

# The Prohibition of Discrimination under European Human Rights Law

Relevance for the EU non-discrimination directives - an update

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# The Prohibition of Discrimination under European Human Rights Law

Relevance for the EU non-discrimination directives - an update

European Network of Legal Experts in the non-discrimination field

Written by Olivier de Schutter

**European Commission**  
Directorate-General for Justice

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Jessica | 1986

# Executive Summary

The report offers an overview of protection from discrimination under the 1950 European Convention on Human Rights and the 1961 European Social Charter as well as the 1996 Revised European Social Charter, which are the main human rights treaties of the Council of Europe. The report seeks to identify aspects of that protection which could influence the outstanding questions of interpretation of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, as well as the proposed Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation that is currently under discussion.

The report is structured in three parts. Part I offers an overview of the anti-discrimination clauses of the European Convention on Human Rights and of the relevant case-law of the European Court of Human Rights. The European Convention on Human Rights (ECHR) contains a large range of civil and political rights, including the right to life, the prohibition of torture and of inhuman or degrading treatment or punishment, the prohibition of slavery and forced labour, the right to liberty and security, the right to a fair trial, the principle of no punishment without law (*nullum crimen, nulla poena sine lege*), the right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, and the right to marry. Additional protocols to the ECHR guarantee rights such as the protection of property, the right to education, the right to free elections (Protocol No. 1), the prohibition of imprisonment for debt, freedom of movement, the prohibition of expulsion of nationals and the prohibition of collective expulsion of aliens (Protocol No. 4), the abolition of the death penalty (Protocol No. 6 and, extending the prohibition to times of war, Protocol No. 13), the procedural safeguards relating to the expulsion of aliens, the right of appeal in criminal matters, the right to compensation for wrongful conviction, the right not to be tried or punished twice, or equality between spouses (Protocol No. 7). The enjoyment of all these substantive rights must be ensured without discrimination, pursuant to Article 14 ECHR, to which the later additional protocols also refer. Part I of the report describes the method used by the European Court of Human Rights in the examination of differences in treatment which are denounced as being discriminatory. It notes in particular that the level of the scrutiny exercised by the Court will vary according to a largely implicit and evolving, but nevertheless identifiable, hierarchy of prohibited grounds of discrimination: differences in treatment on the basis of ‘suspect’ grounds (birth out of wedlock, sex, sexual orientation, race and ethnic origin, and more recently nationality) must be justified by ‘particularly weighty reasons’ and be necessary to the fulfilment of the aims pursued; differences in treatment based on ‘non-suspect’ grounds (these constitute a residual category which includes property, but arguably also religion as well as disability) must have an objective and reasonable justification, requiring that they pursue a legitimate aim and that there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. However, the non-discrimination clause included in the 1950 ECHR only applies in the enjoyment of the rights and freedoms set forth in the Convention, and cannot be invoked independently of those other substantive provisions: as a result, although Article 14 ECHR may be invoked in contexts such as education, social aid or social security, the exercise of political rights or the provisions which seek to facilitate family life, as well as in situations where the impugned difference in treatment is based on the exercise of freedom of religion, on sexual orientation, or generally on the exercise by the individual of the freedoms protected under the Convention, it shall not be invocable in principle in the context of employment and occupation. Part I of the report therefore includes a study of the added value of Protocol No. 12 to the ECHR, which opened for signature in 2000 and entered into force in 2005, as this instrument provides for a general anti-discrimination clause for the States Parties with respect to which that protocol is in force. Although the scope of application of Protocol No. 12 to the ECHR is broader than that of Article 14 ECHR, the relatively low number of ratifications of this instrument, as well as the timid approach it appears to take on the scope of positive obligations which may be derived from it, will limit its effectiveness in imposing on States Parties the adoption of measures to combat discrimination in private relationships.

Part II examines protection from discrimination under the European Social Charter, according to the interpretation given to the Charter by the body of independent experts established under the Charter to monitor its implementation: the European Committee of Social Rights. Both the conclusions adopted by the Committee on the basis of the periodic state reports and the decisions it adopted in the context of collective complaints are examined in order to highlight its contribution to the shape of anti-discrimination law in Europe. Under the European Social Charter, the non-discrimination requirement is derived from Article 1, para. 2 of the 1961 European Social Charter and the 1996 Revised European Social Charter (the right to work), as well as from Article 15 (the right of persons with disabilities to independence, social integration and participation in the life of the community) and Article 23 (the right of elderly persons to social protection), whether combined or not with the non-discrimination clause included in Article E of the 1996 Revised European Social Charter. On the basis of this latter provision, the European Committee of Social Rights requires that States Parties to the Revised European Social Charter monitor the impact of their policies and legislation on the most vulnerable segments of the population, thus imposing on them a positive duty to promote equality. This positive duty—in effect, a due diligence obligation to measure the impact on vulnerable groups of certain general measures or policies that are ostensibly ‘neutral’—goes beyond what the European Court of Human Rights has imposed on the basis of Article 14 ECHR or Protocol No. 12 to the ECHR. Part II of the report also examines the content of the practical measures (especially of a procedural nature) which promote the full effectiveness of the efforts to combat discrimination according to these provisions, and which the European Committee of Social Rights encourages the states bound by these provisions to adopt.

Part III examines the relationship of these instruments and the case-law of those bodies to the interpretation of Directives 2000/43/EC and 2000/78/EC. In this latter part, an overview is proposed, ground per ground, of the questions of interpretation which the European Court of Human Rights and the European Committee of Social Rights have addressed, to the extent that they may influence the interpretation of the directives.

The conclusions which may be derived from the study concern both the general orientation of an anti-discrimination strategy based on legal tools and specific questions of interpretation relating to each of the grounds covered by the Racial Equality and Employment Equality Directives. At the level of the general orientation of the strategy against discrimination, the report concludes that in the progressive development of anti-discrimination law in Europe, despite the important influence traditionally exercised by the European Convention on Human Rights on fundamental rights in the legal order of the European Union, the European Social Charter may become of increasing importance. Indeed, the European Committee of Social Rights is presented with state reports which make it possible to follow on a regular basis the progress made in the realisation of the rights of the 1961 European Social Charter or of the 1996 Revised European Social Charter, and since 1998, it may receive collective complaints which target general legislation and policies and the effect they produce on groups. The European Committee on Social Rights may therefore be better placed than the European Court of Human Rights to develop jurisprudence on a number of issues that are highly relevant in the implementation of anti-discrimination strategies, such as the need for an active labour policy aimed at the integration of target groups and, more generally, on the need for affirmative action—in the field of employment but also in the fields of education, housing, or social policy—directed towards the social and professional integration of the most vulnerable segments of the population, or the impact of a flexibilisation of labour legislation or of the ‘activation’ of social aid or unemployment benefits on the most vulnerable groups.

The quasi-absence of any case-law of the European Court of Human Rights deriving positive obligations from Article 14 ECHR and the timidity of the drafters of Protocol No. 12 to the ECHR on the issue of positive action contrasts with the insistence of the European Committee of Social Rights that legislation prohibiting discrimination actually produces effective integration, as well as with the requirement—also imposed by the European Committee of Social Rights—that the States Parties monitor closely the impact their policies have on the situation of the most vulnerable groups. The report argues that combating discrimination requires more than prohibitions: as exhibited within the EU by the complementarity between the anti-discrimination directives based on Article 13 TEC (now



Article 19 TFEU) and the European Employment Strategy or, more recently, the EU Framework for National Roma Integration Strategies up to 2020, it requires an active social and employment policy commensurate to the aim of realising integration. It is in this direction that recent evolution within the European Social Charter points. On the other hand, the case-law of the European Court of Human Rights under Article 14 ECHR may have an impact on certain specific issues of interpretation. It could in particular encourage an understanding of the prohibition of indirect discrimination on the grounds of race or ethnic origin which includes the requirement to take into account relevant differences between racial or ethnic groups, per analogy with the approach taken towards religion-based discrimination by the European Court of Human Rights.

From the point of view of the impact on the interpretation of the Racial Equality and Employment Equality Directives of the reference to the jurisprudence of the European Social Charter and the European Convention on Human Rights, the clearest lesson from the report is that such reference could lead to moving beyond the explicit definition of indirect discrimination under Article 2, para. 2 (b) of the both these directives. In these directives, indirect discrimination is defined only in reference to one of the three potential understandings of that concept distinguished in the report: it is seen to occur where apparently neutral regulations, criteria or practices appear to be particularly disadvantageous to the members of a certain category, if the provision creating the disadvantage is not objectively and reasonably justified (a). Neither disparate impact discrimination, as demonstrated by statistics (b), nor the failure to treat differently a specific individual or category by providing for an exception to the application of the general rule (c) are explicitly included in that definition. The jurisprudence of the European Committee of Social Rights, however, strongly encourages states to combat institutional discrimination by authorising statistical proof of discrimination and by measuring the impact of the laws and policies they implement. In addition, although the Employment Equality Directive only mentions a requirement of reasonable accommodation with respect to persons with disabilities, the case-law of the European Court of Human Rights illustrates why the failure to take into account relevant differences could be seen as a form of indirect discrimination, even though it may not fall clearly within the definition of Article 2, para. 2 (b) of the Directives. With respect to religion, as shown in Section 4 of Part III of the report, this could be a consequence of the freedom of religion guaranteed under Article 9 ECHR.

The report also draws two further conclusions with regard to two specific grounds of prohibited discrimination, namely disability and sexual orientation. In the context of the Employment Equality Directive, the requirements deriving from Article 8 ECHR may have a decisive role to play in countering the risk of discrimination against workers with disabilities resulting from the imposition of health and safety requirements which create an obstacle to their recruitment or their retention, where allegedly their employment would put themselves, their co-workers or the general public at risk. The same provision of the Convention, insofar as it protects the right to respect for private life, to which the sexual orientation of a person belongs, may contribute to the effectiveness of the prohibition of direct discrimination on the ground of sexual orientation. On the other hand, the report shows that the European Court of Human Rights has not considered that reserving advantages to married couples should be treated as discrimination based on sexual orientation in violation of Article 14 ECHR, read in combination with either Article 8 ECHR (right to respect for private life) or Article 1 of Protocol No. 1 to the ECHR (right to property, including to social benefits), even under jurisdictions where marriage is not available to same-sex couples.



Daniël | 2009

# Introduction

This report offers an overview of protection from discrimination under the European Convention on Human Rights and the Revised European Social Charter. It seeks in particular to identify aspects of that protection which could influence the outstanding questions of interpretation of Directive 2000/43/EC of 29.06.2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Racial Equality Directive)<sup>1</sup> and Directive 2000/78/EC of 27.11.2000 establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive)<sup>2</sup> or indeed, as relevant, the other instruments that contribute to the implementation of equality of treatment in EU law, such as the 2006 Recast Directive on equal treatment between men and women in employment and occupation.<sup>3</sup> The current discussions on the adoption of a Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation<sup>4</sup> could also benefit from this review of the protection against discrimination under the relevant Council of Europe instruments.

While this report focuses on the European Convention on Human Rights and on the European Social Charter,<sup>5</sup> other instruments adopted within the framework of the Council of Europe may also in the future influence the interpretation of the directives, insofar as they contain clauses protecting from discrimination based on the membership of a national minority<sup>6</sup> or on genetic heritage,<sup>7</sup> grounds which intersect with those of ethnic origin or disability, or insofar as they prohibit discrimination in certain domains, for instance in the implementation of measures aimed at preventing and combating trafficking in human beings.<sup>8</sup> However, the European Convention on Human Rights and the European Social Charter deserve a particular degree of attention. The European Convention on Human Rights has been recognised as having a particular significance in European Union law, and its requirements are to be considered part of the general principles of EU law which the Court of Justice of the European Union (CJEU) applies as part of its task of ensuring that the law is respected in the application of the Treaties.<sup>9</sup> The case-law of the European Court of Human Rights in the non-discrimination field, therefore, could increasingly influence the position of the Court of Justice of the European Union in its interpretation of instruments

<sup>1</sup> OJ L 180 of 19.07.2000, p. 22.

<sup>2</sup> OJ L 303 of 02.12.2000, p. 16.

<sup>3</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.07.2006, p. 23.

<sup>4</sup> COM(2008) 426 final, 02.07.2008.

<sup>5</sup> See also European Union Agency for Fundamental Rights and European Court of Human Rights, *Handbook on European anti-discrimination law*, Strasbourg and Vienna, 2010 (manuscript finalised in July 2010).

<sup>6</sup> Framework Convention for the Protection of National Minorities (ETS No. 157), signed in Strasbourg on 01.02.1995, in force on 01.02.1998: see Art. 4. The EU Charter of Fundamental Rights prohibits any discrimination based, *inter alia*, on grounds of membership of a national minority (Art. 21). Therefore, although Belgium, France, Greece and Luxembourg have not ratified the Council of Europe Framework Convention for the Protection of National Minorities, it cannot be excluded that this instrument will in time influence the development of EU law, particularly for the interpretation of this provision of the Charter.

<sup>7</sup> Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (ETS no. 164), signed in Oviedo on 04.04.1997, in force on 01.12.1999: see Art. 11.

<sup>8</sup> Council of Europe Convention on Action against Trafficking in Human Beings (ETS no. 197), opened for signature in Warsaw on 16.05.2005, and in force since 01.02.2008: see Art. 3.

<sup>9</sup> Case C-260/89, *ERT* [1991] ECR I-2925, para. 41; Opinion 2/94, *Accession of the European Community to the European Convention for the Safeguard of Human Rights and Fundamental Freedoms*, [1996] ECR I-1759, para. 33; Case C-274/99 P, *Connolly v. Commission* [2001] ECR I-1611, para. 37; Case C-94/00, *Roquette Frères* [2002] ECR I-9011, para. 25; Case C-112/00, *Schmidberger* [2003] ECR I-5659, para. 71; Case C-36/02, *Omega* [2004] ECR I-9609, para. 33.

adopted by the EU.<sup>10</sup> The accession of the European Union to the European Convention on Human Rights, which is currently under negotiation,<sup>11</sup> will further increase this tendency, since the result of the accession will be that the Convention will be directly applicable in the EU legal order.<sup>12</sup> However, although it will affect the relationships between the Court of Justice of the European Union and the European Court of Human Rights, the accession of the EU to the ECHR will not significantly change the role of the Court of Justice in guaranteeing the rights and freedoms listed in the ECHR. In interpreting the Charter of Fundamental Rights, the CJEU is already directed to take into account the case-law of the European Court of Human Rights related to the provisions of the Charter that correspond to rights and freedoms listed in the ECHR.<sup>13</sup> The reference to the European Social Charter is justified to the extent that the CJEU has occasionally referred to that instrument not only for the interpretation of EU law,<sup>14</sup> but also as a source of fundamental rights that could be recognised among the general principles of EU law that

<sup>10</sup> See Denis Martin, 'Strasbourg, Luxembourg et la discrimination: influences croisées ou jurisprudences sous influence?', *Revue trimestrielle des droits de l'homme*, n°. 69 (2007), pp. 107-134.

<sup>11</sup> Article 6 § 2 of the Treaty of the European Union provides the legal basis for the accession of the EU to the ECHR, following the entry into force of the Treaty of Lisbon on 01.12.2009 (Treaty on European Union as amended by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJ C 306, of 17.12.2007, p. 1)). The negotiations were officially launched on 07.07.2010, and it was the intention that they should be completed by June 2011. At the time of writing, it is uncertain whether this calendar will be complied with. Once agreement has been reached, it will have to be approved unanimously within the Council of the EU and by the European Parliament, and each Member State of the EU will have to ratify the agreement in accordance with its constitutional procedures (see Art. 218, §§ 6 a) and 10 of the Treaty on the Functioning of the European Union); in addition, the agreement will require ratification by the 20 other (non-EU) member States of the Council of Europe. It is therefore unlikely that the accession will be effective before the end of 2012.

<sup>12</sup> According to the Court of Justice, the provisions of international agreements concluded by the Union and the acts adopted by the organs set up under such agreements 'from the time of their entry into force form an integral part of the Community legal order' (Opinion 1/91, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, [1991] ECR I-6079, at para. 37). The result is that the legislation of the EU, like the national laws of the Member States, must take into account the provisions of such agreements, the CJEU having the jurisdiction to ensure that they are respected (see in particular Koen Lenaerts and Eddy De Smijter, 'Some Reflections on the Status of International Agreements in the Community Legal Order', in G.C. Rodriguez Iglesias et al., *Mélanges en hommage à Fernand Schockweiler* (1999), at 347; and see more generally Israel de Jesus Butler and Olivier De Schutter, 'Binding the EU to International Human Rights Law', *Yearbook of European Law*, vol. 27 (2008), pp. 277-320).

<sup>13</sup> The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, cited above, gives binding legal effect to the Charter of Fundamental Rights, initially proclaimed in 2000: see Article 6(1) of the Treaty on European Union as amended by the Treaty of Lisbon (referring to the EU Charter of Fundamental Rights in the revised form it was proclaimed, in a revised form, on 12.12.2007 (OJ C 303 of 14.12.2007, p. 1)). Article 52, para. 3 of the Charter establishes the rule that, in so far as the rights of the Charter correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the ECHR.

<sup>14</sup> Case 149/77, *Defrenne v. Sabena* [1978] ECR 1365, at para. 26. See also Case 6/75, *Horst v. Bundesknappschaft* [1975] ECR 823, at 836.

the CJEU ensures respect for.<sup>15</sup> Indeed, it cannot be excluded that in the future, reference will also be made to the case-law developed by the European Committee of Social Rights, the body of independent experts tasked with interpreting the European Social Charter on the basis of state reports and collective complaints.<sup>16</sup>

The report is structured in three parts. Part I offers an overview of the anti-discrimination clauses of the European Convention on Human Rights and of the relevant case-law of the European Court of Human Rights. Part II examines protection against discrimination under the European Social Charter, under the interpretation given to the Charter by the European Committee of Social Rights (previously the Committee of Independent Experts), either in its conclusions adopted on the basis of the periodic state reports, or in the context of collective complaints. Part III examines the relationship of these instruments and the case-law of those bodies to the interpretation of Directives 2000/43/EC and 2000/78/EC. Certain general comments are offered, after which an overview is proposed, ground per ground, of the questions of interpretation which the European Court of Human Rights and the European Committee of Social Rights have addressed, to the extent that they may influence the interpretation of these directives.

<sup>15</sup> See Case C-438/05, *International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti*, para. 43 (judgment of 11 December 2007); and Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet*, para. 90 (judgment of 18 December 2007) (where the Court accepted 'the right to take collective action, including the right to strike', as part of the general principles of Community law, since it is 'recognised both by various international instruments which the Member States have signed or cooperated in, such as the European Social Charter... to which, moreover, express reference is made in Article 136 EC – and [ILO] Convention No 87 concerning Freedom of Association and Protection of the Right to Organise [of 1948]... and by instruments developed by those Member States at Community level or in the context of the European Union, such as the Community Charter of the Fundamental Social Rights of Workers [of 1989], which is also referred to in Article 136 EC, and the Charter of Fundamental Rights of the European Union'). See in particular the Opinion of AG Mengozzi, para. 78, which was apparently decisive on this point.

<sup>16</sup> Currently, there is no obligation imposed on the Court of Justice of the European Union to refer to the body of case-law developed by the European Committee of Social Rights in applying the provisions of the EU Charter of Fundamental Rights that stipulate rights that correspond to rights of the European Social Charter, a situation which contrasts with that of the provisions of the Charter of Fundamental Rights that replicate rights of the ECHR. However, in her opinion in the *Parliament v Council* case where the Parliament sought the annulment of the Family Reunification Directive, AG Kokott refers explicitly to the case-law of the European Committee of Social Rights, as a means of clarifying the meaning of the provisions of the ESC: see in Case C-540/03, *Parliament v Council*, [2006] ECR I-5769, para. 74 of the opinion (where, after mentioning Article 19(6) of the European Social Charter, which concerns the right to family reunification for migrant workers, AG Kokott refers to the fact that 'the European Committee of Social Rights, which supervises the implementation of the Social Charter, has to date, in its rulings, only accepted waiting periods of up to one year, and has rejected waiting periods of three years and more'). However, this attitude remains exceptional and it is far from clear whether it will be followed by the judges themselves.

Xiomara | 1989

# Part I

## The European Convention on Human Rights

The European Convention on Human Rights (ECHR) is in force in all the Member States of the European Union and binds them even in situations where they are implementing EU law. In order to explain what the European Convention on Human Rights may contribute to the implementation and interpretation of the Directives adopted in 2000 on the basis of Article 13 TEC (now Article 19 of the Treaty on the Functioning of the European Union), this section examines the substantive content of the requirement of non-discrimination under Article 14 ECHR and Article 1 of Protocol No. 12 ECHR (1.). It then examines the scope of application of the non-discrimination clause contained in Article 14 of that instrument (2.), and the extension of the requirement of non-discrimination by Protocol No. 12 additional to the Convention, which was opened for signature on 04.11.2000, and entered into force on 01.04.2005 (3.).<sup>17</sup>

## 1.1 The substantive content of the requirement of non-discrimination under the ECHR

Article 14 of the European Convention on Human Rights provides that:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The guarantee against discrimination afforded by Article 14 ECHR in the enjoyment of the rights and freedoms of the Convention presents three characteristics:<sup>18</sup> like Article 1 of Protocol No. 12 to the Convention (which extends the protection of discrimination to all rights set forth by law, and not only to the rights protected under the Convention), it contains a non-exhaustive list of prohibited grounds of discrimination (1.1.); the case-law on Article 14 ECHR recognises to a limited extent a distinction between ‘suspect’ and ‘non-suspect’ grounds of differentiation, although the strictness of the scrutiny exercised on differences of treatment by the States Parties to the Convention will depend on the context as a whole (1.2.); and it prohibits both direct and indirect discrimination, both in the sense of disparate impact discrimination and in imposing that the specific situations of certain individuals be accommodated (1.3.). A last paragraph in this section will briefly comment upon the regime of positive action under the European Convention on Human Rights (1.4.).

<sup>17</sup> On 01.05.2011, a total of 18 States Parties to the ECHR had ratified Protocol No. 12. Of the 27 EU Member States however, only 7 had ratified the Protocol (these are Cyprus, Finland, Luxembourg, the Netherlands, Romania, Slovenia and Spain). Twelve other EU Member States have signed the Protocol, but have not ratified it. The first application of Protocol No. 12 by the European Court of Human Rights was in the case of *Sejdic and Finci v. Bosnia-Herzegovina*, in which the Court delivered a judgment on 22.12.2009 (Appl. N° 27996/06 and 34836/06). Relying on Article 14, Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12, the applicants challenged their ineligibility to stand for election to the House of Peoples and the Presidency on the ground of their Roma and Jewish origin, which, in their view, amounted to racial discrimination. The Court concluded that the applicants’ continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina lacked an objective and reasonable justification and had therefore breached Article 14 taken in conjunction with Article 3 of Protocol No. 1. It also concluded that the conditions for eligibility for election to the Presidency constituted a violation of Article 1 of Protocol No. 12. Both violations stemmed from the fact that the applicants were not affiliated with a ‘constituent people’, as defined in the constitutional structure of Bosnia and Herzegovina following the 1998 Dayton Peace Agreements. The Court noted that the meaning of ‘discrimination’ in Protocol No. 12 should be identical to that of the same term in Article 14 ECHR: the two provisions differ only by their scope of application.

<sup>18</sup> See further, *inter alia*, J. Gerards ‘The Application of Article 14 ECHR by the European Court of Human Rights’, in J. Niessen and Isabelle Chopin (eds.), *The Development of Legal Instruments to Combat Racism in a Diverse Europe*, Martinus Nijhoff Publ., Leiden/Boston, 2004, pp. 3-60.



### 1.1.1 A non-exhaustive list of prohibited grounds of discrimination

Both Article 1 of Protocol No. 12 to the ECHR and Article 14 ECHR prohibit discrimination in the enjoyment of the rights and freedoms set forth in the Convention 'on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. This list is not exhaustive.<sup>19</sup> Thus, Article 14 ECHR has been applied, for instance, in order to protect individuals from discrimination based on their sexual orientation,<sup>20</sup> on gender reassignment following an operation,<sup>21</sup> or on birth out of wedlock.<sup>22</sup> Indeed, any criterion of differentiation may be potentially examined under Article 14 ECHR, whether or not it has traditionally been listed among the prohibited forms of discrimination in international human rights law: for instance, the European Court of Human Rights took the view in 2005 that, with regard to child benefits, there are no sufficient reasons justifying difference of treatment on one hand of aliens who were in possession of a stable residence permit, and on the other of those who were not, although this criterion is not traditionally considered as suspect in international human rights law and, indeed, may seem to be at the foundation of immigration law.<sup>23</sup>

### 1.1.2 The significance of the prohibition of discrimination and the question of a hierarchy of grounds

It is the established case-law of the European Court of Human Rights that a difference of treatment is discriminatory within the meaning of Article 14 ECHR if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.<sup>24</sup> The examination of a discrimination claim thus requires a two-tiered analysis, focusing first on the *aim* pursued, second on the *relationship between the impugned difference in treatment* (or, as we shall see, the lack thereof) *and the realisation of that aim*.

How this two-part test is to be applied may depend on the nature of the criterion on which the difference in treatment is based. To this extent, a certain hierarchy of grounds does appear in the case-law of the European Court of Human Rights: although, in most cases, a difference of treatment will pass the test of non-discrimination if it pursues a legitimate aim by means presenting a reasonable relationship of proportionality with that aim, where differential treatment is based on a 'suspect' ground, it will be required that it is justified by 'very weighty reasons'

<sup>19</sup> Eur. Ct. HR, *Engel and Others v. the Netherlands* judgment of 8 June 1976, Series A no. 22, pp. 30-31, § 72. The Explanatory Report to Protocol No. 12 to the ECHR states in § 20 that 'expressly including certain additional non-discrimination grounds (for example, physical or mental disability, sexual orientation or age) [appeared to the drafters of the Protocol as] unnecessary from a legal point of view since the list of non-discrimination grounds is not exhaustive, and because inclusion of any particular additional ground might give rise to unwarranted *a contrario* interpretations as regards discrimination based on grounds not so included'.

<sup>20</sup> See, e.g. Eur. Ct. HR (4th sect.), *Salgueiro da Silva Mouta v. Portugal* (Appl. no. 33290/96), judgment of 21 December 1999, ECHR 1999-IX, § 28.

<sup>21</sup> Eur. Ct. HR (GC), *Christine Goodwin v. the United Kingdom* (Appl. N° 28957/95) judgment of 11 July 2002, ECHR 2002-VI.

<sup>22</sup> See, e.g., Eur. Ct. HR, *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31; Eur. Ct. HR, *Inze v. Austria*, judgment of 28 October 1987, Series A no. 126, § 41; Eur. Ct. HR (3rd sect.), *Mazurek v. France* (Appl. N° 34406/97), judgment of 1 February 2000.

<sup>23</sup> See Eur. Ct. HR (4th sect.), *Niedzwiecki v. Germany* (Appl. no. 58453/00), judgment of 25 October 2005 (final on 15 February 2006), § 33. The Court follows the position of the German Federal Constitutional Court (*Bundesverfassungsgericht*) as expressed after the close of the litigation related to the applicant's situation (see decision of 6 July 2004 (1 BvL 4/97, 1 BvL 5/97, 1 BvL 6/07)).

<sup>24</sup> See, among many others, the *Karlheinz Schmidt v. Germany* judgment of 18 July 1994, Series A no. 291-B, pp. 32-33, § 24. For a general study on the principle of non-discrimination in the case-law of the European Court of Human Rights, see Denis Martin, *Egalité et non-discrimination dans la jurisprudence communautaire. Etude critique à la lumière d'une approche comparative*, Bruxelles, Bruylant, 2006, paras. 45-272.

and that the difference in treatment appears both suited for realising the legitimate aim pursued, and *necessary*; and the European Court of Human Rights has occasionally mentioned that, where a difference of treatment is based on such a suspect ground, 'the margin of appreciation afforded to the State is narrow and in such situations the principle of proportionality does not merely require that the measure chosen is in general suited for realising the aim sought but it must also be shown that it was necessary in the circumstances.'<sup>25</sup>

It is difficult to offer a systematic presentation of the regime resulting from the hierarchy between 'non-suspect' and 'suspect' grounds of differentiation, because of the shifting character of the boundary between the two categories, both in time and according to the subject-matter under consideration.<sup>26</sup> It is, however, undeniable that certain grounds of differentiation require particularly strong justifications from the state. No relationship exists between the explicit identification of a particular criterion in Article 14 ECHR or Article 1 of Protocol No. 12 and the question whether or not that criterion is treated as 'suspect': 'property', for instance, although listed in Article 14 ECHR, is a criterion frequently relied upon by the national authorities in the areas of taxation or social security, matters in which States Parties are recognised as having a wide margin of appreciation.<sup>27</sup> Conversely, although not mentioned in Article 14 ECHR, birth out of wedlock is considered in principle a suspect ground,<sup>28</sup> requiring any difference in treatment based on such ground to be justified by 'particularly weighty reasons'. Other 'suspect' grounds are, *inter*

<sup>25</sup> Eur. Ct. HR (4th sect.), *Kozak v. Poland* (Appl. no. 13102/02) judgment of 2 March 2010 (final on 2 June 2010), § 92 (alleged discrimination on grounds of sexual orientation, in a case where the applicant could not succeed to the tenant's rights of his deceased partner, with whom he lived in a same-sex relationship).

<sup>26</sup> Indeed, it has been suggested that a new approach to dealing with protection against discrimination under the Convention should be adopted, based on more clearly delineated variations in the strictness of scrutiny: see Oddný Mjöll Arnadóttir, *Equality and non-discrimination under the European Convention on Human Rights*, Martinus Nijhoff Publ., International studies in human rights Vol. 74, The Hague, 2003, 265 pp.; and J. Gerards, 'Intensity of Judicial Review in Equal Treatment Cases', *N.I.L.R.*, 2004, pp. 135-183.

<sup>27</sup> See, e.g., Eur. Ct. HR, *Fredin v. Sweden*, judgment of 18 February 1991, Series A no 192, § 151; *Immobiliare Saffi v. Italy*, judgment of 28 July 1999, Reports 1999-V, § 49; or *Chapman v. the United Kingdom*, judgment of 18 January 2001.

<sup>28</sup> Eur. Ct. HR, *Inze v. Austria*, judgment of 28 October 1987, Series A no. 126, § 41; Eur. Ct. HR (3d sect.), *Mazurek v. France* (Appl. no. 34406/97), judgment of 1 February 2000, § 49; Eur. Ct HR (GC), *Sommerfeld v. Germany* (Appl. no. 31871/96), judgment of 8 July 2003, § 93.

*alia*, race and ethnic origin,<sup>29</sup> sex,<sup>30</sup> sexual orientation,<sup>31</sup> and more recently nationality.<sup>32</sup> On the other hand, religion does not in general seem to be considered as a suspect ground;<sup>33</sup> nor does disability.

Even where the claim of discrimination is clearly considered by the Court to concern a ‘suspect’ ground of discrimination leading to a form of heightened scrutiny, such scrutiny, for all its strictness, is not necessary fatal to the impugned differentiation. The presumption that no objective and reasonable justification will support the difference of treatment remains rebuttable. The Court has admitted as constituting ‘very weighty reasons’, powerful enough to justify even differences in treatment based on ‘suspect’ grounds, those reasons which, by their very nature, come close in certain circumstances to simply annulling the special guarantee afforded to groups defined by their sex, their sexual orientation, their birth, or their nationality. For instance, the Court accepts that ‘protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment’ based on the homo- or heterosexual nature of a relationship, provided such a difference in treatment is necessary for the protection of such a traditional notion of family.<sup>34</sup> The legitimacy, in principle, of such a justification has also been recognised by the Court when it was confronted with a difference in treatment based on birth—within or outside wedlock—again with the consequence that the ‘suspect’ character of the ground of differentiation is practically nullified by the admission of the legitimacy of that aim.<sup>35</sup> And while nationality is often considered to constitute a suspect ground of differentiation—any difference in treatment based exclusively on nationality would only be allowable provided particularly weighty reasons are provided—the Court does not treat as discriminatory certain regulations that exclude foreigners from certain positions, because of the link of

<sup>29</sup> See, e.g., Eur. Ct. HR, *Jersild v. Denmark*, judgment of 23 September 1994, § 30; Eur. Ct. HR (GC), *Oršuš and Others v. Croatia*, judgment of 16 March 2010 (Appl. no. 15766/03), § 156 (where the Court notes that ‘Where the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification [of a difference in treatment alleged to be discriminatory] must be interpreted as strictly as possible’).

<sup>30</sup> See Eur. Ct. HR (plenary), *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, § 78 (‘it can be said that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention’); Eur. Ct. HR, *Burghartz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 29, § 27; *Karlheinz Schmidt v. Germany*, judgment of 18 July 1994, Series A no. 291-B, pp. 32-33, § 24; *Petrovic v. Austria*, judgment of 27 March 1998, Reports of Judgments and Decisions 1998-II, p. 587, § 37).

<sup>31</sup> Indeed, partially for the same motives that an interference with the sexual life of a person will only be justified by very serious reasons (see, e.g., Eur. Ct. HR, *Smith and Grady v. the United Kingdom*, judgment of 27 September 1999; *Lustig-Prean and Beckett v. the United Kingdom* (Appl. no. 31417/96 and 32377/96), judgment of 27 September 1999; and Eur. Ct. HR (3d sect.), *A.D.T. v. the United Kingdom* (Appl. no. 35765/97), judgment of 31 July 2000, ECHR 2000-IX, § 37)—being related to the most intimate aspects of one’s personality, such matters should in principle not concern the outside world—the Court has considered that differences based on sexual orientation require particularly serious reasons by way of justification: see Eur. Ct. HR (1st section), *L. and V. v. Austria* (Appl. no. 39392/98 and 39829/98), judgment of 9 January 2003, § 45; Eur. Ct. HR, *S.L. v. Austria* (Appl. no. 45330/99), judgment of 9 January 2003, § 36; Eur. Ct. HR (1st sect.), *Karner v. Austria* (Appl. no. 40016/98), judgment of 24 July 2003, § 37.

<sup>32</sup> See Eur. Ct. HR, *Gaygusuz v. Austria*, judgment of 16 September 1996, at § 42; *Koua Poirrez v. France*, (Appl. no. 40892/98), judgment of 30 September 2003, at § 46.

<sup>33</sup> Eur. Ct. HR (2nd sect.), *Palau-Martinez v. France* (Appl. no. 64927/01), judgment of 16 December 2003, § 39 (applying a classical test based on the legitimacy of the reasons for differentiating on the basis of religion and on the proportionality of the differentiation). Compare, however, with Eur. Ct. HR, *Hoffmann v. Austria*, judgment of 23 June 1993, Series A no. 255-C, at § 36.

<sup>34</sup> Eur. Ct. HR, *Karner v. Austria*, judgment of 24 July 2003, § 40 (although the Court concludes with a finding of discrimination on grounds of sexual orientation).

<sup>35</sup> See Eur. Ct. HR, *Mazurek v. France* (Appl. no. 34406/97), judgment of 1 February 2000, at §§ 50-51 (although the Court concludes that discrimination has occurred on grounds of birth).



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such positions with the public interest.<sup>36</sup> The dividing line between ‘suspect’ and ‘non-suspect’ grounds, therefore, is shifting, and the implications of one ground falling in either group will depend on the circumstances of each case.

Differences of treatment on grounds of race or ethnic origin seem to be one exception, however. The European Court of Human Rights insists in its recent case-law that racial discrimination is ‘a particularly egregious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy’s vision of a society in which diversity is not perceived as a threat but as a source of enrichment’.<sup>37</sup> In the 2005 case of *Timishev v. Russia*, where a Chechen lawyer had been denied authorisation to pass an administrative border on the basis of an oral instruction from the Ministry of the Interior of the Kabardino-Balkaria Republic not to admit persons of Chechen ethnic origin to the Republic, the Court did not simply note that the Government had provided no justification of the difference in treatment between persons of Chechen and of non-Chechen origin in the enjoyment of their freedom of movement. It added that: ‘In any event, ... no difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures’.<sup>38</sup> The Court concluded that the applicant had been victim of discrimination because his right to liberty of movement was restricted ‘solely on the ground of his ethnic origin’: the Court appears to impose an *absolute* prohibition on any difference of treatment on grounds of race or ethnic origin, without it being possible to justify any such difference of treatment. This is particularly remarkable since the Council of Europe’s European Commission against Racism and Intolerance (ECRI) General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, adopted in 2002, does not go as far, in that it defines ‘direct racial discrimination’ as ‘any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, *which has no objective and reasonable justification*’ (emphasis added), a formulation which apparently leaves open the possibility of justifying differences of treatment on grounds of race or ethnic origin.

In contrast to ECRI, therefore, the European Court of Human Rights treats differences in treatment on grounds of race and ethnic origin as subject to an absolute prohibition, with the sole exception that certain remedial measures may be adopted to improve the situation of certain underprivileged groups or to ensure appropriate representation of distinct ethnic groups in certain contexts. Thus, the Court noted in later cases that ‘Article 14 does not prohibit Contracting Parties from treating groups differently in order to correct “factual inequalities” between them. Indeed, in certain circumstances a failure to attempt to correct inequality through different treatment may, without an objective and reasonable justification, give rise to a breach of that Article’.<sup>39</sup> In the 2010 case of *Oršuš and Others v. Croatia*, which concerned the conditions under which Roma children were *de facto* segregated in education, the Court took the view that ‘temporary placement of children in a separate class on the grounds that they lack an adequate command of the language is not, as such, automatically contrary to Article 14 of the Convention. It might be said that in certain circumstances such placement would pursue the legitimate aim of adapting the education system to the specific needs of the children. However, when such a measure disproportionately or even, as in the present case, exclusively, affects members of a specific ethnic group, then appropriate safeguards have to be put in place’.<sup>40</sup>

<sup>36</sup> Eur. Ct. HR (1st sect.), *Bigaeva v. Greece* (Appl. no. 26713/05) judgment of 28 May 2009 (absence of violation where a foreigner, national of a state not belonging to the EU, was prohibited from practising as a lawyer registered with the Bar).

<sup>37</sup> Eur. Ct. HR (GC), *Nachova and Others v. Bulgaria* (Appl. nos. 43577/98 and 43579/98) judgment of 6 July 2005, § 145, ECHR 2005-VII.

<sup>38</sup> Eur. Ct. HR (2nd sect.), *Timishev v. Russia* (Appl. nos. 55762/00 and 55974/00) judgment of 13 December 2005 (final on 13 March 2006), § 58.

<sup>39</sup> Eur. Ct. HR (GC), *Sejdic and Finci v. Bosnia-Herzegovina* (Appl. nos. 27996/06 and 34836/06) judgment of 22 December 2009, § 44.

<sup>40</sup> Eur. Ct. HR (GC), *Oršuš and Others v. Croatia*, judgment of 16 March 2010 (Appl. no. 15766/03), § 157.

Whether or not a particular difference in treatment, operated within a particular sphere on the basis of a particular ground, is in principle suspect, will evolve over time: since the 1980s sex and sexual orientation have been treated differently to how they were in the 1960s; the view on birth out of wedlock has also changed since the late 1970s; in the 1990s, nationality lost the appearance of legitimacy it once may have seemed to have;<sup>41</sup> and transsexualism may now be considered to be a suspect ground, following the conclusion of the European Court of Human Rights that the refusal to recognise the new gender identity of a transsexual amounts to a violation of the right to respect for private life set out in Article 8 ECHR.<sup>42</sup> Age and disability, the next candidates for being treated as suspect grounds, are rapidly rising in the hierarchy of prohibited grounds:<sup>43</sup> there is hardly any doubt that European Union law will have an important—indeed, probably decisive—impact on that evolution.

However, the degree of scrutiny exercised over certain differences of treatment will depend, not only on the more or less ‘suspect’ character of the ground concerned, but on that ground in relation to the subject matter considered. It is also striking that, in areas that relate to the economic and social policies of the States Parties to the European Convention on Human Rights, the European Court of Human Rights generally allows them a broad margin of appreciation, and will arrive at a finding of violation only where the impugned differences in treatment are manifestly unreasonable.<sup>44</sup> This is illustrated in the area of equality of treatment between men and women by the case of *Stec v. the United Kingdom*, filed with the European Court of Human Rights in 2001.<sup>45</sup> The applicants in that case claimed that the schemes of Reduced Earnings Allowance (REA) (an earnings-related additional benefit under the statutory occupational accident and disease scheme which was put in place in 1948) and Retirement Allowance (RA), as it applied to each of them, was discriminatory on grounds of sex, in breach of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1. The dispute arose as a result of the reforms introduced under the Social Security Contributions and Benefits Act 1992: since REA is conceived as an earnings-related benefit designed to compensate employees or former employees for an impairment of earning capacity due to an accident at work or work-related illness, it was decided, as a matter of policy, that REA should no longer be paid to claimants who had reached an age at which, even if they had not suffered injury or disease, they would no longer be in paid employment. Under the Social Security Contributions and Benefits Act 1992, it was therefore decided that all REA recipients who, before 10.04.1989, had reached either (a) 70, if a man, or 65, if a woman, or (b) the date of retirement fixed by a notice, at age 65+ for a man or 60+ for a woman, would receive a frozen rate of REA for life. All other REA recipients would cease to receive REA, and would instead receive Retirement Allowance (RA), the rate of which is 25 per cent of REA, either on reaching (a) 70, if a man, or 65, if a woman, or (b) the date of retirement fixed by a notice, at age 65+ for a man or 60+ for a woman, or on giving up employment, at 65 for a man or 60 for a woman. In addition, in order to bring male and female pensionable age into line with each other, section 126 of the Pensions Act 1995 provided for the pensionable age of women born between 06.04.1950 and 05.04.1955 to increase progressively. With effect from 2010, the pensionable age of men and women in the United Kingdom would begin to equalise, and by 2020 both sexes would attain pensionable age at 65.

The applicants in *Stec* were men and women who complained that, in their individual situations, their retirement benefits would have been higher if they had been of the other sex. Their complaints before the British courts led to a referral to the Court of Justice of the European Union, which was asked whether the scheme in the United Kingdom was compatible with Council Directive 79/7/EEC of 19.12.1978 concerning the progressive implementation of the principle of equal treatment for men and women in matters of social security. Article 4,

<sup>41</sup> See, to that effect, J. Gerards, ‘Gelijke behandeling en het EVRM’, *NJCM-Bulletin*, vol. 29-2, March 2004, pp. 176-198, at p. 179.

<sup>42</sup> Eur. Ct. HR (GC), *Christine Goodwin v. the United Kingdom* (Appl. no. 28957/95) judgment of 11 July 2002, ECHR 2002-VI. See also Eur. Ct. HR (4th sect.), *Grant v. the United Kingdom* (Appl. no. 32570/03) judgment of 23 May 2006 (final on 23 August 2006).

<sup>43</sup> Indeed, it should not be a surprise that these grounds have been mentioned as possible candidates for explicit designation in Article 1 of Protocol No. 12 to the ECHR (see § 20 of the Explanatory Report).

<sup>44</sup> See Eur. Ct. HR (GC), *Carson and Others v. the United Kingdom* (Appl. no. 42184/05) judgement of 16 March 2010, at § 61.

<sup>45</sup> Eur. Ct. HR (GC), *Stec and Others v. the United Kingdom* (Appl. no. 65731/01) judgement of 12 April 2006.

para. 1 of the Directive prohibits all discrimination on grounds of sex, in particular as concerns the calculation of benefits. Such discrimination can be justified only under Article 7, para. 1 (a), which provides that the Directive is to be without prejudice to the right of Member States to exclude from its scope the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits. Under Article 7, para. 2, 'Member States shall periodically examine matters excluded under paragraph 1 in order to ascertain, in the light of social developments in the matter concerned, whether there is justification for maintaining the exclusions concerned'. In its preliminary ruling delivered on 23.05.2000,<sup>46</sup> the European Court of Justice of the European Union found, first, that 'removal of the discrimination at issue ... would have no effect on the financial equilibrium of the social security system of the United Kingdom as a whole' (§ 29), but that it had been objectively necessary to introduce different age conditions based on sex in order to maintain coherence between the State retirement pension scheme and other benefit schemes, so that the UK's choice to maintain differences of treatment between men and women in the Retirement Allowance (RA) scheme was justified under Article 7, para. 1 (a) of Directive 79/7/EEC.<sup>47</sup>

Although assessing the alleged discrimination on the basis of Article 14 ECHR in combination with Art. 1 of Protocol No. 1 to the Convention and not, of course, on the basis of the provisions of Directive 79/7/EEC, the European Court of Human Rights agreed with the Court of Justice of the European Union. It noted that at the time when differential pensionable ages were first introduced for men and women in the United Kingdom (in 1940), this served to mitigate financial inequality and hardship arising out of women's traditional unpaid role of caring for the family in the home rather than earning money in the workplace. 'At their origin, therefore, the differential pensionable ages were intended to correct "factual inequalities" between men and women and appear therefore to have been objectively justified under Article 14 of the Convention'.<sup>48</sup> According to the Court, it follows that 'the difference in pensionable ages continued to be justified until such time as social conditions had changed so that women were no longer substantially prejudiced because of a shorter working life. This change, must, by its very nature, have been gradual, and it would be difficult or impossible to pinpoint any particular moment when the unfairness to men caused by differential pensionable ages began to outweigh the need to correct the disadvantaged position of women'.<sup>49</sup> The Court concludes that 'the difference in State pensionable age between men and women in the United Kingdom was originally intended to correct the disadvantaged economic position of women. It continued to be reasonably and objectively justified on this ground until such time as social and economic changes removed the need for special treatment for women. The respondent State's decisions as to the precise timing and means of putting right the inequality were not so manifestly unreasonable as to exceed the wide margin of appreciation allowed it in such a field. Similarly, the decision to link eligibility for REA to the pension system was reasonably and objectively justified, given that this benefit is intended to compensate for reduced earning capacity during a person's working life. There has not, therefore, been a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 in this case'.<sup>50</sup> The case illustrates both the relatively broad margin of appreciation that is left to states in areas that relate to taxation or macro-economic policies, and the willingness of the Court, in principle, to allow for differential treatment where 'factual differences' have to be taken into account.

### 1.1.3 The Forms of Prohibited Discrimination

Although the same terms may be used in different ways in various legal systems, we may examine the case-law of the European Court of Human Rights by distinguishing between the following instances of discrimination. (i) *Direct discrimination* occurs where certain categories of persons are treated differently without this difference in

<sup>46</sup> Case C-196/98, *Hepple and Others v. Adjudication Officer* [2000] ECR I-3701.

<sup>47</sup> Eur. Ct. HR (GC), *Stec and Others v. the United Kingdom* judgment of 12 April 2006, cited above, at §§ 31-34.

<sup>48</sup> Eur. Ct. HR (GC), *Stec and Others v. the United Kingdom* judgment of 12 April 2006, cited above, at § 61.

<sup>49</sup> Eur. Ct. HR (GC), *Stec and Others v. the United Kingdom* judgment of 12 April 2006, cited above, at § 62.

<sup>50</sup> Eur. Ct. HR (GC), *Stec and Others v. the United Kingdom* judgment of 12 April 2006, cited above, at § 66.

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treatment having an objective and reasonable justification, either because it does not pursue a legitimate aim or because there is no reasonable relationship of proportionality between the means employed and the aim pursued. (ii) *Indirect discrimination* comes in three different forms: (a) where, without on the face of it creating a difference in treatment (and being thus apparently neutral), a regulation or a practice appears to be particularly disadvantageous to the members of a certain category, if the provision creating the disadvantage is not objectively and reasonably justified; (b) where a general measure is applied which affects a disproportionately high number of members of particular category, unless the measure resulting in such a disparate impact is objectively and reasonably justified (disparate impact discrimination); (c) finally, where the author of a general measure has without objective and reasonable justification failed to treat differently a specific individual or category by providing for an exception to the application of the general rule. A failure to provide effective accommodation—to a person with a disability or, for instance, to a person with specific needs because of religious prohibitions—may be seen as an instance of this latter sub-category of discrimination, insofar as such discrimination does not have its source in the general measure as such, which may still be perfectly justified, but in the failure to take into account, up to the individual level (as where religious conscientious objections are raised), the specific situation of those to whom the general measure is applied.

In recent years, the European Court of Human Rights has moved beyond the prohibition of direct discrimination in order to reinforce the protection afforded by Article 14 ECHR, but its case-law on the different forms of indirect discrimination which have been identified still remains under-developed. It has been more than a decade since the Court recognised that the failure to treat differently the members of certain categories could constitute a form of discrimination (which corresponds to the third sub-category (c) of indirect discrimination distinguished above). It has, however, been slower to assimilate disparate impact to discrimination ((b) in our typology), showing thus that it remains attached to the notion that prohibited discrimination must be intentional or, at least, sufficiently explicit—as occurs where it has its sources in openly differential treatment which cannot be objectively and reasonably justified. The Court has been willing, however, to make progress in other directions. Influenced both by EU law and by the views expressed by other Council of Europe bodies or by the UN human rights treaty bodies, it has recognised in recent years the difficulties of proof which the victims of discrimination frequently confront, and it has therefore agreed to facilitate such proof, at least where the national authorities have failed to adequately investigate instances of alleged discrimination. The following paragraphs briefly describe this evolution.

### 1.1.3.1 The obligation to take into account existing differences

The European Court of Human Rights has traditionally been confronted with situations where the laws or practices of a State Party to the European Convention on Human Rights differentiated between categories on allegedly discriminatory grounds, raising the question whether such differences in treatment could be considered objectively and reasonably justified. In such situations, the question presented to the Court is whether the challenged laws or practices are the source of a *direct discrimination* against the category of persons with respect to whom they impose a certain disadvantage. Only in 2000, in the case of *Thlimmenos v. Greece*, did the Court extend its case-law in order to identify a violation of Article 14 ECHR in the *failure to provide effective accommodation* to meet the specific

needs of certain categories. The applicant in that case, a Jehovah's Witness, had been refused an appointment as a chartered accountant because of his past conviction for insubordination, consisting in his refusal to wear military uniform. He complained not about the 'distinction that the rules governing access to the profession make between convicted persons and others', but rather about the fact 'that in the application of the relevant law *no distinction is made* between persons convicted of offences committed exclusively because of their religious beliefs and persons convicted of other offences'.<sup>51</sup> The answer of the Court is well known. It enriches its understanding of the notion of prohibited discrimination under Article 14 ECHR in order to include as a form of discrimination not only direct discrimination (i), but also the failure to accommodate effectively the specific needs of persons whose situation distinguishes them from the majority (ii) (c):<sup>52</sup>

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. [The Court therefore has to address the question] whether the failure to treat the applicant differently from other persons convicted of a serious crime pursued a legitimate aim. If it did the Court will have to examine whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Court considers that, as a matter of principle, States have a legitimate interest to exclude some offenders from the profession of chartered accountant. However, the Court also considers that, unlike other convictions for serious criminal offences, a conviction for refusing on religious or philosophical grounds to wear the military uniform cannot imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise this profession. Excluding the applicant on the ground that he was an unfit person was not, therefore, justified. (...) the Court finds that there existed no objective and reasonable justification for not treating the applicant differently from other persons convicted of a serious crime.

The reasoning of the Court in *Thlimmenos* could be applied, for instance, to the application of regulations relating to land use, without taking into account the particular needs of the Roma/Gypsies arising from their tradition of living and travelling in caravans.<sup>53</sup> The discrimination would have its source, in this instance, not in the adoption of land use regulations or their application in a generality of cases, but in the failure to consider the impact their application might have on Roma/Gypsies and to examine which mitigating measures, including the provision of an exception in the law, could be taken. It is in this direction, as we shall see, that the case-law of the European Committee of Social Rights, acting in the framework of the European Social Charter, has been moving.

The judgment delivered by the European Court of Human Rights on 30.04.2009 in the case of *Glor v. Switzerland*<sup>54</sup> may be seen to extend the reasoning held in *Thlimmenos* to the area of disability. The Court held that the Swiss government had violated Mr Glor's rights under Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to private and family life) of the European Convention on Human Rights. Mr Glor was a person with

<sup>51</sup> Eur. Ct. HR (GC), *Thlimmenos v. Greece* (Appl. no. 34369/97), judgment of 6 April 2000, § 42.

<sup>52</sup> Eur. Ct. HR (GC), *Thlimmenos v. Greece* (Appl. no. 34369/97), judgment of 6 April 2000, §§ 44-47.

<sup>53</sup> See Eur. Ct. HR (GC), *Chapman v. the United Kingdom* (Appl. no. 27238/95), judgment of 18 January 2001, at §§ 127-130 (where the Court does not exclude this reasoning, concluding however that there was no discrimination in that case); Eur. Ct. HR (GC), *Beard v. the United Kingdom* (Appl. no. 24882/94), judgment of 18 January 2001, at §§ 129-132 (same); Eur. Ct. HR (GC), *Coster v. the United Kingdom* (Appl. no. 24876/94), judgment of 18 January 2001, at §§ 139-142 (same); Eur. Ct. HR (GC), *Jane Smith v. the United Kingdom* (Appl. no. 25154/94), judgment of 18 January 2001 (same); Eur. Ct. HR (GC), *Lee v. the United Kingdom* (Appl. no. 25289/94), judgment of 18 January 2001, at §§ 126-130 (same).

<sup>54</sup> Appl. no. 13444/04 (judgment available in French only).

diabetes who, because of his medical condition, could not carry out compulsory military service, as he was deemed medically unfit. His condition, according to the Swiss authorities, posed a problem on account of the particular restrictions related to military service, including limited access to medical care and medication, the significant physical efforts required and psychological pressure exerted. However, the authorities decided that Mr Glor's diabetes was not severe enough to relieve him from paying a military service exemption tax on his annual earnings for several years to come: they thus levied a tax for exemption from military service, for an amount that could not be considered negligible. Although Mr. Glor wanted to carry out his military service, he was thus prohibited both from doing so and from carrying out alternative civil service, this being available only to conscientious objectors. Invoking Article 14 together with Article 8 of the European Convention on Human Rights, Mr Glor argued that he had been subjected to discrimination on the basis of his disability because he had been prohibited from carrying out his military service, and was obliged to pay the exemption tax as his disability was judged not to be severe enough for him to forgo the tax. The Court condemned the Swiss authorities for failing to provide reasonable accommodation to Mr Glor in finding a solution which responded to his individual circumstances. It took note of the fact that reasonable accommodation could have been provided by, for example, filling posts in the armed forces which require less physical effort by persons with disabilities. In highlighting the failure of the Swiss authorities, the Court pointed to legislation in other countries which ensure the recruitment of persons with disabilities to posts which are adapted both to the person's (dis)ability and to the person's professional skills.<sup>55</sup>

### 1.1.3.2 Facilitating the burden of proving discrimination

A second direction in which the European Court of Human Rights has recently been moving is towards facilitating the proof of discrimination, which leads—where that proof may be offered by providing statistical data—to the progressive recognition of disparate impact discrimination as a form of prohibited discrimination under Article 14 ECHR. The European Court of Human Rights has been confronting these questions of proof of discrimination only recently.<sup>56</sup> In the case of *Hugh Jordan v. the United Kingdom*,<sup>57</sup> the Court was confronted with statistics showing that, over a period of 25 years (1969-1994), 357 people, the overwhelming majority of whom were young men from the Catholic or nationalist community, had been killed in Northern Ireland by members of the security forces. According to the applicant, whose son was killed by the security forces while unarmed: 'When compared with the numbers of those killed from the Protestant community and having regard to the fact that there have been relatively few prosecutions (31) and only a few convictions (four, at the date of his application), this showed that there was a discriminatory use of lethal force and a lack of legal protection vis-à-vis a section of the community on grounds of national origin or association with a national minority'.<sup>58</sup> Although the Court in that case was led to find a violation of the right to life protected under Article 2 ECHR because of the lack of appropriate investigations into the death of the son of the applicant, it rejected the claim of discrimination, noting that mere statistical data would not suffice to prove discrimination as prohibited under Article 14 ECHR:

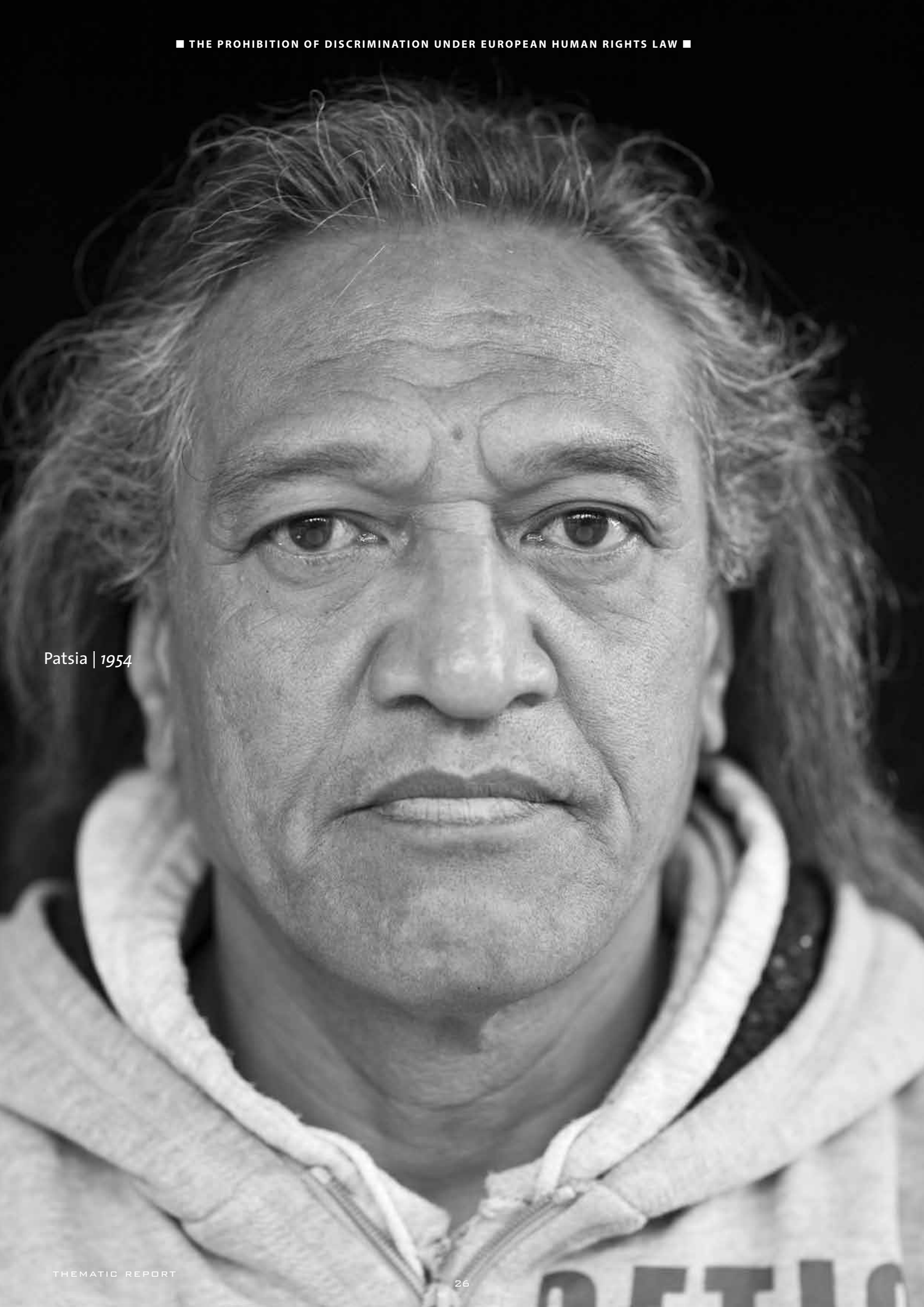
Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group. However, even though statistically it appears that the majority of people shot by the security forces were from the Catholic or nationalist community, the Court does not consider that statistics

<sup>55</sup> Appl. no. 13444/04 (judgment available in French only), § 94.

<sup>56</sup> It should be emphasised that, as an international court deciding issues of state responsibility, the Court is not passing judgment on the responsibility, civil or criminal, of any individual defendant facing an allegation that he or she has acted in a discriminatory fashion. See Eur. Ct. HR, *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, p. 24, § 32; Eur. Ct. HR (1st sect.), *Nachova and Others v. Belgium* (Appl. nos 43577/98 and 43579/98), judgment of 26 February 2004, § 166, with further references).

<sup>57</sup> Eur. Ct. HR (3d sect.), *Hugh Jordan v. the United Kingdom* (Appl. no. 24746/94), judgment of 4 May 2001.

<sup>58</sup> Eur. Ct. HR (3d sect.), *Hugh Jordan v. the United Kingdom* (Appl. no. 24746/94), judgment of 4 May 2001, § 152.



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can in themselves disclose a practice which could be classified as discriminatory within the meaning of Article 14.<sup>59</sup>

Over the past decade, the pressure has been building on the Court to expand its case-law in order to allow alleged victims of discrimination to shift the burden of proof to the defending state, by bringing forward statistics that establish a sufficiently strong presumption of discrimination. In *Nachova v. Bulgaria*, the Court was confronted with the killing by state agents of two deserters of Roma origin and the ensuing lack of effective investigations. In a first judgement, adopted on 26.02.2004 by one Chamber of the Court,<sup>60</sup> the Court essentially took the view that a state should not be allowed to benefit from its own wrong: when confronted with the allegation that killings by state agents were committed with racial overtones, states are under a positive obligation to pursue an official investigation with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of racism and ethnic hatred, and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence.<sup>61</sup> Where the public authorities fail to comply with this obligation, it becomes justified to shift the burden of proof and presume the existence of discrimination, even in the absence of any positive evidence demonstrating this. Referring to the provisions relating to the proof of discrimination in the EU's Racial Equality and Employment Equality Directives of 2000, the Court noted that 'it has become an established view in Europe that effective implementation of the prohibition of discrimination requires the use of specific measures that take into account the difficulties involved in proving discrimination'.<sup>62</sup> According to the Court, it followed that where the authorities have not diligently investigated a case and discarded evidence of possible discrimination, it could draw negative inferences from this attitude and shift the burden of proof to the respondent government.<sup>63</sup>

The case was then referred to the Grand Chamber, which disagreed with the approach adopted by the Chamber.<sup>64</sup> The Grand Chamber did not exclude that shifting the burden of proof of alleged discrimination may be justified in certain cases, particularly 'where the events lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of the death of a person within their control in custody'. However, the Grand Chamber of the Court added, 'where it is alleged – as here – that a violent act was motivated by racial prejudice, such an approach would amount to requiring the respondent Government to prove the absence of a particular subjective attitude on the part of the person concerned. While in the legal systems of many countries proof of the discriminatory effect of a policy or decision will dispense with the need to prove intent in respect of alleged discrimination in employment or the provision of services, that approach is difficult to transpose to a case where it is alleged that an act of violence was racially motivated. The Grand Chamber, departing from the Chamber's approach, did not consider that the alleged failure of the authorities to carry out an effective investigation into the supposedly racist motive for the killing should shift the burden of proof to the Government with regard to the alleged violation of Article 14 of the Convention taken in conjunction with the substantive aspect of Article 2'.<sup>65</sup>

<sup>59</sup> Eur. Ct. HR (3d sect.), *Hugh Jordan v. the United Kingdom* (Appl. no. 24746/94), judgment of 4 May 2001, § 154. The same wording was adopted by a Chamber constituted within another section of the Court in the case of *McShane v. the United Kingdom*, which raised similar issues: see Eur. Ct. HR (4th sect.), *McShane v. the United Kingdom* (Appl. no. 43290/98), judgment of 25 May 2002, §§ 132-136.

<sup>60</sup> Eur. Ct. HR (1st sect.), *Nachova and Others v. Bulgaria* (Appl. nos 43577/98 and 43579/98), judgment of 26 February 2004.

<sup>61</sup> Eur. Ct. HR (1st sect.), *Nachova and Others v. Bulgaria* (Appl. nos 43577/98 and 43579/98), judgment of 26 February 2004, § 157.

<sup>62</sup> Eur. Ct. HR (1st sect.), *Nachova and Others v. Bulgaria* (Appl. nos 43577/98 and 43579/98), judgment of 26 February 2004, § 168.

<sup>63</sup> Eur. Ct. HR (1st sect.), *Nachova and Others v. Bulgaria* (Appl. nos 43577/98 and 43579/98), judgment of 26 February 2004, § 169.

<sup>64</sup> Eur. Ct. HR (GC), *Nachova and Others v. Bulgaria* (Appl. nos 43577/98 and 43579/98), judgment of 6 July 2005.

<sup>65</sup> Eur. Ct. HR (GC), *Nachova and Others v. Bulgaria* (Appl. nos 43577/98 and 43579/98), judgment of 6 July 2005, § 157.

The hesitation of the European Court of Human Rights in the case of *Nachova* should be understood against the specific background of the case, where potentially criminal acts were alleged to have been motivated by racial discrimination: as the Court itself notes, things might have been different—and statistics might have been sufficient to shift the burden of proof—if the alleged discrimination had taken place in the context of employment, housing, or education—although the most relevant distinction here may be whether the alleged discrimination is sanctioned by criminal law or by civil remedies. Indeed, the position of the Court in *Nachova* is consistent with other cases where it has shown it was unwilling to find that discrimination had occurred in the absence of material facts pointing strongly to that conclusion. For instance, in *Balogh v. Hungary*, the applicant, of Roma ethnic origin, had been ill-treated by police officers, leading the Court by a narrow majority of four votes to three to find a violation of Article 3 ECHR; but although he argued that the suspected police officers were aware of the fact that he was of Roma origin and noted that the Hungarian police's discriminatory conduct vis-à-vis persons of Roma origin was well-documented, the Court considered that there was no substantiation whatever of the claim that he had been a victim of discrimination, and dismissed his claim in that respect.<sup>66</sup> In *Hasan Ilhan v. Turkey*, the applicant argued that the destruction of his family home and possessions was the result of an official policy, which constituted discrimination because of his status as a member of a national minority; this claim again was dismissed, the Court considering that there was insufficient basis in fact for grounding this allegation.<sup>67</sup>

The European Court of Human Rights first recognised the competence of a person claiming to be a victim of discrimination to rely on statistics to shift the burden of proof to the defending state in 2005, in the case of *Hoogendijk v. the Netherlands*<sup>68</sup>—unsurprisingly, a case relating to social security matters (rather than to police violence that could lead to criminal sanctions where discriminatory intent is proven). Following a change in Dutch legislation in 1989, which required individuals seeking to benefit from the General Labour Disablement Benefits Act (*Algemene Arbeidsongeschiktheidswet* (AAW)) to have earned a fixed minimum amount of income from work in the year preceding the occurrence of the labour incapacity, a group of about 5,100 persons lost their entitlement to disability benefits due to failure to meet this income requirement. This group consisted of about 3,300 women and 1,800 men. The Court noted that 'where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be regarded as discriminatory notwithstanding that it is not specifically aimed or directed at that group'. 'Although statistics in themselves are not automatically sufficient for disclosing a practice which could be classified as discriminatory under Article 14 of the Convention', it added, such statistics cannot be ignored: 'where an applicant is able to show, on the basis of undisputed official statistics, the existence of a *prima facie* indication that a specific rule—although formulated in a neutral manner—in fact affects a clearly higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex. If the onus of demonstrating that a difference in impact for men and women is not in practice discriminatory does not shift to the respondent Government, it will be in practice extremely difficult for applicants to prove indirect discrimination'. Although, in that case, the Court concluded that the application was manifestly ill-founded since there was an objective and reasonable justification for the change in legislation, the principle according to which relevant statistical data allow a shift in the burden of proof had therefore been recognised. In the later case of *Zerb Adami v. Malta*, the same reasoning led the Court to conclude that the applicant had been a victim of discrimination on grounds of gender, since statistical data demonstrated that men were significantly more frequently called upon to serve as members of juries, and the resulting difference in treatment vis-à-vis women—although it could be *explained* by a number of factors—had no reasonable and objective *justification*, as required by Article 14 ECHR (combined, in this case, with Article 4, para. 3 (d), ECHR, which excludes 'normal civic obligations' from the prohibition of forced or compulsory labour).<sup>69</sup>

<sup>66</sup> Eur. Ct. HR (2nd sect.), *Balogh v. Hungary* (Appl. no. 47940/99), judgment of 20 July 2004, § 79.

<sup>67</sup> Eur. Ct. HR (2nd sect.), *Hasan Ilhan v. Turkey* (Appl. no. 22494/93), judgment of 9 November 2004, §§ 128-130.

<sup>68</sup> Eur. Ct. HR (1st sect.), *Hoogendijk v. the Netherlands* (Appl. no. 58641/00), decision (inadmissibility) of 6 January 2005.

<sup>69</sup> Eur. Ct. HR (4th sect.), *Zerb Adami v. Malta* (Appl. no. 17209/02) judgment of 20 June 2006 (final on 20 September 2006), §§ 75-84 (the case exists only in French).

Although it was inaugurated in the context of alleged discrimination on grounds of gender, this case-law was extended to discrimination on grounds of ethnic origin in the case of *D.H. and others v. Czech Republic*. The applicants were 18 Czech nationals of Roma origin who were born between 1985 and 1991 and lived in the Ostrava region in the Czech Republic. Between 1996 and 1999 they were placed in special schools for children with learning difficulties who were unable to follow the ordinary school curriculum. Under the law, the decision to place a child in a special school was taken by the head teacher on the basis of the results of tests to measure the child's intellectual capacity carried out in an educational psychology centre, and requiring the consent of the child's legal representative. The applicants argued, however, that their placement in special schools amounted to a general practice that had resulted in segregation and racial discrimination through the coexistence of two autonomous educational systems, namely special schools for the Roma and 'ordinary' primary schools for the majority of the population.

Initially, a Chamber of the European Court of Human Rights held by six votes to one that there had been no violation of Article 14 of the Convention (non-discrimination), read in conjunction with Article 2 of Protocol No. 1 (right to education). In its view, the government had established that the system of special schools in the Czech Republic had not been introduced solely to cater for Roma children, and that considerable efforts had been made in those schools to help certain categories of pupils to acquire a basic education. In that connection, the Chamber observed that the rules governing children's placement in special schools did not refer to the pupils' ethnic origin, but pursued the legitimate aim of adapting the education system to the needs, aptitudes and disabilities of the children.<sup>70</sup> However, the case was then referred to the Grand Chamber of the European Court of Human Rights, which took the opposite view. A key aspect of the landmark judgment delivered by the Grand Chamber on 13.11.2007 was the recognition that 'when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the prima facie evidence the applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence.'<sup>71</sup> Confirming its position in *Hoogendijk and Zerb Adami*—a position which, it noted, was influenced both by the fact that in the EU legal order Council Directives 97/80/EC and 2000/43/EC provide that alleged victims of discrimination may be allowed to bring forward statistics in order to establish a

<sup>70</sup> Eur. Ct. HR (2nd sect.), *D.H. and Others v. Czech Republic* (Appl. no. 57325/00), judgment of 7 February 2006.

<sup>71</sup> Eur. Ct. HR (GC), *D.H. and Others v. Czech Republic* (Appl. no. 57325/00), judgment of 13 November 2007, § 188. See, inter alia, E. Debout, 'Vers une protection de l'égalité "collective" par la Cour européenne des droits de l'homme?', *Revue trimestrielle des droits de l'homme*, 2006, p. 851.

presumption of discrimination,<sup>72</sup> and by the position on this point of the supervisory bodies of the United Nations human rights treaty bodies—the Court took the view that ‘[w]here an applicant alleging indirect discrimination thus establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent State, which must show that the difference in treatment is not discriminatory’, since ‘[r]egard being had in particular to the specificity of the facts and the nature of the allegations made in this type of case, it would be extremely difficult in practice for applicants to prove indirect discrimination without such a shift in the burden of proof’.<sup>73</sup> On the facts of the case, the Court noted that the statistics available ‘show that, even if the exact percentage of Roma children in special schools at the material time remains difficult to establish, their number was disproportionately high. Moreover, Roma pupils formed a majority of the pupils in special schools. Despite being couched in neutral terms, the relevant statutory provisions therefore had considerably more impact in practice on Roma children than on non-Roma children and resulted in statistically disproportionate numbers of placements of the former in special schools’.<sup>74</sup> The Court went on to conclude that the Czech government had failed to rebut the presumption of discrimination that these statistics thus established: in order to do so, it should have demonstrated that the difference in the impact of the legislation was the result of objective factors unrelated to ethnic origin.<sup>75</sup>

<sup>72</sup> Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ L 14 of 20.1.1998, p. 6 (defining indirect discrimination as a situation where ‘an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex’ (Art. 2 § 1) and providing that the EU Member States should allow shifting the burden of proof ‘when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination’ (Art. 4 § 1)). It is of course awkward that the European Court of Human Rights cites this directive, which was repealed at the same time that the implementation of the principle of equal treatment of men and women in matters of employment and occupation was recast in Directive 2006/54/EC of 5 July 2006 (Recast), OJ L 204 of 26.7.2006, p. 23. While the repeal of Directive 97/80/EC, along with other directives that are recast in the 2006 Directive, was only effective on 15 August 2009 (see Art. 34 § 1 of Directive 2006/54/EC), it is noteworthy that the Recast Directive adopts a definition of indirect discrimination that, in contrast to the Burden of Proof Directive (97/80/EC), does not refer to evidence of discrimination on the basis of statistical data: even the Preamble is silent on this issue. On the one hand, this may be seen as facilitating the work of victims, since no statistics will be required. On the other hand, however, this potentially weakens the scope of the non-discrimination requirement since, taken literally, national authorities are not obliged to allow victims to rely on statistics to establish a presumption of discrimination (see Art. 3 § 1, b), of Directive 2006/54). At the same time, it is likely that the Court of Justice will impose on the Member States that they recognise the presentation of statistical data as shifting the burden of proof in equal treatment cases, since according to the Court this possibility is a condition of effectiveness of the protection of women against discrimination where apparently neutral rules create a disparate impact, for instance in remuneration schemes: see Case 170/84, *Bilka - Kaufhaus GmbH v Karin Weber von Hartz*, [1986] ECR 1607 (judgment of 13 May 1986).

<sup>73</sup> Eur. Ct. HR (GC), *D.H. and Others v. Czech Republic* (Appl. no. 57325/00), cited above, § 189.

<sup>74</sup> Eur. Ct. HR (GC), *D.H. and Others v. Czech Republic* (Appl. no. 57325/00), cited above., § 193.

<sup>75</sup> Eur. Ct. HR (GC), *D.H. and Others v. Czech Republic* (Appl. no. 57325/00), cited above, § 194. The European Court of Human Rights delivered other judgments on the issue of Roma children segregated, in fact, in special schools. In *Sampanis and Others v. Greece*, the Court found that the practice of first denying Roma children enrolment in school and their subsequent placement in special classes located in an annex to the main building of a primary school, coupled with a number of racist incidents in the school instigated by the parents of non-Roma children, amounted to discrimination based on the applicants’ Roma origin (Eur. Ct. HR (1st sect.), *Sampanis and Others v. Greece* (Appl. no. 32526/05) judgment of 5 June 2008). In a case concerning Croatia, the Grand Chamber of the Court held by nine votes to eight that there had been a violation of Article 14 of the Convention read in conjunction with Article 2 of Protocol No. 1, noting that, despite the efforts made by the Croatian authorities to ensure that Roma children receive schooling, ‘the schooling arrangements for Roma children were not sufficiently attended by safeguards that would ensure that, in the exercise of its margin of appreciation in the education sphere, the State had sufficient regard to their special needs as members of a disadvantaged group’ (Eur. Ct. HR (GC), *Oršuš and Others v. Croatia*, judgment of 16 March 2010 (Appl. no. 15766/03), § 182)).



### 1.1.4 Positive action

The Racial Equality and Employment Equality Directives refer to positive action measures as specific measures adopted to prevent or compensate for disadvantages linked to a certain ground in order to ensure full equality in practice. Such measures provide differential treatment on grounds of race or ethnic origin, religion or belief, disability, age or sexual orientation, in order to remedy past inequalities or to compensate for existing inequalities; they substitute a requirement of substantive equality for a requirement of formal equality.

Apart from certain remarks of the European Court of Human Rights concerning situations where the electoral system is designed to ensure fair representation of certain ethnic groups<sup>76</sup> or where states seek to organise education taking into account the specific needs of Roma children,<sup>77</sup> no case-law of the Court on the compatibility with Article 14 ECHR of positive action measures as defined above exists.<sup>78</sup> It is, however, likely that most such measures would pass this test, provided the difference in treatment is not disproportionate in the light of the aim pursued: since, in certain circumstances, a failure to attempt to correct inequality through different treatment may, without an objective and reasonable justification, give rise to a breach of Article 14 ECHR, it follows that this provision 'does not prohibit Contracting Parties from treating groups differently in order to correct "factual" inequalities' between them.<sup>79</sup> Indeed, in the Preamble to Protocol No. 12, the signatories reaffirm that 'the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures'. The explanatory report of Protocol No. 12 specifies in this respect:<sup>80</sup>

The fact that there are certain groups or categories of persons who are disadvantaged, or the existence of de facto inequalities, may constitute justifications for adopting measures providing for specific advantages in order to promote equality, provided that the proportionality principle is respected. (...) However, the present Protocol does not impose any obligation to adopt such measures. Such a programmatic obligation would sit ill with the whole nature of the Convention and its control system which are based on the collective guarantee of individual rights which are formulated in terms sufficiently specific to be justifiable.

Whether under Article 14 ECHR or under Article 1 of Protocol No. 12 to the ECHR, affirmative action should be considered admissible provided that the difference in treatment it results in is objectively and reasonably justified, in other words, provided it pursues a legitimate aim, and it does not pursue this aim by disproportionate means. Like the fight against other forms of discriminations, the fight against racism and xenophobia indisputably constitutes a very important objective for the European Court of Human Rights, which affirms that it is 'particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations'<sup>81</sup>. As will be seen below, in certain cases, discrimination on grounds of race can also constitute degrading treatment within the

<sup>76</sup> Eur. Ct. HR (GC), *Sejdic and Finci v. Bosnia-Herzegovina* (Appl. nos 27996/06 and 34836/06) judgment of 22 December 2009, § 44.

<sup>77</sup> Eur. Ct. HR (GC), *Oršuš and Others v. Croatia*, judgment of 16 March 2010 (Appl. no. 15766/03), § 157.

<sup>78</sup> On the question addressed in the following paragraphs, see also J.-Fr. Flauss, 'Discrimination positive et Convention européenne des droits de l'homme', in: *Pouvoir et liberté. Mélanges offerts à Jacques Mourgeon*, Bruxelles, Bruylant, 1998, p. 415.

<sup>79</sup> Eur. Ct. HR (plen.), *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"*, judgment of 23 July 1968, cited above, § 10; Eur. Ct. HR (GC), *Thlimmenos v. Greece* (Appl. no. 34369/97) judgment of 8 April 2000, § 44, ECHR 2000-IV; and Eur. Ct. HR (GC), *D.H. and Others* judgment of 13 November 2007, cited above, § 175.

<sup>80</sup> Explanatory report of Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, H (2000) 11 prov., 29 August 2000, § 16.

<sup>81</sup> Eur. Ct. H.R., *Jersild v. Denmark*, judgment of 23 September 1994, § 30.

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meaning of Article 3 of the Convention.<sup>82</sup> *A fortiori*, the need to combat racial discrimination is one of the legitimate aims which the States Parties to the Convention may want to pursue, even if this leads to certain restrictions on the rights and freedoms enumerated by the Convention, such as the right to non-discrimination. This is not to say that affirmative action could be upheld only on the basis that it is combating discrimination, as a remedial or backward-looking measure. The Court views a 'democratic society' as one based on the values of diversity and tolerance. This would seem to imply that it would allow forms of positive action which are not premised on pre-existing discrimination they seek to respond to or compensate for, but are justified by the aim of organising diversity. It is, however, likely that it would consider positive action as a disproportionate restriction of the right to formal equality where it would not correspond to the criteria set forth in the relevant international human rights treaties,<sup>83</sup> in particular where the measure would not be temporary but would risk leading, instead, to the creation and maintenance of separate rights.

## 1.2 The Scope of Application of Article 14 ECHR

Article 14 of the European Convention on Human Rights does not create independent protection from discrimination. It may only be invoked in combination with another substantive provision of the European Convention on Human Rights or of one of its additional Protocols: it is only when discrimination is found to exist *in the enjoyment of the rights and freedoms set forth in the Convention* that it will come into play. This is not to say that Article 14 ECHR has no autonomous function to fulfil in the system of the Convention. On the contrary, it supplements all the other substantive provisions by adding the requirement that they be applied and implemented without discrimination. In the case '*relating to certain aspects of the laws on the use of languages in education in Belgium*' v. *Belgium* (the 'Belgian Linguistics Case'), the Court famously noted that, although the right to obtain from the public authorities the creation of a particular kind of educational establishment could not be inferred from Article 2 of Protocol No. 1,

... nevertheless, a State which had set up such an establishment could not, in laying down entrance requirements, take discriminatory measures within the meaning of Article 14. [Thus, similarly,] Article 6 of the Convention does not compel States to institute a system of appeal courts. A State which does set up such courts consequently goes beyond its obligations under Article 6. However it would violate that Article, read in conjunction with Article 14, were it to debar certain persons from these remedies without a legitimate reason while making them available to others in respect of the same type of actions. In such cases there would be a violation of a guaranteed right or freedom as it is proclaimed by the relevant Article read in conjunction with Article 14. It is as though the latter formed an integral part of each of the Articles laying down rights and freedoms. No distinctions should be made in this respect according to the nature of these rights and freedoms and of their correlative obligations, and for instance as to whether the respect due to the right concerned implies positive action or mere abstention.<sup>84</sup>

Thus, the application of Article 14 ECHR does not presuppose a breach of another right or freedom of the Convention: a violation of the non-discrimination clause may be found, even if, considered independently from that clause, the provision it is combined with is not violated. For it to be cognisable under Article 14 ECHR—and, thus, justiciable by the European Court of Human Rights—it nevertheless remains required that the discrimination

<sup>82</sup> European Commission of Human Rights, case of *East African Asians (Patel et al.)*, decision of 10 October 1970, *Ann. Conv.*, vol. 13, p. 995; Eur. Ct. H.R., *Abdulaziz, Cabales and Balkandali v. United Kingdom*, judgment of 29 May 1985, Series A no. 94, p. 42, §§ 90-91; Eur. Ct. H.R., *Smith and Grady v. United Kingdom*, judgment of 27 September 1999, § 121.

<sup>83</sup> See, for a summary of the position adopted by the relevant international instruments, Sub-Commission on the Promotion and Protection of Human Rights (53rd session), United Nations Commission on Human Rights, 'The concept and practice of affirmative action', final report submitted by Mr Marc Bossuyt, Special Rapporteur, in accordance with the Sub-Commission Resolution 1998/5, E/CN.4/Sub.2/2002/21 (21 June 2002).

<sup>84</sup> Eur. Ct. HR, judgment of 23 July 1968, Series A no. 6, pp. 33-34, § 9.

occurs ‘within the ambit of’ one or more other rights of the Convention.<sup>85</sup> The European Court of Human Rights formulates this restriction by stating that ‘Article 14 of the Convention complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to “the enjoyment of the rights and freedoms” safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions—and to this extent it is autonomous—there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter’.<sup>86</sup>

Therefore, unless an alleged discrimination occurs in the enjoyment of a right protected under the European Convention on Human Rights (for instance, in the protection of the home or of the right to social security benefits considered as part of the right to property<sup>87</sup>), or is based on the exercise of a right protected under the Convention (such as, for instance, freedom of religion or the freedom to choose one’s sexual orientation),<sup>88</sup> Article 14 ECHR will be inapplicable. As a result, a number of instances of discrimination in access to employment will not be considered to fall under the scope of application of Article 14 ECHR.<sup>89</sup>

Although Article 14 ECHR thus has a limited scope of application, this is in part compensated for in the system of the Convention by a number of factors. First, Article 8 ECHR protects the ‘right to respect for private and family life’. Because of the broad understanding which has been given to this provision in the case-law of the European Court of Human Rights, the requirement of non-discrimination extends to a diversity of situations which would have been excluded under a literal—and more restrictive—reading of the Convention.<sup>90</sup> For instance, this could imply that the modalities according to which allowances are afforded to persons with a disability should respect Article 14 ECHR,

<sup>85</sup> This led a former President of the European Court of Human Rights to note that the non-discrimination provision of Article 14 ECHR was a ‘second-class guarantee’. See Luzius Wildhaber, ‘Protection against discrimination under the European Convention on Human Rights – a second-class guarantee?’, *Baltic Yearbook of International Law*, 2002, p. 5.

<sup>86</sup> This formulation is constant in the case-law of the Convention. See, e.g., Eur. Ct. HR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, Series A no. 94, p. 35, § 71; Eur. Ct. HR, *Inze v. Austria* judgment of 28 October 1987, Series A no. 126, p. 17, § 36; *Karlheinz Schmidt v. Germany*, 18 July 1994, Series A no. 291-B, p. 32, § 22; Eur. Ct. HR, *Van Raalte v. the Netherlands*, judgment of 21 February 1997, Reports of Judgments and Decisions 1997-I, p. 184, § 33; Eur. Ct. HR, *Petrovic v. Austria*, 27 March 1998, Reports of Judgments and Decisions 1998-II, p. 585, § 22; Eur. Ct. HR, *Haas v. the Netherlands* (Appl. no. 36983/97), judgment of 13 January 2004, § 41.

<sup>87</sup> See Eur. Ct. HR, *Gaygusuz v. Austria*, judgment of 16 September 1996, Reports of Judgments and Decisions 1996-IV, p. 1141; Eur. Ct. HR (2nd section), *Koua-Poirrez v. France* (Appl. no. 40892/98), judgment of 30 September 2003.

<sup>88</sup> Robert Wintemute, ‘“Within the Ambit”: How Big Is the “Gap” in Article 14 European Convention on Human Rights?’, (2004) *E.H.R.L.R.* 366, at p. 371. See Eur. Ct. HR (GC), *Thlimmenos v. Greece* (Appl. no. 34369/97), judgment of 6 April 2000, § 42 (Article 14 ECHR invoked successfully in combination with Article 9 ECHR by a Jehovah’s Witness denied access to the profession of chartered accountant because of a past criminal conviction for having refused to serve in the army for religious motives). Article 14 ECHR may be presumed to apply—whatever the nature of the disadvantage inflicted or of the advantage which is denied—where the discrimination penalises persons for having sought to defend their rights before a court (Article 6 ECHR), for having chosen a sexual orientation or a particular lifestyle or for being in a particular family status (Article 8 ECHR), for having exercised their religion (Article 9 ECHR), for opinions they have expressed (Article 10 ECHR), for having joined an association or having refused to join an association (Article 11 ECHR), for having married or refused to enter into a marital relationship (Article 12 ECHR).

<sup>89</sup> In certain extreme cases where across-the-board prohibitions are imposed, the inability of the individual to have access to certain professions may constitute an interference with the right to respect for private life. See Eur. Ct. HR (2nd sect.), *Sidabras and Dziautas v. Lithuania* (Appl. no. 55480/00 and 59330/00), judgment of 27 July 2004, § 48.

<sup>90</sup> See, e.g., Eur. Ct. HR, *Petrovic v. Austria* (Appl. no. 20458/92), judgment of 27 March 1998, §§ 26-27 (Article 14 ECHR in combination with Article 8 ECHR applicable to the granting of a parental leave allowance).

excluding systems under which such allowances would be granted in a discriminatory fashion.<sup>91</sup> However, the European Court of Human Rights has considered that public authorities were not obliged under Article 8 ECHR to take measures in order to facilitate the social or professional integration of persons with disabilities, for instance by ensuring the accessibility of private beaches<sup>92</sup> or public buildings to persons with limited mobility,<sup>93</sup> or by providing them with certain equipment which would diminish their dependency on others.<sup>94</sup> The Court concluded that, because Article 8 ECHR was inapplicable in such cases, Article 14 ECHR could not be invoked either.<sup>95</sup>

Second, if combined with the right of each individual to the 'peaceful enjoyment of his possessions' protected by Article 1 of Protocol n°1 ECHR, Article 14 ECHR prohibits any discrimination in the allocation of benefits, whether in contributory or in non-contributory schemes.<sup>96</sup> The European Court of Human Rights considers that although there is no obligation under Article 1 of Protocol No. 1 to the Convention to create a welfare or pension scheme, 'if a State did decide to enact legislation providing for the payment as of right of a welfare benefit or pension - whether conditional or not on the prior payment of contributions - that legislation had to be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements.'<sup>97</sup> This implies that the European Convention on Human Rights in fact prohibits any discrimination in the field of social security or social aid. This case-law, however, does not extend the scope of application of Article 14 ECHR beyond situations where there is an established right to certain benefits, rather than mere expectations of future gains.<sup>98</sup>

Third, where it attains a certain level of severity, discrimination based on race or ethnic origin,<sup>99</sup> sex,<sup>100</sup> religion<sup>101</sup> or sexual orientation<sup>102</sup> may constitute a degrading treatment prohibited in absolute terms (i.e. without the possibility of justification) under Article 3 ECHR.<sup>103</sup> The impact of any particular treatment, rather than simply the intention of the author of the treatment, may suffice to constitute its 'degrading' character. Therefore, in certain situations at least, the refusal to take into account the specific needs of a person with a disability in order to accommodate those needs may constitute a form of 'degrading' treatment: in *Price v. the United Kingdom*,<sup>104</sup> the Court concluded

<sup>91</sup> See the dissenting opinion of judge Molinari to Eur. Ct. HR (2nd Section), *Koua Poirrez v. France* judgment of 30 September 2003 (Appl. no. 40892/98) (allowance to adults with a disability which had been denied to the applicant on the grounds of his nationality). The Court decided in this case that there had been a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

<sup>92</sup> Eur. Ct. HR, *Botta v. Italy* judgment of 24 February 1998.

<sup>93</sup> Eur. Ct. HR, *Zehlanova and Zehnal v. the Czech Republic* decision of 14 May 2002 (Appl. no. 38621/97). See the commentary by A. Hendriks in *NJCM-Bull.* 2003, p. 321.

<sup>94</sup> Eur. Ct. HR, *Sentges v. the Netherlands* decision of 8 July 2003 (Appl. no. 27677/02).

<sup>95</sup> See Olivier De Schutter, 'Reasonable Accommodation and Positive Obligations under the European Convention on Human Rights' in A. Lawson and C. Gooding (eds.), *Disability Rights in Europe: From Theory to Practice*, London, Hart Publ., 2005, pp. 35-63.

<sup>96</sup> See, e.g., Eur. Ct. HR, *Luczak v. Poland* (Appl. no. 77782/01) judgment of 27 November 2006 (finding a violation of Article 14 (prohibition of discrimination) in conjunction with Article 1 of Protocol No. 1 (protection of property) because the applicant, a French national, had been refused admission to the farmers' social security scheme).

<sup>97</sup> Eur. Ct. HR (GC), *Carson and Others v. the United Kingdom* (Appl. no. 42184/05) judgement of 16 March 2010, § 64.

<sup>98</sup> See, e.g., Eur. Comm. HR, *Wanda Paruszevska v. Poland* (Appl. no. 33770/96), decision (inadmissibility) of 12 April 1998 (Article 14 ECHR does not apply to legal regulations obliging a person to retire, entailing a loss of future salaries for that person).

<sup>99</sup> See the report adopted on 14 December 1973 by the Commission under former Article 31 ECHR in the *East African Asians v. the United Kingdom* (Decisions and Reports 78-A, p. 62).

<sup>100</sup> See Eur. Ct. HR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Series A no. 94, at p. 42, § 91.

<sup>101</sup> Eur. Ct. HR (GC), *Cyprus v. Turkey* (Appl. no. 25781/94), judgment of 10 May 2001, § 309.

<sup>102</sup> Eur. Ct. HR (3d sect.), *Smith and Grady v. the United Kingdom* (Appl. no. 33985/96 and 33986/96), judgment of 27 September 1999, § 121.

<sup>103</sup> According to which, 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

<sup>104</sup> Eur. Ct. HR (3d section), *Price v. the United Kingdom* judgment of 10 July 2001 (Appl. no. 33394/96) (applicant suffering from phocomelia due to thalidomide, committed to prison for a short term for contempt of court).

that despite the absence of any ‘positive intention to humiliate or debase the applicant’, ‘to detain a severely disabled person in conditions where she is dangerously cold, risks developing sores because her bed is too hard or unreachable, and is unable to go to the toilet or keep clean without the greatest of difficulty, constitutes degrading treatment contrary to Article 3 of the Convention.’<sup>105</sup>

Despite these qualifications, and the possible further extension in the future of the scope of application of Article 14 ECHR, especially in combination with Article 8 ECHR and Article 1 of Protocol n°1 ECHR, the prohibition under the European Convention on Human Rights of discrimination ‘in the enjoyment of the rights and freedoms’ it sets forth remains limited. In particular, unless it is based on the exercise of a right or freedom of the Convention—in which case it will generally be analysed as an interference with rights such as the right to choose one’s sexual orientation or lifestyle (Article 8 ECHR),<sup>106</sup> to exercise one’s religion (Article 9 ECHR),<sup>107</sup> to express one’s opinions (Article 10 ECHR),<sup>108</sup> to join or to refuse to join an association (Article 11 ECHR),<sup>109</sup> or to marry or to refuse to enter into a marital relationship (Article 12 ECHR), rather than under the non-discrimination clause of Article 14 ECHR—discrimination in employment and occupation will in principle not fall under the scope of application of Article 14 ECHR. It is in order to expand the protection against discrimination in the system of the European Convention on Human Rights that Protocol No. 12 additional to the ECHR was drafted and opened for signature on 04.11.2000.

### 1.3 Protocol No. 12 to the ECHR (2000)

Article 1 of Protocol No. 12 to the European Convention on Human Rights contains a general prohibition of discrimination:

- 1 The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
- 2 No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

<sup>105</sup> Eur. Ct. HR (3d section), *Price v. the United Kingdom* judgment of 10 July 2001 (Appl. no. 33394/96), para. 30.

<sup>106</sup> Eur. Ct. HR (3d section), *Smith and Grady v. the United Kingdom* (Appl. no. 33985/96 and 33986/96), judgment of 27 September 1999 (homosexuals discharged from the British Army, after investigations had revealed their homosexuality); Eur. Ct. HR (3d section), *Lustig-Prean and Beckett v. the United Kingdom* (Appl. no. 31417/96 and 32377/96), judgment of 27 September 1999 (same).

<sup>107</sup> See, e.g., Eur. Ct. HR, *Kalaç v. Turkey* (Appl. no. 20704/92), judgment of 1 July 1997, Rep. 1997-IV, p. 1209 (judge advocate in the Turkish air force forced to retire for what the Turkish authorities considered to constitute breaches of discipline and scandalous conduct: the applicant had adopted ‘unlawful fundamentalist opinions’, in becoming a member of the Muslim fundamentalist Süleyman sect); *Dahlab v. Switzerland* (Appl. no. 42393/98, ECHR 2001-V (dismissal of a schoolteacher converted to Islam and wishing to wear a headscarf).

<sup>108</sup> Eur. Ct. HR, *Vogt v. Germany*, judgment of 20 November 1995 (dismissal of the applicant from her post as a schoolteacher in the public educational system for having persistently refused to dissociate herself from the German Communist Party, as she considered that membership of that party was not incompatible with the duty of loyalty to the German Constitution imposed on all public servants: the Court considered that this constituted a violation of the freedoms of expression and association protected by the Convention, respectively in Articles 10 and 11).

<sup>109</sup> Eur. Ct. HR, *Vogt v. Germany*, judgment of 20 November 1995.

Although Article 1 of Protocol No. 12 to the ECHR concerns only the ‘enjoyment of any right set forth by law’, the protection against discrimination thus afforded by the Protocol goes beyond that afforded by Article 14 ECHR.<sup>110</sup> Social security matters being covered under Article 1 of Additional Protocol No. 1 to the ECHR since the 1996 case of *Gaygusuz* (as noted above), the areas concerned shall be, in particular, access to public places, access to goods, provision of services, access to nationality, and in certain cases access to employment. Where discrimination is based on other grounds than on the exercise of rights protected under the ECHR, the European Court of Human Rights might rely on Protocol No. 12 in order to extend its jurisdiction to those situations which are not presently covered under Article 14 ECHR.

Article 1 of Protocol No. 12 to the ECHR imposes direct obligations only on public authorities (whether they belong to the executive, the legislative or the judicial branches). However, states may have to adopt measures in order to prohibit discrimination by private parties. A positive obligation may be imposed on State Parties to adopt measures to prohibit discrimination by private parties, in situations where the failure to adopt such measures would be clearly unreasonable and result in depriving persons of the enjoyment of rights set forth by law. The Explanatory Report to Protocol No. 12 mentions ‘a failure to provide protection from discrimination in [relations between private persons] might be so clear-cut and grave that it might engage clearly the responsibility of the State and then Article 1 of the Protocol could come into play.’<sup>111</sup> Although certain positive obligations may thus be imposed on states to protect against discrimination in relationships between private parties, States Parties may not, under the pretext of protecting against discrimination, commit disproportionate interference with the right to respect for private or family life, as guaranteed by Article 8 ECHR. Therefore, a tripartite division is required, between three kinds of legal relations: in interactions between public authorities and private individuals, the former are prohibited from discriminating against the latter; in interactions between private individuals occurring in the context of market relationships, state authorities may be under an obligation to intervene in order to prevent the most flagrant cases of discrimination and offer remedies to the victims thereof; finally, in interactions between private individuals which concern the private sphere, in the original meaning of private and family life which restricts this notion to the sphere of intimacy, public authorities are prohibited from intervening, even if their objective in doing so is to provide better protection against discriminatory acts. It is in the intermediate or semi-public sphere where the obligations of the state are the least clearly defined: there, discriminatory behaviour may be regulated in order to outlaw discrimination, but whether or not this is an obligation under Article 1 of Protocol n°12 ECHR may in certain cases be debatable.

<sup>110</sup> See generally J. Schokkenbroek, ‘A New European Standard Against Discrimination: Negotiating Protocol n° 12 to the European Convention on Human Rights’, in J. Niessen and Isabelle Chopin (eds.), *The Development of Legal Instruments to Combat Racism in a Diverse Europe*, Martinus Nijhoff Publ., Leiden/Boston, 2004, pp. 61-79.

<sup>111</sup> Explanatory Report, § 26.

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## Part II

# The European Social Charter

The European Social Charter was initially signed on 18.10.1961 as the complement, in the field of economic and social rights, to the European Convention on Human Rights. It has undergone profound transformation since 1988. The initial list of protected rights was expanded by the adoption of the Additional Protocol of 1988, which adds four rights closely inspired by developments in the social legislation of the European Community. On 03.05.1996, the Revised European Social Charter further expanded the list of rights to cover an increasingly large number of issues going beyond the protection of workers and their families, including the right to protection against poverty and social exclusion and the right to housing.<sup>112</sup> The effectiveness of the Charter has been improved with the entry into force, on 01.07.1998, of the Additional Protocol to the European Social Charter providing for a System of Collective Complaints.<sup>113</sup> The following paragraphs examine the potential contribution of the European Social Charter to the understanding of discrimination under the EU directives. The 1961 Charter already imposed protection against discrimination in employment under the right to work (1.). With the adoption in 1996 of the Revised European Social Charter, protection against discrimination has been extended beyond the sphere of employment, on the basis both of the general non-discrimination clause of Article E of the Revised European Social Charter and specific provisions aimed at the integration and social protection of persons with disabilities and of elderly persons (2.).

## 2.1 The European Social Charter of 1961

The European Social Charter of 1961 does not contain an explicit provision on equal treatment or non-discrimination,<sup>114</sup> although the Preamble does mention that ‘the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin’. However, the States Parties to the ESC or those which have accepted Article 1, para. 2 of the European Social Charter<sup>115</sup> undertake thereby to ‘protect effectively the right of the worker to earn his living in an occupation freely entered upon’. The Committee of Independent Experts, now renamed European Committee on Social Rights (ECSR), has read this clause—in combination with the Preamble of the Charter—as prohibiting all forms of discrimination in employment.<sup>116</sup> It considers that para. 2 of Article 1 of the Charter requires states to

legally prohibit any discrimination, direct or indirect, in employment. Stronger protection may be provided in respect of certain grounds, such as gender or membership of a race or ethnic group. The discriminatory acts and provisions prohibited by this provision are all those which may occur in connection with recruitment and employment conditions in general (mainly remuneration, training, promotion, transfer, dismissal and other detrimental action).<sup>117</sup>

<sup>112</sup> The Revised Charter is an instrument separate from the original Charter, which it does not replace or amend. The States Parties to the 1961 Charter are however encouraged to accede to the newer instrument, and upon ratification, their substantive obligations under the 1996 Revised European Social Charter absorb their commitments under the earlier instrument. For the States Parties to both instruments, the undertakings accepted under the 1996 Revised Charter thus supersede those accepted under the 1961 Charter.

<sup>113</sup> Signed on 09.11.1995 (ETS, no. 158).

<sup>114</sup> Article 4(3), however, recognises ‘the right of men and women workers to equal pay for work of equal value’. Article 1 of the Additional Protocol to the European Social Charter, 1988 (ETS, no. 128; entered into force on 4 September 1992) guarantees the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex. This guarantee is detailed in terms closely inspired by the existing *acquis* of the European Community.

<sup>115</sup> Para. 2 of Article 1 of the Revised European Social Charter opened for signature on 03.05.1996 contains an identical clause. Therefore the commentary of this clause is valid under both instruments.

<sup>116</sup> See, e.g., ECSR Concl. 2002, pp. 22-28 (France).

<sup>117</sup> See also ECSR Concl. XVI-1, vol. 2 (Luxembourg), pp. 377-380, although those conclusions do not include a list of measures ‘promoting the full effectiveness of the efforts to combat discrimination’ according to Article 1 § 2 of the Revised Charter.

In order to comply with para. 2 of Article 1 of the Charter, states which have accepted that provision should therefore ‘take legal measures to safeguard the effectiveness of the prohibition of discrimination’,<sup>118</sup> ensuring to all the persons covered by the European Social Charter—which comprises the nationals of the states concerned and of the other States Parties to the Charter, but not third-country nationals<sup>119</sup>—that they will have access to employment and be treated without discrimination during their employment (1.1.). Moreover, states are encouraged to ensure that the legal framework will be effective, a requirement from which the ECSR has derived a number of supplementary requirements (1.2.). Finally, beyond legal measures, policy measures promoting the professional integration of certain target groups are considered to complement the adaptation of the legal framework to the requirements of effective prohibition of discrimination (1.3.).

## 2.1.1 The legal framework prohibiting discrimination

According to the European Committee of Social Rights, the legal framework<sup>120</sup> prohibiting discrimination in employment must protect against discrimination either on all grounds or, at least, on the grounds of political opinion, religion, race, language, sex, age and health.<sup>121</sup> The ECSR has occasionally expressed doubts as to the compatibility with para. 2 of Article 1 ESC of legislation outlawing discrimination only with respect to certain of these grounds, the list of which, notably, goes beyond that of Article 19 TFEU.<sup>122</sup> The Committee has considered, however, that undertakings specifically established to promote a particular political view or religious belief could be exempted from the obligation to comply with the non-discrimination principle of non-discrimination, and it recalled that it considered that these did not pose any problems of compliance with Article 1, para. 2 of the Charter.<sup>123</sup>

The legal framework protecting against discrimination must present at least four characteristics in order to comply with Article 1, para. 2 of the Charter. First, the legal framework must ensure that any legal obstacles to the access to

<sup>118</sup> See ECSR Concl. XVI-1, vol. 2 (Luxembourg).

<sup>119</sup> See the Appendix to the Social Charter, ‘Scope of the Social Charter in terms of persons protected’: foreigners are included under the substantive provisions of the Charter ‘only insofar as they are nationals of other Contracting Parties lawfully resident or working regularly within the territory of the Contracting Party concerned (...)’.

<sup>120</sup> In its Conclusions relating to the Netherlands Antilles, the ECSR has made it clear that the direct application of Article 14 of the European Convention on Human Rights and Article 26 of the International Covenant on Civil and Political Rights constitutes an insufficient legal basis and that employment discrimination must be the subject of a more precise legal prohibition: see ECSR Concl. XVI-1, vol. 2, pp. 464-467. Nor does a general non-discrimination clause in the national Constitution appear sufficient: ‘specific legislation on discrimination in employment (...) that is sufficiently detailed to protect employees in all aspects of their working lives’ should be introduced (with respect to the protection afforded under Article 10 of the 1982 Turkish Constitution: see Concl. XVI-1, vol. 2 (Turkey), pp. 637-640).

<sup>121</sup> In recent Conclusions relating to Italy, the European Committee of Social Rights examined the provisions which protect against discrimination in employment in the Italian legal system. Finding that neither Article 3 of the Constitution nor Article 15 of Act No. 300/1970 (the Workers’ Statute)—which prohibits any agreement or act discriminating against a worker because of his or her political opinions, religion, race, language or sex—offer protection against discrimination based on age or health, the ECSR concluded that this omission should be remedied under para. 2 of Article 1 of the Charter (ECSR Concl. 2002 (Italy), p. 75). In its Conclusions relating to Romania on the same provision of the Charter and during the same cycle of control, the ECSR noted expressly that health-based discrimination was prohibited in the Romanian legal system, despite it not being explicitly mentioned in the applicable regulations (ECSR Concl. 2002 (Romania), pp. 117-121).

<sup>122</sup> See, e.g., ECSR Concl. XVI-1, vol. 2 (Belgium), pp. 56-63.

<sup>123</sup> ECSR Concl. XVI-1, vol. 1 (Denmark), pp. 164-168 (remark made in relation to section 6 of Act No. 459 of 12 June 1996, which prohibits any discrimination in the labour market).

employment of protected workers be removed:<sup>124</sup> the European Committee of Social Rights has repeatedly held that Article 1, para. 2 of the Charter requires Contracting Parties to rescind any statutory, regulatory or administrative provisions that violate the principle of equal treatment,<sup>125</sup> and that non-application of national legislation does not suffice to demonstrate a state's compliance with the Charter.<sup>126</sup> The legal framework must provide, moreover, that any provision contrary to the principle of equal treatment which appears in collective labour agreements, in employment contracts or in firms' own regulations may be declared null or be rescinded, abrogated or amended. Second, appropriate and effective remedies must be available in the event of an allegation of discrimination. In its Conclusions relating to Romania, the ECSR thus expressed its regret at the finding that: 'No provision for easing the burden of proof is made where an allegation of discrimination is raised. The alleged victim bears the entire burden of proving that infringement of the anti-discrimination provisions has occurred. The Committee considers that this situation is apt to impair the effectiveness of the prohibition of discrimination in employment. It recalls that the Charter prohibits all discrimination, whether evident in a clearly expressed rule or occurring in practice, and stresses that in the event of de facto discrimination it is often difficult if not impossible for the complainant to establish the existence of a difference in treatment.'<sup>127</sup> In Conclusions concerning Malta, the Committee requested from that state information on 'the rules governing evidence in cases of alleged discrimination and asks whether employer intent is deemed by the courts to be a determining factor in establishing discrimination' Third, the legal framework must ensure 'protection against dismissal or other retaliatory action by the employer against an employee who has lodged a complaint or taken legal action.'<sup>128</sup> Fourth, in the event of a violation of the prohibition of discrimination, the law must provide for 'sanctions that are a sufficient deterrent to employers as well as adequate compensation proportionate to the damage suffered by the victim.'<sup>129</sup>

## 2.1.2 The legal measures promoting the full effectiveness of the prohibition of discrimination

Apart from these specific requirements which the Committee considers to flow directly from Article 1, para. 2 of the Charter, the Committee mentions a number of measures which should be encouraged because, in its own words, they 'promote the full effectiveness of the efforts to combat discrimination according to Article 1 § 2 of the Revised Charter'. The states bound by this provision should in that respect recognise 'the right of trade unions to take action in cases of discrimination in employment, including on behalf of individuals'. They should allow for 'the possibility of collective action by groups with an interest in obtaining a ruling that the prohibition of discrimination has been

<sup>124</sup> For instance, as the prohibition of discrimination in employment under Article 1, para. 2 ESC extends to the prohibition of discrimination on grounds of nationality where nationals of States Parties are concerned (under the ESC, the only jobs from which foreigners may be banned under Article 31 of the Charter are those that are inherently connected with the protection of the public interest or national security and involve the exercise of public authority), the ECSR noted with respect to Poland that 'under the Medical Profession Act of 5 December 1996, foreign nationals who are permanently resident and have obtained their medical qualifications in Poland must also seek authorisation to practise there. The granting of such authorisation is apparently entirely at the discretion of the professional body of the relevant district. The Committee considers that this could constitute discrimination in employment contrary to Article 1§2 of the Charter' (ECSR Concl. XVI-1, vol. 2, pp. 524-528).

<sup>125</sup> ECSR Concl. XIII-5, p. 253.

<sup>126</sup> ECSR Concl. XIII-3, p. 66. See also ECSR Concl. XVI-1, vol. 2 (Austria), pp. 22-27.

<sup>127</sup> ECSR Concl. 2002 (Romania), pp. 117-121.

<sup>128</sup> In Conclusions concerning Romania, the ECSR asked, 'Which specific safeguards are prescribed in Romanian law against possible dismissal and other retaliatory measures by an employer against an employee who has lodged a complaint of discrimination or instituted judicial proceedings?' (ECSR Concl. 2002 (Romania), pp. 117-121).

<sup>129</sup> The Committee seeks to assess whether compensation is 'proportionate to the damage suffered by the victim' (ECSR Concl. XVI-1, vol. 1 (Czech Republic), pp. 125-129). Compensation equal to remuneration during the period of notice appears to be insufficient to the Committee: see ECSR Concl. XVI-1, vol. 2 (Poland), pp. 524-528.

violated'.<sup>130</sup> They should also set up a specialised body to 'promote, independently, equal treatment, especially by providing discrimination victims with the support they need to take proceedings'.<sup>131</sup>

### 2.1.3 Policy measures intended to improve professional integration of target groups

Though necessary, legal measures may not be sufficient in the view of the Committee: concrete measures should, moreover, be taken in order to encourage completely equal treatment in employment.<sup>132</sup> The Committee therefore encourages the States Parties to conduct an active labour policy seeking to promote the integration of minorities.<sup>133</sup> The ECSR has occasionally referred in that respect to the guidelines adopted in the framework of the European Employment Strategy, one pillar of which concerns the integration of disadvantaged groups into the employment market.<sup>134</sup> The insistence by the Committee on this dimension of non-discrimination is based on its general understanding of the requirements of para. 2 of Article 1 of the Charter that 'although a necessary requirement, appropriate domestic legislation that is in conformity with the Charter is not sufficient to ensure the principles laid down in the Charter are actually applied in practice. It is not sufficient therefore merely to enact legislation prohibiting discrimination (...) as regards access to employment; such discrimination must also be eliminated in practice'.<sup>135</sup> Where the situation on the labour market of women or certain minorities remains unsatisfactory, the Committee considers that this demonstrates that the measures taken to date are not sufficient.

It should therefore not be surprising that in its first cycle of control, the Committee of Independent Experts has already remarked that acceptance of Article 1, para. 2 of the Charter 'placed the Contracting States under an obligation, inter alia, to provide appropriate education and training to ensure the full exercise of the right guaranteed therein'.<sup>136</sup> Indeed, as the ECSR examines on the basis of that provision of the Charter not only the adequacy of the *legal framework* prohibiting discrimination, but also the *results* which are achieved in the integration of certain target groups traditionally excluded from the labour market, providing training and education to the members of those groups constitutes a means for the States Parties to comply with their obligations under that provision.<sup>137</sup>

It is noteworthy that the ECSR has frequently encouraged the States Parties which have agreed to be bound by para. 2 of Article 1 of the European Social Charter to comply with the obligations imposed under European Union law in

<sup>130</sup> See ECSR Concl. 2002 (Italy), p. 75.

<sup>131</sup> ECSR Concl. 2002 (Slovenia), pp. 174-176.

<sup>132</sup> In its first conclusions adopted about Italy, the Committee of Independent Experts noted 'regretfully' that it has been 'unable to find in the first report of the Italian Government sufficient particulars on the admission of women to certain posts, notably in the civil service; it considered that the rights guaranteed by the Charter, especially in the matter of non-discrimination against women, required not only that the State remove all legal obstacles to admission to certain types of employment, but also that positive, practical steps be taken to create a situation which really ensured complete equality of treatment in this respect' (ECSR Concl. I (released on 1.1.1970), at p. 15-16). See also the conclusions adopted during that same cycle of control on the United Kingdom: Concl. I (released on 1.1.1970), at p. 16.

<sup>133</sup> See ECSR Concl. XVI-1, vol. 2 (Norway), pp. 485-487.

<sup>134</sup> See, e.g., ECSR Concl. XVI-1, vol. 2 (Spain), pp. 602-606; ECSR Concl. XVI-1, vol. 1 (Germany), pp. 236-242. See also ECSR Concl. XVI-1, vol. 1 (Czech Republic), pp. 125-129 (reference to the national employment action plan 1999-2000).

<sup>135</sup> ECSR Concl. XVI-1, vol. 2 (Spain), pp. 602-606.

<sup>136</sup> ECSR Concl. I (released on 1.1.1970), at p. 15.

<sup>137</sup> See, with respect to the need to provide training and education to the Roma population, underrepresented in the labour market, ECSR Concl. XVI-1, vol. 1, pp. 125-129.



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the field of non-discrimination in employment.<sup>138</sup> Indeed, as demonstrated by its emphasis on a legal framework with the effectiveness required to provide protection against discrimination, including with regard to the burden of proof in discrimination cases and the role of unions and organisations with an interest in combating discrimination, developments in the case-law of the ECSR seem to have been influenced by the evolution of European Community anti-discrimination law.

## 2.2 The Revised European Social Charter of 1996

The adoption of the Revised European Social Charter in 1996, one of the main results of the ‘revitalisation’ of the Charter launched in 1990, led to the expansion of the list of substantive rights protected under the new instrument.<sup>139</sup> This has potentially important positive impacts on certain groups that are traditionally marginalised. For instance, in a case concerning the failure by France to fully implement the Reception and Accommodation of Travellers Act, No. 2000-614 of 05.07.2000 (‘Besson Act’), which in principle requires municipalities with over 5,000 residents to prepare a plan for the setting up of permanent camp sites for Travellers—a requirement that only a minority of the municipalities concerned in fact complied with—the Committee concluded that France was in breach of the obligation under Article 31, para. 1 of the Revised European Social Charter (right to housing), interpreted in the light of Recommendation (2005) 4 of the Committee of Ministers to Member States on improving the housing conditions of Roma and Travellers in Europe. The Committee considered that ‘despite the efforts of central and local authorities in this area and the positive results that have been achieved at times, there appears to have been a long period during which local authorities and the state have failed to take sufficient account of the specific needs of Travellers’.<sup>140</sup> The European Committee of Social Rights also took the view that under Article 30 (which guarantees the right to protection against poverty and social exclusion), states have a positive obligation ‘to encourage citizen participation in order to overcome obstacles deriving from the lack of representation of Roma and Sinti in the general culture, media or the different levels of government, so that these groups perceive that there are real incentives or opportunities for engagement to counter the lack of representation’.<sup>141</sup> Although the developing case-law of the European Committee of Social Rights on the full range of the substantive rights of the (Revised) European Social Charter cannot be reviewed in detail here, these examples suffice to illustrate that further protection of these rights will benefit in particular the most vulnerable groups within society, including groups which have been traditionally marginalised and subject to discrimination, such as the Roma. This is true especially as regards certain new rights that were introduced with the Revised Charter in 1996, such as the right to protection against poverty

<sup>138</sup> For instance, in Conclusions relating to Germany, the Committee ‘considers (...) that the fragmentary nature of the employment laws and the fact that the burden of proof rests entirely with the plaintiff are a major barrier to employees exercising their rights. The Committee asks whether the German authorities plan to bring in legislation or specific procedures to remedy this problem, e.g. when Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation is incorporated into national law’ (ECSR Concl. XVI-1, vol. 1, pp. 236-242). This reference to Union law is by no means exceptional in the case-law of the ECSR.

<sup>139</sup> The Revised Charter does not bring changes to the control mechanism of the original Charter. However, it enriches the list of the rights protected: the Revised Charter includes the 19 original guarantees listed in the 1961 instrument, sometimes with certain reformulations (Articles 1-19 in Part II of the Revised Charter); it adds to this list the four guarantees contained in a 1988 Additional Protocol (in force since 1992) which had ensured a first, still relatively minor, update of the rights of the European Social Charter (Articles 20-23); and (in Articles 24-31) it completes the list by adding seven other rights, including rights such as the right to protection against poverty and social exclusion (Article 30) and the right to housing (Article 31) which clearly place the Revised European Social Charter at the forefront of instruments protecting economic and social rights in international law.

<sup>140</sup> See ECSR, *European Roma Rights Centre (ERRC) v. France*, Collective Complaint No. 51/2008, Decision on the merits of 19 October 2009, § 40.

<sup>141</sup> ECSR, *Centre for Housing Rights and Evictions (COHRE) v. Italy*, Collective Complaint No. 58/2009, decision on the merits of 25 June 2010, § 107.

and social exclusion (Art. 30) or the right to housing (Art. 31); it also holds for the right to health (Art. 11), the right to social and medical assistance (Art. 13), the right to social welfare (Art. 14), or—for instance—the right to education as part of the broader right of children and young persons to social, legal and economic protection (Art. 17, para. 2).

The focus in this section is on the main improvements to protection against discrimination that were introduced in 1996 by the Revised European Social Charter. First, the non-discrimination requirement was significantly strengthened. Article E was included in Part V of the Revised Charter—which contains ‘horizontal’ clauses applicable to the generality of its substantive clauses. According to Article E: ‘The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status’. In its interpretation of this provision, the European Committee of Social Rights—although ostensibly aligning its reading on that of Article 14 ECHR by the European Court of Human Rights—adopted a bold view of the implications for the States Parties to the Revised European Social Charter, significantly strengthening the protection against discrimination under this instrument. Second, the 1996 Revised European Social Charter enhanced the position of persons with disabilities under the Charter, emphasising in a reworded Article 15 the right to independence, to social integration and to participation in the life of the community, which goes beyond the previous approach based on the right to rehabilitation measures. Third, and finally, Article 23 of the Revised European Social Charter guarantees the right of elderly persons to social protection, a requirement that has been interpreted as imposing the obligation that this category of persons be protected against discrimination on grounds of age.

### 2.2.1 Strengthening the non-discrimination requirement (I): the due diligence obligation to target vulnerable groups

Three important implications from the new Article E of the Revised European Social Charter, cited above, deserve to be highlighted. A first implication is that the States Parties to the Revised Charter must put in place measures ensuring that the general measures they adopt in order to fulfil the rights of the Charter must take into account the specific needs of the most vulnerable groups in society, who may not otherwise benefit from such measures unless the obstacles that they face are expressly addressed. This is the main lesson that can be drawn from the decision on the merits of Collective Complaint No. 13/2002 directed by Autism-Europe against France, adopted on 07.11.2003 by the European Committee of Social Rights.<sup>142</sup> In this decision, the Committee concluded by 11 votes to 2 that France had violated Article 15, para. 1 (obligation to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes whenever possible) and Article 17, para. 1 (right to education by the provision of institutions and services sufficient and adequate for this purpose) of the Revised European Social Charter, either alone or in combination with Article E (non-discrimination), because the proportion of children with autism being educated in either general or specialist schools is much lower than in the case of other children, whether or not disabled, and because of the chronic shortage of care and support facilities for autistic adults. In adopting that decision, the Committee underlined that ‘the insertion of Article E into a separate Article in the Revised Charter indicates the heightened importance the drafters paid to the principle of non-discrimination with respect to the achievement of the various substantive rights contained therein’. It considered that this provision should be read per analogy with Article 14 ECHR, the wording of which it replicates, as protecting from discrimination in the enjoyment of the substantive rights of the Charter, on all grounds not limited to those explicitly enumerated in that provision. It should be emphasised that, although Article E of the Revised European Social Charter therefore has no independent existence (it may only be invoked in combination with substantive provisions of the Charter), the scope of the protection it offers is, nevertheless, much wider than that of Article 14 ECHR, because of the range of rights protected under the Charter—which includes, for example, the right to work,

<sup>142</sup> ECSR, *International Association Austisme-Europe (IAAE) v. France*, Collective Complaint No. 13/2002, decision on the merits of 7 November 2003.



to vocational guidance or training, to protection of health, to social protection of the elderly, to protection against poverty and social exclusion, or to housing. This will contribute to the influence the jurisprudence developed by the European Committee of Social Rights may have on the development of the EC directives.

Even more importantly, the Committee cited the judgment of the European Court of Human Rights in *Thlimmenos v. Greece* to the effect that the principle of non-discrimination ‘is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different’, and concluded:

In other words, human difference in a democratic society should not only be viewed positively but should be responded to with discernment in order to ensure real and effective equality.

In this regard, the Committee considers that Article E not only prohibits direct discrimination but also all forms of indirect discrimination. Such 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.<sup>143</sup>

While acknowledging that the realisation of certain rights with important budgetary implications could require some time to achieve, the European Committee of Social Rights—clearly inspired here by the approach adopted by the UN Committee on Economic, Social and Cultural Rights with respect to the obligations of the Covenant on Economic, Social and Cultural Rights, which are to be progressively realised<sup>144</sup>—considered that:

When the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources. States Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for others persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings.<sup>145</sup>

The Committee found that, ‘notwithstanding a national debate going back more than twenty years about the number of persons concerned and the relevant strategies required’, France has failed to achieve sufficient progress in advancing the provision of education for persons with autism. It was, therefore, in violation of the Revised European Social Charter, not simply because of its failure to achieve a particular result, but because it had not proven that it had adopted measures to the maximum extent of its available resources in order to address as a matter of priority the situation of vulnerable groups such as persons with disabilities. This decision not only illustrates that the requirement of non-discrimination under Article E of the Revised European Social Charter is understood as prohibiting both *direct* discrimination (i.e. a difference in treatment between categories of persons which has no objective and reasonable justification, either because it does not pursue a legitimate aim or because there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised) and *indirect* discrimination, the latter arising from a failure to take due and positive account of all relevant differences or to take adequate steps to ensure that the rights and collective advantages that are open to all are

<sup>143</sup> At § 52.

<sup>144</sup> See in particular CESCR, General comment No. 5: Persons with disabilities, adopted at the 11th session of the Committee (1994) (UN doc. E/1995/22), in *Compilation of general comments and general recommendations adopted by human rights treaty bodies* (UN doc. HRI/GEN/1/Rev.7, 12 May 2004), p. 26: ‘since the Covenant’s provisions apply fully to all members of society, persons with disabilities are clearly entitled to the full range of rights recognized in the Covenant. In addition, insofar as special treatment is necessary, States parties are required to take appropriate measures, to the maximum extent of their available resources, to enable such persons to seek to overcome any disadvantages, in terms of the enjoyment of the rights specified in the Covenant, flowing from their disability.’

<sup>145</sup> At § 53.

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genuinely accessible by and to all.<sup>146</sup> It also shows how the requirement of non-discrimination may lead to the realisation of socio-economic rights such as the right to education by identifying the categories which, because of their particular vulnerability, deserve special attention.

The European Committee on Social Rights transposed this approach to the structural exclusion of Roma in its more recent case-law. For instance, in a collective complaint filed against Bulgaria in 2007, the European Roma Rights Centre (ERRC) alleged that Bulgaria was in violation of the rights to health and to social and medical assistance, alone or in combination with the non-discrimination requirement, stipulated under the Revised European Social Charter. While Bulgarian legislation provided for state-subsidised health insurance for socially vulnerable individuals, this was made conditional on being eligible for the right to social assistance or being registered as unemployed. However, since many Roma did not receive social assistance or were not registered as unemployed, they could not benefit from this type of public health insurance coverage: the ERRC relied on surveys showing that around 46 per cent of Roma were not covered by health insurance, and that in some towns the percentage of uninsured Roma ranged between 40-90 per cent. In addition, as a result of amendments made to the Social Assistance Act in 2006, assistance was interrupted for one year after claimants had received benefits for 18 months, except for certain essential medical services such as emergency medical care and obstetrical care for women: this, the ERRC stated, had further disproportionate impacts on the Roma, as a group in which long-term unemployment is widespread. As a result, according to the ERRC, government policies did not adequately address the specific health risks affecting Romani communities. The ERRC further alleged widespread discriminatory practices on the part of health care practitioners against Roma in the provision of health services, exemplified by the failure of emergency services to respond in an efficient manner to calls for assistance received from Roma, and the impossibility for many Romani women to avail themselves of pre- and post-natal medical services, as well as the segregation of Romani women in hospital facilities.

In the decision on the merits it adopted on 03.12.2008, the European Committee of Social Rights concluded that Bulgaria was in breach of Article 11, paras 1, 2 and 3 (right to health), in conjunction with Article E (non-discrimination), and of Article 13, para. 1 (right to social and medical assistance) of the Revised European Social Charter.<sup>147</sup> As regards the failure of Bulgaria to ensure access to health care without discrimination,<sup>148</sup> the Committee noted that 'the State has failed to meet its positive obligations to ensure that Roma enjoy an adequate access to health care, in particular by failing to take reasonable steps to address the specific problems faced by Roma communities stemming from their often unhealthy living conditions and difficult access to health services' (para. 49). According to the Committee, the specific instances of abuse put forward by the ERRC 'cannot be relied on to conclude that there are systematic discrimination practices against Roma in the health care system'; however, 'these specific cases taken together with all other evidence submitted by the complainant serve to reinforce the Committee's overall conclusion that Roma in Bulgaria do not benefit from appropriate responses to their general and specific health care needs' (para. 50).

Although it does not explicitly rely on *Autisme-Europe v. France*, the European Committee of Social Rights thus adopts a very similar approach to that taken in that earlier decision. States have a due diligence obligation to

<sup>146</sup> See, e.g., European Committee of Social Rights, *ERRC v. Bulgaria*, Collective Complaint No. 31/2005, decision on the merits of 18 October 2006, § 40; *Centre on Housing Rights and Evictions (COHRE) v. Italy*, Collective Complaint No. 58/2009, decision on the merits of 25 June 2010, § 34. For an elaboration of this distinction in the case-law of the European Committee of Social Rights, see ECSR, *ERRC v. France*, Collective Complaint No. 51/2008, decision on the merits of 19 October 2009, paras. 82-83.

<sup>147</sup> ECSR, *ERRC v. Bulgaria*, Collective Complaint No. 46/2007, decision on the merits of 3 December 2008.

<sup>148</sup> As regards the right to social and medical assistance stipulated in Article 13 § 1 of the Revised European Social Charter, the Committee notes that, 'bearing in mind that Article 13§1 of the Revised Charter provides that persons without adequate resources, in the event of sickness, should be granted financial assistance for the purpose of obtaining medical care or provided with such care free of charge, ... the measures adopted by the Government do not sufficiently ensure health care for poor or socially vulnerable persons who become sick, thus amounting to a breach of this provision' (para. 44).

ensure that the general measures they adopt in order to fulfil the rights of the Charter—whether legislative or policy measures—take into account the specific needs of the most vulnerable groups, which must be specifically supported in their ability to have access to advantages that should in principle be of benefit to all. A failure to consider the obstacles that such groups may face amounts to discrimination in the meaning of Article E of the Revised Charter. This sheds doubts on the acceptability of measures or policies that are ‘neutral’, but that do not include specific monitoring of their impact on certain vulnerable groups. As was noted by the Committee in a case concerning the failure of France to ensure that Roma Travellers have access to adequate sites for parking their caravans, and are not subject to risk of eviction of caravans, as well as the failure of France to recognise caravans as forms of housing which entitle their occupants to housing benefits, ‘in the case of Travellers, merely guaranteeing identical treatment as a means of protection against any discrimination is not sufficient. (...) there is no doubt that Travellers are in a different situation, and that the difference in their situation must be taken into account. It considers that Article E imposes an obligation to take due account of the relevant differences.’<sup>149</sup>

### 2.2.2 Strengthening the non-discrimination requirement (II): the shift of the evidentiary burden in discrimination cases

The European Committee of Social Rights has taken the view that ‘the burden of proof should not rest entirely on the complainant, but should be the subject of an appropriate adjustment.’<sup>150</sup> For instance, after it was presented with statistical data showing that, in Bulgaria, only 6.2 per cent of the intellectually disabled children living in homes for mentally disabled children are educated in mainstream primary schools or in special schools, the Committee considered that since these statistics showed ‘unexplained differences’, it falls on the government ‘to demonstrate that there is no ground for this allegation of discrimination.’<sup>151</sup> This, it should be noted, seems to go beyond the requirements set forth in the Racial Equality and Employment Equality Directives, insofar as these instruments merely *allow* the EU Member States to which they are addressed to make provision for alleged victims of discrimination to produce statistics that might allow the victim to establish a presumption of discrimination, leading to a shift of the burden of proof to the defendant in discrimination cases which allow for civil remedies. In contrast, the case-law of the European Committee of Social Rights seems to *require* that victims be allowed to rely on such statistics, which in turn would seem to imply that public authorities must allow such data to be collected and used in cases alleging discrimination.

### 2.2.3 Strengthening the non-discrimination requirement (III): the stigmatisation of vulnerable groups and the aggravated violation of the Charter

In a case concerning Italy, where the European Committee of Social Rights found that evictions of Roma and Sinti that were carried out without respecting the dignity of the persons concerned and without alternative accommodation being made available, that the government did not convincingly refute the claims that Roma suffered unjustified violence during such evictions, and that raids on Roma and Sinti settlements, including by the police, had not been systematically reported and investigated, the Committee took the further step of identifying an ‘aggravated violation’ of the Charter. Such an ‘aggravated violation’, the Committee noted, is constituted ‘when the following criteria are met:

<sup>149</sup> ECSR, *ERRC v. France*, Collective Complaint No. 51/2008, decision on the merits of 19 October 2009, para. 84.

<sup>150</sup> ECSR, *Mental Disability Advocacy Centre (MDAC) v. Bulgaria*, Collective Complaint No. 41/2007, decision on the merits of 3 June 2008, § 52.

<sup>151</sup> ECSR, *Mental Disability Advocacy Centre (MDAC) v. Bulgaria*, Collective Complaint No. 41/2007, decision on the merits of 3 June 2008.

- on the one hand, measures violating human rights specifically targeting and affecting vulnerable groups are taken;
- on the other, public authorities not only are passive and do not take appropriate action against the perpetrators of these violations, but they also contribute to such violence.<sup>152</sup>

Although the motivation of the Committee seems clear—to stigmatise in particular discrimination that is intentional and openly encouraged by public authorities, thus going beyond a mere failure of the state to duly combat discrimination and to take measures that protect against discrimination—there seem to be no specific consequences attached to a finding of ‘aggravated violation’.<sup>153</sup>

## 2.2.4 Strengthening the right of persons with disabilities to independence, social integration and participation in the life of the community

Another important contribution of the Revised European Social Charter has been to modify Article 15 of the Charter, in order to reinforce the right of persons with disabilities to independence, social integration and participation in the life of the community and go beyond an approach centred (in the 1961 version of that provision) on rehabilitation and social resettlement. In its first interpretations of Article 15 of the Revised European Social Charter, the Committee said of this provision that it ‘advances the change in disability policy that has occurred over the last decade away from welfare and segregation and towards inclusion and choice’. It considers accordingly that Article 15 of the Revised ESC embodies a requirement of non-discrimination. For instance,<sup>154</sup>

In so far as Article 15 par. 1 of the Revised Charter explicitly mentions ‘education’, (...) the existence of non-discrimination legislation [is necessary] as an important tool for the advancement of the inclusion of children with disabilities into general or mainstream educational schemes. Such legislation should, as a minimum, require a compelling justification for special or segregated educational systems and confer an effective remedy on those who are found to have been unlawfully excluded or segregated or otherwise denied an effective right to education.

<sup>152</sup> ECSR, *Centre on Housing Rights and Evictions (COHRE) v. Italy*, Collective Complaint No. 58/2009, decision on the merits of 25 June 2010, § 76. The fact that the situation had worsened since an earlier decision of the Committee based on the same pattern of facts seems to have been equally decisive in the Committee’s assessment that the violation by Italy of the rights of the Roma and Sinti was particularly serious (see ECSR, *European Roma Rights Center (ERRC) v. Italy*, Collective Complaint No. 27/2004, decision of 7 December 2005: in its decision of 25 June 2010 under Complaint No. 58/2009, the Committee notes that ‘the situation has not been brought into conformity but it has worsened as highlighted by several international monitoring bodies’ (at § 77)). In another part of the decision, the Committee notes that ‘statements by public actors ... create a discriminatory atmosphere which is the expression of a policy-making based on ethnic disparity instead of on ethnic stability’ and that ‘the racist misleading propaganda against migrant Roma and Sinti indirectly allowed or directly emanating from the Italian authorities constitutes an aggravated violation of the Revised Charter’ (§ 139) under Article E in combination with Article 19 § 1 (the right of migrant workers and their families to protection and assistance) of the Revised Charter.

<sup>153</sup> The Resolution adopted by the Committee of Ministers on the basis of the report of the European Committee of Social Rights does not allude to the fact that Italy was found to have committed an ‘aggravated violation’ of the Charter: see Resolution CM/ResChS(2010)8 Collective Complaint No. 58/2009 by the Centre on Housing Rights and Evictions (COHRE) against Italy, adopted by the Committee of Ministers on 21 October 2010 at the 1096th meeting of the Ministers’ Deputies.

<sup>154</sup> ECSR, Concl. 2003-1, p. 159 (France – Article 15 para. 1); Concl. 2003-1, p. 292 (Italy – Article 15 para. 1); Concl. 2003-2, p. 498 (Slovenia – Article 15 para. 1); Concl. 2003-2, p. 608 (Sweden – Article 15 para. 1).

Article 15, para. 3 of the Revised European Social Charter concerns the integration and participation of persons with disabilities in the life of the community. According to the European Committee on Social Rights, this provision requires the adoption of positive measures to achieve integration in housing, transport, telecommunications, cultural and leisure facilities. As Article 15, para. 3 of the Revised Charter refers to participation of persons with disabilities, the European Committee on Social Rights also requires that ‘persons with disabilities and their representative organisations should be consulted in the design, and ongoing review of such positive action measures and that an appropriate forum should exist to enable this to happen.’<sup>155</sup> Moreover, Article 15, para. 3 of the Revised European Social Charter ‘requires the existence of anti-discrimination (or similar) legislation covering both the public and the private sphere in the fields such as housing, transport, telecommunications, cultural and leisure activities, as well as effective remedies for those who have been unlawfully treated’.<sup>156</sup>

## 2.2.5 Protecting elderly persons from discrimination

Article 23 of the Revised European Social Charter guarantees the right of elderly persons to social protection.<sup>157</sup> The Committee reads this provision as requiring the introduction of non-discrimination legislation protecting elderly persons against discrimination on grounds of age.<sup>158</sup> It also insists on the provision of adequate resources to the elderly, by pensions or other financial assistance where they receive no salary, or by an adequate level of wages; on the provision of services and facilities, including home help services and day care centres, in particular for elderly persons suffering from Alzheimer’s disease; on health care programmes and services specifically aimed at the elderly; on the inclusion of the needs of elderly persons in national or local housing policies; on the availability, accessibility and quality of residential institutions for elderly persons; and on the possibility for elderly persons, their families, and social and trade union organisations to make complaints about care and treatment in these institutions.

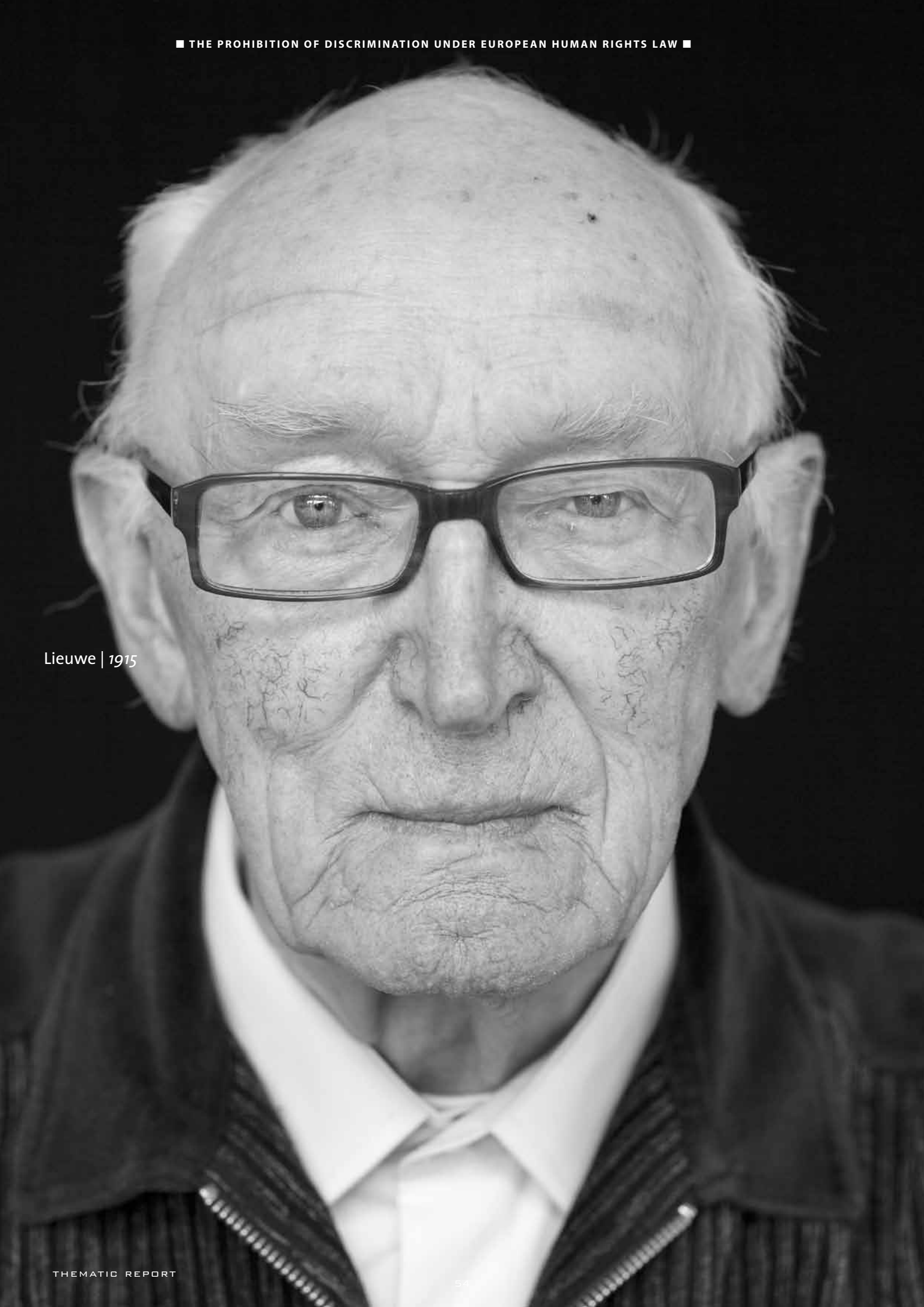
<sup>155</sup> ECSR, Concl. 2003-1, p. 168 (France – Article 15 para. 3); Concl. 2003-1, p. 507 (Slovenia – Article 15 para. 3).

<sup>156</sup> ECSR, Concl. 2003-1, p. 170 (France – Article 15 para. 3); Concl. 2003-1, p. 298 (Italy – Article 15 para. 3); Concl. 2003-2, p. 508 (Slovenia – Article 15 para. 3); Concl. 2003-2, p. 614 (Sweden – Article 15 para. 3).

<sup>157</sup> This provision has no exact equivalent in the 1961 Charter. It was introduced initially as Article 4 of the Additional Protocol of 4 May 1988, which added 4 rights to the original list contained in the 1961 Charter.

<sup>158</sup> Concl. 2003, vol. 1 (Italy), p. 314.





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## Part III

### A Comparison with the EU Directives: Key Interpretive Challenges

The adoption in 2000 within the European Community of the Racial Equality and Employment Equality Directives has influenced both the European Court of Human Rights in its interpretation of Article 14 ECHR and the European Committee of Social Rights. For instance, when, in *Nachova*, the European Court of Human Rights first acknowledged the need to adapt evidentiary rules to facilitate the proof of discrimination, it did so with explicit reference to the EU Directives, and this in turn led the European Committee of Social Rights to take the view that ‘in respect of complaints alleging discrimination the burden of proof should not rest entirely on the complainant organisation, but should be the subject of an appropriate adjustment.’<sup>159</sup> When presented with reports by Member States of the European Union, the European Committee of Social Rights insists that, in order to promote the full effectiveness of the efforts to combat discrimination according to Article 1, para. 2 of the Revised Charter, the states which have accepted that provision should implement fully the Racial Equality and Employment Equality Directives, especially the procedural clauses thereof relating to the role of organisations having an interest in combating discrimination and, in the context of the Racial Equality Directive, of equality bodies. Here, we are asking the reverse question: what influence may the case-law briefly described exercise on the interpretation of the directives adopted on the basis of Article 13 TEC (now Article 19 TFEU)?

A first observation relates to the hierarchy of grounds of prohibited discrimination. In EU law, such a hierarchy follows from the choice made by the EU Member States when they adopted the Treaty of Amsterdam to provide the Council with the power to adopt measures against discrimination based on a limited number of grounds—race or ethnic origin, sex, sexual orientation, religion or belief, disability and age—and from the later choice of the Council, with the adoption of the Racial Equality Directive, to offer broader protection against discrimination based on race or ethnic origin, than that based on the other grounds mentioned in the new provision inserted in the Treaty of Rome. As we have seen, the European Committee of Social Rights has on occasion insisted that the legal framework prohibiting discrimination in employment must protect against discrimination either on all grounds or, at the least, on the grounds of political opinion, religion, race, language, sex, age and health. We are left to wonder, then, whether the omission of both political opinion and language from Article 13 TEC (now Article 19 TFEU) and, therefore, from the Directives, will not create a risk of non-compliance with Article 1, para. 2 of the European Social Charter (or of the Revised European Social Charter) by the Member States which have accepted that provision in either of those instruments, where they choose not to expand the scope of the protection afforded to persons under their jurisdiction to those grounds. We may also ask whether a prohibition of discrimination based on ‘disability’, as in Directive 2000/78/EC, is sufficient, or whether it should be implemented, preferably as a prohibition from discrimination based on the ground of ‘health’ (or, perhaps, ‘physical or mental condition’), following a symmetrical rather than a non-symmetrical approach. Although the European Committee of Social Rights has explicitly recognised that stronger protection may be provided in respect of certain grounds (and it cited in that respect gender or membership of a race or ethnic group), it may be less justifiable for States Parties to the Charter to offer no protection at all from discrimination based on certain grounds not mentioned in the Directives.<sup>160</sup>

A second observation relates to the content of the requirement of non-discrimination. Under Article 2, para. 2 (b) of the Racial Equality and Employment Equality Directives, indirect discrimination is defined as a situation where apparently neutral regulations, criteria or practices appear to be particular disadvantageous to the members of a certain category, unless the provision creating the disadvantage is objectively and reasonably justified. In contrast, the case-law of the European Committee of Social Rights includes disparate impact discrimination (indirect discrimination as demonstrated by statistics) in its understanding of indirect discrimination, and it strongly encourages states to combat institutional discrimination by authorising statistical proof of discrimination and by measuring the impact of the laws and policies they implement. In addition, both this Committee and the European

<sup>159</sup> European Committee of Social Rights, *Mental Disability Advocacy Center (MDAC) v. Bulgaria*, Collective Complaint No. 41/2007, decision on the merits of 3 June 2008, § 52.

<sup>160</sup> This, it will be noted, is the position adopted by the Constitutional Court of Belgium (then called the Cour d’arbitrage) (judgment n° 157/2004 on 6 October 2004).

Court of Human Rights consider that the failure to treat differently a specific individual or category by providing for an exception to the application of the general rule may constitute a form of indirect discrimination: the case-law of the European Court of Human Rights illustrates why, although the Employment Equality Directive only mentions a requirement of reasonable accommodation with respect to persons with disabilities, the failure to take into account relevant differences could be seen as a form of indirect discrimination even though it may not fall clearly within the definition of Article 2, para. 2 (b) of these directives.

The following observations examine, for each ground covered by the Racial Equality and Framework Equality Directives, which lessons may be drawn from the case-law presented above, and—more often—from the case-law of the European Court of Human Rights on other bases than the non-discrimination clauses of the ECHR, in order to address certain outstanding questions of interpretation of the requirements of the directives.

### 3.1 Race and ethnic origin

The Racial Equality Directive does not contain a provision on the reasonable accommodation of the specific needs of the members of certain ethnic groups, leaving unresolved the question whether a failure to provide reasonable accommodation should be considered a form of prohibited discrimination under the Directive. We have seen, however, that there are indications in the case-law of the European Court of Human Rights that this may be a direction to be explored in the future. The reasoning of the Court in *Thlimmenos*—which this report has presented above as a judgment requiring the reasonable accommodation of members of particular religious minorities—could be applied, for instance, to those accommodations that certain Roma could require in order to be able to pursue their traditional nomadic, or semi-nomadic, lifestyle, by the provision of certain exceptions in generally applicable regulations.

Representative cases presented to the European Court of Human Rights concerned the application of regulations relating to land use, which did not take into account the particular needs of the Roma arising from their tradition of living and travelling in caravans.<sup>161</sup> The majority of the members of the Court in those cases have failed to correctly rely on the notion of effective accommodation. When, on 18.01.2001, the Grand Chamber of the European Court of Human Rights dismissed five applications concerning that question, refusing in particular to consider that the United Kingdom authorities had failed to treat differently Roma living in caravan homes whose situations were allegedly different from that of the rest of the population,<sup>162</sup> it based its reasoning in part on the fear that ‘to accord to a Gypsy who has unlawfully stationed a caravan site at a particular place different treatment from that accorded to non-Gypsies who have established a caravan site at that place or from that accorded to any individual who has established a house in that particular place would raise substantial problems under Article 14 of the Convention.’<sup>163</sup> In the view of the author of this report, this confuses the obligation to provide effective accommodation (or to treat differently situations which require such differential treatment) with a form of positive action, which it is not. In

<sup>161</sup> See Eur. Ct. HR(GC), *Chapman v. the United Kingdom* (Appl. no. 27238/95), judgment of 18 January 2001, at §§ 127-130 (where the Court does not exclude this reasoning, concluding however that there was no discrimination in that case); Eur. Ct. HR (GC), *Beard v. the United Kingdom* (Appl. no. 24882/94), judgment of 18 January 2001, at §§ 129-132 (same); Eur. Ct. HR (GC), *Coster v. the United Kingdom* (Appl. no. 24876/94), judgment of 18 January 2001, at §§ 139-142 (same); Eur. Ct. HR (GC), *Jane Smith v. the United Kingdom* (Appl. no. 25154/94), judgment of 18 January 2001 (same); Eur. Ct. HR (GC), *Lee v. the United Kingdom* (Appl. no. 25289/94), judgment of 18 January 2001, at §§ 126-130 (same).

<sup>162</sup> See, however, for a finding of violation of Article 8 ECHR because of the lack of procedural safeguards in the eviction of the applicant from a caravan site on which he and his family had lived for 14 to 15 years, Eur. Ct. HR (1st sect.), *Connors v. the United Kingdom* (Appl. no. 66746/01), judgment of 27 May 2004.

<sup>163</sup> Eur. Ct. HR(GC), *Chapman v. the United Kingdom* (Appl. no. 27238/95), judgment of 18 January 2001, at § 95.

*Chapman*, seven judges<sup>164</sup> filed a joint dissenting opinion contesting the approach of the majority, as exhibited in the extract cited above. This approach, the dissenters noted,

ignores the fact, earlier acknowledged by the majority, that in this case the applicant's lifestyle as a Gypsy widens the scope to Article 8, which would not necessarily be the case for a person who lives in conventional housing, the supply of which is subject to fewer constraints. The situations would not be likely to be analogous. On the contrary, discrimination may arise where States, without objective and reasonable justification, fail to treat differently persons whose situations are significantly different (see *Thlimmenos v. Greece*, no. 34369/97, § 44, ECHR 2000-IV).

The obligation to take into account relevant differences in situation in drafting legislation with a general scope of application should not be confused with the introduction of positive action measures. Indeed, under Article 4 of the Council of Europe Framework Convention for the Protection of National Minorities,<sup>165</sup> where States Parties are led to adopt 'adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority', taking due account in this respect of 'the specific conditions of the persons belonging to national minorities', such measures are specifically designated as not being discriminatory in character. But the promotion of full and effective equality through the adoption of positive action measures should be carefully distinguished from the prohibition, under Article 5 of the same instrument, of any measure constituting a form of forced assimilation. The understanding of discrimination by the European Court of Human Rights—which includes in that notion the failure to take into account relevant differences and thus to 'accommodate difference'—therefore requires us to rethink whether the definition of discrimination under the Racial Equality Directive (including both direct and indirect discrimination) is truly sufficient: that the EU Member States are allowed to go beyond that definition by adopting positive action measures is no answer.

## 3.2 Disability

Two outstanding questions of interpretation of the provisions of Directive 2000/78/EC, relating to the equal treatment of persons with disabilities in employment and occupation, may be illuminated by the relevant case-law of the European Court of Human Rights. A first question of interpretation concerns the imposition of health and safety requirements creating an obstacle to the recruitment or the retention, of workers with a certain disability by putting either themselves or the co-workers or the general public at risk under certain conditions of employment.<sup>166</sup> It is well documented that occupational health and safety regulations may constitute a significant barrier to access to employment for workers with disabilities, or to their retention.<sup>167</sup> Article 8 ECHR protects the right to respect for private life. It has been interpreted broadly by the European Court of Human Rights to restrict not only the power of States Parties to interfere with the right to privacy of the individual, understood as the sphere of intimate matters—and, in particular, to seek information he or she wishes to remain confidential— but also their ability to process personal data, i.e. any information relating to an identified or identifiable individual. Under the former aspect, Article 8 ECHR embodies protection laid out in further detail in the 1997 Council of Europe Convention

<sup>164</sup> Mr Pastor Ridruejo, Mr Bonello, Mrs Tulkens, Mrs Strážnická, Mr Lorenzen, Mr Fischbach and Mr Casadevall.

<sup>165</sup> ETS, no. 157. Opened for signature on 01.02.1995, and entered into force on 01.02.1998.

<sup>166</sup> These questions are developed in detail in the report commissioned by the EC Network of experts on disability discrimination for the Commission of European Communities, DG Employment and Social Affairs: O. De Schutter, *Pre-Employment Inquiries and Medical Examinations as Barriers to the Employment of Persons with Disabilities: Reconciling the Principle of Equal Treatment and Health and Safety Regulations under European Union Law*, August 2004, 54 pp.

<sup>167</sup> See in particular *The extent of use of health and safety requirements as a false excuse for not employing sick or disabled persons*, study prepared by IRS Research for the Health and Safety Executive and the Disability Rights Commission, HSE Research Report 167, 2003.

on Human Rights and Biomedicine.<sup>168</sup> Under the latter, it embodies protection of the individual with respect to the processing of personal data, which is developed in the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 1981,<sup>169</sup> and which Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data<sup>170</sup> further details for the Member States of the European Union.

Adequate regulation of pre-employment enquiries and medical examinations has a crucial role to play if we wish to prevent occupational health and safety requirements from becoming unjustified barriers to the employment of persons with disabilities. In the cases which are most significant statistically, disability will only be revealed by such enquiries or medical examinations. It is therefore on the basis of such enquiries or examinations that discrimination may occur; and it is by providing better protection for the privacy of the individual, through strict regulation of the conditions under which information concerning his or her health, physical condition, or impairment may be sought from that individual, that we may hope to limit the number of circumstances where a disability will become known to an employer under conditions where this may lead to unjustified reactions on his/her part—reactions resulting from fear or prejudice, or from overprotective attitudes, which the employer will seek to justify by misrepresentation of the obligations of employers under health and safety regulations. Article 8 ECHR<sup>171</sup> prohibits any medical examination which constitutes unjustified interference with private life,<sup>172</sup> and which, when

<sup>168</sup> Convention for the Protection of Human Beings and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, opened for signature in Oviedo on 04.04.1997 (ETS no. 164). Like Article 5 of that Convention, Article 8 ECHR requires in principle that any medical intervention be authorised by the free and informed consent of the individual concerned. See also *Medical Examinations Preceding Employment and/or Private Insurance: A Proposal for European Guidelines*, Council of Europe, April 2000, p. 30. In the case-law of the European Court of Justice, which protects the right to respect for private life by including Article 8 ECHR among the general principles of EC Law, see Case C-404/92 P, *X v. Commission*, ECR [1994] 4737 (judgment of 5 October 1994). For a commentary, see O. De Schutter, 'Les examens médicaux à l'embauche de la Commission européenne', *Observations sous C.J.C.E.*, 5 octobre 1994, *X c. Commission des C.E.*, *Revue trimestrielle des droits de l'homme*, 1995, pp. 97-122.

<sup>169</sup> ETS, no. 108. In the case-law of the European Court of Human Rights, the traditional right to respect for private life has been enriched by the inclusion of a purely informational dimension: it now guarantees the individual not only against unwanted intrusion into the sphere of 'privacy' (as occurs when personal data that the individual wished to protect from divulgation are collected), but also against the systematic processing of information relating to the individual (whether the information is confidential or not): see Eur. Ct. HR, *Rotaru v. Romania*, judgment of 4 May 2000, § 43. For a commentary, see O. De Schutter, 'Vie privée et protection de l'individu vis-à-vis des traitements de données à caractère personnel', *Revue trimestrielle des droits de l'homme*, n°45, 2001, pp. 137-183.

<sup>170</sup> OJ L 281 of 23.11.1995, p. 31.

<sup>171</sup> Or, arguably, of Article 1, para. 2 of the European Social Charter: see esp. ECSR Concl. VIII, p. 28 (interpreting this provision as implying a right of the candidate employee not to be subjected to requirements which bear no defensible relationship to the job to be performed, and which are therefore discriminatory).

<sup>172</sup> See, e.g., Eur. Comm. H.R., Appl. no. 8239/78, *X v. the Netherlands*, dec. of 4 December 1978, *D.R.*, 16, p. 184; Eur. Comm. H.R., Appl. no. 8278/78, *X v. Austria*, dec. of 13 December 1979, *D.R.*, 18, p. 154; Eur. Comm. H.R., Appl. no. 21132, *Peeters v. the Netherlands*, dec. of 6 April 1994, *D.R.*, 77-A, p. 75; Eur. Comm. H.R., Appl. no. 20872/92, *A.B. v. Switzerland*, *D.R.*, 80-A, p. 66. See generally M. van de Kerchove, 'La protection de la santé publique par le droit pénal et les restrictions qui en découlent par rapport aux autres droits fondamentaux. Examen de la jurisprudence de la Cour et de la Commission européenne des droits de l'homme', *Revue de science criminelle et de droit pénal comparé*, 1996, esp. pp. 103-105.

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the examination is performed in the particular context of employment, is not strictly tailored to the needs of the task to be performed.<sup>173</sup>

The requirements of the European Convention on Human Rights in this respect should be taken into account, in particular when an interpretation is required of the prohibition of indirect discrimination, as defined in Article 2, para. 2 (b) of the Employment Equality Directive. They should also guide the reading of the safeguard clauses contained in Article 7, para. 2 of this instrument, which provide that the principle of equal treatment with regard to persons with disabilities does not prohibit Member States from maintaining or adopting ‘provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment’. Article 2, para. 5 of the Employment Equality Directive finally authorises the Member States to adopt measures ‘which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others’. These various clauses seek to immunise existing or future<sup>174</sup> health and safety regulations from being challenged under the Employment Equality Directive, or they may serve that purpose. However, only if they comply with the requirements of Article 8 ECHR as interpreted by the European Court of Human Rights should they be allowed to be invoked in order to shield such regulations from scrutiny.

A second question of interpretation of these provisions concerns the obligation imposed on employers to provide effective accommodation in order to ensure that workers with disabilities may be recruited or retained, unless this imposes a ‘disproportionate burden’ on the employers concerned. It will suffice to say in the context of this report that the right to peaceful enjoyment of possessions guaranteed under Article 1 of Protocol No. 1 to the ECHR does not constitute an obstacle to the imposition of such an obligation on the employer, especially when combined with the proviso that it should not lead to imposing a disproportionate burden.

In the absence of any case-law of the monitoring bodies of the Convention relating specifically to this issue, the case of *Mellacher and Others v. Austria* should be considered as guiding. The applicants, landlords in Austria, complained of an infringement of their property rights under Article 1 of Protocol No. 1 to the Convention by reason of the allegedly excessive reduction in rents allowed to their tenants under the 1981 Rent Act, which restricted agreements on the basic rent for premises covered to the amount regarded as reasonable with reference to the size, type, layout, location, fittings and condition of the premises, and laid down maximum limits for the most common types of apartments. The Court rejected the argument of the applicants that the infringement of their property rights was disproportionate, observing in particular that ‘in remedial social legislation and in particular in the field of rent control (...) it must be open to the legislature to take measures affecting the further execution of previously

<sup>173</sup> The recent case-law of the European Court of Human Rights on this issue shows, however, that the States Parties to the ECHR are granted a certain margin of appreciation in this regard: see Eur. Ct. HR (1st sect.), dec. of 7 November 2002, *Madsen v. Denmark*, Appl. no. 58341/00 (inadmissibility of manifestly ill-founded application alleging a violation of Article 8 ECHR by the crewmember of a Danish shipping company subjected to mandatory alcohol and drug tests justified by safety reasons); and Eur. Ct. HR (4th sect.), dec. of 9 March 2004, *Wretlund v. Sweden*, Appl. no. 46210/99 (inadmissibility of the application lodged by an office cleaner at a nuclear plant obliged to comply with a drug testing aimed at detecting the presence of cannabis).

<sup>174</sup> Despite the fact that the Employment Equality Directive, while authorising the Member States to introduce or maintain measures more favourable to the realisation the principle of equal treatment—as it lays down minimum requirements for combating discrimination, based *inter alia* on disability, as regards employment and occupation—specifically states that the implementation of the Directive ‘should not serve to justify any regression in relation to the situation which already prevails in each Member State’ (Preamble, Recital 28), it is clear from both Article 7, para. 2 and Article 2, para. 5 of the Directive that the Member States may introduce further requirements aiming at the protection of health and safety at work, even though such measures may impact negatively upon the access to employment of persons with disabilities.

concluded contracts in order to attain the aim of the policy adopted'.<sup>175</sup> This judgment is characteristic in that the Court usually affords a wide margin of appreciation to the States Parties to the Convention when they restrict the right to property for public interest purposes. The individualised character of the test—whether or not the effective accommodation requested imposes a disproportionate burden on the employer, and should therefore be considered 'unreasonable'—would seem to constitute, in that respect, a supplementary guarantee which shields national legislation implementing the Framework Directive from challenges brought on the basis of Article 1 of Protocol No. 1 to the ECHR.<sup>176</sup>

### 3.3 Sexual orientation

The Framework Directive does not clearly specify whether differences in treatment based on civil status—in particular, on whether or not a person is married—may be tolerated or whether, in countries where civil marriage is not open to same-sex partners (all EU Member States except Belgium, the Netherlands, Portugal, Spain and Sweden), such differences in treatment should be considered as a form of discrimination based on sexual orientation. Recital 22 of the Preamble to the Employment Equality Directive mentions that this instrument is 'without prejudice to national laws on marital status and the benefits dependent thereon'. Of course, where certain advantages accorded to married couples are extended to different-sex couples living under a form of stable *de facto* cohabitation (or legal cohabitation) but refused to same-sex couples, this would constitute direct discrimination based on sexual orientation<sup>177</sup>: where such advantages are part of 'employment and working conditions, including dismissals and pay' (Article 3, para. 1 (c) of the Framework Directive), they are prohibited under Article 2, para. 1 and para. 2 (a) of the Employment Equality Directive. However, Recital 22 of the Preamble of the Employment Equality Directive raises the question whether reserving certain benefits to married couples, where the consequence is that individuals with a homosexual sexual orientation will thereby be excluded from such benefits, constitutes a prohibited discrimination, either direct or indirect.<sup>178</sup>

<sup>175</sup> Eur. Ct. HR, *Mellacher and Others v. Austria*, judgment of 19 December 1989, at § 36. See also § 56: 'It is undoubtedly true that the rent reductions are striking in their amount, (...). But it does not follow that these reductions constitute a disproportionate burden. The fact that the original rents were agreed upon and corresponded to the then prevailing market conditions does not mean that the legislature could not reasonably decide as a matter of policy that they were unacceptable from the point of view of social justice.'

<sup>176</sup> See Eur. Ct. HR, *Sporrong and Lönnroth v. Sweden* judgment of 23 September 1982, Series A no. 52, pp. 26-27, §§ 70-71; and Eur. Ct. HR (GC), *Immobiliare Saffi v. Italy* (Appl. no. 22774/93), judgment of 28 July 1999, at § 56.

<sup>177</sup> See Eur. Ct. HR (1st sect.), *Karner v. Austria* (Appl. no. 40016/98), judgment of 24 July 2003. As Section 14 of the Austrian Rent Act (*Mietrechtsgesetz*) provided that on the death of the main tenant of a flat, a spouse, a life companion, relatives in the direct line including adopted children, and siblings of the former tenant, could succeed the tenant, and defined 'life companion' as 'a person who has lived in the flat with the former tenant until the latter's death for at least three years, sharing a household on an economic footing like that of a marriage', thus excluding companions of the same sex as the deceased tenant, the Court considered that such an exclusion could not be justified by the objective of promoting the traditional notion of family, because the measure was disproportionate to the fulfilment of that aim (§ 41).

<sup>178</sup> It could be argued that the prohibition of indirect discrimination is a prohibition not to treat differently situations which call for a differential treatment, as the European Court of Human Rights and the European Committee of Social Rights have done in *Thlimmenos* and *Autisme-Europe* respectively. Under this reasoning, homosexual couples are in a situation different from that of heterosexual couples, because only the former, having no access to marriage, have not chosen not to marry. Alternatively, this situation could be described as an instance of direct discrimination on the basis of the reasoning that, just like difference of treatment based on pregnancy as a form of direct discrimination based on sex, because only women—not men—may become pregnant (see Case C-177/88, *Dekker* [1990] ECR I-3941, Recital 12 (judgment of 8 November 1990)), an advantage recognised to married couples is direct discrimination based on sexual orientation, because only homosexuals cannot marry.



There is an emerging consensus that international human rights law requires that same-sex couples either have access to an institution, such as registered partnership, which provides them with the same advantages as those they would be accorded if they had access to marriage; or that, failing such official recognition, the *de facto* durable relationships they enter into lead to extending to them such advantages.<sup>179</sup> Indeed, where differences in treatment between married couples and unmarried couples have been recognised as legitimate, this has been justified by the reasoning that opposite-sex couples have made a deliberate *choice* not to marry. Since such reasoning does not apply to same-sex couples which, under the applicable national legislation, are prohibited from marrying, it follows *a contrario* that advantages accorded to married couples should be extended to unmarried same-sex couples, either when these couples form a registered partnership, or when, in the absence of such an institution, the *de facto* relationship presents a sufficient degree of permanency: any refusal to thus extend the advantages benefiting married couples to same-sex couples should be treated as discriminatory.

Until recently, the case-law of the European Court of Human Rights was not favourable to such reasoning. In a 2000 case, where a woman who had cohabited for 17 years with a man who died in an industrial accident had been denied the advantages she would have been accorded if she had been a widow, despite the fact that her companion had contributed to the relevant fund during his lifetime, the European Court of Human Rights stated that although ‘there may well now be an increased social acceptance of stable personal relationships outside the traditional notion of marriage, (...) marriage remains an institution which is widely accepted as conferring a particular status on those who enter it. The situation of the applicant is therefore not comparable to that of a widow’.<sup>180</sup> Recalling its case-law according to which the promotion of the traditional concept of family constitutes a legitimate aim which a State Party to the ECHR may pursue,<sup>181</sup> the Court noted at the time that ‘marriage remains an institution that is widely accepted as conferring a particular status on those who enter it and, indeed, it is singled out for special treatment under Article 12 of the Convention’. It concluded that ‘the promotion of marriage, by way of limited benefits for surviving spouses, cannot be said to exceed the margin of appreciation afforded to the respondent government’.

This case-law concerned a situation where the applicant had the choice whether or not to marry her life companion, and chose deliberately to remain outside the institution of marriage although this institution was accessible to the couple. It thus left open the question whether such a conclusion would also apply where a homosexual couple—to whom the institution of marriage is closed—would be deprived of certain advantages reserved to married couples. However, later case-law of the European Court of Human Rights simply transposed the same solution to this arguably different context. In the case of *Mata Estevez v. Spain*, the applicant complained of the difference of treatment regarding eligibility for a survivor’s pension between *de facto* homosexual partners and married couples, or even unmarried heterosexual couples who, if legally unable to marry before the divorce laws were passed in 1981, are eligible for a survivor’s pension.<sup>182</sup> He submitted that such difference in treatment amounted to unjustified discrimination which infringed his right to respect for his private and family life. The Court however considered that application inadmissible, noting that the Spanish legislation relating to eligibility for survivors’ allowances ‘does have a legitimate aim, which is the protection of the family based on marriage bonds’ and that, therefore, ‘the difference in treatment found can be considered to fall within the State’s margin of appreciation’. It would follow,

<sup>179</sup> Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on measures to combat discrimination on grounds of sexual orientation or gender identity states on this point: ‘Where national legislation does not recognise nor confer rights or obligations on registered same-sex partnerships and unmarried couples, member states are invited to consider the possibility of providing, without discrimination of any kind, including against different sex couples, same-sex couples with legal or other means to address the practical problems related to the social reality in which they live’ (para. 25).

<sup>180</sup> Eur. Ct. HR, *Shackell v. the United Kingdom* (Appl. no. 45851/99), decision of 27 April 2000 (inadmissibility for manifest ill-foundedness of the application).

<sup>181</sup> See Eur. Ct. HR, *Mazurek v. France* (Appl. no. 34406/97), § 50; Eur. Ct. HR, *F v. Switzerland*, judgment of 18 December 1987, Series A no. 128, § 36.

<sup>182</sup> Eur. Ct. HR (4th sect.), *Mata Estevez v. Spain* (Appl. no. 56501/00), dec. (inadmissibility) of 10 May 2001, Rep. 2001-VI.

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then, that an interpretation of the Employment Equality Directive which would allow for reserving advantages to married couples would be compatible with Article 14 ECHR, read in combination with either Article 8 ECHR (right to respect for private life) or Article 1 of Protocol No. 1 to the ECHR (right to property, including to social benefits).

This aspect of the case-law of the European Court of Human Rights may have to be re-examined in the light of current evolution. In its judgment of 02.03.2010 adopted in the case of *Kozak v. Poland*,<sup>183</sup> the Court found, in line with its earlier case-law,<sup>184</sup> that a same-sex partner should be able to succeed to a tenancy held by their deceased partner, although the Polish courts had taken the position that as regards non-married couples, only *de facto* marital cohabitation, understood as a stable or permanent relationship between a man and a woman, could give rise to such a right. The Court unanimously held that the blanket exclusion of persons living in same-sex relationships from succession to a tenancy was in breach of Article 14, taken in conjunction with Article 8 (the right to respect for private and family life). Rejecting the government's argument that this discriminatory treatment was necessary to protect the family founded on a 'union of a man and a woman', as stipulated in Article 18 of the Polish Constitution, the Court stated that there is a need for governments to recognise 'developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice in the sphere of leading and living one's family or private life'. Furthermore, it asserted that laws adversely affecting the 'intimate and vulnerable sphere of an individual's private life' need strong justifications, which had not been satisfied in this case.

*Kozak* was a case where difference of treatment was still established between same-sex and opposite-sex couples, rather than between married couples and non-married couples: the Court therefore found direct discrimination on grounds of sexual orientation, rather than indirect discrimination on grounds of sexual orientation, resulting from the privileged position of marriage combined with the inability for two persons of the same sex to have access to marriage or to an institution providing the same advantages. More recently however, the Court noted that 'there is an emerging European consensus towards legal recognition of same-sex couples', and it suggested that, although the Convention does not require that marriage be open to same-sex couples, the States Parties to the ECHR may be under an obligation to provide same-sex couples with 'an alternative means of legal recognition of their partnership'.<sup>185</sup> Therefore, although the recognition of same-sex marriage may not at this point in time be required under the ECHR,<sup>186</sup> international human rights law may be interpreted as requiring that same-sex couples either have access to an institution, such as registered partnership, which provides them with the same advantages as those they would be accorded if they had access to marriage, or that, failing such official recognition, the *de facto* durable relationships they enter into leads to extending to them such advantages.<sup>187</sup> Indeed, where differences in treatment between married couples and unmarried couples have been recognised as legitimate, this has been justified by the reasoning that opposite-sex couples have made a deliberate *choice* not to marry. Since such reasoning does not apply to same-sex couples which, under the applicable national legislation, are prohibited from marrying, it follows *a contrario* that advantages accorded to married couples should be extended to unmarried

<sup>183</sup> Eur. Ct. HR (4th sect.), *Kozak v. Poland* (Appl. no. 13102/02) judgment of 2 March 2010 (final on 2 June 2010).

<sup>184</sup> Eur. Ct. HR (GC), *Karner v. Austria* (Appl. no. 40016/98) judgment of 26 June 2003, ECHR 2003-IX.

<sup>185</sup> Eur. Ct. HR (1st sect.), *Schalk and Kopf v. Austria* (Appl. no. 30141/04) judgment of 24 June 2010, §§ 96-110.

<sup>186</sup> Following a decision of the French Court of Cassation adopted on 13 March 2007 (*Cour de cassation - Première chambre civile, Arrêt n° 511 du 13 mars 2007*, [http://www.courdecassation.fr/jurisprudence\\_2/premiere\\_chambre\\_civile\\_568/arret\\_no\\_9963.html](http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/arret_no_9963.html)), the issue is again presented to the European Court of Human Rights in the case of *Chapin & Charpentier v. France*, pending at the time of writing.

<sup>187</sup> Recommendation CM/Rec(2010)5 of the Committee of Ministers to the member states of the Council of Europe on measures to combat discrimination on grounds of sexual orientation or gender identity states on this point: 'Where national legislation does not recognise nor confer rights or obligations on registered same-sex partnerships and unmarried couples, member states are invited to consider the possibility of providing, without discrimination of any kind, including against different sex couples, same-sex couples with legal or other means to address the practical problems related to the social reality in which they live' (para. 25).

same-sex couples, either when these couples form a registered partnership, or when, in the absence of such an institution, the *de facto* relationship presents a sufficient degree of permanency: any refusal to thus extend the advantages benefiting married couples to same-sex couples should be treated as discriminatory.

### 3.4 Religion or belief

The main question of interpretation which national authorities will be likely to face in the implementation of the Employment Equality Directive with respect to the application of the principle of equal treatment of persons having a particular religion or belief concerns the conditions under which a generally applicable regulation, criterion or practice, targeting no particular religious belief, would nevertheless be considered a form of indirect discrimination on the ground of religion because of its disadvantageous impact on the members of certain religious groups. Under the ECHR, such a situation would be framed as a question of freedom of religion (Article 9 ECHR)<sup>188</sup> rather than as a question of discrimination (Article 14 ECHR in combination with Article 9 ECHR). In the opinion of this author, however, where under Article 9 ECHR an apparently neutral provision, criterion or practice leads to unjustified interference with freedom of religion, this should be seen as a form of indirect discrimination in the meaning of Article 2, para. 2 (b) of Directive 2000/78/EC, because both these articles require that any measure impacting upon the freedom to manifest one's religion be justified as both appropriate and necessary for the fulfilment of a legitimate aim.

The judgment of the European Court of Human Rights in the case of *Thlimmenos v. Greece*, described in section 1.3. above as signalling the emergence of the notion of indirect discrimination in the jurisprudence of Article 14 ECHR, illustrates that where practices based on religious beliefs enter into conflict with certain legally imposed obligations, a state may have to make provision for certain exemptions, the absence of which may lead to a form of indirect discrimination.<sup>189</sup> Indeed, although the guarantee in Article 9 ECHR of freedom of thought, conscience and religion primarily protects the inner faith of the individual (the *forum internum*), it also offers protection to the external manifestations of this inner faith, as it translates into words or acts.<sup>190</sup> Of course, such an obligation to offer reasonable accommodation to the religious beliefs of an individual—insofar as these beliefs translate into certain practices linked to those beliefs—is not unlimited.<sup>191</sup> In the context of employment, when imposing certain regulations which are on the face of it neutral, it would appear that three factors need to be taken into account in order to identify the adequate balance to be found between freedom of religion on the one hand, and the interests of the employer on the other hand. These factors are the centrality of the particular religious manifestation to the religious belief in question; the burden of providing an exception to the general rule in order to accommodate that

<sup>188</sup> See especially C. Evans, *Freedom of Religion under the European Convention on Human Rights*, Oxford Univ. Press, 2001, chap. 8 ('Neutral and Generally Applicable Laws').

<sup>189</sup> Eur. Ct. HR, *Thlimmenos v. Greece* judgment of 6 April 2000 (Appl. no. 34369/97), § 44.

<sup>190</sup> Eur. Ct. HR, *Otto-Preminger-Institut v. Austria* judgment of 20 September 1994, Series A no. 295-A, p.17, § 47; Eur. Ct. HR, *Kokinakis v. Greece* judgment of 25 May 1993, § 31.

<sup>191</sup> See, e.g., Eur. Ct. HR (3rd section), *Pichon et Sajous v. France* (Appl. no. 49853/99), decision (inadmissibility) of 2 October 2001 (refusal of pharmacologists to deliver medically prescribed contraceptives, and invoking their religious convictions to justify this refusal: the Court considers manifestly ill-founded an allegation that the sanctioning of this attitude is in violation of freedom of religion protected under Article 9 ECHR). According to the European Court of Human Rights, the obligation for a teacher to observe normal working hours which, he asserts, clash with his attendance at prayers, may be compatible with the freedom of religion (see *Ahmad v. the United Kingdom*, Appl. no. 8160/78, Commission decision of 12 March 1981, D.R. 22, p. 27), as may the obligation requiring a motorcyclist to wear a crash helmet, which in his view is incompatible with his religious duties (see *X v. the United Kingdom*, Appl. no. 7992/77, Commission decision of 12 July 1978, D.R. 14, p. 234).

religious manifestation; and the question whether the employee has voluntarily accepted the regulation imposing the restriction to his or her religious manifestation, implying a waiver of his/her right to free exercise of religion.<sup>192</sup>

The case of *Kalaç* illustrates these different dimensions.<sup>193</sup> The applicant, a judge advocate in the Turkish air force, complained that he had been ordered to retire, together with two other officers and twenty-eight non-commissioned officers, for what the Turkish authorities considered to constitute breaches of discipline and scandalous conduct: the conduct and attitude of Mr Kalaç had led these authorities to conclude that he had adopted 'unlawful fundamentalist opinions' in becoming a member of the Muslim fundamentalist Süleyman sect. Declining the invitation of the applicant to find a breach of Article 9 of the Convention protecting freedom of religion, the European Court of Human Rights considered, on the contrary, that in choosing to pursue a military career Mr Kalaç was 'accepting of his own accord a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians',<sup>194</sup> and it noted that 'the applicant, within the limits imposed by the requirements of military life, was able to fulfil the obligations which constitute the normal forms through which a Muslim practises his religion'.<sup>195</sup>

30. The Supreme Military Council's order was, moreover, not based on Group Captain Kalaç's religious opinions and beliefs or the way he had performed his religious duties but on his conduct and attitude [the applicant had allegedly participated in the activities of the Süleyman community, had given it legal assistance, had taken part in training sessions and had intervened on a number of occasions in the appointment of servicemen who were members of the sect]. According to the Turkish authorities, this conduct breached military discipline and infringed the principle of secularism.
31. The Court accordingly concludes that the applicant's compulsory retirement did not amount to an interference with the right guaranteed by Article 9 since it was not prompted by the way the applicant manifested his religion.

The question of Muslim women wearing headscarves constitutes another example.<sup>196</sup> In the well-known case of *Leyla Sahin*, the applicant complained that in March 1998 she had been refused access to a written examination on one of the subjects she was studying because she was wearing an Islamic headscarf, after the University of Istanbul issued a circular a month earlier directing that students with beards and students wearing Islamic headscarves would be refused admission to lectures, courses and tutorials. Subsequently the university authorities refused on the same grounds to enrol her on a course, or to admit her to various lectures and a written examination. Before the European Court of Human Rights, Ms Leyla Sahin complained under Article 9 (freedom of religion) that she had

<sup>192</sup> On this latter criterion, see *Ahmad v. the United Kingdom*, Appl. no. 8160/78, Commission decision of 12 March 1981, D.R. 22, p. 27 (schoolteacher having converted to Islam when already employed, and then requesting from his employer to be authorised to attend the Friday prayers); a similar reasoning is followed by the European Court of Justice in Case 130/75, *Prais v. Council*, ECR [1976] 1599. See also P. Frumer, *La renonciation aux droits et libertés. La Convention européenne des droits de l'homme à l'épreuve de la volonté individuelle*, Bruxelles, Bruylant, 2001, pp. 381-394.

<sup>193</sup> Eur. Ct. HR, *Kalaç v. Turkey* (Appl. no. 20704/92), judgment of 1 July 1997, Rep. 1997-IV, p. 1209.

<sup>194</sup> Referring to its judgment of 8 June 1976 in the case of *Engel and Others v. the Netherlands* (Series A no. 22, p. 24, para. 57), the Court recalled that 'States may adopt for their armies disciplinary regulations forbidding this or that type of conduct, in particular an attitude inimical to an established order reflecting the requirements of military service'.

<sup>195</sup> *Kalaç*, § 29. The Court remarked that 'For example, he was in particular permitted to pray five times a day and to perform his other religious duties, such as keeping the fast of Ramadan and attending Friday prayers at the mosque.'

<sup>196</sup> See on this issue E. Brems, 'De hoofddoek als constitutionele kopzorg', *Tijdschrift voor Bestuurs- en Publiekrecht*, 2004, pp. 323-360; E. Bribosia and I. Rorive, 'Le voile à l'école: une Europe divisée', *Rev. trim. dr. h.*, 2004, pp. 951-984; T Loenen, 'Hoofddoeken voor de klas en in de rechtbank: op weg naar een multicultureel publiek domein?', *NJCM-Bull.*, 2001, pp. 851-869; C.W. Maris van Sandelingenambacht, 'Private deugden en publieke ondeugden: hoofddoekjes in de openbare school?', *NJCM-Bull.*, 2004, pp. 992-998.

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been prohibited from wearing the Islamic headscarf at university. She also complained of unjustified interference with her right to education, within the meaning of Article 2 of Protocol No. 1 and of a violation of Article 14 (non-discrimination), taken together with Article 9, arguing that the prohibition on wearing the Islamic headscarf obliged students to choose between education and religion, and discriminated between believers and non-believers.

These arguments convinced neither the Chamber constituted within the Fourth Section of the European Court of Human Rights,<sup>197</sup> nor the Grand Chamber of the Court, to which the case was subsequently referred. In its judgment of 10.11.2005,<sup>198</sup> the Grand Chamber does agree that the circular in issue, adopted on 23.02.1998 by the Vice-Chancellor of the University of Istanbul, which placed restrictions of place and manner on the right to wear the Islamic headscarf in universities, constituted interference with the applicant's right to manifest her religion. Nevertheless, it considers that such interference pursues the legitimate aims of protecting the rights and freedoms of others and of protecting the public order. It also considers that the interference is necessary, as it is based in particular on the principles of secularism and equality. The Court agrees with the Turkish Constitutional Court that the principle of secularism, which guides the State in its role of impartial arbiter, also serves to protect the individual not only against arbitrary interference by the State but from external pressure from extremist movements. It considers that upholding that principle may be considered necessary to protect the democratic system in Turkey. The Court also notes the emphasis placed in the Turkish constitutional system on protection of the rights of women and gender equality. Taking into account the fact that in Turkey, the majority of the population, while professing a strong attachment to the rights of women and a secular way of life, adheres to the Islamic faith, and that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts, the Court takes the view that imposing limitations on the freedom to wear the headscarf can be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially since that religious symbol has taken on political significance in Turkey in recent years. The Court notes also that practising Muslim students in Turkish universities remain free, within the limits imposed by educational organisational constraints, to manifest their religion in accordance with habitual forms of Muslim observance. In addition, a resolution adopted by Istanbul University on 09.07.1998 shows that various other forms of religious attire were also forbidden on the university premises. The Court concludes that the ban on wearing the Islamic headscarf has not impaired the very essence of the applicant's right to education, and that there had therefore been no violation of Article 2 of Protocol No. 1. Finally, examining the complaint under the non-discrimination clause of Article 14 of the Convention, the Court simply notes that the regulations on the Islamic headscarf are not directed against the applicant's religious affiliation, but pursue, among other things, the legitimate aim of protecting order and the rights and freedoms of others and are manifestly intended to preserve the secular nature of educational institutions.

The outcome of the *Leyla Sahin* case did not come as a surprise to most observers. To a large extent, the Court was building on the previous case-law of the monitoring bodies of the ECHR on this topic, which concerns not only the wearing of headscarves by adolescents or by women attending school or higher-level educational institutions,<sup>199</sup> but also the wearing of a headscarf in the context of employment: in *Dahlab v. Switzerland*,<sup>200</sup> the applicant, a primary-school teacher in the Swiss canton of Geneva, had converted to Islam after that appointment and began wearing an Islamic headscarf, her stated intention being to observe a precept laid down in the Koran whereby women were enjoined to draw their veils over themselves in the presence of men and male adolescents. This, however, appeared to the authorities to be in violation of section 6 of the Canton of Geneva Public Education Act of 06.11.1940, which

<sup>197</sup> Eur. Ct. HR (4th sect.), *Leyla Sahin v. Turkey* (Appl. no. 44774/98) judgment of 29 June 2004. See *inter alia* on this case the commentaries by N. Chauvin, in *Revue française de droit administratif*, May-June 2003, pp. 536-54, and by J.-F. Flauss, *A.J.D.A.*, n°5, 2001, pp. 482-484.

<sup>198</sup> European Court of Human Rights (GC), *Leyla Sahin v. Turkey* (Appl. no. 44774/98), judgment of 10 November 2005.

<sup>199</sup> See Eur. Comm. HR, *Karaduman v. Turkey* (Appl. no. 16278/90, Commission decision of 3 May 1993, DR 74, p. 93; and Eur. Comm. HR, *Bulut v. Turkey* (Appl. no. 18783/91, Commission decision of 3 May 1993.

<sup>200</sup> Appl. no. 42393/98, ECHR 2001-V.

provides that the public education system ‘shall ensure that the political and religious beliefs of pupils and parents are respected’. After she was formally requested to cease wearing a headscarf when on duty, Ms Dahlab failed to have that decision annulled by the Swiss courts. The European Court of Human Rights refused to consider that this resulted in a violation of the freedom of religion protected under Article 9 ECHR. While acknowledging that it is difficult to ‘assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children’, the Court did note that the applicant’s pupils were aged between four and eight, ‘an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the [Swiss] Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils’.

At the same time, the *Leyla Sahin* judgment concerned Turkey, a predominantly Muslim society in which, therefore, the risk is high that women left ‘at liberty’ to choose whether or not to wear a headscarf will be pressured by their families or communities to conform to the dominant norms of the majority religion.<sup>201</sup> It could not therefore be excluded that, were a similar prohibition to be imposed in other countries presenting different characteristics, the Court would narrow the margin of appreciation left to the State. The more recent case-law of the Court seems to foreclose this possibility, however.<sup>202</sup> In six inadmissibility decisions adopted on 30.06.2009, all related to the French Law of 15.03.2004 on secularism (*laïcité*) and conspicuous religious symbols in public schools,<sup>203</sup> which prohibits the wearing of conspicuous religious symbols, the Court took the view that where the relationships between the state and religions are at stake, the weighing of interests by the national authorities should in principle be trusted: it therefore found that neither freedom of religion or the right to education taken alone, nor combined with the requirement of non-discrimination, were violated after girls of Muslim origin wearing a headscarf or Sikh boys wearing a turban (*keski*), were excluded from the French public educational system.<sup>204</sup> It is noteworthy that the Court was not led to change its view despite the fact that, in *Aktas* for instance, the applicant had proposed to wear other headgear without any religious connotation—a solution that might have been considered a reasonable accommodation—and that the Court deems it appropriate that, if the applicants want to continue wearing a headscarf, they should follow the educational curriculum by distance learning, remaining within their families, or moving to private schools.

<sup>201</sup> See already, anticipating the judgment in *Leyla Sahin*, Eur. Ct. HR (GC), *Refah Partisi and Others v. Turkey* (Appl. nos 41340/98, 41342/98, 41343/98 and 41344/98), at § 95: ‘In a country like Turkey, where the great majority of the population belong to a particular religion, measures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students who do not practise that religion or on those who belong to another religion may be justified under Article 9 § 2 of the Convention’ (emphasis added).

<sup>202</sup> See already, recognising a broad margin of appreciation granted to the State, Eur. Ct. HR, *Dogru and Kervanci v. France* (Appl. nos 31645/04 and 27058/05), judgments of 4 December 2008 (concerning the prohibition of the headscarf for classes of physical education, but noting the legitimacy of the aim of the state to enforce the ‘principe de laïcité’ in the public sphere).

<sup>203</sup> Loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics.

<sup>204</sup> See Eur. Ct. HR (5th sect.), *Tuba Aktas v. France* (Appl. no. 43563/08), dec. (inadmissibility) of 30 June 2009; Eur. Ct. HR (5th sect.), *Hatice Bayrak v. France* (Appl. no. 14308/08), dec. (inadmissibility) of 30 June 2009; Eur. Ct. HR (5th sect.), *Mahloud Sadek Gamaleddyn v. France* (Appl. no. 18527/08), dec. (inadmissibility) of 30 June 2009; Eur. Ct. HR (5th sect.), *Sarah Ghazal v. France* (Appl. no. 29134/08), dec. (inadmissibility) of 30 June 2009; Eur. Ct. HR (5th sect.), *Jasvir Singh v. France* (Appl. no. 25463/08), dec. (inadmissibility) of 30 June 2009; Eur. Ct. HR (5th sect.), *Ranjit Singh v. France* (Appl. no. 27561/08), dec. (inadmissibility) of 30 June 2009. These decisions are all available in French only.



### 3.5 Age

Apart from certain judgments concerning criminal prosecutions against minors,<sup>205</sup> there is no case-law of the European Court of Human Rights relating to discrimination on grounds of age. The paucity of case-law on this issue only increases the importance of any developments in the jurisprudence of the European Committee of Social Rights on the basis of Article 23 of the Revised European Social Charter (or Article 4 of the 1988 Additional Protocol to the European Social Charter), which concerns the right of elderly persons to social protection, especially since the European Committee on Social Rights has read into this provision a requirement to adopt legislation prohibiting discrimination based on age.<sup>206</sup>

<sup>205</sup> Eur. Ct. HR (GC), *T. v. the United Kingdom* (Appl. no. 24724/94) judgment of 16 December 1999; Eur. Ct. HR (GC), *V. v. the United Kingdom* (Appl. no. 24888/94) judgment of 16 December 1999; Eur. Ct. HR, *D.G. v. Ireland* (Appl. No. 39474/98) judgment of 16 May 2002.

<sup>206</sup> See above, text corresponding to notes 155-156.

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## Conclusions

In the progressive development of anti-discrimination law in Europe, there are reasons to believe that, despite the important influence traditionally exercised by the European Convention on Human Rights on fundamental rights in the legal order of the Union, the European Social Charter will become of increasing importance. In part, this is because of the restricted scope of application of Article 14 ECHR—for which the entry into force of Protocol No. 12 to the ECHR, due to the still limited number of state ratifications it has for the moment attracted, will hardly compensate. But there is also another reason for the increased relevance of the European Social Charter in this area: the European Committee of Social Rights is presented both with state reports, which make it possible to follow on a regular basis the progress made in the realisation of the rights of the Charter, and with collective complaints, which target general legislation and policies and the effect they produce on groups. It may therefore be better placed than the European Court of Human Rights to develop jurisprudence on the need for an active labour policy aimed at the integration of target groups and, more generally, on the need for affirmative action—in the field of employment but also in the fields of education, housing, or social policy—directed towards the social and professional integration of the most vulnerable segments of the population.

The quasi-absence of any case-law of the European Court of Human Rights deriving positive obligations from Article 14 ECHR and the timidity of the drafters of Protocol No. 12 to the ECHR on the issue of positive action contrast, as we have seen, both with the insistence of the European Committee of Social Rights that legislation prohibiting discrimination actually produces effective integration, and with the requirement that the States Parties monitor closely the impact their policies have on the situation of the most vulnerable groups. Combating discrimination requires more than prohibitions: it requires an active social and employment policy commensurate to the aim of realising integration<sup>207</sup>. It is in this direction that recent evolution within the European Social Charter points. On the other hand, the case-law of the European Court of Human Rights under Article 14 ECHR may encourage an understanding of the prohibition of indirect discrimination on the grounds of race or ethnic origin which includes the requirement to take into account relevant differences between racial or ethnic groups, per analogy with the approach taken towards religion-based discrimination in the case of *Thlimmenos*.

In sum, reference to the jurisprudence of the European Social Charter and the European Convention on Human Rights could lead to movement beyond the explicit definition of indirect discrimination under Article 2, para. 2 (b), of both the Racial Equality and Employment Equality Directives. In these directives, indirect discrimination is defined only in reference to one of the three potential understandings of that concept distinguished in section 1.3. of Part I of this report: it is seen to occur where apparently neutral regulations, criteria or practices appear to be particular disadvantageous to the members of a certain category, if the provision creating the disadvantage is not objectively and reasonably justified (a). Neither disparate impact discrimination, as demonstrated by statistics (b), nor the failure to treat differently a specific individual or category by providing for an exception to the application of the general rule (c), are explicitly included in that definition. The jurisprudence of the European Committee of Social Rights, however, strongly encourages states to combat institutional discrimination by authorising statistical proof of discrimination and by measuring the impact of the laws and policies they implement. And the *Thlimmenos* case-law of the European Court of Human Rights illustrates why, although the Framework Directive only mentions a requirement of reasonable accommodation with respect to persons with disabilities, the failure to take into account relevant differences could be seen as a form of indirect discrimination, even though it may not fall clearly within the definition of Article 2, para. 2 (b) of the directives. With respect to religion, as shown in section 4 of Part III of this report, this could be a consequence of the freedom of religion guaranteed under Article 9 ECHR, without it being necessary to rely on Article 14 ECHR.

An examination of the case-law of the European Court of Human Rights relevant to the questions relating to the specific grounds envisaged in the directives leads to the following main conclusions. In the context of the Employment Equality Directive, the requirements deriving from Article 8 ECHR may have a decisive role to play

<sup>207</sup> C. McCrudden, 'Institutional Discrimination', *Oxford J. Legal Studies*, vol. 2(3) (1982), pp. 303-367.

in countering the risk of discrimination against workers with disabilities resulting from the imposition of health and safety requirements which create an obstacle to their recruitment or their retention, where allegedly their employment would put themselves, their co-workers or the general public at risk. The same provision of the Convention, insofar as it protects the right to respect for private life, to which the sexual orientation of a person belongs, may contribute to the effectiveness of the prohibition of direct discrimination on the ground of sexual orientation.<sup>208</sup> On the other hand, the European Court of Human Rights has not considered that reserving advantages to married couples should be treated as discrimination based on sexual orientation in violation of Article 14 ECHR, read in combination with either Article 8 ECHR (right to respect for private life) or Article 1 of Protocol No. 1 to the ECHR (right to property, including to social benefits), even under jurisdictions where marriage is not available to same-sex couples. As these last examples suggest, the European Convention on Human Rights may have more to contribute to the further implementation of the EC Directives, by guiding their interpretation, through provisions other than the non-discrimination clause of Article 14 ECHR.

<sup>208</sup> Paradoxically perhaps, the protection of private life may also constitute an obstacle to the promotion of diversity in the workplace, in housing or in education, insofar as the processing of sensitive data is subject to specific restrictions both under Convention no. 108 of the Council of the Europe and under Directive 95/46/EC of 24 October 1995, cited above.



## **European Commission**

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