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Non-Discrimination Law

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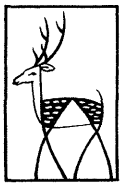

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CHAPTER ONE
DISCRIMINATION GROUNDS

Prof. Janneke Gerards

1.1. INTRODUCTION

Non-discrimination legislation in many Member States of the EU contains a long list of prohibited grounds. As a result of the implementation of the relevant Gender Equality and Article 13 Directives, they should at least include gender/sex, race/ethnicity, religion/belief, sexual orientation, disability and age, but in many national texts much longer lists can be found, also mentioning, for example, marital status, birth/descent, nationality, political conviction and income. As a result, the personal scope of such legislation would seem to be quite broad, offering extensive protection against discrimination. In practice, however, it is not as simple as that. The actual scope of non-discrimination law is determined by at least two variables. First, the definition of a certain ground is of importance in determining the scope of non-discrimination legislation. If "race" is also taken to mean "skin colour", "ethnic origin" and "belonging to a national minority", a prohibition of racial discrimination is obviously much more inclusive than if only a narrow definition is given to the notion. Secondly, even if a legislative act enumerates a large number of grounds, and even if these grounds are broadly defined, this does not yet mean that all grounds are protected to the same degree. The degree of protection also depends on the justifications and exceptions the legislation allows for and on their interpretation and application by the courts.[1] To some extent, however, there appears to be a connection between the possibilities for justification and the grounds of discrimination. This is particularly true for legal systems with an open system of justification, as contrasted to closed systems, in which a limited number of carefully drafted exception clauses are provided.[2] In open systems, as are visible in the European Convention of Human Rights and in a number of Member States, the ground of discrimination may to a large extent determine the strictness with which the courts analyse cases of unequal treatment and the arguments advanced in justification. According to well-established case-law of the European Court of Human Rights (ECtHR), for example, "very weighty reasons" must be adduced by the Member States to justify a difference in treatment based on sex, birth, nationality and sexual orientation. By contrast, the intensity of the Court's assessment will be much weaker if an instance of discrimination is based on another ground. The same is true for non-discrimination law in a number of states. It

[1] Possibilities for justification and exception clauses are discussed below by M. Bell in Chapter Two: Direct Discrimination and by D. Schiek in Chapter Three: Indirect Discrimination.

[2] See above, Introductory Chapter: A Comparative Perspective on Non-discrimination Law.

appears from national legislation and case-law that discrimination based on specific grounds is regarded as less acceptable than discrimination based on other grounds. Accordingly, the protection offered by non-discrimination law in open systems of justification is dependent not only on the definition and scope of the various grounds of discrimination, but also on the perception of such grounds as unacceptable or "suspect" reasons for distinction.

Because of the importance of the concept of "suspectness" of certain grounds of discrimination, we will start this chapter with a general discussion of this concept and its relevance for the intensity of judicial review (section 1.2).

Subsequently, we will give an overview of the various grounds of discrimination that are protected in the legal systems under study. Section 1.3 will focus on a number of discrimination grounds that are prohibited in almost all legal systems under study. We will discuss the grounds of race, ethnic and national origin, nationality, gender, marital status, sexual orientation, birth, religion and political conviction, disability, age, working time and fixed-term work. This chapter will thus consider a number of grounds which are not covered by the Article 13 and Gender Equality Directives, but which are included in openly formulated legislative or constitutional non-discrimination provisions; in international human rights instruments such as the European Convention of Human Rights (ECHR) or the International Covenant on Civil and Political Rights (ICCRP); or in specific EC legislation. We will therefore devote greater attention in this chapter to the case-law of the ECtHR and international monitoring bodies that provides for explanations and definitions of the various grounds. This is particularly valuable even with regard to the grounds that are covered by the various equal treatment Directives; presently there is little clarity as to the definition of the various grounds contained therein. Indeed, many national legislators and courts appear to rely on the international case-law as an important source of inspiration and it is highly probable that the European Court of Justice (ECJ) will do so as well if asked to provide a definition. This is particularly true for grounds which are closely related to fundamental freedoms, such as the ground of religion, which will probably be interpreted in line with the case-law on Article 9 of the ECHR that is concerned with the definition of the freedom of religion. Furthermore, we will refer to a wide range of national non-discrimination legislation in which the grounds are defined. Because of the relatively recent implementation of the Directive by most states, only limited case-law is available to elucidate the scope and meaning of the various grounds. Such case-law primarily exists in the Netherlands, Ireland, Germany and the UK, where non-discrimination legislation has been in existence for a longer period of time. For that reason, most case-law excerpts will come from these legal systems.

In addition to discussing the definition and interpretation of the various grounds mentioned, we will also address the issue of "suspectness" of each of these grounds, given that some of the grounds are mainly protected in open systems of non-discrimination law.

In section 1.4, the separate issue of discrimination based on assumed characteristics and discrimination by association will be considered: the question is whether

and to what extent states only prohibit discrimination that is based on actual, existing personal characteristics or whether they also prohibit discrimination that is based on characteristics that are (rightly or wrongly) attributed to a certain individual.

Section 1.5 will be devoted to a description of the concept of multiple discrimination, i.e. discrimination based on (a close combination of) two or more protected grounds, such as gender and ethnic origin. In this section we will also provide some insight as to the ways in which this concept is dealt with in Europe.

Finally, we will present some concluding thoughts on the convergence of the European legal systems with respect to the definition of the grounds of discrimination and their suspectness in section 1.6.

1.2. "SUSPECT" GROUNDS OF DISCRIMINATION

The notions of discrimination and unequal treatment easily evoke the image of serious cases of discrimination which are based on prejudice and stigma, and which severely harm individual rights and interests. The general principle of equal treatment has a wide reach, however, and also covers such issues as unequal treatment of farmers based on the amount of milk they produce, or distinctions between income groups in the context of income taxation. Especially open-formulated non-discrimination provisions will cover all such forms of unequal treatment, mostly in combination with an undefined, general possibility for justification. In such systems it will be up to the courts to decide if and under what circumstances a case of unequal treatment is acceptable. As has been stressed in the introductory chapter to this casebook, such open systems may be found primarily in broadly defined constitutional prohibitions of discrimination and international human rights treaties, such as the ECHR (Article 14 and Article 1 Twelfth Protocol) and the ICCRP (Article 26). In the EC Treaty, open possibilities for justification are visible as well. Examples may be found in provisions relating to unequal treatment in the field of agriculture (Article 34(2) EC); nationality discrimination (Article 12 EC); (indirect) discrimination relating to the four freedoms; and indirect discrimination in a variety of non-discrimination Directives.[3] In all of these cases, the courts will necessarily have to address the question if a certain difference in treatment is supported by a convincing, objective and reasonable justification in order to decide on its legal acceptability. Although the issue of justification in open systems will not generally be dealt with in this chapter, it may be noted that the justifiability of a difference in treatment may be influenced by the ground on which it is based.[4] Grounds such as race, ethnic origin or gender are

[3] For more details, see ch. 3, section 3.3. To some extent, an open system is even provided by the various Equality Directives with respect to direct discrimination. Examples are the possibility for justification of age discrimination provided by the Employment Equality Directive (Art. 6) and the possibility for justification relating to the provision of services and goods primarily or exclusively to members of one sex provided by the Gender Goods and Services Directive (Art. 4(5)).

[4] Next to the ground of discrimination, a variety of other factors may influence the justifiability of a case of (indirect) discrimination. See, in particular, ch. 3, section 3.5.2.B.

rarely considered to constitute reasonable bases for unequal treatment and, accordingly, it will be very difficult to justify a distinction based on such a ground. Indeed, the fact that certain personal characteristics are generally regarded as unreasonable and unacceptable grounds for unequal treatment may have formed an important reason for the introduction of specific non-discrimination legislation with a closed list of exceptions.[5] Such generally unacceptable grounds of discrimination are commonly termed "suspect" grounds, as they immediately raise a suspicion of unreasonableness and prejudice.[6] They may be contrasted with "non-suspect" grounds, which do not immediately evoke such images of unfairness and are usually considered relatively tolerable criteria for distinction—one may think of examples such as intelligence, merit and talent.

The "suspectness" of a ground may have important consequences for the strictness with which a court will review the reasonableness of the discrimination at hand. As stated above, this is especially true in open systems, in which a wide variety of grounds and justifications for discrimination will have to be considered by the courts. The ECtHR in particular, which decides cases under the "open" non-discrimination provision of Article 14 of the ECHR, has used the suspectness of certain grounds of discrimination to determine the proper "level" of review. In general, the ECtHR applies a "very weighty reasons" test if it finds that a ground is commonly held to be suspect by the various Member States or if the ground may be considered suspect for other reasons.[7] In those cases it is very strict and a justification will hardly ever be accepted. This is different for cases in which no suspect ground is present. The ECtHR then generally leaves a certain "margin of appreciation" to the state to determine the necessity of a certain classification or distinction, which means that it will only marginally review the state's justification. In fact, the ECtHR then seems to apply a test which comes close to a general test of arbitrariness. Two examples may serve to illustrate the Court's approach:

[5] J.H. Gerards, "Intensity of Review in Equal Treatment Cases" [2004] *NILR* 35.

[6] The terminology of "suspectness" derives from the case-law of the US Supreme Court relating to the Fourteenth Amendment to the US Constitution. Although this terminology is not used by the ECJ or the ECtHR, it constitutes useful shorthand for the perceived unreasonableness and unfairness of unequal treatment based on certain grounds. For that reason, the term will be used throughout this Casebook. It must be remarked, however, that the term is not used to refer to the notion of "suspectness" as it has elaborately been developed in the US, but only to denote the meaning given to it in this casebook.

[7] See, e.g. ECtHR, 28 November 1984, *Abdulaziz, Cabales and Balkandali* v. *the United Kingdom*, Series A, Vol. 87, § 78. See further J.H. Gerards, *Judicial Review in Equal Treatment Cases* (Leiden, Martinus Nijhoff Publishers, 2005) 199*ff*.

ECtHR, 13 December 2005[8] **1.CoE.1.**
Timishev v. *Russia*

FREEDOM OF MOVEMENT OF CHECHENS

Timishev

Facts: Timishev, a Chechen lawyer, lives as a forced migrant in Nalchik, in the Kabardino-Balkaria Republic of the Russian Federation. In 1999, the applicant and his driver travelled by car from the Ingushetia Republic to Nalchik. Their car was stopped at the checkpoint and officers of the Inspectorate for Road Safety refused him entry. The refusal appeared to be based on an oral instruction from the Ministry of the Interior of Kabardino-Balkaria not to admit persons of Chechen ethnic origin. Timishev had to turn round and make a detour of 300 kilometres to reach Nalchik through a different checkpoint.

Held: The Court decided that the refusal of entry amounted to a violation of the prohibition of discrimination (Article 14 ECHR), taken in conjunction with the right to liberty of movement (Article 2 of Protocol No. 4).

Judgment: "56. . . . Discrimination on account of one's actual or perceived ethnicity is a form of racial discrimination . . . Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment . . .

58. . . . In any event, the Court considers that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures."

ECtHR, 21 February 1986[9] **1.CoE.2.**
James and Others v. *the United Kingdom*

DIFFERENT TREATMENT OF PROPERTY OWNERS

James

Facts: The complaint in this case arose from a legal provision in the UK concerning long leasehold tenure. The legal system provided for a form of long-term lease whereby the leaseholder had to meet all costs for maintenance and repairs. At the end of the lease the whole property, including improvements and repairs, reverted to the landlord. To eradicate this situation, leasehold reform legislation was introduced. In the new system, a leaseholder with long lease tenure could take over the property for the value of the land when the lease expired. The applicants argued the leasehold reform legislation was discriminatory on the ground of "property", in that, firstly, it was a measure that applied only to a restricted class of property, that is long leasehold houses occupied by the leaseholders; and, secondly, the lower the value of the property, the more harshly the landlord was treated.

Held: The facts of the case did not disclose any breach of Article 14 ECHR, taken in conjunction with the right to property as guaranteed by Article 1 First Protocol.

[8] Not yet published. See also below **1.CoE.7.** and **1.CoE.112.**
[9] Series A, Vol. 98.

Judgment: "75. For the purposes of Article 14, a difference of treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised . . . As in relation to the means for giving effect to the right of property, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations permit a different treatment in law . . .

76. As to the applicants' first head of complaint, . . . [t]his amounts in substance to the same complaint, albeit seen from another angle, as that which has been examined under Article 1 of Protocol No. 1 . . . The Court sees no cause for arriving at a different conclusion in relation to Article 14 of the Convention: having regard to the margin of appreciation, the United Kingdom legislature did not transgress the principle of proportionality. In the Court's opinion, therefore, the contested distinction drawn in the legislation is reasonably and objectively justified.

77. The second head of complaint must also be examined in the light of the Court's finding under Article 1 of Protocol No. 1 that the United Kingdom Parliament was entitled to consider the scheme embodied in the leasehold reform legislation as a reasonable and appropriate means for achieving the legitimate aim pursued . . . In view of the legitimate objectives being pursued in the public interest and having regard to the respondent State's margin of appreciation, that policy of different treatment cannot be considered as unreasonable or as imposing a disproportionate burden on the applicants . . . The provisions in the legislation entailing progressively disadvantageous treatment for the landlord the lower the value of the property must be deemed to have a reasonable and objective justification and, consequently, are not discriminatory."

Note

In *James*, the ECtHR applied a marginal test, referring to the "margin of appreciation" the states have in the area of regulation of property. The main reason for this would seem to be that the case concerned a difference of treatment in regard to different categories of property owners and was therefore based on property. As the Court does not consider the ground of property to be a suspect ground of discrimination, it did not see the need to apply a strict test. This was clearly different in *Timishev*, where the alleged discrimination was based on ethnic origin. In that case the ECtHR applied a particularly strict test, stating that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin would be capable of being objectively justified. The reason for this was explained in paragraph 56, where the Court stated that racial discrimination is a particularly invidious type of discrimination. It thus clearly regards race and ethnic origin as suspect grounds of discrimination, triggering a very strict assessment of the justification—in fact, in this case no such justification was considered to exist. Hence, these examples show that the ECtHR distinguishes between more "suspect" and "non-suspect" grounds and applies a stricter or more marginal test accordingly.

It is important to note, however, that the intensity of judicial review and the requirements for justifiability will not be influenced by the ground of discrimination alone, not even in open systems of non-discrimination law. Other factors are of

relevance too, such as the importance of the individual rights and interests harmed by the difference in treatment; the seriousness of the interference with individual rights and interests; the character of the discretionary powers of the person or institution responsible for the difference in treatment; and even the general policy area in the context of which a distinction is made.[10] In an open system, even discrimination based on a relatively neutral ground (e.g. income) may be subjected to vigorous scrutiny if it interferes with a fundamental right (e.g. the right to vote). Alternatively, classifications based on a suspect ground (e.g. gender) may be reviewed more marginally if they are made in the specific context of social security measures.[11] Nonetheless, it is clear that the ground for discrimination bears important influence on the justifiability of a difference in treatment, especially in open systems of discrimination. For that reason, it is worthwhile to devote some attention to the subject in the context of this chapter. For each of the various grounds discussed in section 1.3, we will investigate the substantive reasons which are given in national and international legislation and case-law to regard certain grounds as a priori "suspect" or, to the contrary, as "non-suspect". As far as possible, we will also consider the extent to which the ECJ in its case-law has varied the intensity of its review with respect to certain grounds of discrimination.

1.3. THE GROUNDS OF DISCRIMINATION

1.3.1. INTRODUCTION

In most Member States, non-discrimination legislation contains a list of prohibited grounds. Currently these should be at least the grounds enumerated in the Employment Equality Directive, the Racial Equality Directive and the various Gender Equality Directives—i.e. gender, racial/ethnic origin, religion/belief, sexual orientation, disability and age. Sometimes grounds have been added which are considered to be of particular importance, but which are not mentioned in the European Directives. Further, a number of states use open-ended lists of grounds, which make it less necessary to give clear definitions of the various grounds. After all, all situations of unequal treatment, regardless of the ground on which it is based, are covered by such lists. In these cases, classification under specific grounds (and thereby definition of the grounds) is only important if there are different exception and justification clauses for discrimination based on specific grounds, or if the courts apply a stricter test to discrimination based on grounds that are considered suspect.

It is mainly in states that prohibit discrimination on a limited number of grounds, however, that the definition of the grounds really matters: the definition is then determinative of the scope of protection. In these states one could therefore expect

[10] On this, see more elaborately Gerards, above n. 7.

[11] This is visible, for example, in the context of the objective justification of cases of indirect discrimination on grounds of gender. On this see ch. 3, section 3.5.2.B.

that careful attention would be paid to the formulation and definition of the various grounds of discrimination.[12] In practice, however, a definition of the grounds or an explanation of their meaning has been given only rarely in the legislation itself or in legislative history. Many states appear to find the grounds difficult to define or consider the concepts self-explanatory.[13] Thus, the meaning of most of the grounds will need to be explained by the courts.

This will be a difficult task indeed, as many grounds pose important problems of definition and distinction. This is true in particular for the grounds protected (and, conversely, those *not* protected) by the Employment Equality Directive and the Racial Equality Directive. It is sometimes difficult to distinguish, for example, between such grounds as race and ethnic origin, ethnic origin and national origin, national origin and nationality, ethnic origin and religion, marital status and sexual orientation, or disability and (chronic) illness. Since the Article 13 Directives have only recently been adopted and the resulting national legislation is in many Member States the first anti-discrimination legislation to come into force, limited case-law is presently available in the various Member States to explain the meaning of the grounds and to elucidate the borderlines between them. It is important, however, that the ECJ has indicated that the grounds contained in the Article 13 Directives have to be considered as Community legal concepts which require the development of uniform definitions:

> "It follows from the need for uniform application of Community law and the principle of equality that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community, having regard to the context of the provision and the objective pursued by the legislation in question . . ."[14]

As yet, however, most of the grounds have not been explained by the ECJ. In this chapter, we will therefore mainly revert to court interpretations of legislation that was already in existence before the Article 13 Directives entered into force. Such case-law is available in particular in the Netherlands, the UK, Germany and Ireland. We have furthermore tried to trace as many useable examples as possible of interesting (legislative) definitions given in the Member States; such examples are, however, rare. The discussion of the definition of the various grounds will therefore necessarily remain incomplete for many of the Member States under study.

Furthermore, it has transpired that the case-law of international human rights bodies is of particular importance to the definitions given on the national level. For example, many states have based their definition of race and ethnic origin on

[12] See extensively S. Fredman, *Discrimination Law* (Oxford, Oxford University Press, 2002) 68*ff*.

[13] For the latter situation, see, e.g. O. de Schutter, "Report on Measures to Combat Discrimination: Directives 2000/43/EC and 2000/78/EC. Country Report Belgium" (European Commission, 2004) 15, available on the website of Directorate-General for Employment, Social Affairs and Equal Opportunities.

[14] ECJ, Judgment of 11 July 2006, Case C–13/05 *Chacón Navas* [2006] ECR I–6467, para. 40; see below **1.EC.84**.

the ICERD definition, whilst the definition of the ground of religion is often strongly influenced by the case-law of the ECtHR regarding the right to freedom of religion.[15] Expectedly such international materials will also influence the future interpretation of the grounds by the ECJ, either directly or indirectly through the available national definitions. Whenever relevant and available, we will therefore also discuss international materials and case-law.

1.3.2. RACE; ETHNIC, RACIAL AND NATIONAL ORIGIN; BELONGING TO A NATIONAL OR ETHNIC MINORITY; SKIN COLOUR

1.3.2.A. DEFINITIONS

RACE

The Racial Equality Directive prohibits discrimination on the grounds of racial or ethnic origin, but neither of these terms have been defined or explained. In the legislation of the various Member States, the grounds of race and ethnic origin are also mentioned, but a variety of definitions have been given here. In most Member States, the definition is inspired by the definition of racial discrimination as contained in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[16] The ECtHR has also used this Convention in interpreting the ECHR[17] and it is probable that the ECJ will be inspired by it if asked to interpret the Racial Equality Directive. The relevant part of Article 1 of this Convention reads as follows:

> "In this Convention the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public law."

The ICERD's definition of racial discrimination thus covers a number of grounds, i.e. race, colour, descent, national origin and ethnic origin. It is perhaps surprising, considering the impact of the provision and the contents of ICERD, that the

[15] The latter is witnessed, for example, by the Explanatory Note to the UK Equality Act 2006, in which it is stated that the term religion "... has a broad definition in line with the freedom of religion guaranteed by Art. 9 of the ECHR" (para. 155, available on the website of the UK Parliament).

[16] The ICERD definition itself is based on the wording of the Universal Declaration on Human Rights (Art. 2). Other international conventions use similar terminology. See, e.g. the International Covenant on Economic, Social and Cultural Rights (mentioning race, colour and national origin—see Art. 2) and the International Covenant on Civil and Political Rights (also mentioning race, colour and national origin—see Art. 2).

[17] See, e.g. ECtHR, judgment of 23 September 1994, *Jersild* v. *Denmark*, Series A, Vol. 298, para. 30 and ECtHR, judgment of 13 December 2005, *Timishev* v. *Russia*, not yet reported, para. 56.

Convention does not contain a more substantive definition of race. An explanation for this may be found in the particularly sensitive character of the term "race". The principled view is widely expressed that the use of this term in legislation would reinforce the perception that individuals can actually be distinguished according to "race", even though there is no solid scientific or theoretical basis for this.[18] Moreover, all racist theories are based on the perceived existence of different human races.[19] According to some, the use of the term in legislation might be tantamount to accepting such theories.[20] An alternative terminology is therefore often preferred, such as the terms "origin" or "ethnicity".[21]

Nonetheless, many states find it difficult or even undesirable *not* to use the term "race" in legislation. Removing "race" from prohibitions of racial discrimination would easily cause confusion. Furthermore, for some it is of importance to use the word "race" to stress that it is precisely "racism" that has to be combated.[22] A variety of approaches have been chosen to solve this problem. The Racial Equality Directive uses the term "race", but stresses in its preamble that any theory which attempts to determine the existence of separate human races is rejected (Recital 6). The European Commission against Racism and Intolerance (ECRI) has opted for a comparable approach. In a footnote to its General Recommendation on national legislation to combat racism and racial discrimination, it stresses that:

> "[s]ince all human beings belong to the same species, ECRI rejects theories based on the existence of different 'races'. However, in this Recommendation ECRI uses this term in order to ensure that those persons who are generally and erroneously perceived as belonging to 'another race' are not excluded from the protection provided for by the legislation."

A similar approach is adopted by the Austrian legislator, which explains in its explanatory notes to the Equal Treatment Act why it has opted to use the term "race" and how it should be understood:

[18] J. Cormack and M. Bell, "Developing Anti-Discrimination Law in Europe. The 25 EU Member States Compared" (European Commission, September 2005) 19.

[19] *Cf.* G. Cardinale, "The Preparation of ECRI General Policy Recommendation No. 7" in J. Niessen and I. Chopin (eds.), *The Development of Legal Instruments to Combat Racism in a Diverse Europe* (Leiden, Martinus Nijhoff, 2004), 84.

[20] A. Tyson, "The Negotiation of the EC Directive on Racial Discrimination" in Niessen and Chopin, above n. 19, 113.

[21] An example of such use is visible, for instance, in Finland; see Finnish Constitution of 2000, s. 6. See also Scheinin, who explains that the term "origin" was chosen to reflect race, colour, ethnicity and social origin (M. Scheinin, "Constitutional Consistence: Minority Rights and Non-Discrimination under the Finnish Constitution" in M. Scheinin and R. Toivanen, *Rethinking Non-Discrimination and Minority Rights* (Turkiv.Åbo: Institute for Human Rights, Åbo Akademi University, 2004) 2.

[22] *Ibid.*, 113.

Austrian Equal Treatment Act (Gleichbehandlungsgesetz), Explanatory Notes[23] 1.AT.3.

"The Directive on anti-racism does not contain a definition of 'race and ethnic origin'. Theories which attempt to determine or separate race are rejected. The use of the term 'race' does not imply an acceptance of such theories. As a benchmark for the interpretation of the open and broad Directive we have to look to international norms, especially the Convention on the Elimination of all Forms of Racial Discrimination CERD. Additionally, Art. 26 of the ICCPR can be used. CERD deals with discrimination based on 'race, colour, descent, or national or ethnic origin', Art. 26 ICCPR obliges the ratifying states to provide protection against discrimination inter alia on the grounds of race, skin-colour, language, religion, and national origin. As a back-up for interpretation, reference shall also be made to ILO Convention Nr. 111, as well as Art. 14 of the Human Rights Convention.

Also Art. IX para. 1 fig. 3 of the Introductory Provisions to the Code of Administrative Procedure (EGVG) provides for an administrative penal sanction for discrimination of a person due to his/her race, skin-colour, national or ethnic origin, religious faith or disability and can therefore also be used to interpret the term 'race'. The use of the term 'race' in the above mentioned instruments shows that the term 'race' is quite commonly used in legal texts, albeit that the terms 'race and ethnic origin'—understood correctly according to international law—cannot be seen in a way that they refer to biological relationships to a distinct ethnic group in the sense of a theory of descent. The above mentioned sources lend rather useful support to a more culturally orientated view of the problem of ethnic discrimination. Addressees of discrimination are persons who are perceived by others as being 'strange' because they are not seen as members of the majority of the regional population due to some distinct differences. Discrimination in these cases is related to differences which are perceived as natural due to myths of descent and affiliation and which cannot be modified by the affected persons."

Note

In these explanatory notes, the Austrian government explained that the notion of "race" as contained in the Austrian Equal Treatment Act should be understood as a purely legal notion, which does not at all refer to any biological distinctions between "races". It also underlined that the term does not imply an acceptance of theories according to which different "races" can be distinguished. In this way, the use of the term is clarified without there being a need to revert to the use of other, possibly less clear notions or terms.

A definition as contained in ICERD is another common solution. No substantive definition of "race" or an explanation of the term is given, but "racial discrimination" is defined as a broad legal category covering a variety of race-related and

[23] 307 der Beilagen XXII. GP—Regierungsvorlage—Materialien at 15. The translation given here can be found in D. Schindlauer, "Report on Measures to Combat Discrimination: Directives 2000/43/EC and 2000/78/EC. Country Report Austria" (European Commission, January 2005) 7, available on the website of Directorate-General for Employment, Social Affairs and Equal Opportunities.

ethnic forms of discrimination, encompassing a variety of biological, cultural and historical group characteristics.[24] An example of this approach can be found in the definition proposed for national legislation to combat racism by the ECRI General Policy Recommendation:

European Commission against Racism and Intolerance, ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination[25] **1.CoE.4.**

"1. For the purposes of this Recommendation, the following definitions shall apply:

b) 'direct racial discrimination' shall mean any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification . . ."

Note

The list of grounds comprised under the general umbrella of "racial discrimination" in this General Recommendation is even longer than in ICERD, containing also nationality, language and even religion. The reason for this is to be found in the explanatory memorandum to the Recommendation and relates to the wish to combat all possible instances of racism, xenophobia and intolerance:

> "In the Recommendation, the term 'racism' should be understood in a broad sense, including phenomena such as xenophobia, antisemitism and intolerance. As regards the grounds set out in the definitions of racism and direct and indirect racial discrimination (paragraph 1 of the Recommendation), in addition to those grounds generally covered by the relevant legal instruments in the field of combating racism and racial discrimination, such as race, colour and national or ethnic origin, the Recommendation covers language, religion and nationality. The inclusion of these grounds in the definitions of racism and racial discrimination is based on ECRI's mandate, which is to combat racism, antisemitism, xenophobia and intolerance. ECRI considers that these concepts, which vary over time, nowadays cover manifestations targeting persons or groups of persons, on grounds such as race, colour, religion, language, nationality and national and ethnic origin. As a result, the expressions 'racism' and 'racial discrimination' used in the Recommendation encompass all the phenomena covered by ECRI's mandate. National origin is sometimes interpreted as including the concept of nationality. However, in order to ensure that this concept is indeed covered, it is expressly included in the list of grounds, in addition to national origin. The use of the expression 'grounds such as' in the definitions of racism and direct and indirect racial discrimination aims at establishing an open-ended list of grounds, thereby allowing it to evolve with society. However, in criminal law, an

[24] See K. Henrard, *Devising an Adequate System of Minority Protection. Individual Human Rights, Minority Rights and the Right to Self-Determination* (Leiden, Martinus Nijhoff, 2000) 49.

[25] Adopted on 13 December 2002, CRI (2003) 8, available on the website of the Council of Europe, European Commission against Racism and Intolerance.

exhaustive list of grounds could be established in order to respect the principle of foreseeability which governs this branch of the law."[26]

The method of defining "race" by listing a number of more specific grounds has been followed in many of the EU Member States. There appears to be some variation as to exactly which grounds are comprised under the notion of "race", but mostly race, ethnic origin, national origin and colour are included.[27]

EC Implementation Act (EG-Implementatiewet), Explanatory Memorandum[28] **1.NL.5.**

. . . Dutch law proceeds on the basis of the concept of 'race' as such. The concept of race must be broadly interpreted in accordance with the International Convention on the Elimination of All Forms of Racial Discrimination and established precedents and also includes skin colour, origin or national or ethnic descent.

British Race Relations Act 1976[29] **1.GB.6.**

'Racial grounds' means any of the following grounds, namely colour, race, nationality (including citizenship), ethnic and national origins.

Within the EU, furthermore, there are some states which do not so much include characteristics such as ethnic origin or membership of a national minority within the wide category of "race" as prohibit *both* discrimination based on race *and* discrimination based on ethnicity, colour, national origin or other relevant grounds.[30] In themselves, such variations would not seem to matter much. Most importantly, the relevant prohibitions of discrimination cover all relevant instances of racial discrimination. Still, the results of differences in definition may be far-reaching. The material scope of legislation, the availability of exemptions and the intensity of judicial review are often closely connected with the ground in question and its perceived "suspectness". This can be illustrated by the situation in the UK, where the scope of the racial non-discrimination legislation has been complicated by a number of amendments to implement the Racial Equality Directive. These amendments, which, for instance, have the effect of broadening the material scope of protection, do apply

[26] G. Cardinale, "The Preparation of ECRI General Policy Recommendation No. 7" in Niessen and Chopin, above n. 19, 84–5.

[27] J. Cormack and M. Bell, Developing Anti-Discrimination Law in Europe. The 25 EU Member States Compared (European Commission, September 2005) 20.

[28] *Kamerstukken II* 2002/03, 28 770, no 3, at 3.

[29] c. 74, s. 3(1). An identical provision is included in the Race Relations (Northern Ireland) Order 1997, Statutory Rule 2003 No. 341, Art. 5(1).

[30] See in particular Art. 14 ECHR (". . . discrimination on any ground such as . . ., race, colour, language . . . national or social origin, association with a national minority . . .") and the identical list in Art. 1 of Protocol 12 to the ECtHR.

to the grounds explicitly connected to the Directive (race and ethnic or national origin), but not to other grounds protected by the UK legislation, such as colour and nationality. As a result, the level of protection is lower with respect to colour and nationality, even if these grounds are commonly regarded as elements of the definition of race.

Finally, the frequent use of "ethnicity" or "ethnic origin" as either an acceptable alternative for "race" or a complementary notion might raise questions as to the difference between race and ethnicity and the definition of ethnicity. Mostly, this question remains unanswered, but in 2005 the ECtHR explicitly addressed the issue.

ECtHR, 13 December 2005[31] **1.CoE.7.***
Timishev v. *Russia*

FREEDOM OF MOVEMENT OF CHECHENS

Timishev

Facts: Timishev, a Chechen lawyer, lives as a forced migrant in Nalchik, in the Kabardino-Balkaria Republic of the Russian Federation. In 1999, the applicant and his driver travelled by car from the Ingushetia Republic to Nalchik. Their car was stopped at the checkpoint and officers of the Inspectorate for Road Safety refused him entry. The refusal appeared to be based on an oral instruction from the Ministry of the Interior of Kabardino-Balkaria not to admit persons of Chechen ethnic origin. Timishev had to turn round and make a detour of 300 kilometres to reach Nalchik through a different checkpoint.

Held: The Court decided that the refusal of entry amounted to a violation of the prohibition of discrimination (Article 14 ECHR), taken in conjunction with the right to liberty of movement (Article 2 of Protocol No. 4).

Judgment: "55. Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds."

Note

The distinction between race and ethnicity made by the ECtHR in *Timishev* seems to be in accordance with the general academic opinion on the subject. From academic literature it was clear already that "race" is mainly used to refer to biological factors, whereas "ethnic origin" is primarily determined by other factors and characteristics, such as geographical, religious and linguistic characteristics. It must be stressed, however, that there is a difference between the definition of "race" given by the ECtHR, which refers to any perceived biological and morphological differences between "races", and the definition of "racial discrimination" given by ICERD and a

[31] Not yet published.

* See also above **1.CoE.1.** and below **1.CoE.112.**

number of Member States. It must be recalled that the ICERD definition is a much wider notion that also covers ethnicity, language and other related grounds. Since the wide definition is most accepted in legal discourse, we will further refer to "race" only in this sense.

MEMBERSHIP OF AN ETHNIC OR RACIAL GROUP

Although the definition given by the ECtHR in *Timishev* to the notion of "ethnicity" seems rather clear, it has proven difficult to establish what "ethnicity", "ethnic origin" or "belonging to an ethnic group" mean in practice. An important question here is whether the notion should be interpreted objectively or subjectively. When ethnic origin (or, for that matter, the broad notion of "race" or "racial group") is regarded as an objective category, a number of concrete criteria can be formulated to test whether or not an individual belongs to a specific racial or ethnic group. The ECtHR clearly opts for this approach, referring to objective criteria such as a common nationality, tribal affiliation, religious faith, shared language and cultural and traditional origins and backgrounds. The objective approach is also discernible in the case-law of some Member States, in which similar criteria are mentioned. An example can be found in the following case decided by the Dutch Equal Treatment Commission:

Equal Treatment Commission (Commissie Gelijke Behandeling) **1.NL.8.**
Opinion 1998-57

ASYLUM SEEKERS ARE NOT MEMBERS OF A "RACIAL GROUP"

Dentistry for asylum seekers

Facts: The applicant, a fifteen-year-old asylum seeker living in a refugee centre in Eindhoven, broke one of his teeth during a sports activity. The respondent, a dentist, refused to treat the boy because he was not accompanied by an employee of the refugee centre. According to the applicant, the respondent thereby made an unlawful distinction based on race.

Held: There is no discrimination against asylum seekers as a racial group, but there is a case of discrimination based on ethnic origin and nationality against the individual asylum seekers which is not compatible with the Equal Treatment Act.

Judgment: ". . . [I]t must first be considered whether there has possibly been unequal treatment for a group of persons which can be regarded as a distinction based on race within the meaning of the Equal Treatment Act.

The Commission feels that the group of asylum seekers as such does not necessarily fall within the concept of race within the meaning of Article 1 of the Equal Treatment Act. After all, there is no question of a cohesive group with shared physical, ethnic, geographical or cultural characteristics. Nor do asylum seekers differ from other population groups through shared characteristics or behaviour patterns."[32]

[32] Interestingly, there is some internal debate in the Netherlands on the qualification of asylum seekers as a racial group. In 2000, the Supreme Court handed down a judgment which is clearly contradictory to that

Note
In this case, the Dutch Equal Treatment Commission considered it of importance that the asylum seekers did not belong to a special group with distinct characteristics that could be established in an objective way.

It is also possible to opt for a more subjective interpretation. Such an interpretation would be in line with a recent General Recommendation of the ICERD Committee which is worded as follows:

Committee on the Elimination of Racial Discrimination **1.UN.9.**
General Recommendation No. 08: Identification with a particular racial or ethnic group (Art.1, par.1&4): 22/08/90[33]

"The Committee on the Elimination of Racial Discrimination, having considered reports from States parties concerning information about the ways in which individuals are identified as being members of a particular racial or ethnic group or groups, is of the opinion that such identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned."

In the spirit of this Recommendation, a number of Member States use terms of ethnic affiliation or ethnic belonging instead of "ethnic origin" or "race":

Austria—*Gleichbehandlungsgesetz* (Federal Equal Treatment Act): ethnic affiliation (*ethnische Zugehörigkeit*)
France—*Article 225-I Code pénal* (Criminal Code) and *Article L. 122-45 Code du travail* (Labour Code): membership or non-membership, true or supposed, of a given ethnic group, nation, race or religion (*de leur appurtenance ou de leur non-appartenance, vrai or suppose, à une ethnie, une nation, une race ou une religion déterminée*)
Sweden—*Lagen om åtgärder mot etnisk diskriminering i arbetslivet* (Ethnic Discrimination Act)—ethnic belonging (*etnisk tillhörighet*)

Thus far, it is not quite clear what the practical effect of such alternatives would be, since there is no case-law in these Member States in which explicit questions regarding the definition of racial discrimination were raised. During the deliberations on the Racial Equality Directive it was mentioned, however, that the use of these alternatives might have the consequence of limiting the impact of the non-discrimination provisions. It was suggested that, to succeed in a case of alleged discrimination, a national court might then need to be convinced that the

of the Equal Treatment Commission, even though both instances depart from the same criteria. The Supreme Court in its judgment held that ". . . residents of the refugee centre in question do not differ exclusively through their common address but also—as is common knowledge—by their skin colour, national or ethnic descent and/or geographical or cultural origin and in that sense belong to a race in the broad sense of the word . . ."

[33] 38th Session, 1990, Doc A/45/18.

discrimination in question was actually inspired by an idea or supposition about the racial background of the victim.[34] Such might be difficult to prove, as it would require judicial insight into the discriminator's mind.[35] Having regard to the legislative background, however, it is improbable that the ECJ would accept such a burden of proof under the Directive.

Finally, some states have opted for a combination of the subjective and objective approach to the establishment of membership of a racial or ethnic group. A good example of the combined approach can be found in the UK, in which a benchmark decision on the definition of ethnicity was given in a 1983 judgment in the case of *Mandla* v. *Dowell Lee*:[36]

House of Lords, 24 March 1983[37] **1.GB.10.**
Mandla v. *Dowell Lee*

SIKHS AS AN ETHNIC GROUP

Mandla

Facts: The headmaster of a private school refused to admit as a pupil to the school a boy who was an orthodox Sikh (and wore long hair under a turban), unless he removed the turban and cut his hair. The headmaster's reasons for his refusal were that the wearing of a turban, being a manifestation of the boy's ethnic origins, would accentuate religious and social distinctions in the school which, being a multiracial school based on the Christian faith, the headmaster desired to minimise.

Held: The Sikhs are a group defined by reference to "ethnic origins" for the purpose of the Race Relations Act 1976 ("the 1976 Act"); the "no turban" rule is not "justifiable" within the meaning of the 1976 Act.

Judgment: LORD FRASER OF TULLYBELTON: "My Lords, I recognise that 'ethnic' conveys a flavour of race but it cannot, in my opinion, have been used in the Act of 1976 in a strictly racial or biological sense. For one thing, it would be absurd to suppose that Parliament can have intended that membership of a particular racial group should depend upon scientific proof that a person possessed the relevant distinctive biological characteristics (assuming that such characteristics.exist). The practical difficulties of such proof would be prohibitive, and it is clear that Parliament must have used the word in some more popular sense. For another thing, the briefest glance at the evidence in this case is enough to show that, within the human race, there are very few, if any, distinctions which are scientifically recognised as racial . . . In my opinion, the word 'ethnic' still retains a racial flavour but it is used nowadays in an extended sense to include other characteristics which may be commonly thought of as being associated with common racial origin.

[34] Tyson, above n. 19, 113.

[35] See also ch. 2, section 2.3.2.A on motive and direct discrimination.

[36] See critically on this decision, which has triggered a number of comparable cases to be brought before the British courts, S. Fredman, *Discrimination Law* (Oxford, Oxford University Press, 2002) 71, who submits that the criteria defined in *Mandla* v. *Lee* are not always applied consistently and convincingly.

[37] [1983] IRLR 209.

For a group to constitute an ethnic group in the sense of the Act of 1976, it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant; (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups.

A group defined by reference to enough of these characteristics would be capable of including converts, for example, persons who marry into the group, and of excluding apostates. Provided a person who joins the group feels himself or herself to be a member of it, and is accepted by other members, then he is, for the purposes of the Act, a member . . . In my opinion, it is possible for a person to fall into a particular racial group either by birth or by adherence, and it makes no difference, so far as the Act of 1976 is concerned, by which route he finds his way into the group . . . A person may treat another relatively unfavourably 'on racial grounds' because he regards that other as being of a particular race, or belonging to a particular racial group, even if his belief is, from a scientific point of view, completely erroneous."

Notes

(1) It is clear from this case that the notion of "ethnic or racial group" is defined objectively by reference to a number of essential criteria, i.e. a long, shared history and a particular cultural tradition. In addition, the group should share a number of other characteristics, such as a common geographical origin or a common language. Whether an individual is really found to belong to such an ethnic group is determined on the basis of whether the individual actually regards himself as forming part of the relevant group. This means that the definition is not completely objective in character, but also has subjective features.

(2) The case of *Mandla* is interesting for other reasons as well. It stresses, for example, that there is no such thing as a "biological race" and that, for that reason, the use of the notion of "ethnic origin" must be preferred over that of "race"—in this regard its reasoning is similar to the legislative approach used in a number of other Member States. The *Mandla* definition of the notion "ethnic origin" furthermore intends to avoid the "racial flavour" that is still inherent in the notion by referring to non-race related, objective group characteristics. The definition also makes clear that one larger ethnic group may comprise a variety of smaller ethnic groups, which have their own particular characteristics.

(3) *Mandla* has triggered a number of comparable cases to be brought before the British courts, which have not always been successful. Rastafarians have not been

considered to constitute an ethnic group, for example, because of a lack of separate identity from the rest of the Afro-Caribbean community[38] and Muslims have not been held to constitute an ethnic group as they are primarily regarded as a religious grouping.[39] These borderline cases make clear that there is much overlap between the grounds of ethnic origin and religion, which has to be duly acknowledged. The problems resulting from this overlap will be discussed further in section 1.5 of this chapter, in which the issue of multiple discrimination will be addressed.

TRAVELLERS AND GYPSIES

Specific examples of the combination between objective and subjective elements of ethnic groups can be found in the case-law that relates to Roma, Sinti, Gypsies and the Traveller Community. Irish legislation, for instance, contains a definition of "Traveller Community" which is apparently based on a combination of subjective and objective factors: according to this definition, "Traveller Community" means "the community of people who are commonly called Travellers and who are identified (both by themselves and others) as people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland".[40] This definition has been further elaborated and clarified in the following two decisions of the Irish Equality Officer:[41]

Equality Tribunal, 1 June 2001[42] **1.IE.11.**
Decision DEC-S/2001/003, Connors v. *Molly Heffernan's Public House*

NOMADIC LIFE NO REQUIREMENT FOR ESTABLISHMENT OF TRAVELLER IDENTITY

Molly Heffernan's pub

Facts: On different occasions, the manager of Molly Heffernan's pub refused to offer service to Mr and Mrs Connors. They claim that they were told they were refused because of their membership of the Traveller Community.

Held: The claimants are Travellers as defined by the Act; both of the complainants have been discriminated against on the basis of their membership of the Traveller Community.

Decision: "8. [From the definition in Section 2 of the Equal Status Act] I consider that for someone to be considered as a Traveller within the meaning defined in the Act they must identify themselves as a Traveller and must also be identified by others as a Traveller. From this

[38] *Dawkins* v. *Department of the Environment* [1993] IRLR 284, CA.
[39] *CJ H Walker Ltd.* v. *Hussain* [1996] IRLR 11, EAT.
[40] Equal Status Act 2000 (No. 8/2000), s. 2.
[41] In addition to the quoted decision, see on this *Joyce et al.* v. *The Temple Gate Hotel* (DEC-S2001–012), *Maughan* v. *The Glimmer Man* (DEC-S2001–020), *Maughan* v. *Dolly Heffernan's Public House* (DEC-S2002–010v.011).
[42] Available on the website of the Equality Tribunal of Ireland, under the heading Equal Status Decisions.

definition it is clear that for someone to be considered as a member of the Traveller community that they do not have to be actively leading a nomadic way of life. This is because the definition states that Travellers are people with a shared history, culture and traditions '*including historically, a nomadic way of life*' [emphasis in the original]. In my view the reference to the word historically in this context is important and that it was put in the definition to include people who were nomadic in the past but who are now settled and the settled descendants of people who led a nomadic way of life in the past . . .

Mrs Connors stated at the oral hearing that she considers herself to be a Traveller because she has a different culture than settled people. She said that before she got married she lived in a caravan with her parents and led a nomadic life. Since then she has lived in a house as a settled Traveller and for the last ten years this has been in a house in Tallaght . . .

Mr Connors said that he has never led a nomadic life and the he has been settled all of his life, the last 10 years in his current home in Tallaght. He said that his parents were Travellers and that although they were also settled for a long time, when they were young they led a nomadic life with their parents (Mr Connor's grandparents). It is clear to me that Mr Connors has always identified himself as a Traveller . . .

. . . [A]s I said earlier I do not think that actively living a nomadic life is an essential prerequisite to establishing a Traveller identity within the meaning defined in the Act. In any event in my mind the claimant clearly satisfies the link to nomadism required by the definition because his parents led a nomadic lifestyle in the past.

I have fully considered the question raised by the respondent as to whether Mr Connors is a Traveller within the meaning defined in the Act and I am satisfied that he is. It is clear to me that Mr Connors has always identified himself as a Traveller and that others, and in particular Mr Kane, also recognised him as such e.g. when he refused him service from the pub."

Equality Tribunal, 20 August 2001[43] **1.IE.12.**
Decision DEC-S/2001/008, O'Brien v. *Killarney Ryan Hotel*

IRRELEVANCE OF SUBJECTIVE FEELING OF BELONGING TO THE "TRAVELLER COMMUNITY"

Travellers in Killarney Ryan Hotel

Facts: Mr O'Brien called for a drink in Killarney Ryan Hotel several times, but was refused service. He claimed that he was later told that the manager had instructed staff not to serve Travellers. The hotel denied that a strict anti-Traveller policy was in place.

Held: The complainant comes within the definition of a member of the Traveller Community contained in the Act, but has not produced sufficient evidence to substantiate his claim that the respondents discriminated against him on the grounds of his imputed membership of the Traveller Community.

Decision: "9.1 [Mr O'Brien] stated [at the hearing] that he personally does not consider himself a Traveller and explained that, while his parents were Travellers and had lived a nomadic life, he himself had never travelled. He said that he and his wife have lived in a private housing estate for almost 30 years and had brought up their family as part of the settled community.

This point raises the question as to whether the complainant is entitled to claim discrimination on the Traveller community ground when he does not see himself as a Traveller . . .

[43] Available on the website of the Equality Tribunal of Ireland, under the heading Equal Status Decisions.

Given that the complainant has stated that his parents were members of the Traveller community and that they did indeed travel, I believe that, by imputation, the complainant's status is in keeping with the Act's definition of a member of the Traveller community. For this reason, I believe that the complainant comes within the definition of a member of the Traveller community contained in the Act."

Note

The cited cases disclose an intricate combination of objective and subjective factors. Although objective factors such as leading a nomadic life and coming from a family of Travellers may be of importance in deciding if the complainant can be considered as a member of the Traveller Community, subjective factors may also play a role. Their relevance is limited, however, to the situation in which the complainant actually identifies himself with the Traveller Community. In that situation, the subjective feeling of belonging to the group will even overrule the fact that the complainant does not conform to certain objective criteria, such as leading a nomadic life. On the other hand, from the fact that a complainant does not consider himself a Traveller it may *not* be derived that he does not come within the definition of membership of the Traveller Community. In that situation, objective factors such as a family history of travelling may be of overriding influence to the legal classification. Although this would seem to run counter to the individual desire not to be considered a Traveller, it has the advantage of offering a high level of protection, as it guarantees that individuals are also protected against discrimination if they are assumed to belong to the Traveller Community.

In other EU Member States, non-discrimination law makes no specific mention of Roma, Sinti, Gypsies and Travellers. In these states the relevant groups are protected by such notions as membership of a minority group, ethnic group or racial group. Interestingly, the combination of objective and subjective factors is not always present here, as may be illustrated by one of the leading cases on the issue in the UK:

Court of Appeal[44] **1.GB.13.**
Commission for Racial Equality v. *Dutton*

GYPSIES AS AN ETHNIC GROUP

Gypsies at the Cat and Mutton pub

Facts: Dutton displayed signs marked "No travellers" at his pub, the Cat and Mutton, following "unpleasant experiences" involving persons from caravans parked nearby: they had caused damage, threatened him and his wife and upset the regular customers.

Held: Gypsies are an identifiable group defined by their ethnic origins for the purposes of the Race Relations Act; there was no evidence to show that the signs were justifiable.

[44] [1989] 1 All ER 306, CA.

Judgment: NICHOLLS LJ: "On the evidence it is clear that . . . gipsies are a minority, with a long-shared history and a common geographical origin. They are a people who originated in northern India. They migrated thence to Europe through Persia in medieval times. They have certain, albeit limited, customs of their own, regarding cooking and the manner of washing. They have a distinctive, traditional style of dressing, with heavy jewellery worn by the women, although this dress is not worn all the time. They also furnish their caravans in a distinctive manner. They have a language or dialect, known as 'pogadi chib', spoken by English gipsies (Romany chals) and Welsh gipsies (Kale) which consists of up to one-fifth of Romany words in place of English words. They do not have a common religion, nor a peculiar, common literature of their own, but they have a repertoire of folktales and music passed on from one generation to the next. No doubt, after all the centuries which have passed since the first gipsies left the Punjab, gipsies are no longer derived from what, in biological terms, is a common racial stock, but that of itself does not prevent them from being a racial group as widely defined in the Act.

I come now to the part of the case which has caused me most difficulty. Gipsies prefer to be called 'travellers' as they think that term is less derogatory. This might suggest a wish to lose their separate, distinctive identity so far as the general public is concerned. Half or more of them now live in houses, like most other people. Have gipsies now lost their separate, group identity, so that they are no longer a community recognisable by ethnic origins within the meaning of the Act? . . .

. . . [W]ith respect to the judge, I do not think that there was before him any evidence justifying his conclusion that gipsies have been absorbed into a larger group, if by that he meant that substantially all gipsies have been so absorbed. The fact that some have been so absorbed and are indistinguishable from any ordinary member of the public, is not sufficient in itself to establish loss of . . . 'an historically determined social identity in [the group's] own eyes and in the eyes of those outside the group.' . . . In my view the evidence was sufficient to establish that, despite their long presence in England, gipsies have not merged wholly in the population, as have the Saxons and the Danes, and altogether lost their separate identity. They, or many of them, have retained separateness, a self-awareness, of still being gipsies . . .

In my view . . . the evidence was still sufficient to establish that gipsies are an identifiable group of persons defined by reference to ethnic origins within the meaning of the Act."

Note

In defining the relevant racial group, Nicholls LJ applied the objective criteria of the above-cited case of *Mandla* v. *Dowell Lee* (**1.UK.10.**). In addition, he discussed the question if Gypsies had lost their separate and distinctive identity, thus making clear that the meaning of the notion of "racial or ethnic group" can vary over time, depending on whether the objective criteria are met in the concrete circumstances. The question whether the concerned individual actually regards himself as being part of the group did not seem to be of any influence at all.

For the Netherlands, the situation is different, as is exemplified by the following case:[45]

[45] The decision cited below is well-established case-law of the Dutch Equal Treatment Commission. See also Opinion 1998-99, available on the website of the Dutch Equal Treatment Commission.

Equal Treatment Commission (Commissie Gelijke Behandeling) **1.NL.14.**
Opinion 1999-65

UNEQUAL TREATMENT OF CARAVAN DWELLERS CONSTITUTES RACIAL DISCRIMINATION

Baby's furniture for caravan dwellers

Facts: The applicants lived in a caravan placed on an official caravan site and wanted to acquire baby's furniture at a shop that was run by the respondent. The sales person informed them of the fact that the respondent did not deliver any furniture to caravan sites. The reason for this policy was that there had been a number of serious incidents in the past when goods were delivered to caravan sites.

Held: Discrimination against caravan dwellers constitutes indirect racial discrimination. The facts disclose a case of unjustified indirect discrimination which is contrary to the Equal Treatment Act.

Opinion: "4.3 The question arises first of all whether caravan dwellers are covered by the concept of race in terms of the Equal Treatment Act. To answer this question, the legislative history of the Act approving the Convention on the Elimination of all Forms of Racial Discrimination and that of the ban against discrimination under criminal law based thereon, serve as a guideline. Both indicate that when ascertaining whether racial discrimination exists, reference can be made to characteristics that are of a physical, ethnic, geographical, cultural, historic or religious nature.

This interpretation of the concept of race means that the cohesion within the group in question is important to the present consideration. This cohesion may be determined by social, cultural and/or historical backgrounds.

The Commission has already considered that, in principle, the concept of race may cover a group of persons that has manifested itself from generation to generation as caravan dwellers and which regards itself as a population group with a culture to be distinguished from other population groups. This applies the more so because caravan dwellers generally encounter prejudice and unequal treatment from their environment as a special population group.

The Commission finds that the origin of both applicants is characterised by a lengthy tradition of caravan dwelling. Both the parents and grandparents of both of them have already lived on caravan sites and with regard to the applicant—according to oral tradition—this lifestyle goes back to the 18th century.

Both applicants are registered as caravan dwellers. It is clear from the particulars produced that the applicant had a licence under Article 18 Caravan Act (old version) to live in a caravan, through her father. The applicants regard themselves as belonging to the population group of caravan dwellers. They experience their 'own' culture with strong mutual ties between caravan dwellers and with mutual support. As caravan dwellers they claim experiencing relegation and disadvantage through the actions of both the authorities and non-caravan dwellers.

In view of these facts and the circumstances, the Commission feels that the unequal treatment of applicants as caravan dwellers may be regarded as unequal treatment by virtue of their race within the meaning of article 1 AWGB."

Note

It is clear from this opinion that the Dutch Equal Treatment Commission has regard to a combination of objective and subjective factors in determining whether caravan dwellers constitute a racial group. Of relevance are not only factors relating to group

cohesion and social, cultural or historical background, but also factors relating to the identification of an individual with the group concerned.

Hence, it is clear that there is but little convergence within the European Union as regards the proper definition of an ethnic or racial group and, in particular, with regard to the definition of the group of Travellers, Gypsies and caravan dwellers—varying criteria to determine group membership are currently in use.

MEMBERSHIP OF A (NATIONAL) MINORITY—NATIONAL ORIGIN

Closely related to the grounds of race and ethnic origin is the notion of national origin or membership of a national minority. According to the drafting history of the ICERD, the term "national origin" is used in the context of a politically organised nation included within a different state, which continues to exist as a nation in the cultural and social sense of the word, even without being a sovereign state.[46] Members of such a nation can be discriminated against, not so much because of their race or ethnic background, but as members of the (former) nation. In this context, the term "national origin" is often used to denote "belonging to a national minority". Reference is also sometimes made in this context to "national self-consciousness", which is connected with a certain political aspiration for a degree of autonomy or even independence.[47] It has proven to be very difficult, however, to arrive at an agreement regarding the precise definition of a "minority". There is presently no generally accepted definition of this notion, either at the European level or at the international level.[48] The controversies relate to all minorities (ethnic, religious, linguistic, national), but the problems are most insoluble with respect to national minorities.[49] The European Framework Convention for the Protection of National Minorities, in which the notion would appear to play a central role, even takes special care not to take any position in this regard:[50]

Council of Europe, "European Framework Convention for the Protection of National Minorities", Explanatory Memorandum, 1996 **1.CoE.15.**

"12. It should . . . be pointed out that the framework Convention contains no definition of the notion of 'national minority'. It was decided to adopt a pragmatic approach, based on the

[46] See N. Lerner, *The UN Convention on the Elimination of all Forms of Racial Discrimination* (Alphen a/d Rijn, Sijthoff and Noordhoff, 1980) 29, referring to a debate in the context of the drafting of CERD (Av.C.3v.SR.1304, pp. 2v.3).

[47] Henrard, above n. 24, 54.

[48] *Ibid.*, 18 and *cf.* N. Lerner, *Group Rights and Discrimination in International Law*, 2nd edn (Leiden, Martinus Nijhoff, 2003) 8–9, mentioning several definitions of a minority group.

[49] *Ibid.*, 27*ff.*

[50] The same is true for the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by UN General Assembly, Resolution 47/135 of 18 December 1992.

recognition that at this stage, it is impossible to arrive at a definition capable of mustering general support of all Council of Europe member States.

The lack of any clear definition of a (national) minority may have important consequences for the protection of members of such minorities. Presently, a number of states do not, or only reluctantly, recognise the existence of national minorities in their midst. It is clear that in those cases, the concept of discrimination based on 'national origin' is hardly conceivable. Of course, such denial of the existence of national minorities has clear consequences for the protection against discrimination."

The lack of any clear definition of a (national) minority may have important consequences for the protection of members of such minorities. Presently, a number of states do not, or only reluctantly, recognise the existence of national minorities in their midst. It is clear that in those states a prohibition of discrimination based on "national origin" is hardly conceivable. Indeed, this is illustrated by the legislative situation in certain Member States, such as Greece, which has been criticised precisely for that reason:

> ". . . throughout the 20th Century the existence of racial/ethnic minorities has been viewed by the young (1832–) Greek state as a taboo subject 'with dangerous implications for its ethnic and territorial integrity'. As a consequence, no serious public debate on these matters has ever been initiated by any Greek political party, or any NGO . . . It is also characteristic that a (pending) Bill for the transposition of the Race Directive was brought to surface by the socialist opposition in May 2004, without initiating consultations or non-governmental organizations."[51]

As a result of such problems, there does not seem to be a workable definition of minorities which is agreeable to all the Member States and which could serve as a proper basis for protection against discrimination based on membership of a national minority.

A further problem related to the definition of "national origin" and "membership of a national minority" concerns the term "national" itself. In the first place, the term must be carefully distinguished from the notion of "nationality", which is discussed separately in section 1.3.3 below. This notion refers to citizens of other nation states and is mainly political in character, whereas the notion of national origin refers to autochthon individuals and seems to be more social in nature. Still, both notions are often confused, as the term "national origin" is sometimes used to refer to individuals who are born in another nation state. To that extent, national origin and nationality are overlapping concepts.[52]

In addition, it appears to be difficult to make a clear distinction between "national origin" and "membership of a national minority", and between "ethnic origin" and

[51] I. Ktistasis and N. Sitaropoulos, "Discrimination Based on Racial or Ethnic Origin. Executive Summary for Greece" (European Commission, June 2004) 1, available on the website of Directorate-General for Employment, Social Affairs and Equal Opportunities.

[52] This was solved in the ICERD by adding a second and third paragraph to Art. 1, in which it is made clear that the notion of nationality is not covered by the term "racial discrimination". See Lerner, above n. 48, 53.

"membership of an ethnic minority".[53] In Estonia, for example, one of the basic elements of the definition of member of a *national* minority is that "they differ from Estonians by their *ethnic* affiliation, cultural and religious idiosyncrasies, or language [emphasis added]".[54] In this definition, membership of a particular ethnic group is decisive for the qualification of a group as a national minority. In other states, the notion of national origin is formulated more widely, covering both national origin as described above and ethnic origin; this is, for example, the case in Lithuania.[55] Notwithstanding such examples of overlap, it is clear that the notions cannot be used interchangeably—although a member of a national minority may have a different ethnic background than the majority, a person of different ethnic origin does not necessarily mean that an individual is a member of a national minority.[56] Some Member States have endeavoured to prevent any confusion by inserting a clear definition of both notions in the relevant legislation, or even by indicating which groups in the state should be considered national or ethnic minority groups. A good illustration of this approach can be found in the Polish legislation:

Polish National and Ethnic Minorities and Regional Languages Act of 6 January 2005[57] **1.PL.16.**

1) A national minority within the meaning of the Act is a group of Polish citizens which jointly satisfies the following criteria:

1. Is less numerous than the remainder of the Polish population;
2. Differs in a fundamental way from the remaining citizens, in its language, culture or tradition;
3. Strives to preserve its language, culture or tradition;
4. Is aware of its own historical national identity and directs its efforts towards its expression and protection;
5. Its ancestors have lived in the present Polish territories for at least 100 years;
6. It identifies with its country's nation.

2) The following are recognised as national minorities:

1. Belarusian
2. Czech
3. Lithuanian

[53] Henrard, above n. 24, 54.

[54] Art. 1 of the Law on Cultural Autonomy of National Minorities, cited by V. Poleshchuk, "Report on Measures to Combat Discrimination: Directive 2000/43/EC and 2000/78/EC: Country Report Estonia" (European Commission, February 2005) 10, available on the website of Directorate-General for Employment, Social Affairs and Equal Opportunities.

[55] S. Vindrinskaite, "Report on Measures to Combat Discrimination: Directive 2000/43/EC and 2000/78/EC. Country Report Lithuania (European Commission, December 2004) 6, available on the website of Directorate-General for Employment, Social Affairs and Equal Opportunities.

[56] However, this is a point of debate. It has also been argued that the notion of "national minority" is wider than that of "ethnic minority" and even that "national minority" can be taken to include all ethnic, religious or linguistic minorities. See Henrard, above n. 24, 54.

[57] Art. 2.

4. German
5. Armenian
6. Russian
7. Slovak
8. Ukrainian
9. Jewish

3) An ethnic minority within the meaning of the Act is a group of Polish citizens which jointly satisfies the following criteria:

1. Is less numerous than the remainder of the Polish population;
2. Differs in a fundamental way from the remaining citizens, in its language, culture or tradition;
3. Strives to preserve its language, culture or tradition;
4. Is aware of its own historical ethnic identity and directs its efforts towards its expression and protection;
5. Its ancestors have lived in the present Polish territories for at lest 100 years;
6. It does not identify with its country's nation.

4) The following are recognised as ethnic minorities:

1. Karimians
2. Lemkovians
3. Roma
4. Tatars

Although this approach seems to have the advantage of clarity, it also has its problematic elements, as is made clear by a discussion of this legislative definition in a report of the Polish Parliamentary Office:

Comments of the Polish Parliamentary Office to the Draft National Minorities Act[58] **1.PL.17.**

"The Minorities Act as adopted finalises the meaning of the terms 'national minorities' and 'ethnic minorities' and specifies to which groups these terms relate. The first concept applies to ethnic communities which identify themselves with the nations of their own states, while the second one applies to non-national communities. This is a formal division, which simplifies the socially complex ethnic identities of members of minority groups. It has also aroused protests among some minorities. When the *Sejm* adopted the Act in November 2004 and sent it to the Senate, senators received a letter protesting against the division into 'national' and 'ethnic' minorities from the Association of Jewish Confessional Communities in Poland, the Union of Polish Tatars and the Polish Roma Association.

These organisations found the provision 'deeply humiliating' and protested against associating their sense of separate national identity with the existence of the state. Their letter

[58] S. Łodziński, "Wyrównanie czy uprzywilejowanie? Spory dotyczące projektu ustawy o ochronie mniejszości narodowych (1989–2005)", Kancelaria Sejmu Bioro Studiów I Ekspertyz; Wydział Analyz Economicznych I Społecznych, March 2005, Report No. 232, ch. 6.

says 'We experience this as a painful blow to our identities, inflicted on us in a manner which takes no account of the history of the lands in which we have come to live, the history of the nations among which our cultures have developed, or the development of statehood which also includes our history. Irrespective of the existence or non-existence, either now or at any time, of one or more Tatar, Roma or Jewish states, we were and remain nations. No parliament in the world has the power to deprive us of our awareness of this fact.'

The division may also cause bitterness among those who were classified as ethnic minorities, such as the Roma and the Lemkovians, which have limited parliamentary election rights. However, the Minorities Act, although it does not include electoral rights, is designed to guarantee equal rights to both kinds of minorities [references omitted]."

Note

The commentary illustrates that explicit recognition and distinction of ethnic and national minorities is highly controversial, as it may simplify the complex reality in a diverse society and cause unwanted and unnecessary social divisions. For that reason, it is not surprising that most Member States have thus far refrained from adopting the Polish legislative approach and do not clearly distinguish between national and ethnic minorities.

LANGUAGE

It is clear from the definition of racial discrimination given in the legislation of a number of states that language is explicitly covered by the notion of race or ethnic origin. In other states, this point is open to debate. In the Netherlands, for example, a difference is made between a prohibition to speak a foreign language (which would amount to discrimination directly based on race)[59] and a requirement to speak Dutch (which would not amount to direct discrimination based on race, but merely to indirect discrimination).[60] It may be gathered from this that language is only considered to form an actual part of the ground of ethnicity and race if the language concerned is *foreign*.

Further, some states mention language as a separate ground of discrimination, as is the case in the Polish constitution (Article 13) and the Finnish Non-Discrimination Act (section 6). Unfortunately, no materials are presently available in which the meaning of the ground is further explained.

ETHNICITY AND RELIGION

One last difficult question which is relevant to this subsection relates to the distinction between racial or ethnic discrimination and discrimination based on religion. Discrimination against Jews or Muslims, for instance, can easily be

[59] See, e.g. Dutch Equal Treatment Commission, Opinion 2001-97.
[60] See, e.g. Dutch Equal Treatment Commission, Opinion 2001-141.

categorised both ways.[61] This causes particular problems if the protection offered against racial discrimination is different from the protection against religious discrimination, as is the case with the protection offered by the Racial Equality Directive and the Employment Equality Directive. This problem will be explored separately in section 1.5, which is devoted to the concept of "multiple" and "intersectional" discrimination.

1.3.2.B. SUSPECTNESS

Race is commonly regarded as a highly suspect ground. Unequal treatment based on such a ground can only rarely be considered acceptable. This finds clear expression in the legislation in the various Member States, which mostly contains absolute or nearly absolute prohibitions on race-based distinctions. Insofar as non-discrimination legislation has an open character (i.e. does not contain an enumerative list of grounds and contains an open possibility for justification), it is usually clear from case-law that race based classifications are suspect and almost impossible to justify. This is particularly clear from the case-law of the European Court of Human Rights. In its case-law on race based discrimination, two different situations can be distinguished. In the first place, the ECtHR has dealt with complaints of racially inspired cases of inhuman and degrading treatment, such as racial police violence. In this context, it has consistently held that discrimination based on race can of itself amount to degrading treatment within the meaning of Article 3 of the Convention.[62] This type of case, in which acts are at stake that are clearly inspired by racism and racial prejudice, can be distinguished from cases that actually concern a *difference in treatment* based on race or ethnic origin. In this type of case, the ECtHR has recently qualified race and ethnic origin as "suspect" grounds of discrimination. This is particularly clear from the *Timishev* case decided in 2005, which has been discussed before (see **1.CoE.1.**). In this case, the Court made it clear that racial discrimination has to be regarded as so invidious that hardly any discrimination based on race or ethnic origin can be considered to be justifiable. This ruling stands in marked contrast to earlier judgments of the ECtHR relating to unequal treatment of Gypsies:

[61] See above n. 18, 20.
[62] ECtHR, 6 July 2005, *Nachova and Others* v. *Bulgaria*, not yet published, §§ 145 and 164.

ECtHR, 18 January 2001[63] **1.CoE.18.**
Chapman v. United Kingdom

NO STRICT TEST APPLIED TO DISCRIMINATION AGAINST GYPSIES[64]

Chapman

Facts: Chapman is a Gypsy by birth and has always travelled in the Hertfordshire area in the UK. In 1985, she bought a piece of land with the intention of giving up her nomadic lifestyle and living quietly in a mobile home place on the land. The County Council, however, told her that she would not be allowed to live on the land, since it was in the Metropolitan Green Belt and national and planning policies overrode Chapman's needs and interests.

Held: As there is no lack of objective and reasonable justification for the measures taken against the applicant, there is no violation of Article 14 of the Convention.

Judgment: "93 . . . The Court observes that there may 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 but to preserve a cultural diversity of value to the whole community.

94. However, the Court is not persuaded that the consensus is sufficiently concrete for it to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation. The framework convention, for example, sets out general principles and goals but the signatory States were unable to agree on means of implementation. This reinforces the Court's view that the complexity and sensitivity of the issues involved in policies balancing the interests of the general population, in particular with regard to environmental protection, and the interests of a minority with possibly conflicting requirements renders the Court's role a strictly supervisory one.

95. Moreover, to accord to a Gypsy who has unlawfully stationed a caravan site at a particular place different treatment from that accorded to non-Gypsies who have established a caravan site at that place or from that accorded to any individual who has established a house in that particular place would raise substantial problems under Article 14 of the Convention . . .

129. . . . While discrimination may arise where States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different . . . the Court does not find, in the circumstances of this case, any lack of objective and reasonable justification for the measures taken against the applicant."

Notes

(1) Although the ECtHR acknowledged the special character of the problems of Gypsies in this case, this did not lead it to conclude that a case of de facto unequal treatment based on Gypsy status or ethnic origin is suspect, nor did it require very weighty reasons to be adduced in justification. It may be argued, however, that this judgment concerned an atypical case of ethnically inspired unequal treatment, since

[63] Reports 2001-I.

[64] See for comparable cases ECtHR, 25 September 1996, *Buckley* v. *UK*, Reports 1996-IV and ECtHR, 18 January 2001, *Jane Smith* v. *UK*, not published.

there was no clear case of disadvantageous treatment of a Gypsy in comparison to a non-Gypsy. On the basis of *Timishev* and earlier case-law of the ECtHR, in which it said "that it is particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations",[65] it may be expected that the ECtHR will show less deference if it is presented with a more obvious case of unequal treatment of Gypsies.

(2) Having regard to the general perception of suspectness of the grounds of race and ethnicity, it is highly probable that the national courts and the ECJ will strictly review all instances of direct discrimination based on these grounds. However, considering the possible impact of ECtHR precedents such as *Chapman*, and having regard to the lack of consensus on the definition of racial and ethnic groups, it is difficult to predict what will happen if more controversial cases are brought before the courts. A uniform and wide definition provided by the ECJ, accompanied by a clear stance with respect to the level of scrutiny, would be most helpful to guarantee an adequate level of protection against discrimination.

1.3.3. NATIONALITY

1.3.3.A. DEFINITION

DIFFERENT SITUATIONS

The ground of nationality poses particular problems for non-discrimination legislation. A distinction is usually made between two different situations. First, an important question is whether non-discrimination legislation applies to non-citizens who are present in a certain Member State, i.e. whether non-citizens have a claim to the protection offered by such legislation. This question seems to be answered in the affirmative for the Article 13 Directives, which both apply to "all persons". This is obviously a notion that is broad enough to cover citizens as well as non-citizens.[66] Indeed, the preambles of both Directives stress that the prohibition of discrimination should also apply to nationals of third countries.[67]

Secondly, it is questionable if non-discrimination law covers all cases of unequal treatment based on nationality. In this respect, the approach towards discrimination based on nationality appears to differ from that towards race and origin, both on the international and European level and on the level of the Member States. ICERD and the Racial Equality Directive do not prohibit the states from making distinctions

[65] ECtHR, 23 September 1994, *Jersild* v. *Denmark*, Series A, Vol. 298, para. 30.

[66] See the Racial Equality Directive, Art. 3(1) and the Employment Equality Directive, Art. 3(1). See also S. Parmar, "The European Court of Justice and Anti-Discrimination Law" in J. Niessen and I. Chopin, *The Development of Legal Instruments to Combat Racism in a Diverse Europe* (Leiden, Martinus Nijhoff, 2004) 138.

[67] Recital 13 of the preamble to the Racial Equality Directive, Recital 12 of the preamble to the Employment Equality Directive.

based on this ground,[68] whereas the EU Charter of Fundamental Rights and the EC Treaty contain explicit non-discrimination clauses relating to nationality discrimination.[69] Within the EU, this seeming contradiction may be explained by the background of the various provisions. Article 12 EC[70] is meant to remove all differences in treatment of EU citizens and is usually read in close connection with the EC Treaty provisions relating to free movement. Disadvantageous treatment of citizens of other EU Member States might hamper their rights of free movement within the internal market and should therefore be prevented. A similar need for equal treatment for economic and internal market reasons does not exist with respect to third-country nationals. Accordingly, third-country nationals do not generally fall within the scope of the non-discrimination clauses of the EC Treaty.[71] On these issues, the European Court of Justice has developed an extensive and highly nuanced body of case-law. It is understandable that the Member States, when drafting the Racial Equality Directive, wished to leave this body of case-law intact by exempting nationality discrimination from the scope of the Directive.[72] Thus, it might be said that nationality discrimination continues to be governed by the "regular" provisions of the European Treaties and the ECJ case-law, rather than by the specific equality provisions of the Equality Directives.

As a result of the exclusion of nationality from the scope of the Article 13 Directives, some EU Member States, such as Bulgaria,[73] have refrained from mentioning the ground in their national non-discrimination legislation. Even in these states, however, the level of protection accorded to non-nationals should be equal to the level of protection guaranteed by international treaties such as the ECHR and the ICCRP. In other states, a different choice has been made: a large number of states have added "nationality" to their legislative lists of prohibited grounds.

DEFINITION OF NATIONALITY

The definitions given to the notion of nationality are widely diverging and sometimes confusing. For instance, ICERD defines "nationality" purely as "citizenship", whilst the Racial Equality Directive (in exempting this category) refers to "third country nationals and stateless persons". In the Member States, "nationality" is sometimes

[68] See Art. 1(2) and (3) CERD and Art. 3(2) of the Racial Equality Directive.

[69] See Art. 21(2) of the Charter of Fundamental Rights of the European Union and Art. 12 EC.

[70] And, consequently, Art. 21(2) of the Charter of Fundamental Rights—see "Explanation Relating to the Complete Text of the Charter", December 2000, on Art. 21(2).

[71] There are some exceptions, based on a variety of legal constructs. Family members of EU citizens may, for instance, be placed in a different situation, just like employees in the EC service. See on this P. Craig and G. de Búrca, *EU Law. Text, Cases and Materials*, 3rd edn (Oxford, Oxford University Press, 2003) 754.

[72] See critically on this C. Brown, "The Race Directive: Towards Equality for All the Peoples of Europe?" [2002] *YEL* 210.

[73] P. Johansson, "Comparing National and Community Anti-Discrimination Law" in Niessen and Chopin, above n. 66, 189: in Bulgaria, non-nationals are only protected against discrimination on the grounds of nationality in the exercise of basic rights under binding instruments.

used to refer to national minorities and the ground of national origin, mentioning "citizenship" as a separate ground of distinction.[74] A clearer definition can be found in Article 2(a) of the European Convention on Nationality:

> "'Nationality' means the legal bond between a person and a State and does not indicate the person's ethnic origin."

According to this definition, nationality is a purely legal and objective concept which refers to the nationality legislation valid in a certain state. The nationality of a specific individual can be established on the basis of such legislation, thus enabling a determination of whether an individual is discriminated against because of his nationality.

Still, the availability of such a relatively clear definition does not bring an end to the confusion, since it is not always obvious that it is this definition that is meant if a Member State prohibits unequal treatment based on "nationality": the notion is seldom defined and mostly no reference is made to any international definitions. Particularly unclear is whether national non-discrimination legislation which refers to "nationality" must also be held to cover stateless persons (which is a large category in several Eastern European states, such as Estonia and Latvia),[75] or persons whose nationality is difficult to establish as a result of lack of nationality papers. It is thus difficult to give any general overview of the way in which the notion is used throughout Europe.

An additional problem is that the notion of nationality is easily confused with the concept of national or ethnic origin.[76] In many cases, discrimination against non-nationals and discrimination based on national and ethnic origin will coincide, especially since there is a considerable overlap between minority ethnic communities in Europe and communities of third-country nationals.[77] In some cases, "nationality" thus seems to be used not so much to refer to someone's legal nationality, as to someone's country of birth or ethnic background. Having regard to such overlap, it is understandable that the legislation of some Member States comprises the ground of nationality under the scope of the wider notion of "race". In the Irish Equal Status Act of 2000, for instance, the ground of race is defined as including "race, colour, nationality or ethnic or *national* origins".[78] Such definitions still raise the question whether they refer only to nationality in the sense of "national origin", or (also) to the concept of nationality in the form of "citizenship". Indeed, it would seem that both meanings are used, as is made explicit in the comparable definition given to "racial grounds" in UK legislation: "'racial grounds' means any of the following grounds, namely colour, race, nationality (including citizenship), ethnic and national origins".[79]

[74] *Cf.* A. Dummett, "Implementing European Anti-Discrimination Law" in Niessen and Chopin, above n. 66, 238.

[75] *Ibid.* at 238–9.

[76] Brown, above n. 72, 210.

[77] See M. Bell, "Setting Standards in the Fight against Racism" in Niessen and Chopin, above n. 66, 218–19.

[78] Art. 3(2)(h), emphasis added.

[79] Race Relations Act 1976, s. 3(1) and Race Relations (Northern Ireland) Order 1977, Art. 5(1).

Notwithstanding such examples, it is clear that the European Directives and a large number of Member States adhere strictly to the distinction between nationality and national or ethnic origin. Any real convergence of legislation is thus not visible in this area.

1.3.3.B. SUSPECTNESS

The suspectness of nationality as a ground of discrimination is particularly difficult to determine, since nationality is closely connected to national sovereignty. Many states confer privileges, social advantages and rights only to their own citizens, not aliens, rendering nationality a rather common ground of distinction. This is also certainly true for immigration law, where it is widely accepted that non-nationals can be treated differently from nationals. In these cases, concerning what may be termed the "external dimension" of the treatment of non-nationals, nationality is clearly considered a non-suspect ground. Indeed, many of the Member States which have included an explicit prohibition on nationality discrimination allow for wide exceptions to the principle of equal treatment, at least as long as this is compatible with the requirements of the European Convention of Human Rights and Title IV of the EC Treaty.

This is different for cases in which the "internal dimension" of the treatment of non-nationals is at stake. These cases concern classifications based on nationality in a variety of areas, such as employment (e.g. lower payments for non-nationals) or social security (e.g. exclusion from childcare benefits). In cases relating to this "internal dimension", it is more difficult to find a justification for nationality based differences in treatment.[80] The European Court of Human Rights has even accepted nationality as a suspect ground in these cases, which means that a distinction based on these grounds has to be justified by "very weighty reasons":

ECtHR, 16 September 1996[81] **1.CoE.19.**
Gaygusuz v. *Austria*

"VERY WEIGHTY REASONS" TEST APPLIED TO NATIONALITY DISCRIMINATION

Gaygusuz

Facts: Mr Gaygusuz is of Turkish origin and lives in Austria on the basis of a permanent residence permit. The Austrian authorities refused to grant him emergency assistance, a kind of social advantage, on the ground that he did not have Austrian nationality. Such nationality was one of the legislative conditions for entitlement for an allowance of this type.

Held: The difference in treatment between Austrians and non-Austrians is not based on any objective and reasonable justification and therefore constitutes a violation of Article 14 ECHR.

[80] *Cf.* M. Bell, "Setting Standards in the Fight against Racism" in Niessen and Chopin, above n. 66, 218.
[81] Reports 1996-IV.

Judgment: "42 . . . the States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. However, *very weighty reasons* would have to be put forward before the Court could regard a difference exclusively based on the ground of nationality as compatible with the Convention [emphasis added]."

Note

The ECtHR confirmed this holding in the *Koua Poirrez* case of 2003.[82] Unfortunately, in neither case has it explained the reason why nationality should trigger a "very weighty reasons" test. Indeed, it is probable that this case-law is not completely crystallised as yet. This may appear from the following decision:

ECtHR, 25 October 2005[83] **1.CoE.20.**
Niedzwiecki v. *Germany*

NO "VERY WEIGHTY REASONS" TEST APPLIED TO NATIONALITY DISCRIMINATION

Niedzwiecki

Facts: Mr Niedzwiecki, who is of Polish origin, moved to Germany in 1987. In 1989 he obtained a provisional residence permit; in 1991 he was issued with a limited residence title for exceptional purposes. This residence title was renewed every two years. In 1997, he finally obtained an unlimited residence permit. In 1995, his daughter was born. Niedzwiecki applied for child benefits, which were available under the Federal Child Benefits Act. His request was dismissed, as he only had a limited residence title for exceptional purposes.

Held: Though no "very weighty reasons" test was applied, the Court found that there were no sufficient reasons justifying the different treatment.

Judgment: "32. . . . The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment . . .

33. The Court is not called upon to decide generally to what extent it is justified to make distinctions, in the field of social benefits, between holders of different categories of residence permits. Rather it has to limit itself to the question whether the German law on child benefits as applied in the present case violated the applicant's rights under the Convention . . ."

Note

In *Niedzwiecki*, the ECtHR did not mention the "very weighty reasons" test at all, nor did it refer to its earlier judgments in *Gaygusuz* (**1.CoE.19.**) and *Koua Poirrez*. From § 33, it may even be inferred that the ECtHR is willing to apply a less strict test to cases of nationality discrimination in social security, as it is "not called upon to decide generally to what extent it is justified to make distinctions in the field of social benefits". It is not clear, therefore, if the Court still considers nationality a suspect

[82] ECtHR, 30 September 2003, *Koua Poirrez* v. *France*, Reports 2003-X, para. 46.
[83] Not yet published.

ground of discrimination, nor if it will be stricter or less strict in cases yet to be decided. To this extent, the national courts will find little guidance in this case-law as to the level of scrutiny they will need to apply in cases of nationality discrimination.

The ECJ's case-law on nationality discrimination is even more complicated. Indeed, the ECJ seems to regard nationality as a suspect ground of discrimination in the sphere of employment and social security, especially because of economic and internal market considerations. Discrimination against EU citizens would hamper their access to the employment market of other Member States and would impede their freedom of movement. It is thus well understandable that the ECJ, as much as the ECtHR, has laid down strict requirements to justify classifications based on nationality. Interestingly, the strictness of the ECJ's review is thus based on different considerations than the "very weighty reasons" test applied by the ECtHR. This is apparent, for example, from the following excerpt from an opinion of Advocate General Jacobs:

ECJ, Opinion of Advocate General Jacobs, 20 October 1993[84] **1.EC.21.**
Joined Cases C–92/92 and C–326/92, Phil Collins v. *Imtrat Handelsgesellschaft mbH and Patricia Im- und Export Verwaltungsgesellschaft GmbH and Leif Emanuel Kraul* v. *EMI Electrola GmbH*

IMPORTANCE OF THE PROHIBITION OF NATIONALITY DISCRIMINATION

Phil Collins

"The prohibition of discrimination on grounds of nationality is the single most important principle of Community law. It is the leitmotiv of the EEC Treaty . . . It is not difficult to see why the authors of the Treaty attached so much importance to the prohibition of discrimination. The fundamental purpose of the Treaty is to achieve an integrated economy in which the factors of production, as well as the fruits of production, may move freely and without distortion, thus bringing about a more efficient allocation of resources and a more perfect division of labour . . . Although the abolition of discriminatory rules and practices may not be sufficient in itself to achieve the high level of economic integration envisaged by the Treaty, it is clearly an essential prerequisite. The prohibition of discrimination on grounds of nationality is also of great symbolic importance, inasmuch as it demonstrates that the Community is not just a commercial enterprise in which all the citizens of Europe are able to participate as individuals. The nationals of each Member State are entitled to live, work and do business in other Member States on the same terms as the local population. They must not simply be tolerated as aliens, but welcomed by the authorities of the host State as Community nationals who are entitled, 'within the scope of application of the Treaty', to all the privileges and advantaged enjoyed by the nationals of the host State. No other aspect of Community law touches the individual more directly or does more to foster that sense of common identity and shared

[84] [1993] ECR I–5145.
[85] Paras 9–11.

destiny without which the 'ever closer union of the peoples of Europe', proclaimed by the preamble to the Treaty, would be an empty slogan."[85]

Note

Thus, according to Advocate General Jacobs, the primary reason for suspectness of nationality discrimination is economic in nature. In addition, he stresses that equal treatment of all EU citizens would foster a sense of common identity, thus giving a more fundamental reason for suspectness as well. It seems clear that the ECJ has been inspired by like considerations, in particular in the line of case-law it developed with respect to the rights related to EU citizenship. A good illustration of the case-law on this issue is the case of *D'Hoop*:

ECJ, 11 July 2002[86] **1.EC.22.**
Case C–224/98, M.N. D'Hoop v. *Office national de l'emploi*

IMPORTANCE OF PROHIBITION OF NATIONALITY DISCRIMINATION

D'Hoop

Facts: Ms D'Hoop, who has Belgian nationality, completed her secondary education in France. Her diploma was recognised in Belgium as equivalent to the approved certificate of higher secondary education. D'Hoop studied at university in Belgium until 1995. In 1996, she applied for a so-called "tideover allowance", a specific type of unemployment allowance which is granted to young people who have just completed their studies and are seeking their first employment. Her application was refused because she did not fulfil the relevant conditions, one of which was to have completed full-time higher secondary education at an educational establishment run, subsidised or approved by the Belgian authorities.

Held: Community law precludes a Member State from refusing to grant a tideover allowance to one of its nationals, a student seeking her first employment, on the sole ground that that student completed her secondary education in another Member State.

Judgment: "28. Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy within the scope *ratione materiae* of the Treaty the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for . . .

29. The situations falling within the scope of Community law include those involving the exercise of the fundamental freedoms guaranteed by the Treaty, in particular those involving the freedom to move and reside within the territory of the Member States, as conferred by Article 8a of the EC Treaty (now, after amendment, Article 18 EC) . . .

30. In that a citizen of the Union must be granted in all Member States the same treatment in law as that accorded to the nationals of those Member States who find themselves in the same situation, it would be incompatible with the right of freedom of movement were a citizen, in the Member State of which he is a national, to receive treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the Treaty in relation to freedom of movement.

[86] [2002] ECR I–6191.

31. Those opportunities could not be fully effective if a national of a Member State could be deterred from availing himself of them by obstacles raised on his return to his country of origin by legislation penalising the fact that he has used them . . ."

Note
It appears from this case that all EU citizens have the right to be treated on the same footing as national citizens and that unequal treatment is only allowed if it is justified by fundamental and compelling reasons. Still, the ECJ's case-law on nationality is nuanced. The strictness of the requirements does not seem to depend only on the suspectness of the ground of nationality, but also on other circumstances, such as the policy field in question. In cases concerning public security or public order, for example, the demands seem to be less stringent.[87]

Hence, it is difficult to state any general conclusions with respect to the level of scrutiny applied to cases of nationality discrimination.

1.3.4. GENDER, SEX AND RELATED GROUNDS

1.3.4.A. DEFINITION

GENDER AND SEX

The ground of gender/sex seems only rarely to raise debate, although the terms "sex" and "gender" are sometimes confused. In legal discourse, the term "sex" is used to refer to biological, genetically determined differences between women and men, such as differences related to pregnancy and lactation or average differences in physical strength. Other differences between men and women appear to be more social than biological in nature, such as (perceived) differences in the relation between parent and child. To describe these "social" differences between the sexes, the term "gender" is usually employed. Thus, "sex" refers to a biological reality, whereas "gender" refers to a social reality:

> "Gender refers to the social attributes and opportunities associated with being female and male, and the relationship between women and men, and girls and boys, as well as between women and between men. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context and time-specific but changeable, since gender determines what is expected, allowed and valued in a woman or a man in a given situation. In most societies, there are differences and inequalities between men and women in the assignment of responsibilities, under-taking of activities, access and control over resources, and decision-making opportunities, with gender part of the broader socio-cultural context . . ."[88]

[87] See, e.g. Case 30/77 *Bouchereau* [1977] ECR 1999, paras 28 and 30 and Case C–83/94 *Leifer* [1995] ECR I–3231, para. 35.

[88] A.-M. Mooney-Cotter, *Gender Injustice. An International Comparative Analysis of Equality in Employment* (Aldershot, Ashgate, 2004) 6.

In practice, it is sometimes hard to separate the two notions, as it is not always easy to classify a difference between men and women as either socially constructed or biological in nature. The result is that academic writers, courts and legislators do not always carefully distinguish between the terms, rendering the difference rather fuzzy. Indeed, although the term "gender" is now used more often than "sex", many legal texts still primarily contain the ground "sex". Further, it is important to remember that not all states distinguish between the two notions in their own languages; often, "sex" and "gender" are covered by a single term.

SYMMETRICAL AND ASYMMETRICAL DEFINITIONS

In determining the personal scope of non-discrimination legislation, an important difference may be perceived between symmetrical and asymmetrical non-discrimination provisions. Symmetrical provisions protect against sex or gender discrimination in general, regardless of whether it is a man or a woman that is disadvantaged by the difference in treatment. The various European gender provisions are all formulated in such a symmetrical way, i.e. not referring to one particular sex.[89] Often as a result of implementation of the various Directives, most national legislation in the Member States contains such neutrally formulated provisions as well, as the following examples from Estonia and Germany may illustrate:

Estonian Law on Gender Equality 2004[90] **1.EE.23.**

The purpose of this Act is to ensure gender equality arising from the Constitution of the Republic of Estonia and to promote equal treatment for men and women as a fundamental human right and for the public good in all areas of social life . . .

German Constitution (Grundgesetz)[91] **1.DE.24.**

Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.

At this point, there is an interesting contrast between European and international law. The International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979) is based on a clearly asymmetrical approach. All of

[89] See, e.g. Art. 2 of the Gender Employment Directive (Art. 2 of the Recast Gender Employment Directive).

[90] RT I 2004, 27, 181, Art. 1.

[91] Art. 3(2).

its provisions are meant to protect the position of women, not of men. The main reason for this is that, in general, women find themselves in a disadvantaged position as compared to men and are more often harmed by discriminatory treatment. In order to reduce the factual disadvantages and improve the real participation of women in social, economic and political life, it was considered necessary to provide specific rules that apply to women only. This is clearly expressed in a number of important CEDAW provisions:

International Convention on the Elimination of All Forms of Discrimination against Women, 1979 **1.UN.25.**

Article 1
For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2
States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women . . .

Article 3
States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 4
1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards, these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved . . .

Note
The difference of approach between CEDAW and the European gender provisions is clearly illustrated by the cited Articles. For the Member States this may be difficult to deal with. If a Member State were to use an asymmetrical approach, as is favoured by CEDAW and many academic writers, they might infringe the strictly symmetrical provisions of the European Directives, especially if the application of the relevant provisions were to cause an interference with the rights and interests of men. Several academic writers have therefore argued that it would be preferable to create more uniformity and consistency in the international and European approaches towards

gender discrimination.[92] At present, however, such harmonisation still seems a distant prospect.

GENDER RELATED GROUNDS—PREGNANCY AND GENDER-SPECIFIC ILLNESS

Although it might seem to be relatively easy to classify a concrete case of discrimination as based on sex or gender, this is more difficult for situations in which the discrimination is not so much based on someone's being a man or a woman, but on closely related grounds, such as pregnancy, childbirth or maternity. European law has been unclear on this point until 1990, when the *Dekker* case was decided:

ECJ, 9 November 1990[93] **1.EC.26.**
Case C–177/88, Dekker v. *Stichting VJV*

DISCRIMINATION BASED ON PREGNANCY CONSTITUTES SEX DISCRIMINATION

Dekker

Facts: In June 1981 Mrs Dekker applied for the post of instructor at the training centre for young adults run by VJV. She informed the committee dealing with the applications that she was three months' pregnant. The committee nonetheless put her name forward to the board of management of VJV as the most suitable candidate for the job. VJV, however, informed Mrs Dekker that she would not be appointed, because VJV would be financially unable to employ a replacement during Mrs Dekker's absence and would thus be short-staffed.

Held: An employer acts in direct contravention of the principle of gender equality if he refuses to enter into a contract of employment with a female candidate whom he considers to be suitable for the job, where such refusal is based on the possible adverse consequences of employing a pregnant woman.

Judgment: "12. . . . it should be observed that only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex. A refusal of employment on account of the financial consequences of absence due to pregnancy must be regarded as based, essentially, on the fact of pregnancy . . ."

Precisely because of the fact that pregnancy and gender are closely correlated concepts, the ECJ held in *Dekker* that the definition of sex also covers pregnancy. In the later case of *Mary Brown*, the Court has broadened the meaning of the ground of sex even further to cover absence during pregnancy:

[92] E.g. R. Holtmaat and C. Tobler, "CEDAW and the European Union's Policy in the Field of Combating Gender Discrimination" (2005) 12 *MJ* 421 and J.H. Gerards, "Descriptieve representatie als rechtvaardiging voor voorkeursbeleid. Noot bij *Jacobs/België* (Human Rights Committee 17 augustus 2005)", (2005) 30 *NJCM-Bulletin* 640.

[93] [1990] ECR I–3941.

ECJ, 30 June 1998[94] **1.EC.27.**
Case C–394/96, Mary Brown v. *Rentokil*

DISMISSAL BECAUSE OF ABSENCE DURING PREGNANCY IS SEX DISCRIMINATION

Mary Brown

Facts: Mrs Mary Brown informed Rentokil, her employer in August 1990, that she was pregnant. Thereafter she had difficulties associated with her pregnancy. She did not work again after mid-August 1990. According to the employment policy of Rentokil, an employee would be dismissed if he or she were absent because of sickness for more than 26 weeks continuously. Since Mrs Brown did not go back to work, she was dismissed while pregnant in February 1991.

Held: Articles 2(1) and 5(1) of Directive 76/207 preclude dismissal of a female worker at any time during her pregnancy for absences due to incapacity for work caused by illness resulting from that pregnancy.

Judgment: "22. Although pregnancy is not in any way comparable to a pathological condition . . ., the fact remains . . . that pregnancy is a period during which disorders and complications may arise compelling a woman to undergo strict medical supervision and, in some cases, to rest absolutely for all or part of her pregnancy. Those disorders and complications, which may cause incapacity for work, form part of the risks inherent in the condition of pregnancy and are thus a specific feature of that condition . . .

24. . . . [D]ismissal of a female worker during pregnancy for absences due to incapacity for work resulting from her pregnancy is linked to the occurrence of risks inherent in pregnancy and must therefore be regarded as essentially based on the fact of pregnancy. Such a dismissal can affect only women and therefore constitutes direct discrimination on grounds of sex."

The ECJ held in this case that medical conditions occurring during and attributable to the pregnancy are so closely interconnected with the pregnancy that a distinction based on such a condition constitutes sex based discrimination. This situation may be contrasted to the situation in which a condition or illness is the result of the pregnancy, but occurs after the period of pregnancy and maternity leave. In this situation, the Court has adopted a different stance:

ECJ, 8 November 1990[95] **1.EC.28.**
Case C–179/88, Handels- og Kontorfunktionaerernes Forbund i Danmark, acting on behalf of Birthe Vibeke Hertz v. *Dansk Arbejdsgiverforening*

NO SEX DISCRIMINATION IN CASE OF DISMISSAL FOR PREGNANCY-RELATED REASONS

Hertz

Facts: Mrs Hertz gave birth to a child in 1983 after a pregnancy marked by complications for most of which, with the consent of her employer, she was on sick leave. Mrs Hertz resumed work in late 1983. She had no health problems until 1984, but between 1984 and 1985, she was once more on sick leave for 100

[94] [1998] ECR I–4185.
[95] [1990] ECR I–3979.

working days; her illness was a consequence of her pregnancy and confinement. Her employer informed Mrs Hertz that he was terminating her employment contract.

Held: Article 5(1) of Directive 76/207, in conjunction with Article 2(1) thereof, does not preclude dismissals which are the result of absences due to an illness attributable to pregnancy or confinement.

Judgment: "13. It follows from the provisions of the Directive quoted above [76/207/EEC] that the dismissal of a female worker on account of pregnancy constitutes direct discrimination on grounds of sex, as is a refusal to appoint a pregnant woman . . .

14. On the other hand, the dismissal of a female worker on account of repeated periods of sick leave which are not attributable to pregnancy or confinement does not constitute direct discrimination on grounds of sex, inasmuch as such periods of sick leave would lead to the dismissal of a male worker in the same circumstances . . .

17. Male and female workers are equally exposed to illness. Although certain disorders are, it is true, specific to one or other sex, the only question is whether a woman is dismissed on account of absence due to illness in the same circumstances as a man; if that is the case, then there is no direct discrimination on grounds of sex."

Notes

(1) It appears from the case-law of the ECJ that, even if only a man or a woman can develop a certain disease or condition (e.g. prostate or breast cancer), this does not constitute a relevant sex-related difference per se. Although the character of a disease may differ and the development of a disease may be gender-specific, it is clear, according to the ECJ, that men and women are equally prone to illness. This is different with respect to pregnancy, as this is obviously a condition that is particular to women. For that reason, it is understandable that pregnancy discrimination is considered sex discrimination, whereas this is not true for discrimination based on gender-specific illness.

(2) Nonetheless, it seems surprising that pregnancy-related illness is considered as closely linked to one's sex during pregnancy and maternity leave, but not after the period of maternity leave has passed. The reason for this may be found outside the definitional question itself. The ECJ considers it desirable that special protection is given to women during their pregnancy, especially against the harmful effects of the risk of dismissal. That risk does not exist any more after pregnancy, implying that there is less reason to place illness, pregnancy and gender within the same category of prohibited grounds for distinction.

HOMOSEXUALITY AND GENDER

Another interesting issue relates to the question as to where the exact borderline between homosexuality and gender should be drawn. This question became particularly relevant as Community law offered comprehensive protection against gender discrimination in employment, but none against discrimination based on sexual orientation. In a number of factual situations, however, it would seem possible to define discrimination based on sexual orientation in terms of gender discrimination. Gays, lesbians and bisexuals (or, eventually, heterosexuals) would then also profit from the protection offered by European law. The ECJ, however, has blocked this possibility:

ECJ, 17 February 1998[96] **1.EC.29.**
Case C–249/96, Grant v. *South-West Trains*

SEX DISCRIMINATION OR DISCRIMINATION BASED ON SEXUAL ORIENTATION

Grant

Facts: Ms Grant was employed by South West Trains (SWT), a railway company. As an employment benefit, all SWT employees and their spouses were granted free and reduced travel concessions. Ms Grant applied in 1995 for travel concessions for her female partner, with whom she declared she had had a meaningful relationship for over two years. SWT refused to allow the benefit sought, on the ground that for unmarried persons travel concessions could be granted only for a partner of the opposite sex.

Held: The refusal by an employer to grant travel concessions to a person of the same sex with whom a worker has a stable relationship, where such concessions are granted to a worker's spouse or to a person of the opposite sex with whom a worker has a stable relationship outside marriage, does not constitute discrimination prohibited by Article 119 of the Treaty or Directive 75/117.

Judgment: "26. The refusal to allow Ms Grant the concessions is based on the fact that she does not satisfy the conditions prescribed in those regulations, more particularly on the fact that she does not live with a 'spouse' or a person of the opposite sex with whom she has had a 'meaningful' relationship for at least two years.

27. That condition, the effect of which is that the worker must live in a stable relationship with a person of the opposite sex in order to benefit from the travel concessions, is, like the other alternative conditions prescribed in the undertaking's regulations, applied regardless of the sex of the worker concerned. Thus travel concessions are refused to a male worker if he is living with a person of the same sex, just as they are to a female worker if she is living with a person of the same sex.

28. Since the condition imposed by the undertaking's regulations applies in the same way to female and male workers, it cannot be regarded as constituting discrimination directly based on sex."

Note

The reasonableness of the distinction between gender and sexual orientation made in *Grant* is heavily debated.[97] Given that protection against gender discrimination is still much stronger than that against discrimination based on sexual orientation, it may be considered unfortunate from a strategic point of view that the ECJ has decided to exclude the possibility of classifying discrimination against gays, lesbians and bisexuals as (at least partly) based on gender.

GENDER/SEX, TRANSSEXUALITY AND INTERSEXUALITY/HERMAPHRODITISM

An interesting debate regarding the definition of gender further relates to the question if transsexuality and intersexuality come under the scope of gender/sex. With respect to transsexualism, the answer to this question is clear, now that the ECJ

[96] [1998] ECR I–621.
[97] S. Fredman, *Discrimination Law* (Oxford, Oxford University Press, 2002) 73.

has explicitly accepted that transsexualism is so closely related to sex and gender that a distinction based on this ground can be regarded as a distinction that is directly based on grounds of sex.

ECJ, 30 April 1998[98] **1.EC.30.**
Case C–13/94, P. v. S. and Cornwall County Council

DISCRIMINATION BASED ON TRANSSEXUALITY CONSTITUTES SEX DISCRIMINATION

P. v. S.

Facts: P. used to work as a manager in an educational establishment operated by Cornwall County Council. In early April 1992, a year after being taken on, P. informed S., the Director of the establishment, of the intention to undergo gender reassignment. This began with a "life test", a period during which P. dressed and behaved as a woman, followed by surgery to give P. the physical attributes of a woman. After undergoing minor surgical operations, P. was given three months' notice, expiring on 31 December 1992.

Held: Article 5(1) of Directive 76/207 precludes dismissal of a transsexual for a reason related to a gender reassignment.

Judgment: "17. The principle of equal treatment 'for men and women' to which the directive [Directive 76/207/EEC] refers in its title, preamble and provisions means, as Articles 2(1) and 3(1) in particular indicate, that there should be 'no discrimination whatsoever on grounds of sex'.

18. Thus, the directive is simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law.

19. Moreover, as the Court has repeatedly held, the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure . . .

20. Accordingly, the scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned.

21. Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment."

By now, the various Member States have integrated this decision into their own case-law,[99] or have adopted special legislation to protect transsexuals and regulate legal issues of gender reassignment.[100]

Some related grounds have proven to be more difficult to interpret as being gender-related. This is particularly true when there are problems relating to sexual

[98] [1998] ECR I–2143.

[99] See, e.g. Opinion 1998–12 of the Dutch Equal Treatment Commission.

[100] See, e.g. the German *Transsexuellengesetz* (TSG, Transsexuality Act), paras 1, 4, 5, 7, 8 and 10 and the UK Sex Discrimination (Gender Reassignment) Regulations 1999, SI 1999/1102.

differentiation, which may be present with respect to hermaphrodites and inter- or intrasexuals. Case-law in this problematic area, however, is scarce.

Regional Court of Munich, Civil Division (Landgericht München I 16. Zivilkammer), 30 June 2003[101] **1.DE.31.**

DOES HERMAPHRODITISM QUALIFY AS A SEPARATE GENDER?

Hermaphrodites

Facts: A hermaphrodite demanded that the entry under "sex" in the public register of civil status should be "intersexual" or "intrasexual". The registry refused, stating that neither of the terms designated a certain sex.

Held: Neither human dignity nor the right to free development of the personality, nor the principle of equality require the recognition of an additional gender category as capable of being entered under the law on registration of births, deaths and marriages.

Judgment: "a) The term 'hermaphrodite' is taken to refer to living entities which are of both sexes, i.e. they possess male and female sex-organs in equal measure . . . A person is described as 'hermaphrodite', if both testicles and ovaries are present. Only in this case—which occurs with extreme rarity—can one speak of 'genuine hermaphroditism' . . .

The applicant is not a hermaphrodite within the meaning of this definition, since in her case only female and no male sex-glands are present: while she possesses ovaries, she does not possess testicles. In the present case, therefore, it does not have to be decided whether, in the case of genuine hermaphroditism, the sexual designation 'hermaphrodite' could be entered in the Register of Births, Deaths and Marriages.

b) The entry of 'intersexual' or 'intrasexual' as gender identification in the Register of Births, Deaths and Marriages cannot be considered as an option, since these terms do not indicate any specific gender, but are blanket-terms for a series of disorders in sexual differentiation, in which internal and external sexual features develop, in varying degrees of prominence, in contradiction to the chromosomal gender.

Biology and medicine make the assumption that human beings belong to one of two sexes, and consider the various forms of doubtful gender as exceptions to the rule, which arise, due to a variety of malfunctions, in the development of the embryo. Among the manifestations of intersexuality, apart from rare syndromes, science recognises three manifestations of hermaphroditism in particular: genuine hermaphroditism, where both testicular and ovarian tissue is present in the organism, as well as the male and female forms of pseudo-hermaphroditism.

In the latter, which applies to the applicant, male or female gonads of the corresponding chromosome set are present, whereas the external features of the opposite sex are visible . . .

The division of humanity into five genders, as asserted by this appeal, is nothing other than a classification of genuine hermaphroditism, masculine pseudohermaphroditism and feminine pseudohermaphroditism as independent genders. It represents a minority opinion, which—as far as can be ascertained—has as yet found little support except among the group of researchers cited in the grounds for the appeal.

[101] NJW-RR 2003, at 1590.

c) Not even from fundamental human rights can any claim to recognition of an additional gender next to 'male' and 'female' be derived in cases such as the present one. Even the Federal German constitution, in Art. 3 II 1, assumes that human beings are divided into two sexes, male and female. This bipolar concept of gender is the basis of the ban on discrimination in Art. 3 III of the *Grundgesetz* [GG, Basic Law], under which regulations which discriminate on the basis of sex are only permissible, to the extent that they are urgently required for the resolving of problems which, by their nature, can only arise in either men or women . . .

Neither the principle of human dignity (Art. 1 I GG) nor the right to free development of the personality (Art. 2 I GG), nor the principle of equality (Art. 3 II GG) require the recognition of an additional gender category as capable of being entered under the law on registration of births, deaths and marriages. Such a category—as explained—does not correspond to the current state of scientific knowledge, is entirely unknown to current German law and would lead to considerable difficulties in the defining of terms and to uncertainties in the law."

Note

According to the Munich regional court, there can exist no other category of sex apart from the male and female sex. In this approach, hermaphroditism and inter/intrasexualism can be considered as different from transsexualism, since a transsexual, after gender reassignment, can still be designated as a man or as a woman. Such a clear placement in the categories of "men" and "women" is not possible with respect to hermaphrodites or inter/intrasexuals. Still, there is a close relation between intersexualism and gender or sex, for which reason it would not be illogical to classify distinctions based on intersexualism or hermaphroditism as being gender based. Some support for this submission can be found in the ECJ's decision in *P.* v. *S.*, where it considered that "the scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex".[102] A similar stance seems to have been taken by the German Constitutional Court in a 2005 decision concerning transsexuality, in which it found that it should be acknowledged that not all transsexuals really strive for complete gender reassignment. It thereby seemed to imply that it may be difficult to categorise such persons as either men or women.[103] Thus, both cases would seem to leave some room for legal acknowledgement of transgender categories in the future.

1.3.4.B. SUSPECTNESS

Sex and gender are generally regarded as suspect grounds of discrimination, both by the European Court of Justice and the European Court of Human Rights. The reasoning that leads both Courts to apply a strict test of gender discrimination seems to be somewhat different, however, as is illustrated by the following two excerpts:

[102] See *P.*v.*S.*, above **1.EC.30.**, para. 20.
[103] BVerfG, 6 December 2005, 1 BvL 3/03.

ECJ, 30 March 1993[104] **1.EC.32.**
Case C–328/91, Secretary of State for Social Security v. *Thomas and Others*

STRICT SCRUTINY IN GENDER DISCRIMINATION CASES

Thomas

Facts: In the UK, the Social Security Act 1975 provided for the grant of severe disability allowances to people who are incapable of working. People who have attained retirement age, which is 65 for men and 60 for women, are not entitled to those benefits. Mrs Thomas was refused severe disability allowance on the ground that she had ceased employment because of invalidity after attaining retirement age.

Held: Where a Member State prescribes different retirement ages for men and women for the purposes of granting old-age and retirement pensions, the scope of the derogation permitted under Directive 79/7 is limited to the forms of discrimination existing under the other benefit schemes which are necessarily and objectively linked to the difference in retirement age.

Judgment: "8. In considering the scope of the derogation provided for . . ., it is to be noted, first, that, in view of the fundamental importance of the principle of equal treatment, which the Court has reaffirmed on numerous occasions, the exception to the prohibition of discrimination on grounds of sex . . . must be interpreted strictly."

ECtHR, 25 May 1985[105] **1.CoE.33.**
Abdulaziz, Cabales and Balkandali v. *the United Kingdom*

VERY WEIGHTY REASONS TEST APPLIED TO GENDER DISCRIMINATION

Abdulaziz

Facts: A British law concerning family reunification (the "1984 Act") made it much easier for foreign families where the man was already resident in Britain to be reunited than for families where only the wife lived in Britain.

Held: The applicants have been victims of discrimination on the ground of sex, in violation of Article 14 taken together with Article 8.

Judgment: "78. Although the Contracting States enjoy a 'certain margin of appreciation' in assessing whether and to what extent differences in otherwise similar situations justify a different treatment, the scope of this margin will vary according to the circumstances, the subject-matter and its background. As to the present matter, it can be said that the advancement of the sexes is today a major goal in the Member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention."

Note
It appears from these excerpts that the ECJ bases the suspectness of the ground of gender (mirrored by the strictness of its review) on considerations relating to the

[104] [1993] ECR I–1247.
[105] Series A, Vol. 94.

fundamental character of the right to equal treatment of men and women.[106] This fundamental character has been stressed in a long line of case-law which the ECJ has developed since 1978.[107] The ECtHR, by contrast, primarily seems to apply a "very weighty reasons" test because, throughout the Council of Europe, all states seem to agree that gender is a suspect ground of discrimination. Both reasons are strongly related, however, as the European consensus on the suspectness of the gender ground is evidently inspired by a generally shared perception of sex equality as a fundamental right.

Importantly, the ECJ and the ECtHR do not consider gender discrimination to be suspect in all cases, although the ECJ seems to be more consistent in this respect than the ECtHR. Indeed, the ECJ would not even seem to consider it of any relevance that a gender distinction is made in the context of positive action—the test it applies there is as strict as the one applied to "regular" forms of gender discrimination.[108] Nonetheless, even the ECJ seems to relax its standards sometimes, especially if the area of social security is concerned. To this extent, the approaches of the ECJ and ECtHR appear to be rather similar, as may be illustrated by the following excerpts:

ECJ, 12 July 1984[109] **1.EC.34.**
Case 184/83, Hofmann v. *Barmer Ersatzkasse*

LESS INTENSIVE REVIEW OF SOCIAL SECURITY ISSUES

Hofmann

Facts: Mr Hofmann, a German father, obtained unpaid leave from his employer for the period between the expiry of the statutory period of eight weeks which was available to the mother and the day on which the child reached the age of six months. During that time he took care of the child while the mother continued her employment. He submitted to the Barmer Ersatzkasse a claim for payment during that period. His request was refused, as only mothers could claim paid maternity leave under the relevant German legislation.

Held: A Member State may, after the statutory protective period has expired, grant to mothers a period of maternity leave which the State encourages them to take by the payment of an allowance. The Directive

[106] There may also be more political reasons for strictly scrutinising gender discrimination. As Ellis has argued, sex equality may have been given priority "because it provides a relatively innocuous, even high sounding, platform by means of which the Community can demonstrate its commitment to social progress" and may constitute political legitimisation of the European Community. She also stresses that an important reason for suspectness of gender discrimination may still be economical in character, as sex equality prevents competitive distortions in highly integrated market. See E. Ellis, *EU Anti-Discrimination Law* (Oxford, Oxford University Press, 2005) 22–3.

[107] In *Defrenne III*, the ECJ held for the first time that the elimination of sex discrimination forms part of the fundamental rights respected by community law (Case 149/77 *Defrenne* v. *Sabena* [1978] ECR 1365, paras 26 and 27). In *Schröder*, decided in 2001, the ECJ even held that the fundamental rights aspect of the principle of equal treatment of men and women had become more important than the social and economic values it was originally meant to protect (Case C–50/96 *Schröder* [2000] ECR I–743, para. 57).

[108] On this issue, see below, O de Schutter in Chapter Seven: Positive Action, section 7.5.

[109] [1984] ECR 3074.

does not impose on the Member States a requirement that they shall, as an alternative, allow such leave to be granted to fathers, even where the parents so decide.

Judgment: "27. . . .the Directive leaves Member States with discretion as to the social measures which they adopt in order to guarantee, within the framework laid down by the Directive, the protection of women in connection with pregnancy and maternity and to offset the disadvantages which women, by comparison with men, suffer with regard to the retention of employment. Such measures are . . . closely linked to the general system of social protection in the various Member States. It must therefore be concluded that the Member States enjoy a reasonable margin of discretion as regards both the nature of the protective measures and the detailed arrangements for their implementation."

ECtHR, 27 March 1998[110] **1.CoE.35.**
Petrovic v. *Austria*

NO VERY WEIGHTY REASONS REQUIRED TO JUSTIFY GENDER DISCRIMINATION

Petrovic

Facts: According to an Austrian regulation of parental leave allowances, both men and women could take parental leave, but only women came into consideration for a parental leave allowance.

Held: The Austrian authorities' refusal to grant the applicant a parental leave allowance has not exceeded the margin of appreciation left to them and was not discriminatory within the meaning of Article 14.

Judgment: "37. It is true that the advancement of the equality of the sexes is today a major goal in the Member States of the Council of Europe and very weighty reasons would be needed for such a difference in treatment to be regarded as compatible with the Convention . . .

38. However, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its back-ground; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States . . .

39. It is clear that at the material time, that is at the end of the 1980s, there was no common standard in this field, as the majority of the Contracting States did not provide for parental leave allowances to be paid to fathers . . .

42. There still remains a very great disparity between the legal systems of the Contracting States in this field. While measures to give fathers an entitlement to parental leave have now been taken by a large number of States, the same is not true of the parental leave allowance, which only a very few States grant to fathers.

43. The Austrian authorities' refusal to grant the applicant a parental leave allowance has not, therefore, exceeded the margin of appreciation allowed to them. Consequently, the difference in treatment complained of was not discriminatory within the meaning of Article 14."

[110] Reports 1998-II.

Note
It appears from both *Hofmann* and *Petrovic* that neither the fundamental character of the equality principle nor the existence of a general consensus relating to the suspectness of sex as a ground for classification is always decisive for the strictness of judicial review. The need to leave room for differentiation between and within the Member States, or the lack of common ground in a specific policy field, may override these general notions and may induce a more marginal test.[111]

1.3.5. SEXUAL ORIENTATION

1.3.5.A. DEFINITION

SYMMETRICAL OR ASYMMETRICAL APPROACH

As is the case with gender equality, protection against discrimination based on sexual orientation may be based on a symmetrical or an asymmetrical approach. The Employment Equality Directive appears to start from a symmetrical approach, generally prohibiting discrimination based on "sexual orientation". No special protection is thus provided for gays, lesbians and bisexuals, who in practice constitute the group that is most often subjected to discrimination and disadvantage as a result of their sexual orientation. As a result of the implementation of the Directive, a symmetrical approach is also generally adopted in the non-discrimination legislation of the Member States. In several Member States, notably Ireland and the UK, this has been made explicit by mentioning all relevant groups in a legislative definition of the term of sexual orientation:

Irish Equal Status Act 2000[112] **1.IE.36.**

'Sexual orientation' means heterosexual, homosexual or bisexual orientation.

Employment Equality (Sexual Orientation) Regulations 2003[113] **1.GB.37.**

In these Regulations, 'sexual orientation' means a sexual orientation towards—

(a) persons of the same sex;
(b) persons of the opposite sex; or
(c) persons of the same sex and of the opposite sex.

[111] See in more detail also ch. 3, section 3.5.2.B.
[112] No. 8/2000, Section 2.
[113] SI 2003/1661, Reg. 2.

These legislative examples show that the prohibition of discrimination based on sexual orientation covers discrimination based on homosexual or bisexual orientation as well as on heterosexual orientation.[114]

A different stance seems to be taken in Germany, where the notion of "sexual identity" ("*sexuellen Identität*") is used instead of "sexual orientation" (e.g. Article 1 § 1 of the General Equal Treatment Act (AGG)). The result seems to be an asymmetrical approach:

> "Usually, German legislators use the term 'sexual identity'. This is designed to cover homosexuals, transsexuals and intersexuals. Until today, bisexuals and heterosexuals have not been part of the legal discussion."[115]

As a result, bisexuals and heterosexuals do not seem to be protected by the German legislation against discriminatory treatment.

SEXUAL ORIENTATION, SEXUAL PREFERENCE AND SEXUAL BEHAVIOUR

The Employment Equality Directive prohibits discrimination based on sexual orientation, but the Explanatory Memorandum to the Directive contains an important distinction in this regard:

Explanatory Memorandum to the Employment Equality Directive[116] **1.EC.38.**

"With regard to sexual orientation, a clear dividing line should be drawn between sexual orientation, which is covered by this proposal, and sexual behaviour, which is not."

Unfortunately, the Explanatory Memorandum does not state any reasons for the distinction made between sexual orientation and sexual behaviour.[117] The implementation of the prohibition by the various Member States shows mixed reactions to

[114] *Cf.* clearly, e.g. Finland (see T. Makkonen, "Report on Measures to Combat Discrimination: Directive 2000/43/EC and 2000/78/EC. Country Report Finland" (European Commission, 2005) 8, available on the website of Directorate-General for Employment, Social Affairs and Equal Opportunities; (presumably) France (see D. Borrillo, "France" in European Group of Experts on Combating Sexual Orientation Discrimination, *Combating Sexual Orientation Discrimination in Employment: Legislation in Fifteen EU Member States* (Leiden University, 2004) 193); Ireland (see main text); Italy (see A. Simoni, "Report on Measures to Combat Discrimination: Directive 2000/43/EC and 2000/78/EC. Country Report Italy" (European Commission, 2004) 8, available on the website of Directorate-General for Employment, Social Affairs and Equal Opportunities; the Netherlands (see main text); Sweden (see H. Ytterberg, "Sweden" in European Group of Experts, *ibid.*; and the UK (see main text and B. Cohen, "Report on Measures to Combat Discrimination: Directive 2000/43/EC and 2000/78/EC. Country Report United Kingdom" (European Commission, 2005) 9, available on the website of Directorate-General for Employment, Social Affairs and Equal Opportunities).

[115] S. Baer, "Germany" in European Group of Experts, *ibid.*, 218, available on the website of Directorate-General for Employment, Social Affairs and Equal Opportunities.

[116] COM (1999) 565 def, Explanation to Art. 1.

[117] See critically M. Bonini-Baraldi, "European Law" in European Group of Experts, *ibid.*, 25.

this definition. Some Member States have accepted the European Commission's approach by limiting legislative protection to sexual orientation, as is the case in the UK:

> "'Sexual orientation' does not include 'sexual practices and preferences (e.g. sado-masochism and paedophilia)'."[118]

Other states do not seem to have paid much attention to the issue and have limited themselves to adding the ground "sexual orientation" to their non-discrimination legislation without giving a legislative definition or referring to the distinction between orientation and behaviour. In these states, clarification will have to be offered by case-law or legislative history, but there are presently only a few examples that disclose explicit consideration of the issue. Such an example may be found in the opinions of the Dutch Equal Treatment Commission, which predate the Employment Equality Directive.

Equal Treatment Commission (Commissie Gelijke Behandeling) Opinion 2003-150 **1.NL.39.**

"SEXUAL ORIENTATION" ALSO COVERS SEXUAL BEHAVIOUR

Lesbian test person

Facts: The defendant party is a research institute that carries out research relating to the development of drugs, thereby making use of test persons. In 2003 the research institute was studying a drug that would be used to treat Alzheimer's disease and was looking for test persons. In its research protocol, it defined the following conditions for suitable test persons: "Female subjects must be non-pregnant, surgically sterile, or, if sexually active, must have a partner who has been vasectomised for at least six months, or agree to utilize [a] form of contraception from screening through completion of the study . . ." The applicant is a lesbian woman, who has applied to participate in the drug study. The research institute excluded her because she does, though sexually active, not use any form of contraception.

Held: As the sexual orientation of the applicant is not pertinent to the aims of the research protocol, there is no justification for the difference in treatment.

Opinion: "5.3. The term heterosexual or homosexual orientation must, according to the legislative history of the Equal Treatment Act, be broadly interpreted and is aimed at a person's orientation in sexual and amatory feelings, expressions and relations . . . The term orientation has been adopted because it covers specific expressions as well as feelings. The term orientation is therefore broader than the term preference . . . It follows that specific behaviour that is generally regarded as an emanation of a person's homosexual (or heterosexual) orientation is protected by the Equal Treatment Act."

Note

It is clear from this case that the Dutch Equal Treatment Commission uses the term "sexual orientation" precisely because of its wide scope, considering that it is

[118] UK Employment Equality (Sexual Orientation) Regulations 2003, Explanatory Memorandum, Annex B, para. 5.

sufficiently broad to cover both sexual feelings and expressions. This reading of the term was confirmed by the legislative history of the Dutch implementation of the Employment Equality Directive, in which the government explained its interpretation of the term "sexual orientation" (*seksuele gerichtheid*):

> "The concept of orientation (*gerichtheid*) includes a person's concrete expressions as well as feelings and preferences, so that the term 'orientation'—and consequently also the protection against discrimination—is broader than the concept of preference (*voorkeur*) and the concept of proclivity (*geaardheid*) . . . Replacing the term orientation by the term preference or the term proclivity would restrict the protection that the Equal Treatment Act offers on this point. The government does not intend to reduce the level of protection under the Equal Treatment Act." [119]

As the adoption of the distinction made by the Commission would have reduced the level of protection offered by the Dutch equal treatment legislation, it is understandable that the Dutch government has opted for continued use of the wide notion of "sexual orientation". Similar interpretations have been given in other states, such as Italy and Sweden.[120] These wide definitions do not only provide a higher level of protection against discrimination, but they would also seem to be more in line with the approach taken by the European Court of Human Rights. In several cases, this Court has implicitly accepted that a distinction based on homosexual conduct constitutes a case of unequal treatment under Article 14 ECHR.[121]

OTHER FORMS OF SEXUAL ORIENTATION, PREFERENCE OR BEHAVIOUR

In concrete cases coming before the national courts or equal treatment commissions, questions are sometimes raised regarding behaviour or feelings somehow related to sexual orientation or sexual behaviour, such as transvestism or transsexuality. The question then arises if these forms should be comprised under the notion of sexual orientation. For transsexuality the answer to this question is relatively clear. Since the ECJ's decision in *P.* v. *S.* (**1.EC.30.**), almost all Member States regard transsexuality as part of the definition of the ground of sex, rather than as discrimination based on sexual orientation. The question of whether transvestism, sadomasochism and paedophilia could be considered as part of the definition of sexual orientation is much more difficult to answer. In most Member States, this question has not been

[119] Memorandum of the Government in connection with the Report of the Second Chamber on the EC Implementation Act, *Kamerstukken II* 2002/03, 28 770, no. 5, at 7.

[120] See A. Simoni, "Report on Measures to Combat Discrimination: Directives 2000/43/EC and 2000/78/EC. Country Report Italy" (European Commission, December 2004), available on the website of Directorate-General for Employment, Social Affairs and Equal Opportunities; and H. Ytterberg, "Sweden" in European Group of Experts, *ibid.*, 457–8, available on the website of Directorate-General for Employment, Social Affairs and Equal Opportunities.

[121] See ECtHR, 9 January 2003, *L. and V.* v. *Austria*, Reports 2003-I. Although the ECtHR referred to a distinction based on "sexual orientation", it is clear from the facts that the case concerned not so much homosexual orientation as homosexual conduct: the complaint related to the criminalisation of homosexual acts of adult men with consenting adolescents. See also above Bonini-Baraldi, note 117, at 26.

addressed at all and, to the extent to which the issue has been dealt with, there appears to be little agreement on the appropriate classification. In the Dutch and UK legislative materials, it is explicitly stated that paedophilia is not protected; in the UK, sadomasochism is also mentioned in this respect.[122] The question if transvestism is covered by the notion of sexual orientation is debated:

Equal Treatment Commission (Commissie Gelijke Behandeling) Opinion 1996-108 **1.NL.40.**

DISCRIMINATION AGAINST TRANSVESTITES IS NOT SEXUAL ORIENTATION DISCRIMINATION

Homosexual transvestite

Facts: The applicant is a homosexual who practices transvestism. He was in training with the respondent to become a qualified nurse. His practical training period was terminated by the respondent because of complaints by patients and colleagues about perverse and suggestive remarks he had made, which were regarded as shocking and annoying.

Held: It has not been established that the dismissal was based on the applicant's sexual orientation.

Opinion: "7.4. The fact that the applicant told a colleague that he had ordered shoes with stiletto heels partly played a role in the defendant party's decision to terminate the contract of employment. However, this cannot be taken as indicating discrimination based on homosexual orientation, since there has been no sign that transvestism occurs predominantly amongst persons with a homosexual orientation."

Note

It is clear from this opinion that the Dutch Equal Treatment Commission does not see an objective relation between sexual orientation and transvestism, which view has also been expressed in France:

> "[T]he concept of sexual orientation does not protect . . .transvestites against discrimination . . . [T]he latter have found protection in the category of 'morals' or, more particularly, in the category of 'physical appearance'."[123]

In other states, however, a wider definition of "sexual orientation" has been given, which does include transvestism. This appears to be the case, for example, in Denmark:

> "In the existing Danish law the term 'sexual orientation' is used, which means homo- and heterosexual relations and other kinds of lawful sexual inclinations (like transvestism)."[124]

[122] Dutch Memorandum of the Government in connection with the Report of the Second Chamber on the EC Implementation Act, *Kamerstukken II* 2002/03, 28 770, no. 5, at 7 and the Explanatory Memorandum to the UK Employment Equality (Sexual Orientation) Regulations 2003, Annex B, para. 5.

[123] D. Borrillo, "France" in European Group of Experts, *ibid.*, s. 7.2.1.

[124] S. Baatrup, "Denmark" in European Group of Experts, *ibid.*, s. 5.2.2.

Although it is difficult to derive any general conclusions from these examples, there seems to be some agreement as to the fact that forms of sexual inclination other than homo- or heterosexualism are usually excluded from the definition of sexual orientation. As the Equality Employment Directive does not offer any guidance in this respect, interpretative case-law of the ECJ is needed to provide clarity.

1.3.5.B. SUSPECTNESS

Already in the case of *Dudgeon* v. *the United Kingdom* (1981), the ECtHR held that consensual homosexual behaviour concerned "a most intimate aspect of private life" and that "[a]ccordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate . . ."[125] In a later case (*Smith and Grady* v. *UK*), concerning a discharge from the army because of homosexuality, the Court also held that "[c]oncerning as it did a most intimate aspect of an individual's private life, particularly serious reasons by way of justification were required".[126] Both of these cases did not explicitly concern unequal treatment, however, but were mainly about the right to privacy (Article 8 ECHR). Only in the case of *Salgueiro* (1999) did the Court directly address the issue of discrimination based on sexual orientation:

ECtHR, 21 December 1999[127] **1.CoE.41.**
Salgueiro da Silva Mouta v. *Portugal*

DISADVANTAGE BASED SOLELY ON SEXUAL ORIENTATION IS NOT ACCEPTABLE

Salgueiro

Facts: After his divorce, Salgueiro da Silva Mouta sought an order giving him parental responsibility for his daughter. The Court of First Instance awarded him parental responsibility, holding that he would be, to a greater extent than the mother, "capable of providing her with the balanced conditions she needs and of respecting her right to maintain regular and sustained contact with her mother and maternal grandparents". This judgment was quashed on appeal and parental responsibility was awarded to the mother. The primary reason for this was contained in the following consideration: "The fact that the child's father, who has come to terms with his homosexuality, wishes to live with another man is a reality which has to be accepted. It is well-known that society is becoming more and more tolerant of such situations. However, it cannot be argued that an environment of this kind is the healthiest and best suited to a child's psychological, social and mental development, especially given the dominant model in our society, as the appellant rightly points out. The child should live in a family environment, a traditional Portuguese family, which is certainly not the set-up her father has decided to enter into, since he is living with another man as if they were man and wife. It is not our task here to determine whether homosexuality is or is not an illness or whether it is a sexual orientation towards persons of the same sex. In both cases it is an abnormality and children should not grow up in the shadow of abnormal situations; such are the dictates of human nature . . ."

[125] ECtHR, 22 October 1981, Series A, Vol. 45, para. 52.
[126] ECtHR, 27 September 1999, Reports 1999-VI.
[127] Reports 1999-IX.

Held: The Portuguese Court of Appeal made a distinction based on considerations regarding the applicant's sexual orientation, which is not acceptable under the Convention.

Judgment: "35. It is the Court's view that the above passages from the judgment in question, far from being merely clumsy or unfortunate as the Government maintained, or mere obiter dicta, suggest, quite to the contrary, that the applicant's homosexuality was a factor which was decisive in the final decision . . .

36. The Court is therefore forced to find, in the light of the foregoing, that the Court of Appeal made a distinction based on considerations regarding the applicant's sexual orientation, a distinction which is not acceptable under the Convention . . ."

Note

From the wording of this judgment, it might be derived that distinctions and classifications based on sexual orientation will never be accepted under the ECHR. The Court nuanced this opinion in a later case by stating that such difference in treatment might be justified by "very weighty reasons":

ECtHR, 9 January 2003[128] **1.CoE.42.**
L. and V. v. *Austria*

VERY WEIGHTY REASONS TEST APPLIED TO SEXUAL ORIENTATION DISCRIMINATION

L. and V.

Facts: L. and V. were convicted under the Austrian Criminal Code (*Strafgesetzbuch*) of homosexual acts with adolescents. L. was sentenced to one year's imprisonment suspended on probation for a period of three years; V. was sentenced to six months' imprisonment suspended on probation for a period of three years. L. and V. complained before the ECtHR of the maintenance in force of Article 209 of the Criminal Code, which criminalises homosexual acts of adult men with consenting adolescents between the ages of 14 and 18. Heterosexual or lesbian relations between adults and adolescents in the same age bracket were not punishable.

Held: The Government has not offered convincing and weighty reasons justifying the maintenance in force of Article 209 of the Criminal Code and, consequently, the applicants' convictions under this provision.

Judgment: "45. The applicants complained of a difference in treatment based on their sexual orientation. In this connection, the Court reiterates that sexual orientation is a concept covered by Article 14 . . . Just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification . . .

49. What is decisive is whether there was an objective and reasonable justification why young men in the 14 to 18 age bracket needed protection against sexual relationships with adult men, while young women in the same age bracket did not need such protection against relations with either adult men or women. In this connection the Court reiterates that the scope of the margin of appreciation left to the Contracting State will vary according to the circumstances, the subject matter and the background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States . . .

[128] Reports 2003-I.

50. In the present case the applicants pointed out, and this has not been contested by the Government, that there is an ever growing European consensus to apply equal ages of consent for heterosexual, lesbian and homosexual relations. Similarly, the Commission observed in Sutherland . . . that 'equality of treatment in respect of the age of consent is now recognised by the great majority of Member States of the Council of Europe'."

Note

By applying the "very weighty reasons" test, the ECtHR has placed the ground of sexual orientation on the same level as sex and illegitimate birth. The reason for suspectness is the existence of a growing consensus within the various Contracting States of the Council of Europe on the need to treat homosexual relations on the same footing as heterosexual relations.

The ECJ has not yet been offered the opportunity to pronounce itself on the suspectness of the ground of sexual orientation. Having regard to the ECtHR's case-law, it might be expected that the ECJ will award a similar level of protection and will strictly scrutinise any case of discrimination based on sexual orientation. Indeed, the fact that the ground is now explicitly mentioned in the Employment Equality Directive, the EU Fundamental Rights Charter and Article 13 EC may be regarded as recognition of the suspectness of discrimination based on sexual orientation.[129] However, Bell's caveat that sexual orientation discrimination is not yet recognised as creating a barrier to participation in the European labour market and undermining overall economic competitiveness still holds true.[130] Although this is certainly not the only factor which determines the ECJ's intensity of review in discrimination cases, it therefore remains uncertain that the ECJ will provide a level of protection against sexual orientation discrimination that is comparable to that offered to equal treatment based on gender or nationality. It is clear, moreover, from such cases as *Grant* (above, **1.EC.29.**), that the ECJ does not presently recognise the need to treat same-sex partners the same as partners of different sex. The Employment Equality Directive might not lead to a change in this respect, since its material scope is rather limited and does not cover the sensitive and controversial area of family law.[131] Against this background, it would not be surprising if the ECJ chose to decide sexual orientation cases along two different lines: it may regard sexual orientation as a suspect ground of discrimination in those limited areas in which there is clear legislation available (such as in the area of employment), whilst leaving a wide scope of discretion to the states in other, more controversial and unregulated areas, such as family law.

[129] See, on the developments in the EU, in particular with respect to policy measures adopted by the European institutions, M. Bell, "Setting Standards in the Fight against Racism" in Niessen and Chopin, above n. 66, 89*ff*.

[130] *Ibid.*, 119.

[131] However, see Case C–267/06 *Maruko*, lodged with the Court of Justice on 20 June 2006, which concerns surviving partner pensions and their availability to registered (same-sex) partners.

1.3.6. MARITAL AND FAMILY STATUS

1.3.6.A. DEFINITIONS

MARITAL STATUS

The Employment Equality Directive does not contain a prohibition of discrimination based on marital status in the sense of discrimination between married and unmarried couples. Indeed, European law does not really seem to be concerned with discrimination on this basis, even though the Gender Employment Directive mentions the ground as a possible cause of indirect gender discrimination.[132] The little case-law available with respect to marital status is concerned mainly with Regulation No. 1612/68, which provides a number of rights and benefits to workers employed in a different Member State and their family and spouses. In the *Reed* case of 1986, the ECJ denied that an unmarried partner could be brought within the category of "spouse" as contained in this Regulation:

ECJ, 17 April 1986[133] **1.EC.43.**
Case 59/85, State of the Netherlands v. *Ann Florence Reed*

NO RESIDENCE PERMIT FOR UNMARRIED PARTNER

Reed

Facts: Ms Reed, an unmarried British national, arrived in the Netherlands in 1981. In 1982 she applied for a residence permit on the ground that she was living with Mr W. Mr W. was also an unmarried British national, who had worked in the Netherlands since 1981 and obtained a residence permit as a national of a member state of the EEC. Miss Reed and Mr W. were living together in the Netherlands and had a stable relationship of some five years' standing. Miss Reed was refused a residence permit on the basis of the Dutch policy on aliens. Although that policy made it possible for aliens to obtain a residence permit in the Netherlands because of a stable relationship (even if the partners were not married), this possibility did not exist for workers residing in the Netherlands on the basis of a residence permit granted to nationals of EEC states.

Held: The relevant provisions must be interpreted as meaning that a Member State which permits the unmarried companions of its nationals, who are not themselves nationals of that Member State, to reside in its territory cannot refuse to grant the same advantage to migrant workers who are nationals of other Member States.

[132] Gender Employment Directive, Art. 2 para. 1 (not included in the Recast Gender Employment Directive): "For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status." On the meaning of this clause, see aboveEllis, n. 106, 28.

[133] [1986] ECR 1283.

Judgment: "14. Article 10(1) of Regulation No. 1612/68 provides that certain members of the 'family' of a worker, including his 'spouse', irrespective of their nationality, 'have the right to install themselves with a worker who is a national of one member state and who is employed in the territory of another member state'.

15. In the absence of any indication of a general social development which would justify a broad construction, and in the absence of any indication to the contrary in the regulation, it must be held that the term 'spouse' in Article 10 of the Regulation refers to a marital relationship only . . .

22. It must . . .be ascertained whether the right to be accompanied by an unmarried companion falls within the scope of the Treaty and is thus governed by the principle of non-discrimination laid down by the provisions referred to above . . .

26. As the Court has repeatedly held, the purpose of . . . Regulation No. 1612/68 is to achieve equal treatment, and therefore the concept of social advantage . . .must include all advantages 'which . . . are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and the extension of which to workers who are nationals of other member countries therefore seems suitable to facilitate their mobility within the Community' . . .

28. . . . it must be recognized that the possibility for a migrant worker of obtaining permission for his unmarried companion to reside with him, where that companion is not a national of the host member state, can assist his integration in the host state and thus contribute to the achievement of freedom of movement for workers. Consequently, that possibility must also be regarded as falling within the concept of a social advantage . . .

29. It must therefore be concluded that the member state which grants such an advantage to its own nationals cannot refuse to grant it to workers who are nationals of other Member States without being guilty of discrimination on grounds of nationality . . .

30. . . . A member state which permits the unmarried companions of its nationals, who are not themselves nationals of that member state, to reside in its territory, cannot refuse to grant the same advantage to migrant workers who are nationals of other Member States."

Note

In this case the ECJ expressly held that the Regulation only applied to married partners, thereby rejecting the supposition that unequal treatment based on marital status were impermissible under EC law. The ECJ did, however, recognise that if a Member State voluntarily granted similar rights to married and unmarried partners in respect of its own nationals, it should also grant those rights to workers from other Member States. Thus, the Member States were left with a rather wide margin of discretion to decide whether they wanted to prohibit discrimination based on marital or family status and, if they did, how they would interpret the relevant ground.

Fifteen years later, the ECJ's stance has not significantly changed. In the case of *D. and Sweden* v. *Council*, it held once more that it was not the task of the ECJ to widen the scope of such notions as "marriage" in order to cover similar legal arrangements such as registered partnerships:

ECJ, 13 May 2001[134] **1.EC.44.**
Joined Cases C–122/99 P and C–125/99, P, D. and Sweden v. *Council*

DISCRIMINATION OF SAME-SEX PARTNERS WITH A REGISTERED PARTNERSHIP

D v. Council

Facts: D., a Swedish EC official working at the Council, registered a partnership with another Swedish national of the same sex in Sweden on 23 June 1995. He applied to the Council for his status as a registered partner to be treated as being equivalent to marriage for the purpose of obtaining the household allowance provided for in the Staff Regulations. The Council rejected the application on the ground that the provisions of the Staff Regulations could not be construed as allowing a registered partnership to be treated as being equivalent to marriage.

Held: The Council could not interpret the Staff Regulations so as to treat D's situation as that of a married official for the purposes of granting a household allowance.

Judgment: "33. . . . As the appellants contend, a stable relationship between partners of the same sex which has only a de facto existence, as was the case in Grant . . . is not necessarily equivalent to a registered partnership under a statutory arrangement, which, as between the persons concerned and as regards third parties, has effects in law akin to those of marriage since it is intended to be comparable.

34. It is not in question that, according to the definition generally accepted by the Member States, the term 'marriage' means a union between two persons of the opposite sex.

35. It is equally true that since 1989 an increasing number of Member States have introduced, along-side marriage, statutory arrangements granting legal recognition to various forms of union between partners of the same sex or of the opposite sex and conferring on such unions certain effects which, both between the partners and as regards third parties, are the same as or comparable to those of marriage.

36. It is clear, however, that apart from their great diversity, such arrangements for registering relation-ships between couples not previously recognised in law are regarded in the Member States concerned as being distinct from marriage.

37. In such circumstances the Community judicature cannot interpret the Staff Regulations in such a way that legal situations distinct from marriage are treated in the same way as marriage. The intention of the Community legislature was to grant entitlement to the household allowance under Article 1(2)(a) of Annex VII to the Staff Regulations only to married couples.

38. Only the legislature can, where appropriate, adopt measures to alter that situation, for example by amending the provisions of the Staff Regulations. However, not only has the Community legislature not shown any intention of adopting such measures, it has even . . . ruled out at this stage any idea of other forms of partnership being assimilated to marriage for the purposes of granting the benefits re-served under the Staff Regulations for married officials, choosing instead to maintain the existing arrangement until the various consequences of such assimilation become clearer.

39. It follows that the fact that, in a limited number of Member States, a registered partnership is assimilated, although incompletely, to marriage cannot have the consequence that, by mere interpretation, persons whose legal status is distinct from that of marriage can be covered by the term 'married official' as used in the Staff Regulations."

[134] [2001] ECR I–4319.

Note
D. v. *Council* shows that there may be a strong measure of overlap between the ground of marital status and that of sexual orientation. It seemed to be decisive in the case not that a distinction was made between married partners and partners with a registered partnership, but that a distinction was made between same-sex partners and partners of a different sex. It is far from clear how this case would have been decided if D. had had a registered partnership with an individual of another sex. If that would have resulted in the outcome that a well-established and consistent relationship between unmarried partners ought to be treated the same as the relationship between married partners, such a result would imply that the ground would cover only relations between different-sex partners, not between partners of the same sex. If that were true, this would constitute discrimination based on sexual orientation.[135]

FAMILY STATUS AND MARITAL STATUS

The above has shown that EC law does not provide any guidance as to the way in which the Member States should combat discrimination based on marital status. This is stressed by Recital 22 of the preamble to the Employment Equality Directive, which states that "this Directive is without prejudice to national laws on marital status and the benefits dependent thereon". Many Member States have included the ground of marital status in their non-discrimination legislation, yet the legislative definitions are far from uniform. In some legislation a notion of "family status" is mentioned which encompasses both marital status and related grounds, such as cohabitation with (close) family members, such as parents, siblings or children. An example may be found in the Bulgarian legislation:

The Bulgarian Protection against Discrimination Act[136] **1.BG.45.**

'Family status' shall mean marital status, or a factual cohabitation with, and a caring responsibility for offspring or parents, including grandchildren and grandparents, or for a collateral relative up to third degree inclusive of those who are dependent due to age or a disability.

Non-discrimination provisions starting from such a wide notion of family status obviously offer stronger protection against unequal treatment than provisions starting from marital status do.

Other Member States make a sharper distinction between family status and marital status. They do not consider "marital status" as part of the definition of

[135] *Cf.* O. de Schutter, "The Prohibition of Discrimination under European Human Rights Law. Relevance for EU Racial and Employment Equality Directives" (European Commission, February 2005) 43.

[136] Art. 1, subs 12.

"family status", but define family status as a separate ground with a different meaning. Marital status is then used primarily to refer to the civic relationship of two individuals (married, unmarried, cohabitating), whereas family status is employed to refer to the relationship between an individual and his family members. In this regard, the category of family members may be wide or narrow, the Bulgarian definition quoted above being an example of a wide definition which even encompasses grandparents. The Irish definition is also relatively wide, although it is limited to the relation to minors and other persons needing direct care.[137] This definition was explored further in decisions by the Equality Officer:

Equality Tribunal, 12 September 2003[138] **1.IE.46.**
Decision DEC-S/2003/109-110, Travers & Maunsell v. *The Ball Alley House*

DEFINITION OF FAMILY STATUS

The Ball Alley House

Facts: Travers and Maunsell complained about the fact that they were asked to leave the Ball Alley House pub at 7.00 pm because they had a sleeping nine-month-old baby with them on the premises. According to the owner of the pub, he acted in accordance with the pub's children's policy, according to which no children were allowed in(to) the pub after 6.00 pm to curtail the annoyance and risks that can arise from the presence of unsupervised children.

Held: The complainants were directly discriminated against on the family status ground contrary to the provisions of the Equal Status Act 2000 in being refused service.

Decision: "7.20 . . . I consider that the 'family status' ground is different to other grounds in so far as a persons family status can change, for the purposes of the Equal Status Act 2000, depending on the circumstances in which they find themselves at a particular time . . . [I]t appears clear to me that the term 'family status' as defined in the Equal Status Act 2000, relates specifically to having responsibility for children under 18 or for a person with a disability. Therefore, for a person to claim that they were discriminated against on the 'family status' ground, I consider that it must be shown that the treatment afforded to them was directly attributable to the fact that that person 'had responsibility' for a child under the age of 18 or for a person with a disability."

Note

It is clear from this case that the notion of "family status" under the Irish Equal Status Act 2000 is rather flexible. Parents will not always be able to invoke the ground, for example when a situation occurs in which they have no responsibility for their child. On the other hand, the notion is relatively wide in that it also covers relations to persons with a disability.

[137] See Equal Status Act 2000 (No. 8/2000), Art. 2 (Interpretation).

[138] Available on the website of the Equality Tribunal of Ireland, under the heading Equal Status Decisions.

By contrast, there are a number of states which use a far more limited definition and in which the refusal of service in a pub because of the presence of a minor would not constitute a prohibited form of discrimination. In the Netherlands, for example, only the ground of "civil status" is covered by the equal treatment legislation, which only concerns legal differences between married and unmarried persons and between registered and non-registered partners.[139] Although distinctions between legitimate, natural and adopted children would appear to fall under the scope of the Dutch notion, discrimination against singles does not qualify as a direct distinction on this ground.[140] Against the background of the wide variety of definitions of family life and marital status in the various Member States, these examples once more stress the lack of common ground and convergence in this area of equal treatment law.

1.3.6.B. SUSPECTNESS

Just like the exact meaning of "marital status" or "family status", the suspectness of the ground is still undetermined. Both the ECtHR and the ECJ have remained relatively silent on this issue. The ECJ's decisions do seem to make clear, however, that the ECJ does not regard the ground as a highly problematic ground for unequal treatment. This may be different for the ECtHR, but the one decision available does not provide a clear-cut answer to the question of suspectness:

ECtHR, 4 June 2002[141] **1.CoE.47.**
Wessels-Bergervoet v. *The Netherlands*

VERY WEIGHTY REASONS TEST APPLIED TO DISCRIMINATION BASED ON SEX AND MARITAL STATUS

Wessels-Bergervoet

Facts: Wessels-Bergervoet and her husband have always lived in the Netherlands. In 1984, Wessels was granted a married man's old-age pension under the General Old Age Pensions Act (AOW). However, his pension was reduced by 38% as neither he nor Wessels-Bergervoet had been insured under the Act during nine periods when he had worked in Germany and had old-age insurance under the German social-security legislation. These nine periods amounted in total to 19 years. After Wessels-Bergervoet reached the age of 65 in 1989, she was granted an old-age pension, which was reduced by 38%, just like her husband's, under a royal decree of 1985, the limitation applying to Wessels also applied to the person married to him.

[139] Cabinet view on the evaluation of the Equal Treatment Act by the Equal Treatment Commission, 1999, *Kamerstukken II* 2001–02, 28 481, no. 1, 13.
[140] *Ibid.*
[141] Reports 2002-IV.

Held: The difference in treatment between married women and married men is not based on any objective and reasonable justification and accordingly constitutes a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

Judgment: "47. . . .The only reason for the applicant's exclusion from insurance under the AOW for a global period of nineteen years was the fact that she was married to a man who was not insured under the AOW on grounds of his employment abroad. It is undisputed that a married man in the same situation as the applicant would not have been excluded from the AOW insurance scheme in this manner.

48. The Court concludes that the reduction applied to the applicant's AOW benefits was therefore based exclusively on the fact that she is a married woman . . .

49. The Court considers that very strong reasons would have to be put forward before it could regard a difference in treatment based exclusively on the ground of sex and marital status as compatible with the Convention."

Note

It is clear from this judgment that the Court regards discrimination based on combination of sex and marital status as suspect, but it is difficult to conclude from the ruling whether it will also apply a "very weighty reasons" test if a complaint of discrimination is based solely on the ground of marital status. Unfortunately, no other ECtHR judgments are available that give any clue as to the Court's stance on this issue.

1.3.7. BIRTH, PARENTAGE AND DESCENT

The ground of legitimate or illegitimate birth, parentage or descent is often mentioned in national legislation, but is not included in the list of grounds of the Employment Equality Directive. No definition of these grounds can thus be found in EC law. Although many Member States prohibit discrimination based on birth or parentage, a definition is seldom provided on the domestic level—the national legislators either seem to find the meaning of the grounds rather obvious and further definition superfluous, or they consider it difficult to provide a clear and practical legislative definition.

The ECtHR has paid much attention to the ground of birth as a basis for unequal treatment. In the case-law of this Court, issues of definition and suspectness are closely intertwined; these will therefore not be dealt with separately in this section.

In its famous *Marckx* decision, the Court accepted for the first time that a distinction based on birth in or out of wedlock would be very difficult to justify:

ECtHR, 13 June 1979[142] **1.CoE.48.**
Marckx v. *Belgium*

ILLEGITIMATE BIRTH AS A SUSPECT GROUND FOR DISCRIMINATION

Marckx

Facts: Alexandra Marckx was born in 1973; she is the daughter of Paula Marckx, who is unmarried. Paula Marckx duly reported Alexandra's birth, recognised the child and thereby became Alexandra's guardian. The procedure concluded with a judgment confirming the adoption, the effect whereof was retroactive to the date of the instrument of adoption. Marckx complained about the Civil Code provisions on the manner of establishing the maternal affiliation of an illegitimate child and on the effects of establishing such affiliation as regards both the extent of the child's family relationships and the patrimonial rights of the child and of his mother. She also raised the issue of whether it is necessary for the mother to adopt the child if she wishes to increase its rights.

Held: The state cannot rely on any general interest or objective and reasonable justification to limit an unmarried mother's right to make gifts or legacies in favour of her child when at the same time a married woman is not subject to any similar restriction. Accordingly, there was a breach of Article 14 of the Convention

Judgment: "41. It is true that, at the time when the Convention of 4 November 1950 was drafted, it was regarded as permissible and normal in many European countries to draw a distinction in this area between the 'illegitimate' and the 'legitimate' family. However, the Court recalls that this Convention must be interpreted in the light of present-day conditions (*Tyrer* judgment of 25 April 1978, Series A no. 26, p. 15, para. 31). In the instant case, the Court cannot but be struck by the fact that the domestic law of the great majority of the Member States of the Council of Europe has evolved and is continuing to evolve, in company with the relevant international instruments, towards full juridical recognition of the maxim 'mater semper certa est'.

Admittedly, of the ten states that drew up the Brussels Convention, only eight have signed and only four have ratified it to date. The European Convention of 15 October 1975 on the Legal Status of Children born out of Wedlock has at present been signed by only ten and ratified by only four members of the Council of Europe. Furthermore, Article 14(1) of the latter Convention permits any State to make, at the most, three reservations, one of which could theoretically concern precisely the manner of establishing the maternal affiliation of a child born out of wedlock (Article 2).

However, this state of affairs cannot be relied on in opposition to the evolution noted above. Both the relevant Conventions are in force and there is no reason to attribute the currently small number of Contracting States to a refusal to admit equality between 'illegitimate' and legitimate' children on the point under consideration. In fact, the existence of these two treaties denotes that there is a clear measure of common ground in this area amongst modern societies.

The official statement of reasons accompanying the Bill submitted by the Belgian Government to the Senate on 15 February 1978 . . . provides an illustration of this evolution of rules and attitudes. Amongst other things, the statement points out that 'in recent years several Western European countries, including the Federal Republic of Germany, Great Britain, the Netherlands, France, Italy and Switzerland, have adopted new legislation radically altering the traditional structure of the law of affiliation and establishing almost complete equality between legitimate and illegitimate children'. It is also noted that 'the desire to put an end to all

[142] Series A, Vol. 31.

discrimination and abolish all inequalities based on birth is . . .apparent in the work of various international institutions'. As regards Belgium itself, the statement stresses that the difference of treatment between Belgian citizens, depending on whether their affiliation is established in or out of wedlock, amounts to a 'flagrant exception' to the fundamental principle of the equality of everyone before the law (Article 6 of the Constitution). It adds that 'lawyers and public opinion are becoming increasingly convinced that the discrimination against (illegitimate) children should be ended'."

Note

It is clear from the cited considerations that the Court will not easily accept a justification for a difference in treatment based on legitimate or illegitimate birth, having regard to the growing European consensus regarding the unacceptability of such distinctions. The "common ground" argument is thus the main reason for suspectness in this case. This was stressed by the Court in its later judgment in the *Inze* case:

ECtHR, 28 October 1987[143] **1.CoE.49.**
Inze v. *Austria*

VERY WEIGHTY REASONS TEST APPLIED TO DISCRIMINATION BASED ON ILLEGITIMATE BIRTH

Inze

Facts: Mr Inze was born out of wedlock in 1942. Until 1965, he lived on a farm which had belonged first to his maternal grandmother and then to his mother. At the age of 23, he left the farm and later he married and settled down a few kilometres away. The applicant's mother died intestate on 18 April 1975 and left as her heirs, apart from the applicant, her husband and her second son. According to the provisions of the Civil Code, the widower was entitled to a one-fourth part of the inheritance and each of the sons (irrespective of their illegitimate or legitimate birth) to three-eighths thereof. However, the farm in question was subject to special regulations providing that farms of a certain size may not be divided in the case of hereditary succession and that one of the heirs must take over the entire property and pay off the other heirs. Inze had claimed that he should be called to take over his mother's farm as he was the eldest son, but his claim was dismissed: according to national law, precedence should be given to legitimate children.

Held: The reasons advanced by the Government cannot justify the rule at hand; violation of Article 14.

Judgment: "41. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what ex-tent differences in otherwise similar situations justify a different treatment in law; the scope of this margin will vary according to the circumstances, the subject-matter and its background . . .

In this respect, the Court recalls that the Convention is a living instrument, to be interpreted in the light of present-day conditions . . . The question of equality between children born in and children born out of wedlock as regards their civil rights is today given importance in the Member States of the Council of Europe. This is shown by the 1975 European Convention on the Legal Status of Children born out of Wedlock, which is presently in force in respect of nine Member States of the Council of Europe. It was ratified by the Republic of Austria on 28 May 1980, with a reservation which is not relevant to the facts of the present case. Very weighty

[143] Series A, Vol. 126.

reasons would accordingly have to be advanced before a difference of treatment on the ground of birth out of wedlock could be regarded as compatible with the Convention . . ."

Note
It is clear from this case that "very weighty reasons" have to be advanced in justification of a distinction based on birth out of wedlock. By now, the "very weighty reasons" test has become part of a well-established line of case-law regarding distinctions based on birth.[144] Discrimination based on this ground is thus clearly considered suspect and its justification will be subjected to very strict scrutiny by the ECtHR.

From the perspective of the definition and meaning of the various grounds of discrimination, it is furthermore interesting to see that the ECtHR has recently applied the "very weighty reasons" test in two related cases of unequal treatment: discrimination against parents of illegitimate children and discrimination against adopted children.

ECtHR, 8 July 2003[145] **1.CoE.50.**
Sahin v. *Germany*

DISCRIMINATION AGAINST PARENTS OF ILLEGITIMATE CHILDREN

Sahin

Facts: Mr Sahin is the father of G., who was born out of wedlock in 1988. He acknowledged paternity of the unborn child and undertook to pay maintenance. Sahin applied to the national courts for a decision granting him a right of access to G., but all his requests were dismissed. The main reason was that the courts were convinced that personal contact with her father would not be in the child's best interests. A Chamber of the ECtHR, which dealt with the case in 2001, found a violation of Article 14 because the underlying legislation put fathers of children born out of wedlock in a different, less favourable position than divorced fathers. Unlike the latter, natural fathers had no direct right of access to their children and the mother's refusal of access could only be overridden by a court when access was "in the interests of the child".

Held: The Court does not discern a sufficient justification for the difference in treatment of divorced and natural fathers; the discrimination is accordingly in violation of Article 14 ECHR.

Judgment: "94. The Court has already held that very weighty reasons need to be put forward before a difference in treatment on the ground of birth out of or within wedlock can be regarded as compatible with the Convention . . . The same is true for a difference in the treatment of the father of a child born of a relationship where the parties were living together out of wed-lock as compared with the father of a child born of a marriage-based relationship. The Court discerns no such reasons in the instant case."

[144] See also the case of *Camp and Bourimi* v. *the Netherlands*, ECtHR, 3 October 2000, Reports 2000-X.
[145] Not published.

Note

It is clear from this case that the ECtHR not only accepts that a difference in treatment between divorced fathers of legitimate children and fathers of children born out of wedlock is covered by the prohibition of discrimination of Article 14 ECHR, but even that this difference in treatment is included in the same category of suspect grounds, requiring very weighty reasons as justification.[146] The same is true for discrimination against adopted children, as the following excerpt makes clear:

ECtHR, 13 July 2004[147] **1.CoE.51.**
Pla and Puncernau v. *Andorra*

DISCRIMINATION AGAINST ADOPTED CHILDREN

Pla and Puncernau

Facts: In 1949 Mrs Carolina Pujol Oller died, leaving three children. She settled her estate on her son, Francesc-Xavier, as tenant for life. She indicated that Francesc-Xavier was to transfer the estate to a son or grandson of a lawful and canonical marriage. Francesc-Xavier contracted canonical marriage to the second applicant, Roser Puncernau Pedro. They adopted two children in accordance with the procedure for full adoption. In 1995 Francesc-Xavier made a will in which he left a sum of money to his son and daughter. After his death in 1996 two sisters, the great-grandchildren of the testatrix, brought proceedings to have the codicil declared null and void. The Andorran high court held that a proper interpretation of the will in the context of the legal and social circumstances at the time implied that the testatrix could not have intended that an adopted son could be regarded as 'a son or grandson of a lawful and canonical marriage'. Accordingly, Francesc-Xavier's codicil was declared null and void.

Held: The interpretation given by the national court amounted to a discrimination based on birth and is in contravention of Article 14 ECHR.

Judgment: "61. The Court reiterates that a distinction is discriminatory for the purposes of Article 14 if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised' . . . In the present case, the Court does not discern any legitimate aim pursued by the decision in question or any objective and reasonable justification on which the distinction made by the domestic court might be based. In the Court's view, where a child is adopted (under the full adoption procedure, moreover), the child is in the same legal position as a biological child of his or her parents in all respects: relations and consequences connected with his or her family life and the resulting property rights. The Court has stated on many occasions that very weighty reasons need to be put forward before a difference in treatment on the ground of birth out of wedlock can be regarded as compatible with the Convention. Furthermore, there is nothing to suggest that reasons of public policy required the degree of protection afforded by the Andorran appellate court to the appellants to prevail over that afforded to the first applicant.

[146] Before the case of *Sahin*, there was some reason to doubt the suspectness of a distinction based on parentage: in the earlier case of *McMichael*, the Court did not apply a very weighty reasons test to a case in which a married father was treated differently from a natural father (ECtHR 24 February 1995, *McMichael* v. *UK*, Series A, Vol. 307-B, paras 97–8).

[147] Reports 2004-VIII.

62. The Court reiterates that the Convention, which is a dynamic text and entails positive obligations for States, is a living instrument, to be interpreted in the light of present-day conditions and that great importance is attached today in the Member States of the Council of Europe to the question of equality between children born in and children born out of wedlock as regards their civil rights . . .Thus, even supposing that the testamentary disposition in question did require an interpretation by the domestic courts, that interpretation could not be made exclusively in the light of the social conditions existing when the will was made or at the time of the testatrix's death, namely in 1939 and 1949, particularly where a period of fifty-seven years had elapsed between the date when the will was made and the date on which the estate passed to the heirs. Where such a long period has elapsed, during which profound social, economic and legal changes have occurred, the courts cannot ignore these new realities. The same is true with regard to wills: any interpretation, if interpretation there must be, should endeavour to ascertain the testator's intention and render the will effective, while bearing in mind that 'the testator cannot be presumed to have meant what he did not say' and without overlooking the importance of interpreting the testamentary disposition in the manner that most closely corresponds to domestic law and to the Convention as interpreted in the Court's case-law.

63. Having regard to the foregoing, the Court considers that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8."

Note

In paragraph 61 of its judgment in *Pla and Puncernau*, the Court seems to classify discrimination based on being an adopted child instead of a biological child as discrimination based on "birth out of wedlock". This may seem an odd classification, but it is probably chosen because of the fact that birth out of wedlock is a suspect ground of discrimination warranting intensive scrutiny, which secures a measure of protection against discrimination the Court wanted to offer to adopted children too.

In conclusion, it seems clear that the notion of "birth" should be given a rather wide definition under the ECHR, including even adopted children and illegitimate fathers, and that distinctions based on this ground should be considered suspect at all times. As a consequence, the domestic courts should adopt a similar approach to the ground.

1.3.8. RELIGION AND BELIEF; POLITICAL OR PERSONAL CONVICTION

1.3.8.A. DEFINITION

INTRODUCTION

The Employment Equality Directive prohibits discrimination based on "religion or belief", without giving a definition of these terms. The only thing that is clear from this prohibition is that a difference is perceived between the notions of "religion" and

"belief" which is considered meaningful enough to justify separate mention of the notions. The same combination is also often found in national legislation. Many national lists of grounds even contain more or other related grounds, such as conscience and thought, but also political or personal conviction.

Employment Equality (Religion or Belief) Regulations 2003[148] **1.GB.52.**

In these Regulations, 'religion or belief' means any religion, religious belief, or similar philosophical belief.

Bulgarian Protection Against Discrimination Act[149] **1.BG.53.**

All direct or indirect discrimination on the grounds of . . . religion or faith . . . beliefs [and] political affiliation . . . shall be prohibited.

Constitution of Malta[150] **1.MT.54.**

In this article, the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by . . . political opinions . . . [or] creed . . .

These broad lists of grounds are probably inspired by the fact that international legal texts tend to provide a wide definition of the freedom of religion of belief, mentioning far more aspects than religion and belief alone. Both international and regional legislators have shrunk back from explicitly addressing the difficult question regarding the definition of such terms as "religion" and "belief". Instead, they have opted for listing a wide number of related notions, which may have appeared an easier solution than to provide elaborate and disputable definitions.[151]

[148] SI 2004/2520, s. 2(1). This definition will be amended when Equality Act 2006 s. 77 enters into force. This clarifies that lack of religion and lack of belief are prohibited grounds of discrimination.

[149] Art. 4(1).

[150] Art. 45(3).

[151] Lerner, above n. 48, 77.

Universal Declaration of Human Rights (1948)[152] **1.UN.55.**

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion and Belief (1981) **1.UN.56.**

1(1)—Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practices and teaching.

2(1)—No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief.

2(2)—For the purposes of the present Declaration, the expression 'intolerance and discrimination based on religion or belief' means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

European Convention of Human Rights[153] **1.CoE.57.**

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Charter of Fundamental Rights of the European Union[154] **1.EC.58.**

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.

[152] Art. 18.
[153] Art. 9(1).
[154] Art. 10.

2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

Human Rights Committee, General Comment No. 22: The right to freedom of thought, conscience and religion (Article 18)[155] **1.CoE.59.**

"1.The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in Article 18.1 is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others. The Committee draws the attention of States parties to the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief . . .

2. Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms 'belief' and 'religion' are to be broadly construed. Article 18 is not limited in its application to traditional religions and beliefs with institutional characteristics or practices analogous to those of traditional religions . . ."

The variety in grounds covered by such national and international lists makes it interesting to investigate what exactly is the meaning of such terms as "religion", "faith", "belief", "conscience", "thought", "political conviction" and "personal conviction".[156] In this section, we undertake to give an overview of the existing national and international case-law on the matter. We will devote particular attention to the definitions given in international legal texts and case-law relating to the freedom of religion, as the national notions are often interpreted in accordance with international law.[157] For the European Member States, the main source of inspiration is the case-law of the ECtHR on Article 9 ECHR. It is highly probable that future decisions of the ECJ on the Employment Equality Directive will be influenced by this case-law as well. For that reason, we will discuss this case-law in considerable detail.

RELIGION—RECOGNITION AND SECTS

It is clear from the quoted European legislation and case-law that the notion of "religion" itself extends to all existing and recognised religions and faiths. There is some debate, however, about the requirement of a religion being "recognised". Sometimes the requirement seems to be taken literally, in the sense that a religion is

[155] 30 July 1993—ICCRP/C/21/Rev.1/Add.4.

[156] On this see also M.D. Evans, "The Evolution of Religious Freedom in International Law: Present State and Perspectives" in J.-F. Flauss (ed.), *International Protection of Religious Freedom* (Brussels, Bruylant, 2002) 39*ff*.

[157] See, e.g. T. Makkonen, "Discrimination Based on Religion and Belief. Finland", Executive Summary (European Commission, 2004) 3, available on the website of Directorate-General for Employment, Social Affairs and Equal Opportunities and the Explanatory Note to the UK Equality Act 2006, para. 155.

only considered to exist if a religious community is officially recognised by a governmental body. The Danish situation offers a good example of this approach:

N.E. Hansen, "Report on measures to combat discrimination: Directive 2000/43/EC and 2000/78/EC. Country report Denmark"[158] **1.DK.60.**

"'Religion' is not directly legally defined in Denmark. Indirectly a definition may be found due to the practice of the Danish authorities in relation to the recognition of 'religious communities'. This recognition takes place in order to allow recognised communities to perform marriage ceremonies with legal validity. On the other hand, a number of communities are not recognised by the state, and consequently not a 'religious community' in a legal sense . . .

Religious communities in Denmark may be grouped into four categories: according to section 4 of the Danish Constitution . . . the Evangelical-Lutheran Church is the National Church of Denmark. The status as national church is associated with certain rights, which distinguish the legal position of the Danish national church markedly from that of other religious communities.

The second category of religious communities comprises the so-called recognised religious communities . . . A total of eleven religious communities have been recognised by Royal Decree.

The third category consists of religious communities with only limited recognition . . . Section 16 of the [Danish Formation and Dissolution of Marriage Acts] empowers the Ministry to take administrative action to afford limited competence to ministers of religion, imams and other spiritual leaders of newly arrived religions, to celebrate marriage ceremonies with legal effect, according to civil law. The fact that a minister of religion or an imam has authority to celebrate marriages implies that the religious community in question has obtained a certain degree of recognition . . . [A] Committee decides . . .what constitutes a religious community . . . Presently 56 religious communities are included in the third category.

The fourth category comprises non-recognised religious communities, which are religious communities that either cannot or do not wish to obtain recognition, and therefore do not enjoy the same rights as the religious communities with full or limited recognition . . ."

Note

It is clear that the protection offered by the prohibition of discrimination may vary for each of the different categories distinguished in the Danish legislation. Also, the scope of non-discrimination legislation depends on the willingness of the national authorities to recognise a certain religious group as a religious community.

Different approaches to the recognition of religious communities are also conceivable. A rather loose approach can be found in Italy:

[158] (European Commission, 2005) 17, available on the website of Directorate-General for Employment, Social Affairs and Equal Opportunities.

A. Simoni, "Report on measures to combat discrimination: Directive 2000/43/EC and 2000/78/EC. Country report Italy"[159] **1.IT.61.**

"The main set of standards has been set by the Court in a 1995 case, where it is said that, in the absence of agreements with the State, the character of 'religious denomination' of a social group can be established on the basis of 'public recognitions' (*pubblici riconoscimenti*), or on the basis of its charter (not alone but examined against the backdrop of the actual activity of the organisation) or on the basis of the 'common opinion' (*comune considerazione*). These criteria have been applied and further detailed specially with regard to the case of Scientology, which according to the case-law of the Supreme Court meets the criteria for the inclusion among the 'religious denominations' protected under the Constitution."

Note

It is clear from this excerpt that in Italy there is no need for *official* recognition to be able to speak of a "religious denomination". Instead, the Italian courts appear to rely on general criteria such as public recognition and common opinion as to the religious character of the community. This may lead to a relatively wide definition of the ground of religion, as the example of the acceptance of the Church of Scientology as a religious community shows, though the approach will clearly not result in a wider recognition of religious groups per se—this will depend on the application of such notions as "public recognition" and the extent to which a "common opinion" is easily accepted to exist.

The Italian recognition of the Church of Scientology brings us to the interesting question if minority religions and sects are generally covered by the ground of religion. There does not appear to be a uniform answer to this question in the various Member States. In Belgium, for example, sects are not covered by national legislation:

> "The protection from discrimination based on religion will most probably be denied to members of groups defined as 'sects' under the Belgian law of 2 June 1998, which describes these as 'any group with a religious or philosophical vocation, or pretending to have such a vocation, which in its organisation or practice, performs illegal and damaging activities, causes nuisance to individuals or to the community or violates human dignity'."[160]

[159] (European Commission, 2004) 8, available on the website of Directorate-General for Employment, Social Affairs and Equal Opportunities.

[160] de Schutter, above n. 13, 16, available on the website of Directorate-General for Employment, Social Affairs and Equal Opportunities.

[161] *Cf.* also N. Gavalas, "Report on Measures to Combat Discrimination: Directive 2000/43/EC and 2000/78/EC. Country Report Greece" (European Commission, 2004), at 16, available on the website of Directorate-General for Employment, Social Affairs and Equal Opportunities, stating that, according to Greek scholars, the Greek Constitution does not recognize "mystical and secret practices and dogmas". Likewise, the Spanish Organic Law on Religious Freedom states that "activities, intentions and entities relating to or engaging in the study of and experimentation on psychic or parapsychological phenomena or the dissemination of humanistic or spiritual values or other similar non-religious aims do not qualify for

Several other Member States seem to exclude sects from a number of advantages available to recognized religious communities as well.[161] As yet it is unclear, however, how sects are generally defined and whether they will always be excluded from the scope of "religion".[162] The Italian and Belgian examples make clear that this will not be the case by definition, but possibly only if the sect performs illegal activities. Indeed, some sect-like organisations, such as the Church of Scientology, are frequently considered to fall under the protection of the freedom of religion. This is apparent from the Italian case-law mentioned above, but also (though more implicitly) from the case-law of the European Commission of Human Rights (EComHR)—a predecessor of the present ECtHR.[163] The EComHR also assumed that other sects, such as Druids and the Divine Light Zentrum, constitute religious organisations, unfortunately without defining criteria which might enable the domestic courts to make or test such classifications.[164] This makes it difficult for the states to give a proper definition of a sect and to reason whether certain sects fall outside the scope of the principle of religion. It has been rightly stressed by the special rapporteur on Freedom of Religion and Belief to the UN Commission on Human Rights that the uncertainty as to the status of such sects may easily lead to unacceptable forms of intolerance and discrimination based on religion.[165]

How to prove the existence of religion?

Closely related to the question if sects or cults come within the scope of religion is the question if someone who professes to have a certain religion, and claims that he has been discriminated on the basis of that religion, really adheres to such a religion. This issue raises difficult issues of proof, as is evidenced by the following case decided by the ECtHR:

the protection provided in this Act" (see L. Cachon, "Report on Measures to Combat Discrimination: Directive 2000/43/EC and 2000/78/EC. Country Report Spain" (European Commission, 2005) t 9, available on the website of Directorate-General for Employment, Social Affairs and Equal Opportunities; it is probable that sects such as the Church of Scientology are implicitly aimed at by this provision. The legislator specifies only what religion is not, not what it is. See more generally A. Amor, "Implementation of the Declaration on the Elimination of Intolerance and of Discrimination Based on Religion or Belief" (1998), Addendum: Visit to Germany, Ev.CN.4v.1998/6.

[162] See, e.g. S. Latraverse, "Report on Measures to Combat Discrimination: Directive 2000/43/EC and 2000/78/EC. Country Report France" (European Commission, 2004) 12, available on the website of Directorate-General for Employment, Social Affairs and Equal Opportunities, stating that there is currently no definition of sects in France.

[163] See *X. and Church of Scientology* v. *Sweden*, App. No. 7805/77, D&R 16, at 68; see further C. Evans, *Freedom of Religion under the European Convention of Human Rights* (Oxford, Oxford University Press, 2001) 55. The ECJ has dealt with national restrictions as regards the Church of Scientology as well, but never explicitly addressed the question whether it should be regarded as a religion (see Case 41/74 *Van Duyn* [1974] ECR 1137 and Case C–54/99 *Association Eglise de scientologie de Paris* [2000] ECR 1335).

[164] See Evans, *ibid.*, 55.

[165] Amor, above n. 161, paras. 94*ff.*

ECtHR, 13 April 2006[166] **1.CoE.62.**
Kosteski v. *the Former Yugoslav Republic of Macedonia*

PROOF OF ADHERENCE TO A RELIGION

Kosteski

Facts: In 1998, Kosteski did not appear at work at the Electricity Company of Macedonia. He explained that he had wanted to celebrate a religious holiday which was a public holiday for the citizens of Muslim faith under the National Constitution. The disciplinary committee found that he had breached the disciplinary rules of the company and fined him with a cut of 15% in his salary for three months. Later in the same year, the applicant was again fined for not having appeared at work at the time of the celebration of another Muslim religious holiday. The case was brought before the Bitola Municipal Court, which found that the applicant had not given any evidence to corroborate his statement that he was a Muslim. He had never been absent from work at the time of the Muslim religious holidays before 1998. To the contrary: he had celebrated the Christian religious holidays, his parents were Christians and his way of life and diet showed that he was a Christian. The court held that the applicant proclaimed himself a Muslim in order to justify his absence from work.

Held: By requiring the applicant to produce evidence to substantiate his claims, the authorities did not violate the freedom of religion, nor the prohibition of discrimination (Article 14 in conjunction with Article 9 ECHR).

Judgment: "39. Insofar as the applicant has complained that there was an interference with the inner sphere of belief in that he was required to prove his faith, the Court recalls that the courts' decisions on the applicant's appeal against the disciplinary punishment imposed on him made findings effectively that the applicant had not substantiated the genuineness of his claim to be a Muslim and that his conduct on the contrary cast doubt on that claim in that there were no outward signs of his practising the Muslim faith or joining collective Muslim worship. While the notion of the State sitting in judgment on the state of a citizen's inner and personal beliefs is abhorrent and may smack unhappily of past infamous persecutions, the Court observes that this is a case where the applicant sought to enjoy a special right bestowed by Macedonian law which provided that Muslims could take holiday on particular days, including the Bayram festival in issue in the present case . . . In the context of employment, with contracts setting out specific obligations and rights between employer and employee, the Court does not find it unreasonable that an employer may regard absence without permission or apparent justification as a disciplinary matter. Where the employee then seeks to rely on a particular exemption, it is not oppressive or in fundamental conflict with freedom of conscience to require some level of substantiation when that claim concerns a privilege or entitlement not commonly available and, if that substantiation is not forthcoming, to reach a negative conclusion . . . The applicant however was not prepared to produce any evidence that could substantiate his claims. To the extent therefore that the proceedings disclosed an interference with the applicant's freedom of religion, this was not disproportionate and may, in the circum-stances of this case, be regarded as justified in terms of the second paragraph, namely, as prescribed by law and necessary in a democratic society for the protection of the rights of others . . .

45. In the present case, while there is no right as such under Article 9 to have leave from work for particular religious holidays, the Court notes that the courts' decisions on the

[166] Not yet published.

applicant's appeal against the disciplinary punishment imposed on him made findings touching on the apparent genuineness of his beliefs. This, in the Court's view, is sufficient to bring the applicant's complaints within the scope of Article 9.

46. However, insofar as the applicant claims that he is the only person of the Muslim faith who has been required to prove his adherence to that religion, the Court considers that any resulting difference of treatment may be regarded as based on objective and reasonable justification. The applicant was making claim to a privilege or exemption to which he was not entitled unless he was a member of the faith concerned and in circumstances which arguably gave rise to doubts as his entitlement. As found above under Article 9, it was not unreasonable or disproportionate to require him to show some level of substantiation of his claim."

Note

The ECtHR found in this case that the requirement to show evidence of the adherence to the Muslim faith touched upon the genuineness of the applicant's religious conviction and thus came within the scope of both the freedom of religion and the prohibition of discrimination based on religion. Although no proof of the existence of a genuine religious conviction may generally be required of an individual, the Court allowed the national courts to ask for such proof if the individual claims a privilege or exemption which itself is based on the freedom of religion. For those cases, "some level of substantiation" may be required of the individual claim of adherence to a certain religion. It remains unclear, however, what kind of evidence would be needed to substantiate such a claim and to what extent having a certain religion can actually be proven. Further decisions by either the ECtHR or the ECJ may elucidate these points.

THE FREEDOM NOT TO HAVE A RELIGION

It is common ground that the notion of "religion" does not only cover adopting or professing a certain religion, but also the freedom not to adopt or profess a religion. In particular, the ECtHR has accepted atheism and agnosticism as part of the wider notions of "thought" and "conscience" and thereby of the right to freedom of religion.[167]

[167] This is not self-evident: Evans has pointed out that the issue of whether atheism and agnosticism are included within the definition has been a much debated one and one that has never been conclusively resolved in the UN (Evans, above n. 163, 51).

ECtHR, 18 February 1999[168] **1.CoE.63.**
Buscarini et al. v. *San Marino*

FREEDOM OF CONSCIENCE COVERS FREEDOM *NOT* TO HAVE A RELIGION

Buscarini

Facts: Buscarini and Della Balda were elected to the parliament of the Republic of San Marino. The official oath to be taken by members of the Republic's parliament included a reference to the Holy Gospels. The applicants took the oath in the form of words laid down in the decree save for the reference to the Gospels, which they omitted. Afterwards the Secretariat of the parliament gave an opinion on the form of the oath sworn by the applicants to the effect that it was invalid. They were then required to swear allegiance in accordance with the oath on pain of forfeiting their parliamentary seats; in the end, they complied with the requirement.

Held: The requirement to take the oath on the Gospels is tantamount to requiring to swear allegiance to a particular religion, a requirement which is not compatible with Article 9 of the Convention.

Judgment: "34. The Court reiterates that: 'As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it' . . . That freedom entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion."

Note

In this case the ECtHR clearly accepted a wide interpretation of the freedom of religion, which finds support in other international materials. The UN Human Rights Committee, for example, has expressed an opinion similar to the ECtHR's in its General Comment to the right to freedom of thought, conscience and religion contained in Article 18 ICCRP:

> "5. The Committee observes that the freedom to 'have or to adopt' a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as to retain one's religion or belief." [169]

It may be expected that such a wide definition of the freedom of religion will also be applied in the context of non-discrimination law. An example of such application may be found in an opinion of the Dutch Equal Treatment Commission:

[168] Reports 1999-I.

[169] General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18), 30 July 1993, ICCRP/C/21/Rev.1/Add.4.

Equal Treatment Commission (Commissie Gelijke Behandeling) **1.NL.64.**
Opinion 2003-114

"RELIGION" ENCOMPASSES "NOT HAVING A RELIGION"

Interconfessional school

Facts: The defendant is an organisation based on a Christian foundation, consisting of various schools accessible to all pupils, regardless of their religion or belief. All Christian (interconfessional) schools participating within the defendant organisation require their teachers to pay respect to the Christian view of life. The participating non-Christian schools do not have a similar requirement, but the organisation still requires that its teachers be willing to accept functions at both the non-Christian and Christian schools. The applicant, who was working in a non-Christian school, was given in 2003 a teaching and coordinating function in one of the Christian schools. He refused as he could not pay due respect to the Christian foundations of the relevant department.

Held: The requirement constitutes indirect discrimination based on religion which could not be justified under the Equal Treatment Act.

Opinion: "5.9 The concept of religion under the Equal Treatment Act must inter alia be interpreted in accordance with the international human rights treaties, including the European Convention of Human Rights. This means that freedom of religion is aimed not only at possessing or professing a faith but also at not possessing or professing a faith. This implies that failure to cooperate with education on a religious foundation must be regarded as an aspect of freedom of religion and is therefore covered by the concept of religion under the Equal Treatment Act. In the present case, it may therefore also be tested on the grounds of religion for possible discrimination."

Note
It is evident from this case that not having a certain religion is covered by the notion of "religion" in Dutch non-discrimination law and discrimination based on this ground is prohibited.

MANIFESTATION OF RELIGION AND RELIGIOUS EXPRESSIONS

It is widely accepted that religious practice and profession of religion come under the scope of the freedom of religion: the freedom of religion is not limited to the freedom of conscience alone. This is expressly stated in most international fundamental rights texts, and both the ECHR and the EU Charter of Fundamental Rights expressly mention the freedom "either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance".[170] The ECtHR has elaborated this notion of religious expression in its *Kokkinakis* case:

[170] Evans, above n. 163, 41.

ECtHR, 25 May 1993[171] **1.CoE.65.**
Kokkinakis v. *Greece*

RELIGIOUS EXPRESSION IS PROTECTED BY THE FREEDOM OF RELIGION

Kokkinakis

Facts: Mr Kokkinakis was born into an Orthodox family. After becoming a Jehovah's Witness in 1936, he was arrested more than 60 times for proselytism. He was also interned and imprisoned on several occasions.

Held: It has not been shown that the applicant's convictions were justified by a pressing social need. There has accordingly been a breach of Article 9 of the Convention.

Judgment: "31. While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to 'manifest [one's] religion'. Bearing witness in words and deeds is bound up with the existence of religious convictions.

According to Article 9, freedom to manifest one's religion is not only exercisable in community with others, 'in public' and within the circle of those whose faith one shares, but can also be asserted 'alone' and 'in private'; furthermore, it includes in principle the right to try to convince one's neighbour, for example through 'teaching', failing which, moreover, 'freedom to change [one's] religion or belief', enshrined in Article 9, would be likely to remain a dead letter."

The Human Rights Committee has opted for a similarly wide interpretation of the freedom of religion and belief in its aforementioned general comment on Article 18 ICCRP:

Human Rights Committee, General Comment No. 22: **1.UN.66.**
The right to freedom of thought, conscience and religion[172]

"The freedom to manifest religion or belief may be exercised 'either individually or in community with others and in public or private'. The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications."

[171] Series A, Vol. 260-A.
[172] 30 July 1993, CPR/C/21/Rev.1/Add.4.

Domestic case-law likewise shows that manifestations of belief are acknowledged to form part of the freedom of religion—in most Member States, cases may be found in which this is established by the courts.[173] It may be derived from these cases and the international materials that the prohibition of religious discrimination will probably be interpreted in line with the right to freedom of religion. Thus, unequal treatment based on manifestations of religion will be unlawful as much as unequal treatment based on having a certain religion as such.

Still, many difficulties appear where a more precise definition of this category is required. With respect to the religious character of such clear examples of religious manifestation as the organisation of religious communities and the building of places of worship, there seems to be a strong consensus that this is part of the freedom of religion.[174] There are, however, many instances of religious manifestation on which opinions may reasonably differ. This is particularly true for religious practices which are not supported by all or even a majority of members of a religious community. It is clear, for example, that religious attire is not regarded as mandatory by all believers: not all Muslim women choose to wear a niqaab or head scarf, nor do all Jewish men wear a yarmulke. The same is true for religious requirements regarding behaviour. There may be Christian nurses who will refuse to assist in an abortion operation because of their religious convictions, whilst others will not regard such assistance as problematic; similarly, some Muslim men will shake hands with a woman, where others will refuse to do so.

The Member States appear to be divided over the question whether it should be *objectively* determined if a certain expression or behaviour can be regarded as part of someone's religion or whether a *subjective* approach should be adopted. In a subjective approach it should be established if the relevant person or group regards his or her behaviour as conforming to a religious prescription, regardless of the lack of support of the practice by other believers. Such a subjective approach is to some degree adopted by the Dutch courts and the Dutch Equal Treatment Commission, as is illustrated by the following excerpt:

Equal Treatment Commission (Commissie Gelijke Behandeling) **1.NL.67.**
Opinion 1998-18

SUBJECTIVE APPROACH TO RELIGIOUS PRACTICE

Teacher's trainee with head scarf

Facts: The applicant was a trainee teacher who was offered a traineeship with a primary school. Because of her Islamic faith, the applicant wore a head scarf. When the head of the school noticed this, he contacted the applicant's supervisor and told her that it was not desirable for teachers to wear a head scarf in class.

[173] See, e.g. BVerfG, 5 February 1991, 2 BvR 263/86 (*Bahá'i*) and the Italian *Corte Costituzionale* 19–27 April 1993, No. 1993/195.

[174] See in particular ECtHR, 26 October 2000, *Hasan and Chaush* v. *Bulgaria*, Reports 2000-XI, para. 62.

The applicant refused to oblige to the request to remove her head scarf and ended her traineeship with the school.

Held: The request constitutes a case of direct discrimination based on religion which is incompatible with the Equal Treatment Act.

Opinion: "With regard to whether the applicant's wearing a head scarf comes within the scope of the concept of 'religion' within the meaning of the Equal Treatment Act and consequently within the scope of that act, the Commission considers as follows.

The term religion included in the Equal Treatment Act as a ground for non-discrimination covers not only the adoption of a religious conviction but also conduct accordingly. Conduct which, having regard to its character and to the significance of the religious rules and provisions, directly expressed the religious conviction is also protected by the ban on discrimination based on religion. The wearing of a head scarf by a Muslim woman or a Muslim girl may be one of these expressions of her religious conviction. The fact that these rules are honoured in different ways and that attitudes to wearing a head scarves (also in Muslim circles) differ, does not detract from this as far as protection for a person against unlawful discrimination within the meaning of the Equal Treatment Act is concerned. The position is different only where there might be an individual, subjective attitude that can no longer be regarded generally as an expression of faith by members of the religious community or a particular persuasion within it. There is no question of the latter with regard to wearing a head scarf. In accordance with long existing precedents of the Supreme Court, it is not up to the Commission to interfere with differences of opinion regarding theological principles and interpretations of the Koran.

The conclusion from the above is that the applicant's wearing a head scarf comes within the scope of the concept of religion as stated in the Equal Treatment Act . . ."

Note

This case discloses a rather subjective approach to religious expression, as the Equal Treatment Commission holds that a certain expression does not need to be regarded as a religious requirement by all members of the religious community. On the other hand, the Commission accepted that an expression or practice should not be completely subjective in character, in the sense that only one or a few individuals regard the expression as a religious prescription. To that extent, the approach is objective in character.

It is clear, however, that opinions on the issue are diverging. In particular, the former EComHR adopted a different stance, which departs from an objective approach:

EComHR, 16 May 1977[175] **1.CoE.68.**
Arrowsmith v. *UK*

OBJECTIVE APPROACH TO RELIGIOUS PRACTICE

Arrowsmith

Facts: Arrowsmith was arrested when distributing leaflets to troops stationed at an army camp, urging them to desert or refuse orders if they were posted to Northern Ireland. She was convicted under the Incitement to Disaffection Act 1934 and sentenced to 18 months' imprisonment. Arrowsmith alleged a violation of her freedom of religion, contending that the dissemination of the leaflet was a moral imperative flowing from her life-long commitment to the pacifist cause.

Held: The contents of the leaflet and its distribution did not amount to the manifestation of a belief and do not enjoy the protection of Article 9.

Judgment: "3. For the purposes of paragraph 1 of Art. 9 the manifestation has to have some real connection with the belief. The question whether or not a particular manifestation falls within the protection afforded by Art. 9 (1) has to be determined by an objective, not subjective, test. In the present case it has to be determined on the face of the leaflet itself whether or not the contents of that leaflet and the act of its distribution were in fact a manifestation of the belief of pacifism. In fact, the contents of the leaflet and its distribution did not amount to the manifestation of a belief and so did not enjoy the protection of Art. 9 (1)."

Note

The Commission in this case demanded an objective valuation of the available evidence on the character of the manifestation, although it did not formulate criteria as to the classification of a certain expression or manifestation as part of the freedom of religion. From later cases it appears that it has opted for a rather strict approach in this respect.[176] It is rather unclear if the ECtHR will adopt the same approach towards manifestations of religion as the EComHR did. From the important case of *Leyla Sahin* v. *Turkey* it would seem to transpire that it prefers a more subjective interpretation:

ECtHR, 10 November 2005[177] **1.CoE.69.**
Leyla Sahin v. *Turkey*

HEADSCARF AS RELIGIOUS EXPRESSION

Leyla Sahin

Facts: Leyla Sahin studied medicine at the University of Istanbul. As an expression of her Islamic faith, she wore a head scarf. In 1998 a circular was issued stipulating that students whose head was covered and

[175] Appl. No. 7050/75, D&R 8, at 123.
[176] See, e.g. EComHR, 3 December 1996, *Konttinen* v. *Finland*, Appl. No. 24949/94, not published.
[177] Not yet published.

students with beards should not be admitted to lectures, courses and examinations. Leyla Sahin was thereupon refused from enrolling in several courses because of her headscarf. In May 1998 disciplinary proceedings were brought against her as a result of her failure to comply with the dress rules and she was given a warning. At a later point in time, she was suspended from the University, although she was reinstated in 2000 as a result of an amnesty.

Held: The interference at issue was justified in principle and proportionate to the aim pursued and did not constitute a violation of Article 9 ECHR.

Judgment: "78. As to whether there was interference, the Grand Chamber endorses the following findings of the Chamber [see paragraph 71 of the Chamber judgment of 29 June 2004]:

> 'The applicant said that, by wearing the headscarf, she was obeying a religious precept and thereby manifesting her desire to comply strictly with the duties imposed by the Islamic faith. Accordingly, her decision to wear the headscarf may be regarded as motivated or inspired by a religion or belief and, without deciding whether such decisions are in every case taken to fulfil a religious duty, the Court proceeds on the assumption that the regulations in issue, which placed restrictions of place and manner on the right to wear the Islamic headscarf in universities, constituted an interference with the applicant's right to manifest her religion'."

Note

The ECtHR did not pay close attention in this case to the issue of whether the expression actually formed an expression of religion. Instead, it seemed to accept without further ado the individual statement that the wearing of a headscarf was a religious manifestation, which is an approach that is rather subjective in character. It is clear, however, that the case-law of the ECtHR on this point is not yet crystallised, since some recent cases show a strict approach which is closer to that of the EComHR.[178] It is therefore difficult to derive any general conclusions from present case-law as to the exact test that needs to be applied in order to establish if a certain expression is covered.

BELIEF

The Employment Equality Directive and many other national and international instruments mention the ground of belief on the same footing as the ground of religion. Indeed, the two notions are to some extent similar, the most important difference relating to the (assumed) existence of a deity or divine being: whereas this element is always present in the definition of "religion", it is expressly left out of the definition of "belief". Belief should thus be taken to mean a coherent set of fundamental ideas and attitudes to life and human existence, without reference being

[178] See, e.g. ECtHR, 13 April 2006, *Kosteski* v. *the Former Yugoslav Republic of Macedonia*, not yet published (above, **1.CoE.62.**). Other cases have confirmed the more subjective approach of the Court, however. In its admissibility decision in the case of *Phull* v. *France* (11 January 2005, appl. no. 35753/03, not published), it assumed, for instance, purely on the basis of the applicant's statement that masculine adherents of the Sikh religion are required to wear a turban, that a demand to remove the turban to undergo a safety check at an airport amounted to an interference with the freedom of religion.

made to a higher being. Indeed, this is the definition most often given by the courts. Two examples may serve to illustrate this:

ECtHR, 25 February 1982[179] **1.CoE.70.**
Campbell and Cosans v. *UK*

DEFINITION OF "PHILOSOPHICAL CONVICTIONS" AND "BELIEF"

Campbell and Cosans

Facts: In St Matthew's Roman Catholic Primary School, corporal punishment was used in the form of striking the palm of a pupil's hand with a leather strap. Under Scottish law, teachers were invested with the power to administer such punishment in moderation as a disciplinary measure. According to the parents of the applicants, who were pupils of the school in question, this ran counter to their "philosophical convictions" as protected by Article 2 of Protocol 1 to the ECHR.

Held: The philosophical convictions of the parents should have been respected by the school. The omission to do so amounts to a violation of the right to education as protected in Article 2 of Protocol 1.

Judgment: "36 . . . In its ordinary meaning the word 'convictions', taken on its own, is not synonymous with the word 'opinions' and 'ideas', such as are utilized in Article 10 of the Convention, which guarantees freedom of expression; it is more akin to the term 'beliefs' (in the French text: 'convictions') appearing in Article 9—which guarantees freedom of thought, conscience and religion—and denotes views that attain a certain level of cogency, cohesion and importance . . .

Having regard to the Convention as a whole . . . the expression 'philosophical convictions' in the present context denotes, in the Court's opinion, such convictions as are worthy of respect in a 'democratic society' and are not incompatible with human dignity; in addition, they must not conflict with the fundamental right of the child to education . . ."

Equal Treatment Commission (Commissie Gelijke Behandeling) **1.NL.71.**
Opinion 2005-28

DEFINITION OF "BELIEF" AND "RELIGION"

"Nazarene" religious conviction

Facts: One of the employees of a cafeteria refused the applicant access because of his appearance: he looked like a vagabond and stunk fiercely, which had led to disgust and complaints from customers and employees. The applicant contends that his personal appearance is in accordance with his "Nazarene" conviction. He admits that there is no group officially holding and exercising this conviction, and that the views and attitudes related to the conviction are not public and not generally known. He argues that the Nazarene conviction departs from the given that there is an invisible, creative and controlling being which brings happiness. A Nazarene is convinced that the human body is made as it is meant to be and is usually functioning well as long as it is not modified by using such things as a razor. For that reason, the applicant does not shave or cut his hair and he does not use any detergents that may not please the "being", such as water or soap.

[179] Series A, Vol. 48.

Held: The case is inadmissible as it has not been shown that the refusal was based on the applicant's religion or belief.

Opinion: "5.3 The question arises firstly whether the applicant can in the present case have recourse to the ground of belief and/or religion.

5.4 Parliament has combined the concepts of religion and belief in one provision under Article 6 of the Constitution [amended in 1983] because religious and humanistic convictions display many gradual overlaps in practice. By placing the concepts of freedom of religion and belief on the same footing, Parliament intended to provide a guideline for interpretation of the then 'new' concept of belief. This equal footing is constitutional by nature and Parliament may not therefore so interpret it that religion and belief are of equal substance. Essential differences between the two would be lost from sight were the essence of religion and belief be ignored.

Recognition that religion and belief each have their specific character as to nature and orientation does not, however, alter the fact that these differences should not have a bearing as far as guaranteeing freedom, protection and equality are concerned. Freedom and protection must therefore be guaranteed for both forms of spiritual life on an equal footing . . .

5.5 According to the established precedents of the Commission, religion incorporates a conviction as to life in which a higher being stands central, while with belief, this supreme being is lacking but a common existential conviction nonetheless exists . . .

5.6 In line with established precedents the Commission takes belief to mean a more or less cohesive system of ideas, concerned with fundamental attitudes to human existence . . .

5.7 The Commission also considers it necessary that this attitude is not individually held but is held by a group . . .

5.8 The Commission considers that it follows from the considerations under 5.4 to 5.7 that, whether or not a higher being exists, both religion and belief imply an existential common conviction, in other words a more or less cohesive system of ideas incorporating fundamental attitudes to human existence that the applicant does not hold individually only.

5.9 Since the applicant argues that the distinction concerns both his religion and his belief, the Commission will for the rest of this Opinion treat this as a single conviction.

5.10 According to the applicant, the knowledge associated with 'Nazareneship' is not generally known or public. The applicant therefore provides no information sources, even after the Commission had requested them in writing, that support his view. The applicant refers to the Bible for the concept of "Nazareneship". The applicant indicates that many people, especially Jews, practice 'Nazareneship'. However, the applicant admits that there is no Dutch organisation with an umbrella function. He has not indicated any others who belong to the same religion or attitude to life, nor has he mentioned third parties who can say something about this religion or attitude to life.

5.11 The Commission arrives at the view that the applicant has been unable to demonstrate that 'Nazareneship' comprises a more or less cohesive system of ideas, concerned with fundamental attitudes to human existence, and that a common attitude therefore exists. The applicant was unwilling to take up the Commission's request to indicate information sources and cannot demonstrate group practice. The applicant was therefore unable to show that 'Nazareneship' in terms of the Bible or otherwise can today be taken as a religion or attitude to life within the meaning of the Equal Treatment Act. The Commission has not otherwise found any indications in public sources as to the existence of such a religion or attitude to life."

Notes

(1) It is clear from both excerpts that coherence and cogency form important aspects in answering the question if someone's convictions can be termed a "belief"

for the purposes of anti-discrimination legislation. The Dutch definition moreover includes a number of additional requirements, such as the presence of fundamental attitudes to human existence and the need for the establishment of group practice. According to the Equal Treatment Commission, a purely individually held belief cannot be qualified as a belief in the sense of non-discrimination legislation. It is uncertain, however, if this requirement complies with the more flexible definition given by the ECtHR.

(2) From *Campbell and Cosans*, it furthermore transpires that any "philosophical convictions" or beliefs must be worthy of respect in a "democratic society" and must be compatible with human dignity in order to be protected by the freedom of religion. This criterion may be an important means to put totalitarian, fascist or Nazi-convictions, or beliefs which imply criminal behaviour, outside the scope of the ground of belief. Unfortunately, the criterion is not further elaborated and the Strasbourg case-law on the issue is somewhat ambiguous.[180] It is clear, however, that the criterion is broadly accepted under international law, as it is also mentioned by the Human Rights Committee in its General Comment on the interpretation of the freedom of religion.[181]

Relation between religion and belief

Although the discussion of the notions of religion and belief shows that there is an important difference between the two, the practical relevance of the distinction seems relatively limited. The Employment Equality Directive mentions both notions as prohibited grounds of distinction, just like most of the Member States do, which means that there will often be no need to establish whether a concrete case of unequal treatment is based on either religion or belief. This is witnessed by the following decision of the German Federal Administrative Court:

[180] The case of *X.* v. *Austria* (EComHR, 13 December 1963, Appl. No. 1747/62, 13 Collections 42 (1963)), for example, concerned Nazism. The EComHR avoided the question regarding the proper classification of this "belief" by moving directly to the question if the interference in question was justified. As is pointed out by Evans (above n. 163, 56), this approach can be taken to imply that Nazism is a belief capable of manifestation, which falls within the scope of the freedom of belief and interferences with which should be justified in accordance with Art. 9(2). It is probable, however, that this judgment is effectively overruled by the Court's *Campbell and Cosans* decision (above, **1.CoE.70.**).

[181] Human Rights Committee, above n. 169, para. 7.

The German Federal Administrative Court (Bundesverwaltungsgericht), 27 March 1992[182] **1.DE.72.**

RELIGION OR BELIEF?

Bhagwan

Facts: The applicants in this case are meditation associations that form part of the Osho-movement established by Osho-Rajneesh (before: Bhagwan).

Held: The applicants' religion or belief is covered, in principle, by the freedom of religion as guaranteed by Article 4 German Basic Law.

Judgment: "The terms 'religion' and 'belief' are to be understood as meaning the convictions of a person concerning certain views on the world as a whole, the origin of mankind and the purpose and meaning of life of mankind. Religion is based on a reality that exceeds and surrounds all of mankind ('transcendent'), whereas a belief restricts itself to intrinsic ('immanent') world boundaries. These prerequisites were deemed by the Oberverwaltungsgericht [Higher Administrative Court] to have been fulfilled in this case with the reasoning that in particular the teachings of Oslo-Rajneeshs on the 'enlightenment' speak of the purpose of mankind and contain a comprehensive elucidation on the question of meaning . . . No further categorization of the teachings followed by the applicant, i.e. classification as either religion or belief, is required due to the fact that a belief and a religion are placed on equal terms in Article 4 paragraph 1 of the Grundgesetz [Basic Law]."

Note

In its decision, the Federal Administrative Court did not see a need to categorise the conviction of the applicant associations as either religious or non-religious in character. It is probable that other courts, such as the ECJ, will adopt a similar approach, paying more attention to the similarities between religion and belief (such as there being a shared and coherent set of fundamental attitudes or beliefs) than to the differences.

POLITICAL CONVICTION OR OPINION

The ground of political conviction or political opinion is not explicitly mentioned in the Employment Equality Directive. However, many Member States have included the ground in constitutional or statutory lists of prohibited grounds of discrimination, often placing it in the same category as religion and belief. In Belgium, the omission of the ground of political opinion from the Anti-Discrimination Law even proved to be a reason for the Belgian Arbitration Court to extend the scope of the Act to all possible discrimination grounds.[183]

[182] BVerwGE 90, 112.

[183] Court of Arbitration, 6 October 2004, no. 157/2004. See further de Schutter, above n. 160, 11, available on the website of Directorate-General for Employment, Social Affairs and Equal Opportunities.

An interesting interpretative question relating to the Employment Equality Directive is if political conviction can be considered to amount to "belief", which would have the advantage that individuals are protected from being discriminated against not only on the basis of their personal religious beliefs, but also on the basis of their political convictions. Indeed, it is difficult to draw a clear line between belief and political conviction, certainly where a political creed implies a fully fledged view as to the organisation of society and the individual's place in it, as is the case with communism.[184] Unfortunately, few cases are available to provide guidance on this issue. The EComHR case of *Arrowsmith* may offer some clarification:

EComHR, 16 May 1977[185] **1.CoE.73.***
Arrowsmith v. *UK*

OBJECTIVE APPROACH TO RELIGIOUS PRACTICE

Arrowsmith

Facts: Arrowsmith was arrested when distributing leaflets to troops stationed at an army camp, urging them to desert or refuse orders if they were posted to Northern Ireland. She was convicted under the Incitement to Disaffection Act 1934 and sentenced to 18 months' imprisonment. Arrowsmith alleged a violation of her freedom of religion, contending that the dissemination of the leaflet was a moral imperative flowing from her lifelong commitment to the pacifist cause.

Held: The contents of the leaflet and its distribution did not amount to the manifestation of a belief and do not enjoy the protection of Article 9.

Judgment: "1. Art. 9 applies to religious or other beliefs based on thought and conscience. Beliefs which are not so based are not protected by Art. 9 but their expression may be protected by Art. 10. Pacifism is generally regarded as: 'the policy of avoiding or abolishing war by the use of arbitration in settling international disputes; advocacy or support of the policy or belief in its practicability; often, with depreciatory implication, the advocacy of peace at any price' (Oxford English Dictionary).

Another definition is as follows: 'the doctrine that the abolition of war is both possible and desirable' (Concise Oxford Dictionary).

To the extent to which pacifism may be characterised as a belief based on thought and conscience, paragraph 1 of Art. 9 would apply to it."

Note

Apparently, the EComHR considered a belief to be present as soon as it is based on thought and conscience, even if it seems rather political in nature, as may be the case with a belief such as that of pacifism. This will be a difficult criterion to apply in practice, however, as it places a demand on the courts to establish when a certain expression is really based on thought and conscience.

[184] Lerner, above n. 48, 78, mentioning Nazism as an example of a borderline case and explaining that Nazism expected the German individual to identify fully with the Nazi creed in almost religious terms.

[185] Appl. No. 7050/75, D&R 8, at 123.

* See above **1.CoE.68.**

The issue of proper classification is made somewhat easier if political conviction or opinions are explicitly mentioned as protected grounds of discrimination. As in the case of religion and belief, a distinction can be made between *having* and *expressing* a political conviction. Generally, both elements can be considered to form part of the definition of political opinion: clearly, such expressions as membership of a political party come within the scope of this ground.[186] In the Netherlands, however, a line is drawn where criminally punishable behaviour is concerned:

Equal Treatment Commission (Commissie Gelijke Behandeling) Opinion 1998-45 **1.NL.74.**

"POLITICAL CONVICTION" DOES NOT COVER CRIMINALLY PUNISHABLE BEHAVIOUR

Extremist right wing party

Facts: The applicant, the Nationale Volksunie/CP'86, is an extremist right wing political party. The party tried to open a business bank account with the defendant, but was refused because of the bank's policy not to start relations with persons, companies and organisations whose activities cannot be considered socially acceptable. The bank supported its decision by pointing to a number of offences, intimidation and other criminal acts attributable to the applicant.

Held: The refusal does not constitute discrimination which is unacceptable under the Equal Treatment Commission.

Opinion: "The Commission has found in the past that the concept of political opinion under the Equal Treatment Act includes not only the adoption of a political conviction but also behaviour that may generally be regarded as an expression of such political convictions. The Commission's guiding consideration is that conduct that is criminal is excluded from protection under the Equal Treatment Act. The Commission considers that whether or not the conduct to which the defendant refers should be regarded as criminal, it is in any event so much in conflict with what is legally acceptable that it cannot be regarded as conduct protected by the Equal Treatment Act. This leads to the conclusion that the defendant's refusal to accept the applicant as a customer on grounds of legally unacceptable behaviour does not amount to discrimination on grounds of political conviction within the meaning of the Equal Treatment Act."

Note

The approach taken by the Dutch Equal Treatment Commission seems to be in line with *Campbell and Cosans*, in which the ECtHR held that "philosophical convictions" are only protected if they are not incompatible with human dignity and if they are worthy of respect in a "democratic society". Article 17 of the ECHR, which prohibits the use of fundamental rights where it has the effect of destroying the rights guaranteed by the Convention, would seem to stand in the way of any other interpretation.

[186] E.g. Dutch Equal Treatment Commission, Opinion 1997-132: "The Commission notes that political conviction must in any event include membership of a political party."

1.3.8.B. SUSPECTNESS

It may seem obvious that the ground of religion constitutes a suspect ground of discrimination, since such discrimination touches on the fundamental individual right to freedom of religion. Religion is based on faith and not reason, which makes it an element beyond the individual will that is particularly worthy of protection against outside interference.[187] Furthermore, it is clear that members of religious groups often suffer discrimination as a result of (historical) prejudice, which may give sufficient cause in itself for regarding a religiously based distinction as inherently suspect. It may therefore seem surprising that the suspect character of the grounds of religion and belief is not, or not yet, explicitly confirmed by national and international judicial decisions. In particular, the case-law of the European Court of Human Rights would seem to show some ambiguities. From a case decided by the ECtHR in 1993, it would seem to follow that it regards discrimination based on religion as highly suspect:

ECtHR, 23 June 1993[188] **1.CoE.75.**
Hoffmann v. *Austria*

RELIGION BASED DISCRIMINATION IS HIGHLY SUSPECT

Hoffmann

Facts: In 1980, Mrs Ingrid Hoffmann married Mr S; two children were born to them. At a certain moment in time, Mrs Hoffmann left the Roman Catholic Church to become a Jehovah's Witness. In 1986, a divorce was pronounced between Hoffmann and S. Both parents applied to the national courts to be granted parental rights over the children. The lower courts granted parental rights to Hoffmann, as the children had stronger emotional ties with her and separation might cause them psychological harm. The Austrian Supreme Court overturned the judgments of the lower courts, granting parental rights to Mr S. instead of the applicant. According to the Supreme Court, the lower courts had not given due consideration to the children's welfare. The Supreme Court stressed that the children would be at risk of becoming social outcasts if educated according to the religious teaching of the Jehovah's Witnesses and their well-being could be in danger because Hoffmann would refuse to consent to the children's receiving a necessary blood transfusion.

Held: As there was no reasonable relationship of proportionality between the difference in treatment and the aim pursued (protection of the welfare of the children), there has been a violation of Article 8 taken in conjunction with Article 14.

Judgment: "33. . . . The European Court . . . accepts that there has been a difference in treatment and that that difference was on the ground of religion; this conclusion is supported by the tone and phrasing of the Supreme Court's considerations regarding the practical consequences of the applicant's religion.

Such a difference in treatment is discriminatory in the absence of an 'objective and reasonable justification', that is, if it is not justified by a 'legitimate aim' and if there is no

[187] Lerner, above n. 48, 37.
[188] Series A, Vol. 155-C.

'reasonable relationship of proportionality between the means employed and the aim sought to be realised' . . .

36. In so far as the Austrian Supreme Court did not rely solely on the Federal Act on the Religious Education of Children, it weighed the facts differently from the courts below, whose reasoning was moreover supported by psychological expert opinion. Notwithstanding any possible arguments to the contrary, a distinction based essentially on a difference in religion alone is not acceptable . . ."

Note

Judging from the ECtHR's reasoning, the decision would seem to imply that discrimination based on the ground of religion alone cannot ever be justified. This could be considered as the ultimate expression of strictness, which would clearly confirm the highly suspect character of the ground of religion. Nevertheless, it is questionable whether the ECtHR adheres to this strict approach in all cases of discrimination based on religion.[189] In 2003, the ECtHR delivered a judgment which may raise some doubts in this respect:

ECtHR, 16 December 2003[190] **1.CoE.76.**
Palau-Martinez v. *France*

MARGIN OF APPRECIATION IN RELIGIOUS DISCRIMINATION CASE

Palau-Martinez

Facts: Mrs Palau-Martinez married in January 1983. She and her husband had two children when her husband left the matrimonial home and moved in with his mistress. The Court of First Instance granted a divorce and decided that the children would reside with their mother. The father was to have visiting and residence rights on an unrestricted basis. Palau-Martinez appealed against this judgment, asking to be given access to the children during the summer (holidays). The Court of Appeal upheld the grant of the divorce but found that the children's place of residence should be their father's home. In support of this, the Court of Appeal referred to the fact that Palau-Martinez was a Jehovah's Witness and the two children were being brought up in accordance with the precepts of her religion. According to the Court of Appeal, it was in the children's best interests to be free from the constraints and prohibitions imposed by a religion whose structure resembled that of a sect.

[189] A first case which may cause doubt in this respect is *Thlimmenos* v. *Greece* (*ECtHR*, 6 April 2000, Reports 2000-IV). This is hardly a representative case, however, as it is concerned with the recognition of new legal concepts which may have distracted the Court's attention from the question of suspectness of the ground in question. For a further discussion of the *Thlimmenos*-case, see ch. 2, excerpt **2.CoE.2.**The same holds true for another case decided in 2000: European Court of Human Rights, 27 June 2000, *Cha'are Shalom Ve Tsedek* v. *France* (Reports 2000-IV). The complaint in this case concerned an alleged instance of discrimination based on religion with respect to religious slaughtering. The Court did not apply a strict test to this case but this may, once more, have been the result of the atypical nature of the case, which concerned an interference with the freedom of religion which the Court considered to be limited in scope and impact (para. 87). This in itself may constitute an adequate reason for reduced intensity of review and may serve to explain the fact that the Court did not address the more general question as to the suspectness of the ground of religion.

[190] Reports 2003-XII.

Held: As there was no reasonable relationship between the Court of Appeal's decision and the best interests of the children, the case disclosed a violation of Article 8 of the Convention in conjunction with Article 14.

Judgment: "31. . . . [D]ifferent treatment is discriminatory, for the purposes of Article 14, if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'. Moreover, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment . . .

38. There is . . . no doubt, in the Court's view, that the Court of Appeal treated the parents differently on the basis of the applicant's religion, on the strength of a harsh analysis of the principles regarding child-rearing allegedly imposed by this religion . . .

42. The Court notes firstly that the Court of Appeal . . . asserted only generalities concerning Jehovah's Witnesses.

It notes the absence of any direct, concrete evidence demonstrating the influence of the applicant's religion on her two children's upbringing and daily life and, in particular, of the reference which the Government alleged was made in the Court of Appeal's judgment to the fact that the applicant took her children with her when attempting to spread her religious beliefs. In this context, the Court cannot accept that such evidence is constituted by the Court of Appeal's finding that the applicant 'does not deny that she is a Jehovah's Witness or that the two children were being brought up in accordance with the precepts of this religion'.

It further notes that the Court of Appeal did not consider it necessary to grant the applicant's request for a social inquiry report, a common practice in child custody cases; such an inquiry would no doubt have provided tangible information on the children's lives with each of their parents and made it possible to ascertain the impact, if any, of their mother's religious practice on their lives and upbringing during the years following their father's departure when they had lived with her. Accordingly, the Court considers that the Court of Appeal ruled *in abstracto* and on the basis of general considerations, without establishing a link between the children's living conditions with their mother and their real interests. Although relevant, that reasoning was not in the Court's view sufficient.

43. In those circumstances, the Court cannot conclude that there was a reasonably proportionate relationship between the means employed and the legitimate aim pursued. There has accordingly been a violation of Article 8 of the Convention taken in conjunction with Article 14."

Notes

(1) The facts of *Palau-Martinez* are similar to those of *Hoffmann*, in which the Court stated that a distinction based on religion alone could never be acceptable. In *Palau-Martinez*, however, the Court does not mention this very strict approach, nor does it mention a "very weighty reasons" test or a European common ground regarding the unlawfulness of discrimination based on religion. Quite to the contrary, it mentions the fact that states have a margin of appreciation in determining whether discrimination of this kind is permitted (§ 31). From this it must be derived that the ECtHR does not place religion on exactly the same level as grounds such as race, gender or (il)legitimate birth.

(2) It also transpires from the Court's reasoning, however, that the disadvantage complained of was not based primarily on religion, but more generally on the interests of the applicant's children. It cannot be excluded, therefore, that the Court

will revert to its earlier *Hoffmann* ruling in later cases which represent clearer examples of purely religious discrimination. Furthermore, the cited paragraphs do not express a strong degree of deference—the test applied is much stricter than the test of arbitrariness which the use of the "margin of appreciation" formula would seem to imply. Even if the Court does not view religion as a really suspect ground of discrimination, still the case suggests that it at least considers this ground to be "semi-suspect", warranting a stricter test than that applied to non-suspect grounds.

(3) A (relatively) strict approach by the ECHR in the future as well as a strict test to be applied by the ECJ seems the more probable, given the existence of a general consensus on the suspectness of specific aspects of the general ground of religion or belief. It is clear from both the text of Article 9 of the ECHR and other international texts (quoted at the start of this section) that a distinction can be made between the freedom to *manifest* a religion and belief and the freedom to *hold* certain beliefs. Article 9 paragraph 2 ECHR makes clear that interferences with the freedom of religion are only allowed with respect to the *manifestation* of belief—the right to *hold* a certain belief is considered to be inviolable. The same holds true for Article 18 of the ICCRP.[191] It may be derived from this that a discrimination based on the sole fact that someone holds a certain belief or religion has to be considered highly suspect and cannot, in principle, be justified. This may be different for distinctions based on manifestations of religion or belief, as is shown by *Palau-Martinez*. The suspectness of distinctions based on religion and belief may thus be determined on the basis of a kind of "nexus" doctrine, i.e. by determining whether a certain manifestation is close to the core of the freedom of religion, belief or political conviction, or is more peripheral in character.

1.3.9. DISABILITY AND (CHRONIC) ILLNESS

1.3.9.A. DEFINITION

As a result of the Employment Equality Directive, all states now prohibit discrimination based on disability. In addition, the scope of protection of both international and domestic legal instruments sometimes includes (chronic) illness, health and genetic features, as may be illustrated by the following excerpts:

Charter of Fundamental Rights of the European Union (2000)[192] **1.EC.77.**

Any discrimination based on any ground such as . . . genetic features [and] . . . disability . . . shall be prohibited . . .

[191] Human Rights Committee, above n. 169, para. 3.
[192] Art. 21(1).

Convention on Human Rights and Biomedicine (1997)[193] **1.EC.78.**

Any form of discrimination against a person on grounds of his or her genetic heritage is prohibited.

Finnish Non-Discrimination Act 21/2004[194] **1.FI.79.**

Nobody may be discriminated against on the basis of . . . health, disability . . . or other personal characteristics . . .

Dutch Act on Equal Treatment on the Grounds of Disability or Chronic Illness (2003)[195] **1.NL.80.**

The following definitions apply in this Act:
. . .b. direct unequal treatment: unequal treatment between people on the grounds of a real or supposed disability or chronic illness . . .

As a result of the absence of a definition of the notion of disability in the Employment Equality Directive, many states have refrained from providing a legislative definition. When confronted with concrete questions as regards the meaning of "disability", the courts may therefore be inclined to search for elucidation in other legislation where the notion is used, such as social security legislation relating to disability pensions or benefits. In most of these laws, some definition is given as to the meaning of "disability". Usually, such definitions refer to bodily, mental or psychological impairments with a minimum degree of severity, often expressed in terms of the detrimental influence on normal bodily functions or measured as a percentage of the remaining capacity to work. It must be noted, however, that the context in which such definitions are given is completely different from that of anti-discrimination law. Having regard to its particular aims and its political and socio-economic context, social security legislation relating to disability benefits requires highly specified and narrowly formulated definitions. On the other hand, general equal treatment legislation is meant to offer a high level of protection against social exclusion and discrimination of disabled persons. Having regarded to those aims, the definition of disability will need to be much more inclusive.[196] For that reason, great caution must be exercised in interpreting the notion of disability

[193] Art. 11.
[194] Yhdenvertaisuuslaki (21/2004), s. 6(1).
[195] Wet gelijke behandeling op grond van handicap of chronische ziekte, Staatsblad (Official Gazette) 2003, 206, Art. 1.
[196] It may also include provisions relating to discrimination based on assumed disabilities and illness. This issue will be dealt with separately in section 1.4, in which the issue of discrimination by assumption and association is discussed.

contained in equal treatment legislation on the basis of or in line with the definition given in disability insurance regulations; the definition in the latter type of regulation may be regarded as a minimum standard, but should certainly not be taken as a guiding principle. In this section, therefore, we will focus on the definitions contained in legislation and case-law relating to equal treatment based on disability, instead of definitions contained in social security legislation.

HANDICAP OR DISABILITY?

In many legislative texts, academic articles and translations, the terms "handicap" and "disability" are used interchangeably. The desirability of this may be questioned, as both terms have a distinct meaning which may influence the interpretation given to the provision in which the term is used. The difference between the terms is explained clearly in the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities.

UN General Assembly, "Standard Rules on the Equalization of Opportunities for Persons with Disabilities"[197] **1.UN.81.**

"17. The term 'disability' summarizes a great number of different functional limitations occurring in any population in any country in the world. People may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness. Such impairments, conditions or illnesses may be permanent or transitory in nature.

18. The term 'handicap' means the loss or limitation of opportunities to take part in life of the community on an equal level with others. It describes the encounter between the person with a disability and the environment. The purpose of this term is to emphasize the focus on the shortcomings in the environment and in many organized activities in society, for example, information, communication and education, which prevent persons with disabilities from participating on equal terms."

Note

It seems clear from this definition that the term "disability" is used mainly to refer to disability in the medical sense, while the term "handicap" refers to the social aspects of disability (see *infra* for further discussion of this difference). Still, there does not seem to be a general consensus on these definitions and the distinction made between them. In the remainder of this section, we will primarily use the term "disability", as this is the term which is usually employed in the context of European law.

[197] A/RES/48/96, December 1993.

SYMMETRICAL OR ASYMMETRICAL APPROACH?

Most of the grounds discussed in this chapter have been defined in a symmetrical way in national and international legal instruments and case-law. A group that is normally advantaged by discrimination on a certain ground (e.g. men) is thereby protected to the same degree as a group that is normally disadvantaged (e.g. women). This is different, however, where disability discrimination is concerned. Even though the Employment Equality Directive does not contain a definition of the ground of disability, various commentators have argued that it is only discrimination on grounds of disability, and not on grounds of *not* having a disability, that is prohibited:

> ". . . [I]t must be remembered that with regard to disability the Directive does not operate in the same symmetrical fashion as provisions on sex and race do. It is only discrimination on grounds of disability and not 'non-disability' which is prevented by the Directive. Thus in principle employer or state measures which prefer disabled workers do not constitute unlawful discrimination against non-disabled co-worker or applicants."[198]

Opinions seem to be divided, however, which is understandable as the wording of the Directive itself leaves room for a symmetric as well an asymmetric interpretation. This is clearly shown by Waddington:

> ". . . The Directive provides:
>
> 'The purpose of this Directive is to lay down a general framework for combating discrimination on the ground . . . of . . . disability.
>
> Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1.'
>
> These provisions could be interpreted as embracing a symmetrical approach to disability discrimination, in other words as protecting an individual from discrimination on the grounds that they are disabled as well as discrimination on the grounds that they are not disabled." [199]

As yet it is unclear if a symmetric or an asymmetric interpretation should be preferred. The first decision of the ECJ on the definition of disability (*Chacón Navas*, below **1.EC.84.**) does not provide any clarity on this issue either. As a result of this uncertainty, different approaches can be discerned in national legislative texts. An asymmetrical approach is visible in the UK, Germany and Spain,[200] whereas the Dutch Equal Treatment on grounds of Handicap and Chronic Illness Act seems to start from a symmetrical approach:[201]

[198] A.T. Skidmore, "EC Framework Employment Directive on Equal Treatment in Employment: Towards a Comprehensive Community Anti-discrimination Policy?" [2001] *ILJ* 131.

[199] L. Waddington, "Implementing the Disability Provisions of the Framework Employment Directive: Room for Exercising National Discretion" in A. Lawson and C. Gooding (eds.), *Disability Rights in Europe. From Theory to Practice* (Oxford, Hart, 2005) 115.

[200] *Ibid.*, 115.

[201] See M. Gijzen, "Report on Measures to Combat Discrimination: Directive 2000/43/EC and 2000/78/EC. Country Report Netherlands" (European Commission, 2004), para. 2.1.1, available on the website of Directorate-General for Employment, Social Affairs and Equal Opportunities.

> "Every citizen enjoys protection on the basis of this bill; this is not about having a handicap or chronic illness, but about being discriminated against as compared to someone who has or does not have such impairment." [202]

The symmetrical character of the Dutch non-discrimination legislation has been confirmed by the Equal Treatment Commission:

> "Parliament has not further defined the concepts of handicap and chronic disorder. The ban on distinction on these grounds also includes a ban on a distinction on account of not possessing a handicap or chronic disorder."[203]

Such a symmetrical approach seems to fit best with the approach taken by the ECJ to the grounds of gender and race and is more protective of the rights of non-disabled persons. It is just as clear, however, that an asymmetric approach provides better protection of disabled people, as non-disabled workers are then withheld from challenging forms of positive action.[204] It remains to be seen which approach is favoured by the ECJ on this issue.

SOCIAL CONSTRUCT OR MEDICAL IMPAIRMENT?

In defining "disability", it is further important to note that there are different views with respect to the concept of disability itself, which are usually described in the form of two main theoretical models—the medical model and the social model of disability.[205] The medical model is based on a rather functional view of disability, which regards disability primarily as a physical or psychological impairment impeding someone's daily functioning in society. An example of legislation which is based on the medical model may be found in the UK:

Disability Discrimination Act 2005[206] **1.UK.82.**

Subject to the provisions of Schedule 1, a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

Schedule 1—Provisions supplementing Section 1[207]
2.—(1) The effect of an impairment is a long-term effect if—

[202] Explanatory Memorandum to the Act on Equal Treatment on the Grounds of Disability or Chronic Illness of 2003, *Kamerstukken II* 2001/02, 28 169, no. 3, at 9.
[203] Dutch Equal Treatment Commission, Opinion 2005–02.
[204] Waddington, above n. 199, 116.
[205] See further below L. Waddington, Chapter Six: Reasonable Accommodation and L. Waddington, *From Rome to Nice in a Wheelchair. The Development of a European Disability Policy*, Inaugural Lecture University of Maastricht 2005 (Groningen, Europa Law Publishing, 2006) 13.
[206] c. 50, s. 1(1).
[207] *Ibid.*, c. 50.

(a) it has lasted at least 12 months;
(b) the period for which it lasts is likely to be at least 12 months; or
(c) it is likely to last for the rest of the life of the person affected.

. . .

4.—(1) An impairment is to be taken to affect the ability of the person concerned to carry out normal day-to-day activities only if it affects one of the following—

(a) mobility;
(b) manual dexterity;
(c) physical co-ordination;
(d) continence;
(e) ability to lift, carry or otherwise move everyday objects;
(f) speech, hearing or eyesight;
(g) memory or ability to concentrate, learn or understand; or
(h) perception of the risk of physical danger . . .

Note

It is clear that a definition such as that contained in the Disability Discrimination Act 1995 involves determinations of fact. The presence of a disability must be established on the basis of medical proof, for instance in the form of a medical diagnosis, in order to successfully invoke the relevant provisions. As a result, many disability discrimination cases in the UK involve discussions on the basis of expert medical opinions.[208]

The medical definition is often criticised in academic literature, as it is questionable if it provides sufficient protection against disability discrimination. In particular, it has been argued that the medical model focuses too strongly on adaptation to prevailing norms and standards in society, instead of on the failure of the social environment to adjust to the needs and aspirations of people with impairments.[209]

The social model regards disability as a social construct, being ". . . the result of the impaired individual's situation in his or her environment and in the wider structure of society, which places that individual at a disadvantage".[210]

According to this perspective, many cases of disability discrimination stem not so much from the actual impairment as from a disabling environment.[211] On this view the concept of "disability" in anti-discrimination legislation needs to be given a different definition, which should not focus on functional impairments alone, but should also take into account the impairments created by society.[212]

The social model is more in line with the European policy towards disability than the purely medical approach—indeed, the European Action Plan on equal opportunities for people with disabilities (2003) explicitly recognises disability as a "social

[208] K. Wells, "The Impact of the Framework Employment Directive on UK Disability Discrimination Law" [2003] *ILJ* 257.
[209] Waddington, *From Rome to Nice*, above n 205, 13.
[210] Wells, above n 208.
[211] Waddington, *From Rome to Nice*, above n 205, 14.
[212] Wells, above n 208, 261.

construct".[213] The approach of the World Health Organisation (WHO) towards disability also recognises the social aspects of the concept of disability. Its influential *International Classification of Functioning, Disability and Health* (ICF), which provides a worldwide standard for the description of health and health-related states, is based on a model of disability which endeavours to include both the medical and the social perspective. In addition, the model encompasses an individual perspective, which means that it recognises that some aspects of disability are almost entirely internal to the person.[214] The model of disability it has thus created is called the "biopsychosocial model" and is explained as follows:

World Health Organisation, "Towards a Common Language for Functioning, Disability and Health"[215] **1.UN.83.**

". . . [I]n ICF disability and functioning are viewed as outcomes of interactions between health conditions (diseases, disorders and injuries) and contextual factors.

Among contextual factors are external environmental factors (for example, social attitudes, architectural characteristics, legal and social structures, as well as climate, terrain and so forth); and internal personal factors, which include gender, age, coping styles, social background, education, profession, past and current experience, overall behaviour pattern, character and other factors that influence how disability is experienced by the individual.

[There are] . . . three levels of human functioning classified by ICF: functioning at the level of body or body part, the whole person, and the whole person in a social context. Disability therefore involves dysfunctioning at one or more of these same levels: impairments, activity limitations and participation restrictions. The formal definitions of these components of ICF are provided . . . below . . .

Body Functions are physiological functions of body systems (including psychological functions).
Body Structures are anatomical parts of the body such as organs, limbs and their components.
Impairments are problems in body function or structure such as a significant deviation or loss.
Activity is the execution of a task or action by an individual.
Participation is involvement in a life situation.
Activity Limitations are difficulties an individual may have in executing activities.
Participation Restrictions are problems an individual may experience in involvement in life situations.
Environmental Factors make up the physical, social and attitudinal environment in which people live and conduct their lives."

Various efforts have been made to translate the "social" or "biopsychosocial" model into anti-discrimination legislation. The social aspect of disability is, for instance, well

[213] European Commission, Equal Opportunities for People with Disabilities: A European Action Plan, COM (2003) 650 final, at 4.
[214] See World Health Organisation, *Towards a Common Language for Functioning, Disability and Health*, ICF, WHO/EIP/GPE/CAS/01.3 (WHO, Geneva, 2002) 9.
[215] *Ibid.*

articulated in a definition proposed by the European Disability Forum (EDF) in 2004:

> "1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination whatsoever on the grounds of disability and no discrimination in the form of a failure to make a reasonable accommodation . . .
>
> 7. For the purposes of this Directive, a person shall be regarded as having a disability if they currently have a disability, they have had a disability in the past, they may have a disability in the future, they are associated with a person with a disability through a family or other relationship, or they are assumed to fall into one of these categories."[216]

This definition not only cover persons with a current impairment, but also covers persons who have had a disability in the past or may become disabled in the future. Assumed disabilities and discrimination by association are also covered, which results in a provision focusing primarily on the aspect of *discrimination* against disabled persons, instead of the disability itself.[217]

An existing legislative definition which seems to come close to the approach that is proposed by the WHO is contained in the Irish Employment Equality Acts of 1998 to 2004, although the aspect of individuality is not clearly visible therein:

> "'Disability' means:
>
> (a) the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body,
>
> (b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness,
>
> (c) the malfunction, malformation or disfigurement of a part of a person's body,
>
> (d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or
>
> (e) a condition, illness or disease which affects a person's thought processes, perception of reality, emotions or Judgment or which results in disturbed behaviour,
>
> and shall be taken to include a disability which exists at present, or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person."[218]

Although this definition seems to be based primarily on the medical model, it also refers to discrimination based on previous and future disabilities and disabilities which are not real, but assumed. Furthermore, it appears from the application of

[216] European Disability Forum, *Proposal for a Directive Implementing the Principle of Equal Treatment for Persons with Disabilities*, 12 March 2004, Art. 2, available on the website of European Disability Forum.

[217] These elements have also been mentioned as necessary to the definition of 'disability' in non-discrimination legislation by the EU Network of Independent Experts on Disability Discrimination in their *Baseline Study of Disability Discrimination Law in the EU Member States* (European Commission, November 2004), at 11–12, available on the website of Directorate-General for Employment, Social Affairs and Equal Opportunities.

[218] Irish Employment Equality Acts 1998 to 2004, s. 2 (Interpretation).

these definitions in Irish case-law that the courts will not easily dismiss a claim on the ground that the individual is not disabled, as will be illustrated in more detail hereinafter. To that extent, the Irish definition comes much closer to the WHO and EDF definitions than the aforementioned UK definition does.

Finally, some states have not given a social definition of disability discrimination in their legislative texts, but rather have expressed in explanatory notes that the notion should be defined in accordance with ICF, as is the case in the Netherlands:

> "A conclusive definition of the terms handicap or chronic disease is neither necessary nor desirable, especially because what are concerned are not precisely described characteristics of a person but characteristics in relation to situationally determined restrictions. In general usage, the terms have a sufficiently clear meaning. Contact points can be offered if required by the WCC standard . . . 'Terms for the Handicapped' [a national standard developed by the National Health Council in 1991], the International Classification of Impairments Disabilities and Handicaps (ICIDH) and the International Classification of Functioning, Disability and Health (ICF). In this connection, the government has not considered it plausible, either, that the absence of definitions for the terms handicap and chronic disease will affect the application or implementation of the law."[219]

The Dutch government thus argued that the addressees of non-discrimination legislation will find sufficient guidance to define the notion of disability outside the legislative text, which implied that there was no real need to provide for a definition in the non-discrimination legislation.

A wide definition of disability that leaves sufficient room to take account of the social aspects of disability is to be preferred over a purely medical definition from the perspective of inclusion and effective protection against discrimination. It might therefore be expected that the European Court of Justice will choose an interpretation of the disability ground contained in the Employment Equality Directive which is in line with the social definition of disability. There is reason for doubt here, however, as a result of the first case decided by the ECJ on the meaning of the notion of disability: *Chacón Navas*. In his opinion to the case, Advocate General Geelhoed pleaded for restraint n the interpretation of the Directive, as the understanding of the notion of disability is evolving relatively quickly and the notion may be understood differently from onè context to the other. Geelhoed concluded that it would not be advisable to pursue a more or less exhaustive definition of the notion of handicap. Nevertheless, he proceeded to define the notion of disability as follows:

> "76. Disabled people are people with serious functional limitations (disabilities) due to physical, psychological or mental afflictions.
>
> 77. From this two conclusions can be drawn:
>
> — the cause of the limitations must be a health problem or physiological abnormality which is of a long-term or permanent nature;
> — the health problem as cause of the functional limitation should in principle be distinguished from that limitation.

[219] Second Memorandum in Reply with respect to the Act on Equal Treatment on the Grounds of Disability or Chronic Illness of 2003, *Kamerstukken* II 2001/02, 28 169, no. 5, at 16.

78. Consequently, a sickness which causes what may be a disability in the future cannot in principle be equated with a disability. It does not therefore provide a basis for a prohibition of discrimination, as referred to in Article 13 EC in conjunction with Directive 2000/78.

79. An exception to this rule is admissible only if during the course of the sickness permanent functional limitations emerge which must be regarded as disabilities despite the continuing sickness.

80. A dismissal because of sickness can thus constitute discrimination on the grounds of disability, which is prohibited by Directive 2000/78, only if the person concerned is able to make a reasonable case that it is not the sickness itself but the resulting long-term or permanent limitations which are the real reason for the dismissal.

81. I would add, to complete the picture, that in that hypothesis the dismissal may none the less be justified if the functional limitations—the disability—make impossible or seriously restrict the pursuit of the occupation or business concerned."

This definition is highly medical or functional in character, as it only refers to serious functional limitations which are the result of a physical, mental or psychological impairment and find their basis in a medical problem. In its judgment, the ECJ has partly followed the definition proposed by the Advocate General:

ECJ, 11 July 2006 **1.EC.84.**
Sonia Chacón Navas v. *Eurest Colectividades SA*

DEFINITION OF DISABILITY AND ILLNESS

Chacón Navas

Facts: Ms Chacón Navas was employed by Eurest and was certified as unfit to work on grounds of sickness in 2003. She was on leave of absence from her employment for eight months when she was given notice of her dismissal, which was not supported by reasons. The referring court pointed out that Chacón Navas had to be regarded as having been dismissed solely on account of the fact that she was absent from work because of sickness.

Held: A person who has been dismissed solely on account of sickness does not fall within the general framework laid down for combating discrimination on grounds of disability by the Employment Equality Directive.

Judgment: "39. The concept of 'disability' is not defined by Directive 2000/78 itself. Nor does the directive refer to the laws of the Member States for the definition of that concept.

40. It follows from the need for uniform application of Community law and the principle of equality that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community, having regard to the context of the provision and the objective pursued by the legislation in question . . .

41. As is apparent from Article 1, the purpose of Directive 2000/78 is to lay down a general framework for combating discrimination based on any of the grounds referred to in that article, which include disability, as regards employment and occupation.

42. In the light of that objective, the concept of 'disability' for the purpose of Directive 2000/78 must, in accordance with the rule set out in paragraph 40 of this judgment, be given an autonomous and uniform interpretation.

43. Directive 2000/78 aims to combat certain types of discrimination as regards employment and occupation. In that context, the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.

44. However, by using the concept of 'disability' in Article 1 of that directive, the legislature deliberately chose a term which differs from 'sickness'. The two concepts cannot therefore simply be treated as being the same.

45. Recital 16 in the preamble to Directive 2000/78 states that the 'provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability'. The importance which the Community legislature attaches to measures for adapting the workplace to the disability demonstrates that it envisaged situations in which participation in professional life is hindered over a long period of time. In order for the limitation to fall within the concept of 'disability', it must therefore be probable that it will last for a long time.

46. There is nothing in Directive 2000/78 to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness.

47. It follows from the above considerations that a person who has been dismissed by his employer solely on account of sickness does not fall within the general framework laid down for combating discrimination on grounds of disability by Directive 2000/78."

Notes

(1) Focusing on the difference between "sickness" and "disability", the ECJ formulated a definition of disability in *Chacón Navas* which includes three cumulative requirements:

a. There must be a limitation which results in particular from physical, mental or psychological impairments;
b. The limitation must hinder the participation of the person concerned in professional life;
c. It must be probable that the limitation will last for a long time.

Thus, the ECJ's definition focuses on *present* disability, which is defined in a rather functional and medical fashion. The definition thus seems to be closer to the medical model of disability than to the social model, resembling the definition provided in the UK Disability Discrimination Act. The ECJ did not pronounce itself on the question if future or previous disabilities may be covered by the notion of disability, as the Advocate General did in his opinion to the case. It is probable that it has accepted the Advocate General's invitation to refrain from giving an exhaustive and fixed definition at once, leaving intact the open nature of the term. This has the advantage that the Court can further elucidate and develop its definition in later cases on the basis of concrete national questions and factual situations. It cannot therefore be derived from *Chacón Navas* that the ECJ has

completely distanced itself from a more social approach towards the notion of disability—it might, for instance, accept future or previous disability as part of the definition in later judgments which specifically relate to such aspects. Furthermore, it is recalled here that the Member States are allowed to provide a higher level of protection against disability discrimination than is offered by the Employment Equality Directive. Hence, even though the ECJ has given a uniform and autonomous definition of the notion of disability in *Chacón Navas*, a Member State might opt for a more inclusive definition if it would thereby guarantee a higher level of protection against discrimination.

(2) The ECJ's definition of disability does not explain the precise meaning of the various requirements included therein. For example, the minimum duration needed for a limitation to qualify as "lasting for a long time" or the exact meaning of the requirement of "hindrance to the participation in professional life" is uncertain. Furthermore, the distinction the ECJ makes between sickness and disability is an interesting one, especially against the background of the legislation of some Member States in which illness and chronic illness are expressly included. Further elucidation of the meaning of these elements is needed in order to give a truly uniform definition of the ground. In this regard, the legislation and case-law of some of the Member States may be an important source of inspiration for the ECJ. For that reason, we will discuss the most important elements of the definition of disability as it is given in the Member States in the remainder of this section.

PERMANENT OR LONG-TERM PHYSICAL OR MENTAL IMPAIRMENT

Two important elements of the ECJ's definition of disability can also be traced in the legal practice of the Member States, where (present) disability is often defined as a physical or mental impairment which is permanent or at least long-term in character. Interesting examples can be found, for example, in Germany and the Netherlands:

German Federal Constitutional Court (Bundesverfassungsgericht), **1.DE.85.**
8 October 1997[220]

DISABILITY AS A LONG-TERM PHYSICAL, MENTAL OR PSYCHOLOGICAL FUNCTION IMPAIRMENT

Spina bifida

Facts: The applicant was born in 1984 with spina bifida. Both of her legs are paralysed, just like her bladder and bowels. She also suffers from a disturbance of the coordination of her movements and dysfunction of her speech and locomotion system. The applicant was placed in a primary school, which she finished

[220] 1 BvR 7/97.

without any delays. During her time at the primary school, she received special guidance and additional training in mathematics. When she wanted to transfer to an integrated secondary school, it transpired that she would need intensive additional support and training. Against the desire of the parents, the national authorities thereupon decided to place the applicant in a special school for physically disabled children, as it would not be possible to organise the necessary support and additional training at a regular secondary school. According to the applicant, this decision ran counter to Article 3(2) of the German Basic Law, which stipulates that no person shall be disfavoured because of disability.

Held: The placement in a special school amounts to unconstitutional discrimination, as the applicant could have been taught at a regular school by specially trained personnel, the costs could be covered by the school's own means and no other organisational or personal obstacles existed.

Judgment: "C.1.1. a) What is meant by 'disability' [in Art. 3 III 2 GG] cannot be directly inferred from the legislative materials . . . However, it can be seen that the legislator who amended the Basic Law adopted the interpretation of the term that was common at the time when the Basic Law was amended. This understanding of the term disability was expressed particularly in Article 3(I)(1) of the *Schwerbehindertengesetz* (SchwbG, Law on Severely Disabled). According to that law, disability is the effect of an impairment of function that is not purely temporary, and which stems from an anomalous physical, mental or psychological condition. This same interpretation of 'disability' underlies the term 'disabled' in the Third Federal Government Report on the situation of the disabled and the development of rehabilitation, and is consistent with international practice in the defining of terms . . . There is no reason not to start from this definition as a basic principle when interpreting Art. 3 III 2 *Grundgesetz* . . . Whether [Art. 3 III 2 GG] conclusively defines disability does not have to be decided on here. The case of the applicant gives no reason for this."

The Dutch Second Memorandum of Reply with respect to the Act on Equal Treatment on the Grounds of Disability or Chronic Illness of 2003[221] **1.NL.86.**

"Disabilities and chronic diseases may be physical, mental or psychological by nature . . . Brief or lengthy restrictions resulting from an accident do not in principle fall within the protection under this act. The possibility of recovery is an essential element, comparable with the situation of incapacity for work where a person may temporarily be less able to work through an accident but will in due course be able to function again to the full extent of his or her capacity. As stated in the Explanatory Memorandum (page 24), a disability is in principle irreversible."

Note

Both the definition of the German Constitutional Court and the Dutch definition in the *travaux préparatoires* speak of a "physical, mental or psychological impairment" which is long-term in character. The latter element is further defined in the Dutch legislative materials by stating that a disability is irreversible and there is no possibility of recovery—in fact, this comes down to the requirement that the disability is permanent in character. Such a limitation to long-term or permanent disabilities is also visible in other Member States, but it is clear that the protection

[221] *Kamerstukken* II 2001/02, 28 169, no. 5, at 16.

of a prohibition of discrimination is relatively limited if this requirement is included—after all, it means that negative employment decisions, such as dismissal, are not covered by the legislation if someone is temporary disabled as a result of an accident.

The requirement of a "physical, mental or psychological impairment" is also common in the various Member States. Only rarely is a definition framed differently, as in the Hungarian legislation on the Rights of Disabled Persons:

> "A person is disabled if he/she has a fully or greatly restricted command of organoleptic, locomotor or mental abilities, or is greatly restricted in his/her communication, and this constitutes an enduring obstacle with regard to his/her participation in social life."[222]

It is questionable if a definition such as this one will be in full compliance with the definition provided by the ECJ in *Chacón Navas*, as it is much more specific as regards the various limitations which qualify as disabilities.

LIMITATION TO PARTICIPATION IN SOCIAL OR PROFESSIONAL LIFE

As the ECJ made clear in *Chacón Navas*, an essential element of the definition of a disability is the negative influence of the impairment on the individual's participation in professional life. This requirement is mentioned in the legislation of many Member States, but it is only rarely further explained and the national provisions reveal a wide variety of definitions. Sometimes a negative influence on participation in the employment market is sufficient, while other states demand a substantial reduction of all "normal" functions of life or a restriction of participation in society. A few examples may serve as an illustration of this point:

Executive Regulation adopted on 30 January 2004 by the Flemish Government to implement certain provisions of the Decree of 8 May 2002[223] **1.BE.87.**

. . .2. Persons with a handicap—persons with a physical, sensorial, mental or psychic disturbance or limitation which may constitute an obstacle to fair participation in the employment market.

[222] Act XXXVI of 1998 on the Rights of Disabled Persons and Guaranteeing of their Equal Opportunities, Art. 4.

[223] Besluit van de Vlaamse regering tot uitvoering van het decreet van 8 mei 2002 houdende evenredige participatie op de arbeidsmarkt wat betreft de beroepskeuzevoorlichting, beroepsopleiding, loopbaanbegeleiding en arbeidsbemiddeling, N. 2004–786, Belgisch Staatsblad (Belgian Official Gazette) 2004, 12050.

Cypriot Law concerning Persons with Disabilities[224] **1.CY.88.**

Disability—Any form of deficiency or disadvantage that may cause bodily, mental or psychological limitations which are permanent or of an indefinite duration and which, considering the background and other personal data of the particular person, substantially reduce or exclude the ability of the person to perform one or more activities or functions that are considered normal or substantial for the quality of life of any person of the same age that does not experience the same deficiency or disadvantage.

French Act 2005-102 on the Equality of Rights and Opportunities, the Participation and Citizenship of Disabled Persons (2005), amending Section L. 114-1 of the Social Action and Family Code[225] **1.FR.89.**

The following constitutes a disability according to this code: any limitation on activity or restriction on the ability to participate in society encountered by a person in his or her environment by reason of a substantial, lasting or definitive alteration of one or many physical, sensory, mental, cognitive or psychological faculties, of multiple disabilities or of a disabling illness.

Lithuanian Law on the Social Integration of the Disabled 2004[226] **1.LT.90.**

Disability—the combination of a person's body structure, functional disorders and unfavourable elements of the environment, which cause exacerbation of long-term health conditions and decrease abilities to participate in public life and activities.

Portuguese Law 38/2004[227] **1.PT.91.**

A person shall be considered disabled when, as a consequence of congenital or acquired loss or anomaly of functions or body structures, including psychological functions, he/she presents with specific difficulties, in conjunction with circumstantial factors, which limit or hinder activity and participation on equal terms as other persons.

Notes

(1) It is difficult to say if these definitions are all compatible with the definition given by the ECJ in *Chacón Navas*, which only refers to limitations to an individual's

[224] Law N. 127(I)/2000 as amended by Law N. 57(1)/2004.

[225] Loi ° 2005/102 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées of 11 February 2005, JO 36 of 12 February 2005.

[226] Art. 2(6) (The main concepts of this law).

[227] Lei no. 38/2004 de 18 de Agosto de 2004 define as bases gerais do regime juridico da prevenção, habilitação e participação da pessoa com deficiênda, Art. 2 (Definition).

"participation in professional life". The ECJ's restriction would seem to deprive people of the protection offered by the Directive if they are hindered in some daily activities without there being a loss of ability to perform a certain job or class of jobs. This may be illustrated by the example of a job applicant in a wheelchair who is refused for a job in a call centre because the employer feels that she will probably work less efficiently than an able-bodied person. This clearly constitutes discrimination based on disability, but it is questionable if the situation is covered by the definition given by the ECJ. After all, even though it will be clear that a wheelchair may cause some difficulties in daily life, it is far from certain that this would really hinder her participation in professional life. As the job applicant's disability would thereby fall short of the requirements formulated by the ECJ, her case would not fall within the scope of protection of the Directive.

(2) National definitions which focus on the limitation of "day-to-day activities" or "activities or functions that are considered normal or substantial for the quality of life" would seem to offer stronger protection in this respect, as they cover a larger category of disability. Furthermore, the negative consequences of the limited definition given by the ECJ may be mitigated if the prohibition of discrimination is extended to discrimination based on *assumed* disability, i.e. discrimination based on misconceptions or stereotypical assumptions about the individual's abilities to participate in professional life. This issue will be discussed in more detail in section 1.4.

FUTURE DISABILITY

An important question which was not addressed by the ECJ in *Chacón Navas* relates to whether someone who is likely to acquire a disability in the future is covered by the prohibition of discrimination based on disability. This question is particularly relevant with respect to persons who are genetically predisposed to certain kinds of illness or disability, or have attracted a disease the symptoms of which will only develop in the future (e.g. Huntington's disease or HIV/Aids). In some legal systems future disability is explicitly mentioned as part of the definition of disability, but the criteria that have to be met in order to classify a case as "future disability" are rather unclear:

SGB IX, Social Law Code, Book IX (Sozialgesetzbuch, Neuntes Buch)[228] **1.DE.92.**

(2) A person is disabled if his/her bodily functions, mental capabilities or spiritual health deviate with a high degree of probability from the typical condition for the age of the person by at least six months and if as a result this affects the participation of the person in question

[228] Sozialgesetzbuch, Neuntes Buch (SGB IX), Rehabilitation und Teilhabe behinderter Menschen of 19 June 2001, BGBl.I.1046, § 2 (Disability).

in daily life. *A person is under threat of becoming disabled if such an influence on daily life is to be expected* [emphasis added].

Swedish Disability Discrimination Act 1999—Section 2 **1.SE.93.**

Disability means every permanent physical, mental or intellectual limitation of a person's functional capacity that, as a consequence of an injury or illness that existed at birth, arose thereafter or *may be expected* to arise [emphasis added].

Note

Both of these definitions make it clear that there must be some objective basis for expecting that the disability will actually occur in the future and will meet the various criteria established for the presence of a disability. How such expectations must be proved before the courts is presently not clear.[229]

CHRONIC ILLNESS, SICKNESS AND HEALTH

In some Member States, legislation is in place which offers specific protection against discrimination based on chronic or long-lasting illness, or even generally sickness or state of health. The national definitions given are highly diverse, as may be illustrated by the following excerpts and those given above (in particular **1.FR.89.**, **1.NL.80.** and **1.PT.91.**):

Hungarian Act CXXV of 2003 on equal treatment and on fostering equal opportunities[230] **1.HU.94.**

A provision shall qualify as direct discrimination if it results in less favourable treatment for a person or group than for another person or group in a comparable position, because of their actual or assumed . . .

g) disability,
h) health condition . . .

[229] In this respect, the case-law in the US relating to the Americans with Disabilities Act (ADA) may be of particular interest. For further information see, e.g. J.H. Gerards, "Regulation of Genetic Information in the United States" in J.H. Gerards, A.W. Heringa and H.L. Janssen, *Genetic Discrimination and Genetic Privacy in a Comparative Perspective* (Antwerp, Intersentia, 2005) 154*ff.*

[230] 2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról, s. 8.

Portuguese Labour Code[231] **1.PT.95.**

(1) Employers may not practice any direct or indirect discrimination based on, in particular, . . . reduced capacity to work, disability, chronic illness . . .

Note

It appears that some Member States refer to a broad category such as "health condition", but that most legislative texts contain some kind of limitation. The French text, for example, speaks of "disabling illness" (above **1.FR.89.**), and states such as Portugal and the Netherlands have chosen to cover only *chronic* illness (above **1.NL.80.** and **1.PT.91.**). Such legislative choices would seem to create the need to define these notions and to distinguish disabling or chronic illness from other forms of illness.[232] Mostly, however, no such definitions or explanations are given. In the Netherlands, for example, the legislature has refrained from giving a definition of "chronic illness", stating that the term has a clear significance in daily usage. The only clue given as to the definition of the notion is as follows:

Dutch Explanatory Memorandum to the Act on Equal Treatment on the Grounds of Disability or Chronic Illness of 2003[233] **1.NL.96.**

"A disability is . . . irreversible in principle. A chronic illness is not always so, but is in any event long-lasting by nature."

The Irish definition of "disability" mentions "the malfunction, malformation or disfigurement of a part of a person's body", without explaining if the definition also covers cases of chronic illness or (temporary) sickness. It is clear from a number of decisions of the Irish Equality Officer, however, that the provision must be given a wide interpretation:

Equality Tribunal, 11 December 2002[234] **1.IE.97.**
Decision DEC-E/2001/052, Fernandez v. *Cable & Wireless*

ILLNESS AS DISABILITY

Fernandez

Facts: Ms Fernandez was given an intravenous penicillin injection to fight a kidney infection in 2001. She had a severe reaction to the injection and had to stay in hospital for a week to recover. After this, and in

[231] Art. 23(1).

[232] Although this is less relevant for the Portuguese Labour Code, which does not contain a closed list of grounds and may be interpreted as to cover non-chronic illness as well as chronic illness.

[233] Kamerstukken II, 2001/02, 28 169, no. 3, at 24.

[234] Available on the website of the Equality Tribunal of Ireland, under the heading Employment Equality Decisions.

combination with earlier health problems relating to pregnancy, she was removed from the "24-hour service" at the call centre she was working for with the loss of £5000 per annum. Furthermore, she was advised to follow the established practice with respect to planning of medical appointments, as she had not given adequate notice of such appointments to her team leader. Her team leader warned her that if there were further occurrences of unplanned leave, further action would have to be considered.

Held: In the circumstances of this particular case, the respondent did provide reasonable accommodation in relation to the complainant's medical appointment; the respondent did not directly discriminate against the complainant on the disability ground.

Decision: "5.12 The complainant does not deny that she had a number of sick leave absences but submits that the impact of her absences on the call centre had only minimal effect. I have examined the absence details including sick leave provided by both parties and for the most part, the absences correspond. The respondent submitted that the complainant was removed from the 24-hour shift on 20 August 2001 due to her high level of sick leave absences. It did not dispute the nature of the complainant's illnesses but did not accept that the complainant had proved her case that she had/has a disability as defined by the Act. I have considered the nature of the complainant's illnesses and I accept that the complainant's illnesses amounted to a disability within the meaning of the Act."

The Equality Officer's decision makes clear that any sickness may come within the scope of the definition of disability, regardless of its duration, character or severity. This understanding was confirmed by a more recent decision:

Equality Tribunal, 1 June 2004[235] **1.IE.98.**
Decision DEC-E/2004/029, A Civil Servant v. *The Office of Civil Service and Local Appointments Commissioners*

ASTHMA AND IRRITABLE BOWEL SYNDROME AS DISABILITY

Asthmatic civil servant

Facts: The complainant passed an exam and interview in 2001 for the post of Executive Officer. By letter dated 29 November 2001, he was informed that his sick leave record did not fall within the limits specified in Department of Finance Circular 34/76. He was informed that his application had not been successful as he could not be regarded as qualified in terms of health. The complainant submits that he suffers from asthma and irritable bowel syndrome.

Held: In the circumstances of this case, the respondent has successfully rebutted the claim of discrimination on the disability ground.

Decision: "5.5 . . . I have considered . . .various definitions and I am not satisfied that asthma (which according to Butterworths Medical Dictionary is, inter alia, a narrowing of the smaller bronchi and bronchioles of the lungs) amounts to a disability within the definition of subsection (b), *i.e.* the presence in the body of organisms causing, or likely to cause, chronic disease or illness.

5.6 I will now consider the definition of irritable bowel syndrome . . .I have considered the . . . definition and in particular, that it is caused by a disturbance of involuntary muscle

[235] Available on the website of the Equality Tribunal of Ireland, under the heading Employment Equality Decisions.

movement in the large intestine and therefore, I am not satisfied that irritable bowel syndrome is a disability which falls within subsection (b) of the definition of disability and relates to the presence in the body of organisms causing, or likely to cause, chronic disease or illness.

5.7 As stated in the preceding paragraphs, I find it difficult to reconcile the complainant's illnesses with subsection (b) of the definition of disability. However, I will proceed to examine whether the illnesses could fall within any of the other subsections of the definition of disability. Section 2(1) of the Act defines disability in broad terms. It provides at subsection (c) that disability includes 'the malfunction, malformation or disfigurement of a part of a person's body', I have considered a number of Labour Court cases of discriminatory dismissal on the disability ground which concern illnesses such as diabetes, epilepsy, a congenital neuromuscular disease, a hearing difficulty and injuries sustained in a car accident . . . The Court in the case of *Customer Perception Limited* v. *Gemma Leydon* considered in that case whether injuries sustained by the complainant in a road traffic accident amounted to a disability within the meaning of the Employment Equality Act, 1998. It held:

'Taking the ordinary and natural meaning of the term malfunction (connoting a failure to function in a normal manner), the condition from which the complainant suffered in consequences of her accident amounted to a malfunction of parts of her body. It thus constituted a disability within the meaning of the Act. Moreover, in providing that the term comprehends a disability which existed but no longer exists, it is clear that a temporary malfunction comes within the statutory definition.'

In my view, both asthma and irritable bowel syndrome are malfunctions of the airways of the lungs and the intestinal tract respectively and more appropriately fall within the definition contained at subsection (c). I therefore accept that both conditions amount to disabilities within the meaning of the Act."

Notes

(1) The decision in the case of the civil servant confirms that sickness and illness that cannot be considered as chronic in character nevertheless constitute a "disability" within the meaning of the Employment Equality Act if they (temporarily) cause a malfunctioning of parts of the body. This wide definition has also led the Equality Officer to accept that alcoholism forms part of the definition of disability, just like health problems that are the result of work-related stress.[236]

(2) Thus, the Irish definition seems to be more protective than the definition provided by the ECJ in *Chacón Navas*. From this case it transpired, after all, that temporary illness does not come within the scope of "disability", although this may be different for a disabling or chronic illness that meets the requirements of hindering participation in professional life over a long period of time. To that extent, the ECJ's decision would seem to oblige all national laws to provide for some protection against discrimination based on chronic illness.

[236] See Equality Officer Decision, 2 May 2003, DEC S/2002/024, *A Complainant* v. *Café Kylemore* (alcoholism) and Equality Officer, 20 November 2003, DEC E/2003v.052, *Mr. O.* v. *A Named Company* (work-related stress).

1.3.9.B. SUSPECTNESS

While the legislation in many Member States devotes significant attention to the definition of disability, much less information is available with respect to the perceived suspectness of the ground. Because of the inclusion of the ground in the Directive and the many policy efforts made on both the European and domestic level, a consensus might seem to exist on the need to offer strong protection against disability discrimination and to provide for special accommodation to meet the needs of disabled persons. It may thus be concluded that disability is generally considered as a suspect ground for discrimination.

The only clue which is presently available as to the approach that will be taken by the ECJ in this respect can be found in the case of *Mangold*,[237] in which the Court applied a relatively strict test to a distinction based on age. It might be derived from this that the Court will adopt a similar approach towards the ground of disability. There may be some doubt in this regard, however, as Advocate General Geelhoed has argued that an extensive interpretation of the Employment Equality Directive might lead to potentially far-reaching economical and financial consequences for the relations between citizens and between public authorities and citizens.[238] This line of reasoning would seem to imply that the states should generally be afforded a relatively wide margin of appreciation to decide if certain distinctions are reasonable and justifiable. As a result, disability discrimination would not have to be strictly scrutinised on the level of the ECJ, regardless of the suspectness of the ground in question. Of course, this should not be taken to mean that disability cannot be considered suspect on the national level and a strict test cannot be applied by the national courts on their own accord. Nonetheless, the lack of clear approval of the ECJ on the Community level would certainly discourage some national courts from doing so. For that reason, much will depend on the ECJ's willingness to stand by its decision in the *Mangold* case or, alternatively, to follow the proposal made by AG Geelhoed. Unfortunately, the *Chacón Navas* case as it was decided by the ECJ does not offer any more clarity in this respect, as the Court found that the Directive was not applicable to the case at hand and therefore did not address the question about the justifiability of the discrimination that was complained of.

Similarly, no answer to the question of suspectness can be found in the case-law of the ECtHR, as the ECtHR has not yet decided any cases pertaining to disability discrimination.[239]

[237] See below **1.EC.101.**

[238] See his opinion in the case of *Chacón Navas*, above **1.EC.84.** and accompanying text.

[239] The reason for this is that the ECtHR has not yet accepted many cases of disability discrimination to come under the scope of one of the substantive provisions of the ECHR; because of the accessory character of the non-discrimination provision contained in Art. 14, this means that it has also proven to be impossible to successfully challenge cases of disability discrimination. For an example, see ECtHR, 11 April 2006, *Molka* v. *Poland*, Appl. No. 56550/00 (admissibility decision), not published. This might change now that the independent non-discrimination provision of Protocol No. 12 has entered into force. Furthermore, it is important to note that this has not prevented the ECtHR from deciding complaints from disabled persons under the substantive rights protected by the Convention, such as Art. 8 (right to respect

1.3.10. AGE

1.3.10.A. DEFINITION

As with the other grounds contained in the Employment Equality Directive, no definition is provided of the ground of age. The Member States have scarcely made use of the resulting possibility to provide their own definition of the notion: most of the Member States have not given any explanation of the meaning of "age". Indeed, the meaning of the ground would seem to be self-evident, as it would simply seem to refer to distinctions between older and younger persons.[240] Consequently, few national materials are available in which the notion is further explained. A rare exception is the Netherlands, where some attention has been paid to the question if the ground also covers age categories:

> "The notion of 'distinction' includes first of all direct unequal treatment, whereupon age is used directly as the ground for distinction. This is so not only if a distinction is made on grounds of a particular age but also if age categories are adopted. An example of adopting a specific age is the fixing of an age limit in a job advertisement or allowing additional days holiday based on age. An example of the use of age categories may be found in the Dismissals Order. In the light of this Order, age categories may be adopted for group severance when fixing the order of severance. The Order refers to 5 age categories; the youngest category includes employees aged 15 to 25, the oldest, employees aged 55 and over."[241]

Furthermore, some states have found it necessary to explain that the ground of age should be interpreted in a symmetrical manner, thus clarifying that discrimination against both younger and older persons is prohibited. In the Explanatory Notes to the Austrian Equal Treatment Act, it is, for instance, stated that: "The ground 'age' also covers discrimination on the ground of young age."[242]
In other legal systems the symmetrical character of the ground of age seems to have been taken for granted. From the various country reports on measures to combat discrimination it clearly transpires that "age" is supposed to cover younger as well as older persons,[243] but this assumption is seldom expressed in legislation, legislative

for private life). For a further analysis, see in particular O. de Schutter, *The Prohibition of Discrimination under European Human Rights Law. Relevance for EU Racial and Employment Equality Directives* (Brussels, European Commission, 2005) 21/23.

[240] Although here, as well as with disability, it is sometimes argued that a distinction should be made between someone's biological age and the social construct of age: societal attitudes, assumptions and barriers may be of importance here as much as with disability. *Cf.* H. Meenan, "Age Equality after the Employment Directive" (2003) 10 *MJ* 13.

[241] Explanatory Memorandum to the Act on Equal Treatment on Grounds of Age, *Kamerstukken II* 2001/02, 28170, no. 3, at 17.

[242] Explanatory Notes to the Austrian Equal Treatment Act, *307 der Beilagen XXII.GP, Regierungsvorlage, Materialien*, at 15.

[243] See generally the website of Directorate-General for Employment, Social Affairs and Equal Opportunities.

materials or case-law. An exception to this general approach can be found in Ireland:

Irish Equal Status Act 2000, as amended by the Equality Act 2004[244] **1.IE.99.**

(3) (a) The age ground applies only in relation to persons above the maximum age at which a person is statutorily obliged to attend school.

(b) Notwithstanding subsection (1) and section 37(2), an employer may set a minimum age, not exceeding 18 years, for recruitment to a post.

(c) Offering a fixed term contract to a person over the compulsory retirement age for that employment or to a particular class or description of employees in that employment shall not be taken as constituting discrimination on the age ground.

Note

The result of the Irish formulation is that only persons over 18 years old are protected against age discrimination. Furthermore, in certain circumstances the non-discrimination legislation does not apply to persons over the compulsory retirement age, which may differ for each employment sector. However, this second exclusion does not so much relate to the *definition* of the ground of age, but can be considered to constitute a general limitation on the scope of the non-discrimination legislation. It is unclear as yet whether such a general exclusion is in compliance with the Employment Equality Directive, which seems to start from the perspective that everyone, regardless of age, should have the same right to equal treatment.[245]

1.3.10.B. SUSPECTNESS

The suspectness of the ground of age is subject to debate. A number of reasons can be said to raise doubt as to the suspect character of this ground.[246] The relevance and reasonableness of many age-based distinctions is not, or at least not fundamentally, disputed—examples are age restrictions for smoking, drinking or driving, or age limitations relating to the right to participate in elections.[247] Further, even though there are many cases of unacceptable stereotyping as regards persons belonging to certain age groups,[248] there would not seem to be a degree of social prejudice comparable to that visible with respect to race, ethnic origin, sexual orientation or

[244] No. 8/2000, as amended by No. 24/2004, s. 3.

[245] C. O'Cinneide, *Age Discrimination and European Law*, European Commission Report (April 2005) 11, available on the website of the Migration Policy Group.

[246] *Ibid.*, 13.

[247] This is also stated in the preamble to the Employment Equality Directive: in consideration 25, it is stipulated that it is essential to distinguish between situations of justified unequal treatment based on age, and actual age discrimination.

[248] See O'Cinneide, above n. 245, 10.

gender. It has even been argued that the introduction of non-discrimination legislation with respect to the ground of age was primarily inspired by the economically motivated wish to improve employment participation of senior workers, which is necessary to finance the welfare state for an ageing population. Notions relating to fundamental individual rights and human dignity, which form the primary source of inspiration for other non-discrimination provisions, are considered of secondary importance here.[249] For such reasons there might seem to be less need to apply a strict test to age-discrimination than to the other grounds mentioned in the Employment Equality Directive. This view is supported by a decision of the Irish Supreme Court of 1997, which is one of the very few European cases in which express attention is devoted to the issue:

Supreme Court, 15 May 1997 **1.IE.100.**
Case 118/1997, In the Matter of Article 26 and in the Matter of the Employment Equality Bill 1996

LIMITED SCOPE OF AGE DISCRIMINATION PROHIBITIONS

Age discrimination in the Employment Equality Bill

Facts: In 1996, the Irish parliament (Oireachtas) had drafted an Employment Equality Bill. In 1997, the Irish president referred the Bill to the Supreme Court for a decision on the question as to whether the Bill was repugnant to the Irish Constitution. One of the specific questions that was raised in this case related to the prohibition on age discrimination as contained in the Bill. The Bill excluded persons aged 65 or more and persons under 18 from the scope of the ground of age. Furthermore, the prohibition did not apply to employment in the Defence Forces, the Garda Siochana (the Irish police service) or the prison service. The question was raised if these exclusions were in compliance with the general principle of equal treatment as guaranteed in Article 40.1 of the Irish Constitution, given that not all persons were offered the same level of protection against age discrimination.

Held: The provisions relating to the age ground are not repugnant to the provisions of the Constitution.

Judgment: ". . . The aged are . . . entitled as human beings to protection against laws which discriminate against them, unless the differentiation is related to a legitimate objective and is not arbitrary or irrational. The young are also so entitled, although the need for protection may be less obvious and pressing in their case. There is no question but that the Bill under consideration in seeking to eliminate from the work place so far as practicable is designed to meet an important objective which is enshrined in the Constitution itself . . .

It might be, at first sight, more difficult to defend on constitutional grounds the wide-ranging exclusion from the Bill's provisions of employment in the Defence Forces, the Garda Siochana or the Prison Service. Once, however, it is accepted that discrimination on the grounds of age falls into a different constitutional category from distinction on grounds such as sex or race, the decision of the Oireachtas not to apply the provisions of the Bill to a

[249] Although they are certainly of relevance. If a distinction is based on stereotypes or prejudice regarding someone's age, it may well be argued that such a distinction comes into conflict with one's right to respect for human dignity; in addition, such discrimination sometimes deprives persons of important work opportunities. See O'Cinneide, above n. 245, 10.

relatively narrowly defined class of employees in the public service whose duties are of a particular character becomes more understandable . . ."

Note
The excerpt makes clear that the Irish Supreme Court perceives a difference between the age ground and grounds such as sex or race. In the case of unequal treatment based on age, a test of arbitrariness or irrationality is considered sufficient and exclusions from the scope of protection are more readily held to be permissible.

Notwithstanding such assumptions in favour of a more marginal test, it is clear from the ECJ's decision in *Mangold* that a relatively strict test of proportionality will be applied in cases in which a difference in treatment is based on age alone:

ECJ, 22 November 2005[250] **1.EC.101.**
Werner Mangold v. *Rüdiger Helm*

STRICT TEST OF PROPORTIONALITY IN AGE-DISCRIMINATION CASES

Mangold

Facts: In 2003 Mr Mangold, then 56 years old, concluded with Mr Helm a contract that provided the following three points:

1. The employment relationship shall start on 1 July 2003 and last until February 2004.

2. The duration of the contract shall be based on the statutory provision which is intended to make it easier to conclude fixed-term contracts of employment with older workers . . . since the employee is more than 52 years old.

3. The parties have agreed that there is no reason for the fixed term of this contract other than that set out in paragraph 2 above. All other grounds for limiting the term of employment accepted in principle by the legislature are expressly excluded from this agreement.

The contract was based on the Law on part time working and fixed-term contracts, in which it was stated that a fixed-term employment contract shall not require objective justification if at the start of the fixed-term employment relationship the employee has reached the age of 58. The Law also provided that until 31 December 2006 the first sentence could be read as referring to the age of 52 instead of 58.

Held: Community law must be interpreted as precluding a provision of domestic law such as that at issue in the main proceedings.

Judgment: "63. . . . [T]he Member States unarguably enjoy broad discretion in their choice of the measures capable of attaining their objectives in the field of social and employment policy.

64. However, as the national court has pointed out, application of national legislation such as that at issue in the main proceedings leads to a situation in which all workers who have reached the age of 52, without distinction, whether or not they were unemployed before the contract was concluded and whatever the duration of any period of unemployment, may

[250] [2005] ECR I–9981.

lawfully, until the age at which they may claim their entitlement to a retirement pension, be offered fixed-term contracts of employment which may be renewed an indefinite number of times. This significant body of workers, determined solely on the basis of age, is thus in danger, during a substantial part of its members' working life, of being excluded from the benefit of stable employment which, however, as the Framework Agreement makes clear, constitutes a major element in the protection of workers.

65. In so far as such legislation takes the age of the worker concerned as the only criterion for the application of a fixed-term contract of employment, when it has not been shown that fixing an age threshold, as such, regardless of any other consideration linked to the structure of the labour market in question or the personal situation of the person concerned, is objectively necessary to the attainment of the objective which is the vocational integration of unemployed older workers, it must be considered to go beyond what is appropriate and necessary in order to attain the objective pursued. Observance of the principle of proportionality requires every derogation from an individual right to reconcile, so far as is possible, the requirements of the principle of equal treatment with those of the aim pursued . . . Such national legislation cannot, therefore, be justified under Article 6(1) of Directive 2000/78."

Note

Although the ECJ did not expressly deal with the issue of suspectness and even stressed that Member States enjoy broad discretion in the field of social and economic policy, it is clear from its decision in *Mangold* that it will not apply a marginal test of arbitrariness to age distinctions. It may be concluded that the ECJ will apply at least an intermediate intensity of review to discrimination based on age, as it concerns a derogation from the individual right to non-discrimination. To this extent, the national courts (such as the Irish Supreme Court) will need to adapt their case-law to meet the standard of review set by the ECJ.

1.3.11. PART TIME AND FIXED-TERM WORK

1.3.11.A. DEFINITION

Two European Directives were adopted in the nineties which are devoted to part time workers and workers with fixed-term contracts. Both Directives aim to implement the Framework Agreements on part time work and fixed-term contracts concluded by the Union of Industrial and Employer's Confederations of Europe (UNICE), the European Centre of Enterprises with Public Participation (CEEP) and the European Trade Union Confederation (ETUC). Both Framework Agreements contain express prohibitions of discrimination against part time workers and workers with fixed-term contracts. These prohibitions are formulated asymmetrically, protecting only members of the group that are most often victims of discrimination. The Directives further contain explicit definitions of part-time workers, full-time workers and fixed-term contracts, which sets them apart from the Racial and Employment Equality Directives.

Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and ETUC—Annex (Framework Agreement on Part-Time Work)[251] **1.EC.102.**

For the purposes of this agreement:

1. The term 'part-time worker' refers to an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker.

2. The term 'comparable full-time worker' means a full-time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work/occupation, due regard being given to other considerations which may include seniority and qualification/skills . . .

Clause 4—Principle of non-discrimination

1. In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds.

2. Where appropriate, the principle of *pro rata temporis* shall apply.

Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP—Annex (Framework Agreement on Fixed-Term Work)[252] **1.EC.103.**

1. For the purpose of this agreement the term 'fixed-term worker' means a person having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event.

2. For the purpose of this agreement, the term 'comparable permanent worker' means a worker with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualifications/skills.

Clause 4—Principle of non-discrimination

1. In respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds . . .

In this section we will provide an overview of the way these provisions have been implemented and interpreted on the international level and in the various Member States. We will start with an explanation of the meaning of the grounds of part-time and full-time work, followed by a discussion of the ground of fixed-term contract.

[251] [1998] OJ L 14/12, cl. 3 (Definitions).
[252] [1999] OJ L 175/43, cl. 3 (Definitions).

PART-TIME AND FULL-TIME WORK

The definition provided in the Framework Agreement on Part-Time Work is similar to the definitions contained in International Labour Organisation (ILO) Convention No. 175 concerning part-time work:

ILO Convention No. 175: Part-Time Work Convention[253] **1.UN.104.**

For the purposes of this Convention:

(a) the term 'part-time worker' means an employed person whose normal hours of work are less than those of comparable full-time workers;
(b) the normal hours of work referred to in subparagraph (a) may be calculated weekly or on average over a given period of employment;
(c) the term 'comparable full-time worker' refers to a full-time worker who:
(i) has the same type of employment relationship;
(ii) is engaged in the same or a similar type of work or occupation; and
(iii) is employed in the same establishment or, when there is no comparable full-time worker in that establishment, in the same enterprise or, when there is no comparable full-time worker in that enterprise, in the same branch of activity, as the part-time worker concerned;
(d) full-time workers affected by partial unemployment, that is by a collective and temporary reduction in their normal hours of work for economic, technical or structural reasons, are not considered to be part-time workers.

Notes

(1) Just like the European Framework Agreement, the ILO Convention is formulated asymmetrically, protecting only part-time workers against discrimination. This is in line with the common view that part-time employment is "atypical" employment which deviates from the general rule of full-time work.[254] Being the exception, part-time workers need stronger protection against discrimination than full-time workers do.

(2) Furthermore, the definitions are comparable as far as regards the choice of full-time workers as the relevant comparator. Part-time work is defined in relation to full-time work by stipulating that a job is part-time when the number of weekly working hours is considerably less than the number of hours in a comparable full-time job.[255] The reason for mentioning a similar occupation is that the number of

[253] Art. 1.

[254] K. Ogura, "International Comparison of Atypical Employment: Differing Concepts and Realities in Industrialized Countries" (2005) 2 *JLR* 6.

[255] A. van Bastelaer et al., *The Definition of Part-Time Work for the Purpose of International Comparisons*, Labour Market and Social Policy Occasional Papers No. 22 (Paris, OECD, 1997) 5–6.

hours per week or month that are regarded as normal for full-time employees may vary considerably according to the profession or activity concerned.[256]

(3) Finally, the definitions in neither the ILO Convention nor the European Framework Agreement distinguish between various types of part-time work, such as job-sharing, combinations between work and training (e.g. traineeships and apprenticeships) and semi-retirement.[257] Hence, all of these forms are presumably covered by the non-discrimination provisions. Only part-time workers who work on a casual basis may be excluded from the scope of the relevant legislation, as is expressly stated in the European Framework Agreement:

> "Member States, after consultation with the social partners in accordance with national law, collective agreements or practice, and/or the social partners at the appropriate level in conformity with national industrial relations practice may, for objective reasons, exclude wholly or partly from the terms of this Agreement part-time workers who work on a casual basis. Such exclusions should be reviewed periodically to establish if the objective reasons for making them remain valid."[258]

According to the *ETUC Guide to the Framework Agreement on Part-time Work*, the term "casual" contained in this definition may be read as to describe short, temporary and non-repetitive contracts.[259]

Within the EU, most Member States strive for equal treatment of part-time workers by other means than by adopting specific non-discrimination legislation, e.g. by concluding collective agreements or amending or supplementing existing employment legislation.[260] Only a few states appear to have implemented the Part-Time Work Directive by extending the scope of their non-discrimination legislation to the ground of part-time/full-time work.[261] These states have sometimes included a definition of part-time and full-time work which is similar to the one contained in the ILO Convention and the Part-Time Work Directive, though a few notable variations and deviations are visible:[262]

[256] A.T. Bollé, "Part-time Work: Solution or Trap?" (1997) 136 *ILR* 559.

[257] See A.T. Vielle and A.T. Walthery, *Flexibility and Social Protection, European Foundation for the Improvement of Living and Working Conditions* (Luxembourg, European Communities Publications, 2003) 10.

[258] European Framework Agreement on part-time work, in Vielle and Walthery, above n. 257, cl. 2 (2) (Scope).

[259] See Annex 9 to S. Clauwaert, *Survey on the Implementation of the Part-Time Work Directive v. Agreement in the EU Member States and Selected Applicant Countries* (Brussels, European Trade Union Institute, 2002) 102 (cl. 2, scope).

[260] Further information on the implementation of the Directive can be found in Clauwaert, above n. 259.

[261] Obviously, equal treatment legislation which does not contain a closed list of protected grounds will also include the grounds of working-time and fixed-term work.

[262] See Clauwaert, above n. 259, 30*ff*.

(1) . . .
— 'full-time employee' means an employee who is not a part-time employee;
— 'normal hours of work' means, in relation to an employee, the average number of hours worked by the employee each day during a reference period;
— 'part-time employee' means an employee whose normal hours of work are less than the normal hours of work of an employee who is a comparable employee in relation to him or her;
— 'reference period' means a period which complies with the following conditions:

(a) the period is of not less than 7 days nor more than 12 months duration,
(b) the period is the same period by reference to which the normal hours of work of the other employee referred to in the definition of 'part-time employee' in this section is determined, and
(c) the number of hours worked by the employee concerned in the period constitutes the normal number of hours worked by the employee in a period of that duration; . . .

(2) For the purposes of this Part, an employee is a comparable employee in relation to the employee firstly mentioned in the definition of 'part-time employee' in this section (the 'relevant part-time employee') if—

(a) the employee and the relevant part-time employee are employed by the same employer or associated employers and one of the conditions referred to in subsection (3) is satisfied in respect of those employees,
(b) in case paragraph (a) does not apply (including a case where the relevant part-time employee is the sole employee of the employer), the employee is specified in a collective agreement, being an agreement that for the time being has effect in relation to the relevant part-time employee, to be a type of employee who is to be regarded for the purposes of this Part as a comparable employee in relation to the relevant part-time employee, or
(c) in case neither paragraph (a) nor (b) applies, the employee is employed in the same industry or sector of employment as the relevant part-time employee is employed in and one of the conditions referred to in subsection (3) is satisfied in respect of those employees, and references in this Part to a comparable full-time employee in relation to a part-time employee shall be construed accordingly.

(3) The following are the conditions mentioned in subsection (2)—

(a) both of the employees concerned perform the same work under the same or similar conditions or each is interchangeable with the other in relation to the work,
(b) the work performed by one of the employees concerned is of the same or a similar nature to that performed by the other and any differences between the work performed or the conditions under which it is performed by each, either are of small importance in relation to the work as a whole or occur with such irregularity as not to be significant, and
(c) the work performed by the relevant part-time employee is equal or greater in value to the work performed by the other employee concerned, having regard to such matters as skill, physical or mental requirements, responsibility and working conditions.

[263] No. 45/2001, s. 7 (Interpretation).

Note
The Irish definition is far more detailed than the European provisions where the comparator and the definition of "normal working hours" are concerned. It is clear that such an elaborate provision, though rather complex, offers much clarity in respect of the way the notion of "part-time work" will be interpreted by employers and courts.

A definition which clearly deviates from the ILO standards and the Part-Time Work Directive can be found in the UK:

The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000[264] **1.GB.106.**

(1) A worker is a full-time worker for the purpose of these Regulations if he is paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, is identifiable as a full-time worker.
(2) A worker is a part-time worker for the purpose of these Regulations if he is paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, is not identifiable as a full-time worker.
(3) For the purposes of paragraphs (1) (2) and (4), the following shall be regarded as being employed under different types of contract—

(a) employees employed under a contract that is not a contract of apprenticeship;
(b) employees employed under a contract of apprenticeship;
(c) workers who are not employees;
(d) any other description of worker that it is reasonable for the employer to treat differently from other workers on the ground that workers of that description have a different type of contract.

(4) A full-time worker is a comparable full-time worker in relation to a part-time worker if, at the time when the treatment that is alleged to be less favourable to the part-time worker takes place—

(a) both workers are—
  (i) employed by the same employer under the same type of contract, and
  (ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience; and
(b) the full-time worker works or is based at the same establishment as the part-time worker or, where there is no full-time worker working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements.

[264] As amended by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (Amendment) Regulations 2002, SI 2002/2035, Reg. 2.

Note
This provision makes reference to the "custom and practice of the employer" to define when a worker can be considered to work full-time or part-time. In addition, the UK definition specifies a variety of possible employment contracts to which the regulations apply. Not mentioned in the excerpt are a number of additional provisions which relate to workers becoming part-time and workers returning part-time after absence. The system of legislative definitions thus created has been strongly criticised in the UK since it has led to the exclusion of many part-time workers from the protection offered by the Directive.[265] A House of Lords decision of 2006, however, states that the regulations have to be interpreted broadly rather than narrowly, which suggests that more part-time workers will be covered in the future.[266]

In France, until 2001, protective employment legislation covered only discrimination based on working hours at least one fifth less than the statutory working hours or the working hours determined by agreement for the industry or enterprise.[267] In 2000, the relevant provision of the *Code du travail* was amended by the so-called *Loi Aubry II*:

French Labour Code (Code du travail)[268] **1.FR.107.**

Article L.212-4-2
Workers are deemed to be part-time if the duration of their work is less than:

- the statutory hours of work or, if such hours are less than the statutory hours, the hours of work determined by agreement for the industry or enterprise or the hours of work applicable in the plant;
- the monthly hours of work ensuing from the application, over that period, of the statutory hours of work or, if these are less, the hours of work determined by agreement for the industry or enterprise or the hours of work applicable in the plant;
- the annual hours of work ensuing from the application, over that period, of the statutory hours of work, i.e. 1600 hours or, if these are less, the hours of work determined by agreement for the industry or enterprise or the hours of work applicable in the plant.

Note
This new definition has clearly brought the French legislation more in line with the European and ILO definitions.[269]

[265] See Clauwaert, above n. 259, 33.
[266] *Matthews and others* v. *Kent and Medway Towns Fire Authority and others* [2006] 2 All ER 171.
[267] Art. L.212-4-2 of the French Labour Code (*Code du travail*). See a Clauwaert, above n. 259, 30–1.
[268] As amended by the Loi Aubry II, Loi 2000–37 relative à la réduction négociée du temps de travail (1) of 19 January 2000, JO, 20 January 2000, 975.
[269] A similar definition may be found in Italy; Clauwaert, above n. 259, 31.

Finally, an interesting deviation from the ILO and the European definition can be found in the Dutch Act on Equal Treatment based on Working Hours of 1996, which entered into force before the Part-time Work Directive was adopted:

Dutch Act on Equal Treatment based on Working Hours of 1996[270] **1.NL.108.**

It is forbidden to discriminate on the grounds of a difference in working hours, in the conditions under which a contract of employment is entered into, continued or terminated, or in the conditions under which an appointment is made, extended or terminated, unless such unequal treatment is objectively justified . . .

Note

Neither the Dutch Working Hours Act nor its legislative history provide for a definition of the ground of working hours. It is clear, however, that the Act is based on a symmetrical approach, protecting full-time workers as much as part-time workers.[271] For that reason, the relevant comparator is not a full-time employee, but an employee with different working hours. This means that the choice of the comparator depends on the concrete circumstances of the case and the applicable provisions of collective labour agreements.[272] Thus, where necessary or suitable, part-time workers may be compared with other part-time workers to find out if there was a case of unequal treatment based on working hours.[273]

Thus, the various definitions discussed in this subsection show differences both with respect to the precision with which they are formulated and the level of protection they secure: where the Dutch definition even protects full-time workers against discrimination, the scope of protection offered by the UK definition would seem to be much more limited in character. Presently there does not seem to be any real sign of uniformity or convergence in this context, regardless of the definitions provided by the Part-time Work Directive and ILO Convention No. 175.

FIXED-TERM CONTRACTS

Very little information is available on the implementation of the Fixed Term Work Directive in the Member States. As with the Part-time Work Directive, most states have made the choice to supplement or amend their employment legislation instead

[270] Staatsblad (Official Gazette) 1996, 391, Art. III(1).

[271] The Netherlands is not unique in this respect; a symmetrical approach can also be found in the Polish Labour Code (Art. 183a).

[272] See S. Burri, *Tijd delen. Deeltijd, gelijkheid en gender in Europees- en nationaalrechtelijk perspectief* (Deventer, Kluwer, 2002) 195.

[273] See Clauwaert, above n. 259, 53.

of adopting or amending non-discrimination legislation. Usually, the same definition seems to be used as is contained in the Framework Agreement on fixed-term work, although there are some variations. Ogura has shown, for example, that the term "fixed-term work" means in some countries that the work is temporary in character, where in other states the term is used to refer to a ceiling on the duration of a contract or the length or frequency of contract renewal.[274]

The Netherlands and Poland have included the ground of duration of employment contracts in their equal treatment legislation, placing the ground of fixed-term work on the same level as other grounds discussed in this chapter.[275] The Dutch legislation even provides for the possibility to bring cases of unequal treatment before the Equal Treatment Commission.

The relevant provisions are formulated as follows:

Dutch Act on Equal Treatment based on Temporary and Permanent Contracts of 2002[276] **1.NL.109.**

1. Employers may not discriminate between employees in the terms and conditions of employment on the basis of the permanent or temporary nature of the contract of employment, unless such discrimination is objectively justified . . .

4. The provisions of paragraphs 1 to 4 shall not apply to temporary agency work . . .

Polish Labour Code[277] **1.PL.110.**

The principle of equal treatment of employees shall be applied to the initiation and termination of the employment relationship, employment terms as well as promotion and access to vocational training, irrespective of . . . whether employment is for a specified or an unspecified period of time . . .

Note

Both provisions disclose a symmetric approach, discrimination against workers with a permanent contract being prohibited as strongly as discrimination against workers with fixed-term contracts. The definitions thereby differ from the one contained in the

[274] Ogura, above n. 254, 14.

[275] For a comparable (but asymmetric) approach, see Hungarian Act on Equal Treatment and Equal Opportunities of 2003, s. 8(r), which prohibits discrimination of persons based on "definite term or part time nature of their employment contract".

[276] Staatsblad (Official Gazette) 2002, 560, cl. 1 (adding a new Art. 649 to the Dutch Civil Code).

[277] Consolidated text of 23 December 1997 (Dz.U. 1998, No. 21, Item 94), Wording of 2005–2–8, Art. 183a.

Fixed-term Work Directive, which focuses on discrimination against the fixed-term contract and is clearly asymmetric in character.[278]

Further information with respect to the Dutch definition of fixed-term contracts is given in the Explanatory Memorandum to the Act:

Dutch Explanatory Memorandum to the Act on Equal Treatment based on Temporary and Permanent Contracts of 2002[279] **1.NL.111.**

. . . This wording [the definition contained in the Framework Agreement] with regard to the termination of the contract of employment for a specified period complies with the criteria applicable in Dutch law concerning fixed-term contracts of employment. For example, according to article 667, book 7, Civil Code, a contract of employment ends *de jure* when the period fixed by the agreement, the law or custom has expired. The period for which a contract of employment has been concluded can therefore be precisely stated. The period can also be made dependent on completing a particular job or another event (employee's recovery from an illness). If the final date is not fixed by the calendar, it must be objectively determinable. If that is not the case, there is no question of a contract of employment for a specified period.

The description of the notion of 'comparable employee in permanent employment' requires no further implementation. Mention is made in Clause 3 (2) in this connection of an employee with a contract of employment or a working relationship for an indeterminate period in the same establishment that undertakes the same or similar work or who undertakes the same or similar duties, with qualifications/skills being taken into account. When considering whether there is equal treatment, a comparable employee with a contract of employment for an unlimited period must be the criterion.

Note

It is clear that the Dutch definition contained in the non-discrimination legislation is based on the regular definition of fixed-term and permanent contracts as are in the Dutch Civil Code. This approach may well be followed in other Member States.

1.3.11.B. SUSPECTNESS

Compared to such grounds as race, gender and religion, the grounds of part-time work and fixed-term contract can hardly be considered to be "suspect". The prohibitions on less favourable treatment of part-time workers and workers with fixed-term contracts is not inspired by the need to combat deeply-rooted stereotypes and prejudice, nor is it meant to remove historical stigma against vulnerable minority groups. Instead, the Part-time and Fixed-term Work Directives and their national

[278] Long-term or permanent employment contracts are considered the "typical" form of employment contract in most industrialized countries; Ogura, above n. 254, 9–10.

[279] Kamerstukken II 2000/01, 27 661, No. 3, at 3.

implementation legislation seem to be inspired mainly by economic and social policy considerations, such as the need to create jobs and the desire to enable workers to combine work and caring responsibilities.[280] Although such considerations are evidently of great importance, they show that unequal treatment based on these grounds cannot be regarded as inherently invidious and suspect, but rather as economically and socially undesirable.

The social policy considerations underlying the Agreements make clear, however, that the situation is more complicated than might appear at first sight. Far more women than men have part-time positions[281] and part-time employment appears to be concentrated at the end (and, to a lesser extent, the beginning) of people's working lives.[282] This means that direct unequal treatment of part-time workers may easily result in indirect discrimination against women and elderly workers. Indeed, some have argued that national efforts to introduce specific legislation to combat discrimination based on part-time work is really an endeavour to combat gender discrimination in the workplace.[283] As gender is obviously a suspect ground, it might be expected that unfavourable treatment of part-time workers, resulting in indirect discrimination against women, will for that reason be subjected to relatively strict scrutiny by the courts. To some degree, this may also be true for fixed-term contracts in relation to the ground of age. As is exemplified by the case of *Mangold*,[284] younger or elderly workers may have fixed-term contracts more frequently than other age groups, and may be subjected to unfavourable treatment more often. In many of these cases it may be possible to find an indirect discrimination based on age, which is arguably a more suspect ground of discrimination and justifies more intensive judicial review.

[280] See S. Sciarra, "New discourses in labour law: part-time work and the paradigm of flexibility" in S. Sciarra et al. (eds.), *Employment Policy and the Regulation of Part-Time Work in the European Union. A Comparative Analysis* (Cambridge, Cambridge University Press, 2004) 22 and A. Jacobs and M. Schmidt, "The Right to Part-time Work: The Netherlands and Germany compared" (2001) 17 *IJCLLIR* 372.

[281] A. van Bastelaer et al., *The Definition of Part-Time Work for the Purpose of International Comparisons*, Labour Market and Social Policy Occasional Papers No. 22 (Paris, OECD, 1997) 9 and, more recently, Ogura, above n. 254, 21.

[282] A. Corral and I. Isusi, *Part-time Work in Europe*, European Foundation for the Improvement of Living and Working Conditions (2004) 4.

[283] A. Jacobs and M. Schmidt, "The Right to Part-time Work: The Netherlands and Germany Compared" (2001) 17 *IJCLLIR* 372.

[284] See above **1.EC.101.**

1.4. DISCRIMINATION ON GROUNDS OF ASSUMED CHARACTERISTICS AND DISCRIMINATION BY ASSOCIATION

1.4.1. DISCRIMINATION ON GROUNDS OF ASSUMED CHARACTERISTICS

In some situations it is clear that a difference in treatment is not so much based on a particular personal characteristic, such as race, gender or religion, but on *assumptions* relating to that characteristic. It is well conceivable, for example, that an employer takes a negative employment decision because he *thinks* that a certain employee is chronically ill and therefore unable to perform his job responsibilities to his satisfaction, or a barman refuses entrance to a young person whom he perceives as belonging to an ethnic minority. An important question is if such cases of unequal treatment are covered by non-discrimination legislation. Mostly this question is answered in the affirmative, as non-discrimination is primarily meant to protect individuals against discrimination. Whether such discrimination is based on real characteristics or on perception is irrelevant.

The Employment and Racial Equality Directives do not contain express references to discrimination on grounds of assumed characteristics. On the other hand, it does not transpire from their content that discrimination by assumption is excluded from its scope. Given the importance of the inclusion of discrimination by assumption, and given the fact that important international instruments seem to offer protection against such discrimination, it must be presumed that both the Employment Equality Directive and the Racial Equality Directive protect individuals against discrimination based on assumed characteristics.

International support for such a wide formulation of the prohibition of discrimination may firstly be found in the interpretation of Article 14 ECHR by the ECtHR:

ECtHR, 13 December 2005 **1.CoE.112.***
Timishev v. *Russia*

FREEDOM OF MOVEMENT OF CHECHENS

Timishev

Facts: Timishev, a Chechen lawyer, lives as a forced migrant in Nalchik, in the Kabardino-Balkaria Republic of the Russian Federation. In 1999, the applicant and his driver travelled by car from the Ingushetia Republic to Nalchik. Their car was stopped at the checkpoint and officers of the Inspectorate for Road Safety refused him entry. The refusal appeared to be based on an oral instruction from the Ministry of the Interior of Kabardino-Balkaria not to admit persons of Chechen ethnic origin.

* See above **1.CoE.1.** and **1.CoE.7.**

Timishev had to turn round and make a detour of 300 kilometres to reach Nalchik through a different checkpoint.

Held: The Court decided that the refusal of entry amounted to a violation of the prohibition of discrimination (Article 14 ECHR), taken in conjunction with the right to liberty of movement (Article 2 of Protocol No. 4).

Judgment: "54 . . . the Court notes that the Kabardino-Balkarian senior police officer ordered traffic police officers not to admit 'Chechens'. As, in the Government's submission, a person's ethnic origin is not listed anywhere in Russian identity documents, the order barred the passage not only of any person who actually was of Chechen ethnicity, but also of those *who were merely perceived as belonging to that ethnic group* . . . In the Court's view, this represented a clear inequality of treatment in the enjoyment of the right to liberty of movement on account of one's ethnic origin.

56 . . . Discrimination on account of one's *actual or perceived* ethnicity is a form of racial discrimination . . . [emphasis added]."

Note

It is clear from this case that Article 14 prohibits not only discrimination based on real characteristics, but also discrimination based on *perceived* characteristics, i.e. discrimination by assumption. As a result, even persons who are not really a member of a certain group can be covered by the non-discrimination legislation if they are regarded by others as belonging to that group.

On the national level, a few Member States have expressly prohibited discrimination based on assumption, either by mentioning the concept in the legislative text or by referring to it in legislative history or case-law:

Explanatory Notes to the Austrian Equal Treatment Act[285] **1.AT.113.**

The principle of equal treatment is applicable irrespective of the fact whether the reasons for the discrimination (e.g. race or ethnic origin) are factually given or only assumed.

Hungarian Act CXXV. of 2003 on equal treatment and on fostering equal opportunities[286] **1.HU.114.**

A provision shall qualify as direct discrimination if it results in a less favourable treatment for a person or group than for another person or group in a comparable position, because of their actual or assumed a) gender; b) racial origin; c) colour of skin; d) nationality; e) belonging to national or ethnic minority; f) mother tongue; g) disability; h) health condition; i) religious or non-confessional conviction; j) political or other opinion; k) family status; l) motherhood

[285] See Explanatory Notes, 307 der Beilagen XXII.GP, Regierungsvorlage, Materialien, at 15.

[286] 2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról, s. 8.

(pregnancy), fatherhood; m) sexual orientation; n) sexual identity; o) age; p) social origin; q) property status; r) definite term or part-time nature of their employment contract; s) association with an interest representing organisation; t) other conditions, properties or characteristics (hereinafter together: characteristics).

Irish Equal Status Act 2000, as amended by the Equality Act 2004[287] **1.IE.115.**

(1) For the purposes of this Act and without prejudice to its provisions relating to discrimination occurring in particular circumstances discrimination shall be taken to occur where—

(a) a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the grounds specified in subsection (2) (in this Act referred to as the 'discriminatory grounds') which—
(i) exists,
(ii) existed but no longer exists,
(iii) may exist in the future, or
(iv) is imputed to the person concerned . . .

Next to these legislative examples, which all refer to assumed or imputed characteristics, there are some examples of cases in which the national courts have held that discrimination by assumption is prohibited. The following excerpt may serve as an illustration:

House of Lords, 24 March 1983[288] **1.GB.116.***
Mandla v. *Dowell Lee*

SIKHS AS AN ETHNIC GROUP

Mandla

Facts: The headmaster of a private school refused to admit as a pupil to the school a boy who was an orthodox Sikh (and wore long hair under a turban), unless he removed the turban and cut his hair. The headmaster's reasons for his refusal were that the wearing of a turban, being a manifestation of the boy's ethnic origins, would accentuate religious and social distinctions in the school which, being a multiracial school based on the Christian faith, the headmaster desired to minimise.

Held: The Sikhs are a group defined by reference to "ethnic origins" for the purpose of the Race Relations Act 1976 ("the 1976 Act"); the "no turban" rule is not "justifiable" within the meaning of the 1976 Act.

[287] No. 8/2000, as amended by No. 24/2000, s. 6.
[288] [1983] IRLR 209.
* See above **1.GB.10.**

Judgment: LORD FRASER OF TULLYBELTON: ". . .In my opinion, it is possible for a person to fall into a particular racial group either by birth or by adherence, and it makes no difference, so far as the Act of 1976 is concerned, by which route he finds his way into the group . . . A person may treat another relatively unfavourably 'on racial grounds' because he regards that other as being of a particular race, or belonging to a particular racial group, even if his belief is, from a scientific point of view, completely erroneous . . ."

Note

It follows from this case that the fact that the individual discriminated against really belongs to a certain group is irrelevant to the determination if such discrimination is covered by the non-discrimination legislation. It suffices to establish that the person who is responsible for the difference in treatment believes that the victim is a member of a protected group.

In other states, discrimination by assumption is expressly protected only with respect to specific grounds, such as race[289] and, in particular, disability.[290] An example of application of such a specific provision may be found in the following opinion of the Dutch Equal Treatment Commission:

Equal Treatment Commission (Commissie Gelijke Behandeling) **1.NL.117.**
Opinion 2004-67

DISCRIMINATION BASED ON ASSUMED DISABILITY

Heart attack

Facts: The applicant was working as a seaman on a transport vessel on the basis of a temporary employment contract. In June 2003, he suffered a heart attack, which made him unfit to work for two months. After this, he started working again, but he received a letter in December 2003 announcing that his temporary employment contract would not be extended, as this would be irresponsible considering his recent medical past.

[289] See, e.g. Art. 225-I of the French Penal Code (*Code pénal*) and Art. L. 122–45 of the French Labour Code (*Code du travail*). For a comparable Luxembourg example see F. Moyse, "Report on Measures to Combat Discrimination: Directive 2000/43/EC and 2000/78/EC. Country Report Luxembourg" (European Commission, December 2004) 10, available on the website of Directorate-General for Employment, Social Affairs and Equal Opportunities.

[290] See, e.g. the Dutch Act on Equal Treatment on the Grounds of Disability or Chronic Illness (2003), Art. 1 (b): "Direct unequal treatment: unequal treatment between people on the grounds of *a real or supposed* disability or chronic illness." Other examples may be found in the Maltese Equal Opportunities (Persons with Disabilities) Act 2000, Art. 3(1)(b); see further T. Ellul, "Report on Measures to Combat Discrimination: Directive 2000/43/EC and 2000/78/EC. Country Report Malta" (European Commission, 2005) 6, available on the website of Directorate-General for Employment, Social Affairs and Equal Opportunities and the Slovakian Anti-Discrimination Act (Section 6(3)(d)); see further Z. Dlugosova, "Report on Measures to Combat Discrimination: Directive 2000/43/EC and 2000/78/EC. Country Report Slovakia" (European Commission, 2004/2005) 13–14, available on the website of Directorate-General for Employment, Social Affairs and Equal Opportunities.

Held: The case discloses an instance of direct discrimination which cannot be justified by reasons of health or security and which is, accordingly, in contravention of the Act on Equal Treatment on Grounds of Disability and Chronic Illness.

Opinion: "5.4 . . . [T]he concept of discrimination is not aimed only at an actual handicap or chronic illness but also at an assumed handicap or chronic illness. The concept of assumed handicap or chronic illness is included in the Act on Equal Treatment on Grounds of Disability and Chronic Illness in order to also offer protection against discrimination in cases where it is incorrectly assumed that a person suffers from a handicap or chronic illness. Examples are an ex-cancer patient who is regarded as chronically ill . . .

This implies that recourse can also be had to the ban on discrimination based on a handicap or chronic illness if a person is incorrectly (still) regarded as a patient on account of a sickness or accident in the past. Since the applicant has argued that he has been unable to obtain any new employment on account of his (recent) medical past, more especially a heart attack, he can have recourse to the grounds of discrimination for handicap or chronic illness protected under the Act on Equal Treatment on Grounds of Disability and Chronic Illness."

Notes

(1) It is clear from this opinion that the concept of assumed illness or disability widens the definition of "disability and chronic illness" to a significant degree. As explained in section 1.3.9.A, the Dutch concept of chronic illness will normally only come into play if someone is ill for an undetermined or very long period. If regard is paid to appearances, however, even a non-chronic illness may trigger the application of the non-discrimination legislation, as long as it can be shown that the person responsible for the difference in treatment *regards* the illness as constantly affecting or endangering the victim's health.

(2) By providing this definition, the Dutch legislator and the Equal Treatment Commission have made clear that it is really the discrimination itself that is considered problematic, not so much the ground on which it is based. The effectiveness of the non-discrimination legislation is thereby increased considerably.

An important question with respect to legislation in which the issue of discrimination by assumption is only mentioned in relation to specific grounds is if this should be read so as to exclude the possibility of such a construction with respect to other grounds. Although there is little information available on this issue, it is clear that no such negative inference can be made in the Netherlands. The case-law of the Equal Treatment Commission has shown that assumptions about other grounds than disability may also give rise to a case of discrimination that is covered by the Dutch equal treatment legislation, even if the Equal Treatment Act does not contain an express provision relating to discrimination by assumption. An example of the Dutch approach may be found in the following excerpt:

Equal Treatment Commission (Commissie Gelijke Behandeling) **1.NL.118.**
Opinion 2002-84

ASCRIBED POLITICAL CONVICTION

Discussion about terrorist attacks

Facts: On 11 September 2001, the applicant, who is of Iranian origin, was working as a temporary employee for the defendant party. On that day she had a politically charged discussion with one of her colleagues about the terrorist attacks in the US. When her colleague asked her if she thought Osama Bin Laden was responsible for the attacks, she said that she was not certain, but did not think so: although it had been on the news that the US had proof of Bin Laden's involvement, no one had yet seen this proof. The applicant said that she therefore had a neutral opinion. Three days after the incident, the applicant's temporary contract was terminated. Her colleague had told her group leader that she had found the discussion to be "shocking" and that it had caused her feelings of fear and intimidation. Because the employment contract of the applicant was temporary and the contract of her colleague was permanent, the only solution for the disturbed relations between the two colleagues was to end the applicant's contract.

Held: As the employer has not carefully investigated the complaints of the colleague relating to the political discussion she had had with the applicant, the suspicion of direct discrimination based on political opinion has not been sufficiently rebutted. There has thus been a violation of the Equal Treatment Act by the employer.

Opinion: "5.6 The Commission considers that terrorist attacks are not infrequently based on political motives or convictions that may be included under the concept of 'political opinion' within the meaning of Article 1, preamble and (b) of the Equal Treatment Act. A person's political attitude may, it is said, be expressed in discussions regarding such attacks. There is no doubt that the witness [the applicant's colleague] assumed that the applicant wished to protect the Muslims and that the applicant consequently placed the blame for the attacks on America and not on Bin Laden. Whether or not the applicant actually held this conviction, the Commission feels that in the present case a political opinion within the meaning of the AWGB is under discussion. In the Commission's opinion, this ground also includes the ascribing of a political conviction . . ."

Note

It transpires from this that the Dutch Equal Treatment Commission did not deem it relevant if the individual really held a certain political view, or if it was rather imputed to her by her colleague: in both cases, a case of discrimination based on political opinion could be made out.

In some Member States, the issue of discrimination on grounds of assumed characteristics is still unresolved. Future case-law will have to provide clarity about the extent to which imputed characteristics can be considered to constitute an unlawful basis for unequal treatment. In general, however, it may be expected that widely formulated non-discrimination provisions which generally prohibit discrimination on the basis of a certain ground (i.e. "discrimination on the basis of race, gender, etc.", instead of "discrimination on the basis of *his* or *her* race, gender, etc."), will easily allow for the inclusion of discrimination based on assumed characteristics.[291]

[291] T. Makkonen, "Discrimination Based on Religion and Belief. Finland", Executive Summary (European Commission, 2004) 9, available on the website of Directorate-General for Employment, Social Affairs and Equal Opportunities.

1.4.2. DISCRIMINATION BY ASSOCIATION

Another important concept is discrimination by association, which is a concept that can be interpreted in two different ways. In the first place, it may be understood as to refer to associations of individuals with certain characteristics which are treated unfavourably if compared to other associations. Understood in that way, the concept is closely related to the classic freedom of association.[292] Another, more common reading of the notion is that it relates to the situation where someone is discriminated against not so much because of his or her own characteristics, but because of his or her relations with someone else. An example is that of a non-Roma person who is refused entry to a bar because he is together with a number of people from the Roma community.

The vast majority of Member States have not yet provided a clear answer to the question if discrimination by association is covered by non-discrimination legislation, nor does such an answer clearly follow from the Article 13 Directives. A rare example is Ireland, where the concept is explicitly mentioned in the Equal Status Act 2000 (as amended by the Equality Act 2004):

> "(1) For the purposes of this Act and without prejudice to its provisions relating to discrimination occur-ring in particular circumstances discrimination shall be taken to occur where . . .
> (b) a person who is associated with another person . . .
> (i) is treated, by virtue of that association, less favourably than a person who is not so associated is, has been or would be treated in a comparable situation, and
> (ii) similar treatment of that other person on any of the discriminatory grounds would, by virtue of paragraph (a), constitute discrimination . . ."[293]

A classic example of application of this provision can be found in a decision by the Irish Equality Officer:

Equality Tribunal, 27 January 2004[294] **1.IE.119.**
Decision DEC-S/2004/009-014, Six Complainants v. *A Public House, Dublin*

DISCRIMINATION BY ASSOCIATION

Drunk or disabled?

Facts: Mr BMcM has a disability which affects his balance, coordination and facial expressions, and causes him at times to display some traits of drunkenness. At the relevant time, Mr BMcM went to a pub in Dublin with his family to celebrate his mother's 50th birthday. They met in the car park and went to enter

[292] de Schutter, above n. 13, 19, available on the website of Directorate-General for Employment, Social Affairs and Equal Opportunities.
[293] No. 8/2000, as amended by No. 24/2004, s. 6.
[294] Available on the website of the Equality Tribunal of Ireland, under the heading Equal Status Decisions.

the pub, but were stopped by the doorman who said that they would not be admitted: the owner of the premises had indicated that the group might have consumed alcohol.

Held: Mr BMcM was discriminated against by the refusal on the basis of disability; the remaining five applicants were discriminated against, by association, on the disability ground in terms of the Equal Status Act 2000.

Decision: "7.3 It is quite clear from the evidence provided that the five members of the complainant group, other than Mr. BMcM were not giving any indication that they had any drink taken, and all six complainants were well presented. However, it is also clear that something indefinable about Mr. BMcM drew the attention of the doorman to him specifically, and the doorman singled out Mr. BMcM as the reason for refusing the entire group entry. This is further borne out in the emphasis placed on Mr. BMcM's demeanour and appearance by the respondent in written submissions. Given that Mr. BMcM's disability outwardly affects his facial expressions and at times causes him to stagger, I am satisfied that the visible attributes of his disability are precisely what drew attention to him. These attributes are identical to those which would give the appearance of drunkenness to any person charged with making a snap decision in the matter. The doorman stated that it is his standard practice to speak to potential clients for a short time in circumstances where he suspects that they have drink taken, in order to determine whether his suspicions are well founded. In the instant cases he made no attempt to engage any member of the group in such a conversation . . .

10.1 The complainant, Mr. BMcM was discriminated against by the respondent on the disability ground in terms of Sections 3(1)(a) and 3(2)(g), 5(1) and 4(1) of the Equal Status Act 2000. The remaining five complainants were discriminated against, by association, on the disability ground in terms of Section 3(1)(b) and 3(2)(g), 5(1) and 4(1) of the Equal Status Act 2000."

Note

There was no reason in this case to assume that the five complainants other than Mr BMcM were disabled, but it was clear that they were refused entry because of the fact that they were together with a man who was. This constituted discrimination based on disability as much as when the complainants themselves are disabled.

In other Member States, the issue of whether discrimination by association can be regarded as being based on one of the protected grounds remains generally unresolved. It is to be expected, however, that cases of discrimination by association will be dealt with in much the same manner as that adopted by the Equality Officer.

1.5. MULTIPLE DISCRIMINATION

1.5.1. INTRODUCTION

International treaties, European Directives and national legislation prohibit discrimination on the basis of a variety of personal characteristics, varying from race and age to birth and sexual orientation. However, each individual will unavoidably present a combination of these characteristics and it is thus easily imaginable that concrete

cases of unequal treatment are based on a combination of grounds. A woman could be refused for a job because she wears a headscarf out of religious principle, a man could become the victim of harassment because of his ethnic origin in combination with his homosexuality, or an elderly worker with back problems might have difficulties in finding a permanent job because of the combination of age and disability. Such cases disclose examples of what is commonly called "multiple discrimination", i.e. discrimination based on more than one ground.

Within the wider category of multiple discrimination, two subcategories can be distinguished. First, it is possible that a case shows a concurrence of grounds. For example, the case may be that someone has been refused access to a pub because he belongs to the Roma community and is accompanied by a young child—in this case, the grounds of origin and family status have both influenced the negative decision. Another well-known example is that of a police department which uses both a written test in its application procedure that disproportionately affects persons of a different ethnic or national origin and a minimum height requirement that adversely affects women.[295] Such a policy would cause indirect discrimination based on both gender and race. This form of multiple discrimination is often termed "cumulative" or "additive" discrimination.[296]

Secondly, discrimination may be based on a unique combination of factors. A black woman, for example, may have been discriminated against not so much because she is a woman or because she is black, but because she is a *black woman*.[297] Similarly, specific prejudice may exist towards gays of different ethnic origin, or towards female migrants. In these cases, it will not so much be the different grounds in se that cause the discrimination as the unique combination of grounds.[298] This form of multiple discrimination is mostly referred to as "intersectional discrimination", as it is located at the intersection between the individual grounds protected by non-discrimination legislation.[299]

Although the existence of such cases of multiple discrimination is well known, present non-discrimination legislation is hardly apt to solve these issues. Generally, non-discrimination law seems to regard discrimination as a "one-issue" problem. Such instruments as the Racial Equality Directive and ICERD only offer protection against discrimination to persons of different racial or ethnic origin, while the various Gender Equality Directives and CEDAW are exclusively directed at gender-related problems. Although such specific protection against discrimination is highly desirable

[295] E.W. Shoben, "Compound Discrimination: The Interaction of Race and Sex in Employment Discrimination" (1980) 55 *NYULR* 793, at 794–5.

[296] See S. Hannett, "Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination" (2003) 23 *OJLS* 68.

[297] *Ibid.* See also above Shoben, n. 295, 796, giving the example of an oral interview in an application procedure in which black men and white women score well, but black women are disproportionally excluded. It is not then race or gender in itself that is problematic, but the interaction of both characteristics.

[298] *Cf.* e.g. *Gender and Racial Discrimination*, Report of the Expert Group Meeting, 21–24 November 2000, Zagreb.

[299] See S. Fredman, "Double Trouble: Multiple Discrimination and EU Law" [2005] *European Anti-Discrimination Law Review* Issue No. 2, at 13.

and needed, it hardly solves intersectional problems such as those experienced by black women.

In this section, we will provide a short overview of the most important problems resulting from the one-issue approach (section 1.5.2), followed by a discussion of the various ways in which these problems have been acknowledged and approached within the European states (section 1.5.3).

1.5.2. PROBLEMS OF MULTIPLE DISCRIMINATION

DIFFERENCES IN PERSONAL AND MATERIAL SCOPE

The most important problem relating to multiple discrimination is created by the differences in personal and material scope of non-discrimination legislation. Many non-discrimination laws contain closed lists of grounds, excluding grounds such as political conviction or marital status, and relate only to certain areas (e.g. employment), to the exclusion of others (e.g. provision of services). These differences may have the effect that a case of multiple discrimination is only partly covered by legislation. In addition, it will be hard to determine if there is any legislative protection available if, for example, legislation only offers protection in the field of social services to cases of race based discrimination. This is particularly problematic in cases of intersectional discrimination, where it will be very difficult and often artificial to separate the various grounds and to classify a case as based *primarily* on one ground or the other. This may result in strange and arbitrary classifications, as exemplified by the fact that in the UK Sikhs and Jews have been held to constitute ethnic groups for the purposes of the Race Relations Act 1976, whereas Muslims and Rastafarians have not.[300] Given that such a classification has major consequences for the protection against discrimination, the search for clear line-drawing between the various grounds is highly complex.

The complexities are even more distinct if different enforcement mechanisms are provided for each of the different grounds.[301] A good example of this is Sweden, where there is an Ombudsman system which provides for different protection for gender, disability, ethnic origin and sexual orientation. The UK also had a variety of Commissions to assess cases relating to their specific field of interests and Denmark still has a Commission which has powers only in the field of race discrimination.[302] If such institutions are presented with complaints about multiple discrimination, they may only deal with one aspect of the case. Consequently, there will be no opportunity for them to grasp the full extent of the case of unequal treatment presented and deal with the complex issues of social stereotyping disclosed by such a case.

[300] *Ibid.*, 72 and Brown, above n. 72, 204.

[301] For a detailed overview of enforcement bodies, see below, G. Moon, Chapter Eight: Enforcement Bodies.

[302] See further ch. 8 below.

DIFFERENCES IN EXEMPTIONS

An additional difficulty arises from the differences in exemptions that are available with respect to the various grounds of discrimination. It may be difficult to decide under the Employment Equality Directive if a case of discrimination against an elderly disabled worker must be considered under the more general exemption for age, or the much more narrowly defined exemption for disability. In cases of cumulative discrimination, this may be solved by considering both aspects separately, deciding the cases of disability discrimination and age discrimination on their own merits. In intersectional discrimination cases, where the disadvantage suffered is based on a close combination of grounds, this may be more difficult to do. It is well recognised that the disadvantage suffered by common victims of intersectional discrimination, such as black women, is of a different character than discrimination against black men or white women.[303] In drafting equal treatment legislation, as well as in applying it, it is important to recognise and acknowledge such particularities.

ESTABLISHING (INDIRECT) DISCRIMINATION: WHO IS THE COMPARATOR?

Multiple discrimination may also cause particular problems in establishing a case of indirect discrimination. As Hannett has shown, a job requirement may, for instance, not disproportionately affect either Asian men or white women, but it may have a clearly adverse impact on Asian women:

> "In a claim for indirect race discrimination, the comparison must be made between the proportion of Asians who can comply, compared with the proportion of non-Asians who can comply. Under this test, it may be arguable that *as an Asian* [the woman in question] has not been indirectly discriminated against as she has suffered insufficient disproportionate effect: Asian men, and some Asian women, could comply with the condition. Similarly, in a claim for indirect sex discrimination, the comparison must be made between the proportion of women who can comply, compared with the proportion of men who can comply. Again, under this test, it is at least arguable that as a woman she has not been indirectly discriminated against, as the majority of women could comply. But as *an Asian woman*, the requirement or condition disproportionately impacts upon her."[304]

If such a possible impact on groups sharing multiple characteristics is not accepted, problematic cases of societal discrimination may escape judicial scrutiny.

The problem of establishing discrimination in multiple discrimination cases is thus closely related to the choice of a relevant comparator. In cases of unequal treatment based on a single ground, this is relatively easy—a female employee complaining about unfavourable employment conditions may be compared to a male employee, or a black person complaining about unequal treatment in respect of social advantages may be compared to a white person.[305] In situations of multiple discrimination the

[303] Fredman, above n. 299.
[304] Hannett, above n. 296, 73 (emphasis in the original).
[305] Although many problems exist here as well; see further on this below, ch. 2, section 2.3.1.

situation is far more complex, as is demonstrated by the example of the Asian woman.[306] It might seem clear that it is not sufficient to compare her to women or Asian persons alone, but to whom should she be compared instead? Possible comparators might be white women or Asian men, or both, but it is difficult to decide which of these comparators is the most appropriate.[307] Moreover, the establishment of a prima facie case of indirect discrimination will be even further complicated by the lack of availability of statistical information on the complex and highly specific comparator group—though a state may collect information with respect to women or people of different ethnic origin, it will not always be easy to gather relevant and useable information with respect to women of a specific ethnic origin.[308]

1.5.3. PRACTICAL SOLUTIONS TO CASES OF MULTIPLE DISCRIMINATION

All of these problems are well-known by now. The existence of multiple discrimination and the related social problems are even expressly acknowledged in the preamble to the Employment Equality Directive: [309]

> "3. In implementing the principle of equal treatment, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination."

Such recognition is also visible on the international level, as is exemplified by the following two excerpts:

Fourth World Congress on Women, **1.UN.120.**
Beijing Declaration and Platform for Action[310]

We are determined to: . . .

32. Intensify efforts to ensure equal enjoyment of all human rights and fundamental freedoms for all women and girls who face multiple barriers to their empowerment and advancement because of such factors as their race, age, language, ethnicity, culture, religion, or disability, or because they are indigenous people . . .

[306] For a concrete example, see UK Court of Appeal, 30 July 2004, *Bahl* v. *The Law Society* [2004] EWCA Civ 1070 in reaction to UK Employment Appeal Tribunal, 31 July 2003 [2003] UKEAT 1056 01 3107.

[307] An additional complexity here may be that not all states accept hypothetical comparators, or even stipulate which comparators should be chosen in specific cases. On this see Hannett, above n. 296, 83.

[308] See Fredman, above n. 299, 14, referring to an Irish study which demonstrates that there is no statistical information available about ethnic minority people with disabilities, even though it is clear that this group suffers from complex forms of discrimination.

[309] An identical recital is contained in the Racial Equality Directive (para. 14).

[310] 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add. 1 (1995).

Committee on the Elimination of Racial Discrimination, General Recommendation No. 25: Gender related dimensions of racial discrimination[311] **1.UN.121.**

1. The Committee notes that racial discrimination does not always affect women and men equally or in the same way. There are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men. Such racial discrimination will often escape detection if there is no explicit recognition or acknowledgement of the different life experiences of women and men, in areas of both public and private law.

. . .

3. Recognizing that some forms of racial discrimination have a unique and specific impact on women, the Committee will endeavour in its work to take into account gender factors or issues which may be interlinked with racial discrimination. The Committee believes that its practices in this regard would benefit from developing, in conjunction with the States parties, a more systematic and consistent approach to evaluating and monitoring racial discrimination against women, as well as the disadvantages, obstacles and difficulties women face in the full exercise and enjoyment of their civil, political, economic, social and cultural rights on grounds of race, colour, descent, or national or ethnic origin.

4. Accordingly, the Committee, when examining forms of racial discrimination, intends to enhance its efforts to integrate gender perspectives, incorporate gender analysis, and encourage the use of gender-inclusive language in its sessional working methods, including its review of reports submitted by States parties, concluding observations, early warning mechanisms and urgent action procedures, and general recommendations.

Note

Such international and European acknowledgement of the gender and racial aspects of multiple discrimination is extremely important, just like the policy efforts made by the ICERD Committee. Nevertheless, the recognition of the problem has only rarely been followed by the adoption of adequate legal solutions. In legal scholarship it has been stressed that multiple discrimination could effectively be dealt with by developing a harmonised model of equal treatment legislation, featuring a comparable scope of protection and similar exemptions for all grounds and providing sufficient flexibility as regards the choice of a comparator.[312] Such an approach is presently visible in the widely formulated non-discrimination provisions in fundamental rights instruments such as the European Convention on Human Rights. Article 14 of the Convention contains neither a closed list of grounds nor an elaborate system of carefully drafted exception clauses. As a result, it is not necessary under Article 14 to show that a difference in treatment is based on a specific ground and the ECtHR is able to decide each case on its own merits, not being bound by the

[311] 20 March 2000, 56th session; available on the website of the Committee on the Elimination of Racial Discrimination.

[312] S. Fredman, *Discrimination Law* (Oxford, Oxford University Press, 2002) 74–5 and Fredman, above n. 299, 17.

limitations of exception clauses. Indeed, it is clear from the ECtHR's case-law that there is no need to reduce a complex case of unequal treatment to one of the grounds expressly mentioned in the Convention:

ECtHR, 28 November 1984[313] **1.CoE.122.**
Rasmussen v. *Denmark*

INTERSECTIONAL DISCRIMINATION UNDER THE ECHR

Rasmussen

Facts: Mr Rasmussen was married in 1966. During the marriage, two children were born, a boy and a girl. Mr Rasmussen had reason to suspect, even before the birth of the girl in 1971, that another man might be the father; however, in order to save the marriage, he took no steps to have his paternity determined. In 1973, he and his wife applied for and obtained a separation; in 1975, they obtained a divorce. In 1976, Mr Rasmussen finally sought formal leave to institute proceedings to determine the paternity of the girl, previously still having nurtured hopes of preserving the marriage. He was refused such leave for the reason that he had not brought the action within the time limits provided for and there was no cause to grant him an exemption. According to the relevant legislative provision, the time limit to contest paternity only applied to the husband, not to the mother of the child—with respect to women, the choice was made to leave the issue to be decided by the courts.

Held: The competent authorities were entitled to think that, as regards the husband, the aim sought to be realised would be most satisfactorily achieved by the enactment of a statutory rule, whereas as regards the mother it was sufficient to leave the matter to be decided by the courts on a case-by-case basis. The difference of treatment complained of was not discriminatory within the meaning of Article 14.

Judgment: "34. For the purposes of Article 14, the Court . . .finds that there was a difference of treatment as between Mr. Rasmussen and his former wife as regards the possibility of instituting proceedings to contest the former's paternity. There is no call to determine on what ground this difference was based, the list of grounds appearing in Article 14 not being exhaustive."

Notes

(1) In this case it would have been possible to classify the difference in treatment as based on gender, but the Court saw no need to do so. Instead, it focused on the actual difference in treatment between the time limit applying to the husband and that applying to the wife.

(2) Such an approach would seem to solve the issue of intersectional discrimination quite effectively, as a complainant may then allege a case of discrimination based on his being a homosexual black man or an Islamic woman, or any other combination of characteristics. It must be recalled, however, that even with such open lists it may be important to show that a distinction is actually based on a certain ground. It has been shown in this chapter that the ECtHR treats certain grounds of discrimination as suspect, requiring "very weighty reasons" as a justification for a difference of treatment based on such a ground. Thus the ground chosen is still

[313] Series A, Vol. 87.

important for the way in which a case is decided, even in open systems of non-discrimination law. Indeed, it is far from certain if the same outcome would have been reached in the case of *Rasmussen* if the Court had accepted that the distinction was actually gender based and applied a "very weighty reasons" test.

(3) For many cases of multiple discrimination this does not seem to pose a real problem, however, as it may be assumed that such cases usually concern at least one suspect personal characteristic (or even more, as in the example of discrimination against a black woman), which may determine the intensity of judicial review. The creation of open lists of grounds, combined with a comparable material scope and comparable exception clauses, thus clearly constitutes an effective remedy to victims of multiple discrimination.

The various European Equality Directives show, however, that streamlining is not an easy task if an elaborate legislative framework is in place which contains detailed provisions and exemptions which are closely fitted to the covered grounds of discrimination. Indeed, it is fully reasonable that there are different possibilities of justification for the various grounds, as each exemption will be the result of a careful weighing of interests and each of the covered grounds is different in character and suspectness. It is also understandable that the EU has adopted an incremental approach as regards the material scope of protection, starting with employment and, to some degree and where feasible, broadening it to social security and provision of services. It is important, however, that any differences are limited to where they are really necessary. It may therefore be worthwhile to investigate the possibilities to opt for a more comprehensive approach on the national level, harmonising the various measures where possible and advisable.[314] As many of the Member States seem to have followed the structure of the Article 13 Directives, however, such harmonisation does not seem to be feasible in the short term.[315]

This situation necessitates the search for a solution within the framework of the existing variety of non-discrimination laws. Indeed, some of the Member States seem to have provided for such a solution. Especially in cases of cumulative discrimination the approach is rather straightforward: as far as possible, all aspects of the complaint are dealt with.[316] Typical examples of this approach can be found in the decisions of the Irish Equality Officer:

[314] Fredman, above n. 299, 17.
[315] See Cormack and Bell, above n. 18.
[316] Hannett, above n. 296, 79.

Equality Tribunal, 18 December 2001[317] **1.IE.123.**
DEC-S2001-020, Maughan v. *The Glimmer Man*

CUMULATIVE DISCRIMINATION

The Glimmer Man

Facts: Maughan is visually impaired and is a member of the Traveller Community. When he entered the Glimmer Man pub with his wife (who is also visually impaired), his thirteen-year-old son and his guide dog he was refused service, first because of the presence of the child (the bar had a no-children policy) and then, after he had sent his son home, because of the presence of the dog. Maughan felt that his membership of the Traveller Community might also have influenced the refusal to serve him.

Held: Maughan was discriminated against on the basis of his family status, contrary to the Equal Status Act 2000. He was not discriminated against on the basis of disability or his membership of the Traveller Community on the same day.

Decision: "4 . . . Section 3(2) provides that the discriminatory grounds include the family status ground, disability ground and membership of the Traveller community ground . . . The issues for consideration in this complaint are whether or not The Glimmer Man Ltd discriminated against Mr. John Maughan on the basis of the grounds claimed . . .

6. For the complainant's claim to be upheld on any of the grounds claimed he has to establish *prima facie* evidence of discrimination on that ground. In order for the complainant to establish *prima facie* evidence on a ground he has to show that he was treated less favourably than someone in the same circumstances who is not covered by that ground. If he succeeds in establishing *prima facie* evidence on a ground, the burden of proof then shifts to the respondent to rebut the inference of discrimination on that ground.

The complainant claimed that he was discriminated against on the family status, disability and membership of the Traveller community grounds.

6.1 . . . Both parties agree that when the complainant first entered the pub his thirteen year old son was with him. I am therefore satisfied that the complainant is covered by the family status ground.

6.2 . . . The complainant claims that because of his visual impairment he falls within the scope of this definition and I accept that this is the case.

6.3 . . . At the oral hearing the complainant stated that although he does not lead a nomadic lifestyle at the moment he did so in the past with his parents for a time. He said that he has always considered himself to be a member of the Traveller community and that his relatives also identify themselves as Travellers. He said that he lived on a halting site for a number of years and I consider that he is a member of the Traveller community within the meaning defined in the Act.

[The Equality Officer proceeded by examining, for each of the three grounds, the concrete complaint of discrimination.]

10. Taking account of all the evidence presented it is my decision that Mr John Maughan was discriminated against by The Glimmer Man Ltd on the basis of his family status on 2nd November, 2000, contrary to the Equal Status Act, 2000. It is also my decision that Mr John Maughan was not discriminated against by The Glimmer Man Ltd on the basis of disability or his membership of the Traveller community on the same day . . ."

[317] Available on the website of the Equality Tribunal of Ireland, under the heading Equal Status Decisions.

Note
The Equality Officer dealt with each of the grounds separately, not having regard to their possible interrelation or overlap. This enabled him to take account of the different requirements and exemptions available under the Irish Equal Status Act 2000–2004. Thus, all cumulative complaints were effectively dealt with.

As mentioned before, the situation is more difficult with respect to intersectional discrimination, as such cases are not easily identifiable as discrimination based on one particular protected ground. The Dutch Equal Treatment Commission tends to deal with this type of case in the following way:

Equal Treatment Commission (Commissie Gelijke Behandeling) **1.NL.124.**
Opinion 1998-48

INTERSECTIONAL DISCRIMINATION AGAINST A JEWISH EMPLOYEE

Jewish employee

Facts: The applicant, who is of Jewish origin and who has adopted the Jewish faith, worked for a transport company which often deals with countries in the Middle East. The applicant complains of severe forms of anti-Semitism in the workplace, varying from insulting remarks being made about Jews and finding a drawing of a swastika on his desk, to being skipped when coffee was distributed. When he complained about this, the employer took measures and made sure that the responsible colleagues apologised for their behaviour.

Held: As the employer has investigated the complaints about discrimination and has taken effective measures to avoid them, no discrimination can be established contrary to the Equal Treatment Act.

Opinion: "4.5 The applicant is of Jewish origin; his wife and children are Jewish and he has assumed the Jewish faith. At the hearing, the applicant indicated that he identifies with the Jewish people both by religion and by descent.

According to the established precedents of the Supreme Court, discrimination by virtue of Jewish descent also falls within the concept of the concept of race. The Commission will therefore in the present case examine possible unequal treatment based on religion and on race."

Notes

(1) After having decided that it would proceed on the assumption that the distinction was based on both religion and race, the Equal Treatment Commission examined if the allegations of the applicant were sufficiently substantiated and the measures taken by the employer could be considered sufficient to meet his responsibilities in safeguarding a discrimination-free environment. The Commission then concluded that the case did not disclose discrimination based on religion or race. Hence, the Commission did not distinguish between the two grounds in examining the case, but considered the claim in its entirety.

(2) Indeed, this approach was easily possible in this case, as religion and race are both highly suspect grounds and the same obligations for employers exist under the

Dutch legislation with respect to both grounds. It may be more difficult to choose this integrated approach in cases in which scope or suspectness differ with respect to the various grounds invoked.

It might be submitted, in this regard, that a court must in principle apply the legislative provisions which provide most protection to the individual or group concerned. In cases in which the grounds of age and race coincide, for example, this would imply that the courts rely on the Racial Equality Directive instead of the Employment Equality Directive. Indeed, it may be said that, as a general rule, the courts should search for the highest level of protection available. Indeed, this rule is included in the German *Allgemeines Gleichbehandlungsgesetz* (General Equal Treatment Act),[318] which is the only example in Europe of a legislative rule dealing with multiple discrimination:

> "Discrimination based on several of the grounds mentioned in § 1 is only capable of being justified by reference to of §§ 8 to 10 and 20, if the justification applies to all the grounds liable for the difference of treatment."[319]

This provision implies that the justification advanced for a case of multiple discrimination (whether cumulative or intersectional) always needs to be assessed with respect to all grounds alleged. As a consequence the highest level of protection is secured, as this construction means that the requirements of both the most restrictive exception clause and the less restrictive ones must be met. Although this may not solve all problems related to multiple discrimination, it can be regarded as an interesting starting point.

1.6. COMPARATIVE ANALYSIS

In this chapter, we have given an overview of the way in which a variety of grounds of discrimination have been defined and interpreted in European law, the law of the Member States and a number of international instruments. When drafting the Article 13 Directives, the choice was made not to provide a definition of the various grounds protected (race, ethnic origin, religion and belief, sexual orientation, disability and age), thus leaving considerable discretion to the Member States to adopt their own interpretation of the terms. The need to take decisions on the European legislative level about sensitive and controversial issues such as the definition of "race", "membership of an ethnic minority" and "disability" was thereby avoided. The result has been, however, the coming into being of a wide spectrum of national definitions and understandings: the discussion in this chapter discloses a clear lack of common ground with respect to the meaning of many of the grounds, in particular race, ethnic origin, marital status and disability. We have also found that many states have not provided for any interpretation or definition of the grounds at all, limiting themselves

[318] Allgemeines Gleichbehandlungsgesetz (AGG, 2006), BGBl. Teil I 17.8.2006, S. 1897.
[319] *Ibid.* § 4.

to including the various grounds in their national implementation legislation without paying express attention to their meaning. In these states, the personal scope of the non-discrimination legislation will depend on the interpretation and application of the grounds by the national authorities and, eventually, the ECJ.

By contrast, strong convergence and growing uniformity are visible with respect to those aspects of the grounds of discrimination which have been already been addressed by the ECJ. Since the case of *Grant*,[320] for example, it is accepted in all Member States that discrimination against transsexuals should be regarded as discrimination based on gender. Likewise, as a result of the *Dekker*[321] and *Mary Brown*[322] jurisprudence, all Member States place discrimination based on pregnancy and pregnancy-related illness in the same category as gender discrimination.

It is expected that the harmonising influence of the ECJ's case-law will further increase in the future. The ECJ itself has stated in its *Chacón Navas* judgment[323] that there is a clear need for uniform application of Community law and its principle of equality, which requires an autonomous and uniform interpretation of the various grounds that is valid throughout the Community. This fundamental stance will in all probability give rise to a wealth of judgments in the future in which definitions are given of all the grounds protected by the Article 13 Directives and possibly even with respect to Equality Directives that have been drafted outside the context of Article 13 (e.g. the Part-time and Fixed-term Work Directives). The ECJ will probably proceed on a case-by-case basis, as is well illustrated by its approach in *Chacón Navas*. In that case the ECJ provided a uniform, yet rather open-ended, definition of the ground of disability, which can be elaborated and detailed in later cases. The ECJ may thereby find inspiration in the definitions contained in national case-law and legislative materials, which are sometimes highly developed—in the UK, Ireland and the Netherlands, for example, much attention has been given to definitional issues. The ECJ may also find guidance in the wealth of international materials available with respect to the grounds of discrimination. Where the grounds of race and ethnicity are concerned, the ECJ's interpretation may be adapted to the definitions provided by the ICERD Convention and the ECtHR, and to those proposed by ECRI. The understanding of the grounds of religion and belief may be based on the ECtHR's elaborate case-law on the freedom of religion as protected by Article 9 of the ECHR—indeed, the definitions in national legal systems already show such influence, although there are still many variations. The interpretation of the ground of "disability" may be inspired by other international instruments, such as the International Classification of Functioning, Disability and Health (ICF) adopted by the World Health Organisation. Although the ECJ does not mention ICF in *Chacón Navas*, this may be different in later cases where specific aspects of the definition of disability are at stake.

[320] See above **1.EC.29.**
[321] See above **1.EC.27.**
[322] See above **1.EC.28.**
[323] See above **1.EC.84.**

Hence, an intricate cycle of mutually influenced interpretations may come into being in which national definitions are tailored to those developed by the ECJ. The ECJ's definitions themselves will be inspired by national understandings and international materials, which in turn are influenced by both national and European developments.

We have further focused on the question if the various grounds discussed are to be considered "suspect". In open systems of non-discrimination law, where there are no limited lists of grounds or closed systems of specific exception clauses, the "suspectness" of the ground will often determine the strictness of the test of justification applied by the courts. It is clear, for example, that the ECtHR requires "very weighty reasons" to be adduced in justification of discrimination based on grounds such as illegitimate birth, gender, sexual orientation and nationality. This means that the ECtHR will closely scrutinise the reasons advanced by the government in favour of such discrimination, which usually results in the finding of a violation of the prohibition of discrimination. Similarly, even though the ECJ does not work with an open system comparable to that of the ECHR, the "suspectness" of the ground in question may also determine the strictness with which the ECJ assesses national allegations about necessity and proportionality of a certain difference in treatment. It must be noted, however, that the suspectness of the various grounds will not always result in strict scrutiny. The case-law of both the ECJ and the ECtHR shows examples where other circumstances were found (such as the context of the case or a lack of consensus in a specific domain) which justified a reduction in the intensity of review. Nonetheless, the suspectness of the ground at hand clearly forms an important reason for intensification of the level of review.

It is clear from the discussion of "suspectness" in this chapter that, as a matter of principle, all of the grounds mentioned in Article 13 EC (gender, race/ethnicity, religion/belief, disability, age and sexual orientation) can be considered as suspect. A possible exception to this rule might be the ground of "age", but this remains uncertain, as the ECJ made clear in *Mangold*.[324] In that case it held that age-discrimination has to be regarded as a derogation from a fundamental individual right and the proportionality test has to be applied in that light. It may be derived from this that the ECJ will at least apply an intermediate level of review in cases of age discrimination.

With respect to grounds which are not included in Article 13 EC, such as nationality, marital or family status, legitimate birth, part-time work and fixed-term work, the perceived suspectness differs. It is well-established case-law of the ECtHR that (il)legitimate birth is a highly suspect ground, but its case-law is less clear and predictable with respect to the grounds of nationality and marital status. No case-law at all is available from which any conclusions may be drawn with respect to the suspectness of the grounds of part-time and fixed-term work, although some general

[324] See above **1.EC.101.**

predictions may be made on the basis of the case-law relating to other grounds (see above, section 1.3.11).

Thus, a fair amount of convergence can be discerned with respect to the suspectness of the grounds of discrimination discussed in this chapter. National and European courts may find important guidance in this consensus as to the appropriate intensity of review.

Finally, we have discussed a number of issues in this chapter which are relevant to all grounds of discrimination. First, we have mentioned the possibility of defining the various grounds in a symmetrical or asymmetrical way. The European Directives clearly favour a symmetrical definition, meaning, for example, that the ground of gender must be interpreted to cover both men and women, and the ground of sexual orientation must be read to cover heterosexuals as well as gays and bisexuals. Within the context of the Article 13 Directives, some debate is only possible with respect to the ground of disability, which some authors have stated protects only disabled people. As national legislation shows both symmetrical and asymmetrical definitions here, this controversy needs to be solved by the ECJ.

A second general issue discussed in this chapter relates to discrimination by assumption and by association. Sometimes individuals are not discriminated against because of characteristics they really have, but rather because of characteristics which others impute to them or because of an association with persons with certain characteristics. Although none of the European non-discrimination Directives contains an express prohibition of these forms of discrimination, the legislation and case-law in the various Member States show clear recognition of the need to combat such discrimination. It is expected, for that reason, that the ECJ will adopt a similar approach.

Finally, we have considered the difficult issue of multiple discrimination, which can generally be described as the situation in which a single case of discrimination is based on more than one ground. The differences in material scope and exemptions provided for each ground by the European Equality Directives prove to be particularly problematic in such cases, even if the structure of the Directives has the advantage of providing nuanced and well-fitted solutions for each of the grounds as such. The problems of multiple discrimination have been acknowledged in academic literature and to some degree in national case-law and legislation, but no workable solutions have been offered. The ideal solution would be to create an open system of non-discrimination legislation in which each individual case can be decided on its own merits and account can be taken of particularities such as a unique combination of grounds. However, it is evident that such a system would hardly be compatible with the current system of European non-discrimination law and would unacceptably reduce the degree of clarity and specificity provided by that system. Adequate responses will therefore have to be found within the system itself. A good example of how this could be done is offered by a provision included in the German General Non-Discrimination Act of 2006, which stipulates that in cases of multiple discrimination the justification must meet the requirements of the strictest exception clause applicable to the case at hand. As it is possible to apply this method even without

explicit legislative provision, it might be expected that the ECJ will adopt such an approach in future case-law.

Thus, where the interpretation and suspectness of discrimination grounds is at issue, European law will remain an interesting object for the study of the convergence of national legal systems. It is expected that common definitions and understandings of the various grounds and their suspectness will develop over the years under influence of judgments of the ECJ, which itself will be inspired by national and international interpretations and developments. It remains uncertain, however, if this will really lead to uniform and identical definitions throughout Europe. To some degree, national definitions of grounds such as religion or marital status will be inextricably bound up with strong national opinions, traditions and sensitivities. The ECJ will need to respect such national differences and will probably leave some discretion and room for differentiation in these areas, searching for an acceptable balance between the need for differentiation and the need for uniform protection against discrimination.