THE ROAD TO EQUALITY
-
DEVELOPING THE PROTECTION AGAINST DISCRIMINATION ON RACIAL OR ETHNIC GROUNDS WITHIN THE EUROPEAN UNION

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ABSTRACT

In 2000, the European Union adopted a Directive against discrimination on the grounds of racial or ethnic origin. This Directive was one of the first legislative measures taken by the EU in the fight against racism and racial discrimination. The Thesis examines whether the Directive improves the protection against discrimination on the grounds of racial or ethnic origin for people within the EU by an in-depth analysis and evaluation of the Directive as a whole in relation to the theoretical concepts of race and racism and of models of anti discrimination law. This analysis includes a discussion of the need for and the effectiveness of legislation in general and of legislation at EU level in the fight against racism and racial discrimination and an evaluation of the anti discrimination clauses of the international and European human rights instruments. The Directive is studied in these wider contexts because they have all been influential upon its development and because they provide both the framework and a set of standards for the examination and evaluation of the Race Directive and its effectiveness in protecting people within the EU against racial or ethnic origin discrimination. The Thesis concludes with an assessment of how far the EU has come on the road to equality with the adoption of the Directive and the subsequent developments; or, in other words, how far the EU has progressed towards achieving equality for all people in Europe.
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Statement of Originality

I certify that this Thesis, and the research to which it refers, are the product of my own work, and that any ideas or quotations from the work of other people, published or otherwise, are fully acknowledged in accordance with standard referencing practices.
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CHAPTER 7 - CONCLUSION

1 Concepts of Race, Racism and Racial Discrimination
INTRODUCTION

In 2000, the EU adopted a Directive against discrimination on the grounds of racial or ethnic origin. This Directive was one of the first legislative measures taken by the EU in the fight against racism and racial discrimination. This fight had been part of the discussions within the EU since the mid 1980s, but no legislative action was taken until the Treaty of Amsterdam of 1997 established the Community competence to do so by inserting Article 13 into the EC Treaty. However, once it was given the competence, the EU adopted the Race Directive in record time.

This Thesis aims to identify whether the Race Directive improves the protection against discrimination on the grounds of racial or ethnic origin for people within the EU by an in-depth analysis and evaluation of the Directive as a whole in relation to the theoretical concepts of race and racism and models of anti discrimination law. This analysis will include a discussion of the need for and the effectiveness of legislation in general and of legislation at EU level in the fight against racism and an evaluation of the anti discrimination clauses of the international and European human rights instruments. Through this analysis, the Thesis establishes where the protection given by the Directive is lacking and why this is so.

The Thesis starts from the assumption that anti discrimination legislation needs to be studied within the wider conceptual, historical and societal context. For a proper understanding of the Directive it is important to study it against the backgrounds mentioned because they have all been influential on the development of the provisions of the Directive. They help explain why the Directive was adopted, why it covers particular grounds and areas and ultimately why and where its effectiveness is limited.

The literature on the Directive suggests, on the one hand, that overall the Directive is considered to be a very positive development in the fight against racial and

ethnic origin discrimination within the EU and its Member States. On the other hand, many writers are also highly critical of a number of its provisions because they are falling short of providing comprehensive protection for all. However, this literature has often looked at one or more separate issues or provisions of the Race Directive in isolation, without giving enough detailed attention to the historical, social and political backgrounds which have made the Directive into what it is today. The Thesis, on the other hand, analyses and critiques the Directive using the contexts mentioned to explain its strengths and weaknesses.

In order to do this, the research for this Thesis has concentrated on an analysis of the literature about theories on race, racism, racial discrimination and equality, about whether law is the right tool to tackle racism and racial discrimination and about the arguments for and against legal measures. A number of international human rights instruments and the interpretation given to them in the case law and the literature have also been studied. These studies provide both the framework and a set of standards for the examination and evaluation of the Race Directive and its effectiveness in protecting people within the EU against racial or ethnic origin discrimination.

The first of the contexts that have influenced the Race Directive relates to theories on race, racism and racial discrimination. Racism and racial discrimination are by no means recent problems, but at the international level, the fight against these came to the fore after World War II. In the war, theories about the existence of different races and the superiority of some over others had led to genocide and persecution. The feeling was that states should work together to avoid a repetition of the war. To further this aim the United Nations was formed in 1945 and the Council of Europe in 1949. Fundamental human rights were seen as vitally important to achieve greater unity between nations and, therefore, the United Nations agreed the Universal Declaration of Human Rights (UDHR) in 1948 and the Council of Europe adopted the European...
Convention on Human Rights and Fundamental freedoms (ECHR) in 1950. Both include a prohibition of discrimination in the enjoyment of the rights protected in the instrument on a large number of grounds, including race, colour, religion and national origin. Thus, after World War II, the fight against racism and racial discrimination developed at the international and the wider European level, both of which affected the European states.\(^2\)

Many of these states already had a plural society, made up of people of different descent, ancestry or culture, even before the large-scale immigration that took place after World War II. Some of these States were colonial powers and had people of their former colonies, often with citizenship rights, living within their territory. Others had taken in people fleeing persecution on the grounds of their religion, race or ethnic origin and economic migrants who came to work in the industries in these countries and then settled there. Most European States, therefore, have had a very mixed, plural society for a long time.\(^3\) However, the numbers of people from other states have risen sharply since 1945. All countries were building up their economies again after the war and many new industries were established. For these, large numbers of workers were needed and many countries could not fill this need from the people already living within their borders, so most looked further afield and brought in people from elsewhere. The present situation in most EU countries is that these people who came to work there and who, originally, may have had no intention to stay, did in the end settle and brought their families to the


new country as well. Once the economic situation deteriorated, their presence started to lead to resentment in the people who were already in the country as they saw these new settlers as taking their jobs, housing, benefits, etc. All this had an effect on racial and ethnic relations, because the newcomers were often of a different race, ethnic origin and/or religion, and hatred and distrust of these people took on the form of discrimination on these grounds and of racism. Many States looked to control the situation through their immigration and asylum policies. Alongside these policies, anti-race discrimination laws were often developed as well. The latter were enacted to lighten or soften the impact of harsh immigration and asylum rules and to show that something was done about racism and racial discrimination. States wanted to restrict immigration, but, on the other hand, they did not want to be seen to be racist, either at home or on the international scene.

The September 11th 2001 attacks on New York and the Madrid and London bombings have escalated the antagonism towards people perceived to be of certain races and religions, who are linked to terrorism. Almost all European States are now considering tightening up their entry requirements for immigrants and asylum seekers and their conditions for acquiring citizenship or have already done so.

The Member States joining the EU in 2004 and in 2007 have brought their own problems in this area. They might not all have as many economic migrants as the old Member States, but many of the Eastern European States have national minority

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populations and a considerable number of people of Roma origin, both of which have been discriminated against for many years and on a large scale.

Because all the EU Member States have faced similar problems, cooperation and policy coordination in immigration appeared on the EU Agenda in the early 1990s, and this was one of the factors that led to the development of measures against racism and discrimination. As Bell mentions, 'the restrictive trend of EU immigration policy acted as a catalyst for EU policy to combat racism'. Civil society was galvanised into transnational action for anti racism measures at EU level, 'so as to ameliorate the effects of immigration policies'. There was pressure 'to improve the image of EU immigration policies'.

The above provides the backdrop for the analysis of the Race Directive. In this analysis, a number of concepts are used – race, racism, (racial) discrimination, ethnic and ethnicity, xenophobia and equality - and it is important to make clear at the start what is to be understood by these concepts in the Thesis, and especially in the context of legislation. In Chapter 1, we define these key concepts and point out possible pitfalls that should be avoided. All these concepts can be, and have been, defined in very different ways, and it is, therefore, easy to get confused about what exactly is meant by these terms. Thinking about these terms has also changed over time and thus their development in history needs to be examined to get an idea of their current meaning. The latter is especially true of the terms race and racism. Furthermore, the terms racism and (racial) discrimination have, over time, acquired a negative connotation and are linked to a moral judgment that they are 'bad'.

There is also confusion about the meaning of the concept of equality, which appears to be used to indicate any of the following four notions: formal equality or equality of treatment, equality of opportunity, equality of results and pluralism. In the

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6 Supra note 4, at 67.
7 Ibid. at 69.
last part of Chapter 1, we examine these four types of equality and, in Chapter 2, we develop these concepts of equality into four models of anti discrimination law: the formal equality model; the equality of opportunity model; the equality of results model and the pluralist model, which each aim to achieve the corresponding type of equality. We also identify some existing examples of legislation that fit in each of these models. The models are developed to assist in our analysis of the Race Directive in later Chapters.

In Chapter 3, we raise the question whether legislation is the right weapon to tackle the problem of (racial) discrimination. Are anti discrimination laws effective and useful? Are they necessary in the fight against discrimination? Are there other, non-legal means that could be used together with or instead of legislation with the same or better effect? Opinions about the effectiveness of legislation to combat discrimination are strongly divided and we examine the arguments both for and against such legislation. We will also look at some research findings on the effects of anti discrimination laws.

We explore the international context of the Race Directive in Chapter 4. A number of international measures, most of which are signed and ratified by all EU Member States, contain equality guarantees and anti discrimination clauses. These instruments set minimum standards of human rights at international level and these minimum standards are recognised by the EU, as the EU treaties and other legislative measures refer to the international human rights instruments. Moreover, the European Institutions have, from the very first discussions on the fight against racism, placed the right to equality and the right not to be discriminated against firmly within a wider human rights context. This right is also recognised by the European Court of Justice (ECJ) as a fundamental principle of Community law. The Race Directive places itself
within this wider human rights context by referring to a number of international instruments in Recital 3 of its Preamble.

In Chapter 5, we undertake a detailed analysis of the Race Directive in relation to the theories of race, racism and racial discrimination discussed in the first chapter. The Directive itself does not define many of the key terms and, therefore, there are a number of questions as to how these will be interpreted. In Chapter 5, we examine the possible problems this may cause and in what ways this weakens the Directive and we suggest examples of definitions or interpretations that the Member States and the ECJ could follow. The reason for the omission of these definitions is discussed, as is the question whether the Directive should cover more than racial or ethnic origin. The history of the fight against racism and racial discrimination within the EU and the developments that led up to the adoption of the Directive will be referred to where this is useful to explain the provisions of the Race Directive.

Chapter 6 is devoted to a second detailed analysis of the Race Directive, this time using the models of anti discrimination law developed in the earlier part of the Thesis. We discuss which of these models can be detected in the Directive and whether the EU legislation against racial or ethnic origin discrimination goes beyond a formal concept of equality to promote equality of opportunity, equality of results and pluralism. We also discuss developments within the EU since the Directive was adopted and the likelihood of legislative or other changes in the near future.

In the final Chapter, we discuss what the results of the analysis have revealed about the Race Directive and apply these results to answer the question whether it provides increased protection against racial or ethnic origin discrimination for people within the EU. From the preceding analysis it will be clear that the Race Directive should not be seen in a vacuum, but should be placed within the many different contexts which have all played a role in its development and its drafting process and which will,
no doubt, play a further role in its interpretation and in the future of anti race
discrimination measures in the EU.
CHAPTER 1 - DEFINITIONS OF KEY CONCEPTS

1 Introduction

A number of key terms and concepts are used throughout the Thesis, including race and racism, discrimination on racial or other grounds and equality. In this first Chapter, these concepts are briefly explored and defined for the purposes of the Thesis. Their possible pitfalls need to be kept in mind and these are also highlighted. In the following Chapters of the Thesis, we build upon the concepts defined in this first Chapter, and use them in analysing and evaluating the EU legislation against racial discrimination.

The first concept to be explored is race and this is followed by racism. In some ways, which will be touched upon in the discussion, it is difficult to define race without also mentioning racism. However, the opposite, defining racism without touching on race would be even more difficult. The two concepts are linked in many ways, although they can also be seen, as Benedict does, as being 'poles apart'.

After the discussion of race and racism, the concept of discrimination, and especially racial discrimination, is explored. Although the emphasis is on racial discrimination, other forms of discrimination will also be mentioned. It is difficult to discuss racial discrimination without looking at discrimination in a wider context, as the demarcation between the different grounds for discrimination is not always clear and people are often discriminated against on more than one ground.

The final concept explored in this Chapter is equality. Equality is a key concept in any study on discrimination because it can be seen as the 'flip-side' of discrimination: the right not to be discriminated against or the right to protection against discrimination is seen as a human right based on the principle of equality of all humans. The right to non-discrimination is often used interchangeably with the right to equality. But there are different types of equality and different uses of the term, which will be

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examined. In this context, the terms difference and diversity are often used and their relationship with equality will also be touched upon.

2 Race

2.1 Historically Specific

Perhaps the simplest way to find a definition of race or a good first step would be to look up the term in the dictionary. The Collins Concise Dictionary² defines race as: ‘A group of people of common ancestry, distinguished from others by physical characteristics such as hair-type, colour of skin, stature etc. …’ But does this definition help us in explaining what race is, how it has been understood in the past and how it is understood now?

The literature on the subject suggests that it is not as simple as the dictionary definition, that defining race is much more complicated because the term appears to be changing over time; it is not a static concept with a single meaning. It has had different meanings in different historical settings and we will therefore have to trace the meaning of the term over time. Goldberg suggests looking at race ‘as a fluid, transforming, historically specific concept parasitic on theoretic and social discourses for the meaning it assumes at given historical moments …’³ Race, in other words, is a fluid concept that takes its meaning in a historically specific context. We therefore have to look briefly at this history.⁴

The term race was hardly used before the eighteenth century, but when it was used it denoted nothing more than lineage or line of descent; therefore, race was a group of people with a common line of descent, a common ancestry. When people came into

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⁴ Because we are only defining race and racism for the purpose and in the context of this Thesis, this look at the history is necessarily short and does not go into details. For more information on the history of these two terms the reader is referred to Benedict, supra note 1; Miles, Robert, Racism (1989 London/New York: Routledge); Furedi, Frank, The Silent War: Imperialism and the Changing Perception of Race (1998 London: Pluto Press); Bulmer and Solomos, supra note 3; Banton, Michael, The International Politics of Race (2002 Cambridge: Polity Press).
contact with other people, race was used as a term to relate to these other people and to define themselves in relation to these other people. Race denoted observed variations between people, what Banton describes as 'phenotypical variations', for example variations in complexion, hair type, and physique.⁵

Not until the eighteenth century did race become a biological term, a subject of the biological sciences. The world was seen as populated by distinct races, each with different biological and cultural characteristics. This biological distinction became linked to a hierarchy between the races, with some races being considered superior to others. This inferiority/superiority was used to justify exclusion, subordination and even extermination of certain groups considered to be inferior. Many people argue that race was used or 'reinvented' with this ranking attached to it to explain events in the eighteenth and nineteenth centuries like white domination, colonisation, slavery and other forms of exploitation.⁶ Even in the twentieth century, race is used for political goals. The International Council on Human Rights Policy states that: 'in many cases race is made use of, or even invented, to justify discrimination. Race or a myth of race serves political ends'.⁷

Scientists in the 1930s disproved the theories about biological differences and most writers, writing after World War II, now acknowledge that there is no scientific evidence to support any theory that there are different, separate, biological races. However, biological notions of race do still appear to be present in political discourse and popular thinking. The term is still used in everyday language to label differences between people, especially differences in skin colour.⁸

⁶ See for example: Miles and Furedi, both supra note 4.
2.2 Hierarchy of Races

Race, therefore, has been and still is connected to the idea of a hierarchy between races. The hierarchy meant that some races were considered to be inferior and this has led to inferior treatment of people of certain races. This is where race and racism are so closely linked that one cannot describe one without touching on the other. Because the term race has this ‘negative’ link, some writers suggest that it should be dropped altogether. See for example, the quote from Montagu that ‘it were better that the term “race”, being so weighed down with false meaning, be dropped altogether from the vocabulary’. Other writers clearly state that they reject any link. Benedict, writing in 1942, expresses emphatically in her preface that using the category race does not entail supporting or authorising racism. According to her, race is a matter of scientific study, while racism is an unproven assumption of the biological and perpetual superiority of one human group over another. Race and racism are therefore ‘poles apart’.

That theories of the superiority of some races over others still exert their influence and that the negative connotation of the term race still exists, can be seen in the Third UNESCO Statement on Race of 1964, which declared that ‘all men living today belong to a single species, homo sapiens, and are derived from common stock’. Further on it states that ‘it is not possible from the biological point of view to speak in any way whatsoever of a general inferiority or superiority of this or that race’.

Another example can be found in the Preamble of the United Nations International Convention on the Elimination of all Forms of Racial Discrimination 1966, where the conviction is stated that:

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9 This quote can be found in Miles, supra note 4, at 45.
10 Supra note 1.
12 Point 1.
13 Point 6.
14 Hereafter referred to as the ICERD.
any doctrine of superiority based on racial differentiation is scientifically false, morally
condemnable, socially unjust and dangerous, and that there is no justification for racial
discrimination, in theory or in practice, anywhere.

Even at the beginning of the twenty-first century, the link between the use of the term
race and support for racist theories is still present, as is clear from Tyson’s article on
the negotiations of the Race Directive which took place in the EU in 1999-2000. During
these negotiations there was controversy about using race or racial origin as, for some
Member States, this denoted accepting racist theories that alleged the existence of
separate human races. Other Member States wanted to use the word race, rather than
solely relying on ethnic origin, in order to make clear that the Directive was combating
racism. The compromise that was reached was the addition of a Recital which states:

The European Union rejects theories which attempt to determine the existence of separate
human races. The use of the term ‘racial origin’ in this Directive does not imply an
acceptance of such theories.

2.3 Social Construct

Connected to the fact that race is historically specific and should therefore be studied
within the society in which it is used, is the view, often expressed by modern writers,
that race is a social relationship and a social construct. Race is created in a particular
society to justify differences in treatment or in position. Miles writes that people have
continued to use race to label difference and as a result certain types of social relations
are defined as race relations, as relations between people of different races. Further on in
his book, Miles writes that the use of the word race to label groups is ‘an aspect of the
social construction of reality: races are socially imagined rather than biological
realities’.17

15 Tyson, Adam, “The Negotiation of the European Community Directive on Racial Discrimination” 3,
17 Supra note 4, at 72.
Mason\textsuperscript{18} starts his book with the assumption that there are no races in the biological sense of distinct divisions of the human species. Rather there are sociological interactions which are constituted by their participants as a particular kind of social relationship: race. In his words, race ‘was always more than just a way of thinking about and describing human differences. It was a social relationship characterized by an unequal distribution of power and resources’.\textsuperscript{19} Mason therefore sees race as:

a social relationship in which structural positions and social actions are ordered, justified, and explained by reference to systems of symbols and beliefs which emphasise the social and cultural relevance of biologically rooted characteristics. In other words, the social relationship race presumes the existence of racism.\textsuperscript{20}

Fredman\textsuperscript{21} argues that ‘race is itself a social construct, reflecting ideological attempts to legitimate domination, and heavily based on social and historical context’.

\textbf{2.4 Concluding Remarks}

Summarising, it will be clear that there is little agreement about what the concept of race means, especially when looking at the use of the term at different points in history. What needs to be kept in mind is that it is a fluid concept, changing over time and indeed, changing with the use a person makes of it. It is suggested that there are no superior or inferior races, but that large numbers of people behave as if there are. In this sense, it is not relevant whether races exist or not, but it is important to observe that social actors treat races as real and organise their lives and exclusionary practices by reference to this. When studying race as a ground for discrimination, the perception in the minds of people is important; they discriminate against another person because they perceive him or her to be different and therefore inferior or threatening.

\textsuperscript{18} Supra note 8, at 1.
\textsuperscript{19} Ibid. at 8.
\textsuperscript{20} Ibid. at 9.
Race in everyday meaning is still often based on a difference between races, although not necessarily based on biological differences. It is also, and sometimes exclusively, based on cultural differences. It must also be kept in mind that the term race has been and is often used in political contexts, to support all kinds of policies, from right wing to left wing.

One more point needs discussing under this heading. The terms ethnicity or ethnic origin are often used together with, or as an alternative to, race or racial origin. How closely the two concepts are related can be seen from the description of ethnic (with the noun ethnicity) in the Collins Concise Dictionary (my italics):

1. of or relating to a human group having *racial*, linguistic and other traits in common.
2. relating to the classification of mankind in groups especially on the basis of *racial* characteristics.
3. denoting or deriving from the cultural traditions of a group of people.
4. characteristics of another culture.

From this dictionary definition it will be clear that it is difficult to draw a boundary between the concepts of ethnicity and race, as they overlap in many aspects. It is suggested that the terms ethnic and ethnicity, when coupled with race, are used to clarify that cultural traits are also included. When used instead of race, it is often as a euphemism, to avoid the negative implications that the word race has. Ethnic and ethnicity are less negatively loaded. Ethnic minority is also an often-encountered term. In this Thesis it will be understood as meaning a group differentiated by racial origin or cultural background.

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22 As in the title of the Race Directive.
3 Racism

3.1 Ideology/Actions

The concept of racism is, just like race, a contested concept. Starting from the same basis as race, we find the following definition of racism in the Collins Dictionary:

1. The belief that races have distinctive cultural characteristics determined by hereditary factors and that this endows some races with intrinsic superiority.

2. Abusive or aggressive behaviour towards members of another race on the basis of such a belief.

This definition uses the term race, like most definitions of racism do. This shows the strong link between the two concepts, and also the reason why race was defined first.

The definition includes in the concept of racism not only beliefs, but also behaviour. Not all definitions given in the literature include both views and behaviour. Some writers define racism as beliefs, doctrines, views or ideologies and specifically exclude the actions or behaviour based on those doctrines. The reasons they give for this exclusion is that an inclusive definition is too wide, covers too much and is therefore of limited analytical use. Such a concept often obscures more than it reveals. Miles especially is very clear on this; he rejects what he calls 'an inflated concept of racism' and uses racism to denote only ideologies and beliefs.

Banton writes that, at the United Nations, the word racism is taken to mean almost the same as racial discrimination. The two terms are often coupled together in the same sentence, because some people do not regard the two terms as synonymous. Many writers use medical metaphors when writing about racism, it is seen as something pathological like an illness or a cancer. Racial discrimination is seen as something more normal and general, in the sense that crime is a normal feature of any human society.

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23 Mason, supra note 8, at 11.
24 Miles, supra note 4, at 41-61.
25 Supra note 8, at 69-72.
Banton writes that on a general level the two terms offer distinct and possibly competing conceptions, but that their differences often dissolve when it comes to practical applications. For some then, racism is a doctrine while racial discrimination is a practice.\(^{26}\) In that view, racism only covers ideologies and doctrines, while actions based on those views are called racial discrimination.

### 3.2 Historically Specific

An aspect that the concept of racism has in common with the concept of race is that racism is not a static phenomenon but is historically specific: it has to be studied in its historical and geographical setting. Banton writes that racism is usually assumed as 'historically specific, something that originated in a particular time to rationalise an economic interest'.\(^{27}\) And Solomos writes that debates about racism 'do not make sense outside particular social, political and economic contexts'.\(^{28}\)

Although the history of notions about race can be traced back to ancient times, most writers place the emergence of what we now call racism at the end of the eighteenth century. That is when racial doctrines and ideologies began to develop. Most writers link this emergence to processes of European expansion, slavery, colonisation and domination, which could all be seen as institutions of white supremacy. Racist theories, doctrines that some races – i.e. the white race - were superior, were used to rationalise why white people should exploit black people or why black people should be slaves. The development of racism was linked with processes of economic expansion and capitalist development, which were happening at the same time.\(^{29}\)

Although racism emerged at the end of the eighteenth century, the term itself did not gain common currency until much later. The usage of the term racism is linked to

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\(^{26}\) Solomos, supra note 8, at 79. Furedi also mentions ‘racism as a theory and racial discrimination as a practice’, Furedi, supra note 4, at 14.

\(^{27}\) Banton, supra note 8, at 70.

\(^{28}\) Supra note 8, at 4.

\(^{29}\) See for example: Benedict, supra note 1; Miles and Furedi, both supra note 4; Bulmer and Solomos, supra note 3, especially chapter 2.
the rise of Nazism in the 1930s. Prior to that decade the concept of racism was not used to identify theories about the superiority of certain races and the inferiority of others.

3.3 Hierarchy of Races

Racism, whether used to denote only ideologies or also actions, is grounded in a hierarchy of races, is based on the belief that some races are superior to others. If it can be said that race has a negative link to such a hierarchy, it will be clear that this link is very much stronger with racism. The concept is, in Miles’ words ‘heavily negatively loaded. To claim someone has expressed a racist opinion is to denounce them as immoral or unworthy’.30 Banton writes:

By 1971 the word ‘racism’ had become a sufficiently accepted designation for indefensible attitudes and practices. It had enormous rhetorical power. ... To join in the condemnation of racism was one way a person, or a state, could assert it was not racist.31

Furedi also points out that after the Second World War ‘racism as a theory and discrimination as a practice acquired negative connotations’.32 Racism, therefore, has a strong negative connotation, and is often seen as socially unacceptable. In today’s language: racism is not ‘politically correct’.

3.4 Social Construct

Connected with its historically specific character is the fact that racism, just like race, has been described as a social construct, as something that has been created within a society to justify inequality and to protect the political and economic interests of those who discriminate. The International Council on Human Rights Policy expresses it thus:33

30 Supra note 4, at 1.
31 Banton, supra note 8, at 71-2.
32 Supra note 4, at 14.
33 See the Report, supra note 7, at 4.
Racism created and sustained the relevant distinctions of race on which social and economic discrimination in these societies depend. It is a social construct that created and then justified patterns of inequality and discrimination.

Because of the fact that racism can be seen as historically specific and as constructed in different ways within the societies within which it appears, some writers are of the opinion that it is more correct to speak about multiple racisms. Miles, for example, writes that there have been many significantly different racisms, although they are not necessarily independent of each other: one form of racism will take on some new elements and so develop into a new form.\(^{34}\) Bulmer and Solomos write, ‘there is no single monolithic racism … Rather there are quite distinct racisms that are constructed and reconstructed through time and space by social action’.\(^{35}\) Fredman also writes about multiple racisms, and continues: ‘colour racism must be examined together with cultural racism, which include ethnicity, religion, and language’.\(^{36}\)

Sometimes the term ‘new racism’ is used to refer to racism in modern times, which is based on cultural and social differences rather than on biological differences. But if racism is seen as historically specific, a term like new racism is not needed, because it is racism in its specific present day form. Mason even argues that the term is actually just a ‘rhetorical smokescreen behind which lurk old beliefs about race’.\(^ {37}\) Social and cultural differences are used to differentiate between people because biological differences have been rejected by science. But ideas about biological differences are still widespread and are often at the basis of ideas about cultural and social differences.

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\(^{34}\) Miles, supra note 4, at 82-3.
\(^{35}\) Bulmer and Solomos, supra note 3, at 15.
\(^{36}\) Fredman, supra note 21, at 2.
\(^{37}\) Mason, supra note 8, at 10.
3.5 Acknowledgement and Denial

Some writers have pointed out that, to combat racism effectively, we first have to acknowledge that it exists. Denial of racism occurs frequently and is seen as an obstacle to any progress in addressing it effectively. Petrova\(^{38}\) sums this up in four assumptions: firstly, all societies are racist to some degree; secondly, racism is ubiquitous; thirdly, the existence of racism is widely denied; and, fourthly, the acknowledgement of racism is a prerequisite (but not at all a guarantee) to overcoming it.

Petrova concludes that the discussion of denial of racism should be accompanied by a discussion of acknowledgement. Van Boven\(^{39}\) writes that the denial of the existence of racism, racial discrimination and related phenomena is still widespread, although awareness is slowly growing that no society is free from racism. Acknowledgement that these phenomena exist is needed if a strategy to combat racism and racial discrimination is to be effective.

3.6 Institutional Racism

The term ‘institutional racism’ is used regularly in Britain since it was defined in the MacPherson Report.\(^{40}\) This report was the conclusion of an inquiry into the death, in 1993, of black teenager Stephen Lawrence. The Report gave the following definition of institutional racism:

\begin{quote}
the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.
\end{quote}

\(^{38}\) Petrova, Dimitrina, “Racial Discrimination and the Rights of Minority Cultures” in: Fredman, supra note 21, 45-76, at 45. Petrova discusses denial in its various meanings and illustrates this using the position of the Roma people in Eastern Europe.


\(^{40}\) The Stephen Lawrence Inquiry Report of an Inquiry by Sir William MacPherson of Cluny (Cmnd 4262-I, 1999), para 6.34.
The Report contained a harsh verdict of institutional racism within the London Metropolitan Police. Three points need to be made; firstly, the use of the term ‘unwitting’ indicates that the people within the organisation (the police in the Lawrence case) are not aware of the prejudices and the racist stereotyping, they do not disadvantage minority ethnic people intentionally. They do so because it is the normal thing to do, because it is the ‘culture’ of the organisation. It is seen like normal to act like that within the organisation.

Secondly, this definition uses racism as including both attitudes and behaviour. And, thirdly, since the report, the term institutional racism has become common currency in Britain and both the Crown Prosecution Service and the Prison Service have been accused of institutional racism. The term has also been mentioned in relation to other services, including the NHS and the mental health service. However, the term does not appear to have played a role in discussions on anti discrimination law within the EU at the time the Race Directive was negotiated.

3.7 Xenophobia

The term xenophobia is often used coupled together with racism, especially within the EU. The dictionary definition of xenophobia is a dislike or fear of foreigners and all things foreign. The term xenophobia is also often used as a euphemism for racism, because of the negative connotation of racism and the links between racism and fascism and the holocaust. As Spencer writes:

Xenophobia ... implies an irrational but more excusable sentiment, capable of being expressed as much by jokes about foreigners as by violent expressions of hatred. ... In practice the two words express aspects of the same thing: a mistrust and fear of any person


whose language, culture or appearance is different to that of the majority, allied with a
conviction that one’s own ‘race’, nation or culture is superior to any other.

3.8 Concluding Remarks

Racism thus appears to be an even more contested concept than race. Because it is
closely related to the concept of race, the problems with the latter are equally
problematic in relation to the concept of racism. First of all, racism is used in two
distinct ways, either to denote beliefs and ideologies or to denote these ideologies and
the attitudes and actions based on these views. What has to be kept in mind when
studying racism is that the term is used by some for both ideologies and attitudes and
that others distinguish the two, often calling the ideologies, theories, views, beliefs or
doctrines racism and the practices, attitudes, behaviour or actions based on them racial
discrimination.

Just like race, the concept of racism must be seen as a fluid concept that should
be studied in its historic, geographical, economic, political and social context. And,
again just like race, but to a much greater degree, racism has a negative connotation,
although its history suggests that this connotation is a product of the post World War II
era. This negative connotation has led to widespread denial of the existence of racism
and racial discrimination and the need for acknowledgement before these can be
overcome effectively.

In this Thesis, the concept of racism will be used to indicate the belief that races
have distinctive hereditary characteristics, which can be biological or cultural, and that
this endows some races with intrinsic superiority, while the term racial discrimination is
used for the behaviour based on such a belief. However, the concepts are often used in
the same way or will run over into one another when it comes to their practical
applications. Therefore, the following must be kept in mind. Firstly, it is often difficult
to distinguish between beliefs and views on the one hand and attitudes and behaviour on
the other. When talking about an ideology or doctrine of racism, one usually visualises a clear, well-formulated theory, but in practice, in most people's minds the racist feelings will not be so clearly formulated and separated from racist attitudes and behaviour. Secondly, racist views and beliefs often only show themselves or become manifest through racist behaviour or action. And, thirdly, legislation will prohibit the practical occurrences of racism, such as (incitement to) racist violence, racist hate speech and discrimination in employment and other areas of life, rather than views and ideas.

It is submitted that racism is negative and that it is a phenomenon that needs to be combated. This raises the central question: can racism ever be fully overcome; can there be a world without racism? On the one hand, it is suggested that much has already been achieved in the last two centuries, in the sense that slavery, Nazism and apartheid have been prohibited and firmly condemned in international law and in many national laws. Banton remarks on the rapid development of international human rights law and states that:

jurists can now confidently testify that freedom from slavery, from genocide, from racial discrimination, and from torture, are protected by international law. These developments force the view that moral progress in human affairs is possible, and furnish a standard against which other changes may be judged.  

On the other hand, as Bulmer and Solomos summarise:

... there is clear evidence that existing initiatives are severely limited in their impact, given the socially entrenched character of much racist behaviour. A number of commentators have pointed to the limitations of legislation and public policy interventions in bringing about a major improvement in the socio-political position of minorities.  

Therefore, can racism be eradicated or is it a natural part of any society? It is natural for people to identify themselves by reference to the group to which they belong. This might be any group, large or small, like a family, a social or sports club, a political

43 Banton, supra note 8, at 83.
44 Bulmer and Solomos, supra note 3, at 17.
party, a religious, ethnic or linguistic community or a region or nation. In this sense, humans have a natural tendency to see themselves as part of a group, as 'us' and others outside their group as 'them'. Thus, in any society groups will be formed which identify themselves because of differences with others. In this sense, people will always look at differences between themselves and others and treat the others differently because they are different. The 'us' and 'them' division can therefore be seen as a natural condition of every society. Race is just one of many differences that people use to set themselves apart from others. Race is often a clearly observable difference (in skin colour or other physical characteristics). But will race as a criterion for difference become less important in future, because races appear to become increasingly mixed? Bulmer and Solomos write:

What are treated as socially defined racial groups are likely to become less sharply delineated in future, and an increasing number of people will identify with more than one racial group or some kind of mixed group.45

So the line between races, often referred to as the colour line, will become more blurred but will it ever be completely erased? It is suggested that complete eradication of racism is unlikely to be achieved in the near future, as it is a phenomenon that is deeply entrenched in every society. It might well never be fully eliminated. But, in the words of Winant,46 'nor can we expect that it [i.e. racism] will ever be fully overcome. That does not mean, however, that we are free to desist from trying'. Chapter 3 will suggest that legislation is one of the tools that can be used in the fight against racism.

45 Ibid. at 389.
4 Racial Discrimination

4.1 Negative Connotations

Racial discrimination is, especially where legislative texts are concerned, a different concept from race and racism. The latter two are usually not defined at all and racism is seldom mentioned, while legislation often provides a definition of discrimination. However, as already mentioned, racism and racial discrimination are sometimes taken to be almost synonymous and the possible differences between the two often dissolve when it comes to practical applications. Solomos writes that the two concepts - racism and racial discrimination - become merged in practice, so that they have little apparent difference.47 If a difference is to be made, then racism is more often seen as an ideology or doctrine, as a theory about the existence of different races and a hierarchy between these races, while racial discrimination is more often seen as a practice, as behaviour or acts.

The Collins Concise Dictionary defines discrimination as:

1 Unfair treatment of a person, racial group, minority etc.; action based on prejudice;

2 Subtle appreciation in matters of taste;

3 The ability to see fine distinctions and differences.

The descriptions under point two and three are referring to discrimination as discriminating between people or things, as making a distinction, while the description under point one refers to discrimination as discriminating against. The latter has a negative connotation.

Feldman48 writes that ‘discrimination, when it consists of the ability to differentiate right from wrong and good from bad, is an everyday part of life’. He continues that it ‘becomes morally unacceptable only when it takes a particular form,

47 Supra note 8, at 79.
namely treating a person less favourably than others on account of a consideration that
is morally irrelevant'. So, according to Feldman, differentiating between people is not
wrong as long as the criteria used for the different treatment are morally acceptable.

Discrimination can mean discernment or differentiation but in everyday use the
negative meaning of the term appears to have gained ground over the other meaning and
the term discrimination is thus more often tied up with a moral judgment that
discriminating is unfair or bad. Sunstein provides an example of the use of the term in
this negative sense where he writes that discrimination includes any decision to treat a
black person, a woman or a disabled person less favourably than a white, able-bodied
male; and that ‘the term tends to connote irrational differentiation’.49 Townshend-
Smith50 also mentions that a stigma is implied in the term discrimination.

In his book on discrimination, Banton51 distinguishes between the objective
definition of discrimination as differential treatment of people supposed to belong to a
particular class of persons and the moral judgment about whether the differential
treatment is morally justified and lawful. He suggests splitting these two up because
discrimination is more difficult to define if it is coupled with a moral judgment, as
morality is a difficult concept. As suggested above, in practice this split is not often
made and the term discrimination is usually used with the judgment that it is bad or
immoral implicit in the term.

4.2 Discrimination: A Normal Part of Society

It was contended above that it is natural for people to form groups. Groups exist
because they maintain criteria of membership and because they distinguish between
members and non-members. Non-members do not receive the benefits of group
membership; they are treated less favourably and thus one could say that they are

and 770.
Cavendish Publishing), at 65.
discriminated against. As Goldschmidt writes, ‘awareness of one’s specific position as a group, identification with that specific group, involves a certain urge to distinguish that group, to exclude outsiders’.\(^{52}\) In this sense, everyone discriminates and discrimination is therefore socially normal and a characteristic of every society. People identify with those with whom they have shared experiences and define others as outsiders, which is a normal process of human socialisation. But not all discrimination is unlawful. Anti-discrimination laws do not prohibit discrimination in protected spheres of private life. If a person wants to marry only someone from his/her own race, religion or culture, anti-discrimination laws will not prohibit this. They will only prohibit discrimination in the sphere of public life. As Banton writes: ‘Anti-discrimination legislation is designed, among other things, to restrain the tendency to extend such patterns of behaviour from the private to the public sphere’.\(^{53}\) However, the difference between the two spheres is not always clear-cut and in the economic sphere (in employment and in access to goods and services) anti-discrimination legislation is spreading from the public sphere to the private sphere. We will mention this in more detail later.

So it is natural for people to discriminate against people who are different from them, who are not part of their group. The motivation for this can be manifold: prejudice, hostility, (economic) self-interest, taste, habit or custom, stereotyping, fear of the unknown, ignorance etc. It will not always be clear, even for the discriminator, which motive is behind the decision. Often more than one motive will be present. According to Banton ‘motives are often mixed and people may be unaware of some of the forces that stimulate their behaviours’.\(^{54}\)


\(^{53}\) Banton, supra note 8, at 79.

\(^{54}\) Supra note 51, at 8.
Both Sunstein\textsuperscript{55} and Townshend-Smith\textsuperscript{56} point out that the most obvious meaning of discrimination puts emphasis on hostility and prejudice, and both writers criticise this. They do this, firstly, because disadvantageous differential treatment frequently occurs in the absence of prejudice and hostility, and, secondly, because hostility or prejudice is not always easy to define or prove.

\textbf{4.3 The Right to Non-Discrimination as a Fundamental Human Right}

Many see the right to non-discrimination or to equality as a basic human right and (racial) discrimination as a violation of such a right. Boyle and Baldaccini point out that ‘it was largely the search for an effective international response to racism that produced the main components of the United Nations human rights regime’.\textsuperscript{57}

The United Nations Universal Declaration of Human Rights of 1948 declares in Article 1 that all human beings are born free and equal in dignity and rights. Article 2 then states that everyone is entitled to all the rights and freedoms of the Declaration without distinction of any kind.\textsuperscript{58} Article 7 declares that all are equal before the law and entitled without any discrimination to equal protection of the law, to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

The United Nations Declaration on the Elimination of All Forms of Racial Discrimination\textsuperscript{59} states clearly that the UN Charter ‘is based on the principles of dignity and equality of all human beings’. Article 1 of the Declaration then states that:

\begin{quote}
Discrimination between human beings on the ground of race, colour or ethnic origin is an offence to human dignity and shall be condemned as a denial of the principles of the
\end{quote}

\textsuperscript{55} Supra note 49, at 752-3. Sunstein argues that civil rights law has often identified discrimination with prejudice, irrationality and hostility and that this is a fallacy.

\textsuperscript{56} Supra note 50, at 63.

\textsuperscript{57} Boyle, Kevin and Badaccini, Anneliese, “A Critical Evaluation of International Human Rights Approaches to Racism” in: Fredman, supra note 21, 135-91, at 141.

\textsuperscript{58} The article gives the following distinctions: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

\textsuperscript{59} This Declaration was made in 1963 and preceded the ICERD.
Charter of the United Nations, as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights ...

Article 1 ICERD defines racial discrimination as a practice 'which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise of human rights and fundamental freedoms'.

So, within international law, the principle of equality and non-discrimination is firmly anchored within human rights, and 'racial discrimination is understood in human rights law as a violation of human rights'.\(^{60}\) Boyle and Baldaccini\(^{61}\) express this even stronger where they write:

> It is now established in international law that the prohibition of racial discrimination exists independently of the general obligation to respect human rights and is part of ius cogens.

O'Hare\(^{62}\) also writes that 'it is now widely accepted that the principle of equality and non-discrimination form part of customary international law'.

The four EU Directives on Equal Treatment adopted on the basis of Article 13 EC all mention in their Preambles that the right of all persons to equality before the law and protection against discrimination constitutes a universal human right.\(^{63}\) This is in line with a number of cases in which the ECJ has recognised a general principle of equality as one of the fundamental principles of Community law.\(^{64}\)

\(^{60}\) Petrova, supra note 38, at 61.

\(^{61}\) Supra note 57, at 144.


\(^{64}\) This will be discussed in Chapter 4.
All this suggests that the right to equality, to non-discrimination, exists as a fundamental human right.

4.4 Points for Analysis and Evaluation of Anti Discrimination Law

As mentioned, discrimination is not always bad or unlawful. It is not wrong when the criteria used to justify differential treatment are morally acceptable or when it takes place in certain spheres. And even if distinctions between people are made on grounds that are unacceptable or in prohibited areas, exceptions or justifications to the prohibition could mean that the distinctions are not considered unlawful. The following qualifications are used in the analysis and evaluation of anti discrimination provisions in later Chapters of the Thesis.

4.4.1 Grounds for Discrimination

Just like the motives for discrimination can be many and varied, there are also many grounds for discriminatory behaviour. This Thesis is mainly concerned with race as a ground for discrimination. But legal instruments prohibiting race discrimination often mention race with a number of other grounds or as including other grounds. For example, Article 1 of the ICERD - which contains a definition of racial discrimination - mentions race, colour, descent or national or ethnic origin, while the British Race Relations Act 1976 prohibits discrimination on racial grounds, which means 'any of the following grounds, namely, colour, race, nationality or ethnic or national origins'. 65 However, these can all be seen as being connected with race, as is clear from the first part of this Chapter.

There are numerous other grounds for discrimination. Article 14 of the ECHR mentions discrimination on any such grounds as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority,

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65 Section 3(1) RRAct 1976.
property, birth or other status. Article 13 EC gives the following grounds: sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

There are two problems that can occur in relation to the grounds of discrimination: firstly, it will not always be easy to distinguish between the different grounds, because some of them are very close to each other or even overlap. For example, if a person is discriminated against because he/she is Jewish, is this on racial or ethnic or religious grounds? If gypsies are treated less favourably is this on the ground of their race or ethnicity, their national or social origin, or their association with a national minority? Secondly, there is the problem of multiple discrimination: a person could be discriminated against on more than one ground. For example a black woman could be discriminated against because she is black and because she is a woman. These problems arise especially where protection against discrimination is provided in different ways for different grounds.

4.4.2 Protected Fields of Discrimination

Legislative provisions against discrimination describe the areas in which they are applicable. Sometimes these descriptions are in broad terms, but they can also be more specific. For example, Article 1(1) of the ICERD gives its field of application in broad terms; it is applicable ‘in the political, economic, social, cultural or any other field of public life’. The Race Directive is much more specific: Article 3 (1) determines that it is applicable as regards both public and private sectors in relation to employment, self-employment and occupation; education and vocational training; social protection including social security and healthcare; social advantages; and access to and supply of goods and services available to the public, including housing. Because most anti

68 The problems with multiple discrimination will be discussed in Chapter 5.
discrimination legislation determines its own field of application, the problems encountered here are mainly with interpretation. However, what has to be kept in mind is, as Banton\textsuperscript{69} points out: ‘The failure to appreciate that anti-discrimination provisions are restricted to particular fields has been one of the prime sources of opposition to legislation against discrimination’.

4.4.3 Exceptions and Justification

Most laws against discrimination allow certain exceptions to the prohibition of discrimination. International instruments often exclude distinctions made between citizens and non-citizens and decisions on nationality and naturalisation.\textsuperscript{70}

Another exception to be found in both national and international laws is the exception based on inherent requirements of a particular job. This is usually subject to a proportionality test, either via the legislation itself or via the case law of the appropriate court. This requires that the means used to achieve the given end must be no more than that which is appropriate and necessary to achieve that end. For example, Article 4 of the Race Directive determines that a difference in treatment shall not constitute discrimination where there is a genuine and determining occupational requirement providing that the objective is legitimate and the requirement is proportionate.

A third exception found in both national and international legislation against discrimination is the possibility to take positive measures to correct or redress factual inequalities. Positive measures can include special protection of or assistance to disadvantaged groups and are based on the principle that action needs to be taken to overcome the effects of past discrimination.\textsuperscript{71}

Frequently, anti discrimination laws will allow for justification of discrimination. In other words, discrimination is not considered to be against the law if

\textsuperscript{69} Supra note 51, at 40.

\textsuperscript{70} See for example: Articles 1(2) and (3) ICERD, discussed in Chapter 4; Article 3(2) of the Race Directive, discussed in Chapter 5.

\textsuperscript{71} See for example: Article 5 International Labour Organisation’s Discrimination (Employment and Occupation) Convention C111, 1958; Article 5 Race Directive.
it can be objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.\textsuperscript{72} So, here again, a proportionality test must be fulfilled.

The reasons for mentioning exceptions and justifications in anti discrimination law is, that these have to be studied carefully, because they could severely limit the effect of such laws as instruments against discrimination. Therefore, exceptions should be clearly specified and be able to be challenged in a court.

4.4.4 Direct and Indirect Discrimination

The distinction between direct and indirect discrimination needs to be mentioned here as well. Banton\textsuperscript{73} describes direct discrimination as disparate treatment and indirect discrimination as disparate impact. Indirect racial discrimination takes place when someone imposes a condition which has a disparate and unfavourable impact on a racial group and which cannot be shown to be justifiable on other grounds. In other words, direct discrimination consists of difference in treatment, of treating a person less favourably because of his or her race, while indirect discrimination consists of apparently equal treatment which has an unequal impact on persons of a certain racial group.\textsuperscript{74} The concepts are here described for racial discrimination but can be used for discrimination on other grounds as well.

4.5 Concluding Remarks

Summarising, it can be seen that the term discrimination is more often than not used with a negative connotation, with the implication that it is morally wrong, although the term is still also used as a synonym for the words distinction and differentiation, without any negative connotation at all. Discrimination in both these meanings is part of everyday life and a normal process in any society. Discrimination does not have to be motivated by prejudice or hostility and there can be many and mixed motives.

\begin{itemize}
\item \textsuperscript{72} See: Article 2(2)(b) Race Directive, which allows for objective justification of indirect discrimination.
\item \textsuperscript{73} Supra note 51, at 45.
\item \textsuperscript{74} Article 2(2)(b) Race Directive gives a definition of indirect discrimination.
\end{itemize}
The right not to be discriminated against appears to be firmly established in human rights law as a fundamental human right and racial or other forms of discrimination are widely considered to be a violation of a person’s fundamental right to equality and dignity.

When studying anti discrimination measures in the following Chapters, a number of questions will be asked: what are the grounds on which discrimination is prohibited? In what fields is the legislation applicable? Does the provision allow for exceptions and can these be challenged in law? Does the measure prohibit both direct and indirect discrimination?

Finally, some writers have made the point that discrimination should be distinguished from disadvantage. These writers argue that some groups in society are disadvantaged because of past and present discrimination and the transmission of these disadvantages from one generation to the next. As Banton writes:

"It is essential to distinguish discrimination from the larger phenomenon of disadvantage, as this can be seen in patterns of gender and racial inequality. These patterns are the products of a great variety of causes, of which discrimination is but one."

Sunstein writes that the problem is not discrimination, but ‘second-class citizenship’ and that legal and social structures should not turn differences between groups that are morally irrelevant into social disadvantage, especially not when the disadvantage is systemic.

5 Equality

5.1 Equality as a Fundamental Human Right

What is the meaning of equality in the context of laws against discrimination? The terms equality and discrimination are closely linked because the prohibition of

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75 Banton, supra note 51, at 19.
76 Sunstein, supra note 49, at 770.
77 See this chapter, under 4.3.
discrimination is based on the fact that people are equal. People should not be
differentiated or distinguished from other people in a negative way, because all persons
are equal. The right to non-discrimination is seen as a human right based on the
principle of equality, and discrimination is a violation of such a fundamental right. The
right to non-discrimination and the right to equality are therefore often used
interchangeably. O'Donovan and Szyszczak\(^7^8\) call the idea of equality 'the mainspring
of anti-discrimination legislation', but write that this idea lacks precision. They discern
two uses of the term in political discussions. One is the use in a descriptive way,
representing a statement of fact: all persons are equal. The second use is in a
prescriptive way, representing a statement of aim: all persons should be equal.
According to these authors, the latter, which appears to underlie the objectives of much
anti-discrimination legislation, is aspirational and is based on an idea of the fundamental
equality of all human beings.

Dworkin makes an interesting distinction in his discussion of an individual's
right to equality.\(^7^9\) He discerns two sorts of rights an individual may be said to have.
Firstly, the right to equal treatment, which is the right to an equal distribution of some
opportunity or resource or burden. Secondly, the right to treatment as an equal, which is
the right to be treated with the same respect and concern as anyone else. The right to
treatment as an equal is a fundamental right, while the right to equal treatment is
derivative, according to Dworkin. In certain circumstances the right to treatment as an
equal will entail a right to equal treatment, but not, by any means, in all circumstances.
Dworkin's right to be treated as an equal appears to correspond with Feldman's 'moral
equality', which he describes as meaning that people should be 'equally entitled to
respect for their moral status by virtue of being human beings'.\(^8^0\)

\(^7^8\) O'Donovan, Katherine and Szyszczak, Erika, *Equality and Sex Discrimination Law* (1988 Oxford:
Basil Blackwell), at 1-2.
\(^8^0\) Feldman, supra note 48, at 136.
It will be clear, that the term equality can have different meanings. Dworkin’s right to equal treatment falls within the first type of equality distinguished in this Thesis: formal equality or equal treatment. The fundamental right to be treated as an equal, to respect for one’s moral status, goes beyond formal equality and suggests that differences between people should be recognised and diversity should be respected. The second and third type of equality distinguished in this Thesis, equality of opportunity and equality of results, recognise difference between people, while the fourth type, the pluralist approach to equality, not only recognises difference but also respects diversity.

5.2 Formal Equality

Formal equality is based on the idea that every person has a right to be treated in an equal way to any other person in the same situation. This is based on the premise that like should be treated alike, which goes back to Aristotle. In this view, equality lies in consistency. It is sometimes referred to as equality in law, or equality before the law.

This approach has been criticised on a number of grounds. Firstly, the concept of formal equality, that like should be treated alike, raises the question: who is like who? The concept thus relies on a comparator: is a person treated unequally compared to another person in the same situation? But to whom should he/she be compared? The choice of a comparator can influence the outcome. Should a black person always be compared with a white person? To avoid this problem, Barnard, in her discussion on Article 13 EC, suggests:

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82 Barnard (1999), supra note 81, at 386.
These ideas need to penetrate any interpretation of non-discrimination in legislation adopted under Article 13: that the comparator must not always be a male, white, European, able-bodied, straight man.

The second point of criticism against the notion that like should be treated alike, is that it creates strong conformist and assimilationist pressures. The concept negates the value of difference and assumes sameness. Schiek\textsuperscript{83} writes:

As regards ethnic discrimination, the tendency of formal equality principles to further assimilation instead of recognition has been stressed. Here, the counter-model to the society based on the assumption of sameness is the society striving to integrate differences, the inclusive society.

Thirdly, in this approach, everyone is treated in identical fashion. It is a symmetrical approach that does not look at existing inequalities or social disadvantages. In fact, this approach can even reinforce the inequalities that exist in reality. As Fredman\textsuperscript{84} writes:

\ldots an apparently neutral criterion, applied equally to two individuals, can, in fact, exacerbate inequality, because its neutrality disguises a bias towards the social or group attributes of one of them.

Because formal equality is symmetrical, there is no room for positive action measures, as these would give preferential, and thus unequal treatment, to certain people.

The fourth criticism raised against the notion of formal equality is that it is a relative concept, that it does not guarantee a particular outcome. The principle is satisfied as long as likes are treated equally, no matter whether this is equally well or equally badly. The concept allows for levelling down (where both people compared are deprived of a benefit) as well as levelling up (where the benefit is conferred on both of them).\textsuperscript{85}

\textsuperscript{83} Supra note 66, at 304-5.
\textsuperscript{84} Fredman (2001), supra note 81, at 155.
\textsuperscript{85} Barnard and Hepple, supra note 81, at 563.
5.3 Substantive Equality

In attempts to overcome the problems associated with the notion of formal equality, other concepts of equality have been suggested. Because formal equality is perceived as not touching the substantive inequalities that exist in most societies, or even as reinforcing these, a more substantive equality, which is sensitive to the effects of past and ongoing discrimination, is put forward. Substantive equality aims to compensate for the social disadvantages suffered by certain groups. The focus is on the material reality of people's life. The concept can be in direct conflict with the idea of formal equality because it may require unequal treatment. Bacik\textsuperscript{86} writes that the concept of substantive equality is 'based upon difference'. This means that 'in order to create equality, persons must be treated differently according to their needs'. This again comes close to Dworkin's right to be treated as an equal.

Substantive equality is also referred to as equality in fact, as opposed to formal equality, which is equality in law. The concept of substantive equality suggests that equality laws should be sensitive to the practical results of equal or unequal treatment. Whereas formal equality can be seen as symmetrical, substantive equality is asymmetrical, in that it allows unequal treatment in order to rectify social disadvantages and so achieve the goal of equality in fact.

McInerney\textsuperscript{87} writes that 'equality demands, at minimum, formal equal treatment'. She continues:

Equality can take a more substantive and "effect-centred" form, demanding that group perspectives be considered, that historical and contextual dimensions of discrimination be accommodated and that remedial action be permitted to redress past discrimination.


Within the concept of substantive equality two types can be distinguished: equality of opportunity and equality of results.

5.3.1 Equality of Opportunity

This form of equality concentrates on equalising the starting point for all, on giving everyone the same opportunities. This approach may well involve unequal treatment and unequal finishing points, because it is not concerned with the end result, but only aims to make the starting point equal for all. Equality of opportunity recognises that the effects of past discrimination can make it very difficult for members of particular groups to even reach a situation of ‘being alike’ so that the right to like treatment becomes applicable.

The concept of equality of opportunity as a basis for anti discrimination laws has been criticised for the following reasons. Firstly, it appears to go against the principle of equality and non-discrimination, as it requires preferential treatment of, for example, a black person or a woman, which would discriminate against white people or men. Secondly, once the starting point has been equalised for all, the competition from then on will be based on merit. O’Donovan and Szyszczak\(^88\) write that the role of the state here is to equalise the rules of entry and thereafter ‘to hold the ring for free competition’. The question with this competition on merit is, what is merit and who determines this? Townshend-Smith writes that the notion of merit is deep-rooted in our society, and that ‘merit has historically been determined in [white] male terms’.\(^89\)

Feldman points out that ‘the opportunities which systematically disadvantaged groups seek might not be those which are traditionally favoured by the dominant set of values’. This group might not want to be like the dominant group, but might prefer the freedom to pursue their own values in their own ways.\(^90\)

\(^88\) Supra note 78, at 3-4.


\(^90\) Feldman, supra note 48, at 138-9.
Lacey\textsuperscript{91} calls the notion of equality of opportunity a 'manipulable notion'. She advocates abandoning equality of opportunity as an underlying principle of equality law:

The opportunity ideal's presupposition of a world of autonomous individuals starting a race or making free choices has no cutting edge against the argument that men and women are simply running different races.\textsuperscript{92}

The above suggests that the disadvantaged group, in the terminology of Lacey, is not running the same race and might well not want to run the same race, and that therefore equalising the starting point for all will not lead to a more equal society.

Fredman describes the two views of equality of opportunity as distinguished by Williams.\textsuperscript{93} On a procedural view, it would require 'the removal of obstacles to the advancement of women and minorities', but this would not 'guarantee greater substantive fairness in the result'. A substantive view of equality of opportunity would require 'measures to be taken to ensure that persons from all sections of society have a genuinely equal chance of satisfying the criteria for access to a particular social good'. This would require a 'reconsideration of existing criteria of merit'. It is submitted that equality of opportunity on a substantive view would go some way towards remedying the criticism against the notion described above. It would also get closer to a notion of equality of results.

5.3.2 Equality of Results

This concept is also referred to as equality of outcome or impact. It is based on a system of justice which concentrates on correcting maldistribution and takes account of past or

\textsuperscript{91} Supra note 81, at 420.
\textsuperscript{92} Although Lacey is writing about legislation against sex discrimination, it is suggested that her argument is equally valid for legislation against racial discrimination.
\textsuperscript{93} Supra note 21, at 21. This distinction is based on Williams, Bernhard, "The Idea of Equality" in: Laslett, Peter and Runciman, Walter, (eds.), Philosophy, Politics and Society (2nd Series, 1965 Oxford: Basil Blackwell) 110-31, at 125-6, although Williams himself does not use the terms 'procedural' or 'substantive' as such.
present discrimination. Its aim is thus redistributive. Townshend-Smith\textsuperscript{94} describes equality of outcome as ‘a notion which pays at least some regard to the distribution of outcomes between the various different groups’. Later on he writes that ‘equality of outcome implies an equitable division of the economic cake between different groups in society’.

According to Fredman,\textsuperscript{96} equality of results can be used in three different ways. The first focuses on the impact on the individual, with the aim of obtaining a remedy for that individual, rather than achieving equality of results. This would not touch the discriminating structure. The second use focuses on the results to the group. However, this aims to demonstrate the existence of obstacles to entry rather than prescribing an outcome pattern. The third and strongest meaning of equality of results is a demand for an equal outcome. This is a more obviously redistributive aim, although even here, as Fredman points out, the notion of equality is not fully in focus: often ‘it is not equality, but proportionality, fairness or balance which is required’.

Equality of outcome or results can thus be used in different ways. In the first two uses the aim of redistribution, of an ‘equitable division of the economic cake’ will not be reached. Even if the concept is used in the third sense, full equality of outcome might not be the result.

Therefore, it will be clear that equality of results is not without its problems. The following objections have been made against it. Firstly, like equality of opportunity, it requires preferential treatment of some people and thus involves unequal treatment. Townshend-Smith points out a second problem with equality of results. Its aim of redistribution of wealth is intertwined with the relief of poverty. But why then should only certain victims of poverty (black people, women) and not others be entitled to such

\textsuperscript{94} Supra note 50, at 61.
\textsuperscript{95} Ibid. at 73.
\textsuperscript{96} Supra note 21, at 19.
\textsuperscript{97} Ibid.
A third problem with equality of outcome is that it might only partially lead to redistribution, depending on the way in which it is used. As Fredman writes ‘monitoring of results does not necessitate any fundamental re-examination of the structures that perpetuate discrimination’. And lastly, O’Donovan and Szyszczak point out that ‘it is evident that the creation of outcome equality would require a major social revolution’. This poses the question whether anti discrimination legislation could ever fully reach the aim of equality of results. This question will be discussed in the next Chapter.

5.4 Pluralist Approach to Equality

Some writers suggest a more pluralist approach to equality. Such an approach would aim to create a society where differences and diversity between groups and individuals are considered an asset and everyone is treated with the same respect. Townshend-Smith writes that an approach based on pluralistic political philosophies is far more appropriate. In such an approach ‘the law must take account of the differences between groups which affects their capacity for equal competition in the market place’. Fredman suggests that a central challenge is to fashion a concept of substantive equality that can encompass positive diversity. Bacik appears to support this pluralist view, when she writes that substantive equality is based on difference and that people should be treated differently according to their needs. And Schiek’s ‘inclusive society’ striving to integrate differences can also be seen as supporting this approach.

It is suggested that this pluralism can be related to Dworkin’s right to treatment as an equal, the right to be treated with the same respect and concern as anyone else. O’Donovan and Szyszczak write about the distinction made by Dworkin:

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98 Townshend-Smith, supra note 50, at 80.
99 Supra note 21, at 20.
100 Supra note 78, at 6.
101 Townshend-Smith, supra note 50, at 80-1.
102 Supra note 21, at 3.
103 Supra note 86, at 119-20.
104 Supra note 66, at 304-5.
If this passage is taken as suggesting that people and their needs are different, then it seems to follow that rights to equality do not mean treating people in the same way. This is an argument for pluralism. ... It is an argument against the assimilationist ideal.\(^{105}\)

Further on they write:

If treatment as an equal implies respect for others, avoidance of stereotypes and viewing the world from another’s point of view, than pluralism goes further than equal treatment.\(^{106}\)

Feldman’s concept of moral equality also appears to favour pluralism and to reject assimilationist ideas. He writes that treating people as moral equals is ‘seen as demanding respect for (even celebration of) difference, rather than its elimination’. And the ‘willingness to treat someone as an equal only if he or she adopts one’s own system of beliefs and values is a denial of moral equality rather than an expression of it’.\(^{107}\)

Mason\(^{108}\) writes about the distinction between difference, which is often seen as a problem and has assimilationist assumptions, and diversity, which is a positive perspective. He concludes that the choice between fearing difference and embracing diversity is a major challenge for the future. To choose to embrace diversity would fit in a pluralist approach.

The above suggests that, in a pluralist view, equality laws should be based on respect for difference and diversity and should prescribe that everyone is treated with equal respect and concern. But is it possible to put this down in legislation? As O’Donovan and Szyszczak write, ‘in terms of legislative policy pluralism may be impossible to implement’.\(^{109}\) This will be discussed in Chapter two.

5.5 Concluding Remarks

It will be clear that the concept of equality, just like the other concepts discussed in this Chapter, has been given different interpretations. Anti discrimination laws, sometimes

\(^{105}\) O’Donovan and Szyszczak, supra note 78, at 6.
\(^{106}\) Ibid. at 7.
\(^{107}\) Feldman, supra note 48, at 139.
\(^{108}\) Supra note 8, at 2 and 127.
\(^{109}\) Supra note 78, at 7.
referred to as equality laws because they prohibit discrimination or prescribe equality, are often promoting a notion of formal equality, or equality of treatment: like people should be treated alike. However, they can also aim for a more substantive equality, which is sensitive to existing inequalities produced by past and on-going discrimination. This substantive equality can take the shape of equality of opportunity or equality of results. The first aims to give everyone the same opportunities, and therefore aims to equalise the starting point. This can involve unequal treatment and unequal outcomes. Equality of results is aiming to equalise the end results and therefore has a more distributive aim. The lines between the two forms of substantive equality are not clearly drawn. If one takes a more substantive view of equality of opportunity one comes close to equality of results, especially as that can be used in a less or more redistributive way.

Pluralism is another possible approach to equality, which sees diversity as a positive attribute of society and which accords equal respect and concern to every person and to his/her values and way of life. Pluralism rejects assimilationist ideals.

6. Conclusion

None of the terms discussed in this Chapter are easy to define or uncontested in their meaning. For the purpose of this Thesis the term race will mean a group of people with a common descent or common ancestry and the term will be used without any link with biological or cultural ideas of inferiority and superiority. The term racism will be understood as indicating ideologies and doctrines that races have distinctive hereditary characteristics and that this endows some races with intrinsic superiority, while the term racial discrimination will be used for the behaviour and attitudes based on these ideologies. Racism will also be considered as a negative phenomenon which is part of society and which needs to be fought, although it can probably never be fully eradicated. Discrimination shall be taken to mean distinguishing or differentiating in a negative way between people because they are assigned to a certain group. We have
distinguished four concepts of equality: equal treatment, equality of opportunity, equality of results and pluralism.
CHAPTER 2 - MODELS OF ANTI DISCRIMINATION LAW

1 Introduction

For a proper evaluation of anti discrimination legislation, it is necessary to ascertain what the legislation is trying to achieve. The aim(s) pursued will likely influence not only the measures laid down, but also the enforcement procedures and remedies made available. In other words, different aims call for different provisions, remedies and enforcement strategies.

In Chapter 1, we defined the key concepts that are used throughout the Thesis, one of which was equality. Four types of equality were distinguished: formal equality or equality in law; two types of substantive equality: equality of opportunity and equality of results; and pluralism. In this Chapter, we build on these different types of equality and develop them into models of anti discrimination law. These models are applicable to laws against discrimination on any ground, but in this Thesis they are used specifically to aid our analysis and evaluation of measures against racial and ethnic origin discrimination at the EU level.

All anti discrimination legislation is, as the term itself implies, aimed at fighting discrimination. Laws against racial discrimination, therefore, aim to combat racism and racial discrimination. Fredman distinguishes three functions that are required of equality if it is to combat racism:

- A means of redressing racist stigma, stereotyping, humiliation and violence – this could be said to correspond to formal equality: equal treatment without differentiating on the grounds of racial or ethnic origin;

• The redistributive aim of breaking the cycle of disadvantage associated with groups defined by race or ethnicity – this corresponds to substantive equality in both its forms: equality of opportunity and equality of outcome or results; and,

• The positive affirmation and accommodation of difference as a part of the right to equal concern and respect - which corresponds to the pluralist approach to equality.

This suggests that equality in all its types is needed to fight racism and racial discrimination. Does this mean that anti discrimination legislation should protect equality in all these forms? Can these types be laid down in law, and if so, how can this be done? This Chapter attempts to answer these questions by developing the four concepts of equality into four models of anti discrimination legislation: the equal treatment model; the equality of opportunity model; the equality of results model; and, the pluralist model. The names used to refer to each model have been chosen deliberately to indicate that each model is based on one of the four concepts of equality defined before. One can say that each model developed here aims to establish the type of equality it corresponds with. Therefore, legislation based on the equal treatment model prohibits differential treatment of persons who are in the same situation. Laws based on the equality of opportunity model try to equalise the starting point for everyone by prescribing or permitting preferential treatment of historically disadvantaged groups to bring them in a position where they can compete on an equal footing with people who did not suffer such disadvantage. Anti discrimination measures based on the equality of results model aim to achieve a fairer distribution, or, as Townshend-Smith expresses it, 'an equitable division of the economic cake between different groups in society'.

respected equally. In the following, examples of anti discrimination legislation from all
over the world will be given as illustrations. These examples show that many of the
concepts employed in EU anti discrimination measures are used in many different
countries, including EU Member States.

2 Equal Treatment Model of Anti Discrimination Legislation

Anti discrimination legislation based on this model prohibits different treatment of
people in the same situation. This is grounded in the principle that like should be treated
alike. Everyone has a right to be treated like anyone else in the same circumstances. As
we have seen in Chapter 1, equal treatment or formal equality is also referred to as
equality in law or before the law. This is often expressed in international treaties and in
the constitution in many countries in a statement similar to Article 7 of the Universal
Declaration of Human Rights (1948): ‘All are equal before the law and are entitled
without any discrimination to equal protection of the law’. As in this statement,
proclaiming the right to equal protection against discrimination often follows the right
to equality before the law.

At European level, the Charter of Fundamental Human Rights of the European
Union4 also proclaims, in Article II-80, that ‘everyone is equal before the law’, which is
followed in Article II-81 by a prohibition of discrimination. Recital 3 of the Preamble to
the Race Directive declares that ‘the right to equality before the law and protection
against discrimination for all persons constitutes a universal right’ as recognised by a
number of international human rights instruments.

3 See for example the following international instruments: Article 26 International Covenant on Civil
and Political Rights (ICCPR) (1966); Article 24 American Convention on Human Rights (1969);
Article 3 African Charter on Human and Peoples’ Rights (1981). For some constitutional examples
see Section 15(1) Canadian Charter of Rights and Freedoms; Article 14 Constitution of India; Section
6(1) Finnish Constitution. It should be noted that these three countries accord equality before the law
to any person, while some other countries restrict this to citizens only. Examples of the latter are:
Article 40(1) Irish Constitution, Article 3 Italian Constitution and Article 13(1) Portuguese
Constitution (all three refer to ‘citizens’); Article 4(1) Greek Constitution (‘all Greeks’); Article 14
Spanish Constitution (‘Spaniards’).

became part of the Draft Constitution for Europe, see Treaty establishing a Constitution for Europe
However, more detailed protection is usually not provided in international or constitutional instruments, rather it is left to other legislation to do this. These other laws follow the equal treatment model if they prescribe equal treatment or prohibit differential treatment of people in the same or very similar situations. A good example of a law prescribing equal treatment is Article 1 of the Dutch Constitution,\(^5\) which provides that:

All persons in the Netherlands shall be treated equally, in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race, or sex or any ground whatsoever, shall not be permitted.

Another example of legislation prohibiting differential treatment is the definition of direct discrimination in Article 2(a) of the Race Directive:

direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin.

Therefore, this model is expressed most often in either of two ways: a positive duty to treat people equally, or a negative duty not to discriminate, not to treat people unequally or differently. It is suggested that this model of anti discrimination legislation is based on the basic meaning of discrimination, which is, as we have seen in Chapter 1,\(^6\) making a distinction or differentiating in some way. The legislation only prohibits making such a distinction if it is based on grounds that are mentioned in the legislation, like ‘racial or ethnic origin’ in the Race Directive.

The strength of this model, and one of its main attractions, lies in the fact that it appeals to people’s feeling of fairness, of being just and equitable. O’Donovan and

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\(^5\) In a sense, this is an exception, because it is a constitutional provision. More often this is provided for in other legislation.

\(^6\) Point 4.1.
Szyszczak\textsuperscript{7} write that ‘the idea of equality under the law is a major justification for the rule of law itself’. If formal barriers exist for certain citizens, then these citizens are not equal under the law. If these barriers are upheld by law, then inequality is sanctioned by law. This undermines the rule of law which fails to deliver its promise of equality, and this would call the legitimacy of the law into question. Those subjected to legal barriers will deny the law’s claim to fairness. Thus, according to O’Donovan and Szyszczak, unequal treatment based on law is seen as unfair. Treating people equally is seen as fair, while unequal treatment is not, because it treats one person better and thus another one worse. This feeling of fairness appears to be a very strong human feeling. How often do you hear someone (and not only children!) say: ‘It’s not fair’? As we have seen, the principle that things that are alike should be treated alike goes back to Aristotle. The sense of unequal treatment as being unfair or unjust can be seen in a quote from him: ‘Equality and justice are synonymous: to be just is to be equal, to be unjust is to be unequal’.\textsuperscript{8} Fredman writes that the power of this most basic concept of equality ‘derives from the even more elementary notion, that fairness requires consistent treatment’.\textsuperscript{9} Therefore, the strong point of this model of anti discrimination law is its focus on fairness and consistency of treatment.

However, there are also problems with this model. Many of the problems raised in Chapter 1 in relation to the concept of equality as equal treatment can also be applied to legislation aiming to achieve equal treatment. Firstly, there is the question: when are people alike? To establish if a person is treated differently on racial grounds we need to find a similarly situated person of a different racial group to compare him/her with. As

\footnotesize


we have seen, the choice of comparator can influence the result. There is also the problem, as Barnard writes, that ‘it is a moral judgment as to who is alike’. In a sense, it is different or less favourable treatment from a norm, a standard of what is seen as proper treatment. But this standard or norm is decided by the dominant culture and is often biased towards social or group attributes of the dominant group. Should a black person always be compared with a white person? Should he/she aspire to a white person’s life pattern? This ignores that:

- what at least some members of the underprivileged group (women or ethnic minorities) really desire is not the opportunity to be like the previously dominant group (men, whites, Christians etc.) but rather the freedom to pursue their own values in their own ways.

This point was already touched upon in Chapter 1, but there it was mentioned in relation to equality of opportunity. The problem attaches to both the equal treatment and the equality of opportunity models.

This critique is connected to the next problem with the equal treatment model of anti discrimination legislation: that it creates strong conformist and assimilationist pressures; pressures to conform to the dominant norms and values of the society. Boyle and Baldaccini write that the formal equality concept ‘assumes conformity with the dominant culture’. This model assumes and promotes sameness and aims at the elimination of difference. If you aspire to be the same, to assimilate into society and to conform to the standard norm, then you have a right to equal treatment with everyone else. Parekh expresses this, in his description of assimilation, as follows:

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10 For a more extensive discussion of the problems with the comparator concept see Fredman, supra note 9, at 95-102.
11 Barnard, supra note 8, at 363.
The choice before the minorities is simple. If they wish to become part of and be treated like the rest of the community, they should think and live like the latter; if instead they insist on retaining their separate cultures, they should not complain if they are treated differently.

Because of its focus on sameness, 'the notion that likes should be treated alike therefore necessarily negates the value of difference'. Fredman sums this up:

Thus equality in its most familiar sense, that like should be treated alike, could well have the effect of collapsing the principle of equality into one of sameness, devaluing difference and endorsing assimilation and conformity.

This model, therefore, leaves no room for any recognition of the positive aspects of difference or for a requirement that people should be treated appropriately according to their differences.

The approach has been described as symmetrical, because it treats everyone in the same way. The effect of this is that the same right not to be discriminated against, not to be treated differently, is applicable to everyone, black or white, male or female. Black people have the right to be treated equally to white people, but white people also have the right to be treated equally to black people. This makes any positive action programmes that give preferential treatment to some groups to make up for past discrimination and disadvantage difficult, as that would constitute more favourable treatment of some and thus less favourable treatment of others.

The third problem with this model of anti discrimination legislation is that, by prescribing identical treatment for everyone, it ignores any existing inequalities and social disadvantages. It does not look at any imbalances that have been created by past discrimination. Lacey writes:

Fredman, supra note 1, at 3.
It is widely recognised that a legal commitment to formal equality is insufficient to guarantee the fair treatment of groups which have suffered a history of prejudice and discrimination.

The equal treatment approach will only work if everyone can start from the same starting point. However, cumulative disadvantage may make it difficult for members of some groups to attain the prerequisite merit criteria to compete on the same level. The law may determine that all applicants for a job must be treated equally, but this ignores the fact that some people, because of their race or sex or another ground, have never had the opportunity to acquire the required skills for the job in the first place. In the words of Hepple:18

One is not supplying equality of opportunity if one applies this criterion to people who are unequal because they have been deprived of the opportunity to acquire merit.

The approach could even perpetuate and reinforce existing inequalities because, as we have seen, it is biased towards the dominant culture.19 The law prescribing equal treatment does nothing to give the disadvantaged groups the chance to catch up with the dominant group and so to become able to compete at the same level. Therefore, this model ignores the fact that some groups cannot compete at the same level as others because of past discrimination and that they might not even want to so.

A fourth criticism raised against both the notion and the model of formal equality is that it is a relative principle which does not guarantee any particular outcome. The law is complied with as long as two like persons are treated equally, and it does not make any difference if they are treated equally well or equally badly. Barnard and Hepple20 express this as follows:

18 Hepple, Bob, “Have Twenty-Five Years of the Race Relations Acts in Britain been a Failure?” in: Hepple and Szyszczak, supra note 17, 19-34, at 26.
A claim to equal treatment can be satisfied by depriving both the persons compared of a particular benefit (levelling down) as well as by conferring the benefit on them both (levelling up).21

A fifth problem with legislation prescribing equal treatment or prohibiting unequal treatment is its focus on an individual model of justice: the individual is central in the enforcement procedures and remedies. The model relies on an individual to complain about differential or unfavourable treatment by another individual. The remedies made available by such laws are usually (financial) compensation for the wrong done. The perpetrator of the discrimination is held responsible for the wrong he/she has done to the victim, and, therefore, has to compensate the victim for the loss suffered. Some legal systems allow courts to make certain orders against the discriminator, for example, to reinstate the victim in case of discriminatory dismissal or to reserve the next available post for the victim in case of discriminatory recruitment policies. However, the more usual remedy is compensation. Fredman22 points out:

the correlative of treating a person only on the basis of her ‘merit’ is the principle that an individual should only be liable for damage for which he or she is responsible.

In other words, this approach ignores that, often, racial discrimination and prejudice cannot be attributed to any one person. It must be noted that this problem is not exclusively linked to the equal treatment model, but can be a problem for other models as well. It is more likely to occur with this model, but this does depend on what the legislation itself determines and what remedies are available in general.

This suggests that this model of equality law is useful as a minimum requirement, addressing the first function of equality (law) as formulated by Fredman:23 it can help to redress racist stigma, stereotyping, humiliation and violence. It makes it

21 A good example of levelling down can be found in Case C-408/92 Smith v Avdel Systems Ltd [1994] ECR I-4435, at para. 21. In this case there was a difference in pension ages for men (65) and women (60). The Court held that raising the pension age for women to 65 satisfied the principle of equal treatment.

22 Fredman, supra note 1, at 17.

23 See the introduction to this Chapter.
clear that differential treatment on the grounds of skin colour or race is prohibited, that racial prejudice will not be tolerated. But it is a minimum requirement only or, as McInerney\textsuperscript{24} writes, ‘equality demands, at minimum, formal equal treatment: that likes should be treated alike, and that deviations from that proportionality be justified’.

Fredman’s conclusion sums up the role and the limits of the formal equality model accurately:

While formal equality or equality of treatment has a role to play, particularly in eradicating personal prejudice, it is clear from the above that it needs to be allied to a more substantive approach.\textsuperscript{25}

3 Substantive Equality Models of Anti Discrimination Legislation

There are two substantive models of anti discrimination legislation: the equality of opportunity model and the equality of results model. Law based on the first model aims to equalise the starting point for everyone but is not concerned about the eventual outcome, while law based on the second model aims to equalise the result.

Both models aim to establish a more substantive equality which takes account of the social inequalities and disadvantages which some groups suffer because of past discrimination. Substantive equality models are thus more sensitive to group aspects of discrimination and recognise that persons are discriminated against as members of a particular group (like ethnic minorities, religious groups, women, disabled persons). There are extra burdens and barriers to achieving equality for members of disadvantaged groups. Schiek\textsuperscript{26} writes:

A substantive, asymmetric notion of equality is … based on a group-sensitive model of justice, … The group-sensitive approach purports that discrimination on any of the forbidden grounds is group related. Persons are grouped into a collective and disadvantaged...
as a 'member' of such a collective. Thus non-discrimination law needs to be sensitive to
this group dimension, while avoiding to support forced group membership.

The models could, therefore, allow for actions taken by or on behalf of groups.

The laws based on both these models try to compensate for these inequalities
and will allow unequal treatment of disadvantaged groups where that is necessary to
achieve equality in fact. This unequal treatment or preferential treatment has been
referred to as: special measures (often used in international instruments); affirmative
action (more often used in the US); or, positive action (more commonly used in (the
literature in) Europe). The three terms can be seen as interchangeable. Article 1(4)
ICERD is an example of an international measure:

Special measures taken for the sole purpose of securing adequate advancement of certain
racial and ethnic groups or individuals requiring such protection as may be necessary in
order to ensure such groups or individuals equal enjoyment or exercise of human rights and
fundamental freedoms shall not be deemed racial discrimination, ... 

Section 9(2) of the South African Constitution reads as follows:

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the
achievement of equality, legislative and other measures designed to protect or advance
persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

And Article 5 of the Race Directive, which is headed 'Positive action' determines:

With a view to ensuring full equality in practice, the principle of equal treatment shall not
prevent any Member State from maintaining or adopting specific measures to prevent or
compensate for disadvantages linked to racial or ethnic origin.

This Thesis will use the term positive action in the sense given by Fottrell.28

27 See also Article 2(2) ICERD: 'special and concrete measures'.
28 Fottrell, Deirdre, "Ever Decreasing Circles: Affirmative Action and Special Measures under
International Law" in: Fottrell, Deirdre and Bowring, Bill, (eds.), Minority and Group Rights in the
Special measures or affirmative action, in their simplest possible form, involve legalised
differential treatment of individuals based on their membership of an historically
disadvantaged minority group.

The terms positive or reverse discrimination are also sometimes used but, because of the
use of the word discrimination and its negative connotations, this term is not very
popular. Sometimes it is used as a synonym for positive action, at other times it is
distinguished from the term positive action, in that positive discrimination indicates
preferential treatment that goes further than positive action, like, for example, the
imposition of quotas or goals. Bacik\textsuperscript{29} writes:

\begin{quote}
Generally, policies which seek to achieve equality of opportunity may be described as
"positive action", while those which seek to achieve equality of result are described as
"positive discrimination".
\end{quote}

In this sense, the difference between the models can be said to be one of degree only.
We will come back to this when discussing the two substantive models. Because of the
confusion as to its meaning, the terms positive or reverse discrimination will not be used
here.

Therefore, both models will allow for preferential treatment of historically
disadvantaged groups, for positive action measures. However, the main problem with
positive action measures is – and it is submitted that this is also one of the reasons why
the terms reverse or positive discrimination are unpopular - that they are going against
the principle of equal treatment, that they themselves constitute discrimination:
preferential treatment of some is worse treatment of others and this is seen as unfair. As
Barnard writes, ‘equality comes with a price tag attached. ... improving the position of
one group is often to the detriment of another’.\textsuperscript{30} And, according to Feldman, such

\textsuperscript{29} Bacik, Ivana, “Combating Discrimination: The Affirmative Action Approach Developments in
Affirmative Action Law in Ireland and Europe” in: Byrne, Rosemary and Duncan, William, (eds.),
\textit{Developments in Discrimination Law in Ireland and Europe} (1997 Dublin: Irish Centre for European
Law) 119-30, at 120.

\textsuperscript{30} Barnard, supra note 8, at 373.
action 'will be seen by the disadvantaged members of previously advantaged groups as a straightforward form of discrimination'. Poulter gives as one of the arguments in favour of varying degrees of assimilation, that the vital principle of equality before the law will be jeopardised if minorities are given special exemptions and privileges. He also states that such equality can be seen as part of the rule of law. Nevertheless, advocates of positive action see it as justified because of the inequalities suffered through historical discrimination.

Anti discrimination legislation providing for positive action can, therefore, follow either of the two substantive models and it is not always clear from the texts which type of equality is aimed for. The reason is that the laws do not often give any further details of the measures that can be taken (see the examples given) and thus what is allowed depends on the interpretation in secondary legislation or in case law. As mentioned, the models can be distinguished because law based on the equality of opportunity model aims to make the starting point equal for everyone without being concerned with the results, while law based on the equality of results model aims to equalise the outcome. Positive measures may only attempt to create fair procedures in job applications without giving a person a right to a job. Or they may go further and actively encourage people from disadvantaged groups to apply without guaranteeing any specific outcome in their favour. Both these type of measures would fit in the equality of opportunity model. On the other hand, positive measures could not only encourage applications from certain groups, but could also determine that a set number of jobs should be given to people of that group. In this case, the measure fits in the equality of results model. We will now look at each model in turn.

Feldman, supra note 12, at 152.

3.1 Equality of Opportunity Model of Anti Discrimination Law

Anti discrimination legislation based on this model is sensitive to the position of disadvantage and inequality which some groups of people are in because of the discrimination they have been or are subjected to, and attempts to make up for this past inequality by making the starting point equal for everybody. This approach accepts that treating everyone equally, according to merit, cannot be successful if not everyone has been able to, or had the opportunity to, acquire merit. Feldman33 expresses this well:

Inequality of opportunity is particularly likely to result where one group suffers from the effects of a history of systematic discrimination which has limited the educational and economic opportunities open to them.

Thus, this model of anti discrimination law tries to make up for these missed opportunities. Because they have suffered disadvantage, some groups cannot compete on the same level. They are not at the same starting point. The model aims to equalise this starting point so everyone has 'the opportunity to compete on equal terms for the goods which society has to offer'.34 Once this is achieved, once the starting point is equalised, the competition from then on will be on merit only. The model is thus not concerned with the end results of the race as long as anyone can compete at the same level.

Section 14 of Ireland’s Equal Status Act 200035 can be seen as an example of an anti discrimination measure aimed at equal opportunity. It reads as follows:

Nothing in this Act shall be construed as prohibiting-

(a) ....,

(b) preferential treatment or the taking of positive measures which are bona fide intended to-

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33 Feldman, supra note 12, at 152.
34 Townshend-Smith, supra note 2, at 73.
promote equality of opportunity for persons who are, in relation to other persons, disadvantaged or who have been or are likely to be unable to avail themselves of the same opportunities as those other persons, or …

Article 5 of the Race Directive, quoted above, permits EU Member States to take positive action. The Article itself does not give any indication as to what sort of action is allowed and how far this action can go. However, if the ECJ interprets this article in the same way as it has interpreted Article 2(4) of the Equal Treatment Directive\(^{36}\) and Article 141(4) EC which both allow for positive action measures in relation to women, then the Court will exclude programmes which involve automatic preferential treatment at the point of selection for employment. The ECJ has also held that positive measures should be limited to the period necessary to overcome the disadvantage.\(^{37}\) If this interpretation is indeed followed, then Article 5 of the Race Directive can be seen as aiming for equality of opportunity. However, Schiek\(^{38}\) points out that the Race and Framework Directives both allow for positive measures ‘with a view to ensuring full equality in practice’ and do not use the terminology of the Equal Treatment Directive, which appears to indicate that these directives are aiming for equality of results. So Schiek argues for a different interpretation of the Race and Framework Directives because their text differs from the older Equal Treatment Directive’s text. The new text points, according to her, to a result-oriented approach. We will come back to this in Chapter 6 when we discuss the provisions for positive action in the Race Directive.

The concept of indirect discrimination is, according to some writers, an example of a legislative measure that aims at equality of opportunity, although others refer to it


\(^{38}\) Schiek, supra note 26, at 299.
as promoting substantive equality without specifying whether its aim is equality of opportunity or equality of results. Yet others see it as promoting equality of results only.

Indirect discrimination occurs, according to Article 2(2)(b) of the Race Directive.39

... where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons ...

The Belgian law combating discrimination40 states:

Indirect discrimination occurs when a seemingly neutral provision, measure or practice has harmful repercussions on persons on which one of the grounds for discrimination set out in para 1 applies, ...

And Section 9 of the Swedish Act on Measures to Counteract Ethnic Discrimination in Working Life41 determines:

An employer may not disfavour a job applicant or an employee by applying a provision, a criterion or a method of procedure that appears to be neutral but which in practice disfavours persons with a particular ethnic background.

From these definitions it will be clear that indirect discrimination takes account of differences. In cases of indirect discrimination, people are treated equally, the same provision is applied equally to everyone, but some people will find it more difficult or impossible to comply. Therefore, the concept of indirect discrimination recognises that equal treatment can have a discriminatory effect on some as a result of historical and structural impediments to equality. For example, requiring applicants for jobs to pass literacy tests, even if this is not necessary for doing the job, can be discriminatory against those who did not have the educational opportunities to become literate. The concept does, therefore, aim to compensate for past or current inequality and disadvantage. By defining as prohibited discrimination apparently neutral provisions,

39 The same definition is used in the other Article 13 EC Directives.
40 Article 2(2) Act of 25/02/2003 Pertaining to the Combat of Discrimination and to the Amendment of the Act of 15/02/1993 Pertaining to the Foundation of a Centre For Equal Opportunities and Opposition to Racism, <www.diversiteit.be
41 See: www.sweden.gov.se/content/1/c6/01/99/57/b98945ab.pdf
criteria and practices that have a disparate effect, and therefore by taking these barriers away as irrelevant, laws against indirect discrimination make the starting point more equal for everybody and make it easier for everyone to compete on the same level. In this sense, such legislation can be seen as aiming at equality of opportunity. However, not all barriers are against the law. The reason for this is that legislation against indirect discrimination allows for justification: there is no discrimination if the provision, criterion or practice is 'objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary' (Article 2(2)(b) of the Race Directive). Such justification clauses are a feature of many legislative measures against indirect discrimination. So even if there is a disadvantage or a barrier, this might not be unlawful if business or administrative interests objectively justify it.

The definitions show that indirect discrimination takes account of the impact, the results of seemingly neutral provisions or measures applied to all persons equally. It focuses on the practical result of a measure: if it has 'harmful repercussions' it may be considered discrimination. In this sense, indirect discrimination takes differences into account and is result-oriented. Does this mean that it aims at equality of results? Fredman writes, 'this focus on impact may be used in different ways, the aim not necessarily being equality of results'. As we saw in Chapter 1, she discerns three ways in which the notion of equality of results can be used: the first focuses on the effect of the equal treatment on the individual. In this sense, the concept of indirect discrimination involves equality of results, because the focus is on the 'particular disadvantage' or the 'harmful repercussions' for the individual. The second sense

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43 Fredman, supra note 15, at 161.
focuses on the results to the group. In this sense too, the concept can be said to involve outcome equality. As Barnard and Hepple write: 44

The essential characteristic of indirect discrimination is that an apparently neutral practice or criterion has an unjustifiable adverse disparate impact upon the group to which the individual belongs.

The third sense of equality of results assumes that the end result should be equal, proportional and fair, that the outcome is equal. In this last sense, the concept of indirect discrimination is not redistributive, because the end result may remain unequal. For example, a finding of indirect discrimination against an employer requiring literacy tests for jobs when this is not necessary to do the job might not result in the person who was discriminated against getting the job. And, even if this were the result, it would not change the fact that some people never had the opportunity to become literate because of past or ongoing discrimination in education. Requiring literacy tests might in other cases be justified for the interest of the business. With Fredman 45 we can conclude that:

The aims of the concept of indirect discrimination are ambiguous. ... its goals are not necessarily the achievement of equality of results. ... If indirect discrimination is only partially about equality of results, is it instead about equality of opportunity in that it aims to equalise the starting point? Again, this is only partially true.

We can add to this, however, that indirect discrimination ‘has been characterised as an important step away from a formal equality approach towards a substantive notion’. 46

A last point that needs to be discussed in relation to the equality of opportunity model is the sort of remedies this model could permit or prescribe. These remedies could include: compensation; orders to change policies; and, contract compliance or withholding of licences – where a public body has the authority not to make contracts with or give licences to companies unless they have an equality of opportunity policy in

44 Barnard and Hepple, supra note 20, at 564.
45 Fredman, supra note 9, at 115.
46 Schiek, supra note 26, at 305.
place or to end contracts with and withdraw licences from companies who do not respect equality principles. However, whether these sorts of remedies are available, depends on the legislation itself and the legal system it is part of. Sometimes, neither the anti discrimination law itself nor the legal system will allow for anything but compensation.

It will be clear that the equality of opportunity model of anti discrimination legislation remedies some of the problems that we have distinguished in relation to the equal treatment model. It does not ignore existing inequalities and social disadvantages but recognises these and allows for preferential treatment to overcome these. It is also asymmetrical, in that it takes account of difference and disadvantage and permits unequal treatment. But, the latter goes, as we have already mentioned above, against the feeling of fairness and justice that was the strong point of the equal treatment model.

However, this model still leaves the competition to be on merit only, once the starting line has been equalised. Therefore, the problems with regards to merit as it is defined by the dominant culture, are not solved. This model does little to change the focus on assimilation and on conforming to the dominant norms and values. In a sense, it leaves these norms and values in place and aims to bring disadvantaged groups to a position where they can also aspire to them, without recognising that they might not want to do this.

This model also does not guarantee a particular result. It is not concerned with the outcome of the competition: different finishing points are not seen as a problem, as long as everyone can compete equally on merit. This is the reason why this model rejects the setting of quotas and targets to correct imbalances in the workforce or in the allocation of housing which aim at equalising the results. It aims at the removal of barriers, but does ignore that this might not necessarily equip the disadvantaged group to move forward. Equalising the starting point may not necessarily lead to a more equal
society. Townshend-Smith describes equal opportunity as giving everyone "the opportunity to compete on equal terms for the goods which society has to offer". He continues:

The problem, though, is that reliance on equal opportunity alone provides no guarantee that, in practice, those goods will not remain disproportionately in the hands of white males.

This model focuses more on groups and could lead to a more group sensitive model of justice, but whether it allows for more than just compensation as remedy depends, as was mentioned, on the legislation and the legal system. If this solely focuses on an individual model of justice, than the same objections that applied to the equal treatment model also apply here.

3.2 Equality of Results Model of Anti Discrimination Law

Legislation against discrimination based on this model takes into account existing inequalities and disadvantages caused by past and ongoing discrimination and aims to remedy these by equalising the outcome or result; the laws aim to establish a fairer distribution of goods and resources in society. It would aim to correct maldistribution and to achieve a more representative participation of all groups in public life. This model "looks to the results of competition and then raise questions about the rules of entry". The Fair Employment and Treatment (Northern Ireland) Order 1998 clearly aims at fair participation in employment of both Protestants and Catholics. It determines under the heading "Affirmative Action" in Section 4(1):

In this Order "affirmative action" means action designed to secure fair participation in employment by members of the Protestant, or members of the Roman Catholic, community in Northern Ireland by means including:

(a) the adoption of practices encouraging such participation; and

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47 Townshend-Smith, supra note 2, at 73.
48 O'Donovan and Szyszczak, supra note 7, at 4.
(b) the modification or abandonment of practices that have or may have the effect of restricting or discouraging such participation.

This involves redressing imbalances and under-representation between the two communities in Northern Ireland. The aims are 'to secure greater fairness in the distribution of jobs and opportunities'.

The equality of results model of anti discrimination legislation would, as would the previous model, allow for positive action measures, but, in this model, they would go further and include the setting of targets and quotas. An example of such a law aimed at equality of results is Section 46 of the Police (Northern Ireland) Act 2000 which contains a quota system for the recruitment of police trainees and support staff. Its aim is to reverse the under-representation of Catholics in the police force. Section 46(1) requires the appointment of one Catholic person for every person of another religion who is awarded a post. According to Section 47(1), these provisions are temporary for three years. The Police (Northern Ireland) Act 2000 (Renewal of Temporary Provisions) Order 2004 extended this period for another three years. However, the other paragraphs of Section 46 empower the Secretary of State to amend the above requirements if not enough people can be appointed.

Another example is the Canadian Employment Equity Act of 1995. According to Article 2 on the purpose of the Act, 'employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences'. Article 5 of this Act puts the following obligation on employers:

Every employer shall implement employment equity by

(a) ...; and

(b) instituting such positive policies and practices and making such reasonable accommodations as will ensure that persons in designated groups achieve a

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50 See Barnard and Hepple, supra note 20, at 565.
degree of representation in each occupational group in the employer's workforce that reflects their representation in

(i) the Canadian workforce, or

(ii) those segments of the Canadian workforce that are identifiable by qualification, eligibility or geography and from which the employer may reasonably be expected to draw employees.

In other words, employers must use positive policies and practices and make accommodations to ensure that women, aboriginal peoples, persons with disabilities and members of visible minorities – Article 3 gives this as the meaning of ‘designated group’ – are represented in their workforce in the same numbers as they are represented in the Canadian workforce as a whole or in those segments of the workforce that the employer may reasonably be expected to recruit employees from, looking at qualifications, eligibility and geography. Therefore, if 5% of the Canadian workforce as a whole or of that segment is of a visible minority, then the workforce should also have about 5% of visible minority people, and not just the workforce of the employer as a whole but also each occupational group. This can be seen as a clear target: 5% should be of visible minorities. However, is this duty on employers as results-oriented as it first appears from Article 5? This is indeed questionable; firstly, part (b)(ii) could mitigate the duty on the employer, depending on how it is interpreted. Secondly, even if part (b)(ii) does not do so, Article 6 certainly does. It contains the following exceptions:

The obligation to implement employment equity does not require an employer

(a) to take a particular measure to implement employment equity where the taking of that measure would cause undue hardship to the employer;

(b) to hire or promote unqualified persons;

(c) with respect to the public sector, to hire or promote persons without basing the hiring or promotion on selection according to merit in cases where the Public Service
Employment Act requires that hiring or promotion be based on selection according to

merit; or

(d) to create new positions in its workforce.

So, Article 5, as it is aiming to achieve fair participation in the workforce for minority
groups, can be seen as an example of a results-oriented measure. However, its effect
could be mitigated by the interpretation of its part (b)(ii), and is definitely mitigated by
the exceptions of Article 6. Therefore, both the Police (Northern Ireland) Act 2000 and
the Canadian Employment Equity Act 1995 allow for exceptions.

It appears that many national legislative measures that allow for positive action,
will permit, or are interpreted as permitting, some preferential treatment but this usually
stops short of allowing targets and quota setting. This is, as we have seen, also the
interpretation by the ECJ of the EU legislation allowing positive action measures for
women. That this is the same for the British Race Relations Act 1976 is illustrated by an
article in the Guardian newspaper about plans by the Metropolitan Police (the Met) to
fast track black recruits. The article reports that ‘Britain’s biggest police force is
urging positive discrimination in favour of black recruits’ by fast tracking ‘ethnic
minority people into its training schools ahead of some white candidates to make its
force more representative of London’s racial mix’. At present, people have to wait for
about a year for a training place. The plan would give the Met the right to select ethnic
minority candidates to start training straight away, while others would have to wait. The
Met stresses that the same selection criteria would apply to both white and ethnic
minority recruits. It believes that the plan would be illegal under the Race Relations
Act, but does not think that, without it, it can meet the target set by the Government:
25% of its officers should be from ethnic minorities by 2009, reflecting that a quarter of
Londoners are from ethnic minorities. It is interesting that the article mentions that ‘the

law allows for positive action, such as encouraging applications from disadvantaged
groups, but positive discrimination is unlawful'. This suggests that positive action
measures aiming at equality of opportunity are allowed under the British Race Relations
Act 1976, but that positive discrimination, aiming at reaching specific targets, are not.53
The article therefore uses, like Bacik did, the terms positive action for measures aiming
at equality of opportunity and positive discrimination for those aiming at equality of
results.

This model of anti discrimination legislation remedies the objection made
against the equality of opportunity model in that it is focused on the outcome, but there
are also, like with the other models, some problems. Firstly, the model goes, as does any
model that allows for preferential treatment, against the principle of equal treatment and
thus against people's feeling of fairness and justice.

As mentioned in Chapter 1, there is also the problem, pointed out by
Townshend-Smith, that the redistributive aim is intertwined with the relief of poverty.
This poses the question: why should only certain victims of poverty (black people,
women) and not others be entitled to such relief?54

The third problem is that, despite the fact that this model aims at redistribution,
this might not necessarily be the result because the outcome depends on the way the
model is used. This can be seen in the paper by Menski55 on the policy of protective
discrimination of traditionally disadvantaged groups that was laid down in the
Constitution of India in 1950. Articles 14-16 of the Constitution of India explicitly

53 See also Bowcott, Owen and Dodd, Vikram, "Police halt Jobs Diversity Scheme after Discrimination
Claims" The Guardian 08/03/2006, <www.guardian.co.uk/gender/story/0,1725899,00.html> These
two articles are used as illustrations of the difference between equality of opportunity and equality of
results. A discussion on positive action measures under the British Race Relations Act 1976 would go
beyond the subject of this Thesis. For more information, see McColgan, Aileen, Discrimination Law:
Text, Cases and Materials (2nd ed. 2005 Oxford/Portland, Oregon: Hart Publishing), at 132-57, the
case law referred to there and Lambeth London Borough Council v CRE [1990] IRLR 230, Balcombe
LJ at 234.

54 Townshend-Smith, Chapter 1, 5.3.2 and supra note 2, at 80.
55 Menski, Werner, "The Indian Experience and its Lessons for Britain" in: Hepple, and Szyszczak,
supra note 17, at 300-43.
allow preferential treatment for certain groups and Article 16(4) allows the reservation of appointments or posts in favour of any backward class of citizens. The constitutional provisions aimed to accelerate the process of building an egalitarian social order. However, the Constitution does not give any indication as to how these policies of protective discrimination are to be implemented and ‘the implementation of the policies is apparently far from perfect’. And, as Menski writes, ‘the social reformer’s dream of an egalitarian society as the result of ‘equalizing policies’ … has clearly not been achieved in modern India’. Fredman writes about equality of results that the ‘underlying redistributive aims may only be partially achieved’. She gives two reasons for this: firstly, ‘monitoring of results does not necessitate any fundamental re-examination of the structures that perpetuate discrimination’; and, secondly, there is a danger that a focus on equality of results pays too little attention to the equally important notion of equality of diversity; or the duty to accommodate diversity by adapting existing structures.

A fourth problem is that there are disadvantages linked to the setting of quotas. Gregory mentions:

Although a system of quotas produces rapid and dramatic results, its application in the job market would tend to accentuate rather than dissipate racial hostility. If it entailed the selection of people with inferior qualifications merely because they were black or female (or both), those selected might feel patronized and those not selected might see themselves as a new class of victim.

Menski calls this the ‘efficiency argument’: the public perception in India is ‘that the effect of reservation policies has been to bring about lower standards and to encourage inefficiency’.

56 Ibid. at 310-11.
57 Ibid. at 313.
58 Ibid. at 307. For more information on how the policies were implemented and why they did not have the desired effects, see the paper.
59 Fredman, supra note 1, at 20.
MacEwen\textsuperscript{62} criticises quotas thus:

In particular the results may involve the less well-qualified, and potentially less deserving, getting a job, a house or a promotion to make up the numbers, and in doing so discriminating against better qualified white applicants who feel no great need to shoulder the burden of rectifying historical disadvantage. Such reverse discrimination is often unlawful, but perhaps more importantly it is seen to be unfair; it denies everyone a fair chance and is in breach of the concept of natural justice.

Thus, again, the importance of treatment being seen to be fair and just is stressed.

The last problem, also already touched upon in Chapter 1, is whether it is really possible to achieve equality of results through legislation. O’Donovan and Szyszczak write that ‘the creation of outcome equality would require a major social revolution. … Liberals object that equality of outcomes could be maintained only at a substantial cost to liberty’. This is because ‘the maintenance of strict equality would require continuous coercive interference to maintain an egalitarian distribution pattern’.\textsuperscript{63} A second question is whether legislation can be of a pure equality of results model We can put this question in a different way: can we have legislation of this model that uses the notion of equality of results as defined in Fredman’s third way above, as requiring a redistributive outcome, an ‘equal outcome, that is that the spread of women and minorities in a category should reflect their proportions in the workforce or the population as whole’?\textsuperscript{64}

It is suggested that we can have such a legislative aim, that we can have laws that aim at a more equal distribution and a fairer participation, but that legislation alone can never reach full equality of results. Section 46(1) of the Police (Northern Ireland) Act 2000, Section 4(1) of the Fair Employment and Treatment (Northern Ireland) Order

\textsuperscript{61} Supra note 55, at 324-5.
\textsuperscript{63} See Chapter 1, 5.3.2 and supra note 7, at 6.
\textsuperscript{64} Fredman, supra note 9, at 12-3.
1998, and Article 5 of the Canadian Employment Equity Act, cited above, can be seen as examples of legislation with such an aim. However, as we have seen, the Police (Northern Ireland) Act 2000 provides for exceptions when not enough people are available and Article 5 of the Canadian Act is mitigated by Article 6. The Fair Employment and Treatment (Northern Ireland) Order 1998 defines affirmative action as action designed to secure fair participation by means of adopting practices that encourage it and abandoning practices that discourage or restrict it. Therefore, this Order focuses more on encouraging fair participation, rather than setting strict rules and quotas as to how to achieve this. The reason that anti discrimination legislation alone cannot establish full equality of results is that there are always conflicting interests at work. Firstly, there is the conflict between the different groups that should be given preferential treatment: why some groups (like, for example, black people or women) and not others (like, for example, religious groups)? And even within the groups selected, preferential treatment often goes to the more privileged people within that group. To be truly redistributive, all disadvantaged people should be given such treatment, irrespective of the group they belong to or even if they don’t belong to any group at all.

Secondly, there is the conflict, already mentioned, between preferential treatment and the feeling of fairness and justice. Positive action is seen to be unfair and to go against the principle of equal treatment of every person.

Thirdly, there is also the conflict between the redistribution of goods and resources and the business interests of an employer. This is clear in Article 6 of the Canadian Employment Equity Act, where an employer does not have to take an employment equity measure if it 'would cause undue hardship to the employer' or if it

meant hiring or promoting unqualified persons. The problem can be illustrated by an example: in a country, ten percent of the population is from a racial or ethnic minority origin. Because this group of people is involved in employment in only a very small percentage, a law determines that every employer must make sure that ten percent of his workforce and of each category in his workforce is from such a minority origin. How quickly should an employer comply (the law could give a time scale)? Should an employer make some people redundant and replace them with people of the racial or ethnic minority if financial restraints will not make it possible for the employer to create new jobs? What if there are not enough people of the racial or ethnic minority who are qualified and suitable to do the job? 66

This suggests that legislation can be based on the equality of results model in that it can aim at a more equitable distribution and a fairer participation, but that these legislative measures need to be supported by measures in a number of other areas, such as the social, political and educational field. In Chapter 3, we will discuss the capacity and effectiveness of law in tackling discrimination and the possible other measures that could be used with the same or more effect.

As for remedies, the same range would apply here as was discussed for laws in the equality of opportunity model: compensation; orders to change policies; and, contract compliance or the withholding or withdrawing of licences. It could also allow orders to reach certain targets or quotas before the expiry of a certain time. 67 But, again, which remedies are allowed depends on the legislation and the legal system it is part of.

It can be concluded that both substantive models of anti discrimination law go some way towards remedying the problems that occur with the equal treatment model,

67 For a way of dealing with non-compliance see Part II of the Canadian Employment Equity Law, Articles 22-34. Part III (Articles 35-40) determines monetary penalties for employers who do not comply.
but that they are not without problems themselves. It will also be clear that it is not always possible to draw a sharp line between the equality of opportunity and the equality of results models because measures can contain aspects of both. Where the models differ is that the equality of opportunity model focuses on equalising the starting point for everyone without being concerned about the outcome, while the equality of results model concerns itself with an equal outcome.

4 The Pluralist Model of Anti Discrimination Legislation

Legislation based on this model of anti discrimination law aims to establish a society where difference and diversity are celebrated as positive assets and where every individual is treated with equal respect. In such a society, there would be acceptance of distinctive cultures and identities and people would be treated in accordance with their own requirements and aspirations. Society would be based on respect for and tolerance of differences and diversity and strive to integrate minority communities rather than assimilate them. The idea is not new: in a speech in 1966 Roy Jenkins (then Home Secretary) described integration thus:

I do not regard it as meaning the loss, by immigrants, of their own national characteristics and culture. ... I define integration therefore, not as a flattening process of assimilation but as equal opportunity, coupled with cultural diversity in an atmosphere of mutual tolerance.68

Dine and Watt69 discuss Dworkin’s distinction between ‘equal treatment’ and ‘treatment as an equal’.70 They ask what it means to treat people as equals and write:

... all that is needed is a recognition that individuals have different incommensurable abilities, goals and aspirations, and that ‘treating people as equals’ means giving equal weight to each person’s own ‘plan of life’, i.e. treating people as equals means recognizing their autonomy.

70 See Chapter 1, 5.1.
So, according to this, treating people as equal means respecting their goals and aspirations, their 'plan of life', whatever people choose this to be. However, what this is should never be decided by an outside official body.

Law based on this model would aim to create 'an atmosphere of mutual tolerance' between people of different groups. One way of doing this is by prohibiting intolerance and its manifestations, like discrimination. In this sense all laws against discrimination aim to promote tolerance. But legislation based on this model would go further. It could contain a government statement that cultural diversity is to be respected or put a positive duty on authorities and employers to eliminate discrimination and to respect diversity. It could also lay down a policy of mainstreaming equality and diversity: a duty to take combating discrimination and promoting equality and respect for diversity into account in every policy and executive decision, thus making equality and diversity factors that always need to be considered.

An example of legislation following this model is the Canadian Multiculturalism Act 1985. The Preamble states that:

the Government of Canada recognizes the diversity of Canadians as regards race, national or ethnic origin, colour and religion as a fundamental characteristic of Canadian society and is committed to a policy of multiculturalism designed to preserve and enhance the multicultural heritage of Canadians while working to achieve the equality of all Canadians in the economic, social, cultural and political life of Canada.

Article 3(1)(a) and (e) and 3(2)(a), under the heading 'Multicultural Policy of Canada' are the most relevant for our discussion. These declare that it will be the policy of the Government of Canada:

- To 'recognize and promote the understanding that multiculturalism reflects the cultural and racial diversity of Canadian society and acknowledges the freedom of

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71 Mainstreaming could fit in the other models of anti discrimination law, but this depends on what is mainstreamed. We will discuss this in Chapter 6. The term mainstreaming is used extensively in relation to gender discrimination within the EU, see Fredman, supra note 1, at 27.

all members of Canadian society to preserve, enhance and share their cultural heritage’ (Article 3(1)(a));

• To ‘ensure that all individuals receive equal treatment and equal protection under the law, while respecting and valuing their diversity’ (Article 3(1)(e));

• that all federal institutions shall ‘ensure that Canadians of all origins have an equal opportunity to obtain employment and advancement in those institutions’ (Article 3(2)(a)).

Here, the aim of a multicultural society in which everyone, whatever their cultural heritage, has a right to equal treatment and equal protection under the law as well as a right to respect for their diversity, is laid down in law as a government policy. The Act does not define what a multicultural society is. Parekh73 describes a multicultural society as ‘a society which includes several distinct cultural, ethnic and religious communities’. According to Watson,74 a multicultural society denotes a society in which there exist several cultures; and culture refers to a common language, a shared history, a shared set of religious beliefs and moral values, a shared geographical origin, all of which taken together define a sense of belonging to a specific group. Watson writes that other terms have been used to describe such a society: plural, cosmopolitan, multi-ethnic, poly-ethnic or multi-racial.

The Preamble to the Canadian Multiculturalism Act mentions that ‘the Canadian Human Rights Act provides that every individual should have an equal opportunity with other individuals to make the life that the individual is able and wishes to have (my italics), ...’. The words ‘wishes to have’ indicate that the decision of what life a person wants to make should not be made by the government or by the majority.

73 Parekh, supra note 14, at 1.
The Dutch system of ‘verzuiling’ (pillarisation)\(^75\) is often mentioned as an example of a democratic, pluralist society where tolerance for others was laid down in law. The system was based on the existence of four pillars, a Roman-Catholic, a Protestant, a Socialist and a Liberal or neutral one, where members of each pillar accorded rights and deference to members of other pillars. The pillars had their own organisations at all levels of life: politics, unions, education, health, youth, media and sports. The system was a result of the Pacifatie (peaceful settlement) of 1917, which established a politics of accommodation. In that year, the Dutch Constitution was changed in three respects: firstly, all public and all denominational schools were given the same financial status (in other words, they were all financed by the Government in the same way) (Article 23); secondly, universal (male) suffrage was introduced (followed in 1919 by universal female suffrage) (Article 54); and, thirdly, the electoral system was changed to a system of proportional representation (Article 53). The seven main rules that taken together describe how this system worked were:\(^76\)

1. The business of politics: practical politics aimed at achieving results;
2. The agreement to disagree: acceptance of the spiritual disunity of society; the fundamental convictions of other pillars must be tolerated if not respected;
3. Summit diplomacy: top-level discussion, especially to solve crises;


4. Proportionality as the principle for solving crises (distributional equity);
5. Depoliticisation of issues that are loaded ideologically or in terms of political principles, thus turning them into practical technical issues;
6. Secrecy when seeking solutions, to enable compromises to be reached;
7. The Government’s right to govern: the Government is elected to get a job done, in the business-like traditions of Dutch politics. It has the power and the duty actually to apply solutions. To do this it needs a lot of room for manoeuvre.

The above is a very short and simplified description of the Dutch system of pillarisation, mentioned as an example of a plural society where sections of the population live together and tolerate and respect the differences between them. The term ‘living apart together’ has been used frequently in this context.

However, there are some problems with pluralism and the pluralist model of anti-discrimination law. We can discuss these by using Poulter’s arguments for assimilation, which can be seen as arguments against minorities retaining their separate customs and traditional practices, as they would do in a pluralist society.

One of his arguments, that the principle of equality before the law will be jeopardised, if minorities get special treatment by the legal system, has already been mentioned when we discussed positive action measures. This argument goes back to the feelings of unfairness and injustice about unequal treatment in whatever form.

Another of Poulter’s arguments is that members of minority groups may not so easily be able to attain economic advancement and break free of the cycle of disadvantage and discrimination if they insist upon retaining their separate customs. This is mainly because employers will not employ them out of fear that they will make cultural or religious demands or will not fit in with other employees. Is this an argument against a pluralist society? It is submitted that this is not as such a society is all about

77 Poulter, supra note 32, at 13-4.
tolerating and respecting diversity, about accommodating and making room for differences. The problem would not exist in a truly pluralist society. Anti discrimination legislation based on this model would aim to establish tolerance and respect, so would aim to remedy the problem Poulter points at here.

This leaves us with Poulter's other two arguments: one is the concern that failure to assimilate to certain important shared values will mean a departure from minimum standards of acceptable behaviour. This is connected with the other argument, that 'the active promotion of separate identities may foster divisiveness and be incompatible with the degree of social cohesion required for the maintenance of a sense of national unity'. These arguments both suggest that there are limits to cultural diversity. The 1985 Swann Committee Report expressed this as follows:

We would ... regard a democratic pluralist society as seeking to achieve a balance between, on the one hand, the maintenance and active support of the essential elements of the cultures and lifestyles of all the ethnic groups within it, and, on the other, the acceptance by all groups of a set of shared values distinctive of the society as a whole. This then is our view of a genuinely pluralist society, as both socially cohesive and culturally diverse. 78

Rex 79 writes about the 'secular civic culture as a common and necessary component of all cultures in advanced industrial societies. ... The possibility of different cultures coexisting depends upon them all accepting this shared set of common ideals'. And Verma 80 concludes, in relation to Britain, that 'the type of pluralist society for which we must strive is one that stresses core values but allows for diversity within an agreed framework'. But what are these shared values, core values or shared set of common ideals? Parekh 81 considers that minority values and practices 'should be tolerated

78 Swann Committee Report Education of Children from Ethnic Minority Groups (Cmnd 9453, 1985), at 5-6.
81 Parekh, supra note 14, at 11.
subject to such collectively agreed minimum principles as respect for human life and
dignity'. Other writers have mentioned human rights norms - like freedom of expression
and religion and the legal and moral equality of all persons - and democracy and the
rule of law as minimum standards to be maintained. Poulter\textsuperscript{82} advocates the use of
human rights and suggests that two questions of principle should be asked. Firstly, does
a particular ethnic practice demand legal recognition because to refuse it would be
tantamount to a denial of human rights? This question sees it as a human right to have
one's culture and traditions respected if one so wishes, and sees a denial of such
recognition and respect as a breach of fundamental human rights. Human rights are thus
used as an argument for respecting diversity. Secondly, does an ethnic tradition require
automatic non-recognition because the practice itself constitutes a violation of human
rights? Poulter gives as examples here slavery, female circumcision and barbarous
punishments.

All this suggests, therefore, that human rights values can provide a limit on
diversity in a society. However, it must be kept in mind that these values, the core
values of society, must not automatically be the values of the dominant group in that
society. As Poulter\textsuperscript{83} writes: 'the relationship between 'shared values' ... and minority
cultures ... should be seen as a reciprocal one. ... These values are not immutable'. In
other words, these two influence each other constantly and both are always developing.

As Rex\textsuperscript{84} points out, 'the creation of a multicultural society must involve an
element of voluntarism'. This means that those who want to assimilate should be
allowed to do so, while those who prefer to keep their own culture should also be
allowed to do just that. The important point is 'to create the kind of society in which all
people may choose their cultural affiliations'. Every person and every group should be

\textsuperscript{82} Poulter, Sebastian, "Cultural Pluralism and its Limits: A Legal Perspective" in: Commission for
\textsuperscript{83} Poulter, supra note 32, at 24-5.
\textsuperscript{84} Supra note 79, at 134.
respected in the choices they make about their culture. People should not be labelled by outside agencies as belonging to a group and therefore as having a certain culture. Schiek, quoted above, also mentions ‘avoiding to support forced group membership’. Therefore, a person’s cultural affiliation should not be defined or decided by an outside body, because that would mean imposing certain values on that person and the group or community he/she belongs to. In all this it should be noted, that it is often not a clear-cut choice between following either the minority culture or the majority culture. Ethnic minorities follow strategies of adaptation and often follow a hybrid of their own culture and the dominant culture.

The last point to be raised is whether legislation can promote pluralism and achieve the aim of establishing a plural society. It is suggested that legislation can aim to create acceptance of and respect for whatever culture or mixture of cultures people would want to follow, it can aim to promote tolerance and participation and it can aim to establish the circumstances in which a plural society can blossom. However, legislation alone cannot establish such a society. As with legislation based on the other models of anti discrimination law, legislation based on the pluralist model needs to be supported by measures in other areas.

It can be concluded that the pluralist model of anti discrimination law, although it remedies some of the objections made against the other models, also raises some problems of its own.

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85 Supra note 26.
5 Conclusion

We have distinguished four models of anti discrimination law, based on the four types of equality distinguished in the first Chapter. Firstly, there is the equal treatment model, in which the law prescribes that like cases should be treated alike. This seems to be the most common formulation found in anti discrimination laws. The reason for this is most likely that this is fairly easy to lay down in law and that the principle has popular appeal because it fits in with people’s feelings of fairness and justice. Then there are two substantive models, the equality of opportunity model and the equality of results model. Both models aim to take account of disadvantages suffered by some groups because of past discrimination. The equality of opportunity model aims to equalise the starting point in order to enable everyone to compete at the same level. The equality of results model aims to equalise the outcome, to establish a fairer distribution of goods and resources in society. Legislation based on these models allows for preferential treatment of the groups that have been disadvantaged. Laws based on the pluralist model of anti discrimination legislation aim to create a society which not only tolerates, but also respects and celebrates difference and diversity.

Lustgarten\textsuperscript{87} discusses the question where anti race discrimination law in Britain should be going and approaches this question by asking: what are the goals of racial equality policy? It is submitted that these goals are not limited to Britain, but can be applied to (racial) equality policies in general. Lustgarten describes three aims: the first aim should be the just treatment of individuals, in other words no unfavourable treatment on grounds such as race or ethnicity. This should involve more than formal equality and go towards a conception of substantive equality. The equality of all humans is the bedrock here. The reason for fair treatment is, according to Lustgarten, that ‘the value of fairness in the sense of formal equality is one that is deeply rooted in

\textsuperscript{87} Lustgarten, Laurence, “Racial Inequality, Public Policy and the Law: Where are we Going?” in: Hepple and Szyszczak, supra note 17, 455-71, at 455-7.
British culture' and has been the driving force behind efforts to counter discrimination. Again this does not appear to be limited to British culture and can be applied more widely.

The second aim should be group distributional equality: the income distribution of each racial or ethnic group of significant size should be proportionally equivalent to whites and the rates of unemployment of people in these groups should be roughly equal.

The third aim is 'the acceptance in principle of the equality of cultural norms and beliefs, which means adjustment and accommodation to customs and practices of significant minority groups'. Lustgarten makes this subject to two provisos: firstly, that human rights norms are paramount; and, secondly, that there operates some notion of proportionality, 'which will balance the seriousness of the minority’s interest against the degree of disruption the accommodation will cause'. Lustgarten adds that he 'would equally insist on the principle that each individual retains the right of self-definition about group membership or identity'.

The above aims of equality policies correspond with the models of anti-discrimination law which we have described and can be seen as a good summary thereof. The first aim covers the formal equality model and goes some way towards the equality of opportunity model. The second aim covers the equality of results model, while the third aim corresponds with the pluralist model. The provisos show that Lustgarten also accepts limits on cultural diversity.

The British Race Relations (Amendment) Act 2000 warrants a mention because it appears to have elements of each of our models. The Act was the result of the recommendations made in the MacPherson Report, which, as mentioned in Chapter 1, found the Metropolitan Police institutionally racist. The Report led to a large number of

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recommendations, aimed not only at the police, but also the legal system, public administration, the NHS and schools. The aim was to develop a zero tolerance policy against racism. This can be seen as a plea for a more culture sensitive service provision by these institutions.

The 2000 Act places a general duty on public authorities, in performing their public functions, to ‘have due regard to the need- (a) to eliminate unlawful racial discrimination; and (b) to promote equality of opportunity and good relations between persons of different racial groups’. The Act contains a very wide list of public authorities caught by the duty. The elimination of racial discrimination includes fighting discrimination and unequal treatment, as in the equal treatment model. The promotion of equality of opportunity hints at a more substantive equality model, while the promotion of ‘good relations between different racial groups’ can be seen as a duty to work towards promoting tolerance and respect, as in the pluralist model. The duty also means a move away from an individual model of justice which depends on individual complaints and can be seen as a move towards mainstreaming equality of opportunity and good relations. However, the way the Act is worded: ‘to have due regard to the need to’ is a rather weak interpretation of the recommendations of the MacPherson Report.

In this Chapter we have shown that all four models have advantages and disadvantages and that all models have been used in some form of legislation. It will be clear that the models overlap and that one cannot always draw a clear dividing line between them. Anti discrimination legislation can also contain elements from more than one model. Which model(s) of anti discrimination law is chosen is ultimately a political choice. If this is kept in mind, the models will be useful tools in analysing and evaluating measures against racial discrimination in the following Chapters.

89 See new Section 71 of the Race Relations Act 1976.
CHAPTER 3 - EFFECTIVENESS OF ANTI DISCRIMINATION LAW

1 Introduction

In the previous Chapter we distinguished four models of anti discrimination legislation based on the type of equality these laws aim to establish and saw that anti discrimination legislation based on all four types exists. In fact, there are numerous national and international legal provisions against discrimination on a varied number of grounds, following any one or more of the four models. International instruments at European level and world level contain duties for states to take legislative measures in their national law. The European Equality Directives, for example, have to be implemented into the national law of the EU Member States. Article 4 of the ICERD prescribes criminal law measures, while Article 6 puts a duty on state parties to provide effective remedies through tribunals. Article 2(1)(d) ICERD and Articles 2(a), (b) and (e), 3 and 6 CEDAW require states to take ‘all appropriate measures, including legislation’. And Article 26 ICCPR determines that ‘... the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination ...’.

Behind all these measures there must be a presumption that legislative rules against discrimination are useful, effective and/or necessary in the fight against discrimination; if they were not, for one reason or another, legislators would obviously not enact such measures. But is it really the case that states can reduce or eliminate discrimination through legal measures? Some people argue that anti discrimination laws, for a number of reasons, are of no use at all and do, in fact, more harm than good.

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1 Examples of laws at national level: the Dutch General Equal Treatment Act, the Constitution of India, the British Sex Discrimination Act and Race Relations Act, the South African Promotion of Equality and Prevention of Unfair Discrimination Act and the US Civil Rights Act.

2 At the European Union level, there are the Equal Treatment, Race, Framework, Equal Treatment (Amendment) and Equal Treatment (Goods) Directives. The term ‘European Equality Directives’ will be used to refer to these Directives together.

3 For example: the ICERD, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the ICCPR.
and that, therefore, these laws should be abolished. In this Chapter we examine the arguments, both for and against legislation, brought forward in the literature and we attempt to answer the question whether law is a useful tool to combat discrimination. A related question that will be discussed for each argument is whether, looking at the models developed in the previous Chapter, the argument is stronger in relation to legislation applying one model than in relation to legislation applying another model. A third point of discussion relates to research into the need for and the effectiveness of anti discrimination legislation in general or of legislation seeking to pursue any one of the models distinguished.

Before we go over to a discussion of the arguments for and against legislation, two points need to be made. Firstly, legislation against race discrimination seeks to make considerations based on race irrelevant, but by doing so, it necessarily puts people into racial groups, and thus it reinforces and entrenches the very characteristic it seeks to eliminate. It also raises the question of how one can legislate against discrimination on the ground of race, when different races do not exist. The Race Directive, the ICERD and ECRI General Policy Recommendation 7 have solved this problem by including a statement rejecting theories based on the existence of different human races.4

And, secondly, the term legislation against discrimination has so far been used in general, without distinguishing between different types of law. But a prohibition on discrimination can be laid down in a state’s constitution, its civil law or its criminal law. As mentioned in Chapter 2, many national Constitutions state that everyone is equal before the law and has the right to equal protection of the law without discrimination. An example of a Constitutional provision can be found in Article 15 of the Constitution of India which prohibits discrimination in public areas on grounds of religion, race,

caste, sex or place of birth. Section 201(a) of the American Civil Rights Act 1964 is an example of a civil law prohibition. It determines that:

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, and privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

Another example is Section 1 of the British Race Relations Act 1976, which declares that a person discriminates against another person when he/she treats him/her less favourably than another person on racial grounds.

Many countries have chosen to prohibit discrimination by making it a criminal offence in their criminal code. For example, both the Penal Codes of Luxembourg (Article 455) and Finland (Chapter 47, Section 3) make employment discrimination on a wide range of grounds a criminal offence. It must be noted that constitutional, civil and criminal law provisions against discrimination can, and often do, exist at the same time.

There are advantages and disadvantages to using either criminal or civil law. Using criminal law has a very strong symbolic effect (see below), as it raises the awareness of society as to the seriousness of discrimination. Penal sanctions can have strong dissuasive powers. On the other hand, victims of discrimination might not be satisfied or compensated by a criminal prosecution of the perpetrator. Instead, civil proceedings may facilitate the victim's recourse to legal action, as they are usually more flexible and as he/she can instigate such proceedings him/herself. It is also easier to prove discrimination in civil proceedings as the level of proof needed is lighter than it is in criminal proceedings and the latter require proof of intent to discriminate.

The EU Race Directive does not specify which type of law – civil or criminal - the Member States should use to implement its provisions. However, it can be argued that criminal law is not suited to deal with indirect discrimination, as intent to discriminate needs to be proven in criminal proceedings. For a criminal conviction,
‘mens rea’ – a guilty mind – of the perpetrator is required, while indirect discrimination is, by its nature, more often than not unintentional. It is suggested that a combination of both civil and criminal laws, possibly backed up by a constitutional guarantee, might well be most effective in the fight against racism and racial discrimination, with civil laws prohibiting direct and indirect discrimination in a number of areas and criminal laws penalising acts like incitement to racial hatred, public insults and threats for racist purposes, public disseminating of racist material or supporting of or taking part in racist or xenophobic groups and/or providing for enhancement of penalties for crimes committed with racist motives.\(^5\) It must be kept in mind, that the Race Directive does not prescribe criminal law measures like the ones mentioned above. The Race Directive was adopted under Article 13 EC, and this Article does not give the EU the competence to do so.\(^6\)

In the following discussion, differentiation between the different types of law will be made where necessary. Where no differentiation has been made, the argument can be seen as valid for laws of any type.

2 Arguments for and against Anti Discrimination Legislation

The following arguments for/against anti discrimination laws are most often encountered. It should be pointed out that these arguments apply to discrimination on all kinds of different grounds, although some arguments will be stronger in relation to some forms of discrimination than in relation to others. The quotes used may relate to discrimination in general or to one or more specific forms. A second point to be noted is that the arguments overlap and are related to each other and that one cannot always

\(^5\) For example: in Britain, the (civil) Race Relations Act 1976 (Section 1(1)) prohibits direct and indirect discrimination; while the Public Order Act 1986 (Sections 18-23) makes incitement to racial hatred a criminal offence and the Crime and Disorder Act 1998 (Sections 28-33) provides for higher penalties for ‘racially motivated’ crimes.

\(^6\) The fight against racism in criminal law falls under Article 29 TEU. On the basis of this Article, the EU Commission presented, in 2001, a Proposal for a Council Framework Decision on Combating Racism and Xenophobia (COM (2001) 644) which has yet to be adopted. This proposal will be discussed in Chapter 5.
make a clear distinction between them. A third point is that some of the arguments might be stronger for legislation based on one model of anti discrimination legislation than on another, and, where this is the case, it will be discussed.

2.1 Clear Statement of Public Policy

Anti discrimination measures make a clear statement of public policy, of commitment to curb discrimination. In the words of the British Race Relations Board, ‘a law is an unequivocal declaration of public policy’.7 These laws have, therefore, a declaratory function, making a declaration of firm opposition to discriminatory behaviour and of the intention of the state to act against this. A Council of Europe Report similarly stated that ‘the very existence of a law has a declaratory effect whose importance should not be minimised’.8 This function of anti discrimination law has also been described as its symbolic function. By enacting anti discrimination legislation, the state ‘makes a legal statement prohibiting discrimination as wrong’.9 Through the law, a state sets standards to be observed by everyone. It sends clear signals about what is regarded as acceptable or unacceptable, to both its citizens and the outside world. The European Commission wrote:10

The adoption of Community law in this field [discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation] will constitute an unequivocal statement of public policy leaving no doubts as to the stance which European society has adopted towards discriminatory practices.

The symbolic value of criminal legislation against discrimination may be even stronger than that of civil law because, by making discrimination a criminal offence, a state emphasises that discrimination is wrong and will be penalised.

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7 Report of the Race Relations Board 1966-1967 (1967 London: HMSO), para 65. This is the first of five principles summarising the role of anti discrimination law. The Race Relations Board was created by the British Race Relations Act 1965 and was later replaced by the Commission for Racial Equality.
8 Council of Europe, Final report of the Community Relations Project “Community and Ethnic Relations in Europe” MG-CR (91) 1 Final E (1991 Strasbourg: Council of Europe), para 120.
However, it has been argued that the statement might be a hollow statement, which a state uses to show it is willing to combat discrimination without actually doing anything. It can be used to hide behind and to avoid making other commitments. Lustgarten\textsuperscript{11} concludes his article, in which he discusses the effects of the Race Relations Acts in Britain, as follows:

It is impossible to say whether the preference for a legal approach was based upon an exaggerated faith in the efficacy of the law; or the need, for political reasons, to be seen to do something highly visible, such as enacting a statute; or was a conscious alternative to taking on a wider long-term expensive and controversial commitment. It does seem tolerably clear, however, that continued reliance on the legal approach in the future will signal a decision that racial equality has been accorded low priority, and perhaps also that greater importance has been accorded to being seen to be doing something rather than actually doing it.

MacEwen\textsuperscript{12} writes that states may provide anti discrimination legislation because they may want to 'look good'. States are frequently concerned about their own public image and will go to some lengths to avoid being categorised as racist, xenophobic or exploitative. ...

but the legislation will often lack the necessary teeth to secure compliance.

This public image is important at both national and international level. Alibhai-Brown\textsuperscript{13} writes that many black and Asian people in Britain feel:

that the lame law [Race Relations Act 1976] simply piles up promises and expectations, that it is failing to deliver and – worse – that it gives the Government a convenient exit when it is called upon to show that it is committed to the eradication of racism in Britain.

Anti discrimination legislation can, therefore, be a symbol and make a statement of intent, but this might be all it is, a hollow statement, made to be seen to be doing

something rather than actually doing anything to turn this intent into action. Either way, this symbolic function exists: whether it is as a symbol of a genuine commitment or as a hollow statement made for political reasons, such legislation makes a declaration. Anti discrimination legislation based on any of the four models can make a statement of intent, whether this is hollow or not.\textsuperscript{14}

This symbolic value should not be underestimated: the fact that so many laws against discrimination exist at national and international level indicates that discrimination is widely considered to be wrong, otherwise there need not be a law against it. This can be further illustrated by looking at the symbolic effect that abolishing such laws would have. Would repealing existing laws against discrimination, even if this would not actually be a breach of a state’s obligations under international or European law, not send out a dangerous message: that it is all right to discriminate against women, ethnic, racial, national or religious groups, minorities, disabled people, homosexuals, old or young people and people who hold different (political) opinions?

2.2 Protection of Victims

Anti discrimination legislation protects people who suffer discrimination and provides them with a form of redress. However, we must make a distinction between criminal and civil measures here. Both protect people who suffer discrimination, because they provide sanctions against discriminators. But the redress for victims is different. Civil laws usually provide that victims can start court proceedings against the discriminator and ask for compensation (in whatever form) for the wrong done. Criminal proceedings are usually instigated by the state and the offender is punished for breaking the law. Victims are not always able to claim compensation, although sometimes, depending on the legal system, victims can join criminal proceedings and request compensation. If the

state does not prosecute the discriminator, victims might not have a way of getting satisfaction. So, criminal laws do not always provide remedies or a form of redress for victims. On the other hand, criminal laws might have a stronger dissuasive effect: a person might be more reluctant to discriminate if he/she faces a criminal conviction and criminal sanctions than if he/she faces civil sanctions. Therefore, both civil and criminal laws against discrimination provide protection for victims, but in different ways. As criminal laws do not always provide for redress or remedies for victims, the following arguments, where they relate to these, are stronger in relation to civil laws against discrimination.

By giving protection and redress, the legislation provides a way of settling grievances. Such laws make people of minority groups more self-confident and assertive by reassuring them that discrimination is taken seriously and by giving them a means to fight back. They give sufferers recourse to legal action against discrimination. In the words of the Race Relations Board, ‘a law gives protection and redress to minority groups; a law thus provides for the peaceful and orderly adjustment of grievances and the release of tensions’. The Explanatory Memorandum to the Proposal for the Race Directive stresses both this and the previous point where it states:

The law not only protects victims and gives them a remedy, but also demonstrates society’s firm opposition to racism and the genuine commitment of the authorities to curb discrimination.

However, the argument that law protects people against discrimination and provides them with a form of redress will only be true if the law has ‘the necessary teeth to ensure compliance’ and the redress is sufficiently and easily available. Victims of discrimination should have easy recourse to the courts and remedies should be adequate, otherwise ‘peaceful and orderly adjustment of grievances’ will not take place. Sanctions

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15 Supra note 7. The Race Relations Board mentions this as two principles, but, as they are closely connected, I will discuss them as part of the same argument.

should be 'effective, proportionate and dissuasive'. This is not always the case. The
discrimination in many countries has been criticised for providing
insufficient access to courts and/or inadequate remedies or sanctions, in other words, for
not having 'the necessary teeth'. If the legislation does not give victims easy and
adequate access to courts or tribunals, if it is not followed up by action to ensure proper
implementation and enforcement, then, in this sense too, it is a hollow statement, which
only appears to give protection to victims. The same can be argued in relation to
criminal laws against discrimination: if the state does not prosecute people who
discriminate or if the penalties handed out in such prosecutions are too lenient, then the
law will not be effective in protecting victims, because it does not deter people from
discriminating. Such (civil or criminal) legislation makes it look as if the state is doing
something for victims, but it is not actually doing anything. The state could thus, as we
have seen, use the legislation as an excuse for not making further commitments. And
not only the state could use this excuse, as is clear from the following quote from
Lacey:

... many feminists see the 'equality' legislation as a sop intended to promote false
consciousness; it makes women feel that things are getting better or enables men to resist
women's further claims, while actually making no real contribution to the dismantling of
sexism in our society.

On top of that, a major point of criticism against much existing anti discrimination
legislation is that the legal system is not suited to fight discrimination because of its
often complicated and very individual-oriented character. For example, the anti
discrimination laws in Britain have been criticised because of their incoherence and
complexity, the weak and limited remedies they provide, the gaps they leave and their

17 Articles 15 Race, 17 Framework, 8d Equal Treatment (Amendment) and 14 Equal Treatment (Goods)
Directives.
18 Lacey, Nicola, "Legislation Against Sex Discrimination: Questions from a Feminist Perspective" 14, 4,
ineffective enforcement. The individual-oriented character of law is also seen as limiting the effectiveness of legislation against discrimination. This character can be seen in the fact that many laws prohibiting discriminatory behaviour need an individual victim of the behaviour to bring a complaint against an individual perpetrator. If there is no victim, who should complain? If there is no perpetrator, who should be held responsible and thus be liable for the damage done? The focus on the individual plays a role in the available remedies and sanctions as well: the individual victim is compensated by the perpetrator (the wrong-doer) for the wrong done. This does not necessarily stop the perpetrator from doing the wrong again, to the same victim or to another person. It also does not change the disadvantaged position that a minority group occupies in society. So, in the end, it does not make the position of potential victims any better, it just provides one victim with some compensation. As Lustgarten writes, ‘racial disadvantage in the fullest sense is outside the law entirely. ... The reason the law cannot extend to racial disadvantage is that no one is formally responsible’. Townshend-Smith sums up the ‘unfortunate consequences’ of the view that the law's function is to compensate victims of wrongdoing:

First, the political association of anti-discrimination law with wrongdoing is so strong that defendants resist all efforts to have them classified in this way, and this may hinder the promotion of out-of-court settlements with the potential to improve the position of disadvantaged groups. Secondly, the levels of compensation awarded are unlikely in most cases to be sufficient to act as a deterrent against repetition of such behaviour. Thirdly, ... the assumption is that there is no entitlement to a remedy unless the claimant can prove that measurable financial loss has been suffered.

A legal system based on the principle of ‘compensatory justice’, where the question is whether ‘an identifiable actor has harmed an identifiable person in an identifiable way’

20 Supra note 11, at 72.
is 'ill-suited to the problem of discrimination ...'\textsuperscript{22} Therefore, individual based legislation, with an individual victim and an individual wrong-doer, who can be held responsible for his wrongdoing and thus has to pay the victim for the financial loss the latter has suffered, is seen as unsuited to fight discrimination and thus as not giving appropriate protection to victims, because, as Lustgarten\textsuperscript{23} writes:

By definition, discrimination is the antithesis of individualised decision. A person is ill-treated, or shares some social circumstances, because of his involuntary membership of a group. There is therefore a collective dimension to every discrimination case which it is difficult to fit within the traditional processes of law.

In criminal law, an individual wrongdoer needs to be identified and proof is required of the wrongdoing and of the intent of the perpetrator. Without these, a criminal prosecution would not succeed.

This poses the question whether anti discrimination legislation \textit{per se} cannot provide protection and redress to victims, or whether individual-based legislation is not able to do so effectively? Could the law be adapted and/or improved to deal with discrimination in a better way? The individual focus could just be a defect of much existing anti discrimination legislation or of the fact that the legal system in which they are enacted is an individual-oriented system, rather than an inherent flaw of all such legislation.

In Chapter 2, the focus on an individual model of justice, where the individual is central within enforcement procedures and remedies, was mentioned as one of the problems with anti discrimination legislation within the equal treatment model. Both substantive models and the pluralist model are more sensitive to the group aspects of discrimination and the disadvantages groups have suffered because of past discrimination. Therefore, legislation in the substantive and pluralist models might not


\textsuperscript{23} Supra note 11, at 73.
be so individual-based, and could focus more on a group-sensitive model of justice. However, this depends on what the legislation itself provides for and on the legal system in which it operates.

The focus of anti discrimination legislation could be shifted away from the individual claimant by allowing group claims to be made. This could be done in different ways. The law could allow representative actions, where people with a common grievance can be represented by one or more of their number. These representatives bring proceedings on behalf of the whole group. Another way is providing for class actions, like the law in the United States does. This is an action on behalf of a number of plaintiffs, against a common defendant. The advantage of this is that the burden is shared and if the action is successful, all will benefit. But, these actions are binding on all members of the class, who are therefore banned from bringing an individual claim. The US Supreme Court has therefore determined that plaintiffs should take steps to notify other members of the class of the action. Court and tribunal rules might have to be changed to accommodate such actions and to provide for remedies for all people shown to be affected. The latter is important, because it makes discriminatory behaviour expensive: an employer has to pay compensation to all those within the group or class rather than just to an individual or a few individuals who have brought the case.24

Another way of moving the focus away from the individual claimant would be to allow for public interest litigation. Such litigation is allowed in India for the protection of the public interest, and can be used in case of, for example, violations of religious or other basic human rights. Any person can file a case against the state or a local authority on behalf of a group of persons whose rights are affected.

24 See on this Lustgarten, supra note 11, at 73-4.
Allowing for group or class actions or for public interest litigation would fit in the more group-focused substantive and pluralist models of anti discrimination law, but could also fit in the equal treatment model. A whole group could complain or one person could complain on behalf of a whole group that each of them has been treated less favourably than another person or group of persons.

The problem of the focus on wrongdoing by an individual, on the need for an individual perpetrator, could be solved by legislation which imposes positive action measures and positive duties to promote equality. However, firstly, this would not be possible in criminal law, as this needs an individual wrongdoer, who can be penalised; and, secondly, this would not fit in a pure equal treatment model of anti discrimination law because, as we saw in Chapter 2 the prohibition of unequal treatment needs an individual perpetrator and because preferential treatment involves unequal treatment.

Positive action measures fit in the other three models, as they take account of the disadvantage suffered by some groups because of past discrimination. Positive duties are described by Fredman\textsuperscript{25} as being proactive rather than reactive. She mentions a number of such positive duties: the policy of mainstreaming gender equality adopted by the EU, which means that equality 'is one of the factors taken into account in every policy and executive decision'; the 'duty on employers to take measures to achieve fair participation of Protestants and Roman Catholic employees in their workforces', that exists in Northern Ireland;\textsuperscript{26} and, duties on public bodies, like the duty on public authorities in Northern Ireland to have 'due regard to the need to promote equality of opportunity' in carrying out all their functions\textsuperscript{27} and the general statutory duty on public authorities to 'have due regard to the need- (a) to eliminate unlawful discrimination; and

\begin{footnotes}
\item[26] Fair Employment and Treatment (Northern Ireland) Order 1998, Section 4.
\item[27] Northern Ireland Act 1998, Section 75.
\end{footnotes}
(b) to promote equality of opportunity and good relations between persons of different racial groups’, introduced by the British Race Relations (Amendment) Act 2000.28

Legislation based on the two substantive models and on the pluralist model could prescribe positive duties and positive action and provide for sanctions if these obligations are not fulfilled. Legislation prohibiting unequal treatment could be combined with legislation prescribing a policy of mainstreaming and/or with legislation imposing a positive duty or all these could be provided for in one law. All this illustrates clearly, firstly, that an anti discrimination law can, and often does, contain aspects of more than one model; and, secondly, that civil or criminal laws prohibiting discrimination can be combined with laws providing for positive duties.

The focus on compensation as remedy could be solved by providing other remedies in the anti discrimination legislation itself, especially forward looking ones, like orders to change discriminatory policies or practices or to draw up equality schemes; contract compliance or withholding of licences; and, the setting of quotas or targets. It must be noted, that anti discrimination measures themselves often do not mention the remedies or sanctions that can be imposed when the law is broken. When this is left out, the normal sanctions and remedies made available in the legal system in which the legislation exists can be assumed to apply. Legislation based on all four models, but especially legislation based on the equal treatment model, could provide for compensation (for damages and for injury to feelings) and orders to stop the discriminatory practice. Contract compliance measures would fit better in the substantive and pluralist models. Legislation setting quotas and targets would be based on the equality of results or the pluralist model. In some cases, criminal sanctions might also be applicable via the general criminal law system.

28 Race Relations Act 1976, Section 71(1) (as amended). See also the conclusion of Chapter 2. This Act gives the Home Secretary the power to impose specific duties on listed public authorities. The Race Relations Act 1976 (Statutory Duties) Order 2001 imposes duties on public bodies to prepare and publish a race equality scheme or race equality policy, which includes monitoring its policies for any adverse impact on the promotion of race equality.
2.3 Reduction of Prejudice and Change of Attitudes

Legislation against discrimination can reduce prejudice by prohibiting behaviour in which prejudice is expressed; it can have an important educational and persuasive function, teaching people that discrimination is wrong. It can thus help create conditions in society which favour the growth of tolerance. Again, in the words of the Race Relations Board: ‘a law reduces prejudice by discouraging the behaviour in which prejudice finds expression’.

The 1967 UNESCO Statement on Race and Racial Prejudice states:

Law is among the most important means of ensuring equality between individuals and one of the most effective means of fighting racism. ... It is not claimed that legislation can immediately eliminate prejudice. Nevertheless, by being a means of protecting the victims of acts based upon prejudice, and by setting a moral example backed by the dignity of the courts, it can, in the long run, even change attitudes.

Anti-discrimination legislation can also act as a deterrent. As already mentioned, criminal laws could have a stronger deterrent or dissuasive effect than civil laws, but both will act in this way. Lord Lester writes that ‘no law can restrain the determined law breaker,’ but that ‘it is aimed at the great majority of the community who are ordinarily law-abiding’. He quotes from Allport, that the law:

will not deter the compulsive bigot or demagogue. But neither do laws against arson deter the pyromaniac. Laws ... restrain the middle range of mortals as a mentor in moulding their habits.

This view - that laws can help to reduce prejudice and change attitudes and behaviour - has been expressed within Europe as well. The European Commission considers that the experience of the Community in combating gender discrimination has shown that

29 Supra note 7.
'legislation to outlaw discrimination is an essential part of an effective strategy to change attitudes and behaviour ...' 32 And the Explanatory Memorandum to the Proposal for the Race Directive states that 'the enforcement of anti-racist laws can have a significant effect on the shaping of attitudes'. 33 The European Commission against Racism and Intolerance (ECRI), a Council of Europe body monitoring racism and racial discrimination, states its conviction that:

the action of the State legislator against racism and racial discrimination also plays an educative function within society, transmitting the powerful message that no attempts to legitimise racism or racial discrimination will be tolerated in a society ruled by law. 34

The argument that legislation against discrimination can influence behaviour and change attitudes is probably the most contested of the arguments given. The opposite opinion, that laws cannot change attitudes at all, that they cannot change the way people think, has been voiced as well. It can be argued that anti discrimination laws ultimately aim to transform society; because their aim is to stop people discriminating, this aim is, by its nature, to change behaviour and attitudes and ultimately to transform society into a discrimination free society. However, many writers are doubtful about such laws being able to do so. They consider anti discrimination legislation of limited impact, because law is not suited to change attitudes and reduce or remove prejudice. Hepple discusses the lack of social change that the British Race Relations Acts have brought. 35 He writes that law is more likely to be effective in facilitating action which people want to take than in creating new rights to protect weaker parties. That is why law, especially where the long-term aim is to alter entrenched attitudes and behaviour, is not often effective as an instrument of social change. Hepple gives two reasons for this: firstly,

33 Supra note 16, at 1.
34 ECRI, General Policy Recommendation 7, supra note 4, at 8.
the ‘cycle of disadvantage’ in which second and later generations of ethnic minorities are trapped cannot itself be brought within the scope of the law. This is a similar argument to that of Lustgarten: that ‘racial disadvantage in the fullest sense is outside the law entirely’. 36 Secondly, the law is directed at only one element in the many causes of disadvantage, namely ‘discrimination’; in other words, the focus of the law is too narrow.

But are Hepple and Lustgarten writing about legislation based on a specific model? Could it be that they only look at legislation based on the equal treatment model? The substantive models aim to take the ‘cycle of disadvantage’ into account and try to make up for this disadvantage by providing for positive action measures or preferential treatment of the previously disadvantaged group. Are laws based on both the substantive models perhaps better suited to change attitudes and behaviour? We will come back to this later.

Another writer who argues that laws, including anti discrimination laws, cannot change inner attitudes or transform society is Allott. 37 He writes that the legislator becomes a social engineer who tries to bring about an immediate and major change in human relationships. The problem is that the legislator cannot change the inner man; he must direct his action to external behaviour. According to Allott, social transformation through law contains the seeds of resistance against itself. The social transformer has no time, is unwilling to resort to persuasion, displays no responsiveness to people’s feelings and desires and is not prepared to make any accommodations. All of these are essential ingredients of a successful attempt to cause people to change voluntarily and effectively. Because of this, such laws can actually create strong resentment, especially if they are using criminal sanctions. Such legislation can only touch on the exterior behaviour, but repression of undesired action by (criminal) law does not necessarily

36 Supra note 11, at 73.
change the inner attitude. The resentment that such laws can create could even harden people's feelings against certain groups.

Therefore, laws against discrimination can have a deterrent effect in that they can stop people discriminating or behaving in a discriminatory way, but they might not touch people's inner feelings and prejudices. They could actually make these prejudices go 'underground' and strengthen them. It appears that Allott argues that laws that aim to transform society try to push this change through too quickly and with too much force. To persuade people to comply with such laws, strong sanctions are needed. But if the legislator tries to change attitudes and prejudices in society too quickly by heavy-handed measures, people will react against this. Resentment and bad feelings against certain groups which the law is trying to protect would result.

However, Allott\(^{38}\) does admit that there can be change over time, but suggests that in such cases 'it is not the law which changes attitudes so much as the accompanying education and persuasion'. He also expresses as his personal view 'that the elaborate structure of anti discrimination legislation is misconceived and self-defeating. Much simpler and less ambitious laws would in the long run stand a greater chance of success'. This does suggest that Allott does not rule out the possibility that law could be effective.

It is submitted, that anti discrimination laws based on all four models can help in changing people's attitudes, but this cannot and will not be done overnight. It is a slow and long-term process. Laws may, in the short term, change people's behaviour. In the longer term, however, this changed behaviour may become a habit and may be seen as the normal behaviour in society. This will then lead to changes in the attitudes behind the behaviour. As the quote from the UNESCO Statement on Race and Racial Prejudice, states, 'it is not claimed that legislation can immediately eliminate prejudice.

\(^{38}\) Ibid. at 236.
Nevertheless ... it can, in the long run, even change attitudes.\textsuperscript{39} Banton\textsuperscript{40} expresses the same:

It is sometimes said that the suppression of discrimination does not eradicate sentiments of prejudice in the minds of the discriminators, but there is good reason to believe that much expressed prejudice is to be understood as stemming from the pressure individuals feel to conform to what they believe to be the social norms prevailing in the groups to which they belong or seek to belong. If actual patterns of behaviour are changed by legal regulation, this gradually changes group norms and the pressures of conformity then operate so as to induce people to conform to the new norms.

Laws, including anti discrimination laws, can also create resentment. Legislation based on the equal treatment model might, on the one hand, appeal to people's feelings of justice and fairness, but on the other hand, it might create resentment because it influences their choice of who to do business with or who to employ. Legislation which allows for positive action measures, as the two substantive models do, can create resentment, because people who do not receive the preferential treatment feel aggrieved. Quota setting especially is seen as unfair and could 'accentuate rather than dissipate racial hostility',\textsuperscript{41} as we have seen in Chapter 2. Laws based on the pluralist model would specifically aim at creating tolerance, mutual respect and good relations between different groups in society, and thus aim for changes in attitudes and thinking. However, they could create resentment if some groups were given special treatment. They could also lead to divisiveness and a diminishing of social cohesion, which might be blamed on certain (minority) groups.

The fact that laws can create resentment should not be overlooked and neither should the fact that sometimes there will be initial resentment, but that this will dissipate over time. As Cohen writes: 'The experience in countries like the UK or the USA is

\textsuperscript{39} Supra note 30.
that, over time, even unwelcome laws begin to change behaviour'. Ultimately, though, it will be a political decision: how much does the legislator want to change attitudes and how much (initial) resentment is he/she able and willing to put up with to reach that goal?

Even if laws against discrimination cannot change attitudes and reduce prejudice overnight, they can have a more immediate effect by prohibiting the behaviour in which prejudice finds its expression. Dr. Martin Luther King Jr replied to the argument that laws cannot make people love each other and treat each other with dignity and respect: 'Law can not make a man love me, but it can keep him from lynching me, and I think that is pretty important'. By doing so, these laws might, in the longer term, reduce the prejudices that lie behind the behaviour.

One more point needs to be made: it is important that any legislation – based on whatever model - is sufficiently funded and underpinned by enforcement mechanisms. If this is missing, if the legislation lacks the ‘necessary teeth’ and is just a hollow statement, then the measures will be ineffective in practice and an ineffective measure might convince people that the object of the measure itself is not desirable.

2.4 Reducing Barriers to Employment Participation

By prohibiting employers to discriminate on certain grounds, laws can take away barriers to the participation in employment and so open up more employment opportunities for people who were previously disadvantaged because of discrimination. For example, anti race discrimination legislation prohibits employers to use racial stereotypes in their decisions on hiring, firing and promoting people. As Deakin argues, ‘the non-discrimination principle has an important role to play in opening up

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42 Cohen, Barbara, “Positive Obligations: Shifting the Burden in Order to Achieve Equality” 1 Roma Rights Quarterly (2005), at 1.
labour markets to disadvantaged groups'. He also writes that 'legal intervention based on equality principles is necessary to destabilise institutionalised forms of discrimination which would otherwise remain well entrenched'.\textsuperscript{45} In other words, without legislative intervention to stop discrimination, certain disadvantaged groups will not have the opportunity to participate in the labour market and thus will not have the opportunity to change their social position and end the 'cycle of disadvantage'. Deakin writes this in a commentary on Epstein's argument that legislation prohibiting discrimination does more harm than good because it creates rather than dismantles barriers to fair participation in employment. Epstein\textsuperscript{46} suggests that all anti discrimination legislation should be scrapped and that all equality commissions entrusted with their enforcement should be abolished. His argument is that discrimination is best dealt with by the market, because legislation which interferes with freedom of contract in the name of equality will simply end up blocking market forces and making things worse. In Epstein's view, anti discrimination legislation 'will make it harder in some cases for members of protected classes to be hired, because it is harder to fire them once on the job'.\textsuperscript{47} Epstein believes that, even if it takes some time before individual firms respond to competitive pressures, ultimately a firm's prejudices will rebound to harm the firm more than the people it refuses to hire. Once firms appreciate that not hiring blacks or women on the basis of some irrational dislike is simply not good business, prejudices will not last very long.\textsuperscript{48} It is thus better to leave the market to regulate itself. In other words, according to Epstein, reduction in discrimination in employment will happen voluntarily and legislative intervention will not be necessary and can even be harmful in this process.

\textsuperscript{45} Ibid. at 52.
\textsuperscript{46} Epstein's opinion can be found in the same book, supra note 44, at 1-41, with a short reply to Deakin at 57-64.
\textsuperscript{47} Ibid. at 39.
\textsuperscript{48} Ibid. at 20-1.
However, many writers do not agree that changes in discriminatory practices will be brought about voluntarily and, therefore, they argue that legislation is needed to back up voluntary activities. McCrudden\(^{49}\) wrote in 1983 that a decisive reason for taking the legislative route is that:

there is little in the experience of the past two decades of attempting to bring about a reduction in discriminatory practices which gives confidence that either government, administrators or private businessmen will seek to bring about changes voluntarily.

The fact that anti discrimination measures exist in many national laws, in European Directives and in international Treaties appears to indicate that legislators at all levels are also of the opinion that changes will not happen voluntarily. This can be illustrated with the following example: the EU did not have the competence to legislate against discrimination, apart from gender discrimination, until the Treaty of Amsterdam came into force, which established, in Article 13 EC, the EU competence to enact legislation against discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. According to Duncan,\(^{50}\) 'the absence of a clear competence within the community has inhibited even those initiatives which do not involve legal sanctions'.

2.5 Support for People who want to Combat Discrimination

Anti discrimination law – both criminal and civil law - can provide support for those people who want to fight discrimination. It can make it easier for them not to succumb to social pressure to discriminate and it can strengthen them in their resolve to work towards the elimination of discrimination. In the words of the Race Relations Board: ‘a law gives support to those who do not wish to discriminate, but feel compelled to do so

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by social pressure'. This argument is related to the arguments that the law makes a declaration that discrimination and behaviour based on prejudice are wrong and gives victims a means of redressing that wrong. Laying down this message in law will encourage people who want to fight discrimination.

In a sense, this appears to be more often a side effect of anti discrimination legislation than an effect that is deliberately sought, although some anti discrimination laws do provide support for other people than victims as well. For example, the EU Equality Directives provide that an instruction to discriminate against a person shall be deemed to be discrimination. They also provide against victimisation: they put a duty on Member States to introduce measures ‘necessary to protect individuals from adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment’. This protects not only victims of discrimination, but also others who may support victims by reporting an act of discrimination or by acting as a witness.

It can be argued that legislative measures to combat discrimination based on any of the four models might be useful here, as they would all provide support in one way or another. Another point is that this argument is based on the fact that there are social pressures on people to discriminate, even if they do not wish to do so. Therefore, if law could take away these social pressures by changing the attitudes of others in society, then these people would not feel under pressure. Whether laws can do so has been discussed above.

51 Supra note 7. This argument can also be found in the Council of Europe Report, supra note 8, para. 120.
53 Articles 9 Race, 11 Framework, 7 Equal Treatment (Amendment), and 10 Equal Treatment (Goods) Directives.
2.6 Underpinning of other Activities

Both civil and criminal legislation against discrimination can strengthen and underpin other activities; they can create a framework encouraging other developments. In their turn, these developments can influence and promote further legal elaboration and expansion. Therefore, legislative and other measures should support and complement each other. This argument will only be valid, however, if one accepts that anti-discrimination legislation can be useful/effective and necessary in the fight against discrimination. If one rejects legislative measures in this field, then one also rejects the possibility that these laws support and complement other activities.

MacEwen writes that 'it is generally accepted that law alone will be inadequate to effect change; legislation must be integrated with complimentary policy measures'. 55 In the proposal for the Community Action Programme, the European Commission considers that:

to combat discrimination, the Community needs to use all the instruments at its disposal, in a co-ordinated and integrated strategy. Legislation is a key component of such a strategy, but it is only one component. 56

The existence of this Action Programme, which accompanied the Race and Framework Directives, is recognition that legislation is only one component of action to combat discrimination, as a European Commission Green Paper of 2004 57 points out. This paper goes on to state that 'support for a range of positive measures is also necessary in order to challenge discriminatory behaviour and promote a change of attitude over time'. And Niessen 58 writes:

55 Supra note 12, at 23.
Legislation is important, but it is only one of the instruments available to combat racial discrimination. Legislation should be embedded in a comprehensive approach that includes other policy measures against discrimination, the promotion of equal treatment and the valuing of diversity.

A 2003 paper from the European Network against Racism\(^{59}\) concludes:

Therefore, as it is recognised that using legal tools alone would be insufficient, these need to be complemented by a range of policies and practical strategies which can lead to more effective practices and satisfactory outcomes.

Despite the fact that some writers\(^{60}\) express doubts about the effectiveness of anti-discrimination legislation, many of them are also part of a wider group of writers who advocate a combination of legal and other measures that complement and strengthen each other. The following quote from MacEwen\(^{61}\) appears to sum up this opinion:

... it is clearly optimistic to expect that an anti-discrimination law, in itself, will have anything other than a marginally ameliorative impact on improving the real life chances of black and ethnic minority communities. ... at best, anti-discrimination laws may provide protection against the worst abuses and facilitate a remedy where wrong has been identified. Unless they are accompanied by government policies and strategies which imbed the legislative provisions in a more holistic approach to discrimination, substantial change is unlikely to be effective.

In other words, legislation is useful to put pressure on people not to discriminate and to give victims a remedy, but it is only one part of a broader strategy to combat discrimination and to counter inequality. It is submitted that legislation in this field - and this applies to legislation based on any of the four models distinguished - can facilitate the implementation of other policies, which, in their turn can influence changes and additions to the legislation. Law - be it civil or criminal or both - is thus


\(^{60}\) See, for example: Hepple, supra note 35; Lacey, supra note 18; Lustgarten, supra note 11; Townshend-Smith, supra note 21.

not to be seen as the only way of tackling the problem of discrimination, but as one of a number of different, mutually interacting strategies.

The view that legislative measures should be taken together with other measures appears to be quite widespread and lies behind both the ICERD and the CEDAW. Article 2(1)(d) ICERD puts a duty on States to ‘prohibit and bring to an end, by all appropriate means, including legislation, as required by circumstances, racial discrimination by any persons, groups or organisation’. Article 2(2) mentions measures in the ‘economic, cultural and other fields’. Article 7 is interesting as well. It states:

States Parties undertake to adopt immediate and effective measures, particularly in the field of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups ...

Article 3 CEDAW prescribes that ‘State Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation ...’

Measures to combat discrimination could be taken, as Article 7 ICERD suggests, in the field of education, where school children could be taught about human rights and understanding, respect and tolerance for others; or, in the field of information and the media, which can be used to inform and to raise awareness about other nations and racial groups. In the economic and social fields, policies to attack poverty, social exclusion and economic and social disadvantage can be taken to help in reducing discrimination.

There are, therefore, a wide range of measures in many different areas that can be taken to further the fight against discrimination and many different actors, such as politicians and political parties, educational institutions, the media, trade unions, the judiciary, law enforcement officials and NGOs all have a role to play. In my view, these measures will be more effective if underpinned by (civil and/or criminal) anti
discrimination legislation - based on any one or more of the four models - and such legislation will, in its turn, be more effective if it is supported by other measures. To combat discrimination and to fight against prejudice, both are equally necessary.

3 Measuring the Effect of Anti Discrimination Law

So far, we have discussed arguments for and against the need for and the usefulness/effectiveness of (civil or criminal) anti discrimination legislation. This raises an important question: how do we measure if such legislation is effective? Has any research been done into this? It should be noted that it is very difficult to measure the effects of legislation against discrimination, because many other factors play a role as well. Laws are seldom the only measures taken, and indeed should not be the only measures taken as we have argued, so it is difficult to determine if any improvement that might take place is the effect of legislation, of other measures or of both. National and international political, economic and social circumstances can be of influence too. As long as we keep this in mind, we can discuss some of the available research results. The research discussed is mainly based on some of the anti discrimination legislation used in Chapter 2 to illustrate the different models of such legislation.

3.1 Legislation against Discrimination in General

First of all, there are some writers who remark on the (in)effectiveness of anti discrimination legislation without referring to any specific research. Banton, writing about the educational value of laws against discrimination, writes:

In Britain, Western Europe and North-America over the past generation the movement against racial and sex discrimination has recorded both successes and disappointments. ... The mass media and the schools have taught these lessons to new generations so that now there is less racial prejudice amongst the young than the elderly, and less among the better educated.

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The finding that young people and higher educated people appear to be more likely to oppose discrimination has also been found across Europe, but there is no indication of why this is so. As the survey was done in 2002, it is highly unlikely that this is (mainly) due to the fact that there are now legislative measures against discrimination within the EU, as this legislation was adopted in 2000 and had to be implemented by the Member States by July 2003. It could mean, as Banton indicates, that educational and information campaigns are having some effect. But national legislation, where this has been in existence for a number of years, and international measures like the ICERD, in force since 1969, and the CEDAW, in force since 1981, could also have had some influence.

The Commission on the Future of Multi-Ethnic Britain writes in its Report:

We are convinced that the Race Relations Act 1976 has had a positive effect. Together with the Sex Discrimination Act of the previous year ... it has helped to curb the worst kinds of discrimination in employment and the provision of services. It has also had an invaluable impact on the general climate of opinion.

There are also writers who discuss research findings in relation to anti-discrimination law, without specifying the exact laws that are researched or the precise content of these laws. It is therefore difficult to determine which models of anti-discrimination legislation these laws are based on.

Appendix 1 to the Hepple Report contains some findings from employer case studies, done in 1999, in the UK, the US and Northern Ireland. One of them is that the anti-discrimination legislation has been the starting point for changes in practices in

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employment. 66 'There was general agreement by all those interviewed that the equality legislation had a significant effect on human resource and other practices, and, gradually, on attitudes', while no employer argued that the equality legislation was no longer necessary. 67 Everyone felt that the voluntary code of practice on age discrimination would be ineffective without legislation. 68 Employers in Northern Ireland 'agreed unanimously that the Fair Employment legislation had made a fundamental difference to equal opportunities'. 69 The latter is, as we saw in Chapter 2, an example of legislation based on the equality of results model. This legislation will also be mentioned further below.

Hornstein 70 reports on foreign lessons about outlawing age discrimination. The study identified legislation against age discrimination in employment in thirteen countries, and looked in detail at Australia, Canada and the USA, where such legislation has been established for some time. The study found that 'the evidence from Australia, Canada and the United States, though limited and uneven, shows that legislation has indeed made an impact on discrimination in these countries'. Evidence from the US shows that:

- Age discrimination laws significantly increase employment rates of older workers. This is mostly due to them leaving jobs at a later age, rather than to more of them being hired.

- There is some evidence that employers may be a little less likely to hire older workers because they are not allowed to set mandatory retirement ages.

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66 In 2.1.
67 In 2.9.
68 In 5.4.
69 In 10.1.
• The legislation has strengthened the relationship between employees and employers.\textsuperscript{71}

Evidence from Australia, Canada and the US suggests:

• Legislation has had a marked effect on some forms of direct discrimination, for example in advertising vacancies or in the selection for promotion.

• Employer behaviour has changed in countries with legislation, to the extent that explicit discrimination, especially in recruitment, has been reduced. However, society's and employers' attitudes do not yet appear to have shifted as much as towards groups such as women and people from minority ethnic communities, where legislative protection has, generally, operated for longer. [sic] Changing attitudes is likely to be a long-term process.

Coussey\textsuperscript{72} has researched international comparisons in tackling inequality. She mentions the difficulties in making such comparisons and evaluating legislation in some countries because of the lack of data, but concludes that countries with comprehensive legal approaches and reasonable data such as the USA, Britain and the Netherlands can show some signs of improvement in the position of ethnic minorities.

3.2 Legislation based on the Equal Treatment Model of Anti Discrimination Law

Hepple writes specifically about the Race Relations Acts in Britain, which are mainly based on the equal treatment model. He discusses some early research findings and concludes:\textsuperscript{73}

Even the severest critics of the Acts would concede that they have broken down some barriers for individuals in their quests for jobs, housing and services and that they have

\textsuperscript{71} Epstein expresses the view that legislation against age discrimination has had only negative effects. See Epstein, supra note 44, at 18-33.


\textsuperscript{73} Supra note 35, at 20. There have been three Race Relations Acts in Britain, in 1965, 1968 and 1976.
driven underground those overt expressions of discrimination which were current twenty years ago.

In 1999, the Equal Treatment Commission in the Netherlands evaluated the first five years of the Equal Treatment Act and concluded that the Act works quite well and that it fulfils the aim of the legislator.74 This aim was to promote equal participation in society by prohibiting discrimination on the grounds of religion, belief, political opinion, race, sex, nationality, sexual orientation or civil status. This Act prescribes equal treatment and as such is clearly based on the equal treatment model, although it contains some element of the substantive models, in that it allows for positive action. Its stated aim could be said to go some way towards the pluralist model, in that it aims to promote equal participation. The Report does conclude that the equal treatment process is far from complete: more than 25 years of the Equal Pay Act have not led to the elimination of all unjustified differences in pay; people of foreign origin are still less able to get work; and homophobic attacks still happen. Deep-seated prejudices are hard to eradicate and in this sense one cannot expect too much from five years of the Equal Treatment Act.

The report on improving the equality laws in Britain75 considers the following:

The problem is that despite over two decades of sex equality legislation, the majority of low-paid workers are still women, there is still a significant earnings gap between men and women, and there is a glass ceiling which keeps women out of top jobs. Twenty years after the Race Relations Act 1976, there is a continued gap in unemployment rates, job levels, earnings, household income and quality of housing between white and black citizens. While the situation could have been even worse had there been no legislation, the complexity and weak remedies of British anti discrimination have undoubtedly blunted the impact of this legislation. One may compare with this, the remarkable elimination of Catholic

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75 Supra note 19, at 5.
underrepresentation in the top two standard occupational classifications in Northern Ireland since the passage of the Fair Employment (Northern Ireland) Act 1989, which is much stronger than the Sex Discrimination and Race Relations Acts.

This indicates that the authors of the report view the Fair Employment legislation in Northern Ireland, which is legislation based on the equality of results model, as more successful than the British equality legislation, which is mainly based on the equal treatment model. The report continues that ‘the UK needs effective legislation to promote genuine equality of opportunity on the basis of individual merit’. Such legislation would fit with the equality of opportunity model.

3.3 Legislation based on the Equality of Opportunity Model of Anti Discrimination Law

Research from the British Equal Opportunities Commission showed that overall, most senior decision makers – defined as MPs, MEPs, Life Peers and Political Advisers - felt that it is better to rely on legislation than on voluntary codes of practice in terms of equal opportunities. 76

It should be noted that some of the laws mentioned under the previous headings, like the legislation discussed in the 2000 Hepple Report and the Dutch Equal Treatment Act, contain elements of the equality of opportunity model. The same can probably be said for the legislation Hornstein and Coussey discuss. The legislation discussed under the following heading might also fall partly into the equality of opportunity model; as we have seen, the distinction between the two substantive models is not always clear cut and obvious.

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3.4 Legislation based on the Equality of Results Model of Anti Discrimination Law

Leck and Saunders\textsuperscript{77} write about the effects of Canada's Employment Equity Act on the hiring of women. The Act is designed to increase the presence of four traditionally underrepresented groups: women, aboriginal peoples, disabled persons, and visible minorities. They conclude that 'the current study suggests that EEPs [Employment Equity Plans] do have an impact on the hiring of women, and that without these programs, employment equity would be less likely'.

In Chapter 2, we mentioned the Constitution of India. Article 15(3) and (4) provide that positive measures can be taken for women and children and for the advancement of backward classes or Scheduled Castes or Scheduled Tribes. Article 16(4) provides:

> Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens, which, in the opinion of the State, is not adequately represented in the services under the State.

This is clearly a measure based on the equality of results model. Menski writes that, despite this policy, 'significant inequalities, strengthened by discriminatory practices of all kinds, continue to be perpetuated in modern India'.\textsuperscript{78} Further on he writes that 'instead of reducing caste differences, the reservation policies have evidently contributed to an increased awareness of differential statuses and caste and class competition in India today'.\textsuperscript{79}

Like India, Malaysia has constitutionally entrenched provisions on positive action. Article 8(5) declares that:

> this Article does not invalidate or prohibit ... (c) any provision for the protection, wellbeing or advancement of the aboriginal peoples of the Malay Peninsula (including the


\textsuperscript{78} Menski, Werner, "The Indian Experience and its Lessons for Britain" in: Hepple and Szyszczak, supra note 35, 300-43, at 304.

\textsuperscript{79} Ibid. at 307.
reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service.

Phillips writes:

Ironically, the attempt to create a more egalitarian society through this means [constitutionally entrenched provisions on positive discrimination] has resulted in a society which, quite apart from the view of external commentators, perceives itself to be fragmented along racial lines.80

He concludes that the experience in Malaysia shows that positive discrimination does not work and he submits that the same is true for India. ‘Positive discrimination is counter productive as it, in effect, devalues real ability’. Successful people of the disadvantaged group are successful because of differential treatment rather than because of their ability.81

The House of Commons Northern Ireland Affairs Committee assessed the effectiveness of the Fair Employment (Northern Ireland) Act 1989.82 This Act aims at an active practice of fair employment by employers and the use of affirmative action to remedy under-representation, backed up by strong enforcement agencies and the use of penalties and economic sanctions. The report concluded:

- The general view from all the witnesses heard was that unlawful employment discrimination on grounds of religious belief and political opinion appears to have declined. Despite the fact that there is no direct evidence which can be said to support this general view, the unanimity of the views that discrimination is in decline is good news.

81 Ibid. at 353-5.
Significant improvement appears to have occurred in reducing segregation of predominantly Catholic firms and predominantly Protestant firms. Occupational segregation also appears to have declined.

The picture appears to be mixed as regards reduction in under-representation in employment. On the positive side, appointments from the two designated religious communities now roughly reflect applications for jobs from these communities. However, a gap still remains between the percentage of Roman Catholics in employment and the percentage of Roman Catholics who are classed as economically active.

The extent to which employers have complied with the regulatory requirements of the legislation, such as monitoring and periodic review requirements, appears impressive. The Fair Employment Commission (FEC) reported considerable improvements in equality-based employment practices in recent years. The FEC also considered that 'the major achievement which has been gained has been the transformation in employers' attitudes in terms of employment practices'. The Standing Advisory Commission on Human Rights (SACHR) considered that employers had now 'accepted the need for fair employment and equality'. The FEC reported generally a 'sea-change in the attitude of both communities, particularly the Protestant community; greater recognition that fair employment is something which we have to get right as part of getting Northern Ireland right'.

There was little success in gaining an insight into the costs of legislation to employers, although the existence of fair employment legislation does not appear to have operated as a deterrent to inward investment.

Paragraph 54 asks how far these employment shifts are the result of fair employment legislation. Sir Robert Cooper, chairperson of the FEC, expressed the belief that 'a

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83 As quoted in the report, para 48-9.
considerable part of the changes has been as a result of the legislation but I would by no means argue ... that the changes have been exclusively because of that'. Others shared that basic viewpoint, arguing that the legislation ‘has created an environment within which the values that legislation encapsulate have been accepted by employers’.  

3.5 Legislation based on the Pluralist Model of Anti Discrimination Law

In Chapter 2, the Canadian Multiculturalism Act of 1985 was given as an example of legislation based on the pluralist model. This Act laid down in law the Canadian Government’s commitment to the policy of multiculturalism adopted in 1971. A paper by Kymlicka discusses that the Canadian multicultural policies have been criticised because they promote a form of ethnic separatism amongst immigrants. However, he does not agree with the critics and, after looking at naturalisation, political participation, official language competence and inter-marriage rates, concludes that there is no evidence to support the claim that multiculturalism has decreased the rate of integration of immigrants, or increased the separatism or mutual hostility of ethnic groups. He is obviously of the opinion that the multicultural policy is successful as, after comparing Canada with other countries, he concludes that:

the two countries which are head and shoulders above the rest of the world in the successful integration of immigrants are the two countries with official multiculturalism policies [Canada and Australia]. They are much more successful than any country which has rejected multiculturalism. ... Along with our fellow multiculturalists in Australia, Canada does a better job of respecting ethnic diversity while promoting societal integration than any other country.

According to Kymlicka, the critics of multiculturalism view the policy in isolation rather than as a modest part of a larger package of policies which include citizenship, education and employment policies. Kymlicka thus paints a very rosy picture of  

84 Ibid. para 54.
multiculturalism policies in Canada, but it is clear from his paper that these policies are not without opponents either.

In Chapter 2, we also mentioned the Dutch system of ‘verzuiling’ (pillarisation) as an example of a democratic, pluralist society where tolerance for others was laid down in law. However, this system was often referred to as ‘living apart together’, which already indicates that it was based on a form of segregation. The pillars were separated but there was cooperation and consultation, especially in the political arena. The system worked for the Netherlands at that time – the system was at its strongest from 1917 until the mid-1960s - because it managed to create a very stable society, despite the fragmented nature of that society. Bagley,86 who did research in the Netherlands in the mid-1960s, writes that, ‘despite the extreme segmentation of so many aspects of Dutch life, social conflict is notably absent’ and ‘Dutch society itself is segmented and it is also socially harmonious and democratic’. Pennings87 writes of the system: ‘a socially and ideologically fragmented system was also very stable and based on consensus-building and cooperation’. And Wintle88 writes ‘what is more it worked: the Dutch democracy was one of the most stable in the world’. Therefore, this legislation based on the pluralist model of law has worked for the Netherlands. Pillarisation came to an end in the 1960s when Dutch society became much less segmented,89 although the laws that were adopted to make the system of pillarisation possible stayed in place. Dwyer and Meyer90 wrote in 1995:

Dutch legislation is characterised by religious pluriformity. There is no established church and all religious groups should be treated equally. This principle of equality is anchored in

89 For more information on this process see: Bryant, Christopher, “Depillarisation in the Netherlands” British Journal of Sociology 56-74 (1981); Pennings supra note 87.
article 1 of the Constitution and has important consequences for religious minorities as it implies that facilities which are offered to Christian denominations cannot be denied to other religious groups.

They continued that Article 23 of the Constitution guarantees the freedom of education and that, since 1988, a number of Islamic state-funded schools were established in the Netherlands on the basis of this article. Despite local opposition and debates about integration at both local and national level, applications for such schools could not be rejected if they met the conditions, and it appears that, until recently, most Dutch people accepted such schools. However, towards the end of the 1990s, the political climate slowly changed and resentment against foreign communities, and especially Muslim communities, started to grow. The attacks on New York on 11 September 2001 and the Madrid and London Bombings, but more especially the murder of controversial filmmaker Theo van Gogh in November 2004 by a Muslim with both Dutch and Moroccan nationality, have led to strong criticism of the Dutch tradition of tolerance and its policy of multiculturalism. Of course, the Netherlands is not the only country where multiculturalism is debated and criticised, but it is discussed here because its system of pillarisation was described in Chapter 2 as an example of a pluralist society where tolerance for others was laid down in law. Similar debates on multiculturalism have taken place and are taking place in many other countries.
4 Conclusion

In this Chapter we have discussed arguments for and against legislation against discrimination. The main arguments against anti discrimination legislation and for abolishing such legislation where it exists can be summarised as follows: firstly, anti discrimination laws usually set minimum standards of acceptable behaviour. However, the existence of law in this field might lead to complacency that something has been done and no further action is needed. It might also lead to a narrow focus on achieving what is required without any attention for other, possibly more effective measures in other fields. This argument could be applicable to legislation based on each of the four models.

Secondly, anti discrimination laws do not touch the underlying problem of existing inequalities and social disadvantage that some groups experience because of historic prejudice and discrimination. These laws do not look at any imbalances that have been created by past discrimination. They cannot cover the 'cycle of disadvantage', and, therefore, do nothing about real inequalities in society. This argument would be stronger against legislation based on the equal treatment model than based on the other three models. The following quote from Townshend-Smith touches on both the first and the second points:

Some would argue that it is misconceived to rely on the law to bring about improvements in the social position of women and minority ethnic groups. Passing legislation may create the false impression that the problem of discrimination and disadvantage has been tackled and perhaps even solved, as ordinary people often assume that laws necessarily achieve their purpose.93

Thirdly, laws are considered harmful, because they create resentment, which in its turn leads to hardening of attitudes and the going underground of prejudices, thereby

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93 Townshend-Smith, supra note 21, at 82.
strengthening rather than reducing them. This would mean that the laws would need to be stricter and have more punitive enforcement, which then causes even stronger feelings against the law and its objectives. The law will be resented and disregarded as much as possible. Prohibiting certain behaviour backed up by sanctions might not be the most effective way to change attitudes. Laws based on all four models can lead to resentment.

Fourthly, legislation prohibiting discrimination does more harm than good because it creates rather than dismantles barriers to fair participation in employment. Discrimination is best dealt with by the market, because legislation against discrimination will simply end up blocking market forces and making things worse. If the market is left to regulate itself, a reduction in discrimination in employment will happen voluntarily.

Measuring the effectiveness of anti discrimination laws is not an easy task, because so many different factors play a role. On top of this, there is the fact that such measures usually only have effects in the longer term. The effects of legislation based on some of the models are simpler to measure than that based on other models. If monitoring takes place and statistics are recorded, than fair and equal participation, for example, can be measured fairly easily. We looked at a very limited number of findings about the effectiveness of anti discrimination legislation, not all of them underpinned by research. The outcomes are by no means conclusive, but some points can be made:

- laws in general appear to have some impact on discriminatory behaviour; although in some instances they can be seen as creating extra barriers to employment of the protected group(s);
- laws in general are seen to influence opinions and attitudes, although this is said to be only in the (very) long term;
• voluntary measures on their own, without legislative measures (of whatever model) to support them, are mostly considered to be insufficient;

• laws aiming at fair participation of previously under-represented groups appear to have some impact;

• some of the laws prescribing a policy of quotas or reservations do not appear to have been very successful; and,

• laws based on the pluralist model have been successful in some places and at some times, but they are also seen as creating segregation between communities.

There is, thus, some indication in all this that anti discrimination laws based on all four models can be useful in the fight against discrimination. Therefore, it is suggested that, rather than abandoning the law as a tool to fight discrimination, it might be better to extend the laws to include more proactive duties and remedies, to improve enforcement as well as introduce measures in other fields. In other words, to adopt legislation against discrimination that has elements of all four models. Such legislation could start with the prohibition of unequal treatment, of discrimination, as a minimum requirement to fight discrimination and behaviour based in prejudice in its most explicit forms. This requirement complies with people’s feeling of fairness and justice. Then such legislation could allow for positive action measures and prescribe fair and equal participation of all people in all aspects of life to make up for disadvantage suffered in the past. Finally, such legislation could promote a policy of respect for diversity and tolerance and impose a duty on all public and private bodies to promote equality and diversity in all their functions. These measures and the different models of anti discrimination law are not mutually exclusive and can be combined in the same legislative measure.

It is submitted that anti discrimination legislation, at both national and international level, is useful and can be effective, and is necessary in the fight against
discrimination, even though much of the existing legislation in different countries has been shown to have an, as yet, fairly modest effect. But law should never be seen as the only way to tackle discrimination, it should be one of a number of tools that each complement and strengthen each other. Voluntary measures alone will not be enough, they need to be underpinned by legislation and by efforts in other areas, such as education, the media and information, and economic and social policies to reduce poverty and social exclusion. The reduction of prejudice and the changing of attitudes is a long-term process which needs a concerted effort from a number of different social actors over a large number of years.
CHAPTER 4 - INTERNATIONAL HUMAN RIGHTS INSTRUMENTS TO COMBAT RACIAL DISCRIMINATION

1 Introduction

In the previous Chapter, we discussed the capacity and effectiveness of legislation in the fight against (racial) discrimination, without further specifying at what level such measures were to be taken. Legal measures can be taken at international, regional or national level. In the international and regional sphere, there are a number of human rights treaties and conventions that contain rights to equality and non-discrimination. In this Chapter, we study global measures and measures taken at the level of greater Europe.¹ For a proper analysis and evaluation of the anti race discrimination legislation in the EU, we need to place these measures within this wider European and international context.

First we discuss why the international context is important and then give an overview of equality and/or anti discrimination clauses in the main global human rights instruments. This will be followed by a more extensive discussion of the ICERD, which is a United Nations Convention; and two instruments of the Council of Europe: the anti discrimination article (Article 14) of the ECHR and Additional Protocol 12 to the ECHR. As we shall see, these three are especially important for this Thesis.

In the discussion of the international measures, particular attention will be given to the question what model of anti discrimination legislation the instrument in question is aiming at, using the four models developed in Chapter 2: the equal treatment model, the equality of opportunity model, the equality of result model and the pluralist model. As we have seen, a number of aspects could help us in this analysis: whether a measure prohibits indirect discrimination as well as direct discrimination; whether it is more sensitive to group aspects of discrimination and allows for actions by groups as well as

¹ This term indicates a wider concept of Europe rather than just the EU Member States.
by individuals; whether it allows for positive measures or even quota and target setting; whether it puts a positive duty on authorities to eliminate discrimination and respect diversity; and whether it would prescribe a policy of mainstreaming equality and/or diversity. These aspects will therefore be looked at for each of the instruments.

2 Why International Instruments are Important

It is important to place the EU measures against racial and ethnic discrimination in their international context because this context has been, and still is, influencing the EU instruments for a number of reasons: firstly, all Member States of the EU have signed and ratified most of the international conventions and treaties, and, by doing so, have accepted certain obligations. But, even if they have not signed and/or ratified some of the Conventions, there is still the fact that 'it is now established in international law that the prohibition of racial discrimination ... is part of ius cogens' which means that it is part of the peremptory norms or overriding principles of international law.

Secondly, from the very first discussions on the fight against racism and racial discrimination, the EU institutions have placed the right to equality and non-discrimination firmly within the wider human rights context. In their earliest coordinated joint declaration against racism and xenophobia, the European Institutions stressed the importance of respect for fundamental rights and considered that 'respect for human dignity and the elimination of forms of racial discrimination were part of the common cultural and legal heritage of all the Member States'. The Race Directive also places the right to equality and non-discrimination clearly on a human rights basis.

Recital 2 to the Directive mentions Article 6 TEU, which determines that the Union

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shall respect fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law. Recital 3 then continues:

The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all Forms of Discrimination against Women, the International Convention on the Elimination of all Forms of Racial Discrimination and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories.

Therefore, the Race Directive itself refers to most of the international instruments discussed in this Chapter.

Thirdly, the ECJ has also considered the principle of equality to be a fundamental principle of Community law. See, for example, the Frilli v Belgium case, in which the ECJ stated that equality of treatment is ‘one of the fundamental principles of Community law’. In the Ruckdeschel case the ECJ held that the prohibition of discrimination was ‘merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law’. In the case of Defrenne v Sabena No. the ECJ repeated what it had said in earlier cases ‘that respect for fundamental personal human rights is one of the principles of Community law, the observance of which it has a duty to ensure’. It concluded that ‘the elimination of discrimination based on sex forms part of those fundamental rights’. In the Karlsson case the ECJ held that the fundamental rights in the Community legal order ‘include a general principle of equality and the obligation not to discriminate’. The general principles of Community law are binding on the Community institutions and the

5 Case C-1/72 Rita Frilli v Belgium [1972] ECR 457, para 19.
6 Joined Cases C-117/76 Ruckdeschel and Another v HZA Hamburg-St. Annen and C-16/77 Diamalt AG v HZA Itzehoe [1977] ECR 1753, para 7.
7 Case C-149/77 Defrenne v Sabena No. 3 [1978] ECR 1365, paras 26 and 27.
primary source of guidance on which principles are to be considered as general principles of Community law is Article 6 TEU, mentioned above. The ECJ also uses as guidelines ‘international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories’. 9 The ECJ ‘has consistently held that all sources of fundamental rights support the existence of a strong principle of equality and non-discrimination’. 10

The fourth reason why the international human rights instruments are important for the EU anti discrimination measures is that the European Union Charter of Fundamental Rights refers to the ECHR and its case law and other international human rights instruments. This Charter was approved by the European Council in October 2000, but it was not incorporated in the Treaty of Nice of December 2000. It then became part of the Draft Constitution of the European Union, adopted in 2004. It is at present unclear if and when the Draft Constitution will come into force 11 and, therefore, neither the Constitution, nor the Charter are legally binding, although the Charter is already influential in the EU. The Charter forms Part II of the Draft Constitution and contains a Title III, headed ‘Equality’. In the Preamble, the Charter reaffirms:

the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community


11 The German Presidency for the first half of 2007 has put the Constitution back on the Agenda, see: “Europe – Succeeding Together” Presidency Programme 1 January to 30 June 2007, at 4 and 5, <www.auswaertiges-amt.de/diplo/de/EU-P/Programm-EU-P-en.pdf>
Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.

The text of the Charter itself also refers to the ECHR, in Article II-112(3), where it states that where the Charter contains rights that correspond to rights guaranteed by the ECHR ‘the meaning and scope of those rights shall be the same as those laid down by the said Convention’. This is followed by Article II-113, which determines that:

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms, as recognised ... by Union law and international law and by international agreements to which the Union, the Community and all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ Constitutions.

The Updated Explanatory Memorandum\textsuperscript{12} to Article II-113 states that ‘owing to its importance, mention is made of the ECHR’. Therefore, the Charter stresses the importance of the ECHR within the EU legal order.

The influence of international and regional human rights instruments, especially the ECHR, in the EU is, for all these reasons, considerable. Accession of the EU as a Contracting Party to the ECHR has also been suggested and Article I-9(2) of the Draft Constitution for Europe determines that the Union shall do so. Article I-9(3) declares that fundamental rights as guaranteed by the ECHR and as they result from the Constitutional traditions common to the Member States, shall constitute general principles of Union law. This again shows the importance of the ECHR and the Council

\textsuperscript{12} CONV 828/1/03, Updated Explanations Relating to the complete Text of the Charter of Fundamental Rights of the European Union (as amended by the European Convention and incorporated as Part II of the Treaty on a Constitution for Europe), Brussels, 18/06/03, at 52.
of Europe within the EU. Accession to the ECHR would bring the EU Institutions under the scrutiny of the European Court of Human Rights in Strasbourg. 13

3 International Equality and Anti Discrimination Clauses, an Overview

The Universal Declaration of Human Rights (UDHR), adopted by the United Nations in 1948, starts in Article 1 with ‘all human beings are born free and equal in dignity and rights’. This is followed by Article 2 which declares that:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 7 then proclaims that ‘all are equal before the law and entitled without any discrimination to equal protection of the law’. The latter formulation is, as mentioned in Chapter 2, the way formal equality is frequently laid down in law. It can be found in many constitutions, and then often forms the basis for equality and anti discrimination measures in other laws. The UDHR thus declares everyone’s equality before the law as a basic human right.

Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) and Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which are both UN instruments, determine that States parties

... undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The ICCPR, however, also declares in Article 26:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 ICCPR gives a much broader right to non-discrimination than Article 2 UDHR, Article 2(1) ICCPR or Article 2(2) ICESCR. While the latter provisions only prohibit discrimination in relation to the rights and freedoms set forth in the Declaration/Covenants, Article 26 ICCPR gives a freestanding right to non-discrimination. The Human Rights Committee (HRC)¹⁴ discusses in paragraph 12 of its General Comment No. 18¹⁵ that Article 26 provides an autonomous right. And, Liegl, Perching and Weyss¹⁶ write that:

Article 26 of the Covenant provides one of the strongest antidiscrimination rights that can be found in legally binding international treaties. ... Article 26 does not only prohibit discrimination in regard to the rights guaranteed by the Covenant itself but includes a freestanding prohibition of discrimination. This means that in whatever case a signatory state guarantees rights it has to do so without discrimination on the grounds of ...

All three instruments contain the same, non-exhaustive list of grounds for discrimination: 'or other status' indicates that other grounds can be recognised by the courts as a prohibited ground.

These instruments are very important because together they make up the International Bill of Human Rights. As Boyle and Baldaccini¹⁷ write:

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¹⁴ Established under Article 28 ICCPR.
¹⁷ Supra note 2, at 139-40.
It was on these foundations, entrenching the norms of equality and non-discrimination, that all other international human rights instruments created through the United Nations and the regional systems have been built.

All Member States of the EU are members of the United Nations and all have signed and ratified or acceded to the two Covenants, and are, therefore, bound by the obligations imposed. But what model of equality do the Covenants follow? They certainly have elements of the equal treatment model, in that they proclaim the equality of every person before the law. But do they go beyond this model?

As we have seen, providing against indirect discrimination and for positive action point to a more substantive model of equality. It is submitted that both Covenants do include protection against indirect discrimination. General Comment No. 18 gave the following definition of discrimination - taking into account the ICERD and the CEDAW:

the Committee believes that the term ‘discrimination’ as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect (my italics) of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.18

The use of the words ‘purpose or effect’ indicates that both direct and indirect discrimination are included. We will discuss this in more detail when we discuss the ICERD, as this definition, given by the HRC, is the same as that of Article 2 ICERD, apart from the grounds mentioned. The ICESCR also appears to include indirect discrimination in its prohibitions.19

18 Supra note 15, at para 7.
19 Committee on Economic, Social and Cultural Rights, Concluding Observations on Romania, 30/05/1994, E/C.12/12/1994/4, para 12, where the Committee mentions that direct and indirect discrimination of gypsies appears to continue; Id. Concluding Observations on Belgium, 01/12/2000, E/C.12/1/Add. 54, para 22, where the Committee mentions that a rule has ‘indirectly discriminatory impact on women’; both <www.unhchr.ch/tbs/doc.nsf
Another indication that these Covenants go some way towards a more substantive model is that they both allow for — temporary — positive measures to be taken in order to eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. However, these measures are seen as exceptions from the equal treatment model and are limited in time.\footnote{For the ICCPR see supra note 15, at para 10; for the ICESCR, see CESCR General Comment, No. 13, 1999, at para 32, \textless www.ohchr.org/english/bodies/cescr/comments.htm \textgreater}

Any law that provides against indirect discrimination and/or allows for positive action measures is more sensitive to group aspects of discrimination, as we saw in Chapter 2, so both Covenants can be said to recognise this group aspect. As far as action by groups is concerned, the ICESCR has no individual or state complaints procedure. Optional Protocol No. 1 of the ICCPR provides that individuals can complain to the HRC. All EU Member states, except the UK, have ratified the Protocol. The Rules of Procedure for the HRC state (Rule 96) as one of the conditions for admissibility, that it emanates from an ‘individual or individuals’ (my italics), which indicates that more than one individual victim can complain.\footnote{Human Rights Committee, Rules of Procedure, 04/08/2004, CCPR/C/3/Rev. 7, \textless www.ohchr.org/english/bodies.} It is thus arguable that the ICCPR allows for group actions.

Do these instruments impose positive duties on states and public authorities to eliminate discrimination and/or to promote tolerance and respect for diversity? Do they allow for recognition of rights of minority groups? First of all, international treaties bind the contracting parties, the States that sign up to it. It is the States Parties that are under an obligation to do what they agree to by signing. An international instrument could impose a duty on States Parties to eliminate discrimination and to promote diversity and tolerance. If it did so, it could be said to fit in the pluralist model of anti discrimination law, because it would aim at a more tolerant, diverse and thus plural society. However such a duty would be different from the duty under the British Race Relations
(Amendment) Act mentioned in previous Chapters, which is imposed – by the state/legislature – on all public authorities. International measures could put an obligation on States Parties to provide for such a duty on all public (and/or private) authorities. However, these authorities could only be obliged to do so by an act of the State Party, not by the international measure itself. Similarly, international treaties could impose a duty on States to follow a policy of mainstreaming equality and diversity in all its actions and to impose such a duty on other (public and/or private) bodies. But only the States Parties can be bound by the treaty/convention.

There are, however, two problems with international treaties imposing duties. Firstly, international treaties are usually not easy to enforce, even if they do contain some enforcement mechanisms, and sanctions for non-compliance are not particularly effective. It is submitted that most international treaties are not strictly legally enforceable but have a more political and persuasive force. States Parties might sign and ratify them because not doing so would make them look ‘bad’, would harm their public image, both at home and at the international stage. If an international measure contains a reporting procedure and the body receiving the report can remark on or criticise the failure of a State Party to follow and implement the measure, then this could have persuasive influence, especially if these comments are made public, because a Government would not like to be publicly ‘named and shamed’. A report criticising a government could also assist organisations lobbying for implementing legislation. In this way, international measures can exert influence on a State Party. The problem with enforcement is made worse by the fact that States Parties can, and often do, make reservations to some of the articles, i.e. opt out of some of the duties imposed by the Convention, or do not recognise the enforcement procedures provided. Secondly, international treaties are limited in the obligations they can impose because they have to respect the States Parties sovereignty and independence. For these two reasons,
international instruments will not often impose duties that would fit in the pluralist model of anti-discrimination law apart from making more general statements about the goals of tolerance, solidarity and respect for other people.

The UDHR, the ICCPR and the ICESCR do not appear to impose a positive duty on States to eliminate discrimination or promote tolerance and diversity. They only prohibit discrimination in guaranteeing rights and freedoms. However, both the UDHR and the ICCPR state that 'all are equal before the law and are entitled to equal protection of the law'. According to Liegl et al, this involves a two-fold obligation: 'states must refrain from adopting discriminatory laws and ... public authorities have to apply laws in a non-discriminatory way'. They continue: 'furthermore, Article 26 obliges Member States to prohibit discrimination by enacting special laws and to afford effective protection against discrimination'. 22 This suggests that the ICCPR and the UDHR contain a positive duty on states to eliminate discrimination. But do these instruments also impose a positive duty to promote tolerance and diversity? There appears to be no explicit mention of such a duty in the instruments itself. But we should keep in mind why the UN was formed. According to the Preamble to the Charter of the United Nations of 1945, the peoples of the UN were determined 'to save succeeding generations from the scourge of war' and, 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small'; and, for these ends 'to practice tolerance and live together in peace with one another as good neighbours'. Article 1(2) of the Charter gives as one of the purposes of the UN: 'to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace'. The Preamble to the UDHR contains similar expressions, and Article 1 mentions that all human beings

22 Supra note 16, at 22.
'should act towards one another in a spirit of brotherhood'. Article 26(2) UDHR states that education ‘shall promote understanding, tolerance and friendship among all nations, racial or religious groups’. This suggests that these UN instruments do implicitly aim to promote tolerance and understanding between people of different groups. However, the UDHR and the ICESCR do not go beyond this and do not contain any specific articles prescribing recognition of the rights of groups. Article 27 ICCPR has a more specific element of the pluralist notion in that it recognises rights of groups. It determines:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Two other UN instruments can be said to recognise rights of groups: the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (1992) and the Draft Declaration on the Rights of Indigenous Peoples (1994). However, the fact that neither has led to a Convention shows that most nations are not ready to go very far along the road to such rights. It can be said, therefore, that the UN instruments guarantee mostly individual rights and only contain some general statements that would fit in a pluralist idea, in that they aim at promoting tolerance and good relations between nations, racial and religious groups.

The last instrument to discuss is the International Labour Organisation’s Convention C111 on Equality in Employment and Occupation of 1958, signed and ratified by all EU Member States. This Convention prohibits discrimination in the field of employment. Article 1 defines discrimination as:

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23 For more information, see these instruments themselves, <www.ohchr.org/english/law/index.htm>
... any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

Cox\textsuperscript{25} writes that this:

... requires that each ratifying State must adhere to the basic goal of promoting equality of opportunity and treatment by means of a national policy which aims to end all forms of discrimination.

C111 thus imposes an obligation on States to eliminate discrimination and to promote equal opportunity and in this sense it goes beyond the formal equality model towards an equal opportunity model of anti discrimination law. Other indications that this convention goes further than just promoting equal treatment are that the definition covers both direct and indirect discrimination;\textsuperscript{26} and that the Convention 'requires special measures to be taken by state parties where necessary to eliminate discrimination in employment'.\textsuperscript{27} In this, C111 goes further than most national and international anti discrimination laws, which usually only permit, but do not require positive action. This Convention has, therefore, some elements of the substantive equality model as well as some of the equal treatment model of anti discrimination legislation. Its scope is, however, confined to the area of employment and occupation.

4 International Convention on the Elimination of all Forms of Racial Discrimination

This Convention was adopted in 1966 with a unanimous vote and deals, as its name suggests, specifically with racial discrimination and will therefore be discussed in more


\textsuperscript{27} MacEwen, Martin, Tackling Racism in Europe, An Examination of Anti-Discrimination Law in Practice (1995 Oxford and Washington: Berg), at 55; Cox also stresses that positive action is specifically required, supra note 25, at 6
detail. Its adoption was considered necessary, because of the 'manifestations of racial discrimination still in evidence in some areas of the world' and the existence of 'government policies based on racial superiority or hatred, such as policies of apartheid, segregation or separation.' \(^{28}\) The Convention was in part a reaction against the devastating effect of Nazism, but it was also a reaction against colonialism and all the practices of segregation and discrimination associated with it. Furedi\(^{29}\) argues that, after World War II, public attitudes to racism changed quickly and the principle of racial equality was rapidly accepted. This was a defensive and pragmatic reaction of the Western world which feared revenge of non-white people for the domination by the West. World War II brought out the inconsistency and the conflict between the denouncing of the prevailing Nazi ethos and the practice of discrimination and feelings of racial superiority. Therefore, Furedi concludes, the principle of race equality had to be conceded to ensure a stable world order. World War II had helped to discredit racism and to make the question of race an international issue.

Banton\(^{30}\) mentions the rise of fascism and the revulsion felt against apartheid as spurs for international action which led, among others, to the ICERD. He argues that the Convention obtained the support of the international community and was adopted unanimously because it was based on a 'lie': that racial discrimination as defined by Article 1(1) ICERD could be eliminated by political action.\(^{31}\) Banton discerns two ways to view racial discrimination: it can be viewed either as a pathological illness or as a normal part of everyday society. Without the political myth that it was a social sickness that could be eliminated, and be eliminated quickly, states would surely not have

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\(^{28}\) See the Preamble to the ICERD.


\(^{31}\) Banton, supra note 24, at 50 and note 30, at 42.
invested so much energy in the Convention. The title of the Convention confirms that the view that racial discrimination could be eliminated was the prevailing one, as does the Preamble, which:

solemnly affirms the necessity of speedily eliminating racial discrimination throughout the world, in all its forms and manifestations and of securing understanding of and respect for the dignity of the human person.

Banton concludes that this dubious assumption served a noble purpose: the axiom that racial discrimination as defined by the Convention can be eliminated is a lie, but because it made possible agreement on a Treaty that now restraints racial discrimination in most of the world's states, it was a 'noble lie'.

Banton also mentions that states regarded racial discrimination as a social pathology which afflicted other states than their own and was thus a matter for foreign policy. Therefore, signing the Convention brought a state credit on the international stage without many domestic demands.

The ICERD came into force in 1969 after it had been ratified by 27 states and is now one of the most widely ratified UN human rights treaties. However, many states have made reservations, especially to Article 4 and to the enforcement mechanism adopted. All Member States of the EU have signed and ratified this Convention, although some of them have made reservations.

In its Preamble, the Convention expresses the conviction:

that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere.

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33 Banton, supra note 30, at 44-5.
34 Banton, supra note 24, at 305. The notion that racism and racial discrimination were seen as an issue of foreign policy and foreign relations is also mentioned by Boven, Theo van, “Discrimination and Human Rights Law: Combating Racism” in Fredman, supra note 2, 111-34, at 111-3.
The Preamble also mentions that racial discrimination ‘is an obstacle to friendly and peaceful relations among nations’ and can disturb peace and security and the harmony of persons living side by side even within one and the same state.

Article 1(1) ICERD defines ‘racial discrimination’ as:

any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

A number of observations can be made about this definition. Firstly, it covers race, colour, descent, or national and ethnic origin. This is wider than, for example, the EU Race Directive, which only covers racial and ethnic origin. However, it does not cover religious discrimination. This could be problematic as religion is often closely related to race or ethnic origin and it can be difficult to draw a distinction between the two.

Secondly, it covers a wide range of protected fields (see Article 5): those of human rights and fundamental freedoms, including equality before the law, the right to security, political and civil rights and economic, social and cultural rights. This corresponds with the rights guaranteed in the International Bill of Rights.

Thirdly, according to the Committee on the Elimination of All Forms of Racial Discrimination (CERD), the words ‘purpose or effect’ indicate that both direct and indirect discrimination are covered. The Committee has stated:

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

‘Disparate impact’ is a term often used, especially in the US, instead of ‘indirect discrimination’ but denoting the same. On the other hand, MacEwen expresses doubt

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36 See Banton, supra note 24, at 64.
37 CERD is established under Article 8 ICERD. See CERD General Recommendation 14, Definition of Discrimination (Art 1(1)), 22/03/93, <www.ohchr.org/english/bodies/cerd/comments.htm>
whether the definition covers indirect discrimination, although he writes that 'a number of international lawyers are of the view that the Convention does cover indirect discrimination'.

Fourthly, the definition refers to 'public life'. Does this mean that the ICERD is not applicable where non-governmental or private actors are involved? According to Boyle and Baldaccini,38 there are two opinions; the first one holds that private acts are excluded from the scope of the Convention. The second opinion interprets 'public life' as being opposed to private life rather than just referring to government actions. The latter is supported by provisions such as those laid down in Article 5(e) and (f) ICERD. Authors point out that the distinction between the public sphere which is subject to government regulation and the private sphere, which is not, is becoming more blurred with the extension by many governments of programs of privatisation and with the ever more prominent role of private actors on global level. The issue is important because the scope of the ICERD would be wider, and thus it would be preferable, if the second opinion was followed, because it would put a duty on States Parties to prohibit, for example, a private employer or landlord discriminating against a person on the grounds of race, colour, descent, or national or ethnic origin. National legislation prohibiting discrimination often covers parts of the private sphere: purely private relationships, like who a person wants to marry, fall outside the scope of the legislation – although many States do intervene when a party is subject to immigration control39 - but relationships between, for example, a private landlord and tenant or a private employer and employee are covered by the prohibition. The EU anti discrimination legislation explicitly mentions that it covers both the public and private sectors, including public bodies.40

38 Supra note 2, at 159-60.
39 See for example: Sections 19-25 of the British Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.
40 See Articles 3(1) of the Race, Framework, Equal Treatment (Amendment) and Equal Treatment (Goods) Directives.
The ICERD provides expressly for positive action measures: Article 1(4) determines that:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Article 2(2) is even stronger in its formulation, in that it actually prescribes that States Parties shall take ‘special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them …’ Here again, the measures should not lead to the maintenance of unequal or separate rights and should not be continued after their objective has been achieved. Like Convention C111 above, the ICERD thus imposes a duty on States Parties to take positive measures, but these measures should be for a limited time only.

Article 14 ICERD provides for an individual right to petition to the CERD, if the State Party makes a declaration that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals (my italics) within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention.

This Convention thus allows for actions by groups of individuals as well. Of the EU Member States, Estonia, Greece, Latvia, Lithuania and the UK have not made such a declaration, the others have all recognised the individual right to petition.

But what model of anti discrimination law is this Convention aiming at? It is based on the equal treatment model in that it prohibits direct discrimination. The
provisions against indirect discrimination and for positive measures for 'certain racial or ethnic groups or individuals' and the possibility for 'groups of individuals' to take action all fit in a more substantive model, aiming at equality of opportunity or equality of results. Boyle and Baldaccini⁴¹ are of the view that:

The special feature of the Convention is that it promotes not only equality in law but also equality in fact, in order to allow different ethnic, racial, and national groups the same social development. The goal of de facto equality is reflected in several provisions of the Convention, calling for 'special measures' (Article 2(2)), allowing distinctions for the purpose of affirmative action (Article 1(4)), and prohibiting distinctions which have the purpose or effect of impairing the recognition, enjoyment, and exercise, 'on an equal footing', of human rights and fundamental freedoms (Article 1).

They conclude:

The Convention thus advocates a notion of equality of outcome, which is sensitive to the starting point of people, to past disadvantages which have created systematic patterns of discrimination in many societies, the effect of which may be continued or even exacerbated by facially neutral policies. The Convention's purpose of achieving substantive equality ... rather recognizes the need to accommodate diversity and to redress disadvantage ... This suggests that the Convention goes some way towards an equality of results model of anti discrimination law.

In some aspects, the influence of the pluralist model can be recognised as well: firstly, the ICERD imposes a positive duty on States Parties to eliminate discrimination and to take special action measures for groups or individuals who have suffered from past disadvantages. It thus recognises that there are groups that need and have a right to special measures; secondly, there is the Preamble's affirmation of the need to secure 'understanding of and respect for the dignity of the human person'; thirdly, the Preamble reaffirms that racial discrimination is 'an obstacle to friendly and peaceful relations among nations' which disturbs the 'peace and security among peoples and the

⁴¹ Supra note 2, at 156-7.
harmony of persons living side by side even within one and the same state'; and, fourthly, as Boyle and Baldaccini state, the recognition of ‘the need to accommodate diversity’.

On the other hand, the ICERD provisions for special measures could be used by States Parties to promote the assimilation of certain racial and ethnic groups into society. The special measures could put pressure on these groups to adapt and conform to the dominant values of society. And once they have assimilated, the special measures are no longer necessary. In the words of Boyle and Baldaccini:

Article 2(2) provides no safeguards against the use of measures that, in promoting the adequate development of racial groups, constitute assimilationist policies. The ICERD approach is integrationist, as reflected in the provision that the maintenance of separate rights for vulnerable groups is only admitted for a limited period ...\(^{42}\)

This assimilationist aim puts the ICERD back within the equal treatment model of anti discrimination law.

Two more problems in relation to the ICERD need to be pointed out, because they affect its practical value, although they do not have any influence on what model of anti discrimination legislation the Convention follows.

Firstly, there is the fact that Article 1(2) allows for distinctions between citizens and non-citizens. Article 1(3) recognises a State’s sovereignty in matters of nationality, citizenship or naturalisation, but does put a proviso on this: such provisions should not discriminate against any particular nationality. CERD has brought out a General Recommendation on discrimination against non-citizens\(^ {43}\) in which it affirms, firstly (point 1, 2), that Article 1(2) should not be interpreted to detract in any way from the rights and freedoms recognised in particular in the UDHR, the ICECSR and the ICCPR. Secondly (point 1, 3), that Article 5 ICERD incorporates the obligation of States Parties

\(^{42}\) Ibid. at 158.


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to prohibit and eliminate discrimination in the enjoyment of a number of human rights, which are, in principle, to be enjoyed by all persons. States Parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognised in international law. And, thirdly (point 1, 4), and most importantly, that:

Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim. Differentiation within the scope of Article 1, paragraph 4, of the Convention relating to special measures is not considered discriminatory.

The CERD follows this with an enumeration of measures that it recommends the States Parties to adopt. Therefore, Article 1(2) must be construed narrowly and differential treatment of non-citizens will be considered to be discrimination, unless it is objectively justified.

Secondly, like with other international instruments, there are problems with the enforcement of the ICERD. Despite Article 6 providing that States Parties shall assure ‘effective protection and remedies through the competent national tribunals and other state institutions’ and that such tribunals should give ‘just and adequate reparation or satisfaction’, in practice, as MacEwen44 writes, ‘the sanctions for non-compliance are largely ineffective’ and there is no specific obligation for signatories ‘to demonstrate that individuals are provided with appropriate remedies for acts of discrimination, or that there are effective state systems for monitoring and review’.

What are the obligations of the signatories? According to Article 9, States Parties undertake to submit periodic reports on the legislative, judicial, administrative or other measures they have adopted following the Convention for the consideration of the

44 Supra note 27, at 51.
CERD. The CERD reports annually to the General Assembly of the UN on its activities and it may make suggestions and general recommendations based on the examination of the reports from the States Parties. The provisions on reporting are therefore rather vague. Article 11 determines that if a State Party considers that another State Party is not giving effect to the provisions of the Convention, it may bring it to the attention of the Committee. However, this procedure has never been utilised. This could be because of the possible adverse diplomatic consequences or of the awareness that the Committee has ‘no power to legally adjudicate on a state’s complaint. The Committee may only recommend a friendly settlement and has no enforcement powers’.46

There is also the - already mentioned - individual complaint procedure of Article 14. However, this can only be used if a State Party has recognised the competence of the Committee to do so. This procedure also has the same problem that, as O'Flaherty notes, the CERD 'is not a court, does not issue 'judgements’ and has no means to enforce any views it might adopt'.47 The problem with enforcement is compounded by the fact that many States Parties have made reservations to the ICERD and/or have not recognised its individual complaints procedure.

We can conclude that the ICERD, despite these limitations, can be a very useful convention in the fight against racial discrimination, firstly, because it is the only UN instrument specifically aimed at the elimination of such discrimination. Secondly, because it contains a clear and wide definition of race discrimination which encompasses both direct and indirect discrimination. Thirdly, because it puts a duty on States to take positive action measures. And, fourthly, because it provides for an individual complaints procedure as long as States Parties have agreed to be subject to it.

We can also conclude that elements of all four models of anti discrimination legislation

45 For more information on the reporting procedure see Banton, supra note 24, and note 30, at 67-87.
46 Boyle and Baldaccini, supra note 2, at 173.
can be found in the Convention, although the emphasis appears to be on guaranteeing individual rights, with only a few references to groups and their rights.

5 Council of Europe and the Fight against Discrimination

The instruments discussed so far are global instruments adopted through the UN. In contrast, Article 14 ECHR and Protocol 12 to the ECHR are European measures adopted by the Council of Europe. The ECHR was agreed in 1950 and Protocol 12 was adopted in 2000.

The Council of Europe, with its seat in Strasbourg, is an international organisation, established in 1949 in order to promote greater unity between its members and has, at present, 46 Member States, among which are all EU Member States. Any European State can become a member provided it accepts the principle of the rule of law and guarantees human rights and fundamental freedoms to everyone under its jurisdiction. The Council of Europe is thus an organisation specifically focusing on human rights in greater Europe. The Council has no legislative powers.

In 1993, the Council established the European Commission against Racism and Intolerance (ECRI). This monitoring body has been given the task to ‘combat racism, xenophobia, antisemitism and intolerance at the level of greater Europe and from the perspective of the protection of human rights in the light of the European Convention on Human Rights, its additional protocols and related case law’. ECRI’s action covers ‘all necessary measures to combat violence, discrimination and prejudice faced by persons or groups of persons, notably on grounds of “race”, colour, language, religion, nationality and national or ethnic origin’. Therefore, ECRI is a body specifically focusing on the fight against racism and racial discrimination in greater Europe. It is important to note that religious discrimination is included in its mandate.

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ECRI's programme, according to Article 10 of its Statute, shall include three aspects: country-by-country approach; work on general themes; and, activities in relation to civil society. Under the first aspect, ECRI makes up periodic (every four/five years) country reports in which it reviews a Member State's legislation, policies and other measures to combat racism, xenophobia, antisemitism and intolerance and its effectiveness, and proposes further action. These reports are published, unless the Member State expressly opposes such publication. Under the second aspect of its programme, ECRI adopts General Policy Recommendations and collects and disseminates examples of 'good practices'. Under the third aspect, it aims to promote dialogue and mutual respect among the general public and it organises awareness raising and information activities.\(^5\) General Policy Recommendation 7, on national legislation to combat racism and racial discrimination, is of some interest for this Thesis. Adopted in December 2002, it recommends that the Governments of the Member States enact legislation against racism and racial discrimination, if such legislation does not already exist or is incomplete; and that they ensure that the key components set out in the Recommendation are included in such legislation. ECRI has taken account of, among other instruments, the EU Race Directive, and many of the key components set out in the Recommendation are similar to the provisions of the Directive. However, the Recommendation has no legally binding force, whereas the Directive is binding on the EU Member States, who are obliged to implement the Directive in their national legislation.\(^6\)


The ECHR was adopted in Rome in 1950. Article 19 of the Convention established a European Court of Human Rights to ensure that contracting states observe their obligations under the Convention. Article 14 contains a prohibition of discrimination on an extensive number of grounds:

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

The terms 'any ground such as' and 'or other status' indicate that the list is open-ended and can be extended through the case law. Feldman calls the list 'illustrative, not exhaustive' and writes:

The open-ended nature of the list of improper grounds for differentiation enables changing mores to be fed into the protection available under Article 14 without the need for further treaties or legislation, unlike the approach taken in UK and EC law.52

This implies that UK and EC law contain closed lists of grounds, which can only be added to via new legislation. For EC law this can be seen in Article 13 EC which allows 'action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation'. This leaves no room for any other grounds to be recognised except via a Treaty revision.

Despite the extensive and open-ended list of prohibited grounds, Article 14 has one major drawback: it does not give an independent, freestanding right to non-discrimination. It only secures 'the enjoyment of the rights and freedoms set forth in this Convention' without discrimination. Therefore, the right to non-discrimination is accessory or parasitic, and discrimination can only be challenged in relation to the other Convention rights. This situation has been criticised for falling short of the standard of

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protection provided in other international human rights instruments. ECRI itself noted that the Convention was 'lagging behind other international instruments in the matter of non-discrimination'. O'Hare even called it a 'prominent failure of the Convention system'. To overcome this problem, the Council of Europe's Committee of Ministers approved, following a proposal from ECRI, an Additional Protocol 12 to the ECHR. This Protocol, which opened for signature on 4 November 2000, provides an independent, freestanding right to non-discrimination in Article 1(1): 'The enjoyment of any right set forth by law shall be secured without discrimination on any grounds such as ...' and then it mentions the same grounds as Article 14 ECHR. Protocol 12 uses the same terms 'any grounds such as' and 'or other status' and thus the list of grounds is also open-ended. Many Member States appear reluctant to ratify the Protocol because, on the one hand, it is said to be too broad and to give too much discretion to the European Court of Human Rights to determine the obligations of States, and, on the other hand, it is criticised for not providing for positive measures. However, the Preamble makes it clear that positive measures are allowed. It states:

Reaffirming that the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures.

We will come back to this statement later.

Another criticism of the ECHR, related to the criticism about its accessory character, is that it does not give a guarantee of equality before the law or a right to protection against discrimination, like Article 26 ICCPR does. Both Article 24 of the

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55 Supra note 53, at 135.
American Convention on Human Rights and Article 3 of the African Charter on Human and Peoples’ Rights contain such a guarantee. Protocol 12 does extend Article 14 ECHR beyond the rights and freedoms of the Convention to ‘any right set forth by law,’ but it still does not contain a guarantee of equality before the law, although its Preamble mentions that the Member States are ‘having regard to the fundamental principle according to which all persons are equal before the law and entitled to equal protection of the law’. However, the principle is not explicitly stated in the operative part of the Protocol itself. Therefore, Protocol 12 can be seen as an improvement on Article 14 ECHR by creating a freestanding right, but it would have been better if it had expressly stated the principle of equality before the law.\textsuperscript{56} The Protocol entered into force on 01/04/2005.\textsuperscript{57} As the Protocol has only been in force for a very short time and has been ratified only by a small number of States, there is no case law on it yet.

What models of anti discrimination law do the ECHR and Protocol 12 follow? In Thlimmenos v Greece, the Court\textsuperscript{58} stated clearly that the right under Article 14 not to be discriminated against was violated ‘when States treat differently persons in analogous situations without providing an objective and reasonable justification’. The Court then went on to consider that the right not to be discriminated against was also violated ‘when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different’.\textsuperscript{59} The first part is thus a clear statement of the equal treatment model: treating people in the same situation alike.

Note that a difference in treatment is not considered to be discrimination if it is

\textsuperscript{56} Whether an equality clause and a clause expressly allowing for positive action measures should be added to the provision of Protocol 12 or whether a mention in the Preamble was sufficient, was part of the discussions on the text of Protocol 12, see Schokkenbroek, Jeroen, “A New European Standard Against Discrimination: Negotiating Protocol No 12 to the European Convention on Human Rights” in: Niessen, Jan and Chopin, Isabelle, (eds.), The Development of Legal Instruments to Combat Racism in a Diverse Europe (2004 Leiden/Boston: Martinus Nijhoff Publishers) 61-79, at 70-2.

\textsuperscript{57} By June 2006, of the EU Member States, only Cyprus, Finland, the Netherlands and Luxembourg had ratified the Protocol. Romania, which has become a Member State on 01/01/2007, ratified the Protocol in July 2006.

\textsuperscript{58} In this section of the Chapter, reference to ‘the Court’ will mean the European Court of Human Rights in Strasbourg.

\textsuperscript{59} Case Thlimmenos v Greece [2001] 31 EHRR 15, at para 44.
objectively and reasonably justified. This possibility of objective and reasonable justification has been expressed frequently by the Court. This interpretation of the Court will, most probably, also apply to Protocol 12.

But are there signs of any other models in the Convention and the Protocol? Do they allow for indirect discrimination? It seems that the Court recognises that Article 14 covers indirect discrimination. In the Belgian Linguistics case, the Court referred to the ‘aim and effects’ of the measures under consideration in the case. The use of the term ‘effects’ appears to imply that indirect discrimination is covered as well as direct discrimination. However, in the Abdulaziz case, the Court seemed to implicitly reject the concept of indirect discrimination. In that case, the applicants argued that British immigration rules were discriminatory on the grounds of race because their effect was to prevent substantially more men from the New Commonwealth and Pakistan than from elsewhere from entering Britain. The Court did not accept this argument and did not find the rules racially discriminatory, although it did find them directly discriminatory on the grounds of sex. Small discusses this case and writes:

... it was precisely because the generally applicable rules disproportionately affected these men that they should have been reviewed as indirectly discriminatory on the test in the Belgian Linguistics.

In the Thlimmenos case the Court accepted that indirect discrimination was covered by Article 14 ECHR, as will be clear from the second part of the statement quoted above. As Small writes, that case 'has finally settled the issue in favour of indirect discrimination under Article 14'. Mr Thlimmenos, a Jehovah's Witness, was convicted and served a prison sentence for refusing, on religious grounds, to wear a military


62 Ibid. at 60-1; see also McColgan, supra note 35, at 169 and Grief, supra note 53, at HR/7.
uniform while performing his military service. About nine years later he was refused access to the chartered accountancy profession because he had a previous conviction for a serious criminal offence, and this barred him from access. He argued that this was a violation of Article 14 ECHR taken together with Article 9 (freedom of religion). The Court decided that the Greek Government had failed to treat Thlimmenos differently from other people convicted of a serious crime without an objective or reasonable justification. It considered that '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'. The State should have provided for appropriate exceptions to the rule barring persons convicted of a serious crime from the profession of chartered accountant. So, the Greek Government was held to be in violation of Article 14, because it had not taken into account that the rule for access to the chartered accountancy profession could have disproportionate adverse effects for people like Thlimmenos. The following passage of the Jordan v UK case also indicates that the Court has accepted that Article 14 ECHR covers both direct and indirect discrimination:

Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group.

The interpretation of Protocol 12 will, very likely, follow the interpretation of Article 14 ECHR in this, and we can conclude that both cover indirect discrimination as well and as such go some way towards a substantive model of anti discrimination law. Gerards writes that the Court in the Thlimmenos case 'explicitly accepted that not only formal

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63 Supra note 59, at para 47.
64 Case Jordan v United Kingdom [2003] 37 EHRR 2, at para 154. This case was conducted together with three other cases, in each of which the same passage was quoted. Judgment in all four cases was given on 4/05/2001. See Cases McKerr v United Kingdom [2002] 34 EHRR 553, at para 165; Kelly and others v United Kingdom [2001] ECHR 40, at para 148; Shanaghan v United Kingdom App. No. 37715/97, at para 129.
discrimination (unequal treatment of equal cases), but also substantive discrimination falls within the scope of Article 14 ECHR'.

The next question is whether Article 14 and Protocol 12 allow for positive action, as that is another indication of a more substantive model. As mentioned, the Strasbourg Court allows justification for discrimination under Article 14 ECHR. This enables positive measures to be accepted as a justified form of differential treatment, provided that the justification is objective and reasonable, has a legitimate aim, and there is a reasonable relationship of proportionality between the means employed and the aims sought. The latter is the test for justification used by the Court. Feldman points to the Belgian Linguistics case to support this, as it mentions that `certain legal inequalities tend only to correct factual inequalities'. In the case of Lindsay v UK, it was found `that the difference in treatment in the present case has an objective and reasonable justification in the aim of providing positive discrimination in favour of married women who work'. Small explains that the Court held that the failure to treat Mr. Thlimmenos differently from others convicted of a felony was without objective and reasonable justification. The specific failure in this case was the failure of the Greek law to provide for appropriate exceptions to the rule barring persons convicted of a felony from the profession of chartered accountant. In other words, Greek law should have provided for exceptions. From this, she then concludes that `it is implicit in the reasoning of Thlimmenos that positive discrimination may sometimes be required'.

The above indicates that Article 14 ECHR allows for positive measures. As we have seen, Protocol 12 does not explicitly allow for positive measures in the Protocol itself, but the Preamble states that they are allowed, if there is an objective and reasonable justification. This confirms what has been said about Article 14. So both

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66 See the cases mentioned in note 60.
67 Feldman, supra note 52, at 145-6.
68 Belgian Linguistics case, supra note 60, para 10.
69 Case Lindsay v UK [1987] 9 EHRR 555, at 559.
70 Small, supra note 61, at 61-2.
measures allow for positive measures, but neither of them put a duty on states to take such measures.

Article 32 ECHR determines that the jurisdiction of the Court extends to all matters concerning the interpretation and application of the Convention and the Protocols thereto. Under Article 33, any State Party may refer another State Party for any alleged breach of the provisions of the Convention and the Protocols. Article 34 gives ‘any person, non-governmental organisation or group of individuals’ who claim to be the victim of a violation by a State Party of the rights of the Convention or its Protocols, the right to apply to the Court. These enforcement mechanisms are available for Protocol 12 as well, as the Articles mention both the Convention and its Protocols. So both Article 14 and Protocol 12 allow for actions by groups as well as by individuals. This is another indication of a more substantive model of anti-discrimination law.

Do Article 14 ECHR and Protocol 12 put positive duties on states to eliminate discrimination and to respect diversity and so go some way towards a pluralist model? Article 14 ECHR obliges States Parties to secure the enjoyment of the rights and freedoms set forth in the Convention without discrimination, while Article 1 obliges them ‘to secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention’. Section 1 includes Article 14. This appears to put a positive duty on states to protect a person against discrimination in relation to his or her Convention rights. This is supported by the Report from the Commission in the *Belgian Linguistics* case. The Commission expresses its opinion that the word ‘secured’ implies the placing of an obligation which is not simply negative on the Contracting States.\(^71\)

Article 1 of Protocol 12 has two paragraphs; according to the first one, the enjoyment of any right set forth by law shall be secured without discrimination; the second one states

\(^71\) See Feldman, supra note 52, at 143 and 145-6; *Belgian Linguistics* case, supra note 60, para 10.
that no one shall be discriminated against by any public authority on any of the grounds mentioned in paragraph 1. The duty imposed on States by the first paragraph is formulated in the same way as Article 14 ECHR, although it covers 'any right set forth by law', so the same reasoning can be used here: the state has a duty to protect a person against discrimination in any rights set forth by law. The second paragraph puts a (negative) duty on any public authority not to discriminate. However, neither instrument seems to require States to enact new legislation to guarantee non-discrimination. The Explanatory Report to Protocol 12 states that 'while such positive obligations cannot be excluded altogether, the prime objective of Article 1 is to embody a negative obligation for the Parties: the obligation not to discriminate against individuals'.\footnote{Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Explanatory Report, (ETS No. 177), at para 24 < www.conventions.coe.int/Treaty/en/Reports/Html/177.htm} It continues:

> On the other hand, it cannot be totally excluded that the duty to "secure" under the first paragraph of Article 1 might entail positive obligations. For example, this question could arise if there is a clear lacuna in domestic law protection from discrimination.\footnote{At para 26.}

The latter suggests that a failure to act could be a violation of the Protocol. According to O'Hare,\footnote{Supra note 53, at 140 and the cases mentioned there.} 'this approach is supported by the case law of the Court in the context of other Convention rights'. This therefore suggests that both Article 14 ECHR and Article 1 Protocol 12 contain a very tentative positive duty to protect from and to prevent or remedy discrimination,\footnote{See on the question whether Protocol 12 imposes positive obligations on states: Schokkenbroek, supra note 56, at 75-9.} but there is no duty to promote tolerance and respect for diversity, nor is there a duty to follow a policy of mainstreaming equality and/or diversity in either measure.

The Court has considered that its 'supervisory functions oblige it to pay the utmost attention to the principles characterising a "democratic society"', and that these supervisory functions must be guided by the demands of 'pluralism, tolerance and
broadmindedness without which there is no "democratic society".\textsuperscript{76} The Court has also mentioned repeatedly that "the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective".\textsuperscript{77}

In summary, both Article 14 ECHR and Protocol 12 mainly follow the equal treatment model of discrimination law, but there are also some elements of the more substantive models, in that both appear to cover indirect discrimination, both allow States to take positive measures and both allow groups to take action together. The fact that the rights guaranteed should be ‘practical and effective’ also points to a more substantive model. There is even a small hint towards the pluralist model in that the Council of Europe was formed to promote greater unity between its members and that the Court interprets the Convention in a spirit of pluralism, tolerance and broadmindedness. But, as with all international measures, this is more in the form of general statements than concrete provisions. The ECHR does guarantee individual rights and there appears to be no real recognition of group rights.\textsuperscript{78}

The ECHR has been in force for more than 50 years but, because of the accessory character of Article 14, the Court has not all that often made a decision on that article. Article 14 can only be invoked together with one or more of the other rights in the ECHR. Often, if the Court has decided that there is a breach of the other article(s), it will find it unnecessary to consider if there was also a breach of Article 14. In fact, until 2004, the Court has never found a violation of Article 14 on the grounds of racial discrimination. \textit{Nachova and others v Bulgaria}\textsuperscript{79} was the first case concerning

\begin{itemize}
    \item \textsuperscript{76} Case \textit{Handyside v UK} [1979-80] 1 EHRR 737, at para 49.
    \item \textsuperscript{77} Cases \textit{Artico v Italy} [1980] 3 EHRR 1, at para 33; \textit{Loizidou v Turkey} [1995] 20 EHRR 99, at para 72.
    \item \textsuperscript{79} Case \textit{Nachova and Others v Bulgaria} [2004] ECHR 90. In this judgment a violation was found both concerning the lack of investigation into whether discriminatory attitudes played a role in the shootings of Roma people by police officers and concerning the shootings themselves. The Grand Chamber, in its judgment of 06/07/2005, [2005] ECHR 465, also found a violation of Article 14, but only concerning the lack of investigation, not concerning the shootings themselves.
\end{itemize}
racial discrimination in which a violation of Article 14 (in conjunction with Article 2) was found. This case involved the treatment of people of Roma origin. It was followed by two other cases in which racial discrimination was held to be a violation of Article 14: Moldovan and others v Romania (No 2),\textsuperscript{80} also involving Roma People, and Timishev v Russia,\textsuperscript{81} a case involving a Russian national of Chechen origin. However, the Court found no breach of Article 14 (in conjunction with Article 2, Protocol 1, which states the right to education), in D.H. and others v Czech Republic.\textsuperscript{82} In this case, 18 children of Roma origin complained that the decision to place them in special schools was discriminatory. This case has been referred to the Grand Chamber.

There is another area of the Court’s case law where racism and racial discrimination have played a role and that is in cases where the issue has been whether prohibitions on and limitations to the expression of racism and racial hatred are compatible with the rights of the Convention. In these cases there is often a clash between different human rights, like the right to freedom of expression, guaranteed in Article 10, or freedom of association, guaranteed in Article 11, and the right to be free from discrimination.

The views in Europe with regard to interference with freedom of expression or association to ban expressions of racist hatred are in marked contrast to those in the US, where freedom of expression and the right to voice political dissent is afforded greater protection under the First Amendment of the US Constitution. In the US, racist propaganda is seen as part of the legitimate political discourse.\textsuperscript{83} Here we will

\textsuperscript{80} Case Moldovan and Others v Romania [2005] ECHR 473.
\textsuperscript{81} Case Timishev v Russia [2005] ECHR 858.
\textsuperscript{82} Case D.H. and Others v Czech Republic [2006] ECHR 113.

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concentrate on the position taken by the European Court of Human Rights, as this is relevant for the EU Member States. The Convention gives the right to freedom of expression in Article 10:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...

However, the Convention itself states clearly that this right carries duties and responsibilities and is not absolute. Paragraph 2 of Article 10 states when interference is justified:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

This right to freedom of expression as a fundamental human right which carries with it duties and responsibilities can also be found in the UDHR (Articles 19 and 29) and in the ICCPR (Article 19).

In many of the cases, someone has been convicted for libel, defamation or incitement to racial hatred for what he or she has said or written. The person convicted then applied to the Strasbourg Court claiming that this was a violation of Article 10, a breach of his/her right to free expression. There are a number of points that can be made about the decisions of the Court. Firstly, the Court has often stressed that freedom of expression constitutes one of the basic conditions of a democratic society, and is
essential for its progress and for the development of every man.\textsuperscript{84} Secondly, the Court has stressed the importance of freedom of the press and freedom of political debate for a democratic society and that the limits of acceptable criticism are wider with regard to a politician acting in his official capacity than in relation to a private individual. The protection of the reputation of a politician, acting in his public capacity, has to be weighed against the interests of open discussion of political issues.\textsuperscript{85} Thirdly, the Court has held that freedom of expression under Article 10 may not be invoked in a sense contrary to Article 17. The latter article prohibits abuse of the rights of the Convention. Therefore, Article 10 cannot be invoked contrary to the text and the spirit of the Convention which would contribute to the destruction of the rights and freedoms set forth in the Convention.\textsuperscript{86} Fourthly, the Court will take into account the medium and manner of the communication. For example, in the \textit{Jersild} case, the Court considered that television would have more impact than an article in a paper. It also considered that the programme in that case was broadcast as part of a serious news programme and was intended for well-informed people.\textsuperscript{87} In \textit{Lopez Gomes da Silva v Portugal}, the Court considered that the applicant acted in accordance with the rules governing the journalistic profession by placing the editorial in question, which described a politician as being fascist and antisemitic, alongside the declarations of that politician.\textsuperscript{88}

We can conclude that the Court will allow for interference with freedom of expression in case of racist expressions or incitement to acts of violence, but that these exceptions have to fulfil strict conditions: they have to be prescribed by law, be

\textsuperscript{84} \textit{Handyside} case, supra note 76, at para 49.
\textsuperscript{86} See Cases \textit{Glimmerveen and Haagenbeek v the Netherlands} [1982] 4 EHRR 260; \textit{Kuhnen v Federal Republic of Germany} App. No. 12194/86, Admissibility Decision 12/05/1988. Glimmerveen and Haagenbeek were convicted for distributing leaflets advocating racial discrimination and repatriation of all non-whites from Holland. Kuhnen had a leading position in an organisation attempting to reinstitute the National Socialist Party in Germany. They were all considered to invoke freedom of expression against the spirit of the Convention and therefore the interference with their right was considered justified.
\textsuperscript{87} \textit{Case Jersild v Denmark} [1994] 19 EHRR 1, at paras 31 and 34.
\textsuperscript{88} \textit{Case Lopez Gomes da Silva v Portugal} [2002] 34 EHRR 56, at para 35.
necessary in a democratic society to achieve a legitimate aim, which means that they have to fulfil a pressing social need, that the means used must be proportionate to the aim pursued and that the reasons given for the justification must be relevant and sufficient. The Court will thus accept (criminal or other) laws against hate speech and racist expressions, as does Article 4 ICERD. However, some States Parties see these laws as an infringement of freedom of expression rights, and have, therefore, made reservations against Article 4 when they signed the Convention.

Within the EU it appears to be accepted that such laws are justified restrictions on a person's freedom of expression. For example, the Consultative Commission on Racism and Xenophobia wrote in its report of 1995:

The legal systems of all EU Member States as well as the international human rights instruments to which the Member States are parties allow for such restrictions ... [i.e. criminal laws prohibiting incitement to racial hatred] of the freedom of expression and association, provided these are lawful and necessary to protect the rights of others. Moreover, various international human rights instruments to which most EU Member States are parties prohibit by law the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility and violence. 89

In the Charter of European Parties for a Non-Racist Society, 90 the democratic political parties of Europe express their awareness of the fact that according to the international human rights instruments signed and ratified by the EU Member States:

one's political freedoms are not absolute in view of the equally fundamental right to be protected against racial discrimination and that therefore political freedoms cannot be allowed to be abused to exploit, cause or initiate prejudice on the grounds of race, colour,


90 Charter of European Parties for a Non-Racist Society, adopted at Utrecht, 28/02/1998, <www.lbr.nl/internationaal/charter%20uk.html > The relaunched Charter was supported in a Joint Declaration signed on 25/09/2003 by the President of the European Parliament and the President of the Parliamentary Assembly of the Council of Europe, see on this also: <http://eumc.europa.eu/eumc/index.php?fuseaction=content.dsp_cat_content&catid=3ef0500f9e0c5&contentid=3ef0546396bb5>
ethnic origin or nationality or for the purpose of seeking to gain the sympathy of the electorate for prejudice on such grounds.

Another example is a Resolution\(^91\) in which the European Parliament mentions freedom of speech where it welcomes Member States equality laws which are 'protective of the rule of law in setting the limit to freedom of speech at the point where it incites to racial hatred or violence'.\(^92\) The Parliament goes on to call for, amongst other things, 'adequate checks and balances on the role of the media, including the Internet, while avoiding the infringement of truthful reporting, free speech, and ability to counter extremist opinions'.\(^93\) Further on in the Resolution, the Parliament 'calls on the Member States and the Community institutions to ensure that rules restricting freedom of opinion and expression are not contrary or disproportionate to national, European and international rules on the subject'.\(^94\)

In 2001, the EU Commission issued a Proposal for a Framework Decision on Combating Racism and Xenophobia, aimed at criminal law measures.\(^95\) In the Proposal, the European Commission mentions the importance of respect for human rights, such as the right to freedom of expression and freedom of assembly. However, 'the exercise of these freedoms has to be balanced with the prevention of disorder and crime and the protection of the reputation or rights of others'.

These examples all suggest that, within the EU, restrictions on free expression to protect against racist speech and incitement to racial hatred are accepted. The general opinion appears to be that a balance needs to be found between the protection of freedom of expression on the one hand, and the right not to be discriminated against on

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\(^92\) At QQ.
\(^93\) At RR.
\(^94\) At 25.
\(^95\) COM (2001) 664, Proposal for a Council Framework Decision on Combating Racism and Xenophobia, at 7. We will come back to this proposal in Chapters 5 and 6.
the other hand. States have a margin of appreciation in balancing these rights, but the Court will be the ultimate judge on whether the state has come to the right conclusion.

Two more articles of the ECHR need to be mentioned as important to racial discrimination. Firstly, in the *East African Asians Case,* it was found in the Commission’s report that racial discrimination could amount to degrading treatment and thus be in violation of Article 3 of the Convention. Secondly, racial prejudice expressed by jurors in jury trials have been held by the Court to impede the right of the accused to a fair trial under Article 6 ECHR. The Court held that the Convention imposes an obligation on national courts to check whether it is an impartial tribunal under Article 6(1) when there are serious allegations about racist expressions by a juror.

6 Conclusion

In this Chapter we have discussed the anti discrimination clauses of the international human rights instruments that are influential in the EU. One reason for this influence is that all EU Member States have signed and ratified most of the international measures, and, protection against racial discrimination is part of the general principles of international law, or *ius cogens.* Another reason is that all institutions of the EU have put the fight against racial and ethnic discrimination firmly within an international human rights context, as is clear from, for example, the texts of Article 6(2) TEU, the Preamble of the Race Directive and the European Charter of Fundamental Rights. The ECJ has also stressed the importance of the principle of equality and non-discrimination as a general principle of Community law. Within the EU, the ECHR and the case law of the European Court of Human Rights are the most important and influential. These have, therefore, been discussed in more detail, together with Protocol 12, as that widens the protection against discrimination given in Article 14 ECHR to cover ‘any right set

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forth by law'. The other instrument discussed in detail is the ICERD, because it is the only international measure specifically aimed at the elimination of racial discrimination and because it is one of the most widely ratified UN Conventions. The ICERD is also useful because it gives a clear definition of racial discrimination.

Looking at the different models of anti-discrimination law, described in Chapter 2, we can conclude that most (of the anti-discrimination articles of) international instruments have mainly been following the equal treatment model, although there are aspects of the substantive models, as most prohibit indirect discrimination and allow for positive measures to make up for past disadvantage. This seems to be closer to the equality of opportunity model than to the equality of results model, as the positive measures are seen as temporary and should end when the objectives aimed at have been achieved. Most international measures recognise the importance of tolerance and understanding between people(s) in general statements in their preambles. This is the reason why they were adopted in the first place, especially those that were adopted just after the end of World War II. There was a general feeling at that time that such a disastrous event should never be allowed to happen again and that future generations should be saved from the ravages and sorrows of war. The world reacted against the use of theories of race to declare some races inferior, which justified their exclusion, subordination and extermination. This was to be avoided in future and, therefore, the United Nations was established, with its peoples determined 'to practise tolerance and live together in peace with one another as good neighbours, and, to unite our strength to maintain international peace and security'. A number of international treaties and declarations followed, proclaiming the equality of every person. The Council of Europe was also established with the aim of achieving greater unity between its members. In the sense that these instruments aim to create a sphere of mutual tolerance and

98 Preamble to the Charter of the United Nations (1945).
understanding of and respect for diversity, they can be said to have a pluralist aim. However, the measures do not contain any specific duties on States Parties to promote tolerance and respect, nor do most of them contain any recognition of rights of groups. Therefore, these instruments cannot really be said to be following the pluralist model of anti discrimination legislation.

The aim of this Chapter has been to provide the international human rights context for the anti race discrimination legislation of the EU. Boyle and Baldaccini end with a mixed verdict on the achievement of the international human rights approaches but conclude:

The most important achievement of the international human rights approach to the elimination of racial discrimination has been to establish in international law a prohibition on racism as a state ideology and on the practice of all forms of racial and ethnic discrimination. Not only are these prohibitions part of international customary law but the majority of the world states that have ratified ICERD have embraced a range of duties obligating them to eliminate any such discrimination by legislative, educational and other means.99

It is with this in mind that we will examine the EU measures against racial or ethnic origin discrimination against the background of the analyses made in Chapters 1 to 4.

99 Supra note 2, at 191.
CHAPTER 5 - THE RACE DIRECTIVE: THE PROBLEM OF DEFINING RACE AND RACISM.

1 Introduction

In Chapter 1, we examined a number of the key concepts used in the Thesis, including race, racism and racial discrimination. These concepts and their historical development have had a bearing on the legislative measures against racial discrimination which the Union has taken. However, despite extensive European discussions of the problems of racism and racial discrimination since the mid 1980s, the EU did not adopt a directive until 2000. A number of suggestions and proposals for a directive or for treaty amendment have been made over the years, but it was thought that the Union did not have the competence to adopt legislative measures. This competence was given by the Treaty of Amsterdam, which came into force on 1 May 1999 and introduced Article 13 into the EC Treaty.

Once the competence was established, the Commission acted quickly and issued, in November 1999, three proposals based on Article 13: one for a General Framework Directive for Equal Treatment in Employment and Occupation;\(^1\) a second for a Directive on Equal Treatment irrespective of Racial or Ethnic Origin;\(^2\) and a third for a Community Action Programme to Combat Discrimination.\(^3\) In June 2000, the Race Directive was adopted, followed in November 2000 by the Framework Directive and the Action Programme.\(^4\)

In this Chapter, we examine the Race Directive with respect to the theoretical concepts of race, racism and racial discrimination analysed in Chapter 1. For a proper

\(^1\) COM (1999) 565.
\(^2\) COM (1999) 566.
\(^3\) COM (1999) 567.
analysis of the Directive in relation to these concepts, it is essential not only to look at the measure itself, but also at the history of anti race discrimination measures in the EU, because this historical development has been influential in shaping the Directive. We will start with analysing why the EU, after years of discussions and general statements about the need to combat racism and xenophobia without the adoption of any specific measures, finally adopted a directive against racial or ethnic origin discrimination in record time, within seven months after a proposal was issued. What brought about this change of heart?

The next part of this Chapter contains a discussion of the way the EU has dealt with the concepts of race, racism and racial discrimination in legislation specifically aimed at combating racism and xenophobia. From previous Chapters, it will be clear that measures against racism and racial discrimination vary in what exactly they cover under these terms. For example, the ICERD includes race, colour, descent and national or ethnic origin in its definitions of racial discrimination, while the British Race Relations Act 1976 covers colour, race, nationality and ethnic or national origin. Many national anti discrimination measures include race and ethnic origin as one of a number of grounds on which discrimination is prohibited in a general equality law. For example, the Irish Equal Status Act 2000 covers gender, marital status, family status, sexual orientation, religion, age, disability, race, colour, nationality, national or ethnic origin and membership of the Traveller community, while the Belgian Act against discrimination covers sex, a so-called race, colour, descent, national or ethnic origin, sexual orientation, marital status, birth, fortune, age, religion or belief, current or future state of health, a disability or physical characteristic.

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5 See Article 3(2), <www.irishstatutebook.ie/ZZAgY2000.html
6 Article 2 Act of 23/02/2003 pertaining to the Combat of Discrimination and to the Amendment of the Act of 15/02/1993 pertaining to the Foundation of a Centre for Equal Opportunities and Opposition to Racism, <www.diversiteit.be
The Race Directive prohibits discrimination between persons 'irrespective of racial or ethnic origin'. The third part of this Chapter will analyse what 'racial or ethnic origin' means. Does the Directive also protect a person against discrimination on the ground of his/her colour, descent or nationality? The question whether nationality as a ground for discrimination is covered by the Race Directive will be given special attention, together with the question, linked to this, whether all persons who find themselves in the EU are protected against racial or ethnic origin discrimination or only those who have the nationality of one of the Member States. We also discuss whether racial or ethnic origin should cover any other related concepts, like religion or belief.

2 Taking Action against Racism and Racial Discrimination

Racism and racial discrimination have been discussed within the EU since the mid-1980s. The European Parliament called repeatedly for Community action against racial discrimination. In these calls it was supported by a number of NGOs. It can be said, that the Parliament and the NGOs were, until the early 1990s, the only major actors in the fight against racism within the EU. Until that time, neither the Member States, nor the other Institutions showed any real commitment towards taking Community action. Some general statements about the need to combat racism and xenophobia were made, but these can be said to be hollow, as they did not lead to any real action against racial discrimination.

Therefore, the Member States appear to have been reluctant to take anti-discrimination measures at EU level, despite repeated calls for such action. Bell,

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describing the evolution of EU law and policy in the field of racial discrimination, notes that, although racism entered into the debates in the mid-1980s, no significant progress was made because of opposition in the Council. He writes:

Symbolic statements of commitment were not underpinned by a genuine desire to develop common measures against race discrimination. The Council relied on the absence of any specific EC Treaty provision on racism to insist that this was not within the Community’s legal competence. In this way, the question of competence became a kind of filter mechanism, a device to keep off the agenda issues the Council did not wish to address.

As Bell mentions, if the Member States really had wanted to take action, they could have amended the EC Treaty to give the Community legal competence in this field, but they did not do so in either the Single European Act (1986) or the Treaty on European Union (TEU 1992). Dummett\textsuperscript{10} writes:

Legal opinion was divided on whether Article 235 was an adequate basis when there was no direct mention of racism or xenophobia in the Treaty. The problem was really quite as much political as legal: the basis for dealing with sex equality had been a very slender one.

In other words, if the Member States had been committed enough to take legislative measures against racial discrimination they would have either found a basis in the existing Treaty or proposed changes to that Treaty. As MacEwen notes,\textsuperscript{11} there was ‘a lack of resolve, particularly by the Council of Ministers, to secure the promotion of Community legislation against racial discrimination’.

These quotes show clearly that the statements by the Council of its commitment to fighting racism and xenophobia were, in the words used in Chapter 3, hollow statements, which were not followed up by concrete action. MacEwen suggests a possible reason for this reluctance: a Community directive could be argued to be


superfluous, because of extensive membership of the ICERD and recognition of the ECHR by Member States and Community Institutions, or because of a growing body of legislation at national level.\textsuperscript{12} Member States might also have considered that action against racial discrimination was a matter for national, rather than Community legislation. However, some other, more hidden reasons might also have played a role. Member States might have been reluctant to acknowledge that the problem of racism and racial discrimination existed within their borders and might have considered it a problem affecting other states. In Chapter 1, we mentioned that denial of racism occurs frequently and is seen as an obstacle to any progress in addressing it effectively, while in Chapter 4, we touched upon the fact that states see the problem of racism as affecting other states. The denial could have been exacerbated by the fact that, in some Member States, the subject of race and racism and the use of these terms with their negative connotations was (and still is) a sensitive issue. Taking action against racism and racial discrimination might also have been considered not politically beneficial, as it was not an issue that would win many votes.

The mood within the EU started to change in the early 1990s, and support for community action grew in many different quarters, including in the European Council. Bell\textsuperscript{13} mentions three principal reasons for this: firstly, the development of cross-border racism and the realisation that this might affect the functioning of the internal market; secondly, the spill-over effects from EU immigration and asylum policies; and, thirdly, the establishment of an effective European lobby against racism. The EU immigration and asylum policies ‘galvanised national and European civil society into transnational action for anti-racism measures at the EU level, so as to ameliorate the effects of the immigration policies’\textsuperscript{14}.

\textsuperscript{12} Ibid.
\textsuperscript{13} Supra note 9, at 63-9.
\textsuperscript{14} Ibid. at 67.
A clear indication of this change of mood within the EU in favour of taking legislative measures was the decision by the European Council at the 1994 Corfu Summit to set up a Consultative Commission on Racism and Xenophobia.\textsuperscript{15} The final report of this Commission, called the Kahn Commission after its chair Jean Kahn,\textsuperscript{16} concluded that ‘amendment of the Treaty to provide explicitly for Community competence must be regarded as an essential element in any serious European strategy aimed at combating racism and xenophobia’. The Commission saw this as ‘the clearest expression of the European Union’s real intention of combating, not merely protesting against, the rising tide of racism and xenophobia’.\textsuperscript{17} In other words, the Kahn Commission saw Treaty amendment as doing something about racism and xenophobia, rather than making hollow statements. The Kahn Commission’s Report is important because it was a report from a body appointed by the European Council and consisting of representatives of the Member States themselves. Many of the Report’s recommendations were followed in the Race Directive and other measures and because of this, the Kahn Commission can be seen as the third major player in the development of EU anti race discrimination legislation.

As we have mentioned, in the preceding years, doubt had been expressed as to whether the Community had the competence to act against racial discrimination. The clearest way of dealing with this was explicitly stating the Community competence to do so in the EC Treaty, as the European Parliament,\textsuperscript{18} the Starting Line Group\textsuperscript{19} and the Kahn Commission had advocated. This was done by the Treaty of Amsterdam, which was adopted in 1997 and added Article 13 to the EC Treaty. This Article established the

\textsuperscript{15} Corfu Summit Conclusions, <www.europarl.eu.int/summits/cor1_en.htm#justice
\textsuperscript{17} Ibid. at 57.
competence of the Community to take action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

The Treaty of Amsterdam came into force on 1 May 1999 and led to the proposals for the Race and Framework Directives and the Action Programme. But why was discrimination based on racial or ethnic origin singled out for special treatment in a separate Directive? Does this special treatment mean that the protection against discrimination on the grounds of racial or ethnic origin is stronger than the protection provided for the other grounds of Article 13 EC? The answer to this question is: yes, the protection provided by the Race Directive is stronger than that provided by the Framework Directive. There are three reasons for this: firstly, the Race Directive has a much wider material scope: both Directives cover access to employment; access to training; employment conditions; and, membership of professional organisations. But the Race Directive also covers social protection, including social security and health care; social advantages; education; and, access to and supply of goods and services which are available to the public, including housing. In other words, the scope of the Framework Directive is limited to the field of employment and occupation, while the Race Directive goes beyond that.

Secondly, the Race Directive only allows for two specifically mentioned exceptions: for genuine and determining occupational requirements (Article 4) and for positive action measures (Article 5). Direct racial or ethnic origin discrimination cannot be justified under any other circumstances. The Framework Directive also allows for these exceptions (Articles 4(1) and 7, respectively), but it provides for a number of additional ones: Article 2(5) gives an additional general exception; Article 4(2) contains an exception for occupational activities of organisations with a religious ethos; Article 5 prescribes that reasonable accommodation must be made for disabled persons; Article 6

20 Supra notes 1, 2 and 3.
21 The material scope can be found in Article 3(1) of both Directives.
provides for a general justification and a number of exceptions in relation to age; and, Article 15 makes exceptions for the police service and for teachers in Northern Ireland.

Thirdly, the Race Directive makes it easier for victims to bring a case for discrimination because of the enforcement support it provides. Both Directives put a duty on Member States to make judicial and/or administrative procedures available to all persons who feel discriminated against. Both also provide that associations and organisations can support victims in bringing actions. But only the Race Directive (in Article 13) puts a duty on Member States to ‘designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin’.

The protection against sex discrimination given by the Equal Treatment, the Equal Treatment (Amendment) and the Equal Treatment (Goods) Directives is also wider than that under the Framework Directive but not as extensive as that under the Race Directive. As far as the scope is concerned, the prohibition of sex discrimination now covers the same employment and occupation areas as the Race and Framework Directives and, additionally, it covers the provision of goods and services. With regard to the exceptions allowed, the Equal Treatment (Amendment) Directive allows for the same exceptions as the Race Directive but also contains some provisions for the protection of women as regards pregnancy and maternity. However, the Equal Treatment (Goods) Directive contains much broader exceptions. Article 4(5) allows for justification of direct discrimination, while Article 3(3) exempts the media, advertising and education and Article 5 allows for an exception in the insurance field. With regard to enforcement, Member States are also under a duty to designate a specialist body or bodies for the promotion of equal treatment between men and women.

22 See Articles 7 Race and 9 Framework Directives.
23 This duty will be discussed in more detail in Chapter 6.
Therefore, the scope of the prohibition of sex discrimination is not as wide as the scope under the Race Directive, and, in the provision of goods and services especially, much wider exceptions are allowed, while the duty to designate a specialist body exists for both sex and racial or ethnic origin. The protection provided by the Framework against discrimination on the grounds of religion and belief, disability, age and sexual orientation is weaker than that against discrimination on the grounds of sex or of racial or ethnic origin.

So why is the protection against racial discrimination stronger than that against other forms of discrimination? In the Explanatory Memorandum to the proposal for the Race Directive, the Commission explained that it had chosen a broad scope for the Race Directive because ‘a comprehensive coverage is necessary to make a serious contribution to curbing racism and xenophobia in Europe’.24 In the Communication accompanying the Article 13 EC proposals, the Commission explains that the proposal for the Race Directive has a scope that extends beyond the labour market, while the scope of the Framework Directive is limited to employment and occupation. This takes account of the ‘strong political will which exists to take action to combat as many aspects as possible of racial discrimination’.25 It is submitted that this strong political will also led to the speedy adoption of the Race Directive. Seven months between proposal and adoption is, as Tyson writes, ‘a record for the adoption of a piece of Community law requiring substantial legislative changes at national level’.26

Why was the political will to act against racial discrimination so strong at that time? A number of writers mention the influence of the results of the elections in

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24 Supra note 2, at IV.
Austria in February 2000. For example, Goldston writes that the Race Directive was 'given renewed political impetus by the electoral developments in Austria ... which prompted a number of EU member governments to offer tangible evidence of their commitment to combating racism'. Bell explains that, in February 2000, Jorg Haider’s Freedom Party, an extreme right-wing party, became part of the government of Austria. The other Member States protested against this and imposed bilateral diplomatic sanctions. This led the Portuguese Presidency to fast track the Race Directive as a sign of the Union’s commitment to combating racism. It also pressurised the individual Member States to be more flexible in their negotiating positions – ‘with presumably no state wishing to be regarded as blocking new laws combating racism’.

Ellis also mentions the rise to power of the Freedom Party in Austria. She adds that:

there was a perception among the Member States that some of the aspiring entrant states in central and eastern Europe posed serious problems in relation to racial, ethnic and religious tolerance, especially as far as the Roma were concerned. The Commission and the Member States took the view that it was vital to ensure that the ‘acquis communautaire’ contained strong anti-discrimination legislation in good time before those states became members of the Union.

The European Commission mentioned the importance of the Race Directive in relation to the enlargement of the EU as well.

Another factor that might have played a role in the quick adoption, again because the Member States wanted to show their genuine commitment to the fight

28 Goldston, supra note 27.
29 Bell, supra note 9, at 74.
31 Supra note 2, at III.
against racism and racial discrimination, is the United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR), which took place in Durban in August/September 2001. Preparations for this Conference were well under way when the Race Directive was negotiated, with regional Conferences taking place in 2000. Not only were all EU Member States involved in the preparations for the European Regional Conference as States Parties to the Council of Europe, but the EU also contributed in its own capacity. The latter is interesting as it shows once again the importance the EU attaches to the work of the Council of Europe.

Therefore, the reason for the speedy adoption of EU legislation against racial discrimination with a wide scope beyond the employment field, is based on the desire of the Member States to show their genuine commitment to the fight against racism and racial discrimination, not only to the other Member States, and in particular Austria, but also to the (then) Candidate Countries and the rest of the world.

3 Definitions

3.1 Race and Racism

In Chapter 1, we concluded that the terms race, racism and (racial) discrimination are far from easy to define and that their meaning is by no means uncontested. We also concluded that these terms are both historically specific and socially constructed, or, in other words, they have different meanings in different historical and societal settings.

As mentioned, all three terms carry a negative connotation, but this is strongest for the term racism. This negative connotation is linked to the fact that theories of race and racism were used to justify suppression, persecution and extermination of people considered to be of inferior races. The memory of the Holocaust and the abuse of

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theories about race made under Nazism in Germany were casting long shadows over the debates in the EU and wider Europe and the use of the terms race and racism were and still are very sensitive for many Member States. The negotiations on the Race Directive show clearly that some Member States saw the use of the term race as ‘tantamount to accepting racist theories that alleged the existence of separate human races’. As we saw in Chapter 1, Recital 6 states that the EU rejects theories which attempt to determine the existence of separate human races and that the use of the term racial origin does not imply acceptance of such theories. The Recital was added as a compromise between those Member States who had problems with the use of the term race and others, who did not want to rely solely on the term ethnic origin. The problematic nature of these terms shows itself in the fact that the collection of data on racial or ethnic origin is prohibited in many Member States. According to Johansson, legislation which prohibits the collection and processing of data that refers to an individual’s race or religion without that person’s consent, exists in Bulgaria, the Czech Republic, Denmark, France, Greece, Italy, Latvia, Poland, Portugal, Slovakia and Sweden.

The problems about the wording during the negotiations might explain why there is no definition of the key terms race, racism and racial or ethnic origin. Article 13 EC requires unanimity in the Council and it appears unlikely that agreement about definitions of these terms could have been reached. The Directive has, however, been widely criticised in the literature for this omission. According to Brown, the marked

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34 Supra note 26, at 201-2.
35 See Chapter 1, 2.2, and Tyson, supra note 26, at 201-2.
lack of key definitions 'may create uncertainty and generate a fair amount of litigation'. 38

However, other documents within the EU appear to show the same lack of definitions of key terms. In many of the Resolutions and Declarations issued by the EU, the term racism can be found together with the term xenophobia, 39 while the European Parliament also often used anti-Semitism. 40 The terms racism and xenophobia are also used together in Article 29 TEU, where 'preventing and combating racism and xenophobia' is mentioned as one of the means by which the Union shall provide citizens with a high level of safety within an area of freedom, security and justice. But no definitions of these terms are given in any these documents.

As the Race Directive contains minimum requirements only, Member States could define race, racism, racial origin or ethnic origin in their national laws. In some language versions, the Directive uses 'race or ethnic origin' rather than 'racial or ethnic origin,' which would suggest that race and racial origin have the same meaning. Are there any definitions of race/racial or ethnic origin which the Member States could follow if they want to define these concepts in their national law? An example can be found in the British Race Relations Act 1976, which defines 'racial grounds' as to mean 'colour, race, nationality or ethnic or national origins'. 41 However, the Regulations transposing the Race Directive into British law refer only to race, ethnic or national origin, which suggests that the Government held 'racial or ethnic origin' in the


38 Brown, supra note 37.
41 Section 3 Race Relations Act 1976.
Directive to mean race, ethnic or national origin, and not colour or nationality. The exclusion of ‘nationality’ is most likely the result of Article 3(2) of the Directive, which we will look at in the next section of this Chapter. Why the British Government also excluded colour is less easy to understand, although colour discrimination would likely qualify as race or ethnic or national origin discrimination. We will come back to colour as a ground for discrimination in the next section as well.

Other Member States could follow the definition from the British Act or, alternatively, they could omit any definition of racial or ethnic origin and leave the interpretation to the ECJ. The ECJ might well look at the same British Race Relations Act 1976 and the case law for guidance, as this Act has been in place for thirty years. The leading decision which could help the interpretation of the term ‘ethnic origin’ is the Mandla v Dowell Lee case, where the House of Lords had to decide whether Sikhs were protected under the 1976 Act. As Sikhs could not be identified by colour, race, nationality or national origin, the question was whether Sikhs were covered by the term ‘ethnic group’. Lord Fraser set out two essential and five other relevant characteristics of an ethnic group. The essential characteristics are:

(a) a long shared history of which the group is conscious as distinguishing it from other groups and the memory of which it keeps alive;
(b) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance;

The other relevant characteristics are:

(c) either a common geographical origin, or descent from a small number of common ancestors;
(d) a common language, not necessarily peculiar to the group;

42 See Race Relations Act 1976 (Amendment) Regulations 2003, SI 2003/1626, Section 3. Note that this means that the amended Race Relations Act 1976 applies to discrimination based on race, ethnic or national origin, but that the un-amended 1976 Act applies to discrimination based on colour or nationality.

(e) a common literature, peculiar to the group;

(f) a common religion different from that of neighbouring groups or from the general community surrounding it;

(g) being a minority or being an oppressed or a dominant group within a larger community.

Using these criteria, Sikhs were held to be an ethnic group. By applying the same test, gypsies or travellers were also held to be an ethnic group, but Muslims and Rastafarians were not. The ECJ might well use this case as guidance in its interpretation of race/racial or ethnic origin.

The Race Directive does not provide a definition of racism either, but, again, there are examples which the Member States could follow. Within the EU, 'racism and xenophobia' are defined in the 2001 Proposal for a Framework Decision to combat racism and xenophobia. This Proposal, which aims at criminal law measures, has a twofold purpose: firstly, to ensure that racism and xenophobia are punishable in all Member States by effective, proportionate and dissuasive criminal penalties, which can give rise to extradition and surrender (approximation); and, secondly, to improve and encourage judicial cooperation by removing potential obstacles (cooperation). Article 3(a) of the Proposal states:

"racism and xenophobia" shall mean the belief in race, colour, descent, religion or belief, national or ethnic origin as a factor determining aversion to individuals or groups.

It is interesting to note that this (EU) definition includes colour, descent, religion or belief, and national origin, while these are not mentioned in the Race Directive. It appears rather inconsistent that the two EU measures aimed at combating racism differ

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in these aspects. However, the Proposal has yet to be adopted as the EU Justice and Home Affairs Ministers have not been able to reach agreement. The German Presidency plans to resume the stalled negotiations and to drive the project forward.\footnote{See “Europe – Succeeding Together” Presidency Programme 1 January to 30 June 2007, at 19, <www.auswaertiges-amt.de/diplom/DE/EU-P/Programm-EU-P-en.pdf>}

Another example of a definition of racism can be found in General Policy Recommendation 7 of the Council of Europe’s European Commission against Racism and Intolerance (ECRI) which defines racism as:

\begin{quote}
the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.\footnote{ECRI, General Policy Recommendation 7, On National Legislation to Combat Racism and Racial Discrimination, CRI (2003) 8 (2003 Strasbourg: Council of Europe), para 1(a). The footnote added after race in this paragraph is interesting, as it states: “since all human beings belong to the same species, ECRI rejects theories based on the existence of different “races”. Therefore, like the EU Member States, ECRI also found it necessary to state this explicitly.}
\end{quote}

This definition is provided for the purposes of the Recommendation and it is up to the States Parties to decide whether they want to include it in their national law. In contrast to this, the definition of racial discrimination has to be included.\footnote{See the Explanatory Memorandum to the Recommendation, para 7.} Coomber\footnote{Coomber, Andrea, “The Council of Europe: Combating Racism and Xenophobia” in: Nickel, Rainer, Coomber, Andrea, Bell, Marc, Hutchinson, Tansy and Zahi, Karima, European Strategies to Combat Racism and Xenophobia as a Crime (2003 Brussels: ENAR) 17-26, at 23.} makes an interesting point in relation to this ECRI definition where she writes that, in the drafting of other international instruments, such as the ICERD and the Race Directive, the drafters avoided defining racism. She continues:

\begin{quote}
ECRI’s attempt at a definition indicates why it is perhaps wiser to define unlawful conduct rather than ambiguous concepts such as “racism”. Moreover, by linking such activities to an ambiguous standard based on the ‘belief’ of the person, Recommendation No. 7 introduces a concept that it is difficult for any legal system to prosecute.
\end{quote}

This suggests that it might be better for the legislator not to give a definition of racism, but to define racial discrimination only. It is submitted that prosecuting a person for his/her beliefs is problematic not only because it might be difficult to prove such beliefs,
but, more importantly, because this would violate the fundamental human right to freedom of thought. As we mentioned in Chapter 1, legislation aims at the practical occurrences of racism, at the behaviour based on racist beliefs rather than at views and ideas. The Race Directive does not define racism, but it defines both direct and indirect discrimination on the grounds of racial or ethnic origin in its Article 2. We discuss these definitions in the next Chapter, where we look at which model(s) of anti discrimination law can be detected in the Race Directive. However, the inconsistency between the Directive and the 2001 Proposal remains an anomaly. We will come back to the definitions of both the Proposal and ECRI in the next section of this Chapter.

3.2 What is included under Racial or Ethnic Origin?

Can racial or ethnic origin be interpreted as including other grounds of discrimination? As mentioned the ICERD includes race, colour, descent and national or ethnic origin in its definitions of racial discrimination. Neither the Proposal for the Directive, nor the Directive itself or its Preamble give any indication as to whether colour and descent are included, but all three mention discrimination based on nationality. In the following, we first discuss these grounds and then consider whether any of the other grounds mentioned in Article 13 EC should be included in the Race Directive.

3.2.1 Colour and Descent

Because ‘racial or ethnic origin’ is not defined in the Directive, the exact grounds the Directive covers are not clear. Can ‘racial or ethnic origin’ be taken to include colour, nationality or descent? Brennan mentions that ‘a series of reports on Northern Ireland consider that characteristically the principal trigger for racially discriminatory behaviour is ‘skin colour racism’. The reports show that ‘in Northern Ireland discriminators do not generally know the ethnic or national background of victims’ but they tend to

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50 Supra note 2.
‘discriminate on the basis of ‘visible’ characteristics’. It could be argued that skin colour is included as a ground in the Race Directive, as it is used as an indication of a person’s racial origin, and it is hoped that the ECJ will decide that this is so. The same can be said about descent: race/racial or ethnic origin appears to include descent (or ancestry), but it would have been clearer if the Directive itself had mentioned both colour and descent as grounds on which discrimination is prohibited.

As already mentioned, since the late 1980s, many NGOs and other organisations had been active in lobbying for EU legislation against racism. In 1991, a number of these groups formed the ‘Starting Line Group’, an informal network of NGOs, semi-official organisations, trade unions, churches, independent experts and academics. The group’s aim was to promote legal measures to combat racism and xenophobia in the EC. In 1993 this group launched the Starting Line, a proposal for a draft Council Directive concerning the elimination of racial discrimination, which covered race, colour, descent, nationality, national and ethnic origin. This proposal defined racial discrimination in the same way as the ICERD and covered the same grounds. So both include colour and descent. They also cover nationality, although, as we saw in Chapter 4, the ICERD qualifies this in Article 1(2) and (3). But does the Race Directive cover discrimination based on nationality? This is discussed in the next part of this Chapter.

3.2.2 Nationality

The personal scope of the Race Directive, in other words, which persons are covered can be found in Article 3. However, this Article is not very clear. On the one hand, Article 3(1) states that the Directive ‘shall apply to all persons’ and Recital 3 explicitly mentions that ‘the right to equality before the law and protection against discrimination for all persons constitutes a universal right’. The words ‘shall apply to all persons’ were

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51 Brennan, supra note 37, at 320-1.
52 See the dictionary definition of race in Chapter 1: a group of people of common ancestry ...'.
not present in the Proposal\textsuperscript{54} or in any of the Council Proceedings.\textsuperscript{55} The words suggest that, as Liegl \textit{et al} write, ‘the protection against discrimination conferred by the [Race and Framework] directives applies to all persons that are on the territory of one of the EU Member States irrespective of their nationality’.\textsuperscript{56} The European Parliament,\textsuperscript{57} the Starting Line Group\textsuperscript{58} and the Kahn Commission\textsuperscript{59} all expressed the opinion that all people within the EU, ‘whether citizens of the EU or not’ should be protected against racial discrimination.

On the other hand, however, the Race Directive makes an explicit exception for nationality in Article 3(2) and also adds a further proviso:

This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of the Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

Article 3(2) was not present in either the original or the amended proposals, but was added, together with Recital 13, after much discussion during the negotiations of the Directive.\textsuperscript{60} Recital 13 determines that discrimination under the Directive ‘should be prohibited throughout the Community’. It then adds:

This prohibition of discrimination should also apply to nationals of third countries, but does not cover differences of treatment based on nationality and is without prejudice to

\textsuperscript{54} Supra note 2.

\textsuperscript{55} Council of the European Union, Outcome of Proceedings of the Social Questions Working Party, 6435/00, Brussels, 01/03/2000; idem, 6942/00, 31/03/2000; idem, 8454/00, 16/05/2000.

\textsuperscript{56} Liegl \textit{et al}, supra note 37, at 10.

\textsuperscript{57} For example: the 1990 European Parliament Committee of Inquiry on Racism and Xenophobia Report, supra note 5, recommended that a Community Directive cover all Community residents.

\textsuperscript{58} See on the Starting Line: Dummett, supra 53, at 533; on the New Starting Line, the Group’s amended proposal issued after the Treaty of Amsterdam was adopted: Chopin, supra note 19, at 123. Chopin writes that the New Starting Line would apply to ‘any person, regardless of nationality, status or country of origin or residence’. The New Starting Line can be found in Chopin, Isabelle and Niessen, Jan, (eds.), Proposals for Legislative Measures to Combat Racism and to Promote Equal Rights in the European Union (1998 London: Belmont Press), at 23-32.

\textsuperscript{59} See the Report, supra note 16, at 39: ‘all individuals’ and at 59: ‘whether citizens of the European Union or not’.

\textsuperscript{60} Tyson, supra note 26, at 209-10. See also Council Paper 6435/00, at 3 and Recital 10 in Council Papers 6435/00, 6942/00 and 8454/00, all supra note 55.
provisions governing the entry and residence of third-country nationals and their access to employment and to occupation.

Therefore, the first part of Article 3(2) makes an exception for discrimination on grounds of nationality. According to the Explanatory Memorandum of the Proposal for the Race Directive, 'the Directive does not prohibit differences in treatment based on nationality, which is dealt with by separate Articles of the Treaty (in particular Articles 12 and 39) and by existing secondary legislation'. 61

However, there are two problems with the exclusion of nationality discrimination from the Directive. Firstly, it is not always easy to distinguish discrimination on grounds of racial or ethnic origin from nationality discrimination. And, secondly, Article 12 does not apply to third-country nationals, so they are not protected against nationality discrimination. The second part of Article 3(2) of the Race Directive appears to limit the protection afforded to third-country nationals against racial discrimination even further.

During the negotiations on the Directive, some Member States were concerned about preserving their immigration and asylum systems. The Commission argued that admission policies were not included in the material scope of the Directive, but this did not satisfy all Member States and in the end it was agreed that Article 3(2) and Recital 13 would be added. 62 The exception in Article 3(2) reflects the fact that it is up to a state to decide on whether to admit a person to its territory and whether to give him/her a residence or work permit, as this is a power of the Member State and not of the Community. The same reason lies behind Article 1(2) and 1(3) ICERD, which we will come back to later. Article 3(2) has been severely criticised in the literature and many writers have called for a narrow interpretation of this paragraph, because a broad interpretation would greatly reduce the effectiveness of the Directive for third-country nationals.

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61 Supra note 2, at 4.
62 Ibid.
nationals, who are often the main target of discrimination.\textsuperscript{63} According to Lord Lester,\textsuperscript{64} for example:

The blanket exclusion of racially discriminatory provisions governing the entry, residence and treatment of third-country nationals and stateless persons is incompatible with the effective protection of human rights.

A Report\textsuperscript{65} from the European Commission discusses the Race and Framework Directives and the Action Programme. It states:

The two directives outlawing discrimination cover everyone living or working in an EU country, whether they are officially resident there or not. Protection, therefore, is not confined to EU nationals but extends to people from outside the EU who might be visiting for a period, whatever their nationality. (The directives do not, however, affect rules on immigration and do not cover differences in treatment on grounds purely of nationality.)

All this suggests that the Race Directive applies to non-EU nationals and thus protects them against racial and ethnic origin discrimination, except in relation to immigration laws or other legal acts covering entry, residence and legal status. Or, as Ellis\textsuperscript{66} concludes:


\textsuperscript{64} Lester, supra note 63, at 565.


\textsuperscript{66} Ellis, supra note 63, at 289-90.
Nevertheless, one positive message which can be drawn from this provision is that, in situations other than those specified, the Race Directive (and its partner Framework Directive) is intended to apply to all persons within the EU irrespective of their nationality.

Ellis continues, however, that:

The breadth of the wording used is significant and regrettable; in particular, the final phrase of the provision permits ‘any’ adverse treatment of third-country nationals and stateless persons which is based on their status.

Therefore, there are significant gaps in the protection of third-country nationals against racial and nationality discrimination. Will the Charter of Fundamental Rights of the Union, which forms Part II of the Draft Constitution, bring any changes in this respect? Title III, entitled ‘Equality’, starts in Article II-80 with stating that ‘everyone is equal before the law’. The next Article, II-81, contains a clear prohibition of discrimination:

(a) Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

(b) Within the scope of application of the Constitution and without prejudice to any of its specific provisions any discrimination on grounds of nationality shall be prohibited.

It will be clear from the words ‘any grounds such as’ that paragraph 1 contains a non-exhaustive or open-ended list of grounds. Although this list is very extensive, it does not contain any reference to nationality or national origin, unlike Article 14 ECHR, upon which it draws. Discrimination on grounds of nationality is instead covered by the second paragraph, which according to the Explanatory Memorandum 67 ‘corresponds to Article I-4(2) of the Constitution and must be applied in compliance with that Article’.

Article I-4(2) echoes the present Article 12 EC, and, therefore, it is likely that the

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67 CONV 828/1/03, REV 1, Updated Explanations Relating to the Complete Text of the Charter of Fundamental Rights of the European Union (as amended by the European Convention and incorporated as Part II of the Treaty on a Constitution for Europe), Brussels, 18/06/03.
Article I-4(2) echoes the present Article 12 EC, and, therefore, it is likely that the interpretation of this article and Article II-81(2) will follow the interpretation given to Article 12 EC. And, as that article has always been interpreted by the ECJ as covering only EU nationals, the Charter does not extend the protection against nationality discrimination to third-country nationals. Several authors have criticised this. According to Bell, this 'places the Charter in a poor light when compared with Article 14 ECHR'.

Nevertheless, there are some other EU measures which provide protection for third-country nationals and these provisions alleviate somewhat the problems created by the exceptions in Article 3(2) of the Race Directive. Firstly, nationals from countries which have Association Agreements with the EU are protected against nationality discrimination as these Agreements state that the treatment accorded to workers (of Turkish, Romanian, Bulgarian, Tunisian, Moroccan, and Algerian nationality) employed on the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration and dismissal, relative to the Member States own nationals. Some of these Agreements go further and also provide for security of residence or a right to establishment in a Member State.

Secondly, in November 2003, a Directive on the status of third-country nationals who are long-term residents was adopted, which determines that third-country nationals who have been resident in a EU Member State for 5 years or more can acquire

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69 Bell, supra note 68, at 99.

70 See the Association Agreements: Turkey, Article 9 [1964] OJ 217/3685; Romania, Article 38(1) [1994] OJ L 357/2; Bulgaria, Article 38(1) [1994] OJ L 358/3; Tunisia, Article 64 [1998] OJ L 97/2; Morocco, Article 64 [2000] OJ L 70/2; Algeria, Article 67 COM (2002) 157. (Note that as of 1 January 2007, Romania and Bulgaria have joined the EU as Member States.)

long-term resident status. This status gives them the right to equal treatment with nationals in a large number of areas.

Thirdly, Recital 8 of the Race Directive mentions that the Employment Guidelines 2000 ‘stress the need to foster conditions for a socially inclusive labour market by formulating a coherent set of policies aimed at combating discrimination against groups such as ethnic minorities’. The 1999 Guidelines consider, under the heading ‘promoting a labour market open to all’, that ‘many groups and individuals experience particular difficulties in acquiring relevant skills and in gaining access to, and remaining in the labour market’. The guideline requires the Member States to:

Give special attention to the needs of the disabled, ethnic minorities and other groups and individuals who may be disadvantaged, and develop appropriate forms of preventive and active policies to promote their integration into the labour market.72

Promoting integration and labour market participation and combating discrimination against people at a disadvantage in that market has been part of the guidelines since then.73 These employment guidelines thus include ethnic minority groups and they do not specify anywhere that these only include nationals of EU Member States. Therefore, it must be taken that third-country nationals are also included in the Employment Strategy. As Bell writes: ‘To the extent that the Employment Strategy is bringing third country nationals back into the picture, then it offers a valuable complement to the limits of the Race Directive’.74 The European Employment Strategy uses the Open Method of Coordination (OMC) procedure. Under the Employment OMC, the Council adopts annual guidelines for employment and the Member States make up National

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74 Bell, supra note 72, at 64.
Action Plans to report on their progress towards these guidelines. The Council and the Commission then make up a joint Employment Report which monitors progress and sets priorities for the coming year. Therefore, the Guidelines depend on peer review and exchange of good practices in order to monitor progress towards agreed goals. So, although the Guidelines are not judicially enforceable, they could play an important role in the integration of ethnic minority people, including third-country nationals, at a disadvantage in the labour market.

Article 6 of the Race Directive makes clear that the Directive contains minimum requirements that need to be implemented by the Member States and that ‘Member States may introduce or maintain provisions which are more favourable’. Therefore, the Member States could provide protection against racial discrimination to all persons on their territory irrespective of status or nationality without exceptions. But if they want to make exceptions, they could look to the ICERD for guidance – as all EU Member States have signed and ratified this Convention. As we discussed in Chapter 4, the ICERD also makes exceptions for distinctions between citizens and non-citizens (in Article 1(2)) and for legal decisions of States concerning nationality, citizenship and naturalisation (in Article 1(3)). However, according to the CERD, Article 1(2) must be constructed narrowly and differential treatment of non-citizens will be considered discrimination, unless it is objectively justified, while Article 1(3) contains a proviso to the exception: such provisions must not discriminate against any particular nationality. The EU Member States could not make any exceptions, or they could only allow the exceptions mentioned in Article 3(2) if they are objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. A third alternative would be to add a proviso similar to the one in Article 1(3) ICERD. All three alternatives would provide more protection for third-country nationals than Article 3(2) of the Race Directive does.
3.2.3 Other Grounds of Article 13 EC

3.2.3.1 Religion or Belief

In this section, we discuss the question whether any of the other grounds mentioned in Article 13 EC should be included in the Race Directive. The Race Directive covers racial or ethnic origin discrimination, while the Framework Directive covers discrimination on the grounds of religion or belief, disability, age and sexual orientation. Sex is covered by the Equal Treatment Directives. We have seen that the protection provided against racial or ethnic origin discrimination is more extensive than the protection provided against discrimination on the grounds in the Framework Directive. We also mentioned that this was the result of the political will to go further in the fight against racial and ethnic origin discrimination and suggested some factors that influenced this political will. The strong and sustained pressure by a large number of NGOs and by the European Parliament for action against racial discrimination mentioned before could also have influenced the stronger protection given to that form of discrimination.

But are there differences in character between the grounds that could also have influenced the difference in protection provided? Is race/racial or ethnic origin in any way different from the other grounds? Bell and Waddington\(^75\) write that some grounds of discrimination can result in an individual being temporarily not available or not able to do a job or use a good or service. They make a distinction between grounds that are always irrelevant for the employment/access situation, like racial or ethnic origin, sexual orientation and gender; and, grounds that are sometimes relevant. The latter category is subdivided between grounds that limit the availability to do a job or use a good or service, like sex in relation to maternity and religion with regard to times of

worship, religious holidays and periods of pilgrimage; and grounds that can limit both the availability and the ability to do so, like age and disability.

Schiek\(^76\) makes a different distinction; she discerns, firstly, characteristics that 'only exist as ascriptions - despite being construed as unchangeable'. The most obvious example here is race: 'there is no scientific justification for describing different human groupings as races'. Race is an ascription because racist categorisation is beyond the control of the person affected. Other ascriptions are gender '(to be distinguished from sex)', and disability, but the latter only in part. Schiek's second category contains those characteristics 'which are in some way or other referable to a biological basis' and reflect real biological differences, such as sex, age and, under different aspects, disability. These characteristics 'may restrict the market value or employability of persons'. Or, in the words of Bell and Waddington above, they may affect the ability and/or availability of a person to do a job or use a good or service. The third category contains characteristics which reflect a chosen lifestyle or chosen difference in identity, like ethnicity or religion, sexual orientation or political conviction. This category presupposes that persons convey information about themselves, which allows categorisation. It is questionable whether religion and sexual orientation (and even ethnicity) is something that a person freely chooses and can control and, also, whether discrimination on these grounds only takes place when the person discriminated against conveys this information about him/herself. Discrimination will often take place because a person is perceived to be of a particular religion, ethnicity or sexual orientation, and then it would come closer to an ascription. Gerards mentions the 'immutability of the personal characteristic used as a basis for the distinction' and suggests that 'immutability' should be given a broad interpretation 'as to mean all characteristics that cannot be changed without infringing the essence of an individual’s

identity. In this broad interpretation, religion and sexual orientation (and possibly also ethnicity) can be seen as immutable characteristics, which would come closer to characteristics that are beyond the control of the person affected. But they would still be different in character from race, because race is an ascription of something that does not exist, while different religions, ethnicities and sexual orientations do exist.

Although the writers mentioned make slightly different distinctions, the above does suggest that there are differences in character between the grounds and these may justify treating race/racial or ethnic origin differently. We can conclude that race is an ascribed characteristic which is always irrelevant because it does not affect a person’s ability or availability to do a job or use a good or service. Discrimination on racial grounds is thus particularly invidious. Of the Article 13 EC grounds, sex and religion can affect a person’s availability, while disability and age can affect both a person’s ability and the availability to a greater or lesser extent. Sexual orientation, like race, does not affect either, but there is a difference in character between the two, even if we take both to be ascriptions. This would lead to the conclusion that all the grounds covered by the Framework Directive are in some way different in character from racial or ethnic origin and this would thus be an argument for treating the latter ground differently. Or, to put it another way, it would be an argument for keeping the two Directives as they are and for not extending the Race Directive to cover any of the other grounds.

Are there any other arguments for including any of the grounds covered by the Framework Directive in the Race Directive? We would argue that religion or belief should be covered in the same Directive as racial or ethnic origin. The Race Directive

Gerards, Janneke, “Intensity of Judicial Review in Equal Treatment Cases” 51, Netherlands International Law Review 135-83 (2004), at 164-5. Gerards discusses the factors that influence the level of scrutiny a court uses when deciding equal treatment cases. The personal characteristic used as a basis for the distinction is one of those factors.

has been strongly criticised for omitting this ground from its protected grounds, because religion is often closely related to racial and ethnic origin, so it can be difficult to distinguish between the two. Racial discrimination may be interwoven with discrimination on grounds of a person’s adherence to a (minority) religion or ethnicity. Therefore, it is often difficult to draw a clear and precise line between racial or ethnic origin and religion or belief.

The following provide some illustrations of the problem. In 1993, the European Parliament called on the Council to adopt a Directive introducing national legislation designed to combat racism, xenophobia and anti-Semitism. This Resolution does not contain definitions of these terms, but it mentions anti-Semitism and other forms of religious intolerance (my italics). This would suggest that the Parliament saw anti-Semitism as a form of religious intolerance. Does this mean that it considered Jews a religious group rather than a racial or ethnic group? The Resolution also mentions ‘racism, anti-Semitism, or religious intolerance’, which would suggest that anti-Semitism is different from religious intolerance and from racism. Therefore, the European Parliament appears to be unclear whether religious intolerance and anti-Semitism are forms of racism.

The case law under the British Race Relations Act 1976 is another example. As we mentioned, under this Act, Jews, Sikhs and Gypsies are considered to be racial groups, while Muslims and Rastafarians are not. Although the regulation implementing the Framework Directive remedied this gap in protection in the employment sphere, the

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81 Ibid. para A.

82 Ibid. para 1.
exclusion of Muslims from protection against discrimination has proved to be especially problematic after the events of 11 September 2001 in the US and the Madrid and London bombings. However, the Equality Act 2006 will extend the protection against discrimination on the grounds of religion or belief to the provision of goods, facilities, services, the disposal and management of premises, education and the exercise of public functions. This part of the Act will come into force in April 2007.

In their General Policy Paper on religious discrimination, ENAR expresses the problem very well:

Discrimination on the grounds of religion or belief and racism are inextricably linked. They can often be fused in the identification of the racialised ‘other’; or the line between these forms of prejudice can be blurred.

Another reason why the omission of religion or belief in the Race Directive has been criticised is connected to the fact we have mentioned above, that the protection against discrimination on religious grounds under the Framework Directive is not as extensive as the protection against discrimination on racial or ethnic origin grounds under the Race Directive. This difference in protection, and especially the limitation of the material scope of the Framework Directive to the employment sphere, might create a loophole: perpetrators could claim that they discriminate against victims because of their religion rather than because of their racial or ethnic origin and so evade legal action. As the ENAR paper states:

Religion or belief are often used to justify racial discrimination, and can be used to obscure racist motivations. This reality is compounded by the fact that the perpetrators of racist acts do not necessarily distinguish between nationality, culture or religious background.

The European Parliament appears to have been aware of this problem as it suggested the following addition to Article 2 of the Race Directive:

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Discrimination on the basis of racial or ethnic origin which is presented as a difference in treatment on the grounds of religion, conviction or nationality is deemed to be discrimination within the meaning of Article 1.\textsuperscript{84}

Both Bell\textsuperscript{85} and Brown\textsuperscript{86} suggest that discrimination on the grounds of religion or belief might be covered by indirect racial discrimination under the Directive, because religious discrimination will disproportionately affect people belonging to an ethnic minority. Whether this is indeed the case will ultimately be decided by the ECJ. Of course, the Member States are free to extend the protection against religious discrimination to some or all the areas covered by the Race Directive, as Britain does in the Equality Act 2006.

The ‘Starting Line’, the proposal for a draft Directive from the Starting Line Group, covered, as mentioned, race, colour, descent, nationality, national and ethnic origin. So it did not include religion as a protected ground. However, the ‘New Starting Line’, the draft proposal the Group issued after the Treaty of Amsterdam inserted Article 13 into the EC Treaty, included religion or belief.\textsuperscript{87} The Group declared that it had opted to cover racial or ethnic origin and religion or belief in one Directive because they had been mentioned together in a number of Declarations made at Community level and because they might arise from overlapping causes:

against Jews, for example (are they being identified by the discriminator as a racial or a religious group?) and even against Muslims in cases where hostility to north Africans and Turks may spring from one cause or the other, or perhaps both together.\textsuperscript{88}

Both definitions of racism given above as examples - in ECRI Recommendation 7 and in the Proposal for a Framework Decision – also specifically include religion. The inclusion in the ECRI Recommendation shows that the Council of Europe does not differentiate between religious and racial discrimination, whereas the EU sends out


\textsuperscript{85} Bell, in Chopin and Niessen (2001), supra note 63, at 25.

\textsuperscript{86} Brown, supra note 37, at 204-5.

\textsuperscript{87} Supra note 58, at 19.

\textsuperscript{88} Ibid. at 20.
mixed signals: the two Directives suggest that the EU makes a difference, but the definition in the Proposal suggests it does not. The difference between the grounds covered by the Race Directive and those covered by the Proposal, both EU measures aiming to combat racism, is likely to create confusion and lead to problems in interpretation. But this difference in definition appears to have been one of the stumbling blocks in the negotiations of the Proposal in the Council. As Bell\textsuperscript{89} writes:

The breadth of this definition was significant, not least because it contrasts with the Racial Equality Directive, which only applies to discrimination on grounds of ‘racial or ethnic origin’. Most notably, the Commission sought to include prejudices linked to ‘religion or belief’ within the concept of racism and xenophobia, whereas discrimination on grounds of religion or belief has been treated as distinct from racial discrimination in the Directives adopted under Article 13EC. ... It is not surprising then that this aspect of the proposal has proven highly contentious in the Council.

It will be interesting to see whether the German presidency will succeed in reaching agreement on this Proposal.

For the above reasons, it is argued here that religion or belief should be included in the grounds covered by the Race Directive. The only argument against treating discrimination on the ground of religion and belief the same as that on the ground of race would be that racial or ethnic origin and religion or belief as grounds are slightly different in character. If we take Bell and Waddington’s distinction,\textsuperscript{90} based on a person’s ability or availability to do a job or use a good or service, then the two grounds are different: a person’s race will not affect this, but his/her religion can affect his/her availability. The inclusion of a duty to make reasonable accommodation in case of religion would solve this problem. For example, providing a place and time for religious worship and adapting patterns of working time could prevent discrimination on

\textsuperscript{89} Bell, Mark, “European Union Strategies to Combat Racism and Xenophobia as a Crime” in: Nickel, Coomber, Bell, Hutchinson, and Zahi, supra note 49, 31-7, at 34.

\textsuperscript{90} Bell and Waddington 2003, above note 75, at 359-63.
religious grounds. If a duty to make reasonable accommodation is included, there appears to be no reason why the Race Directive could not also cover discrimination on the ground of religion or belief.

Another point needs to be raised at this stage. From the above discussion, and especially from the Reports Brennan writes about (quoted above): 'that discriminators do not generally know the ethnic or national background of the victim'; from the quote from ENAR 'that the perpetrators of racist acts do not necessarily distinguish between nationality, culture or religious background'; and, from the quote from the Starting Line Group, it will be clear that discriminators more often than not do not distinguish clearly between race, colour, descent, religion or nationality when they discriminate and that their behaviour may spring from any one or more or all of these causes. This would be another argument for including colour, descent, nationality and religion or belief in the grounds covered by the Race Directive.

However, it might be difficult to reach unanimity on this. Religion or belief appears to be a more contentious issue in many Member States. Why is this so? It is suggested that, although there is a wide variety of traditions regarding the interaction between church and state, the Member States are all traditionally Christian States and, even in countries that have a strict separation, the Christian churches have played and are frequently still playing a major part in the daily life of the society. They often also have quite significant influence in the political process. These churches and religious organisations see legislation against religious discrimination as limiting their freedom to

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92 Brennan, supra note 37, at 320-1.
93 Supra note 83.
94 Supra note 87.
employ only people with the same religion or religious ethos. This is also the likely reason behind the inclusion of Article 4(2) of the Framework Directive.

Article 4(2) adds an extra genuine occupational requirement exception for occupational activities of churches and other organisations with an ethos based on religion or belief. This allows religious organisations to take religion and belief into account in recruitment decisions where national law or practice allows this already, but this 'should not justify discrimination on any other ground'. Article 4(2) also determines that, in regard to existing employees, religious organisations can 'require individuals working for them to act in good faith and with loyalty to the organisation's ethos'.  

During the negotiations, France and Sweden questioned the need for this second paragraph because it repeats the provision in Article 4(1). Waddington and Ellis both see Article 4(2) as unnecessary as well. However, the other Member States, probably influenced by pressure from churches and other religious organisations, did see the need for this extra paragraph.

Religion is also a contentious issue because many Member States have seen an 'influx of Islamic migrants who practise and promote their religion in a more prominent and public fashion, going against the general trend among the Christian denominations which is to see one's religion increasingly as a private, publicly less prominent issue', as Zwamborn writes. Although he writes specifically about the Netherlands, it is submitted that this process has taken/is taking place in many other Member States as well. Most are becoming more and more secularised in terms of traditional religious practices and church attendance in the Christian churches. On the other hand, the

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96 Article 4(2) of the final text is considerably different from the proposal and was also changed during the negotiations. See the Framework Directive, the Proposal for this Directive (COM (1999) 565, supra note 1, and Council of the European Union, Outcome of Proceedings of the Social Questions Working Party, 9423/00 of 20/06/2000, at 16.
97 Council Paper 9423/00, supra note 96.
98 Waddington, supra note 91, at 179.
99 Ellis, supra note 63, at 283.
100 See the Report on the Netherlands, supra note 95, at 1.
to these values. But they are not only seen as a threat to these Christian values, but also, and even more strongly, as a threat to the liberal value of tolerance.

Because Muslims are often the biggest and most vociferous group amongst the new migrants and because of the events of 9/11 and bombings in Madrid and London, many Member States perceive especially Muslims as a threat to their liberal, tolerant, secular societies. Muslims are seen as putting religion and religious laws above these liberal values and above ‘the law of the land’. They are seen as a threat because they demand too much in terms of legal concessions in relation to their values, which are considered to clash with the values of the Member State. The debates in many Member States about the wearing by Muslim women of the *hijab*, the *niqab* and the *burqa*\(^{101}\) are illustrative of this.

For example, in France,\(^ {102}\) government employees, including teachers at state schools, are prohibited from wearing religious symbols at work. In 2004, France adopted a law prohibiting the wearing of signs or dress by which pupils openly manifested a religious affiliation in state primary and secondary schools. In Germany, the Constitutional Court has held that the states could ban teachers from wearing *hijabs* as long as they did this in specific legislation which complied with the Constitution. A number of German states have banned teachers and public servants from wearing *hijabs*.

In Belgium and the Netherlands, the wearing of the *hijab* has been debated but the focus here seems to be more on the wearing of the *burqa* in public. In Belgium, a number of local councils have banned the wearing of the *burqa* in public places, while the Netherlands is considering a ban on the wearing of the *burqa* in public places such

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\(^{101}\) The *hijab* is a scarf that covers the hair and neck, but leaves the face free. The *niqab* is a veil that covers the head and face with the exception of the eyes. The *burqa* is a loose robe that covers the female from head to toe with the exception of the hands and with gauze covering or a slit for the eyes.

\(^{102}\) For more information on the way France and a number of other European countries have dealt with the wearing of Islamic headscarves, see McGoldrick, Dominic, *Human Rights and Religion: the Islamic Headscarf Debate in Europe* (2006 Oxford/Portland, Oregon: Hart Publishing).
as schools, shops, public buildings, cinemas, train and bus stations and airports, for safety reasons, namely to deal with the threat of terrorism. Those supporting a ban on the *burqa* and the *niqab* often use this argument. Another argument is that wearing the *burqa* and the *niqab* is a statement of separation and difference and a barrier to communication and to integration. The argument that it is a barrier to communication is used especially in relation to teachers and people looking after children. Some also see the *burqa* and the *niqab* as a suppression of women’s rights and freedoms.

In Britain, the *Begum* case brought the question of school uniforms and Islamic dress to the fore. Following her school’s policy on uniforms, Ms. Begum had been wearing the *shalwar kameeze* for her first two years at the school. She then decided that she wanted to wear the *jilbab* because the *shalwar kameeze* did not, in her view, conform to Islamic dress requirements for mature women. The school refused to admit her unless she conformed to the uniform rules, which she refused. Two years later she went to another school where she was allowed to wear the *jilbab*. The case ended up in the House of Lords where the majority held that there was no interference with her freedom to manifest her religion under Article 9(1) ECHR because she had chosen the school fully aware of their uniform policy and because she could have gone to an alternative school. The Law Lords did consider the question of justification under Article 9(2) ECHR because of the minority view that there was an interference. They held that the school’s interference was justified. In this, the Law Lords considered the extent of the school’s effort to accommodate the religious manifestation. It had taken great pains in devising its uniform policy and, before it rejected Ms Begum’s request to

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104 *Shalwar Kameeze*: loose trousers and a sleeveless, smock-like dress. Nearly 80% of pupils at the school were Muslims and therefore the uniform policy allowed pupils to wear the *shalwar kameeze* and/or the *hijab* in the school colours.

105 *Jilbab* is a long plain dress with sleeves covering arms and legs.

106 *R (Shabina Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15. See also McGoldrick, supra note 102, at 180-203.
wear the *jilbab*, it had taken advice and was told that its uniform policy conformed to mainstream Muslim opinion.

In their decision on justification in the *Begum* case, the House of Lords considered the judgment of the European Court of Human Rights in the *Leyla Sahin v Turkey* case. In this case, the Court held that a ban on wearing the *hijab* at universities in Turkey was an interference with Ms Sahin’s freedom to manifest her religion, but that this interference was justified because it had a legal basis and pursued the legitimate aims of protecting the rights and freedoms of others and of protecting public order; and, because it was necessary in a democratic society as it was based on the principles of secularism and equality. Imposing limitations on the freedom to wear the *hijab* could be regarded as meeting a pressing social need by seeking to achieve these two legitimate aims, especially since the religious symbol had taken on political significance in Turkey in recent years. Some extremist political movements in Turkey sought to impose on society as a whole their religious symbols and conceptions of a society founded on religious precepts. The regulations on the wearing of the *hijab* were manifestly intended to preserve the secular nature of universities and the Court thus held that they were justified under Article 9 (2) ECHR.

There is a difference between the examples from the EU Member States and the *Sahin* case, because Turkey is a state where 99% of the population is Muslim, while the EU Member States are mostly Christian. But Turkey has been a secular state since 1923 and the *hijab* ban at universities was seen as preserving and promoting secularism. However, what these examples of the problems with Islamic forms of dress in the EU Member States clearly show is that religion is a sensitive issue and, therefore, that it might be difficult to reach the required unanimity for extending the grounds covered by the Race Directive to include religion or belief.

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108 This is one of the reasons why many people see the accession of Turkey to the EU as problematic.
3.2.3.2 Sex, Disability, Age and Sexual Orientation

Should any of the other grounds of Article 13 EC be included in the Race Directive? Having different instruments means that there is a need to draw distinct lines between the different grounds, which, as we have mentioned, is not always easy. This is the reason why we have argued for an extension of the grounds covered by the Race Directive to include religion or belief. The other grounds of Article 13 EC are easier to distinguish from racial or ethnic origin and from religion or belief, so they do not need to be included under the grounds covered by the Race Directive for this reason.

The different levels of protection provided do, however, lead to a problem in cases of multiple discrimination: where a person is discriminated against on two or more grounds, for example a woman is discriminated against because she is disabled, black and female. Any one of these might be the reason why she is discriminated against, or it might be because she is all three. If she is discriminated against in education, she could take action because of racial discrimination, but not on the other grounds. If a white disabled woman were treated in the same way, there would be no unfavourable treatment on the grounds of racial or ethnic origin. If a black disabled man or a black able-bodied woman or man were treated differently, there would be no action, because the Equal Treatment Directives and the Framework Directive do not cover education. Both the Race and Framework Directives explicitly recognise the possibility of multiple discrimination, of the possibility that sexual discrimination can go together with discrimination on any of the other grounds covered in the Directives.

Recital 14 of the Preamble to the Race Directive states:

In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination (my italics).
The Framework Directive contains the same in Recital 3, but the term ‘multiple discrimination’ does not appear anywhere else in either of these Directives and no definition is given nor any indication as to how to deal with cases of multiple discrimination. And, as Fredman writes, ‘no concrete links are made as between the directives, and cumulative discrimination on other grounds ... is not dealt with’. 109

The Action Programme mentions multiple discrimination a number of times. Firstly, Recital 4 of the Action Programme is similar to Recital 14 of the Race Directive. Secondly, Recital 5 states that ‘the different forms of discrimination cannot be ranked; all are equally intolerable’, and that the programme is intended, among other things, ‘to develop new practice and policy for combating discrimination, including multiple discrimination’. And, thirdly, Article 2 on the objectives of the Action Programme, mentions that ‘the Programme shall support and supplement the efforts at Community level and in the Member States to promote measures to prevent and combat discrimination whether based on one or on multiple factors ...’. However, the Programme does not give any definition or any further explanation as to how to deal with multiple discrimination.

In the proposed 2006 Work Plan under the Community Action Programme, the Commission announces that three new studies will be conducted to ‘improve the understanding of the concept of roots and causes of discrimination’. One will be a study on multiple discrimination, with among its objectives, ‘to raise awareness of the particular difficulties victims of multiple discrimination face’. 110 Again there are no indications as to how to deal with cases of multiple discrimination, but the recognition


of the problems faced by victims is encouraging and it is to be hoped that the study itself will suggests ways of dealing with these problems.

An interesting point is made in the Explanatory Memorandum to ECRI's General Policy Recommendation 7.\textsuperscript{111} Paragraph 13 reads:

Discriminatory actions are rarely based solely on one or more of the enumerated grounds, but are rather based on a combination of these grounds with other factors. For discrimination to occur, it is therefore sufficient that one of the enumerated grounds constitutes one of the factors leading to differential treatment. The use of restrictive expressions such as 'difference of treatment solely or exclusively based on grounds such as ...

ECRI thus recommends that discrimination should be prohibited if it is based on one of the enumerated grounds, no matter whether this is the only factor leading to the discrimination or if it is one of a number of enumerated and other grounds. This suggests that ECRI favours a wide definition of discrimination, which includes multiple discrimination. If national legislation followed ECRI's Recommendation then unlawful discrimination would be found in the case mentioned above of the black disabled woman and it would not be necessary to provide proof that she was discriminated against because of race and sex and disability. Proof of discrimination of any one of these grounds would be sufficient.

4 Conclusion

In this Chapter, we have analysed the Race Directive in the context of the concepts of race, racism and racial discrimination discussed in Chapter 1. The negotiations on the Directives show that the terms race and racism are still very much linked to the negative use that was made of them in the past and are, therefore, still problematic for many Member States.

\textsuperscript{111} Supra note 47.
Despite discussions since the 1980s about the problems racism and racial discrimination posed for the EU, it was held that the Community did not have the competence to act against discrimination. However, this lack of competence was used as a 'smokescreen' to hide behind: if the Council had wanted to take action, it would have found a way to do so. This is clear from the fact that, once the mood changed, action was taken very quickly and Article 13 was added to the EC Treaty, establishing the Community competence to act against discrimination based on sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation. The Commission issued three proposals for legislation soon after this and within 7 months the Race Directive was adopted, followed 5 months later by the Framework Directive and the Action Programme. After the initial reluctance to take community action was overcome and the competence to take such action was established, the political will was strong enough to accept a Directive against racial and ethnic origin discrimination with a very wide scope.

Our analysis has shown that the Race Directive and many national and international measures against race discrimination do not give a definition of race or racism, but only define racial discrimination. It was suggested that this omission might be preferable, because it is difficult to give a definition that would be useful in legal proceedings. However, some definitions exist and there is even a definition of 'racism and xenophobia' in the EU: in the 2001 Proposal for a Framework Decision.¹¹² The EU Member States are free to include a definition in their national law and could follow one of the examples we mentioned. If they do, the EU definition in the Proposal would be preferable because using the same definition in different EU measures aimed at combating racism and racial discrimination will avoid problems in interpretation. However, it is not clear if the Proposal will actually ever be adopted, as the political will

¹¹² Supra note 45.
to do so appears to be missing. But maybe the plans of the German Presidency to put the Proposal back on the agenda will lead to its adoption.

A definition of race/racial or ethnic origin is also missing from the Race Directive, but we have suggested that it would be preferable if the terms include colour, descent, nationality and religion or belief, because it is very difficult to draw clear distinctions between any of these grounds and discriminators often do not make such distinctions anyway. Colour and descent are closely related to racial and ethnic origin and it is to be hoped that the ECJ will decide that the Directive implicitly covers these grounds.

The exception for nationality and for provisions governing the entry, residence and treatment of third-country nationals and stateless persons made in Article 3(2) of the Directive has been strongly criticised for being overly broad and for not providing sufficient protection for third-country nationals. This is seen as one of the major problems with the Race Directive and hopefully the Member States will introduce legislation which gives more protection than the minimum standard provided by the Directive.

We have argued for including religion or belief under the grounds covered by the Race Directive because it is difficult to distinguish between these grounds and perpetrators of discriminatory acts do not always do so; and, because the difference in protection might create a loophole to avoid prosecution. We do, however, foresee problems in reaching agreement of all the Member States on this, as religion is a very contentious issue in most Member States.

Adding colour, descent, nationality and religion or belief to the grounds of discrimination covered by the Race Directive would deal with some of the major points of criticism levelled against it and bring it more in line with the definition of the proposed Framework Decision. The other grounds of Article 13 EC: sex, disability, age
and sexual orientation, do not necessarily need to be included in the Race Directive. However, there are differences in the levels of protection afforded by the different Equality Directives which mean that clear lines need to be drawn between the different discrimination grounds. This can lead to problems in cases of multiple discrimination.

The EU Member States could provide the same protection against discrimination on all the grounds mentioned in Article 13 EC by extending the material scope of the Framework and the Equal Treatment Directives to include all the areas included in the Race Directive. This could be done either in one legislative instrument or in more than one. The Member States could also extend the number of grounds if they so wish. The Irish Equal Status Act 2000, mentioned in our introduction, is an example where all the grounds of Article 13 EC and some others are all provided for in the same law. The European Commission, in a Green Paper in 2004, expressed its approval that some Member States had gone beyond the minimum standards set out in Community legislation: some had extended the protection beyond employment to discrimination on the grounds of religion or belief, disability, age and sexual orientation; some had opted for a single legislative framework addressing all grounds; and, many had established single equality bodies dealing with all the grounds of discrimination covered by the Directives.113 These equality bodies will be part of the discussion on the different models of equality that can be detected in the Race Directive in the next Chapter.

CHAPTER 6 - THE RACE DIRECTIVE: CONCEPTS OF EQUALITY AND MODELS OF ANTI DISCRIMINATION LAW

1 Introduction

In the previous Chapter we analysed the Race Directive in relation to the concepts of race and racism. In Chapter 1, we discussed the term equality and established that four concepts of equality can be distinguished. In Chapter 2, we developed these concepts of equality into models of anti discrimination law, using the same terms to refer to each model to make clear that each model aims to establish the type of equality it corresponds with. We distinguished the following four models of anti discrimination law: the equal treatment model, the equality of opportunity model, the equality of results model and the pluralist model. Legislation in the equal treatment model aims to establish formal equality; it aims to prevent people in the same or similar situations being treated differently on the grounds of their racial or ethnic origin. Laws based on the equality of opportunity model aim to achieve equal opportunities for everyone; they aim to equalise the starting point so that historically disadvantaged groups can compete on an equal footing with people who did not suffer such disadvantage, by prescribing or permitting preferential treatment of these groups. Measures against discrimination based on the equality of results model aim for an equal outcome; aim for a fairer distribution of goods, resources and opportunities in society and for the equal participation of all. This also involves preferential treatment of the disadvantaged groups. The equality of opportunity and the equality of results models are together referred to as substantive models of anti discrimination law. Finally, legislation based on the pluralist model aims to create a society that welcomes and celebrates diversity and in which each person is respected equally. This Chapter assesses which models of anti discrimination law can be detected in the Race Directive.
The question what types of equality should be the aim of the equality legislation at the EU level did not appear to feature in any explicit form in the discussions and negotiations before the Directive was adopted, although there seems to have been a consensus that legislative prohibitions on discrimination should include both direct and indirect discrimination and that there should be room for positive action.\textsuperscript{1} The concepts of indirect discrimination and positive action were familiar from the existing sex discrimination legislation and had been part of the proposals for a Community Directive made by the Starting Line Group.\textsuperscript{2} As mentioned in the previous Chapter, this group, together with the European Parliament, played an important role in lobbying for action against racism and racial discrimination in the EU. The Kahn Commission also recommended that indirect discrimination should be prohibited in EU anti discrimination legislation and that this legislation should make provisions for positive action.\textsuperscript{3}

At the time the Race Directive was proposed and during the negotiations, the main focus appears to have been on achieving the adoption of legislation at EU level in order to lay down minimum standards for all Member States. As the Commission itself stated in the Explanatory Memorandum to the Proposal for the Race Directive, that Directive would ensure ‘that people in all Member States enjoy a basic level of protection against discrimination’.\textsuperscript{4} Once these minimum standards were laid down in EU legislation and the deadline for implementation of the Race and Framework Directives had passed, the language within the EU started to shift towards an awareness

\textsuperscript{1} The Explanatory Memorandum to the Proposal for the Race Directive does recognise that some groups suffered disadvantage because of discrimination. See COM (1999), 566, at 6. We discuss this further when we analyse the positive action provisions of the Race Directive.


\textsuperscript{4} Supra note 1, at 3.
of the limitations of formal equality and the need to go beyond this. This shift in language and the question whether this is translated into concrete measures will be part of the discussion in this Chapter. We first look at the Race Directive in relation to each model of anti discrimination law in turn.

2 Formal Equality Model of Anti Discrimination Law


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\text{direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin.}
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This reflects clearly a formal notion of equality, prohibiting less favourable treatment than a person in the same circumstances.

This definition of direct discrimination did not appear to cause particular difficulties in the negotiations of the Race Directive.\(^5\) It is close to that used in the British Race Relations Act 1976\(^6\) and what has been understood as direct discrimination by the ECJ in its case law on sex discrimination. This case law was the only guideline at EU level, as there have been no legislative measures containing a definition of direct discrimination until the Race Directive. The case law asks for a comparison to be made between a man and a woman in the same or a comparable situation. In Defrenne v Sabena No. 2,\(^7\) the ECJ held that direct discrimination may be ‘identified solely by reference to the criteria laid down by Article 119 (now 141) EC’. This Article prescribes equal pay for men and women doing equal work or work of equal value, which means

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\(^6\) Section 1(1)(a) RRA 1976.

\(^7\) Case C-43/75 Defrenne v Sabena No.2 [1976] ECR 455, at para 21.
that a comparison has to be made. The ECJ continues that these forms of discrimination 'may be detected on the basis of a purely legal analysis of the situation. This applies even more in cases where men and women receive unequal pay for equal work carried out in the same establishment or service ...'. In Macarthys v Smith, the ECJ used a comparative test; it considered that in a situation of direct discrimination, 'the decisive test lies in establishing whether there is a difference in treatment between a man and a woman performing “equal work”'. In para 15, the ECJ again mentions that 'comparisons are confined to parallels which may be drawn on the basis of concrete appraisals of the work actually performed by employees of different sex within the same establishment or service'.

Therefore, the definition makes it necessary to identify a ‘comparable situation’, but there is no indication as to the meaning of this. The test has been used in sex discrimination cases, but not always without problems. In both Chapters 1 and 2, one of the problems identified in relation to the concept of formal equality and the formal equality model of anti discrimination law was the need to find someone in a comparable situation. But who is in a comparable situation? The choice of comparator is important because it can influence the result. The use of the words 'would be' in the definition in the Race Directive suggests that a hypothetical comparator can be accepted, although the ECJ has rejected such a comparator in sex discrimination cases. The ECJ has made an exception in cases of discrimination on grounds of pregnancy, where it has held that

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8 Ibid. at paras 21 and 22.
no comparator is required. However, it seems likely that the situation in sex discrimination cases will now change, because the two new Equal Treatment Directives contain the same definition, including the words ‘would be’. Ellis writes that as a result of the amendment of the Equal Treatment Directive, ‘this now defines discrimination so as to embrace hypothetical comparison’. She continues that ‘the Race Directive and the Framework Directive expressly permit hypothetical comparisons over the whole field of their respective application’. In many cases of direct discrimination, it will be easier to find a hypothetical comparator and the possibility of using such a comparator in cases of discrimination on all Article 13 EC grounds including sex will alleviate one of the problems with the formal equality concept and model.

In Chapter 2, we mentioned the three functions that are required by equality if it is to combat racism, distinguished by Fredman: a means of redressing racist stigma, stereotyping and humiliation; the redistributive aim of breaking the cycle of disadvantage associated with groups defined by race or ethnicity; and, the positive affirmation and accommodation of difference.

Following on from this, it is submitted that legislation against racial discrimination should aim to establish equality in all its four concepts, or, by the same token, should perform all three functions Fredman mentions. In other words, legislation based on all four models is needed in the fight against racism and racial discrimination. The prohibition of direct discrimination or of unequal or less favourable treatment on the grounds of racial or ethnic origin can be seen as performing the first function and is, therefore, important because it is the minimum first step to attack racial prejudice and prohibit behaviour based on such prejudice.

11 In Case C-177/88 Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV Centrum) Plus [1990] ECR 1-3941, the ECJ held that discrimination on grounds of pregnancy contravenes the equal treatment principle and that there is no need for a comparator in such case (at para 12). See also Case C-32/93 Webb v EMO Air Cargo (UK) Ltd [1994] ECR I-3567, at para 24 and 25.

12 Ellis, supra note 10, at 165.

In Chapters 1 and 2, we also saw that both the notion and the model of formal equality were criticised for being relative principles which do not guarantee any particular outcome, as treating two people equally can mean treating them both equally well or equally badly. Article 6 of the Race Directive might remedy this problem to some extent. This article contains a so-called ‘non-regression clause’: the implementation of the Directive shall under no circumstances constitute grounds for reducing the already existing level of protection. This can be seen as a ‘prohibition on levelling-down’, so equal treatment can no longer be achieved by limiting or taking away existing benefits. However, the Directive is addressed to the Member States, and therefore only binds these States. Article 6 does not prevent levelling-down by individual employers or service providers.

The equal treatment concept and model can also be seen in the Charter of Fundamental Rights of the Union (Part II of the Draft EU Constitution). Title III ‘Equality’ starts in Article II-80 with stating that ‘everyone is equal before the law’. The Explanatory Memorandum mentions that this ‘corresponds to a general principle of law which is included in all European constitutions and has also been recognised by the Court of Justice as a basic principle of Community law’. It corresponds to similar articles in many of the international human rights instruments we have discussed in Chapter 4. As we have seen there, it is an expression of the formal equality model of anti discrimination law.

3 Substantive Equality Models of Anti Discrimination Legislation

The Race Directive’s title indicates that the aim of the Directive is ‘to implement the principle of equal treatment’, while Article 1 states as its purpose: ‘to lay down a


15 CONV 828/1/03, Updated Explanations Relating to the Complete Text of the Charter of Fundamental Rights of the European Union (as amended by the European Convention and incorporated as Part II of the Treaty on a Constitution for Europe), Brussels, 18/06/03.
framework for combating discrimination on the grounds of racial or ethnic origin, with a view of putting into effect in the Member States the principle of equal treatment'. The Framework and the Equal Treatment (Goods) Directives contain the same purpose in their Article 1. In this, all three Directives follow the 1976 Equal Treatment Directive. The 2002 amendments did not change this purpose. So, the expressly stated aim of the EU legislative measures against discrimination is to put into effect or to implement the principle of equal treatment. This would suggest that their aim is to establish formal equality. However, the phrase ‘put into effect’ can be read as meaning that the Directives aim at more than formal equality. As Schiek writes:

All of the directives have the purpose to ‘put into effect’ the principle of equal treatment (her italics). Thus they are not merely concerned with equality in law but also with equality in fact.

The ECJ has also held that the objective of the 1976 Equal Treatment Directive is ‘to arrive at real equality of opportunity’ for men and women. Moreover, Article 2 of the Race Directive explains that the principle of equal treatment means that ‘there shall be no direct or indirect discrimination based on racial or ethnic origin’. Therefore, the use of the words ‘put into effect’, the opinion of the ECJ and the inclusion of a concept of indirect discrimination in the meaning of the principle of equal treatment all suggest that the purpose of the EU Equality Directives goes beyond the formal concept towards a more substantive concept of equality. We have distinguished two substantive models of anti discrimination law: the equality of opportunity and the equality of results model. Next, we discuss which substantive concept of equality can be detected in the Race Directive.

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16 The 1976 Equal Treatment Directive was followed by a number of Directives implementing the principle of equal treatment for men and women in different areas, see Council Directives 79/7/EEC, 86/378/EEC, and 86/613/EEC. All these Directives state as their purpose: to implement the principle of equal treatment.

17 Schiek, supra note 10, at 305.

3.1 Indirect discrimination

As we have seen in Chapter 2, legislation prohibiting indirect discrimination can be seen as a step away from formal equality towards a more substantive concept, which has elements of both the equality of opportunity and equality of results models. Article 2(2)(b) of the Race Directive determines that:

indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

The Race Directive follows the definition of indirect discrimination given by the ECJ in relation to the free movement of persons in the O'Flynn case. The Court considered that:

... unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage. It is not necessary in this respect to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect.

Tyson writes that the definition in the Directive did not follow the definition given in the Burden of Proof Directive and that it caused some concern to a number of Member States. The Burden of Proof Directive defines indirect discrimination in Article 2(2):

indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless

20 Supra note 5, at 202-4.
21 For the suggestions made by different Member States in relation to the definition of indirect discrimination see: Council of the European Union, Outcome of Proceedings of the Social Questions Working Party, 6435/00, Brussels, 01/03/2000; idem, 6942/00, 31/03/2000; idem, 8454/00, 16/05/2000.
that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.

Tyson explains that, for a finding of indirect sex discrimination, it is thus necessary to show that a greater proportion of one sex than the other is affected. This involves statistical evidence. Note, however, that this may have changed with the Equal Treatment (Amendment) Directive (see below). In the case of sex discrimination, obtaining statistical evidence is usually not a problem, because all Member States collect statistics on gender. However, as was mentioned in Chapter 5, statistics about racial or ethnic origin are not collected in all Member States. As a result of the misuse of racial and ethnic information in the 1930s and 1940s, there is widespread opposition to the collection of such data and in some Member States it is unlawful ‘as it is seen either to be an infringement of personal privacy or as a racist act in itself’. 22

The definition in the Race Directive would thus remove the burden of providing statistical proof. This was the intention of the European Commission, as is clear from the negotiations. In answer to the remark from some of the Member States that the definition was broader than that in the Burden of Proof Directive, the Commission answered that this ‘takes new caselaw into account, which leaves out the reference to numbers’. 23 The same intention was clearly stated by the Commission’s Director General for Employment and Social Affairs, Odile Quintin, in her evidence to the House of Lords Select Committee on European Union. 24 She ‘defended the new definitions on the grounds that it removed the need to demonstrate statistically that indirect discrimination had in fact occurred’, which would make the definition easier to use because the ‘statistical assessment is something which is extremely complicated to develop for other areas of discrimination’. But some Member States wanted to retain the

22 Tyson, supra note 5, at 203.
23 See Council paper 6435/00, supra note 21, in footnote 9.
definition of the Burden of Proof Directive, because they did not want a definition that made it apparently easier to win a case of racial discrimination than a case of sex discrimination.\textsuperscript{25} Recital 15 was added to the Race Directive as a compromise. This Recital declares:

\begin{quote}
The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence.
\end{quote}

This allows, but does not oblige Member States to require statistical evidence. However, it means, as Tyson\textsuperscript{26} points out, that different tests for indirect discrimination could be applied in different Member States. This problem could be solved by removing the Recital, as the reason for the addition of the Recital now no longer exists, because the Equal Treatment (Amendment) Directive contains the same definition of indirect discrimination as the Race Directive, as do the Framework and Equal Treatment (Goods) Directives.\textsuperscript{27} Support for the argument that the Recital (and a similar Recital 15 in the Framework Directive) are no longer necessary can be found in the fact that the two Equality Directives adopted on the basis of Article 13 EC after the Race and Framework Directives – the Equal Treatment (Amendment) and the Equal Treatment (Goods) Directives – do not contain a reference to statistical evidence in their Preamble.

According to the definition, indirect discrimination is not unlawful if it is ‘objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary’. The Burden of Proof Directive also allowed for

\textsuperscript{25} See Council paper 8454/00, supra note 21, footnote 16.
\textsuperscript{26} Supra note 5, at 204.
justification: indirect discrimination is not established where the ‘provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex’. Both these exceptions follow the case law of the ECJ. In the *Bilka case*,28 the ECJ decided that it was for the national court to determine whether there was an objective justification, but it laid down a three-tier test: the measures chosen must, firstly, fulfil a real need on the part of the undertaking; secondly, be appropriate with a view of achieving the objectives pursued; and, thirdly, be necessary to that end.

The Race Directive does not allow for justification of direct racial or ethnic origin discrimination,29 but it does allow for justification of indirect discrimination. As we saw in Chapter 4, most international instruments prohibit discrimination as such, and do not make a distinction between direct and indirect discrimination. Indirect discrimination is taken as falling under the instrument’s prohibition of discrimination, usually via the case law or via advice or recommendations of the body designated to oversee the instrument. The international measures allow for justification of discrimination in general, so this includes both direct and indirect discrimination. The Race Directive did not follow the international measures in this, but instead it followed the then existing EU legislation on sex discrimination and thus gives definitions of both direct and indirect discrimination.

So why does it only allow for justification of indirect discrimination? Perhaps it is because the EU legislators saw direct discrimination as ‘worse’, as more offensive and repugnant than indirect discrimination. The EU legislator might have reasoned that direct discrimination is a more overt and noticeable form of making a difference in treatment. It can be seen as openly flouting the rule that one should not discriminate. Indirect discrimination, on the other hand, can be seen as not quite such an infringement, because it is a more ‘accidental’ result of a rule or practice. The

29 These exceptions are for genuine and determining occupational requirements (Article 4) and for positive action (Article 5).
prohibition of direct discrimination, of unequal or less favourable treatment, is the basic, most fundamental concept and the first requirement to fight racism and racial discrimination and, therefore, justifications should be strictly limited and prescribed by law. But, because indirect discrimination can be seen as a lesser infringement of the rules, it should not be prohibited in all situations, or, in other words, justification should be permitted, but only if it has a legitimate aim and the means of achieving that aim are appropriate and necessary. In cases of indirect discrimination, other interests play a role as well and a balancing of interests must take place between prohibiting the indirectly discriminatory practices and business interests and policy and administrative considerations. These interests might be present in direct discrimination cases as well, but they should never be given priority in such cases, because that form of discrimination is so much more openly against the rules and offensive. This might be the reason why direct racial or ethnic origin discrimination under the Race Directive cannot be justified.

Although the European Court of Human Rights allows for justification for both direct and indirect discrimination, in its determinations whether a difference of treatment contravenes the anti discrimination clause of article 14 ECHR it appears to deal with certain grounds of discrimination in a different way. As de Schutter explains:

although, in most cases, a difference of treatment will pass the test of non-discrimination if it pursues a legitimate aim by means of presenting a reasonable relationship of proportionality with that aim, where differential treatment is based on a 'suspect' ground, it will be required that it is justified by 'very weighty reasons' and that the difference in treatment appears both suited for realizing the legitimate aim pursued, and necessary (his italics).

The European Court of Human Rights thus requires 'very weighty reasons' before it will consider that a difference in treatment on suspect grounds is justified. Gerards\textsuperscript{31} writes that this Court will scrutinise the suspect classifications more carefully, while it will leave a wider margin of appreciation in the case of other classifications. In her own words, 'if the right is fundamental in character, the Court will mostly apply a very strict test'.\textsuperscript{32} But are not all Convention rights fundamental or core rights? Gerards deduces from the case law that 'the Court seems to characterize aspects of Convention rights as core rights especially if they prove to be essential to the well functioning of a pluralistic and democratic society', and that, as a general rule, 'political rights and rights that are closely linked to human dignity belong to the core rights protected by the Convention'.\textsuperscript{33} Both de Schutter\textsuperscript{34} and Gerards\textsuperscript{35} write that the Human Rights Court appears to consider race a suspect ground.

Even though the European Court of Human Rights allows for justification of both direct and indirect discrimination, it is suggested that the ECJ should use the distinction between suspect and non-suspect grounds when considering whether indirect discrimination is justified and scrutinise such justification more strictly when a suspect ground is involved.\textsuperscript{36} As mentioned, the Race and the Equal Treatment (Amendment) Directive only allow for justification of indirect discrimination but the Framework and the Equal Treatment (Goods) Directives contain more exceptions and both also allow for some justification of direct discrimination. From this, we could infer that the EU has made racial or ethnic origin into a suspect ground, while sex has also been made suspect, but only in relation to the employment fields. For this reason, we would argue

\begin{flushleft}
\textsuperscript{31} Gerards, Janneke, "The Application of Article 14 ECHR by the European Court of Human Rights", in: Niessen and Chopin (eds.), supra note 10, 3-60, at 38-57.
\textsuperscript{32} Ibid. at 44.
\textsuperscript{33} Ibid. at 45 and 46. For more information and for the relevant case law the reader is referred to Gerards.
\textsuperscript{34} Supra note 30, at 15.
\textsuperscript{35} Supra note 31, at 26.
\textsuperscript{36} See also Howard, Erica, "The Case for a Considered Hierarchy of Discrimination Grounds in EU Law" 13, 4, Maastricht Journal of European and Comparative Law 443-68 (2006).
\end{flushleft}
for a very strict scrutiny of all justifications put forward for indirect discrimination on racial or ethnic origin grounds.

Another reason why we advocate that the ECJ applies a very exacting test to justifications for indirect discrimination based on racial or ethnic origin is that such justifications can be used in different ways. They can be used to support a multicultural approach as well as an approach supporting or reinforcing assimilation. For example, rules that hair must be covered in places where food is handled can be justified on the basis of health and safety requirements. But is an employer justified in requiring all employees to wear a specific type of headgear, or should he/she allow any headgear as long as it covers all hair? If he/she requires all employees to wear specific headgear, this could be indirectly discriminatory against Sikhs who wear turbans. Such a requirement would support an assimilationist approach. Allowing Sikh employees to wear turbans (and, if necessary also provide for surgical type masks to cover facial hair), would comply with health and safety rules, but at the same time would support a diverse and multicultural workforce. The requirement that all employees wear specific headgear should not pass the justification test under the Race Directive because, although the aim of the rule is legitimate (health and safety), the means of achieving that aim cannot be said to be appropriate and necessary, since the same aim could be achieved by different means which would not indirectly discriminate against Sikhs. Therefore, the court should conclude that the rule is not objectively justified and make a finding of indirect discrimination against the employer.

Schick writes that the objective justification test in the Race Directive stresses 'a little more that a strict standard of proportionality is required', and that, 'as regards gender equality, the jurisdiction of the European Court of Justice has been contradictory in this respect'. In relation to gender discrimination, the ECJ has in most cases,
according to Schiek, applied a strict proportionality test in relation to the practices of individual employers, while it has used a much less exacting test for Member States legislation.\(^{38}\) Finlay\(^{39}\) argues the same, but Parmar seems to argue the opposite: ‘that the Court is applying a higher standard of scrutiny when the objective justification exception is raised by Member States’.\(^{40}\) This shows clearly that there are contradictions in the case law and that the situation under the 1976 Equal Treatment Directive is far from transparent. This might change, as ‘these regrettable developments are now likely to be halted by the more concise wording, which will also be inserted into the Gender Equality Directive’.\(^{41}\) The more concise wording should, therefore, lead the ECJ to scrutinise all justifications of indirect discriminatory measures, whether advanced by employers or by Member States, very closely.

The definition of indirect discrimination in the Race Directive does recognise that an apparently neutral provision can have a disparate impact on some people because they have faced historical and structural impediments to equality and, in this aspect, it fits in a substantive model of equality. But does it fit in an equality of opportunity or an equality of results model of anti-discrimination law?\(^{42}\) It focuses on results in that it takes account of the disparate impact of a seemingly neutral provision, criterion or practice, applied to all equally. By focusing on the impact, the Directive’s aim appears to be equality of results. However, the end result of a finding of indirect discrimination under the definition of the Race Directive may well remain unequal because the Directive’s aim is not redistributive. In other words, equality of results is not the end the Directive’s provisions are aiming for. An unequal impact is not always discriminatory: if no exclusionary provision, practice or criterion can be shown or if the

\(^{38}\) Ibid.


\(^{40}\) Parmar, supra note 10, at 146-7. All three authors (Schiek, Finlay and Parmar) cite cases in support of their argument. For these cases, see these authors.

\(^{41}\) Schiek, supra note 10, at 297.

\(^{42}\) See also Chapter 2, under 3.1.
inequality can be objectively justified by reference to business needs or administrative interests, there will be no finding of indirect discrimination. So the Directive's prohibition of indirect discrimination cannot be said to fit fully within the equality of results model, it only fits in that model to the extent that it takes the result of a measure into account.

Does the Directive's prohibition of indirect discrimination then fit in the equality of opportunity model because it makes the starting point equal for all? By prohibiting indirect discrimination, it makes the barriers certain people face unlawful. These barriers are, therefore, taken out of, for example, the recruitment process and, in this aspect, the prohibition makes the starting point more equal for everybody. In this way, the prohibition of indirect discrimination fits in the equality of opportunity model. However, the barriers are not unlawful if they are objectively justified by business or administrative interests. So indirect discrimination is not always unlawful. A finding that an employer has, in the recruitment process, indirectly discriminated against an individual or against the group he/she belongs to, does not necessarily lead to the individual obtaining the job after all; and, even if he/she would get the job, it does nothing about the disadvantaged position of the group to which he/she belongs. If the legal system of the Member State only allows individuals to complain about (indirect) discrimination, then the remedy, if the claim is successful, will only apply to that individual. Moreover, the remedy may well be individual compensation, rather than a duty to refrain from the discriminatory behaviour in future. So, there is no obligation on the employer to abstain from applying the discriminatory practice in future recruitment processes, although the risk of another court finding against him/her might stop him/her doing so. There is also no duty on the employer to create equality of opportunity by making sure that the members of the group can compete on an equal footing in that process. Therefore, here again, indirect discrimination is only partially about equality of
opportunity. On the other hand, we cannot deny that the concept does move away from a formal equality towards a substantive equality model, with some elements of both the equality of opportunity and the equality of results models.

3.2 Positive Action

The Race Directive allows, but does not require, Member States to take positive action measures. Article 5 of the Race Directive determines:

With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.

Recital 17 expands on this:

The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular racial or ethnic origin, and such measures may permit organisations of persons of a particular racial or ethnic origin where their main object is the promotion of the special needs of those persons.

The Explanatory Memorandum to the Race Directive’s Proposal states with regard to ‘Article 5: Positive Action’:

Equal treatment by itself may not be enough if it does not overcome the weight of accumulated disadvantage suffered by discriminated groups. Article 4 allows Member States to authorise legislative or administrative measures which are necessary to prevent or correct situations of inequality.43

Article 5, Recital 17 and the Memorandum thus all express a fairly clear idea of substantive equality: they recognise the accumulated disadvantage suffered by some groups and allow Member States to take measures to make up for this. That positive action measures aim at substantive equality is confirmed by the case law of the ECJ on Article 2(4) of the 1976 Equal Treatment Directive. This Article allowed Member States

43 Supra note 1, at 6. In my view Article 4 in this quote should read Article 5, as the title above this passage suggests.
to take 'measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities', in other words, to take positive action measures for women. The ECJ has recognised that Article 2(4) allows measures which 'are intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life'. It has also held that 'the result pursued by the Directive is substantive, not formal equality'.

By providing for positive action, Article 5 of the Race Directive thus moves towards a more substantive model of equality law but there is no indication in the article, the proposal or the recital, as to what type of positive action measures are allowed. Are only those measures allowed that fit in the equality of opportunity model or can the Member States take positive action that fits in the equality of results model? The original proposal for the Race Directive also allowed for positive action, but it was formulated in a different way. Under the Heading 'Article 5 Positive Action' it determined:

This Directive shall be without prejudice to the right of Member States to maintain or adopt measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular racial or ethnic origin.

In the final text of the Race Directive 'with a view to ensuring full equality in practice' is added. These opening words are the same as those of Article 141(4) EC, although Article 5 of the Race Directive does not follow this article fully. Article 141(4) EC was added to the EC Treaty by the Treaty of Amsterdam in 1997 and was the first primary legislation to refer to positive action. Article 141(4) EC reads:

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46 Supra note 1.
With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

The fact that the final text of the Directive corresponds more closely to Article 141(4) EC could be an indication that the Commission and the Member States intend to give the same interpretation to the two positive action provisions. Does this help us in deciding what sort of positive action is allowed and how far this action can go?

In Chapter 2, we mentioned that the ECJ, in its interpretation of Article 2(4) of the Equal Treatment Directive, has excluded programmes which involve automatic preferential treatment at the point of selection for employment, although it does seem to accept a wide range of measures prior to that point. The ECJ has also held that positive measures should be limited to the period necessary to overcome the disadvantage.47 And, the ECJ sees positive action as derogation from the principle of equal treatment and as such it should be interpreted strictly.48 In other words, in the sex discrimination field, the ECJ appears to hold that positive action within the equality of opportunity model is allowed, but that positive action which goes further and fits within the equality of results model is not. As Poiares Maduro writes: ‘the case law of the ECJ regarding affirmative action measures has therefore been framed largely by the notion of equality of opportunities'.49

This raises the question whether Article 141(4) EC is more extensive than Article 2(4) of the Equal Treatment Directive and whether it would allow for further-reaching positive action. The ECJ decided that the measures in the Abrahamsson case50

47 See Chapter 2, point 3.1 and the cases mentioned there.
50 Supra note 45, para 55.
were not permitted under either Article 2(4) or Article 141(4). It considered Article 141(4) EC separately and held:

Even though Article 141(4) EC allows the Member States to maintain or adopt measures providing for special advantages intended to prevent or compensate for disadvantages in professional careers in order to ensure full equality between men and women in professional life, it cannot be inferred from this that it allows a selection method which appears on any view to be disproportionate to the aim pursued.

This might mean that the ECJ sees Article 141(4) EC as going beyond Article 2(4) of the Equal Treatment Directive, but, unfortunately, it does not really give any indication as to whether Article 141(4) EC allows for broader positive action. Ellis writes that the language of the Race and Framework Directive appears to be more permissive than that of Article 2(4) of the Equal Treatment Directive, but weaker than that of Article 141(4) EC,\(^5^1\) which suggests that Article 141(4) EC is more permissive than Article 2(4). We will come back to this later.

Article 7(1) of the Framework Directive and Article 6 of the Equal Treatment (Goods) Directive contain the same provision as Article 5 of the Race Directive, while Article 2(8) of the Equal Treatment (Amendment) Directive replaces Article 2(4) Equal Treatment Directive and determines that 'Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women'. Will the ECJ use this same interpretation for positive action as it has done in gender equality cases under the new Equality Directives or will it allow for more far-reaching measures that come closer to the equality of results model? Will it make a distinction between the different Article 13 EC Directives in this area? This is yet to be decided. Some arguments can be advanced for allowing a broader interpretation in relation to all Article 13 EC grounds because, firstly, the Article 13 EC Directives allow for positive measures 'with a view to

\(^{51}\) Supra note 10, at 312.
ensuring full equality in practice' which, as Schiek\textsuperscript{52} argues, appears to indicate that these directives do go further and are aiming for equality of results. She writes:

Neither of the directives thus uses the term 'equal opportunity' from the old Gender Equality Directive, which led both Advocates General Tesauro and Jacobs in their conclusions on Marschall and Kalanke respectively to assume that positive action measures aiming at results are inadmissible. On the contrary, aiming to 'ensure full equality in practice', the directives appear to envisage result-oriented as well as procedural measures.

Secondly, the case law of the ECJ is partly based on its interpretation of Article 2(4) of the 1976 Equal Treatment Directive, but the Equal Treatment (Amendment) Directive has replaced this Article. Poiares Maduro uses the same argument where he writes that the scope of Article 141(4) EC and the Article 13 EC Directives might broaden the scope of admissibility of affirmative action measures.\textsuperscript{53}

Thirdly, there might be some room for a broader interpretation in the case of racial or ethnic origin discrimination because the scope of the Race Directive goes beyond the employment field. The ECJ might decide to allow broader positive action measures in the other areas covered. Support for this can be found in the Lommers case\textsuperscript{54} in which the ECJ upheld an employer’s scheme that provided subsidised nursery places only for female employees (save in exceptional circumstances). This third argument can also be used in relation to the Equal Treatment (Goods) Directive.

Finally, there might also be some, albeit tentative, support for a broader interpretation in relation to racial and ethnic origin discrimination in the opinion of the Commission in the Explanatory Memorandum, as quoted above.

However, it can also be argued, as Ellis,\textsuperscript{55} mentioned above, does, that the text of the Race and Framework Directives is weaker than Article 141(4) EC. Waddington

\textsuperscript{52} Schiek, supra note 10, at 299.
\textsuperscript{53} Supra note 49, at 26.
\textsuperscript{55} Ellis, supra note 10, at 312. Brown also expresses this view, see supra note 27, at 216.
and Bell write that the text of the Race Directive is more restrictive than Article 141(4) EC because ‘it omits the positive element of that Article, notably the possibility of conferring specific advantages to make it easier for the under-represented sex to pursue a vocational activity’. These authors anticipate ‘that the Court will seek to extend these general principles on positive action to the other grounds of discrimination enumerated in Article 13 EC’, although they do admit that ‘there remains a variety of positive action schemes that have yet to be tested’. 56

In another paper, Bell and Waddington 57 write that ‘an assumption that such result-oriented measures [programmes involving preferential treatment at the point of selection] will be difficult to justify under the Article 13 Directives may be inferred from two derogations from the positive action clause’. These derogations are, firstly, an additional exception in Article 7(2) of the Framework Directive for disabled people, which ‘has been interpreted as permitting states to retain quota based schemes’; and, secondly, a specific exception in Article 15(1) of the Framework Directive ‘for recruitment into the Police Service of Northern Ireland, in order to protect legally the “50:50” quota system introduced to increase Catholic participation’. 58 Therefore, Bell and Waddington argue that the fact that the Framework Directive makes exceptions for two cases where quotas are allowed would indicate that quotas are not allowed in any other cases.

Therefore, there are arguments to be found both for and against an extension of the permitted positive action measures under the EU Equality Directives. It is suggested that the arguments for an extension are stronger for the Race Directive, because its field of application goes beyond the employment field and because the derogations mentioned by Bell and Waddington are both made in the Framework Directive and

56 Waddington and Bell, supra note 10, at 602.
58 Section 46(1) of the Police (Northern Ireland) Act 2000 was mentioned in Chapter 2 as an example of legislation of the equality of results model, because it contains a quota system.
there are no such derogations in the Race Directive. The Race Directive generally contains less exceptions and derogations than the other Equality Directives. Are there any other arguments that could be used for allowing wider positive action for racial groups than for groups characterised by the other grounds in Article 13 EC? Is race in any way different from the other grounds?

In Chapter 5, we discussed the difference in character between discrimination grounds. As we mentioned there, Bell and Waddington\textsuperscript{59} looked at the influence a ground could have on the ability or availability to do a job or use a good or service, while Schiek\textsuperscript{60} distinguished between characteristics which only exist as ascriptions, characteristics which reflect real biological differences and characteristics that reflect a chosen lifestyle or difference in identity. We concluded that race is an ascribed characteristic which is always irrelevant because it does not affect a person’s ability or availability to do a job or use a good or service. Of the Article 13 EC grounds, sex and religion can affect a person’s availability, while disability and age can affect both a person’s ability and the availability to a greater or lesser extent. Sexual orientation, like race, does not affect either. Schiek put religion, ethnicity and sexual orientation in the third category, but, by following Gerards’ suggestion that a characteristic should be considered as immutable if it ‘cannot be changed without infringing the essence of an individual’s identity’,\textsuperscript{61} we argued that religion and sexual orientation – and possibly ethnicity – are immutable characteristics in this sense and so would come closer to the first category because they are beyond the control of the person affected. We could, therefore, argue that discrimination on the grounds of race/racial or ethnic origin, religion and sexual orientation is particularly repugnant and malicious, because these characteristics can be seen as being beyond the control of a person.

\textsuperscript{59} Supra note 57, at 359-63.
\textsuperscript{60} Supra note 10, at 309-10.
But does this justify allowing for different levels of acceptable positive action? In my view, the difference in character and the fact that discrimination is more repugnant on these grounds could well be used as an argument for allowing more far-reaching positive action in relation to racial, ethnic and religious groups, but not in relation to homosexual groups. As we have argued in Chapter 5, the Race Directive should be extended to cover religion or belief as well and, therefore, religion or belief should be treated in the same way as racial or ethnic origin. Positive action measures are taken to make up for structural disadvantages suffered by particular groups in society. In this sense, homosexual people cannot be said to have suffered such disadvantages as a group, but racial, ethnic and religious groups have.

Other possible differences between the grounds that might justify the provision for broader positive action measures are the size of the group affected, the disadvantage suffered by this affected group and the extent of the discrimination. All these factors are difficult to assess accurately, but it might be the perception that these differences exist that influence the decision on how to deal with the different grounds. The perception may lead to the conclusion that some grounds need to be dealt with more urgently and/or more extensively than others.

The perception that the number of people affected by racial discrimination in the EU was and is very large and that racial discrimination was and is particularly widespread and invidious appears to have played a role in the quick adoption of the Race Directive with its stronger protection. This perception – influenced no doubt by the strong lobbying by NGOs and the European Parliament for legislative action against racial discrimination – most likely strengthened the political willingness to take action to combat racism and racial discrimination in a wide area. Support for this can be found in the fact that the European Council mentioned the importance of the fight against racism and xenophobia at the Maastricht Summit in 1991, the Edinburgh Summit in
1992 and the Copenhagen Summit in 1993, while the Corfu Summit in 1994 resulted in the setting up of the Kahn Commission. The designation of 1997 as the European Year Against Racism and the establishment of the European Monitoring Centre on Racism and Xenophobia also lend support to this view as does the already quoted (in Chapter 5) opinion of the European Commission that ‘a comprehensive coverage is necessary to make a serious contribution to curbing racism and xenophobia in Europe’. Thus, the perception in the EU that racial discrimination affects a large number of people and that such discrimination is particularly widespread and invidious, could well be used as another argument for allowing broader positive action measures in relation to racial groups under Article 5 of the Race Directive.

Therefore, a number of arguments can be advanced for a broader interpretation of Article 5 of the Race Directive, allowing for more result-oriented measures than what is allowed under the old Equal Treatment Directive and the other Equality Directives. Unfortunately, the European Commission, in its report on the application of the Race Directive under Article 17, states in respect of Article 5 that ‘it is worthwhile stressing the difference between positive action measures, which are allowed, and so-called “positive discrimination” measures, which are not compatible with the Directive’. It continues:

On the one hand, positive action measures aim to ensure full equality in practice by preventing or compensating for disadvantages linked to having a certain racial or ethnic origin. These measures may include, for example, providing specific training to people belonging to groups that do not usually have access to such training, or taking particular

steps to ensure that certain racial or ethnic groups are fully informed about job
advertisements, including, for example, publishing adverts in publications targeting these
groups. On the other hand, "positive discrimination" measures give automatic and absolute
preference (for example in access to employment) to members of a particular group over
others for no other reason than belonging to that group. 68

This suggests that the Commission does not want to accept broader positive action
measures under Article 5 of the Race Directive, nor does it appear to want to go beyond
the case law of the ECJ in sex discrimination cases. This is, in my view, an undesirable
development and it would have been better if the Commission had pursued either of the
following alternative paths.

In the Report, the Commission itself points out that attitudes towards positive
action vary hugely across the Member States. 69 Ellis 70 writes that the differences in
wording of Article 5 of the Race Directive, Article 2(4) of the Equal Treatment
Directive and Article 141(4) EC and the 'notoriously inscrutable' case law of the ECJ
on the equivalent sex discrimination provisions, are 'evidence of deep political and
philosophical tensions which surround the whole matter of positive action'. She argues
that:

because of the legitimate scope for a wide diversity of views on the role of positive action,
this is an area where it is unacceptable to leave the resolution of the meaning of the law
entirely in judicial hands.

This suggests that Ellis is in favour of a path requiring more detailed guidance from the
legislator on what measures are allowed. The Commission could have proposed an
amendment to Article 5 with more guidance.

68 Ibid. at 7-8
69 Ibid. at 8.
70 Ellis, Evelyn, "The Principle of Non-Discrimination in the Post-Nice Era" in: Arnall, Anthony and
In contrast, the existence of a wide variety of views in this area leads Caruso to argue for a path where more discretion is given to the Member States. She writes that the ECJ is likely to interpret the positive action clauses of the new directives 'along the lines of its previous scrutiny of gender programs'. This is 'a chapter of E.U. history that should not be written'. Caruso argues strongly for a policy of restraint in the ECJ's scrutiny of positive action cases. Poiares Maduro also suggests giving the Member States a certain margin of discretion. He writes:

It cannot be excluded that the reference in Article 141 EC to compensatory measures has as its aim providing a broader margin of discretion to Member States in adopting measures of positive discrimination. The issue here for the ECJ, and the decision that it has to take regarding admissibility of affirmative action and positive discrimination measures adopted by the Member States, is not actually whether affirmative action is the best way to fight discrimination and to reinstate equality in the labour market, but whether to give Member States a margin of discretion to decide what is compatible with the principle of equality. In my view, in an area such as this that is subject to intense discussion and scrutiny, it may be appropriate for the court to allow for some diversity of national political choice regarding the extent to which Member States adopt affirmative action measures.

As mentioned, the ECJ sees positive action as a derogation of the principle of equal treatment. In the Lommers case, the ECJ held that its case law on derogations from an individual right was applicable to positive action measures. This case law had introduced a proportionality test for such derogations. As the ECJ considered:

According to settled case law, in determining the scope of any derogation from an individual right such as the equal treatment of men and women laid down by the Directive, due regard must be had to the principle of proportionality, which requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the

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72 Supra note 49, at 26.
73 Supra note 54, para 39, repeated in Briheche case, supra note 45.
aim in view and that the principle of equal treatment be reconciled as far as possible with
the requirements of the aim thus pursued

Therefore, a proportionality test is already applicable to positive action measures within
the EU. Allowing the Member States a margin of discretion might lead to the
development of some interesting and innovative measures that could be used as
examples of good practice for other Member States. The proportionality test introduced
by the ECJ would ensure that the Member States cannot take just any measure they see
fit, because they must be able to objectively justify any positive action legislation. It is
submitted that, rather than limiting positive action measures to what has thus far been
permitted in the ECJ sex discrimination case law, like the Commission appears to do in
the Report mentioned, or providing more guidance as to what measures are allowed in
more detailed legislation at EU level, as Ellis seems to advocate, it is preferable to allow
the Member States some discretion, provided this is subject to a proportionality test.
More detailed legislation at this level is likely to limit, rather than expand, the measures
permitted.

One last point needs to be made in relation to positive action measures. Article 5
allows, but does not require, Member States to take such action. This contrasts with the
ICERD which requires, in Article 2(2), States Parties to take such measures. ECRI has
also recommended that national law 'should' provide for (temporary) positive action
measures. 74 Under EU law there is no obligation on the Member States to do so and if
they don't they are not contravening any EU legislation. This means that there could,
and, because of the variety of attitudes towards positive action in the Member States,
more than likely would, be significant differences between the individual Member
States with some taking extensive positive action measures while others do not. Some

74 European Commission against Racism and Intolerance, General Policy Recommendation 7, On
Council of Europe), para 5.
calls for mandatory positive action in the EU Directives have been made. Cahn,\textsuperscript{75} for example, writes:

In light of the fact that both Article 1(4) and Article 2(2) [ICERD] comprise components of European Union Member States' obligations to end racial discrimination, the currently diminished EU standard will need to change, and the sooner the better, to end a situation in which states are faced with discord between requirements flowing from the EU acquis on the one hand, and their international obligations on the other.

It could be argued that as all EU Member States are required to take positive action measures under the ICERD, the lower standard in the Directives does not matter, because the duty exists anyway. In Chapter 4, we have seen, however, that enforcement of a duty imposed by an international instrument is not easy.

Another organisation that has advocated mandatory positive action under the Race Directive is the ENAR.\textsuperscript{76} According to ENAR, 'without mandatory positive action the anti-discrimination model espoused by the Directive will never be fully effective, particularly for the most vulnerable groups in society'. ENAR recommends that: 'the Directive be enhanced through the promotion of mandatory positive action, which is responsive to the individual national contexts'. The latter part appears to indicate that ENAR is also in favour of allowing the Member States more discretion in what measures they take.

The fact that the EU Equality Directives allow Member States to take positive action measures, but do not require them to do so, most likely reflects the diversity of views on the subject and the lack of unanimity between the Member States for mandatory positive action.

Positive action is mentioned in the Charter of Fundamental Rights of the EU in Article II-83, which determines that 'the principle of equality shall not prevent the


maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex'. This article appears to be a general statement which does not add anything to the provisions for positive action in Article 141(4) EC – this is verbatim repeated in Article 214(4) of the Draft Constitution - or Article 2(8) of the Equal Treatment (Amendment) Directive. The Charter does not mention positive action in relation to any of the other grounds of Article 13 EC.

Therefore, the positive action provisions of the Race Directive move it towards a substantive model of anti discrimination law but it remains to be seen whether the Member States will be allowed to go beyond measures fitting in the equality of opportunity model and take positive action which fits in the equality of results model.

4 Pluralist Model of Anti Discrimination Legislation

In the previous Chapter, we saw that Recital 8 of the Race Directive mentions 'a socially inclusive labour market' and 'combating discrimination against groups such as ethnic minorities'. A socially inclusive labour market means a labour market in which all groups in society, including groups such as ethnic minorities, participate. The recognition of discrimination against groups and the stress on their participation in the labour market fit in the pluralist model of anti discrimination law. The same can be said for Recital 12 which explains that the scope of the Race Directive should go beyond the employment field and cover other areas 'to ensure the development of democratic and tolerant societies which allow for the participation of all persons irrespective of racial or ethnic origin'.

Article 11 and 12 of the Race Directive determine that the Member States should promote dialogue with the social partners (Article 11(1)) and with NGOs which have 'a legitimate interest in contributing to the fight against discrimination on grounds of racial or ethnic origin' (Article 12) with a view to fostering and promoting equal treatment; or with a view 'to address different forms of discrimination and to combat them', as
Recital 23 explains. Article 17 provides for Reports from the Commission on the application of the Directive, which ‘shall include, if necessary, proposals to revise and update this Directive’. According to Article 17(2), the Commission’s report shall take into account, among other views, the viewpoints of the social partners and relevant NGOs.

Dialogue with and considering the viewpoints of the social partners and NGOs involved in the fight against race discrimination gives these partners and organisations – and through them employers, employees and (groups of) victims - a chance to participate in the implementation of the Race Directive and in policy making in relation to the fight against race discrimination. Articles 11, 12 and 17 and Recital 23 can thus be seen as promoting participation, which fits in the pluralist model of anti-discrimination law.

We have mentioned above, that ECRI recommends that Member States should provide for temporary special measures (or positive action). These measures should be allowed either ‘to prevent or compensate for disadvantages suffered by persons designated by the grounds enumerated in paragraph 1b)’ – the Recommendation uses the same wording as the Race Directive here – or ‘to facilitate their full participation in all fields of life’. Legislation providing for positive action measures aimed at participation would be of the pluralist model.

The Draft Constitution of the European Union warrants a mention. Article I-2 gives the Union’s values:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

77 Supra note 74, para 5.
Equality and respect for the rights of persons belonging to minorities are thus explicitly mentioned as values on which the Union is founded. It is interesting that Article 1-3 determines, under the heading 'The Union’s Objectives’, that the Union, among other things, ‘shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations’ and ‘solidarity among Member States’. It shall ‘respect its rich cultural and linguistic diversity’ and ‘contribute to peace, ... solidarity and mutual respect among peoples’. Both these Articles have elements of the pluralist notion of equality: respect for human dignity and the rights of minorities; a pluralist and tolerant society; respect for diversity; and, the stress on solidarity and mutual respect between peoples. The placing of these Articles, right at the start of the Constitution, makes a clear statement that the Union values equality and diversity.

Three articles in the Charter of Fundamental Rights in part II of the Draft Constitution also contain statements of intent to respect diversity: Articles II-82 ('the Union shall respect cultural, religious and linguistic diversity’), II-85 ('the Union recognises and respects the rights of the elderly...’), and II-86 ('the Union recognises and respects the rights of persons with disabilities...’). Therefore, there are elements of the pluralist concept of equality in the Draft Constitution, but both the statements in Articles I-2 and I-3 and those in the Charter are general statements without creating legal rights, so they could remain hollow statements.

5 Other Provisions

Some parts of the Race Directive and the Draft Constitution could fit in different models of anti discrimination law, depending on the way they are interpreted or implemented by the Member States or on the legal system of the Member State in question. We will discuss these parts in this section.
5.1 Enforcement Provisions of the Race Directive

As the experience in the EU with sex discrimination had shown that enforcement is often problematic, the new Equality Directives give considerable attention to enforcement and contain a number of provisions to alleviate the problems experienced by victims in bringing cases. Article 7(1) of the Race Directive puts a duty on Member States to make 'judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures', available to all persons who feel discriminated against, even after the relationship in which the discrimination is alleged to have occurred has ended. The second paragraph provides victims with support in bringing actions. It determines that associations, organisations or other legal entities with a legitimate interest may bring enforcement actions, 'either on behalf or in support of the complainant, with his or her approval'. Therefore, the Directive does not provide for organisations to bring cases in their own name, but, as it contains minimum requirements only, the Member States can give them the right to do so.

Article 8 of the Race Directive shifts the burden of proof onto the respondent, once facts from which it may be presumed that there has been direct or indirect discrimination have been established before a court or any other competent authority. This Article echoes Article 4 of the 1997 Burden of Proof Directive, which laid down in law the shift in the burden of proof developed by the ECJ. The reason for this shift is that in many discrimination cases, especially in employment related cases, it is the respondent (the discriminator) and not the victim who holds the relevant information. This provision is, again, a minimum requirement and Member States can introduce rules of evidence which are more favourable to the plaintiff.

Article 9 of the Race Directive provides for protection against victimisation:

Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a
reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.

This Article protects not only victims of discrimination, but also others who support victims by reporting an act of discrimination or by acting as a witness. The reason for including protection against victimisation is that the fear of retaliation often works as a real deterrent to making a complaint of discrimination.

One of the problems for victims of discrimination has proved to be that they do not know about their rights to take action. To alleviate this problem, Article 10 of the Race Directive determines that the Member States should take care to disseminate information to all persons concerned on provisions adopted pursuant to the Directive or on provisions already in place.

All the above provisions appear to be mainly aiming to make it easier for individual victims of discrimination to bring a case against a discriminator. In this sense, the provisions do not appear to go beyond the formal equality model of anti-discrimination law. However, nothing in the Directive prevents or prohibits Member States to allow actions by groups of individuals as well, and the provisions above are equally applicable to such groups. Allowing for group actions would move towards a more substantive concept of equality.

Article 13 of the Directive can be considered to go beyond the formal equality model, as it prescribes that:

Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at the national level with the defence of human rights or the safeguarding of individuals' rights.

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78 See Tyson, supra note 5, at 214.
The use of the word ‘shall’ means that it is compulsory for the Member States to designate such a body or bodies.  

Article 13(2) gives the competences of the body/bodies as: providing independent assistance to victims of discrimination in pursuing complaints about discrimination; conducting independent surveys concerning discrimination; and publishing independent reports and making recommendations on any issue relating to such discrimination. The Proposal for the Race Directive did include: ‘receiving and pursuing complaints from individuals’ and ‘commencing investigations or surveys concerning discrimination’, but this was dropped in the final text. According to Tyson, the EU Member States were concerned that ‘the proposal overstepped the line between setting objectives and telling Member States how to achieve them (so contravening the principle of subsidiarity)’. This suggests that the Member States preferred to leave the precise structure and tasks of the body/bodies to be decided at national level.

The final text of the Race Directive is different from the Proposal in another aspect: in the latter, the Article was entitled: ‘independent bodies’ and the first paragraph put a duty on Member States to provide for an independent body or bodies, which may form part of independent agencies. The second paragraph gives the tasks of these independent bodies (my italics). In the final text, the word independent is omitted from Article 13(1) and the opening part of Article 13(2), but then added to each task in the second paragraph. During the negotiations, the Member States expressed their concern about the independence of these bodies, but the Commission responded that the key point was to enshrine the existence of these bodies in legislation so that governments could not abolish them without consent of Parliament. Their independence could be ensured in different ways and was not incompatible with the obligation to

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79 See Council paper 6435/00, supra note 21, footnote 27.
80 Supra note 1, Article 12(2).
81 Supra note 5, at 216.
report to Ministers and/or financing by the State, according to the Commission. The change in the text does not appear to make the situation with regards the independence of these bodies any clearer.

Both the new Equal Treatment Directives prescribe the designation of ‘a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on the grounds of sex’ with the same competences as given in Article 13(2) of the Race Directive. The Framework Directive does not contain such duty and this omission has been criticised in the literature. There appears to be no sound reason why victims of sex and racial or ethnic origin discrimination need such a body more than victims of discrimination on the grounds covered by the Framework Directive. However, the practice in many Member States appears to be to designate a body or bodies with competence to deal with all the Article 13 EC grounds of discrimination. As Liegl et al write:

Although the Employment Equality Directive does not provide for a similar obligation, the majority of Member States extended the competences of such bodies or established new institutions with similar mandates to also encompass the other grounds of discrimination.

And the Commission’s 2004 Green Paper notes the ‘trend towards the establishment of single equality bodies dealing with all of the grounds of discrimination covered by

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82 See Council Paper 6942/00, supra note 21, footnote 42.
85 Liegl et al, supra note 10, at 12.
the Directives’. But if the Commission finds this a positive development, it is curious that it has not proposed to provide a similar obligation in the Framework Directive.

The Directives leave it to the Member States to decide whether they want to designate a single body covering one or more grounds or more than one body each covering a single ground. The advantages of having a single equality body, which deals with all the grounds of discrimination covered by the national legislation are, firstly, that a single body would provide a ‘one-stop-shop’ for all victims of discrimination and for all persons who seek information about discrimination, thus making it easier for people to obtain information or help. Secondly, a single body could deal much better with cases of multiple discrimination. With single ground bodies, a victim of multiple discrimination will either have to decide which ground he/she wants to pursue or he/she will have to go to different bodies. Thirdly, a single body could keep an overview of all the grounds covered, while a number of single ground bodies would fragment the overall picture. Fourthly, a single body would also be better able to handle possible clashes between different grounds. And, finally, a single body would have the advantage of scale and could probably work more efficiently financially, because it would avoid possible overlap between objectives and tasks, including administrative tasks. However, having a number of smaller bodies for each specific ground has the advantage that each body only has to concentrate on a narrow area and thus it can quickly build up special expertise in this area. With a single body there is also a risk that some grounds of discrimination will be given more attention and that other grounds will be neglected, especially if resources are insufficient.

The establishment of national bodies for the promotion of equal treatment is important because they provide independent assistance to victims of discrimination in pursuing complaints and so make it easier for the victims to pursue a claim. This assistance of victims can take the form of supporting cases in court, but many equality
bodies only support a small number of court cases and these are often chosen on the basis of the importance of the legal point at issue. This is called ‘strategic litigation’ and, through such litigation, the bodies can test or establish important legal issues, for example on the interpretation of key terms. The assistance to victims can also take the form of providing opinions or recommendations on complaints. Often these have strong persuasive value and will be followed but, if they are not followed, the victim can take legal action before the courts, which will take the opinions and recommendations of the body into account. Some bodies also provide mediation services. Some of the bodies established in the Member States can even provide legally binding recommendations on complaints submitted to them. In this way, through opinions, recommendations or mediation, complaints are often solved before they reach the court or tribunal stage. Through the strategic litigation and through their opinions and recommendations, these bodies can influence and support the development of national and EU anti-discrimination legislation.

But the national bodies are also important because, through the other tasks mentioned in Article 13 (2) of the Race Directive, - conducting surveys, publishing reports and making recommendations – the bodies can influence policy making at both national and European level and play a part in the development of new legislative, but also non-legislative measures. The bodies in the Member States have been given a variety of tasks. The Dutch Equal Treatment Commission, for example, undertakes investigations on its own initiative and organises training sessions, lectures and conferences on the Equal Treatment Legislation. The British Commission for Racial Equality issues codes of practice which provide guidance on how to avoid unlawful discrimination and achieve equality. These codes aim at preventing discrimination as well as informing people about the legal steps they can take once discrimination has

88 See Annual Report 2006, supra note 86, at 21
89 See www.cgb.nl for more information.
taken place. The work of these bodies can thus be said to go beyond establishing formal equality, because it is proactive and preventative and it aims at eliminating discrimination and at promoting and establishing factual equality. Whether these bodies work towards equality of opportunity, equality of results and/or pluralism depends on the competences given to them by the Member States.

5.2 Mainstreaming Duty

Under the 'Provisions of General Application' in the Draft Constitution, there are a number of Articles that establish a strong legal basis for the mainstreaming approach in relation to all the grounds of discrimination mentioned in Article 13 EC, not just in relation to sex discrimination. In the latter area such a duty already exists under Articles 2 and 3(2) EC and Article 1(1) Equal Treatment (Amendment) Directive. Article III-116 echoes Article 3(2) EC and reads:

In all the activities referred to in this Part, the Union shall aim to eliminate inequalities, and to promote equality between women and men.

Article III-118 extends the mainstreaming duty to all the grounds of Article 13 EC as it states:

In defining and implementing the policies and activities referred to in this Part, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Bell points out the strength of these mainstreaming duties. He writes:

the equality mainstreaming duties go beyond an obligation to 'take into account', but instead integrate equality as an aim (his italics) of all policies. ... placing equality as an aim conveys the need for all policies to be actively engaged in achieving equality.

90 The CRE has issued a Statutory Code of Practice in Employment, a Code of Practice for public authorities on their duty to promote racial equality; A Housing Code of Practice and a Health Care Code of Practice. For more information, see www.cre.gov.uk

He does mention that translating this duty into practice is not easy. But putting such a
duty down in law is a positive step, because, rather than providing an individual victim
with a means of redress, a mainstreaming duty is a more forward-looking, pro-active
and positive mechanism, which moves beyond the need to identify an individual victim
and perpetrator and thus beyond a formal equality model. Mainstreaming means that an
authority has to assess the impact of each policy or decision on the fight against
discrimination and for equality. But a mainstreaming strategy also assesses and
evaluates the decision-making processes; it obliges the authority making decisions and
policies to look at the way these are made. So a legislative mainstreaming duty can be
seen as moving beyond the formal equality model of anti discrimination law, beyond
the prohibition of unequal treatment, because it moves away from the focus on the
individual and because it aims to prevent discrimination rather than acting after this has
taken place.

But does it aim to establish substantive equality (either equality of opportunity
or equality of results) or pluralism? This is often not very clear for two reasons. The
first reason is that it depends on what is being mainstreamed. Is it non-discrimination
and equality or is it diversity? A duty to mainstream non-discrimination and equality, to
assess the impact of all decisions and policies on non-discrimination and equality means
that an authority must ask itself if its policy or decision promotes non-discrimination
and equality. This could mean promoting equal treatment or equal opportunities or
equal results. If it does no more than promote equal treatment, it would not really go
much beyond the formal equality model of anti discrimination law, although it would go
beyond just prohibiting discrimination and would be more preventative. If it promotes
equal opportunities or if the duty imposed is to mainstream equality of opportunity, it
would fit in the equality of opportunity model, while promoting equality of results
would fit in the equality of results model.
On the other hand, if the duty is to mainstream diversity or social and political participation or social inclusion, it would fit in the pluralist model of anti discrimination law. For example, in the 1998 Action Plan against Racism, the Commission mentions that it will ‘actively develop a mainstreaming approach to combating racism and discrimination and promoting integration across all relevant sectors’ (my italics). 92

The second reason why it is not always clear what the aim of a legislative mainstreaming duty is, is that the concept itself, although it is a popular concept, is vague and open to a wide variety of interpretations and that it is not easy, to use Bell’s words mentioned above, to translate the duty to mainstream into practice. What exactly does a duty to mainstream equality mean? We mentioned that it means that an authority must ask itself if its policy or decision promotes equality. But what happens if it doesn’t? Does the mainstreaming duty include a duty to change the policy or decision in such a way that it does? Shaw 93 points out that the 1998 Action Plan mentioned above lists many areas where the fight against racism should be incorporated into policy considerations - employment strategy; structural funds; education, training and youth; Justice and Home Affairs cooperation; information, communication, culture, audiovisual and sport; public procurement; research activities; external relations; and, Commission staff policy. On paper, this, according to Shaw, ‘amounts to a substantial commitment to a policy of mainstreaming’. She continues: ‘Yet, despite the rhetoric and these paper policies, there has been little solid action to bring the fight against racism to the forefront of the EU policy concerns’. This suggests that the commitment to a mainstreaming policy or even a mainstreaming duty imposed by law is not always as effective as it might at first appear. This very much depends on how this duty is interpreted and how or even whether it is put into practice.

However, if the duty in the Draft Constitution is interpreted, as Bell appears to do, as meaning that all policies need ‘to be actively engaged with achieving equality’, then it could be useful to have such a duty as it would mean a greater focus on equality issues. It is, therefore, argued here that the addition of a mainstreaming duty for all the grounds of Article 13 EC is a positive development. But, as it is uncertain whether the Draft Constitution will be adopted in its present form, a legislative mainstreaming duty only exists in relation to gender equality. There does not seem to be any reason why the Race (and Framework) Directive could not follow Article 1(1) of the Equal Treatment (Amendment) Directive, which states:

Member States shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in paragraph 1.

The Race and Framework Directives were influenced by the then existing sex discrimination legislation and, in turn, the Equal Treatment (Amendment) Directive was adopted in order to bring the equal treatment provisions in relation to sex discrimination more in line with those Directives. In other words, the Race and Framework Directives have been influenced by, but have also been influential upon, EU sex discrimination legislation. Parmar writes that ‘there now seems to be a reflexive cross-fertilisation (her italics) process between EU race and gender equality law in particular, in which legislative definitions are borrowed, adapted and integrated’. The Race Directive (and the Framework Directive) could, therefore, ‘borrow, adapt and integrate’ Article 1(1) of the Equal Treatment (Amendment) Directive. The fact that the Draft Constitution extends the mainstreaming duty to those other grounds seems to indicate that extending the duty to all the Article 13 EC grounds would not meet with major objections.

94 Supra note 91.
95 Supra note 10, at 135.
6 EU Developments after Adoption of the Race Directive

Recently, there appears to be a shift at the EU level in the language in relation to anti discrimination policies and the term ‘equal opportunities’ is used more frequently. This shift in language concerns anti discrimination policies in general rather than specifically mentioning measures against racial or ethnic origin discrimination, but the shift is important because it can influence the interpretation of the Race Directive and the future development of new legislative or other measures against racial or ethnic origin discrimination. The Commission also refers a number of times to disadvantaged ethnic minorities.

The shift can be seen, for example, in the fact that the new European Commission, installed in 2004, has a Commissioner for Employment, Social Affairs and Equal Opportunities (Mr. Spidla). This is the first time that equal opportunities are specifically mentioned in the title of a Commissioner. A group of Commissioners responsible for fundamental rights, anti discrimination and equal opportunities has also been created.96

Commissioner Spidla himself mentioned equal opportunities and the need to tackle patterns of inequality on a number of occasions. In his opening address to the Dutch EU Presidency Conference on Anti-discrimination, he said: ‘I would like, above all, to push for the incorporation of equal opportunities in all policies – commonly referred to as “mainstreaming”’.97 Note that this mainstreaming duty would fit in the equality of opportunity model of anti discrimination law. And, in June 2005, at a Conference on ‘Mainstreaming Diversity’, Spidla ended his speech with: ‘Europe

cannot be content with formal equality. It must work towards achieving genuine equality for everyone'.

In an interview with 'Equal Rights in Practice', he said:

But I think we can all agree that laws in themselves – even when fully implemented and enforced – are not enough to tackle some of the ingrained patterns of inequality in our society.

This use of the ‘language of equal opportunities’ in the Community anti discrimination context appears to be even stronger in the Commission’s Communication on the Framework Strategy for Non-discrimination and Equal Opportunities for All, and the Proposal to designate 2007 as the European Year of Equal Opportunities for All.

The introduction to the Communication describes the EU legislation against discrimination as ‘some of the most comprehensive and far-reaching anti-discrimination legislation to be found anywhere in the world’. The Commission emphasises that full and effective implementation and enforcement of this legal framework must be ensured.

However, this is followed by the consideration that:

It is clear that the implementation and enforcement of anti-discrimination legislation on an individual level is not enough to tackle the multifaceted and deep-rooted patterns of inequality experienced by some groups. There is a need to go beyond anti-discrimination policies designed to prevent unequal treatment of individuals. The EU should reinforce its efforts to promote equal opportunities for all, in order to tackle the structural barriers faced by migrants, ethnic minorities, the disabled, older and younger workers and other vulnerable groups.

98 Spilda, Vladimir, Mainstreaming Diversity, Opening Address to the EU Luxembourg Presidency Conference on Anti-Discrimination, Mondorf-les-Bains, 27/06/2005, available from the same website, supra note 97.
102 Supra note 100, at 2.
Later in the Communication, the Commission states:

... it is difficult for legislation alone to tackle the complex and deep-rooted patterns of inequality experienced by some groups. Positive measures may be necessary to compensate for long-standing inequalities suffered by groups of people who, historically, have not had access to equal opportunities.

The EU experience in the field of gender equality strongly suggests that protection of individual rights must be backed up by accompanying measures in order to bring about lasting change and to promote genuine equal opportunities for all.\(^{103}\)

The Commission suggests as one of the accompanying measures the promotion of mainstreaming of non-discrimination and equal opportunities for all in relevant EU policies. The Commission will also seek to promote exchanges of good practice, cooperation and networking between all stakeholders in the field of discrimination.

The Communication then announces:

In order to drive forward the agenda outlined in the Communication for a more positive approach to equality (my italics), the Commission is proposing to designate 2007 as the European Year of Equal Opportunities for All ...

The Year will aim to: inform people of their rights to protection against discrimination under European and national law; celebrate diversity as an asset for the EU; and to promote equal opportunities for all in economic, social, political and cultural life.\(^{104}\)

The Commission recognises that ‘enlargement has increased the EU diversity in terms of culture, language and ethnicity’ and that ‘one of the key challenges facing the enlarged EU is the need to develop a coherent and effective approach to the social and labour market integration of ethnic minorities’. To deal with this, the EU ‘needs to develop appropriate responses to the different needs of new migrants, established

\(^{103}\) Ibid. at 6.
\(^{104}\) Ibid. at 8-9.
minorities of immigrant origin and other minority groups'. The Commission thus stresses the need for the integration of established and new ethnic minority groups.

The conclusion reiterates that 'in addition to the legal protection of individual rights, this Communication sets out a strategy for the positive and active promotion of non-discrimination and equal opportunities for all'. However, 'the Commission is not proposing to come forward at this stage with further legislative proposals based on Article 13 of the Treaty', but it 'will undertake an in-depth study into the relevance and feasibility of possible new measures to complement the current legal framework'. The results of this study should have been available in Autumn 2006 but have, as yet (January 2007) not been published. The Commission will follow this study with a feasibility study on further legislation.

Which concepts of equality can be detected in all this? The Communication recognises the need to go beyond the prevention of unequal treatment, in other words, beyond a mere formal concept of equality. It acknowledges that positive action may be necessary to compensate for the structural barriers and long-standing and deep-rooted inequalities that some groups experience which have denied these groups access to equal opportunities. This shows clearly a substantive notion of equality. The Commission itself calls the Communication an agenda for 'a more positive approach to equality', and stresses the importance of the promotion of equal opportunities for all in economic, social, political and cultural life, which also suggests a substantive approach including positive action. The aims of the Year include the celebration of diversity as an asset for the Union. This and the focus on the social and labour market integration of ethnic minorities and the development of appropriate responses to their different needs, all fit in a pluralist approach to equality.

105 Ibid. at 9-10.
106 Ibid. at 12.
107 Ibid. at 6.
The Commission will aim to ensure that a range of EU funding instruments contribute to the promotion of non-discrimination and equal opportunities for all. The Commission also proposes an annual high-level Equality Summit to bring together key stakeholders. If this leads to greater participation of disadvantaged groups, it would fit in the pluralist notion of equality. To support policy development to tackle discrimination and social exclusion faced by disadvantaged ethnic minorities, the Commission plans to establish a high-level advisory group on social and labour market integration of these disadvantaged ethnic minorities. Here again, there is a focus on ethnic minorities, which shows that the Commission recognises that there are disadvantaged ethnic minorities. This fits in the substantive idea of equality, and if the recommendations of this group actually lead to policy development to create greater inclusion, then it would also fit in the pluralist notion of equality. Therefore, the Communication contains clear elements of both the substantive and the pluralist concepts of equality. Can we also detect such elements in the Proposal for the Year of Equal Opportunities for All?

The Explanatory Memorandum to the Proposal for the Year states:

The global objective of the Year will be to raise awareness of the benefits of a just, cohesive society where there is equality of opportunity for all. This will require tackling barriers to participation in society and promoting a climate in which Europe's diversity is seen as a source of socio-economic vitality.

It considers that the Year 'will provide an opportunity to promote a more cohesive society that celebrates differences within the framework of EU core values'. Article 2 gives the specific objectives of the year: rights, representation, recognition and respect and tolerance. 'Rights' refers to the raising of awareness on the right to equality and

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108 Ibid. at 7-9.
109 Ibid. at 10.
110 Supra note 101, at 2.
111 Ibid. at 4.
112 Ibid. at 20-5 and Article 2.
non-discrimination and of the existing anti discrimination legislation. ‘Representation’ means the promotion of full and equal participation of all groups in society. ‘The disadvantages suffered by some communities ... are so wide-scale and embedded in the structure of society, that positive action may be necessary to remedy the nature of their exclusion’. ‘Recognition’ indicates the celebration and accommodation of diversity. As Article 2(c) states:

The European Year will highlight the positive contribution that people, irrespective of their sex, racial or ethnic origin, religion or beliefs, capacities, age and sexual orientation can make to society as a whole, in particular by accentuating the benefits of diversity.

‘Respect and tolerance’ relates to the promotion of a more cohesive society. Key to this will be the promotion of good relations between different communities and building trust and understanding, and work to eliminate stereotypes and prejudices.113 Under the heading ‘delivering change’ it states that the Year:

will target common barriers and inequalities affecting several communities ... It will seek to encourage the promotion of good relations among different communities, building trust and understanding that will contribute to a more cohesive society.114

There is also an interesting point in the legislative financial statement. Where this looks at the specific objectives, it mentions that ‘a key challenge will be to demonstrate that the notion of “equality” does not mean “sameness” but rather taking account of differences and diversity to ensure equal treatment’. It also states that ‘equal opportunities policy is not simply limited to the elimination of discrimination. It also requires equalising the opportunities to full and equal participation for all’.115

Therefore, the proposal also clearly contains elements of the concepts of substantive equality: a society where there is equal opportunity for all and where structural disadvantages, barriers and inequalities affecting several communities may

113 Ibid. at 2-5 and Article 2.
114 Ibid. at 5.
115 Ibid. at 25.
necessitate positive action. Three elements fit in the pluralist approach to equality: the
tackling of barriers to participation to aim at the full and equal participation of all
groups in society; the celebration and accommodation of diversity; and, the promotion
of good relations, trust and understanding between different communities.

Thus elements of both the substantive and pluralist concepts of equality are
appearing in the 'equality' language of the EU. A recognition is emerging that the deep-
rooted patterns of inequality experienced by some groups need to be tackled. But is this
use of the 'language of equal opportunities' translated into practical policies or are the
statements made hollow?

The Communication proposes the development of tools to promote
mainstreaming of non-discrimination and equal opportunities for all in relevant EU
policies, not only in relation to gender discrimination, but also in relation to
discrimination on the other grounds of Article 13 EC. It mentions that the Commission
does an 'impact assessment': any proposal for legislation and any draft instrument to be
adopted will, when being prepared under the normal decision-making procedures, be
scrutinised for compatibility with the EU Charter of Fundamental Rights.16 As the
Charter contains a right to equality before the law and a prohibition of discrimination on
a large number of grounds, including all those mentioned in Article 13 EC, any draft
instruments will be scrutinised for compatibility with the right to equality and non-
discrimination. Thus, there appears to be a commitment to assess the impact of all
proposals for legislation on non-discrimination and equal opportunities which fits in the
equal opportunity model of anti discrimination law. This impact assessment suggests
that the mainstreaming policy is more than mere rhetoric and paper policies.17

document has been set out in COM (2005) 172, Communication from the Commission, Compliance
with the Charter of Fundamental Rights in Commission Legislative Proposals. See also IP/05/494,
President Barroso proposes a New Framework to 'lock-in' a Culture of Fundamental Rights in EU

17 See Shaw, supra note 93.
Both the Communication and the Proposal mention repeatedly the need for positive action measures to tackle the inequalities and structural barriers suffered by some groups. However, these statements could remain hollow as there are no specific policies or measures requiring or promoting positive action. Because there will be no proposals for changes in the legislation in the near future, the current provisions allowing for, but not requiring, positive action, will, therefore, not be changed or strengthened.

The Communication and the Proposal have been followed up by some action. The first action was specifically directed at ethnic minority groups. It was the establishment, in January 2006, of a High-level Advisory Group, with as task to analyse how to achieve better social integration of ethnic minorities and their full participation in the labour market within the EU. This Group should submit a report containing recommendations on the policies to be implemented in this area before the end of the 2007 ‘European Year of Equal Opportunities for All’.

Secondly, in a Press Release on 01/06/2006, the Commission welcomed the Decision of the Council and the European Parliament to designate 2007 as ‘European Year of Equal Opportunities for All’ and announced a new website for the Year. Equal opportunities for all continue to be stressed and a number of interesting points can be made about the website. Under ‘Why a European Year?’ we find the following consideration: ‘Calling for equal rights and adopting laws to try and guarantee them is not enough to ensure equal opportunities are available for all in practice’. Three suggestions as to how equal opportunities for all should be ensured are: giving incentives to bring about a change in behaviour and mentality; tackling patterns of inequality; and, meeting more effectively the challenges of ever-growing diversity.

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119 IP/06/712 of 01/06/2006, “2007 starts Today: ‘European Year of Equal Opportunities for All’ gets Green Light”. 

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Under ‘The Year’s four key themes’, in relation to awareness-raising, it is stated:

The idea will also be to show that being equal does not [mean] being identical. The implementation of the equality principle has to take into account differences and diversity so as to ensure that each individual genuinely enjoys equal treatment.

Under ‘representation’ it states that ‘an equal opportunities policy also has to try to provide all individuals with opportunities for becoming fully involved on the same footing in society’.

The above suggests that the EU is moving towards a more substantive concept of equality. There is a realisation that prohibiting discrimination and prescribing equal treatment is not enough to tackle the patterns of inequality suffered by some groups in society and a recognition that there are structural barriers to full participation faced by vulnerable groups such as migrants, ethnic minorities, the disabled, older and younger people and others. Why has this shift taken place? In the discussions and negotiations before the adoption of the Article 13 EC Directives, questions about concepts of equality do not appear to have played any great role. It is submitted that the Commission wanted to establish a common minimum standard of protection against discrimination across the EU, and anti discrimination measures aiming at formal equality are seen as providing this minimum standard of protection, as a first step in the fight against discrimination. To a large extent, the Directives followed the existing legislation in the field of gender discrimination, where formal equality was the main aim, supplemented by provisions against indirect discrimination and for positive action. These minimum standards were set in 2000 (in the Race and Framework Directives). Now the Member States have become more familiar with anti discrimination rules, the idea of going beyond formal equality has started to crop up in the language of the Commission. This idea is not new: as we have seen, it was mentioned by the ECJ in a
number of cases. Similar discussions on what aims equality laws should pursue took and are taking place in many Member States. The shift in emphasis is based on the EU experience in the field of gender discrimination that formal equality is not enough to tackle existing inequalities.

However, it appears that despite the emphasis on the need for positive action measures to tackle the inequalities and structural barriers suffered by some groups, this shift in language is not going to be reflected in the near future in any new legislative measures. Other, non-legislative measures and policies could and will, hopefully, go further towards substantive and pluralist notions of equality and in this way complement the formal equality idea in the EU legislation. The Open Method of Coordination, which we mentioned in Chapter 5 in relation to the Employment Guidelines, might be a useful process in this area by setting common objectives and benchmarks and providing for the exchange of good practices.

The European Commission is, in its own words, looking for 'a more positive approach to equality'. However, where do the Member States stand in this? Will the Year create enough political determination to take further action against discrimination? The Commission appears to be using the language of equal opportunities and to be emphasising the idea of equal opportunities for all more and more often. It is suggested that it is doing so with the idea that if this language of equal opportunities is used and repeated often enough, the terms might become so familiar to the Member States that they will accept more and stronger measures to tackle inequality and barriers in society. In this way the use of the language might act as a catalyst for more EU action, both legislative and non-legislative, against discrimination.

7 Conclusion

In this Chapter we have analysed which models of anti discrimination law can be detected in the Race Directive. The definition of direct discrimination is a clear example
of legislation of the formal equality or equal treatment model. However, the definition in the Directive goes some way towards remedying some of the problems identified in relation to the formal equality concept and model. Firstly, it allows for a hypothetical comparator and this will make it easier for victims to prove discrimination. Secondly, the non-regression clause of Article 6 prohibits Member States from complying with the principle of equal treatment by levelling-down the protection provided. Levelling-down by private actors, however, does not fall under this clause.

Although its stated purpose seems to suggest that the Directive aims at equal treatment, there are indications that it goes in fact beyond the formal concept of equality towards a more substantive concept of equality.

The inclusion of a concept of indirect discrimination also moves the Race Directive towards a more substantive concept of equality as it does recognise that an apparently neutral provision can have a disparate effect on some people because they have faced historical and structural impediments to equality. The definition of indirect discrimination in the Directive is partly about equality of opportunity and partly about equality of results, but, even though it is a step away from the formal equality model of anti discrimination law, it does not quite fit in either model.

The Directive allows for justification of indirect discrimination, but we have argued that such justification should only be allowed in very limited circumstances and, therefore, every justification must be subjected to a very strict scrutiny.

It is clear from Article 5, Recital 17 and the Explanatory Memorandum to the Proposal for the Race Directive on positive action, that these provisions fit in a substantive equality model of anti discrimination law, as they recognise the accumulated disadvantage suffered by some groups and allow Member States to take measures to make up for this. This is confirmed by the case law on positive action under Article 2(4) of the Equal treatment Directive. However, the Directive itself does not
give any indication of how far such measures can go, and neither are there any indications in the other Article 13 EC Equality Directives.

The case law in the sex discrimination field suggests that positive measures which fit in the equality of opportunity model are allowed, but that positive action which goes further and fits in the equality of results model is not. We advanced a number of arguments for allowing a broader interpretation, especially in the case of positive measures permitted under the Race Directive, although there are also arguments against this. However, the Commission’s Report on the application of the Race Directive under Article 17,\(^{120}\) suggests that the Commission does not want to go beyond the case law in sex discrimination cases and accept broader positive action measures under Article 5 of the Race Directive. It was argued that it would have been better if the Commission had not commented on this and had left more discretion to the Member States, subject to a proportionality test, especially because the attitudes in the Member States towards positive action vary so widely.

The pluralist model of anti discrimination law can be detected in Recitals 8 and 12 of the Race Directive, which stress the importance of participation of all groups, and in Articles 11, 12, 17 and Recital 23, which can be seen as promoting participation. The pluralist model can also be found in the Draft EU Constitution in a number of articles stressing equality and respect for diversity, pluralism, tolerance and solidarity. But, these are all very general statements which could very well remain hollow.

However, the mainstreaming duty in relation to all Article 13 EC grounds laid down in Articles III-116 and III-118 could be useful, depending on how such a duty is interpreted and translated into practice. It is not certain whether the Draft Constitution in its present form will be adopted, although it has reappeared on the Agenda of the German Presidency for the first half of 2007. Because of the uncertainty, we proposed

\(^{120}\) Supra note 67.
that such a duty should be laid down in the Race and Framework Directives in a similar way as it is in Article 1(1) of the Equal Treatment (Amendment) Directive. A mainstreaming duty could prove useful to make authorities focus on equality issues. If the duty is interpreted as an obligation to promote equality, diversity and tolerance in all policies and decisions then it would fit in the substantive and pluralist models of anti-discrimination law.

We showed that a shift is taking place in the EU in the language about equality and that the EU is moving towards a more substantive concept of equality. Prohibiting discrimination and prescribing equal treatment are no longer seen as sufficient to tackle patterns of inequality and disadvantage suffered by some groups. There is recognition that vulnerable groups face barriers to full participation in society. At the time of adoption of the Race Directive, the Commission’s main concern appeared to be to create common minimum standards of protection in all Member States. Once these standards were laid down, the notion of different concepts of equality entered the discussion. The EU experience in the field of gender discrimination that formal equality is not enough to tackle existing inequalities influenced this development.

Despite the fact that this shift in language is not likely to lead to an extension of the EU legislation against discrimination in the near future, it could be significant for two reasons. Firstly, it might influence non-legislative measures and policies. We suggested that, for example, the Open Method of Coordination could be useful in the anti-discrimination field, by setting common objectives and benchmarks and providing for the exchange of good practices. Secondly, by frequently using the language of equal opportunities and emphasising that patterns of disadvantage and barriers to participation of ethnic minorities and other disadvantaged groups need to be tackled, this language might become common currency in the Member States and their willingness to work towards a more substantive equality for all might grow. The shift in the language might,
in this way, lead to stronger and more effective measures – both legislative and non-legislative – against discrimination.
CHAPTER 7 - CONCLUSION

In this Thesis we have analysed and critiqued the Race Directive, the EU legislative measure against discrimination based on racial or ethnic origin, with respect to the theoretical concepts of race and racism and models of anti discrimination law. The analysis has included questioning the need for and the effectiveness of laws against discrimination. Also, an evaluation of the anti discrimination clauses in international and European human rights treaties and specific human rights instruments against race discrimination has been made. These studies have provided the theoretical basis for the analysis of the Directive as well as a set of standards against which to measure it. This has enabled us to make an assessment in this Chapter of whether the Directive has improved the protection against racial or ethnic origin discrimination for people within the EU.

In making this assessment it is important to bear in mind that the Race Directive cannot be seen as a completely separate entity which was adopted and exists in a vacuum. This is precisely the reason why the Race Directive has weaknesses and leaves gaps in the protection it provides. It is not a theoretical exercise to make the perfect legislation against racial or ethnic origin discrimination but it is a practical instrument. The Directive was the product of negotiations and required unanimity for its adoption. In the negotiations, developments in thinking about the concepts of race and racism, existing national and EU measures against discrimination, like the sex discrimination provisions, and developments in international human rights law played a role. It must be stressed, not only that there is a degree of overlap between these areas but also that these areas have been both influenced by and influential on each other.

The problems of racism and racial discrimination were seen as undermining the proper functioning of the EU and the achievement of its objectives. Action against racial discrimination was therefore considered necessary and the EU institutions saw a
combination of legislative and other measures as the best way to tackle the problem.
The legislation aimed to establish minimum standards across the EU, protecting people
against being treated worse than other people because of their racial or ethnic origin.
This protection was explicitly given a basis in the international and European human
rights instruments and was meant to complement and to enhance the protection given by
these instruments. These international instruments have thus influenced the EU anti
discrimination measures, but, in their turn, the EU measures have had an effect upon the
measures adopted by the Council of Europe and the work of ECRI, as is clear from the
ECRI General Policy Recommendation 7.¹ The EU has also participated in the
discussions at international level, as its contribution to the WCAR shows.²

1 Concepts of Race, Racism and Racial Discrimination

In Chapter 1, we defined a number of key terms and concepts, including race, racism
and racial discrimination, for use in the Thesis. These terms are central to a discussion
of the Race Directive, but their meaning, as used within the EU, is not always very clear
or consistent. The terms race and racism are historically and socially specific and
should, therefore, always be studied within the time and society in which they occur.
Before the eighteenth century, the term race was not very commonly used, but if it was
used it denoted a group of people with a common line of descent or a common ancestry.
In the eighteenth century, race became a subject of the biological sciences, which saw
the world’s population as being made up of people of different races, each with their
own biological characteristics. However, this biological distinction became linked to
ideas that some races were superior to other races and that it was, therefore, justified to
exclude, suppress or exterminate people of inferior races. The extermination of Jews

¹ ECRI, General Policy Recommendation 7, On National Legislation to Combat Racism and Racial
² Contribution from the Commission Services to the Regional European Conference ‘All Different, All
Equal’: From Theory to Practice, European Contribution to the World Conference Against Racism,
Racial Discrimination, Xenophobia and Related Intolerance, 17/04/2000, <
www.europa.eu.int/comm/external_relations/human_rights/wcar/com04_00_en.pdf
and Gypsies during World War II and the Apartheid regime in South Africa are clear examples.

The term racism is used in two distinctive ways; either, to denote the belief that races have distinctive biological or cultural characteristics determined by hereditary factors and that this endows some races with intrinsic superiority; or, to indicate not only this belief but also the behaviour based on it. In this Thesis, we have used the term racism for beliefs, doctrines or ideologies only, while the term racial discrimination was used to denote the behaviour based on these views. However, we should keep in mind that, in practice, the terms racism and racial discrimination are often merged with little apparent difference between the two.

In the 1930s, scientists disproved the theories about biological differences and it now appears to be generally accepted that there is no scientific evidence that supports theories that there are different, separate, biological races. Despite this, biological notions of race appear to persist in both political discourse and popular thinking. Because of the already mentioned abuse/misuse of theories of race, both the terms race and racism are negatively loaded. Ethnicity is, therefore, sometimes used instead of race and xenophobia instead of racism because these terms appear to have a less negative connotation. Ethnicity or ethnic (origin) is also used together with race, as in Article 13 EC and the Race Directive. The term discrimination is also most commonly used in a negative way as it is linked to a moral judgment that discrimination is unjustified and unlawful.

The terms race and racism are usually not defined in legislation, while racial discrimination often is. If racism is defined, it appears more often to be used to indicate beliefs only, as in the definitions in ECRI Recommendation 7 and in the 2001 Proposal

3 Supra note 1, at para 1a.
for a Framework Decision to combat racism and xenophobia, mentioned in Chapter 5. However, it is also sometimes employed to denote both the racist beliefs and the behaviour based on these beliefs, like in the term 'institutional racism' in the definition of the MacPherson Report, mentioned in Chapters 1 and 2. If it is used to indicate beliefs only, then racial discrimination is usually employed to denote the behaviour based on these beliefs. However, legislation can only prohibit behaviour or, in other words, it can only prohibit the practical occurrences of racism, because legislating against ideas and beliefs would violate the human right to freedom of thought.

Many national and international measures against racism and race discrimination omit giving definitions of these terms. For example, the ICERD does not mention racism in either the text of the Convention or the Preamble. Article 1 ICERD only defines racial discrimination, while the Preamble rejects theories of superiority based on racial differentiation.

2 Concepts of Equality and Models of Anti Discrimination Law

In Chapter 1, we distinguished four concepts of equality, and these were developed into four models of anti discrimination law in Chapter 2. Anti race discrimination legislation based on the equal treatment model aims to establish formal equality; it aims to prevent that people in the same or similar situations are treated differently on the grounds of their racial or ethnic origin. Laws based on the equality of opportunity model aim to achieve equal opportunities for everyone; they aim to equalise the starting point so that historically disadvantaged groups can compete on an equal footing with people who did not suffer such disadvantage, by prescribing or permitting preferential treatment of these groups. Measures against discrimination based on the equality of results model aim for an equal outcome; aim for a fairer distribution of goods, resources and

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opportunities in society and for the equal participation of all. This also involves preferential treatment of the disadvantaged groups. The equality of opportunity and the equality of results models are together referred to as substantive models of anti discrimination law. Finally, legislation based on the pluralist model aims to create a society which welcomes and celebrates diversity and in which each person is respected equally.

In Chapter 2, we mentioned that, according to Fredman, equality should perform at least three functions if it is to combat racism. These functions correspond with the concepts of equality we distinguished in Chapter 1. Firstly, equality should redress racist stigma, stereotyping, humiliation and violence. This function corresponds with the concept of formal equality. Secondly, equality should aim to break the cycle of disadvantage associated with groups defined by race or ethnicity. This function corresponds with both concepts of substantive equality. And, thirdly, equality should affirm the accommodation of difference as a part of the right to equal concern and respect. This would fit in the pluralist notion of equality and the aim of creating an atmosphere of tolerance for others and respect for diversity.

Following on from this, it is submitted that legislation against racial discrimination should aim to establish equality in all four concepts, or, by the same token, should perform all three functions Fredman mentions. In other words, legislation based on all four models is needed in the fight against racism and racial discrimination. In this context, it is not important whether there are a number of different laws existing side by side or whether one piece of legislation contains measures based on one or more or all of the models. In my opinion, what is important is that anti discrimination legislation aims to work towards establishing all four concepts of equality. Therefore, I do not see the four models as being in conflict with each other but rather as

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complementing each other. This means that the equal treatment model should not be interpreted to mean that equal treatment is the ultimate goal in all cases. Legislation of this model performs the first of Fredman's functions and, as such, is the first step towards the end goal of a more equal society. But anti discrimination legislation of the equal treatment model alone cannot perform the other two functions and, therefore, it should leave room for positive action and measures aimed at greater participation or at creating tolerance and respect. The four models of equality law should be seen as part of a gradual process: equal treatment forms the basic minimum standard; equality of opportunity and equality of results are added to make up for existing disadvantage and inequality, while pluralism is added to affirm the accommodation of difference and to create a way of living together in tolerance, harmony and respect.

3 Effectiveness of Anti Discrimination Law

In Chapter 3, we examined the question whether legislative rules are useful, effective and/or necessary in the fight against discrimination; or, put in a different way, whether one can reduce or eliminate discrimination through legal measures. Opinions are divided on this question, some people express the opinion that anti discrimination laws are ineffective and can even be harmful, while others support the enactment of such laws, often together with other non-legislative measures.

The first argument discussed was that anti discrimination laws make a clear statement of public policy and of a commitment to fight discrimination. However, this statement could very well remain a hollow statement if it is made to be seen to be doing something but is not followed up by any action. The European Commission itself expressed clearly that the adoption of the Race and Framework Directives constituted 'an unequivocal statement' about the stance adopted by European society towards discriminatory practices.\(^7\) This statement was, as we have seen, not only aimed at the

Member States and their people themselves, but also at the Candidate Member States and the rest of the world. As the Commission has taken action against those Member States that have not informed it about their transposition of the Race Directive and is in the process of examining the implementing legislation for conformity, this appears to be a genuine statement, rather than just a hollow one.

The 2005 Communication and the Proposal to designate 2007 as the European Year of Equal Opportunities for All also appear to show a genuine commitment of the EU Commission to the fight against discrimination. On the other hand, agreement on the Framework Decision on criminal law measures against racism, proposed more than five years ago, has so far not been reached, despite the fact that the original proposal has already been watered down considerably. As Bell writes:

the negotiations of the Framework Decision have been protracted and difficult. This has resulted in significant departures from the original proposal, often in the direction of more limited offences, as well as additional exceptions.

It remains to be seen whether the plans of the German Presidency to move this project forward will succeed in getting the Proposal adopted.

The second argument for enacting anti discrimination legislation was that such laws protect people who suffer discrimination and provide them with a form of redress, a way of fighting back. However, such legislation could again be a hollow statement, if it is not implemented or enforced properly, if the redress provided is not sufficiently or easily available and/or the remedies given are not adequate. The Race Directive (and the other Equality Directives) have given considerable attention to enforcement provisions,

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8 See Cases C-320/04 Commission v Luxembourg, and C-327/04 Commission v Finland, judgment 24/02/05; C-329/04 Commission v Germany, judgment 28/04/05; C-335/04, Commission v Austria judgment 04/05/2005. Similar action has been taken in relation to the Framework Directive.


as the experience with sex discrimination had shown that this was a problem area. This, together with the action taken against non-implementation, suggests that the Race Directive provides victims with a form of redress and is not, in this sense, a hollow statement.

The third and probably most contested argument discussed, was that anti-discrimination laws have a persuasive and educative function, transmitting the message that racism and racial discrimination are wrong; that they can reduce prejudice by prohibiting the behaviour in which prejudice finds expression; and, that they can act as a deterrent. Although not everyone believes that anti-discrimination laws are effective in changing attitudes and behaviour, the Commission certainly seems to think they can as it states in the Explanatory Memorandum to the Proposal for the Race Directive that ‘the enforcement of anti-racist laws can have a significant effect on the shaping of attitudes’. Some of the research findings, discussed in Chapter 3, support this view, although they also show that changes only happen over a long period of time.

The fourth argument for enacting anti-discrimination legislation was that this leads to a reduction in barriers to employment and thus it opens up more employment opportunities for disadvantaged groups. Again, this argument is contested, and the opposite view, that such laws do, in fact, create extra barriers to employment for disadvantaged people has been supported as well. In the latter view, the market should be left to regulate itself and this will lead voluntarily to a reduction in discrimination. However, it has been questioned whether changes in discriminatory practices will be brought about voluntarily and, therefore, many people argue that legislative measures are needed to back up voluntary activities. The absence, in the EU, of the competence to enact legislation against racial discrimination appears to have hindered the taking of voluntary initiatives.

The fifth argument in support of enacting laws against discrimination was that this provides support for those people who do not want to discriminate against certain people but feel under social pressure to do so. This argument could be powerful in relation to EU legislation, as the social pressure to discriminate might be quite strong in some Member States and legislation in other Member States and at EU level would provide support to resist that pressure.

A final argument for enacting anti discrimination laws was that these strengthen and underpin other measures and policies aimed at promoting equality and reducing discrimination. These other measures in turn support legislative measures. The EU Institutions obviously considered that both legislative and other measures were necessary, as the Race and Framework Directives were accompanied by the Community Action Programme to Combat Discrimination. In the Proposal for this Action Programme, the Commission states, as we have seen, that a coordinated and integrated strategy, using all the instruments available, is needed and that legislation is only one, albeit a key one, component of such a strategy. 13

We looked at some research findings in relation to anti discrimination law and concluded that some moderate impact on discriminatory practices and, in the very long term, some impact on discriminatory attitudes can be detected. It is too early to say what the impact of the Race and the other Equality Directives will be on existing patterns of discrimination within the EU. Recital 28 of the Preamble to the Race Directive mentions that

the objective of this Directive, namely ensuring a common high level of protection against discrimination in all Member States, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and impact of the proposed action, be better achieved by the Community.

The Explanatory Memorandum to the Proposal for the Race Directive mentions that its adoption ‘will lay down common protections against racial discrimination to be enjoyed by citizens all over the Union’ and that it will ensure ‘that people in all Member States enjoy a basic level of protection against discrimination’.\textsuperscript{14}

Therefore, the legislation at EU level aims to establish a common minimum standard of protection across all Member States. The Member States have to enact laws against discrimination which conform to the minimum standards set by the EU in the Equality Directives. This means that, wherever a person finds him/herself within the EU, he/she should, at a minimum, be protected against the discrimination prohibited by these Directives and lack of protection and fear of discrimination should not stop people from travelling or exercising their free movement rights.

4 International Human Rights Instruments to Combat Discrimination

In Chapter 4, we examined the anti discrimination clauses in international human rights instruments. The ravages of World War II with its abuse of theories of race and racism were to be avoided in future and to this end the UN and the Council of Europe were established. Fundamental human rights were seen as vitally important in achieving greater unity between all nations and, therefore, the UDHR, the ICCPR, the ICESCR and the ECHR were adopted. These measures can be seen as setting international standards of human rights. Because these fundamental human rights should be enjoyed by everyone without discrimination, anti discrimination clauses can be found in all these instruments.

According to Article 6 TEU, one of the founding principles of the Union is respect for human rights and fundamental freedoms. The Union shall respect the fundamental rights guaranteed by the ECHR and the rights that result from the constitutional traditions common to the Member States. As all Member States are

\textsuperscript{14} Supra note 12, at III.
parties to most of the international instruments discussed in Chapter 4, the rights
guaranteed in these measures can be said to be part of their common constitutional
traditions. The EU institutions have always placed the right to equality and non-
discrimination firmly within the wider European and international human rights
standards. This explicit adherence to international human rights standards gives the EU
anti discrimination legislation more legitimacy and improves the image of the EU in
both the Member States - towards its own citizens - and on the international scene. And,
as the prohibition of racial discrimination is part of ‘ius cogens’, the EU shows, in
legislating against such discrimination, that it respects international law.

The ICERD has been signed and ratified by all Member States and has had an
impact on their laws, because it prescribes in Article 2(d) that States Parties shall
prohibit and bring to an end racial discrimination by any persons, groups or
organisations, by all appropriate means, including legislation. The ICERD prohibits
both direct and indirect discrimination, like the Race Directive, and it puts an obligation
on State Parties to take positive action measures. On positive action the Convention,
therefore, goes further than most legislative instruments against discrimination,
including the Race Directive, which allow but do not require positive action.

The ECHR is particularly important within the EU because both Article 6 TEU
and the European Charter of Fundamental Rights specifically refer to it and because the
EU would accede to this Convention if the Draft Constitution came into force. In
Chapter 4, we discussed that the Charter determines that, when Charter rights
correspond to the rights guaranteed by the ECHR, the meaning and scope of the rights
will be the same as that of the ECHR rights. According to the Memorandum, the
reference to the ECHR covers not only the text of the Convention and the Protocols to
it, but also the case law of the European Court of Human Rights and of the ECJ. The
Convention and its case law are, therefore, important aids in interpreting the Charter and the EU anti discrimination legislation.

Like the Race Directive, all the international measures discussed in Chapter 4 prohibit both direct and indirect discrimination and allow – in the case of the ICERD require - positive action measures. They thus have elements of the formal equality and the substantive equality models of anti discrimination law. Most also contain general statements about tolerance and respect which fit in the pluralist model. The big difference between these measures and the Directive lies in their enforcement. International measures are not strictly legally enforceable and sanctions for non-compliance are largely ineffective, but they have a more political and persuasive force. Many states sign and ratify them to improve their public image both at home and on the international stage, and they stick to them because they do not want to look ‘bad’. In contrast, the Race Directive is binding on the EU Member States, which have a legal duty to implement it. They can be taken to the ECJ when they do not (fully) comply with this duty or when Member States interpretations of substantive obligations under the Directive are challenged.

The international human rights instruments are thus important for the Race Directive and for EU anti discrimination law because they are part of its historical foundation; because adherence to the international standards of human rights that they set provides the EU with legitimacy; and, because they can act as an aid to interpretation.

5 The Race Directive: Problems of Defining Race and Racism

The negotiations for the Race Directive show clearly that in many Member States racism and racial discrimination are still very sensitive issues because the term race is still very much associated with theories of race and the atrocities of World War II they gave rise to. This is confirmed by the explicit rejection, in Recital 6, of theories which
attempt to determine the existence of separate human races. And, it was not only the (then 15) EU Member States which felt the need for such an explicit statement as is clear from Recommendation 7 of ECRI.15

The fact that race and racism were and still are a sensitive subject might help explain, firstly, why it took the EU such a long time to take action against racism and racial discrimination. As we saw in Chapter 5, the discussion on this subject began in the 1980s, but the Race Directive was not adopted until 2000. And, secondly, it helps explain why a definition of the key terms race, racism and racial or ethnic origin is notably absent from the Directive. The problems during the negotiations suggest that it might have been too difficult to reach a consensus on the definitions of these terms.

However, as the Race Directive contains minimum requirements only and the Member States can go beyond these if they wish to do so, they are free to define race and racism in their national laws. We suggested a number of examples that the Member States could follow and pointed out that there is a definition of ‘racism and xenophobia’ within an EU measure: the Proposal for a Framework Decision. It seems anomalous that the two EU measures to combat racism and racial discrimination differ in what is included: the Race Directive covers racial or ethnic origin, while the Proposal covers race, colour, descent, religion or belief, and national or ethnic origin. This difference can only lead to problems in interpretation. However, as we have mentioned, the Proposal is yet to be adopted, although it is back on the agenda of the German Presidency (Jan-June 2007).

We suggested that it might well be better for the legislator not to give a definition of racism, but to define racial discrimination only. The reason for this is that it is difficult to define an ambiguous and social constructed concept like racism in a way

15 Supra note 1, in the footnote to para 1(a).
that would be useful in court proceedings. It might be better to define those acts which are based on racist beliefs as unlawful discrimination.

The ECJ should, in our view, interpret 'racial or ethnic origin' to include colour and descent, as these can both be seen as part of race. We concluded that Article 3(2) of the Race Directive means that there are gaps in the protection of third-country nationals against racial or ethnic origin discrimination and that these gaps are not remedied by the provisions of the European Charter of Human Rights. The EU Member States could, in implementing the Race Directive, improve the protection of third-country nationals against racial or ethnic origin discrimination in three possible ways. Firstly, they could not make any exceptions to the personal scope at all and include protection of all persons. Secondly, they could make an exception for the situation mentioned in Article 3(2), but make this subject to an objective justification test, following the Recommendation of the CERD on Article 1(2) ICERD, mentioned in Chapter 4.16 Thirdly, they could add a proviso like the one made in Article 1(3) ICERD.

Within the EU, the protection against racial or ethnic origin discrimination is stronger than the protection provided by the Framework Directive against discrimination on the grounds of religion or belief, disability, age or sexual orientation, because the Race Directive has a wider material scope, only allows for very limited exceptions and includes a duty to establish an equality body/bodies. We suggested that the stronger protection is partly the result of the strong political will to combat as many aspects of racial discrimination which existed at the time of adoption of the Directive.

We discussed the difference in character between the discrimination grounds and concluded that race does not affect a person's ability or availability to do a job or use a good or service and it is an ascription of something that does not exist. This might

make race particularly invidious as a ground for discrimination and this might be another reason for the stronger protection against racial discrimination.

However, the difference in levels of protection could lead to problems because it necessitates clear distinctions between the grounds. This is especially problematic with the grounds of racial or ethnic origin and religion or belief, because these grounds are often very closely related and overlapping, especially in the mind of discriminators. For this reason, we suggested that religion or belief should be included in the grounds covered by the Race Directive, although it would be difficult to reach unanimity between all Member States on this, because religion is a contentious issue, as illustrated by the debates on the Islamic head scarves in many European countries. In my view, the other grounds of Article 13 EC do not need to be covered by the Race Directive, although the difference in the levels of protection provided will be problematic in cases of multiple discrimination.

6 The Race Directive: Concepts of Equality and Models of Anti Discrimination Law

Analysing the Race Directive using the concepts of equality and models of anti discrimination law, it can be said to follow the equal treatment model in its definition of direct discrimination as less favourable treatment of a person on the grounds of racial or ethnic origin. However, the Directive addresses some of the problems of the concept of formal equality and the equal treatment model identified in Chapters 1 and 2. Firstly, the Race Directive allows for a hypothetical comparator like all the Article 13 EC Equality Directives do, and this should make it easier for victims to find a comparator and to prove discrimination. Secondly, the non-regression clause in Article 6 of the Race Directive – a similar clause is found in the other Equality Directives – prevents levelling down by the Member States. Unfortunately, private actors are not covered by this prohibition. And, thirdly, the problem that the formal equality concept and model...
ignore existing inequalities and social disadvantages created by past discrimination is partially addressed by the inclusion of a prohibition of indirect discrimination and a provision for positive action.

The Directive does not appear to do anything to avoid the problem that both formal equality concept and model lead to strong conformist and assimilationist pressures nor does it create any room for respect for difference or for the recognition of its positive aspects. The Directive also does not appear to go beyond a focus on the individual in enforcement procedures and remedies, but the provisions leave the details of this to the Member States.

Can the Race Directive be said to fit in a substantive model of anti-discrimination legislation? And which substantive model does it follow, the equality of opportunity or the equality of results model or both? Its title and purpose both mention equal treatment, but the use of the words 'put into effect' in Article 1, the opinion of the ECJ that the aim of Article 2(4) of the Equal Treatment Directive is to arrive at real equality of opportunity and the fact that Article 2 includes in the principle of equality both direct and indirect discrimination all suggest that the purpose of the EU Equality Directives goes beyond the formal concept towards a more substantive concept of equality.

The Directive's prohibition of indirect discrimination takes account of differences and of the unequal impact of seemingly neutral provisions or measures, applied to all persons equally, and, therefore, it goes beyond formal equality and fits in the substantive models of equality, although it is not always clear whether the aim of the provisions against indirect discrimination is to establish equality of opportunity or equality of results. The move towards substantive equality is somewhat tempered by the possibility of justification: indirect discrimination is not unlawful if it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and
necessary. Therefore, business or administrative interests could objectively justify treatment that has an adverse impact on some people. We have argued that the national courts and the ECJ should always scrutinise justifications of indirect racial or ethnic origin discrimination very strictly because race can be seen as a suspect ground and because justifications can be used to promote either pluralism/multiculturalism or assimilation.

The Race Directive can also be said to fit in the substantive models of anti discrimination law because it allows the Member States to take positive action measures ‘to prevent or compensate for disadvantages linked to racial or ethnic origin’. It thus permits preferential treatment of historically disadvantaged groups. Whether this fits in an equality of opportunity model or an equality of results model will depend on what the ECJ is prepared to accept as permitted positive action. Our discussion in Chapters 2 and 6 showed that there are arguments both for and against a broader interpretation than the ECJ has allowed in sex discrimination cases up to now, which would go further towards the equality of results model of anti discrimination law. However, the Commission’s Report under Article 17 of the Directive indicates that the Commission is not prepared to allow for a broader interpretation. We suggested that this is unfortunate and that it would have been better to allow the Member States a wider margin of discretion in how far these measures should go because attitudes towards positive action vary hugely across the Member States. A proportionality test is already applicable to such measures within the EU and this would ensure that the Member States cannot take just any measure they see fit. Suggestions have also been made to make positive action mandatory, as it is under the ICERD, but it is unlikely that the Member States will reach a unanimous decision on this.
Some references in Recitals 8 and 12 of the Preamble to the Race Directive and Articles 11, 12 and 17 and Recital 23, which can be seen as promoting participation, fit in the pluralist model of anti discrimination law.

We discussed some provisions of the Race Directive that move it beyond an equal treatment model, like the duty imposed on the Member States by Article 13 of the Directive to designate a body or bodies for the promotion of equal treatment. The work of these bodies is proactive and preventative as they aim at promoting and establishing factual equality. These bodies can influence policy-making at national and EU level and can be involved in the development of new anti discrimination measures. We also mentioned that there appears to be no logical explanation for the omission of such a duty in the Framework Directive.

We looked at the mainstreaming duty in relation to all Article 13 EC grounds laid down in the Draft EU Constitution and concluded that such a duty moves beyond formal equality. However, the question whether a mainstreaming obligation fits in an equality of opportunity, an equality of results or a pluralist model of anti discrimination law depends very much on how it is implemented and interpreted. Nevertheless, a mainstreaming duty laid down in legislation is a positive step which goes beyond formal equality and, therefore, we suggested that, as it is uncertain whether the Draft Constitution in its present form will come into force, a mainstreaming duty similar to the one in Article 1(1) of the Equal Treatment (Amendment) Directive should be added to the Race and Framework Directives. This would establish the same obligation to mainstream equality in relation to all Article 13 EC grounds of discrimination.

When the Race Directive was adopted there appeared to be little consideration of the different concepts of equality. However, from the end of 2004, a shift in the language at EU level towards more substantive and pluralist ideas of equality can be detected, in that there is now a recognition of the need to go beyond the prevention of
unequal treatment and of the fact that positive action may be necessary to compensate for the structural barriers and long-standing and deep-rooted inequalities that some groups experience. The term equal opportunities has been mentioned more frequently and now appears in the mandate of the Employment Commissioner and in the responsibilities of a special group of Commissioners.

There is also a greater emphasis on mainstreaming non-discrimination and equal opportunities in relation to all the grounds of Article 13 EC. The 2005 Communication\(^ {17}\) and the Proposal for a European Year of Equal Opportunities for All,\(^ {18}\) stress the importance of social inclusion and of the promotion of the full and equal participation of all groups in society. The Communication and the Proposal appear to be more than hollow statements as they have been followed up by some action. Although it appears unlikely that this shift in language will lead to legislative changes in the near future, it might well lead to other measures and policies and so, in time, to further legislation.

7 Conclusions on the Research Question

This Thesis aimed to identify whether the Race Directive improves the protection against discrimination on the grounds of racial or ethnic origin for people within the EU. In order to answer this question, we have made an in-depth evaluation of the Directive based on the theoretical basis and the standards provided in the first four Chapters. We will now turn to the answer to the above question.

In my opinion, the answer is: yes, the Race Directive has improved the protection of victims of racial or ethnic origin discrimination in the EU. It has established common minimum standards and has put the EU Member States under a legally enforceable duty to ensure that their national laws conform to this minimum standard. By doing so, it has taken the first significant step on the road to equality referred to in the title of this Thesis.

\(^ {17}\) Supra note 9.
\(^ {18}\) Supra note 10.
The Directive has added value to the protection against racial or ethnic origin discrimination provided for at both national and international level. At national level, all Member States had to adopt new legislation or amend existing legislation. For some Member States, the transposition of the Directive meant that completely new legislation against discrimination had to be adopted. For example, Austria, Finland, Germany, Greece and Luxembourg did not have any specific anti discrimination legislation. Other countries already had laws in place, but these laws needed to be amended to bring them in line with the Directive. For example, Britain, where legislation against race discrimination existed since 1965, had to make a number of changes, including an amendment of its definition of indirect discrimination.

In its imposition of a legally enforceable obligation to adopt legislation the Directive goes beyond the international human rights instruments, because their enforcement is problematic. The ICERD also imposes duties on Member States, including an obligation to take positive action measures but, again, the enforcement provisions are vague and the sanctions provided are largely ineffective. Article 14 ECHR is problematic because it is accessory in character and can only be used in conjunction with another article of the ECHR. To compound the problem, the European Court of Human Rights did not find a breach of Article 14 on the grounds of racial discrimination until 2004. Protocol 12 to the ECHR provides a freestanding right to non-discrimination, but it has only been ratified by a small number of EU Member States.

19 For information on the different measures in existence in the 15 Member States which were Members when the Race Directive was adopted in 2000 see: Commission Report on Member States Legal Provisions to Combat Discrimination (2000 Luxembourg: OOPEC).
20 See also Moraes, Claude, "Claude Moraes MEP launches a 'Name and Shame' League Table of Failure to Implement New EU Race Laws" (2003), <www.claudemoraes.net/article13transpose.html>. These same countries have been taken to the ECJ for not complying with the Directive, see supra note 8. The case against Greece was withdrawn, but the ECJ ordered Greece to pay the costs as it only adopted measures after the Commission had initiated infringement proceedings.
21 For more information on this see: Hill, Henrietta, "New Regulations on Race Discrimination" 20, 29 Discrimination Law Association Briefings 3-6 (2003).
But what can a victim of discrimination, who should be protected by these minimum standards, do if a Member State does not fulfil its duty to implement the Directive? The Commission has taken action against those Member States that have not informed it of the implementation of the Race Directive in their national law under Article 226 and 228 EC but this is a long and slow process, which will not provide a very effective remedy for individual victims. However, under the general legal principles established by the ECJ, an individual can rely on directly effective provisions in Directives against organs of the State, where these provisions are sufficiently clear, precise and unconditional. Which provisions of the Race Directive are directly effective would ultimately be determined by the ECJ but, given the case law on sex discrimination provisions, it is likely, as the Commission writes, 'that quite a lot of the provisions in the two Directives could be directly effective'.

However, this would not help the individual in cases where the discriminator is a private individual or organisation. But the individual might still succeed in his/her complaint of discrimination, because the national courts are under an obligation to interpret existing national law, as far as possible, in such a way that it implements the Directive's provisions. If that does not help either, the individual can directly sue the Member State itself for loss or damages suffered as a result of the failure to transpose a Directive on the conditions that the legal provision infringed is intended to confer rights on individuals; that the breach was sufficiently serious; and, that there is a direct causal link between the breach and the damages suffered by the individual.


24 These are the principles of direct effect, indirect effect and state liability. For more information see the report, supra note 23, at 15; Ellis, Evelyn, *EU Anti-Discrimination Law* (2005 Oxford: Oxford University Press), at 47-76.
In my opinion, the value which the EU provisions add to the existing national and international measures against discrimination, lies, therefore, in the setting of minimum, enforceable standards of protection against racial and ethnic origin discrimination across the EU. The Race Directive must thus be seen as a very positive development in the fight against racism and racial or ethnic origin discrimination in the EU or, in other words, as a very positive and significant step on the road to equality.

We suggested that equality in all its types is needed to fight racism and racial discrimination and that legislation following all four models is necessary to ensure real equality for all. The end goal of this road is, therefore, to reach equality in all four concepts: formal equality, or, in Fredman’s words, equality which redresses racist stigma, stereotyping, humiliation and violence; and equality of opportunity and equality of results, which both aim to break the cycle of disadvantage associated with groups defined by race or ethnicity and pluralism, which affirms the accommodation of difference as a part of the right to equal concern and respect.

If we see this as the end goal of our road, the Race Directive, although an important step, is ‘only the end of the beginning. Much has still to be done to ensure the right to non-discrimination for all the peoples of Europe’. It is a necessary first step towards fulfilling the first concept of formal equality or equal treatment. Such legislation is useful and indeed necessary as a minimum requirement. The Directive has made a step towards the second concept of equality of opportunity by permitting positive action, but, considering the Commission’s Report on the Race Directive, it appears to be unlikely that this will go further towards a concept of equality of results. However, there will be no progress at all towards substantive equality in this respect if Member States do not take any positive action. The Directive has also made a cautious step towards substantive equality in prohibiting indirect discrimination. In a very

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tentative way, the Directive could also be said to go some way towards a pluralist concept of equality in that it contributes to a more tolerant society, because it fights discrimination and intolerance. However, it does not contain any provisions for positive duties or for a duty to mainstream equality and diversity.

Whether the recent shift in the language about equality at EU level will lead to (legislative) measures which will move the EU further towards achieving equality of opportunity, equality of results and pluralism, will have to be seen. The emphasis on mainstreaming equal opportunities and the incorporation of a mainstreaming duty in relation to all Article 13 EC grounds in the Draft Constitution is encouraging in this respect. A study of the legislation on positive duties which exists in some of the Member States might also suggest possible future steps EU legislation could take.

The Race Directive is 'only the end of the beginning' because, at present, it does not yet ensure full, factual equality for 'all the peoples in Europe'. Despite the fact that it is often difficult to draw a distinct line between religion or belief and racial or ethnic origin as grounds for discrimination and despite the fact that these are more often than not linked in the mind of perpetrators of discriminatory acts, people who are discriminated against outside the employment field because of their religion are not protected because of the omission of religion or belief from the grounds covered by the Race Directive. Despite the fact that third-country nationals are often the target of discriminatory acts, the Directive leaves a gap in their protection because of the exceptions in Article 3(2). Despite the fact that legislation of the formal equality model is considered not to be enough to tackle real inequalities, the absence of more proactive and preventive provisions also limits the protection afforded to disadvantaged groups in society.

Therefore, the Race Directive is a significant step, but it should be seen as only the first step towards greater equality for all. It is important because it started the EU on
its journey to equality and, thereby, laid the foundation for the protection against racial or ethnic origin discrimination for everyone in the EU. The challenge is now to build on this foundation. From the shift in language within the EU it appears that the Commission is keen to progress further along the road. Whether the Member States are equally keen remains to be seen. But, perhaps the stricter immigration policies which many Member States and the EU are pursuing at present might make them more inclined to accept further measures against racial discrimination. As we have seen, measures against racial discrimination have often been taken to ameliorate the effects of stricter immigration policies and to show that the harsh immigration rules are not motivated by racism. The Commission's repeated emphasis on equal opportunities for all and on the need to go beyond equal treatment to make up for historical disadvantages suffered by some groups, might also lead to greater acceptance of these ideas among the Member States. This, in turn, could lead to more positive and proactive measures against racial or ethnic origin discrimination which would bring the EU further along the road to racial and ethnic equality.
General


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