. In regard to the Danish legal system it was pointed out that the Act on Ethnic Equality does not cover unequal treatment due to citizenship, but it was immediately added that ‘discrimination in the labour market on account of citizenship must not indirectly reflect discrimination due to, for instance, national origin²⁵⁷ (which is covered by the definition of racial discrimination in ICERD, incorporated in the Danish legal system). This is also nicely captured in the Austrian country report, where it is pointed out that the ‘issue of protection against discrimination on the basis of nationality or citizenship is crucial for the Austrian situation as most of the racist discourse is not labeled with terms like race or ethnic origin, but the scape goats and concept of the enemies is to a very large extent about ‘foreigners’, ‘asylum seekers’, ‘asylum frauds’.²⁵⁸ While the Equal Treatment Act itself takes up a provision like article 3(2) Racial Equality Directive, the Explanatory Notes to the Act underline that ‘this exception can not be used to legitimate discriminations on the grounds covered in this act. The prohibition of discrimination also protects third country nationals’. It should be acknowledged though that case

²⁵³ While this was not explicitly taken up as an issue of ‘reach’, it is of course relevant for the effective protection against discrimination that the definitions in national law of the prohibitions of direct and indirect discrimination should not be framed in a way which would allow more exceptions, than those allowed in terms of the Racial Equality Directive. Bad example here would be the definition of indirect discrimination in Polish law (*Poland Country Report on Measures to Combat Discrimination*, 12) and the definition of direct discrimination in the Belgian Federal Law (article 2(2) of the law of 25 February 2003) uses a general justification possibility in this respect (*Belgium Country Report on Measures to Combat Discrimination*, 20-21).

²⁵⁴ Legal Experts, *Denmark: Country Report on Measures to Combat Discrimination*, 2005, 15.

²⁵⁵ Legal Experts, *United Kingdom: Country Report on Measures to Combat Discrimination*, 2005, 8.

²⁵⁶ Legal Experts, *Austria: Country Report on Measures to Combat Discrimination*, 2005, 7.

²⁵⁷ Legal Experts, *Denmark*... 2005, 21.

²⁵⁸ Legal Experts, *Austria*... 2005, 21.

law and interpretations by the courts, that will clarify the actual amount of protection against possible indirect racial discrimination, are awaited.²⁵⁹ The position taken in the Finnish legal system gets closest to General Recommendation no 30 of CERD/C since it also prohibits discrimination on the basis of nationality. This position can be understood that in so far as differentiations on the basis of nationality are not proportional (and thus would constitute discrimination on the basis of nationality) they would also amount to indirect discrimination on the basis of race.²⁶⁰

It should also be highlighted that the prohibition of discrimination on the basis of nationality is especially important in countries where many residents do not have citizenship. This point was explicitly made by the Advisory Committee (FCNM) when it reviewed the periodic state report of Estonia, in relation to the draft equality legislation.²⁶¹ In this respect, Thematic Comment no 3 of the EU Network of Independent Experts on Fundamental Rights highlights that in these circumstances it cannot be ruled out that the very conditions for granting nationality could constitute indirect discrimination on the basis of racial or ethnic origin.²⁶²

In regard to the reach of the prohibition of discrimination into the private sphere, it was pointed out in chapter 2 that it remains to be seen what the ECJ will determine to be the correct (minimum standard) of understanding for 'goods and services available to the public'. In order to eradicate racial discrimination it is obviously important that this reaches as far as possible into the private sphere (without interfering disproportionately with the enjoyment of the right to respect for privacy). In this respect it is to be welcomed that in certain countries no distinction is made between goods and services available to the public and those only available privately, as in Slovenia and France.²⁶³ Similarly in the UK, the Race Relations Regulations have removed the original distinction made in the Race Relations Act between wholly private disposal of premises and disposal involving either an advertisement or the services of an estate agent, so that now any form of contractual arrangements between two natural persons is covered by the prohibition of discrimination.²⁶⁴

4.1.2. Opening towards Substantive Equality

By way of general remark in regard to the French legal system, it should be pointed out that the narrow formalistic conception of equality in the French legal tradition is at odds with attempts to interpret non-discrimination in a way that opens towards substantive or real equality.²⁶⁵

Considering the analysis of the case law of the ECJ in relation to positive action in chapter 2, the softer measures of positive action aimed at obtaining equal opportunities (like special facilities in relation to education and training and encouragements to apply) permitted under UK law,²⁶⁶ will surely meet the required standard. Even though article 5 Racial Equality Directive does not oblige member states to adopt measures of positive action, it seems unduly narrow to restrict the possibilities of private companies to take special measures to integrate racial groups/ethnic minorities in the labour market as is the case in the Danish legal system.²⁶⁷

²⁵⁹ Ibid. 21-22.

²⁶⁰ See also CERD/C, General Recommendation no 30 on Non-Citizens, para. 4.

²⁶¹ See also EU Network of Independent Experts on Fundamental Rights, Report on Estonia 2005, CFR-CDF/Rep {EE}2005, 33 (referring to the second opinion of the AC on Estonia, of 2005, ACFC/OP/II(2005)001.

²⁶² EU Network of Independent Experts..., *Thematic Comment no 3*, 21. See also CERD/C, General Comment no 30 on Discrimination against non-citizens, para 15.

²⁶³ French Penal Code article 255(2) (French Country Report on Measures to Combat Discrimination, 25); Slovenia Country Report on Measures to Combat Discrimination, 3.2.9.

²⁶⁴ Legal Experts, *United Kingdom Country Report on Measures to Combat Discrimination 2005*, 30.

²⁶⁵ Legal Experts, *French Country Report on Measures to combat Discrimination 2005*, 3.

²⁶⁶ Legal Experts, *United Kingdom: Country Report on Measures to Combat Discrimination 2005*, 42.

²⁶⁷ Legal Experts, *Denmark: Country Report on Measures to Combat Discrimination*, 34.

The type of special measures adopted under Polish law aimed at realizing full equality between members of national minorities and the rest of the population are not limited to remedial measures, but also encompass more enduring measures, like extra subsidies for minority schools. While this can be seen as form of positive action of the more preventive kind, envisaged under article 5 Racial Equality Directive, because these extra subsidies are meant to compensate for the higher operating costs,²⁶⁸ they could actually also be qualified as a differentiation flowing from the prohibition of indirect discrimination.

Notwithstanding the fact that the Racial Equality Directive does not contain explicitly positive duties to promote equality (by taking special measures to that effect), several member states have adopted such a more pro-active approach. The Finnish Non Discrimination Act obliges all authorities to take steps to foster equality.²⁶⁹ Similarly the Greek constitution imposes a duty on the state to adopt positive measures to promote equality.²⁷⁰ Also the Italian constitution enshrines in its provision on the prohibition of discrimination a principle of substantive equality which calls on the state to adopt the necessary measures to achieve genuine equality in the social and economic domain.²⁷¹

4.2. Case Law

4.2.1. Reach of the Prohibition of Discrimination

In view of the importance of an effective protection against discrimination for persons belonging to minorities, it is important that also potential (in the sense of not actually materialized) discrimination would be covered by the prohibition. In this respect, an interesting case in Belgium can be highlighted, in which the court accepts that public statements of a discriminatory nature by employers might result in a finding of discrimination, even in the absence of any proven instance in which a practice or policy has been implemented vis-à-vis a particular person.²⁷²

It was highlighted in chapter 2 that certain differentiations on the basis of language could potentially be qualified as indirect racial discrimination, which would be of obvious importance for linguistic minorities. A few national examples bear this out. A Swedish Labour Court decision of October 2005 might not have found indirect racial discrimination on the facts, it did acknowledge that language requirements for a position would amount to indirect racial discrimination if they were not objective justified, adequate and necessary for an adequate performance of the position at hand.²⁷³ Similarly, the Belgian Centre of Equality of Chances and the Fight against Racism indicated to the Flemish Government that an obligation to pass a Dutch course in order to become eligible for social housing would amount to a prohibited indirect discrimination on the basis of racial or ethnic origin.²⁷⁴

²⁶⁸ Legal Experts, *Poland: Country Report on Measures to Combat Discrimination*, 33.

²⁶⁹ Legal Experts, *Finland: Country Report on Measures to Combat Discrimination* 2005, 28.

²⁷⁰ Legal Experts, *Greece: Country Report on Measures to Combat Discrimination* 2005, 37-38.

²⁷¹ Legal Experts, *Italy: Country Report on Measures to Combat Discrimination* 2005, under items 1 and 5.

²⁷² Case Centre for Equal Opportunities and Fight against Racism v NV Feryn; judgment of the industrial tribunal Brussels, 26 June 2006 concerning media statements in which it was announced that applications by Moroccans would not be welcome. The text of the judgment (in Dutch) can be found here : http://www.diversiteit.be/NR/rdonlyres/B7C7706C-E400-4833-8197-AAE4099A6070/0/r060626_ar_brussel.pdf A request for a preliminary ruling was later asked by the Belgian court ; see http://www.diversiteit.be/CNTR/FR/about_the_center/press/cntr_press_07-01-24Fr.htm (in French).

²⁷³ Swedish Labour Court decision of the 19 October 2005, AD 2005 No.98. .

²⁷⁴ EU Network of Independent Experts on Fundamental Rights, *Report on Belgium*, 2005 (CFR-CDF/Rep[BE]2005), 150. Similar concerns were expressed in regard to language proficiency requirements for access to employment in both the public and private sector, inter alia in the Opinions of the AC(FCNM) on Latvia and Estonia (see also EU Network of Independent Experts on Fundamental Rights, *Report on Estonia* 2005 (CFR-CDF/Rep[EE]2005), 34).

A judgement of the House of Lords²⁷⁵ should be singled out as it demonstrates the prevalence of discrimination on the basis of racial or ethnic origin in the immigration context, which in light of article 3(2), unfortunately, runs the risk of falling outside the scope of application of the Racial Equality Directive. *R- v Immigration Officer at Prague Airport and another ex parte ERRC and others* concerns the treatment of Roma in the pre-clearance procedure by UK authorities in Prague airport. Evidence was produced that Roma were subjected to longer, more intensive interviews and were 400 times more likely to be refused leave (to go to the UK).²⁷⁶ The House of Lords qualified this as less favourable treatment on racial grounds, and underscored that it would not be possible to justify this direct discrimination. A stronger confirmation of the need to be attentive for cases of indirect racial discrimination in this context will be difficult to find.

Finally, the tremendous amount of case law in relation to Roma and discriminatory access not only to employment, but also to public facilities, like restaurants, bars and discotheques is striking, and confirms clearly the relevance of the inclusion of article 3(1)(h) in the scope of the Racial Equality Directive.²⁷⁷

4.2.2. Opening towards substantive equality

Several national cases have underscored the importance of the prohibition of indirect discrimination to get to deeply imbedded prejudices (against persons belonging to minorities), some in the negative sense, others in the positive sense. An example of the former category is the decision of the Boulogne first instance French Labour court concerning a case brought by five claimants of African origin, where the analysis of the employer's records by an expert had revealed that there was differential treatment in terms of salaries, status and career development (*Confédération Générale des travailleurs (Union) and Mouvement contre le racisme et pour l'amitié entre les peuples (NGO) against Renault S.A.*, Boulogne Labour Court, judgment of the 'Conseil des Prud'hommes' of 12 December 2005). The court dismissed this case because there would be no evidence that the differential treatment was intentional. This shows the importance of a sound understanding of the concept 'indirect discrimination' and more particularly the irrelevance of intent.

An example of the latter category can be found in the 2005 advisory opinion by the Dutch Commission of Equal Treatment on suggested adaptations to the housing policy in the city of Rotterdam. The Commission concluded that the envisaged new housing policy which wanted to permit only persons with an income of 120 percent of the minimum wage to be eligible for renting a house in the city, amounted to indirect discrimination on the basis of ethnicity.

In relation to both positive action and the duty to differentiate (as a second dimension to the prohibition of discrimination), the decision by the Slovak Constitutional Court of 18 October 2005 should be cited as a negative example, since it construes the (Constitutional) prohibition of discrimination as excluding positive action, and even seems to negate the principle that substantively unequal situations should be treated differentially.²⁷⁸

²⁷⁵ Information provided by the AD Legal Network.

²⁷⁶ While this seems to concern a case of indirect discrimination in the implementation of norms, which are (arguably) neutral, the House of Lords treats it as a case of direct discrimination.

²⁷⁷ The AD Legal Network identified inter alia in 2004 a problem of a Roma community which was denied service in a Sport restaurant in the Czech Republic, and of two Romani men who were barred entrance to a discotheque in Hungary.

²⁷⁸ EU Network of Independent Experts on Fundamental Rights, *Report on Slovakia 2005* (CFR-CDF/Rep[SV]2004, 49).

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Part V

The Racial Equality Directive, the FCNM and Minority Protection: Parallels and Differences

As the previous chapters revealed, the central question in relation to minority protection has been (and still is) the role of special rights for minorities. While ‘special’ rights seem at first sight the opposite of ‘equal’ rights, everything depends what conception of equality one embraces. The on-going debate about whether or not the prohibition of discrimination would suffice for an adequate minority protection, depends to a great extent on the way in which this prohibition is conceived (interpreted), and more particularly on the degree to which it embraces substantive equality considerations.

The way in which the Racial Equality Directive will be interpreted by the ECJ will clarify the potential it has to contribute to minority protection, both concerning the inclusion of substantive equality considerations and the actual reach of the instrument. A closer comparison of the Racial Equality Directive and the FCNM seems called for to determine where the Racial Equality Directive would fall short, revealing the added value of the FCNM.²⁷⁹ This comparison will focus on four issues: the respective (overarching) objectives of the instruments, the scope of application *ratione personae*, the scope of application *ratione materiae* and finally the kind of special measures envisaged.

It should be noted however that while the FCNM is ratified by 39 countries, it is not ratified by all Member States of the EU. Belgium, Greece and Luxemburg have only signed the convention, while France has not even signed it.

5.1. Overarching objective

The starting point seems to be that the Racial Equality Directive and the FCNM have different overarching objectives in that the Racial Equality Directive is not meant to protect and promote the separate identity of minorities, unlike the FCNM.²⁸⁰ In other words, the primary objective of the Racial Equality Directive is not to oblige member states to promote the conditions necessary for persons belonging to minorities to maintain and develop their culture, and to preserve their essential elements of their identity, namely their religion, language, traditions and cultural heritage. The objective of the Racial Equality Directive is to implement the principle of equal treatment irrespective of racial and ethnic origin, as is equally reflected in its full title. However, as was pointed out *supra*, the importance of non discrimination for minorities is widely acknowledged and is also explicitly taken up in article 4 FCNM. Furthermore, as has been pointed out several times, the way the prohibition of discrimination is interpreted may imply various openings towards substantive equality, and even obligations to adopt special measures (in favour of minorities). The dimension of the prohibition of discrimination which entails a duty to differentiate is particularly relevant in that respect as it may imply an obligation to carve out exceptions vis-à-vis generally applicable measures which would otherwise put persons of a certain racial or ethnic origin at a particular disadvantage. This obligation to adopt special measures would, however, be limited in two respects. First, as the goal would not be the promotion of identity, but only the avoidance of disproportionate disadvantage, which might have implications for the content of the measure. A second limitation would flow from the limited scope of application of the Racial Equality Directive.²⁸¹

²⁷⁹ See also R. Hofmann, *The Impact of International Norms on the Protection of National Minorities in Europe: the Added Value and Essential Role of the Framework Convention for the Protection of National Minorities*, DH-MIN(2006)018prov.

²⁸⁰ The title as well as the provisions of the FCNM clearly bear this out, see also especially article 5(1) FCNM. See also T.H. Malloy, ‘The Title and the Preamble’, in M. Weller (ed.), *The Rights of Minorities: A Commentary on the FCNM* (Oxford: OUP, 2005), 53-54.

²⁸¹ See *supra*, page 24.

The ECJ's case law in regard to positive action is known to be restrictive. Even though various promising developments have been traced, it is unlikely that the level of substantive equality considerations with which the FCNM is imbued will be matched by EC equality law in the near future. A similar difference between the two instruments can be identified as regards the inclusion of explicit positive duties to ensure substantive equality.

5.2. Scope of application *ratione personae*

The FCNM is formulated in terms of persons belonging to national minorities, while the Racial Equality Directive wants to promote equal treatment between persons irrespective of racial or ethnic origin. It can be highlighted that neither instrument provides a definition of the concepts determining their scope of application *ratione personae*. Notwithstanding the fact that both instruments are framed or conceived in terms of rights for individual persons, and not groups, they ostensibly have important implications for particular groups and provide protection with an important group dimension.²⁸² Despite the absence of a generally accepted definition of the concept 'national minority' in terms of positive international law, which is also visible in the absence of a definition of the concept national minority,²⁸³ there is little disagreement about the fact that minorities concern groups with different ethnic, religious or linguistic characteristics.²⁸⁴ The Racial Equality Directive (implicitly) caters for persons belonging to ethnic and racial groups. Unfortunately the directive does not include a definition of race or ethnicity, but it clearly covers differentiation on the basis of ethnicity. It was also pointed out that indirect racial discrimination could reach, depending on the circumstances, certain differentiations on the basis of language or religion. This would obviously be beneficial for linguistic and religious groups.

Neither instrument determines explicitly who has the power to identify the relevant groups or to determine what individuals belong to these groups. Article 3 FCNM paragraph 1 literally only addresses the right of persons belonging to national minority to choose to be treated or not as such and the prohibition of disadvantages to result from this choice or from the exercise of the rights which are connected to that choice. However, when considering the practice of the AC, two other dimensions are being addressed in terms of article 3 (not always equally extensively and explicitly), namely the identification of groups as national minorities, and the identification of members of these groups.

Most attention in terms of article 3 FCNM actually goes to the determination of the groups qualifying as national minorities. While the AC acknowledges that state parties have a margin of appreciation when making decisions concerning the personal scope of application of the FCNM, arbitrary or unjustified distinctions should not be made.²⁸⁵ The AC does not have the power to oblige states to recognise (particular) groups as national minorities but it attempts through a constructive dialogue to persuade the authorities to adopt an inclusive approach. In the process the AC seems to give extensive weight to self-identification by the groups concerned.²⁸⁶ For example in relation to Bulgaria's reluctance to recognise certain groups as national minorities, the AC encourages the

²⁸² See *inter alia* the definition of indirect discrimination and the provision on positive action in the Racial Equality Directive and article 5 FCNM. Minority rights generally have a strong collective dimension (see also Pentassuglia, *Minorities in International Law*..., 51)..

²⁸³ The Explanatory Report to the FCNM justifies this by stating that a pragmatic approach was chosen (paragraph 12).

²⁸⁴ G. Pentassuglia, *Minorities in International Law* ..., 58-59.

²⁸⁵ This is actually a formulation which is part of the steady jurisprudence of the AC, see *inter alia* AC, Opinion on Bulgaria, ACFC/OP/I(2006)001, para 15; AC, Opinion on Poland, ACFC/INF/OP/I(2004)005, para 17. See also H.J. Heintze, 'Article 3'; in M. Weller (ed), *The Rights of Minorities: A Commentary to the FCNM* (Oxford: OUP, 2005), 112.

²⁸⁶ Mostly the concept self-identification refers to the level of membership of a (minority) group.

government to afford these groups access to protection under the FCNM in view of their 'keen consciousness of belonging to distinct ethnic groups...'.²⁸⁷ In its second opinion on Finland the AC explicitly indicates in regarding the recognition of a group as a national minority, that 'the principle of self-identification of the persons concerned should be a guiding principle when considering the matter'.²⁸⁸

It is furthermore striking that the AC interprets the concepts 'treated as such' in a broad way, which would make obligatory census questions contrary to the FCNM.²⁸⁹ 'Treatment' would then almost be equated with 'identification', and the choice to be identified as a member of a minority.²⁹⁰ It should be highlighted though that self-identification should not be understood as an absolute subjective matter but that it should have a factual basis.²⁹¹

The Racial Equality Directive, on the other hand, is meant to protect persons/groups that have a particular racial or ethnic origin from discrimination. The text of the Racial Equality Directive does not say anything about who determines what constitutes a particular 'racial or ethnic origin', what groups are to be considered as racial or ethnic groups, and who can be considered as members of racial or ethnic groups. The practice of CERD/C in relation to ICERD could be helpful in this respect as article 1 ICERD defines racial discrimination in terms of differences on the basis of race, colour, descent or national or ethnic origin. CERD/C has been confronted with questions about the ways in which individuals are identified as being members of a particular racial or ethnic group. It has emphasized in its General Recommendation VIII that 'such identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned'.²⁹² This position has been clearly confirmed in its Concluding Observations in relation to periodic state reports. In its concluding observations on Nigeria of 2005, the Committee indicated that voluntary self-identification is the basis to determine the situation of groups falling within the definition of article 1 ICERD.²⁹³

²⁸⁷ Opinion on Bulgaria (I, 2006), para 24.

²⁸⁸ AC, Opinion on Finland, ACFC/INF/OP/II(2006)003, para 26. See also Opinion on Poland (ACFC/INF/OP/I(2006)005), para 19 where it welcomes a decision of the government because it would be in line with the wishes of a particular group, see also AC, Opinion on Russia, ACFC/INF/OP/ I(2003)005, para 21, where it welcomes the approach of the government which has not objected in principle to any claims to be protected by the FCNM, see also AC, Opinion on Slovenia, ACFC/INF/OP/ II(2005)005, para 39 where the AC urges the government 'to adopt a more inclusive approach in order to better respond to the established reality on the ground' which arguably refers to the wishes of several groups also to be considered as national minorities).

²⁸⁹ Opinion on Bulgaria (I, 2006), para 27, Italy I par 18-20, AC, Opinion on Estonia, ACFC/INF/OP/ I(2002)005, para 19, Opinion on Poland (II, 2004), para 24.

²⁹⁰ This can also be seen in the opinion on Russia (I, 2003), para 30 where the AC underscores that 'an obligatory ethnicity entry in internal passports, in particular when coupled with limitations on persons' right freely to choose which ethnicity should be indicated therein, is not compatible with the principles contained in article 3'.

²⁹¹ The Explanatory Memorandum of the FCNM confirms this as it points out that the choice of belonging in article 3 'does not imply a right for an individual to choose arbitrarily to belong to any national minority. The individual's subjective choice is inseparably linked to objective criteria relevant to the persons identity' (para 35). This was also the position in terms of the Minorities Treaties of the League of Nations, as well as under article 27 ICCPR. See PCIJ, Rights of Minorities in Upper Silesia (Minority Schools), PCIJ, Series A, no 15, 1928, 33; HRC, Kitok v Sweden, Communication no 197/1985, views of 27 July 1988, para 9.7.

²⁹² See also CERD/C, General Recommendation no 27: Discrimination against Roma, para.3.

²⁹³ CERD/C, Concluding Observations on Nigeria, 2005, para 10. Cf. CERD/C, Concluding Observations Venezuela, 2005, para 15. See also implicitly in CERD/C Concluding Observations in relation to Turkmenistan of 2005, para 9. In none of the individual complaints considered by CERD/C the identification question was an issue.

5.3. Scope of application *ratione materiae*

The scope of application *ratione materiae* of the FCNM is only confined by the content of the rights it enshrines, but these tend to address the typical needs of minorities anyway. Furthermore, it should be underlined that the equality provision in article 4 is not accessory and thus has a virtual limitless scope, which also allows to address issues under the FCNM that are not explicitly enshrined in its provisions, like equal access to employment and to public services. The supervisory practice of the AC shows an increasing attention for economic difficulties of minority groups, especially the Roma.²⁹⁴

The material scope of the Racial Equality Directive seems at first sight very broad, definitely in relation to other EC Equality Directives, but it remains to be seen whether the ECJ will agree that all the areas in article 3 indeed are within the competence sphere of the EC. The Racial Equality Directive clearly addresses several areas in which minorities face discrimination, the interpretation by the ECJ is awaited to determine to what extent also typical minority concerns like language use in education and in public services are covered. It seems unlikely that all areas in which the FCNM provides special minority rights will be covered by the Racial Equality Directive, even when the latter is interpreted generously.²⁹⁵

5.4. Special measures

While special minority rights, aimed at protecting and promoting the separate identity of minorities are inherently not temporary, this is less clear cut in terms of the Racial Equality Directive. The special measures that flow from the prohibition of indirect discrimination and a possible duty to promote equality would arguably not be inherently temporary. In regard to positive action, it should be underlined that the Racial Equality Directive, in contrast to ICERD, does not limit this concept to remedial measures, which are inherently temporary. The inclusion of positive action measures that are aimed at preventing disadvantage, opens the door to more enduring measures. Nevertheless, all special measures will have to be in line with the proportionality principle (in order not to fall foul of the prohibition of discrimination), and this might entail temporal limitations as well, depending on the circumstances. It should in any event be underlined that the case law of the ECJ seems to be gradually less restrictive (and more nuanced) in regard to positive action, which could also have positive repercussions for the acceptance of special measures more generally.

²⁹⁴ See e.g. AC, Opinion on Albania, ACFC/INF/OP, I(2003)004, para 75; Opinion on Bulgaria (I, 2006), para 109; Opinion on Italy (I, 2002), para 65; Opinion on Norway, ACFC/IF/OPI(2003)003, para 63.

²⁹⁵ See also Von Toggenburg who argues that in addition to the Racial Equality Directive, also minority specific measures should be adopted, and minority sensitive interpretations of the ECJ are invited inter alia in relation to linguistic and cultural diversity: G. Von Toggenburg, 'The Racial Equality Directive: A new Dimension in the Fight against Ethnic Discrimination in Europe' in 1 European Yearbook of Minority Issues, 2001/2, 243-244.

Conclusion

A central question in relation to minority protection has been (and still is) the role of special rights for minorities. While 'special' rights seem at first sight the opposite of 'equal' rights, everything depends what conception of equality one embraces. A substantive equality conception implies an acknowledgement that differential treatment ('special' measures) are needed in order to reach substantive or real equality. The on-going debate about whether or not the prohibition of discrimination would suffice for an adequate minority protection, depends to a great extent on the way in which this prohibition is conceived (interpreted), and more particularly on the degree to which it embraces substantive equality considerations. It may be obvious that also the actual reach of this prohibition of discrimination, and particularly to what extent it can reach the typical areas of concern of minorities, matters. In view of the central importance of the right to identity of minorities, these areas of concern surely include identity related matters, in addition to equal access and effective participation in economic, social and cultural life and public affairs.

The general understanding that the prohibition of discrimination allows certain forms of differential treatment (and thus special measures) already implies a certain opening to substantive equality. It clarifies in any event that special minority rights do not necessarily violate the prohibition of discrimination. To the extent that the prohibition of discrimination also includes a prohibition of indirect discrimination, this implies an inclusion of important substantive equality considerations. Indirect discrimination gets at rules and practices that may be neutral on their face but (are likely to) have a disproportionate impact on certain groups. To the extent that it is easier to establish a *prima facie* case of indirect discrimination, this undoubtedly benefits the victims (often persons belonging to minorities) of these measures.

The ECJ has played an important role in incorporating indirect discrimination in EC equality law, and has a good track record, especially in comparison with the case law of the ECHR or the HRC. The analysis in chapter 3 has revealed that the supervisory practice of CERD/C and the European Committee of Social Rights takes a rather progressive stance in this respect. However, the potential guidance of especially the practice of CERD/C is diminished by the fact that the EC's competence sphere is limited (which also has repercussions for the Racial Equality Directive). It should in any event be highlighted that the definition in the Racial Equality Directive seems to strengthen the protection against indirect discrimination, by facilitating the case of the victims.

While a duty to differentiate (between substantively different situations) as flowing from the prohibition of discrimination has been firmly acknowledged by the ECtHR, the ensuing case law has not been promising in terms of minority specific rights. The case law of the European Committee of Social Rights, however, has more potential in the sense that it appears to acknowledge that an effective non-discriminatory enjoyment of rights imposes an obligation on the state to accommodate relevant differences, where necessary through the adoption of special measures.²⁹⁶ In so far as these special measures are not remedial, there is no need for them to be temporary. However, the scope (both in substance and in duration) should be in line with the proportionality principle.

Considering the fact that the prohibition of discrimination constitutes the limit for acceptable positive action measures, the interpretation (and application) of the former determines the scope of the latter. While the case law of the ECJ is developing in relation to positive action, and increasingly seems to acknowledge the substantive equality goal, it remains rather restrictive towards forms of positive action aimed at equality of results. The practice of ICERD (and even the HRC) seems more flexible in this respect. As the ECJ seems to give more weight to the proportionality principle in its recent case law, it might follow the path of the former, especially in relation to the Racial Equality Directive. This directive does not only explicitly acknowledge the substantive equality

²⁹⁶ *Inter alia* European Committee of Social Rights, Complaint 27/2004, para 21 and 36.

goal of positive action, but also concerns a different social context than that of gender. It should furthermore be highlighted that article 5 Racial Equality Directive does not limit positive action to remedial measures (of a temporary nature) but also includes the possibility of preventive measures.

While the Racial Equality Directive does not contain explicit duties to promote equality, the inclusion of numerous such positive obligations in ICERD, as further elaborated in the practice of CERD/C might be instructive for the ECJ, particularly the extent to which the far reaching positive state obligations intrude into the private sphere. In regard to the reach of the prohibition of discrimination in the Racial Equality Directive, it was already mentioned that the definition in ICERD would be a good reference point. The practice of CERD/C has also clearly shown the potential to reach differentiations on the basis of language and religion through the prohibition of indirect racial discrimination.

Furthermore, it is to be hoped that the ECJ will follow General Recommendation no 30 of CERD/C in relation to the exclusion of differentiations on the basis of nationality as this is extremely circumscribed in the Recommendation so that indirect racial discrimination would not be condoned.

Finally, a closer comparison of the Racial Equality Directive and the FCNM points to the extent to which the FCNM has added value (compared to the Directive) in relation to the goals of minority protection.

Notwithstanding the fact that their respective overarching goals and themes seem very different, the interpretation of the relevant concepts in relation to the scope of application *ratione personae*, *ratione materiae* and the inclusion of substantive equality considerations might imply a higher level of convergence. The competence limit of the EC should nevertheless be taken into account.

The FCNM has the obvious benefit that it is resolutely geared towards substantive equality, and that it is explicit about the kinds of special rights that are particularly relevant for minorities, especially as related to their right to identity. These special measures are furthermore not intrinsically limited to temporary ones.

The Racial Equality Directive, on the other hand, may be less explicit on identity issues, but it does explicitly address very important issues for the day to day integration of minorities which are not covered explicitly and in the same degree of detail in the FCNM, more specifically access to employment, health care, goods and services available to the public etc. The interpretation by the ECJ is eagerly awaited, to determine its actual potential as a source of special measures in favour of minorities, including the question whether these special measures can also be enduring (and not merely temporary).

It should in any event be emphasized that the Racial Equality Directive does not prohibit all kinds of differential (or special) measures (adopted under the FCNM). Not only is the scope of application of the RED *ratione materiae* and *personae* limited, but special measures can also flow from the prohibition of indirect discrimination, from a duty to promote equality or can be acceptable as positive action (also aimed at preventing disadvantage). Nevertheless these measures have to be in line with the proportionality principle, and here everything depends (again) on the interpretation (and the level of scrutiny) adopted.

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