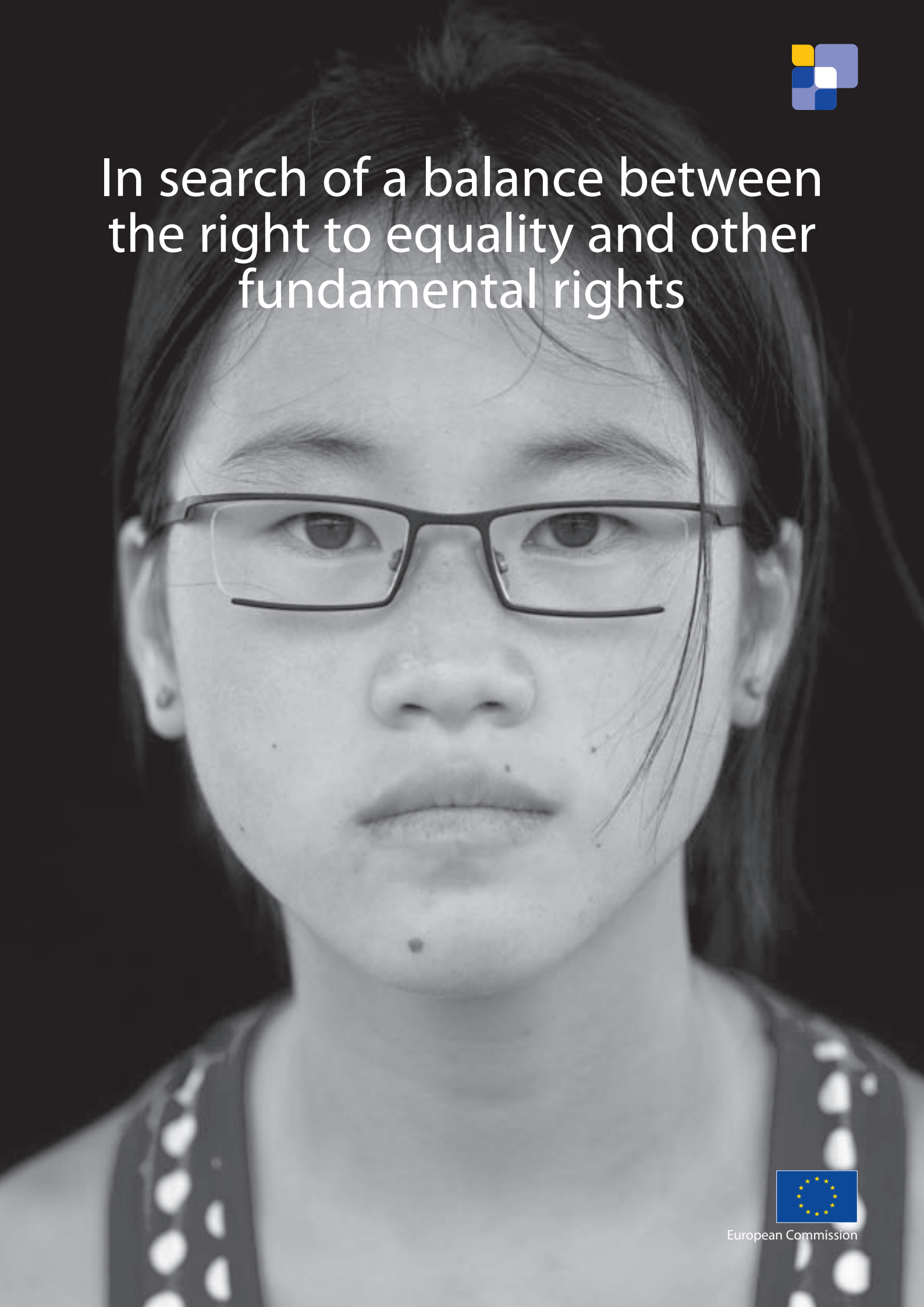
In search of a balance between the right to equality and other fundamental rights



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In search of a balance between the right to equality and other fundamental rights

European Network of Legal Experts in the Non-Discrimination Field

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Contents

Erwin | *1963*

Abstract

This report identifies the main conflicts between certain fundamental rights and the right to equality and non-discrimination as safeguarded by the Race Equality Directive (Directive 2000/43/EC) and the Employment Equality Directive (Directive 2000/78/EC). Primarily, they concern the right to respect for private life, the right to freedom of association and the right to freedom of religion. The various conflict scenarios have been approached against the backdrop of the case law of the European Court of Human Rights as well as, in a non-exhaustive manner, the law and practices of Member States. In this respect, a better understanding of the approaches currently existing within the EU would serve to guide national authorities, while also allowing an exchange of best practices. The task is at times so delicate that it would justify the establishment of guidelines and a coherent methodology by the EU authorities, which would also contribute to the consistent application of European law.

Chapter I of the report briefly recalls that the fundamental rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms (referred to hereafter as ECHR) and other international legal instruments ratified by Member States of the European Union, as well as those derived from constitutional traditions common to these Member States, form part of the general principles of law that are enforced by the Court of Justice of the European Union. The EU Charter of Fundamental Rights, which became binding with the entry into force of the Treaty of Lisbon on 1 December 2009, is a further instrument for safeguarding human rights within the European Union. Consequently, the EU Member States must transpose into their legal systems all European directives that combat discrimination without undermining the other fundamental rights contained within these various instruments. In general, the Court of Justice of the European Union considers that the Member States have an obligation to implement the directives imposed on them while respecting fundamental rights. It also holds that it is their responsibility to accommodate tensions between competing fundamental rights as best they can.

The tensions that can arise between the right to equality and other fundamental rights or freedoms provide an example of just one conflict scenario that can exist between fundamental rights. In practice, this issue is of critical importance today, as evidenced by the proliferation of legal theory literature on the subject in recent years. In order to provide the national decision-makers (legislators or judges) who are responsible for settling conflicts between the principle of non-discrimination and fundamental rights with some direction in terms of analysis, **Chapter II** of the report deals with general theoretical issues: (i) Does a useful or appropriate typology exist to facilitate understanding of the conflicts between fundamental rights? (ii) Are the conflicts between the principle of non-discrimination and fundamental rights of a different nature to the conflicts between other fundamental rights? (iii) In this debate, where do the conflicts between grounds of discrimination occur within the principle of equality itself? And where exactly do we find the tensions that can cause friction within the different aspects of the right to equality? (iv) What are the methods needed to resolve these conflicts? And do these methods vary according to the authority (legislator or judge) concerned?

On the question relating to typology, the classification of the conflicts that can occur between fundamental rights recently proposed by Lorenzo Zucca seems particularly relevant and instructive. Zucca's theory is based on two observations. Firstly, regarding fundamental rights, the conflicts either cause two rights or freedoms to be set in opposition to one another (*inter-rights* conflict), or they reflect tensions within the same right or freedom (*intra-right* conflict). Secondly, these conflicts either operate *externally* (where claims arising from the protection of fundamental rights cause a conflict between

two individuals) or *internally* (where claims arising from the protection of fundamental rights conflict in relation to a single individual).

When transposed to conflicts between fundamental rights that involve the principle of non-discrimination, Zucca's typology clearly demonstrates that these conflicts go far beyond the conventional hypothesis of a clash between the right to equality and another fundamental right invoked by two different owners of these rights. It also demonstrates that the challenges are very different when it comes to resolving an internal conflict and an external conflict. In the first case, the beneficiary of the principle of non-discrimination would need to waive another fundamental right, partially, in order to obtain a benefit. Once this right has been partially waived with full knowledge of the facts and in return for certain safeguards, the conflict can be resolved in a relatively satisfactory manner. However, in the second case, the dilemma is that it is only possible to overcome the conflict by sacrificing one right, in whole or in part, for the benefit of another right, and by allowing the fundamental right of one individual to prevail at the expense of that of another individual.

Some conflicts can be classified interchangeably as either an inter-rights conflict or an intra-right conflict. Thus, a dispute in which the right to equality comes up against religious freedom can sometimes be seen as a conflict within the right to equality itself, involving the principle of non-discrimination based on religion or belief. Presented and argued as an intra-right conflict in which two aspects of the right to equality conflict with each other, it highlights the tensions that can exist between certain grounds of discrimination, mainly religious belief, on the one hand, and gender or sexual orientation on the other. The external intra-right conflict model also reveals the tensions inherent in the different notions of equality itself, that is, between formal equality and substantive equality. As evidenced by the growth of affirmative action programmes, interference with the principle of formal equality is now deemed necessary in order to achieve substantive equality, which is focused more on groups than on individuals. However, it is important not to classify all of the obstacles encountered when implementing the principle of substantive equality in terms of conflicts of rights.

In addition to presenting a suitable typology for reporting on conflicts between the principle of non-discrimination and other fundamental rights, the report focuses on finding methodological signposts that will help guide legal reasoning when it comes to resolving these conflicts. To this end, it describes, in particular, the concept of 'practical concordance' derived from German constitutional law, the abuse of rights theory, the distinction between the substantive and peripheral aspects of fundamental rights, the impact of third-party rights as well as the importance of the quality of the procedural method adopted. Before discussing these methodological signposts, the report explores the possibility of the right to equality taking priority over other human rights. The report concludes that the hierarchal argument is not tenable in the case of an inter-rights conflict. By virtue of the principle of the indivisibility and interdependence of human rights, the a priori non-existence of a hierarchy of rights is generally accepted, except when international law lays down precedence criteria. Although, in implementing the principle of equal treatment in different directives, it is undeniable that the European Union legislator may have taken the view that this could restrict, under certain limits, the exercise of other fundamental rights, it cannot be said that it was the intention of this legislator to establish non-discrimination as the predominant principle. Insofar as the European Union legislator is not competent to establish a full set of fundamental rights, this type of decision does not fall under its responsibility.

The hierarchal argument can also arise in the case of an intra-right conflict. Within the right to equality, the conflict here will be between different grounds of traditional discrimination, discrimination founded on religious belief, on the one hand, and differences in treatment on grounds of gender or sexual orientation on the other hand. In this regard, the report shows that the case law of the European Court

of Human Rights in respect of suspect grounds of distinction is largely powerless to resolve the issue. As far as the European Union legislator is concerned, certain guidelines have been provided for resolving conflicts between different grounds of discrimination. Thus, Article 4(2) of Directive 2000/78/EC expressly states that the exception relating to the prohibition of direct discrimination founded on religion or belief, which Member States can lay down for the benefit of professional activities carried out by churches and organisations the ethos of which is based on religion or belief, cannot lead to the violation of the principle of equal treatment based on another ground (such as gender or sexual orientation).

It is in connection with this type of conflict — within the requirement for equality itself — that the responsibility of the European Union appears most substantial, since it was assigned competence for combating discrimination based on gender by the Treaty of Rome, and this was then extended, by the Treaty of Amsterdam, to include race, ethnic origin, religion or belief, sexual orientation, disability and age. Although the issue of a possible hierarchy between grounds of discrimination (for example, between discrimination founded on religion and that founded on gender or sexual orientation) is a thorny one, it is of critical importance today. Unless such responsibility is assumed at a much earlier stage in the process, the courts will remain first in line when it comes to resolving conflicts on a case-by-case basis, with no possibility of being able to draw on a methodology that ensures a minimum level of coherence and uniformity in the implementation of European Union law.

Chapter II of the report considers the main tensions likely to arise between the requirements of the Race Equality Directive and the Employment Equality Directive, on the one hand, and those relating to the respect of fundamental rights on the other hand. More particularly, it deals with conflict scenarios that occur between: (i) the right to respect for private life and the principle of non-discrimination; (ii) the right to freedom of religion, freedom of association and freedom of expression in the context of genuine occupational requirements and 'ethos-based organisations'; and (iii) the right to conscientious objection on religious or philosophical grounds and the principle of non-discrimination based on gender or sexual orientation.

- Potential conflicts between the principle of non-discrimination and the right to respect for private life (Chapter II.1)

In reality, there are various types of interference between the principle of non-discrimination and the right to respect for private life since the right to respect for private life, as interpreted by the European Court of Human Rights, is an increasingly inclusive concept which has an ambiguous relationship with the prohibition of discrimination. In particular, the complexity stems from the various complementary facets of the right to respect for private life, consisting of the preservation of a 'sphere of privacy around the individual' (which covers, by extension, the right to a 'private social life' or the right of an individual to establish and develop relations with his/her peers), the right to the protection of personal data, and finally, the right to personal autonomy. Each of these aspects of the protection of private life may interfere with the prohibition of discrimination, either by limiting the scope of application of this prohibition through the exclusion of areas relating to private and family life, or by adding safeguards to the framework used for the processing of personal data, or by contributing to the fight against discrimination by prohibiting the disclosure of certain information relating to an individual's private life.

The first case scenario considered by the report relates to the issue of applying the principle of non-discrimination to private matters, whether this concerns domestic work, a job in a family business or the provision of goods and services in a private context. In this case, the prohibition of discrimination may clash with the requirements of the right to respect for private and family life, in terms of it preserving a sphere of privacy around the individual and a private social life.

The report also examines the right to the protection of personal data, the second facet of the right to private life that can interact with the prohibition of discrimination. If you start from the well-acknowledged observation that in order to combat discrimination, it must be possible to compare individual situations by having access to certain personal data, it becomes immediately apparent that tensions will inevitably occur between this aspect of the right to respect for private life and the fight against discrimination. This type of interaction was able to go unnoticed in the early decades of European integration because only discrimination based on nationality or gender was prohibited by European Community law. However, although data relating to the gender or nationality of individuals certainly constitutes personal data, in that it concerns an identified or identifiable person, it is not considered 'sensitive' data under the terms of Directive 95/46/EC or Convention No 108 of the Council of Europe. The same cannot be said for the majority of the grounds of discrimination added to Article 13 EC (subsequently Article 19 TFEU) by the Treaty of Amsterdam. Given the clear overlap between the fight against discrimination and the protection of personal data, the complete lack of guidance provided by the 2000 Directives and the negotiations that produced them regarding the interaction between this new arsenal of legislation and the treatment of personal data is quite surprising. However, on examination, the tensions between the requirements of non-discrimination based on certain grounds and the protection of personal data might be only tensions at first sight, given their complementary as opposed to conflicting relationship. In this regard, the report examines the links established by the protection of personal data with the use of statistics in the event of a prima facie case of discrimination or the implementation of positive action for the benefit of disadvantaged groups. The report also deals with the situation of an individual with a disability who, in certain circumstances, may be forced to waive his/her 'right to secrecy' in respect of sensitive data such as his/her state of health or disability, so that reasonable accommodation can be provided.

Finally, the right to respect for private life, understood as the third facet of this right, namely, the right to individual self-determination or personal autonomy, may cause conflict with the right to non-discrimination when the latter aims to achieve substantive equality, by means of methods such as positive action or statistics intended to highlight prohibited differences in treatment. In this scenario, the focus is effectively shifted from the individual to the group, thereby prompting the delicate question of how to categorise the individuals within these groups. Although it is hard to imagine an objection to the affiliation of an individual with the male or female gender or a specific age range, on the basis of the right to self-determination, the report strives to show that reconciling the right to personal autonomy with the classification of an individual in an ethnic or racial group is a more delicate task. Moreover, the report also deals with the scenario in which the right to respect for private life, as a right to personal autonomy, protects certain choices made by the individual which relate to his/her non-professional life.

- Potential conflicts between the principle of non-discrimination and the rights to freedom of religion, freedom of association and freedom of expression in the context of genuine occupational requirements and 'ethos-based organisations' (Chapter II.2)

Although the logic underlying the concept of a genuine and determining occupational requirement is not systematically presented in terms of a conflict of rights, the report shows that certain case scenarios in which it has been invoked serve to illustrate inter-rights or intra-right conflicts. Moreover, a particular conflict occurs when the prohibition of discrimination based on religion or belief creates tension with religious freedom, where this is understood as the right for churches or religious or philosophical organisations to act without interference from the State. It was for the purpose of providing guidelines for the settlement of such conflicts that the European legislator laid down a specific exception to the prohibition of discrimination based directly on religion or belief (Article 4(2) of Directive 2000/78/EC). Churches and public and private organisations the ethos of which is based on religion or belief (referred

to as 'ethos-based organisations') can, therefore, in certain conditions, establish differences in treatment that are directly founded on the religion or beliefs of individuals that they wish, for example, to recruit. The report addresses the questions of the beneficiaries of the exception, its outlines and its limitations taking into account the conflict of rights situation (external inter-rights conflict) that underlies this exception, as well as the experience drawn from international and European human rights law and from certain national laws.

- Potential conflicts between the principle of non-discrimination and the right to conscientious objection (Chapter II.3)

To a certain extent, Directive 2000/78/EC marks the implicit recognition of religious conscientious objection in the field of employment and vocational training. By requiring Member States to provide protection against discrimination founded on religion and belief, this European standard gives conscientious objectors a new legal instrument for making their voices heard. In some cases, the concept of conscientious objection can collide with the principle of equal treatment. The national case law of the EU Member States offers several illustrations of conflicts between the right to conscientious objection on religious grounds on the one hand, and the principle of non-discrimination based on sexual orientation or that of equality between men and women on the other hand. These cases are generally treated from the point of view of the right to non-discrimination (and not that of religious freedom). However, they present significant differences when compared to the other external intra-right conflict cases dealt with in this report, insofar as the conflicting parties do not hold subjective rights derived from the right to non-discrimination by reason of different grounds of distinction. In reality, in these conflicts there are, on one side, parties that believe that they have been discriminated against because of their religious beliefs and, on the other side, individuals pleading grounds of equality (based on gender or sexual orientation) in the public interest.

Certain cases relating to conscientious objection illustrate the extent to which this issue can be intrinsically linked with that of reasonable accommodation in the religious domain. Although Directive 2000/78/EC only expressly establishes the concept of reasonable accommodation for people with a disability (Article 5), it has still resurfaced as an issue, following the example given by the Canadian Supreme Court in 1985, in certain case scenarios involving indirect discrimination founded on religion. In order to assess the justification of indirect discrimination, judges are sometimes called on, when applying the proportionality test, to examine whether the legitimate objective underlying the difference in treatment can be achieved by measures that are less detrimental to the principle of equality or religious freedom.


Bennie | 2000
Martijn | 1971

Introduction

The fundamental rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, ECHR) or other international legal instruments ratified by the Member States of the European Union as well as those derived from the constitutional traditions common to these States form part of the general legal principles enforced by the European Court of Justice of the European Union [3]. The Charter of Fundamental Rights which became binding when the Lisbon Treaty entered into force on 1 December 2009, has further strengthened the legal arsenal of human rights guarantees within the European Union. Consequently, the Member States of the European Union should implement all of the directives aimed at combating discrimination without undermining the other fundamental rights contained in these various instruments. This requirement applies, quite clearly, to Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [4] (hereinafter, Race Equality Directive or Directive 2000/43/EC), and also to Council Directive 2000/78/CE of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [5] (hereinafter, Employment Equality Directive or Directive 2000/78/EC). Moreover, this is explicitly referenced in the preambles to these two directives [6].

In general, the Court of Justice of the European Union holds that the Member States are required to implement the directives that are imposed on them in terms of respecting fundamental rights and that it is their responsibility to accommodate the tensions between concurrent fundamental rights as best they can [7]. On this tightrope walk, it goes without saying that a better understanding of the existing approaches within the Union would serve to guide national authorities, while also allowing an exchange of best practices. The task is at times so delicate that it would justify the establishment of guidelines and a coherent methodology by the Union authorities, which would contribute further to the consistent application of European law.

This report provides the opportunity to identify the main conflicts between the principle of equality and non-discrimination [8] and other fundamental rights arising from the stipulations contained in the directives on racial equality and on equal treatment in employment [9]. Primarily, they concern the right to respect for private life, the right to freedom of association and the right to freedom of religion [10].

3 Article 6(2) EU.

4 OJ L 180, 19.7.2000, p. 22.

5 OJ L 303, 2.12.2000, p. 16.

6 See recitals 2 and 4 of the preamble to Directive 2000/43/EC and recitals 1 and 5 of the preamble to Directive 2000/78/EC.

7 See, in particular, ECJ, *Tietosuojavaltuutettu*, 16 December 2008, Case C-73/07 (50–62); ECJ, *Promusicae*, 28 January 2008, Case C-275/07 (61–70); ECJ, *Lindqvist*, 20 November 2003, Case C-101/07 (79–90); ECJ, *Parliament* v *Council,* 27 June 2006, Case C-540/03 (70–76).

8 The expressions 'principle of equality' and 'principle of non-discrimination' are used interchangeably in this report, in accordance with European directives and the case law of the European Court of Justice.

9 Insofar as they represent a rich source of learning, conflicts with the principle of non-discrimination founded on gender will be taken into consideration on a case-by-case basis.

10 Note that this report does not address the case of the incitement to hatred (whether racial, religious, homophobic, etc.) which, although it can result in the need to resolve tensions between the principle of non-discrimination and freedom of expression, goes beyond the scope of Directives 2000/43/EC and 2000/78/EC. On this interesting issue, see, in particular, Bamforth, N., Malik, M. and O'Cinneide, C., *Discrimination Law: Theory and Context*, London, Sweet and Maxwell, 2008, Chapter 8, pp. 505–516; ECRI, *Combating Racism while Respecting Freedom of Expression*, proceedings of the Expert Seminar held in Strasbourg on 16 and 17 November 2006, 2007.

The different conflict scenarios are discussed against the main backdrop of the case law of the European Court of Human Rights as well as, in a non-exhaustive manner, the laws and practices of the Member States. Many of the examples of these conflicts are taken from national reports as well as the *European Anti-discrimination Law Review*[11], published by the European Network of Legal Experts in the Non-discrimination Field (founded on race or ethnic origin, age, disability, religion or belief and sexual orientation)[12].

The tensions that can arise between the right to equality and other rights or fundamental freedoms represent one of the conflict scenarios that can apply to fundamental rights. In practice, this issue is of critical importance today, as testified by the proliferation of doctrinal research on the subject in recent years[13]. In order to provide the national decision-makers (legislators or judges) who are responsible for settling conflicts between the principle of non-discrimination and fundamental rights with some direction in terms of analysis, we will start by discussing some general theoretical issues: (i) Does a useful or appropriate typology exist to facilitate understanding of the conflicts between fundamental rights? (ii) Are the conflicts between the principle of non-discrimination and fundamental rights of a different nature to the conflicts between other fundamental rights? (iii) In this debate, where do the conflicts between grounds of discrimination occur within the principle of equality itself? And where exactly do we find the tensions that can cause friction within the different aspects of the right to equality? (iv) What are the methods needed to resolve these conflicts and do these methods vary according to the authority (legislator or judge) concerned? (Chapter II)

We will then look at the main tensions that can emerge between the requirements of the directives relating to racial equality and to equal treatment in employment, on the one hand, and those relating to the respect of fundamental rights on the other hand (Chapter III). More particularly, we will begin by discussing potential conflicts between the right to respect for private life and the principle of non-discrimination (Chapter III.1). These conflicts can occur at various stages but mainly when the prohibition of discrimination extends to strictly private matters, whether domestic work or the supply of services in a private context, or when the application of the principle of non-discrimination involves the collection and processing of sensitive personal data. Subsequently, we will address the potential conflicts between the right to freedom of religion, freedom of association and freedom of expression in the context of genuine occupational requirements and 'ethos-based organisations'. This is actually the only conflict scenario explicitly envisaged by the body of Directive 2000/78/EC (Chapter III.2). Finally, we will conclude with some examples of conflicts between the right to conscientious objection on religious or philosophical grounds and the principle of non-discrimination founded on sexual orientation or gender. The latter cases can both reflect conflicts between the principle of non-discrimination and religious freedom, but equally they can reflect tensions within the principle of equality itself. It prompts us to have a closer look at the concept of reasonable accommodation on religious grounds as it relates to indirect discrimination (Chapter III.3).

[11] In the section of the review entitled 'News from the EU Member States'.

[12] This network initially formed part of the programme of community action against discrimination (2001–06). Today, it is supported by the PROGRESS community programme for employment and social solidarity (2007–13) and is jointly managed by the Human European Consultancy and the Migration Policy Group. The publications produced by the network are available on its website (http://www.non-discrimination.net).

[13] See, in particular, Zucca, L., *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA*, Oxford, OUP, 2007; Brems, E. (ed.), *Conflicts Between Fundamental Rights*, Antwerp-Oxford-Portland, Intersentia, 2008.

Chapter I

A general approach to conflicts between the principle of non-discrimination and concurrent fundamental rights

1. An increase in conflicts between fundamental rights

Although the issue of conflicts between fundamental rights is not new, it has prompted renewed interest in recent years, particularly due to the proliferation in the number of these conflicts that have been referred to national, European and international judges. Various reasons have been advanced to explain this increase [14]. Firstly, the catalogue of legally protected fundamental rights has grown incessantly, not just as a result of adopting new provisions to this effect, but more especially through the extensive interpretation of existing texts. The example of Article 8 of the European Convention on Human Rights (right to respect to private life) is particularly significant in this respect. The wider recognition of the horizontal impact of human rights, that is to say their application to relationships between private persons (whether individuals, groups, organisations or businesses) and not just solely between the State and its citizens has also caused the number of conflicts to multiply. Nowadays, public authorities are not simply required to respect fundamental rights by abstaining from acts that violate these rights; they are also required to protect fundamental rights in relationships between private individuals. This positive obligation to provide protection presupposes the adoption of legislative, administrative, judicial and substantive measures to protect individuals against the violation of their fundamental rights by other individuals. It leads necessarily to an increase in the number of actions founded on the violation of individual freedoms and as a result, to an escalation in the number of conflicts between fundamental rights. Finally, with Sébastien Van Drooghenbroeck, it is hard not to conclude that the explanation for the proliferation of conflicts between fundamental rights lies in the change of 'rhetoric' register in public policy [15]. Once there is no longer wide acceptance for traditional values (such as general interest, public order and public security), which had been used as the basis for restricting rights and freedoms, it may be worth, in order to persuade judges or public opinion, classifying these values within the discursive register of fundamental rights. Therefore, the fight against terrorism today is identified more with the defence of the life and integrity of individuals rather than public order or public security. It is equally important to bear in mind that the proliferation of conflicts between fundamental rights is sometimes grossly exaggerated for ideological purposes. When we consider issues such as bioethics, abortion, same-sex marriage or the adoption of children by homosexual couples, it is undoubtedly clear that the rise in the power of religion on the political scene is an integral part of this phenomenon [16].

[14] See, in particular, Brems, E., 'Introduction', in Brems, E. (ed.), *Conflicts Between Fundamental Rights,* op. cit, 2008, p. 2; Van Drooghenbroeck, S., 'Conflits entre droits fondamentaux, pondération des intérêts : fausses pistes (?) et vrais problèmes', in Renchon, J.L. (dir.), *Les droits de la personnalité*, Actes du X[e] colloque de l'Association 'Famille et Droit', Louvain-la-Neuve, 30 November 2007, Brussels, Bruylant, 2009, pp. 299 ff., No 11–13.

[15] Van Drooghenbroeck, S., 'Conflits entre droits fondamentaux, pondération des intérêts : fausses pistes (?) et vrais problèmes', *Les droits de la personnalité,* op. cit., pp. 299 ff., No 13.

[16] Zucca, L., 'Conflicts of Fundamental Rights as Constitutional Dilemmas', in Brems, E. (ed.), *Conflicts Between Fundamental Rights*, op. cit., p. 22. More generally, see volume 30 of the *Cardozo Law Review*, June 2009 edition, which collates the papers presented to the symposium 'Constitutionalism and Secularism in an Age of Religious Revival: The Challenge of Global and Local Fundamentalism'.

2. In search of a typology

The nomenclature of the conflicts between fundamental rights recently proposed by L. Zucca [17], appears particularly useful from a didactic point of view. When transposed to conflicts in which the principle of non-discrimination is set in opposition to other fundamental rights, it not only allows a distinction to be made between conflicts that occur between rights and conflicts that occur between grounds of discrimination, it also allows some of the tensions inherent in the right to equality itself to be brought to light. Zucca's thesis rests on two findings. Firstly, regarding fundamental rights, conflicts either cause two rights or freedoms to be set in opposition to one another (*inter-rights* conflict), or they reflect tensions within the same right or freedom (*intra-right* conflict). Secondly, these conflicts either operate *externally* (where claims arising from the protection of fundamental rights cause a conflict between two individuals) or *internally* (where claims arising from the protection of fundamental rights conflict in relation to a single individual).

L. Zucca's nomenclature transposed to conflicts between the right to equality and other fundamental rights [18]

Conflict	Inter-rights	Intra-right
Internal	Example: *Equality versus private life* (programme of positive actions and ethnic origin; reasonable accommodation and disability [19]	*Equality versus equality* (reasonable accommodation and disability [20]; reasonable accommodation on religious grounds [21])
External	Example: *Equality versus freedom of religion* (recruitment in an 'ethos-based organisation' [22]) Example: *Equality versus private life* (recruitment of domestic staff [23]; material scope of the principle of non-discrimination [24])	*Equality versus equality* (same-sex marriage and civil registrar pleading conscientious objection; civil servant refusing to shake hands with persons of the opposite sex [25])

An *external* '*inter-rights*' *conflict* concerns the most traditional scenario in which two individuals base their application on separate fundamental rights. The principle of non-discrimination can, for example, come into opposition with the right to respect for private life. The extension of the prohibition of discrimination to 'private matters', whether the recruitment of domestic staff or renting out a room in

17 Zucca, L., *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA,* op. cit., pp. 64–66.

18 It is interesting to note that in a subsequent contribution, L. Zucca slightly amended this typology to emphasise constitutional dilemmas comprising 'total conflicts', which involve normative discrepancies and which, to a certain extent, are irresolvable. He did this to differentiate these conflicts from 'partial conflicts', which can be ruled on without jeopardising the normative essence of a fundamental right ('Conflicts of Fundamental Rights as Constitutional Dilemmas', in Brems, E. (ed.), *Conflicts Between Fundamental Rights*, op. cit., p. 26).

19 These examples are discussed in further detail in Chapter II.1.

20 This example is discussed in further detail in Chapter II.1.

21 This example is discussed in further detail in Chapter II.3.

22 This example is discussed in further detail in Chapter II.2.

23 This example is discussed in further detail in Chapter II.1.

24 This example is discussed in further detail in Chapter II.1.

25 These examples are discussed in further detail in Chapter II.3.

one's home, interferes with the intimate sphere of the beneficiary of the service which constitutes one of the protected facets of private life as regards respect of fundamental rights.

An *internal* '*inter-rights*' *conflict* describes the case where, for the same individual, contradictory claims derived from two separate fundamental rights to which this individual is entitled are set in opposition to each other. Here again, the principle of non-discrimination can conflict with the right to respect for private life when the former implies the processing of sensitive data relating to racial or ethnic origin, religious belief, disability or sexual orientation. Does a worker who wishes to avail of a programme of positive actions reserved for individuals of a specific ethnic origin have any choice but to reveal his/her origin in possible disregard of the right to respect for his/her private life? How can an employee with a disability claim reasonable accommodation without revealing to his/her employer the exact nature of his/her disability?

An *external* '*intra-right*' *conflict* occurs when two individuals base contradictory claims on the same right or freedom. In the right to equality, this relates, for example, to the non-renewal of the contract of a civil registrar on the grounds that he/she has refused, for religious reasons, to celebrate same-sex marriages recognised by national legislation. In this scenario, the civil registrar may consider himself/herself the victim of indirect discrimination based on his/her religious beliefs. Viewed from another angle, this person's behaviour can be seen as discriminatory from the point of view of the homosexual individuals. Another example would be the decision not to recruit an individual who refuses, on religious grounds, to shake hands with a person of the opposite sex. Here once again, this person may consider himself/herself a victim of indirect discrimination founded on his/her beliefs, whereas his/her behaviour may raise questions about compliance with the principle of equality between men and women.

Finally, an *internal* '*intra-right*' *conflict* occurs when contradictory claims derived from the same fundamental right to which an individual is entitled are set in opposition for that same individual. Although instances illustrating this type of conflict are extremely rare, an example can be drawn from the case law of the European Court of Human Rights, namely, the *Kosteski* case [26]. This case related to the issue of reasonable accommodation invoked on religious grounds in the area of employment. Mr Kosteski, who was absent from his place of work without permission from his employer, justified his absence by explaining that he was participating in the Bayram festival, a Muslim religious festival which is a public holiday for Macedonians of the Muslim faith, under the Constitution and legislative provisions. Notwithstanding, disciplinary sanctions were applied to Mr Kosteski, who went on to invoke both a violation of his religious freedom and a violation of his right to non-discrimination founded on his religious beliefs before the Court of Human Rights in Strasbourg [27]. While remaining extremely cautious, the Court did not completely rule out the idea that Article 9 of the European Convention on Human Rights (right to religious freedom) should form the basis for a request for holiday leave for the purpose of attending a religious festival. However, the Court noted that an examination of the merits of such a request may be subject to a demonstration of the sincerity of the religious beliefs of the individual making it. Yet, such a requirement infringes the religious freedom guaranteed by the Convention.

[26] Eur. Ct. H.R., *Kosteski* v *the former Yugoslav Republic of Macedonia*, 13 April 2006 (Application No 55170/00). This example is taken from the contribution of Van Drooghenbroeck, S., 'Conflits entre droits fondamentaux, pondération des intérêts : fausses pistes (?) et vrais problèmes', *Les droits de la personnalité,* op. cit., pp. 299 ff., No 9.

[27] Before the European Court of Human Rights, Mr Kosteski invoked a violation of Article 14 ECHR (principle of non-discrimination) combined with Article 9 ECHR (religious freedom). Article 14 ECHR is a non-independent provision in the sense that it guarantees protection against discrimination when it comes to exercising the rights and freedoms guaranteed by the Convention.

In practice, this means that Mr Kosteski can really only claim his right to equality of treatment without discrimination founded on religion by sacrificing another aspect of his religious freedom [28].

When transposed to conflicts between fundamental rights that involve the principle of non-discrimination, Zucca's typology helps us to clearly understand that these conflicts go far beyond the conventional hypothesis of a clash between the right to equality and another fundamental right invoked by two different owners of these rights. It also makes it clear that the challenges in question are most likely very different when it comes to resolving an *internal* conflict and an *external* conflict. In the first case, the beneficiary of the principle of non-discrimination would need to waive another fundamental right, partially, in order to avail of the principle of non-discrimination. Once this right has been partially waived with full knowledge of the facts and in return for certain safeguards [29], the conflict can be resolved in a relatively satisfactory manner. Conversely, in the second case, the dilemma occurs when it is only possible to overcome the conflict by sacrificing one right, in whole or in part, at the expense of another right, and by allowing the fundamental right of one individual to prevail to the detriment of another individual.

Some conflicts can be classified interchangeably as either an *inter-rights* conflict or an *intra-right* conflict. Thus, a dispute in which the right to equality collides with religious freedom can sometimes be conveyed as a conflict within the right to equality itself, involving the principle of non-discrimination based on religion or belief. Presented and argued as an intra-right conflict in which two aspects of the right to equality are set in opposition to each other, it highlights the tensions that can exist between certain grounds of discrimination, mainly religious belief, on the one hand, and gender or sexual orientation on the other hand. This external intra-right conflict model also reveals the tensions inherent in the different notions of equality itself, that is, between formal equality and substantive equality. As evidenced by the growth of affirmative action programmes, interference with the principle of formal equality is now deemed necessary in order to achieve substantive equality, which is focused more on groups than on individuals. However, it is important not to classify all of the obstacles encountered when implementing the principle of substantive equality in terms of the conflict of rights.

The difficulty in finding examples that comply with the *internal intra-right* conflict model highlights once again that multiple or intersectional cases of discrimination [30] do not reflect the conflicts that exist between different aspects of the right to equality. On the contrary, the challenge here consists of taking into account a cumulative or interactive dimension involving several grounds of discrimination on which an individual is discriminated against, as opposed to analysing these grounds in an antinomian way.

28 Although it is two facets of the right to religious freedom that are conflicting here (and not two aspects of the right to equality), the case in point seems pertinent as it concerns the issue of reasonable accommodation which is central to the right to equality.

29 On this topic, see De Schutter, O., and Ringelheim, J., 'La renonciation aux droits fondamentaux. La libre disposition du soi et le règne de l'échange', in Dumont, H., Ost, F., and Van Drooghenbroeck, S. (dir.), *La responsabilité : face cachée des droits de l'homme*, Brussels, Bruylant, 2005, pp. 443–481. See also, Frumer, Ph., *La renonciation aux droits et libertés : la Convention européenne des droits de l'Homme à l'épreuve de la volonté individuelle*, Brussels, Bruylant, 2001.

30 For example, a black woman of African origin who considers herself a victim of discrimination in the hiring process can invoke the anti-discriminatory device in terms of equality of treatment founded on gender, but equally in terms of equality of treatment founded on 'race' (multiple discrimination). She can also consider that the violation of the principle of equality of treatment in her regard was not due to the fact that she is a woman and that she is black, but that she is a black woman (intersectional discrimination). See Malik, M., *From Conflict to Cohesion: Competing Interests in Equality Law and Policy*, London, Equality and Diversity Forum, 2008, p. 5, available on the website of the Equality and Diversity Forum (http://www.edf.org.uk/blog/wp-content/uploads/2009/02/competing-rigts-report_web.pdf). See also, Danish Institute for Human Rights, *Tackling Multiple Discrimination: Practices, policies and laws,* European Commission, 2007.

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3. In search of a methodology

3.1 Real and fake conflicts

In the model that she designed for the treatment of issues pertaining to conflicting rights, Eva Brems recommends, as a first step, to 'eliminate fake conflicts'[31]. To this end, she points out that, in certain scenarios, the conflict between fundamental rights does not constitute an essential characteristic of the case, but the result of a particular approach to the latter[32]. In reality, the conflict here can be set aside by finding a solution that can protect both rights simultaneously. In his research on constitutional dilemmas, L. Zucca drastically reduces this category, pointing out that most conflicts between fundamental rights, when they are not fallacious, can be resolved easily insofar as one claim will rationally win out over another[33]. When analysing the method used by the European Court of Human Rights to settle conflicts between fundamental rights, Olivier De Schutter and Judge Françoise Tulkens start by making a distinction between 'real' conflicts and 'imagined' conflicts with respect to the particular legal system of the European Court of Human Rights and its additional protocols[34].

Although, in terms of principles, it seems essential to avoid artificially inflating the issue of conflicts between fundamental rights and to disregard irrelevant situations[35], we believe that the approaches recommended by these authors are scarcely operational when it comes to contributing to the resolution of the conflicts that occur between the principle of the right to equality and other fundamental rights which are our concern here. Firstly, making a distinction between a real conflict and a false conflict is a delicate task insofar as it is intrinsically linked to the context in question. In other words, the result is dependent on the legal system concerned and may diverge according to whether the authority is a national judge, the European Court of Justice or the European Court of Human Rights. The role assigned to a court, its competences, the wording as well as the interpretation of the rights applicable in the relevant legal system will have an inevitable influence on the court's analysis. Secondly, it also appears that this initial step of eliminating false conflicts, and therefore the qualification of a situation as one that constitutes a conflict of rights often involves discussing possible options earlier on in the process. In reality, this approach often leads to subsequent steps in the legal reasoning process.

The issue of identifying real conflicts between fundamental rights also raises the question of how they are distinguished from conflicts that involve the collision of a fundamental right and a 'simple' interest.

31 Brems, E., 'Introduction', in Brems, E. (ed.), *Conflicts Between Fundamental Rights*, op. cit., p. 4.

32 Therefore, a legislative provision aimed at guaranteeing the right to be tried within a reasonable time frame by imposing procedural deadlines solely for the accused, and not the prosecutor, limits the right of the accused to benefit from the equality of arms. The requirement relating to a reasonable time frame and respect of the equality of arms constitute two aspects of a fair trial, which, following the case law of the European Court of Human Rights, should not be sacrificed at the expense of another. See Brems, E., 'Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms', *Human Rights Quarterly*, 2005, pp. 294–326.

33 Zucca, L., 'Conflicts of Fundamental Rights as Constitutional Dilemmas', in Brems, E. (ed.), *Conflicts Between Fundamental Rights*, op. cit., p. 28.

34 'Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution', in Brems, E. (ed.), *Conflicts Between Fundamental Rights,* op. cit., p. 174.

35 See our discussions in the previous point (Chapter II.2).

Traditionally, authors emphasise the specific nature of the former in respect to the latter [36]. In the context of the European Convention on Human Rights, the arbitration of a conflict arising between a fundamental right and a public interest is at the heart of the case law of the European Court. In principle, it is governed by an approach that accords *in abstracto* a privileged position to the fundamental right (*priority-to-rights principle*) [37], and which applies the well-known method of *proportionality*, often associated with the process of assessing the degree to which the interference with the fundamental right or freedom in question is 'necessary in a democratic society'. The 'Belgian linguistic' case, in which the Court delivered its initial findings on the principle of non-discrimination, is topical in this respect. The European Court affirms that 'the Convention […] implies a just balance between the protection of the general interest of the Community and the respect due to fundamental human rights while attaching particular importance to the latter' [38].

However, this *priority-to-rights* approach is powerless when it comes to resolving conflicts between fundamental rights that are a priori placed on an equal footing [39].

3.2 The hierarchal argument

In a scenario involving an inter-rights conflict, it matters to ask whether the right to equality should take precedence over the other fundamental rights. In other words, does the principle of non-discrimination take precedence over other rights and freedoms? In general, the question of a possible hierarchy between human rights and the definition of criteria allowing their classification has had much written about it [40]. By virtue of the principle of the indivisibility and interdependence of human rights [41], the a priori non-existence of a hierarchy of rights is generally accepted, except when international law lays down precedence criteria [42]. Although, in implementing the principle of equal treatment in different directives, it is undeniable that the European Union legislator may have held that this could restrict, under certain limits, the exercise of other fundamental rights, it cannot be said that it was the intention

[36] See, for example, Rigaux, F., *La protection de la vie privée et des autres biens de la personnalité*, Brussels, Bruylant 1990, p. 214, No 15; Zucca, L., *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA,* op. cit., pp. 49–5; Malik, M., *From Conflict to Cohesion: Competing Interests in Equality Law and Policy,* op. cit., pp. 5–6. In the context of the European Convention on Human Rights, see De Schutter, O., and Tulkens, F., 'Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution', in Brems, E. (ed.), *Conflicts Between Fundamental Rights,* op. cit., pp. 175–178.

[37] Greer, S., *The European Convention on Human Rights: Achievements, Problems and Prospects,* Cambridge, Cambridge University Press, 2006, pp. 203–213, in particular p. 208.

[38] The case relating to certain aspects of the linguistic teaching system in Belgium that was taken against Belgium on 23 July 1968 (Application Nos 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64), Series A, No 6 (5).

[39] Cariolou, L., 'The Search for Equilibrium by the European Court of Human Rights', in Brems, E. (ed.), *Conflicts Between Fundamental Rights*, op. cit., p. 261.

[40] See, for example, Bribosia, E., and Hennebel, L. (dir.), *Classer les droits de l'homme*, Brussels, Bruylant, 2004; Levinet, M., *Théorie générale des droits et libertés*, Brussels, Bruylant, Coll. 'Droit et Justice' No 82, 2008, second edition, pp. 84 ff. See also references mentioned by Bribosia, E., 'Classification des droits de l'homme', in Andriantsimbazovina, J., Gaudin, H., Marguenaud, J.-P., Rials, S., and Sudre, F. (dir.), *Dictionnaire des droits de l'homme*, Paris, P.U.F., 2008, pp. 159–164.

[41] See, in particular, the Vienna Declaration and Programme of Action, adopted on 25 June 1993 by the World Conference on Human Rights, (5) (United Nations, General Assembly A/CONF.157/23); Resolution 60/251, adopted 15 March 2006 by the United Nations General Assembly (A/RES/60/251).

[42] For example, in the ECHR system, the fact that just a handful of rights established by the Convention are absolute while others can be subject to derogations, even if an examination of case law shows that absolute rights are not always exempt from a certain relativity (see, for the prohibition of torture (Article 3 ECHR): Eur. Ct. H.R. (Grand Chamber), *Jalloh* v *Germany*, 11 July 2006 (Application No 54810/00), (77–83) and the corroborating opinion of Judge Nicolas Bratza; for the principle of legality in penal law (Article 7 ECHR): Eur. Ct. H.R., *S.W.* v *United Kingdom*, 22, November 1995 (Application No 20166/92), (36 and 44); Eur. Ct. H.R., *C.R.* v *United Kingdom*, 22 November 1995 (Application No 20190/92), (34 and 42)).

of this legislator to establish non-discrimination as the predominant principle. Insofar as the European Union legislator is not competent to develop a full set of fundamental rights, this type of decision does not fall under its responsibility.

Certain authors have defended the predominance of the right to equality on the grounds that the principle of non-discrimination was established in order to define the specific content of each human right, of which it constitutes the initial premise to a certain degree[43]. This approach allows for the elimination of the category of conflicts between fundamental rights, an incompatibility between a religious precept that is discriminatory against women and the right to equal treatment founded on gender[44]. In other words, once a religious precept is found to be discriminatory, the religious believer cannot benefit from the protection granted by religious freedom on the grounds that the principle of non-discrimination constitutes one of the cornerstones of any fundamental right.

Although such an approach may seem attractive, it is not easy to defend in such absolute terms[45]. In terms of principle, firstly, it reflects an ideological stance that gives precedence to equality over freedom which lies at the heart of an irresolvable philosophical debate and which has widely divided opinion in the legal and political domain[46]. On a practical level especially, it does not seem likely to satisfactorily resolve all of the conflicts in which the right to equality is set in opposition to other fundamental rights (beyond religious freedom), if only because the concept of equality is plural and today it combines formal equality and substantive equality, equality of opportunities and equality of results.

The hierarchal argument can also arise in the case of an intra-right conflict. Within the right to equality, the conflict here will cause different grounds of discrimination to be set in opposition to each other[47]: traditionally, discrimination founded on religious belief, on the one hand, and differences in treatment on grounds of gender or sexual orientation on the other hand. We know that through its case law the European Court of Human Rights has, to a certain extent, identified suspect grounds of distinction[48],

43 Stuart, A., 'Back to Basics: Without Distinction — A Defining Principle?', in Brems, E. (ed.), *Conflicts Between Fundamental Rights,* op. cit., pp. 101–130. See also, but in the more limited context of racial discrimination, segregation and apartheid, Shelton, D., 'Mise en balance des droits : vers une hiérarchie des normes en droit international des droits de l'homme', in Bribosia, E., and Hennebel, L. (dir.), *Classer les droits de l'homme,* op. cit., pp. 157–158.

44 Stuart, A., 'Back to Basics: Without Distinction — A Defining Principle?', in Brems, E. (ed.), *Conflicts Between Fundamental Rights,* op. cit., p. 102.

45 See, in particular, Benoît-Rohmer, F., 'L'égalité dans la typologie des droits de l'homme', in Bribosia, E., and Hennebel, L. (dir.), *Classer les droits de l'homme*, op. cit., pp. 135–152.

46 In a case relating to an appeal taken by a student excluded from a Turkish university for wearing a Muslim headscarf, see the dissenting opinion of Judge Tulkens in which she states: 'In a democratic society, I believe that it is necessary to seek to harmonise the principles of secularism, equality and liberty, not to weigh one against the other' (Eur. Ct. H.R. (Grand Chamber), *Leyla Sahin* v *Turkey,* 10 November, 2005 (Application No 44774/98) (4)).

47 For more detailed discussions on the different grounds of discrimination, see Malik, M., *From Conflict to Cohesion: Competing Interests in Equality Law and Policy*, op. cit., pp. 13 ff.

48 For a critical description of this case law, see Martin, D., *Egalité et non-discrimination dans la jurisprudence communautaire. Etude critique à la lumière d'une approche comparatiste*, Brussels, Bruylant, 2006, pp. 272–284, No 398–418.

the main ones being gender[49], followed by race and ethnic origin[50], religious belief[51], sexual orientation[52], nationality[53], and birth out of wedlock[54]. For the Court, differences in treatment founded on such grounds can only be justified in respect to reasons which are 'very weighty', 'particularly serious' or constitute 'overriding' considerations[55]. This case law, founded on a non-discrimination clause comprising an open-ended list of prohibited grounds of discrimination (Article 14 ECHR), pleads in favour of establishing a certain hierarchy of rights within the principle of equal treatment. However, this does not allow for the resolution of the numerous conflicts that fall within the scope of application of European directives as, with the exception of age[56] and disability[57], all of the grounds of discrimination described in Article 13 EC (subsequently Article 19 TFEU), as introduced by the Treaty of Amsterdam, are now qualified as suspect grounds of discrimination. Unless of course these suspect grounds can be arranged in a hierarchy themselves, which, apart from racial discrimination to a certain extent[58], we do not feel is in keeping with the case law of the European Court of Human Rights.

Nevertheless, the European Union legislator has provided certain guidelines for resolving conflicts between different grounds of discrimination. For example, Article 4(2) of Directive 2000/78/EC clearly specifies that the exception to the prohibition of direct discrimination founded on religion or belief, which can be reserved by Member States for the benefit of professional activities carried out by Churches

[49] See, in particular, Eur. Ct. H.R., *Abdulaziz, Cabales and Bakandali* v *United Kingdom*, 28 June 1985 (Application Nos 9214/80; 9473/81; 9474/81), (78).

[50] See, in particular, the judgments referenced in footnote 55. However, the case law of the Court is not entirely consistent. See, for example, Eur. Ct. H.R., *Oršuš* v *Croatia*, 17 July 2008 (Application No 15766/03; case referred to the Grand Chamber on 1 December 2008) where the First Section of the Court upheld a difference in treatment founded on language competence only (non-suspect differentiating ground) and refused to examine the case from the point of view of indirect racial discrimination.

[51] See, in particular, Eur. Ct. H.R., *Hoffmann* v *Austria*, 23 June 1993 (Application No 12875/87), (36).

[52] See, in particular, Eur. Ct. H.R., *Salgueiro da Silva Mouta* v *Portugal*, 21 December 1999 (Application No 33290/96), (36).

[53] See, in particular, Eur. Ct. H.R., *Gaygusuz* v *Austria*, 16 September 1996 (Application No 17371/90), (42).

[54] See, in particular, Eur. Ct. H.R., *Inze* v *Austria*, 28 October 1987 (Application No 8695/79), (41).

[55] It is important to highlight that according to the Court, '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' (Eur. Ct. H.R., *Timichev* v *Russia*, 13 December 2005 (Application Nos 55762/00 and 55974/00), (58); Eur. Ct. H.R. (Grand Chamber), *D.H.* v *Czech Republic*, 13 November 2007 (Application No 57325/00), (176); Eur. Ct. H.R., *Sampanis* v *Greece*, 5 June 2008 (Application No 32526/05), (69)).

[56] See also the important judicial debates which followed the *Mangold* judgment regarding the existence of a general principle of Community law relating to non-discrimination founded on age. For a summary of these debates, see the conclusions of Advocate General Sharpston prior to the judgment of the ECJ, *Bartsch*, 22 May 2008, Case C-427/06, as well as the article by Bribosia, E., 'La lutte contre les discriminations dans l'Union européenne : une mosaïque de sources dessinant une approche différenciée', in *Les nouvelles lois luttant contre la discrimination,* Bayart, C., Sottiaux, S. and Van Drooghenbroeck, S. (dir.), Brussels, Brugge, La Charte, Die Keure, 2008, pp. 31–62.

[57] In the *Glor* v *Switzerland* judgment, of the 30 April 2009 (Application No 13444/04), the European Court of Human Rights abstained from classifying disability as a suspect discrimination ground, while applying a rigorous proportionality test, allowing 'Switzerland largely reduced discretionary powers' in its justification of legislation which 'may prove to be in contradiction with the need to address the problem of discrimination against disabled individuals and to promote their full participation and integration into society' (84).

[58] It appears that the Court will not consider the possibility of an individual waiving his/her right not to be subjected to racial discrimination under any circumstances 'as it would be counter to an important public interest' (*D.H. v Czech Republic* (Grand Chamber), 13 November 2007 (Application No 57325/00), (204); *Sampanis v Greece*, 5 June 2008 (Application No 32526/05) (95)), whereas in relation to religious freedom, the Court has accepted contractual derogations (see Chapter II.3).

and organisations the ethos of which is based on religion or belief, cannot lead to the violation of the principle of equal treatment founded on another ground (such as gender or sexual orientation) [59].

3.3 Some guidelines for delineating the legal reasoning process

In some cases, the legislator resolves certain conflicts in advance, but clearly, it is the judge who is very often called upon to make a decision in situations where the right to equality conflicts with another fundamental right. If the resolution of such a conflict is inevitably approached through various methods depending on the judge hearing the case (national court, Court of Justice of the European Union or European Court of Human Rights), and if there is no ideal obligatory method at this stage, we believe that there are a number of different elements that can help guide legal reasoning.

In his search for a method capable of grasping the conflicts between fundamental rights, Sébastien Van Drooghenbroeck indicates the extent to which the concept of *praktische konkordanz* (practical concordance) has been widely accepted by legal opinion in recent years: 'Derived from the German constitutional doctrine, this complex notion of "practical concordance" stresses the fact that when two fundamental rights are in conflict, neither is entitled to be sacrificed a priori at the expense of the other. The two conflicting rights owe each other reciprocal concessions: their respective complaints must be minimised for the purposes of overcoming, or at the very least, "reducing" or even "deferring" the conflict that exists between the rights' [60]. However, the status of this approach must not be overvalued. Above all, it represents a "regulatory horizon" in which the person faced with a conflict between fundamental rights is required to adopt an interpretive approach driven by imagination and inventiveness' [61]. Moreover, it is important to bear in mind that the concept of 'practical concordance', theorised by the constitutionalist Konrad Hesse, was shaped over the years by the case law of the Bundesverfassungsgericht (German Federal Constitutional Court) to deal with conflicts arising from the German Basic law in which a certain number of fundamental freedoms [62] are expressed, for historical reasons, in absolute terms [63].

Once the principle of 'practical concordance' is viewed as a 'regulatory horizon', a general course of action used to guide the judge, all that remains is to define the adjudication technique that is to be implemented in this 'horizon'. Discussions on this topic are generally held against the backdrop of the European Convention on Human Rights. In this context, some consider that the *principle of proportionality*, traditionally used to govern conflicts between a fundamental right and a public interest, also applies to conflicts between fundamental rights, provided that it is adapted to the 'regulatory horizon' of the principle of 'practical concordance', which tends to avoid sacrificing a fundamental right at the expense of another [64]. Others, meanwhile, are of the view that this test can only be applied within

59 This example is discussed in further detail in Chapter II.2.

60 Van Drooghenbroeck, s.,'Conflits entre droits fondamentaux, pondération des intérêts : fausses pistes (?) et vrais problèmes', *Les droits de la personnalité*, *op.cit*., pp. 299 ff., No 26 (our translation). For examples of how this principle is applied in the case law of the European Court of Human Rights, refer to this author, No 28–33.

61 *Ibidem*, No 27 (our translation).

62 For example, religious freedom (Article 4(1–2) of the Basic law) or freedom of artistic expression and academic freedom (Article 5 (3) of the Basic law).

63 Marauhn, T., and Ruppel, N., 'Balancing Conflicting Human Rights: Konrad Hesse's Notion of "Praktische Konkordanz" and the German Federal Constitutional Court', in Brems, E. (ed.), *Conflicts Between Fundamental Rights*, op.cit., pp. 274–276.

64 Van Drooghenbroeck, S., 'Conflits entre droits fondamentaux, pondération des intérêts: fausses pistes (?) et vrais problèmes', *Les droits de la personnalité,* op. cit., pp. 299 ff., No 35.

a framework that enables the implementation of the *priority-to-rights* principle [65]. They prefer to call on the metaphor of *balancing (or weighting) the interests at stake* while also concluding that 'Balancing […] raises more questions than it provides answers'[66]. Going into any further detail on this controversial issue will take us away from the scope of this report. Rather than an all-encompassing legal technique, which is impossible to find if one considers the point of view of national judges, we feel it is important here to tease out the safeguards and criteria which are likely to guide the judges in the fulfilment of their role. To this end, it is worth returning to and enriching the elements highlighted by the authors in order to facilitate the management of conflicts between fundamental rights in general and the assessment of their relevance when it comes to resolving conflicts between the principle of non-discrimination and another right or fundamental freedom.

Firstly, the abuse of rights concept, as it emerged from the case law of several civil legal systems in the 19th and 20th centuries, may contribute to clearing the minefield of certain conflicting rights scenarios. At the time, the aim was to strip the right of ownership of its absolute nature, in particular, in the Napoleonic Code of 1804. The objective here was, at first, to limit the exercise of this right in cases where the holder used it with the intention of harming others, and, subsequently, to limit the use of this right when the advantage procured as a result of exercising it was disproportionate or minimal in relation to the harm caused [67]. Although the abuse of rights, albeit widely adapted, was reincorporated into the European Convention on Human Rights (Article 17) and invoked on several occasions in the case law of the European Court in order to limit the exercise of freedom of expression when it issued from a racist or hate speech, it may also be useful in restricting public demonstrations, based on religious precepts, which undermine the principle of equal treatment of women or homosexuals, for example.

Secondly, Eva Brems emphasises the importance of distinguishing between the substantive and peripheral aspects of conflicting rights in order to prioritise the application of the right in which the substantive aspect is made subservient to a right in which only the peripheral aspect will be affected by the conflict [68]. This criterion necessarily leads on to evaluate the seriousness of the interference caused by the respective exercising of one right at the expense of another. Insofar as it seeks to avoid sacrificing one right at the expense of another, it also implements the principle of 'practical concordance'.

Thirdly, the addition of other rights in the conflict, due to the indirect involvement of a third party, has prompted Eva Brems to recommend granting lesser protection to the exercising of fundamental freedoms which, as a result, indirectly affects the rights of third parties [69]. The same reasoning applies when a significant general interest weighs in favour of one of the conflicting rights.

Fourthly, Eva Brems has questioned whether direct interference by a government authority (negative obligation to respect rights and freedoms) can prove more serious than the absence of such interference (positive obligation to protect rights and freedoms), so that the former is perceived in a more critical light than the latter, within the framework of a conflict between fundamental rights. In the same vein, Marjolein van den Brink has submitted that if an internal conflict occurs within the right to equality that causes the prohibition of direct discrimination to clash with the prohibition of indirect discrimination, priority must

[65] De Schutter, O., and Tulkens, F., 'Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution', in Brems, E. (ed.), *Conflicts Between Fundamental Rights*, op. cit., pp. 188–191.

[66] *Ibidem*, p. 197.

[67] See also, M. Galenkamp, 'Towards a Socialisation of Fundamental Rights', in E. Brems (ed.), *Conflicts Between Fundamental Rights*, op. cit., pp. 158–160.

[68] E. Brems, 'Introduction', in E. Brems (ed.), *Conflicts Between Fundamental Rights*, op. cit., p. 5.

[69] *Ibidem*.

be given to the prohibition of direct discrimination [70]. In light of studies showing how economic and social players adapt to anti-discriminatory provisions and the degree to which the concept of structural or indirect discrimination is essential to the implementation of the principle of equal treatment [71], we feel that it is important to add some perspective to this a priori definition of a hierarchy between direct and indirect discrimination, which is based on the classic premise that direct discrimination is more serious from a social perspective than indirect discrimination. Besides, Marjolein van den Brink was reasoning in favour of homosexual individuals in the specific context of civil servants exercising a conscientious objection in the Netherlands. She was actually justifying the settlement of the conflict between the discrimination that was suffered indirectly by these civil servants as a result of their religious beliefs, on the one hand, and the discrimination that was suffered directly by homosexuals wishing to marry on the other hand [72]. This reasoning appears very restricted insofar as the civil servant exercising a conscientious objection may have considered himself/herself a victim not of indirect discrimination founded on his/her religious beliefs, but of harassment based on the same grounds. In this case, no argument based on a hierarchy of rights would have helped the judge to settle the conflict.

Fifthly, as Judge Françoise Tulkens, Olivier De Schutter [73] and Sébastien Van Drooghenbroeck [74], we are of the opinion that the procedural approach appears to be the most fruitful approach to reducing the subjectivism inherent in the solutions aimed at settling conflicts between fundamental rights. This procedural approach covers several dimensions. Primarily, when resolving a conflict *in concreto*, it involves verifying the quality of the deliberation process implemented by the 'authority' involved (public authority, employer, education authority, legislative power, equality body, national judge, etc.) [75] in order to reconcile the conflicting rights, insofar as possible, while respecting the 'ethics of the discussion' [76]. It is then the responsibility of the judge hearing the case to evaluate the extent to which he/she represents the most appropriate *forum* for making a decision on the conflict in question. For the European Court of Human Rights or the Court of Justice of the European Union, this may mean having recourse to the State's margin of appreciation, whereas for the national judge, this may involve, while also settling the case *in casu* and following the example of comparative law as much as possible, reverting the issue back to the legislator and initiating a debate in the elected democratic assemblies. The latter approach can be particularly useful when fundamental changes need to be made to the background against which a conflict is regularly occurring.

70 VAN DEN BRINK, M., '"If there is anyone, who has an objection to this marriage …", Religious objections to conducting marriages of same-sex couples in the Netherlands', speech given during the seminar entitled *Religion in the public sphere*, University of Utrecht, 8 May 2008 and quoted by E. Brems during the *Legal seminar on the implementation of common law in relation to equal opportunities and combating discrimination*, European Commission, Human European Consultancy, Migration Policy Group and University of Utrecht, 9 October 2009. For information on civil servants with conscientious objections, see discussions in Chapter II.3.

71 See, for example, SIMON, P., *Comparative study on the collection of data to measure the extent and impact of discrimination within the United States, Canada, Australia, the United Kingdom and the Netherlands,* Report to the European Commission's Directorate-General for Employment, Social Affairs and Equal Opportunities, Fundamental rights and anti-discrimination, Luxembourg, 2004 (pp. 86–89 of the French version of the report).

72 This example is discussed in further detail in Chapter II.3.

73 De Schutter, O., and Tulkens, F., 'Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution', in Brems, E. (ed.), *Conflicts Between Fundamental Rights*, op. cit., pp. 207–213.

74 Van Drooghenbroeck, S., 'Conflits entre droits fondamentaux, pondération des intérêts: fausses pistes (?) et vrais problèmes', *Les droits de la personnalité,* op. cit., pp. 299 ff., No 61–69.

75 In this case, everything is determined by the level in question. For example, the national judge may be called on to examine the quality of the process implemented by a public authority or an employer to settle a conflict between two conflicting values. As far as the Court of Justice of the European Union or the European Court of Human Rights are concerned, they will also be interested in evaluating the quality of the procedure before the national judge, etc.

76 Habermas, J., *De l'éthique de la discussion*, translated from German by M. Hunyadi, Paris, Cerf, 1992.

Berdien | *1984*

Chapter II

Special cases of conflicts between the right to equality and other fundamental rights

1. The right to respect for private life and the principle of equal treatment

The right to respect for private life, recognised in particular in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 7 of the Charter of Fundamental Rights of the European Union and the Constitution of Member States, is one of the fundamental rights that is likely to interact with the principle of equal treatment enshrined in Directives 2000/43/EC and 2000/78/EC.

In reality, the interferences are of various types as the right to respect for private life, as interpreted by the European Court of Human Rights, is an increasingly inclusive concept[77], which has an ambiguous relationship with the prohibition of discrimination. In the words of Olivier De Schutter, 'the issue of the relationship between non-discrimination and private life is impressively complex'[78].

In particular, the complexity stems from the various complementary facets of the right to respect for private life, consisting of the preservation of a 'sphere of privacy around the individual'[79] (which covers, by extension, the 'right to a private social life' or the 'right of an individual to establish and develop relations with his/her peers'[80]), the 'right to the protection of personal data'[81], and finally, the 'right to personal autonomy'[82]. Each of these aspects of the protection of private life may interfere with the prohibition of discrimination, either by limiting the scope of application of this prohibition through the exclusion of areas relating to private and family life, or by adding safeguards to the framework applied to the processing of personal data, or by contributing to the fight against discrimination by prohibiting the disclosure of certain information relating to an individual's private life.

77 Sudre, F. (dir.), *Le droit au respect de la vie privée au sens de la Convention européenne des droits de l'homme*, Brussels, Bruylant, 2005, 336 pp. (in particular, Sudre, F., 'Rapport introductif. La "construction" par le juge européen du droit au respect de la vie privée', pp. 11–33); Rigaux, F., *La protection de la vie privée et des autres biens de la personnalité*, op. cit.

78 De Schutter, O., *Discriminations et marché du travail. Liberté et égalité dans les rapports d'emploi*, Brussels, P.I.E. Peter Lang, 2001, pp. 33 ff (our translation).

79 It is the 'right to the intimacy of private life', which is the main aspect covered by the right to private life, such as it was originally recognised in the European Convention on Human Rights (Sudre, F., 'Rapport introductif. La "construction" par le juge européen du droit au respect de la vie privée', op. cit., p. 13).

80 Eur. Ct. H.R., *Niemietz* v *Germany*, 16 December 1992 (Application No 13710/88), discussed in Sudre, F., Marguenaud, J.-P., Andriantsimbazovina, J., Gouttenoire, A., and Levinet, M., *Les grands arrêts de la Cour européenne des droits de l'homme*, Paris, PUF, fourth edition, pp. 463–469.

81 This facet of the right to respect for private life was recognised as having been derived from Article 8 ECHR, by the European Court of Human Rights on the occasion of its *Rotaru* v *Romania* judgment (Grand Chamber), 4 May 2000 (Application No 28341/95)). For more information, see De Schutter, O., 'Vie privée et protection de l'individu vis-à-vis des traitements de données à caractère personnel', *Revue trimestrielle des droits de l'homme*, 2001, pp. 137–183.

82 This notion is presented, as of the judgment delivered by the European Court of Human Rights in the *Pretty* v *United Kingdom* case on 29 April 2002 (Application No 2346/02), in Sudre, F., Marguenaud, J.-P., Andriantsimbazovina, J., Gouttenoire, A., and Levinet, M., *Les grands arrêts de la Cour européenne des droits de l'homme*, op. cit., pp. 452–463.

1.1. Private life as the preservation of a 'sphere of privacy around the individual' and 'social privacy'

The first scenario in which the requirements associated with the right to respect for private and family life are likely to clash with the prohibition of discrimination, such as it results from the law of the European Union, concerns the application of this prohibition to private matters, whether this concerns domestic employment or work in a family business or the provision of goods and services in a private context. These scenarios, all of which involve an interference with private life, may be applied to numerous practical situations (*external inter-rights conflicts*). For example, can a family looking for a home help assistant to care for an elderly woman refuse to offer this position to a man? In a classified advertisement relating to the hiring of a 'nanny', is it possible to request that the nanny be of the same ethnic origin or share the same religious beliefs as those of the family and children that he/she is to take care of? Can an employer in a family business invoke his/her right to respect for private life when recruiting close associates, without respecting the stipulations of the principle of equal treatment enshrined in the law of the European Union?

Finding answers to these questions initially requires an examination of the potential limits of the material scope of application of the prohibition of discrimination imposed by the European law, based on the right to respect for private and family life.

This issue was at the core of the proceedings brought against the United Kingdom for failing to implement Directive 76/207/EEC relating to equal treatment between men and women in employment within the prescribed time frame[83]. One of the Commission's objections concerned the exclusion of jobs in private households and in businesses with a staff of less than five employees from the scope of application of the Sex Discrimination Act of 1975 (Section 6(3)). The United Kingdom claimed that this exception fell under the concept of genuine occupational requirement as provided for in Article 2(2) of Directive 76/207/EEC[84]. On this occasion, the Court of Justice acknowledged that the exception relating to employment in a private household 'is intended to reconcile the principle of equality of treatment with the principle of respect for private life, which is also fundamental [and that] reconciliation of that kind is one of the factors which must be taken into consideration in determining the scope of the exception provided for in Article 2(2) of the Directive'[85]. However, the Court ruled that the wording of the British exception was too loose, on the grounds that gender does not constitute a determining requirement for all jobs in private households, by reason of the nature of the activities involved or the context in which they are carried out[86]. This is also the case for the exception relating to small undertakings with a staff of less than five employees as it has not been demonstrated that the gender of the worker constitutes a determining factor in all undertakings of this size[87].

Several lessons can be drawn from this decision. Firstly, reliance on the right to respect for private and family life does not suffice in excluding domestic employment from the material scope of the directive. The Court of Justice then indicated that considerations relating to private life may, nevertheless, be introduced by means of the specific vehicle of the exception provided for when gender constitutes a determining condition for a professional activity, given its nature or the context in which it is carried

83 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ L 39, 14.2.1976, pp. 40–42). ECJ, *Commission* v *United Kingdom*, 8 November 1983, Case 165/82.

84 *Ibidem*, (12).

85 *Ibidem*, (13).

86 *Ibidem*, (14).

87 *Ibidem*, (15).

out. Finally, the Court rejected the exception, as it had been worded in English law, on the grounds that it proved too broad and, as a result, disproportionate in relation to the restricted interpretation that should apply to this exception.

On examination, Directives 2000/43/EC and 2000/78/EC do not, in principle, exclude domestic employment from their material scope of application as discrimination is prohibited in 'conditions for access to employment, to self-employment and to occupation […], whatever the branch of activity and at all levels of the professional hierarchy'[88]. Moreover, Directive 2000/43/EC has exercised a strong influence on United Kingdom law in this respect. Originally, the Race Relations Act of 1976 provided for the same type of exception for the prevention of discrimination concerning small undertakings with a maximum of five employees and employment in private households. These exceptions, which could have been justified based on a certain conception of the right to respect for private life, were discarded to meet the requirements of Directive 2000/43/EC. A more limited exception was retained according to which race may constitute a genuine occupational requirement when, for the employer, it involves providing members of this same racial group with services that promote their well-being and which can be better provided by an individual from this group[89]. This then leads to the possibility of escaping the prohibition of any form of discrimination founded directly on race or ethnic origin when this can be considered a genuine and determining occupational requirement, in view of their nature or the context in which they are carried out, when the objective is legitimate and the requirement is proportionate[90]. The fact of taking into account the private or domestic nature of the job is one of the elements that moulds the context in which the job is carried out without this giving rise to its outright exclusion from the scope of application of the directive.

From this point of view, the compliance of the scope of application of the Employment Equality Act 1998–2007 adopted by Ireland with Directives 2000/43/EC and 2000/78/EC is questionable. It expressly provides that the prohibition of discrimination does not apply to the provision of personal services in a private home. The term 'personal service' is further defined and means services 'provided in a person's home, includes but is not limited to services that are in the nature of services in *loco parentis* or involve caring for those residing in the home'[91].

For the prohibition of discrimination in the provision of access to goods and services and the supply of goods and services, Directive 2000/43/EC, the first to have covered this material scope, expressly states that it only relates to goods and services that are 'available to the public'[92]. Most likely influenced by important debates held in Germany when implementing Directive 2000/43/EC in relation to the balancing of the prohibition of discrimination against the right to respect for private life[93], this precision

88 Articles 3(1)(a) of Directives 2000/43/EC and 2000/78/EC.

89 Section 5(2)(d) of the *Race Relations Act* of 1976. See Bamforth, N., Malik, M., and O'Cinneide, C., *Discrimination Law: Theory and Context*, op. cit., p. 857; Bell, M., 'Direct Discrimination', in Schieck, D., Waddington, L., and Bell, M., *Non-Discrimination Law: Cases, Materials and Texts on National, Supranational and International*, Oxford and Portland, Oregon, Hart publishing, 2007, p. 286.

90 Article 4 of Directive 2000/43/EC, for more information, see Chapter II.2.1.

91 Section 2(1) of the *Employment Equality Act* 1998–2007, O'Farrell, O., European Network of legal experts in the non-discrimination field, *Ireland Report on Measures to Combat Discrimination, Directives 2000/43/EC and 2000/78/EC*, 2008, Section 3.2.1.

92 This precision is reinforced by recital 4 of the preamble to Directive 2000/43/EC which emphasises that 'It is also important, in the context of the access to and provision of goods and services, to respect the protection of private and family life and transactions carried out in this context'.

93 Bell, M., 'Direct Discrimination', op. cit., p. 292.

was reinforced in Directive 2004/113/EC [94]. This extends the scope of the prohibition of discrimination founded on gender 'to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and *which are offered outside the area of private and family life* and the transactions carried out in this context' (Article 3) [95]. The draft directive of 2 July 2008 [96], currently the subject of deliberations, also provides, in its explanatory memorandum, that 'In terms of access to goods and services, only professional or commercial activities are covered. In other words, transactions between private individuals acting in a private capacity will not be covered: letting a room in a private house does not need to be treated in the same way as letting rooms in a hotel' [97].

These different precisions relating to the express exclusion of transactions between private individuals from the scope of application of the prohibition of discrimination in the supply of goods and services does not shed much light on a situation that recurs as a frequent issue in the employment domain. Does this mean *a contrario* that without such an express stipulation, domestic employment is not excluded from the scope of application of the European directives per se, unless the exception relating to genuine occupational requirements can be applied? On the contrary, should we deduce that employment, in the same way as transactions between private individuals, automatically falls outside the scope of application of the prohibition of discrimination based on the right to respect for private life? The preparatory work for Directives 2000/43/EC and 2000/78/EC does not provide any clarification in this respect.

The explanatory memorandum to Protocol No 12 to the ECHR appears to favour the second interpretation. In order to define the positive obligations that may be imposed on the Member States in terms of the prohibition of discrimination in the field of relationships between private individuals, the memorandum specifies that they would concern 'at the most, relations in the public sphere normally regulated by law, for which the State has a certain responsibility (for example, arbitrary denial of access to work, access to restaurants, or to services which private persons may make available to the public such as medical care or utilities such as water and electricity, etc.)'. And adding that 'It is understood that purely private matters would not be affected. Regulation of such matters would also be likely to interfere with the individual's right to respect for his private and family life, his home and his correspondence, as guaranteed by Article 8 of the Convention' [98]. This option was also adopted by the German legislator, in order to reconcile non-discrimination with the right for private life. In this line, Article 19(5) of the German Non-Discrimination Act adopted in 2006 in order to implement the European directives provides that 'The regulations of this chapter do not apply to obligations under civil law that are substantiated by a specific close or trust relationship between the parties or their relatives […]' [99]. A clarifying interpretation from the Court of Justice of the European Union would certainly be welcomed here.

94 Council Directive 2004/113/EC of 13 December 2004 regarding the implementation of the principle of equal treatment between men and women in the access to and supply of goods and services (OJ L 373, 21.12.2004, pp. 37–43).

95 Our emphasis.

96 Proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, 2 July 2008, COM(2008) 426 final.

97 Article 3(1)(d) relating to 'access to and supply of goods and other services which are available to the public, including housing': 'Subparagraph (d) shall apply to individuals only insofar as they are performing a professional or commercial activity'.

98 Memorandum to Protocol No 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 2000, ETS No 177, (28).

99 Bell, M., 'Direct Discrimination', op. cit., p. 292.


Gabriël | *1989*
Marloes | *1993*

1.2. Private life as a right to the protection of personal data

The right to the protection of personal data constitutes the second facet of the right to respect for private life that can interact with the prohibition of discrimination. This right was enshrined, initially, in Convention No 108 of the Council of Europe for the protection of individuals with regard to the automatic processing of personal data of 28 January 1981 [100] and, later, within the European Union, in Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data [101]. The European Court of Human Rights subsequently recognised this right as being derived from the right to respect for private life (Article 8 of the ECHR) [102], and this right to the protection of personal data was finally expressly enshrined in Article 8 of the Charter of Fundamental Rights of the European Union. There are numerous examples of potential conflicts. Can an employer who wishes to adopt a proactive attitude in order to avoid being accused of discrimination against non-native individuals compile company statistics which include ethnic origin, without violating the right to respect for private life of his/her workers? Moreover, does the implementation of positive action in favour of individuals from the same ethnic origin or specific religion not imply, by definition, the collection and processing of data relating to the relevant characteristics of the individuals for whom it is intended? How can we reconcile these requirements with the protection of personal data? Finally, is it possible for an individual to refuse to disclose specific medical data to an employer, or undergo a pre-recruitment medical examination by virtue of his/her right to the respect for private life? In certain cases, does this not run the risk of an individual being forced to disclose his/her disability so that it can be taken into account by the employer in the event that reasonable accommodation must be provided in terms of working hours or in terms of performing the duties of the job being solicited?

Based on the well-acknowledged fact that in order to combat discrimination, it must be possible to compare individual situations by having access to certain personal data, it is immediately apparent that tensions will inevitably occur between this aspect of the right to respect to private life and the fight against discrimination [103]. This type of interaction was able to go unnoticed in the early decades of European integration on the basis that only discrimination founded on nationality or gender was prohibited by European Community law. However, although data relating to the gender or nationality of individuals certainly constitutes personal data, in that it concerns an identified or identifiable person, it is not considered 'sensitive' data under the terms of Directive 95/46/EC and the Council of Europe Convention No 108. The same cannot be said for the majority of the grounds of discrimination set out in Article 13 EC (subsequently Article 19 TFEU) by the Treaty of Amsterdam, which, as 'sensitive data', benefit from a reinforced protection system implemented by Directive 95/46/EC. This system applies to 'personal data revealing *racial or ethnic origin*, political opinions, *religious or philosophical beliefs*, trade

[100] Convention No 108 came into force on 1 October 1985. Article 2 of this Convention defines personal data as 'any information relating to an identified or identifiable natural person' (Eur. Ct. H.R. (Grand Chamber), *Amann* v *Switzerland*, 16 February 2000 (Application No 27798/95), (65)).

[101] OJ L 281, 23.1.1995, p. 31. It is important to bear in mind the limit of the material scope of application of Directive 95/46/EC, which is only aimed at the collection and processing of data in the domain of EU law, excluding, in particular, the processing of data: (i) concerning 'public security, defence, State security (including the economic well-being of the State when the activities relate to State security matters) and the activities of the State in areas of criminal law'; and (ii) carried out 'by a natural person in the course of a purely personal or household activity' (Article 3(2) of the Directive). For a detailed description of the system used for the protection of sensitive data in the European Union, see Cammilleri-Subrenat, A., and Levallois-Barth, C., *Sensitive Data Protection in the European Union*, Brussels, Bruylant, 2007, 250 pp.

[102] Eur. Ct. H.R., *Rotaru* v *Romania*, 4 May 2000 (Application No 28341/95) (43) ('public information can fall within the scope of private life where it is systematically collected and stored in files held by the authorities').

[103] Ringelheim, J., and De Schutter, O., *The Processing of Racial and Ethnic Data in Anti-Discrimination Policies: Reconciling the Promotion of Equality with Privacy Rights*, Brussels, Bruylant, 2009, p. 7 (in press).

union membership, and the processing of *data concerning health or sex life*' (Article 8(1)) [104]. Given the clear overlapping between the fight against discrimination based on certain grounds, such as race, religion or sexual orientation, and the protection of personal data, the complete lack of guidance provided by the 2000 Directives and the negotiations that resulted in the interaction between this new arsenal of legislation and the treatment of personal data is quite surprising [105]. On examination, the tensions between the requirements of non-discrimination founded on certain grounds and the protection of personal data could mostly be superficial, given their complementary as opposed to conflictory relationship.

1.2.1. Protection of personal data, use of statistics and positive action

An effective approach to combating discrimination often involves the use of statistics in the event of a prima facie case of discrimination or the implementation of positive action in favour of disadvantaged groups. The use of these statistics (for example, in cases of discrimination founded on ethnic origin, religion or belief) may collide with the requirements associated with private life by virtue of the protection of personal data [106]. Certainly, the Directives of 2000 did not make the use of statistics mandatory when it comes to providing evidence of discrimination, but their use may prove inevitable if the Member States consider, in certain circumstances, that indirect discrimination has occurred as a result of an apparently neutral measure or practice having a disproportionate impact on individuals from a particular group that has been protected against discrimination [107]. With regard to the adoption of positive action devices with a view to ensuring full equality in practice, Directives 2000/43/EC and 2000/78/EC allowed the Member States a wide margin of appreciation. Member States are free to 'maintain or adopt specific measures to prevent or compensate for disadvantages linked [to any of the grounds of prohibited discriminations]'[108]. If a Member State opts to grant preferential treatment for the benefit of certain individuals based on their ethnic origin, for example, the data required to link up the individuals to the relevant categories must be collected and processed in accordance with the requirements associated with the right to private life.

Many authors have spoken about the European paradox in which the effective fight against discrimination conflicts with the production of statistics relating to sensitive personal data; a paradox which must be, and is possible to, overcome [109]. In reality, hardly any contradiction or conflict exists between the requirements associated with the protection of personal data, on the one hand, and the

[104] Our emphasis. This does not include the age or gender of an individual, which are not considered 'sensitive' data protected by virtue of the right to protection for private life. However, according to O. De Schutter, it is useful to note that gender and age are covered by the notion of 'private life', identified by the case law of the European Court of Human Rights as covering all forms of processing of personal data, namely data relating to an identified or identifiable individual. A violation of the right to respect for private life occurs if the processing of this data does not follow a legitimate objective, if it takes places outside a sufficiently defined regulatory framework or if it interferes with the private life in a way that is disproportionate given the legitimate objective pursued (*Discriminations et marché du travail*, op. cit., p. 34).

[105] For more information on this interaction and the clarifications that could be applied to it, see De Schutter, O., 'Three Models of Equality and European Anti-Discrimination Law', *Northern Ireland Legal Quarterly*, 2006, Vol. 57, No 1, pp. 22–33.

[106] *Ibidem*; De Vos, M., *Beyond Formal Equality: Positive Action under Directive 2000/43/EC and Directive 2000/78/EC,* European Commission, 2007; Dubout, E., 'Vers une protection de l'égalité collective par la Cour européenne des droits de l'homme', *Revue trimestrielle des droits de l'homme*, 2006, pp. 851–884.

[107] De Schutter, O., 'Three Models of Equality and European Anti-Discrimination Law', op. cit., p. 22.

[108] Article 5 of Directive 2000/43/EC; Article 7 of Directive 2000/78/EC.

[109] Simon, P., *Comparative study on the collection of data*, op. cit. (p. 86 of the French version of the report).

processing of data which is required by proactive policies aimed at combating discrimination on the other hand [110].

Firstly, the use of statistics in order to evaluate the impact of public policies, legislation or private practices on certain groups protected against discrimination is entirely possible, with certain safeguards, by virtue of the requirements associated with the protection of personal data in Europe. From this point of view, it is important to stress out that personal data is defined as 'any information relating to an identified or identifiable natural person'. This means that once data that has been collected for statistical purposes is defined as anonymous or is 'anonymised', it no longer falls under the scope of protection of Directive 95/46/EC or Convention No 108. If the data relates to identified or identifiable individuals, Directive 95/46/EC provides, on condition that the data was collected initially for 'specified, explicit and legitimate purposes', that 'further processing of [this] data for historical, statistical or scientific purposes shall not be considered as incompatible [with the initial objective], provided that Member States provide appropriate safeguards' [111]. In relation to sensitive data, the processing of data for historical, statistical or scientific purposes must, in addition, be carried out with the consent of the individual involved or on the grounds of a 'significant public interest' [112]. This category includes the safeguarding and promotion of equal treatment, the facilitation of scientific research and the compilation of government statistics. In the United Kingdom, it was on the grounds of a 'significant public interest' that workplace monitoring was recognised in United Kingdom's data protection legislation as a legitimate form of processing sensitive data, in particular by means of 'ethnic monitoring' [113]. Moreover, the processing of data must respect the principle of proportionality, in particular, by only relating to data that is adequate, relevant and not excessive in relation to the purposes for which it is processed [114]. In practical terms, as outlined by Timo Makkonen, the respect to proportionality involves prioritising the collection of secondary data over primary data, anonymous surveys, sample surveys rather than large-scale surveys, and voluntary surveys rather than obligatory surveys [115]. Furthermore, in these different scenarios, we need to take into account the principles listed in the Recommendation No R(97)18 of the Committee of Ministers of the Council of Europe concerning the protection of personal data collected and processed for statistical purposes [116].

By the same token, the requirements associated with the protection of data do not, in principle, prevent alleged victims of discrimination from presenting statistical data with the objective of shifting the burden of proof in the courts [117]. In Member States where this method of proof is permitted, it very often results in acknowledging that employers are able to monitor the impact of their decisions on the composition of their workforce. Again, this type of monitoring is not excluded under Directive 95/46/EC. Certain exceptions to the prohibition of treatment of personal sensitive data could be invoked, when this processing of data is necessary, in the field of employment, in order to carry out obligations under labour law or, including outside the sphere of employment, the defence of legal claims, for example,

[110] De Schutter, O., 'Three Models of Equality and European Anti-Discrimination Law', op. cit., p. 25; Ringelheim, J., and De Schutter, O., *The Processing of Racial and Ethnic Data in Anti-Discrimination Policies,* op. cit.; Makkonen, T., *Measuring Discrimination: Data Collection and EU Equality Law*, European Commission, 2006, pp. 49–82.

[111] Article 6(1)(b) of Directive 95/46/EC.

[112] This is derived as a result of combining Article 6 and Article 8 of Directive 95/46/EC.

[113] Makkonen, T., *Measuring Discrimination,* op. cit., p. 61.

[114] For an organised and detailed description of these safeguards, see Makkonen, T., *Measuring Discrimination*, op. cit., pp. 55–57.

[115] *Ibidem*, p. 62.

[116] Adopted by the Committee of Ministers of the 30 September 1997, at the 602nd meeting of the representatives of the Ministers. For a summary of these principles, see De Schutter, O., 'Three Models of Equality and European Anti-Discrimination Law', op. cit., pp. 27–28.

[117] De Schutter, O., 'Three Models of Equality and European Anti-Discrimination Law', op. cit., pp. 28–29.

in order to anticipate complaints made on the grounds of discrimination in relation to recruitment or promotion [118]. Finally, when collecting personal data for the purpose of granting certain advantages to minority groups or for the purpose of offering these groups specific treatment, within the framework of positive action, the safeguards inherent in the protection of personal data do not give rise to any insurmountable obstacle. In this scenario, it is principally the exception which enables the processing of sensitive data in return for the full, informed, explicit and specific consent of the individual in question that must be invoked [119].

The recent controversy in the Netherlands, regarding the creation of a database containing the ethnic origin of certain youths of West Indian or Caribbean origin who are considered 'at risk', is an indication of the delicate balance that needs to be struck between the exceptions associated with the prohibition of treatment of sensitive data and the risk of disputes based on discrimination [120]. While the Dutch legislator explicitly allowed for a space within the data protection Act for the processing of sensitive data, related *in casu* to ethnic origin, for the purposes of carrying out positive action aimed at combating the discrimination that is levelled against these groups, the abuse of these exceptions can lead to discrimination founded on race or ethnic origin. Although the right to respect for private life and the fight against discrimination could a priori appear as being in conflict, it is in this case by strictly interpreting the requirements of the right to respect for private life that errors can be avoided.

1.2.2. Protection of personal data, people with disabilities and reasonable accommodation

The prohibition of discrimination founded on disability has a specific relationship with the right to protection of personal data. In the field of employment, it is generally ideal, in order to prevent discrimination founded on disability, that such disability, if not visible, is not disclosed to the employer who, moreover, usually ensures that a medical examination is carried out by an occupational health officer bound by an oath of confidentiality, in respect to the employer also, in order to evaluate the employee's ability to carry out the job [121]. In this first scenario, the requirements associated with the protection of personal data do not in any way conflict with the requirements associated with combating discrimination. On the contrary, they make it more effective.

However, a person with a disability may, in certain situations, be required to give up his/her 'right to privacy' in respect to sensitive data, which involves his/her state of health or his/her disability [122].

[118] Article 8(2)(b) and (e) of Directive 95/46/EC.

[119] Article 8(2)(a) of Directive 95/46/EC.

[120] For details on this controversial issue, see Justice initiative, *Legal Opinion in the case of Reference Index of Antilleans* '*verwijsindex Antillianen*', March 2008 (http://www.yudikorsou.com/download/OSJI%20VIA%20Legal%20Opinion.pdf). See also, Groenendijk, K., 'Noot onder ABRS 3 September 2008 (VIA)', in Van Dijk, T.E., et al. (eds), *Uitsprakenbundel Wet bescherming persoonsgegevens*, The Hague, Sdu, 2009, pp. 407–415; Holmaat, R., European Network of legal experts in the non-discrimination field, *Netherlands Report on Measures to Combat Discrimination. Directives 2000/43/EC and 2000/78/EC*, 2008, p. 12; Ringelheim, J., and De Schutter, O., *The Processing of Racial and Ethnic Data in Anti-Discrimination Policies,* op. cit., pp. 49–50.

[121] See also O. De Schutter's detailed study, *Pre-Employment Inquiries and Medical Examinations as Barriers to the Employment of Persons with Disabilities: Reconciling the Principle of Equal Treatment and Health and Safety Regulations under European Union Law*, European Commission, 2004 (http://europa.eu.int/comm/employment_social/fundamental_rights/policy/aneval/mon_en.htm).

[122] On the protection of health-related data under Article 8 ECHR, see Eur. Ct. H.R., *I.* v *Finland*, 17, July 2008 (Application No 20511/03), (38).

This is usually the case in which an individual is capable of performing the job in return for reasonable accommodation of his/her working times or working environment, where this does not place a disproportionate burden on the employer, and which the occupational health officer can recommend based on employee's medical examination. At this point, we should perhaps point out the employer's obligation to provide persons with disabilities with 'reasonable accommodation', as expressly referenced in Article 5 of Directive 2000/78/EC. This provision stipulates that 'employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer'. In order for the employer to fulfil such an obligation, the employee with a disability must inevitably disclose this disability to his/her employer by waiving his/her right to respect for private life (*internal inter-rights conflict*).

Olivier De Schutter provides an excellent summary of the tensions which tie together the protection of private life and the principle of equality in this context: 'The right to respect for private life enables the worker to oppose the disclosure of information relating to his/her state of health, when this disclosure is not strictly required for the evaluation of his/her abilities to perform the job in question; if he/she wishes to be able to carry out the job in satisfactory conditions, he/she must therefore disclose his/her disability, including where a disability, if invisible, could have remained confidential'[123]. The logic behind the protection of private life which allows the elimination of distinctive characteristics or differences is hardly adequate to ensuring the achievement of substantive equality, which involves handling different situations in different ways, and in so doing, disclosing these same differences.

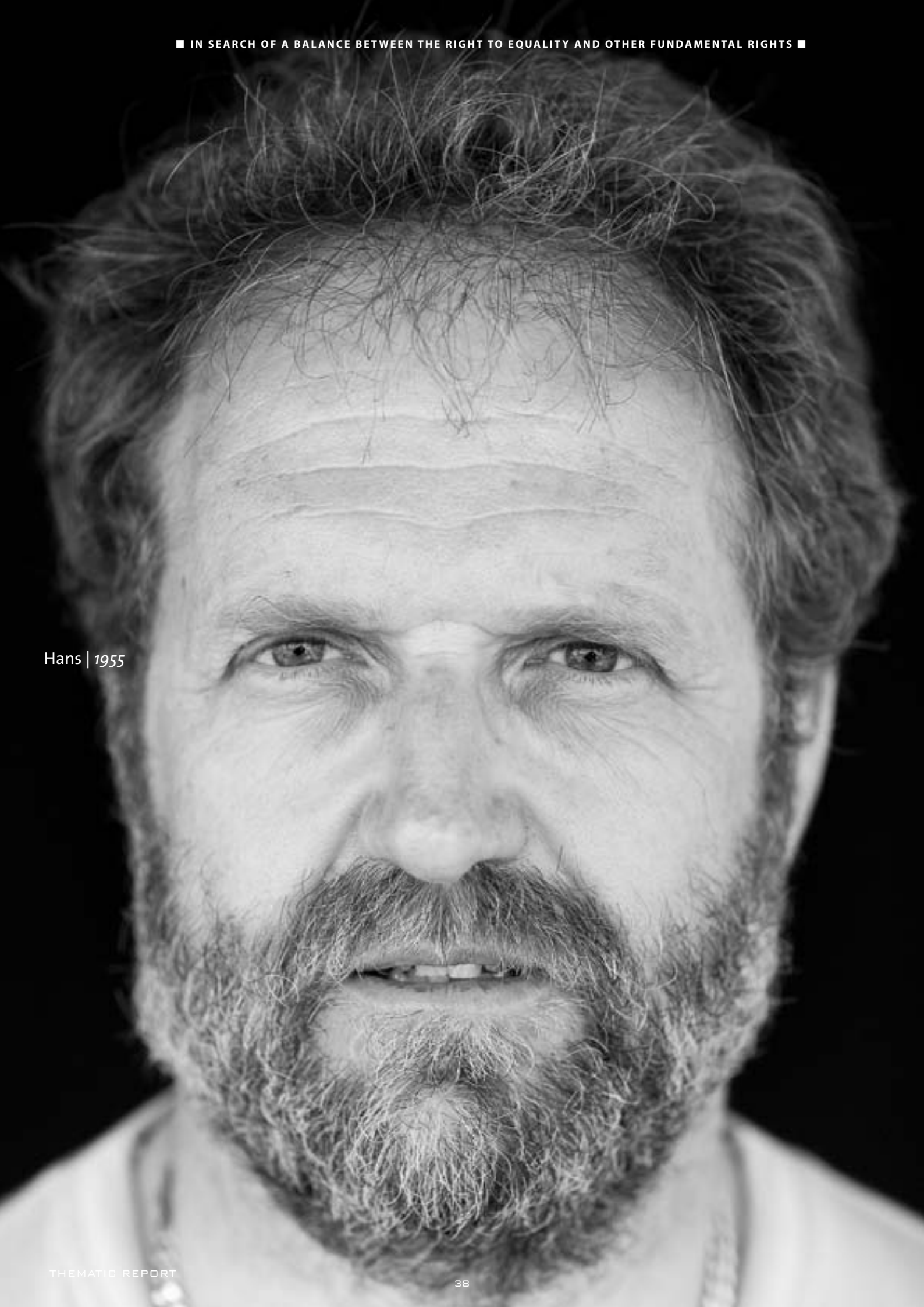
1.3. Private life as the right to personal autonomy

As a result of the development of the International Law of Human Rights, the right to respect for private life must also be understood as the right to individual self-determination or personal autonomy[124]. In this sense, 'Privacy […] may be seen as an anti-totalitarian clause, ensuring that individuals will freely determine which lives they will pursue, how they will develop their personality and identity, and even, insofar as reasonably practicable, how they will be perceived by others'[125]. The right to non-discrimination aims, in principle, to hold as unlawful certain grounds of differentiation founded on irrelevant criteria such as race or ethnic origin, religion or belief, age, disability or sexual orientation, to quote just those grounds of discrimination contained in Directives 2000/43/EC and 2000/78/EC. When the objective consists of achieving substantive equality, by means of methods such as positive action or statistics aimed at highlighting differences, the focus is shifted from the individual to the group, thereby opening up the delicate question of how to categorise the individuals within these groups. Naturally, not all prohibited grounds of discrimination are not on the same footing. Although it is hard to imagine objecting to the affiliation of an individual with the male or female gender or a specific age range,

[123] De Schutter, O., *Discriminations et marché du travail,* op. cit., pp. 38–42 (our translation).

[124] See, in particular, Eur. Ct. H.R., *Tysac* v *Poland*, 20 March 2007 (Application No 5410/03), (107): 'the concept of "private life" is a broad term, encompassing, inter alia, aspects of an individual's physical and social identity including the *right to personal autonomy*, personal development and to establish and develop relationships with other human beings and the outside world' (our emphasis).

[125] Ringelheim, J., and De Schutter, O., *The Processing of Racial and Ethnic Data in Anti-Discrimination Policies,* op. cit., p. 53.



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on the basis of the right to self-determination, reconciling the right to personal autonomy with the classification of an individual in an ethnic or racial group is a more delicate task [126].

1.3.1. The right to personal autonomy and ethnic statistics

The question of so-called ethnic categories and the construction of such categories, a much discussed topic among experts, is the subject of heated controversy [127]. Rather than adding a new contribution to this significant debate, the aim here is to place this issue in the context of balancing the principle of equality with other fundamental rights. If a State wishes to collect data on the ethnicity or race of its population, or certain sections thereof, for the purpose of developing anti-discriminatory policies, it not only needs to define the categories into which individuals will be divided [128], it also needs to define the criteria by which individuals will be included in a specific category. It is within the latter step that we find the potential tensions between the categorisation of individuals for the purpose of combating discrimination and the right to personal autonomy, as part of the right to respect for private life (*internal or external inter-rights conflict*, depending on the case). In terms of statistics, a distinction is generally made between four methods [129]: (i) self-identification; (ii) identification by a third party based on the observation of visible characteristics; (iii) acknowledgement by the group; (iv) the use of objective criteria for classification based on a combination of indirect variables such as nationality, country of birth of one's parents or grandparents or language [130].

The self-identification method is the most common because it has many advantages, particularly that of being more respectful of the right to respect for private life consisting of the right to personal autonomy and the protection of sensitive data [131]. The principle of self-identification is encouraged in international human rights law [132]. Thus, according to the Committee on the Elimination of Racial Discrimination in

126 Other prohibited discrimination grounds, such as religion, belief, disability or sexual orientation, are also likely to raise question relating to the right to self-determination (concerning classifications for statistical purposes, see, Simon, P., *Comparative study on the collection of data*, op. cit. (pp. 71–84 of the French version of the report); Makkonen, T., *Measuring Discrimination*, op. cit., pp. 79–80). However, it is the issue of 'ethno-racial' categories that is most symbolic of the tension that can arise between the requirements associated with combating discrimination, on the one hand, and the requirements associated with the right to respect for private life in terms of the right to personal autonomy on the other hand.

127 See, in particular, Simon, P., '*Ethnic' statistics and data protection in the Council of Europe countries — Study Report*, Strasbourg, European Commission against Racism and Intolerance (ECRI), 2007; Ringelheim, J., and De Schutter, O., *Ethnic Monitoring: The Processing of Racial and Ethnic Data in Anti-discrimination Policies*, op. cit., pp. 53–82; Simon, P., *Comparative study on the collection of data,* op. cit. (pp. 51–70 of the French version of the report).

128 As race and ethnicity are social constructs, it is clearly impossible to identify a single model of categories, which, by definition, will vary and are determined by the history of the country, by the types of group subject to discrimination and by the specific sensitivities of the society concerned. See Bulmer, M., and Solomos, J., 'Introduction: Re-thinking Ethnic and Racial Studies', *Ethnic and Racial Studies*, 1998, Vol. 21, No 5, p. 822; De Schutter, O., and Ringelheim, J., *Ethnic monitoring: The Processing of Racial and Ethnic Data in Anti-discrimination Policies*, op. cit., pp. 53–58 and cited references.

129 Simon, P., *Comparative study on the collection of data*, op. cit. (pp. 36 ff of the French version of the report).

130 The latter method is particularly favoured in the Netherlands within the framework of policies combating discrimination (see Ringelheim, J., and De Schutter, O., *Ethnic Monitoring: The Processing of Racial and Ethnic Data in Anti-discrimination Policies*, op. cit., pp. 68–73). See Chapter II.1.2 regarding the delicate interaction between use of this method and the right to respect for private life in terms of the protection of personal data.

131 It is noteworthy that in the United States, the extension of *affirmative action* to religious groups, which took place in the early 1970s, was abandoned due to the inability to acknowledge religion other than by self-declaration and it was considered that asking employees to declare their religious affiliation was incompatible with due respect to their private life (Simon, P., *Comparative study on the collection of data*, op. cit. (p. 38 of the French version of the report)).

132 Makkonen, T., *Measuring Discrimination,* op. cit., pp. 77–78.

its General Recommendation VIII, the identification of individuals as belonging to a particular ethnic or racial group or groups 'shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned'[133]. This also follows from Article 3(1) of the framework convention for the protection of national minorities, which states that 'Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated treated as such'. This provision does not in any way establish a right to arbitrarily choose the minority group to which one wishes to belong, instead it allows individuals, associated with a minority based on objective criteria, the choice of disclosing their minority status and to be treated or not treated as belonging to that minority[134]. Therefore, a refusal to answer census questions on ethnicity cannot be sanctioned[135].

While self-identification is supported by international human rights law, the latter does not provide any basis for determining the cases in which the use of other methods, such as identification by third parties, would nevertheless be allowed or even recommended, nor does it provide any basis for addressing any issues that result from relying solely on self-identification[136]. As a matter of fact, it is not without methodological difficulties. Thus, for example, it is important to define suitable categories, otherwise the risk is that some individuals will not classified into any category, will have difficulty choosing, or will simply refuse to identify with certain categories because of the stigma attached to these, as in the case of Roma, for example. The addition of a declaration of multiple ethnicity in censuses, as in the case of multiracial Americans in the United States, or the provision of an 'other' category for identities not included in the classification, will encourage the respect of self-determination. Finally, in the context of affirmative action, the system of self-identification can only function if people do not 'cheat' in terms of their race or ethnicity. Although this condition is fulfilled in most cases, the risk of abuse does nevertheless exist, as evidenced by the *Malone* case in the United States. In this case, the two Malone brothers, of white skin and Italian descent, had declared themselves 'black' on a recruitment form for the Boston Fire Department. Under these false pretences, they could have been hired due to racial quotas reserved for Blacks, while as Caucasians, their score in the examination would have excluded them from recruitment. Their fraud was uncovered and the case brought before Suffolk County Court in the State of Massachusetts, which nullified their contract of employment[137]. The Court found itself faced with the delicate issue of these two individuals' allegedly fraudulent affiliation with a racial category, even though no objective definition of race is, or can be, justified in law. To challenge the Malones' claim, the Court used three additional methods of identifying the racial category of an individual: (i) visual observation of their physical appearance; (ii) documentation indicating their origin, such as a birth certificate; (iii) their racial perception in their social environment and that of their families[138]. This example shows that the

[133] As noted by T. Makkonen in his aforementioned study, 'the principle of self-identification has also been endorsed by ECRI and the Durban Declaration and Plan of Action, and has been embraced by some national jurisdictions' (*Measuring Discrimination*, op. cit., p. 77).

[134] See Advisory Committee on the Framework Convention for the Protection of National Minorities, 'Opinion on Cyprus", 6 April 2001, ACFC/OP/1(2002)004, (18); see also 'Opinion on Azerbaijan', 22 May 2003, ACFC/OP/1(2004)001, (22).

[135] Advisory Committee on the Framework Convention for the Protection of National Minorities, 'Opinion on Poland', 27 November 2003, ACFC/INF/OP/1(2004)005 (24).

[136] Makkonen, T., *Measuring Discrimination,* op. cit., p. 77.

[137] *Malone* v *Harley*, No 88–339 (Sup. Jud. Ct. Suffolk County), Massachussets, 25 July 1989.

[138] Simon, P., *Comparative study on the collection of data,* op. cit. (p. 39, footnote on page 14 of the French version of the report).

method of self-identification, although seemingly the most respectful of the right to respect for private life, does present certain drawbacks and limitations. It must therefore be applied with caution [139].

1.3.2. Right to personal autonomy and private life in the sense of life outside work

In the field of employment, the right to respect for private life, like the right to personal autonomy, protects certain choices made by the individual [140]. When explored from this angle, private life does not clash with public life but with working life. In this context, respect for private life means that, provided they are not relevant to the decision being taken in the workplace, certain facts, even if known, or even if the individual never wanted to preserve confidentiality, cannot constitute a source of further disadvantage for that individual [141]. By prohibiting discrimination on certain grounds which relate to the choice of the individual (religion and belief or sexual orientation), Directive 2000/78/EC ensures that the sanctioning of behaviour that results from these choices and which does not affect the performance of duties is prohibited in the context of employment. Thus, an employee in a well-known business could not be dismissed on the grounds that he participated in the Gay Pride parade and, at that time, displayed his homosexual orientation openly. A candidate for a job in a large department store could not, a priori, be denied the job simply because she displays her Muslim beliefs by wearing a veil. In both examples, the prohibition of discrimination contained in Directive 2000/78/EC requires that these elements (sexual orientation disclosed through participation in the Gay Pride parade or religious beliefs disclosed by wearing the Muslim veil) relating to private life — in the sense of life outside work — cannot be taken into account in the decision to dismiss or hire an individual. By virtue of the respect for private life, this was further reiterated by the French Court of Cassation on 22 January1992 in the *Rossard* case. This case concerned the dismissal of an employee on the grounds that she had purchased a different car from the car sold by the company: 'There can be no cause for dismissal based on the employee's private life, unless the behaviour of the employee, taking into account the nature of his/her duties and the aims of the company, has caused recognised disturbances within the company' [142]. As can be seen, Directive 2000/78/EC only protects certain aspects of personal life by limiting the grounds of discrimination prohibited in the field of employment. Otherwise, the right to respect for private life takes over in the form of the right to personal autonomy or the protection of private life, defined as that which has no impact in the professional sphere. In this context, private life and non-discrimination

139 The French debate on diversity statistics, which reached its peak in autumn 2007, provides a good illustration of the delicate relationship that exists between the objectives of the fight against discrimination, the French concept of equality and the inherent requirements of the right to respect for private life. For a history of the emergence of this debate in France, see Simon, P., 'The Controversy on Ethnic Statistics in France', in Ringelheim, J., and De Schutter, O., *Ethnic Monitoring: The Processing of Racial and Ethnic Data in Anti-discrimination Policies*, op. cit., pp. 79–81. See also, Ringelheim, J., 'Le recueil de données personnelles au service de la lutte contre les discriminations : une tension nécessaire entre non-discrimination et vie privée', in *Les nouvelles lois luttant contre la discrimination,* Bayart, C., Sottiaux, S., and Van Drooghenbroeck, S. (dir.), Brussels, Brugge, La Charte, Die Keure, 2008, pp. 63–100.

140 Concerning the protection of private life in the context of the working life, see Mouly, J., 'Vie professionnelle et vie privée. De nouvelles rencontres sous l'égide de l'article 8 de la Convention européenne', in Sudre, F. (dir.), *Le droit au respect de la vie privée au sens de la Convention européenne des droits de l'homme*, op. cit., pp. 279–303.

141 De Schutter, O., *Discriminations et marché du travail,* op. cit., p. 42 (our translation).

142 French Court of Cassation (Labour Law Chamber), 22 January 1992, *Bulletin*, No 30 (our translation). Similarly, the French Court of Cassation has held that dismissal of a notary clerk for gross misconduct in a case where the employer had learned through the press that he had been criminally convicted for aiding the illegal stay of a foreigner, was without genuine and serious cause as the action attributed to the employee related to his personal life and 'could not constitute a fault' (French Court of Cassation (Labour Law Chamber), 16 December 1997, *Bulletin*, No 441.

are not in conflict; instead they interact 'hand in hand' to make the fight against discrimination more effective. However, tensions are still likely to recur in ethos-based organisations because, based on their right to freedom of religion or opinion, a specific exception to the prohibition of discrimination has been included for these organisations. This exception is, as we shall see, likely to clash with the right to respect for private life of persons who are, or wish to be, employed by such organisations [143].

2. Exceptions to the prohibition of direct discrimination and conflicts of rights

Conflicts or tensions between different fundamental rights, such as freedom of association, freedom of expression, religious freedom and the right to respect for private life, on one hand and the prohibition of discrimination based directly on gender, religion or belief or sexual orientation on the other (external inter-rights conflicts) are of long standing and predate the adoption of Directives 2000/43/EC and 2000/78/EC. For example, based on their right to freedom of association, some organisations would prefer to hire a woman than a man for a battered women's refuge. Furthermore, the freedom of expression of a doctor in relation to issues such as abortion can clash with the religious freedom of a Catholic hospital that requires loyalty from its staff [144]. Finally, there are numerous instances of cases where teachers have been dismissed by a Catholic school because of a divorce or re-marriage after divorce. This was considered an affront to the 'ethics' of the school, causing a conflict between the religious freedom of the school on one hand, and the freedom of conscience of the teacher and his/her right to respect for private life on the other.

The anti-discrimination directives contain certain provisions that are relevant for addressing these tensions between the prohibition of direct discrimination and these various rights and freedoms. In particular, they incorporate the desire to protect these freedoms (of religion, of association or of expression) by providing exceptions to the prohibition of direct discrimination which they contain. Our discussions here include the exceptions provided for in the field of employment, namely, genuine and determining occupational requirements in the first instance, and the specific exception included for the benefit of churches and other organisations the ethos of which is based on religion or belief in the second instance. The outlines of these exceptions are not always clear. In any event, they must be interpreted in the light of the instruments provided for the protection of fundamental rights.

2.1. Genuine and determining occupational requirements

All anti-discrimination directives include an exception specific to the field of employment. This exception allows for direct discrimination under certain conditions where sex, racial or ethnic origin, religion or belief, age, disability or sexual orientation constitutes a genuine occupational requirement [145] due to the nature or context of the occupation. The most meaningful example is that of a film-maker who is permitted to hire an actor with black skin to play the role of Nelson Mandela. The logic underlying this

[143] See Chapter II.2.2.

[144] See Eur. Comm. H.R., *Rommelfanger* v *Germany*, decision of 6 September 1989 (Application No 12242/96), *D.R.*, 62, pp. 151 ff.

[145] Article 2(2) of Directive 76/207/EEC, recast in Article 14(2) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on to the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ L 204, 26.7.2006, pp. 23–26); Article 4 of Directive 2000/43/EC and Article 4(1) of Directive 2000/78/EC.

exception consists of allowing a breach of the prohibition of unequal treatment on the grounds of race (skin colour) in a case where this breach of strict equality is considered justified in view of the nature and context of the relevant occupation. In such a case, a person whose skin is not black and who therefore does not have the necessary characteristic would not be incapable of carrying out the job (to play the role of Nelson Mandela) but this person's credibility would inevitably be lessened.

As it involves an exception to the prohibition of direct discrimination, the genuine professional requirement must be of an exceptional nature and interpreted restrictively [146]. The directives stipulate that the differentiating criteria (sex, race, religion or other) must be genuine and determining in terms of the nature or context of the occupation and that the objective pursued is legitimated and that the requirement is proportionate in respect to the principle. In reality, this system calls on the classical requirements delineating the restrictions to the exercise of a fundamental right.

The logic of the genuine occupational requirement does not always appear as a situation of conflict of rights. Hiring an actor based on the colour of his skin so that he can play the role of Nelson Mandela does not cause any conflict between the principle of non-discrimination and another fundamental right. The question is solely to delineate the prohibition of direct discrimination by allowing specific breaches to this principle. In our view, the same applies for cases brought before the European Court of Justice of the European Union relating to situations where gender was considered a genuine occupational requirement for taking up a position within the armed police in Northern Ireland, the army in Germany or the Royal Marines in the United Kingdom [147].

Nevertheless, other cases demonstrate that inter-rights conflicts or intra-right conflicts can occur when the notion of genuine occupational requirement is called upon.

In our discussion devoted to the relationship between the respect for private life and equal treatment [148], we saw that the exception relating to genuine and determining occupational requirements had been the vehicle that was used to take private-life-related factors into account in order to mark out the material scope of the prohibition of direct discrimination in the field of employment. It appears that the law of the European Union has resolved this tension between the prohibition of direct discrimination and the right to the respect for private life by prioritising the prohibition of discrimination. Prohibition of discrimination can be superseded by the requirements of the right to private life only if the latter are strictly confined to the exact conditions to which the exception related to 'genuine occupational requirements' is subject. It is not enough for the employer to invoke his/her right to respect for private life *in abstracto*. The employer should also demonstrate that by reason of the nature and context of the activity for which a person is hired, that person's gender, ethnic origin or religion may be considered a genuine and determining occupational requirement, 'provided that the objective is legitimate and the requirement is proportionate'.

An association for the defence of homosexual rights wishing to employ a person of this sexual orientation for a management position is another emblematic example of potential conflicts of rights that can occur in relation to this exception. Such a situation reveals a conflict between the right to freedom of association on the part of the hiring organisation, the prohibition of discrimination on the

[146] It should be noted that controversies exist as to the framework around the formal obligations imposed upon the States when they make use of this exception. Transposing this exception to the field of gender equality reveals a great variety of situations. For examples of approaches taken by individual States, see Bell, M., 'Direct Discrimination', op. cit., pp. 275–278.

[147] ECJ, *Johnston*, 15 May 1986, Case 222/84, (29–40); ECJ, *Kreil*, 11 January 2000, Case C-285/98, (20–29); ECJ, *Sirdar*, 26 October 1999, Case C-273/97, (21–32).

[148] See Chapter II.1.

grounds of sexual orientation on the part of the candidates and, lastly, the right to respect for private life of the latter, given the complexity involved in designing a mechanism for verifying the candidates' sexual orientation without interfering in their private life [149]. This particular case was expressly taken into account during the preparatory work completed on the former Swedish Act prohibiting discrimination on grounds of sexual orientation in the field of employment (Prohibition of Discrimination in Working Life because of Sexual Orientation Act (1999:133) [150]). It specified that sexual orientation could form a genuine and determining occupational requirement for a 'crucial position' in an organisation working in the field of homosexuals' rights [151]. In Germany however, the Federal Labour Court decided, in 1998, that the position of representative for equal opportunities which would involve handling questions pertaining to gender equality could not be validly restricted to women exclusively. On that occasion, the German Court ruled that under German law, gender does not constitute a genuine occupational requirement unless a representative of the opposite sex was unable to fulfil the contractual requirements and this inability was founded on grounds that conform to the constitutional values relating to gender equality [152]. In this particular case, the inability of a male candidate to fulfil the duties of a representative for equal opportunities had not been demonstrated by the relevant *Land*.

Another conflict situation frequently arises between religious freedom in its collective dimension, on the one hand, and the prohibition of discrimination on the grounds of sexual orientation or gender on the other hand (external inter-rights conflict). It is interesting to note how these conflicts were approached under English law. In this case, the legislator came to a decision in advance of the conflict occurring, by creating a specific exemption 'where the employment is for purposes of an organised religion', thereby authorising discrimination on grounds of sex [153] or sexual orientation in certain, strictly defined, circumstances. Here, we discuss the example of the specific exception introduced in the 2003 Employment Equality (Sexual Orientation) Regulations which applies 'where (a) the employment is for purposes of an organised religion; [and] (b) the employer applies a requirement related to sexual orientation — so as to comply with the doctrines of the religion, or because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers (Section 7(3))'. The conformity

149 De Schutter, O., *Discriminations et marché du travail*, op. cit., pp. 67–68.

150 Note that this legislation was replaced by the Discrimination Act of 5 June 2008, SFS 2008:567, published on 25 June 2008 and entered into force on 1 January 2009.

151 Bell, M., 'Direct Discrimination', op. cit., p. 279.

152 Federal Labour Court (BAG), 12 November 1998, anonymous, NZA 1999, p. 371 (quoted by Bell, M., 'Direct Discrimination', op. cit., p. 287). In Canada, see also *Vancouver Rape Relief society* v *Nixon*, ruled on by the Supreme Court of British Columbia ([2003] *BCSC*, 1936). The latter held that a non-profit feminist association supplying services to female victims of male violence had not committed any form of gender-related discrimination by refusing to hire a transsexual (a man who has changed to a woman) on the grounds that this person had not had the personal experience of being 'oppressed since birth' by reason of having been born female and growing up as such, which was considered a prerequisite to providing advice and appropriate care to victims of male violence. Mrs Nixon's appeal to the Court of Appeal of British Columbia was rejected, as was the leave to appeal brought before the Supreme Court (*Kimberly Nixon* v *Vancouver Rape Relief Society* (B.C.), 31633, 1 February 2007).

153 See Section 19(1) of the 1975 Sex Discrimination Act: '(1) Nothing in this Part applies to employment for purposes of an organised religion where the employment is limited to one sex so as to comply with the doctrines of the religion or avoid offending the religious susceptibilities of a significant number of its followers'.

of these regulations which in certain, admittedly limited, cases [154] give precedence to freedom of religion over the prohibition of discrimination on the grounds of sexual orientation, has been called into question by a number of associations involved in the protection of homosexuals' rights and by several trade unions where these have brought this issue before the High Court in London. Following strict interpretation, the exception was however judged to be compliant with Directive 2000/78/EC (Article 4(1)) and the European Convention on Human Rights (Articles 8 and 14), in *R (Amicus-MSF and others)* v *Secretary of State for Trade and Industry and Christian Action Research Education and others* [155]. On that occasion, Justice Richards ruled that this exception implied that the legislator should balance the different conflicting rights. On the one hand, he emphasised that the latter had acted deliberately in order to limit the questions that, on such a sensitive matter, would have to be ruled on by the courts, and on the other hand, that a legitimate goal was being pursued by the measure and that the balance thus achieved was appropriate [156].

Other cases are less easy to qualify as conflicts of rights. For example, the case of a bar that is primarily aimed at the gay community or an Asian restaurant wishing to hire a waiter according to the candidates' sexual orientation or ethnic origin respectively. As O. De Schutter points out, none of these organisations is truly pursuing an ideological goal, by defending homosexuals or the rights of people of Asian origin, which would make it possible to reason on the basis of the specific exception provided for organisations whose ethos is founded on religion or belief (Directive 2000/78/CE, Article 4(2)) [157]. However, by basing itself on the notion of social privacy, the gay bar could be addressing the desire of members of a minority group 'to stick to their own kind' and, in the case of the Asian restaurant, the profitability of the business, which could be enhanced by the 'authenticity' of its waiters [158]. The question of whether the sexual orientation or ethnic origin of a candidate to the position of waiter may be considered a genuine occupational requirement in the sense of the European directives will have to be resolved by resorting to the principle of proportionality. Whereas it is difficult to make a clear decision in the absence of case law within the Court of Justice of the European Union, it may be argued that in the case of the Asian restaurant, the financial objective of profitability should be of less importance than the prohibition of discrimination on the grounds of ethnic origin. Moreover, it appears difficult to justify the necessity and proportionate nature of selecting waiters on the basis of their ethnic origin in relation to this objective of profitability. In the United Kingdom, for example, a specific exception in the 1976 Race Relations Act rules that colour or nationality may be considered a genuine occupational requirement when 'the job involves working in a place where food or drink is (for payment or not) provided to and consumed by members of the public or a section of the public in a particular setting for which, in that job, a person of that racial group is required for reasons of authenticity'. The absence of any reference to proportionality in the wording of this specific exception leads to issues of compatibility with Directive 2000/43/CE, insofar as it concerns skin colour. The balancing of interests is more complex in the case of the 'gay' bar, which involves a genuine conflict of rights between the prohibition of discrimination on the grounds of sexual orientation, on the one hand, and freedom of association or the right to respect for private life

[154] In defending this regulation, the government pointed out that its intention was to avoid the courts having to face litigation which would force them into a situation of theological controversy in relation to the status of homosexuality within one religious doctrine or another. It, therefore, became the government's responsibility to strike the delicate balance between homosexuals' right to employment and the right of religious groups to freedom of religion (paragraph 90). More specific details about the relevant types of occupation also feature in the discussions relating to the government's position: 'When drafting Regulation 7(3), we had in mind a very narrow range of employment: ministers of religion, plus a small number of posts outside the clergy, including those who exist to promote and represent religion' (paragraph 91).

[155] [2004] IRLR 430.

[156] *Ibidem*, (123–124).

[157] See Chapter II.2.2.

[158] De Schutter, O., *Discriminations et marché du travail,* op. cit., p. 67.

Natasja | *1970*

in its social dimension on the other. In this situation, an additional difficulty arises as a result of it being impossible to verify the sexual orientation of future waiters without infringing their right to private life, where the latter is considered in the sense that is preserves a sphere of intimacy around the individual.

D. Schieck, L. Waddington and M. Bell also raise a delicate question of intra-rights conflict within the very principle of equality itself, by pointing out the tensions that may arise between formal equality and substantive equality depending on the scope attributed to the concept of genuine occupational requirement. Such tensions are clearly illustrated by the example of a call for applications in which a preference is expressed for a candidate of North African origin, on the grounds that the position mainly involves working with young people of that origin and that this will encourage mutual trust. The Dutch Equal Treatment Commission (Commissie Gelijke Behandeling — CGB[159]) considered that such a call for applications constituted direct discrimination on the grounds that the list of genuine occupational requirements does not include any exception that allows the recruitment of a person from a target group with a view to providing assistance to people of a certain ethnic origin[160]. This dispute could have had a different outcome had it been heard in the United Kingdom. The 1976 Race Relations Act (Section 5(2)(d)) makes provision for a specific case in which race or ethnic origin constitute a genuine occupational requirement, namely, when 'the holder of the job provides persons of that racial group with personal services promoting their welfare, and those services can most effectively be provided by a person of that racial group'. In view of the interpretation given by the English courts to this exception, requiring direct contact between the provider of services and their beneficiary along with knowledge of the language and/or cultural or religious customs of the beneficiary of the services[161], it appears likely that the recruitment of a candidate of North African origin may be judged acceptable under English law. In this case, the tension lies between the restrictive interpretation of the notion of genuine occupational requirement by the Dutch Equal Treatment Commission, which creates just a limited infringement of formal equality, on the one hand, and the wider interpretation retained under English law on the other. The latter appears to take into account a substantive conception of equality, justifying a wider interpretation of the exception, so as to promote a disadvantaged group. However, there may be a risk of calling into question the symmetrical aspect of protection against discrimination, which would make it necessary to consider discriminatory the decision not to appoint a person of Dutch or English 'stock' to work with young people of North African origin.

Lastly, and still keeping with the field of employment, it is worth considering the existence of a wider exception to the prohibition of direct discrimination based on one of the prohibited criteria, which would be founded on respect for certain fundamental rights or freedoms. Such a scenario is expressly based on the grounds covered by Directive 2000/78/EC — age, sexual orientation, religion or belief and disability — in its Article 2(5), providing that 'this Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary […] for the protection of the rights and freedoms of others'. As for racial discrimination, no equivalent provision was laid down within the terms of Directive 2000/43/CE. However, recital 4 of its preamble sets out

[159] Established in 1994, this body is responsible for the promotion of equal treatment in the Netherlands. For an overview of its functions and quasi-legislative powers, see Rorive, I., 'A Comparative and European Examination of National Institutions in the Field of Discrimination and Racism', *New Institutions for Human Rights Protection*, Boyle, K. (ed.), Oxford, OUP, 2009, pp. 138–173, spec. pp. 149–150.

[160] Opinion No 1997–51, available in Dutch online (http://www.cgb.nl). Note that in the same case, the CGB ruled that preference for a male candidate for the position involving care of young North Africans had been properly set out as a genuine occupational requirement, in view of the specific nature of the problems experienced by young North African boys with whom the future employee would need to be able to establish a true relationship based on trust (quoted by Bell, M., 'Direct Discrimination', op. cit., p. 288).

[161] See examples quoted and commented in Bell, M., 'Direct Discrimination', op. cit., p. 286.

that 'it is important to respect such fundamental rights and freedoms, including the right to freedom of association. […]'. This clearly demonstrates a similar approach. In any event, the exception is firmly rooted in the obligation of the Member States to implement the directives while respecting fundamental rights.

2.2. Specific exception for churches and organisations the ethos of which is based on religion or belief

A specific conflict arises when the prohibition of discrimination on the grounds of religion or belief clashes with freedom of religion, where this is understood as the right for churches or religious or philosophical organisations to act without interference from the State[162]. With a view to providing guidelines for delineating this type of conflict, the European legislator made provision for a specific exception to the prohibition of discrimination directly founded on religion or belief. Article 4(2) of Directive 2000/78/EC provides that, under certain conditions, differences in treatment founded on religion or belief may be allowed 'in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief'[163]. In the absence of relevant case law from the Court of Justice, it is no easy task for the interpreter to define the scope of this particularly nebulous provision. Indeed the phrasing itself is not without issue. The specific exception laid down in the first paragraph of Article 4(2) is presented as an option for the Member States, thus apparently allowed to decide whether or not to use it once it has been implemented into national law. Moreover, the reference made to the fact of *maintaining* such an exception within national law or to the codification of existing practices raises the question of how wide a margin the States have at their disposal in introducing such an exception, when it results neither from substantive law nor from any existing practice at the time the directive is adopted. However, the second paragraph mentions the right of 'ethos-based' organisations to 'require individuals working for them to act in good faith and with loyalty to the organisation's ethos'. This affirmation is difficult to reconcile with the notion of the exception being presented as an option that is available to the States. Indeed, when implementing the directive, the latter cannot ignore their obligation to respect the churches' freedom of religion and freedom of belief for ethos-based organisations, the freedoms here being understood in their collective dimension. These ambiguities are actually reflected in the highly varied ways in which the exception

[162] In this respect, it is useful to recall the reference made in recital 24 of the preamble to Directive 2000/78/EC, to Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Amsterdam Treaty. The Union explicitly recognises therein 'that it respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States and that it equally respects the status of philosophical and non-confessional organisations'.

[163] Article 4(2) of Directive 2000/78/EC is phrased as follows: 'Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference in treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference in treatment shall be implemented taking account of Member states' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground. Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.'

was implemented by the Member States [164]. And yet, exceptions phrased in terms that are too broad and the absence of exception can both lead to difficulties in the area of fundamental rights and freedoms. Too broad an exception infringes on the prohibition of discrimination within Directive 2000/78/CE, whereas an absence of exception, which is not directly in opposition to the directive, could constitute a violation of religious freedom [165].

We will now discuss questions pertaining to the exception in terms of its beneficiaries, outlines and limits while also considering the situation of a conflict of rights (external inter-rights conflict) underlying this exception, as well as the experience drawn from international and European human rights law along with certain national laws.

2.2.1. Beneficiaries of the exception

This specific exception is intended for 'churches and other public or private organisations the ethos of which is based on religion or belief'. The wording was modified when negotiating the directive in order to allow the inclusion of further beneficiaries. In the proposal for the directive initially filed by the Commission, references were made to the 'public or private organisations *which pursue directly and essentially the aim of ideological guidance in the field of religion or belief* with respect to education, information and the expression of opinions, and *for the particular occupational activities within those organisations which are directly and essentially related to that aim*' [166]. Under pressure by churches and religious communities, the European Commission amended its initial proposal in order to encompass the social activities of religious organisations [167].

Defining what should be understood by 'organisations the ethos of which is based on religion or belief' almost inevitably leads to the delicate issue of defining the notions of 'religion' and 'belief'. Directive 2000/78/EC is mute on the subject as is clearly the case with the national transposing legislation. In keeping with the ruling of the Court of Justice of the European Union in relation to the *Chacon Navas* case in the area of disability, an independent interpretation must be drawn on a European level [168]. The international texts on the protection of fundamental rights and in particular those of the ECHR demonstrate a markedly wide conception of the notion of religion in defining the applicability of religious freedom as safeguarded by Article 9 ECHR [169]. The approach of the European Court of Human Rights does not allow the inference of a definition of religion: the only express condition formulated so far is that it should be a sufficiently 'identifiable' religion [170].

For organisations whose ethos is founded on belief, the task of defining the beneficiaries of the exception is even more complex. What beliefs should be encompassed? Are the beliefs solely religious or could

164 Vickers, L., *Religion and Belief: Discrimination in Employment — the EU law*, European Commission, 2006, pp. 57–60.

165 See examples quoted by Vickers, L., *Religion and Belief,* op. cit., pp. 57–58. However, it is to be noted that in most of the States that have not expressly incorporated such an exception or that have incorporated it under another form, there are other safeguards for religious freedom that sometimes lead to members of the 'clergy' being purely and simply excluded from the scope of employment law and non-discrimination law.

166 Our emphasis.

167 Amended proposal for a Council directive establishing a general framework for equal treatment in employment and occupation, 10 October 2000, COM(2000) 652 final.

168 ECJ, *Chacon Navas*, 11 July 2006, Case C-13/06.

169 Ringelheim, J., *Diversité culturelle et droits de l'homme. La protection des minorités par la Convention européenne des droits de l'homme*, Brussels, Bruylant, 2006, pp. 70–74; Vickers, L., *Religion and Belief*, op. cit., p. 26.

170 Eur. Comm. H.R., *X* v *United Kingdom*, 4 October 1977 (Application No 7291/75), *D.R.* 11, p. 55.

the notion itself be extended to other beliefs, including political or trade union-related beliefs as well as the absence of belief? Directive 2000/78/EC does not provide any specific information on the matter. Although it is possible to assert, as Lucy Vickers has, that not all beliefs are protected by the directive and that, for example, 'a belief in the superiority of one football team over another will not be covered', the question of limits remains unanswered [171]. Most national transposing legislation is also silent on the matter [172]. Certain States expressly included political beliefs, and more seldom, trade union-related beliefs as specific grounds prohibiting discrimination, thereby implying that they did not consider them included within the 'beliefs' covered by the directive. Within the case law of the European Court of Human Rights, it is generally understood that the beliefs safeguarded by Article 9 ECHR encompass religious or philosophical beliefs, to the exclusion, in principle, of political beliefs. To benefit from protection, beliefs should cover 'views that attain a certain level of cogency, seriousness, cohesion and importance' [173]. The implementation of these requirements has led the European Court of Human Rights to include pacifism, veganism and atheism under the notion of 'philosophical beliefs' for the purposes of Article 9 of the Convention [174]. The inclusion of pacifism clearly demonstrates, if there was ever any doubt, how difficult it can be to define the borderline between philosophical and political beliefs.

Could the notion of belief be extended to the point of including 'company culture' or a corporate image, thus allowing recruitment or even dismissal on the grounds of adhering or not adhering to that culture? The 'Club' case in Belgium reflects the difficulties entailed in defining the framework of the exception along with the tensions that may derive from it due to the prohibition of discrimination on grounds of religion or belief and the freedom to conduct a business. In this particular case, the 'Club' company, a stationer and bookshop for the general public, invoked its 'open, forthcoming, simple, family friendly and neutral' image in order to justify its rules that required its employees to wear a uniform bearing the marks of the company and abstain from wearing symbols or clothes that might be construed as damaging to its image. Based on a line of reasoning that was questionable on numerous counts, the labour courts ruled that there had not been any violation of the freedom of religion or prohibition of discrimination, without the specific exception benefiting 'ethos-based organisations' being invoked in the case at bar [175].

The Court of Justice of the European Union will have to provide clarification as to the possibility of including 'company culture' within the notion of belief. As the law currently stands, we believe, along with Olivier De Schutter, that this would be going too far and that the 'exception in Article 4(2) cannot justify discrimination by virtue of belief […] simply because the candidate for a job […] does not fully adhere to the culture of the company or shows no commitment to the project in which he is requested to invest himself'. In other terms, the fact that the belief of certain employees conflicts with the activities of the company does not constitute sufficient grounds for the company to invoke the exception attributed to ethos-based organisations [176]. These cases cannot, moreover, feature within the category of conflicts of rights, unless the freedom to conduct a business is considered a fundamental right that conflicts with the prohibition of discrimination. It is our opinion that it is not possible to pursue such a line of reasoning since it would turn the entire scope of anti-discrimination law in the field of employment

171 Vickers, L., *Religion and Belief,* op. cit., p. 29.

172 *Ibidem*.

173 Eur. Ct. H.R., *Campbell and Cosans* v *United Kingdom*, 25 February 1982 (Application Nos 7511/76 and 7743/76) (36).

174 Sudre, F., Marguénaud, J.-P., Andriantsimbazovina, J., Gouttenoire, A., and Levinet, M., *Les grands arrêts de la Cour européenne des droits de l'homme*, op. cit., pp. 547–548.

175 Labour Appeal Court of Brussels (Fourth Chamber), *E.F.* v *S.A. Club*, 15 January 2008, Case No 48.695, *Journal des tribunaux du travail*, 2008, p. 140. See also the commentary in the *European Anti-Discrimination Law Review,* 2008, issue No 6–7, pp. 76–77.

176 De Schutter, O., *Discriminations et marché du travail,* op. cit., pp. 75–76 (our translation).

into conflict situations between the prohibition of discrimination of workers and employers' freedom to conduct a business.

2.2.2. Outlines of the exception

Unlike the exception provided for in Article 4(1), the specific exception provided for churches and ethos-based organisations does not require the occupational requirement to be determining for the occupation to be carried out given the nature of these activities or the context in which they are performed, it simply needs to constitute a genuine, legitimate and justified occupational requirement in regard to the organisation's ethos. Although the effectiveness to be imparted to this exception implies that it is possible to go beyond the scope of what is authorised by virtue of the classic 'genuine occupational requirement' exception, its precise scope of application is not so easy to define.

The first useful criteria relates to the requirement that the religion (or belief) must constitute a *genuine occupational* requirement, which imposes a sufficiently close link with the occupation in question. It was precisely because such proof was not provided that a Danish Christian humanitarian organisation (Christian Cross Army) agreed to pay compensation in the amount of EUR 8 000 to a worker who had been dismissed from his position as cleaner because he was not a member of the National Lutheran Church, implicitly recognising that cleaning positions cannot avail of the exemption provided under Article 4 of Directive 2000/78/EC [177]. It was also by taking into account the relationship with the nature of the job that a distinction was established under Spanish law between 'ideological' work for religious organisations (which involves conveying the ideology of the institution) and activities that are neutral in regard to the ethics of the organisation [178]. Again, we find this reference to the nature of the occupation in the reasoning given by the European Court of Human Rights in the *Dahlab* v *Switzerland* case in rejecting the application of a primary teacher from the public education system who had been dismissed on the grounds of refusing to remove her Islamic headscarf. On this occasion, the European Court endorsed the position taken by the Swiss Federal Court, specifically in that it '*took into account the very nature of the profession of State school teachers, who were both participants in the exercise of educational authority and representatives of the State*, and in doing so weighed the protection of the legitimate aim of ensuring the neutrality of the State education system against the freedom to manifest one's religion'[179].

However, the majority of cases are more complex and relate to functions whose nature does not always have a clear relationship with the ethics of the organisation — doctor in a Catholic hospital, social worker in a charity organisation associated with a Church, French language teacher in a Muslim school. For this type of occupation, can the image that the organisation portrays of itself through the individuals that constitute this organisation justify a decision to refuse employment to an individual or dismiss an individual based on religion or belief, independently of the content of the job that the person in question was to hold or had held? This argument could be supported by the wording used in some parts of Article 4 of Directive 2000/78/EC. Namely, reference to the *context* in which the activities are carried out, the removal of the express requirement for proportionality in paragraph 2 and, the recognition, in somewhat ambiguous terms, of a *right* held by churches and ethos-based organisations to require the individuals that work for them to adopt an attitude of good faith and loyalty with respect to the ethics of the organisation. As stressed by O. De Schutter, 'in the last part of Article 4(2), there is no

[177] *European Anti-Discrimination Law Review*, 2006, No 3, p. 59.

[178] The Constitutional Court held that the dismissal of a nursing assistant by a private Catholic hospital, by reason of not respecting the ethics of the hospital, was unlawful because the job was a neutral job in terms of the ideology of the hospital (decision of the Constitutional Court of 12 June 1996, 106/1996 (Application No 3507/93)).

[179] Eur. Ct. H.R., *Lucia Dahlab* v *Switzerland*, decision of 15 February 2001 (Application No 42393/98), our emphasis.

longer any emphasis given to the content of the activity carried out, nor to the relationship that must exist between the content of the activity, on the one hand, and the religion and beliefs of the individual that is carrying out or may carry out that activity on the other hand'[180].

A case relating to the position of social worker with a sub-organisation of the Protestant Church of Germany, in which the Labour Court and the Labour Appeal Court in Hamburg adopted diametrically opposed positions, testifies to this delicate balancing between the religious freedom of religious organisations, on the one hand, and the prohibition of discrimination on grounds of religion on the other hand [181]. This particular case involved a call for applications by a sub-organisation of the Protestant Church of Germany for the role of social worker, which would involve working with immigrants within the framework of the 'EQUAL' programme funded by the European Commission. The applicant received a phone call from the employer who indicated that they were interested in her application while also enquiring about her religious faith. In light of the response given by the applicant, who stated that she was a non-practising Muslim, she was asked if she would be prepared to change religion. She communicated her refusal, believing that it was not at all necessary for the position in question. Subsequently, she received a letter indicating that her application had been rejected. Disappointed, the applicant brought her case before the Hamburg Labour Court [182], which upheld her claim. This reasoning used by the tribunal in reaching this decision is interesting as it specifies the limits under which the exception provided by the German law on equal treatment (Article 9) can be invoked for the benefit of churches. According to this Court, this exception may well protect the autonomy of churches but it does not allow the establishment of differences in treatment independently of the type of work involved. In this particular case, there was no justification provided as to why the functions of a social worker who was to work with immigrants could only be fulfilled by an applicant of Christian faith. This decision was all the more noteworthy in that, as emphasised by M. Mahlmann, it deviated from long-standing case law established by the German courts, which authorises greater autonomy for churches, allowing them to determine themselves the types of position that should be filled by members of a particular religion [183]. In *Rommelfanger* [184], for example, already an old case, the German Constitutional Court, followed by the European Commission of Human Rights [185], had ruled that the dismissal of a doctor by a Catholic hospital as a result of positions he had adopted in the media in favour of abortion, was in accordance with the constitutionally enshrined autonomy enjoyed by churches and religious organisations in Germany and did not entail a violation of the doctor's freedom of expression. However, the case in Hamburg relating to the refusal to employ a non-Christian social worker had important reverberations. Ruling on the action taken by the religious organisation, the Labour Appeal Court reversed the decision taken by the Court of First Instance, arguing that the applicant was not qualified for the job in question and could not, therefore, claim any grounds for employment discrimination [186]. Apart from the fact that, very controversially, this Court did not examine the existence of discriminatory behaviour resulting from the conversation held with the applicant during the telephone interview, the Labour Appeal Court's refusal

[180] De Schutter, O., *Discriminations et marché du travail,* op. cit., p. 75 (our translation).

[181] *European Anti-Discrimination Law Review*, 2008, No 6–7, p. 97.

[182] Judgment of 27 May 2008, 20 Ca 105/07.

[183] Mahlmann, M., 'Flash Report — Religious Discrimination', April 2009, available online at the website of the European Network of legal experts in the non-discrimination field (http://www.non-discrimination.net).

[184] See different judgments of the Essen Labour Court, the Düsseldorf Court of Appeal, the Federal Labour Court and the German Constitutional Court that led to the case being brought before the European Commission of Human Rights (Eur. Comm. H.R., *Rommelfanger* v *Germany*, 6 September 1989 (Application No 12242/96), *D.R.*, 62, p. 151). For a more recent approach to the issue by the European Court of Human Rights, see *Lombardi Vallauri* v *Italy*, 20 October 2009 (Application No 39128/05).

[185] *Ibidem*.

[186] Mahlmann, M., 'Flash Report — Religious Discrimination', April 2009, op. cit.

to refer the preliminary issue to the Court of Justice so that it could clarify the scope of Article 4(2) of Directive 2000/78/EC is particularly regrettable. At the time of writing, the latter ruling by the Hamburg Labour Appeal Court remains the subject of an appeal before a German Court of higher instance.

2.2.3. Limits to the exception

The European legislator has provided limits to delineate the circumstances in which this exception can be invoked by churches and ethos-based organisations. In paragraph 2 of Article 4(2), it is expressly held that a difference in treatment founded on religion or belief 'shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground'. This essentially requires that the other fundamental rights and freedoms (constitutional provisions and principles of Member States as well as the general principles of Community law) should be respected and, in particular, the principle of non-discrimination derived from other protected differentiation criteria.

2.2.3.1 Respect for fundamental rights and freedoms

This reference to the general principles of Community law allows, in particular, the reincorporation of the requirement for proportionality which, unlike the genuine occupational requirement provided for in Article 4(1), is no longer mentioned specifically in Article 4(2).

It is this requirement for proportionality that underlies the reasoning of the Dutch Equal Treatment Commission (CGB) in a case involving the refusal of a Muslim school to employ a Muslim woman in the position of Arab language teacher on the grounds that she refused to wear the Islamic headscarf (hidjab). In Opinion No 2005-222 delivered 15 November 2005, the CGB, holding that it was a case of direct discrimination founded on religion, verified whether the conditions governing the exception relating to education were fulfilled [187]. In particular, the CGB stipulated that the requirement be necessary and proportionate to the implementation the founding principles of the institution; *quod non in casu* since the Muslim school did not succeed in proving that wearing the headscarf was a necessary condition for the maintenance or implementation of the religious founding principles of the school. In fact, the school had employed non-Muslim teachers who did not wear the headscarf and the teachers and students were not obliged to wear it outside school. According to the Commission, this testified to the fact that this clothing requirement was not fundamental to the implementation of the principles of the school. Moreover, no proof had been provided to demonstrate that wearing the headscarf constituted a functional criterion that was essential to the effective teaching of the Arab language [188].

In addition, the requirement for respect for human rights logically includes that of respect for private life. In principle, this should prevent ethos-based organisations from taking into account factors relating to an individual's private life that are not determining factors when assessing the individual's capacity to carry out the job in question, when deciding not to employ an applicant for a position, or when dismissing one of their existing employees [189]. This limitation derived from the respect for private life can be used to resolve the iconic cases involving the dismissal of a teacher from a Catholic

[187] Article 5(2)(c) of the Dutch Act on equal treatment of 1994.

[188] *European Anti-Discrimination Law Review*, April 2006, No 3, pp. 78–79.

[189] See Chapter II.1.3.

Rosanne | *1987*

Stephen | *1989*

school for adultery or re-marriage after divorce[190], or refusal to employ a person because of his/her homosexuality[191]. A similar case was referred to the French Court of Cassation in *Painsecq* v *Association Fraternité Saint Pie X*[192]. Called on to rule on a court decision that saw the acceptance of the dismissal of a sexton employed by a traditionalist Christian association after his employer had learned, through indiscretion, that he was HIV-positive and homosexual, the Court of Cassation quashed this judgment. It held that the appeal judge had incorrectly applied the provisions of the French Labour Code, by limiting its ruling to 'calling into question the morals of the employee without having noted any actions on the part of the latter that had created disturbances within the company'[193]. In principle, the protection of private life reinforces the prohibition of discrimination in this scenario in order to limit, where applicable, the religious freedom of churches and other ethos-based organisations. However, this protection offered by the right to private life which prevents the employer from gathering information that is not strictly necessary to the assessment of the individual's professional capacity must be qualified in the case of ethos-based organisations[194]. By virtue of Directive 95/46/EC of 24 October 1995 on the protection of personal data (Article 8(2)(d)), the latter can avail of the possibility to collect and process certain 'sensitive' data relating to religion, belief, political opinion or membership of a trade union on fulfilment of certain conditions. Notwithstanding, this qualification should not justify the recruitment or dismissal of an individual by such organisations on the basis of elements of that person's private life, such as his/her re-marriage after divorce or his/her sexual orientation. In the latter case, another limitation prescribed under Directive 2000/78/EC comes into play, namely that this exemption from equal treatment 'should not justify discrimination on another ground'.

2.2.3.2 Prohibition of discrimination on the basis of other grounds

When you consider the conflicts that are likely to arise between certain religious dogmas and the prohibition of discrimination on the basis of gender and sexual orientation, the provision of a framework for invoking the exception applied to churches and ethos-based organisations[195]. In the Netherlands, this limitation was incorporated into the Equal Treatment Act of 2 March 1994, which permits churches and ethos-based organisations to apply differences in treatment provided that 'it does not result in a distinction based exclusively on political opinion, race, gender, nationality, sexual orientation or civil status' (Article 5(2)). From parliamentary proceedings, it emerges that 'the sole fact' of a person being homosexual cannot justify a refusal to employ or dismiss this person. However, the outcome can be different if 'additional circumstances' are taken into account. The example mentioned is that of a social science teacher in a religious school who is supposedly homosexual and living with a partner of the same sex. The concern is that this person would take certain stances in his classes on the institution of marriage that would be in opposition to the doctrine of the school[196].

190 See, in particular, French Court of Cassation (Plenary Assembly), 19 May 1978, *Dalloz*, 1978, p. 541, conclusions of R. Schmelck, Ph. Ardant note; *J.C.P.*, 1979, II, p. 19009, Sauvageot report, R. Lindon note. See also Belgian Council of State (Fourth Chamber), 20 December 1985, *Van Peteghem*, No 25995, referenced in De Schutter, O., and Van Drooghenbroeck, S., *Le droit international des droits de l'homme devant le juge national*, Brussels, Bruylant, 1999, pp. 287–305.

191 For a similar example in Latvia relating to a former Lutheran minister who lost his job after publicly declaring his homosexuality, see the *European Anti-Discrimination Law Review*, 2005, No 2, p. 67 and *European Anti-Discrimination Law Review*, 2007, No 5, pp. 82–83.

192 French Court of Cassation (Labour Law Chamber), 17 April 1991, *Droit Social*, June 1991, p. 489.

193 *Ibidem* (our translation).

194 De Schutter, O., *Discriminations et marché du travail,* op. cit., pp. 72–73.

195 See Malik, M., *From Conflict to Cohesion: Competing Interests in Equality Law and Policy,* op. cit., pp. 17–30

196 See references quoted by Holmaat, R., European Network of legal experts in the non-discrimination field, *Netherlands Report on Measures to Combat Discrimination: Directives 2000/43/EC and 2000/78/EC*, 2007, pp. 64–65.

In this regard, a case decided on by an administrative court in Finland merits attention. When transposing Directive 2000/78/EC, Finland did not implement a specific exception, based on the model of Article 4(2). The Anti-discrimination Act contains just one provision relating to genuine occupational requirements (based on Article 4(1) of this Directive). In a case that received wide media attention, the Evangelical Lutheran Church had refused to appoint to the position of chaplain (assistant pastor) a woman who was openly having a homosexual relationship and had stated that she wished to officially register this relationship. The Administrative Court of Vaasa set aside the decision of the Cathedral Chapter on the grounds that it constituted discrimination founded on 'other reasons related to a person'. As remarked by T. Makkonen, in its decision, the Court did not take into account the provision of the Anti-discrimination Act that relates to genuine occupational requirement [197].

It is worth comparing this Finnish case with a similar case brought before an English Employment Tribunal, that of *Reaney* v *Hereford Diocesan Board of Finance* [198]. The facts were very similar in that it involved the bishop of a diocese of the Church of England who had refused to employ a homosexual person as a youth worker in the diocese on the grounds that he was not convinced that this person would abstain from having sexual relations during his period of employment, as stipulated by the rules of the Church of England. The legislative context of the United Kingdom is different from that of Finland in that the English legislator had introduced a specific exception in the Employment Equality (Sexual Orientation) Regulations of 2003 (Section 7(3)) [199]. The Employment Tribunal held that the position offered did, indeed, fall within the scope of this exception because, firstly, the position implied representing the diocese of the Church of England, and secondly, the doctrine of the Church of England relating to the absence of sexual relations outside marriage, whether heterosexual or homosexual, could imply prohibiting the employment of an individual engaged in a sexual relationship. However, it granted the claim made by the unsuccessful candidate on the grounds that the latter had not been in a relationship for a number of months and that he had committed to remaining celibate for the duration of the time that he would be working with the Church of England [200]. As this decision demonstrates, once a difference in treatment founded on religious freedom and religious rules implies a difference of treatment founded on other grounds, sexual orientation in this case, the more strict criteria of Article 4(1) come into play. This Article only permits differentiation on the basis of a prohibited ground if it constitutes a genuine and determining occupational requirement [201].

[197] Administrative Court of Vaasa, 27 August 2004, Ref. No 04/0253/3, *European Anti-Discrimination Law Review*, 2005, No 1, pp. 46–47.

[198] [2007] Employment Tribunal No 1602844/2006. For details and discussions about this case, see Bamforth, N., Malik, M., and O'Cinneide, C., *Discrimination Law: Theory and Context*, op. cit., pp. 713–714.

[199] See in this chapter text corresponding to notes 154 to 156.

[200] Malik, M., *From Conflict to Cohesion: Competing Interests in Equality Law and Policy,* op. cit., p. 25.

[201] Vickers, L., *Religion and belief discrimination in employment — The EU Law*, op. cit., p. 61. The case involving the selection policy of students in the faculty of theology of a Calvinist university in Hungary, which implied the exclusion of students that lead or condone a homosexual lifestyle, which was brought before the Hungarian Supreme Court by an organisation protecting the rights of gays and lesbians, also illustrates the complex conflict in rights that can emerge in the area of religious freedom and the delicate interactions associated with the exceptions to the principle of equal treatment. For a detailed description of this case, see the *European Anti-Discrimination Law Review*, 2005, No 1, p. 60 and *European Anti-Discrimination Law Review*, 2005, No 2, p. 63.

3. Conscientious objection and the principle of equal treatment

3.1. Conscientious objection

Conscientious objection generally refers to the refusal to fulfil certain obligations or to accept certain duties on the basis of religious or philosophical beliefs. In other words, the conscientious objector maintains that there are acts that he/she cannot carry out because of requirements relating to his/her religion or beliefs.

In Europe, conscientious objection is mainly invoked in three different types of situation: (i) refusal to complete military service or serve in the army; (ii) refusal to celebrate civil unions: either a marriage between individuals of different sex because one of the future spouses is divorced, or, more often, a marriage or partnership registered between persons of the same sex; and finally, (iii) in the field of healthcare, refusal to contribute to medically assisted contraception, artificial fertilisation procedures, abortion or euthanasia within the confines of the law.

In the Member States of the European Union, the right to conscientious objection is sometimes expressly established in a Concordat agreed with the Holy See which, once ratified, is conferred the status of treaty in international law. In other States, the right to conscientious objection forms part of the constitutional law or national legislation[202]. In any event, this right is one of the facets of the freedom of religion established by the European Convention on Human Rights; however, it does not enjoy absolute protection (Article 9(2)). In the *Pichon and Sajous*[203] case, named after two pharmacists operating the only dispensing pharmacy in a small municipality in south-west France, the applicants had refused, on the basis of their religious beliefs, to sell the contraceptive pill to three women who had presented the medical prescriptions required in order to obtain this pill. Criminally convicted by the French courts, they had pleaded a violation of their right to religious freedom before the European Court of Human Rights. On this occasion, the Court noted that 'Article 9 of the Convention does not always guarantee the right to behave in public in a manner governed by [one's] belief'. It rejected this application at the admissibility stage, ruling that 'as long as the sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy, the applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products, since they can manifest those beliefs in many ways outside the professional sphere'[204]. It clearly follows from this decision that for the European Court of Human Rights, conscientious objection remains a limited right derived from religious freedom that cannot lead to the restriction of the rights and freedoms of another person.

In European law, Directive 2000/78/EC marks, to a certain extent, the implicit recognition of religious conscientious objection in the area of employment and professional training. In requiring Member States

[202] See national examples given in Opinion No 4-2005 of the European Union Network of Independent Experts on Fundamental Rights, *The Right to Conscientious Objection and the Conclusion by EU Member States of Concordats with the Holy See*, 14 December 2005, pp. 6–14, available on the website of the European Commission (http://ec.europa.eu/justice_home/cfr_cdf/doc/avis/2005_4_en.pdf).

[203] Eur. Ct. H.R., *Pichon and Sajous* v *France*, decision of 2 October 2001 (Application No 49853/99).

[204] *Ibidem*, p. 5 of the decision published in French on the website of the European Court of Human Rights (http://www.echr.coe.int/echr/Homepage_EN).

to provide protection against discrimination founded on religion and belief, this European standard gives the conscientious objector a new legal instrument for making their voices heard. Therefore, a doctor employed in a medical centre and subsequently dismissed on the basis of an employment regulation for having refused to participate in a legal abortion, can plead that he/she was the victim of indirect discrimination and demand that his/her employer establish the justified and proportionate nature of his/her dismissal. For certain authors, Directive 2000/78/EC even goes so far as to establish, alongside conscientious objection based on religion, an additional conscientious objection based on ideology. According to Olivier De Schutter, 'once it prohibits discrimination founded on belief, this directive recognises a genuine "right to ideological conscientious objection" on the part of the worker, to which his/her employer cannot object, whereby, for example, the worker can refuse to collaborate on a project that seriously undermines the environment or rights of another person: the company can only sanction use of this right if the activities that it conducts itself are driven by ideological beliefs, or if, at least, the company is able to portray itself as a company whose ethics are founded on belief'[205]. As such, this statement appears too peremptory and must be qualified, since it amounts to recognising the quasi-absolute nature of conscientious objection. In reality, as we will see when attempting to set out the notions of conscientious objection, indirect discrimination and reasonable accommodation below, not every conscientious objection has voice in the area of employment. *In fine,* it is up to the judge to apply a proportionality test which would involve considering, in particular, the nature of the job in question and of the contractual obligation (with the delicate issue of waiving fundamental rights) as well as the burden that the conscientious objection would place on the employer, and on the rights and freedoms of others.

More generally, it is interesting to note, as outlined by Maleiha Malik[206], the importance of the developments made in the area of religious freedom over the past 10 years. Although the requirement to guarantee religious freedom in liberal democracies was initially associated with the notion of religious tolerance, which, alongside freedom of expression and freedom of association, should enable individuals to live according to their beliefs in the private sphere, the recognition of a principle of non-discrimination founded on religious and philosophical grounds points to the emergence of a new standard in the public or semi-public domain: the prohibition of direct discrimination founded on the religious beliefs of individuals in a social domain as fundamental as that of employment, as well as the obligation, in certain circumstances, to modify existing practice where these have been found to constitute indirect or structural discrimination. This principle of non-discrimination has often been complemented with policies aimed at encouraging cultural pluralism and multiculturalism, where these promote organisation of the work environment in a way that includes (as opposed to excludes) religious minorities.

3.2. Conscientious objection *versus* principle of non-discrimination

In some cases, conscientious objection can conflict with the principle of equal treatment. The national case law of the Member States of the European Union offers several illustrations of the conflicts that can occur between the right to conscientious objection on religious grounds, on the one hand, and the principal of non-discrimination founded on sexual orientation or that of equality between men and women on the other hand. These cases were generally treated from the point of view of the right of non-discrimination (and not that of religious freedom). However, there is a significant difference between

[205] *Discriminations et marché du travail*, op. cit., p. 76 (our translation). By 'company whose ethics are founded on belief', O. De Schutter is referring to the organisations described in Article 4(2) of Directive 2000/78/EC. See also Chapter II.2.

[206] Bamforth, N., Malik, M., and O'Cinneide, C., *Discrimination Law: Theory and Context*, op. cit., pp. 866–870.

these cases and the other cases involving *external intra-right conflicts* discussed in this report, insofar as the parties that are in conflict do not have subjective rights derived from the right to non-discrimination based on different grounds of differentiation. In reality, these conflicts involve parties who believe that they have been discriminated against because their religious belief clash with other parties pleading on grounds of equality (founded on gender or sexual orientation) on behalf of the public interest.

In the Netherlands, the Equal Treatment Commission (CGB) was called on a number of times to give a ruling on claims brought by civil registrars or by applicants for the position of civil registrar who had refused to celebrate marriages between individuals of the same sex [207] for religious reasons and whose contracts of employment, for this reason, were not renewed or were not concluded. Initially, the Equal Treatment Commission held that these civil registrars had been the victims of indirect discriminatory treatment founded on their religion. In two opinions delivered in 2002 and 2005 [208], this body effectively stated that the town councils should look for 'practical solutions' aimed at organising working times in a way that would enable the celebration of marriage between individuals of the same sex by civil servants who do not have a conscientious objection, while also employing individuals who do hold such objections. In particular, the Commission based its opinions on the preparatory work of the general Dutch Anti-discrimination Act [209] which recommends, where possible, the respect of the right to conscientious objection [210].

At a later point in time, the Equal Treatment Commission overturned this case law ruling that the requirement for an applicant to the position of civil union registrar to celebrate marriages between persons of the same sex was objectively justified [211]. According to the Dutch Commission, the town council's refusal to enter into a contract of employment pursued the legitimate objective of combating discrimination against homosexual persons whose rights were in question. It held that it was 'difficult to justify' a town council permitting a civil union registrar to treat homosexual couples differently from heterosexual couples. According to Rikki Holmaat [212], the opinion of principle returned by the Equal Treatment Commission on 7 March 2008, in what was a politically sensitive case, diverged from the pragmatic solutions that had been recommended previously and stressed the 'exemplary role' that a public authority must play in combating discrimination. In this context, the personal religious conscience of a civil servant must yield to the general interest.

In the Netherlands, general opinion about this solution is far from unanimous because the intention of the national government is to guarantee both the rights of same-sex couples and the rights of civil union registrars, who claim, in a personal capacity, a conscientious objection with regard to the marriage of persons of the same sex. This policy has been enshrined in an agreement signed by Dutch mayors by virtue of which they have committed to the celebration of homosexual marriages in their town

207 In Europe, the Netherlands was the first country to recognise same-sex marriage: the Act of 21 December 2000 which opened up access to marriage to individuals of the same sex entered into force on 1 April 2001. Previously, the Act of 5 July 1997 on the introduction of registered partnerships, which entered into force on 1 January 1998, had allowed same-sex couples the possibility of officially establishing their cohabitation.

208 Opinion No 2002-25, (5.8) and Opinion No 2005-26, available in Dutch on the website of the CGB (http://www.cgb.nl).

209 *Algemene wet gelijke behandeling (AWGB)*, 2 March 1994 (entered into force on 1 September 1994).

210 Note that this approach is in keeping with previous opinions delivered by the CGB (Opinion No 1997-46 relating to a Jehovah's Witness who had refused a blood transfusion; Opinion No 2000-13 relating to a student who had not been accepted for a professional training due to her refusal to participate in abortion or euthanasia).

211 Opinion No 2008-40, available in Dutch on the website of the CGB (http://www.cgb.nl) and referenced in the *European Anti-Discrimination Law Review*, 2008, No 6/7, pp. 106–107.

212 European Network of legal experts in the non-discrimination field, *Netherlands Report on Measures to Combat Discrimination: Directives 2000/43/EC and 2000/78/EC*, 2008, Section 0.3.

councils while also handling conscientious objection in a pragmatic manner[213]. It was also reflected in a decision delivered by a court of first instance in 2003 which held that the dismissal of a civil registrar in similar circumstances was unlawful[214]. It remains to be seen whether the opinion delivered by the Equal Treatment Commission in March 2008 will prompt a reversal of case law.

In the United Kingdom, a similar case led to an important decision by the Employment Appeal Tribunal on 19 December 2008[215]. Subsequent to the legislation relating to civil partnerships adopted in 2004[216] coming into force, Mrs Ladele, a civil registrar employed by the London Borough of Islington since 1992, refused to carry out any duties associated with the registration of civil partnerships[217] on the grounds that this institution was contrary to her Christian faith and that any union between persons of the same sex was contrary to the law of God and therefore a sin. The Borough insisted, unsuccessfully, that the civil servant should undertake at least some of her duties in relation to the registration of civil partnerships. It then followed this with disciplinary action and a threat of dismissal. In first instance, the Employment Tribunal held that there was a case of direct discrimination based on the religious beliefs of Mrs Ladele, harassment in the workplace and indirect discrimination[218]. According to the Tribunal, the requirement for all registrars, and therefore the applicant, to celebrate civil partnerships could not be justified on the grounds of protecting the rights of the homosexual community since this duty could be undertaken by civil registrars without a conscientious objection. In other words, although the objective pursued by the public authority was legitimate (to promote the rights of the homosexual community), the absolute nature in which it was implemented violated the rights of the applicant. This decision was reversed entirely on appeal. The Employment Appeal Tribunal concluded that no direct discrimination (or harassment) had taken place. The purpose of the disciplinary sanction applied to the applicant was not to punish her for her religious beliefs, but related to the fact that she did not fulfil the duties inherent in her job[219]. Any individual who was contractually obliged to participate in the registration of civil partnerships and had abstained from such duties, for whatever reason, would have been treated in an identical manner[220]. As emphasised by the Employment Appeal Tribunal, this solution was, in practice, the only tenable solution given that direct discrimination founded on religious belief cannot be justified under the system implemented by Directive 2000/78/CE. The position defended by the Tribunal in first instance effectively amounted to obliging employers to accede to all demands of employees motivated by genuine religious belief (adjustment of working times, prayer time, clothing, etc.)[221], irrespective of the nature of these beliefs[222]. In this respect, the Employment Appeal Tribunal developed

213 In its Recommendation accompanying Opinion No 2008-40, the CGB asked the government not to authorise civil union registrars to refuse to celebrate marriage between homosexual persons (*Advies Commissie Gelijke Behandeling inzake gewetensbezwaarde ambtenaren van de burgerlijke stand. Trowens? Geen bezwaar !*, Recommendation No 2008-04 CET, available in Dutch on the website of the CGB(http://www.cgb.nl).

214 District Court of Leeuwarden, 24 June 2003, LJN AH8543, commented in the *European Anti-Discrimination Law Review*, 2008, No 6/7, p. 107.

215 *London Borough Islington* v *Ladele* [2008] UKEAT 0453_08_1912, available online (http://www.bailii.org/uk/cases/UKEAT/2008/0453_08_1912.html) and referenced in the *European Anti-Discrimination Law Review*, 2009, No 8, pp. 69–70.

216 Civil Partnership Act, 2004.

217 Civil partnership enables same-sex partners to enter into a contract to which the same rights as those conferred by marriage are attached.

218 *Ladele* v *London Borough Islington*, Case No 2203694/2007, Employment Tribunal of Central London (not published).

219 See also *McClintock* v *Department of Constitutional Affairs* [2008] IRLR 29 (http://www.bailii.org/uk/cases/UKEAT/2007/0223_07_3110.html). This case relates to a Justice of the Peace who refused to sit on panels on which he might be called on to place children for adoption with same-sex couples.

220 *London Borough Islington* v *Ladele* [2008] UKEAT 0453/08/RN, 10 December 2008, (52–55).

221 *Ibidem*, (72). See also, McColgan, A., 'Class wars? Religion and (In)equality in the Workplace', *Industrial Law Journal*, 2009, Vol. 38, No 1, pp. 11–14.

222 *London Borough Islington* v *Ladele* [2008] UKEAT 0453/08/RN, 10 December 2008 (106).

the example of a civil registrar who was a follower of a Christian church in the USA that advocated the supremacy of the white 'race', and who was able to rely on this belief when refusing to pronounce mixed marriages. This Tribunal also concluded that no indirect discrimination had taken place on the grounds that the requirement for all registrars to perform civil partnership ceremonies was a measure aimed at implementing the principal of equal treatment, to which the public authorities are legally subject. Consequently, the objective pursued was legitimate and the Tribunal held that the principle of proportionality had been respected:

> *'whether the council may have been entitled to avoid bringing this matter to a head by not designating the claimant, in our view they were not obliged to do so. We think they were entitled not to agree to make an exception for the claimant. They were not required to connive in what they perceived to be unacceptable discriminatory behaviour by relieving the claimant of these duties. They were entitled to adopt as an objective an unambiguous commitment to the non-discriminatory provision of services by all staff who in the normal course of events, would be required to carry out those services. It would necessarily undermine that objective to make an exception for the claimant. Accordingly, their refusal to accommodate the religious belief of the claimant did not in our judgment involve unlawful indirect discrimination'* [223].

This position does not appear to contradict the case law of the European Court of Human Rights on the freedom of expression accorded to civil servants, notably in the *Vogt* judgment delivered by the Grand Chamber in 1995 [224]. This case concerns the dismissal of a civil servant from the secondary school system in the Federal Republic of Germany where this dismissal was founded on her role within the communist party by virtue of which she was supposedly unable to fulfil her 'duty of political loyalty' with respect to the Constitution. Although '[t]he Court reiterates that the right of recruitment to the civil service was deliberately omitted from the Convention' and that 'the refusal to appoint a person as a civil servant cannot as such provide the basis for a complaint under the Convention', it added that '[t]his does not mean, however, that a person who has been appointed as a civil servant cannot complain on being dismissed if that dismissal violates one of his or her rights under the Convention' [225]. In this case, the Court condemned Germany, in particular, for violation of the applicant's right to freedom of expression, holding that the sanction inflicted on the teacher was disproportionate. Its ruling relied on the following elements: (i) based on their status, it is legitimate for civil servants to be subject to an obligation of discretion [226]; (ii) there had been no criticism levelled at the teacher in the exercise of her actual functions [227]; (iii) [n]o other Member State of the Council of Europe appears to have imposed such a rigorous duty of loyalty, 'whilst even within Germany, this duty was not construed and implemented in the same manner throughout the country' [228]; (iv) The duties carried out by Mrs Vogt in the capacity of civil servant did not constitute any risk to security and consequently, her involvement in the communist party was not of a nature that would undermine the objective pursued by the duty of political loyalty, namely, to establish a 'democracy capable of defending itself after the nightmare of Nazism' [229].

The situation involving civil registrars of Christian faith who are reluctant to participate in the union of individuals of the same sex can be compared with that of Muslims refusing to shake hands with an individual of the opposite sex. However, the latter case is slightly different to the extent that the fact of shaking someone's hand, when this has been established as an occupational requirement, relates

[223] *Ibidem*, (117).

[224] Eur. Ct. H.R. (Grand Chamber), *Vogt* v *Germany*, 2 September 1995 (Application No 17851/91).

[225] *Ibidem*, (43).

[226] *Ibidem*, (53).

[227] *Ibidem*, (54).

[228] *Ibidem*, (59).

[229] *Ibidem*, (51–60).

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more to a custom of co-existence that is specific to the Western world than to a legal or statutory obligation.Several cases of this type have been dealt with in the Netherlands. In the first case, on the occasion of which the Equal Treatment Commission (CGB) delivered an opinion on 27 March 2006, a Muslim woman was unable to register in a school in order to pursue a training course for educational assistants on the grounds that she had specified that she did not wish, under any circumstances, to shake hands with a man [230]. The CGB concluded that there had been indirect discrimination founded on the religious beliefs of the applicant. According to the opinion delivered by the Commission, this difference in treatment could not be justified by the educational policy of the school which required the students to respect the standard norms and values of Dutch society. The effect of this policy was to exclude students from minority cultures, since shaking hands is not the only means of communicating respect for another. On the point relating to whether or not the refusal to shake the hand of a man (and not that of a woman) violated the principle of gender equality, the Commission indicated that this principle could be preserved by asking the applicant to refrain from shaking the hand of anyone, male or female. However, the position taken by the Dutch Commission was not followed in another dispute. Subsequent to her decision to no longer shake hands with a man, a Muslim teacher brought a case against her employer, a public school. In the first instance and on appeal [231], the courts held that the dismissal was lawful to the extent that the school could reasonably demand of its teachers to behave in accordance with the rules of Dutch society. This requirement was especially important in a school where the majority of the students belonged to ethnic minorities, and, therefore, needed to be prepared for the fact that shaking hands is one of the main rules of conduct applied when greeting and showing respect to another individual.

Another case concerned the decision not to appoint a Muslim applicant to the post of Customer Service Manager in the Social Services Department of the city of Rotterdam [232] as a result of having refused to shake hands with women. Whereas the CGB, in keeping with its previous opinion, upheld the existence of indirect discrimination founded on the religious convictions of the applicant [233], the Court of first instance in Rotterdam ruled in favour of the city council in August 2008 [234]. This Court maintained that it was its responsibility to protect women against the discriminatory behaviour of a civil servant and that fostering a good relationship between the local authorities and citizens was one of the key aspects of the position of Customer manager. This argument convinced the Court that the difference in treatment was justified. It ruled that the city of Rotterdam could have legitimately chosen 'to observe the usual rules of etiquette and of greeting customs in the Netherlands'.

230 Opinion No 2006-51, available in Dutch on the website of the CGB (http://www.cgb.nl) and referenced in the *European Anti-Discrimination Law Review*, 2006, No 4, p. 74.

231 District Court of Utrecht, 30 August 2007 and Central Council of Appeal (*Centrale Raad van Beroep*, superior administrative court), 11 May 2009. These decisions were reported on by Rikki Holtmaalt in the European Network of legal experts in the non-discrimination field, News report dated 26 June 2009: 'Dismissal of female teacher lawful' (http://www.non-discrimination.net).

232 The other aspect of this case concerned the applicant's wearing of a *djellaba* at work. The CGB held that the rejection of this garment by the Social Services Department of the city of Rotterdam constituted direct discrimination founded on religion and was therefore unlawful. See case references in the note below.

233 Opinion No 2006-202 of 5 October 2006, available in Dutch on the website of the CGB (http://www.cgb.nl) and referenced in the *European Anti-Discrimination Law Review*, 2007, No 5, p. 89.

234 District Court of Rotterdam, 6 August 2008, LJN BD9643, referenced in the *European Anti-Discrimination Law Review*, 2009, No 8, pp. 56–57.

3.3. Conscientious objection and reasonable accommodation

This national case law which deals with conscientious objection in more or less explicit manner illustrates the extent to which this issue can be intrinsically linked to that of reasonable accommodation in the religious domain. Although Directive 2000/78/EC expressly established the principle of reasonable accommodation for individuals suffering from a disability only (Article 5), this notion has still surfaced as an issue, following the example given by the Canadian Supreme Court in 1985 [235], in certain scenarios of indirect discrimination founded on religion [236]. In order to assess the justified nature of a case of indirect discrimination, judges are sometimes called on to examine, when applying the proportionality test, whether or not the legitimate objective underlying the difference in treatment can be achieved by measures that are less detrimental to the principle of equality or religious freedom.

Therefore, in its renowned *Thlimmenos* ruling, the European Court of Human Rights ruled that 'the right […] not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification' [237]. It went on to assert that although Greece has a legitimate interest in excluding certain offenders from the profession of chartered accountant, 'a conviction for refusing on religious or philosophical grounds to wear the military uniform cannot imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise this profession' [238]. Excluding the applicant on the grounds that he was an unfit person, therefore, constituted unjustified discriminatory treatment founded on his religious beliefs. By 'failing to introduce appropriate exceptions to the rule barring persons convicted of a serious crime from the profession of chartered accountants', the Greek State had infringed the applicant's right not to be subject to discrimination in the exercising of his right to religious freedom [239].

The reasoning of the Dutch Equal Treatment Commission was clearly based on the concept of reasonable accommodation when it ruled that the town councils should look for 'practical solutions' aimed at accommodating the working times of civil registrars in order to guarantee both the celebration of same-sex marriages and the employment of individuals that object to such unions [240]. It adopted the same approach when reconciling the refusal to shake hands with someone of the opposite sex with the principle of equality between men and women by suggesting that no one's hand should be shaken [241]. This approach was also developed in Great Britain, in the *Ladele* case [242]. In this case, the English Employment

[235] *Ontario Human Rights Commission (O'Malley)* v *Simpsons-Sears* [1985] 2 S.C.R. 536 (O'Malley case).

[236] See also Bribosia, E., Ringelheim, J., and Rorive, I., 'Aménager la diversité : le droit de l'égalité face à la pluralité religieuse', *Revue trimestrielle des droits de l'homme*, 2009, pp. 319–373; Bribosia, E., Ringelheim, J., and Rorive, I., 'L'aménagement raisonnable pour motif religieux: un concept issu d'Amérique du Nord en voie d'intégration en Belgique et en Europe', *Actualités du droit de la non-discrimination*, Bayart, Ch., Sottiaux, S., and Van Drooghenbroeck, S. (dir.), La Charte, Die Keure, Brussels, Brugge, 2009, pp. 354–390.

[237] Eur. Ct. H.R. (Grand Chamber), *Thlimmenos* v *Greece,* 6 April 2000 (Application No 34369/97), (44). Here the Court deviated from the approach adopted in the *Valsamis* v *Greece* case, 18 December 1996 (Application No 31787/93) in which it ruled that the obligatory participation of a student in a parade commemorating the entry of Greece into the war alongside Italy had not violated the religious freedom of his father, a Jehovah Witness, who had opposed his involvement in this parade on religious grounds. In relation to disability, see also Eur. Ct.H.R., *Glor* v *Switzerland*, 30 April 2009 (Application No 13444/04), (94–96).

[238] *Ibidem*, (47).

[239] *Ibidem*, (48).

[240] Opinions No 2002-25 and 2005-26 referenced above.

[241] Opinions No 2006-51 and 2006-202 referenced above.

[242] *London Borough Islington* v *Ladele* [2008] UKEAT 0453/08/1912, (52), referenced above.

Appeal Tribunal stressed that it was not a matter of a difference in treatment directly founded on the religion of the application, but of an action based on the refusal of the administrative authorities of Islington to accommodate the work of this civil servant with regard to rules relating to her faith. In the light of a number of decisions taken by the supervisory authorities of the European Convention on Human Rights [243], the English Employment Appeal Tribunal ruled that the indirect distinction levelled against the applicant did not violate her religious freedom.

This case law is in keeping with the previous line of decisions delivered by the Spanish Constitutional Court. In 1985, in a case concerning a Seventh Day Adventist wishing to observe the Sabbath, this Court decided that the principle of religious conscientious objection did not allow the unilateral modification of an existing contract of employment [244]. This position taken by the Spanish Constitutional Court echoes the case law of the supervisory authorities of the European Convention on Human Rights, criticised by some legal experts for its formalism [245]. According to this Strasbourg case law, restrictions relating to religious freedom arising from the exercising of a contract of employment do not violate this freedom to the extent that the worker always has the option of terminating this contract (contracting-out approach) [246]. Moreover, in 2000, this same Spanish Constitutional Court had stressed that the position of civil servants was different from that of medical personnel and that the former had less discretion at their disposal in terms of assessing the extent to which they could exercise a conscientious objection in order to abstain from duties attached to their functions [247]. For civil registrars exercising a conscientious objection in the Netherlands and in Great Britain, this same specific role of the public authorities in the implementation and observance of the principle of equal treatment is highlighted today in the refusal to accommodate their functions.

The case law of the European Court of Human Rights subsequent to the *Thlimmenos* case illustrates the extent to which the right to religious conscientious objection and the correlating obligation to adjust

[243] Eur. Comm. H.R., *Ahmad* v *United Kingdom,* decision of 12 March 1981 (Application No 8160/78), *D.R.* 22, p. 27: accommodation of an employee's working times; Eur. Comm. H.R., *Stedman* v *United Kingdom,* decision of 9 April 1997 (Application No 29107/75): accommodation of an employee's working times; Eur. Ct. H.R., *Kalaç* v *Turkey*, 1 July 1997 (Application No 20704/92): restricted freedom of religion for an individual entrusted with a public position.

[244] ATC 19/1985, judgment of 13 February 1985.

[245] See, inter alia, Velaers, J., and Foblets, M.-C., 'L'appréhension du fait religieux par le droit — A propos des minorités religieuses', *Revue trimestrielle des droits de l'homme*, 1997, pp. 273–307, pp. 292–293; Evans, C., *Freedom of Religion Under the European Convention on Human Rights*, Oxford, OUP, 2001, pp. 130–131; Cumper, P., 'The Public Manifestation of Religion or Belief: Challenges for a Multi-Faith Society in the Twenty-First Century', in O'Dair, R., and Lewis, A., (eds), *Law and Religion*, Oxford, OUP, 2001, pp. 311–328; Gunn, T.J., 'Adjudicating Rights of Conscience Under the European Convention on Human Rights', in van der Vyver, J.D., and Witte, J. (eds), *Religious Human Rights in Global Perspective — Legal Perspectives (Vol. 2)*, The Hague, Martinus Nijhoff, 1996, pp. 305–330, p. 312. See also *Stephen Copsey* v *WWWB Devon Claeys Ltd* [2005] EWCA CIV 932, (31–35) *per* Lord Justice Mummery, (44–66) *per* Lord Justice Rix, (91) *per* Lord Justice Neuberger.

[246] Eur. Comm. H.R., *Ahmad* v *United Kingdom,* 12 March 1981 (Application No 8160/78), *D.R.* 22, p. 39 (teacher in public French school requesting the rearrangement of his timetable so that he could attend prayers in a mosque on Fridays). See also Eur. Comm. H.R., *Konttinen* v *Finland*, 3 December 1996 (Application No 24949/94), *D.R.* 87-B, p. 68; Eur. Comm. H.R., *Stedman* v *United Kingdom*, 9 April 1997 (Application No 29107/95), *D.R.* 89-B, p. 104; For a description of these decisions, see Bribosia, E., Ringelheim, J., and Rorive, I., 'Aménager la diversité : le droit de l'égalité face à la pluralité religieuse', *Revue trimestrielle des droits de l'homme*, 2009, pp. 349–358.

[247] ATC 135/2000, judgment of 8 June 2000. For more information on the principle of conscientious objection and civil servants, see developments in Finland as described in Opinion No 4-2005 of the European Network of legal experts in the non-discrimination field referenced above, p. 11.

a rule or practice in order to take into account specific religious beliefs is far from unlimited [248]. In the same vein, national courts have remained very reticent [249], although in specific circumstances, certain decisions have established a right to reasonable accommodation on religious grounds [250]. Here, it is important to stress the extent to which the application of the logic of reasonable accommodation to religious discrimination has the effect of increasing the number of cases of conscientious objection, traditionally limited to the refusal to perform military service, celebrate civil unions or participate in medical procedures relating to procreation, abortion or euthanasia.

3.4. Link with indirect discrimination

It is remarkable to note the extent to which, in the vast majority of national cases reported, the conscientious objector or person who requested reasonable accommodation for religious reasons, has based their claim, in principal, on a violation of the principle of non-discrimination against their person, and not on a violation of their right to religious freedom. It is, therefore, in verifying whether or not the indirect religious discrimination is justified that the national courts have been required to take into account other dimensions of the principle of equal treatment by balancing the protection that must be granted in respect to religious or philosophical beliefs with the protection aimed at implementing this principle independently of the sexual orientation or gender of the individuals. Rather than having to

[248] This case law mainly concerns restrictions relating to the wearing of religious symbols: Eur. Ct. H.R., *Kosteski* v *the former Yugoslavian Republic of Macedonia*, 13 April 2006 (Application No 55170/00): improper use of the right conferred to Muslims to take holiday leave in order to celebrate certain religious feasts; Eur. Ct. H.R., *El Morsli* v *France,* decision of 4 March 2008 (Application No 15585/06): refusal of French consular authorities in Marrakech to entrust the task of checking the identity of Ms El Morsli to a female agent; Eur. Ct. H.R., *Mann Singh* v *France*, decision of 13 November 2008 (Application No 24479/07): refusal of ministerial authorities to renew a driver's licence without this driver presenting a new identity photograph in which the driver appears with his head uncovered; Eur. Ct. H.R., *Dogru* v *France* and *Kervanci* v *France*, 4 December 2008 (Application No 27058/05 and 31645/04), (75): refusal of school authorities to allow two students to wear a hat, instead of a headscarf, during physical education classes; and the six last decisions of the Court delivered 30 June 2009 relative to the expulsion of Muslim students or Sikhs from their schools in France, in accordance with the Act of 2004 on the prohibition of conspicuous religious symbols in school, when they had proposed an alternative solution to enable continued attendance at the school: *Aktas* v *France* (Application No 43563/08); *Ghazal* v *France* (Application No 29134/08); *Bayrak* v *France* (Application No 14308/08); *Gamaleddyn* v *France* (Application No 18527/08); *Jasvir Singh* v *France* (Application No 25463/08); *Ranjit Singh* v *France* (Application No 27561/08).

[249] See, for example, in the Netherlands: decision of 13 July 2009 in the Cantonal Court of Hertogenbosch (refusal, for reasons of public health, to adjust the uniform of a Muslim woman wanting to wear three-quarter length sleeves rather than short sleeves) reported on by Rikki Holmaat within the European Network of legal experts in the non-discrimination field, News report dated 3 September 2009: 'Muslim nurse dismissed because of not meeting clothing requirements', available on the website of the network (http://www.non-discrimination.net); in the United Kingdom: decision of 19 October 2006 by the Employment Tribunal (1801450/06) in *Azmi* v *Kirklees Metropolitan Borough Council* (suspension of Muslim teacher for having worn a full *niqab* while teaching an English class to children whose native language was not English) reported in the *European Anti-Discrimination Law Review*, 2007, No 5, pp. 99–100; in the United Kingdom: decision adopted in 2006 by the House of Lords in the renowned case between *R. (on the application of Begum)* v *Headteacher, Governors of Denbigh High School* [2007] 1 AC 100.

[250] See, for example, in Portugal: decision of Central Administrative Court of Appeal in February 2007, *Bar Association* v *applicant* (requirement on the basis of respect for religious freedom whereby the Bar association would set an examination date for the applicant that would not be a public holiday for his 'Church') reported in the *European Anti-Discrimination Law Review*, 2008, No 6/7, p. 111; in the Netherlands: Opinion No 2009-15 of the CGB of 13 March 2009, available in Dutch on the website of the CGB (requirement to wear a swimsuit that leaves the knees exposed with the aim of maintaining a good atmosphere in a public swimming pool has a disproportionate effect on the rights of individuals wishing to wear a *burkini* for religious reasons).

resolve a conflict between a fundamental freedom (religious freedom), which is formed independently of the principle of equal treatment, and the principle of equal treatment itself, judges or national equality bodies are more generally required to arbitrate on the tensions inherent in the principle of equal treatment itself when it involves, as prohibited discrimination grounds, gender, religion, beliefs or sexual orientation.

As Frances Raday has made a point of stressing, the vast majority of traditional religions and cultures are founded on social norms and practices that were developed in a patriarchal context at a time when there was no protection systematically accorded to individual human rights in general, and to women's right to equality or to the freedoms of any individual in particular [251]. It is, therefore, not surprising that even today, the task of simultaneously implementing the principle of equal treatment independently of gender, religious belief or sexual orientation is a complex one.

The decisions taken by the national courts amply illustrate that the test of proportionality remains the preferred legal instrument for approaching this type of conflict, this test being applied when assessing the justifiable nature of the indirect discrimination. In this respect, the case law of the Human Rights Committee suggests that the essential criteria in determining the acceptable nature of an accommodation on religious grounds turns on whether or not it is possible for other individuals to be discriminated against or made subject to negative consequences in the exercising of their fundamental rights as a result this accommodation being granted. Along this line, the *Kenneth Riley* [252] case involving two retired officers of the Royal Canadian Mounted Police and members of an association (the mission of which is to respect the traditions of this police force), who complained about the dispensation granted to a Sikh police officer, in particular whereby he was allowed to wear a turban rather than the traditional Stetson hat, was dismissed by the Human Rights Committee on the grounds that this dispensation relating to uniform in no way deprived them of the enjoyment of their fundamental rights. This criterion had already been established by the Canadian Supreme Court, in particular, in a case in which the management team of an Ontario hospital ignored the opposition of a Jehovah's Witness couple and administered a blood transfusion to their the child since it was necessary for the child's survival. For the Court, the exercise of the right of freedom of religion here was incompatible with the respect of the (absolute) right to life of the child and should be limited accordingly [253].

In specific relation to the resolution of conflicts between religious interests and the human rights of women, a United Nations report takes the same view. It unequivocally asserts 'the pre-eminence of the universal principles of respect for the individual and the individual's inalienable right to self-determination as well as complete equality between men and women' [254]. In a resolution adopted in 2005, the Council of Europe also affirms that 'Freedom of religion cannot be accepted as a pretext to justify violations of women's rights, be they open or subtle, legal or illegal, practised with or without the

[251] 'Culture, Religion and Gender', *International Journal of Constitutional Law*, 2003, Vol. 4, pp. 663–715, pp. 664–665. See also, from the same author: 'Secular Constitutionalism Vindicated', *Cardozo Law Review*, 2009, Vol. 30, pp. 2769–2798.

[252] Human Rights Committee, *Kenneth Riley et al.* v *Canada*, 21 March 2002, Communication No 1048/2002.

[253] *R* v *Children's Aid Society of Metropolitan Toronto* [1995] 1 *S.C.R.*, p. 315.

[254] Report by Abdelfattah Amor, M., Special reporter on the freedom of religion or belief in accordance with resolution 2001/42 of the UN Committee on Human Rights, *Droits civils et politques et, notamment: Intolérance religieuse — Etude sur la liberté de religion ou de conviction et la condition de la femme au regard de la religion et des traditions,* E/CN.4/2002/73/Add.2, 5 April 2002 (our translation), available online in French only(http://www2.ohchr.org/english/issues/religion/docs/E.CN.4.2002.73.Add.2_fr.pdf). See also the report submitted by Ms Asma Jahangir, Special reporter on the freedom of religion and belief in accordance with resolution 6/37 of the UN Committee on Human Rights, *Promotion and Protection of All Human Rights, Political, Economic, Social and Cultural Rights, Including the Right to Development*, A/HRC/10/8, 6 January 2009, (25–28) (http://daccessdds.un.org/doc/UNDOC/GEN/G09/101/04/PDF/G0910104.pdf?OpenElement).

nominal consent of the victims — women'[255]. In our opinion, a similar approach should prevail when appraising conflicts between religious interests and the principle of non-discrimination with regard to homosexual persons. Invoking freedom of religion or freedom of expression to justify differences in treatment founded on sexual orientation constitutes an abuse of rights in the sense of the meaning conferred by Article 17 of the European Convention on Human Rights[256].

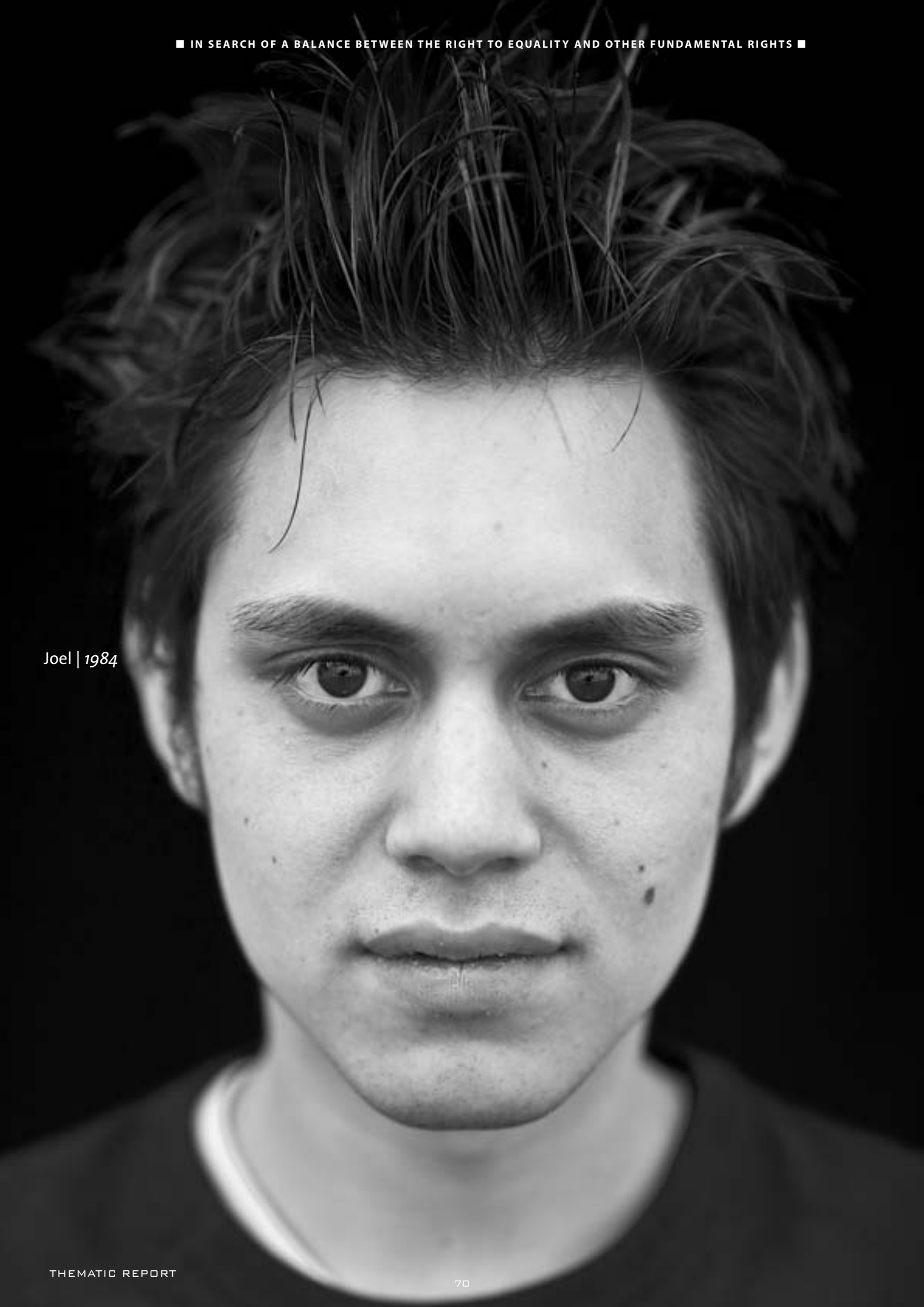
When it comes to the manifestation of religious practices, exactly what is or is not likely to violate the principle of equality between men and women remains to be determined. In this respect, the multilayered significance associated with the wearing of the Islamic headscarf[257] illustrates the extent to which the issue can be a sensitive one to resolve. Notwithstanding the European Court of Human Rights which ruled in a peremptory manner that this 'symbol […] appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality'[258].

[255] *Women and religion in Europe,* Resolution 1464 of the Parliamentary Assembly of the Council of Europe 4 October 2005, (5) (http://assembly.coe.int/mainf.asp?Link=/documents/adoptedtext/ta05/eres1464.htm).

[256] For more information, see Opinion No 4-2005 referenced above and provided by the EU Network of Independent Experts on Fundamental Rights.

[257] Evans, C., 'The "Islamic Scarf" in the European Court of Human Rights', *The Melbourne Journal of International Law*, 2006, Vol. 7, pp. 52–73, p. 52.

[258] In particular, see Eur. Ct. H.R. (Grand Chamber), *Leyla Sahin* v *Turkey*, 10 November 2005 (application No 44774/98), (111); *contra*: Judge Tulkens in her dissenting opinion. See also Bribosia, E., and Rorive, I., 'Le voile à l'école: une Europe divisée' *Revue trimestrielle des droits de l'homme*, 2004, pp. 951–983; Rorive, I., 'Religious Symbols in the Public Space: In Search of a European answer', *Cardozo Law Review*, 2009, Vol. 30, pp. 2669–2698, esp. pp. 2683–2684.



Joel | *1984*

Conclusion

By engaging at a deeper level in the fight against discrimination founded on race, ethnic origin, religion, belief, sexual orientation, age and disability, through the adoption of Directives 2000/43/EC and 2000/78/EC, it is likely that the European Union has not taken the full measure of the potential tensions or conflicts with other fundamental rights that can occur as a result of pursuing this objective of equal treatment. Almost a decade has passed since the adoption of these directives and it is clear that conflict scenarios are still emerging in practice, conflict scenarios which were not all addressed earlier in the process by the European legislator. The delicate and complex task of striking a balance between these different fundamental rights currently falls on the Member States for the most part (legislators or judges), under the supervision of the Court of Justice of the European Union and the European Court of Human Rights.

There are several lessons to be drawn for what we have discussed above.

Firstly, internal conflicts, which are specific to one individual, are the easiest conflicts to resolve. In most cases, it involves the individual partially waiving a fundamental right, for example, respect for his/her private life, so that he/she can fully avail of the right to equal treatment. Once this right has been partially waived with full knowledge of the facts in return for certain safeguards, the conflict can be resolved in a relatively satisfactory manner. This is also the logic adopted by Directive 95/46/EC in relation to the protection of 'sensitive' personal data, such as race or ethnic origin. If the effective fight against discrimination founded on these grounds should require the collection and processing of such data, this should be allowed within the context of a strictly defined framework.

Secondly, when conflicts cause several individuals or organisations to be set in opposition to each other (external conflicts), thus creating conflicts that are a priori irreconcilable, tensions may arise both between the requirement for equality and concurrent fundamental rights (inter-rights) and within the actual principle of equality itself (formal equality v substantive equality), or between the various prohibited grounds of discrimination (intra-right).

Yet, it is in relation to this last type of conflict (within the requirement for equality itself) that the responsibility of the European Union is most important. We know that the European Union does not have general competence in the regulation of all rights and freedoms established by the Charter of Fundamental Rights. Even if it was achievable, it could not, without the risk of exceeding its powers, anticipate and resolve upstream all potential inter-rights conflicts. If the Union can provide certain signposts by regulating the prohibition of discrimination, when the latter conflicts with the right to respect for private and family life or with freedom of association, it would, in principle, be the Member States that would find themselves first in line when it comes to striking an optimum balance between these rights and the principle of equal treatment.

However, in the area of combating discrimination, the European Union has seen itself assigned some competences from the Treaty of Rome in the area of gender, which was then extended to include other grounds by virtue of the Treaty of Amsterdam. As a consequence, the European legislator has been assigned specific responsibility in this area to enable it to clear the existing minefield of intra-right conflicts that occur between different facets of the principle of equal treatment, where such clearing is worthwhile or, indeed, necessary. When we consider the thorny issue of a possible hierarchy between grounds (for example, between discrimination founded on religion and discrimination founded on gender or sexual orientation), the extent to which there is a need for in-depth reflection and debate

on this subject is immediately apparent. If this responsibility is not taken on earlier in the regulatory process, judges will remain the first in line when it comes to the settlement of conflicts on a case-by-case basis, with no possibility of relying on a recommended, consistent and 'ready-to-use' methodology. The examples taken from the case law of the European Court of Human Rights and the case law of the Court of Justice of the European Union demonstrate that the establishment of a hierarchy of grounds is fraught with risk. The opportunity presented by the negotiations currently underway on the proposed directive aimed at extending, beyond employment, the material scope of application of the prohibition of discrimination founded on age, disability, religion or belief as well as sexual orientation should be seized in order to carry out a more detailed reflection on the coherence of European law on non-discrimination in an attempt to clear the minefield of internal conflicts that can occur within the principle of equality.

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Bastiaan | *1992*
Brandon | *1981*

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