



# The Concepts of Equality and Non-Discrimination in Europe: A practical approach

EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY



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Christopher McCrudden and Sacha Prechal

European Commission  
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**Production:**

Susanne Burri  
Frans van Eck  
Titia Hijmans van den Bergh  
Titia Kloos  
Christopher McCrudden  
Simone van der Post  
Sacha Prechal

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# Members of the European Network of Legal Experts in the Field of Gender Equality

## **Co-ordinator:**

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## **Assistant co-ordinator**

Hanneke van Eijken, Utrecht University, the Netherlands

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Hélène Masse-Dessen, Barrister at the Conseil d'Etat and Cour de Cassation, France

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Zuzana Magurová (Slovakia), Slovak Academy of Sciences, Institute of State and Law

Tanja Koderman Sever (Slovenia), Independent legal advisor

Berta Valdes (Spain) University Castilla-La Mancha, Faculty of Law

Ann Numhauser-Henning (Sweden), Lund University, Faculty of Law

Aileen McColgan (the United Kingdom), King's College London

## **Ad hoc experts:**

Dagmar Schiek, University of Leeds, the United Kingdom

Christa Tobler, University of Leiden, the Netherlands and University of Basel, Switzerland





# The Concepts of Equality and Non-Discrimination in Europe: A practical approach

*Christopher McCrudden\* and Sacha Prechal\*\**

## 1. Introduction

Equality and non-discrimination are complex concepts, with considerable debate on their meanings and justification. The discussion of equality and discrimination is, in general, characterised by considerable conceptual and methodological confusion. This is no different in relation to the discussion of equality and discrimination in the European legal context, including in the context of EC law.<sup>1</sup> Although there is agreement on the most elementary principles, in practice a wide range of approaches is often adopted by, for example, the European Court of Justice and the European Court of Human Rights. Similarly, despite there being many common definitions of the central concepts of gender equality law in the EU Member States and EEA countries, there is a fair chance that the concepts are understood and applied differently and that confusion also exists here. Understanding how the concepts are interpreted may help to contribute to the appropriate enforcement of equality law in the countries concerned, as well as to point to areas where further clarification by the Commission or Court may be necessary.

This Report provides, in the first place, an analysis of the concept of equality and related notions in EC law, in particular in the case law of the European Court of Justice. In the second place, it will analyse the concept of equality and related notions in the Member States and EEA countries, in particular in legislation, in case law and in doctrine. Specific attention is paid to the case law of the domestic Constitutional Courts.<sup>2</sup> Although the emphasis of this Report is on gender equality, the discussion of the various concepts is necessarily broader and may also include other grounds of non-discrimination.

The Report is guided by the following two central questions:

1. What is meant in the various national legal systems by
  - a. the range of legal concepts that use the word ‘discrimination’ as the key term, in particular the concepts of ‘non-discrimination’, ‘direct discrimination’, and ‘indirect discrimination’, and
  - b. the range of legal concepts that use the word ‘equal’ as the key term, in particular the concepts of ‘equality’, ‘equal treatment’, and ‘equal opportunities’?

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\* Professor in Human Rights Law, Oxford University and member of the executive committee of the European Network of Legal Experts in the field of Gender Equality.

\*\* Professor of European Law, Utrecht University, Utrecht School of Law (Europa Institute) and member of the executive committee of the European Network of Legal Experts in the field of Gender Equality.

<sup>1</sup> The European Community is a part of the European Union, and EC law is also a part of EU law. Until now, all gender equality and anti-discrimination law is law that originates in the EC Treaty. Therefore we use the term EC law or sometimes Community law to describe it.

<sup>2</sup> This has the effect that the legal interpretation of equality and non-discrimination of those countries, such as Norway, in which a significant part of the legal practice regarding gender equality takes place in the administrative practice of the Ombud/Tribunal system, is not considered in detail.

2. How is the relation between ‘equality’ and ‘discrimination’ defined and understood in the various national legal systems?

The structure of the Report is as follows. A brief discussion of the various sources of equality and non-discrimination is offered, which will help to clarify the origins of the non-discrimination and equality principles. Three main sources are identified: the constitutional and domestic law of the individual Member States and EEA countries, as interpreted by the domestic courts of these countries; EC law; and the ECHR. Although this Report concerns primarily EC law and the law of the Member States and EEA countries, attention is also paid to the ECHR and the non-discrimination provisions in that Convention. There are several reasons for doing so. First, when deciding which fundamental rights are protected in the EC, the Court of Justice is guided by the constitutional traditions of the Member States and the international human rights treaties, especially the ECHR.<sup>3</sup> In particular, in its more recent judgments, the Court of Justice can be seen to be clearly taking its lead from the ECHR and the case law of the European Court of Human Rights (ECtHR). The relationship between the two courts has not been formalised, and indeed could not be, because the EC is not a party to the ECHR. This does not mean, however, that there is no contact between them. The relationship between the two courts also works the other way around, with the ECtHR seeking inspiration in EC law and jurisprudence. A second reason for including the ECtHR in the discussion is that the Lisbon Treaty has created a legal basis for accession of the EC to the ECHR. This may result in the EU becoming a party to the Convention and the Protocols to the Convention, provided that the negotiations about accession are successfully concluded in the future. A third reason for including the ECHR is that, together with EC law, the ECHR is often an authoritative source of equality and non-discrimination law for the Member States in their domestic law.

In the four chapters following the discussion of sources, four categories of equality and non-discrimination applicable in the European legal context are then identified. The four conceptions are: equality as rationality, equality as protective of prized public goods, equality as preventing status-harms, and equality as a positive duty to promote equality of opportunity and de facto equality.<sup>4</sup>

## 2. Sources of equality and non-discrimination

**There are three main legal sources of equality and non-discrimination of particular significance in the development of concepts of equality and non-discrimination in the European legal context: the constitutional traditions of Member States and the EEA countries; EC law; and human rights law, in particular the European Convention on Human Rights. A complete understanding of these concepts requires an understanding of each and how each relates to the others.**

<sup>3</sup> As is well known, in the absence of a Community list of such rights, fundamental rights in the EU are protected as ‘general principles of Community law’.

<sup>4</sup> This report draws extensively on previously published work by Christopher McCrudden, in which these four meanings were first elaborated.

### ***2.1. Constitutional traditions of Member States and the EEA countries***

All but three EU and EEA Member States have one or more constitutional provisions regarding equality and/or discrimination. The three exceptions are Denmark, Norway and the United Kingdom. Of those that do have constitutional protections on discrimination and/or equality, there are, however, significant differences between them. One difference relates to when the provision was introduced, with some states having experience of such provisions stretching back several hundreds of years (e.g. France, 1798), while in other states the provisions are of quite recent vintage.

A second difference relates to whether the constitutional provisions are enforceable in court by individuals or others. In many states they are enforceable (e.g. Austria) while in other states they may not be fully enforceable (e.g. in the Netherlands they are not enforceable against an Act of Parliament). In other words, the legal status of the various provisions differs significantly from state to state. This affects, of course, the extent to which there has been authoritative judicial interpretation of such provisions.

As regards the drafting of these provisions, there are also significant differences. Many (perhaps most) states have a general equality provision under which citizens (sometimes others as well) are regarded as being 'equal before the law' (e.g. Bulgaria, Cyprus, Estonia, Finland, Germany) or 'equal under the law' (e.g. Belgium). The differences in language may or may not indicate a difference in interpretation. Some states, additionally or alternatively provide specifically for equal treatment to be accorded to men and women (Czech Republic, Germany, Poland).

States, either in addition to or instead of these provisions, also provide for constitutional protection against 'discrimination' or 'different treatment' but again there are significant variations between states in the drafting of these provisions. Thus most states that have such provisions use the term 'discrimination' to describe the prohibited treatment, whilst some (e.g. Finland) use the term 'different treatment' instead.

Two further differences emerge from a study of the text of the constitutional provisions. First, some states have what might be called a 'closed' system of grounds of prohibited discrimination (e.g. Romania) in which the listed grounds appear to be the only grounds in which discrimination is prohibited. Others (e.g. Poland) have a more 'open' system, where the list of grounds is either not given at all and discrimination is prohibited on any ground, or the state has adopted an approach to drafting closely related to the approach taken in the ECHR, where a list of grounds is specified but 'any other status' is included as well, thus bringing it closer to being an 'open' system in practice (e.g. Portugal).

There is a second significant difference in the drafting of these provisions regarding discrimination. Some states prohibit discrimination across the whole range of possible situations where it might arise. Other states (as does the ECHR) restrict the prohibition of discrimination to situations where the discrimination is in some way related to other rights protected by the constitution (e.g. Lithuania). In Hungary, the wording of the Constitution is similar, but the Constitutional Court extended the principle of equal treatment to any kind of right.

### ***2.2. EC law on equality and discrimination***

There are several different, but overlapping, sources of EC law that establish general equality and non-discrimination norms binding on EC institutions, and the Member States where they implement, or act within the scope of, Community law. In addition,

EC law prohibits other natural and legal persons as well as EC institutions and the Member States from discriminating in more limited circumstances.

### 2.2.1. Equality as a general principle of EC law

ECJ jurisprudence subjects the exercise of Community competence to the requirement that it complies with ‘general principles’ of EC law.<sup>5</sup> The ECJ has held that the principle of equality is one of the general principles of EC law.<sup>6</sup> Within the sphere of EC law, this principle of equality precludes comparable situations from being treated differently, and different situations from being treated in the same way,<sup>7</sup> unless the treatment is objectively justified.<sup>8</sup> Thus, the principle that everyone is equal before the law is a basic principle of EC law.<sup>9</sup>

The protection of fundamental rights is also one of the general principles of EC law. The requirements flowing from the protection of fundamental rights in the Community legal order are binding on the EC institutions. They are also binding on Member States when they implement EC rules,<sup>10</sup> or act within the scope of Community law.<sup>11</sup> The ‘fundamental rights’ identified by the ECJ are drawn from the constitutional traditions of the Member States and, in particular, the ECHR. Among the fundamental rights protected by the ECJ, particular aspects of equality have been identified. These include religious equality<sup>12</sup> and the prohibition of sex discrimination.<sup>13</sup> More broadly, the Court has held that fundamental rights ‘include the general principle of equality and non-discrimination’.<sup>14</sup>

Equality as an element of fundamental rights does have an autonomous, if uncertain, role in EC law. Although in the third *Defrenne* case<sup>15</sup> the ECJ recognized that the elimination of sex discrimination formed part of fundamental rights, the Court declined to widen the scope of Article 119 (now 141), which provides for equal pay between men and women, to require equality in respect of other working conditions. In *Razzouk*, the Court held that freedom from sex discrimination must be upheld in the context of relations between the institutions and their employees. Therefore, in interpreting the Staff Regulations, the requirements of the principle of equal treatment ‘are in no way limited to those resulting from Article 119 [now 141] of the EEC Treaty or from the Community directives adopted in this field’.<sup>16</sup> So too, equality as

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<sup>5</sup> See, in general, T Tridimas, *The General Principles of EU Law* (2nd edn, OUP, 2006) Ch 2.

<sup>6</sup> Cases 117/76 and 16/77 *Ruckdeschel* [1977] ECR 1753.

<sup>7</sup> Case 106/83 *Sermide SpA v Cassa Conguaglio Zucchero* [1984] ECR 4209 at [28]. See also, Opinion of AG Van Gerven, Case C-146/91 *Koinopraxia Enoseon Georgikon Syнетairismon Diacheir iseos Enchorion Proionton Syn. PE (KYDEP) v Commission* [1994] ECR I-4199.

<sup>8</sup> See, e.g., Case C-189/01 *Jippes v Minister van Landbouw, Natuurbeheer en Visserij* [2001] ECR I-5689 at [129] and Case C-149/96 *Portugal v Council* [1999] ECR I-8395 at [91]; Case C-411/98 *Angelo Ferlini v Centre Hospitalier de Luxembourg* [2000] ECR I-08081.

<sup>9</sup> Case 283/83 *Racke* [1984] ECR 3791; Case 15/95 *EARL* [1997] ECR I-1961; Case 292/97 *Karlson* (13 April 2000).

<sup>10</sup> Case C-442/00 *Caballero v Fondo de Garantia Salarial (Fogasa)* [2002] ECR I-11915 at [30].

<sup>11</sup> See e.g. Case C-260/89 *ERT v DEP* [1991] ECR I-02925 and the Opinion of AG Sharpson in Case C-427/06 *Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* [2008] ECR I-07245.

<sup>12</sup> Case 130/75 *Prais v Council* [1976] ECR 1589.

<sup>13</sup> Case C-149/77 *Defrenne v Sabena* [1978] ECR I-1365 at [26], [27].

<sup>14</sup> Case C-442/00 *Caballero v Fondo de Garantia Salarial (Fogasa)* [2002] ECR I-11915 at [32].

<sup>15</sup> Case C-149/77 *Defrenne v Sabena* [1978] ECR I-1365.

<sup>16</sup> Joined Cases 75 & 117/82 *Razzouk and Beydoun v Commission* [1984] ECR 1509 at [17]. See also Case C-37/89 *Michel Weiser v Caisse Nationale des Barreaux Francais* [1990] ECR I-2395. Case C-227/04 *Lindofer v Council* [2007] ECR I-06767.

an aspect of fundamental rights played an important role in *P v S and Cornwall CC*,<sup>17</sup> regarding whether discrimination on the grounds of gender reassignment was prohibited under EC law. For Tridimas, the case ‘provides a prime example of the way the Court views the principle of equality as a general principle of EC law transcending the provisions of Community legislation’.<sup>18</sup> In other cases, however, such as *Grant* (regarding discrimination on grounds of sexual orientation), the Court has been cautious in drawing on the apparent logic of this position to reach conclusions that are, in the Court’s view, beyond the existing European political consensus.<sup>19</sup>

The significance of recognising equality as a general principle can be seen in the decision of the ECJ in *Mangold*,<sup>20</sup> which involved the issue, inter alia, of the application of the prohibition of age discrimination in the EC Employment Discrimination Directive<sup>21</sup> in Germany.<sup>22</sup> A major problem apparently standing in the way of the application of the Directive was that the time limit for transposition of the age discrimination provisions of the Directive had not yet passed for Germany. The ECJ, however, did not find this to be an insuperable barrier for several reasons. Crucially, one of the reasons articulated by the ECJ, was that the principle of non-discrimination on grounds of age must be regarded as a general principle of Community law and that the application of the general principle of equal treatment was not conditional on the expiry of the period allowed for the transposition of a directive implementing the principle of non-discrimination in a specific area. The Court held that the principle of non-discrimination as a general principle of Community law on grounds of age and, by analogy, on the other grounds designated by Community law, meant that ‘it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination, to provide the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law that may conflict with that law.’<sup>23</sup> This seems to imply that, even if the parties to the case may not rely on the provisions of the Directives before national courts, the national court is still obliged to respect the primacy of the general principle of equality in Community law, thus appearing to create the possibility of the evolution of a body of EC non-discrimination law through direct application of the general principle.<sup>24</sup>

### 2.2.2. Equality obligations in the Community treaties and secondary legislation

We turn now to consider the specific circumstances in which the principles of equality and non-discrimination arise as legally enforceable other than through them being aspects of the general principles of EC law. There are specific provisions of the Community and Union treaties that establish equality and non-discrimination obligations and, in some cases, rights.

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<sup>17</sup> Case C-13/94 [1996] ECR I-2143.

<sup>18</sup> T Tridimas, *The General Principles of EU Law* (2nd edn, OUP, 2006) p. 104.

<sup>19</sup> Case C-249/96 *Grant v South West Trains Ltd* [1998] ECR I-621.

<sup>20</sup> *Mangold v Rudiger Helm*, Case C-144/04 [2005] ECR I-9981.

<sup>21</sup> Council Directive 2000/78/EC of 27 November 2000, [2000] OJ L303, 16.

<sup>22</sup> This paragraph draws significantly on Christopher McCrudden and Haris Kountouros, Human rights and European equality law, in Helen Meenan (ed), *Equality Law in an Enlarged European Union: Understanding the Article 13 Directives* (CUP, 2007), 72 at 89–90.

<sup>23</sup> *Mangold v Rudiger Helm*, Case C-144/04 [2005] ECR I-9981 at [77].

<sup>24</sup> For a more cautious approach, see *Chacon Navas*, Case C13/05, [2006] ECR I-6467, at paragraphs 53 and 56 (non-discrimination on grounds of sickness not a general principle).

### 2.2.2.1. Equality of treatment in economic and social contexts

There are several EC Treaty provisions in which the principles of non-discrimination or equality are expressly mentioned. These are regarded as specific enumerations of the general principle of equality.<sup>25</sup> The principal examples are Article 12 EC (discrimination on the grounds of being a national of one of the Member States is prohibited), Article 34(2) EC (non-discrimination between producers and consumers in the context of the Common Agricultural Policy), Article 39 EC (non-discrimination between workers who are nationals of the host state and those who are nationals of another Member State), Article 43 EC (equal treatment as between nationals and non-nationals who are established in a self-employed capacity in a Member State), Article 49 EC (equal treatment for providers of services), and Article 90 EC (non-discrimination in the field of taxation as between domestic and imported goods).<sup>26</sup> Article 12 EC provides that '[w]ithin the scope of the application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.' A considerable body of secondary legislation has further supplemented these provisions.<sup>27</sup>

While equality and non-discrimination, in particular non-discrimination on grounds of nationality, began as a means of securing market integration, by now it has also become a method to deliver social policies. Relatively early in the case law of the ECJ, in particular in cases involving individuals, the nexus between economic integration and non-discrimination has been weakened in the sense that social considerations have also been taken on board. The result was that individuals, often migrant workers and their families, were held to be entitled to various types of social benefits.<sup>28</sup> This trend in the case law of the ECJ, going far beyond market integration, was further reinforced by cases on the free movement of students and, in particular, by the combination of Article 12EC with European citizenship.<sup>29</sup>

### 2.2.2.2. Equality and non-discrimination in the area of gender

Articles 2 and 3(2) EC impose the objective of promoting equality between men and women in the Community. Article 141 EC provides for the right to equality between men and women in the context of pay. This also provides that the principle of equal treatment does not prevent the maintenance or adoption of measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.<sup>30</sup>

In addition, there is a set of legislative provisions addressing gender inequality that sets a legal framework for women's equality in employment and working conditions more generally. These initially comprised three directives: the first on

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<sup>25</sup> Case 1/72 *Frilli v Belgium* [1972] ECR 457 at [19]; *Royal Scholten-Honig (Holdings) Ltd v Intervention Board for Agricultural Produce* [1978] ECR 2037 at [26].

<sup>26</sup> Article 18 EC.

<sup>27</sup> E.g. Council Regulation (EEC) 1612/68 on the free movement of workers within the Community [1968] OJ L257/2, and the more recent Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77, in particular Article 24.

<sup>28</sup> Cf. Case 249/83, *Hoecx* [1995] ECR 974; Case 94/84, *Deak* [1985] ECR 1873; and Case C-237/94, *O'Flynn* [1996] ECR I-2617.

<sup>29</sup> Cf. Case C-85/96, *Martinez Sala* [1998] ECR I-2691, Case C-184/00, *Grzelczyk* [2001] ECR I-6193, Case C-148/02, *Avello* [2003] ECR I-11613, and Case C-209/03 *Bidar v Ealing and Secretary of State for Education and Skills* [2005] ECR I-02119.

<sup>30</sup> Article 141(4) EC.

equal pay (which incorporated the International Labour Organization concept of ‘equal pay for work of equal value’),<sup>31</sup> a second on equal treatment in other aspects of employment (such as hiring, promotions, and dismissals),<sup>32</sup> and the third on equal treatment in a limited number of social security matters.<sup>33</sup> During the early to mid 1980s, only two of several proposed directives on equality were adopted, both in 1986, and both of very limited scope: one on equality in occupational social security, and one on equality between self-employed men and women (the Occupational Social Security Directive<sup>34</sup> and the Self Employed Directive<sup>35</sup>).

Several pieces of legislation during the 1990s are important. There is a 1992 directive providing certain rights to pregnant women, and those who are breastfeeding (Pregnant Workers Directive).<sup>36</sup> The Working Time Directive was passed in 1993.<sup>37</sup> Under the Social Protocol (and excluding the United Kingdom initially) a Parental Leave Directive was agreed, providing for periods of time off work for mothers and fathers in certain circumstances.<sup>38</sup> In 1996, the Occupational Social Security Directive was adopted, amending the 1986 Occupational Social Security Directive.<sup>39</sup> In 1997, the Council adopted the Burden of Proof Directive.<sup>40</sup> This included a legislative definition of indirect discrimination, and provisions aiming to adjust the rules on the burden of proof in sex discrimination cases. In 1997, the Part-time Workers Directive prohibited discrimination between part-time and full-time workers in certain circumstances.<sup>41</sup>

We shall subsequently see that, from 2000, EC anti-discrimination law was significantly expanded to cover grounds of discrimination other than gender, and beyond the employment context, and this also stimulated further reform of the gender

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<sup>31</sup> Council Directive (EEC) 75/117 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L45/198.

<sup>32</sup> Council Directive (EEC) 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L39/40.

<sup>33</sup> Council Directive (EEC) 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1979] OJ L6/24.

<sup>34</sup> Council Directive (EEC) 86/378 on the implementation of the principle of equal treatment for men and women in occupational social security schemes [1986] OJ L225/40.

<sup>35</sup> Council Directive (EEC) 86/613 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood [1986] OJ L359/56.

<sup>36</sup> Council Directive (EEC) 92/85 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers who have recently given birth or are breastfeeding [1992] OJ L348/1.

<sup>37</sup> Council Directive (EC) 93/104 concerning certain aspects of the organization of working time [1993] OJ L307/18.

<sup>38</sup> Council Directive (EC) 96/34 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC [1996] OJ L145/11, eventually agreed to by the UK in Council Directive (EC) 97/75 amending and extending, to the United Kingdom of Great Britain and Northern Ireland, Directive (EC) 96/34 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC [1997] OJ L10/24.

<sup>39</sup> Council Directive (EC) 96/97 amending Directive (EEC) 86/378 on the implementation of the principle of equal treatment for men and women in occupational social security schemes [1997] OJ L14/13.

<sup>40</sup> Council Directive (EC) 97/80 on the burden of proof in cases of discrimination based on sex [1998] OJ L14/6, eventually accepted by the UK in Council Directive (EC) 98/52 on the extension of Directive (EC) 97/80 on the burden of proof in cases of discrimination based on sex to the United Kingdom of Great Britain and Northern Ireland [1998] OJ L205/66.

<sup>41</sup> Council Directive (EC) 97/81 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC—Annex: Framework Agreement on part-time work [1998] OJ L14/9.

discrimination directives. Significant amendments to the 1976 Equal Treatment Directive were introduced in 2002, to be implemented by Member States by 5 October 2005.<sup>42</sup> In 2004, for the first time, gender discrimination was prohibited in the area of goods and services.<sup>43</sup> This had to be implemented by Member States by the 21 December 2007. In 2006, a new ('Recast') Directive was adopted bringing together many of the existing provisions of several gender discrimination directives dealing with employment, and updating them to reflect the case law of the ECJ.<sup>44</sup> This Directive is to be implemented by Member States by 15 August 2009.

'Soft law' instruments, although not in the form of traditional legislation, and thus not directly enforceable, have set standards and raised expectations, whilst also having considerable indirect influence on the interpretation of the main 'hard law' instruments, particularly in the context of national legislation. They are not, therefore, devoid of legal effect. The Commission and Council have adopted such instruments in several areas of gender equality, in particular in such difficult areas as equal pay, positive action, sexual harassment, and women's representation.<sup>45</sup>

### 2.2.2.3. Equality and non-discrimination on other grounds

Article 13 EC, introduced by the Amsterdam Treaty, enacts a general legislative power to tackle a broad range of types of discrimination.<sup>46</sup> On the basis of Article 13 EC, the Community has developed an important package of measures.<sup>47</sup> The Race Discrimination Directive<sup>48</sup> prohibits racial and ethnic origin discrimination in access to employment, vocational training, employment and working conditions, membership of and involvement in unions, and employer organizations, social

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<sup>42</sup> Council Directive (EC) 2002/73 of the European Parliament and of the Council of 23 September 2002 amending Council Directive (EEC) 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [2002] OJ L269/15.

<sup>43</sup> Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, [2004] OJ L373/37.

<sup>44</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Recast), [2006] OJ L204/23.

<sup>45</sup> Commission Communication on the consultation of management and labour on the prevention of sexual harassment at work COM (1996) 378; Council Resolution of 27 March 1995 on the balanced participation of men and women in decision-making [1995] OJ L168; Council Recommendation of 2 December 1996 on the balanced participation of men and women in the decision-making process [1996] OJ L319/11; Council Recommendation 84/635 on the promotion of positive action for women [1984] OJ L331/34; Communication from the Commission of 17 July 1996 'A Code of practice on the implementation of equal pay for work of equal value for women and men' (COM(96) 336); Commission Recommendation of 27 November 1991 on the protection of the dignity of women and men at work, including the code of practice to combat sexual harassment (92/131/EEC).

<sup>46</sup> 'Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

<sup>47</sup> The literature on equality and the Amsterdam Treaty, together with analysis of the new Article 13 EC directives (in draft and as enacted) is already voluminous; as excellent introductions see Mark Bell, *Anti-discrimination Law and the European Union* (OUP, 2002), Evelyn Ellis, *EU Anti-Discrimination Law* (OUP, 2005), and Helen Meenan (ed), *Equality Law in an Enlarged European Union: Understanding the Article 13 Directives* (CUP, 2007).

<sup>48</sup> Council Directive (EC) 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.



protection, including social security and healthcare, ‘social advantages’, education, as well as goods and services, including housing. The Employment Discrimination Directive<sup>49</sup> prohibits discrimination primarily in the employment context (access to employment, self-employment and occupations; vocational guidance and training; employment and working conditions, including dismissals and pay; membership of organizations), across the rest of the Article 13 EC categories (disability, age, sexual orientation, religion and belief). These directives lay down minimum requirements and give Member States the option of introducing or maintaining more favourable provisions. The directives may not be used to justify any regression in the situation that already prevails in each Member State. Member States were required to implement the Race Directive by July 2003. The provisions in the Framework Directive in relation to religion or belief and sexual orientation were to be implemented by November 2003, and those on age and disability by November 2006. In 2008, the Commission proposed a new directive against discrimination outside employment on grounds of religion or belief, disability, age and sexual orientation.<sup>50</sup>

### 2.2.3. Equality and the EU Charter of Fundamental Rights

Another source of the equality principle in EC law is the EU Charter of Fundamental Rights promulgated in 2000.<sup>51</sup> In part, this document sets out more systematically the fundamental rights already considered by the ECJ as arising from the general principles of EC law. The Charter goes further, however, in setting out a wider catalogue of rights that are considered to be fundamental in the Community/Union. The Charter contains a Chapter headed ‘equality’.

The extent to which these provisions will be seen as giving rise to a legally enforceable principle of equality remains to be seen – the Charter contains a number of complex provisions as to the scope of its application.<sup>52</sup> In any case, the legal status of the Charter<sup>53</sup> is linked to the new Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the EC. The Treaty of Lisbon incorporates the Charter into EU law (with special provisions for the UK and Poland). As is well-known, after Ireland rejected the draft Treaty in a referendum on 12 June 2008, it was for a while unclear whether the Lisbon Treaty would be ratified by all the Member States. However, several Advocates-General,<sup>54</sup> the Court of First Instance,<sup>55</sup> and the ECJ itself have already referred to the Charter in their opinions and decisions.<sup>56</sup> A further Irish referendum held in October 2009 accepted the draft Treaty

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<sup>49</sup> Council Directive (EC) 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ 303/16.

<sup>50</sup> COM(2008)426 of 2 July 2008.

<sup>51</sup> [2000] OJ C 364/1.

<sup>52</sup> See for example S. Koukoulis-Spiliotopoulos ‘The Lisbon Treaty and the Charter of Fundamental Rights: maintaining and developing the *acquis* and gender equality’ *European Gender Equality Law Review* 1/2008 pp.15-24.

<sup>53</sup> The Charter was jointly and solemnly proclaimed at Nice in December 2001 by the Council, Commission and Parliament. The equality clause in the Charter provides in Article 20, ‘Everyone is equal before the law’, while Article 21(1) reads: ‘Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited’.

<sup>54</sup> *R v Secretary of State for Trade and Industry, ex p BECTU*, Case C-173/99, [2001] ECR I-4881.

<sup>55</sup> T-177/01 *Jego-Quere v Commission* [2002] ECR II-2365.

<sup>56</sup> See, for example, C-540/03 *Parliament v Council* [2006] ECR I-5769; Case C-432/05 *Unibet* [2007] ECR I-2271; Case C-303/05 *Advocaten voor de wereld*, 3 May 2007; Joined Cases C-402/05 P and C-415/05 P, *Kadi v Council of the European Union* (2008) 3 CMLR 41.

and, after the Czech Constitutional Court cleared the way for ratification on 3 November 2009, the Czech president signed the ratification instrument (though only after having obtained a limitation as to the justiciability of the Charter in the Czech republic, in the same way as the UK and Poland did before). While the entry into force of the Lisbon Treaty will make the Charter legally enforceable, the various implicit and explicit limitations are likely to provide rich ground for legal debate and cases-law.

### ***2.3. Equality and human rights law***

#### ***2.3.1. European Convention on Human Rights***

Article 14 ECHR provides that ‘the enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status’. The Council of Europe has adopted a new equality provision (Protocol 12) that will go some way to remedying some of the limits of Article 14 ECHR.<sup>57</sup> The Protocol, in effect, would add an additional provision to Article 14 that would prohibit discrimination on any grounds such as those set out in Article 14 by a public authority in circumstances where other Convention rights are not engaged, whilst ‘[r]eaffirming 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’.<sup>58</sup> The Protocol entered into force on 1 April 2005.

#### ***2.3.2. Other international and regional human rights instruments as potential sources of influence on domestic law***

These include the major human rights instruments concluded under the auspices of the United Nations (the International Covenant on Economic, Social and Cultural Rights 1966, the International Covenant on Civil and Political Rights 1966). In addition, some international treaties have a specific focus on discrimination and equality (Convention on the Political Rights of Women 1953, Convention on the Elimination of All Forms of Racial Discrimination 1966, Convention on the Elimination of All Forms of Discrimination Against Women 1979, and Convention on the Rights of the Child 1989). In 2007, the UK signed the Convention on the Rights of Persons with Disabilities 2006, but has not yet ratified it. Several International Labour Organization instruments deal with discrimination: the Equal Remuneration Convention 1951 (No. 100) and the Discrimination (Employment and Occupation) Convention 1958 (No. 111). In addition, several Council of Europe conventions are relevant (on economic and social rights (European Social Charter 1961, revised European Social Charter, 1996), national minorities (Framework Convention for the Protection of National Minorities 1995), and minority languages (European Charter for Regional or Minority Languages, 1992)).

### ***2.4. Effect of European and International equality and discrimination provisions in national law***

Of the provisions discussed above, EC law, particularly the Directives, and the European Convention on Human Rights, are the most consistently important influence on most EC and EEA states. All states have changed their domestic equality law as a

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<sup>57</sup> Protocol 12 to the ECHR, adopted Rome, 4 November 2000.

<sup>58</sup> Preamble, fourth indent.

result of the development of EC law. All the EC and EEA states have ratified the ECHR. Most states have also incorporated the ECHR into domestic law. Many states' courts, particularly Constitutional Courts, also frequently cite both ECJ and ECtHR decisions in domestic cases.

Of the other Council of Europe and international instruments discussed above, the one further provision that appears to be of considerable importance (at least in some states) is CEDAW. This Convention has been influential in several states, sometimes as an influence on the drafting of constitutional provisions (Austria, Finland, Greece, Iceland) and in the context of judicial adjudication of domestic provisions (Greece, Finland). In particular, CEDAW appears to have been influential in domestic debates about the meaning of equality because it emphasises the concept of 'de facto' equality, thus encouraging states to adopt the fourth conception of equality to be discussed below. There appears to be a close correlation, indeed, between the influence exerted by CEDAW, and the extent to which the state has adopted the fourth conception of equality, although which is cause and which is effect is uncertain. The only major exception to this appears to be Germany. CEDAW appears to have had little influence, and the broad concept of discrimination enshrined in CEDAW has not been recognized by courts and only by few academics but not by the academic mainstream. Nor does it appear that CEDAW's understanding of temporary special measures has been taken up in mainstream interpretations of constitutional and statutory law. Yet, despite that, we shall see subsequently that Germany has adopted an approach in the public sector that stresses the need to tackle de facto equality.

The fact that states are often influenced by multiple international and regional conventions incorporating anti-discrimination and equality norms sometimes poses a dilemma because different international and regional provisions appear to adopt different understandings of equality and non-discrimination. Conflict between these understandings can contribute to dilemmas for states because it proves difficult to follow all of these different standards at the same time, thus encouraging a hierarchy of understandings of equality to evolve, based on the hierarchy of legal sources of these differing norms. An example from Norway illustrates the point. The Norwegian State cited its obligations under CEDAW Article 4 in its attempt to maintain the ability to earmark positions for women at the University of Oslo. The EFTA Court, applying EC law in its judgment in case E-1/02, did not share that view that CEDAW should trump EC law.

Having considered the main sources relevant to equality and non-discrimination in the European legal space, we turn now to consider in more detail the four conceptions of equality and non-discrimination mentioned in the introduction to this Report.

### **3. Meanings of equality and non-discrimination I: equality and rationality**

**Equality, in this first meaning, requires that, save where there is an adequate justification, like cases must not be treated differently, and different cases must not be treated in the same way. This implies that where two categories are treated differently, the first issue is whether the categories involved are similar or not. If they are not, there is nothing wrong with treating them differently. If they are, the question is whether the difference in treatment can be justified. In this first meaning of equality, the justification that is required in order to be accepted may often be highly deferential to decisions taken by public bodies: if the action taken is 'rational', that may be enough.**

The first meaning of equality is where the principle of non-discrimination is a self-standing principle of general application, without specific limitation on the circumstances in which it is applicable (except that it be in the public realm, broadly defined), and without limitation on the grounds on which the difference of treatment is challengeable. In EC and EEA states, this approach to equality is particularly associated with broad constitutional equality guarantees, as discussed in the previous section. This meaning, I shall suggest, is essentially rationality-based.

Equality essentially requires, then, that where the exercise of governmental power results in unequal treatment, it should be properly justified, according to consistently applied, persuasive and acceptable criteria, and this I shall call 'equality as rationality'. However, a general idea of equality as rationality cannot operate without some criteria of likeness, difference, acceptability and justification.

The common starting point for the interpretation of the general constitutional guarantees typically found in European constitutions closely follows what has been called the Aristotelian conception of equality. It has two dimensions: like cases should be treated alike, and different cases should be treated differently.

### ***3.1. Treat like cases alike***

The first is that like cases should be treated alike, which also implies that unlike cases may be treated differently. In Belgium, decisions of the courts, later of the *Conseil d'Etat* (the highest administrative court) and more recently the Constitutional Court have adopted a common conception of equality: that there is discrimination when one person, or one group, is treated less (or more) favourably than another person, or group, in the same situation or in comparable situations. In Estonia, the Supreme Court has held that the first sentence of Article 12(1) of the Constitution embraces the right of a person not to be treated unequally. This applies above all to the equality upon application of law and means a requirement to implement valid laws to every person impartially and in a uniform manner. Equality in legislation requires that the law must treat persons in similar situations equally. In France, the Constitutional Council has held that the principle of equality does not preclude legislation from laying down different rules for categories of persons in different situations or legislation from laying down different rules where the difference of treatment is justified by general interest and where the difference of treatment is compatible with the purpose of the legislation. In Poland, too, the Constitutional Court has interpreted the constitutional principle of equality to mean that all subjects characterized by a certain feature or belonging to certain category must be treated equally, without any differentiation, neither in a discriminatory manner, nor more favourably.

An example from Cyprus will illustrate the approach. The Supreme Constitutional Court (SCC) in the *Mikrommatis* case<sup>59</sup> held that the addition of the income from property of a married woman for purposes of income tax to that of her husband, was a reasonable distinction based on the intrinsic nature of the community of life existing between spouses and did not amount to discrimination on the ground of sex, whilst the addition of the income of the wife's labour to that of her husband had no relation to the intrinsic nature of the bond of marriage, nor was it justified and, therefore, it was discrimination on the ground of sex. The right to equality is subject to reasonable differentiations between inherently different situations. On the other hand, arbitrary unreasonable differentiations not justified by the intrinsic nature of things, will contravene the equality principle. However, in the later case of *Ioannidou v Republic*,

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<sup>59</sup> 2 JSCC, pages 125-132.

the Court held that it was contrary to the principle of equality for women's income from any source simply to be added to that of her husband.<sup>60</sup> Since then, each spouse is taxed separately according to his or her own income.

The recent *Arcelor* case is an example from the ECJ. This concerned a greenhouse gas emission allowance trading scheme established by an EC Directive. The scheme currently applies to the steel sector only and not to other sectors, such as the chemical and non-ferrous metal sectors, which are comparable to the steel sector. The ECJ held that in an area where the Community legislature has a broad discretion and its action involves political, economic and social choices, as well as complex assessments and evaluations, an arbitrary difference in treatment of comparable industrial sectors would amount to a breach of the principle of equal treatment and therefore breach Community law. However, after an examination of the issues, the ECJ held that the difference in treatment was justified and that there was, therefore, no arbitrariness. The criteria applied were objective and appropriate to the aim pursued by the legislation in question.<sup>61</sup>

### **3.2. Treat different cases differently**

The second dimension of the Aristotelian conception of equality is sometimes seen as the corollary of the first. It is that different cases must be treated differently. The Constitutional Court of Latvia, for example, interpreted Article 91 of Constitution, providing for principle of equality and non-discrimination, not only as forbidding state institutions from enacting norms that distinguish between persons who find themselves in similar conditions without a reasonable ground, but also as demanding different attitudes to persons who are in different circumstances.<sup>62</sup> In Poland, the Constitutional Court has declared in one of its earlier decisions that different requirements for retirement benefits for female and male workers in the mining industry (as regards age or time of employment) were constitutional.<sup>63</sup> The Constitutional Court justified this decision as follows: 'The law, in order to be just, cannot avoid certain legal classifications differentiating individuals by using norms addressed to specific groups or classes of citizens only. If therefore the biological and social differences between men and women have significance from the point of view of 'wearing out' ('wasting', 'burning up') at work, the law describing identically the legal conditions for early retirement for both groups of employees would infringe the principle of equality (the equality before the law).' However, although in theory a corollary of the first dimension, some courts seldom advert to this second dimension. So, in Belgium, the other side of the coin, uniform treatment of persons, or groups, in different situations, is far more rarely analysed as discrimination.

### **3.3. Weight to be attached to equality**

Whichever dimension of the Aristotelian conception is applied, an important question to be determined is the weight that is attached to the idea of equality in comparison with other competing considerations. In particular, the issue has become one of how strictly the courts will scrutinize arguments from the State that are put forward to limit

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<sup>60</sup> 1979 3 JSCC, pages 295-333.

<sup>61</sup> Case C-127/07, *Société Arcelor Atlantique et Lorraine and Others v Premier ministre, Ministre de l'Ecologie et du Développement durable and Ministre de l'Economie, des Finances et de l'Industrie* [2008] nyr in ECR.

<sup>62</sup> Decision in case No. 2000-07-0409, available on <http://www.satv.tiesa.gov.lv/upload/2000-07-0409E.rtf>, last accessed 4 June 2009.

<sup>63</sup> K 6/89.

equality, or create exceptions to equality? Justifications differ considerably on this question. Some courts apply a highly deferential test to their government's purported justifications for inequality. In this context, we can identify the approach as being one of essentially only considering whether the actions of the public authority were rational. That appears to be the most common approach taken by constitutional and other courts interpreting general constitutional equality guarantees. In Estonia, for example, the Supreme Court has held that the legislator must be granted a wide margin of appreciation.<sup>64</sup> The Supreme Court has established that only arbitrary differential treatment of two persons or groups of persons in analogous situations is considered as a violation of the general right to equality. An unequal treatment can be regarded as arbitrary if there is no reasonable cause for that. Thus, it is necessary to check whether the legislator had a reasonable and appropriate reason to treat comparable groups of persons unequally and whether unequal treatment was proportionate in the narrow sense, i.e. it is necessary to weigh the objective of the unequal treatment and the gravity of the unequal situation that has been created.<sup>65</sup> The ECJ seems to adopt a similar approach, as is illustrated by the *Arcelor* case, discussed previously: a deferential approach to justifications is adopted whenever the EC institutions have a significant margin of appreciation, and the area at stake requires complex assessments and evaluation.

In other jurisdictions (though fewer in number) a stricter, more sceptical test is applied to the assessment of justifications advanced by public authorities. Some courts, such as those in Luxembourg, require that the disparity between categories of individuals must be objective, justified, adequate and proportional to its objective. In Poland, too, the test adopted is close to proportionality. Arguments advanced as justifications for deviations from the rule of equal treatment should be relevant. They must have a direct connection with the aim of the provision under scrutiny and advance the achievement of this aim; in other words, the differentiation has to have a rationally justified character. Second, they must be proportional, The weight of the interests advanced by the differentiation should remain in appropriate proportion to the weight of the interests sacrificed as a result of the unequal treatment. Third, the means used must also be legitimate; they must remain connected with other constitutional values, principles or norms that justify different treatment of similar subjects, such as the principle of social justice.<sup>66</sup> The differentiation of legal situation of similar subjects has greater chances for its recognition as being in conformity with the Constitution, if it remains in accordance with the principle of social justice or serves for realization of this principle. It will be considered as unconstitutional if it finds no support in the principle of social justice. In this sense the principle of equality and social justice to a great extent overlap.<sup>67</sup> In sum, we can see, therefore that we can identify a spectrum of approaches, from highly deferential to highly sceptical, with courts scrutinizing such justifications with considerable thoroughness.

In Germany, there has been a noticeable shift from a highly deferential test to one that involves proportionality analysis. The Basic Law contains a general principle of equality of all human beings before the law (Article 3(1)). In addition, there are special guarantees of equality, such as equality of men and women (Article 3(2)(1)).

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<sup>64</sup> Judgment of the Constitutional Review Chamber of the Supreme Court, No. 3-4-1-8-08, 30 September 2008, p. 20, available in English at: <http://www.nc.ee/?id=991>, last accessed 24 October 2009.

<sup>65</sup> *Ibid.*, p. 27, 32.

<sup>66</sup> K 10/04, K 10/96.

<sup>67</sup> K 10/96.

Moreover, there are specific prohibitions of discrimination: Article 3(3)(1) prohibits discrimination on grounds of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions, Article 3(3)(2) prohibits unfavourable treatment of persons with disabilities, and Article 3(3), for historic reasons, explicitly prohibits discrimination on grounds of religion in the access to public office.

Although the text of Article 3(1) only speaks of equality of all persons before the law, it is settled case law of the Federal Constitutional Court that the principle of equality is also addressed to the legislature, and in essence means that equal things are treated equally, and unequal things unequal in view of that difference.<sup>68</sup> In its earlier case law, the Federal Constitutional Court used the test of arbitrariness (*Willkürformel*) to determine whether there is a violation of the principle of equality (Article 3(1)). Pursuant to this test, there is a violation of the principle of equality only if there is no reasonable ground, emanating from the nature of things, or any other intelligible reason for differentiation. The legislator or law enforcer infringes upon the principle of equality if a group of cases is treated differently from another on evidently irrelevant grounds. Over time, this guarded approach of the Federal Constitutional Court found itself in stark contrast to the highly differentiated approach of the Court's jurisprudence with respect to freedom rights. In particular, the Court found itself faced with the challenge of how to integrate the balancing method developed for freedom rights, *viz.* the principle of proportionality, into a test for the principle of equality.

The Court's answer was the 'new formula' (*neue Formel*), according to which there is a violation of the principle of equality if one group of norm addressees is treated differently than another group of norm addressees, although the differences between both groups is not of such kind and degree that could justify different treatment.<sup>69</sup> The purpose of the 'new formula' is to emphasise that finding an infringement of the principle of equality is no longer only a question of self-evidence, but also of constitutional balancing. Moreover, in the Court's view, the principle of proportionality determines the criteria for balancing, i.e. the requirements for finding unequal treatment justified: They depend on the substance matter regulated and on the criteria used for differentiation. The Court applies heightened scrutiny when different groups of persons, and not just different sets of fact, are treated unequally. This happens notably when the persons concerned cannot meet the requirements of a provision or can do so only with great difficulty because the legal advantage in question depends on person-related features that the individual cannot influence.

What is of particular interest is that, by judicial interpretation, the Court has increased its scrutiny in certain circumstances. The Court's scrutiny increases the more the criterion for differentiation approaches one of the criteria listed in the prohibition of discrimination pursuant to Article 3(3). In addition, the intensity of scrutiny depends on the extent to which unequal treatment curtails the exercise of freedom rights guaranteed by the Basic Law. In effect, therefore, the Court adopts a test of stricter scrutiny where the second or third meaning of equality is engaged.

#### ***3.4. Conflicts between the first conception of equality and other conceptions***

The next sections in this Report discuss various other approaches to equality, in which criteria of likeness, difference, acceptability and justification are set out with greater specificity than in the approach to equality-as-rationality. However, it is important to bear in mind that in those jurisdictions that have a general equality as rationality

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<sup>68</sup> BVerfGE (Decisions of the Federal Constitutional Court) vol. 49, p. 148, and vol. 98, p. 365.

<sup>69</sup> BVerfGE (Decisions of the Federal Constitutional Court) vol. 55, p. 72.

approach embedded in their constitutional jurisprudence, there is the danger that the more specific approaches to equality and discrimination that we shall identify subsequently come to be seen not as simply as extensions of this broad equality provision, but as competitors, in which the other approaches to equality are seen, indeed, as contrary to these other conceptions of equality.

France provides an important example of this, in several respects. In a decision of 1982,<sup>70</sup> the Constitutional Council rejected as unconstitutional a proposal to set a limit of 75 per cent on the proportion from either sex for the lists of candidates at municipal elections. The Council considered that quotas were contrary to the constitutional principle of equality and universality that prohibited any division into categories of the electors and of the people to be elected. (Since then, the Constitution has been modified several times and Article 1 now states that ‘statutes shall promote equal access by women and men to elective offices and posts as well as to professional and social positions’, but the debate continues. More recently, there have been debates on the divergence between what is viewed as a French conception of equality and the European conception of discrimination. These debates can be illustrated by a recent resolution of the Senate of 17 November 2008.<sup>71</sup> In this the Senate expressed its strong opposition to the adoption of the European Commission’s proposal for a directive on implementing the principle of equal treatment between persons irrespective of religion, belief, disability, age or sexual orientation. Two points were especially criticized. First, the Senate believed that the Commission proposal did not distinguish between discrimination and equal treatment and that this confusion could lead to ‘communitarianism’, i.e. the creation of communities of people with specific rights. This communitarianism is seen as contrary to the fundamental principles of the French Republic that support a universalist approach, with the definition of common principles applying to everybody. The proposed directive, it was said, would only protect certain persons and not all citizens.

Other European jurisdictions appear to demonstrate, however, that there is no necessary tension between, say, having a general equality clause of the type we have been examining, and more substantive conceptions of equality. Although the Polish Constitutional Court, for example, also acknowledges that in some circumstances affirmative (privileged) treatment for women could interfere with the principle of equality (K15/99), the starting point for the scrutiny of such affirmative action should be the constitutional imperative to assure equality between women and men. Only in this context would it be appropriate to consider the question of whether the legal differentiation of the situation of women in contrast to men would constitute discrimination against men contrary to the meaning of the general principle of equality. Such actions may be supported by social arguments, in particular attempting to ensure that women achieve de facto equality in employment. Then such a differentiation may be justified by such constitutional values as the general principle of social justice and special principle of equality between women and men. A different approach may be applied however in cases when the law puts a man in a more privileged position. In today’s Poland there are no grounds for accounting men

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<sup>70</sup> Décision n°82-146 DC.

<sup>71</sup> *Sénat, Résolution européenne sur la proposition de directive du Conseil relative à la mise en oeuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle*, 17 November 2008, note S. Laulom, *Revue Droit du Travail*, January 2009, p.8. European resolutions adopted by the Senate do not have any binding legal effect. They are political statements, presenting the Senate’s point of view to the Government before negotiating draft legislation.



to a weaker social group.<sup>72</sup> The Court has also recognised, however, that in certain circumstances a supposed privilege for women may become a real restriction of their rights depriving them of equal opportunities.

Given this approach, then, it is not surprising that in certain circumstances there is a preference for using a general principle of equality, rather than an anti-discrimination principle restricted to protection on certain specified grounds. For example, a right ‘to equal pay for equal work’ for workers in general has been recognized by the *Cour de Cassation* since 1996.<sup>73</sup> It could be defined as an equal treatment principle in the field of wage because it obliges the employer to pay the same wage to all workers in the same position. There is no need here to prove that the difference of treatment is based on a prohibited ground; the difference of treatment is enough to presume the breach of the principle of equal treatment. Of course, it is possible for the employer to justify this difference. The first case recognizing the principle of ‘equal pay for equal work’ illustrates the difference between the concepts of equal treatment and of non-discrimination. The case was about a woman pretending that she was paid less than other women. Clearly, the principle of non-discrimination based on sex could not apply in this situation but it was possible to apply the principle of equal treatment. There are much more cases on the application of the equal treatment principle of ‘equal pay for equal work’ than on discrimination. As a consequence, commentators have concentrated on the application by the tribunals of this general principle and, for example, on the reasons considered by the *Cour de Cassation* as sufficient to justify unequal pay but not on the specificities of cases on sex equality.<sup>74</sup>

#### **4. Meanings of equality and non-discrimination II: equality as protective of prized public goods**

**In the second meaning, the non-discrimination principle becomes an adjunct to the protection of particularly prized ‘public goods’. Such ‘prized public goods’ should in principle be distributed to everyone without distinction. In the distribution of the ‘public good’, equals should be treated on a non-discriminatory basis, except where differences can be justified. The justification standard to be satisfied is often stricter in this context than is the case where ‘equality as rationality’ is concerned.**

In the context of this second meaning, the focus is on the distribution of the public good, rather than the characteristics of the recipient. The courts will scrutinize public authorities’ (less frequently, private bodies’) actions in a more intense way than under the first meaning. A key issue, in this context, is what ‘public goods’ are of sufficient importance to attract heightened equality-based scrutiny. One example is in the context of EC law, where the ‘prized public goods’ in issue are found in those provisions of the Treaty furthering the economic integration of the Community. Another important category of ‘public goods’ are fundamental rights.

<sup>72</sup> (K 15/97, K 35/99, Supreme Court III ARN 93/95).

<sup>73</sup> Cass. Soc. 29 October 1996, J. Péliissier, A. Lyon-Caen, A. Jeammaud, E. Dockès, *Les grands arrêts du droit du travail*, Dalloz 2008.

<sup>74</sup> See for example, Ch. Radé, ‘Variations autour de la justification des atteintes au principe ‘à travail égal, salaire égal’, *Droit Social* 2009, p. 399.

#### **4.1. EC law**

A rough and ready distinction can be made between two overlapping, but relatively separate, functions of EC equality law. First, there are those aspects of EC equality law, operating primarily in the economic sphere, where equality has particular importance in furthering the market-integration goals of the Community. This function is often regarded as the dominant function of equality in EC law. A crucial role is played, in this respect, by the prohibition of discrimination on grounds of nationality. In this model, out-of-state goods, services and capital must enjoy the same treatment as their in-state equivalents. Equal treatment in the host state indeed applies also to individuals who have the nationality of another Member State. Although internal market law also developed along the lines of the market access model,<sup>75</sup> the problem of discrimination on grounds of nationality remained one of the driving forces behind integration.

In some contexts, the principle of equal treatment demonstrates that the goals of the Community go beyond economic goals and extend to the protection of the European social model, defined to include equality considerations. In this context, equality is seen either as important intrinsically or (at least) as important for non-economic integration. In this second category, for example, we might place the provisions regarding sex discrimination. We shall consider this aspect of Community equality in the next section.

As was already observed above (Section 2.2.2.1), there has been a clear shift towards including the social dimension as well in the context of what is believed to be the domain of economic integration. The role of equality as a means of serving market integration implies that the entitlements or interests provided for in the Treaty and EC legislation are being 'distributed' without discrimination. The entitlements and interests are encapsulated in the Treaty freedoms, i.e. in Articles 39(2) (workers), 43 (establishment), 50 and 54 (services), 56 (capital), and nowadays also in areas beyond market integration, in the provisions regarding EU citizenship. They include, inter alia, access to work or self-employment, but also access to social security and assistance, to housing facilities, to education, to maintenance grants, and even to the use of languages in court. In fact, a rich panoply of various aspects that contribute to the integration of a person within the host state is now covered by the prohibition of discrimination on grounds of nationality. Finally, apart from nationality discrimination, there are also other provisions that are closely related to market integration, such as the provisions regarding non-discrimination between producers and consumers.

According to Community case law, both the principle of equality and the prohibition of discrimination require that, save where there is an objective justification, comparable situations must not be treated differently, and different situations must not be treated in the same way. Since equality and non-discrimination are defined in the same terms, it is not surprising that the distinction between the two is often blurred.<sup>76</sup> We shall return to this distinction in Chapter 5, when discussing the third meaning of equality. It is, however, important to note that, as in the case of Article 14 ECHR, to be considered below, the approaches may swing between the second and third meaning, that is, sometimes the focus is on equal treatment in

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<sup>75</sup> In this model, national rules preventing or hindering market access are unlawful, whether they discriminate or not.

<sup>76</sup> Also the Community legislature seems to regard the two concepts as equivalent, using them interchangeably.

relation to the public goods, and sometimes it is an approach that considers the issue through the prism of the prohibition of discrimination on grounds of nationality.

In so far as equality is defined as requiring that different situations must not be treated in the same way, unless such treatment is objectively justified, this implies that 'equal' treatment can in fact lead to discrimination. There may be situations that are so different that treating them 'equally' may amount to discrimination. The appropriate approach then is to treat those cases differently, in other words to differentiate between them.<sup>77</sup> This case law adopts a substantive understanding of equality and is in fact the first step on the way to understanding positive action as a means by which equality can be achieved, rather than as a derogation from the principle of equal treatment. We shall discuss this meaning of equality below, in Section 5.4.

Finally, since the Treaty freedoms and the prohibition of discrimination on grounds of nationality are, in particular, central to the functioning of the internal, integrated market, they are treated by the ECJ as fundamental principles, or as concepts akin to fundamental rights. For that reason, they are subjected to heightened or even very strict judicial scrutiny. In any case, it is important to note that the extensive litigation on the fundamental Treaty freedoms and the prohibition of discrimination have influenced and still influence the interpretation and application of discrimination on other grounds.

#### ***4.2. Human rights as the primary public good in issue in Member States***

The more influential example, in the context of how Member States have articulated and adopted this approach to equality in the area of social discrimination, is to be found in Article 14 ECHR, where the 'prized public goods' are fundamental human rights. Indeed, this is also a characteristic approach to the role sometimes accorded equality and non-discrimination in international human rights law more generally.<sup>78</sup> Before turning to consider Article 14, and EC law, it is important to consider the extent to which this approach is also found in the constitutional traditions of the Member States.

##### *4.2.1. Constitutional provisions*

This approach to equality and non-discrimination can be seen clearly in the constitutional texts of several of the EC states. In Bulgaria Article 6(2) provides: '(...) There shall be no privileges or restriction of rights on the grounds of race, nationality, ethnic self-identity, sex, origin, religion, education, opinion, political affiliation, personal or social status or property status.' Article 28(2) of the Constitution of Cyprus provides: 'Every person shall enjoy *all the rights and liberties provided for in this Constitution* without any direct or indirect discrimination against any person on the ground of his community, race, religion, language, sex, political or other convictions, national or social descent, birth, colour, wealth, social class, or on any ground whatsoever, unless there is express provision to the contrary in this Constitution'. The Czech Constitution includes the concept of equality and the principle of non-discrimination. Article 3 of the Charter of Fundamental Rights and Freedoms reads: 'Everyone is guaranteed *the enjoyment of her fundamental rights and*

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<sup>77</sup> Cf. Case C-61/77 *Commission v. Ireland* [1978] ECR 00417; and Case C-340/89 *Vlassopoulou v Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg* [1991] ECR I-02357.

<sup>78</sup> See M Bossuyt, *L'interdiction de la discrimination dans le droit international des droits de l'homme* (Bruylant, 1976) 68–69.

*basic freedoms* without regard to gender, race, colour of skin, language, faith and religion, political or other conviction, national or social origin, membership in a national or ethnic minority, property, birth, or other status.’ Article 91 of the Latvian Constitution provides in part: ‘*Human rights* shall be realised without discrimination of any kind’.<sup>79</sup> Section 12(2) of the Slovakian Constitution currently reads as follows: ‘*Fundamental rights and freedoms* are guaranteed to everyone in the territory of the Slovak republic regardless of sex, race, colour of skin, language, belief and religion, political affiliation or other conviction, national or social origin, nationality or ethnic origin, property, descent or other status. No one may be harmed, preferred or discriminated against on these grounds.’ The Slovenian Constitution (Article 14) provides that everyone shall be guaranteed equal *human rights and fundamental freedoms irrespective* of national origin, race, sex, language, religion, political or other conviction, material standing, birth, education, social status, disability or any other personal circumstance. Even where it is not apparent from the text of the Constitution, the courts may adopt a similar approach, as we have seen is the case in Germany.

#### 4.2.2. *Judicial interpretation of this conception*

In the Czech Republic, this conception of equality was considered in case Pl. ÚS 22/92, where the Constitutional Court rejected ‘an absolute understanding of equality’ and stated that ‘the equality of citizens must not be understood as an abstract category, but as a relative equality, a principle included in all modern constitutions. (...) The principle of equality has been so understood as constitutionally accepted aspects of differences between subjects and rights. If there is any inequality, the inequality for example in social rights must reach an intensity that questions at least in one or another aspect of the principle of equality in itself. *This happens especially when along with the principle of equality, another fundamental right is broken.*’ In cases Pl. ÚS 16/93, Pl. ÚS 36/93, Pl. ÚS 5/95, and Pl. ÚS 9/95, the Constitutional Court maintained this position. The Supreme Administrative Court stated in its decision on so-called Czecho-Slovak pensions regarding the equality principle: ‘the principle of equality in rights is not protected in itself, but only in connection with a breach of another fundamental right which is guaranteed by constitutional laws or by international agreements on human rights. A prohibition of discrimination is normally interpreted from two points of view: the arbitrariness of the legislator, making a difference between groups and their rights, must be excluded; secondly the aspects of differences must be acceptable. Therefore, any approach taken by the legislator must be based on objective and reasonable reasons and there must be respective adequacy between the objective and instruments to reach such an objective.’<sup>80</sup> In Slovakia, the Constitutional Court has held that ‘The provision of Article 12(2) of the Constitution has a general, declaratory character, rather than a character of a fundamental human right and freedom. Its application may be invoked only in connection with protection of particular fundamental rights and freedoms set out in the constitution.’<sup>81</sup>

The relevance of attaching the idea of equality or discrimination to fundamental rights is that this is likely to give rise to a somewhat stricter approach to assessing the legitimacy of justifications advanced for breaches of the equality/non-discrimination guarantee. In Hungary, the Constitutional Court distinguishes between fundamental

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<sup>79</sup> Unofficial translation in English is available on <http://www.ttc.lv/export/sites/default/docs/LRTA/Likumi/Constitution.doc>, last accessed 4 June 2009.

<sup>80</sup> 6 Ads 62/2003-31.

<sup>81</sup> Award in Case No. I. ÚS 17/99.

rights and non-fundamental rights with respect to the permissibility of differentiation. In cases of fundamental rights the ‘necessity and proportionality’ test applies, like in other cases of limitation of fundamental rights. Regarding non-fundamental rights the action is unconstitutional only if it is ‘arbitrary’, and thus violates the dignity of the person. An action would be arbitrary where there is no ‘reasonable’ or ‘constitutional’ ground for the action taken (offering little certainty about the concept). So too, in Latvia, the Constitutional Court considers that Article 91 contains two mutually closely connected principles – the principle of equality (effectively the first conception of equality, discussed above, and the principle of non-discrimination, effectively the second conception of equality. Both principles prohibit different treatment of persons in similar situations or demands different treatment of persons in different circumstances and allows different attitudes to persons who are in equal circumstances, if there is an objective and reasonable ground. However, an important distinction between the two principles is that there is much less discretion for justification of restriction on the basis on non-discrimination criteria, than in the context of the general equality right.

However, in some jurisdictions it appears to be unclear to what extent a stricter scrutiny of justifications will take place in the context of this second conception. In Slovenia, in the first case,<sup>82</sup> the Constitutional Court decided that Article 101 of the old ERA was inconsistent with the Constitution. Article 101 determined that the fulfilment of the conditions for a full old-age pension, which was according to the pension legislation more advantageous for the retirement of women, is a reason for *ex lege* termination of an employment relationship and therefore discriminatory against women. The court held that although the legislation may specify the reasons for the termination of an employment relationship, it must not interfere with constitutional rights. Freedom of work, free choice of employment and access to every work position under equal conditions mean that, in the context of the termination of an employment relationship, equal conditions must apply to everyone irrespective of the personal circumstances. For differentiation between individual legal subjects to be permitted, a non-arbitrary, substantiated reason must be demonstrated. However, when deciding whether the principle of equality has been violated the Constitutional Court uses one of the constitutional tests (standard or strict scrutiny test), and judging from the constitutional practice of recent years, the Constitutional Court is not always consistent when using one of them in the cases of unequal treatment.<sup>83</sup>

#### **4.3. Article 14 ECHR**

The primary function of Article 14, essentially, is in protecting the distribution of the other human rights protected by the ECHR.<sup>84</sup> There are several features of the meaning of discrimination under Article 14 that are of particular importance.<sup>85</sup> The approach that the ECtHR has taken to the meaning of discrimination has been to consider the question of whether a breach of Article 14 has occurred by seeking answers to several interrelated questions.

<sup>82</sup> Decision of the Constitutional Court U-I-49/98, from 25 November 1999.

<sup>83</sup> B. Flander *Pozitivna diskriminacija*, Ljubljana, Fakulteta za družbene vede 2004 pp. 91.

<sup>84</sup> This is also accomplished, more generally, by a requirement that where the limits on particular rights are in issue, especially the interpretation of paragraph 2 of Articles 8, 9, 10, 11, and 12, an equality test will be applied to assess the justification put forward. See, e.g., *Lustig-Prean and Beckett v UK* (2000) 29 EHRR 548; *Smith and Grady v UK* (2000) 29 EHRR 493.

<sup>85</sup> See, in general, Sandra Fredman, ‘Equality Issues’ in Basil S. Markesinis, *The Impact of the Human Rights Bill on English Law: The Clifford Chance Lectures Vol 3* (OUP, 1998) 111–132.

The non-discrimination requirement in Article 14 is not ‘free-standing’ but is dependent on other rights in the ECHR being engaged. That does not mean that another right has to have been breached. As the ECtHR held in *Schmidt v Germany*:<sup>86</sup> ‘Article 14 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 reason for its application unless the facts at issue fall within the ambit of one or more of the latter.’

An example may help to illustrate the point. In the *Schmidt* case, although the ECtHR found that there was no violation of Article 4(3)(d) prohibiting forced or compulsory labour, the Court went on to hold that an obligation imposed on men (and only on men) to serve in the fire brigade (or pay a financial contribution in lieu of this service) amounted to a breach of Article 14 taken in conjunction with Article 4(3)(d). There may be a violation of Article 14 considered together with another article in a case where there would be no violation of that other article taken alone.<sup>87</sup> It is sufficient that the facts of the case fall ‘within the ambit’ of the rights guaranteed by the Convention. Where that is not the case, however, then a claim of discrimination will not succeed. Further, where the state has gone beyond what is necessary under the substantive articles of the ECHR in the provision of benefits or protection of rights, it must do so in a manner that is not discriminatory.

This question whether persons have been treated differently to other persons in similar circumstances may appropriately be seen as comprising two elements: Was there different treatment as respects the substantive right in issue between the complainant on the one hand and other persons put forward for comparison (the chosen comparator) on the other? Were the chosen comparators ‘in an analogous or relevantly similar situation’<sup>88</sup> to the situation of the complainant?

In several respects the prohibited grounds of discrimination are considerably broader than those found in domestic anti-discrimination legislation. We shall see, in the next section, that the requirement that the difference in treatment be on a ground set out in Article 14 allows the courts to interpret Article 14 as encompassing the third (status-based) approach to equality.

Differences in treatment are subject to a test of ‘reasonable and objective justification’. There are several elements in this test: (1) Has the state established the justification?<sup>89</sup> (2) Does the difference in treatment have a legitimate aim or aims? (3) If so, (a) is the objective sufficiently important to justify limiting a fundamental right; (b) are the measures designed to meet the objective rationally connected to it; and (c) are the means used to impair the right or freedom no more than is necessary to accomplish the objective? In applying the test of objective and reasonable justification, the ECtHR has made clear that states ‘enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law’.<sup>90</sup>

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<sup>86</sup> 18 EHRR 513 at [22].

<sup>87</sup> *Abdulaziz v UK* Series A No. 94 (1985) EHRR 471.

<sup>88</sup> *Stubbings v UK* (1996) 23 EHRR 213.

<sup>89</sup> *Pine Valley Developments Ltd v Ireland* [1992] 14 EHRR 319 at [64].

<sup>90</sup> *Stubbings v UK Application 22083/93* (1996) 23 EHRR 213.

## 5. Meanings of equality and non-discrimination III: non-discrimination, particular characteristics, and the ‘grounds’ of discrimination

According to the third meaning of equality, it is not permitted to make a distinction on the basis of a group characteristic that is considered to be irrelevant or otherwise unacceptable, unless there is a justification. In this type of case, the group characteristics that may not lead to a distinction, such as nationality, race and sex, have often been set out in the text of the legal instrument (such as the Treaty, a Constitution, or other legislation). In this context, the justification of the difference in treatment will, in general, be scrutinized with considerable thoroughness, and the standard to be satisfied will often be high, but that standard may differ depending on the group characteristic under consideration.

In the third meaning of equality and non-discrimination, attention shifts from the importance of the ‘prized public good’ (particularly the human right in issue) and turns instead to the association between a limited number of particular characteristics (such as race, gender, etc.) and the discrimination suffered by those who have, or who are perceived to have, those characteristics. An example that illustrates the contrast between the second and third conceptions of equality and non-discrimination is provided in the case of *Victoria Cassar v The Malta Maritime Authority*, in which the Constitutional Court of Malta held that the Constitution guaranteed protection from discriminatory treatment in an explicit, autonomous and independent manner, separately and distinctly from any other freedom, in light of which, discrimination is capable of forming the basis of an action without the need to reference any other fundamental right in order to achieve protection from discriminatory treatment.

The third meaning should also be contrasted with the first meaning discussed above, equality as rationality. Indeed, some states use different words to describe these two understandings. A feature of Finnish terminology (which is also found in Norway and Sweden) is that equality covers two notions, *tasa-arvo* and *yhdenvertaisuus*. *Yhdenvertaisuus* was the constitutional term, originally referring to formal equality; the etymology of the word is a reference to *yksi* (one) and *vertaisuus* (comparison, equation) and thus to the classical Aristotelian understanding of equality. *Tasa-arvo* was traditionally the term used for political and social equality, its etymology consisting of *tasa* (even, equal) and *arvo* (worth). *Tasa-arvo* was adopted as the term used in the context of sex/gender equality.<sup>91</sup> Anti-discrimination law proper, *Tasa-arvolaki* (Act on Equality between Women and Men), was introduced first against sex discrimination and only two decades later against other grounds. Directives 2000/43/EC and 2000/78/EC were transposed by *Yhdenvertaisuuslaki* in 2004. Since then, the term *tasa-arvo* has become fixed as a term that refers to gender equality, while *yhdenvertaisuus* is used as to other prohibited grounds of discrimination.

The difference between them is also illustrated by the Spanish Constitutional Court’s jurisprudence on Article 14 of the Spanish Constitution. The Constitutional Court understands Article 14 to contain two different parts. In its first point there is a general clause on the equality of all Spaniards before the law. This is a classic

<sup>91</sup> It is worth noting that as Finnish as a language does not have gender, the term is difficult to translate. *Sukupuoli* covers both terms, but when there is a need to specify, gender is generally translated into *sosiaalinen sukupuoli* or ‘social sex’.

example of the first meaning of equality discussed above. The general principle of equality is understood as the citizens' subjective right to enjoy equal treatment. It is binding on the public authorities and requires that matching factual circumstances be treated identically in their legal consequences. Introducing differences between them must be sufficiently and reasonably justified, and the consequences must not be disproportionate. The difference in treatment can be lawful provided it is objectively justified and is judged to be proportional.<sup>92</sup> In addition, the Constitutional Court interprets the second part of Article 14CE as comprising the third conception of equality/non-discrimination. Article 14(2) prohibits a number of specific causes of discrimination. This explicit prohibition is due to there being historically deep-rooted differences that have placed certain groups of the population in positions that are not only disadvantageous, but also contrary to human dignity.<sup>93</sup> Likewise Article 12(1) of the Estonian Constitution provides as follows: 'Everyone is equal before the law. No one shall be discriminated against on the basis of nationality, race, colour, sex, language, origin, religion, political or other opinion, property or social status, or on other grounds.' The first sentence of Article 12(1) provides a general right to equality; the second sentence provides a right against discrimination on the grounds listed in the Constitution.

The courts will scrutinize public authorities' (and others') actions in a more intense way than under the first meaning. In the Spanish case, for example, the distinctions between the sexes can only be used exceptionally as a criterion for distinguishing treatment between men and women.<sup>94</sup> In Estonia, it is generally acknowledged that the third conception requires a higher standard of protection than the general equality clause. The right not to be discriminated against can only be restricted if it is necessary to achieve certain general constitutional objectives or if it is necessary for the protection of the constitutional rights of others. However, restrictions of the right to equal treatment in this third conception have to be in compliance with the stricter principle of proportionality.<sup>95</sup> So too, in Germany, the Federal Constitutional Court has integrated the criteria listed in Article 3(3)(1) (sex, parentage, race, language, homeland and origin, faith, or religious or political opinions) into the general principle of equality (Article 3(1)). In its view, the prohibition of discrimination on these grounds had the purpose of excluding their use as criteria for finding that there were two different situations that, consequently, could be treated differently. In other words, the prohibition of discrimination restricted the state authorities' margin of appreciation whether there was a comparable situation. The use of the grounds listed in Article 3(1)(1) could not be justified under any circumstance, or at the utmost could be justified only under particular circumstances, in particular for reasons contained in the constitution itself (*verfassungsimmanente Gründe*).

In the third meaning, the harm lies in the use made of particular characteristics to affect the allocation of a wide range of opportunities, which may or may not reach the importance of particularly prized public goods, but where the use of those

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<sup>92</sup> According to the Constitutional Court's repeated doctrine, the assessment of proportionality should refer to the connection between the measure taken, the result and the intended purpose (TC judgments: 22/1981, of 2 July; 49/1982, of 14 July; 2/1983, of 24 January; 117/1998, of 2 June). The Constitutional Court interprets Article 14 CE following the doctrine of the European Court of Human Rights in connection with Article 14 ECHR.

<sup>93</sup> Constitutional Court's Judgment 128/1987, of 16 July.

<sup>94</sup> STC 175/2005, of July 4, 2005.

<sup>95</sup> *Eesti Vabariigi Põhiseadus Kommenteeritud väljaanne* (Constitution of Estonia with Commentaries) Teine väljaanne (Second edition), 2008, p. 143.



characteristics is unacceptable. This meaning is essentially aimed at preventing status-harms arising from discrimination on particular grounds. This is sometimes expressed as reflecting a concern with human dignity. We shall see this approach developing in the context of Article 14 ECHR (with the emphasis given to the greater need to justify distinctions on certain grounds) and also in the development of a limited anti-discrimination jurisprudence under Article 3 ECHR.

Although we have seen from the Maltese, German, and Spanish examples that several jurisdictions interpret their constitutions as also including this third conception, the most developed examples of this approach are to be found in domestic legislation and the EC directives discussed above. Indeed, EC anti-discrimination law, prohibiting discrimination on grounds of gender, race, age, sexual orientation, disability, religion, and belief, is a classic example of this third meaning of equality. The legislative approaches that single out particular grounds of discrimination as subject to scrutiny are all characterized, in contrast with those legal regimes discussed above, by the specificity and detail of the legislative provisions.

There are many common features of the EC and domestic statutory approaches and the interpretation of this legislation. All focus on promoting a version of equality defined as the absence of ‘discrimination’. All include specific and general defences and exceptions to the non-discrimination principle. Most include provisions to ensure that some forms of positive or affirmative action are not to be regarded as unlawful. All provide a remedy for the resolution of individual grievances and protection for those involved in litigation. Many have provisions specifying the nature of the burden of proof in adversarial proceedings. Some have provisions allowing associations and organizations to pursue claims for equal treatment. All provide for sanctions to be imposed against those found to have discriminated.

EC equality law has played a significant indirect role in encouraging the emergence of this relatively harmonized approach across areas covered by EC law and those covered only by domestic law. This is due to the requirement under EC law that domestic legislation in the field where a directive operates, and which is considered as implementing that directive and satisfying the Member State’s obligations to implement the directive should be interpreted ‘as far as possible’ to conform to the directive’s obligations. This has been particularly influential in the context of gender discrimination, where this approach had a significant effect in expanding the interpretation of sex discrimination legislation not covered by EC law. In addition, where domestic anti-discrimination legislation shared the same concepts, such as the concept of discrimination itself, EC approaches to the interpretation of that concept in the gender context significantly influenced the domestic interpretation of the concept in the race discrimination legislation before it was subject to the EC Race Directive, on the basis that domestic anti-discrimination legislation should be interpreted consistently across the different grounds.

## ***5.1. Grounds of discrimination subject to heightened degree of scrutiny***

### ***5.1.1. Grounds in domestic and EC legislation***

Domestic and EC legislation providing for the prohibition of discrimination on certain particular grounds covers a range of situations and activities in both the private and public spheres. In this legislation, domestic and EC law specify that particular characteristics of persons should not be used as the basis of the distribution of opportunities. Here, specific grounds of discrimination (gender, race, ethnic, etc.) are prohibited. In EC law, the idea of ‘status-harms’ first began with the prohibition of

discrimination on the basis of gender and nationality, and was broadened considerably in the new Article 13 directives.<sup>96</sup> In British domestic law, the prohibition of racial discrimination was first, followed by gender and disability, and then by religion and belief, sexual orientation, and age.

Existing domestic anti-discrimination legislation prohibits discrimination, in certain areas of activity, on a wide variety of specific grounds, including race, colour, ethnic or national origin, nationality, sex (including pregnancy), gender reassignment, being married, trade union activity, fixed-term working, part-time working, suffering under a disability, sexual orientation, religion and belief, and age. EC law now prohibits discrimination on the grounds of nationality, sex, race, disability, religion or belief, sexual orientation, and age. These are the grounds that attract heightened scrutiny under domestic and EC law. There has, however, been significant debate about the appropriate meaning of several of the key terms, such as the meaning of 'racial' and 'ethnic', 'sex' and 'disability'.

A caveat needs to be entered here regarding the higher degree of scrutiny in EC law. As was pointed out above, in relation to the general principle of equality, the Court accepts that where the Community legislature has a broad discretion and its action involves political, economic and social choices and complex assessments, the ECJ's review is not very strict.<sup>97</sup> Comparable considerations may also apply in relation to national law: in those areas where the national authorities and/or legislatures have a wide margin of discretion (e.g. social security), the test applied may be more lenient than in other areas (e.g. rules governing dismissals).<sup>98</sup>

#### 5.1.2. *Grounds subject to heightened scrutiny under ECHR*

Although, as we have seen, the approach under Article 14 ECHR is, substantially at least, one that promotes the second meaning of equality, in some respects an interpretation of Article 14 is emerging that supports the third approach to equality. The latter occurs primarily in the context of considering whether an objective justification has been established. The ECtHR requires the state in certain circumstances to present particularly convincing reasons justifying the difference in treatment in order to be acceptable. Some grounds of discrimination are considered to be particularly serious, requiring a higher degree of justification than others and this approach has also been applied by domestic courts. The ECtHR appears to apply a two-level standard of scrutiny, with differentiations based on gender and race appearing to be given such heightened scrutiny. Thus the Court has stated that the advancement of gender equality is a major goal of states that are parties to the Convention, and very weighty reasons would need to be advanced to justify a difference of treatment on grounds of sex.<sup>99</sup> Other grounds of discrimination, such as

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<sup>96</sup> By 'status-harm', we mean the type of harm that results from being associated with a group defined by a particular characteristic, such as race or gender.

<sup>97</sup> Cf. Case C-25/02 *Rinke v Ärztenkammer Hamburg* [2003] ECR I-08349 and Case C-444/93 *Megner and Sheffel v Innungskrankenkasse Vorderpfalz* [1995] ECR I-4741 (briefly discussed subsequently in Section 5.3.6).

<sup>98</sup> Cf. also the broadly formulated justifications of discrimination on grounds of age, laid down in Article 6 of Directive 2000/78. However, this did not prevent the ECJ from scrutinizing the application of this provision by a Member State in Case C-388/07 *Age Concern England v Secretary of State for Business, Enterprise and Regulatory Reform* [2009], not published yet.

<sup>99</sup> *Abdulaziz v UK* (1985) EHRR 471 at [78]. See also *Schuler-Zraggen v Switzerland* (1993) 16 EHRR 405 at [67]; *Burghartz v Switzerland* (1994) 18 EHRR 101; *Schmidt v Germany* (1994) 18 EHRR 513 at [27]; *Van Raalte v Netherlands* (1997) 24 EHRR 503 at [39]; *Wessels-Bergervoet v Netherlands* (2004) 38 EHRR 37 at [49].

religion,<sup>100</sup> nationality,<sup>101</sup> illegitimacy,<sup>102</sup> and sexual orientation<sup>103</sup> may also attract a similar high degree of justification to survive scrutiny.

Article 3 ECHR<sup>104</sup> also demonstrates that certain grounds of discrimination will be subjected to heightened scrutiny under the ECHR. The application of Article 3 to discrimination issues began in the report by the European Commission on Human Rights in *East African Asians v UK*,<sup>105</sup> in which the Commission found that discrimination based on race could amount to degrading treatment. Since then, the ECtHR has reiterated that discrimination may breach Article 3, under certain conditions.<sup>106</sup> In *Abdulaziz v UK*, although the Court held that racial discrimination could amount to a breach of Article 3, there was no violation in this case because the differences in treatment complained of (allegedly based on race) ‘did not denote any contempt or lack of respect for the personality of the applicants and that it was not designed to, and did not, humiliate or debase (...)’.<sup>107</sup>

In *Smith and Grady v UK*, although the Court was willing to extend the coverage of Article 3 to include discrimination on the basis of sexual orientation,<sup>108</sup> it held that the discrimination must attain a minimum level of severity that will be assessed taking into account all the circumstances of the case, such as the duration of the treatment and its physical or mental effects. The Court continued: ‘treatment may be considered degrading if it is such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance. Moreover, it is sufficient if the victim is humiliated in his or her own eyes.’<sup>109</sup>

## 5.2. Approaches to coverage

### 5.2.1. EC and domestic legislation

Unlike under the first and second approaches discussed in previous sections, the third approach often has a significantly different approach to coverage. Unlike under the first approach, it does not apply to all public authorities in respect of all their activities, but only to those specified in the relevant legislation. Unlike under the second approach, it does not apply as a penumbra of all major areas of rights, but (again) is limited only to those areas of activity (some of which would not be considered as involving ‘rights’ under the ECHR) specifically included in the legislation. In another respect, of course the approach taken under this third approach is considerably broader in scope, covering both public and private sector actors operating in those areas covered, whereas to a considerable extent the first and second approaches apply only to the public sector.

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<sup>100</sup> *Hoffmann v Austria* (1993) 17 EHRR 293.

<sup>101</sup> *Gaygusuz v Austria* (1997) 23 EHRR 364 (ECtHR indicated that it would require very weighty reasons to justify differential treatment based exclusively on nationality).

<sup>102</sup> *Marckx v Belgium* (1979) 2 EHRR 330; but cf. *McMichael v UK* (1995) 20 EHRR 205.

*Smith and Grady v UK* (2000) 29 EHRR 493 at [90]; *Lustig-Prean and Beckett v UK* (2000) 29 EHRR 548 at [82], but see *Fretté v France* [2003] 2 FCR 39.

<sup>104</sup> Prohibiting ‘torture or inhuman or degrading treatment or punishment’.

<sup>105</sup> (1973) 3 EHRR 76, EComHR.

<sup>106</sup> *Abdulaziz v UK* (1985) EHRR 471 at [90]–[91]; *Smith and Grady v UK* (2000) 29 EHRR 493 at [120]–[121].

<sup>107</sup> *Abdulaziz v UK* (1985) EHRR 471 at [90]–[91]. See also *Moldavan v Romania* (No. 2) (2007) 44 EHRR 16.

<sup>108</sup> *Smith and Grady v UK* (2000) 29 EHRR 493 at [121].

<sup>109</sup> *Ibid* at [120]. See also *Cyprus v Turkey* (2002) 35 EHRR 30 at [302]–[311] (Greek Cypriots in Northern Cyprus subjected to discrimination amounting to degrading treatment).

### 5.2.2. *Rationae personae*

EC and domestic anti-discrimination law has become increasingly complex as to who can be the claimant and who can be the respondent in discrimination cases. In the employment context, for example, in addition to employers, respondents can include trade unions, those who aid unlawful discrimination, those who instruct others to discriminate, and those who act as qualifying bodies. Nor is discrimination on particular grounds confined to less favourable treatment on the ground of the status of the claimant alone. The characteristic of another person with whom the claimant is associated may be a ground of less favourable treatment of the claimant, and therefore amount to discrimination.<sup>110</sup>

### 5.2.3. *Rationae materiae*

In general, the approach taken to the question of coverage has been to begin with a restricted list of activities subject to this non-discrimination principle, and gradually to expand the types of activities covered. Thus, the usual approach has often been to begin by including employment and then to add other areas such as housing, education, and goods, facilities and services. This practice is reflected in the pattern of areas included or excluded under currently applicable domestic anti-discrimination law.

The Race Directive, the Equal Treatment Directive, and the Employment Discrimination Directive each prohibit discrimination by ‘all persons, as regards both the public and private sectors, including public bodies’, in relation to employment, the conditions for access to employment, self-employment, and occupation; access to all types and to all levels of vocational guidance, vocational training, advanced vocational training, and retraining; employment and working conditions, including dismissals and pay; and membership of and involvement in an organization of workers or employers, or any other organization whose members carry on a particular profession, including the benefits provided for by such organizations. The Race Directive and the recast Equal Treatment Directive, in addition, prohibit discrimination in some other areas such as social protection, including social security and healthcare; social advantages, education, and access to and supply of goods and services.

## 5.3. *Meaning of discrimination in this third context*

One of the most important developments that is characteristic of the third approach to equality has been the development of the meaning of unlawful discrimination. This is also one of the most conceptually difficult issues involving judicial interpretation. We have seen earlier that, under the first conception of equal treatment, equality has two dimensions: treating likes alike, and treating differences differently. Failure to treat likes alike, or treating different situations the same are both breaches of the equal treatment principle, unless there are objective justifications demonstrated.

### 5.3.1 *Treating likes alike: direct discrimination*

**Direct discrimination usually corresponds with the less favourable treatment of a person on grounds of a prohibited characteristic.**

<sup>110</sup> Cf. Case C-303/06 *Coleman v Attridge Law and Steve Law* [2008] ECR I-05603.

The approach that has been taken in legislation has been to include a prohibition of 'direct' discrimination, which reflects the requirement that likes should be treated alike. A common formula is used in the domestic anti-discrimination law to describe direct discrimination: the less favourable treatment of a person on the grounds of a prohibited characteristic. The Race Directive and the Employment Discrimination Directive also prohibit direct discrimination. This 'shall be taken to occur where one person is treated less favourably than another is, has been or would be treated' on the prohibited grounds. Similarly, under the Gender Recast Directive, direct discrimination occurs '(...) where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.'

While equality under the first meaning often operates on the basis of assumptions about the 'likeness' of people, non-discrimination provisions usually make explicit the grounds or characteristics that may not in principle be used to treat people less favourably, or accord them different treatment. In other words, while in an equal treatment approach, the focus is on 'similarity' of the situations and 'difference' in treatment, from an anti-discrimination perspective the adverse treatment accorded the alleged victim is grounded on specified prohibited characteristics.

To an extent, these two approaches are sometimes blurred in the ECJ case law.<sup>111</sup> The definition of direct discrimination would seem to contribute to this confusion by making a reference to the 'comparable situation'. On the other hand, according to ECJ case law, both the principle of equality and the prohibition of discrimination require that, except where there is an objective justification, comparable situations must not be treated differently and that different situations must not be treated in the same way. The prohibition of discrimination is considered as an expression of the general principle of equality that operates upon the assumption that the groups concerned are in the same position. Where this presumption turns out not to apply, or where there is only an apparent difference in treatment, the ECJ may engage in testing the comparability.

This was, for instance, the case in *Birds Eye Walls*,<sup>112</sup> which concerned discrimination between male and female workers regarding payment of a bridging pension. Under the occupational pension scheme in question, women between the age of 60 and 65 received a smaller bridging pension than men, because they qualified for a state pension from the age of 60. At first sight, this appeared to constitute direct discrimination on grounds of gender, which would normally require examination of whether it could be justified. However, the Court adopted a different approach and observed that the principle of equal treatment, like the general principle of non-discrimination, presupposes that the men and women to whom it applies are in an identical situation. In this case, it was found that this was not the case. Because of the differences in the retirement age for men and women (65 and 60 respectively), under the state pension system, their financial circumstances were different. In other words, there was a difference in treatment of situations that were different, and so there was no question of discrimination contrary to Article 141, and no need to go further to consider whether a justification would be open in a case of direct discrimination.<sup>113</sup>

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<sup>111</sup> Examples of such blurring are: Case C-279/93, *Schumacker* [1995] ECR I-225; Case C-107/94, *Asscher* [1996] ECR I-3089; Case C-87/99, *Zurstrassen* [2000] ECR I-3337; Case C-249/97, *Gruber* [1999] ECR I-5295; and Case C-220/92, *Österreichischer Gewerkschaftsbund* [2004] ECR I-5907.

<sup>112</sup> Case C-132/92, *Birds Eye Walls* [1993] ECR I-5579.

<sup>113</sup> Cf. also Case C-342, *Gillespie* [1986] ECR I-475; and, in relation to indirect discrimination, Case C-537/07, *GomezLimon*, 16 July 2009.

### 5.3.2. Differing domestic and EC approaches to ‘treating differences differently’

**The idea that different cases should be treated differently has frequently been incorporated into anti-discrimination law in four differing ways: in the concept of ‘indirect discrimination’, in the area of ‘pregnancy discrimination’, in the context of ‘reasonable accommodation’ in disability discrimination, and in protections for ‘positive action’, more generally.**

The legislative approach taken to the requirement to treat differences differently has given rise to a set of additional approaches. Four approaches have been adopted to the problem of how to identify the criteria of difference that mean that different treatment should be accorded. These are: the development of the concept of indirect discrimination, the development of a separate category of pregnancy discrimination, the development of the concept of ‘reasonable adjustment’ in disability discrimination law, and the development of positive action as lawful in limited circumstances where it would otherwise breach the prohibition of direct discrimination.

These approaches have been seen by some commentators as pursuing ‘substantive’ as opposed to ‘formal’ equality. They have argued that ‘treating differences differently’, including through the use of these approaches is a step in the direction of a richer understanding of equality, since social, cultural, and other realities are able to be fully taken into account. So, instead of ignoring de facto differences between, for example, the position of women and men, these approaches encourage us to focus on them, and take them fully into account. In Germany, for example, by using the principle of equal rights of men and women as the yardstick for indirect discrimination, the Court is seen as having recognised the concept of substantive equality: it is not sufficient that men and women are treated equally by the letters of the law, i.e. that the law does not use sex as a criterion for differentiation. What is also necessary is de facto equality, i.e. equality in social reality. It can only be achieved when the legislator (and the Court in its scrutiny) looks at the real effects of a law on men and women.

However, these methods constitute, at least to some extent, somewhat different approaches to ‘treating differences differently’. Where indirect discrimination has been established, in practice a respondent is required to alter the discriminatory practice for all comers. In the context of pregnancy discrimination, an approach is taken concentrating on permitting the pregnant woman to be treated differently, rather than generalizing the treatment that is accorded her to everyone else. Where the absence of a ‘reasonable adjustment’ in the disability context is established, the respondent is not required to alter the approach for everyone either, but only for the person adversely affected by that practice. Under positive action, the approach is to focus on the need to modify certain requirements only for members of the disadvantaged group. In the remainder of this Report, we do not consider further the issues of pregnancy discrimination or reasonable accommodation.

### 5.3.3. Interpretation of direct discrimination: intention, comparators, and justification

We turn, now, to consider particular aspects of the meaning of discrimination, beginning first with the concept of ‘direct discrimination’. One issue that arises is the extent to which a discriminatory motive or intention is regarded as necessary in order to establish that a person is to be regarded as discriminating. In the Czech Republic, for example, in a case concerning different pensionable age for men and women, the facts were that the women's pensionable age was reduced if a woman brings up at

least one child and was progressively reduced according to the number of children the women bring up. This reduction of pensionable age could not be claimed by men, not even in a case where the man brought up his children alone, for example after divorce or after the death of the mother. The Constitutional Court in this issue stated that this measure ‘follows a legitimate objective. The differentiation based on sex and number of children brought up does not represent a breach of the principle of equality and *is not an expression of the bad will of the legislator.*’ In contrast, in the United Kingdom, in the *James* case, the highest court held that discrimination on the basis of pensionable age was directly discriminatory, where pension ages were different for men and women, irrespective of the intention of the body alleged to be discriminating.

A second important issue in the interpretation of direct discrimination is the problem of comparison. The role of comparators is an issue on which there is a degree of uncertainty. In Estonia, the definition of direct discrimination under the Gender Equality Act and Equal Treatment Act means that a person is given less favourable treatment on the grounds listed than another person is, has been, or would be treated in a comparable situation. The notion of a ‘comparator’ was adopted directly from EC law and did not derive from the constitutional non-discrimination clause. However, it is unclear so far what the requirement of the comparator means in practice, as there has been no relevant case law.

The third issue that appears to distinguish countries’ approaches to the meaning of direct discrimination is whether direct discrimination is able to be justified under a general justification provision. Under the EC Directives, direct discrimination is generally prohibited, unless a specific exception applies. In other words, it is generally the case that there is no room for a general justification argument to be made of the type that exists, for example, in cases of indirect discrimination. General justifications of this type are permissible in EC law in the context of age discrimination. In some other areas, the position is unclear. It is not clear, for example, how far direct discrimination on grounds of nationality is permissible.<sup>114</sup> National legislation generally follows the approach of specifying the particular circumstances in which direct discrimination is permitted, and several specifically prohibit general justification defences in direct discrimination. In Cyprus, the Law on Equal Treatment for Men and Women in Employment and Vocational Training<sup>115</sup> also provides that ‘direct discrimination as opposed to indirect discrimination, is not required to be justified’. The Ombudsman has underlined that ‘direct discrimination’ as opposed to ‘indirect discrimination’ is not subject to justification.<sup>116</sup>

In Malta, the *Equal Treatment in Employment Regulations*, entirely devoted to implementing the relevant EC Directives, define the principle of ‘equal treatment’ as the absence of direct and indirect ‘discriminatory treatment’, and define ‘discriminatory treatment’ as: ‘(...) any distinction, exclusion, restriction or difference in treatment, whether direct or indirect, on any of the grounds mentioned in regulation 1(3) which is not justifiable in a democratic society (...)’.<sup>117</sup> This appears to allow the possibility of justifying direct discrimination. However, in the Case of *Victoria Cassar v The Malta Maritime Authority*, the Constitutional Court held that

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<sup>114</sup> Cf. Case C-73/07, *Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française* [2009], pending, at [128] ff. On the somewhat different approach in the context of equal pay, see below in Section 5.3.4.

<sup>115</sup> Law No. 205(I)/2002 Directive 76/207/EEC as amended by Laws No. 191(I)/2004, 40(I)/2006, 176(I)/2007, 39(I)/2009 Directive 2006/54/EC.

<sup>116</sup> File No. A.K.I 4/2007. Complaint for dismissal of a temporary female civil servant.

<sup>117</sup> *Ibid.* Article 2 (1).

discrimination is found when comparable situations or comparable persons are treated differently, and there is no objective and reasonable justification for the difference in treatment. However, such justification shall not hold *if it is based entirely or mainly upon considerations of race, place of origin, political opinion or sex*, or where such measures are not proportionate to the objective justification.

In other countries, the issue is, or has been, subject to considerable debate. In Belgium, for example, the main conceptual clash between EC and Belgian domestic case law and academic commentary concerned the possibility or impossibility of offering objective justifications for direct discrimination. An uneasy compromise was achieved in the three Acts of 10 May 2007: when the disputed matter falls within the scope of EC law, any ‘direct distinction’ is necessarily a ‘direct discrimination’ and may not be justified. In Finland, the issue was also debated. The Parliament Constitutional Committee noted that the proposed formulation of the definition of discrimination in a proposed Non-Discrimination Act<sup>118</sup> only permitted indirect discrimination to be justified discrimination, and considered it problematic that acceptable reasons could not be offered for direct discrimination. The Constitutional Committee required that the definition be changed and justification allowed in both cases. This was because the concept of discrimination in Finnish constitutional law permitted the justification of direct discrimination. The Parliament Employment and Equality Committee stated, however, that the EC Directives to be implemented only allowed an open justification of indirect discrimination (as opposed to specific more narrowly tailored exceptions). The Employment and Equality Committee did not consider it necessary to change the definition of discrimination in the Government Bill,<sup>119</sup> and the Act was enacted with the definition intact. The Parliament added a statement, however, that it expected the Government to prepare a reform bill amending the Non-Discrimination Act so as to be ‘based on the Finnish system of fundamental rights’ such that it ‘brings similar remedies and sanctions to all prohibited grounds of discrimination’. Also in its report on an amendment of the Act on Equality in 2004, the Constitutional Committee noted that direct discrimination can be justified from the point of view of the Constitution.<sup>120</sup>

#### 5.3.4. Equal pay

Equal pay legislation often does not use the terms direct and indirect discrimination and a specialized conceptual scheme is established. In Community law, the main norm laid down in Article 141(1) of the Treaty is the principle that men and women should receive equal pay for equal work. The latter includes work of equal value. However, 141(2) also refers to ‘equal pay without discrimination based on sex.’ The legislation in Member States often provides for equal pay between men and women by giving a woman<sup>121</sup> the right to equality in the terms of her contract of employment where she is employed on like work to that of a man, or work rated as equivalent to that of a man, or work of equal value to that of a man. Any term of the woman’s contract that is less favourable to her than the same term in the man’s contract is improved. The concept of ‘equal pay for work of equal value’ requires an equal pay comparison between a man and a woman even where they are not doing the same, or similar jobs, but where they are said to be doing work of equal value, as measured under an analytical job-evaluation approach. This has allowed equal pay litigation to

<sup>118</sup> PeVL 10/2003 vp – HE 44/2003 vp.

<sup>119</sup> TyVM 7/2003 vp - HE 44/2003 vp.

<sup>120</sup> PeVL 40/2004.

<sup>121</sup> The legislation applies equally to men, allowing equivalent comparisons between men and women.



tackle such notorious problems as the under-valuation of women in female-dominated workforces. In Iceland, in a landmark case in 2004, a woman who was head of department within the institute of social welfare claimed that her job was of equal value as that of a chief technician working for the same municipality. According to a job evaluation scheme conducted within the municipality including these two positions they got the same grade. The Supreme Court held that the local authorities had not succeeded in proving that the woman's pay was not different from those holding similar positions within the municipality. In the Court's view it had been well substantiated that the two positions were comparable in essence and form and that the woman had been discriminated against in the meaning of the GEA.

In the majority of equal pay cases, indeed, the central question is whether the work performed by a female worker is 'equal', or of 'equal value', to work performed by a male worker, and whether there are differences in the salary received by male and female workers. However, such comparisons are not always necessary. The ECJ has also held that in some cases, pay discrimination may be detected by legal analysis as such, without making comparisons, because the discrimination may arise directly from legislative provisions, collective bargaining agreements, occupational pension schemes,<sup>122</sup> and general terms and conditions of employment.<sup>123</sup> Like in national law, Community law has not proven to be sufficiently effective in challenging differences in pay due to market segregation. On the one hand, under Community law, the prohibition of pay discrimination does not require the existence of an actual comparator; a mere hypothetical comparison is sufficient to meet the legislative standard. This is important, because it is not always possible or easy to find an actual comparator. On the other hand, the ECJ has also held that the alleged discrimination must have its origin in one single source.<sup>124</sup> Such a requirement limits the use of hypothetical comparisons, for instance comparisons across sectors and undertakings, not only in relation to pay, but also, for instance, in relation to labour conditions.

#### 5.3.5. Article 14 ECHR and treating differences differently

The difficulties with only regarding discrimination as unlawful if it is direct discrimination has (slowly) come to be recognised by the European Court of Human Rights. In our consideration of Article 14 ECHR previously, we considered situations where complainants argue that they have been treated differently from those similarly situated. What of the situation where the complainant argues that he or she has been treated the same, but he or she should have been treated differently? It is most often in the context of what we have termed 'status-harms' that the concept of equality requiring differences to be treated differently commonly arises in the Article 14 context.

The ECtHR has appeared to take somewhat different approaches over the course of its history, with two (arguably inconsistent) strands of case law being apparent. In one strand of the jurisprudence, in *Abdulaziz*,<sup>125</sup> the ECtHR rejected claims of discrimination based on an argument that immigration restrictions that had the effect of disadvantaging one racial group more than another amounted to racial

<sup>122</sup> Note that pay includes occupational pensions.

<sup>123</sup> Case C-43/75 *Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECR 00455, Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-01889.

<sup>124</sup> Case C-320/00 *Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd* [2002] ECR I-07325; Case C-256/01 *Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment* [2004] ECR I-00873.

<sup>125</sup> *Abdulaziz v UK* (1985) EHRR 471.

discrimination. The Court appears to have adopted an approach to the meaning of discrimination under Article 14 that concentrated on the intention of the state, rather than the effect of the policy. On the basis of this case, some commentators concluded that there was no claim available for indirect discrimination under Article 14.<sup>126</sup>

However, in a more recent strand of the case law, beginning in *Thlimmenos v Greece*,<sup>127</sup> an effects test of sorts has emerged. In that case, the applicant had been prevented from becoming a chartered accountant because he had been convicted of the offence of refusing to wear a military uniform. His refusal had been on the ground that he was a Jehovah's Witness. He complained that the law excluding persons convicted of such offences from appointment as chartered accountants did not distinguish between persons convicted as a result of their religious beliefs and persons convicted on other grounds. The ECtHR held that Article 14 was engaged and that Greece violated his right not to be discriminated against in the enjoyment of his right under Article 9 ECHR by failing to introduce appropriate exceptions to the rule barring persons convicted of a felony from the profession of chartered accountants. After noting that '[t]he court has so far considered that the right under art 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', the Court went on to hold 'that this is not the only facet of the prohibition of discrimination in art 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 full implications of this aspect of the case have yet to be fully explored; so far, few complaints based on this approach have been accepted by the Court.<sup>128</sup> However, its legitimacy has been reiterated.<sup>129</sup>

The ECtHR considers that the concept of discrimination as outlined in *Thlimmenos* encompasses 'indirect discrimination', and presumably with it the more technical aspects of 'comparators' and 'differential impact'.<sup>130</sup> Domestic courts have also accepted that Article 14 includes a prohibition of indirect discrimination. There has, however, been little discussion of the precise application of indirect discrimination within Article 14 principles and there is still caution as to how this is to be applied. It is not at all clear that a test exactly like that required by the other domestic and EC law will be applied.

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<sup>126</sup> Sandra Fredman, *Discrimination Law* (OUP, 2002), at 108, 116-8 thought not, citing *Abdulaziz*.

<sup>127</sup> (2001) 31 EHRR 15.

<sup>128</sup> See *Coster v UK* (2001) 33 EHRR 20; *Chapman v UK* (2001) 33 EHRR 18; *Beard v UK* (2001) 33 EHRR 19.

<sup>129</sup> *Hoogendijk v Netherlands* (2005) 40 EHRR SE22; *DH v Czech Republic* (2008) 47 EHRR 3; cf. the joint dissenting opinion of Judges Türmen, Tsatsa-Nikolovska, Spielmann and Ziemele in *Evans v the United Kingdom* (2008) 46 EHRR 34. But see *Fretté v France* [2003] 2 FCR 39, partly concurring opinion of Judge Costa, joined by Judges Jungwiert and Traja: 'although in the *Thlimmenos* case, in which I sat, the Court reached a unanimous decision, I do wonder whether it may have gone a little far on that occasion, and I note that the judgment was delivered before the opening for signature of Protocol No. 12—which I view as a key factor'.

<sup>130</sup> *Hoogendijk v Netherlands* (2005) 40 EHRR SE22 at [2]; *DH v Czech Republic* (2008) 47 EHRR 3 at [184]. See also *Jordan v United Kingdom* (2003) 37 EHRR 2 at [154].

### 5.3.6. Indirect discrimination in the EC directives and domestic legislation

**Indirect discrimination prohibits practices that formally apply to all from having the effect of disadvantaging individuals of particular protected groups, unless those practices can be shown to be *objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.***

The Race, Equal Treatment, and Employment Discrimination Directives all prohibit indirect discrimination. This occurs ‘where an apparently neutral provision, criterion or practice would put persons (of racial or ethnic origin) (having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation) at a particular disadvantage compared with other persons, unless that provision criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (...)’. The Gender Equality Directive (recast) defines indirect discrimination in the same words but refers to the sex of the person concerned. Indirect discrimination occurs ‘where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary. Domestic legislation has largely adopted the EC formula.

The adoption of the concept of indirect discrimination has three important consequences. First, it shifts attention from the perpetrator to the victim, that is, it focuses attention primarily on the individual who alleges discrimination rather than on the person alleged to be discriminating. Second, it reduces the opportunities for techniques to be adopted to avoid successful challenge if the respondent was engaged in direct discrimination; this is particularly the case where the approach taken to the interpretation of direct discrimination is one that concentrates on the intentions or motives of the person alleged to be directly discriminating. The concept of indirect discrimination renders this interpretation less likely to prevent a finding of discrimination because even if the allegation of direct discrimination is unsuccessful, an allegation of indirect discrimination may succeed. Third, it shifts attention from the victim conceived as an individual to the victim conceived as part of a larger social group of which he or she is a member; claims of direct discrimination are individualistic to a greater degree than claims of indirect discrimination. Legally, these developments meant that an ‘objective’ view had to be taken by the courts and tribunals as to what the relevant social group consisted of, rather than being satisfied to rely on the perpetrator’s subjective view of the social group which was all that was necessary in the context of direct discrimination.

Like in the case of direct discrimination, indirect discrimination may involve a comparative. In the context of indirect discrimination, the comparison is between the effect of the contested practice on two (or more) objectively defined social groups. In Slovakia, the definition in Article 2a(3) of the Antidiscrimination Act provides that ‘Indirect discrimination is an outwardly neutral regulation, decision, order or practice that which favours one person over another person; if such regulation, decision, order or practice is objectively justified by enforcement of a legitimate interest and is adequate to and required for the achievement of such interest, it does not constitute indirect discrimination.’ The definition does not include the group principle contained in the EC Directives and replaces it with an individual principle (an outwardly neutral regulation, ruling, order or practice which favours *one person over another person*). Where, however, a group-based approach to comparison is adopted, the issue of

comparators becomes a central issue, particularly in defining the group adversely affected and the comparator group less adversely affected. What constitutes the relevant comparator groups gives rise to considerable dispute.

A final, crucial, contrast between direct and indirect discrimination is the approach taken to justification. In the context of direct discrimination, as was already discussed above (Section 5.3.3), the approach taken in drafting legislation prohibiting direct discrimination, rather than allowing a general justification defence, is usually to specify as precisely as possible the particular situations in which direct discrimination is not unlawful. In indirect discrimination, however, the possible justifications for adopting a condition or requirement that has an adverse effect on particular groups are next to impossible to list comprehensively. The alternative approach, then, has been to draft a general justification provision allowing the user of the challenged practice to show that it was nevertheless 'justified' or a proportionate means of achieving a legitimate aim.

Where a differential impact is established, then it is for the person seeking to use such a policy or practice to justify it on acceptable grounds, and general assertions of the contested policy's utility will not be enough. So, for example, there has been much litigation contesting differential treatment between part-time and full-time workers, in many cases leading to decisions striking down adverse treatment of part-time workers as indirectly discriminatory against women because in practice part-time workers in several Member States are mostly women.<sup>131</sup> Because of the breadth of coverage of EC law, the approach now applicable in domestic law allows the concept of indirect discrimination to be used to contest legislative as well as employer-originated policies,<sup>132</sup> and indirect discrimination deriving from provisions in collective agreements.<sup>133</sup> The courts allowed arguments to be developed justifying unequal pay, or policies with an adverse impact, on the basis that one group was better organized than another, or on the basis that one group was more competitive in the market place than another.<sup>134</sup>

On other occasions, the courts have held that a particular trend of decision should be limited to prevent it interfering in a sphere of social policy it considers to be legitimately left to government. We can see examples of this in some of the decisions upholding 'justifications' advanced for social security legislation alleged to be indirectly discriminatory.<sup>135</sup> In *Megner*<sup>136</sup> the Court observed that, in the current state

<sup>131</sup> See Case 170/84 *Bilka-Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 1607; Case C-243/95 *Hill v Revenue Commissioners* [1998] ECR I-3739; Case C-1/95 *Gerster v Freistaat Bayern* [1997] ECR I-5253; Case C-100/95 *Kording v Senator Für Finanze* [1997] ECR I-5289; Case C-309/97 *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v Wiener Gebietskrankenkasse* [1999] ECR I-2865.

<sup>132</sup> See Case C-355/93 *Enderby v Frenchay Health Authority and Secretary of State for Health* [1993] ECR 673; Case C-400/93 *Dansk Industri* [1995] ECR I-1275.

<sup>133</sup> See Case C-317/93 *Nolte v Landesversicherungsanstalt Hannover* [1995] ECR I-4625; Case C-444/93 *Megner and Sheffel v Innungskrankenkasse Vorderpfalz* [1995] ECR I-4741; Case C-8/94 *Laperre v Bestuurcommissie Brevepsazken in de Provincie Zuid-Holland* [1996] ECR I-273; Case C-280/94 *Van Damme and Ozturk* [1996] ECR I-625; Case C-167/97 *Seymour-Smith and Perez* [1996] ECR I-623.

<sup>134</sup> Case 96/80 *Jenkins v Kingsgate (Clothing Productions) Ltd* [1981] ECR 911; Case 170/84 *Bilka-Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 1607; Case C-355/93 *Enderby v Frenchay Health Authority and Secretary of State for Health* [1993] ECR 673.

<sup>135</sup> Case C-317/93 *Nolte v Landesversicherungsanstalt Hannover* [1995] ECR I-4625; Case C-444/93 *Megner and Sheffel v Innungskrankenkasse Vorderpfalz* [1995] ECR I-4741; Case C-8/94 *Laperre v Bestuurcommissie Brevepsazken in de Provincie Zuid-Holland* [1996] ECR I-273; Case C-280/94 *Van Damme and Ozturk* [1996] ECR I-625.

<sup>136</sup> *Ibid.*

of EC law, social policy is a matter for the Member States. ‘Consequently, it is for the Member States to choose the measures capable of achieving the aim of their social and employment policy. In exercising that competence, the Member States have a broad margin of discretion.’<sup>137</sup> The Court continued: ‘It should be noted that the social and employment policy aim relied on by the German Government is objectively unrelated to any discrimination on grounds of sex and that, in exercising its competence, the national legislature was reasonably entitled to consider that the legislation in question was necessary in order to achieve that aim.’

Domestic courts have differed significantly on the extent to which they will accept justifications put forward in the context of adjudicating claims of indirect discrimination. In Austria, for example, the Supreme Court<sup>138</sup> held that where a particular legislative provision affected men significantly more adversely than women and therefore constituted a form of indirect discrimination of male insured persons, no objective justification was established, as the aim of the legislator to save the federal budget could not justify discrimination on grounds of gender. ...<sup>139</sup> In Hungary, on the other hand, the Supreme Court turned down the claim of two visually impaired persons who claimed discrimination by their bank, for not being able to use their cash card in machines accessible to the visually impaired. The Bank’s defence was that modifying the cash withdrawal machines would be too expensive. The Supreme Court turned the claim down. The Court classified the case as one of alleged indirect discrimination, finding that the cash withdrawal machines without any aid were ‘neutral’ conditions of taking the services. The disproportionate disadvantage of visually hindered clients was acknowledged but the financial burden of correcting the situation was found sufficient as justification.<sup>140</sup>

In the context of what can constitute an acceptable justification, the terminology that is used to describe the idea of justification in the drafting of the legislation may be particularly important in certain countries. In Denmark, for example, under the directives ‘indirect discrimination’ may be justified by a *legitimate* (in the Danish version of the directives *legitim*) aim if the means of achieving that aim are appropriate and necessary. There are, however, two different definitions of ‘indirect discrimination’ in Danish equality legislation: one in the Equal Treatment Act and the Equal Pay Act, where it deviates from the underlying directives by using the word *saglig* [sound and proper] instead of *legitim* [legitimate], and a different one in the Equality Act using the word *legitim* [legitimate] in accordance with the underlying directive. Under Danish labour law, working conditions will normally be considered *saglige* [sound and proper] if they result from collective bargaining and can be seen as an expression of what the labour market organisations on both sides regard as reasonable. ‘Legitimate aim’ in the Directive is an EC law concept which does not vary according to what the parties to collective agreements find acceptable. The use of the Danish word *saglig* [sound and proper] instead of *legitim* [legitimate] leaves the impression that the parties to collective agreements have freedom to decide what is legitimate.

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<sup>137</sup> On the margin of discretion and the consequences it may have for deciding whether discrimination has occurred, see above at 3.3, 4.3, and 5.1.1.

<sup>138</sup> *Judgment* 28 June 2001; 10ObS43/01y; 10ObS150/01h; 10ObS64/04s.

<sup>139</sup> *Supreme Court, Judgment*, 18 February 2003 10 ObS 18/03z.

<sup>140</sup> Pfv.IV.21.144/2008/7, <http://www.birosag.hu/engine.aspx?page=anonim>, last accessed 24 October 2009.

#### 5.4. Positive action and unlawful discrimination

**Positive action measures include measures attempting to increase the participation of particular groups defined in group terms, such as race, gender, or disability, in those contexts in which those groups are regarded as under-represented.**

##### 5.4.1. EC law

The main EC anti-discrimination directives provide that the principle of equal treatment shall not prevent a Member State from taking specific measures ‘to prevent or compensate for disadvantages linked to [the grounds covered by the directives]’. The objective of permitting these measures is ‘ensuring full equality’. The ECJ has also recognized that to achieve equality of opportunity between women and men it will be necessary on occasion to go beyond the eradication of discrimination, and that positive action may be appropriate even where it results in the preferential treatment of the formerly disadvantaged group. Crucially, the ECJ seems to accept the importance of permitting Member States the discretion to take positive action to redress the societal discrimination which women (in particular) face, in order to lead to genuine equality of opportunity in the future, although the exact parameters of when this is permissible and within what constraints are the subject of continuing consideration by the Court.<sup>141</sup>

Initially, the ECJ started to treat positive action and the provisions at stake as an exception to the prohibition of discrimination, rather than as a justified form of differentiated treatment, and it interpreted the relevant provisions quite strictly in the *Kalanke* case.<sup>142</sup> Gradually, however, the ECJ softened its position. In *Lommers*, for instance, the ECJ did not refer to the principle that derogations to an individual right should be interpreted strictly. Instead, it held that ‘... in determining the scope of any derogation from an individual right ... due regard must be had to the principle of proportionality, which requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued. In two recent cases, the ECJ considered whether national provisions that differentiated between male and female workers as regards pensionable age and minimum length of service infringed the principle of equal treatment. The ECJ made clear that such differences cannot be justified as a form of positive action; the measures in issue could not be considered as measures that contribute to helping women conduct their professional life on an equal footing with men.<sup>143</sup>

##### 5.4.2. Positive action in domestic law

There is a wide variety of different provisions addressing the relationship between the anti-discrimination principle and ‘positive action’ of various types, with the

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<sup>141</sup> Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051; Case C-409/95 *Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363; Case C-158/97 *Badeck* [2000] ECR I-1875; Case C-407/98 *Abrahamsson v Fogelqvist* [2000] ECR I-5539; Case C-476/99 *Lommers v Minister van Landbouw Natuurbeheer en Visserij* [2002] ECR I-2891; *Briheche v Ministri de l’Interieur*, Case C-319/03, [2004] ECR I-8807; *Griesmar v Ministre de l’Economie*, Case C-366/99, [2001] ECR I-9383.

<sup>142</sup> Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051.

<sup>143</sup> Case C-559/07, *Commission of the European Communities v. Hellenic Republic* [2009]; Case C-46/07, *Commission of the European Communities v. Italy* [2008].

overwhelming majority of states taking the opportunity provided by the EC Directives to introduce an exception of certain types of positive action which would otherwise constitute unlawful discrimination.

In Austria, Paragraph 8 of the Equal Treatment Act OJ I 66/2004 states that measures aimed at the promotion of the de-facto equality between women and men do not have to be regarded as sex-related discrimination. Due to a recent amendment of this Act (OJ I 98/2008) this authorisation has been extended to all areas of the labour market as well as the field of goods and services.

In Cyprus, the Equal Treatment in Employment and Occupation Law 2004<sup>144</sup> allows for more favourable treatment in employment aiming at the prevention and/or balancing of disadvantages on the grounds of race or ethnic origin, religion or belief, age, or sexual orientation and covers the issues of positive actions. Further, the Equal Treatment between Men and Women in the Access to and Supply of Goods and Services Law,<sup>145</sup> implementing Directive 2004/113/EC, permits positive action in order to provide equality between the sexes.

In Finland, the main provision that defines discrimination on the ground of gender is Section 7 of the Act on Equality between Women and Men.<sup>146</sup> The definition under Section 7 is to be read in conjunction with Section 9, which contains exceptions to the prohibition. The Section provides that ‘the following shall not be deemed to constitute discrimination based on gender (...) temporary, special actions based on a plan and which are for the purpose of promoting effective gender equality and are aimed at implementing the objectives of this Act.’

In Greece, the most comprehensive piece of gender equality legislation, Act 3488/2006 contains Article 4(4), which states, in line with Article 116(2) of the Constitution, that positive measures do not constitute discrimination, and which does not allow exceptions to the principle of equal treatment.

In Hungary, in compliance with the constitutional concept of equality, which is restricted to non-discrimination, Act CXXV of 2003 on ‘Equal treatment and the promotion of equal opportunity’ provides that the promotion of equal opportunity is a defence for differentiation if it is aimed at the ‘elimination of inequality of opportunities of a group based on objective assessment’.<sup>147</sup> The differentiation has to be provided either by a legal provision (an Act of the Parliament, or, on the basis of authorization by an Act, in a governmental decree or collective agreement) or by the constitution of a political party when the action taken is related to the election of individuals to leading organs or the nomination of election candidates. A further precondition is that there cannot be unconditional preference and the preferential treatment cannot exclude the consideration of individual aspects.<sup>148</sup>

In Malta, specific provision is made in the relevant laws for ‘discriminatory’ measures that constitute positive action for the purpose of achieving substantive equality for men and women.<sup>149</sup> In Poland, Article 18<sup>3b</sup> (3) of the Labour Code states explicitly that ‘does not infringe the principle of equal treatment in employment any action undertaken during limited time having for the objective the equalization of opportunities for all or only a considerable number of employees belonging to the group formed on the basis of one or more grounds listed in Article 18<sup>3a</sup> (1) of the

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<sup>144</sup> Law No. 58(I)/2004 as amended by Law No. 50(I)/2007 and Law 59(I)/2004.

<sup>145</sup> Law No. 18(I)/2008.

<sup>146</sup> As amended by Act 232/2005.

<sup>147</sup> Article 11(1).

<sup>148</sup> Article 11.

<sup>149</sup> Article 2 (4)(b) of the Equality for Men and Women Act, Chapter 456 of the Laws of Malta.

Labour Code, aimed at diminishing the factual inequalities in the field described in this provision.’

There have also been several court decisions interpreting domestic provisions relating to the extent to which positive action may be undertaken. So, for example, in Bulgaria the Constitutional Court<sup>150</sup> accepted that granting some privileges to some vulnerable social groups was legitimate, when such privileges were socially necessary and justified, provided that the principle of equality had priority. This interpretation can be seen as justifying the adoption of affirmative action more generally. A potential problem, however, is that this ruling focuses only on socially vulnerable groups and the need for affirmative action for achieving gender equality is not necessarily related to the kind of vulnerability envisaged in this decision. In another decision, concerning gender quotas in university, the Court has held that affirming by law the principle of tolerance which is at the basis of recognizing equal opportunities for realization in society, presupposes, under certain conditions, that the opportunities of the more represented sex may be limited, when this is justified by the objective of the law.

The operation of positive action in the context of higher education was also the context for a recent Swedish decision. In a judgment issued on 21 December 2006 the Swedish Supreme Court held that the rules of admission to university studies in law at one of Sweden’s universities constituted discrimination on the ground of ethnic origin. The rules of admission at issue – which had been adopted by the university on a trial basis in order to increase the ethnic and social diversity among its law students – reserved ten percent of the available student places for students with both parents born outside Sweden. Two applicants who had not been admitted to the study of law at the university, but who would have been admitted if the rules had not provided for more favourable treatment of persons with a non-Swedish background, brought an action for damages against the Swedish State and asserted that they had been the victims of discrimination on the basis of ethnic origin. The Swedish State contested the claim and asserted, inter alia, that the less favourable treatment accorded to the two unsuccessful applicants was justified by the interest sought to be achieved by the relevant rules and thus fell under an explicit exception in the applicable Act.<sup>151</sup>

In its judgment, the Supreme Court<sup>152</sup> stated that the assessment of whether the type of positive action involved fell within the ambit of the relevant exception should take as its point of departure that any significant exception from such an important principle should be clearly set out in the relevant Act and be restrictively construed. In the Supreme Court’s view, the relevant provision in the Equal Treatment of Students at Universities Act could only be given the construction asserted by the State if it was called for by the Act’s connection with other parts of the non-discrimination legislation, or if it gained clear support from the Act’s *travaux préparatoires*. As no such support existed, the Supreme Court held that the relevant exception did not permit more favourable treatment on the ground of ethnic origin in situations where applicants had different qualifications. The Supreme Court accordingly concluded that the two claimants had been subjected to discrimination based on ethnic origin and awarded them damages in the amount of 75,000 Swedish kronor (approximately 8 000 Euro) each.

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<sup>150</sup> Ruling No. 14 on Const. case No. 19.

<sup>151</sup> Section 7, Sub-Section 2 in the Equal Treatment of Students at Universities Act.

<sup>152</sup> Supreme Court, 21 December 2006, Case no. T 400-06.



## 6. Meanings of equality and non-discrimination IV: equality as positive duties to promote equality of opportunity and de facto equality

**In the fourth meaning of equality, certain public authorities (and some private actors) are placed under a duty actively to take steps to promote greater equality of opportunity (the legal meaning of which are yet to be fully articulated) for particular groups. In that sense, it is a further development of the third ('status-based') meaning. However, the concept of 'equality of opportunity' goes beyond any of the concepts of discrimination characteristic of the previous meanings, and the duty shifts from being essentially negative, to become a positive duty. This positive duty may include a duty to engage in positive action, unlike under the third meaning where it is often permitted to engage in positive action but not required.**

Under the fourth meaning of equality and non-discrimination, those to whom this duty applies are under a duty to do more than ensure the absence of discrimination; the body must also act positively to promote equality of opportunity between different groups. So too, in some contexts, the obligation to take such action extends well beyond the traditional areas of employment, education, and service provision to extend throughout all of the body's policy-making and activities.

### 6.1. EC obligation to promote gender equality

Barnard rightly observes that the gender, race and framework directives 'do not focus on the achievement of equality in the broader, more results-oriented, redistributive sense'.<sup>153</sup> However, there is some evidence of the emergence of the fourth meaning of equality in EC law. Thus, for example, we have seen that Articles 2 and 3(2) EC impose the objective of promoting equality between men and women in the Community, with the latter providing that '[i]n all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to provide equality, between men and women.'<sup>154</sup> Advocate General Stix-Hackl in *Dory* has interpreted this as imposing an obligation on the Community actively to promote equality between men and women.<sup>155</sup> It remains to be seen how far this interpretation presages the development of a more fully worked out fourth meaning of equality in EC law (at least with regard to women's equality).<sup>156</sup>

### 6.2. ECHR and positive obligations

There is a positive obligation on Member States, arising from Article 14 ECHR, to take action going beyond addressing discrimination, but the scope of this obligation remains uncertain. In *Thlimmenos v Greece*<sup>157</sup> the Court considered that Article 14 encompassed 'the right ... not to be discriminated against in the enjoyment of the rights guaranteed under the Convention ... when States treat differently persons in

<sup>153</sup> Catherine Barnard, *The Changing Scope of the Fundamental Principle of Equality?* (2001) 46 McGill LJ 955, 976.

<sup>154</sup> Emphasis added. See also Article 23 of the EU Charter of Fundamental Rights.

<sup>155</sup> Case C-186/01 *Dory v Germany* [2003] ECR I-2479 Opinion, paragraph 102.

<sup>156</sup> See further, Revised Equal Treatment Directive, Directive 2002/73/EC, OJ 2002 L 269/15, Article 1(a) and 4th recital of Preamble. For further discussion, see Christa Tobler, *Indirect Discrimination* (Intersentia, 2005), pp. 33–34; Sandra Fredman, 'Changing the norm: Positive duties in equal treatment legislation' (2005) 12 Maastricht Journal of European and Comparative Law 369.

<sup>157</sup> [2000] ECHR 34369/97 at paragraph 44.

analogous situations without providing an objective and reasonable justification.’ The court also considered that Article 14 is violated ‘when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.’ In *Stec v UK*, the Court went somewhat further, stating that ‘in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the article.’<sup>158</sup> This point was specifically approved in *DH and others v Czech Republic*.<sup>159</sup> Even though the applicants’ allegation in that case was ‘not that they were in a different situation from non-Roma children that called for different treatment or that the respondent State had failed to take affirmative action to correct factual inequalities or differences between them,’<sup>160</sup> the Court appeared to envisage that this was a possible claim under Article 14.

The implications of this approach are unclear. Thus far, the approach has had most effect in cases concerning Roma (or ‘Gypsies’). In *Chapman v United Kingdom*<sup>161</sup> the Court considered that ‘[T]he vulnerable position of gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in arriving at the decisions in particular cases. To this extent there is thus a positive obligation imposed on the contracting states by virtue of art 8 to facilitate the gipsy way of life.’ So too, in *DH*, the Court considered that ‘the vulnerable position of Roma/Gypsies means that special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases.’ It also reiterated the view of the Court in *Chapman v UK*<sup>162</sup> that ‘there could be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.’<sup>163</sup>

### **6.3. Domestic legislation and positive equality duties on public bodies**

Putting aside the development of positive duties in EC law and under the ECHR, considered above, and the issue of reasonable accommodation and accessibility duties (these are considered below), positive duties are primarily placed on national public bodies either as a result of a constitutional provision or as a result of by domestic legislation. These aim at achieving some form of substantive equality.

There is, however, a noticeable difference emerging between the former socialist countries of Central Europe, and the states of Western Europe. It seems relatively clear that the former are considerably less likely to adopt the fourth conception of equality than the latter. The explanation for this difference seems to lie in the adoption of (and the disillusionment with) the substantive conception of equality that was adopted by the former socialist states. Thus in Hungary, for example, prior to the political changes, equality was promulgated as a notion of ‘social equality’, overtly declaring its compensatory character on behalf of past ‘oppressed’ classes. It was

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<sup>158</sup> [2006] ECHR 65731/01 at paragraph 51.

<sup>159</sup> App no. 57325/00, [2007] ECHR 57325/00 (ECtHR Grand Chamber), paragraph 175.

<sup>160</sup> Paragraph 183.

<sup>161</sup> 10 BHRC 48, (ECtHR Grand Chamber), paragraph 96.

<sup>162</sup> [2001] ECHR 27238/95 at paragraph 96. See also *Connors v UK* [2004] ECHR 66746/01 at [84], 27 May 2004).

<sup>163</sup> *DH*, paragraph 181.

carried out through a system of open discrimination, privileges and quotas on class and political ground. Women were also put into positions based on quota considerations and were also entitled to numerous employment privileges under the label of ‘balancing their *de facto* inequality by legal inequality’. This system frequently promoted less qualified (or non-qualified) persons to educational or job opportunities and deeply discredited the idea of ‘substantive equality’ and positive measures. The remainder of this section, therefore, discusses only countries that were not previous socialist countries.

### 6.3.1. *Constitutional and legislative requirements*

In Austria, a new paragraph was added to Article 7 of the Federal Constitution of 1920 in 1998. This reads as follows: ‘The federal state, the regions and the communities acknowledge the principle of de-facto equality of man and woman. Measures aimed at the promotion of de facto equality between women and men in particular such which are aimed at the elimination of existing inequalities are admissible.’ This paragraph was added to the relevant provisions after political discussion on the admissibility of quotas and other measures of affirmative action in favour of women that was raised by the decision of the European Court of Justice in the *Kalanke* case and other cases discussed above. The content and wording of the paragraph was influenced by Articles 1 to 4 of the UN Convention on the Elimination of all forms of discrimination of women (CEDAW), which in Austria was adopted on level of constitutional law, and by Directive 76/207/EC. In 2008 the Federal Constitution was amended further by a paragraph under which the federal state, the regions and the communities are required to aim to achieve de-facto equality between women and men when preparing their budgets. This new principle was implemented by the Act on the Federal Budget that contains provisions requiring that the impact of budgeting on the de-facto-equality between women and men has to be taken into consideration, and measures aiming at achieving equality of women and men must be designed.

In Belgium, a new Article 11bis has provided that Acts of the federal and federate parliaments will ‘guarantee that women and men equally exercise their rights and freedoms.’ Its purpose was to introduce an obligation of gender quotas within all executive political bodies, as stated in the following provisions of Article 11bis.

In Finland, the real impetus for introducing anti-discrimination was the CEDAW convention. This explains why the Act sets proactive duties to authorities, employers and educational institutions. Most of these positive duties are rather programmatic, however. The tradition of understanding equality law from the beginning was more geared to promoting equality than prohibiting discrimination.<sup>164</sup> The Supreme Administrative Court has also decided many cases involving Section 4(a) on the composition of public administration bodies and committee-type bodies exercising public authority. This contains a quota rule of 40 percent women/men in many public bodies, notably municipal boards. The contents of the quota provision have been amended over time, and the interpretation of the rule has been a much contested issue. The quota rule has had a considerable impact in administration.

In France, the Constitution was amended after the Constitutional Council decision discussed above prohibiting positive action for women in the context of political representation. Article 1 now states that ‘statutes shall promote equal access by women and men to elective offices and posts as well as to professional and social

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<sup>164</sup> Ibid.

positions'. This allows the adoption of laws differentiating between men and women in order to promote equality. In a decision of 2000,<sup>165</sup> the Constitutional Council accepted that the adoption of a law which prescribed obligations as to the presence of candidates of both sexes in the composition of electoral lists was constitutional.

In Greece, the new Article 116(2) provides: 'Positive measures aiming at promoting equality between men and women do not constitute discrimination on grounds of sex. The State shall take measures to eliminate inequalities which exist in practice, in particular those detrimental to women'.<sup>166</sup> In 2001 a constitutional provision was introduced conferring horizontal direct effect to constitutional provisions that proclaim human rights (Article 25(1)(c)), hence also to the above provisions. The Constitution adopts an autonomous, positive and pro-active gender equality norm – not a negative non-discrimination principle. This norm, which applies in all areas, goes further than the prohibition of gender discrimination and requires substantive gender equality. It is characteristic in this respect that Article 116(2) requires the elimination of '*inequalities which exist in practice*' (not merely of 'discrimination')<sup>167</sup> and makes positive action, in particular in favour of women, a 'must' for all state authorities. This is acknowledged by well-established case law.

In Germany, in addition to the general equality provisions in the Basis Law discussed earlier, Article 3(2)(2) provides that the State must 'promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist'. Pursuant to this constitutional obligation, federal and state legislation has been introduced so as to promote women in the public service (*Frauenförderungsgesetze* or *Gleichstellungsgesetze*). On the federal level, these are, for the public service in general, the Federal Law on Equality in the Public Service (*Bundesgleichstellungsgesetz*),<sup>168</sup> and for the armed forces, the Law on the Equality of Female and Male Soldiers (*Soldatinnen und Soldaten-Gleichbehandlungsgesetz*).<sup>169</sup> The laws of the 16 *Länder* (States) resemble more or less the federal Law on Equality in the Public Service. There is no law obliging private employers to promote women or realize women's substantive equality. The existing laws use the term 'substantive equality' (*Gleichstellung*) so as to emphasise their purpose of requiring a proactive approach. These laws contain binding obligations for public authorities to realise substantive equality. Outside the context of gender, there has also been the development of a somewhat more positive equality approach adopted in the context of disability issues. Article 3(3)(2) of the Basic Law prohibits unfavourable treatment of persons with disabilities, and pursuant to this provision, the federal legislator enacted the Law on Substantive Equality of Disabled Persons (*Behindertengleichstellungsgesetz*).<sup>170</sup> The *Länder* have comparable laws. These laws only extend to the public sector. They use the terms 'putting at a disadvantage' (*Benachteiligung*) and 'equal

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<sup>165</sup> Décision n°2000-429 DC.

<sup>166</sup> On these constitutional developments see A. Yotopoulos-Marangopoulos *Affirmative Action: Towards Effective Gender Equality* Athens/Brussels, A.N. Sakkoulas/Bruylant 1998, in particular pp. 71-76; S. Koukoulis-Spiliotopoulos 'Greece: From Formal to Substantive Gender Equality: the Leading Role of Jurisprudence and the Contribution of Women's NGOs, in A. Manganas (ed.) *Essays in Honour of Alice Yotopoulos-Marangopoulos* pp. 659-700 Athens/Brussels, Nomiki Bibliothiki/Bruylant 2003 vol. A.

<sup>167</sup> For an interpretation of the term 'inequalities' see S. Koukoulis-Spiliotopoulos *From Formal to Substantive Gender Equality: the Proposed Amendment of Directive 76/207* Athens/Brussels A.N. Sakkoulas/Bruylant 2001, pp. 24-29.

<sup>168</sup> Of 30 November 2001, BGBl. I p. 3234.

<sup>169</sup> Of 14 August 2006, BGBl. I p. 1897.

<sup>170</sup> Of 27 April 2002, BGBl. I p. 1467.

participation in societal life' (*gleichberechtigte Teilhabe am Leben in der Gesellschaft*). The first term echoes the language of the Constitution; the second term points towards substantive equality. It is unclear whether 'equal participation' is less than substantive equality; it is used to emphasise the need for reasonable accommodation, and the laws spell out such obligatory measures in detail.

In Iceland, Article 65 of the Constitution includes a provision that declares: 'Men and women shall enjoy equal rights in all respects.'<sup>171</sup> This was added at a later stage during parliamentary debates responding to pressures to ensure gender equality by resorting to affirmative measures. The Constitutional Committee stated that 'positive discrimination' was embodied in Article 65 if justified on objective grounds with the aim of correcting the incomplete share of certain groups.<sup>172</sup>

In Italy, the second paragraph of Article 3 provides the basis of the definition of substantive equality. It states that 'It shall be the responsibility of the Republic to remove all obstacles of an economic and social nature which, by limiting the freedom and equality of citizens, hinder the full development of the human person and the effective participation of all workers in the country's political, economic and social organization'. A provision similar to Article 3 Paragraph 2 has recently been provided in Article 117 as regards regional legislation, which shall remove all obstacles to the achievement of equality between men and women in the social, cultural and economic field and promote equality in access to elective offices. Article 51 of the Constitution states the principle of equality between men and women as regards the franchise and eligibility. It also provides that the Republic shall promote equal opportunities for men and women. In the context of public employment, and membership of public bodies, Article 57 of Decree no. 165/2001 on the Ruling of Public Employment states that women shall be at least one third of the members of the commission for public competitions (hiring), except in case of justified impossibility; moreover, the Public Administration shall assure to female workers the access to professional training in proportion with their percentage of employment in the respective sector and adopt organizational measures which favour their participation and allow the conciliation between working and family life.

The Spanish Constitution (*Constitución Española*), Article 9.2, establishes the public authorities' duty to promote conditions favouring the achievement of equal rights for individuals and groups, while using the concept of real and effective equality. This provision has been the basis for the adoption of promotional measures and positive action.

In Sweden, Paragraph 4 of Article 2 was amended recently. It now provides: 'The public institutions shall promote the ideals of democracy as guidelines in all sectors of society and protect the private and family lives of private persons. Public institutions shall work to ensure that all persons shall be able to achieve participation and *equality* (my italics) in society. The public institutions shall counteract *discrimination* (my italics) against persons on the grounds of gender, skin colour, national or ethnic origin, language or religious affiliation, disability, sexual orientation, age or other circumstance that relates to the individual as a person.'<sup>173</sup> The new Paragraph 4 is expected to play the role of a guiding principle for public authorities rather than being a statement of law that will be implemented by the courts. The term 'counteract' (*motverka*) would seem to include an obligation to abolish any remaining discriminatory legislation as well as an obligation on all public bodies themselves to

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<sup>171</sup> Law No. 97/1995 on amending the Constitution.

<sup>172</sup> Constitutional Committee's reasoning, p. 4, 118. session of parliament, case 297.

<sup>173</sup> Lag 2002:903.

refrain from discriminating acts. Since this amendment is also not legally binding, the only kind of control is political.

In the United Kingdom, the Northern Ireland Act 1998 which, so far as is relevant, imposes obligations on public authorities (Section 76) to ‘have regard to need to promote equality of opportunity’ (a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation; (b) between men and women generally; (c) between persons with a disability and persons without; and (d) between persons with dependants and persons without’. The Government of Wales Act includes Section 35, entitled ‘Equality of treatment’ which concerns the relative status of the English and Welsh languages and (Subsection (2)) requires the Welsh Assembly to ‘make appropriate arrangements with a view to securing that Assembly proceedings are conducted with due regard to the principle that there should be equality of opportunity for all people’. Section 37 (entitled ‘Equality of opportunity’) requires the Welsh Ministers to ‘make appropriate arrangements with a view to securing that their functions are exercised with due regard to the principle that there should be equality of opportunity for all people’. The Sex Discrimination Act uses the term ‘equality of opportunity’ in its application to public authorities upon which positive obligations are imposed by Section 76A of the Act to ‘have due regard to the need— (a) to eliminate unlawful discrimination and harassment, and (b) to promote equality of opportunity between men and women’. The term equality of opportunity is not defined. The other British equality legislation is in materially similar terms, public authorities being placed under duties by the RRA and the DDA, *inter alia*, ‘to promote equality of opportunity.’

### 6.3.2. Courts adopt the fourth conception of equality in public sector context

Over time, the courts in Greece have developed a ‘substantive gender equality approach’, starting with the landmark judgment CS No. 1933/1998 (Plen.). This judgment concerned a statutory provision requiring the participation of at least one woman having the necessary qualifications in the service councils dealing with the status of civil servants.<sup>174</sup> The CS, interpreting Article 4(2) of the Constitution in light of Directive 76/207/EEC and the CEDAW, ruled that this constitutional provision does not merely prohibit gender discrimination; it furthermore requires the promotion of substantive gender equality. It consequently upheld the constitutionality and recognized the necessity of the provision in issue. Subsequently, interpreting the new provision of Article 116(2) of the Constitution in light of CEDAW and the Covenant on Civil and Political Rights, the CS considered that this constitutional provision requires the legislature and all other state authorities to take those positive measures in favour of women that are necessary for and relevant to achieving substantive gender equality in all cases where women are in an inferior position. Consequently, these judgments upheld the constitutionality and recognized the necessity of gender quotas for municipal elections.<sup>175</sup>

In Italy, too, it is interesting to note the extent to which a more substantive conception of equality has been accepted and applied, for example in the area of

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<sup>174</sup> See A. Yotopoulos-Marangopoulos *Affirmative Action: Towards Effective Gender Equality*, *op. cit.*; and ‘The historical turn of the Council of State towards real equality. Comments on CS (Plen.) 1933/98 and 1917-1929/98’, *The Constitution* 1998 pp. 773-795 (in Greek).

<sup>175</sup> CS Nos. 2831, 2832, 2833/2003, 192/2004, 2388/2004. On this case law and CS No. 1933/1998 (Plen.), see S. Koukoulis-Spiliotopoulos ‘Greece’, *European Gender Equality Law Review* No. 2/2008, pp. 57-59: <http://ec.europa.eu/social/main.jsp?catId=641&langId=en>, last accessed 15 June 2009.

equality in the franchise and eligibility for public office. The first judgment of the Constitutional Court on the issue adopted a very formal concept of equality,<sup>176</sup> similar to the reasoning of the judgment of the European Court of Justice in *Kalanke*. The Court considered a whole series of legal provisions in which it was laid down that neither of the two sexes may be represented on lists of candidates for Town Council, Provincial Council and Regional Council elections, or members of the Chamber of Deputies, in a ratio greater than two thirds. Applying a formal equality interpretation, these provisions were held to be inconsistent with Article 51 of the Constitution. Some years later, however, the Constitutional Court declared the legitimacy of a similar provision of the Statute of Region Valle d'Aosta, and also a new quota in the list of candidates introduced by Act no. 90/2004 for the elections of Italian representatives at the European Parliament.<sup>177</sup> These measures were deemed to be consistent with the constitutional principles as they only applied to candidates and did not affect the freedom of vote. Article 51 of the Constitution was, however, changed in 2003 so as to provide that the Republic shall promote equal opportunities for men and women. Following this, the Constitutional Court accepted the legitimacy of Article 57 of Decree no. 165/2001 providing that women shall be at least one third of the members of the commission for public competitions (hiring) in Public Employment sector.<sup>178</sup>

So too, Judgment 128/1987 of the Spanish Constitutional Court considers that the prohibition of discrimination is not merely the negative side of equality. The constitutional prohibition of discrimination requires measures that actively eradicate historical situations of unequal treatment of certain groups.

In the United Kingdom, an important case is the recent decision<sup>179</sup> of the Administrative Court in *R (Kaur & Shah) v London Borough of Ealing* [2008] EWHC 2062. The case concerned a challenge to the decision by Ealing to withdraw funding from Southall Black Sisters that provided specialist domestic violence services to Asian and African-Caribbean women. One of the issues which arose concerned the proper approach to Section 35 of the RRA which provides that 'Nothing in Parts II to IV will render unlawful any act done in according to a person of a particular racial group access to facilities or services to meet the special needs of persons of that group in regard to their education, training or welfare or any ancillary benefits.' Moses LJ ruled that the provision (paragraph 52) 'recognises that the elimination of discrimination and the promotion of equality requires indirect discrimination to be eliminated and equality for those who are the victims of indirect discrimination may require their special needs to be met (...) It does not derogate from it in any way. It is a manifestation of the important principle of anti-discrimination and equality measures that not only must like cases be treated alike but that unlike cases but must be treated differently'. He went on to state (paragraph 58) that 'specialist services for a racial minority from a specialist source is anti discriminatory and furthers the objectives of equality and cohesion'. If this case is to be followed it may go some way towards underpinning the notion of discrimination with something a little akin to a more substantive notion of equality (i.e. equality of outcome) than has generally previously been the case. The only discussion of 'equality of opportunity' thus far in the British case law arising under the positive statutory obligations is in a case under the Race Relations Act 1976, *R (E) v The Governing Body of JFS and the Admissions Panel of JFS* [2008] ELR 445, in which Munby J ruled that proper compliance with

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<sup>176</sup> No. 422/1995.

<sup>177</sup> No. 49/2003.

<sup>178</sup> No. 39/2005.

the duty required the relevant public body to direct its mind *both* to the need to *eliminate* unlawful racial discrimination and to the need to *promote* equality of opportunity and good race relations, and that the latter would require consideration of the taking of *active* steps.

#### **6.4. Private sector positive obligations**

We have seen that, in the main, positive duties to promote equality of opportunity are placed on public bodies, not private sector bodies. These positive duties apply only to public sector bodies and not, unlike many aspects of the way in which the third meaning of equality is put into operation, to the public and private sectors. This is not to say that a similar approach might not be adopted for the private sector (the ‘fair participation’ duty of employers under the Fair Employment and Treatment (Northern Ireland) Order 1998 has done so), but at the time of writing there is no equivalent private sector duty applicable in England.

So too, in Austria, Paragraphs 11 – 11d of the Federal Equal Treatment Act, OJ No. I 65 /2004, provide for the principle of the promotion of women that obliges all representatives of the employer to aim at the elimination of the existing under-representation of women and existing disadvantages of women in connection with the working relation. This provision defines ‘under-representation’, when women are represented less than 40 % of all employees within their group of the pay scheme or type of function. In Italy, the Code of Equal Opportunities provides positive actions in favour of women designed to encourage female employment and to achieve substantive equality between men and women at work, by removing obstacles that prevent the achievement of equal opportunities, without any automatic quota system. Positive actions are also provided by Article 9 of Act no. 53/2000 on the Protection of Motherhood and Fatherhood and are aimed at the reconciliation of professional, care and family life. In Finland and Sweden, there is a positive duty on private employers to develop ‘equality plans’.

In Great Britain, two further illustrations of statutory positive duties on private bodies both arise in the context of disability. The DDA provided that ‘discrimination’ occurred as the result of an unjustified failure to comply with the duty of reasonable adjustment in relation to both employment and the provision of goods, facilities and services. The Disability Discrimination Act 1995 (Amendment) Regulations 2003 replaced the old duty to make reasonable adjustments with several duties applying to an extended list of circumstances, office holders,<sup>179</sup> occupational pension schemes,<sup>180</sup> partners in firms,<sup>181</sup> advocates,<sup>182</sup> qualifications organisations,<sup>183</sup> and practical work experience.<sup>184</sup> In addition, the Disability Discrimination Act 2005 further amended the Disability Discrimination Act 1995 to include a new duty to make reasonable adjustments in relation to premises. Similarly, Maltese legislation on equal treatment of disabled persons goes beyond the simple prohibition of discrimination or discriminatory treatment, and aims indeed at placing disabled people on a footing of equality of opportunity if not equality of results. The Equal Opportunities (Persons with Disability) Act<sup>185</sup> covers all areas and is clearly conceived in order to provide

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<sup>179</sup> Section 4E.

<sup>180</sup> Section 4H.

<sup>181</sup> Section 6B.

<sup>182</sup> Section 7D.

<sup>183</sup> Section 14B.

<sup>184</sup> Section 14D.

<sup>185</sup> Chapter 413 of the Laws of Malta.



substantive equality. The Persons with Disability (Employment) Act<sup>186</sup> is similarly broadly conceived. They both go well beyond the prohibition of discrimination in narrow terms.

## 7. Conclusions

In this Report, four meanings of equality have been described. However, several caveats are necessary regarding these distinctions. First, the categories are constructed to try to make sense of a sometimes bewildering range of legal material; this attempt at categorization has received no judicial approval. Secondly, these categories are not watertight, but porous, with developments in one category influencing approaches in others. Thirdly, in some respects, the principles underlying each category may be in tension with each other, and this may require decisions as to priority between the categories in the case of conflict. European public law has only just begun to explore these tensions. Fourthly, what was considered in the past to be the appropriate approach to discrimination not infrequently shifts over time, so that, for example, the approach taken to discrimination on grounds of sexual orientation has shifted from being assessed under the first category to the third category. A fifth reason for being wary of too sharp a distinction is that particular instantiations of equality currently appear to fit within more than one category.

Nevertheless, some issues may be drawn from this analysis. We can regard the first meaning of equality in the law of European countries, the ECHR and the EC as having two complementary functions. It is both a general principle underpinning the other categories to be discussed subsequently, as well as a residual category of scrutiny in its own right. As regards the first function of this first meaning, it provides a starting point from which the more detailed meanings of equality that follow may be thought to derive. In this sense, the necessary criteria of likeness, difference and justification missing in the first meaning are supplied in the second, third and fourth meanings of equality. In the second meaning these criteria are supplied by an account of how particularly important interests should be distributed, and in the third and fourth meanings by referring to how particular characteristics of persons should affect the distribution of opportunities more generally. Where, for example, maldistribution of constitutional rights is in issue, or the use of race as a criterion of exclusion is present, judgments of unreasonableness or irrationality have more on which to ‘bite’ and they induce more sceptical scrutiny. A greater effort is required to justify such decisions than where other decisions not involving these considerations are in issue. As regards the second function of the first meaning, the courts stand ready to scrutinize decisions more generally, however weakly, on the basis of unequal treatment, even those decisions that do not involve situations in which particularly important interests, or where particular ‘status-harms’, are in issue.

In the second meaning of discrimination, the primary role of equality is to secure the availability of the ‘prized public good’, free from arbitrariness, interpreted to mean when access to that right is restricted for reasons that do not withstand objective scrutiny. The more important the right or public good in issue, the more intense is the scrutiny by the courts of the reasons for selective allocation. So far, in Europe, two major groups of such goods can be identified with some degree of confidence: fundamental human rights (such as those particularly found in the ECHR) and fundamental economic principles (such as those found in EC internal market law).

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<sup>186</sup> Chapter 210 of the Laws of Malta.

Essentially, in both contexts, the function of equality is the same: to ensure that the distribution of the prized public good is not restricted by the use of arbitrary or unjustified criteria of distribution.

In several ways, the third category of discrimination and equality is more complex than the first and second categories discussed previously, and this greater complexity has resulted in the emergence of legal issues that are so far relatively underdeveloped in the context of discussions about the other categories. The development of EC legislation applying this third category to a wider set of grounds is likely to ensure that the third category remains the most complex meaning for some time to come. It also appears to have become the dominant conception of equality and non-discrimination among courts and legislatures.

The fourth meaning of equality in Europe is the most underdeveloped, not least because it is also the most recently developed. It may have, however, the potential to be the most far reaching in its implications, depending on its interpretation and enforcement, although whether the fourth approach can stand alone or must (if it is to be successful) operate alongside effective anti-discrimination law remains to be seen. It also illustrates further the changing categories of equality and the relationship between them. Under the fourth meaning of equality, some at least of the policies disfavoured under the first conception could well now be seen as examples of how to put into effect the broader conception of equality of opportunity required by the fourth conception.





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