COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 25 October 2006

DH-MIN(2006)020

COMMITTEE OF EXPERTS ON ISSUES RELATING TO THE PROTECTION OF NATIONAL MINORITIES
(DH-MIN)

THE IMPACT OF INTERNATIONAL NON-DISCRIMINATION NORMS IN COMBINATION WITH GENERAL HUMAN RIGHTS FOR THE PROTECTION OF NATIONAL MINORITIES :

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Report prepared by Kristin HENRARD*

* Associate Professor, RUG-Department of International and Constitutional Law, Groningen, The Netherlands

This report was prepared upon the request of the Secretariat of the Framework Convention for the Protection of National Minorities and of the DH-MIN, for the fourth meeting of the Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN), 19-20 October 2006, Strasbourg, France. The views expressed in the present expert paper are those of the author and do not necessarily reflect the views of the DH-MIN or its Members.

I. Introduction

The purpose of this report, the report on the impact of international non-discrimination norms in combination with general human rights for the protection of national minorities: several United Nations Human Rights Conventions, and the reports prepared by Rainer Hoffman and Olivier de Schutter in this field, is to contribute to the ongoing discussion and debate about the appropriate treatment of minorities. It remains a challenge to identify what approach is needed in order to reach an optimal integration of minorities, not only for purposes of peace and security but also in view of the overreaching goal of human rights, the protection of the human dignity of all persons. The recurring problem of ethnic conflicts clearly shows the link between an appropriate minority protection on one hand and peace and security on the other hand. Beyond this more instrumentalist approach, the (pure) human rights approach is also relevant. In this respect, it should be underlined that the minority specific international instruments clearly put the minority specific rights within the overarching framework of human rights.[1]

Two essential goals of minority protection are substantive or full equality (as opposed to mere formal equality) and the right to identity. The central importance of the right to identity is nicely captured by Thornberry when he postulates that it can be 'regarded as constituting the whole of 'minority rights''.[2] These two themes can thus be considered as important benchmarks when evaluating to what extent a certain approach to minority protection is 'adequate'.

This brings me to the central question addressed in the above-mentioned reports, namely whether the prohibition of discrimination provides sufficient protection for persons belonging to minorities. The question is actually whether the prohibition of discrimination in combination with general human rights is sufficient, or whether one needs additionally minority (specific) rights. This question can be framed in terms of the pillars or basic principles of minority protection, more specifically whether in addition to the first pillar (of individual human rights), there is a need for the second pillar (with special rights for minorities). The idea that an adequate system of minority protection (in view of substantive equality and identity considerations) would be constructed on these two pillars can actually be traced back to the opinion of the Permanent Court of International Justice,[3] operative during the League of Nations. Nevertheless, it needs to be acknowledged that this position is not universally accepted. There are indeed still academics and states that argue that an effective protection of the first pillar (general human rights) would be sufficient (hence, disregarding the need for the second pillar with 'special' minority rights).[4]

When reviewing the practice of the member states of the Council of Europe, it is obvious that there are great divergences in approach, reflecting *inter alia* different degrees of sensitivity towards the minority phenomenon. States tend to be concerned not only that the acceptance of potentially far reaching positive obligations towards minorities in their territory will create heavy financial burdens, but also (and possibly primarily) that the acknowledgement of minorities and the grant of special minority rights will counter nation building and lead to stronger divisions within the overall population, possibly even threatening territorial integrity.[5] In this regard, in an attempt to address some of the concerns about minority rights, it should be emphasized (again) that minority rights are not situated outside the human rights framework but are considered to be part of it.

---

[1] For example, Article 1 of the Framework Convention for the protection of National Minorities; OSCE Copenhagen document, para 30. See also infra, the discussion of the rejection by certain states of the need for minority specific rights.
[2] P. Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press; 1991) 392.
[3] PCIJ, Advisory Opinion regarding Minority Schools in Albania, 6 April 1935, *PCIJ Reports, Seires A/B no 64*, 1935, 17.
[4] *Inter alia* C.C. O'Brien, 'What Rights Should Minorities Have?', in B. Whitaker (ed.), *Minorities: A Question of Human Rights?* (Oxford: Pergamon, 1984), 21; J. Raïkka (ed.), *Do we Need Minority Rights? Conceptual Issues* (The Hague: Martinus Nijhoff, 1996); N.S. Rodley, 'Conceptual Problems in the Protection of Minorities: International Legal Developments', (1995) *H.R.Q.*, 64.
[5] See inter alia M.N. Shaw, 'The Definition of Minorities in International Law', in Y. Dinstein and M. Tabory (eds.), *The Protection of Minorities and Human Rights* (Dordrecht: Martinus Nijhoff, 1992) 30-31.

Despite numerous contributions that have already been written about this question in previous years,[6] it is not superfluous to investigate this again since the norms concerned contain concepts and expressions the exact scope of which is determined through interpretation. The latter is however not (necessarily) static, as it is often emphasized by the European Court of Human Rights (ECtHR).[7] In this respect, the argument can be made that if certain jurisprudential developments in relation to the first pillar in favour of substantive equality and the right to identity can be identified (get stronger and consolidate), this might have an impact on the relative importance of the two pillars in relation to the construction of an adequate system of minority protection.

The evaluation of this question in relation to the European Convention on Human Rights (hereafter: ECHR) is the theme of this report, while the report on the impact of international non-discrimination norms in combination with general human rights for the protection of national minorities: several United Nations Human Rights Conventions does the same in relation to several UN human rights conventions.

This report consists of three sections addressing consecutively conceptual issues, substantive issues and enforcement. The conceptual issues are focused on evaluating the implications of non-discrimination for minority protection and address, in addition to the prohibition of discrimination, its relationship to substantive equality, and hence the connection with both temporary and more enduring special measures. The section on substantive issues actually assesses to what extent the other dimension of the first pillar, namely general human rights, contribute to minority protection. Finally, in relation to enforcement the supervisory mechanisms are outlined and burden of proof issues discussed.

Discussing and evaluating measures of relevance to minority protection presupposes that the meaning of the concept 'minority' is clear. However, until the present day there is no generally accepted legal definition of the term in question.[8] Nevertheless, when scrutinizing the various proposals of definition by academics and from within international organizations, a certain core of objective and subjective elements for such definition emerges.[9] There is broad agreement about the requirement of stable ethnic, religious or linguistic characteristics which are different from the rest of the population, a numerical minority position, non-dominance and the wish to preserve the own, separate cultural identity.[10] Notwithstanding some ongoing resistance, an international trend can be identified away from a nationality requirement and towards the acceptance of minorities identified at regional level.[11]

Considering the identification of this 'core', it is not surprising that several working definitions are being used as the point of departure in legal literature concerning minorities.[12] Arguably, this also confirms that an important reason why no convention contains a definition can be attributed to a lack of political will on the side of states. Hopefully, the on-going constructive dialogue entertained by the Advisory Committee on the Framework Convention for the Protection of National Minorities (hereafter: the Advisory

[6] See inter alia the references in the footnotes supra and infra.
[7] The interpretation of case-law is furthermore not always identical either.
[8] With the exception of the 1994 Convention of the Central European Initiative for the protection of minority rights (Article 1), not a single international legally binding document contains a definition of this concept, which is wrought with sensitivities. See also A. Meijknecht, *Towards International Personality: The Position of Minorities and Indigenous Peoples in International law* (Antwerp: Intersentia, 2002), 69.
[9] See also G. Pentassuglia, *Minorities in International Law* (Strasbourg: Council of Europe, 2003), 57-58.
[10] It should be underscored that these discussions played in regard to both 'national minority' (Europe) and 'ethnic … minority' (UN). For a more in depth discussion, which cannot be fully repeated here, see K. Henrard, Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self Determination (The Hague: KLI, 2000), 30-48.
[11] Venice Commission, Opinion on Possible Groups of Persons to which the Framework Convention for the Protection of National Minorities Could be Applied in Belgium, March 2002, CDL-AD (2002) 1. See also P. Thornberry & M.A. Martin Estebanez, *Minority Rights in Europe* (Strasbourg: Council of Europe, 2004), 93 and 95.
[12] *Inter alia* P. Élias Dimitras, 'Recognition of Minorities in Europe : Protecting Rights and Dignity', MRG Briefing, at www.mrg.org, 1.

Committee) is going to contribute to the diminishment of the fears of states regarding the recognition of minorities and special minority rights (see further below).

In line with the practice in Europe, this paper is written in terms of 'national minorities'. It should however be acknowledged that at UN level, the dominant minority terminology is in terms of 'ethnic, religious or linguistic minorities'.[13] As was fully argued elsewhere, the adjectives 'national' and 'ethnic, religious or linguistic' can be understood as covering more or less the same load.[14]

II. Equality and non-discrimination

The concept 'equality' is rather thin on the one hand, since it is merely relative, always presupposing some kind of comparison (and thus does not have a specific content)[15]. It is very rich, on the other hand, because it has many different (albeit interrelated) dimensions (discrimination, affirmative action, equality before the law, equal protection of the law etc.).[16]

From the perspective of minorities, the absence of substantive underpinning is particularly problematic as this absence actually means that a claim of equal treatment does not necessarily have to be met by the extension of a benefit to the relatively underprivileged individual (often the members of minorities) which would imply a levelling up or equalizing at a high point. Indeed, a claim of equal treatment can just as easily be met by removing a benefit from the relatively privileged group, and equalizing the parties at the lower point (levelling down).[17]

In relation to the comparative component of the equality principle, it should also be outlined that this is everything but straightforward. There is no such thing as pure equality in the sense that two objects are always different in some way or the other.[18] The question then is what are - in a particular context - relevant differences. Unfortunately, this aspect is entirely underdeveloped in the (quasi)jurisprudence, in the sense that the supervisory bodies do not even appear to try to develop relevant criteria in relation to the comparator and the 'comparability' factor.[19]

The richness of the equality principle also lies in the fact that there are several distinctive conceptions of equality, which entail different ways of defining and understanding the dimensions enumerated above. An important distinction needs to be made between formal equality (or equality as consistency), which sets out to treat everybody in exactly the same way on the one hand, and substantive (or real or full) equality on the other hand. Full equality acknowledges differences in starting positions which might necessitate

[13] The one exception in this respect concerns the UN Minorities Declaration of 1992, the full title of which refers to 'national or ethnic, religious and linguistic minorities'. The addition of 'national minority' was primarily an attempt to transcend the discussion about which of both expressions covers the widest load: P. Thornberry, 'The UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations and an Update', in A. Phillips and A. Rosas (eds.), Universal Minority Rights (Abo: Abo Akademi Tryckeri, 1995), 33.

[14] Henrard, Devising an Adequate System of Minority Protection…, 53-55. Certain arguments were put forward that 'national minority' would have an extra dimension as compared to 'ethnic minority'. Nevertheless, analogous discussions materialized about and similar definitions were put forward of these concepts in the framework of international organizations. See also G. Pentassuglia, *Minorities in International Law* (Strasbourg: Council of Europe, 2002, 63; P. Thornberry & M.A. Martin Estebanez, *Minority Rights in Europe* (Strasbourg: Council of Europe, 2004, 93-94.

[15] S. Fredman, 'Introduction', in S. Fredman (ed.), *Discrimination and Human Rights: the case of racism* (Oxford: OUP, 2001), 18.

[16] See also HRC, General Comment no 18: Non-discrimination, para 1.

[17] See also S. Fredman, 'Beyond the Dichotomy of Formal and Substantive Equality: Towards a new definition of Equal Rights', in I. Boerefijn et al (eds.), *Temporary Special Measures* (Antwerp, 2003), 113.

[18] E. Holmes, 'Anti-Discrimination Rights Without Equality', 68 *The Modern Law Review*, 2005, 179.

[19] For a more in depth discussion of the comparability factor, see K. Henrard, 'Equality and Non-discrimination', in M. Weller (ed.), *Jurisprudence Digest: Minority Protection*, OUP, 2006, 57 p.

differential treatment in order to reach real, effective equality. The latter understanding of equality is obviously essential for minorities in their quest (for special measures in order) to protect and promote their own identity. Nevertheless, to the extent that that formal equality principle tackles formal exclusionary rules, it is also very important for minorities.

Another important distinction that should be made is between policies aimed at equal opportunities and those aimed at equal results/outcome in relation to various forms of 'positive action' aimed at countering the effects of past or ongoing discrimination.[20] The equal opportunities approach sets out to level the playing field and equalize the starting point for the various competitors, which might necessitate (and justify) special measures for the disadvantaged group.[21] Equality of results or outcome, goes beyond the equalization of the starting point, which it considers insufficient and hence ineffective to obtain real, substantive equality, and focuses on the outcome and actual equality of results. This approach is most controversial because it seems to contradict the principle of equal treatment (on an individual basis), especially when (rigid) quota are concerned.[22]

III. Non-discrimination (in combination with general human rights) and national minorities: European Convention on Human Rights

Admittedly, the text of the ECHR was not designed to respond to the special needs of national minorities, which is reflected by the absence of minority specific rights, while its provisions do not cater for several of the special needs of minorities in terms of *inter alia* language rights, and mother tongue education. As argued extensively elsewhere,[23] the lack of minority attention in the provisions of the ECHR was not, at least initially, compensated by a minority-sensitive jurisprudence with progressive interpretations both as regards the scope of application of the rights, and the application of the doctrine of legitimate limitations.

The 'older' and rather critical assessment of the contribution of general human rights as found in the ECHR to minority protection strongly supported the two pillar structure for an adequate system of minority protection, in the sense that the additional need for the second pillar with special minority rights was 'obvious'. [24] Indeed, the (pre 2000) jurisprudence of the ECtHR in terms of the prohibition of discrimination only provided minimal openings for the principle of true, substantive equality, while the interpretation of the general human rights provided little support for the right to identity of persons belonging to minorities.[25]

However, such assessments do not necessarily remain true indefinitely, since the jurisprudence of the ECtHR is evolutive. As the ECHR is a living instrument that needs to be interpreted so that the convention rights remain in tune with social changes.[26]

Since 2000, it is possible to trace several developments in the jurisprudence of the ECtHR which has direct or indirect special relevance for minorities.[27] In this regard, suggestions about possible nuances to the 'two pillar structure' of an adequate system of minority protection do not seem inappropriate.

---

[20] Fredman, Beyond the Dichotomy…, 110-111, and 113-115.
[21] It should be noted that there are different conceptions as to how far 'equal opportunities' can be stretched in a given context. In this context Fredman has called the approach 'deceptively simple' (Fredman, Introduction…, 20-21).
[22] Fredman, Introduction…, 19.
[23] Henrard, Devising an Adequate System of Minority Protection …, 56-155 (Chapter II: The Contribution of Individual Human Rights to Minority Protection).
[24] Henrard, Devising an Adequate System of Minority Protection …, 141-143.
[25] Henrard, Devising an Adequate System of Minority Protection …, 142.
[26] *Inter alia* J. Vande Lanotte and Y. Haeck, *Handboek EVRM – Deel 1: Algemene Beginselen* (Antwerp: Intersentia, 2005),192.
[27] See *inter alia* G. Gilbert, 'The Burgeoning Minority Rights Jurisprudence of Human Rights', 24 *HRQ* (2002), 736-780; S. Spiliopoulou-Akermark, 'The Limits of Pluralism – Recent Jurisprudence of the European Court of Human Rights with Regard

It is possible to point to several openings in the jurisprudence relating to non –discrimination towards the inclusion of substantive equality considerations. Similarly, several judgments reveal that minority identity concerns are taken on board in the interpretation of individual human rights. However, despite these multiple important developments in the jurisprudence of the ECtHR, which carry the potential of a seriously enhanced level of minority protection flowing from the ECHR (and thus the first pillar), the following overview will reveal that ultimately several flaws (*inter alia* in the form of inconsistencies) and lacuna remain.[28] Consequently, the additional need for special minority rights remains.

A. Conceptual issues

This section focuses on the equality principle and more specifically the prohibition of discrimination in relation to minority protection. The discussion of several factors determining the reach of this prohibition is followed by an overview of the relevant review criteria and the related different levels of scrutiny. Subsequently, various ways in which non-discrimination can contribute to true, effective or substantive equality are identified: indirect discrimination, the obligation to adopt differential treatment (special measures), a positive obligation to eradicate discrimination and ensure equal treatment to all, as well as the link to affirmative action. The role of both temporary and more permanent special measures in relation to the prohibition of discrimination is discussed throughout. The analysis is always preceded by some more theoretical considerations.

1) Recognition of national minorities

Since the ECHR does not contain specific minority rights, it is not surprising that the Court has not ventured into the question of the appropriate definition of the concept 'national minority'. Actually, the Court seemingly tries to avoid taking up a clear stance in this respect. The absence of a generally agreed upon definition in terms of international law and more general subsidiarity considerations may make it understandable that states get a wide margin of appreciation in determining what groups qualify as national minorities. Nevertheless, the question of 'recognition of national minorities' can and has come up in the context of the enjoyment of human rights, like the freedom of association, and the freedom of religion.[29]

---

to Minorities: Does the Prohibition of Discrimination Add Anything?', *JEMIE* (2002/3), 23 p. See also the annual reports by R. Medda-Windischer on the jurisprudence of the European Court of Human Rights in the *European Yearbook of Minority Issues* (the first volume of which appeared in 2001/2002).

[28] This jurisprudence is analyzed extensively in K. Henrard, 'A Patchwork of Successful and Missed Synergies in the Jurisprudence of the European Court of Human Rights', to be published in K. Henrard & R. Dunbar (eds.), *Synergies in Minority Protection* (Cambridge: CUP, 2006), 40 p. A selection of this case law will be outlined infra, under III.

[29] The Court's emphasis on the importance of pluralism extends within religious movements so that the State should not interfere when distinctive sub-streams emerge. The state's positive obligations in this regard would entail protection of religious diversity (including religious minorities) in that the state should not chose side but merely ensure the mutual tolerance between the groups. These principles were underscored in *Metropolitan Church of Bessarabia and others v Moldova* (13 December 2001), which concerned the non-recognition of the church by the Moldovan authorities. In assessing whether the interference with the rights under Article 9 was legitimate or not, the Court acknowledged that in a society where several religions co-exist, it might be necessary for the state to limit the freedom to manifest one's religion in order to accommodate the religious diversity. These limitations, however, should be done in a neutral, impartial and proportional manner, while the margin of appreciation of states in the matter is circumscribed by the need to ensure a true religious pluralism. *In casu* the Court argues that the non-recognition of the applicant church, because it would merely be a rebellious section of the same religion, meant that the religious community concerned was not able to function or organize itself, while its members could not perform religious activities without breaking the law. Hence, the Court concludes that these far-reaching consequences for the freedom of religion amount to a violation of Article 9 by Moldova. As Gilbert correctly underscores, the Court's reasoning reveals how intertwined questions of recognition and registration are with practices and customs (and the ensuing respect for the separate identity) of minorities.

Since *Sidiropoulous v Greece*[30], the ECtHR consistently confirmed its protective stance towards associations with a minority focus (sanctioning refusals to recognize or register such considerations).

In *United Macedonian Organization Ilinden and others v Bulgaria*, the Court underscored in relation to the refusal of registration of an association aiming at the recognition of the Macedonian minority in Bulgaria:

> 'associations formed for other purposes, including those … seeking an ethnic identity or asserting a minority consciousness, are also important to the proper functioning of a democracy. For pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities… It is only natural that … the participation of citizens in the democratic process is to a large extent achieved through the belonging to associations in which they may integrate with each other and pursue common objectives collectively'.[31]

It is difficult to reconcile the strong awareness of the need to protect this fundamental freedom for minorities and the concomitant strict scrutiny by the ECtHR, with the rather 'easy' acceptance of a refusal to register an association under the name of the Union of People of Silesian Nationality as stated in *Gorzelik and others v Poland.*[32] The criticism that has been voiced as regards certain applications of the margin of appreciation doctrine by the ECtHR seems certainly valid in relation to this particular case. The national courts in *Gorzelik* had attached considerable importance to the definitions of 'nation' and 'national minority' in the justification not to accept the registration of the association. The Court simply notes that it is not its task to define 'national minority', acknowledging the difficulties at the international level to agree in such definition.[33] This arguably amounts to a *de facto* acceptance at face value of whatever the Polish authorities decide in this regard. When the result is a serious interference with a fundamental right guaranteed by the ECHR, it seems questionable to leave this definitional issue completely to the discretion of the national authorities.[34] In this respect, it seems especially problematic that the legal system does not contain a definition of the concept 'national minority' or even a hint at relevant criteria to identify them. It can at least be argued that the lack of legal certainty conflicts with the rule of law, which is an essential benchmark of a democratic society.[35]

To some extent, it can be argued that this avoidance to take up a clear position in relation to the definition of the concept 'national minority', explains the Court apparent inhibition to evaluate discrimination claims in relation to the ground 'association with a national minority', as was noticeable in the recent case of *D.H. and others v Czech Republic*[36]. Although the claimants relied not only on race and ethnic origin as grounds of prohibited discrimination, but also on the ground 'membership to a national minority', the Court limited itself in its evaluation of the Article 14 complaint to references to 'ethnic or social origin', 'ethnic origin' and 'racial prejudice'.[37]

While the Court has explicitly and 'warmly' taken up the minority protection theme in the key case *Chapman v UK*,[38] it qualifies Roma as a national minority without any indication of relevant criteria in

[30] ECtHR, Sidiropoulos v Greece, 10 July 1998, para 43-47.
[31] ECtHR, UMO Ilinden and others v Bulgaria, 19 January 2006, para 58.
[32] ECtHR Gorzelik and others v Poland, 17 May 2001.
[33] ECtHR, Gorzelik, para 62.
[34] Contra Gilbert, 'The Burgeoning Minority Rights Jurisprudence of ECtHR of Human Rights' …, 738, who emphasizes that the Court 'was prepared to review the legal process by which the state had denied national minority status to a minority group'. The Court gave such an extensive margin of appreciation to Poland that de facto it reviewed very lightly (if at all).
[35] Contra Hoffmann (other report).
[36] ECtHR., D.H. and others v Czech Republic, 7 February 2006.
[37] ECtHR, D.H. and others v Czech Republic, para 45, 49, 52.
[38] See infra for a more elaborate discussion of this case.

this respect. The position taken in *DH and others v Czech Republic* should not necessarily mean that the ECtHR is coming back on its promise in *Chapman*, but rather, as was also visible in *Chapman* itself, as another confirmation of the Court's general reluctance to find violations of the prohibition of discrimination.

2) Non –discrimination

In view of the fact that the prohibition of discrimination is said to be the *conditio sine qua non* for an adequate minority protection, it is important to identify its reach and scope. Since the prohibition of discrimination does not rule out every differentiation, the identification of the review criteria as well as the way in which they are interpreted and applied by the supervisory organs also determines the actual reach of the prohibition. The relationship and interaction between the prohibition of discrimination and 'special measures' is more fully addressed below.

a) Reach of the prohibition of discrimination

The variables determining the reach of the prohibition of discrimination include the (non) accessory nature of the prohibition, the grounds of prohibited discrimination and the question whether the prohibition of discrimination includes indirect discrimination.[39]

i. Accessory or not

The text of the Convention itself contains one provision prohibiting discrimination, more specifically Article 14. The reach of this prohibition is limited because it contains an accessory right to non discrimination, only applying in so far as it is related to one of the Convention rights. In the meantime, additional Protocol 12 has come into effect (since 1 April 2005) adding a general prohibition of discrimination. However, it should be highlighted that so far ECtHR has not yet pronounced a judgment in terms of this protocol. Consequently, the only document that can be drawn upon for further clarifications is its Explanatory Memorandum. It is expected that the principles developed so far in relation to the prohibition of discrimination will be followed as well in relation to Protocol No. 12, with the exception of course of the case law related to the accessory nature of Article 14.

In view of the limitation flowing from this accessory nature, it needs to be highlighted that the Court has nuanced the rigidity of this requirement by not requiring that the right in combination with which Article 14 is invoked is also violated in itself, [40] and by rather easily accepting that the facts of a case fall within the ambit of one of the substantive provisions. Nevertheless, it is obvious that the ambit of the prohibition of discrimination remained restricted. [41] A related restrictive feature of the ECtHR's jurisprudence concerns the tendency of the Court no longer to investigate the discrimination complaint (or at least not to develop any further argumentation in this regard) after it has concluded to the violation of the substantive right in itself.[42] Although the Court indicates that it will nevertheless review the complaint in terms of Article 14 in so far as a clear inequality of treatment in the enjoyment of the right in question' forms a

[39] In relation to the EU, the reach of the prohibition of discrimination is also determined by the competences of the EU, as is underscored by the legislative texts and the jurisprudence of the ECJ: inter alia Directive 2000/43/EC, Article 3, 1; Directive 2000/78/EC, Article 3, 1; Article 13 TEC; ECJ, Case C-122/96 Saldanha and MTS Securities Corporation v Hiross Holding AG [1997] ECR I-5325, para 25. This requirement is interpreted loosely by the ECJ, inter alia ECJ, C-274/96 Bickel and Franz [1998] ECR I-7637.

[40] ECtHR, Case relating to certain aspects of the laws on the use of language in education v Belgium (Belgian Linguistics case), 23 July 1968, para 9.

[41] ECtHR, Sha'are Shalom ve Tsedek v France, 27 June 2000, para 29.

[42] Clear examples of this 'practice' can be found in the case of *Sha'are Shalom ve Tsedek v France*: ECtHR, Sha-are Shalom ve Tsedek v France, 27 June 2000, para 87 and in Podkolzina v Latvia, 9 April 2002, para 30, 36 and 42. See also ECtHR, Lustig-prean and Beckett v. United Kingdom, 27 September 1999, para 109

fundamental aspect of the case, the application of this vague standard has been criticized as another confirmation of the reluctance of the Court to find a violation of the prohibition of discrimination.[43]

ii. Grounds: open versus closed

Most regional instruments, and also the ECHR, have an open enumeration of prohibited grounds of discrimination, ending with a catch-all provision like 'or other status'. Grounds of specific relevance for minorities are race, religion or belief and 'association with a national minority'. While the latter is unique to the ECHR and seems very promising, it was already highlighted that it has not translated in minority positive jurisprudence so far. In view of the open model of prohibited grounds, it does not really matter that language and ethnic origin are not enumerated, especially since the Court has also adopted higher levels of scrutiny to non-enumerated grounds.[44] It can furthermore be highlighted that the practice of the ECtHR has been to use 'race' and 'ethnic origin' as interchangeably,[45] which is not incompatible with the current understanding of these concepts.

iii. Direct versus indirect discrimination

In so far as the prohibition of discrimination also includes indirect discrimination, its reach is considerably broader. While the prohibition of direct discrimination enables to address instances of explicit differentiations on prohibited grounds, the prohibition of indirect discrimination allows to target the actual impact of rules that in themselves do not seem to target particular groups. The latter has obvious substantive equality considerations, which will be discussed below.

b) Models of review[46]

Since not every differentiation amounts to a prohibition of discrimination, it is important to analyse how supervisory bodies determine whether a particular differentiation is legitimate or not.[47] The latter requires an identification of the review criteria as well as the level of scrutiny which is adopted.[48]

i. Criteria

The ECtHR has a long line of established jurisprudence (since the *Belgian linguistics case*), in which it indicates that a difference of treatment only amounts to a prohibited discrimination if it has no objective and reasonable justification. This means that, if it does not pursue 'a legitimate aim' and/or if there is not a

[43] D.J. Harris, M O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (London, 1999), 469; P. Van Dijk & GJH Van Hoof, *Theory and Practice of the European Convention on Human Rights* (The Hague, 1998), 593.
[44] A good example of a non enumerated ground with heightened scrutiny is sexual orientation: ECtHR, Salgueiro da Silva Mouta v Portugal, 21 December 1999.
[45] ECtHR, Nachova v Bulgaria, 26 February 2004, para 154,158; ECtHR (GC), Nachova v. Bulgaria, 6 July 2005, para 144-145; ECtHR, Moldovan et al v. Romania, 12 July 2005; and ECtHR, Timishev v Russia, 12 December 2005, para 55.
[46] For a more technical discussion in terms of the two-step model of review (distinguishing between a hurdle for review and a justification faze, discussing the meaning and relevance of a prima facie case of discrimination and comparability considerations) see Henrard, Equality and non discrimination …. (to be published). Here the discussion is limited to review criteria and different levels of scrutiny. While the ECHR (as well as the UN Human Rights Conventions) uses open models of justification, this is different for the EU. In the latter framework, the open model is actually confined to instances of indirect discrimination, while for direct discrimination only a limited list of justification grounds is available.
[47] Zie *infra* for the extension of the prohibition of discrimination, which would also include an obligation to differentiate in relation to substantively different matters (ECtHR, *Thlimmenos v Greece*).
[48] More technical considerations in terms of the review model can be detected under 'enforcement – burden of proof'. For a more comprehensive discussion in terms of models of review see inter alia J. H. Gerards, *Rechtelijke Toetsing aan het Gelijkheidsbeginsel* (Sdu, 2002), 28-100; K. Henrard, 'Noot bij Timishev t. Rusland, EHRM 13 december 2005', *EHRC* 2006/19, 189-192.

'reasonable relationship of proportionality between the means employed and the aim sought to be realised'.[49]

The requirement of the legitimate aim in itself is not very demanding and merely requires that the aim of the differential treatment should not be prohibited by the European Convention and its basic values.[50] Most scrutiny goes to the required relation between the differentiation and the legitimate aim pursued. The ECtHR has emphasized that the distinction should be pertinent and adequate or relevant to achievement of the legitimate aim. Even though this requirement is often distinguished from the proportionality test, these are closely interwoven: the pertinence of the distinction is a necessary but not sufficient condition of the proportionality of the distinction (in relation to the legitimate aim).[51] The proportionality test and the particular level of scrutiny used have in any event the strongest impact in the sense that they tend to determine the outcome.

The proportionality test in the broad sense can be further broken down into at least two components: proportionality in the narrow sense and subsidiarity.[52] The former demands that the differential treatment not go beyond what is necessary in order to achieve the goal.[53] The subsidiarity test prevents the use of a particular differential treatment if there are other less onerous alternatives to achieve the legitimate aim.

In relation to the proportionality test, the ECtHR has developed the doctrine of the margin of appreciation, which is inversely related to the level of scrutiny: the higher the level of scrutiny, the smaller the margin of appreciation states have. Traditionally, the contracting states tend to get a rather broad margin of appreciation,[54] which has provoked the justifiable criticism that the supervision by the Court is too subsidiary and deferent to the contracting states, with the danger of a reduced level of protection.[55] In this respect, the development of heightened scrutiny (and thus a reduced margin of appreciation) as regards certain 'suspect' grounds is to be welcomed, especially as these concern typical minority characteristics like religion and race.

ii. Levels of scrutiny

Levels of scrutiny seem especially relevant for systems with open grounds of differentiation, as they provide some structure within the broad range of grounds covered. Nevertheless, these different levels of scrutiny are important for closed models, especially in relation to indirect discrimination, which can bring differentiation on non-suspect grounds within the field of application of a (suspect) ground, triggering heightened scrutiny.[56]

---

[49] *Inter alia* ECtHR, Belgian Linguistic case, para 10; ECtHR, Abdulaziz, Cabales and Balkandali v UK, 28 May 1985, para 72.
[50] Gerards, Rechterlijke toetsing aan het gelijkheidsbeginsel…, 193-194; G. Goedertier, 'Verbod van discrimination', in J. Vande Lanotte & Y. Haeck (eds.), *Handboek EVRM: Deel 2 Artikelsgewijze Bespreking* (Antwerp: Intersentia, 2005), 170. In certain cases the Court has put forward some substantive requirements, inter alia ECtHR, Buchen v Czechia, 26 November 2002, para 75 (demand of objectivity of the aim); ECtHR, L & V v United Kingdom, 9 januari 2003, para 52 (requirement that the aim is not related to prejudices of any kind).
[51] Goedertier, Verbod van discriminatie…, 175.
[52] Gerards, Rechterlijke Toetsing aan het gelijkheidsbeginsel …, 102.
[53] ECtHR, Karner v Austria, 24 July 2003, para 41.
[54] See also A.E. Morawa, 'The Evolving Human Right to Equality', 1 *European Yearbook of Minority Issues* (2001/2), 168-171; D. de Prins, S. Sottiaux, & J. Vrielink, *Handboek Discriminatierecht* (Antwerp, 2005), 23-25.
[55] O. De Schutter, 'Observations: Le Droit au Mode de Vie Tsigane devant la Cour Européenne des Droits de l'Homme', *Revue Trimestrielle des Droits de l'Homme* 1997, 89-90. See also R. Eissen, 'Le Principe de Proportionnalité dans la Jurisprudence de la Cour Européenne des Droits de l'Homme', in L.E Pettiti et al (eds.), *La Convention Européenne des Droits de l'Homme: Commentaire Article par Article* (Paris, 1995), 80.
[56] E. Holmes, 'Anti-Discrimination Rights without Equality', 68 *The Modern Law Review* (2005), 184.

The jurisprudence of the ECtHR has made clear that several grounds of differentiation are considered to be suspect, namely gender, illegitimate birth, religion, nationality, sexual orientation, and race.[57] The Court usually reveals a heightened level of scrutiny by requiring that the defending state puts forward 'very weighty reasons' for the differentiation concerned. This test implies that the Court screens not only the 'legitimate aims' for sufficient seriousness, but also uses a stricter proportionality test, which generally results in a finding of a prohibited discrimination.

In *Hoffmann v Austria,* the ECtHR put forward that 'a distinction based essentially on a difference in treatment based on religion alone is not acceptable'.[58] Arguably, this statement clearly expresses that 'religion' is hardly ever considered to be a legitimate ground for differentiation, hence indicating its 'suspect' nature and a concomitant very high level of scrutiny. In the recent case of *Timishev v Russia,* which concerns the refusal to allow persons of Chechen origin the entry into one of the Russian Republics, the ECtHR adopted an unequivocal point of view about the suspected nature of 'race'. There were already indications about the suspect nature of 'race' in slightly older case law, like *Nachova v. Bulgaria* and *Moldovan and others v. Romania*.[59] The *Nachova* case entailed the first finding of the violation of Article 14 in combination with Article 2 in relation to the killing of two Roma by the Bulgarian police. Both the Chamber and the Grand Chamber judgment contain multiple statements underlining the special opprobrium attached to racial discrimination. *Moldovan* case concerns a violent assault on a Roma settlement and the ensuing miserable living conditions of a group of Roma. The judgment confirms not only the increasing attention by the ECtHR given to the specific problems of Roma but also the line of jurisprudence according to which certain forms of racial discrimination can be qualified as 'degrading treatment'.[60] The fact that degrading treatment is absolutely prohibited by Article 3 of the ECHR, similarly points to heightened scrutiny (and a severely reduced margin of appreciation for states).

Finally, in *Timishev*, the Court underlines that 'no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures'.[61] This formulation is very similar to the one used in *Hoffmann* and hence, points to increased scrutiny.

Asymmetry?

It is only relevant to examine a symmetrical or asymmetrical approach in relation to non-discrimination in so far as the supervisory body concerned adopts different levels of scrutiny. A symmetric approach implies that no matter what the goal or underlying reason for the differential treatment on a suspect grounds, such a differentiation will always be strictly scrutinized. However, it can be argued that while a strict scrutiny is appropriate in relation to forms of so-called 'invidious discrimination', this is not the case for differentiations that have actually as their aim to redress previous disadvantages (affirmative action being the typical example) and hence contribute to achievement of real or substantive equality.

[57] De Prins, Sottiaux & Vrielink, Handboek Discriminatierecht…, 26-35.
[58] ECtHR, Hoffmann v Austria, 23 June 1993, para 36.
[59] ECtHR, Nachova v Bulgaria (26 February 2004 and GC 6 July 2005), and ECtHR, Moldovan and others v Roumenia (12 July 2005).
[60] Examples of older case law include ECommHR, East African Asians v. UK, 3EHRR 76 (1973), para 207; ECtHR, Cyprus v Turkey, 10 May 2001, para 308-310. See also Gilbert, A Burgeoning Jurisprudence…, 745.
[61] ECtHR, Timishev v Russia, para 58. The Court seems to be going even a step further then in the *Hoffmann* case by indicating that no justification would be good enough to justify a differentiation on the basis of race. Nevertheless, it is generally accepted that it is unlikely that the Court would want to add a further distinction with the suspect classes of so called super suspect classes: De Prins, Sottiaux & Vrielink, Handboek Discriminatierecht…, 31; Gerards, Rechterlijke Toetsing…, 204.

As pointed out in the discussion on the case law concerning affirmative action, the ECtHR (as ECJ) exhibits a rather symmetrical approach (with all the negative consequences for the scrutiny of affirmative action measures).

3) Non-discrimination, substantive equality and the role of special measures

In view of the important role of interpretation in determining the actual reach of the prohibition of non discrimination, it is evident that there are different conceptions of non-discrimination. Not all of them are equally 'open' towards substantive equality considerations. Traditionally, the ECtHR revealed (in this respect) a focus on formal equality, as was *inter alia* demonstrated by the *Belgian Linguistics case*.[62] The basic line is that everybody is treated in exactly the same way. In order for a differential treatment to be acceptable, cogent arguments need to be put forward.

Nevertheless, it is possible to identify several possible (often interrelated) ways to incorporate substantive equality considerations. The most obvious 'candidates' to provide openings towards substantive equality are the acknowledgement and acceptance of indirect discrimination and affirmative action. The so-called second dimension of the prohibition of discrimination, which points towards an obligation to differentiate between situations/persons that are substantively different, as well as the more general positive obligations of states to guarantee equal treatment to all, are equally important from the substantive equality perspective. Arguably also the differentiation between different levels of scrutiny for different grounds of differentiation, reflecting a different degree of 'suspectness' can be related to substantive equality considerations as well.[63]

In comparison, the equality provision of the Framework Convention (Article 4) is resolutely geared towards obtaining substantive equality. Indeed, in addition to a prohibition of discrimination in paragraph 1, paragraph 2 of Article 4 contains an obligation to adopt 'special' measures with a view of achieving full or real, substantive equality. It should be highlighted though that this obligation is not seen as a dimension of the prohibition of discrimination, but rather as an additional principle.[64] The third paragraph does remark that measures adopted in accordance with paragraph 2 shall not be considered an act of discrimination. This qualification does not seem in line with the generally accepted criteria to distinguish a legitimate differentiation from discrimination because it only seems to require a certain legitimate goal (full equality) without any reference to proportionality. The Explanatory Report, however, 'adds' that these 'special' measures should be 'adequate', they are i.e. in line with the proportionality principle, in order not to violate the prohibition of discrimination.[65]

Overall, the reasoning of the Advisory Committee is not very technical, in the sense that it does not refer to models of review, levels of scrutiny and does not qualify certain practices (potentially) as indirect discrimination. While the absence of the former type of references is understandable in view of the fact that the Framework Convention does not have a (quasi) complaints procedure, the lack of the latter is regrettable.[66]

Nevertheless, occasionally more technical reasoning can be detected. More specifically, in the Advisory Committee's Opinion on Slovakia, the Advisory Committee made two important points. First of all, it

[62] ECtHR., Belgian Linguistics Case. See also its assessment in Henrard, *Devising an Adequate System of Minority Protection…,* 119-121.
[63] As the latter phenomenon has been sufficiently elaborated upon supra, it is only enumerated here.
[64] See also G. Alfredsson, 'Article 4', in M. Weller (ed.), *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities* (Cambridge, 2005), 145-146.
[65] Framework Convention for the Protection of National Minorities and Explanatory Report (Council of Europe Press, 1995), para 9.
[66] See also infra in relation to the disproportional side-lining of Roma pupils to special schools.

underscored that 'special measures are not only legitimate but may even be required under certain circumstances in order to promote full and effective equality in favour of persons belonging to national minorities'. [67]

Secondly, (and here the Advisory Committee does make use of the typical criteria to distinguish a prohibited discrimination) the Advisory Committee remarked that these special measures cannot be considered an act of discrimination provided that they are in conformity with the proportionality principle.[68]

The Advisory Committee emphasizes throughout its opinions that full, real or substantive equality requires the adoption and implementation of special measures for persons belonging to national minorities. For example, in its opinion on Austria, the Advisory Committee underlined that even for very small groups a considerable number of determined measures on the part of the competent authorities is required.[69]

A final point that should be made is that the 'special' measures envisaged under the Framework Convention are not necessarily temporary. In other words, the focus under the Framework Convention is not exclusively on redressing disadvantages from the past but could also include a kind of institutionalized measures,[70] and other types of 'enduring' measures. Indeed, as long as these non-temporary measures are required in order to achieve full, real equality, they should retain.

a) Non-discrimination and substantive equality: indirect discrimination

Although there is a wide variety of definitions of 'indirect discrimination', there is however broad agreement on the core understanding of this concept. Indirect discrimination can be said to occur when a practice, rule, requirement, or condition is neutral on its face, but impacts disproportionately upon particular groups (without objective and reasonable justification).[71] In addition, when a certain -at first sight- non suspect distinction is made, this can be said to amount to indirect discrimination when it has a disproportionate negative impact on certain group 'suspect grounds' (unless there is a reasonable and objective justification). This description of indirect discrimination already reveals that the focus is on the effects (of a disproportionate nature) of a measure or policy, irrespective of the intention behind it.

There are arguably two related reasons why indirect discrimination is relevant for minorities. First of all, and this was already hinted at supra, the focus on the actual effect of certain policies and rules tends to contribute to the realization of full or real equality, which is of crucial importance for minorities. In the same vein, the prohibition of indirect discrimination allows to get at certain aspects of systemic discrimination and contributes to the accommodation of diversity by revealing that apparently neutral criteria *de facto* favour the dominant culture.[72]

The second reason why the prohibition of indirect discrimination is important, is because of the inherent group focus it has, as also perspires in the above description. This forms a welcome addition to the

[67] Advisory Committee, Opinion on Slovakia (II), ACFC/OP/II(2005)004, para 38.
[68] Advisory Committee, Opinion on Slovakia (II), ACFC/OP/II(2005)004, para 38.
[69] Advisory Committee, Opinion on Austria (I), para 82.
[70] Inter alia Advisory Committee, Opinion on Bulgaria (I), ACFC/OP/I(2006)001, para 45, in which it calls on the state to give stronger state support to the reinstatement of traditional cultural institutes and to the provision of more Turkish or Roma cultural centres.
[71] S. Joseph, J. Schultz & M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford: OUP, 2004), 694.
[72] Fredman, Introduction …, 24.

basically individualist focus of general human rights, considering the inherent group dimension of the minority phenomenon.

The case law of the ECtHR demonstrates an often sceptical attitude towards indirect discrimination, to the extent that it seems to continue to question the concept itself. The Court's reluctance to even accept the notion of indirect discrimination was very visible in *Abdulaziz, Cabales and Balkandali.*[73] The Court's reasoning in that case demonstrated that it would be virtually impossible to successfully rely on indirect discrimination since it is classified as irrelevant to the disparate impact on certain groups (because of their typical characteristics) of at first sight neutral rules.[74] The Court's refusal to take the broader context into account, when assessing a complaint of (indirect) discrimination, also fails to address cases of systemic discrimination, as it is often the case as regards to minorities,[75] like Roma.[76]

In May 2001 the Court - finally - explicitly acknowledged in a series of cases concerning conflict in Northern Ireland that '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'.[77] Although this acknowledgement is to be welcomed, its importance should not be overrated as the ECtHR immediately adds: '[h]owever, even though statistically it appears that the majority of people shot by the security forces were from the Catholic or nationalist community, the *Court does not consider that statistics can in themselves disclose a practice which could be classified as discriminatory* within the meaning of Article 14'. It is obvious that the Court seems to require a heavy burden of proof, while not identifying what that should be exactly.[78]

The admissibility decision in *Hoogendijk v the Netherlands* (6 January 2005) seems to reveal a more positive attitude in relation to statistical evidence as the ECtHR did not rule out that statistical evidence would do in order to establish a '*prima facie'* case.[79] The next 'indirect discrimination' case was eagerly awaited to obtain further clarifications of the ECtHR's stance in *Hoogendijk*. However, the Court's judgment in *D.H. et al v. Czech Republic* can only be qualified as disappointing.[80] First of all, it seems to question again the whole idea of 'indirect discrimination', by putting much emphasis on the importance of the 'intent'.[81] Indeed, the 'major strength of the concept of indirect discrimination lies in its denial of the relevance of any discriminatory intent as a prerequisite for bringing a successful claim'.[82] Moreover, the Court does not confirm its positive stance regarding 'convincing official statistics' and rather goes back to its position that statistics in themselves are not sufficient to establish a *prima facie* case of discrimination. It may be clear that this case has left more questions, than it answered. While this case above appeared to

[73] Eur. Ct. H.R., Abdulaziz, Cabales and Balkandali, para 85.
[74] See also Gerards, *Rechtelijke Toetsing aan het Gelijkheidsbeginsel* ... 114.
[75] See also the inadmissibility decisions in the following cases concerning Kurds in which the Court failed to acknowledge that the differential rules for terrorist crimes in Turkey disproportionally affected the Kurds: ECtHR, Mutly and Yildiz v Turkey, 17 October 2000 and ECtHR, Kalin, Gezer and Tebay v Turkey, 18 January 2000.
[76] ECtHR, Buckley v UK, 25 September 1996 is paradigmatic case of this restrictive attitude of the Court as regards claims by Gypsies. See also de Schutter, Le Droit au Mode de la Vie Tsigane …, 79-85.
[77] ECtHR, Kelly v UK, 4 May 2001, para 148; ECtHR, Hugh Jordan v UK, 4 May 2001, para 154; ECtHR, McShane v UK, 28 May 2002, para 135. The 'founding' cases all concerned the claim that activities of the security services in the conflict in Northern Ireland entailed a disproportionate high number of deaths on one particular religious group, which would amount to a violation of Article 14 in combination with Article 9. This principle has also been (*inter alia*) repeated in cases concerning the Roma: ECtHR, Nachova v Bulgaria, 26 February 2004, para 167
[78] Gilbert, A Burgeoning Jurisprudence …, 749.
[79] See also A. Hendriks, 'Noot bij Hoogendijk t Nederland (EHRM 6 januari 2005)', *NJCM Bulletin* 2005, 452.
[80] See also K. Henrard, 'Noot bij D.H. en overige t. Tsjechië', EHRM 7 februari 2006, *ECHR* 2006/43, 392-393.
[81] ECtHR, D.H et al v Czech Republic, 7 February 2006, para 48, 52, 53.
[82] T. Loenen, 'Indirect discrimination: Oscillating between Containment and Revolution', in T. Loenen & P. R. Rodriguez (eds.), *Non-Discrimination Law: Comparative Perspectives (*Martinus Nijhoff, 1999), 201; Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC law* (Antwerp: Intersentia, 2005)*,* 114.

confirm the unease the ECtHR has vis-à-vis the concept indirect discrimination,[83] the relevant judgement in *Zarb Adami v Malta* (20 June 2006) shows that (at least in cases on indirect discrimination against men) the Court can also show a different face. The Court, without much ado, deduced from the fact that statistics show a huge discrepancy of women versus men called for compulsory jury service, that there had been 'a difference in treatment between two groups in a similar situation'.[84] A strict assessment of the availability of a reasonable and objective justification leads to a finding of a violation of Article 14.[85]

b) Non-discrimination and substantive equality: an obligation to differentiate

Following the old adagium attributed to Aristotle, 'treat equally what is equal and treat differently what is unequal to the extent of the inequality', the traditional conception of the prohibition of discrimination (imposing limitations on acceptable differential treatment) can be complemented by a second 'dimension', which actually demands (formally) unequal treatment. This so-called second dimension of the prohibition of discrimination is explicitly and clearly enunciated by the ECtHR. The so-called founding case in which the Court significantly expanded its jurisprudence relating to non-discrimination in favour of substantive equality is *Thlimmenos v Greece* of 6 April 2000:[86]

> 'The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification … However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is *also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different*.'[87](emphasis added)

In other words, the prohibition of discrimination can, in certain circumstances, entail an obligation for states to treat persons differently. This rational could lead to the recognition of positive state obligations to adopt certain special minority rights, attuned to the specific 'situation' of minorities. The ECtHR in *Thlimmeno*s was willing to hold that treating someone, who is convicted for being a conscious objector, exercising his freedom to manifest his religion, the same way as someone who committed another type of conviction unrelated to the exercise of fundamental rights, amounts to a prohibited discrimination.

However, the subsequent case law in which the Court has taken up this rational has been modest in the sense that it revealed that the Court is clearly very careful to 'impose' exceptions to the application of general norms, when it is not related to the exercise of the freedom to manifest one's religion. For example, in *Chapman v UK* the ECtHR refused to accept the claim of the Roma family that the absence of special measures for Roma in relation to the general planning regulation and policies (in view of their itinerary lifestyle and the particularly ensuing needs) constitutes a prohibited discrimination.[88]

[83] See also *Podkolzina v Latvia* (more fully discussed *infra*), where the Court did not even look into the possible violation of Article 14, while a key issue of the case concerned harsh language requirements in Latvian electoral legislation with their possible discriminatory indirect effects. This is the more regrettable since such language requirements are at the heart of the problem vis-à-vis linguistic minorities. See also A. Spiliopoulou-Akermark, *Justifications of Minority Protection in International Law* (London, 1997), 6.
[84] ECtHR, Zarb Adami v Malta, 20 June 2006, para 77-78.
[85] ECtHR, Zarb Adami v Malta, para 80-83.
[86] See also Gilbert, A Burgeoning Jurisprudence …, 746-747.
[87] ECtHR, Thlimmenos v Greece, para 44.
[88] ECtHR, Chapman v UK, para 127-129.

c) Non-discrimination and substantive equality: positive obligations to eradicate inequality and promote equality[89]

In contrast to the general human rights conventions like the ECHR, the specific UN conventions CERD and CEDAW clearly enshrine a positive duty to improve the *de facto* position of disadvantaged (racial) groups.[90] Such an obligation by state reflects a substantive equality norm. Examples of the kind of measures to be taken to comply with this positive obligation would be affirmative action measures[91] (see below), or measures aimed at eradicating private forms of discrimination.[92]

In terms of the ECHR and the jurisprudence of the Court, it is not really clear whether (and to what extent) there would be a positive obligation on states to eradicate private forms of discrimination. This contrasts with the identification of positive state obligations to ensure the other (substantive) rights also in relations between private parties,[93] and can be related to the generally broad margin of appreciation allowed to states in regard to the prohibition of discrimination.[94]

According to its explanatory report, the Protocol No. 12 was not intended to impose a general positive obligation.[95] Nevertheless, this could be the case in specific circumstances, since 'a failure to provide protection from discrimination in [private] relations may be so clear-cut and grave that it might engage clearly the responsibility of the State and then Article 1 of the Protocol could then come into play'.[96] It will be interesting to see throughout the development of jurisprudence, where the line will be drawn by the ECtHR.

d) Non-discrimination and substantive equality: affirmative action[97]

Even though there is no definition of the concept 'affirmative action', it tends to concern temporary measures aimed at redressing historical disadvantages of a particular group. However, it is also possible to have more forward-looking forms of affirmative action, aimed at preventing disadvantages linked to group characteristics like race and religion.[98] Be that as it may, the descriptions reveal not only that affirmative action has an inherent 'group focus' but also that it is ultimately aimed at realizing substantive or real equality.

---

[89] These positive obligations are obviously closely related to the Thlimmenos rational, see also S. Spiliopoulou Akermark, 'The Limits of Pluralism – Recent Jurisprudence of the European Court of Human Rights with regard to Minorities: Does the Prohibition of Discrimination Add Anything?', 3 *JEMIE* 2002, 5.

[90] In regard to CEDAW: R. Holtmaat and C. Tobler, 'CEDAW and the European Union's Policy in the Field of Combating Gender Discrimination', 12 *MJ* 2005, 406-407.

[91] Article 2 CERD clearly enshrines an obligation to adopt affirmative action measures (in certain circumstances): see also infra under IV.

[92] An effective protection against discrimination implies that there is also adequate protection against private forms of discrimination or discrimination by private actors (and not only public officials). When one accepts this type of positive state obligation, the more important and difficult question is how far this obligation would reach (Fredman, Introduction …, 29).

[93] For an extensive discussion: A.R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by* the European Court of Human Rights (Oxford: Hart, 2004).

[94] As Goedertier points out, in relation to those grounds of discrimination that are considered to be 'suspect', it cannot be excluded that in the future the Court will indeed identify positive state obligations to eradicate discrimination on these grounds also in the private sphere (Verbod van discriminatie …, 146-148).

[95] Explanatory Report to the 12th AP, nr 24.

[96] Idem, nr 26.

[97] Alternative concepts or synonyms include 'temporary special measures' or just 'special measures'[97], 'positive discrimination', and 'reverse discrimination': Ch. McCrudden, 'International and Legal Norms Regarding National Legal Remedies for Racial Equality', in S. Fredman (ed.), *Discrimination and Human Rights: the Case of Racism* (Oxford, 2001), 277.

[98] See inter alia Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 5.

As most debates in relation to affirmative action focuses on its legitimacy or its acceptability, it should be underlined that affirmative action measures must always comply with the principle of non-discrimination.[99] While affirmative action measures arguably have the legitimate aim to achieve substantive equality, there is still the additional need for the measures concerned to be proportional. Arguably, the proportionality principle underlies the requirement that affirmative action measures should be temporary.

The outcome of the proportionality test is dependent on the level of scrutiny adopted which is inherently related to the use of a symmetrical versus an asymmetrical approach in this respect (see above). To the extent that these measures go beyond 'equal opportunities' and aim at equality of results, it will be more difficult to pass the proportionality test.[100]

The ECtHR has not taken a clear, explicit position on this matter because it has not yet been confronted with a 'real' case of affirmative action.[101] Nevertheless, it did have to rule in two cases on measures providing for treatment which benefited women, while excluding men, more particularly *Petrovic v Austria*[102] (parental leave allowance only for women) and *Van Raalte v the Netherlands*[103] (only women above the age of 45 could be exempted from paying a children related levy). In the initial establishment of the appropriate level of scrutiny, the ECtHR seems to favour the symmetrical approach (with all its pernicious consequences for affirmative action).[104]

In a more recent judgement concerning differential rights to social security entitlements related to differences in pensionable ages between men and women, the Court did state explicitly that 'article 14 does not prohibit a Member State from treating groups differently in order to correct 'inequalities' between them; indeed in certain circumstances a failure to attempt to correct inequalities through different treatment may in itself give rise to a breach of the article. … At their origin… the differential pensionable ages were intended to correct 'factual inequalities' … and appear therefore to have been objective justified under Article 14'.[105] Arguably, the Court does not only seem to accept positive action measures as being related to substantive equality, while acknowledging that non-discrimination determines the limits of these measures, but even hints at an obligation to adopt such positive action measures.[106] It remains to be seen though how 'accommodating' the Court will be in relation to hard forms of positive action.[107]

---

[99] M. Bossuyt, 'The Concept and Practice of Affirmative action', in I. Boerefijn et al (ed.), *Temporary Special Measures* (Antwerp, 2003), 66 and 73: 'affirmative action to ensure full equality is not always legitimate. Affirmative action should not be interpreted as justifying any distinction based on any ground with respect to any right merely because the object o f the distinction is to improve the situation of disadvantaged individuals or groups. Affirmative action is no exception to the principle of non-discrimination. Rather, it is the principle of non-discrimination that establishes limits to each affirmative action'.

[100] Bossuyt highlighted in his UN report on affirmative action that 'affirmative preference' is particularly controversial because someone's gender or ethnicity etc will be taken into account in the granting or withholding of social goods' (Bossuyt, The Concept and Practice of Affirmative Action…, 67).

[101] de Prins, Sottiaux & Vrielink, Handboek Discriminatierecht …, 38. Lindsay and others v UK (ECommHR, March 1979) is not argued in terms of Article 14 ECHR, but the reasoning in terms of Article 3 of the first additional protocol (see infra) would seem to suggest that the Court would be willing to accept that in certain circumstances positive measures by the state that favor the minority have a reasonable and objective justification (and would thus not fall foul of the prohibition of discrimination)..

[102] ECtHR, Petrovic v Austria, 27 March 1989.

[103] ECtHR, Van Raalte v the Netherlands, 21 February 1997.

[104] Gerards, Rechterlijke Toetsing aan het Gelijkheidsbeginsel …, 202.

[105] ECtHR, Stec et al v UK, 12 April 2006, para 51 and 61.

[106] It should be highlighted that the Court explicitly refers to its Thlimmenos rational (para. 44) when making this statement.

[107] See also A. Hendriks & F. Wegman, 'Straatsburg ziet onderscheid naar geslacht bij pensioenen door de vingers': noot bij EHRM, Stec e.a. t het Verenigd Koninkrijk, 31 *NJCM Bulletin* 2006, 892.

e) Non-discrimination and special measures

The differential treatment referred to in the preceding paragraphs would qualify as 'special measures'. The areas covered by these measures depend on the reach of the prohibition of discrimination (discussed above), which is broad in terms of Article 14 and virtually all encompassing in terms of Protocol No. 12. The relevant case law in this respect will most probably concern matters of special interest to minorities, like their own way of life, language, religion, culture and education.

While affirmative action measures are inherently temporary, this is not necessarily the case for the other types of special measures. This more enduring nature of special measures is especially valuable to meet the needs relating to the protection and promotion of the identity of minorities.

Finally, it should be highlighted that it is unlikely that the ECtHR will recognize special measures in the form of group rights, understood as rights attributed to a group,[108] since the ECHR is firmly embedded in the realm of individual rights.[109]

A similar remark can be made in relation to the Framework Convention, which is consciously and consistently framed in terms of rights for persons belonging to national minorities and not in terms of rights for national minorities. Even, the current interpretation of Article 15 on effective participation confirms this position, notwithstanding the fact that theoretically participatory rights may encompass forms of autonomy,[110] for national minorities as group. The Advisory Committee does not go as far as demanding that autonomy be granted to certain groups in order for them to obtain 'effective' participation.[111] In other words, there would not seem to be a (group) right to autonomy/participation under Article 15 of the Framework Convention.

B. Substantive issues[112]

1) Culture: right to an own way of life

The right to lead one's own, traditional way of life is obviously very important for minorities. Although there is no such right explicitly guaranteed in the ECHR, the European Commission of Human Rights in 1983 considered to be included in Article 8 of the ECHR, in relation to a claim by the Lap minority in Norway.[113] Only recently, the ECtHR followed suit. In *Chapman v UK,*[114] a case concerning Roma's difficulties to station their caravans, the Grand Chamber of the ECtHR, pointed a significant development concerning minority protection in two respects. Firstly, the ECtHR for the first time recognized that

[108] It should be acknowledged that some people call rights for groups 'collective rights', while others use the latter term for rights attributed to individuals *qualitate qua* as members of groups, and still others use 'group rights' and 'collective rights' interchangeably.

[109] For a more in depth discussion of group rights versus collective rights versus individual rights, see inter alia M. Galenkamp, *Individualism versus Collective Rights: The Concept of Collective Rights* (Rotterdam, 1993); Henrard, Devising an Adequate System of Minority Protection… , 233-243; B. G. Ramcharan, 'Individual, Collective and Group Rights: History, Theory, Practice and Contemporary Evolution', *IJMGR* 1993, 27-43..

[110] See also the Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note (Foundation on Inter-Ethnic Relations), 1999. Y. Dinstein, 'Autonomy', in Y. Dinstein (ed.), *Models of Autonomy,* Transaction Press, 1981, 291.

[111] Nevertheless, the Advisory Committee obviously welcomes and even encourages self governance arrangements: Advisory Committee, Opinion on Finland (2000), par 47; Opinion on Denmark (2000), par 36; Opinion on Italy (2001), par 61.

[112] For an explanation of the specific importance for minorities of the rights discussed here, see the paper by Rainer Hoffman.

[113] ECommHR, G and E v Norway, 3 October 1983, *D.R.* 35, 35-36.

[114] ECtHR (GC), Chapman v UK, 18 January 2001. While Chapman can be considered the pilot case, the ECtHR decided along similar lines in four other, analogous cases on the same day: Beard v UK, Lee v UK, Coster v UK and Jane Smith v UK.

Article 8 of the ECHR indeed enshrines a protection for the traditional life of a minority group.[115] Secondly, the Court recognizes that Article 8 also entails positive obligations for the state in this respect:

> 'although the fact of being a member of a minority with a traditional lifestyle different from that of the majority of a society does not confer an immunity from general laws intended to safeguard assets common to the whole society such as the environment, it may have an incidence on the manner in which such laws are to be implemented. … the vulnerable position of gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in arriving at decisions in particular cases. To this extent there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the gypsy way of life'.[116]

The explicit reference to the Framework Convention as denoting an 'emerging international consensus amongst the Contracting States of the Council of Europe recognizing the special needs of minorities and an obligation to protect their security, identity and lifestyle',[117] does not prevent the Court from holding that it would be impossible to interpret Article 8 to involve a far reaching positive obligation of general social policy.[118] Overall, the Court allows the states a de facto wide margin of appreciation.

While the reasoning of the Court, arguably denotes a more favourable stance to the special needs of minorities,[119] the application to the facts and the ensuing result remains rather disappointing.[120] Nevertheless, the significant dissent,[121] challenging the lenient supervision by the Court,[122] indicates a clear potential for further, more positive developments for minority protection generally.

While the Framework Convention does not contain an explicit recognition of the right to an own way of life, it does specify in Article 5 that the state parties undertake 'to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage'. The references to traditions and culture could indirectly be seen to encompass the right to an own, traditional way of life, while the prohibition of forced assimilation in paragraph 2 also implicitly protects this.[123] In its supervision of periodic state reports under Article 5, the Advisory Committee pays considerable attention to issue of state funding of cultural activities and institutions.[124] Nevertheless, the Advisory Committee also makes general statements which are clearly reminiscent of a right to the own, traditional way of life of persons belonging to national minorities. The Advisory Committee hints for example at the

[115] ECtHR, Buckley v UK, para 73. See also Gilbert, Burgeoning Minority Jurisprudence …, 779.
[116] ECtHR, Chapman v UK, para 96.
[117] ECtHR, Chapman v UK, para 93.
[118] ECtHR, Chapman v UK, para 98.
[119] Farkas, 'Knocking at the Gate: The ECHR and Hungarian Roma', ERRC website, 3; Sebok, 'The Hunt for Race Discrimination', ERRC website, 3. For an extensive discussion of the implications of Chapman, see F. Benoit-Rohmer, 'Observations: A Propos de l'autorité d'un précèdent en matière de protection des droits des minorités', *Revue Trimestrielle des Droits de l'Homme* 2001, 905-915.
[120] The position of the ECtHR appears in conformity with the international trend to recognize whole heartedly the general principle (protection of the own, separate way of life), while leaving extensive discretion to the states how to fill this in.
[121] Seven of the seventeen judges of the Grand Chamber concluded to a violation of Article 8 in the circumstances and criticized the majority to be too careful and reserved: Joint Dissenting Opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Staznicka, Lorenzen, Fischbach and Casadevall.
[122] For a critical assessment of the problems as regards the kind of supervision exercised by the Court, see Benoit-Rohmer, A Propos de l'autorité d'un precedent…, 911-913.
[123] See also Geoff Gilbert, 'Article 5', in M. Weller (ed.), *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities* (Oxford, OUP, 2005), 166, 172.
[124] Inter alia Advisory Committee, Opinion on Finland (II), ACFC/OP/II (2006) 003, para 58- 64; Advisory Committee, Opinion on Bulgaria (II), ACFC/OP/I(2006)001, para 43-45.See also Gilbert, 'Article 5', 160-161.

need for states to create suitable conditions for persons belonging to the various minority groups to preserve and develop their cultures and to assert their respective identities.[125]

2) Participatory rights: electoral rights, freedom of assembly and of association

While there is no definition of the concept 'of participatory rights', it is generally accepted that this concept has potentially a very broad reach.[126] In this respect, reference can be made to the Lund Recommendations on the effective participation of national minorities in public life, issued by the High Commissioner on National Minorities.[127] A cursory reading of these Recommendations reveals that two major dimensions of participation are distinguished, namely 'participation in decision-making' and 'self governance'.

Arguably the former is the one that is most commonly connected with the concepts of 'participation' and 'participatory rights', in the sense that participation is mostly understood as an inclusive concept, referring to a being part of an encompassing 'project' or 'entity'. In this respect, it can be put forward that 'participation in decision-making' is concerned with 'having a say' in the framework of this encompassing 'entity', while 'self-governance' is concerned with 'having (some) control', with no or little interference of this bigger entity.[128] Arguably, 'self governance' can be renamed 'autonomy'[129] while 'participation in decision making' actually is mostly concerned with issues of 'representation' in the broad sense.[130] The latter addresses in addition to election systems (and the protection of minority political parties) and the establishment of various consultation mechanisms, the more specific issues of representation in parliament, in government, in the courts, in advisory bodies and in civil service.

The ECHR Articles of most relevance would seem to be Article 3 of the first additional protocol (elections) and Article 11 (freedom of association). When comparing these provisions with the formulation of Article 15 of the Framework Convention: 'effective participation … in cultural, social and economic life and in public affairs', it is immediately obvious that the potential reach of Article 15 of the Framework Convention is much broader. This is also born out by the practice of the Advisory Committee, which addresses the presence of minorities in ministerial positions, in the civil service, in the judiciary and the police;[131] and scrutinizes autonomy arrangements.[132]

---

[125] Advisory Committee, Opinion on Bulgaria (II), para 47.
[126] See also Yash Gai, *Public Participation and Minorities* (MRG, 2001), 5.
[127] For an elaborate evaluation of the Lund Recommendations see the special issue of the IJMGR of 2005 and inter alia K. Henrard, '"Participation", "Representation", and "Autonomy" in the Lund Recommendations and its Reflections in the Supervision of the FCNM and Several Human Rights Conventions', *IGMGR* 2005, 133-168.
[128] J. Packer, 'The Origin and Nature of the Lund Recommendations on the Effective Participation of National Minorities in Public Life', *Helsinki Monitor* 2000, 39.
[129] See also Y. Dinstein, 'Autonomy', in Y. Dinstein (ed.), *Models of Autonomy,* Transaction Press, 1981), 291.
[130] For further elaboration on the concept 'representation', see infra. Pitkin's work (H.F. Pitkin, *The Concept of Representation*, University of California Press, 1967) already signaled the multitude of understandings of this concept, which has been intensely debated every since.
[131] Inter alia Advisory Committee, Opinion on Albania (I), ACFC/INF/OP/I(2003)004; Advisory Committee, Opinion on Croatia (I), ACFC/INF/OP/I(2002); Opinion on Slovakia (II), para 112-118. Interestingly, there has been a proposal by Austria in 1991 for a protocol to the ECHR which suggested that members of an ethnic group should have the right to access to public office (CDHH(1991), 46, draft Article 6). See also the report by Weller in *Filling the Frame: Five Years of monitoring the Framework Convention for the Protection of National Minorities* (Council of Europe, 2005).
[132] The Committee underlines for example that the competencies of the autonomies should be made concrete and their exact scope to be clear : Advisory Committee, Opinion on Ukraine (2002), par 32. The Advisory Committee sometimes clearly indicates that an autonomous arrangement should include certain competences, for example regarding land issues in cases of the Sami parliaments: Advisory Committee, Opinion on Finland (2001), par 50. See also Advisory Committee, Opinion on Sweden (2002), par 63.

In regard to Article 3, Protocol 1,[133] the defunct European Commission on Human Rights made some very promising decisions, more specifically in *Lindsay v UK* and *Moureaux v Belgium*. The European Commission approved in *Lindsay v UK* the practice of having different election systems within one state in order to protect the rights of minorities. The differential treatment involved would have a reasonable and objective justification.[134] The Commission went even further in *Moureaux v Belgium* since it seemed to indicate that when electors generally choose on the basis of criteria, like belonging to an ethnic or religious group, there might even be an obligation for the State to take the special position of minorities into account (and devise special measures to ensure an equitable representation of these minorities).[135]

Unfortunately the Court did not follow this approach in the subsequent case law, which can (at least partially) be explained in terms of the wide margin of appreciation attributed to states in electoral matters (in view of the lack of a common European standard). The latter was most visible in *Mathieu, Mohin and Clerfayt v Belgium*, where the Court considered the interests of a linguistic minority and its complaint about its limitations in terms of the existing system to be outweighed by the interest of the State in the maintenance of that system, without any reference being made to the obligation hinted at by the Commission in *Moureaux*.[136]

While the Court accepted in *Podkolzina v Latvia*[137] that it is legitimate for a state to impose linguistic requirements for persons wanting to stand for national elections, the judgment in that case at the same time indicates that states do not have unlimited discretion in the way in which they impose these linguistic requirements. According to the Court, the re-assessment of Ms Podkolzina's linguistic competence in the run up to the elections had not followed the normal procedure, and violated Article 3, Protocol 1.[138] Similarly, the Advisory Committee has opposed disproportionate language requirements for candidates in parliamentary and local elections.[139]

The freedom of association includes the freedom to establish associations and political parties based on communal identities, which is particularly important for minorities and their quest to protect and promote their separate identity. As was already pointed out, since *Sidiropoulos v Greece* there has been a consistent line of the case law in which the Court emphasizes that states are not allowed to limit the freedom of association of members of minorities because the association would aim to promote the culture of a minority.[140] Overall, these cases reveal that the Court seems to adopt a strict scrutiny approach as regards states' attempts to restrict minority associations, including minority political parties. However, the ECtHR has recently, in two Grand Chamber judgments,[141] allowed far reaching limitations on the freedom of association both as regards political parties and other 'associations'. This seems difficult to reconcile with the rest of the case law.[142]

---

[133] Although Buscarini v San Marino was decided in terms of Article 9, it can be related to Article 3, of the first additional protocol as it concerns a requirement to swear on the Holy Gospels before elected representatives could effectively act as members of Parliament. The Court concluded to a violation of Article 9 because the exercise of the mandate was subjected to a prior declaration of commitment to a particular set of beliefs (ECtHR, 18 February 1999, para 39).
[134] ECommHR, Lindsay v UK, 8 March 1979, *DR* 15, 251.
[135] ECommHR, Moureaux v Belgium, 12 July 1983, *DR* 33, 114.
[136] ECtHR, Mathieu, Mohin and Clerfayet v Belgium, 2 March 1987, para 52-57.
[137] ECtHR, Podkolzina v Latvia, 9 April 2002.
[138] ECtHR, Podkolzina v Latvia, para 36.
[139] Advisory Committee, Opinion on Estonia (I), ACFC/INF/OP/I (2002), para 55; Advisory Committee, Opinion on the Russian Federation (i), ACFC/INF/OP/I (2002), para 106.
[140] ECtHR, Sidiropoulos and 5 others v Greece, 10 July 1998, para 41 and 44.
[141] For a critical analysis of the chamber judgments in these cases, which were confirmed by the Grand Chamber judgments, see Spiliopoulou Akermark, The Limits of Pluralism …, 11-15.
[142] In regard to the freedom of association the subsequent cases Ivanov and others v Bulgaria (24 November 2995) and UMO Ilinden and others v Bulgaria (19 January 2006) confirm that Gorzelik v Poland should not be read as signaling a reduced protection for minority associations. A similar point can be made in regard to political parties, where for example Ouranio Toxo v Greece (20 October 2005) takes up the traditional protective case law of political parties with an outspoken minority character.

The Grand Chamber judgment in *Gorzelik and others v Poland* (17 February 2004) concerns a complex case which actually warrants extensive analysis. While such analysis is beyond the confines of this paper, it has been done elsewhere.[143] The case turns on the refusal to register an association under the name 'Union of People of Silesian Nationality'. The Polish legal system seems actually rather ambivalent regarding minorities, in any event 'national minorities'.[144] On the one hand, certain privileges are granted to recognized minorities, more specifically in terms of the electoral legislation, while on the other hand there is no legal definition of 'national minority' and no specific procedure for a minority to register. When minorities then use the avenue to get registration as an association with a clear minority goal, the national courts deny registration because the groups would not be a 'national minority'. This seems a rather circular reasoning, which ultimately thwarts the possibility to register an association with a minority objective.

When assessing whether the interference amounts to a violation or a legitimate limitation to the freedom of association, the Court highlights that states have a broad margin of appreciation when it concerns the balancing of conflicting individual interests and rights, as well as in regard to the definition of 'national minority' and the practice of official recognition of minorities.[145] Furthermore, states also tend to get a broad margin of appreciation in electoral matters.[146] In view of the grant of an overall broad margin of appreciation, which seems to cancel out the normal starting point that the freedom of association should only be limited in narrow circumstances,[147] it is not surprising that the Court concludes to the absence of a violation of Article 11. While there are no clear context –specific variables which explain the a-typical outcome in *Gorzelik*, the combination of two areas in which states are accorded a broad margin of appreciation namely minorities and electoral matters, could explain the particular outcome.[148]

The Court has been equally, if not more, vigilant that the freedom of association of **political parties** has not been illegitimately interfered with. The long line of cases against Turkey in relation to the dissolution of political parties is well known in this respect. Also in these cases, the Court exhibited special care to ensure this freedom of fundamental importance for minority groups, in the sense that it did not allow states' anxieties about minorities and their quest to protect their own identity to interfere to a disproportionate extent with these groups' right to freedom of association.

In *Refah Partisi v Turkey*, however, the Court (also in Grand Chamber formation) accepted the dissolution of a political party, Refah Partisi (and the prohibition barring its leaders from holding similar office in any other political party) on the ground that it allegedly threatens to undermine secularism, a key constitutional, democratic principle in Turkey, *inter alia* by advocating a plurality of legal systems. The Grand Chamber did reiterate that states have only a limited margin of appreciation in regard to limitations to Article 11. However, this starting point seems to be counter balanced (and outweighed) by the essential nature of the principle of secularism for Turkey, against the background of its history of theocratic regimes and its predominant Muslim population. The Court considers in any event that the Turkish constitutional court was 'justified in holding that Refah's policy of establishing Sharia was incompatible

[143] See Henrard, A Patchwork of successful and missed synergies … to be published by CUP in 2006.
[144] The Polish system indeed operates a distinction between ethnic and national minorities (GC, Gorzelik v Poland, para 69), which is however entirely glossed over in regard to Article 14.
[145] ECtHR (GC), Gorzelik v Poland, para 59, 67-68.
[146] This was also confirmed in EctHR (GC), Zdanoka v Latvia,16 March 2006.
[147] ECtHR, Gorzelik v Poland, para 58. See also Spiliopoulou Akermark, The Limits of Pluralism …, 14.
[148] It should furthermore be highlighted that the discrimination argument put forward by Poland was not addressed at all by the Court. Poland had argued that the registration of the applicant's association of the applicant's association would have an 'adverse' effect on the rights of 'other ethnic groups in Poland'. However, this argument draws the attention to the question of the appropriate comparator in discrimination complaints. Are these ethnic groups that have not yet put forward a similar demand for registration uberhaupt (part of) the appropriate comparator? See also Spiliopoulou-Akermark, The Limits of Pluralism…, 15.

with democracy',[149] and also emphasized that a plurality of legal systems cannot be considered to be compatible with the Convention system.[150]

While there are several criticisms possible in relation to the reasoning of the Court in this case,[151] the outcome seems very context-specific to the Turkish situation. Overall, it can still be maintained that ECtHR tends to be very protective towards associations and political parties with a minority protection mandate. The judgments in *Gorzelik* and *Refah Partisi* seem to be exceptions that prove the rule (to the extent that they cannot be explained by context-specific factors).

It is worth pointing out that also the Advisory Committee arguably considers direct restrictions on minority parties controversial.[152] The Advisory Committee goes even further and considers problematic registration requirements that are likely to limit the possibilities for persons belonging to national minorities to organize political parties.[153] While this pronouncement is made in terms of Article 7 of the Framework Convention, it is equally relevant in terms of participatory rights (and thus Article 15 of the Framework Convention). It can furthermore be pointed out that the reasoning clearly hints at 'indirect discrimination', but the Advisory Committee does not address it in that respect.

3) Use of the minority language in public

The starting point in relation to linguistic rights in the ECHR is that it does not contain many language rights. The United Nations Treaties do not provide explicitly for language rights neither. Nevertheless, this has not prevented the relevant United Nation Treaty Bodies from highlighting linguistic components of rights (and more specifically their minority dimension).

The few linguistic rights present in the ECHR concern procedural and police related matters and are interpreted in a 'minimalistic' way. Other Articles of the ECHR, like the freedom of expression (Article 10) or the freedom to manifest a belief (Article 9), have never been accepted as a basis for language rights or for 'linguistic freedom, e.g. in relation to communications with the public authorities.[154] Nevertheless, in terms of Articles 2 and 3 of Protocol No. 1, there have been some interesting developments,[155] which might be considered as more far-reaching ones. In this respect, it should be highlighted that on 22 March 2005, the ECtHR considered as admissible a complaint about a typical minority concern in relation to language issues (in terms of Article 8 and Article 8 in conjunction with Article 14) implying that it is at least not manifestly ill-founded. The case of *Bulgakov v Ukraine* concerns a complaint by a Ukrainian citizen of Russian origin regarding the use of Ukrainian forms (etymological equivalents) of his first name and patronymic on his passport, instead of their original (Russian) forms transliterated into the Ukrainian alphabet. He also complained that he was being discriminated on the basis of his association with the Russian minority because names of different foreign origins were merely transliterated into the Ukrainian alphabet. The outcome in *Bulgakov* will provide an important indication of the extent to which traditional 'minority rights' can be achieved on the basis of (general) human rights.

[149] ECtHR (GC), Refah Partisi, para 125.
[150] Ibid., para 119.
[151] Inter alia Spiliopoulou-Akermark, The Limits of Pluralism..., 11-13.
[152] Advisory Committee, Opinion on Albania (I), ACFC/INF/OP/I(2003)004, para 71-72.
[153] Advisory Committee, Opinion on Moldova (I), AFCF/INF/OP/I (2003)002, para 49, concerning the requirement that political parties needed to have at least 5000 members residing in at least half of the districts in the country with at least 150 members residing in at least half of the districts in the country.
[154] Henrard, An Adequate System of Minority Protection …,125-128.
[155] While Article 3 of the first additional protocol was dealt with supra, the analysis in terms of Article 2 of the first AP will follow immediately infra.

In view of the fact that language is often an important identity characteristic of minorities, it is not surprising that the Framework Convention contains many language-related provisions, which explicitly take up typical minority concerns. Articles 10, 11 and 14 should definitely be highlighted in this respect.

However, it should be acknowledged that as soon as there is an important 'public component' (for example Article 10(2), Article 11(3) and Article 14(2)), the provisions are accompanied with qualifying or escape clauses. Article 10, paragraph 2 concerns the possibility to use the minority language in communications with the public authorities is a prime example of a provision which seems to leave so much discretion to the state party, that it is not sure to what extent it can be said to concern a right at all.[156] Nevertheless, the practice of the Advisory Committee has consistently called on states to have clear regulatory frameworks that are sufficiently generous in this respect,[157] while providing further indications about the conditions under which administrative authorities need to use a minority language.

Unfortunately, the Advisory Committee has not adopted so far a consistent approach in this field,[158] which also applies in relation to Article 11, paragraph 1 and the right to use names in the minority language. While in its Opinion on Azerbaijan the Advisory Committee clearly indicated that the state may transliterate the names of persons belonging to national minorities,[159] it seems to acknowledge that transliteration can be problematic under Article 11 in its Opinion on Lithuania.[160] The Committee clearly disapproves the practice of going beyond transliteration and actually using the equivalent in the national official language for official records and documents.[161]

4) Education: linguistic and broader curriculum issues

The jurisprudence in terms of Article 2 of Protocol No. 1 has not developed significantly towards a more minority friendly jurisprudence since 2000,[162] in relation to neither the linguistic dimension of the right to education, nor obligations in terms of broader curriculum questions.

While the ECtHR had indicated in *Kjeldsen, Busk Madsen en Pedersen v. Norway* that the information transferred in public education should be objective, neutral and pluralistic.[163] The ECtHR's scrutiny in this respect seems rather weak, granting the states a considerable margin of appreciation. This attitude was confirmed in *D.H. et al v the Czech Republic,*[164] even though this case did not touch on curriculum issues in the strict sense.

There does seem to be some development pertaining to language in education issues. In its *Cyprus v Turkey* judgment,[165] the ECtHR seems to be moving away from its rigid stance in the *Belgian Linguistics case*[166] of 1968 with respect to the protection of mother tongue education or education in the minority language. In the former case, the ECtHR noted that 'children of Greek-Cypriot parents in northern Cyprus

[156] See also Fernand de Varennes, 'Article 10', in M. Weller (ed.), *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities* (Oxford: OUP, 2005), 313-314.
[157] Inter alia Advisory Committee, Opinion on Azerbaijan (I), para 54-56; Advisory Committee, Opinion on Armenia (I), ACFC/INF/OPI(2003)001, para 101; Advisory Committee, Opinion on Ukraine (I), ACFC/INF/OP/I (2002)010, para 51-52.
[158] De Varennes, 'Article 10', 316-317.
[159] Advisory Committee, Opinion on Azerbaijan (I), ACFC/INF/OP/I(2004)001, para 58.
[160] Advisory Committee, Opinion on Lithuania (I), ACFC/INF/OP/I(2003)008, para 57.
[161] Advisory Committee, Opinion on Ukraine (I), ACFC/INF/OP/I (2002) 010, para 55.
[162] Henrard, An Adequate System of Minority Protection …, 118-124.
[163] ECtHR, Kjeldsen, Busk Madsen and Pedersen v Norway, 7 December 1976, para 53.
[164] ECtHR, D.H. et al v Czech Republic, 7 February 2006, para 47.
[165] .ECtHR, Cyprus v Turkey,10 May 2001.
[166] For a critical analysis of the Belgian linguistics case see *inter alia* Henrard, An Adequate System of Minority Protection, p. 119-121, C. Hillgruber & M. Jestaedt, *The European Convention on Human Rights and the Protection of National Minorities* (Koln: Verlag Wissenschaft und Politik, 1994) 25-31.

wishing to pursue a secondary education through the medium of the Greek language are obliged to transfer to schools in the south, this facility being unavailable in the Turkish Republic of Northern Cyprus ever since the decision of the Turkish-Cypriot authorities to abolish it'.[167] Although the ECtHR at first seems to repeat its stance that the provision on the right to education 'does not specify the language in which education must be conducted in order that the right to education be respected',[168] it does conclude that 'the failure of the authorities of the Turkish Republic of Northern Cyprus to make continuing provision for [Greek-language schooling] at the secondary-school level must be considered in effect to be a denial of the substance of the right at issue'.[169] Indeed, it argues that because the children had already received their primary school education through the Greek medium of instruction, '[t]he authorities must no doubt be aware that it is the wish of Greek-Cypriot parents that the schooling of their children be completed through the medium of the Greek language'.[170] Consequently, it seems that because the authorities assumed responsibility for the provision of Greek-language primary schooling, they have the obligation to do the same for the secondary school level. Obviously, the ECtHR does not go as far as reading into the Article on the right to education a right to mother tongue education in order for the former to be effective.[171] It clearly attaches more weight to the parents' convictions about the benefits of a certain medium of instruction and should thus be welcomed.[172] It is to be hoped that in subsequent jurisprudence, the ECtHR will further elaborate and enhance the protection of mother tongue education for minorities.

The number of Articles on education in the Framework Convention (Articles 12-14) illustrates again its special importance for minorities. It should be highlighted though that while the Advisory Committee has been said to be rather bold under Article 12 in relation to equal access to and equal standards of education and curricular reviews, there are conflicting readings of the Advisory Committee's activities in terms of linguistic rights in education under Article 14. Some people describe the Advisory Committee's attitude as particularly hesitant,[173] while others emphasize the tremendous impetus the Advisory Committee has given in favour of mother tongue education.[174]

In relation to the criticism voiced to the ECtHR's stance in *D.H. et al v Czech Republic*, it should in any event be underlined that the Advisory Committee has consistently pointed out the problematic situation relating to the segregation of Roma children in so-called special schools.[175] While it critically assesses the disproportionate impact of the rules on special schools for mentally disabled children, it has failed to qualify this as an instance of indirect discrimination.[176] Importantly, the Advisory Committee does highlight the importance of using objective tests which are not culturally biased.[177]

[167] .ECtHR, Cyprus v Turkey, para 277.
[168] .ECtHR, Cyprus v Turkey, para 277.
[169] .ECtHR, Cyprus v Turkey, para 278.
[170] . ECtHR, Cyprus v Turkey, para 278.
[171] Similarly, the reasoning followed does not exhibit an awareness of the importance of mother tongue education from a substantive equality viewpoint.
[172] For a more elaborate discussion of this judgment, including the position of the European Commission on Human Rights, see Gilbert, A Burgeoning Jurisprudence …, 762-763.
[173] Duncan Wilson, 'Report on the workshop on Education', in *Filling the Frame* …, 167.
[174] Inter alia Commentary on Education under the Framework Convention for the Protection of National Minorities, ACFC/25DOC(2006)002, 26-27.
[175] Commentary on education under the Framework Convention…, 21.
[176] Inter alia Advisory Committee, Opinion on Slovakia (II), ACFC/INF/OP/I(2005)004, para 94-96; Advisory Committee, Opinion on Bulgaria(I), ACFC/OP/I(2006)001, para 88-89.
[177] Wilson, 'Report on Workshop on Education', 181-182.

5) Freedom of expression and the media

Although the case law of the ECtHR in terms of Article 10 exhibits several lines of jurisprudence as regards general principles of direct relevance to the media and the way this is organized, there have been few cases concerning minorities. It can only be welcomed that the ECtHR's jurisprudence underscores that tolerance and broad-mindedness are fundamental to democratic societies.[178] The ECtHR has underlined that pluralism should be the basis of regulation of the freedom of expression, especially in relation to licenses for the audio-visual media.[179] Having pluralism as a central value for decisions concerning licensing might contribute to some decisions in favour of minorities. However, it can also be argued that 'an obligation to regulate in a pluralistic way is not necessarily sufficient to convince states that the separate culture, language and religion of minorities should enjoy sufficient coverage in the media, possibly even through financial support of their private initiative'.[180]

The argumentation of the ECtHR itself in the landmark case of *Informationsverein Lentia v Austria* seems to confirm this point. Even though the case concerns a complaint of the Slovene minority in Austria, the minority position of the claimant is not been taken into account in the Court's evaluation of the pros and cons of a violation of Article 10, not even as a subsidiary argument. It refuses furthermore (in conformity with its steady line of jurisprudence) to assess the complaint in terms of Article 14 in combination with Article 10 after having concluded to a violation of Article 10 in itself (because the state monopoly and its far reaching restriction on the freedom of expression is not justified by a pressing need)[181]. Needless to say that an explicit inclusion of the minority factor in its analysis under Article 10, paragraph 2 and its investigation of the complaint also in terms of Article 14 in combination with Article 10 would have entailed a possibility to construct a minority 'friendly' line of jurisprudence.

Arguably, there has not been yet a judgment that can be considered to provide authority for the statement that states have a positive obligation to facilitate access to the media for persons belonging to national minorities.[182] In this respect, Article 9 of the Framework Convention contains a welcome addition with rather detailed rules, [183] introducing 'greater specificity as regards dimensions to the right to freedom of expression that could be of particular importance for persons belonging to national minorities'.[184]

6) Freedom of religion

In view of the debate on the added value of the minority specific instruments, like the Framework Convention, it can be emphasized that when analysing these instruments, it is striking that hardly any explicit standards for persons belonging to religious minorities are incorporated. This could be explained by the conviction that the freedom of religion would in itself contain adequate protective principles for religious minorities, and that there would be no need for minority specific instruments in this respect.

---

[178] The founding case of this steady line of jurisprudence is no doubt Handyside: ECtHR, 7 December 1976, para 49.

[179] The ECtHR has identified several relevant and objective criteria that can legitimately be used for licensing regulations: ECtHR, Informationsverein Lentia and Others v Austria, 24 November 1993, para 30-33; ECtHR, Groppera Radio AG and others v Switzerland, 28 March 1990, para 29. The guideline in respect of the 'needs of a specific audience' can in any event be considered as one that is specifically relevant for minorities (Henrard, Devising an Adequate System of Minority Protection …, 93). According to Amor: 'by introducing the broad concept of 'rights and needs of a specific audience', ECtHR opens the door for the minority language of a specific audience becoming a parameter for appropriate licensing, and thus a signpost for appropriate state performance in connection with right enjoyment by its minority population' (A.A. Martin Estebanez, 'Council of Europe Policies Concerning the Protection of Linguistic Minorities and the Justiciability of Minority Rights', in N. Ghanea & A. Xanthaki (eds.), *Minorities, Peoples and Self-Determination* (The Hague: Martinus Nijhoff, 2005, 293)

[180] Henrard, Devising an Adequate System of Minority Protection…, 94.

[181] ECtHR, Informationsverein Lentia, para 39.

[182] *Contra* J. Packer & S. Holt, ' Article 9', in M. Weller (ed.) *The Rights of Minorities: A Commentary on the European FCNM* (New York: OUP, 2005), 294, 297-298.

[183] Packer & Holt, Article 9 …, 264-266.

[184] Tarlach McGonagle, 'Commentary to the report on the Workshop on Media', in *Filling the Frame* …, 146.

The ECtHR has indeed been in favour of religious minorities through its protection of the freedom of religion, in particular the related obligation of states to promote (religious) pluralism and guarantee religious tolerance. The typical balancing act in its evaluation, whether or not Article 9 is violated, does not *ipso facto* lead to negative results for religious minorities. This was made clear *inter alia* in *Kokkinakis v Greece* and *Hoffmann v Austria*.[185] Furthermore, the ECtHR tends to emphasize the importance of religious pluralism for a democratic society, also concerning different sub-streams of a religion, the related state obligation to be neutral and impartial in religious matters and the positive obligation to make these religious (sub)orientations tolerate one another, while not meddling with internal organization and leadership issues.[186] However, a few judgments have elicited considerable criticism.

The case of *Cha'are Shalom VE Tsedek v France*[187] concerns the complaint by a Jewish organization in France which had not received authorization to perform its own type of ritual slaughter following the strictest version of Judaism. The alleged reasoning behind this refusal was the fact that authorization for ritual slaughter was already granted to an organization which was supposed to be broadly representative of the Jewish community in France. This case actually concerns state obligations in relation to a minority within a minority. However, the Court entirely glossed over this dimension, which might also have influenced the demarcation of the margin of appreciation. Since it was possible in practice for the applicant association and its members to obtain and eat meat which is compatible with their religious prescriptions (glatt meat) *inter alia* via Belgium, the Court held that there has not been (even) an interference with the right enshrined in Article 9.[188] Furthermore, even if there would have been interference, Article 9 would not have been violated according to the Court as the requirements of paragraph 2 were met. Concerning the required proportionality, the ECtHR found that 'regard being had to the margin of appreciation left to Contracting States, particularly with regard to establishment of the delicate relations between the Churches and the State, it [the restriction] cannot be considered excessive or disproportionate'.[189]

However, it was also pointed out in the joint dissenting judgment of 7 judges, the 'mere fact that approval has already been granted to one religious body does not absolve the State authorities from the obligation to give careful consideration to any later application made by other religious bodies professing the same religion'. In contrast to the majority of judges, which had disposed without much argument of the Article 14 complaint, the dissent qualified the differential treatment as a central problem of this case. While the dissenting judges accepted that the States enjoy a wide margin of appreciation with regard to the establishment of the delicate relations between the Churches and the State, it emphasizes another principle of steady jurisprudence according to which the margin of appreciation is also determined by what is at stake. In case, the need to secure true religious pluralism, an inherent feature of a democratic society, would be very weighty, reducing the margin of appreciation. Conferring an exclusive right to authorize ritual slaughters to one Jewish community, amounted to a failure to secure religious pluralism, entailing a violation of Article 14 in combination with Article 9.[190]

---

[185] ECtHR, Kokinakkis v Greece, 25 May 1993 and ECtHR, Hoffmann v Austria, 23 June 1993. See also ECtHR, Buscarini and others v San Marino,18 February 1999 and ECtHR, Manoussakis v Greece, 29 August 1996. See also the discussion in Henrard, An Adequate System of Minority Protection …, 110-114.

[186] Inter alia ECtHR, Agga v Greece, 20 September 2001, para 58-60; ECtHR, Serif v Greece, 14 December 1999, para 49-53; ECtHR, Eglise Metropolitaine de Bessarabie et autres c. Moldavie, 13 December 2001, para 123-130; ECtHR, Hasan and Chaush t Bulgaria, 26 October 2000, para 62; ECtHR, Supreme Holy Council of the Muslim Community v Bulgaria 16 December 2004, para 93-99. See also Gilbert, A Burgeoning Jurisprudence …, 763-766.

[187] Sha'are Shalom VE Tsedek v France, 27 June 2000. See also Gilbert, A Burgeoning Jurisprudence…, 766- 768.

[188] ECtHR, Sha'are Shalom v France, para 82.

[189] ECtHR, Sha'are Shalom v France, para 84.

[190] As Spiliopoulou-Akermark points out, the Convention does not guarantee as such the right of minorities to be recognized. However, if recognition and privileges have been granted to one religious group, church, conviction or other minority institution, this should be done on a non-discriminatory basis' (Spiliopoulou-Akermark, Justifications of Minority Protection …, 16). See also Gilbert, A Burgeoning Jurisprudence …, 768.

An interesting line of jurisprudence has been developed in cases concerning limitations put on the manifestation of one's religion aimed at securing secularism,[191] which invite elucidation. Most of these cases are against Turkey, where the majority of the people are Muslims and women often wear the veil. However, prohibitions of wearing the veil in education and at work are increasingly sensitive issues in most Council of Europe countries, where the group concerned does constitute a minority. The case which received most attention so far, was *Leyla Sahin v Turkey*, which was ultimately decided by the Grand Chamber,[192] and which actually 'confirmed' to a great extent the reasoning of the European Commission in *Karaduman v Turkey.*[193] According to the ECtHR, the margin of appreciation of States would be particularly extensive in relation to the determination of the relationship between State and religions, especially as regards the regulation of wearing of religious symbols in schools and universities considering the absence of a common European standard.[194] Furthermore, the ECtHR had already accepted in previous cases that the goal of upholding secularism is indeed necessary for the protection of the democratic system in Turkey. In addition, the ECtHR accepted that the prohibition to wear the veil in Turkey was also based[195] on the equality of sexes. Since gender equality is undoubtedly one of the key principles underlying the ECHR, this influenced the margin of appreciation left to Turkey.[196] The grant of the extensive margin of appreciation already signals the conclusion of the ECtHR meaning that Article 9 was not violated.

While the ECtHR did not take up its controversial reasoning in relation to gender equality in two recent admissibility decisions regarding the wearing of the veil in Turkey, the decision in *Kose and others v Turkey*[197] reveals that its position about the acceptability of the prohibition of the veil aimed at securing secularism in Turkey (at least for the time being). It is to be hoped that the ECtHR will be equally sensitive if a complaint is lodged by a Muslim girl who is facing a similar prohibition in a country without this specific historical background.

The Framework Convention refers explicitly to religion only in Articles 7 and 8, which form part of the Articles which have clear counterparts in the ECHR.[198] Nevertheless, nothing in the formulation of these two provisions refers to issues that would not be protected by the ECHR.[199] There are in any event very

[191] While this restrictive case law regarding wearing religious head-gear in the education sphere relies heavily on the importance of the principle of secularism and its relation to the protection of a democratic society in Turkey, the Court seems to allow states also outside this context the imposition of arguably far reaching (disproportional) interferences with the wearing of religious headgear. In *Phull v France* (11 February 2005) the Court considers it a justified interference with the freedom to manifest one's religion to oblige a Sikh to take of his turban to go through the scanners at the airport as it would be necessary for public security. The Court's reasoning in this case is very thin and fails to screen the proportionality and the subsidiarity of the measure. Unlike the obligation to wear helmets when on a motorcycle, there were obviously alternatives available to screen the turban (with the hand detector, or the Sikh could walk through the security gate with the turban on). See also L. Verhey, Noot bij EHRM, Phull t. Frankrijk (11 January 2005), EHRC 2005/41.

[192] See also the inadmissibility decision in *Kose et al v Turkey* (24 January 2006), in which the Court considered the application (similar to Leyla Sahin's) manifestly ill founded.

[193] ECommHR, Karaduman v Turkey (3 May 1993).

[194] ECtHR (GC), Leyla Sahin, 10 November 2005, para 101-102.

[195] ECtHR (GC), Leyla Sahin, para 104.

[196] ECtHR (GC), para 105-107. It needs to be argued though that qualifying the veil as discriminatory against women touches on a controversial point within the religion, which the Court should stay out of. See also the dissent of Judge Tulkens. See also See also L. Verhey, Noot bij EHRM, Leyla Sahin v Turkey, 29 June 2004', EHRC 2004/80.

[197] ECtHR, Kose and others v Turkey (admissibility), 24 January 2006.

[198] Article 7 and 8 are interesting in regard to the freedom of religion in the sense that, in contrast to general human rights conventions, the forum internum (the freedom to have a belief, conviction etc.) and the forum externum (the right to manifest one's religion or belief) of the freedom of religion is split up and put in different Articles. According to Machnyikova the extra attention given to the right to manifest ones religion can be explained by 'the history of state suppression to which many religious minorities have been subjected' (Zdenka Machnyikova, 'Article 8', in M. Weller (ed.), *The Rights of Minorities: A Commentary to the European Framework Convention for the Protection of National Minorities* (Oxford: OUP, 2005), 232).

[199] Machnyikova, 'Article 8', 252-256.

few opinions of the Advisory Committee which explicitly take up religious issues.[200] Often they concern issues of discrimination between different religions in relation to status, funding and the like.[201]

C. Enforcement

1) Enforcement mechanism

Since the entry into force of Protocol No. 11 to the ECHR, the systematic periodical review (on the basis of regular state reports) has been replaced by a possibility for the Secretary of the Council of Europe to request a contracting state to make an implementation rapport (ad hoc).[202] Furthermore, the individual complaints procedure is no longer optional. The ratification of the ECHR implies automatically the acceptance of this procedure, as was already the case for the interstate complaints procedure.[203]

The judgments of the ECtHR are legally binding for the Contracting States concerned. This implies the duty to implement the judgment, which is supervised by the Committee of Ministers of the Council of Europe.[204] The Committee is supported in this juridical task by the Department for the Execution of Judgments of ECtHR, which forms part of the Secretariat of the Council of Europe.

Traditionally the judgments of the ECtHR resulted in the declaration that Articles of the ECHR were violated (or not), leaving it to the state to adopt the necessary measures in its internal legal order to remedy the violation. More recently, there are instances in which the ECtHR has actually indicated very concrete obligations that would need to be complied with by the state in order to remedy the violation.[205] Since the entry into force of Protocol No. 14 to the ECHR, two specific 'functions' of the Grand Chamber will be introduced. Firstly, the Committee of Ministers will be able to ask (by a two third majority) the Grand Chamber to interpret the final judgment that needed to be implemented (Article 46, para 3 of the ECHR as amended) to settle possible interpretation disputes between the state and the Committee of Ministers.

Furthermore, the Committee of Ministers can start a procedure before the Grand Chamber to establish the violation of Article 46 ECHR in case of refusal to implement the judgment (Article 46, para 4 of the ECHR as amended). This procedure should only be used in exceptional circumstances.[206]

2) Burden of proof

It should be underlined that the effective protection resulting from human rights provisions does not only depend on the reach of these provisions (including their interpretation) but also on the burden of proof imposed by a supervisory mechanism. The actual l burden of proof is determined by the standard of proof (the level of 'certainty') and the distribution of the burden of proof. The latter determines when the burden of proof shifts from the claimant to the respondent.

[200] See the limited references to Opinions of the Advisory Committee in the chapter by Machnyikova.
[201] Inter alia Advisory Committee, Opinion on Finland (II), para 90-92. See however the comment in this Opinion on the circumcision of boys.
[202] Article 52 ECHR.
[203] Articles 33, 34 ECHR.
[204] See also Article 46, para 1 en para 2 ECHR.
[205] J. van de Lanotte & Y. Haeck, *Handboek EVRM: Algemene Beginselen* (Antwerp: Intersentia, 2005), 702-3.
[206] Explanatory Report to the 14th Additional Protocol, para 100.

In regard to the ECtHR, there is a long history of criticism about the general 'standard of proof' required by the Court, namely proof 'beyond reasonable doubt'. This would be too demanding and hence not appropriate for cases about human rights violations.[207] The Court has from the beginning nuanced this standard by indicating that 'proof may follow from the co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact', while it often underlined that the standard of proof would be less demanding than the one in criminal cases. The Court has furthermore taken into account the problems to obtain the required proof by adjusting the distribution of proof in favour of the claimant. Typical examples concern deaths of a person who is in policy custody.[208] Sometimes the Court considers that the surrounding circumstances are so suspect that it concludes to a violation of a provision because the state has not discarded all serious doubts about a possible violation.[209]

Notwithstanding these adjustments to the required standard of proof, the base line remains the 'beyond reasonable doubt' standard. It still seems to be the case that *de facto* this standard often leads to disappointing results. It is furthermore far from clear in what circumstances the Court will proceed to a relaxation of the standard of proof. However, this is essential for 'legal certainty and procedural balance among the parties'.

The Court, in Grand Chamber formation, did gave a few factors that are relevant to determine the exact distribution of the burden of proof in *Nachova v Bulgaria,* a case concerning an allegedly racial killing of two Roma by the Bulgarian police. While the Chamber had concluded that the claimants could benefit from a 'reversal of the burden of proof', the Grand Chamber had indicated that while such a reversal is not ruled out in cases of alleged racial discrimination, more would be required before this 'reversal' would be triggered. Arguably, the Grand Chamber did not agree with the assessment of the Chamber that the claimants had made out a *prima facie* case of discrimination (after which the burden of proof shifts to the respondent state).

The ECtHR Grand Chamber acknowledges that whether or not a *prima facie* case has been made out will each time depend on the specific circumstances, but goes on to provide a few relevant criteria, more specifically the 'specificity of the facts, the nature of the allegations made, and the Convention right at stake'.[210] While this clarification should be welcomed, it should not be overrated, since these general criteria in themselves provide everything but a clear prediction for concrete decisions of the Court. However, even in the subsequent cases in which the Court enumerated the relevant criteria, it has not explained their relevance and implications in the case at hand.

[207] It should be highlighted that this criticism does not only come from NGO's and other external sources but has also been voiced by individual judges of the Court, like judge Bonello in *Veznedarogluv v Turkey,* 11 April 2000, para 12; judge Loucaides in regard to *Hasal Ilhan v. Turkey,* 9 November 2004.
[208] ECtHR, *Salman v. Turkey,* 27 June 2000, para 97.
[209] ECtHR, *Conka t. België,* 5 February 2002, para 61. Even though the Court in these circumstances talks about a 'reversal of the burden of proof' ECtHR (e.g. *Nachova v. Turkey,* 26 February 2004, para 169), it seems more correct to speak in terms of 'distribution of the burden of proof' which is more favorable for the claimant, as the Court did explicitly in *Timishev v Russia:* ECtHR (Grand Chamber), Timishev v Russia, para 39. See also ECtHR (Grand Chamber), Nachova v Bulgaria, para 147.
[210] ECtHR (GC), Nachova v Bulgaria, para 147.

IV. Conclusion

The main point in this report was to examine to what extent the development in the jurisprudence of the ECtHR in terms of the first pillar relating to the prohibition of discrimination and general human rights, towards a protection of substantive equality and the right to identity of persons belonging to minorities, has influenced the additional need for the second pillar to provide for special minority rights. A special emphasis was made on the examination of the following conventions: ECHR and CERD, CCPR, CESCR and CRC (examined in the report DH-MIN(2006)021).

The analysis of the jurisprudence of the ECtHR arguably reveals[211] a rather ambivalent picture about the contribution of individual human rights to minority protection. Remarkable advances at the theoretical level in relation to embracing both substantive equality considerations and the right to identity of minorities are not always matched by equally progressive, minority sensitive applications in concrete cases (due to the extensive margin of appreciation left to states). Furthermore, in certain areas where the ECtHR has traditionally realized a meaningful level of minority protection, a few recent cases are difficult to reconcile and hence threaten to question of the positive *acquis*. The problem is that states are granted an extensive margin of appreciation in minority sensitive areas.

In this respect, the Framework Convention offers at first sight unexpected added value. While its supervisory mechanism seems weak and strongly politicized, this has not prevented the gradual circumscription of the extensive state discretion through its focus on a constructive and ongoing dialogue with the state authorities. More specifically, in relation to the prohibition of discrimination (as a particular manifestation of the equality principle), one has to acknowledge that equality is an empty concept in the end, as it is inherently comparative without any substance. In this connection, the Framework Convention has another 'added value' in the sense that it provides substantive guidance for minority contexts.

At the same time, and this is also explicitly confirmed by the Framework Convention (and its inclusion of general human rights), an interpretation of the prohibition of discrimination and (other) general human rights in line with substantive equality and identity considerations would already realize, to a significant extent, an adequate minority protection. Nevertheless, it is highly unlikely that the interpretation of norms, that are in themselves not catering for (the special needs of) minorities, will ever address and span the entire spectrum of minority concerns. The latter is arguably not even achieved by the current minority rights standards.[212]

In conclusion, it can still be maintained that the human rights (quasi) jurisprudence, which developed over the past two decades confirms the validity of the two-pillar conception in relation to minority protection, and more specifically the need of special minority rights in addition to the prohibition of discrimination in combination with general human rights. The recognition of positive state obligations in relation to minorities is and will remain the essential cement to construct an adequate system of minority protection,[213] the interrelated building blocks of which are the right to identity of minorities, integration without forced assimilation and the principle of substantive equality.[214]

---

[211] In view of the fact that the analysis of the case law in terms of several relevant rights has been reduced to footnotes with references to case law and a more in depth analysis done elsewhere, it seems inappropriate to use the concept 'reveals'.

[212] Consider the special attention by academics and minority NGOs concerning questions of development and economic participation, and the on-going controversies surrounding group rights and the right to self-determination for minorities. See also the analysis in T. Malloy, *National Minority Rights in Europe* (New York: OUP, 2005), more particularly chapters 3 and 7.

[213] *Inter alia* M. Weller, 'Conclusion: the Contribution of the European Convention for the Protection of National Minorities to the Development of Minority Rights', in M. Weller (ed.), *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities* (New York: OUP, 2005), 620-623.

[214] *Inter alia* T. Hadden, 'Integration and Separation: Legal and Political Choices in Implementing Minority Rights', in N. Ghanea and A. Xanthaki (eds.), *Minorities, Peoples and Self-Determination* (Leiden-Boston: Martinus Nijhoff, 2005), 175; Henrard, Devising an Adequate System of Minority Protection …, 11-13; R.M. Letschert, *The Impact of Minority Rights Mechanisms* (The Hague: TMC Asser, 2005), 15; Pentassuglia, Minorities in International law …, 90-93; Weller, Conclusion …, 616.