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Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: *It Takes Two to Tango in the Council of Europe*†

Recent years have seen important developments in the antidiscrimination case law of the European Court of Human Rights and the European Committee on Social Rights. While the latter has always been a privileged European forum for discrimination monitoring and, when applicable, for discrimination-based collective complaints (with a third of its decisions to date raising discrimination issues), the former has also developed an interesting albeit more marginal antidiscrimination case law and has issued a series of crucial decisions in the last five years or so. The purpose of this Article is to assess and compare the take of the two leading human rights bodies of the Council of Europe and their complementary and mutually reinforcing approaches, by situating them within the broader context of substantive changes in antidiscrimination law in the European Union. The two European institutions' respective case law is analyzed with a special emphasis on their conceptions of discrimination, their tests and reasoning, and in particular by reference to their case law on disability and the education rights of Roma children. One of the major developments to be discussed is the emergence and consolidation of a collective conception of discrimination by both bodies that is unprecedented in Europe, especially through their case law on indirect and structural discrimination and on enforcing positive duties and in particular positive action. While there are still important differences between the two bodies' approaches, their growing body of reference jurisprudence shows interesting signs of convergence and cross-fertilization. As a matter of fact, the enhanced coordination between the ECtHR's and the ECSR's approaches to non-discrimination has become legally necessary since the entry into force of Protocol 12 to the European Convention on Human Rights and the extension of the ma-

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terial scope of the ECHR non-discrimination principle to include all the rights entailed in the European Social Charter.

> "The Court observes that the applicants raised the same complaints under Articles 12 and 13 of the European Social Charter. It notes that their allegations do not disclose any appearance of a violation of the rights and freedoms guaranteed by the Convention and its Protocols. It would also point out that it is not its task to review governments' compliance with instruments other than the European Convention on Human Rights and its Protocols, even if, like other international treaties, the European Social Charter (which, like the Convention itself, was drawn up within the Council of Europe) may provide it with a *source of inspiration*." (ECtHR, *Zehnalova and Zehnal v. The Czech Republic* Application No 38621/97, Decision of 14 May 2002, emphasis added).

> "This *normative partnership between the two instruments* is underscored by the Committee's emphasis on human dignity. In Collective Complaint *FIDH v. France* (No. 14/2003) it stated that 'human dignity is the fundamental value and indeed the core of positive European human rights law – whether under the European Social Charter or under the European Convention of Human Rights [. . .].'" (ECSR, Conclusions XVII-2, Vol. 1, 2005, General Introduction, pt 5, emphasis added).

INTRODUCTION

Recent years have seen important developments in the antidiscrimination case law of two of the Council of Europe's human rights monitoring bodies: the European Court of Human Rights (ECtHR), that has monitored the application of the 1950 European Convention on Human Rights (ECHR) since 1959, and the European Committee on Social Rights (ECSR), that has been in charge of the application of the 1961 and the 1996 European Social Charter (ESC) since respectively 1961 and 1996.[1] While the latter has always been a privileged European forum for discrimination monitoring and, when applicable, for discrimination-based collective complaints (with a third of its decisions to date raising discrimination issues), the former has recently developed, after a period of stagnation in the area, a larger and bolder, albeit altogether more marginal, antidiscrimination case law (with half of its decisions on the violation of the non-discrimination

1. The present articles refers to "systems" or "regimes" interchangeably, and in a loose sense, to identify a separate ensemble of European human rights norms and their interpretation by their respective monitoring bodies.

principle issued in the last five years) and has issued a series of crucial decisions in that context. To a large extent, these developments have been mutually responsive and convergent. This has been the case, for instance, with regard to the emerging notions of collective indirect discrimination and remedial positive duties, in particular in the Roma context.

Interestingly, those two regimes' relative importance in the field of European antidiscrimination law at large[2] does not reflect, and in fact is actually diametrically opposed to, that of their human rights case law and, more generally, their overall perceived influence on the protection of human rights in Europe. Whereas the ECHR has influenced domestic human rights protection in a decisive fashion since the 1960s, mostly through the ECtHR's case law, respect for the ESC and the "revitalized" role of the ECSR are more recent and date back to the revision of the ESC in 1996.[3] This two-speed human rights system, with the social rights regimes lagging behind, reflected the post-1945 divide between international civil and political rights on the one hand, and social rights on the other (and the separation of the two UN Covenants), and, more generally, the post-war opposition between the political and the social.[4] Since the beginning, however, equality and non-discrimination have been at the core of the ECSR's jurisprudence, whereas their development in the ECtHR's practice is more recent and related to the development of the former. Given the relational and hence collective or social dimension of equality,[5] its foundational role in each and every human right guarantee[6] and, accordingly, its bridging function between civil and social rights, it should come as no surprise that it is in the field of antidiscrimination law on which the two European bodies are now most visibly converging.[7]

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2. On European non-discrimination law *lato sensu*, see, e.g., OLIVIER DE SCHUTTER, THE PROHIBITION OF DISCRIMINATION UNDER EUROPEAN HUMAN RIGHTS LAW – RELEVANCE FOR EU RACIAL AND EMPLOYMENT EQUALITY DIRECTIVES (2005); European Union Agency for Fundamental Rights and European Court of Human Rights - Council of Europe, HANDBOOK ON EUROPEAN NON-DISCRIMINATION LAW (2011).

3. On the "revitalization" of the ESC, see Olivier de Schutter, *The Two Lives of the European Social Charter, in* THE EUROPEAN SOCIAL CHARTER: A SOCIAL CONSTITUTION FOR EUROPE 11-37 (Olivier de Schutter ed., 2010).

4. See, on the social question, HANNAH ARENDT, ON REVOLUTION (1963).

5. *See* Elizabeth S.Anderson, *What is the Point of Equality?* 109:2 ETHICS 287-337 (1999); Samantha Besson, *International Human Rights and Equality, in* EQUALITY IN TRANSNATIONAL AND GLOBAL DEMOCRACY (E. Erman & S. Näsström eds., 2012 forthcoming).

6. *See* Samantha Besson, *Human Rights and Democracy in a Global Context – Decoupling and Recoupling,* 4:1 ETHICS AND GLOBAL POLITICS 19-50 (2011).

7. *See also* Edouard Dubout, *La Cour européenne des droits de l'homme et la justice sociale – à propos de l'égal accès à l'éducation des membres d'une minorité,* 84 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 987-1011 (2010); J-F. Akandji-Kombé, *Le droit à la non-discrimination vecteur de la garantie des droits sociaux, in* LE DROIT À LA NON-DISCRIMINATION AU SENS DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME 183-96 (F. Sudre & H. Surrel eds., 2008); Edouard Dubout, *Vers une protec-*

The purpose of this Article is to assess and compare the take on equality and discrimination of those two Council of Europe's human rights bodies, by situating them within the broader context of substantive changes in antidiscrimination law in the European Union and hence in the European legal space at large.[8] Despite the historical filiation and, arguably, interdependence between the two European human rights regimes in the Council of Europe system,[9] and in spite of the latter's mutually acknowledged complementarity (e.g., through mutual borrowings since the late 1990s[10]),[11] very few

tion de l'égalité "collective" par la Cour européenne des droits de l'homme ?, 68 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 851-83 (2006); Frédéric Sudre, *La protection des droits sociaux par la Cour européenne des droits de l'homme: un exercice de jurisprudence fiction?,* 55 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 755-72 (2003).

8. All twenty-seven EU Member States are indeed bound by the ECHR and the ESC. For a systematic comparison of the concept and conceptions of equality and nondiscrimination in EU law and the ECHR, see K. Lenaerts & D. Arts, *La personne et le principe d'égalité en droit communautaire et dans la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales*, *in* LA PERSONNE HUMAINE, SUJET DE DROIT, QUATRIÈMES JOURNÉES RENÉ SAVATIER 101-34 (1994); R. HERNU, PRINCIPE D'ÉGALITÉ ET PRINCIPE DE NON-DISCRIMINATION DANS LA JURISPRUDENCE DE LA COUR DE JUSTICE DES COMMUNAUTÉS EUROPÉENNES (2003); DE SCHUTTER, *supra* note 2; D. MARTIN, EGALITÉ ET NON-DISCRIMINATION DANS LA JURISPRUDENCE COMMUNAUTAIRE – ETUDE CRITIQUE À LA LUMIÈRE D'UNE APPROCHE COMPARATISTE (2006); Mark Bell, *The Relationship between EU law and Protocol No. 12, in* NON-DISCRIMINATION: A HUMAN RIGHT 65-70 (2006); N. Bamforth, *Prohibited Grounds of Discrimination under EU Law and the European Convention on Human Rights: Problems of Contrast and Overlap,* 9 THE CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES 1-42 (2006-2007); D. Martin, *Strasbourg, Luxembourg et la discrimination: influences croisées ou jurisprudences sous influence?*, 69 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 107-34 (2007); Samantha Besson, *Never Shall the Twain Meet? Gender Discrimination under EU and ECHR Law,* 8:3 HUMAN RIGHTS LAW REVIEW 647-82 (2008). For the same comparison, but between EU law and the ESC, see Olivier de Schutter, *The Role of the European Social Charter in the Development of the Law of the European Union, in* THE EUROPEAN SOCIAL CHARTER: A SOCIAL CONSTITUTION FOR EUROPE 95-146 (Olivier de Schutter ed., 2010); Mark Bell, *Walking in the Same Direction?: The Contribution of the European Social Charter and the European Union to Combating Discrimination, in* SOCIAL RIGHTS IN EUROPE 261-78 (Gráinne de Búrca & Bruno de Witte eds., 2005) [hereinafter Walking]; Gerard Quinn, *The European Social Charter and EU Antidiscrimination Law in the Field of Disability: Two Gravitational Fields with one Common Purpose, in* SOCIAL RIGHTS IN EUROPE 279-304 (Gráinne de Búrca & Bruno de Witte eds., 2005).

9. On their historical complementarity, see J-F. Akandji-Kombé, *The European Social Charter and the European Convention of Human Rights: Prospects for the Next Ten Years, in* LA CHARTE SOCIALE EUROPÉENNE: UNE CONSTITUTION SOCIALE POUR L'EUROPE 147-65 (Olivier de Schutter ed., 2010); R. Brillat, *Le principe de non-discrimination dans la jurisprudence du Comité européen des droits sociaux, in* LE PRINCIPE DE NON-DISCRIMINATION FACE AUX INÉGALITÉS DE TRAITEMENT ENTRE LES PERSONNES DANS L'UNION EUROPÉENNE, SEPTIÈMES JOURNÉES D'ETUDES DU PÔLE EUROPÉEN JEAN MONNET 407-24, 409-11 (L. Potvin-Solis ed., 2010). *See also* ECSR, Complaint No 14/2003, FIDH v. France, Sept. 8, 2004, at paras. 27-29.

10. *See, e.g.*, on the ESC as a "source of inspiration" in the ECtHR's case law: Sidabras and Dziautas v. Lithuania 2004-VIII; (2006) 42 EHRR 6, para. 47; *Botta v. Italia* 1998-I; (1998) 26 EHRR 241, at para. 28; Zehnalova and Zehnal v. the Czech Republic 2002-V; Application No 38621/97, Decision of May 14, 2002, 12-13. See, e.g., on the ECHR as situated in a "normative partnership" with the ESC in the ECSR's conclusions and decisions: ECSR, Conclusions XVII-2, Vol. 1, 2005, General Introduction, pt 5; ECSR, Complaint No 13/2002, Autisme-Europe v. France, Nov. 4, 2003,

authors have systematically compared their respective antidiscrimination regimes and their mutual reinforcement over the last few years.[12] Given the new developments in both institutions' antidiscrimination case law,[13] and especially "the new life"[14] instilled in the ESC and the ECSR, but also their increasing impact on EU antidiscrimination law,[15] it is important to shed some light on the progressive consolidation of the two antidiscrimination regimes but also on their differences. This should help minimize potential contradictions between the two institutions and their jurisprudence,[16] as well as possibly encourage joint interpretations in the future.

(2004) 11 IHRR 843, para. 52; Complaint No 15/2003, ERRC v. Greece, Dec. 8, 2005, (2006) 13 IHRR 895, para. 25; Complaint No 53/2008, FEANTSA v. Slovenia, Sept. 8, 2009, para. 33; Complaint No 58/2009, COHRE v. Italy, June 25, 2010, at paras. 129 and 155.

11. On their mutual borrowings, see Sudre, *supra* note 7; DE SCHUTTER, *supra* note 2; G. Malinverni, *La Cour européenne des droits de l'homme et le Comité européen des droits sociaux: rapprochements et convergences, in* NEUE HERAUSFORDERUNGEN UND PERSPEKTIVEN FUR̈ DEN SCHUTZ DER MENSCHENRECHTE: KOLLOQUIUM ZU EHREN VON PROFESSOR DR. LUZIUS WILDHABER 3-13 (S. Breitenmoser et al. eds., 2008); J-P. Costa, *La Cour européenne des droits de l'homme et la protection des droits sociaux,* 84 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 207-16 (2010) (from the ECtHR perspective); and Akandji-Kombé, *supra* note 9; Colm O'Cinneide, *Social Rights and the European Social Charter – New Challenges and Fresh Opportunities, in* THE EUROPEAN SOCIAL CHARTER: A SOCIAL CONSTITUTION FOR EUROPE 167-83 (Olivier de Schutter ed., 2010); Holly Cullen, *The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights*, 9 HUMAN RIGHTS LAW REVIEW 61-93 (2009) (from the ECSR perspective).

12. There are exceptions, of course, albeit not focusing on discrimination especially: *see, e.g.,* Akandji-Kombé, *supra* note 9; O'Cinneide, *supra* note 11; Malinverni, *supra* note 11; F. Benoît-Rohmer, *De l'impact de la Convention européenne des droits de l'homme sur la juridictionnalisation du Comité européen des droits sociaux, in* LES DROITS SOCIAUX DANS LES INSTRUMENTS EUROPÉENS ET INTERNATIONAUX 235-52 (N. Aliprantis ed., 2008).

13. On the ESC non-discrimination regime, see, e.g., Brillat, *supra* note 9; Mark Bell, *Combating Discrimination through Collective Complaints under the European Social Charter, in* LA CHARTE SOCIALE EUROPÉENNE: UNE CONSTITUTION SOCIALE POUR L'EUROPE 39-48 (Olivier de Schutter ed., 2010); DE SCHUTTER, *supra* note 2; Olivier de Schutter, *The Contribution of the European Social Charter to the Integration of Roma in Europe, in* THE EUROPEAN SOCIAL CHARTER: A SOCIAL CONSTITUTION FOR EUROPE 49-78 (Olivier de Schutter ed., 2010). On the ECHR non-discrimination regime, see, e.g., ODDNÝ MJÖLL ANARDOTTIR, EQUALITY AND NON-DISCRIMINATION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2003); LE DROIT À LA NON-DISCRIMINATION AU SENS DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME: ACTES DU COLLOQUE DES 9 ET 10 NOVEMBRE 2007 (F. Sudre ed., 2008); F. Tulkens, *L'évolution du principe de non-discrimination à la lumière de la jurisprudence de la Cour européenne des droits de l'homme, in* L'ÉTRANGER FACE AU DROIT 193-210 (Y. Carlier ed., 2010).

14. De Schutter, *supra* note 3, at 37.

15. Of course, EU non-discrimination law also affects the ECtHR's (e.g., indirect discrimination) and the ECSR's case law (e.g., burden of proof), but I will not expand on those reverse influences in this article. *See e.g.,* DE SCHUTTER, *supra* note 2; European Union Agency for Fundamental Rights and European Court of Human Rights - Council of Europe, *supra* note 2.

16. On those contradictions, see Akandji-Kombé, *supra* note 9; Sudre, *supra* note 7.

While their growing body of reference jurisprudence can be usefully compared in substance, there are important structural differences between the two European human rights institutions' approaches that condition the way in which they understand equality and non-discrimination and which therefore affect how one may encourage mutual borrowings between them.

First of all, while the ESC's material guarantees are primarily social and collective both regarding their content and the right-holders, the rights guaranteed by the ECHR are primarily civil and political as well as individual. Second, the two conventions differ in the degree of autonomy of their respective non-discrimination clauses: whereas both Article E ESC and Article 14 ECHR are subsidiary to other rights, Protocol 12 ECHR guarantees a self-standing non-discrimination principle. Third, while the ESC only binds forty-three States, split between those that have ratified its 1961 version (twelve) and its 1996 version (thirty-one)—which is itself an *à la carte* treaty that does not require the ratification of all its provisions—the ECHR currently has forty-seven States Parties that have all ratified the same text. Fourth, the ESC has a restricted scope of right-holders and in principle does not apply to third-country nationals, whereas the ECHR protects any person or group of persons under the jurisdiction of its States Parties. A fifth difference lies in the two conventions' monitoring system. Whereas the 1996 ESC is monitored by a non-judicial[17] committee of independent experts, the ECSR, through both a state reporting system and a collective complaint mechanism that may be triggered by trade unions, employers' associations and non-governmental organizations, the ECHR monitoring is ensured by the ECtHR through a judicial complaint mechanism initiated by an individual or a state application. Unlike the ECtHR, the ECSR collective complaint mechanism requires neither an individual nor a concrete case of violation nor is the admissibility of a complaint conditioned by the exhaustion of local remedies. It may therefore be used to directly target general legislation and policies that affect groups,[18] even though this also means that, unlike under the ECHR, there is no individual remedy for concrete violations of the Charter before the Committee. Furthermore, the ESC reporting system enables the collection of (especially statistical) data, that may be used in the collective complaint mechanism,

17. Although the ECSR is not strictly a judicial organ, it works as a quasi-judicial one to the extent that its members are independent from governments and it issues decisions on complaints that have gradually constituted a body of jurisprudence and precedents.

18. *See, e.g.,* Robin R. Churchill & Urfan Khaliq, *The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?,* 15 EUR. J. INT'L L. 417-56 (2004); Akandji-Kombé, *supra* note 7; *Cullen*, *supra* note 11; Bell, *supra* note 13.

thus enabling important synergies between the political and the quasi-judicial processes, a feature lacking in the ECtHR's system. Finally, the enforcement mechanisms available to follow-up on the ECSR's conclusions or decisions are limited by contrast to the ECtHR's binding judgments and the new enforcement powers under Protocol 14 ECHR.

In this Article, the case law of both European human rights bodies are compared directly and in an integrated fashion rather than first presented in turn and then compared. Interestingly, both the ESC and the ECtHR have started theorizing and systematizing their respective antidiscrimination regimes, thus making this integrated comparison easier. A choice of constitutive elements from both regimes or from either had to be made therefore in order to assess the treatment of these elements by both regimes. Of course, the presentation cannot be entirely impervious to theoretical considerations about antidiscrimination law, and it entails a systematization element that enables the identification of gaps or inconsistencies in the two regimes. The comparison consists mostly of the two institutions' case law (decisions on collective complaints and conclusions on periodic State reports for the ECSR and judicial decisions on individual applications for the ECtHR) regarding their respective guarantees of the non-discrimination principle.

The structure of the Article is three-pronged. After a general presentation of the concepts and conceptions of equality and non-discrimination in the ECHR and the ESC systems in the first section, their respective regimes are compared in the second one. The third section focuses on special features of non-discrimination regimes, and especially on one specific dimension of antidiscrimination law in the Council of Europe, i.e., the collective and positive conception of discrimination that has emerged and consolidated in both the ECtHR's and the ECSR's case law and that is gradually being exported into EU antidiscrimination law.

I. Equality and Non-discrimination

In order to understand how the principle of non-discrimination is regulated under the ESC and the ECHR, it is important to examine the relationship between equality and non-discrimination in general in both legal regimes. The principle of non-discrimination ought first to be distinguished from the principle of equality, before its definition and role can be assessed in the respective legal orders.

A. The Relationship between Equality and Non-discrimination

When studying the principle of non-discrimination in a given legal regime, the first question is its relationship to the principle of

equality.[19] Generally speaking, equality and non-discrimination are held to be positive and negative statements of the same principle.[20] One is treated equally when one is not discriminated against and one is discriminated against when one is not treated equally.

Whereas traditional international law used not to concern itself with discrimination, except in relation to sovereignty, the Second World War triggered an unprecedented concern for human rights protection which led to guaranteeing them for all without discrimination. From the 1950s onwards, conventional guarantees of the non-discrimination principle multiplied. It is now one of the most frequently protected principles of international human rights law. It is often guaranteed in form of a general non-discrimination clause in the enjoyment of human rights,[21] but also sometimes as an independent principle of non-discrimination.[22] It is rarer, however, to find international legal guarantees of the principle of equality before and in the law.[23] Both the ECHR and the ESC law are somewhat special in this respect: they protect both principles as two sides of the same coin.[24]

Since 1950, Article 14 ECHR[25] has guaranteed non-discrimination in the exercise of other rights in the Convention.[26] It was initially conceived as a minimal clause, subsidiary to national constitutional equal protection clauses (see Article 53 ECHR). Article 14 ECHR has now been complemented by Protocol 12 which entered into

19. *See* Christopher McCrudden, *Equality and Non-Discrimination, in* ENGLISH PUBLIC LAW ch. 11 (David Feldman ed., 2004).

20. *See* Anne Bayefsky, *The Principle of Equality or Non-discrimination in International Law,* 11 HUM. RTS. Q. 5-19 (1990). For a critique of the relationship between non-discrimination and equality, see Elisa Holmes, *Antidiscrimination Rights without Equality,* 68 MOD. L. REV. 175-94 (2005); Besson, *supra* note 5.

21. *See, e.g.,* Article 2 Universal Declaration of Human Rights, GA Res. 217 A (III), UN Doc. A/810 at 71 (1948); Article 2(1) and 3 UN International Covenant on Civil and Political Rights, 999 UNTS 171; Article 2(2) UN International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3.

22. *See, e.g.,* Article 26 UN International Covenant on Civil and Political Rights, 999 UNTS 171.

23. *See, e.g.,* Article 7 Universal Declaration of Human Rights, GA Res. 217 A (III), UN Doc. A/810 at 71 (1948); or Article 26 UN International Covenant on Civil and Political Rights, 999 UNTS 171.

24. Given their relationship in the case law of both European bodies, I will not attempt to severe the link between the two in my presentation of the two regimes and their judicial interpretations.

25. Article 14 ECHR reads as follows: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

26. *See* S. Livingstone, *Article 14 and the Prevention of Discrimination in the European Convention on Human Rights,* 2 EUR. HUM. RTS. L. REV. 25-34 (1997); Luzius Wildhaber, *Protection against Discrimination under the European Convention on Human Rights – A Second-class Guarantee?,* 2 BALTIC YEARBOOK OF INTERNATIONAL LAW 71-82 (2002). *See also* THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS at 1027 (Peter van Dijk et al. eds., 2006).

force in 2005.[27] This optional protocol establishes, for those eighteen Contracting Parties which have ratified it to date, a principle of equality before and in the law.[28] The Contracting Parties only constitute a third of the Council of Europe's Member States, but for them the ECHR guarantees both the principle of non-discrimination and that of equality.[29]

The principle of non-discrimination has been protected by the ESC from the beginning, albeit not explicitly in a general equality or non-discrimination clause outside the 1961 Charter's Preamble. It is important, however, to distinguish between the antidiscrimination regime of the 1961 Charter and that of the 1996 Revised ESC.[30] Although the 1961 Charter already imposed (beyond its Preamble) a protection from all forms of discrimination in employment under the right to work (Article 1, para. 2),[31] the revision of the Charter in 1996 improved that protection beyond the sphere of employment. This has been done, on the one hand, by inserting an explicit and general non-discrimination clause at Article E[32] among the horizontal clauses of the Charter that apply to all substantive guarantees and, on the other, by adding two specific provisions aimed at the integration and social protection of persons with disabilities (Article 15, para. 3) and of elderly persons (Article 23). The ECSR reads both of those specific

27. According to the ECtHR, Article 14 ECHR and Article 1(1) Protocol 12 have the same meaning: see Sejdic and Finci v. Bosnia and Herzegovina Application No 27996/06; 34836/06, Judgment of Dec. 22, 2009, at para. 55.

28. Article 1 Protocol 12 reads as follows:

> Article 1 – General prohibition of discrimination 1 The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2 No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

See van Dijk et al., *supra* note 26, at 989; Robert Wintemute, *Filling the Article 14 "Gap": Government Ratification and Judicial Control of Protocol No. 12 ECHR,* 4 EUR. HUM. RTS. L. REV. 484-99 (2004). *See also* S. AGIRBASLI, VOM AKZESSORISCHEN DISKRIMINIERUNGSVERBOT ZUM ALLGEMEINEN GLEICHHEITSGEBOT: EINE UNTERSUCHUNG ÜBER DIE MÖGLICHEN RECHTSWIRKUNGEN DES AM 1. APRIL 2005 MITTLERWEILE FÜR 15 MITGLIEDSTAATEN IN KRAFT GETRETENEN 12. ZUSATZPROTOKOLLS ZUR EUROPÄISCHEN KONVENTION FÜR MENSCHENRECHTE (2008).

29. *See, e.g.,* Urfan Khaliq, *Protocol 12 to the European Convention on Human Rights: A Step Forward or a Step Too Far?,* PUBLIC LAW 457-64 (2001).

30. Unless specified otherwise, I will refer to the ESC as the 1996 Revised European Social Charter.

31. *See e.g.,* Conclusions XVI-1, Vol. 2, 2002 (Luxembourg), Article 1, para. 2, p. 377-80.

32. Article E 1996 ESC reads as follows: "The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status." In what follows, unless specified otherwise, I will concentrate on Article E's general non-discrimination clause and will not address the other self-standing non-discrimination rights and principles in the Charter.

provisions as requiring the introduction of non-discrimination legislation and effective measures protecting persons against discrimination on grounds of disability and age.[33]

Interestingly, the principle of equality, and especially of equal treatment, is also protected by the 1996 ESC. This is done through free-standing rights, on the one hand, albeit by reference to a special ground of discrimination each time (e.g., sex, race or nationality); it is the case, for instance, for Article 20 and the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex, but also for Articles 19 and 27. On the other hand, the ECSR regularly expresses the idea that the ESC non-discrimination regime aims at ensuring "real and effective equality"[34] more generally and considers it as one of the essential values of the Charter.[35]

B. The Principle of Non-discrimination

Although non-discrimination is a dominant and recurrent principle or right[36] within international human rights instruments, the principle is never defined in a single and uniform fashion. Nor do most of its guarantees provide a clear delineation of its scope.[37] Unsurprisingly, given their common origins in the Council of Europe, the ECHR and the ESC do not diverge too much with respect to both the definition and the scope they give to the non-discrimination principle.[38]

Article 14 ECHR does not create an additional right not to be discriminated,[39] but merely a principle which applies when the case at hand falls within the ambit of other rights in the Convention ("ac-

33. *See, e.g.,* Conclusions 2003, Vol. 1 (France), Article 15, p. 170; Conclusions 2003, Vol. 1 (Italy), Article 15, p. 314.

34. *See* Complaint No 13/2002, Autisme-Europe v. France, Nov. 4, 2003, (2004) 11 IHRR 843, at para. 52.

35. *See* Complaint No 58/2009, COHRE v. Italy, June 25, 2010, at para. 78.

36. Scope precludes addressing the vexed question of the nature of non-discrimination *qua* human right in this paper. As I have argued elsewhere, however, there cannot be a human right to a value, and human rights and equality are better understood as distinct norms that are in creative tension with each other than subsumed under the human rights concept. Arguably, the latter is founded in equal moral status and equal moral status is realized through individual human rights. However, the principle of equality may also protect individuals in the absence of human rights' violations. The general and specific functions of non-discrimination clauses within international and European human rights instruments I alluded to before actually confirm this approach. *See* Besson, *supra* note 5.

37. *See* Bayefsky, *supra* note 20, at 34.

38. *See, e.g.,* L. Potvin-Solis, *La liaison entre le principe de non-discrimination et les libertés et droits fondamentaux des personnes dans les jurisprudences européennes,* 80 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 967-1005 (2009).

39. *See, e.g.,* P. Lambert, *La portée de l'article 14 de la Convention européenne des droits de l'homme,* 17 REVUE HELLÉNIQUE DES DROITS DE L'HOMME 59-68 (2003).

cessory" character of the principle).[40] Of course, the scope of the ECHR extends beyond the actual letter of the rights guaranteed; to invoke it, it is sufficient that the facts of the case broadly relate to issues that are protected under those rights.[41] Although these rights need not be violated for Article 14 ECHR to be invoked ("autonomy" of the principle),[42] its violation will not be examined by the Court when other rights in the Convention are actually regarded as being violated ("subsidiarity" of the principle).[43] The only exceptions made by the ECtHR are cases of "clear inequality of treatment,"[44] although this criterion remains vague.[45]

To be sure, Protocol 12 ECHR has guaranteed an independent and general non-discrimination principle since 2005, at least for those eighteen Contracting Parties which have ratified it. That principle may be directly invoked, independently from another right in the Convention or in domestic law,[46] and it may be regarded as violated by the European Court even when other ECHR rights are violated as well. Yet, the recent case law indicates that the Court does not assess whether Protocol 12 has been violated if Article 14 is deemed applicable and violated.[47] Even though Protocol 12 does not formulate the principle as a human right *stricto sensu*, that principle may be invoked like any other right in the Convention. So far, the relatively low number of ratifications of the protocol and the limited number of cases of application (two to date) temper its relevance in the ECtHR's non-discrimination regime.

Given the intricate history of the two European human rights instruments, it should come as no surprise that Article E 1996 ESC

40. *See* Abdulaziz, Cabales and Balkandali v. Royaume-Uni A 94 (1985); (1985) 7 EHRR 471, at para. 71; Petrovic v. Austria 1998-II; (2001) 33 EHRR 14, at para. 29; Sidabras and Dziautas v. Lithuania 2004-VIII; (2006) 42 EHRR 6, at paras. 47-48. *See* P. Lambert, *Vers une évolution de l'interprétation de l'article 14 de la Convention européenne des droits de l'homme?,* 35 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 497-505 (1998). *See, however,* Wintemute, *supra* note 28, at 366-82, arguing, by reference to Thlimmenos v. Greece 2000-IV; (2001) 31 EHRR 15, at para. 42, that the fact that the *ground* of discrimination falls within the ambit of a Convention right is enough to apply Article 14. *See also* Aaron Baker, *The Enjoyment of Rights and Freedoms: a New Conception of the "Ambit" under Article 14 ECHR,* 69 MOD. L. REV. 714-37 (2006).

41. *See* E.B. v. France (2008) 47 EHRR 522.

42. *See* Sommerfeld v. Germany 2003-VIII; (2004) 38 EHRR 756.

43. *See* Dudgeon v. United Kingdom A 45 (1981); (1982) 4 EHRR 149, at para. 69. *See* Wildhaber, *supra* note 26.

44. *See* Airey v. Ireland *(No1)* A 32 (1979); (1979-1980) 2 EHRR 305, at para. 30. *See* Lambert, *supra* note 40, at 501-03.

45. *See* Martin, *supra* note 8, at 112.

46. *See* Sejdic and Finci v. Bosnia and Herzegovina Application No 27996/06, Judgment of Dec. 22, 2009, at para. 51; Savez Crkava "Rijec Zivota" and Others v. Croatia Application No 7798/08, Judgment of Dec. 9, 2010, at paras. 104-08.

47. *See* Sejdic and Finci v. Bosnia and Herzegovina Application No 27996/06, Judgment of Dec. 22, 2009, at para. 51; Savez Crkava "Rijec Zivota" and Others v. Croatia Application No 7798/08, Judgment of Dec. 9, 2010, at paras. 114-15.

was shaped according to Article 14 ECHR and actually replicates its wording. As a result, its principle of non-discrimination is accessory and dependent, and it only protects individuals and groups from discrimination in the enjoyment of ESC substantive rights.[48] Although a Charter's right need not be violated for Article E to be invoked ("autonomy" of the principle),[49] the latter's violation will not be examined by the Committee when other rights in the Charter are actually regarded as being violated ("subsidiarity" of the principle). In practice, and unlike the situation regarding Article 14 ECHR, however, the ECSR has not to date recognized a violation of Article E without a joint violation of one of the Charter's rights; this questions the autonomy of the principle.[50] It remains to be seen whether the Committee will eventually find a violation of Article E in the absence of violation of a Charter right. Moreover, some members of the Committee have actually recommended following the ECtHR's practice of also applying Article 14 ECHR in case of "clear inequality of treatment" even when other ECHR rights have also been violated.[51] Some ECSR decisions, indeed, do not explore the existence of discrimination in addition to another breach of the Charter.[52] Although there are plans to introduce an equivalent to Protocol 12 ECHR in the Charter, they are unlikely to bear fruit before the first assessments of that protocol's success are made within the ECHR system.

Because the principle of non-discrimination is so closely connected to every right in the Charter, it is sometimes considered a *right* to non-discrimination.[53] This tendency is reinforced by the coexistence of self-standing rights to non-discrimination on certain grounds and in certain contexts in the Charter. Moreover, Article E imposes an obligation of result and not just of means on States Parties, and this brings it closer to an individual right to non-discrimination.[54]

Despite the accessory nature of the ESC and ECHR non-discrimination regimes, there has been a rise in the number of cases under both in recent years. Article 14 ECHR was only regarded as violated in seventy-four decisions since 1968,[55] with more than half of those cases decided since 2007 when the ECtHR started addressing cases of

48. *See* Complaint No 13/2002, Autisme-Europe v. France, Nov. 4, 2003, (2004) 11 IHRR 843, at para. 52.

49. *See* Complaint No 51/2008, CEDR v. France, Oct. 19, 2009, at para. 79.

50. Brillat, *supra* note 9, at 420.

51. *See,* e.g., Dissenting opinion of Ms Kollonay, in Complaint No 48/2008, CEDR v. Bulgaria, Feb.18, 2009.

52. *See, e.g.,* Complaint No 14/2003, FIDH v. France, Sept. 8, 2004.

53. *See, e.g.,* Brillat, *supra* note 9, at 409.

54. *See* Complaint No 1/1998, ICJ v. Portugal, Sept. 9, 1999 (1999) 6 IHRR 1142, para. 40. *See also* de Schutter, *supra* note 3, at 35.

55. Out of seventy-four cases, sixty-six resulted in a violation of Article 14 ECHR on its own and eight in a violation of Article 14 ECHR combined with that of another ECHR provision.

indirect discrimination; Protocol 12 has been invoked only twice since 2005,[56] which is a small proportion of the provisions deemed breached by the ECtHR since the 1960s. Article E has been considered violated in a third of the decisions made by the ECSR following collective complaints since 1996.[57] That recent rise in cases indicates a convergence between the two European human rights bodies, even though the ECHR case law on discrimination remains small in proportion to the total jurisprudence of the ECtHR.

II. The Regime of Non-discrimination

In order to understand how discrimination is prohibited under ECHR and ESC law, it is useful to start by discussing the source and role of the principle itself, before studying its personal and material scope and its constitutive material and procedural elements. Unless specified otherwise, the regime presented will be the same for all grounds of discrimination, even though their respective treatments have developed separately;[58] when there are differences between the regimes, an explanation will be provided.

A. Source

The principle of non-discrimination may, depending on the legal order, be guaranteed in many different sources and it may play a very different role from one legal order to the next. Unsurprisingly, given their common origins in the Council of Europe's human rights treaties, that difference in terms of sources and role is not evident from a comparison between ECHR and ESC law on discrimination, although there are slight variations in their respective jurisprudence and interpretation.

Discrimination on suspect grounds is prohibited under Article 14 ECHR and Protocol 12. Since the principle of non-discrimination is still largely accessory in the Convention, it has long remained a second-class guarantee under ECHR law.[59] Of course, the ECtHR's case law has developed a more detailed regime of non-discrimination. All

56. Sejdic and Finci v. Bosnia and Herzegovina Application No 27996/06, Judgment of Dec. 22, 2009; Savez Crkava "Rijec Zivota" and Others v. Croatia Application No 7798/08, Judgment of Dec. 9, 2010.

57. To date, the ECSR has issued sixty-eight decisions on collective complaints and twenty-one of those concerned discrimination (in eleven cases, Article E was deemed violated in combination with another right and, in eight cases, another free-standing right to non-discrimination of the Charter was deemed violated); four collective complaints pertaining to discrimination have been declared admissible and are awaiting a decision on the merits. Violations of Article E have only been rarely observed in the context of the ECSR's conclusions on national reports, however: *see, e.g.,* Conclusions 2005, Vol. 1 (Lithuania), Article 27, at para. 1, p. 426.

58. *See* Bell, Walking, *supra* note 8, 269 *ff.* on gender, race and nationality in the ECSR's case law. *See also* Besson, *supra* note 8 on gender in the ECtHR's case law.

59. *See* on Article 14 *qua* second-class guarantee, Wildhaber, *supra* note 26.

the same, the first case of application of Article 14 ECHR to sex discrimination only dates back to 1985,[60] and half of the cases pertaining to the violation of that provision have been decided since 2007. Overall, the ECtHR's decisions pertaining to violations of Article 14 ECHR (seventy-four altogether) remain too few relative to its total case law to constitute a complete regime of ECHR discrimination law. Despite a recent rise in cases pertaining to Article 14 ECHR and a tendency toward systematization, the Court's casuistic approach in the early days has led to a regrettable lack of overall coherence.

By contrast, even though Article E 1996 ESC also finds its source in a laconic European human rights treaty, the ECSR's case law has helped shape a more systematic regime of non-discrimination, albeit through fewer cases and over fewer years than the ECtHR. This may be explained by the more theoretical approach taken by the ECSR overall[61] and by its dynamic and purposive interpretation of the ESC by reference to its underlying values.[62] It is also due to the ESC's focus on social rights and to the collective complaint mechanism that both contribute to a better understanding of the collective dimension of discrimination and of the various ways to combat discrimination and promote group integration. A more contingent explanation may also be found in the Committee's lighter docket in terms of the total number of States Parties and cases.

B. Scope

The personal scope of a principle refers to the group of its beneficiaries and addressees, while its material scope relates to its domains of application. Interestingly, the principle of non-discrimination has a different personal and material scope under ECHR and ESC law as well as in the case law of the ECtHR and the ECSR.

The personal scope of the principle as it is guaranteed in Article 14 ECHR is very broad. Like all Convention rights and principles, it protects all physical and legal persons, as individuals or groups of individuals and whatever their nationality, under the jurisdiction of a State Party to the Convention (Article 34 ECHR). Following the *DH and others* case that was introduced by a group of eighteen Roma children, some observers have identified the development of a right to collective equality held not only by individuals, but also by a group.[63]

60. Abdulaziz, Cabales and Balkandali v. Royaume-Uni A 94 (1985); (1985) 7 EHRR 471, at para. 78.

61. On the quality of the ECSR's reasoning, see O'Cinneide, *supra* note 11. For a critique, see Akandji-Kombé, *supra* note 9.

62. *See* Complaint No 13/2002, Autisme-Europe v. France, Nov. 4 2003, (2004) 11 IHRR 843, para. 52. On procedural borrowings of this type by the ECSR from the ECtHR's case law, see Malinverni, *supra* note 11.

63. *See e.g.,* Dubout, *Vers une protection de l'égalité "collective," supra* note 7.

Although the Court did not clearly re-conceptualize the principle of equality as a collective one in the *DH and others* case, it issued a decision of collective violation of Article 14 ECHR without assessing the existence of violations in each applicant's individual case.[64] The principle of non-discrimination addresses States Parties and their authorities. Like most international human rights treaties' provisions, Article 14 ECHR does not bind individuals directly (Article 34 ECHR). Article 14 ECHR's horizontal effect is thus at the most indirect and operates via the Contracting States' procedural duties and their positive obligations to protect ECHR rights against both state and individual violations.[65] The same can be said of Article 1 Protocol 12. Broadly speaking, indeed, Protocol 12 prohibits discrimination in all circumstances where public authorities are involved, but also among individuals outside purely personal contexts and where individuals exercise functions placing them in a position to decide on how publicly available goods and services are offered.[66]

By contrast, the personal scope of the non-discrimination principle in the ESC is more limited. The individuals and groups protected by the ESC comprise the nationals of all States Parties provided they are lawfully resident in a given State party, but they exclude third country nationals.[67] The ECSR has actually derogated from the express wording of the Charter in the context of the right to healthcare. Here, it has considered the exclusion of third country nationals from healthcare as treading "on a right of fundamental importance to the individual since it is concerned with the right to life itself and goes to the very dignity of the human being."[68] It remains unclear how the Committee will identify and then interpret Charter rights that are not that intimately linked to human dignity. On a positive note, the social dimension of the rights protected and the collective complaint mechanism enhances the collective dimension of discrimination and helps identify vulnerable groups and measures that may prevent and remedy discrimination more effectively and in a collective fashion. The ESC addressees are States Parties' institutions. It also has an indirect horizontal effect through the States' positive duties to pro-

64. D.H. and Others v. the Czech Republic [GC] (2008) 47 EHRR 3, at para. 97.

65. *See, e.g.,* Pla and Puncernau v. Andorra 2004-VIII; (2006) 42 EHRR 25; Opuz v. Turkey (2010) 50 EHRR 28, at para. 191.

66. *See* Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177), Explanatory Report, at paras. 22 and 28, *available at* http://conventions.coe.int/Treaty/en/Reports/Html/177.htm. *See also* Sudre, *supra* note 7, at 771.

67. *See* Appendix to the Social Charter on its scope in terms of persons protected.

68. *See* Complaint No 14/2003, FIDH v. France, Sept. 8, 2004, at paras. 30-32. *See* J-F. Akandji-Kombé, *The Scope of Application Ratione Personae of the European Social Charter: Between Light and Shadows*, *in* LA CHARTE SOCIALE EUROPÉENNE: UNE CONSTITUTION SOCIALE POUR L'EUROPE 79-93 (Oliver de Schutter ed., 2010).

mote equality, including duties to prevent and remedy private discriminations.[69]

Under Article 14 ECHR, the material scope of the principle of non-discrimination is limited. It encompasses all areas of national law but only if one of the Convention rights applies. The ECHR contains a limited list of rights, predominantly characterized as "civil and political." Of course, the ECHR is increasingly used to protect certain "economic and social" rights either directly or indirectly through the interpretation of civil and political rights.[70] As a matter of fact, it is Article 14's non-discrimination clause that is often invoked to effect a more social and collective interpretation of ECHR rights.[71] With the application of Protocol 12, the material scope of the non-discrimination principle has broadened: here, the principle of non-discrimination applies to all areas of domestic legal intervention outside the material ambit of a Convention right, including in the social context and when applying social rights.[72] The ECtHR's case law has not yet picked up on this possibility, however, and it is too early to tell whether Protocol 12 can work effectively as entry point for ESC rights into the ECHR system.

Unlike its personal scope, the ESC non-discrimination principle's material scope is broader than that of Article 14 ECHR. It applies indeed within the scope of all social rights protected by the Charter. The new role that may be played by Protocol 12 ECHR in expanding the scope of the non-discrimination principle in the social realm may even contribute to creating more overlaps between the two institutions' case law. This may be a cause of enhanced protection for individuals who will benefit from the ECHR protection against discrimination in the social context while also being entitled to the individual judicial remedies guaranteed by the ECHR and the full justiciability of social rights as a result,[73] but it may also call for more coordination between the two bodies.[74]

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69. *See* Oliver de Schutter, *Reasonable Accommodation and Positive Obligations in the European Convention on Human Rights, in* DISABILITY RIGHTS IN EUROPE 35-63 (Anna Lawson & Caroline Gooding eds., 2005).

70. *See, e.g.,* Sudre, *supra* note 7; DE SCHUTTER, *supra* note 2; Malinverni, *supra* note 11; Costa, *supra* note 11. *See, e.g.,* Andrejeva v. Latvia (App no 55707/00), Judgment of Feb. 18, 2009; Gaygusuz v. Austria 1996-IV; (1997) 23 EHRR 364; Koua Poirrez v. France 2003-X; (2005) 40 EHRR 34.

71. *See also* Dubout, *La Cour européenne des droits de l'homme et la justice sociale, supra* note 7; Akandji-Kombé, *supra* note 7; Dubout, *Vers une protection de l'égalité "collective," supra* note 7; Sudre, *supra* note 7.

72. *See* Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177), Explanatory Report, paras. 22 and 28, *available at* http://conventions.coe.int/Treaty/en/Reports/Html/177.htm. *See also* Sudre, *supra* note 7, at 770.

73. *See* de Schutter, *supra* note 3, at 32.

74. *See* Sudre, *supra* note 7, at 774-78.

C. Material Elements

Broadly speaking, the principle of non-discrimination precludes treating similar situations differently and treating different situations equally unless this differential treatment is objectively justified. While both European principles of non-discrimination could fit this general definition, important variations arise inside each of the constitutive material elements of discrimination. In a nutshell, the latter are:[75] an unfavorable treatment (1) of comparable cases (2) based on a prohibited ground of discrimination (3) that cannot be objectively justified (4).

1. Unfavorable Treatment

The unfavorable treatment that constitutes the first element of a case of discrimination consists either in the different treatment of similar situations or in the equal treatment of different situations. Both types of unfavorable treatment are precluded by the ECHR and the ESC.

According to the ECtHR, "Article 14 of the Convention not only requires that persons in a similar situation must be treated in an equal manner but also requires that persons whose situations are significantly different must be treated differently."[76] Article E 1996 ESC's non-discrimination principle is interpreted by the ECSR in the same way and is also violated "when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."[77]

For a long time, the distinction between direct and indirect discrimination was absent from the ECtHR's case law.[78] Generally speaking, however, the definition of discrimination used by the ECtHR was broad enough so that its notion of direct discrimination *lato sensu* could be said to encompass indirect discrimination.[79] It has recently become clear from the ECtHR's case law that both direct and indirect discrimination are prohibited.[80] According to the *Hoogendijk*

75. One retrieves these elements in the case law of both European institutions: *see* ECtHR, Koua Poirrez v. France 2003-X; (2005) 40 EHRR 34, at para. 46; and ECSR, Complaint No 26/2004, Syndicat des Agrégés de l'Enseignement Supérieur (SAGES) v. France, July 11, 2005, (2005) 41 IHRR SE 21.

76. Hoogendijk v. Netherlands (2005) 40 EHRR SE22, 206. *See also* Thlimmenos v. Greece 2000-IV; (2001) 31 EHRR 15, at para. 47.

77. *See* Complaint No 13/2002, Autisme-Europe v. France, Nov. 4, 2003, (2004) 11 IHRR 843, para. 52; confirmed in Complaint No 58/2009, COHRE v. Italy, June 25, 2010, at paras. 19-21.

78. *See, e.g.,* Martin, *supra* note 8, at 113. *See, e.g.,* Abdulaziz, Cabales and Balkandali v. Royaume-Uni A 94 (1985); (1985) 7 EHRR 471.

79. *See* Martin, *supra* note 8, at 285. *See, e.g.,* Thlimmenos v. Greece 2000-IV; (2001) 31 EHRR 15.

80. *See, e.g.,* Zarb Adami v. Malte 2006-VIII; (2006) 44 EHRR 3, at paras. 78, 82-83; DH and others v. Czech Republic [GC] (2008) 47 EHRR 3, at paras. 179-80, 187-95; Opuz v. Turkey (2010) 50 EHRR 28, at para. 183; ECtHR, Oršuš and Others v.

case, "where a general policy or measure has *disproportionately prejudicial effects on a particular group*, it is not excluded that this may be regarded as discriminatory notwithstanding that it is not specifically aimed or directed at that group."[81] The constitutive elements of indirect indiscrimination are a neutral rule, criterion or practice that affects a group defined by a protected ground in a significantly more negative way by comparison to others in a similar situation. The last two elements are common to direct and indirect discriminations and are assessed together in the remainder of the present section.

The ESC non-discrimination principle is interpreted along the same lines by the ECSR. The Committee considers that Article E 1996 ESC not only prohibits direct discrimination, but also all its indirect forms.[82] As a matter of fact, the ECSR's and the ECtHR's decisions on indirect discrimination, and especially indirect discrimination pertaining to the rights of Roma populations, have developed by reference to each other.[83]

2. Comparability of Cases

For differential treatment to be discriminatory, it needs to be treating comparable cases differently or treating non-comparable cases equally. If the cases are not comparable, the difference of treatment does not need to be justified and is not discriminatory. Assessing the comparability of the situations at hand is thus crucial. Both the ECSR and the ECtHR have recognized the importance of the comparability phase albeit in more or less elaborate way.

The ECtHR almost systematically postpones the assessment of comparability of the situations at hand to the justification phase.[84] There are a few exceptions, of course, as when the lack of comparability is used to dismiss a case.[85] Even when the Court compares the

Croatia [GC] (2011) 52 EHRR 7. *See* Edouard Dubout, *L'interdiction des discriminations indirectes par la Cour européenne des droits de l'homme: rénovation ou révolution?,* 75 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 821-56 (2008); Gemma Hobcraft, *Roma Children and Education in the Czech Republic:* DH v. Czech Republic*: Opening the Door to Indirect Discrimination Findings in Strasbourg?,* 2 EUROPEAN HUMAN RIGHTS LAW REVIEW 245-60 (2008); Ralph Sandland, *Developing a Jurisprudence of Difference: The Protection of the Human Rights of Travelling Peoples by the European Court of Human Rights*, 8 HUMAN RIGHTS LAW REVIEW 475-516 (2008).

81. Hoogendijk v. Netherlands (2005) 40 EHRR SE22, 207 (my emphasis). *See also* Jordan v. United Kingdom (2003) 37 EHRR 2, 154.

82. *See* Complaint No 13/2002, Autisme-Europe v. France, Nov. 4, 2003, (2004) 11 IHRR 843, at para. 52; confirmed in Complaint No 58/2009, COHRE v. Italy, June 25, 2010, at paras. 19-21.

83. *See* Complaint No 58/2009, COHRE v. Italy, June 25, 2010, para. 119, citing ECtHR, Connors v. United Kingdom (2005) 40 EHRR 189, at para. 82.

84. *See* Rasmussen v. Denmark A 87 (1984); (1984) 7 EHRR 371, at para. 37. See, however, for a more recent attempt at taking comparability more seriously: Petrov v. Bulgaria Application No 15197/02, Judgment of May 22, 2008, at paras. 52-53; Burden v. United Kingdom (2008) 47 EHRR 38, paras. 61-65.

85. Beale v. United Kingdom (2005) 40 EHRR SE6.

situations, its test is often reduced to a minimum; the chosen comparator needs to be "in an analogous or relevantly similar situation."[86] Sometimes, the Court even uses the measure of comparability as a justification for the differential treatment, thus undermining the whole discrimination test.[87]

By contrast, the ESC non-discrimination regime separates clearly between the comparability of cases and the justification of the differential treatment.[88] The comparability test used by the ECSR is not very elaborate, however.

3. Grounds of Discrimination

Differential treatment of comparable cases is usually only regarded as discriminatory if the ground on which the differential treatment is based is prohibited. What constitutes a prohibited ground varies between Article 14 ECHR and Article E 1996 ESC. So does the ranking among various grounds depending on how closely related a feature is to one's moral status and autonomy.

Under Article 14 ECHR, the grounds mentioned are only exemplary and any characteristic related to one's personality or one's given personal characteristics (status) may be regarded as a prohibited ground.[89] While nationality,[90] disability,[91] age,[92] sexual orientation[93] and transsexuality[94] were not among the grounds expressly mentioned in Article 14 ECHR, they have all been deemed prohibited by the ECtHR—although not always directly on the basis of Article 14 but rather under Article 8 ECHR. Interestingly, the

86. Stubbings and others v. United Kingdom 1996-IV; (1997) 23 EHRR 213; Carson and Others v. United Kingdom (2010) 51 EHRR 13.

87. *See, e.g.,* Stubbings and others v. United Kingdom 1996-IV; (1997) 23 EHRR 213, at para. 74. *See* Aaron Baker, *Comparison Tainted by Justification: Against a 'Compendious Question' in Article 14 Discrimination*, 3 PUBLIC LAW 476-97 (2006).

88. *See* Complaint No 6/1999, Syndicat national des professions de tourisme v. France, Oct. 10, 2000, at paras. 25-9.

89. *See* Sidabras and Dziautas v. Lithuania 2004-VIII; (2006) 42 EHRR 6 (see Judge Thomassen); Budak v. Turkey Application No 57345/00, Decision of Sept. 7, 2004, at para. 4.

90. *See, e.g.,* Luczak v. Poland Application No 77782/01, Judgment of Nov. 7, 2007, para. 48; Andrejeva v. Latvia Application No 55707/00, Judgment of Feb. 18, 2009; Aziz v. Cyprus 2004-V; Application No 69949/01, Judgment of June 22, 2004.

91. *See* Glor v. Switzerland Application No 13444/04, Judgment of Apr. 30, 2009, at para. 80.

92. *See* Schwizgebel v. Switzerland Application No 25762/07, Judgment of June 10, 2010.

93. Dudgeon v. United Kingdom A 45 (1981); (1982) 4 EHRR 149; Salgueiro da Silva Mouta c. Portugal 1999-IX; (2001) 31 EHRR 47; Fretté v. France 2002-I; (2004) 38 EHRR 21; L. and v. v Austria 2003-I; (2003) 36 EHRR 55; E.B. v. France (2008) 47 EHRR 21.

94. Christine Goodwin v. United Kingdom 2002-VI; (2002) 35 EHRR, at paras. 90-93 (albeit not directly on grounds of Article 14 ECHR); I. v. UK Application No 25680/94, Judgment of July 11, 2002; L. v. Lithuania Application No. 27527/03, Judgment of Sept. 11, 2007; Van Kück v. Germany 2003-VII; (2003) 37 EHRR 51.

ECtHR also considers cases of "discrimination by association." These are cases where the victim of the discrimination is not herself the person with the protected characteristic but is closely related to someone who has it, and is discriminated by reference to that other person's characteristic.[95]

In fact, some grounds are not only prohibited but considered suspect classifications. This classification triggers heightened scrutiny by the Court.[96] This is the case for discrimination based on sex or sexual orientation which requires very weighty reasons to be justified.[97] Other grounds of discrimination such as birth out of wedlock, nationality, religion and race may also trigger heightened scrutiny.[98] In this respect, the ECtHR's case law may be compared to that of the U.S. Supreme Court which has developed various categories of suspect classifications and corresponding levels of scrutiny; gender is peculiar in this respect as it is not generally classified as a suspect classification like race and only requires an intermediate level of scrutiny by the U.S. Supreme Court.[99]

Article E 1996 ESC enumerates various grounds of discrimination borrowed from Article 14 ECHR and the 1961 ESC Preamble. That list of prohibited grounds is only exemplary, however. Other grounds not explicitly enumerated in the provision are also covered. The ECSR has, for instance, added disability.[100]

In its recent case law on race, the ECSR has referred to "aggravated violations" by reference to the ECtHR's case law on racial discrimination.[101] There is an aggravated violation when, "on the one hand, measures violating human rights specifically targeting and affecting vulnerable groups are taken; on the other, public authorities not only are passive and do not take appropriate action against the perpetrators of these violations, but they also contribute to this violence."[102] This comes very close to turning race and ethnic origin into suspect grounds of discrimination that trigger heightened scrutiny. It

95. *See, e.g.,* Weller v. Hungary Application No 44399/05, Judgment of Mar. 31, 2009.

96. *See* Abdulaziz, Cabales and Balkandali v. Royaume-Uni A 94 (1985); (1985) 7 EHRR 471, at para. 27.

97. *See* L and v. v Austria 2003-I; (2003) 36 EHRR 55 at para. 45.

98. *See, e.g.,* Hoffmann v. Austria A 255 C (1993); (1994) 17 EHRR 293; Gaygusuz v. Austria 1996-IV; (1997) 23 EHRR 364; DH and others v. Czech Republic [GC] (2008) 47 EHRR 3, at paras. 203-04 (one may not renounce to the principle of the prohibition of racial discrimination). Note on the ECtHR's contrast between race and language skills: Oršuš and others v. Croatia (2009) 49 EHRR 26, at para. 66.

99. *See* United States v. Virginia, 518 US 515, 116 S Ct 2264 (1996); Mississippi University for Women v. Hogan, 458 US 718, 102 S Ct (1982).

100. Complaint No 13/2002, Autisme-Europe v. France, Nov. 4, 2003 (2004) 11 IHRR 843, at para. 52.

101. *See* Complaint No 58/2009, COHRE v. Italy, June 25, 2010, at para. 37, citing ECtHR, Timishev v. Russia 2005-XII; (2007) 44 EHRR 37, at paras. 56-58.

102. Complaint No 58/2009, COHRE v. Italy, June 25, 2010, at paras. 75-76.

remains to be seen whether this can be extended to other grounds of discrimination under the ESC in the future.

4. Justifications

A differential treatment of comparable cases on prohibited grounds is only discriminatory when it cannot be justified by objective reasons. Interestingly, some international law guarantees of the principle of non-discrimination exclude the possibility to provide such justifications. This is the case, for instance, for direct sex discrimination in EU law. Both the ECHR and ESC regimes, however, allow for justification of direct and indirect discrimination, and on all grounds (with the exception of the heightened scrutiny for some of them).

Although Article 14 ECHR does not expressly provide for justified restrictions, the ECtHR's case law allows for objective and reasonable justifications both in cases of direct and indirect discrimination.[103] According to the ECtHR, "a distinction is discriminatory, for the purposes of Article 14, if it "has no objective and reasonable justification," that is if it does not pursue a "legitimate aim" or if there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realised."[104] Accordingly, the two conditions for the justification of a *prima facie* discrimination are: a legitimate aim and proportionality between that aim and the means employed. The case law has not developed a precise test for what a legitimate aim should be: it amounts at the most to a test of reasonableness. Moreover, the Court often conflates the assessment of the legitimate aim with the proportionality test.[105]

Mutatis mutandis, the same may be said about the ESC non-discrimination regime. The Appendix to the 1996 ESC foresees that, regarding Article E, "a differential treatment based on an objective and reasonable justification shall not be deemed discriminatory." The ECSR's case law has not provided a detailed account of the requisite conditions, however.[106]

D. Procedural Elements

The procedural dimensions of the ECHR and ESC antidiscrimination regimes reflect the fundamentally different roles and approaches of the two European human rights bodies. Three procedural elements emerge from both systems and reflect those differences:

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103. *See* Petrovic v. Austria 1998-II; (2001) 33 EHRR 14, at paras. 36-38.

104. Koua Poirrez v. France 2003-X; (2005) 40 EHRR 34, at para. 46; Burden v. United Kingdom (2008) 47 EHRR 38, at para. 60.

105. *See, e.g.,* Abdulaziz, Cabales and Balkandali v. Royaume-Uni A 94 (1985); (1985) 7 EHRR 471, at para. 88. *See* Martin, *supra* note 8, at 268-70.

106. *See, e.g.,* Complaint No 6/1999, Syndicat national des professions de tourisme v. France, Oct. 10, 2000, at paras. 25-29.

evidence and burden of proof, level of scrutiny, and margin of appreciation.

1. Evidence and Burden of Proof

The evidentiary requirements of discrimination concern the degree to, and the manner in, which the allegation of an unjustified differential treatment of comparable cases needs to be substantiated. Closely connected to this question, the issue of the burden of proof has been at the core of the development of non-discrimination law in Europe since the beginning, as applicants are often hindered by the difficulty to provide evidence of indirect or covert discrimination. Both European regimes sometimes shift the burden of proof but the ESC has done so for much longer and provides more detailed guidelines to States Parties relative to evidence and in particular to data collection.

Under Article 14 ECHR, the evidentiary hurdles are high.[107] In principle, the ECtHR requires proof of discriminatory intent. In certain exceptional cases, the Court is satisfied with mere evidence of practical discrimination,[108] but the case should be made "beyond any reasonable doubt."[109] Generally speaking, there are in principle no accommodations made in the case of direct discrimination and the burden of proof does not shift to the State even if proof of the likelihood of discrimination has been provided. The ECtHR has not yet recognized a specific accommodation of the burden of proof in cases of direct discrimination based on the model of the EU non-discrimination directives (e.g., Article 19 Directive 2006/54/EC and Article 10 Directive 2000/78/EC). An exception may be found in the context of racial discrimination where Article 14 ECHR is invoked together with Article 2 or 3 ECHR. This practice has since been confirmed by the Court.[110]

The same regime used to apply to indirect discrimination so that evidence of the discriminatory intent was required here as well.[111] In

107. *See* O.M. Arnardóttir, *Non-Discrimination under Article 14 ECHR- the Burden of Proof*, 51 SCANDINAVIAN STUDIES IN LAW 13-40 (2007).

108. DH and others v. Czech Republic [GC] (2008) 47 EHRR 3, at para. 79.

109. *See* Velikova v. Bulgaria 2000-VI; Application No 41488/98, Judgment of May 8, 2000, at para. 94; Hugh Jordan v. United Kingdom 2001-III; (2003) 37 EHRR 2, at para. 154. *See* Martin, *supra* note 8, at 251. Note that the Court may also apply strict scrutiny to a case by virtue of the other provision at stake, and in particular with respect to Article 3 ECHR (Abdulaziz, Cabales and Balkandali v. Royaume-Uni A 94 (1985); (1985) 7 EHRR 471, at paras. 90-1).

110. *See* Nachova and others v. Bulgaria [GC] 2005-VII; (2006) 42 EHRR 43, at paras. 156-57. *See also* Timishev v. Russia 2005-XII; (2007) 44 EHRR 37, at para. 39. *See* D. Rosenberg*, Enfin. . . le juge européen sanctionne les violations du principe de non-discrimination raciale en relation avec le droit à la vie,* 61 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 171-202 (2005).

111. *See* Hugh Jordan v. United Kingdom 2001-III; (2003) 37 EHRR 2, at para. 154.

recent cases, however, the European Court has gradually changed its practice.[112] Evidence of "the disproportionately prejudicial effect on a particular group" now suffices to presume indirect discrimination. This may be provided by undisputed official statistical evidence,[113] but also through other means if the available sources are reliable.[114] The Court further considers that once statistical evidence has been supplied, the indirect discrimination is regarded as established and the State has to provide an objective and proportional justification for the discrimination rather than evidence of an absence of discriminatory intent.[115] Curiously, the Court sees the role of statistical evidence as shifting the burden of proof, although it does not allow the State to then offer evidence to reverse the presumption of indirect discrimination except in order to justify the unfavorable treatment.[116] The exact role of statistical evidence and a clarification of the distribution of the burden of proof remain to be provided by the Court.

The evidence regime under Article E 1996 ESC is very similar. Under Article E 1996 ESC, however, the Committee has recognized a further duty of States Parties to collect data in order to help assess the effectiveness of the non-discrimination principle and the integration of vulnerable groups.[117] While States Parties have to respect international law in the field (e.g., the self-identification requirement that protects individuals against the stigmatization by census and other forms of data collection),[118] they cannot invoke privacy and data protection to escape their duty to collect data. Where there are legal obstacles to providing certain kinds of personal data, States Parties are requested to provide other kinds of information.[119]

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112. In the case of gender discrimination, see Hoogendijk v. Netherlands (2005) 40 EHRR SE 22, at para. 207; Opuz v. Turkey (2010) 50 EHRR 28, para. 198. In the case of ethnic origin, see DH and others v. Czech Republic [GC] (2008) 47 EHRR 3, at para. 189.

113. Hoogendijk v. Netherlands (2005) 40 EHRR SE22, 207. *See also* DH and others v. Czech Republic [GC] (2008) 47 EHRR 3, at para. 188.

114. Opuz v. Turkey (2010) 50 EHRR 28. *See also* Oršuš and Others v. Croatia [GC] (2011) 52 EHRR 7, at paras. 152-53, 155.

115. On the use of statistical evidence to prove indirect discrimination, see Zarb Adami v. Malte 2006-VIII; (2006) 44 EHRR 3, at paras. 78, 82-83; Opuz v. Turkey (2010) 50 EHRR 28, para. 198 (indirect sex discrimination); DH and others v. Czech Republic [GC] (2008) 47 EHRR 3, at paras. 179-80, 187-95; Oršuš and Others v. Croatia [GC] (2011) 52 EHRR 7 (indirect race discrimination).

116. For a discussion, see Dubout, *Vers une protection de l'égalité "collective," supra* note 7; and K. Heyden & A. von Ungern-Sternberg, *Ein Diskriminierungsverbot ist kein Fördergebot - Wider die neue Rechtsprechung des EGMR zu Art. 14 EMRK*, 36: 5-7 EUROPÄISCHE GRUNDRECHTSZEITSCHRIFT 81-89 (2009).

117. Complaint No 58/2009, COHRE v. Italy, June 25, 2010, at paras. 22-24 and 36.

118. *See* Complaint No 58/2009, COHRE v. Italy, June 25, 2010, at para. 119.

119. *See* Complaint No 15/2003, ERRC v. Greece, Dec. 8, 2005, (2006) 13 IHRR 895, at para. 27.

The data provided by States Parties may then be used by applicants to claim indirect discrimination, and by States Parties to reverse the burden of proof and establish a presumption of indirect discrimination based on statistical evidence or other kinds of information.[120] The ECSR indeed shifts the burden of proof when facts are established by the applicant that lead to a presumption of discrimination. Thus, "when credible evidence is adduced alleging discrimination, it becomes incumbent on the State Party concerned to answer to the allegations by pointing to, for example, legislative or other measures introduced, statistics and examples of relevant case law."[121] The ECSR also requires States Parties to arrange for the burden of proof to shift or at least to be alleviated under domestic law.[122]

2. Level of Scrutiny

Once a *prima facie* case of discrimination has been made by the applicant, the two European bodies need to assess whether the differential treatment can be justified. They can apply different levels of scrutiny that will determine the weight of the requisite justifications and the necessary degree of proportionality. The ECSR and the ECtHR do not diverge a lot in this regard.

The ECtHR distinguishes, as we saw previously, between ordinary and suspect grounds of discrimination. Gender, religion and race, for instance, are classified among the latter and thus call for heightened scrutiny. The Court requires "very weighty reasons" for a differential treatment on grounds of sex, race or religion to be justified. The proportionality test is also more demanding in such cases.[123]

There is no trace in the ESC and the ECSR's practice of a variable level of scrutiny depending on the ground of discrimination. In its recent case law, however, the ECSR has referred to "aggravated violations" by reference to the ECtHR's case law on racial discrimination.[124] This comes very close to turning race and ethnic origin into suspect grounds and hence to creating a level of heightened scrutiny.

120. Complaint No 58/2009, COHRE v. Italy, June 25, 2010, at paras. 22-24 and 36.

121. *See* Complaint No 15/2003, ERRC v. Greece, Dec. 8, 2005, (2006) 13 IHRR 895, at para. 50; Complaint No 41/2007, MDAC v. Bulgaria, June 3, 2008, para. 52.

122. *See* Conclusions 2002, Vol. I (Romania), 117-21.

123. *See* Abdulaziz, Cabales and Balkandali v. Royaume-Uni A 94 (1985); (1985) 7 EHRR 471, at para. 78; Burghartz v. Switzerland A 280A (1994); (1994) 18 EHRR 101, at para. 27.

124. *See* Complaint No 58/2009, COHRE v. Italy, June 25, 2010, at para. 37, citing ECtHR, Timishev v. Russia 2005-XII; (2007) 44 EHRR 37, at paras. 56-58.

3. Margin of Appreciation

Because the two regimes compared, and the two institutions in charge of interpreting them, are international, the question of the margin of appreciation granted to the States Parties is important. The ECSR has developed a more detailed approach than the ECtHR, especially with respect to the limits on the margin of appreciation of domestic authorities and on the option to invoke budgetary restrictions.

Under Article 14 ECHR, and many other rights in the Convention, the ECtHR recognizes a broad margin of appreciation. The explanation lies in the minimal and subsidiary nature of the Convention's guarantees and especially of the ECtHR's jurisdiction.[125] As a result, the margin of appreciation often dilutes the special protection granted to sex, race or religion *qua* suspect classifications in the ECtHR's case law.[126] Of course, the scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background. In this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States.[127] In effect, the Court has turned the margin of appreciation into a test of arbitrariness. This comes close to neutralizing and hence undermining the whole purpose of the heightened scrutiny applicable to suspect grounds of discrimination like gender or race.[128]

The ECSR also grants States Parties a broad margin of appreciation. This is another example of the procedural mechanisms borrowed by the Committee from the ECHR.[129] According to the Committee, States enjoy a margin of appreciation in determining the steps to be taken to ensure compliance with the Charter, in particular as regards to the balance to be struck between the general interest and the interest of a specific group and the choice which must be made in terms

125. *See* P. Lambert, *Marge nationale d'appréciation et contrôle de proportionnalité, in* L'INTERPRÉTATION DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME 63-89 (F. Sudre ed., 1998). *See also* Luzius Wildhaber, *A Constitutional Future for the European Court of Human Rights,* 23 HUMAN RIGHTS LAW JOURNAL 161-65 (2002). More generally on standards of review in the context of antidiscrimination law, see Aalt Willem Heringa, *Standards of Review for Discrimination, in* NON-DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES 25-37 (Titia Loenen & Peter R. Rodriguez eds., 1999).

126. *See* Petrovic v. Austria 1998-II; (2001) 33 EHRR 14, at para. 38.

127. *See* Petrovic v. Austria 1998-II; (2001) 33 EHRR 14, at para. 38; Abdulaziz, Cabales and Balkandali v. Royaume-Uni A 94 (1985); (1985) 7 EHRR 471, at para. 78.

128. For a discussion, see M. Callewaert, *Quel avenir pour la marge d'appréciation?, in* PROTECTION DES DROITS DE L'HOMME: LA PERSPECTIVE EUROPÉENNE – MÉLANGES À LA MÉMOIRE DE ROLV RYSSDAL 147-66 (P. Mahoney, R. Matscher, H. Petzold & L. Wildhaber eds., 2000).

129. *See* Malinverni, *supra* note 11.

of priorities and resources.[130] Interestingly, the ECSR monitors States Parties' margin of appreciation very closely and sets limits to it.[131] Thus, the margin will be narrower "where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights."[132] Further, when faced with budgetary restrictions, States Parties must demonstrate that they have taken measures to achieve the Charter's objectives "within a reasonable time, with measurable progression and to an extent consistent with the maximum use of available resources."[133] This implies paying special attention to the most vulnerable groups in each case, which is a key feature of the ESC non-discrimination regime.[134]

III. Special Features

The non-discrimination principle may protect against different kinds of discrimination which themselves concretize different dimensions of equality. Equality does not always require a symmetrical treatment of equal situations, however. Asymmetrical equality indeed should also be protected as it may be the only way to take into account specifically female or male circumstances or objective occupational requirements.

Further, equality may not only mean formal or legal, but also material equality, i.e., equality in terms of results. Formal equality may therefore have to be violated to ensure material equality in certain cases. As we will see, an example of instruments promoting material equality would be positive or affirmative action measures. One could also think of the adoption of special measures that do not treat similar situations differently and hence do not violate formal equality, but do accommodate differences in practice.

A. Symmetrical and Asymmetrical Equality

Equality is usually said to be symmetrical in the sense that people deemed to be in comparable situations should be treated in comparable ways and people in different situations in different ways. In certain rare cases, however, people may be in a comparable situation (e.g., in terms of professional qualifications), but special features or circumstances only apply to some of them (e.g., to women or men only). This may be the case when women need special protection during pregnancy and after giving birth and when they are accordingly

130. *See* Complaint No 31/2005, ERRC v. Bulgaria, Oct. 18, 2006, (2008) 15 IHRR 895, at para. 35.

131. *See* Complaint No 50/2008, CFDT v. France, Sept. 29, 2009, at para. 39.

132. *See* Complaint No 58/2009, COHRE v. Italy, June 25, 2010, at para. 119, citing ECtHR, Connors v. United Kingdom (2005) 40 EHRR 189, at para. 82.

133. *See* Complaint No 13/2002, Autisme-Europe v. France, Nov. 4, 2003, (2004) 11 IHRR 843, at para. 52.

134. *See* de Schutter, *supra* note 13, at 70.

treated differently from men, or when men are by virtue of their physical constitution more able to fit certain occupational requirements and are therefore treated differently from women. Both European regimes are similar in this context, although it took longer for the ECHR non-discrimination regime to generate duties in cases of assymmetrical equality.

Under Article 14 ECHR, equality seems to be largely understood in symmetrical terms. Yet, certain decisions in the ECtHR's case law testify to an asymmetrical approach. This is the case, for instance, in the context of pregnancy and child-care[135] or of military service.[136] In this respect, there used to be a higher propensity for the Court to respect Contracting States' margin of appreciation when the applicants were men rather than women.[137] While the asymmetrical approach in the ECtHR's case law did have a paternalistic and traditional flavor as a result, the Court has recently clearly changed its approach; it has indeed identified a new consensus among States Parties on those issues.[138]

Based on its collective and social dimension, the ESC's regime of non-discrimination has always clearly endorsed an assymmetrical approach to equality. This has been the case in the context of gender discrimination, in particular, but also of disability. The Committee focuses on tackling disadvantages and on remedying structural inequalities experienced by specifically vulnerable groups, and this may require adopting an asymmetrical approach.[139]

B. Formal and Material Equality

There can be cases where people are equally situated formally and where there are no specific features or circumstances that require an asymmetrical treatment either, but where a special treatment is necessary to redress past material or formal discriminations and hence to ensure present material equality. Duties to promote material equality may include obligations to engage in positive or affirmative action, but also more broadly to adopt any special

135. *See* Petrovic v. Austria 1998-II; (2001) 33 EHRR 14, at para. 38; Weller v. Hungary Application No 44399/05, Judgment of Mar. 31, 2009.

136. *See* Asnar v. France Application No 57030/00, Judgment of June 17, 2003; Konstantin Markin v. Russia Application No 30078/06, Judgment of Oct. 7, 2010.

137. *See,* e.g., Petrovic v. Austria 1998-II; (2001) 33 EHRR 14, at paras. 42-43; Asnar v. France Application No 57030/00, Judgment of June 17, 2003, at para. 28.

138. *See* Konstantin Markin v. Russia Application No 30078/06, Judgment of Oct. 7, 2010, at para. 49; Weller v. Hungary Application No 44399/05, Judgment of Mar. 31, 2009, at paras. 33-35. *See* Besson, *supra* note 8; F. Tulkens, *Droits de l'homme, droits des femmes: les requérantes devant la Cour européenne des Droits de l'Homme*, *in* LIBER AMICORUM LUZIUS WILDHABER: HUMAN RIGHTS, STRASBOURG VIEWS 423-45 (Lucius Caflisch et al. eds., 2007).

139. *See* Complaint No 15/2003, ERRC v. Greece, Dec. 8, 2005, (2006) 13 IHRR 895, at para. 42.

measures that may help to protect and promote equality positively and prevent discrimination in practice.

1. Positive Action

Affirmative or positive action measures exemplify the requirements of material equality. Both European regimes are similar in this context, although it took longer for the ECHR non-discrimination regime to allow positive action.

When read strictly, Article 14 ECHR, at least in its French version, would seem to exclude material equality and especially positive action. It states that the rights in the Convention should be exercised without any "discrimination" ("*sans distinction aucune*"). The ECtHR soon stated, however, that this provision should be understood broadly to encompass material as much as formal equality.[140] In *Stec*, the Court held that "Article 14 does not prohibit a Member State from treating groups differently in order to correct 'factual inequalities' between them."[141] Although there have only been few cases so far,[142] positive action schemes may therefore be compatible with Article 14 ECHR if an objective and reasonable justification can be provided. This has actually been confirmed in the Preamble to Protocol 12 which "[r]eaffirm[s] that the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures." The ECtHR has not yet recognized a *duty* to adopt positive action measures, however. The initial reluctance of the Court in this context may be explained by reference to the subsidiary nature of the ECtHR's control and the broad margin of appreciation it accords to States Parties.

By contrast to Article 14 ECHR, the ESC non-discrimination regime has always been conceived as protecting not only formal but also material and effective equality.[143] The positive duty to take action to protect equality "in practice"[144] goes well beyond that under the ECHR regime. The Charter does not offer general recognition of the admissibility of positive action, however. The closest the Charter comes is to clarify, in Part II of the Appendix to the 1996 ESC, that

140. *Cases relating to certain aspects of the laws on the use of languages in education in Belgium* A 6 (1968); (1979-80) 1 EHRR 252, at para. 10. *See also* Dubout, *Vers une protection de l'égalité "collective," supra* note 7.

141. Stec and others v. United Kingdom 2005-X; (2005) 41 *EHRR* 18, para. 51.

142. *See, e.g.,* Wintersberger v. Austria (friendly settlement) Application No 57448/00, Judgment of Feb. 5, 2004. *See* Dubout, *Vers une protection de l'égalité "collective," supra* note 7, at 870-82.

143. Complaint No 31/2005, ERRC v. Bulgaria, Oct. 18, 2006, (2008) 15 IHRR 895, para. 42; Complaint No 13/2002, Autisme-Europe v. France, Nov. 4, 2003, (2004) 11 IHRR 843, at para. 52.

144. *See, e.g.,* Conclusions XVI-II, Vol. 2, 2003, (Spain), Article 1 Additional Protocol, p. 939.

the prohibition on sex discrimination "shall not prevent the adoption of specific measures aimed at removing de facto inequalities." According to the Committee, such positive action cannot be considered prohibited discrimination. It may even be considered a requirement of equality in certain circumstances.[145] The ECSR has not yet fleshed out, however, what the precise conditions for legitimate positive action could be.

2. Special Measures

Recently, European non-discrimination law has started to include positive duties to promote equality, both on the part of public authorities and, although to a lesser extent, of individuals. One often refers to them, in international human rights law, as duties to adopt special measures. These duties, when they apply to persons such as employers, are sometimes referred to as duties of reasonable accommodation.[146] The concept is relatively new in the ECHR non-discrimination system, but has always been central to the ECSR's jurisprudence, and the latter's elaborate regime of positive duties of equality has had a key influence on the recent ECtHR's case law in the area.

Under the ECHR, the notion of positive duties to promote equality has only recently emerged in the interpretation of Article 14. This is surprisingly late given the ECtHR's very advanced case law on positive human rights duties in general.[147] A technical explanation may lie in the lack of independence of Article 14 in the Convention, and in the subsidiarity of the ECtHR's control more generally. The same can be said *a fortiori* about duties of reasonable accommodation[148] given the lack of direct private duties under the ECHR. Yet another explanation may lie in the collective and social dimension of special measures and hence in the ECtHR's resistance to venture too far into the social field.[149] The application of Protocol 12 ECHR in this context may avoid most of those difficulties since it extends the scope of the ECHR non-discrimination principle to any substantive rights in-

145. Complaint No 31/2005, ERRC v. Bulgaria, Oct. 18, 2006, (2008) 15 IHRR 895, at para. 29.

146. *See, e.g.,* E. Bribosia, *Aménager la diversité: le droit de l'égalité face à la pluralité religieuse,* 79 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 319-73 (2009).

147. *See also* de Schutter, *supra* note 69.

148. *See, e.g.,* on reasonable accommodation: Jakóbski v. Poland Application No 18429/06, Judgment of Dec. 7, 2010.

149. This is particularly striking with respect to positive duties in the disability context if one compares ECtHR, Botta v. Italia 1998-I; (1998) 26 EHRR 241 with ECSR, Complaint No 13/2002, Autisme-Europe v. France, Nov. 4, 2003, (2004) 11 IHRR 843. *See also* Sudre, *supra* note 7, at 764; J-M. Larralde, *La Convention européenne des droits de l'homme et la protection de groupes particuliers*, 56 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 1247-74 (2003); Quinn, *supra* note 8.

cluding ESC rights.[150] Yet, so far the Court has been reluctant to use Protocol 12 or at, least, to use it differently from Article 14.

True, the Court had already recognized positive duties to protect the lifestyle of the Roma population stemming from Article 8 ECHR in the *Chapman* case.[151] According to the Court in *Thlimmenos*, "discrimination may arise where States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."[152] In the *Stec* and *DH and Others* cases, the Court went one step further and stated that "in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the article."[153] The Court distinguished between two understandings of indirect discrimination: it is one thing to recognize, as it had in the past, a violation of Article 14 ECHR due to the indirect discrimination of Roma children resulting from school tests and requiring that those school tests be adapted to accommodate those children in the future[154] but another to recognize a violation of Article 14 ECHR due to the violation of a positive duty to accommodate and promote material equality at school. This is a nuance that has since been abandoned by the ECtHR in the *Oršuš* decision. In that case, the Court established a duty to adopt special measures in cases where their omission would amount to indirect discrimination.[155] What constituted a case of discrimination there was not so much that the Roma children had been treated worse than others due to their differences as in the *DH and Others* case, but that they had not been treated well enough.[156] The contours of those positives duties under the ECHR non-discrimination principle remain to be clarified, especially in relation to conflicting individual rights.

By contrast, the ESC non-discrimination regime has always been conceived as protecting not only formal but also material and effective equality. As a result, both the 1961 ESC and the 1996 ESC have imposed positive duties on States Parties that go beyond those imposed by Article 14 ECHR and Protocol 12 ECHR.[157] More specifically, States are required not only to adopt a legal framework

150. *See also* Sudre, *supra* note 7, at 773.
151. Chapman v. United Kingdom 2001-I; (2001) 33 EHRR 18, 95-96.
152. Thlimmenos v. Greece 2000-IV; (2001) 31 EHRR 15, 44.
153. Stec and others v. United Kingdom 2005-X; (2005) 41 *EHRR* 18, 51. For a confirmation, see DH and others v. Czech Republic [GC] (2008) 47 EHRR 3, at paras. 181-83. For a critique, see Heyden & von Ungern-Sternberg, *supra* note 116.
154. *See* DH and others v. Czech Republic [GC] (2008) 47 EHRR 3, at paras. 198, 207.
155. *See* Oršuš and Others v. Croatia [GC] (2011) 52 EHRR 7. *See also* Dubout, *La Cour européenne des droits de l'homme et la justice sociale, supra* note 7, 990.
156. *See* Dubout, *La Cour européenne des droits de l'homme et la justice sociale, supra* note 7, at 1006.
157. *See* Complaint No 31/2005, ERRC v. Bulgaria, Oct. 18, 2006, (2008) 15 IHRR 895, at para. 35.

prohibiting discrimination, but also to ensure that this framework is effective (e.g., through monitoring) and, finally, that policy measures are adopted, beyond merely legal ones, to promote integration and the effective prohibition of discrimination (e.g., through reasonable accommodation[158]).[159] It follows that States Parties are not only authorized to adopt positive measures to promote equality and combat discrimination of vulnerable groups, but that they are also required to do so with the aim of achieving the social integration of these groups.[160] Failure to take into account relevant differences and to provide remedial positive action or special measures is actually constitutive of indirect discrimination.[161] According to the Committee, indirect discrimination may indeed arise "by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all."[162]

The ESC imposes an obligation of result, and not just of means, on States Parties. As a result, attempts to comply with the principle do not suffice, and the Committee requires explanations as to why the problem of discrimination is not resolved.[163] Of course, as mentioned before, States Parties have a margin of appreciation when determining what kind of special measures to take.[164] Interestingly, the ECSR goes further than the ECtHR in its directives to States Parties in that respect, especially in view of the invocation of limited available resources.[165] In such cases States Parties must show that they have taken measures to achieve the Charter's objectives "within a reasonable time, with measurable progression and to an extent consistent with them maximum use of available resources."[166]

C. Harassment

A newcomer concept in European non-discrimination law is harassment. The concept fits uneasily with the different elements of the

158. *See* Conclusions 2008, Vol. 2 (Moldova), Article 15, p. 599.
159. *See, e.g.,* de Schutter, *supra* note 69; de Schutter, *supra* note 13; Quinn, *supra* note 8 in the context of disability.
160. *See,* e.g., Conclusions 2003, Vol. 1 (Article 15).
161. *See* Complaint No 41/2007, MDAC v. Bulgaria, June 3, 2008, at para. 51.
162. *See* Complaint No 15/2003, ERRC v. Greece, Dec. 8, 2005, (2006) 13 IHRR 895, at para. 52.
163. *See* Complaint No 1/1998, ICJ v. Portugal, Sept. 9, 1999, (1999) 6 IHRR 1142, para. 40. *See also* de Schutter, *supra* note 3, at 35.
164. *See* Complaint No 31/2005, ERRC v. Bulgaria, Oct. 18, 2006, (2008) 15 IHRR 895, at para. 35.
165. *See* Complaint No 13/2002, Autisme-Europe v. France, Nov. 4, 2003, (2004) 11 IHRR 843, at para. 52. *See also* Aoife Nolan, *"Aggravated Violations," Roma Housing Rights and Forced Expulsions in Italy: Recent Developments under the European Social Charter Collective Complaints System,* 11:2 HUMAN RIGHTS LAW REVIEW 343-61, 358 (2011).
166. *See* Complaint No 13/2002, Autisme-Europe v. France, Nov. 4, 2003, (2004) 11 IHRR 843, at para. 52.b.

equality and non-discrimination regime presented so far. Both European regimes, however, have accommodated harassment within their system.

While the ECHR does not specifically prohibit harassment or instruction to discriminate, it does contain particular rights that relate to the same area. Where harassing acts display a discriminatory motive, the ECtHR will examine the alleged breaches of the relevant rights in conjunction with Article 14 ECHR.[167] The notion that comes closest to harassment would be inhuman and degrading treatment prohibited under Article 3 ECHR and the related ECtHR case law.[168] There have been recent cases such as *Bekos* or *Nachova* in which Article 3 has been deemed violated in circumstances where the motivation for the (violent or non-violent) inhuman or degrading treatment was racially motivated and hence potentially discriminatory as well.[169] In other cases, the Court has not based its reasoning on those grounds but on the right to respect for private and family life protected under Article 8 ECHR, although the parties invoked harassment in their submissions under both Articles 3 and 14 ECHR.[170] In the *Osman* case, Article 8 ECHR was invoked in a case of harassment, but there was no discriminatory motivation.[171] Developments in EU law may, however, trigger a further reaction on the part of the ECtHR.

The ESC's non-discrimination regime does not explicitly cover harassment as a form of discrimination either. Yet, it follows from the ECSR's conclusions that harassment *qua* form of unequal treatment ought to be prohibited and repressed in the same way as other acts of discrimination, even if not all forms of harassment are acts of discrimination.[172] Moreover, the Committee allows States Parties to presume by law that harassment is a form of discrimination.

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167. *See, e.g.,* Baczkowski and Others v. Poland Application No 1543/06, Judgment of May 3, 2007; Paraskeva Todorova v. Bulgaria Application No 37193/07, Judgment of Mar. 25, 2010.

168. *See, e.g.,* for a joint application of Article 3 and 14 ECHR: Abdulaziz, Cabales and Balkandali v. Royaume-Uni A 94 (1985); (1985) 7 EHRR 471, at paras. 90-91.

169. Nachova and others v. Bulgaria [GC] 2005-VII; (2006) 42 EHRR 43, at paras. 158-61; Bekos and Koutropoulos v. Greece 2005-XIII; (2006) 43 EHRR 22, at paras. 69-70.

170. In Smith and Grady v. United Kingdom 1999-VI; (2000) 29 EHRR 493, the Court has not recognized the existence of torture under Article 3 ECHR, with or without a violation of Article 14 ECHR. And in Vincent v. France Application No 6253/03, Judgment of Oct. 24, 2006, the Court has recognized torture under Article 3 ECHR, but without a violation of Article 14 ECHR (the parties did not invoke harassment specifically either).

171. Osman v. United Kingdom 1998-VIII; (1998) 29 EHRR 245.

172. *See* Conclusions 2010, Vol. 1 (Andora), Article 26, p. 78. *See also* Conclusions 2003, Vol. 1 (Bulgaria), Article 26, p. 90.

CONCLUSIONS

In recent years, the case law of the ECtHR and the ECSR have contributed in a decisive fashion to the shaping of European non-discrimination law. This has been the case not only in the quantitative sense: half of the ECtHR's case law on discrimination was generated in the last five years or so and the ECSR receives increasingly more collective complaints pertaining to discrimination. It is also true in the qualitative sense as the two European human rights' bodies have lately addressed some of the most difficult issues raised in non-discrimination law. Suffice it here to mention the ECSR's refined jurisprudence on positive duties to implement group equality and the ECtHR's detailed case law on indirect discrimination and its relationship to individual rights.

Given the two conventions' complementarity in the history of the Council of Europe, and, perhaps most importantly, the two institutions' joint contribution to the non-discrimination law applicable within the European Union, clarifying the convergences and divergences between those two parallel bodies of case law is an important task which is still largely incomplete. As a matter of fact, both institutions have already started drawing on each other's decisions even though not always in a systematic way. As I explained before, the principle of non-discrimination is a pivotal or bridging principle within international human rights law and in particular a principle that reveals the social or collective dimension of individual human rights. It should not come as a surprise that it is in the non-discrimination context that the two European human rights institutions, with their respective social and individual rights mandates, converge most or, at least, have the potential to do so.

As one may have expected from a non-judicial and more recent institution, it is the ECSR that mainly cites to the ECtHR and not vice-versa. This may also be explained by the ECtHR's reluctance to venture into the social field in spite of the entry into force of Protocol 12 ECHR and, conversely, by the inherently social and collective dimension of non-discrimination that ties in perfectly with the ECSR's mandate. Among the substantive areas most in need of coordination on the part of the ECtHR, one should mention positive duties, and positive or affirmative action in particular. The ECSR has a well-established case law on positive duties to promote the equality and integration of vulnerable groups, and the ECtHR could benefit from that now that it has recognized the positive duty to accommodate differences in certain circumstances. Another key feature of the ECSR's case law is its purposive and practical approach to discrimination and the value-based interpretation of the principle of non-discrimination that has been lacking in the ECtHR's jurisprudence. Procedurally, there is also much to learn from the ECSR's jurisprudence on the

burden of proof and the collection of statistical data and other forms of gauging the impact of antidiscrimination measures. Of course, there would also be room for borrowing more from the ECtHR's non-discrimination case law in the interpretation of the ESC. One example would be the greater autonomy of the non-discrimination principle in the ECtHR's jurisprudence, since that principle may be deemed violated outside cases of violation of other substantive rights.

Besides those substantive arguments for more coherence, the embryonic implementation of Protocol 12 ECHR actually makes the coordination between the ECtHR's and the ECSR's approaches to non-discrimination legally necessary. Since the entry into force of the Protocol, ESC rights belong to the material scope of application of the ECHR non-discrimination principle just as any other substantive rights applying in the domestic case. ESC rights may therefore have to be interpreted by the ECtHR when applying Protocol 12, and no longer only by the ECSR. This could give rise to competing interpretations of ESC rights and their relationship to the non-discrimination principle. But, of course, just as the current regime is the result of mutual borrowings and years of intentional convergence, closer cooperation will require not only more political will on the part of States Parties but also a clear policy on the part of the two European human rights bodies. After all, it does take two to tango.