European Commission

European network of legal experts in gender equality and non-discrimination

The meaning of racial or ethnic origin in EU law: between stereotypes and identities

Including summaries in English, French and German

Justice and Consumers

EUROPEAN COMMISSION

Directorate-General for Justice and Consumers
Directorate D — Equality
Unit JUST/D1

European Commission
B-1049 Brussels

EUROPEAN COMMISSION

The meaning of racial or ethnic origin in EU law: between stereotypes and identities

Written by Lilla Farkas

January 2017

Directorate-General for Justice and Consumers

2017

The text of this report was drafted by Lilla Farkas, coordinated by Catharina Germaine and Isabelle Chopin for the European network of legal experts in gender equality and non-discrimination.

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Luxembourg: Publications Office of the European Union, 2017

ISBN 978-92-79-62624-1
Doi:10.2838/83148
Catalogue number DS-01-16-914-3A-N

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Executive summary

In EU law, the Racial Equality Directive (RED) prohibits discrimination on the grounds of racial or ethnic origin without defining them.[1] However, their broad or narrow interpretation impacts on a wide array of issues ranging from material scope and the qualification of claims to data collection and positive action measures. Definitional puzzles and complexities, synergies and differences between the key terms await the clarification of these autonomous concepts 'by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part'.[2] This context is historical, social and political, which necessitates an inquiry into how such processes continuously reshape the meaning of legal terms.

The thematic report on 'The meaning of racial or ethnic origin in EU law: between stereotypes and identities' conceives of the grounds as a single, composite and transversal conceptual category for the purposes of implementing European law. Composite means that, as a rule, racial or ethnic origin is comprised of constitutive characteristics that are at times protected separately 'in their own right'. Transversal refers to temporal and geographic contingency, thus focusing on the changes in the terms' meaning over time and space. While the interrogation of historical sources brings to the fore the *unstable meaning* of the word race, it simultaneously depicts racism as a global phenomenon that is motivated by deliberate political projects and results in often violent discriminatory action fuelled by ethnic prejudice.[3] It shows variance in the trajectories of racism in different geographic locations – including differences between Britain and continental Europe, as well as Europe and the United States. Racism itself is a contested concept, taken to denote an ideology, as well as intentional practices.[4] On the other hand, racist attitudes across localities differ. In Europe, most groups targeted by racism categorically reject race as a label. Still, racialisation as 'a process that ascribes physical and cultural differences to individuals and groups' is thriving.[5]

The abundance of terms and concepts applied to individuals and groups eligible for protection under the RED is overwhelming. Rather than cataloguing or classifying minorities as national, ethnic, racial, cultural, historic, territorial, linguistic, religious, ethno-religious, indigenous or *racialised*, the report describes the ways in which one can identify that less favourable treatment has been meted out on the grounds of racial or ethnic origin. It builds on the analysis of *race making* and the appropriation of *racialised* identities provided by social scientists.[6]

The understanding of race as a social construct, a perception or a stereotype directed against groups creates difficulties in legal interpretation. First, stereotypes and perceptions are difficult to interpret in law, particularly because they are by definition directed at groups, not individuals. Second, if the groups targeted by perceptions and stereotypes are not recognised or do not identify with racial or ethnic signifier, the law will have to grapple with status recognition and identity formation, which is particularly problematic if it is geared to deal with individual complaints as opposed to group claims – an oft-repeated characterisation of European anti-discrimination law.

1 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180 of 19 July 2000.

2 As recently reiterated in relation to an apparently 'ironic' discriminatory reproduction of a cartoon in Case C-201/13, *Johan Deckmyn, Vrijheidsfonds VZW* v *Helena Vandersteen, Christiane Vandersteen, Liliana Vandersteen, Isabelle Vandersteen, Rita Dupont, Amoras II CVOH, WPG Uitgevers België*, ECLI:EU:C:2014:2132.

3 Bethencourt, F., Racisms: From the Crusades to the Twentieth Century, Princeton University press, Princeton and Oxford, 2015, pp. 1-7.

4 Miles, R., Racism as a Concept, in Bulmer M. and Solomos J. (eds) Racism, OUP, 1999, pp. 345-355.

5 Barot R. and Bird J., Racialisation: the genealogy and critique of a concept, Ethnic and Racial Studies, Vol. 24 No. 4 July 2001, p. 601.

6 Gellner E., Nations and Nationalism, Blackwell Publishing, Oxford, 2006, p. 131. Knowles C., Theorising Race and Ethnicity: Contemporary Paradigms and Perspectives in Hill Collins P. and Solomos J. (eds.) The SAGE Handbook of Race and Ethnic Studies, pp. 23-42.

The present status of minority groups has been shaped by imperial and nationalistic politics. The field of minority protection is fragmented, revealing an internal hierarchy among minority groups in domestic law, mirrored at the European level. The legal framework established for religious, linguistic and national minorities after World War I and resurrected in the framework of shifting hierarchies between minority groups after the fall of communism locks recognised minorities eligible for special rights in identity quarantines. Being based on the reciprocity principle, it favours national minorities, and is resilient to the fluidity of identities, minority coalitions and the accommodation of new groups, while risking terminological confusion. The thematic report argues that in order to achieve the purpose of European legislation, hierarchy needs to be counterbalanced by interpretation that seeks to tease out commonalities and synergies across diverse groups.

In light of such fragmentation, doubts arise as to whether the law – premised upon generalised concepts – has the means to address less favourable treatment based on racial or ethnic origin. The archaeology of legal terms demonstrates an attempt to overcome the dilemma by combining the contested identity facets – such as racial, ethnic, national, linguistic, cultural and religious – with the apparently objective, material elements – such as origin, extraction, membership of, association with and descent. These terms combine identities individuals and communities hold and share with external ascriptions and perceptions – some of which may become internalised by minorities, thus becoming an identity element. Ascriptions are equally or more relevant from the perspective of adjudicating cases of discrimination, than self-identified traits. Bundling them together is controversial, because while on the one hand it opens up the law to investigating race making and the fluidity of identities, on the other it also renders law amenable to confusing ascriptions with self-identified minority traits.

The report concludes that in the European context the term *racial or ethnic origin* shall be applied as a 'supercategory', rather than race or ethnicity alone. It purports to show that the quest for identifying differences between racial and ethnic origin has been futile and urges the legal profession to refrain from further pursuing such endeavours. This quest has overshadowed the fact that in Europe, national origin is an inherent part of the composite category of origins, while simultaneously producing interpretations of racial origin as reducible to colour and physical appearance.[7] The report warns that this view risks reifying race, while simultaneously obscuring racism against recognised minority groups.

'Europeanness' is an overlapping and diffuse conglomerate of national identities that describe membership in imaginary communities extending beyond or breaking down the boundaries of actual nation states. A real, historic presence on European soil is an indispensable element of national minority status, although it does not directly signify European descent. Thus far, only two minorities – the Jews and the Roma – have been recognised and consequently admitted in this privileged category, critically described as 'membership in the European tribe'.[8] In contrast, 'foreignness', a term often found in national case law, signifies 'non-European' origin.[9] The synonymous term, '(im)migrant' is situated at the apex of intricately interwoven nationalism and racism in contemporary Europe, shining light on xenophobia's central role in producing race.[10]

Racial, ethnic and national origins are mutable grounds, comprising nationality, colour, descent, minority religion, minority language, minority culture and traditions. Together with foreign and immigrant, these characteristics constitute the most common proxies of racial or ethnic origin – most clearly borne out in the context of data collection on inequalities, which is decidedly based on these proxies. In Europe, protection from discrimination on the grounds of religious, linguistic and later national origin preceded protection on the grounds of racial or ethnic origin. While all can serve as grounds of preferential treatment, today

7 Barth, F., 'Introduction', Barth, F. (ed.), *Ethnic groups and boundaries: The social organization of cultural difference*, George Allen & Unwin, London, 1969.
8 Mills, C. W., *The racial contract*, Cornell University Press, 1997.
9 Ibid, pp. 78-80.
10 Already noted in Balibar E, Racism and Nationalism in Balibar E. and Wallerstein I., Race, Nation, Class, Ambiguous Identities, Verso 1991, p. 45.

national origin is singled out for protection under the Framework Convention for the Protection of National Minorities (FCNM), while linguistic origin is promoted under the European Charter of Regional and Minority Languages. However, the FCNM does not define national minorities, due to a lacking European consensus and the Charter provides a lower level of protection for linguistic minorities than does the FCNM for national minorities, while leaving room for a lower level of protection for certain languages, for instance Romanes.

Some see racial and ethnic origins as interchangeable. Others consider racial origin as referring to human phenotypes, while ethnic origin is believed to concern itself with the 'cultural stuff' – but then its conception overlaps with that of national origin. The impossibility of fighting the devious consequences of racism through a race-less discourse has led to ambivalence, which in continental Europe is exacerbated by the general lack of minority identification with race, as a result of which claims for recognition as a racial minority are sporadic, peripheral or non-existent. This partly explains why – with the exception of the **United Kingdom**, where since the 1960s Blacks have appropriated race as a term identifying their struggles for equal treatment – domestic law in EU Member States does not define racial origin. Ethnic origin, proposed after World War II as a supercategory extending from race to linguistic, religious, national, etc. minorities, is considered not to be tarnished by the moral dilemmas inherent in the 'r' word. However, the overwhelming majority of Member States do not have a statutory definition of ethnic origin either. The most widely available definition in domestic laws is that of national minorities.

Ethnic origin as a term promised to bridge gaps in the minority rights regime. Even though in Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) racial discrimination purports to cover distinctions based on race, colour descent, **or** national **or** ethnic origin, the preparatory works of the International Covenant on Civil and Political Rights (ICCPR) posit that 'ethnic' was the broadest term available at the time. Still, national, rather than ethnic, origin is included in Article 26 of the ICCPR, which ensures equal treatment, and ethnic origin is the umbrella term that unites diverse minorities in Article 27. Nor was ethnic origin included in the text of Article 14 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), which instead prohibits discrimination based on race, colour, language, religion, national or social origin and association with a national minority.

Ethnic origin is not an organic legal concept in Europe. In **France**, it is perceived as equivalent to race and elsewhere synergies between ethnic and racial origin continue to be contested. Domestic legislation canvassed in the report shows that in the majority of Member States, ethnic origin remains an amorphous concept. At the domestic level, protection from discrimination stems from legislation transposing or ratifying regional instruments, such as the RED and the ECHR. Furthermore, ICERD and ICCPR have also been ratified by all the Member States. In general, domestic laws governing equality and non-discrimination rely on the catalogue provided in Article 1 ICERD. Where they exist, special minority rights remain removed from the anti-discrimination regime.

Originally, the EU prohibited discrimination in relation to nationality (of a Member State), because equal treatment on this ground was essential for the establishment of the single market. Intensifying in the early 1990s, initiatives to pursue racial equality and protection from racial violence emerged within the Council of Europe and the 'old EU'. These simultaneous and collaborative campaigns led to institutional as well as legal changes. In 1994, the European Commission against Racism and Intolerance (ECRI) was established with a broad mandate to fight racism and related intolerance, bringing under its purview not only racial, ethnic and national minorities but also migrant groups. Definitions in ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial intolerance take the RED into account and impacted on the ECtHR's interpretation of discrimination based on racial or ethnic origin.

The main legal instruments dealing with racial discrimination at the EU level are the RED and the EU Charter of Fundamental Rights – both prohibiting discrimination based on racial or ethnic origin. The Charter also explicitly prohibits discrimination based on national origin and colour. The EU's Framework Decision on combating racism and xenophobia by means of criminal law extends to the ground of religion.

During the drafting of the RED, the unclear boundaries between racial or ethnic origin on the one hand and religion on the other resulted in the severance of the latter from the final text. Religion – complemented with belief – transferred to the Employment Equality Directive.[11]

Social science has settled on the terms race and ethnicity. Political science has more recently revolved around cultural minorities of non-European origin. In this framework culture refers to minority languages, religious practices and cultural traditions that merit protection in the (national) minority context, but as a rule do not extend to cultural minorities. People can be racialised on the basis of their perceived religiosity with reference to visible differences in their dress. Poverty too can be racialised – particularly if racial minorities are overrepresented among the poor.

This report provides an overview of the ways in which the Member States, national courts and equality bodies established under Article 13 RED have addressed the thorny issue of definition.[12] According to the Special Eurobarometer 437, in 2015 ethnic origin based discrimination continues to be perceived as the most widespread in the EU (64%). The European Network Against Racism (ENAR) notes that the groups suffering the highest level of discrimination in Europe in employment and as victims of hate crimes are the Roma, people of African Descent and Black Europeans, Muslims, Jews and migrants.[13] Due to data collection shortcomings in the EU, the number of the most sizeable communities can only be estimated as follows: 19 million European Muslims, eight million Black Europeans and seven million Roma.[14] The report approaches discrimination suffered by immigrants living in the EU from the perspective of racial or ethnic origin, finding that the lack of EU citizenship does not hamper protection under the RED. According to recent figures, 19.8 million third-country nationals live in the EU – representing 4% of the total population – while 34.3 million people (6.75%) now living in the EU are of non-European (geographic) origin.[15]

The Committee on the Elimination of all Forms of Racial Discrimination (CERD), ECRI and the FCNM Advisory Committee have elaborated broad definitions of racial and national origins respectively. Their reports reveal that the definition of racial, ethnic and national origin is inextricably linked with recognising such minorities.

The majority of national laws prohibit discrimination on a wide range of grounds or else provide for an open list of grounds – many of which are constitutive of racial or ethnic origin. Terminological fragmentation is present both at the international, as well as the national level. Origins as a supercategory has been introduced during the recent reforms of anti-discrimination legislation in **Finland** and Brandenburg (**Germany**), where origin(s) include racial, ethnic, national and/or social origin. The term origin is also central in **French** and **Belgian** legal doctrine. Domestic laws do not provide an explicit statutory definition of racial origin except in the **UK**, where, according to Section 9 of the Equality Act 2010, 'Race includes (a) colour; (b) nationality; (c) ethnic or national origins'. UK law does not distinguish between national and ethnic minorities.

11 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, O J L 303, 02/12/2000, pp. 0016-0022.

12 In order to effectively promote equality and tackle discrimination in the European Union it is important to understand the effects of the EU's equal treatment and non-discrimination legislation. The European Commission therefore set up the former European Network of Legal Experts in the field of Gender Equality and the former European Network of Legal Experts in the Non-discrimination Field to support its work by providing independent information and advice on relevant developments in the Member States.

13 Racism and Discrimination in Employment in Europe, ENAR Shadow Report 2012-2013, p. 3. and Racist Crime in Europe, ENAR Shadow Report 2013-2014, p. 3.

14 Muslims in Europe: Questions and Answers, 20 February 2015, ENAR, Afrophobia in Europe, ENAR Shadow Report, 2014-2015, p. 11. The estimates on the Roma living in the EU are based on estimates provided by the Council of Europe, as recalculated by the European Court of Auditors in EU policy initiatives and financial support for Roma integration: significant progress made over the last decade, but additional efforts needed on the ground, 2016, p. 13.

15 As Olivier de Schutter reminds us in his report: de Schutter, O. (2016), *Links between migration and discrimination*, European network of legal experts in gender equality and non-discrimination, p. 9, available at http://www.equalitylaw.eu/downloads/3917-links-between-migration-and-discrimination. Eurostat data is available at http://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics.

The CJEU has established that the prohibition of *discrimination on the grounds of racial or ethnic origin* is the operative term under the RED.[16] The definition of racial discrimination contained in ICERD precedes and complements that provided under national laws transposing the RED. Significantly, in a handful of Member States CERD has noted shortcomings in domestic legislation as concerns the personal scope of the prohibition of racial discrimination. National laws are characterised by legislative omissions and the lack of judicial interpretations as to whether the definition of discrimination based on racial or ethnic origin covers that based on self-identification, assumption, perception or association with racial or ethnic origin and grounds constitutive of or related to it.

Domestic courts grapple with: (1) distinctions between racial and ethnic origin; (2) essential elements; (3) language; (4) descent; (5) 'foreignness'; and (6) a profusion of grounds. There is widespread reluctance across national courts to use these terms or to explicate their meaning. Judicial reluctance to explicitly refer to the term racism at times leads to overinclusion, at other times to underinclusion. Overinclusion opens the RED to constitutive characteristics, such as nationality marked as 'foreignness', migrant status or a foreign language. Alternatively, it is manifested in the finding of direct, rather than indirect, racial discrimination. Overinclusion occurs in three ways: (i) predominantly in countries with a history of immigration (from former colonies), (ii) mostly in countries where nationality is a specifically protected ground, and (iii) in countries with closed lists of grounds interpreted broadly. Underinclusion occurs in two ways: (i) when constitutive characteristics are separately considered, or (ii) when concealment strategies are successful. Underinclusion does not necessarily leave victims unprotected, particularly in countries with a wide or open list of grounds, but it jeopardises access to justice under the RED.

Owing to differences in domestic legislation, histories and policy responses to claims of multicultural accommodation, challenges more specific to national or regional contexts will arise. The most immediate challenge is to provide protection to racialised minorities.[17] In various respects, national case law is as or more progressive than that of the European Court of Human Rights (ECtHR) and more extensive than that of the Court of Justice of the EU (CJEU), which necessitates the intensification of judicial dialogue. The number of cases in which the latter two courts have established racial discrimination is rather low in comparison with gross national figures.

The report briefly discusses the burgeoning debate on procedural aspects that facilitate legal challenges under fundamental rights provisions, noting four interesting trends: (i) a strikingly high number of individual communications from **Denmark** submitted to the CERD; (ii) imbalance in the number of legal challenges across the diverse racial and ethnic groups, leading to the overrepresentation of the Roma; (iii) intensity of Roma rights litigation before the ECtHR as compared to other fora; and (iv) the significant role played by equality bodies in initiating referrals to the CJEU.

In order to succeed as a racial discrimination claim in regional courts, a case must from its inception be framed as such at the domestic level, but there are various ways in which the original frame can be handled, including (i) adequate judicial response, (ii) beneficial judicial response, (iii) downgrading and, (iv) deviation. The definitions and interpretations of the grounds are the key to judicial responses.

Notwithstanding the nuances highlighted in the report, the interpretations of the ECtHR, CERD and the CJEU show convergence towards a broad interpretation of the ground. CERD has a broad and well-defined understanding of the protected ground, but its general recommendations have not been taken into account by European courts, as a result of which the applicability in Europe of its conception of descent – focusing on caste, rather than (geographic) origins – cannot be forecast. Rather, both regional and domestic courts rely simply on Article 1 ICERD in order to distinguish the grounds enumerated therein.[18] In *CHEZ*, constrained by the referring court's question the CJEU conceptualised the Roma as an ethnic

16 Both in Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* and in Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*.

17 Bell, M., *Racism and equality in the European Union*, OUP, 2009, p. 23.

18 *Timishev v Russia*, Applications nos. 55762/00 and 55974/00, judgment of 13 December 2005.

group, which – as the report argues – was somewhat beside the point, given that the case turned on racial stereotyping.

The ECtHR has approached the Roma and Travellers distinctly from other racial or ethnic groups, pursuing three mutually reinforcing perspectives: (i) the necessity to accommodate minority identity as prevalent, for instance, in itinerant lifestyle; (ii) the emerging regional consensus as to vulnerability/disadvantaged status and (iii) the necessity of a chiefly historical and contextual analysis that takes into account the long-standing, collective and structural nature of discrimination in the adjudication of individual applications. The Court's compassionate attitude is seldom met with rigour in judicial interpretation, resulting instead in either a, failing to establish discrimination; b, establishing discrimination only in relation to procedural aspects; c, establishing indirect, rather than direct, discrimination; or d, non-qualifying discrimination.[19]

The contours of a Roma specific approach under EU law have also been noted.[20] The report does not share this view. It argues that the stereotype based analysis in *CHEZ* is far from over-broad, claiming instead that a focus on stereotypes and the parallel reality they create, rather than an analysis of actual racial or ethnic proportions is the key not only to adjudicating discrimination based on racial or ethnic origin, but also to the interpretation of European anti-discrimination law.

Eight cases have so far been referred to the CJEU seeking the interpretation of the RED: *Vajnai, Runevič-Vardyn*, *Feryn, Meister, Belov, Kamberaj, CHEZ* and *Jyske Finans* and these are assessed in this report.[21] Discrimination on the grounds of racial or ethnic origin was interpreted in *CHEZ* and *Feryn*, while other judgments are relevant in reaffirming the scope of protection under the directive.

Convergence between the regional courts can be observed in their reluctance to discuss or establish intentional direct racial discrimination. This fits neatly into the continental European tradition of *silence about race*, which is based on a European self-identification with anti-racism.[22] Thus, racism is discarded as irrational – an intellectual legacy of 'making sense' of the Holocaust – while alongside the 'appearance of non-whites in the European midst' triggered by decolonisation, culture, ethnicity or background come to occupy its place as social signifiers.[23] This approach is criticised as culturally racist, nonetheless the belief that racism seeks to 'maintain certain ill-begotten stereotypes' based on proxies such as a person's place of birth, while the exercise of defining race 'has become increasingly unacceptable in modern societies', and the definition of ethnic origin is not a lawyer's task holds ground even in the CJEU.[24]

As a rule, racial intent is not addressed in CJEU case law. In contrast, the ECtHR regularly deals with intent, but on the whole fails to establish intentional direct discrimination. These trends reveal a uniquely *European intent doctrine* that at times downgrades and at others deviates judicial decision making. It

19 *Nachova and Others* v *Bulgaria*, Applications Nos. 43577/98 and 43579/98, judgment of 26 February 2004; *V.C.* v *Slovakia*, App. no 18968/07, judgment of 8 November 2011; N.B. v Slovakia, App. no 29518/10, Judgment of 12 June 2012. *Yordanova and Others* v *Bulgaria*, Application no. 25446/06, judgment of 24 April 2012; Winterstein et autres c. France, requête No 27013/07, judgment of 17 October 2013. The Roma education cases: *D.H. and Others* v *The Czech Republic*, Grand Chamber judgment of 13 November 2007; *Sampanis and Others* v *Greece*, judgment of 5 June 2008; *Orsus and Others* v *Croatia*, Application no. 15766/03, Grand Chamber judgment of 16 March 2010; *Sampani and Others* v *Greece*, judgment of 11 December 2012; *Horváth and Kiss* v *Hungary*, judgment of 29 January 2013; *Lavida and Others* v *Greece*, 30 May 2013.

20 McCrudden C., "The New Architecture of EU Equality Law after CHEZ: Did the Court of Justice Reconceptualise Direct and Indirect Discrimination?" *European Equality Law Review, 2016/1*.

21 Case C-668/15, Jyske Finans AS v Ligebehandlingsnaevnet, acting on behalf of Ismar Huskic, Case C-83/14 *CHEZ Razpredelenie Bulgaria AD* v *Komisia za zashtita ot diskriminatsia*; Case C-571/10 Servet Kamberaj v Istituto per l'Edilizia sociale della provincial autonoma di Bolzano (IPES) et al; Case C-394/11 *Valeri Hariev Belov v CHEZ Elektro Balgaria AD and others*, Case C-415/10 *Galina Meister v Speech Design Carrier Systems GmbH*, Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding* v *Firma Feryn NV*, Case C-391/09 *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn* v *Vilniaus miesto savivaldybės administracija*; Case C-328/04 *Vajnai*.

22 Lentin A., Europe and the Silence about Race, European Journal of Social theory, 2008/11, pp. 494-503.

23 Ibid, p. 496. Lentin reminds the reader of the influence of Claude Levi-Strauss' book Race and History, published in 1975 on this paradigm shift.

24 Opinion of Advocate General Wahl delivered on 1 December 2016 in case C-668/15, *Jyske Finans AS v Ligebehandlingsnaevnet, acting on behalf of Ismar Huskic*, paras. 3. And 30-33.

leads to diverging results: while so far not inhibiting the CJEU's adequate judicial response, it impedes on the finding/qualifying of discrimination by the ECtHR. Divergence is notable in approaches to covert direct discrimination. Whereas the ECtHR tends to establish indirect discrimination when faced with covert discrimination, the CJEU has taken a different approach, finding direct discrimination in relation to a formally neutral rule that affects only one group.

Following the mid-1990s, when anti-discrimination jurisprudence began to grow, criticism was levelled against the Strasbourg Court for being haphazard in examining or finding discrimination.[25] External criticism has now been echoed internally. Whether owing to political sensitivities or doctrinal opacity, the ECtHR has often established indirect discrimination in cases that could or should otherwise qualify as direct racial discrimination. The inconsistencies of the *equality maxim,* as well as of the protected grounds in Strasbourg case law complicate the identification of comparators.

This report also discusses intersectionality, the dominant critical frame, that has so far focused on sex and disability. It remains doubtful as to the usefulness of intersectional analysis from the perspective of racial or ethnic origin. European multiculturalism focuses on claims of 'post-immigration groups' and seeks the accommodation of cultural identities, relying mainly on the example of European Muslims, but to a smaller extent, also of the Roma.[26] At the heart of the controversy lies legal pluralism, a collision of statutory law with social or religious laws governing private and family matters within minority groups.[27]

The RED has the potential to ensure a balanced approach to protecting traditional, as well as cultural, minorities, but there is a caveat relating to its grasp on minority rights. Challenges to hierarchy of minority status are conceivable under the RED in relation to minority quotas and access to minority institutions in the fields covered. Interestingly, neither the optional character of positive action measures under Article 5, nor the CJEU's so far restrictive approach to substantive equality (based on sex) in asymmetrical situations carry the risk of hampering the equal treatment of non-recognised or less privileged minority groups under the directive. This is because once a positive action measure is in place its discriminatory nature may be subject to review, which in turn will rely on case law apparently oblivious to asymmetries. Moreover, as long as the measures challenged continue, levelling up must be ensured.[28]

Judicial reluctance to acknowledge racial discrimination in all its forms rearranges and upsets the non-discrimination framework under the ECHR. It often downgrades or deviates claims of discrimination. Notably, however, under the surface of the ECtHR's persistent inconsistencies as well as a recurrent and inexplicable reluctance to forcefully tackle racial discrimination, there lies a rich layer of sensitivity and appreciation of the meaning of what it is to belong to a racial minority in today's Europe. Still, it is rather telling that perhaps the most significant insights into the composite nature of racial discrimination emerge in judgments limited to finding 'only' substantive violations, such as *Yordanova and Others v Bulgaria* and *de Melo*.[29]

The CJEU has so far applied a broad and purposive interpretation to racial discrimination. While a higher level of scrutiny is observed in its case law on nationality and age as compared with gender, this does not apply to racial or ethnic origin, ostensibly because cases have dealt with fields congruent with the familiar market integration rationale and have remained in the formal equality frame.[30] In contrast with

25 Summarised by Arnardóttir, O. M., *Equality and non-discrimination under the European Convention on Human Rights* (Vol. 74). Martinus Nijhoff Publishers, 2003, pp. 179-180.

26 Parekh, B., 'Equality in a multicultural society', *Citizenship studies 2.3*, 1998, pp. 397-411 and Modood, T., *Multiculturalism: A civic idea*, Polity Press, 2007, pp. 34-53.

27 Davies, M. Legal pluralism in Cane, Peter, and Herbert Kritzer, eds. *The Oxford handbook of empirical legal research*. OUP Oxford, 2012, pp. 805-828.

28 Joined Cases C-231/06 to C-233/06, National Pensions Office v Emilienne Jonkman (C-231/06), Hélène Vercheval (C-232/06), and Noëlle Permesaen (C-233/06) v National Pensions Office.

29 *Yordanova and Others v Bulgaria*, Application no. 25446/06, judgment of 24 April 2012.

30 Besson, S., 'Gender discrimination under EU and ECHR law: Never shall the twain meet', *Human Rights Law Review*, 21 October 2008, pp. 19-21.

its ancillary nature subject to a certain margin of appreciation under the ECHR, non-discrimination is a fundamental principle of EU law whose justification is narrowly confined, which may at times necessitate the levelling up of protection from discrimination available under the Convention.[31]

The critical frames cannot materialise in practice, unless courts seriously engage in understanding racism, which is as much a political and psychological hurdle as a matter of informed and logical legal analysis. In theory, both the Strasbourg Court's contextual analysis and the CJEU's purposive interpretation are capable of accommodating critical propositions, unless trumped by the lack of legislative will – as is the case with the proposed new Equal Treatment Directive.[32] The report concludes that constructionist analysis can best address the shortcomings of judicial decision making, being complementary to the dominant methods of interpretation. It is insightful not only in revealing covert discrimination, but also tracking racialisation.

The definition of racial or ethnic origin is significant in relation to positive action measures that comprise policies aimed at diminishing 'disadvantage linked to' racial or ethnic origin. In order to assess needs and plan positive action measures, states should collect ethnic data that counts racial or ethnic minorities or that can at least clarify the proportion of such minorities within target groups. Even though the intensity of the link to racial or ethnic origin under Article 5 RED is unspecified, the positive action measures are permissible only as long as their impact on minority groups is substantial. The lack of data on racial or ethnic origin sheds doubt on the adequacy of the policy measures, which in turn raises concerns as to perpetual racial discrimination, because even though positive action is permissible rather than compulsory under the RED, if it is undertaken it must comply with the test therein.

The definition of the grounds has been most widely addressed in the context of ethnic data collection. Available data is collected on the basis of constitutive or related grounds which reaffirms most forcefully the validity of the composite ground approach. The integration of racial or ethnic minorities in European societies is not measured as such. Instead, the integration of immigrants and recently of the Roma has been assessed. In order to measure (in)equality, it is as or more important to identify ascribed racial or ethnic origin as the one that is self-identified. While some argue that data collection essentialises ethnic groups or contributes to racial discrimination, others are concerned that migration, language, education levels and poverty data are not effective proxies for measuring racial discrimination.

The major difference between racial, ethnic and national minorities in data collection is that the former are not named. EU citizens 'of migrant background', 'new- or non-(majority) ethnicities' or 'allochthones' share one characteristic: they are categorised in binary opposition to the Member State's majority population. These categories are also misleading, because they lump minorities in one category without investigating whether they indeed belong together. Progressive recommendations to promote data collection based on racial or ethnic origin have not yet reverberated at the domestic or EU level. Moreover, categorization is not standardised across legal and statistical instruments.

Evidence of discrimination includes statistical evidence, as mentioned in preambular indent (15) RED, but access to statistical evidence is limited by the lack of ethnic data. The report illustrates synergies between data collection and evidentiary efforts in the French context.

31 As Advocate General Sharpston underlined in her Opinion delivered on 13 July 2016 in Case C-188/15, *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA*. Request for a preliminary ruling from the Cour de cassation (France) lodged on 24 April 2015. See, particularly paras 58-72.

32 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181}.

Résumé

En droit de l'UE, la directive relative à l'égalité raciale interdit la discrimination fondée sur la race ou l'origine ethnique sans en donner de définition.[1] Or l'interprétation large ou étroite de l'un et l'autre de ces motifs se répercute sur toute une série d'aspects allant du champ d'application matériel et de la qualification des recours à la collecte de données et aux mesures d'action positive. Le casse-tête et la complexité au niveau des définitions, de même que les synergies et les divergences entre les termes clés, appellent une clarification de chacun de ces concepts autonomes «conformément au sens habituel de celui-ci dans le langage courant, tout en tenant compte du contexte dans lequel il est utilisé et des objectifs poursuivis par la réglementation dont il fait partie».[2] S'agissant d'un contexte historique, social et politique, une investigation s'impose pour déterminer de quelle manière ces processus refaçonnent sans cesse la signification des termes juridiques.

Le présent rapport thématique intitulé «La signification de la race et de l'origine ethnique en droit de l'UE: entre stéréotypes et identités» envisage ces motifs comme une catégorie conceptuelle unique, composite et transversale aux fins de la mise en œuvre du droit européen. «Composite» signifie qu'en règle générale, la race ou l'origine ethnique est constituée de caractéristiques parfois protégées distinctement et «à part entière». L'adjectif «transversal» fait référence pour sa part aux contingences temporelles et géographiques, et porte donc plus spécifiquement sur l'évolution de la signification du terme dans le temps et dans l'espace. Si l'interrogation de sources historiques met en évidence l'*instabilité de la signification* du mot «race», elle dépeint dans le même temps le racisme comme un phénomène mondial qui, impulsé par des projets politiques délibérés, engendre une action discriminatoire souvent violente, nourrie par des préjugés ethniques.[3] L'analyse montre les divergences de trajectoire du racisme selon la localisation géographique – y compris des disparités entre la Grande-Bretagne et l'Europe continentale ainsi qu'entre l'Europe et les États-Unis. Le racisme est en soi un concept contesté, considéré à la fois comme désignant une idéologie et des pratiques intentionnelles.[4] Par ailleurs, les attitudes racistes varient selon les endroits. En Europe, la plupart des groupes visés par le racisme rejettent catégoriquement la race en tant qu'étiquette. Or la racialisation en tant que «processus attribuant des différences physiques et culturelles à des personnes et des groupes» est en plein essor.[5]

Il existe une incroyable abondance de termes et de concepts appliqués à des individus ou des groupes pouvant bénéficier d'une protection en vertu de la directive relative à l'égalité raciale. Au lieu de répertorier ou de classer les minorités comme étant nationales, ethniques, raciales, culturelles, historiques, territoriales, linguistiques, religieuses, ethno-religieuses, indigènes ou racialisées, le rapport décrit les façons de déterminer si un traitement moins favorable a été réservé en raison de la race ou de l'origine ethnique. Il se fonde sur l'analyse de *l'élaboration de la race* et de l'appropriation d'identités *racialisées* émanant de spécialistes en sciences sociales.[6]

Envisager la race en tant que construction sociale, que perception ou que stéréotype visant des groupes pose problème au plan de l'interprétation juridique. Premièrement, l'interprétation des stéréotypes et des perceptions s'avère difficile en droit du fait qu'ils visent par définition des groupes et non des personnes.

1 Directive 2000/43/CE du Conseil du 29 juin 2000 relative à la mise en œuvre du principe de l'égalité de traitement entre personnes sans distinction de race ou d'origine ethnique, JO L 180 du 19 juillet 2000.

2 Comme réitéré récemment à propos d'une «parodie» apparemment discriminatoire d'une bande dessinée dans l'affaire C-201/13, *Johan Deckmyn, Vrijheidsfonds VZW* c. *Helena Vandersteen, Christiane Vandersteen, Liliana Vandersteen, Isabelle Vandersteen, Rita Dupont, Amoras II CVOH, WPG Uitgevers België*, (ECLI:EU:C:2014:2132).

3 Bethencourt, F., *Racisms: From the Crusades to the Twentieth Century*, Princeton University press, Princeton et Oxford, 2015, p. 1-7.

4 Miles, R., *Racism as a Concept*, dans Bulmer M. & Solomos J. (Éd.) Racism, OUP, 1999, p. 345-355.

5 Barot R. et Bird J., *Racialisation: the genealogy and critique of a concept*, Ethnic and Racial Studies, vol. 24, n° 4, juillet 2001, p. 601.

6 Gellner E., *Nations and Nationalism*, Blackwell Publishing, Oxford, 2006, p. 131. Knowles C., *Theorising Race and Ethnicity: Contemporary Paradigms and Perspectives* dans Hill Collins P. & Solomos J. (Éd.), The SAGE Handbook of Race and Ethnic Studies, p. 23-42.

Deuxièmement, si les groupes visés par les perceptions et stéréotypes ne sont pas reconnus ou identifiés par un signifiant racial ou ethnique, la loi va devoir examiner les questions de reconnaissance de statut et de formation de l'identité, ce qui s'avère particulièrement problématique lorsqu'elle a vocation de traiter de recours individuels par opposition à des actions collectives – une qualification souvent réitérée en droit antidiscrimination européen.

Le statut actuel des groupes minoritaires a été façonné par des politiques impériales et nationalistes. Le domaine de la protection des minorités est fragmenté et révèle une hiérarchie interne entre groupes minoritaires en droit national, laquelle se reflète au niveau européen. Le cadre juridique institué pour les minorités religieuses, linguistiques et nationales au lendemain de la Première Guerre mondiale, ravivé par la hiérarchie fluctuante des groupes minoritaires après la chute du communisme, cadenasse les minorités reconnues susceptibles de bénéficier de droits spéciaux dans un isolement identitaire. Basé sur le principe de la réciprocité, ce cadre favorise les minorités nationales et offre de la résilience face à la fluidité des identités, aux coalitions identitaires et à la prise en compte de nouveaux groupes, tout en risquant une de confusion terminologique. Le rapport thématique affirme que la réalisation de l'objectif de la législation européenne exige que la hiérarchie soit compensée par une interprétation visant à déterminer les points communs et les synergies entre les différents groupes.

Face à une telle fragmentation, des doutes s'expriment quant à la capacité de la loi – fondée sur des concepts généralisés – d'aborder le traitement moins favorable basé sur la race ou l'origine ethnique. L'archéologie de termes juridiques atteste d'une tentative de résoudre le dilemme en combinant les aspects identitaires contestés – aspects racial, ethnique, national, linguistique, culturel et religieux notamment – avec des éléments matériels apparemment objectifs tels que l'origine, l'extraction, l'appartenance à, l'association avec et l'ascendance. Ces termes conjuguent les identités auxquelles des individus ou des communautés sont attachés, et qu'ils partagent, à des attributions et perceptions externes – certaines de ces identités pouvant être intériorisées par des minorités et devenir ainsi un élément identitaire. Les caractéristiques attribuées sont tout aussi importantes, voire davantage, que les caractéristiques auto-identifiées lorsqu'il s'agit de se prononcer dans des affaires de discrimination. Leur regroupement est discutable car s'il permet, d'une part, d'ouvrir la loi à l'examen de l'élaboration de la race et à la fluidité des identités, il l'expose d'autre part à un risque de confusion entre caractéristiques attribuées et caractéristiques minoritaires auto-identifiées.

Le rapport conclut que, dans le contexte européen, l'expression *race ou origine ethnique* s'applique en tant que «supercatégorie» plutôt qu'à la seule race ou origine ethnique. Il veut démontrer que la quête visant à établir des différences entre l'origine raciale et l'origine ethnique a été vaine et invite les juristes à s'abstenir de poursuivre dans ce sens. Cette quête a occulté le fait qu'en Europe, l'origine nationale fait partie intégrante de la catégorie composite des origines tout en générant des interprétations de l'origine raciale qui la réduisent à la couleur de peau et l'apparence physique.[7] Le rapport avertit qu'une telle vision risque de réifier la race tout en occultant l'existence du racisme à l'égard de groupes minoritaires reconnus.

«L'européanité» est un amalgame redondant et diffus d'identités nationales qui décrit l'appartenance à des communautés imaginaires dépassant ou abolissant les barrières entre les États-nations en place. Une présence véritable et historique sur le sol européen est un élément indispensable du statut de minorité nationale, bien qu'elle n'implique pas directement une ascendance européenne. Ainsi deux minorités seulement – les Juifs et les Roms – ont-elles été reconnues à ce jour et admises par conséquent dans cette catégorie privilégiée singulièrement désignée comme «l'appartenance à une tribu européenne».[8] À l'inverse, «l'extranéité» – terme qui apparaît fréquemment dans la jurisprudence nationale, désigne une origine «non européenne».[9] Le terme synonyme «(im)migrant» se situe à l'apogée d'un nationalisme

7 Barth, F., «'Introduction», Barth, F. (Éd.), *Ethnic groups and boundaries: The social organization of cultural difference*, George Allen & Unwin, Londres, 1969.
8 Mills, C. W., *The racial contract*, Cornell University Press, 1997.
9 Ibidem, p. 78-80.

et d'un racisme étroitement liés dans l'Europe d'aujourd'hui, et met en lumière le rôle central de la xénophobie dans la production de la race.[10]

L'origine raciale, l'origine ethnique et l'origine nationale sont des motifs «mutables», qui comprennent la nationalité, l'ascendance, la religion minoritaire, la langue minoritaire, la culture minoritaire et les traditions. Ces caractéristiques constituent, conjointement à la qualité d'étranger et d'immigrant, les substituts les plus fréquents de la race ou de l'origine ethnique – ce que confirme en particulier la collecte de données sur les inégalités, qui s'appuie résolument sur ces variables de remplacement. En Europe, la protection contre la discrimination fondée sur l'origine religieuse, linguistique et, ultérieurement, nationale a précédé la protection fondée sur la race ou l'origine ethnique. Il s'agit dans tous les cas de motifs justifiant un traitement préférentiel, mais l'origine nationale fait aujourd'hui l'objet d'une protection particulière au titre de la Convention-cadre pour la protection des minorités nationales (CCPMN), tandis que l'origine linguistique est promue au titre de la Charte européenne des langues régionales ou minoritaires. Ceci dit, la CCPMN ne définit pas les minorités nationales faute de consensus européen, et la Charte assure un moindre degré de protection aux minorités linguistiques que la CCPMN aux minorités nationales en laissant une certaine marge pour une moindre protection de certaines langues parmi lesquelles le romani.

Certains estiment que l'origine raciale et l'origine ethnique sont interchangeables; d'autres considèrent que l'origine raciale fait référence à des phénotypes humains tandis que l'origine ethnique ne se préoccuperait pas de la «chose culturelle» – ce qui impliquerait que sa conception recoupe celle de l'origine nationale. L'impossibilité de lutter contre les effets sournois du racisme au moyen d'un discours sans race a créé une ambivalence exacerbée en Europe continentale par l'absence générale d'identification minoritaire avec la race – ce qui fait que les demandes de reconnaissance en tant que minorité raciale restent sporadiques, périphériques, voire inexistantes. Cette situation explique en partie pourquoi – à l'exception du **Royaume-Uni** où les Noirs ont approprié la race comme le terme désignant leur lutte pour l'égalité de traitement – le droit interne des États membres de l'UE ne définit pas l'origine raciale. Proposée après la Deuxième guerre mondiale en tant que supercatégorie couvrant aussi bien la race que les minorités linguistiques, religieuses, nationales, etc., l'origine ethnique est considérée comme non entachée par les dilemmes moraux inhérents au mot en «R». Il n'empêche que la toute grande majorité des États membres ne se sont pas davantage dotés d'une définition législative de l'origine ethnique. La définition la plus largement disponible en droit interne est celle des minorités nationales.

L'expression «origine ethnique» promettait de combler les lacunes du régime des droits des minorités. Même si, à l'article premier de la Convention internationale sur l'élimination de toutes les formes de discrimination raciale, la discrimination raciale «vise toute distinction, exclusion, restriction ou préférence fondée sur la race, la couleur, l'ascendance **ou** l'origine nationale **ou** ethnique», les travaux préparatoires du Pacte relatif aux droits civils et politiques prennent pour postulat que le terme «ethnique» était le plus large dont on disposait à l'époque. C'est pourtant l'origine nationale, et non l'origine ethnique, qui figure à l'article 26 dudit Pacte, qui garantit l'égalité de traitement – l'origine ethnique apparaissant comme le terme générique regroupant diverses minorités à l'article 27. L'origine ethnique n'a pas été davantage incluse dans le texte de l'article 14 de la Convention européenne des droits de l'homme et des libertés fondamentales, qui interdit plutôt la discrimination fondée sur la race, la couleur, la langue, la religion, l'origine nationale ou sociale et l'association à une minorité nationale.

L'origine ethnique n'est pas un concept juridique organique en Europe. En **France**, elle est perçue comme équivalente à la race; ailleurs les synergies entre origine ethnique et origine raciale continuent d'être contestées. Les législations nationales abordées dans le rapport montrent que, dans la majorité des États membres, l'origine ethnique reste un concept flou. Au niveau national, la protection contre la discrimination découle de la législation transposant ou ratifiant des instruments régionaux tels que la directive relative à l'égalité raciale et la Convention européenne des droits de l'homme. Sans compter que la Convention

10 Déjà signalé dans Balibar E, *Racism and Nationalism* dans Balibar E. & Wallerstein I., Race, Nation, Class, Ambiguous Identities, Verso 1991, p. 45.

internationale sur l'élimination de toutes les formes de discrimination raciale et le Pacte relatif aux droits civils et politiques ont également été ratifiés par tous les États membres. De manière générale, les lois nationales régissant l'égalité et la non-discrimination s'appuient sur l'énumération fournie à l'article premier de la Convention internationale sur l'élimination de toutes les formes de discrimination raciale. Là où ils existent, les droits spéciaux des minorités restent très éloignés du régime antidiscrimination.

Initialement, l'UE interdisait la discrimination en rapport avec la nationalité (d'un État membre) car une égalité de traitement pour ce motif s'avérait indispensable à la création du marché unique. Se multipliant au début des années 1990, des initiatives en faveur de l'égalité raciale et de la protection contre les violences raciales sont nées au sein du Conseil de l'Europe et de «l'ancienne UE». Menées simultanément et en collaboration, ces campagnes ont engendré des changements institutionnels et législatifs. La Commission européenne contre le racisme et l'intolérance (ECRI) a été mise en place en 1994 avec pour large mandat de lutter contre le racisme et contre l'intolérance qui y est associée: sa compétence couvre donc non seulement les minorités raciales, ethniques et nationales, mais également les groupes de migrants. Les définitions figurant dans la recommandation de politique générale n° 7 sur la législation nationale pour lutter contre le racisme et la discrimination raciale de l'ECRI tient compte de la directive relative à l'égalité raciale et a influencé l'interprétation de la discrimination fondée sur la race ou l'origine ethnique par la Cour européenne des droits de l'homme.

Au niveau de l'UE, les principaux instruments juridiques traitant de la discrimination raciale sont la directive relative à l'égalité raciale et la Charte des droits fondamentaux, qui interdisent l'une et l'autre la discrimination fondée sur la race ou sur l'origine ethnique. La Charte proscrit également de manière expresse la discrimination fondée sur l'origine nationale et la couleur. La décision-cadre de l'UE sur la lutte contre certaines formes et manifestations de racisme et de xénophobie au moyen du droit pénal s'étend au motif de la religion. Lors de l'élaboration de la directive relative à l'égalité raciale, la délimitation floue entre la race et l'origine ethnique, d'une part, et la religion, d'autre part, a eu pour effet que cette dernière a été retirée du texte final: complétée des convictions, elle a été transférée vers la directive relative à l'égalité en matière d'emploi.[11]

Les sciences sociales ont opté pour les termes race et ethnicité. Les sciences politiques se sont plus récemment intéressées aux minorités culturelles d'origine non européenne. La culture désigne dans ce contexte des langues minoritaires, des pratiques religieuses et des traditions culturelles qui méritent une protection dans le cadre minoritaire (national) mais qui ne s'étendent généralement pas aux minorités culturelles. Des personnes peuvent être «racialisées» en raison de leur religiosité perçue en référence à des différences visibles au niveau de leur tenue vestimentaire. La pauvreté peut elle aussi être «racialisée» – surtout en cas de surreprésentation de minorités raciales parmi les pauvres.

Le présent rapport propose un aperçu des diverses manières dont les États membres, les juridictions nationales et les organismes de promotion de l'égalité institués en vertu de l'article 13 de la directive relative à l'égalité raciale ont abordé la délicate question de la définition.[12] Les résultats de l'Eurobaromètre spécial 437 montrent que la discrimination fondée sur l'origine ethnique continue d'être perçue en 2015 comme la plus répandue au sein de l'UE (64 %). Le Réseau européen contre le racisme (ENAR) constate pour sa part que les groupes visés par la plus forte discrimination en matière d'emploi et les plus souvent victimes de crimes haineux sont les Roms, les personnes d'ascendance africaine et les Européens noirs, les musulmans, les Juifs et les migrants.[13] Des lacunes au niveau de la collecte de données au sein

11 Directive 2000/78/CE du Conseil du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail, JO L 303 du 2.12.2000, p. 16 à 22.

12 Une action efficace pour la promotion de l'égalité et la lutte contre la discrimination dans l'Union européenne exige de comprendre les effets de la législation européenne en matière d'égalité de traitement et de non-discrimination. La Commission européenne a institué à cette fin l'ex-Réseau européen des experts juridiques dans le domaine de l'égalité des genres et le Réseau des experts juridiques en matière de non-discrimination pour étayer ses travaux en lui fournissant des informations et conseils indépendants sur les évolutions pertinentes dans les États membres.

13 *Racism and Discrimination in Employment in Europe*, Rapport alternatif d'ENAR 2012-2013, p. 3 et *Racist Crime in Europe*, Rapport alternatif d'ENAR 2013-2014, p. 3.

de l'UE font que l'importance numérique des principales communautés peut uniquement être estimée comme suit: 19 millions de musulmans, huit millions d'Européens noirs et sept millions de Roms.[14] Le rapport aborde la discrimination subie par les immigrés vivant dans l'UE sous l'angle de l'origine raciale ou ethnique, et conclut que l'absence de citoyenneté de l'UE n'entrave pas la protection conférée par la directive relative à l'égalité raciale. Il ressort de chiffres récents que 19,8 millions de ressortissants de pays tiers vivent dans l'UE – ce qui représente 4 % de sa population totale – et que 34,3 millions de personnes (6,75 %) vivant actuellement sur le territoire de l'Union sont d'origine (géographique) non européenne.[15]

Le Comité pour l'élimination de la discrimination raciale (CERD), l'ECRI et le Comité consultatif de la CCPMN ont élaboré de larges définitions de l'origine raciale et de l'origine nationale. Leurs rapports font apparaître que la définition de l'origine raciale, ethnique et nationale est inextricablement liée à la reconnaissance de ces minorités.

La majorité des lois nationales interdisent la discrimination fondée sur un large éventail de motifs ou prévoient une liste ouverte de motifs – dont beaucoup relèvent de la race ou de l'origine ethnique. On constate une fragmentation terminologique à la fois au niveau international et au niveau national. La supercatégorie des origines a été introduite lors de la récente réforme de la législation en **Finlande** et dans le Land du Brandebourg (**Allemagne**), où l'origine (les origines) englobe(nt) l'origine raciale, ethnique, nationale et/ou sociale. Le terme «origine» est également au cœur de la doctrine juridique **française** et **belge**. Les droits nationaux ne contiennent pas de définition législative explicite de l'origine raciale, hormis au **Royaume-Uni** où, selon l'article 9 de la loi de 2010 sur l'égalité, la race couvre (a) la couleur; (b) la nationalité; (c) l'origine ethnique et l'origine nationale. La législation britannique ne fait pas de distinction entre les minorités nationales et ethniques.

La CJUE a établi que l'interdiction de *discrimination fondée sur la race ou l'origine ethnique* est l'expression à utiliser en vertu de la directive relative à l'égalité raciale.[16] La définition de la discrimination raciale qui figure dans la CIEDR précède et complète celle contenue dans les lois nationales transposant la directive relative à l'égalité raciale. Il est significatif que le CERD ait constaté, dans quelques États membres, certaines lacunes dans la législation nationale pour ce qui concerne le champ d'application personnel de l'interdiction de discrimination raciale. Les législations nationales se caractérisent par des omissions législatives et un manque d'interprétations judiciaires sur le point de savoir si la définition de la discrimination fondée sur la race ou l'origine ethnique couvre celle basée sur une auto-identification, une supposition, une perception ou une association avec une race ou une origine ethnique et les motifs constitutifs ou y relatifs.

Les juridictions nationales sont aux prises avec: (1) les distinctions entre race et origine ethnique; (2) les éléments essentiels; (3) la langue; (4) l'ascendance; (5) «l'extranéité»; et (6) une profusion de motifs. On observe une réticence de l'ensemble des juridictions nationales à utiliser ces termes ou à en expliquer la signification. La réticence judiciaire de faire explicitement référence au terme «racisme» peut conduire à une sur-inclusion dans certains cas, et à une sous-inclusion dans d'autres. La première tend à ouvrir la directive relative à l'égalité raciale à des caractéristiques constitutives, telles que la nationalité désignée comme «extranéité», le statut de migrant ou une langue étrangère. La sur-inclusion peut aussi

14 *Muslims in Europe: Questions and Answers*, 20 février 2015, ENAR, *Afrophobia in Europe*, Rapport alternatif, 2014-2015, p. 11. Les estimations concernant les Roms vivant dans l'UE se fondent sur des estimations communiquées par le Conseil de l'Europe, recalculées par la Cour des comptes européenne dans son rapport spécial 2016 «Initiatives et soutien financier de l'UE en faveur de l'intégration des Roms: malgré des progrès notables ces dix dernières années, des efforts supplémentaires restent nécessaires sur le terrain», p. 13.

15 Comme Olivier de Schutter nous le rappelle dans son rapport: de Schutter, O, *Links between migration and discrimination*, Réseau européen d'experts juridiques dans le domaine de l'égalité des genres et de la non-discrimination, p. 9, disponible sur http://www.equalitylaw.eu/downloads/3917-links-between-migration-and-discrimination. Les données Eurostat sont disponibles sur http://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics.

16 Tant dans l'affaire C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding c. Firma Feryn NV* que dans l'affaire C-83/14 *CHEZ Razpredelenie Bulgaria AD c. Komisia za zashtita ot diskriminatsia*.

se manifester par le constat d'une discrimination raciale directe, plutôt qu'indirecte. La sur-inclusion survient de trois manières: (i) de façon prédominante dans les pays ayant une tradition d'immigration (en provenance d'anciennes colonies), (ii) surtout dans des pays où la nationalité est un motif spécifiquement protégé, et (iii) dans des pays dotés de listes fermées de motifs bénéficiant d'une large interprétation. La sous-inclusion survient de deux manières: (i) lorsque les caractéristiques constitutives sont envisagées séparément ou (ii) lorsque les stratégies de dissimulation réussissent. La sous-inclusion ne laisse pas nécessairement les victimes sans protection, en particulier dans les pays dotés d'une liste large ou ouverte de motifs, mais elle met en péril l'accès à la justice au titre de la directive relative à l'égalité raciale.

Des difficultés plus spécifiquement liées aux contextes régionaux et nationaux surgissent en raison de disparités au niveau de la législation interne, des traditions et des réponses stratégiques aux demandes d'aménagements multiculturels. La tâche la plus urgente consiste à assurer une protection aux minorités racialisées.[17] À divers égards, la jurisprudence nationale est aussi progressiste, voire davantage, que celle de la Cour européenne des droits de l'homme (CouEDH) et plus vaste que celle de la Cour de justice de l'UE (CJUE), ce qui appelle à une intensification du dialogue judiciaire. Le nombre d'affaires dans lesquelles ces deux Cours ont établi une discrimination raciale est effectivement assez peu élevé au regard des chiffres nationaux bruts.

Le rapport se penche brièvement sur le débat qui s'amorce à propos des aspects procéduraux facilitant les recours juridiques au titre des dispositions en matière de droits fondamentaux, et observe quatre tendances intéressantes: (i) le nombre étonnamment élevé de communications individuelles soumises au CERD en provenance du **Danemark**; (ii) un déséquilibre en termes de nombre de contestations juridiques entre les divers groupes raciaux et ethniques se traduisant par une surreprésentation des Roms; (iii) l'abondance du contentieux en matière de droits des Roms devant la CouEDH par rapport à d'autres enceintes; et (iv) le rôle majeur des organismes de promotion de l'égalité dans l'engagement de procédures auprès de la CJUE.

Pour aboutir au niveau de juridictions régionales, un recours pour discrimination raciale doit être formulé comme tel dès le départ au niveau national; il existe cependant plusieurs manières de traiter cette présentation initiale, à savoir: (i) une réponse judiciaire adéquate, (ii) une réponse judiciaire avantageuse, (iii) une requalification, et (iv) une déviation. Les définitions et interprétations des motifs sont les éléments déterminants pour les réponses judiciaires.

En dépit des nuances mises en lumière par le rapport, les interprétations de la CouEDH, du CERD et de la CJUE présentent une convergence vers une large interprétation du motif. Le CERD a une vision étendue et clairement définie du motif protégé, mais ses recommandations générales n'ont pas été prises en compte par les juridictions européennes: il en résulte que l'on ne peut s'attendre à ce que soit appliquée en Europe sa conception de l'ascendance, axée sur la caste plutôt que sur les origines (géographiques). Tant les juridictions régionales que nationales préfèrent simplement s'appuyer sur l'article premier de la CIEDR pour distinguer les motifs qui y sont énumérés.[18] Dans l'affaire *CHEZ*, limitée par la question de la juridiction de renvoi, la CJUE a conceptualisé les Roms en tant que groupe ethnique, ce qui – comme le fait valoir le rapport – était quelque peu hors sujet, étant donné que l'affaire visait les stéréotypes raciaux.

La CouEDH a opté pour une approche qui distingue les Roms et les gens du voyage d'autres groupes raciaux ou ethniques, intégrant ainsi trois dimensions qui se renforcent mutuellement: (i) la nécessité d'accepter l'identité minoritaire comme prévalant, par exemple, dans le mode de vie itinérant; (ii) l'émergence d'un consensus régional quant à la vulnérabilité/au statut défavorisé et (iii) la nécessité d'une analyse principalement historique et contextuelle prenant en compte la nature persistante, collective et structurelle de la discrimination lorsque des arrêts sont rendus dans des requêtes individuelles. L'attitude bienveillante de la Cour se répercute rarement de façon rigoureuse dans l'interprétation judiciaire, ce qui peut traduire

17 Bell, M., *Racism and equality in the European Union*, OUP, 2009, p. 23.
18 *Timishev c. Russie*, requêtes n° 55762/00 et 55974/00, arrêt du 13 décembre 2005.

à l'inverse par a) le non-établissement d'une discrimination; b) l'établissement d'une discrimination portant uniquement sur les aspects procéduraux; c) l'établissement d'une discrimination indirecte plutôt que directe; ou d) l'établissement d'une discrimination non qualifiée comme telle.[19]

Les contours d'une approche spécifique des Roms dans le cadre de la législation de l'UE semblent s'esquisser.[20] Le rapport ne partage pas cette position: il fait valoir que l'analyse fondée sur les stéréotypes dans l'affaire *CHEZ* est loin d'être trop large et qu'une focalisation sur les stéréotypes et la réalité parallèle qu'ils créent, plutôt qu'une analyse des proportions que représentent réellement les membres des minorités raciales et ethniques, s'avère déterminante non seulement pour se prononcer sur une discrimination fondée sur la race ou l'origine ethnique, mais également pour interpréter le droit européen antidiscrimination.

La CJUE a été saisie à ce jour de huit affaires portant sur l'interprétation de la directive relative à l'égalité raciale: *Vajnai, Runevič-Vardyn*, *Feryn, Meister, Belov, Kamberaj, CHEZ et Jyske Finans.* Toutes sont analysées dans le rapport.[21] Une interprétation de la discrimination fondée sur la race ou l'origine ethnique a été faite dans *CHEZ* et *Feryn*, les autres affaires étant pertinentes dans la mesure où elles réaffirment le champ d'application de la protection au titre de la directive.

La convergence entre juridictions régionales se manifeste au travers de leur réticence à examiner ou à établir une discrimination raciale directe et intentionnelle. Ce constat s'inscrit parfaitement dans une tradition continentale européenne du *silence sur la race*, qui se fonde sur une auto-identification européenne avec l'antiracisme.[22] Le racisme est donc écarté comme étant irrationnel – héritage intellectuel d'une volonté de «conférer un sens» à l'Holocauste – tandis que, parallèlement à l'apparition de non-blancs parmi les Européens par suite de la décolonisation, la culture, l'ethnicité ou «l'origine» en prennent la place en tant que signifiants sociaux.[23] Cette approche est critiquée comme étant culturellement raciste, mais la conviction que le racisme sert à «entretenir certains stéréotypes malvenus» basés sur des caractéristiques de substitution telles que le lieu de naissance alors que «le simple fait de chercher à définir la race est devenu inacceptable dans nos sociétés modernes», et qu'il n'appartient pas à un avocat de définir l'origine ethnique, reste bien ancrée, y compris à la CJUE.[24]

De façon générale, la jurisprudence de la CJUE n'aborde pas la question de l'intention raciale. En revanche, la CouEDH traite régulièrement de l'intention, mais ne conclut généralement pas à une discrimination directe délibérée. Ces tendances révèlent *une doctrine strictement européenne en matière d'intention* qui, dans certains cas, requalifie et, dans d'autres, dévie la prise de décision judiciaire. Cette situation a donné lieu à des résultats divergents: sans nuire jusqu'ici à une réponse judiciaire adéquate de la part de la CJUE, elle met un frein à la constatation/la qualification d'une discrimination par la CouEDH. La divergence se remarque dans l'approche de la discrimination directe déguisée. Alors que la CouEDH tend

19 *Nachova et autres* c. *Bulgarie*, requêtes n° 43577/98 et 43579/98, arrêt du 26 février 2004; *V.C.* c. *Slovaquie*, requête n° 18968/07, arrêt du 8 novembre 2011; *N.B.* c. Slovaquie, requête n° 29518/10, arrêt du 12 juin 2012; *Yordanova et autres* c. *Bulgarie*, requête n° 25446/06, arrêt du 24 avril 2012; *Winterstein et autres* c. *France*, requête n° 27013/07, arrêt du 17 octobre 2013. Affaires relatives à l'éducation des Roms: *D.H. et autres* c. *République tchèque*, arrêt de la Grande chambre du 13 novembre 2007; *Sampanis et autres* c. *Grèce*, arrêt du 5 juin 2008; *Orsus et autres* c. *Croatie*, requête n° 15766/03, arrêt de la Grande chambre du 16 mars 2010; *Sampani et autres* c. *Grèce*, arrêt du 11 décembre 2012; *Horváth et Kiss* c. *Hongrie*, arrêt du 29 janvier 2013; *Lavida et autres* c. *Grèce*, 30 mai 2013.

20 McCrudden C., «The New Architecture of EU Equality Law after CHEZ: Did the Court of Justice Reconceptualise Direct and Indirect Discrimination?» *European Equality Law Review, 1/2016.*

21 Affaire C-668/15, Jyske Finans AS c. Ligebehandlingsnaevnet, agissant pour Ismar Huskic; affaire C-83/14 *CHEZ Razpredelenie Bulgaria AD* c. *Komisia za zashtita ot diskriminatsia*; affaire C-394/11 *Valeri Hariev Belov c. CHEZ Elektro Balgaria AD et autres;* affaire C-415/10 *Galina Meister c. Speech Design Carrier Systems GmbH*; affaire C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding* c. *Firma Feryn NV;* affaire C-391/09 *Malgožata Runevič-Vardyn et Łukasz Paweł Wardyn* c. *Vilniaus miesto savivaldybės administracija*; affaire C-328/04 *Vajnai*.

22 Lentin A., *Europe and the Silence about Race*, European Journal of Social Theory, 2008/11, p. 494-503.

23 Ibidem, p. 496. Lentin rappelle au lecteur l'influence de l'ouvrage «Race et histoire » de Claude Levi-Strauss, publié en 1975 à propos de ce changement de paradigme.

24 Conclusions de l'avocat général présentées le 1er décembre 2016 dans l'affaire C-668/15, *Jyske Finans AS c. Ligebehandlingsnaevnet, agissant pour Huskic*, points 3 et 30 à 33.

à établir une discrimination indirecte lorsqu'elle se trouve face à une discrimination déguisée, la CJUE a opté pour une autre approche, à savoir l'établissement d'une discrimination directe par rapport à une règle formellement neutre qui affecte un seul groupe.

À partir du milieu des années 1990, lorsque la jurisprudence en matière de non-discrimination est devenue plus abondante, la Cour de Strasbourg a été critiquée pour sa façon aléatoire d'examiner et de statuer en matière de discrimination.[25] Les critiques venues de l'extérieur trouvent désormais un écho à l'intérieur. Que ce soit pour des questions de sensibilité politique ou d'opacité doctrinale, la CouEDH a souvent établi une discrimination indirecte dans des cas qui auraient pu ou auraient dû relever d'une discrimination raciale directe. Les incohérences de la *maxime de l'égalité,* de même que des motifs protégés, dans la jurisprudence de Strasbourg complique l'identification de comparateurs.

Le présent rapport examine aussi l'intersectionnalité, cadre critique prédominant focalisé jusqu'ici sur le sexe et le handicap. Il reste sceptique quant à l'utilité d'une analyse intersectionnelle sous l'angle de la race et de l'origine ethnique. Le multiculturalisme européen est principalement axé sur les requêtes de «groupes post-immigration» et vise à une adaptation des identités culturelles en s'appuyant principalement sur l'exemple des musulmans européens mais également, dans une moindre mesure, des Roms.[26] On trouve au cœur de la controverse le pluralisme juridique, là où s'entrechoquent les textes législatifs et les lois sociales ou religieuses régissant les questions privées et familiales au sein de groupes minoritaires.[27]

La directive relative à l'égalité raciale est capable d'assurer une approche équilibrée de la protection des minorités traditionnelles, de même que culturelles, mais une réserve s'impose quant à son emprise sur les droits des minorités. On peut imaginer que la hiérarchie des statuts minoritaires puisse être contestée au titre de la directive relative à l'égalité raciale en ce qui concerne les quotas des minorités et l'accès des institutions minoritaires dans les domaines concernés. Il est intéressant de noter que ni le caractère facultatif des mesures d'action positive visées à l'article 5 ni l'approche restrictive adoptée jusqu'ici par la CJUE en matière d'égalité réelle (basée sur le sexe) dans des situations asymétriques ne risquent de compromettre l'égalité de traitement de groupes minoritaires non reconnus ou moins privilégiés en vertu de la directive – ce qui s'explique du fait qu'une fois une mesure d'action positive en place, sa nature discriminatoire peut faire l'objet d'un réexamen et que ce processus s'appuiera à son tour sur une jurisprudence ignorant apparemment les asymétries. De surcroît, aussi longtemps que les mesures contestées restent d'application, un nivellement par le haut doit être assuré.[28]

La réticence judiciaire à reconnaître la discrimination raciale sous toutes ses formes remanie et perturbe le cadre antidiscrimination institué par la CEDH. Elle peut requalifier ou dévier les recours pour discrimination, Il convient d'admettre cependant qu'il existe, derrière les incohérences persistantes de la CouEDH et la réticence récurrente et inexplicable à traiter énergiquement de la problématique de la discrimination raciale, une grande sensibilité et une vive appréciation de ce que signifie l'appartenance à une minorité raciale dans l'Europe d'aujourd'hui. Il n'en reste pas moins assez révélateur que les analyses les plus importantes de la nature composite de la discrimination raciale tendent à se trouver dans des arrêts limités à la constatation de violations matérielles «seulement» (*Yordanova et autres c. Bulgarie* et *de Melo*, entre autres).[29]

La CJUE a appliqué jusqu'ici une interprétation libérale et téléologique de la discrimination raciale. Si sa jurisprudence fait apparaître un niveau d'examen plus poussé en matière de nationalité et d'âge qu'en

25 Résumé par Arnardóttir, O. M., *Equality and non-discrimination under the European Convention on Human Rights* (vol. 74). Martinus Nijhoff Publishers, 2003, p. 179-180.

26 Parekh, B., «Equality in a multicultural society», *Citizenship studies 2.3*, 1998, p. 397-411 et Modood, T., *Multiculturalism: A civic idea*, Polity Press, 2007, p. 34-53.

27 Davies, M. *Legal pluralism* dans Cane, Peter, et Herbert Kritzer, Éd. *The Oxford handbook of empirical legal research*. OUP Oxford, 2012, p. 805-828.

28 Affaires jointes C-231/06 à C-233/06, Office national des pensions c. Emilienne Jonkman (C-231/06) et Hélène Vercheval (C-232/06) et Noëlle Permesaen (C-233/06) c. Office national des pensions.

29 *Yordanova et autres c. Bulgarie*, requête n° 25446/06, arrêt du 24 avril 2012.

ce qui concerne le genre, tel n'est pas le cas de la race ou de l'origine ethnique – de toute évidence parce que les affaires ont porté sur des domaines en accord avec la logique familière de l'intégration des marchés et qu'elles ne sont pas sorties du cadre de l'égalité formelle.[30] À l'inverse de son caractère accessoire soumis à une certaine marge d'appréciation au titre de la CEDH, la non-discrimination est un principe fondamental du droit de l'UE dont la justification s'inscrit dans des limites étroites – ce qui peut occasionnellement requérir un nivellement par le haut de la protection à l'encontre de la discrimination prévue par la Convention.[31]

Les cadres critiques peuvent se matérialiser dans la pratique sans que les juridictions s'efforcent réellement de comprendre le racisme, qui relève autant de l'obstacle politique et psychologique que d'une analyse juridique éclairée et logique. Théoriquement, tant l'analyse contextuelle de la Cour de Strasbourg que l'interprétation téléologique de la CJUE peuvent intégrer des propositions critiques, à moins que ce soit – comme dans le cas de la nouvelle directive horizontale proposée[32] en matière d'égalité de traitement – le manque de volonté politique qui l'emporte. Le rapport conclut que l'analyse constructiviste est la plus apte à remédier aux lacunes des décisions judiciaires, étant complémentaire des méthodes dominantes d'interprétation. Elle s'avère judicieuse non seulement pour mettre au jour des discriminations déguisées, mais également pour traquer la racialisation.

La définition de la race ou de l'origine ethnique est importante pour les mesures d'action positive visant notamment à atténuer les désavantages liés à ces motifs. Au moment d'évaluer les besoins et de programmer ce type de mesures, les États devraient rassembler des données ethniques permettant de chiffrer les minorités raciales ou ethniques, ou à tout le moins de préciser la proportion qu'elles représentent au sein des groupes cibles. Bien que l'étroitesse du lien avec la race ou l'origine ethnique visé à l'article 5 de la directive ne soit pas précisée, les mesures d'action positive ne sont admises qu'à condition d'avoir un impact important sur les groupes minoritaires. La pénurie de données concernant la race et l'origine ethnique fait naître des doutes quant à l'adéquation des mesures stratégiques – ce qui suscite à son tour certaines préoccupations quant à la pérennité de la discrimination raciale car, même si l'action positive est admise plutôt qu'obligatoire au titre de la directive relative à l'égalité raciale, elle doit, au cas où elle est entreprise, se conformer à la condition qui y figure.

La définition des motifs a été très largement abordée dans le cadre de la collecte de données ethniques. Les données disponibles sont rassemblées sur la base de motifs constitutifs ou connexes, ce qui réaffirme avec force la validité de l'approche fondée sur des motifs composites. L'intégration des minorités raciales ou ethniques dans les sociétés européennes n'est pas mesurée en tant que telle; c'est l'intégration des émigrés, et plus récemment des Roms, qui a été évaluée. Il est tout aussi important, voire plus important, pour la mesure de l'(in)égalité, d'identifier la race ou l'origine ethnique imputée au même titre que celle que la personne concernée s'attribue elle-même. Si certains font valoir que la collecte de données essentialise les groupes ethniques ou contribue à la discrimination raciale, d'autres s'inquiètent de ce que les données relatives à la migration, à la langue, au niveau d'instruction et à la pauvreté ne soient pas des variables de remplacement valables pour mesurer la discrimination raciale.

La grande différence entre les minorités raciales, ethniques et nationales en termes de collecte de données est le fait que les premières ne sont pas nommées. Les citoyens de l'UE «issus de l'immigration», les «ethnicités nouvelles ou non-ethnicités (majoritaires)» ou les «allochtones» ont une caractéristique commune: ils sont catégorisés en opposition binaire avec la population majoritaire des États membres. Ces catégories sont également trompeuses dans la mesure où elles regroupent les minorités dans une

30 Besson, S., «Gender discrimination under EU and ECHR law: Never shall the twain meet», *Human Rights Law Review*, 21 octobre 2008, p. 19-21.

31 Comme le souligne l'Avocat général Mme Sharpston dans les conclusions qu'elle a prononcées le 13 juillet 2016 dans l'affaire C-188/15, *Asma Bougnaoui & Association de défense des droits de l'homme (ADDH) c. Micropole SA*. Demande de décision préjudicielle formée par la Cour de cassation (France) le 24 avril 2015. Voir en particulier les points 58 à 72.

32 Proposition de directive du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de religion ou de convictions, de handicap, d'âge ou d'orientation sexuelle {SEC(2008) 2180} {SEC(2008) 2181}.

même catégorie sans se demander si elles vont réellement ensemble. Les recommandations progressistes visant à promouvoir une collecte de données fondée sur la race ou l'origine ethnique n'ont pas encore trouvé d'écho au niveau national ou européen. La catégorisation n'est en outre pas harmonisée entre les différents instruments juridiques et statistiques.

La preuve de l'existence d'une discrimination inclut des données statistiques probantes, comme le prévoit le quinzième considérant de la directive relative à l'égalité raciale, mais l'accès aux preuves statistiques se trouve limité par la pénurie de données ethniques. Le rapport illustre les synergies entre collecte de données et recherche de preuves dans le contexte français.

Zusammenfassung

Im Unionsrecht verbietet die Antirassismusrichtlinie (ARR) Diskriminierung aus Gründen der „Rasse“ oder der ethnischen Herkunft, ohne diese zu definieren.[1] Die weite oder enge Auslegung dieser Gründe wirkt sich jedoch in vielen Bereichen – vom sachlichen Geltungsbereich über die Einstufung von Klagen bis hin zu Datenerhebung und positiven Maßnahmen – aus. Definitorische Rätsel und Komplexitäten, Synergien und Unterschiede zwischen den zentralen Begriffen warten darauf, dass jeder dieser autonomen Begriffe „entsprechend seinem Sinn nach dem gewöhnlichen Sprachgebrauch [bestimmt wird], wobei zu berücksichtigen ist, in welchem Zusammenhang er verwendet wird und welche Ziele mit der Regelung verfolgt werden, zu der er gehört“.[2] Dieser Zusammenhang ist historisch, sozial und politisch, was es erforderlich macht zu untersuchen, wie die Bedeutung von Rechtsbegriffen durch diese Prozesse kontinuierlich verändert wird.

Der vorliegende Bericht „Die Bedeutung von ‚Rasse‘ oder ethnischer Herkunft im Unionsrecht: zwischen Stereotypen und Identitäten“ begreift diese Gründe als eine einheitliche, zusammengesetzte und transversale konzeptionelle Kategorie zum Zweck der Umsetzung des europäischen Rechts. Zusammengesetzt bedeutet, dass „Rasse“ und ethnische Herkunft in der Regel konstitutive Merkmale umfassen, die bisweilen separat „aus eigenem Recht“ geschützt sind. Transversal bezieht sich auf zeitliche und geografische Kontingenz, spricht also die Veränderung der Begriffsbedeutungen im zeitlichen und räumlichen Verlauf an. Die Befragung historischer Quellen macht die *instabile Bedeutung* des Begriffs „Rasse“ deutlich, zeigt Rassismus jedoch gleichzeitig als globales Phänomen, das durch gezielte politische Projekte hervorgerufen wird und zu häufig gewaltsamen diskriminierenden Handlungen führt, die durch ethnische Vorurteile befeuert werden.[3] Sie zeigt Abweichungen in den Verläufen von Rassismus an verschiedenen geografischen Standorten – unter anderem zwischen Großbritannien und Kontinentaleuropa sowie zwischen Europa und den Vereinigten Staaten. Rassismus selbst ist ein umstrittener Begriff, der sowohl eine Ideologie als auch gezielte Vorgehensweisen bezeichnet.[4] Andererseits sind rassistische Einstellungen von Ort zu Ort unterschiedlich. In Europa lehnen die meisten Gruppen, die von Rassismus betroffen sind, „Rasse“ als Unterscheidungsmerkmal kategorisch ab. Rassifizierung als „ein Prozess, der Individuen und Gruppen physische und kulturelle Unterschiede zuschreibt“,[5] greift jedoch immer mehr um sich.

Die Zahl der Begriffe und Konzepte, die auf Personen und Gruppen angewendet werden, die nach der ARR schutzfähig sind, ist enorm. Der Bericht katalogisiert bzw. klassifiziert Minderheiten nicht als national, ethnisch, „rassisch“, kulturell, historisch, territorial, sprachlich, religiös, ethno-religiös, indigen oder *rassifiziert*, sondern beschreibt, welche Möglichkeiten es gibt, um festzustellen, dass eine weniger günstige Behandlung aus Gründen der „Rasse“ oder der ethnischen Herkunft stattgefunden hat. Er stützt sich auf die sozialwissenschaftliche Analyse des „*Race-making*“ und der Aneignung *rassifizierter* Identitäten.[6]

Das Verständnis von „Rasse“ als einem sozialen Konstrukt, einer Wahrnehmung oder einem Stereotyp, das bzw. die sich gegen Gruppen richtet, schafft Probleme in der Rechtsauslegung. Erstens sind Stereotype und Wahrnehmungen rechtlich schwer auszulegen, gerade weil sie sich *per definitionem* auf Gruppen und nicht

1 Richtlinie 2000/43/EG des Rates vom 29. Juni 2000 zur Anwendung des Gleichbehandlungsgrundsatzes ohne Unterschied der Rasse oder der ethnischen Herkunft, ABl. L 180 vom 19. Juli 2000.

2 Wie unlängst in Bezug auf eine scheinbar „ironische“ diskriminierende Reproduktion einer Karikatur in der Rechtssache C–201/13, *Johan Deckmyn, Vrijheidsfonds VZW* gegen *Helena Vandersteen, Christiane Vandersteen, Liliana Vandersteen, Isabelle Vandersteen, Rita Dupont, Amoras II CVOH, WPG Uitgevers België*, ECLI:EU:C:2014:2132, festgestellt wurde.

3 Bethencourt, F., *Racisms: From the Crusades to the Twentieth Century*, Princeton University Press, Princeton und Oxford, 2015, S. 1-7.

4 Miles, R., „Racism as a Concept“, in Bulmer, M., und Solomos, J., (Hrsg.), *Racism*, OUP, 1999, S. 345-355.

5 Barot R. und Bird J., „Racialisation: the genealogy and critique of a concept“, *Ethnic and Racial Studies*, Bd. 24 Nr. 4, Juli 2001, S. 601.

6 Gellner E., *Nations and Nationalism*, Blackwell Publishing, Oxford, 2006, S. 131. Knowles C., „Theorising Race and Ethnicity: Contemporary Paradigms and Perspectives“, in Hill Collins P. and Solomos J. (Hrsg.), *The SAGE Handbook of Race and Ethnic Studies*, S. 23-42.

auf Individuen beziehen. Zweitens: Wenn die Gruppen, auf die solche Wahrnehmungen und Stereotype abzielen, nicht anerkannt werden oder sich mit „rassischen" bzw. ethnischen Signifikanten nicht identifizieren, wird sich das Recht mit Statusanerkennung und Identitätsbildung auseinandersetzen müssen, was vor allem dann problematisch ist, wenn es darauf ausgerichtet ist, Einzelklagen statt Sammelklagen zu behandeln – eine häufig wiederholte Beschreibung des europäischen Antidiskriminierungsrechts.

Der derzeitige Status von Minderheitengruppen ist von imperialen und nationalistischen Politiken geprägt. Das Gebiet des Minderheitenschutzes ist fragmentiert und im nationalen Recht durch eine interne Hierarchie zwischen Minderheitengruppen gekennzeichnet, die sich auf europäischer Ebene widerspiegelt. Der rechtliche Rahmen, der nach dem Ersten Weltkrieg für religiöse, sprachliche und nationale Minderheiten geschaffen und vor dem Hintergrund sich verändernder Hierarchien zwischen Minderheitengruppen nach dem Zusammenbruch des Kommunismus wieder belebt wurde, steckt anerkannte Minderheiten, die spezielle Rechtsansprüche haben, in „Identitätsquarantänen". Da er auf dem Grundsatz der Gegenseitigkeit basiert, begünstigt er nationale Minderheiten und ist unempfindlich für die Fluidität von Identitäten, für Zusammenschlüsse von Minderheiten, die Berücksichtigung neuer Gruppen, birgt dabei gleichzeitig die Gefahr begrifflicher Verwirrung. Um den Zweck der europäischen Gesetzgebung zu verwirklichen, muss Hierarchie durch eine Auslegung kompensiert werden, die sich darum bemüht, Gemeinsamkeiten und Synergien zwischen verschiedenen Gruppen herauszuarbeiten.

Angesichts der herrschenden Fragmentierung ist es zweifelhaft, ob das – auf verallgemeinerten Konzepten basierende – Recht über die Mittel verfügt, um gegen nachteilige Behandlung aufgrund von „Rasse" oder ethnischer Herkunft vorzugehen. Die Entwicklung der Rechtsbegriffe zeugt von dem Versuch, das Dilemma dadurch zu lösen, dass die umstrittenen Identitätsfacetten „rassisch", ethnisch, national, sprachlich, kulturell, religiös usw. mit scheinbar objektiven sachlichen Elementen wie Herkunft, Abstammung, Mitgliedschaft in, Assoziierung mit usw. kombiniert wurden. Diese Begriffe verknüpfen Identitäten, die Individuen und Gemeinschaften haben und teilen, mit externen Zuschreibungen und Wahrnehmungen – von denen manche von Minderheiten verinnerlicht und damit zu einem Element ihrer Identität werden können. Zuschreibungen sind für die Rechtsprechung in Diskriminierungsfällen genauso relevant oder relevanter als selbst identifizierte Merkmale. Sie zu bündeln ist umstritten: Einerseits wird das Recht dadurch zwar dafür geöffnet, „Race-making" und die Fluidität von Identitäten zu untersuchen, andererseits macht es das Recht aber auch dafür empfänglich, Zuschreibungen mit selbst identifizierten Minderheitsmerkmale zu verwechseln.

Der Bericht kommt zu dem Ergebnis, dass im europäischen Kontext der Ausdruck *„Rasse" oder ethnische Herkunft* – anstatt nur „Rasse" oder Ethnie – als „Superkategorie" verwendet werden sollte. Er begründet dies damit, dass das Bestreben, Unterschiede zwischen „Rasse" und ethnischer Herkunft zu ermitteln, vergeblich war, und fordert die Rechtsexpertinnen und Rechtsexperten auf, dementsprechende Bemühungen nicht weiter zu verfolgen. Dieses Bestreben hat die Tatsache überschattet, dass nationale Herkunft in Europa fester Bestandteil der zusammengesetzten Herkunftskategorie ist, und gleichzeitig Auslegungen hervorgebracht, denen zufolge „Rasse" auf Hautfarbe und äußere Erscheinung reduziert werden kann.[7] Diese Sichtweise, so der Bericht, birgt die Gefahr, „Rasse" zu reifizieren und gleichzeitig Rassismus gegenüber anerkannten Minderheitengruppen zu verdecken.

„Europäizität" ist ein sich überlappendes und diffuses Konglomerat nationaler Identitäten, die die Mitgliedschaft in imaginären Gemeinschaften beschreiben, die über die Grenzen der jeweiligen Nationalstaaten hinausreichen oder diese einreißen. Eine echte, historische Präsenz auf europäischem Boden ist ein unverzichtbares Element des Status einer nationalen Minderheit, bedeutet aber nicht direkt europäische Herkunft. Bislang wurden nur zwei Minderheiten – Juden und Roma – in dieser privilegierten Kategorie, kritisch bezeichnet als „Mitgliedschaft im europäischen Stamm", anerkannt und in diese

7 Barth, F., „Introduction", Barth, F. (Hrsg.), *Ethnic groups and boundaries: The social organization of cultural difference*, George Allen & Unwin, London, 1969.

aufgenommen.[8] „Ausländisch-Sein", ein in der nationalen Rechtsprechung häufig verwendeter Begriff, bedeutet dagegen „außereuropäische" Herkunft.[9] Der synonyme Begriff „Migrant/Immigrant" steht an der Spitze eines engen Geflechts aus Nationalismus und Rassismus im heutigen Europa und wirft ein Licht auf die zentrale Rolle von Fremdenfeindlichkeit bei der Erzeugung von „Rasse".[10]

„Rasse", ethnische Herkunft und nationale Herkunft sind veränderliche Gründe, die Nationalität, Hautfarbe, Abstammung, Minderheitsreligion, Minderheitensprache, Minderheitenkultur und -traditionen umfassen. Zusammen mit ausländisch und Immigrant sind diese Merkmale die häufigsten Indikatoren für „Rasse" oder ethnische Herkunft – am deutlichsten erkennbar im Kontext der Datenerhebung zu Ungleichheiten, die eindeutig auf diesen Indikatoren beruht. In Europa ging der Schutz vor Diskriminierung aus Gründen der religiösen, sprachlichen und später auch nationalen Herkunft dem Schutz aus Gründen der „Rasse" oder der ethnischen Herkunft voraus. Obgleich alle als Grund für bevorzugte Behandlung dienen können, wird heute nationale Herkunft nach dem Rahmenübereinkommen zum Schutz nationaler Minderheiten (FCNM) gesondert geschützt und wird sprachliche Herkunft im Rahmen der Europäischen Charta der Regional- und Minderheitensprachen gefördert. Allerdings werden im FCNM, aufgrund mangelnden europäischen Konsenses, nationale Minderheiten nicht definiert und sieht die Charta für sprachliche Minderheiten ein niedrigeres Schutzniveau vor als das FCNM für nationale Minderheiten, da es für bestimmte Sprachen, z. B. für Romanes, einen geringeren Schutz zulässt.

Manche halten „Rasse" und ethnische Herkunft für austauschbar. Andere glauben, „Rasse" beziehe sich auf menschliche Phänotypen, bei ethnischer Herkunft gehe es dagegen um „Kulturelles" – dann überschneidet sich ihre Bedeutung aber mit der der nationalen Herkunft. Die Unmöglichkeit, die schwerwiegenden Folgen von Rassismus mit einem „rassefreien" Diskurs zu bekämpfen, hat zu einer Ambivalenz geführt, die in Kontinentaleuropa durch die insgesamt mangelnde Identifizierung von Minderheiten mit „Rasse" noch verschärft wird, weshalb Forderungen nach Anerkennung als „rassische" Minderheit vereinzelt auftreten, nebensächlich sind oder nicht existieren. Dies erklärt zum Teil, warum – mit Ausnahme des **Vereinigten Königreichs**, wo Schwarze seit den 1960er Jahren sich „Rasse" als einen Begriff angeeignet haben, der ihre Kämpfe für Gleichbehandlung kennzeichnet – „Rasse" im nationalen Recht der EU-Mitgliedstaaten nicht definiert wird. Ethnische Herkunft, die nach dem Zweiten Weltkrieg als eine Superkategorie vorgeschlagen wurde, die sowohl „Rasse" als auch sprachliche, religiöse, nationale und andere Minderheiten umfasst, gilt als unbeeinträchtigt von den moralischen Dilemmas, die mit dem R-Wort verbunden sind. Die überwältigende Mehrzahl der Mitgliedstaaten verfügt jedoch über keine gesetzliche Definition von ethnischer Herkunft. Die am weitesten verbreitete Definition in innerstaatlichen Rechtsvorschriften ist die von nationalen Minderheiten.

Der Begriff „ethnische Herkunft" versprach, Lücken im System der Minderheitenrechte zu schließen. Obgleich der Begriff „Rassendiskriminierung" in Artikel 1 des Internationalen Übereinkommens zur Beseitigung jeder Form von Rassendiskriminierung (ICERD) offenkundig Unterscheidungen aus Gründen der „Rasse", der Hautfarbe, der Abstammung, der nationalen **oder** der ethnischen Herkunft erfasst, postulieren die Vorarbeiten des Internationalen Paktes über bürgerliche und politische Rechte (ICCPR), dass „ethnisch" zum damaligen Zeitpunkt der am weitesten gefasste Begriff sei. Allerdings enthält Artikel 26 ICCPR, der Gleichbehandlung gewährleistet, nicht ethnische, sondern nationale Herkunft und ist ethnische Herkunft der Überbegriff, der in Artikel 27 verschiedene Minderheiten vereint. Ethnische Herkunft wurde auch nicht in Artikel 14 der Europäischen Konvention zum Schutz der Menschenrechte und Grundfreiheiten (EMRK) aufgenommen, der stattdessen Diskriminierung wegen der „Rasse", der Hautfarbe, der Sprache, der Religion, der nationalen oder sozialen Herkunft sowie der Zugehörigkeit zu einer nationalen Minderheit verbietet.

8 Mills, C. W., *The racial contract*, Cornell University Press, 1997.
9 Ebd., S. 78-80.
10 Vgl. Balibar, E., „Racism and Nationalism", in Balibar, E. und Wallerstein, I., *Race, Nation, Class, Ambiguous Identities*, Verso 1991, S. 45.

Ethnische Herkunft ist kein organischer Rechtsbegriff in Europa. In **Frankreich** gilt sie als gleichbedeutend mit „Rasse", in anderen Ländern sind Synergien zwischen ethnischer Herkunft und „Rasse" nach wie vor umstritten. Die innerstaatlichen Rechtsvorschriften, die in dem Bericht untersucht werden, zeigen, dass ethnische Herkunft in den meisten Mitgliedstaaten noch immer ein amorphes Konzept ist. Auf nationaler Ebene basiert der Schutz vor Diskriminierung auf Rechtsvorschriften, mit denen regionale Instrumente wie zum Beispiel die ARR und die EMRK umgesetzt oder ratifiziert wurden. Darüber hinaus wurden auch das ICERD und der ICCPR von allen Mitgliedstaaten ratifiziert. Nationale Rechtsvorschriften zum Thema Gleichheit und Nichtdiskriminierung stützen sich in der Regel auf die in Artikel 1 ICERD enthaltene Liste. Wo spezielle Minderheitenrechte existieren, sind sie vom Antidiskriminierungssystem getrennt.

Ursprünglich untersagte die Europäische Union Diskriminierung im Zusammenhang mit der Staatsangehörigkeit (eines Mitgliedstaats), weil eine diesbezügliche Gleichbehandlung für die Verwirklichung des Binnenmarkts von wesentlicher Bedeutung war. Im Europarat und in der „alten EU" entstanden Initiativen zugunsten der Rassengleichheit und zum Schutz vor rassistischer Gewalt, die in den frühen 1990er Jahren an Intensität zunahmen. Diese gemeinsamen und gleichzeitigen Kampagnen zogen institutionelle und rechtliche Veränderungen nach sich. 1994 wurde die Europäische Kommission gegen Rassismus und Intoleranz (ECRI) eingerichtet und mit einem umfassenden Mandat zur Bekämpfung von Rassismus und damit verbundener Intoleranz ausgestattet; in ihren Zuständigkeitsbereich fielen nicht nur „rassische", ethnische und nationale Minderheiten, sondern auch Migrantengruppen. Die Begriffsbestimmungen in der Allgemeinen Politischen Empfehlung Nr. 7 der ECRI über nationale Gesetzgebung zur Bekämpfung von Rassismus und Rassendiskriminierung berücksichtigen die ARR und hatten Auswirkungen auf die Auslegung des EGMR von Diskriminierung aus Gründen der „Rasse" oder der ethnischen Herkunft.

Die wichtigsten Rechtsinstrumente betreffend Rassendiskriminierung auf EU-Ebene sind die ARR und die EU-Grundrechtecharta, die beide Diskriminierung aus Gründen der „Rasse" oder der ethnischen Herkunft verbieten. Die Charta enthält darüber hinaus ein ausdrückliches Verbot von Diskriminierung aus Gründen der Staatsangehörigkeit und der Hautfarbe. Der EU-Rahmenbeschluss zur strafrechtlichen Bekämpfung von Rassismus und Fremdenfeindlichkeit bezieht Religion als Grund mit ein. Bei der Ausarbeitung der ARR führte die unklare Abgrenzung zwischen „Rasse" oder ethnischer Herkunft einerseits und Religion andererseits dazu, dass letztere aus der endgültigen Fassung herausgenommen wurde. Religion wechselte – zusammen mit Weltanschauung – in die Rahmenrichtlinie Beschäftigung.[11]

Die Sozialwissenschaft hat sich auf die Begriffe „Rasse" und „Ethnie" geeinigt. Die Politikwissenschaft hat sich in jüngerer Zeit mit kulturellen Minderheiten außereuropäischer Herkunft beschäftigt. Kultur bezieht sich in diesem Zusammenhang auf Minderheitensprachen, religiöse Praktiken und kulturelle Traditionen, die im (nationalen) Minderheitenkontext schützenswert sind, sich in der Regel aber nicht auf kulturelle Minderheiten erstrecken. Menschen können aufgrund sichtbarer Unterschiede in ihrer Kleidung wegen ihrer perzipierten Religiosität rassifiziert werden. Auch Armut kann rassifiziert werden – vor allem, wenn „rassische" Minderheiten unter den Armen überrepräsentiert sind.

Der Bericht liefert einen Überblick darüber, wie die Mitgliedstaaten, nationalen Gerichte und die nach Maßgabe von Artikel 13 ARR geschaffenen Gleichbehandlungsstellen mit der heiklen Frage der Definition umgegangen sind.[12] Dem Eurobarometer Spezial 437 zufolge galt Diskriminierung aufgrund der ethnischen Herkunft 2015 in der EU noch immer als die häufigste Form von Diskriminierung (64 %). Das Europäische Netzwerk gegen Rassismus (ENAR) stellt fest, dass Roma, Menschen afrikanischer Abstammung und

11 Richtlinie 2000/78/EG des Rates vom 27. November 2000 zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf, ABl. L 303, 02.12.2000, S. 0016-002.

12 Um in der Europäischen Union Gleichstellung wirksam zu fördern und Diskriminierung zu bekämpfen, ist es wichtig, die Auswirkungen der Gleichbehandlungs- und Nichtdiskriminierungsvorschriften der EU zu verstehen. Aus diesem Grund hat die Europäische Kommission das ehemalige Netzwerk von Rechtsexpertinnen und Rechtsexperten für Geschlechtergleichstellung und das Netzwerk für Nichtdiskriminierung eingerichtet, die die Arbeit der Kommission unterstützen, indem sie sie über relevante Entwicklungen in den Mitgliedstaaten unabhängig informieren und beraten.

schwarze Europäer, Muslime, Juden und Migranten in Europa die Gruppen sind, die am stärksten von Diskriminierung im Beschäftigungsbereich und von Hassverbrechen betroffen sind.[13] Aufgrund von Defiziten bei der Datenerhebung in der EU kann die Zahl der größten Communities nur wie folgt geschätzt werden: 19 Millionen europäische Muslime, acht Millionen schwarze Europäer und sieben Millionen Roma.[14] Der Bericht untersucht, inwieweit in der EU lebende Migrantinnen und Migranten aus Gründen der „Rasse" oder der ethnischen Herkunft Diskriminierungen ausgesetzt sind, und kommt zu dem Ergebnis, dass die fehlende Unionsbürgerschaft den von der ARR gewährten Schutz nicht beeinträchtigt. Jüngsten Zahlen zufolge leben in der EU derzeit 19,8 Millionen Drittstaatsangehörige – rund 4 % der Gesamtbevölkerung – und 34,3 Millionen Menschen (6,75 %) nicht-europäischer (geografischer) Herkunft.[15]

Der Ausschuss zur Beseitigung der Rassendiskriminierung (CERD), die ECRI und der beratende Ausschuss zum FCNM haben jeweils weit gefasste Definitionen von „Rasse" und nationaler Herkunft erarbeitet. Aus ihren Berichten geht hervor, dass die Definition von „Rasse", ethnischer Herkunft und nationaler Herkunft untrennbar mit der Anerkennung dieser Minderheiten verbunden ist.

Die meisten nationalen Rechtsvorschriften verbieten Diskriminierung aus einer Vielzahl von Gründen oder enthalten eine offene Liste von Gründen, von denen viele konstitutive Merkmale von „Rasse" oder ethnischer Herkunft sind. Terminologische Fragmentierung existiert sowohl auf internationaler als auch auf nationaler Ebene. Herkunft als Superkategorie wurde im Rahmen der jüngsten Reformen der Antidiskriminierungsvorschriften in **Finnland** und Brandenburg (**Deutschland**) eingeführt, wo damit „Rasse", ethnische, nationale und soziale Herkunft erfasst werden. Auch in der **französischen** und **belgischen** Rechtslehre spielt der Begriff „Herkunft" eine zentrale Rolle. Nationale Rechtsvorschriften enthalten keine ausdrückliche Definition von „rassischer Herkunft", außer im **Vereinigten Königreich**, wo es in Artikel 9 des *Equality Act 2010* heißt: „Rasse umfasst (a) Hautfarbe, b) Staatsangehörigkeit, c) ethnische oder nationale Herkunft". Das britische Recht unterscheidet nicht zwischen nationalen und ethnischen Minderheiten.

Der EuGH hat festgestellt, dass das Verbot der *Diskriminierung aufgrund der „Rasse" oder der ethnischen Herkunft* der operative Begriff der ARR ist.[16] Die im ICERD enthaltene Definition von Rassendiskriminierung geht der in den einzelstaatlichen Rechtsvorschriften zur Umsetzung der ARR enthaltenen vor und ergänzt diese. Bezeichnenderweise hat der Ausschuss zur Beseitigung der Rassendiskriminierung (CERD), was den persönlichen Geltungsbereich des Verbots der Rassendiskriminierung betrifft, in einer Handvoll Mitgliedstaaten Defizite in den nationalen Rechtsvorschriften festgestellt. Die nationalen Rechtsvorschriften sind gekennzeichnet von gesetzgeberischen Lücken und dem Mangel an gerichtlichen Auslegungen der Frage, ob die Definition von Diskriminierung aus Gründen der „Rasse" oder der ethnischen Herkunft auch Diskriminierung aufgrund von Selbstidentifizierung, Vermutung, Wahrnehmung oder Assoziierung mit „Rasse" oder ethnischer Herkunft sowie aus Gründen erfasst, die für diese konstitutiv oder mit dieser verwandt sind.

Nationale Gerichte befassen sich mit: (1) Unterscheidungen zwischen „Rasse" und ethnischer Herkunft, (2) wesentlichen Elementen, (3) Sprache, (4) Abstammung, (5) „Ausländisch-Sein" und (6) einer Vielzahl

13 *Racism and Discrimination in Employment in Europe*, ENAR Schattenbericht 2012-2013, S. 3, und *Racist Crime in Europe*, ENAR Schattenbericht 2013-2014, S. 3.

14 *Muslims in Europe: Questions and Answers*, 20. Februar 2015, ENAR, *Afrophobia in Europe*, ENAR Schattenbericht 2014-2015, S. 11. Die Schätzungen über die Zahl der Roma, die in der EU leben, basieren auf Schätzungen des Europarats nach Neuberechnungen des Europäischen Rechnungshofs im Zusammenhang mit politischen Initiativen und finanziellen Unterstützungsmaßnahmen der EU zur Integration der Roma: In den letzten zehn Jahren wurden erhebliche Fortschritte erzielt, es sind aber zusätzliche Anstrengungen vor Ort erforderlich, 2016, S. 13.

15 Vgl. Olivier de Schutter in seinem Bericht: de Schutter, O, *Links between migration and discrimination*, Europäisches Netzwerk von Rechtsexpertinnen und Rechtsexperten für Geschlechtergleichstellung und Nichtdiskriminierung, S. 9, abrufbar unter http://www.equalitylaw.eu/downloads/3917-links-between-migration-and-discrimination. Eurostat-Daten sind abrufbar unter http://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics.

16 Sowohl in der Rechtssache C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding gegen Firma Feryn NV* als auch in der Rechtssache C-83/14, *CHEZ Razpredelenie Bulgaria AD gegen Komisia za zashtita ot diskriminatsia*.

von Gründen. Wenn es darum geht, diese Begriffe zu verwenden oder ihre Bedeutung zu erklären, sind diese Gerichte sehr zurückhaltend. Die Zurückhaltung der Gerichte, ausdrücklich den Begriff „Rassismus" zu verwenden, führt manchmal zu Überinklusion, andere Male zu Unterinklusion. Überinklusion öffnet die ARR für konstitutive Merkmale, z. B. für – als „Ausländisch-Sein" bezeichnete – Nationalität, Migrantenstatus oder Fremdsprache. Alternativ manifestiert sie sich darin, dass statt mittelbarer unmittelbare Rassendiskriminierung festgestellt wird. Überinklusion findet auf dreierlei Arten statt: (i) vorwiegend in Ländern, die Erfahrung mit Einwanderung (aus ehemaligen Kolonien) haben, (ii) vor allem in Ländern, in denen Nationalität ein besonders geschützter Grund ist, und (iii) in Ländern mit abschließenden Aufzählungen von Gründen, die weit ausgelegt werden. Unterinklusion findet auf zweierlei Arten statt: (i) wenn konstitutive Merkmale getrennt voneinander betrachtet werden oder (ii) wenn Verschleierungsstrategien erfolgreich sind. Unterinklusion hat nicht zwangsläufig zur Folge, dass Betroffene unzureichend geschützt sind, vor allem in Ländern mit umfangreichen oder offenen Listen von Gründen; sie gefährdet aber den Zugang zur Justiz im Rahmen der ARR.

Aufgrund von Unterschieden in den nationalen Rechtsvorschriften, geschichtlichen Entwicklungen und politischen Antworten auf Forderungen nach multikulturellem Ausgleich werden in den nationalen bzw. regionalen Kontexten spezifischere Herausforderungen entstehen. Die unmittelbarste Herausforderung besteht darin, rassifizierten Minderheiten Schutz zu gewährleisten.[17] In vielerlei Hinsicht ist die nationale Rechtsprechung genauso fortschrittlich wie oder fortschrittlicher als die des Europäischen Gerichtshofs für Menschenrechte (EGMR) und umfangreicher als die des Gerichtshofs der Europäischen Union (EuGH), was eine Intensivierung des justiziellen Dialogs erforderlich macht. Im Vergleich zu den Gesamtzahlen der Mitgliedstaaten ist die Zahl der Fälle, in denen der EGMR und der EuGH Rassendiskriminierung festgestellt haben, eher gering.

Der Bericht beschäftigt sich kurz mit der zunehmenden Debatte über verfahrensrechtliche Aspekte, die rechtliche Schritte auf der Grundlage von Grundrechtsbestimmungen erleichtern, und stellt dabei vier interessante Entwicklungen fest: (i) eine auffallend hohe Zahl von Einzelfällen aus **Dänemark**, die dem CERD vorgelegt wurden, (ii) Ungleichgewicht zwischen den verschiedenen „rassischen" und ethnischen Gruppen hinsichtlich der Zahl der Rechtsstreite, mit einer Überrepräsentation der Roma, (iii) Intensität der Auseinandersetzungen um Roma-Rechte vor dem EGMR im Vergleich zu anderen Foren und (iv) die wichtige Rolle, die Gleichbehandlungsstellen bei der Initiierung von Klagen vor dem EuGH spielen.

Um als Klage wegen Rassendiskriminierung vor regionalen Gerichten erfolgreich zu sein, muss ein Fall von Anfang an auf der nationalen Ebene entsprechend ausgestaltet sein, aber es gibt verschiedene Möglichkeiten, wie mit der ursprünglichen Klage umgegangen werden kann: (i) angemessene gerichtliche Reaktion, (ii) vorteilhafte gerichtliche Reaktion, (iii) Herabstufung und (iv) Unterlaufung. Die Definitionen und Auslegungen der Gründe sind für die gerichtlichen Reaktionen entscheidend.

Ungeachtet der im Bericht beschriebenen kleinen Unterschiede ist in den Auslegungen des EGMR, des CERD und des EuGH eine Konvergenz hin zu einer weiten Auslegung des Grundes festzustellen. Der CERD hat ein breites, klar definiertes Verständnis des geschützten Grundes. Seine allgemeinen Empfehlungen wurden von den europäischen Gerichten jedoch nicht berücksichtigt, weshalb die Anwendbarkeit seines Abstammungsbegriffs – der den Schwerpunkt auf Kaste statt auf (geographische) Herkunft legt – in Europa nicht vorhersehbar ist. Sowohl die regionalen als auch die nationalen Gerichte beziehen sich lieber einfach auf Artikel 1 ICERD, um die dort aufgezählten Gründe zu unterscheiden.[18] In der Rechtssache *CHEZ*, die durch die Fragestellung des vorlegenden Gerichts eingeschränkt war, konzeptualisierte der EuGH die Roma als eine ethnische Gruppe, was – so die Argumentation des Berichts – etwas am Thema vorbeiging, da es sich in dem Fall um Rassenstereotypisierung handelte.

17 Bell, M., *Racism and equality in the European Union*, OUP, 2009, S. 23.
18 *Timishev gegen Russland*, Beschwerdesachen 55762/00 und 55974/00, Urteil vom 13. Dezember 2005.

Der EGMR hat bei Roma und Fahrenden einen anderen Weg eingeschlagen als bei anderen „rassischen" oder ethnischen Gruppen, wobei er drei sich gegenseitig verstärkende Gesichtspunkte im Auge hat: (i) die Notwendigkeit, einer Minderheitenidentität, wie sie zum Beispiel im fahrenden Lebensstil zum Ausdruck kommt, Rechnung zu tragen, (ii) den sich abzeichnenden regionalen Konsens über Schutzbedürftigkeit/ Benachteiligtenstatus und (iii) die Notwendigkeit einer in erster Linie historischen und kontextuellen Analyse, die bei der Entscheidung über Individualbeschwerden den langjährigen, kollektiven und strukturellen Charakter von Diskriminierung berücksichtigt. Die einfühlsame Haltung des Gerichtshofs findet in der richterlichen Auslegung selten einen konsequenten Ausdruck; stattdessen wird entweder (a) keine Diskriminierung festgestellt, (b) Diskriminierung nur in Bezug auf verfahrensrechtliche Aspekte festgestellt, (c) statt unmittelbarer mittelbare Diskriminierung festgestellt oder (d) Diskriminierung nicht näher bestimmt.[19]

Es wurden auch Umrisse eines Roma-spezifischen Ansatzes im Unionsrecht festgestellt.[20] Der Bericht teilt diese Ansicht nicht. Er argumentiert, dass die auf Stereotype gestützte Analyse in *CHEZ* alles andere als zu weit ist, und vertritt stattdessen die Ansicht, dass nicht eine Analyse tatsächlicher „rassischer" oder ethnischer Proportionen, sondern ein Fokus auf Stereotype und die von ihnen geschaffene Parallelwirklichkeit der Schlüssel – nicht nur für Entscheidungen über Diskriminierung aufgrund der „Rasse" oder der ethnischen Herkunft, sondern auch für die Auslegung des europäischen Antidiskriminierungsrechts – ist.

In acht Fällen wurde der EuGH bislang angerufen und um Auslegung der ARR ersucht, nämlich in *Vajnai, Runevič-Vardyn*, *Feryn, Meister, Belov, Kamberaj, CHEZ* und *Jyske Finans.* Diese Rechtssachen werden in dem Bericht analysiert.[21] Während in *CHEZ* und *Feryn* Diskriminierung aus Gründen der „Rasse" oder der ethnischen Herkunft Gegenstand der Auslegung war, sind andere Urteile insofern von Bedeutung, als sie den Schutzumfang der Richtlinie untermauern.

Bei den regionalen Gerichten ist eine Konvergenz hinsichtlich ihrer Zurückhaltung festzustellen, vorsätzliche unmittelbare Rassendiskriminierung zu behandeln oder deren Vorliegen festzustellen. Dies fügt sich nahtlos in die kontinentaleuropäische Tradition des *Schweigens über Rasse* ein, die auf einer europäischen Selbstidentifikation mit Antirassismus basiert.[22] Rassismus wird somit als irrational verworfen – ein geistiges Erbe der „Verständlichmachung" des Holocaust - während mit dem durch die Entkolonialisierung ausgelösten „Erscheinen von Nicht-Weißen in der europäischen Mitte" Kultur, Ethnie und Hintergrund seinen Platz als soziale Signifikanten einnehmen.[23] Dieser Ansatz wird als kulturrassistisch kritisiert; gleichwohl hält sich sogar im EuGH die Überzeugung, dass Rassismus auf der Grundlage von Indikatoren wie dem Geburtsort einer Person „gewisse dumpfe Stereotype bestärkt", während es „in

19 *Nachova et al. gegen Bulgarien*, Beschwerdesachen 43577/98 und 43579/98, Urteil vom 26. Februar 2004; *V.C. gegen die Slowakei*, Beschwerdesache 18968/07, Urteil vom 8. November 2011; *N.B. gegen die Slowakei*, Beschwerdesache 29518/10, Urteil vom 12. Juni 2012. *Yordanova et al. gegen Bulgarien*, Beschwerdesache 25446/06, Urteil vom 24. April 2012; *Winterstein et al. gegen Frankreich*, Beschwerdesache 27013/07, Urteil vom 17. Oktober 2013. Beschwerdeverfahren wegen der Bildungsrechte von Roma: *D.H. et al. gegen die Tschechische Republik*, Urteil der Großen Kammer vom 13. November 2007; *Sampanis et al. gegen Griechenland*, Urteil vom 5. Juni 2008; *Orsus et al. gegen Kroatien*, Beschwerdesache 15766/03, Urteil der Großen Kammer vom 16. März 2010; *Sampani et al. gegen Griechenland*, Urteil vom 11. Dezember 2012; *Horváth und Kiss gegen Ungarn*, Urteil vom 29. Januar 2013; *Lavida et al. gegen Griechenland*, 30. Mai 2013.

20 McCrudden C.,„The New Architecture of EU Equality Law after CHEZ: Did the Court of Justice Reconceptualise Direct and Indirect Discrimination?", *European Equality Law Review,* 1/2016.

21 Rechtssache C-668/15, *Jyske Finans AS/Ligebehandlingsnaevnet, handelnd für Ismar Huskic*; Rechtssache C-83/14, *CHEZ Razpredelenie Bulgaria AD/Komisia za zashtita ot diskriminatsia*; Rechtssache C-571/10, *Servet Kamberaj/Istituto per l'Edilizia sociale della provincial autonoma di Bolzano (IPES) u. a.*; Rechtssache C-394/11, Valeri Hariev Belov/CHEZ Elektro Balgaria AD u. a.; Rechtssache C-415/10, *Galina Meister/Speech Design Carrier Systems GmbH*; Rechtssache C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding/Firma Feryn NV*; Rechtssache C-391/09, *Malgožata Runevič-Vardyn und Łukasz Paweł Wardyn/Vilniaus miesto savivaldybės administracija;* Rechtssache C-328/04, *Vajnai*.

22 Lentin A., „Europe and the Silence about Race", *European Journal of Social theory*, 2008/11, S. 494-503.

23 Ebd., S. 496. Lentin erinnert an die Bedeutung des Buches *Race and History* von Claude Levi-Strauss, das 1975 zu diesem Paradigmenwechsel veröffentlicht wurde.

modernen Gesellschaften … zunehmend inakzeptabel geworden" ist, den Begriff „Rasse" zu definieren, und die Definition von ethnischer Herkunft nicht die Aufgabe von Anwälten ist.[24]

In der Rechtsprechung des EuGH wird in der Regel nicht auf rassistischen Vorsatz eingegangen. Im Gegensatz dazu befasst sich der EGMR regelmäßig mit Vorsatz, kommt letztlich aber nie zu der Feststellung, dass eine vorsätzliche unmittelbare Diskriminierung vorliegt. An diesen Trends offenbart sich eine spezifisch *europäische Vorsatzdoktrin*, die die gerichtliche Entscheidungsfindung mal herabstuft, mal unterläuft. Sie hat unterschiedliche Auswirkungen: Während sie die angemessene gerichtliche Reaktion des EuGH bislang nicht beeinträchtigt, behindert sie die Feststellung des Vorliegens bzw. die genaue Bestimmung von Diskriminierung seitens des EGMR. Beim Umgang mit verdeckter unmittelbarer Diskriminierung ist eine erhebliche Divergenz festzustellen: Während der EGMR in der Regel auf mittelbare Diskriminierung erkennt, wenn er es mit verdeckter Diskriminierung zu tun hat, geht der EuGH einen anderen Weg und stellt unmittelbare Diskriminierung in Bezug auf eine formal neutrale Vorschrift fest, die nur eine Gruppe betrifft.

Ab Mitte der 1990er Jahre, als die Antidiskriminierungsrechtsprechung immer mehr zunahm, wurde Kritik am Straßburger Gericht laut, es gehe bei der Untersuchung und Feststellung von Diskriminierung willkürlich vor.[25] Die externe Kritik hat nunmehr auch intern Widerhall gefunden. Ob aufgrund politischer Empfindlichkeiten oder doktrineller Undurchsichtigkeit: Der EGMR hat häufig mittelbare Diskriminierung in Fällen festgestellt, die ansonsten als unmittelbare Rassendiskriminierung eingestuft werden könnten oder sollten. Die Inkohärenzen der *Gleichstellungsmaxime* sowie der Schutzgründe in der Straßburger Rechtsprechung erschweren es, Vergleichspersonen zu benennen.

Der Bericht geht auch auf den vorherrschenden Kritikansatz, Intersektionalität, ein, die sich bislang auf Geschlecht und Behinderung konzentriert hat. Es bleibt fraglich, ob die intersektionelle Analyse im Hinblick auf „Rasse" oder ethnische Herkunft nützlich ist. Der europäische Multikulturalismus konzentriert sich auf die Forderungen „post-migratorischer Gruppen" und bemüht sich um die Berücksichtigung kultureller Identitäten; dabei stützt er sich in erster Linie auf das Beispiel der europäischen Muslime, in geringerem Maße aber auch auf das der Roma.[26] Im Zentrum der Kontroverse steht der Rechtspluralismus, eine Kollision geschriebenen Rechts mit sozialen oder religiösen Gesetzen, nach denen in Minderheitengruppen private und familiäre Angelegenheiten geregelt werden.[27]

Die ARR hat das Potenzial, einen ausgewogenen Ansatz zum Schutz traditioneller, wie auch kultureller, Minderheiten zu gewährleisten, es gibt jedoch einen Vorbehalt, was ihr Verständnis für Minderheitenrechte betrifft. Infragestellungen der Hierarchie von Minderheitenstatus sind im Rahmen der ARR in Bezug auf Minderheitenquoten und Zugang zu Minderheiteneinrichtungen in den abgedeckten Bereichen denkbar. Interessanterweise birgt weder der fakultative Charakter positiver Maßnahmen nach Artikel 5 noch der bislang restriktive Ansatz des EuGH in puncto materielle Gleichstellung (aufgrund des Geschlechts) in asymmetrischen Situationen die Gefahr, dass die Gleichbehandlung nicht anerkannter oder weniger begünstigter Minderheitengruppen im Rahmen der Richtlinie behindert wird. Grund dafür ist, dass, sobald eine positive Maßnahme existiert, ihr diskriminierender Charakter einer Überprüfung unterzogen werden kann, die sich ihrerseits auf Rechtsprechung stützt, die für Asymmetrien offensichtlich blind ist. Solange die angefochtene Maßnahme fortbesteht, muss außerdem ein Levelling-up gewährleistet sein.[28]

24 Schlussanträge des Generalanwalts Wahl vom 1. Dezember 2016 in der Rechtssache C-668/15, *Jyske Finans AS gegen Ligebehandlingsnaevnet, handelnd für Ismar Huskic*, Randnrn. 3 und 30-33.

25 Zusammengefasst von Arnardóttir, O. M., *Equality and non-discrimination under the European Convention on Human Rights* (Bd. 74), Martinus Nijhoff Publishers, 2003, S. 179-180.

26 Parekh, B., „Equality in a multicultural society", *Citizenship studies 2.3*, 1998, S. 397-411, und Modood, T., *Multiculturalism: A civic idea*, Polity Press, 2007, S. 34-53.

27 Davies, M., „Legal pluralism", in Cane, Peter, und Herbert Kritzer (Hrsg.), *The Oxford handbook of empirical legal research*, OUP Oxford, 2012, S. 805-828.

28 Verbundene Rechtssachen C-231/06 bis C-233/06, *National Pensions Office gegen Emilienne Jonkman* (C231/06), *Hélène Vercheval* (C-232/06) und *Noëlle Permesaen* (C-233/06) *gegen National Pensions Office.*

Die Zurückhaltung der Gerichte, Rassendiskriminierung in all ihren Formen anzuerkennen, verschiebt den Nichtdiskriminierungsrahmen der EMRK und bringt ihn aus dem Gleichgewicht. Häufig führt sie dazu, dass Diskriminierungsklagen herabgestuft oder unterlaufen werden. Unter der Oberfläche der hartnäckigen Inkohärenzen und einer immer wiederkehrenden, unerklärlichen Zurückhaltung des EGMR, entschlossen gegen Rassendiskriminierung vorzugehen, liegt jedoch eine dicke Schicht Sensibilität und Verständnis dafür, was es heißt, im heutigen Europa einer „rassischen" Minderheit anzugehören. Und doch ist es ziemlich bezeichnend, dass es Urteile wie *Yordanova et al. gg. Bulgarien* und *de Melo* sind, in denen „nur" materiell-rechtliche Verstöße festgestellt werden, die die vielleicht wichtigsten Einblicke in die Komplexität von Rassendiskriminierung liefern.[29]

Der EuGH hat auf Rassendiskriminierung bislang eine weite, teleologische Auslegung angewendet. Während seine Rechtsprechung zu Nationalität und Alter eine intensivere Prüfung erkennen lässt als bei Geschlecht, gilt dies für „Rasse" oder ethnische Herkunft nicht – anscheinend weil sich die betreffenden Fälle auf Bereiche bezogen, die sich mit dem vertrauten Grundprinzip der Marktintegration deckten und im formalen Gleichstellungsrahmen blieben.[30] Im Gegensatz zu ihrem akzessorischen Charakter, der im Rahmen der EMRK einem gewissen Ermessensspielraum unterliegt, ist Nichtdiskriminierung ein grundlegendes Prinzip des Unionsrechts, dessen Begründung enge Grenzen gesetzt sind, was es bisweilen erforderlich machen kann, den im Rahmen der Konvention bestehenden Schutz vor Diskriminierung anzuheben.[31]

Die kritischen Ansätze können sich in der Praxis nicht materialisieren, solange die Gerichte sich nicht ernsthaft darum bemühen, Rassismus zu verstehen, was sowohl eine politische und psychologische Hürde darstellt als auch eine Frage von sachkundiger, logischer Rechtsanalyse ist. Theoretisch sind sowohl die kontextuelle Analyse des Straßburger Gerichts als auch die teleologische Auslegung des EuGH in der Lage, kritische Vorschläge zu integrieren, es sei denn, sie werden – wie im Fall des Vorschlags für eine neue Gleichbehandlungsrichtlinie[32] – vom Mangel an gesetzgeberischem Willen übertrumpft. Der Bericht kommt zu dem Ergebnis, dass eine konstruktionistische Analyse am besten geeignet ist, die Schwachstellen der richterlichen Entscheidungsfindung zu beheben, da sie die vorherrschenden Auslegungsmethoden ergänzt. Sie hat einen hohen Erkenntniswert, da sie nicht nur verdeckte Diskriminierung offenlegt, sondern auch Rassifizierung erfasst.

Die Definition von „Rasse" oder ethnischer Herkunft ist im Hinblick auf positive Maßnahmen, mit denen Benachteiligungen wegen der „Rasse" oder der ethnischen Herkunft reduziert werden sollen, von Bedeutung. Um den Bedarf einschätzen zu können und positive Maßnahmen zu planen, sollten die Staaten ethnische Daten erheben, die „rassische" oder ethnische Minderheiten zahlenmäßig erfassen oder zumindest Klarheit über den Anteil dieser Minderheiten innerhalb der Zielgruppen schaffen. Wenn auch die Intensität der Verbindung zu „Rasse" oder ethnischer Herkunft im Rahmen von Artikel 5 ARR nicht spezifiziert ist, sind entsprechende positive Maßnahmen nur so lange zulässig, wie ihre Auswirkungen auf Minderheitengruppen erheblich sind. Der Mangel an Daten über „Rasse" oder ethnische Herkunft lässt Zweifel an der Angemessenheit der politischen Maßnahmen aufkommen, was wiederum Sorgen bezüglich dauerhafter Rassendiskriminierung weckt, denn auch wenn positive Maßnahmen nach der AGG zulässig, aber nicht obligatorisch sind, müssen sie, wenn sie ergriffen werden, den Anforderungen der Richtlinie entsprechen.

29 *Yordanova et al. gg. Bulgarien*, Beschwerdesache 25446/06, Urteil vom 24. April 2012.

30 Besson, S.,„Gender discrimination under EU and ECHR law: Never shall the twain meet", *Human Rights Law Review*, 21. Oktober 2008, S. 19-21.

31 Wie Generalanwältin Sharpston in ihren Schlussanträgen vom 13. Juli 2016 in der Rechtssache C-188/15, *Asma Bougnaoui und Association de défense des droits de l'homme (ADDH) gegen Micropole SA* betonte. Vorabentscheidungsersuchen des *Cour de cassation* (Frankreich), eingereicht am 24. April 2015. Siehe insbesondere die Randnrn. 58-72.

32 Vorschlag für eine Richtlinie des Rates zur Anwendung des Grundsatzes der Gleichbehandlung ungeachtet der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung, {SEC(2008) 2180} {SEC(2008) 2181}.

Die Definition der Gründe wurde im Zusammenhang mit der Erhebung ethnischer Daten ausführlichst behandelt. Die verfügbaren Daten werden auf der Grundlage konstitutiver oder damit verbundener Gründe erhoben, was die Gültigkeit des Konzepts der zusammengesetzten Gründe nachdrücklich bestätigt. Die Integration „rassischer" oder ethnischer Minderheiten in die europäischen Gesellschaften als solche wurde nicht gemessen. Untersucht wurde stattdessen die Integration von Migrantinnen und Migranten und neuerdings der Roma. Um (Un-)Gleichheit zu messen, ist es genauso wichtig oder wichtiger, die zugeschriebene „Rasse" oder ethnische Herkunft zu erfassen wie die selbst identifizierte. Manche vertreten die Ansicht, dass Datenerfassung ethnische Gruppen essentialisiert oder zur Rassendiskriminierung beiträgt; andere wiederum sind der Auffassung, dass Daten zu Migration, Sprache, Bildungsniveau und Armut keine geeigneten Indikatoren sind, um Rassendiskriminierung zu messen.

Der wichtigste Unterschied zwischen „rassischen", ethnischen und nationalen Minderheiten in der Datenerhebung ist, dass erstere nicht benannt werden. Unionsbürgerinnen und bürger „mit Migrationshintergrund", „neue oder nicht der Mehrheit angehörende Ethnien" und „Gebietsfremde" haben eines gemeinsam: Sie werden in binärer Opposition zur Mehrheitsbevölkerung des Mitgliedstaats kategorisiert. Auch diese Kategorien sind irreführend, da sie Minderheiten in einen Topf werfen, ohne zu prüfen, ob sie tatsächlich zusammengehören. Fortschrittliche Empfehlungen zur verstärkten Erhebung von Daten auf der Grundlage von „Rasse" oder ethnischer Herkunft sind bisher weder auf nationaler noch auf EU-Ebene auf Widerhall gestoßen. Hinzu kommt, dass die Kategorisierung für rechtliche und statistische Instrumente nicht standardisiert ist.

Gemäß Absatz 15 der Präambel der ARR umfasst der Nachweis von Diskriminierung auch statistische Beweise; der Zugang zu statistischem Beweismaterial ist aufgrund des Mangels an ethnischen Daten jedoch beschränkt. Der Bericht weist auf Synergien zwischen der Erhebung von Daten und beweisorientierten Bestrebungen im französischen Kontext hin.

Introduction

The Racial Equality Directive (RED) provides protection from discrimination on the grounds of racial or ethnic origin, but it fails to define those terms. However, their broad or narrow interpretation impacts on a wide array of issues including the range of groups and individuals eligible for protection, the classification and qualification of claims and the design of positive action measures aimed at diminishing discrimination linked to racial or ethnic origin.

This thematic report on 'The meaning of racial or ethnic origin in EU Law: between stereotypes and identities' conceives of these grounds as a single, composite and transversal conceptual category. From this perspective, the wide range of interpretations marking a quest for differences between racial and ethnic origin can be overcome and the so far neglected ground of descent brought to the fore. In Europe, national origin – inherent in the composite category – denotes religious and linguistic minority origin, in other words the 'cultural stuff'.[1] National origin is not only a European concept, but it has come to denote Europeanness, signifying historic presence on European territory in stark contrast with 'foreignness' subsumed under racial or ethnic origin.

Racial, ethnic and national origins are mutable grounds, comprising nationality, colour, descent, minority religion, minority language, minority culture and traditions. In Europe, historically, protection from discrimination on the grounds of religious, linguistic and later national origin preceded protection from racial or ethnic discrimination. National origin is singular, because it embodies a preferential status in national laws, as well as at the European level through the Framework Convention for the Protection of National Minorities (FCNM).

The meaning of racial or ethnic origin is fraught with controversy. Racial and ethnic origins are seen by some as interchangeable. Others consider racial origin as referring to human phenotypes, while ethnic origin is believed not to concern itself with biological and genetic differences, but to focus on the 'cultural stuff' instead, but that competes with the concept of national origin. The impossibility of fighting the devious consequences of racism through a race-less discourse leads to ambivalence among law makers, generating a definitional puzzle, partly explaining why in the overwhelming majority of European Union (EU) Member States racial origin is not defined in law. Ethnic origin, created as a supercategory merging anti-racist and minority rights approaches, is considered not to be tarnished by the moral dilemmas inherent in the 'r' word. However, the overwhelming majority of Member States do not have a statutory definition of ethnic origin either. Indeed, ethnic origin is not an organic legal concept in Europe. The most widely available definition is that of national minorities.

The report discusses definitional puzzles and reviews the complexities, synergies and differences between key terms, highlighting outstanding concerns. The lack of definition in EU law of either racial or ethnic origin necessitates judicial interpretation that shall uncover the scope and meaning of this autonomous concept "by considering its usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part".[2]

The report heavily relies on terms such as race, racial, racialised, race making and racialisation without quotation marks not in order to suggest that the stereotypes they represent can in any way be justified, but rather to reclaim them for the purposes of public discussion. It will not be possible to address the process through which a person's (geographic) origin, perceived religious beliefs or cultural traditions become indicators of racial difference unless racism and racialisation remain in circulation. This being the

1 Barth, 1969.

2 As recently reiterated in relation to racial harassment consisting of an apparently 'ironic' reproduction of a cartoon in Case C-201/13, *Johan Deckmyn, Vrijheidsfonds VZW* v *Helena Vandersteen, Christiane Vandersteen, Liliana Vandersteen, Isabelle Vandersteen, Rita Dupont, Amoras II CVOH, WPG Uitgevers België*, ECLI:EU:C:2014:2132.

case, the report does not shy away from using the 'r' word – all the more so, because the RED purports to prohibit discrimination on the ground of *racial* or ethnic origin.[3]

International and national law contain similar prohibitions, which have given rise to interpretations of racial and ethnic origin by (inter)national courts and treaty bodies. Taking stock of relevant case law, the report seeks to answer an apparently simple question: who is eligible for protection under the RED? Which groups and individuals are covered, what are the interpretive tools that help identify these groups and on exactly what ground should they be protected? As straightforward as the answer may be at first glance, it is everything but. The memory of deplorable racist acts renders racist claims publicly unacceptable, but instead of preventing their dissemination, 'censorship' only exacerbates the complexity of contemporary racism, which seeks to conceal racial or ethnic origin as the basis of discrimination, hate speech and violence.

What is axiomatic is the lack of fixed definitions in law. The archaeology of legal terms such as race, racial, ethnic, national, linguistic, cultural and religious uncovers their permanent associates. Origin, extraction, membership of, association with and descent are bundled together with these adjectives in ways that explain, overlap, supersede, conceal or blur with one another in synchronicity. They describe identities individuals and communities hold and share, as well as assumptions and perceptions of such real or presumed identities. The latter, as is demonstrated in the report is equally or more relevant from the perspective of discrimination.

Starting in the 17th century, international law dealt with the rights of minorities today labelled as religious, linguistic, and national. Following the failure of the League of Nations system originally established to oversee the implementation of the minority clauses in the peace treaties concluding World War I, standard setting moved to the United Nations. Protection from racial discrimination assumed centre stage, and ethnic origin was advanced as an all-encompassing term capable of bridging the gap between the old and new legal regimes. In Europe, in spite of recurring efforts, the concerns of national minorities received only partial attention until 1994, when the FCNM was adopted to ensure both the preservation of national identity and protection from discrimination against national minorities. With the adoption of the RED in 2000 and its subsequent transposition in EU Member States, the non-discrimination frame was reinforced.

Non-legal terminology is different – instructive but not readily transferrable. Social sciences have settled on the terms race and ethnicity, while political science – particularly theoretical work dedicated to multiculturalism – has more recently revolved around cultural minorities who share one origin in Europe: a predominantly non-European descent. However, in this context culture does not denote music and dancing at colourful festivals once or twice a year. Instead, it speaks to the essence of minority identity: languages, minority religious practices and cultural traditions – terms well known in the minority rights context. Religion, language and culture define the identities of minorities and majorities alike. They are protected under the minority rights regime, which rarely extends to cultural minorities.

Through racism, hierarchies are created between population groups, and the superiority of certain cultural value choices over others is posited regardless of actual differences in skin colour, physical features, attitudes or, indeed, cultures. They are taken to denote non-European descent. Without real physical differences, people can be racialised on the basis of their perceived religiosity: the dress they wear or the way they cover their hair. Theories of Christianity's superiority over the Jewish and Muslim faiths can be traced back over centuries of European civilisation, and they laid the ground for anti-Semitism and Islamophobia. Poverty, too, can be portrayed as having its own culture, language and value system, thus poverty can also be racialised – particularly if a visible proportion of poor people belong to racial minorities. Albeit historically present in Europe, the Jews and the Roma are exceptions to the omnipresent

3 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180 of 19/7/2000).

national minority frame. While the former are generally viewed as an ethno-religious minority and the latter as an ethnic one, they have both been racialised on account of their non-European descent.

Racism has ignited a wide array of inhuman acts ranging from genocide, mass murder and coercive sterilization to scapegoating, public vilification and so on. In Europe, the most recent and mass-scale ethnic conflict ended almost twenty years ago, but violent racism is still a threat. It affects race relations, thus posing a threat to the security of the member states and the EU itself. Equally importantly, discrimination based on racial or ethnic origin in the fields of employment, education, housing and services available to the public impacts negatively on national and EU economies.

Legal provisions cannot forbid us from ascribing to others a certain racial or ethnic origin. This we can do on the basis of their (geographic) origin, physical appearance, language, the traditions and customs they observe and the cultural values they hold. In order to draw boundaries between us and the others, we can select fragments of an individual's identity or appearance and attribute racial meaning to them. We can qualify whole groups based on our perception of certain individuals who seem to belong to that group.

Racial or ethnic origins are socially constructed, which does not foreclose that racial or ethnic minorities have essential identity traits that unite them as a group. Discrimination based on racial and ethnic origin rarely emerges in response to an individual's self-identification as belonging to or being a member of a certain racial or ethnic group. Processes, such as attribution or ascription, othering, grouping and stereotyping create, institute or impose racial or ethnic origins. Racial or ethnic identity may not correspond to that perceived or assumed by a third party. Identity is fluid and may change over time. That, however, does not necessarily impact on how that person is perceived. A conception of racial and ethnic origin can also be imposed from within communities and subdue intersecting identities and diverging interests. In the great scheme of things, identities cannot be formed on the single axis of racial or ethnic origin, because sex, age, sexual orientation, (dis)ability and other personal traits also contribute to it.

Identifying oneself as belonging to a racial or ethnic minority may be more difficult than being identified as such by a third party. Any element of the composite ground can be attributed racial meaning, which then serves as a basis for disregarding individual group members' agency. Given that many facets of minority identity are themselves protected, racial or ethnic origin is a *composite ground.* It can be attributed further meaning: groups may be labelled degenerate or intellectually inferior not on the basis of the actual mental abilities of individual members but on the basis, for instance, of cultural practices.

The report builds on recent developments in social and political science, proposing an understanding of racial or ethnic origin that is cognisant of the racialisation of religious groups, the Roma and migrant workers from Central and Eastern Europe (CEE). This multicultural perspective facilitates a contemporary reading of racial or ethnic origin that simultaneously opens and broadens the interpretation of the ground to accommodate diverse cultural minority groups. This frame can also highlight ways in which racism is concealed in relation to cultural practices.

Following the Introduction, chapter 1 of the report turns to a historical legal analysis of international treaties dealing with minority rights and the prohibition of all forms of racial discrimination. The emergence and the transformation of the meaning of terms such as religious and linguistic minority, national minority, race, racial origin, national and ethnic origin, descent and cultural minority will be examined. The historic analysis will be complemented by an institutional account of bodies involved in standard setting.

Chapter 2 maps the full personal scope of the RED. Based on information gathered from the European network of legal experts in gender equality and non-discrimination, it provides an overview of the ways in which the Member States, national courts and equality bodies established under Article 13 RED have addressed the thorny issue of defining the grounds. The chapter closes with an assessment of the findings. Chapter 3 catalogues the definitions of discrimination in national law based on racial or ethnic origin, interpretation by the national courts and a comparative analysis of the findings.

Chapter 4 describes and compares the analytical approaches of the Court of Justice of the EU (CJEU), the European Court of Human Rights (ECtHR) and the Committee on the Elimination of all Forms of Racial Discrimination (CERD) and assesses them in the light of critical academic perspectives. In Chapter 5, three strands of scholarship providing critical insights into the interpretation of discrimination are purveyed in detail: (i) vulnerability and anti-stereotyping, (ii) the multidimensional/intersectional nature of discrimination, and (iii) multiculturalism/diversity and equality.

Chapter 6 turns to positive action and highlights the need for ethnic data. It explores the dilemmas regarding the categorisation of racial or ethnic origin and its evolution over time – often relying on the characteristics that constitute or are closely related to the composite ground, such as migration status, citizenship and poverty. Chapter 7 carries the conclusions.

1 The full personal scope of the Racial Equality Directive

1.1 The need for historical analysis

In order to explore the personal scope of the RED, one must investigate the meaning of racial or ethnic origin in law, which here commences with tracking the historic development of minority rights from the Treaty of Westphalia to the Framework Convention for the Protection of National Minorities (FCNM).[4] This investigation highlights a switch from sovereign prerogative through rights vested in a group to individual human rights and the self-determination of nations. It looks at the League of Nations, the United Nations, the Council of Europe and the EU to portray a revival in Europe of minority rights in synchronicity with the reinforcement of anti-discrimination and equality standards in the aftermath of the fall of communism, the secession of states in the former Soviet bloc and violent ethnic conflict in the former Yugoslavia.

This exploration will be specific to EU anti-discrimination law in the sense that its focus is on the equality and non-discrimination component of minority rights. Consequently, the report does not discuss in detail the status of minorities, the preservation of their identities, the individual or collective nature of their rights or minority rights that do not fall under the scope of the RED. However, certain aspects of the minority rights debate are relevant for the present analysis and will be dealt with – for instance, the inclusion of minorities of immigrant background in the scope of minority protection and the shift from a fundamentally nationalist to a multicultural, diversity-based reading of minority rights.

Minority rights emerged in and were specific to Europe for a considerable period of their existence. Following the end of World War II and the demise of the League of Nations system, standard setting moved to the United Nations, where minority rights disappeared from central stage. Be that as it may, the UN was the first forum where minority rights and ground-specific non-discrimination standards had to be reconciled, just as they now have to be reconciled in the domestic legal regimes of EU Member States. Whether this exercise has been successful on a universal plane is not a matter for this report to investigate, but it is imperative to track which elements have successfully transferred to Europe. Retrospectively, amalgamation in the UN may come to be seen as a laboratory test for the European standard setting that followed 1990 and as such provides the framework for the present analysis. The benefit of a universalist perspective is that it may usefully facilitate our understanding of the asymmetric or unequal status of 'cultural minorities' as compared with historic or territorial national minorities.

Amalgamation has begun but is far from complete, as is borne out by an apparent profusion in the terms used to describe the grounds. The domestic laws governing equality and non-discrimination chiefly rely on the catalogue of grounds enumerated in Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). On the other hand, where they exist, laws regulating special minority rights remain somewhat removed from the anti-discrimination regime. Most importantly, cleavages are noticeable between minority identity as understood by the minorities themselves and the assumptions that outgroups make of that identity. Domestic and European law are yet to fully acknowledge the importance of discrimination based on racist grounds, in other words the majority's role in grouping, othering, ascriptions and assumptions against minorities. In theory, the individual focus of European anti-discrimination law and various national regimes may hamper this process. Notably, however, interpretations that leave room for flexibility rather than rigid classifications are preferred by courts and by monitoring and equality bodies.

4 I would like to thank professor Bruno de Witte for his useful comments on the outline of this report and his recommendation to conduct a wider historical analysis.

1.2 Changing frames: a historical and institutional overview

Race has been described as a 'historically specific' term.[5] One may quickly add, it is specific to geographic space as well. Thus, the starting point and geographic scope of a historical analysis broadens or limits one's understanding of the concept. Racial, ethnic and national origin, minority religion, language and cultural traditions have been recognised as intrinsically interlinked building blocks of minority rights regimes in Europe. Language and religion function as cultural markers and in defining ethnicity and nationhood.[6] Minority rights are truly European. Although their regional relevance subsided after World War II, they returned with the fall of communism and spread across the continent.

1.2.1 Pre-1918: religious, linguistic and national minority communities in peace treaties

The seeds of minority rights were sown from the 17th century onwards, with an initial, later ebbing but never vanishing focus on religion and religious minorities.[7] A tour commencing with the Treaty of Westphalia through the Berlin Conference to the independence of nation states in the Balkans and the adoption of the FCNM charts the dynamic nature of minority rights, noting the role that religion, language, territory and citizenship play in conceptualising them and the shift from their anchoring in sovereign prerogative to rights vested in a group.

Originally, minority rights were based on the assumption that bestowing special concessions on minority groups would ensure stability and further legitimise the state and its sovereign ruler. Minority rights came to the fore following territorial redistribution in the wake of (military) conflict. Since the 17th century, when religious affiliation was the most important dividing line between communities, international agreements granting religious freedoms to certain Christian communities in Europe could stabilise sovereign rule.[8] Religious concessions were dependent on the discretion of the sovereign, according to the principle of 'in the prince's country, the prince's religion prevails' (*cuius regio eius religio)*. The Ottoman Empire provided religious safeguards to Christian communities in order to ensure peaceful relations with Christian powers and it maintained the millet system, which provided important self-governance in matters of education, property rights and religious affairs.[9] Importantly, the central place religion occupied in Europe also meant that Christianity was portrayed in contrast with non-Christian religions such as Judaism and Islam,[10] which lay the ground for binary differences between Christians and Jews, as well as between Christians and Muslims.

From the 19th century onwards, nationalism assumed centre stage in marking divisions, and minority rights became vested in the people instead of the monarch. Differences among national groups were manifest in language as well as religion, but with the growing significance of centrally organised nation states and public institutions, inevitable secularisation shifted the limelight to language.[11] Industrial society is a literacy dependent culture, in which the state language conveys cultural values and education assumes primary importance.[12] Still, during the dissolution of the Ottoman empire, respect for the rights of Muslims remained an important condition of membership in international society for many states in the Balkans. The minorities question gained an Eastern European focus. In the Treaty of Berlin, externally dictated conditions of national independence included the principle of non-discrimination vis-à-vis national and religious groups, including for instance the Jews.[13]

5 Howard, E., *The EU race directive: developing the protection against racial discrimination within the EU*, Routledge, 2009, p. 63.
6 Brubaker, R., 'Language, religion and the politics of difference', *Nations and nationalism*, 19 (1) 2013, pp. 1-23.
7 Many call attention to such beginnings, including Patrick Thornberry in *International law and the rights of minorities*, Oxford University Press, 1991.
8 Preece, J. J., 'Minority rights in Europe: From Westphalia to Helsinki', *Review of International Studies*, 23, 1997, pp. 76-77.
9 Thornberry, 1991, p. 253.
10 Meer, N., 'Racialization and religion: race, culture and difference in the study of antisemitism and Islamophobia', *Ethnic and Racial Studies*, 36:3, 385-398, 2013, pp. 388-389.
11 Brubaker, 2013.
12 Gellner E., Nations and Nationalism, Blackwell Publishing, Oxford, 2006.
13 Preece, 1997, p. 81.

In the second half of the 19th century, Darwin's evolutionary theory gained traction in social sciences and emerging social Darwinism sought to apply principles such as 'the survival of the fittest' to human populations. Such pseudo-scientific beliefs in a 'natural hierarchy' of peoples, manifest in the superiority of certain races over others, as well as in the degeneration of 'inferior races', were widespread.[14] Anthropologists studied non-Western, non-European cultures based on Western European values and given their point of reference, it is of little surprise that the former did not come out on top in such 'scientific' endeavours. Social Darwinism described population groups as races, a category denoting species in evolutionary theory. The population group that served as the most common unit of comparison had by then become the nation. Racialist theories of society, nationalism and colonialism fitted well together and supported a world view according to which Western European nations were superior to the rest of the world.

1.2.2 The interwar period: the League of Nations and peace treaties

World War I ended with the dissolution of long-standing empires and the proliferation of 'nation states' on multi-ethnic territories, which necessitated the establishment of a system that would safeguard minority rights in order to ensure European peace and stability. The minority rights regime created under the auspices of the League of Nations was, however, asymmetric in two important ways. While peace treaties placed an obligation on CEE countries to ensure the rights of national minorities located on their territories, identical obligations did not apply to **Austria**, **Germany** and **Italy** – on whose territory one could also find sizable national minorities – and were not considered at all relevant for other Western European states.[15] The fact that by this time 'distinct linguistic and cultural characteristics were widely accepted as proof of nationhood' paved the way to extending the catalogue of minority rights to comprise language rights and 'a minimal degree of cultural autonomy'.[16] The principle of self-determination, championed by Woodrow Wilson, entailed that minorities had the right to preserve their distinct identity against the odds of assimilation or absorption.[17] Wilson was also active in calling for the protection of 'racial and national minorities', while at the same time being conscious that the special needs of smaller minorities could not be met.[18]

The Permanent Court of International Justice had competence to interpret the minority clauses the peace treaties contained. In various advisory opinions, the PCIJ reiterated its view of what constituted a (national) minority. In the **Greco-Bulgarian** case concerning the existence and definition of a community in relation to the treaty that governed reciprocal emigration between the two states, the PCIJ ascertained the 'general traditional conception' of the term in the following terms.[19]

> 'By tradition, which plays so important a part in Eastern countries (sic!), the "community" is <u>a group of persons</u> living in a given country or locality, <u>having a race,</u> religion, language and traditions of their own and <u>united by this identity of race</u>, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.

14 MacMaster, N., *Racism in Europe 1870-2000*, Palgrave, 2001, pp. 31-39. and 48-58.
15 Pejic, J., 'Minority rights in international law', *Human Rights Quarterly*, Vol. 19. No. 3., 1997, pp. 666-685.
16 Preece, 1997, p. 82.
17 Self-determination as a principle is claimed, in fact, to have been an American ideological impact on Europe. Kunz, J. L., 'The present status of the International Law for the Protection of Minorities' *The American Journal of International Law*, Vol. 48. No. 2, 1954, p. 282.
18 Thornberry, 1991, p. 38.
19 File F. c. XIX., Docket XVIII. I., Advisory Opinion No. 17 of 31 August 1930, Permanent Court Of International Justice, Interpretation of the Convention Between Greece and Bulgaria Respecting Reciprocal Emigration, signed at Neuilly-Sur-Seine on November 27th, 1919 (Question of the 'Communities'), paras. 30, 32 and 35.

> ... the aim and object of the Convention ... that the individuals forming the communities should respectively make their homes permanently among their own race, the very mentality of the population concerned ...
>
> The existence of communities is a question of fact; it is not a question of law.'

In this text the word race assumes a meaning synonymous with *nation* – within and without the borders of a nation state. The reference to the mentality of a race denotes the cultural traditions and customs of a group of people that form a nation. Race as a unit of classification represents a link between a group of humans and a national identity assigned to this group. The characteristic attributed to nations is portrayed as an emotional, psychological one. The distinction between races is not based on visible biological differences, rather on intangible, cultural ones. By virtue of being imposed on CEE countries, the League of Nations' minority rights regime could not seek to impose hierarchy between 'races', but it did overly emphasise cultural differences between nations and national minorities.

Taking into account the historic context is imperative, because racial theories were not used as a matter of course to 'disparage coloured peoples'.[20] 'Racialism itself was not as uncongenial a notion to the Statesmen of the post-World War I period as it might be today. The concept of inferior and superior nations, peoples, and races is present to some extent in Covenant provisions on Mandates, co-existing with their forward looking character.'[21] In the interwar period, race as a legal term was used as a proxy to mark groups of people regardless of state borders. In the minority rights regime race and racial categorisation played a positive function by marking national, linguistic and religious minority communities with a view to securing their access to special rights.

By the 1930s, in certain European countries, racialist or, rather, racialised views of society were not only widespread but also widely held among natural scientists – biologists, genealogists and anthropologists. The focus shifted to biological traits in distinguishing population groups from one another, but in fact the distinction was often based on visible cultural or religious customs or was scientifically insignificant. Not only did racism permeate all walks of life, but holding, reinforcing and spreading such views was instrumental in pursuing scientific careers.[22] Violent anti-Semitism was the trademark of Nazi rule, but violent racism was also present in Western European countries that received migrant workers and soldiers from their colonies – particularly during World War I.[23]

Importantly, the minorities that suffered the most from racism in World War II were not properly or at all protected under the minority rights regime. Jews were only listed as a minority community in the peace treaties concluded with **Greece**, **Poland** and **Romania**. The Roma were not protected, nor even considered as a minority community. On the other hand, Muslim communities were protected in **Albania**, **Greece** and the **Serbo-Croat-Slovene State**.[24] While the Muslim minorities in territories formerly under Ottoman rule could be perceived as having links to a nation state, this was not true for the Jews.

The League system had regional application and it 'reflected European history and experience', while coexisting with 'the colonial system and the Mandates under League supervision.'[25] It did not bind Western European states, therefore the applicability of concepts such as minority, race, etc. to these countries was not discussed. The European minority rights regime offered protection from discrimination, and this pillar continued in existence later on as well. The League system was widely criticised by minorities and states,

20 Banton M., The Racialising of the World in Bulmer and Solomos 1999, pp. 34-40.
21 Thornberry, 1991, p. 40.
22 MacMaster, 2001, pp. 149-152. MacMaster stresses the role of 'race scientists' in creating and upholding the racial state in interwar Germany.
23 Ibid.
24 Thornberry, 1991, pp. 43-44.
25 Ibid, p. 50.

leading to **Poland's** denunciation of her treaty obligations in 1934 and the abrogation of the treaties after 1945.

1.2.3 Post-war developments: 1945-1990

After World War II, the minority rights regime's obvious shortcomings were challenged by recent experiences of the Holocaust and the need for universal standard setting. The United Nations Charter and the Universal Declaration of Human Rights do not protect national minorities. The first mention of them is made in the Genocide Convention, in relation to physical and biological annihilation. There is a break with the previous scheme of minority protection: rather than preserving group identity, members of minorities are protected from discrimination based on various grounds, including racial or ethnic origin.

The work focusing on dispelling the apparently scientific basis of racist theories was undertaken by UNESCO, the UN Educational, Scientific and Cultural Organization based in Paris. UNESCO convened groups of experts who produced statements 'in order to make known the scientific facts about race and to combat racial prejudice'.[26] Four statements were adopted, reflecting the difficulties inherent in the impossibility of abandoning race as a category of natural science linked to, among others, genetic differences and the usurpation of the term for the ulterior purposes of racist propaganda and violence. Indeed, social Darwinism is persistent and keeps reoccurring every time new developments are reported in genetics. Science and scientists cannot undo the damage, because they cannot control or even influence the many forces that have partaken in its doing.

The definitional puzzles concerning minorities continued during this period, initially within the Subcommission for the Prevention of Discrimination and Protection of Minorities. The famous Capotorti definition of national minorities provided on the Subcommission's request bears close resemblance to the definition of a community provided by the PCIJ as concerns the identity elements of the group, but with one notable difference, namely the omission of the word race and the use of ethnic origin instead.[27] Capotorti's proposed definition reads as follows: a minority group is a 'group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly a sense of solidarity directed towards preserving their culture, traditions, religion and language.'

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Covenant on Civil and Political Rights (ICCPR) have taken contrasting approaches to the thorny issue of balancing national minority rights and a general non-discrimination clause addressing all targeted by racism. Under ICERD, for the purposes of prohibiting racial discrimination, national or ethnic origin are both covered, while during the preparation of the ICCPR ethnic origin was understood as covering characteristics that denote 'origins' – including national origin. The grammatical analysis of Article 1(1) ICERD suggests that national and ethnic origin are interchangeable, while the word order implies that their meaning is to be primarily aligned with that of national origin. Notably, in Article 26 of the ICCPR the non-discrimination principle does not pertain to ethnic origin, but national origin is covered. The term ethnic origin is confined to the realm of minority rights, suggesting that it is an umbrella term for linguistic, religious and national origins covered by Article 27 ICCPR. This conception of ethnic origin purports to bring religious and linguistic minorities under ethnic, rather than national minorities.

26 UNESCO, *Four statements on the race question* COM.69/II.27./A, 1969. The booklet contains two introductory essays: on the biological aspects of the racial question and on the social aspects of the race question, authored by Jean Hiernaux and Michael Banton, respectively. The four statements are as follows: 1. Statement on race, Paris, July 1950, 2. Statement on the nature of race and race differences, Paris, June 1951, 3. Proposals on the biological aspects of race, Moscow August 1964 and 4. Statement on race and racial prejudice, Paris, September 1967.

27 This work culminated in the report by special rapporteur Francesco Capotorti: *Study on the rights of persons belonging to ethnic, religious or linguistic minorities*, E/CN4/Sub.2./384/Rev.1, 1979, para. 96.

Article 1(1) ICERD provides that: 'In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, *or national or ethnic origin* which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.' According to subparagraph 2, the Convention does not apply to discrimination based on citizenship, while subparagraph 3 asserts that the Convention applies to provisions on nationality, citizenship or naturalisation inasmuch as they discriminate against a particular nationality. According to Article 6, protection under the Convention is due to everyone within the jurisdiction of a state. Article 26 ICCPR ensures equality before the law to all persons without any discrimination. 'In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' Article 27 ensures the protection of minorities as follows: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'

Under the League system race was synonymous with population groups identified by reference to religion, language and nation (beyond the borders of nation states), while the term ethnic origin was not used.[28] The League system never became universal, but it has a lasting legacy in Europe, which impacts on the application of UN terminology, particularly that of ethnic origin.[29] In the context of UN treaties, differences between racial and ethnic origin may indeed be artificial, reinforced by endeavours to dispel scientific misconceptions of race and racial origin.[30]

> 'Up to 1950, the term "racial minorities" and not "ethnic minorities" was generally used in the United Nations. General Assembly Resolution 217c(III) referred to "racial" and "national", but not "ethnic" minorities. The etymological root of "ethnic" is the Greek *ethnos* or "nation". The Concise Oxford English Dictionary defines "ethnic" as "pertaining to race". These roots and definitions do not result in any ability to distinguish between "race", "ethnic group", and "nation" – the suggestion is rather that they are synonymous. Some have attempted to give substance to distinction … [including a] UNESCO Committee of experts on race problems … [Their] highly abstract, genetically based definition may be supplemented by reference to the common usage of the term "race" to denote physical differences between peoples, particularly their colour. The ethnic group by contrast refers to a "cultural" entity with or without distinct "physical" characteristics.'

During the Cold War, the Council of Europe's efforts at standard setting in relation to national minority rights did not come to fruition: neither a ECHR provision specific to minority rights nor a minority rights Protocol emerged. Instead of a minority-specific instrument, national minorities were provided residual protection under Article 14 ECHR, whose application is dependent on an arguable claim under another Convention right. Notably, ethnic origin is not included among the grounds in this provision, which states that '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.'

1.2.4 Post 1990: abundance of standards in the Council of Europe and the EU

With the fall of communism and the ethnic tensions unleashed in the former Soviet bloc, the protection of minorities once again became a significant building block in European peace and stability. Caution was taken, however, not to repeat past mistakes that led to imbalances between Western and Eastern European states. Racial violence and animosity arising in the wake of the dissolution of the Soviet Union

28 The terminology included 'minorité de race, de langue et de religion' as well as 'minorité nationale'. Andrysek, O., 'Report on the definition of minorities', *SIM Special No. 19*, Netherlands Institute of Human Rights, 1989.

29 Pejic, 1997, p. 390.

30 Thornberry, 1991, pp. 159-160.

and Yugoslavia triggered the adoption of a host of political, policy and legal instruments.[31] Among them, the FCNM – adopted in 1994 – ensures not only non-discrimination, but also the preservation of minority identities, as well as the participation of national minorities in public life. The resurrection of minority rights came with a regrettably weak enforcement mechanism,[32] and this occurred simultaneously with the opening up of legal opportunity structures to Central and Eastern European minorities – through ratification of the ECHR and accession to the EU.

Minority protection is available through piecemeal legislation at the regional as well as national levels. The preservation of minority identity and public participation is chiefly addressed in the FCNM, while the European Charter for Regional or Minority Languages focuses on minority language rights, in. comparison, robust enforcement is available against discrimination under the ECHR – Article 14 and Protocol 12.[33] The latter has been ratified by only a handful of Member States Except for education and aspects of housing and health, which are recognised or interpreted as being covered by Convention rights, the ECHR ensured equal treatment in relation to classic civil and political rights. The European Social Charter provides protection from discrimination in the field of social and economic rights, but its material scope is contingent on ratification. Even though it provides for collective complaints, its enforcement mechanism is considered weaker than that of the ECHR. In EU Member States, protection from discrimination under the RED is complemented by these regional instruments. Furthermore, ICERD and ICCPR have also been ratified by all the Member States.

With a view to standard setting, intensifying in the early 1990s and leading up to the World Conference against Racism in 2000, diverse initiatives to pursue the cause of racial equality and protection from racial violence were undertaken within the Council of Europe and the 'old EU'. These simultaneous and collaborative campaigning and standard-setting efforts led to institutional as well as legal changes, cross-fertilisation and cross-referencing. In 1994, the European Commission against Racism and Intolerance was established with a broad mandate to fight racism and related intolerance. Consequently, not only racial, ethnic and national minorities but also migrant groups come under ECRI's purview. ECRI is an expert monitoring body that, among others role, issues general recommendations. ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial intolerance (GPR No. 7) is an important document within the Council of Europe for various reasons.[34] First, it is the first instrument adopted at the Council of Europe level that defines direct and indirect discrimination on the grounds of racial or ethnic origin. Secondly, it builds on initiatives such as the RED. Thirdly, it contains a broad concept of racial discrimination (including on the ground of nationality and religion), and fourthly, it has influenced the ECtHR's interpretation of discrimination based on racial or ethnic origin.[35] It defines racial discrimination as follows:

31 The instruments adopted within the framework of the Organization of Security and Cooperation in Europe – previously the Conference on Security and Cooperation in Europe – are notable. Gilbert, G., 'The Council of Europe and Minority Rights', *Human Rights Quarterly*, Vol. 18. No. 1, 1996, pp. 160-189. at p. 1.

32 Ibid, p. 2.

33 Three weaknesses are commonly identified in relation to the European Charter for Regional or Minority Languages. The first main weakness is its tendency to limit language rights to national minorities, while leaving unclear what is a national minority. The second weakness is a weak enforcement model. De Varennes, F., 'Language rights as an integral part of human rights', *International Journal on Multicultural Societies* 3.1 (2001): 15-25, p. 23. The third can be pinned down to different levels of protection dependent on the language spoken.

34 On 13 December 2002, the Council of Europe's' European Commission against Racism and Intolerance (ECRI) adopted General Policy Recommendation no. 7 on national legislation to combat racism and racial discrimination.

35 The grounds covered are broadly construed on account of ECRI's mandate. See, Cardinale, G., 'The preparation of ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination', Chopin, I. and Niessen, J. (eds), *The development of legal instruments to combat racism in a diverse Europe*, Martinus Nijhoff Publishing, 2004, pp. 82-83.

> '1. For the purposes of this Recommendation, the following definitions shall apply:
> (b) 'direct racial discrimination' shall mean any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification. ...
> (c) 'indirect racial discrimination' shall mean cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages, persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification.'

Regrettably, Protocol No 12 to the ECHR adopted in Rome on 4 November 2000 has not yet made significant traction among EU Member States, owing partly to the low level of ratification. It contains a general prohibition of discrimination on grounds including race, colour, language, religion, national or social origin, association with a national minority, birth or other status.[36] Notably, it has given rise to a judgment relevant for this report: in *Sejdić and Finci v Bosnia and Herzegovina* the ECtHR found discrimination concerning the relative difference between the status of citizens based on ethnic or national minority status in the context of participation as a candidate in the presidential elections – among other things.[37] The two applicants – an ethnic Roma and an ethnic Jew – were barred from running for the presidential elections because they were not members of the 'constituent peoples', a status limited to Bosniaks, Croats and Serbs.

Initially, the EU prohibited discrimination on the ground of nationality, which was essential for the establishment of a common market in Europe. A Treaty provision prohibits discrimination on grounds of nationality in order to ensure the free movement of workers.[38]

Initiatives aimed at introducing protection at the EU level against racism, xenophobia and anti-Semitism as well as racial and religious discrimination cropped up in the European Parliament and elsewhere since the 1980s.[39] By the end of the 1990s advocacy efforts against discrimination based on other grounds including disability, sexual orientation and age also intensified and led to the amendment of the Treaty in order to create competence for legislation at the EU level. 'Contemporaneous events', including the report released by the Stephen Lawrence inquiry in the **UK** and Jörg Haider's entry into the **Austrian** governing coalition, acted as push factors in the race field and provided an impetus for the legislation to go beyond the field of employment, where the hitherto protected grounds of nationality and sex reached.[40]

In 1992, a lawyer-led coalition of NGOs, the Starting Line Group (SLG), was formed to advocate for legal tools to fight *racial and religious* discrimination. The SLG draft was modelled on the ICERD, which, being signed and ratified by all the Member States – except **Ireland** at the time – represented the only common denominator in respect of legal standards. Looking at the drafts proposed to the European Commission by the SLG, the intention to standardise the definition of various forms of discrimination, as well as many 'innovations concerning access to justice to the courts and institutional support for [strategic] litigation', are noticeable.[41]

36 Article 1(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. Article 1(2) No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph.

37 Grand Chamber, Case of Sejdić and Finci v Bosnia and Herzegovina, Applications Nos. 27996/06 and 34836/06, Judgment of 22 December 2009. At para. 50 the Grand Chamber held that it constituted discrimination based on ethnic origin that 'The lack of a declaration of affiliation by the present applicants with a 'constituent people' also rendered them ineligible to stand for election to the Presidency.'

38 Article 45 of the present Treaty on the Functioning of the European Union; ex-Article 39 of the Treaty Establishing the European Community, EC Treaty. This Treaty provision is directly applicable in the legal systems of Member States so as to render inapplicable a provision in the French maritime code that required a *certain proportion* of the crew of a French ship to be of French nationality (*Commission v France*, Case 167/73).

39 Niessen, J. and Chopin, I., 'The starting line and the Racial Equality Directive', *The development of legal instruments to combat racism in a diverse Europe*, Chopin, I. and Niessen, J. (eds), 2004, pp. 95-110.

40 Ibid.

41 Case, R. E. and Givens, T. E., 'Re-engineering legal opportunity structures in the European Union? The Starting Line Group and the politics of the Racial Equality Directive' *Journal of Common Market Studies*, Volume 48, No. 2, 2010, p. 222. Council

Given the lack of treaty provisions enabling EU legislation in the field, SLG initially campaigned for a starting point, which led to the adoption of Article 13 of the EC Treaty (now Article 19 of the Treaty on the Functioning of the European Union) that gives the EU specific powers to combat discrimination on grounds of sex, *racial or ethnic origin*, religion or belief, age, disability or sexual orientation. The "clear intent of the drafters of the 1997 Amsterdam Treaty was to distinguish 'race' from 'ethnic origin' as separate grounds of prohibited discrimination".[42] The original text adopted the terms 'racial, ethnic or social origin, religious belief, etc.'."[43] The reference to social origin was removed from the final version, particularly because it was considered obsolete: 'its intended meaning of membership of a group defined by its common culture being covered by the expression 'racial and ethnic origin'.[44] While it seems adequate to dismiss earlier suggestions of interpreting social origin as referring to the Roma,[45] it is important to note that 'national or social origin' is specifically named as a protected ground in Article 14 ECHR, as well as Article 26 ICCPR, and consequently forms a basis of protection in various national laws – both treaties being referenced in preambular indent (3) of the RED.

Even though the original SLG proposal did not include religion – being 'limited to' race, colour, descent, nationality, national and ethnic origin, the 'New Starting Line' proposal issued after the Amsterdam Treaty included religion and belief.[46] SLG accounted for this change with reference to Community Decisions and the impossibility to separate out religion from racial origin in the violence Jews and Muslims suffer in Europe.[47] Another factor may have emanated from the influence of **UK** law owing to the involvement in the core coalition of the Commission for Racial Equality, the equality body focusing on racial and ethnic origin in the UK, as well as that of various leading experts from that country.[48] In the majority of the Member States at the time, the matter of whether Jews should be protected as a religious, racial, ethnic or national minority was not settled. Indeed, the uncertainties that surrounded the qualification of ethno-religious groups was raised during the legislative process.[49] In the UK, however, case law had settled the issue: Jews and Sikhs were protected under racial equality legislation. Moreover, by the late 1990s Islamophobia had already been discussed in the country, which necessitated a single approach to race and religion. From this perspective, it was obvious that, at the regional level, protection could only be ensured if the draft addressed both racial and religious discrimination. The decisive role played by these actors may also shed light on the choice of the term 'racial or ethnic origin' and the omission of national, which faithfully reproduced the statutory definition of the UK.

Other definitional concerns did not receive this much attention,[50] but the unclear boundaries between racial or ethnic origin on the one hand and religion on the other certainly contributed to the severance of religion from the SLG proposal. Seeing a real opportunity for adoption, the NGO coalition did not hold out on this aspect, particularly because **German** religious – mainly Catholic – organisations opposed it.

Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

42 De Schutter, 2016, p. 21.

43 Conference of the Representatives of the Governments of the Member States, *European Union today and tomorrow. Adapting the European Union for the benefit of its peoples and preparing it for the future. A general outline for a draft revision of the treaties*, CONF 2500/96, 5 December 1996, p. 16.

44 De Schutter, 2016, p. 22.

45 As does de Schutter, ibid. referring to L. Flynn, 'The Implications of Article 13 EC – After Amsterdam, Will Some Forms of Discrimination be More Equal than Others?' (1999) 36 *CMLRev* pp. 1127-1152, at p. 1132).

46 Howard, 2009, p. 99. referring to Dummett, A., *The starting Line: A proposal for a draft Council Directive concerning the elimination of racial discrimination*, 20, 3, New Community, 1994, p. 535.

47 Chopin I. and Niessen J. (eds), *Proposal for legislative measures to combat racism and to promote equal rights in the European Union*, Belmont Press, London, 1998, p. 20.

48 It was one of the three organisations that established the SLG. Niessen, J. and Chopin, I., 'The Starting Line and the Racial Equality Directive', in Chopin, I. and Niessen, J., 2004, pp. 95-110. See also, Chopin, I. and Niessen, J. (eds), *The Starting Line and the incorporation of the Racial Equality Directive into the national laws of the EU Member States and accession countries*, Commission for Racial Equality and Migration Policy Group, 2001.

49 Barelli, M., Guliyeva, G., Enrico, S. and Pentassuglia, G., *Minority groups and litigation: A review of developments in international and regional jurisprudence*, Minority Rights Group International, 2011 (MRG Report 2011), p. 19.

50 Tyson, A., Chopin, I. and Niessen, J., 'The negotiation of the EC directive on Racial Discrimination', in *The development of legal instruments to combat racism in a diverse Europe*, 2004, p. 123.

Alarmed by the uncertainties inherent in the wide material scope of the RED proposal and the threat they presented to the established services of religious organisations, they campaigned for religion and belief to be included in the other proposal, which focused on employment discrimination on the grounds of disability, age and sexual orientation. Thus, religion and belief was transferred to the Employment Equality Directive, which was adopted at the end of 2000.[51] Neither during the drafting of the Directive nor at the time of its adoption were suggestions made that, with the ground of religion, ethno-religious minorities would also 'transfer' to the EED.

The Commission proposal for a new Equal Treatment Directive did not address the definition of protected grounds.[52] The explanatory memorandum recalled that, since 1977, the European institutions had on many occasions condemned intolerance, racism, xenophobia and anti-Semitism. It noted that, since 1993, concern had been growing within the European Parliament of 'the resurgence of racism and xenophobia in Europe', despite the various national laws and international treaties that Member States ratified with a view to prohibiting racial discrimination. The significant variation in the scope, contents and enforceability of such prohibition measures necessitated action at the EU level. The directive provided a 'solid basis for enlargement' and facilitated the inclusion of new Member States. The Proposal emphasised that nationality discrimination was not covered by the directive, but 'double discrimination' against racial or ethnic minority women was. The Proposal concluded with a canny description of the mutually reinforcing relationship between racial discrimination and poverty, by pointing out that

> 'Discrimination on racial or ethnic grounds – particularly when it is cumulative – can lead to a cycle of disadvantage which is frequently passed from one generation to the next. For example, if educational facilities, housing, health services, environmental conditions and job opportunities for a particular group are all poor, the next generation will grow up less well equipped to deal with the difficulties facing them and will find themselves trapped in poor jobs, in poor housing and with poor health.'[53]

The main legal instruments dealing with racial discrimination at the EU level are the RED and the EU Charter on Fundamental Rights.[54] Pursuant to Article 6 TEU, the EU Charter applies and shall be taken into account during the resolution of legal disputes arising within Union competences.[55] Article 21.1 of the Charter ensures that 'Any discrimination based on any ground such as race, colour, ethnic or social origin, language, religion or belief, membership of a national minority, ... shall be prohibited'. This continues in Article 21.2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited. Under Article 22, the 'Union shall respect cultural, religious and linguistic diversity'.

The RED Preamble references various human rights treaties that prohibit discrimination, of which two appear particularly relevant.[56] Member States have signed and ratified the ECHR, ICERD and the ICCPR,

51 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303, 2 December 2000, pp. 0016-0022.

52 COM(99) 566 Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

53 Ibid, p. 23.

54 Charter of Fundamental Rights of the European Union, 2000/C 364/01.

55 According to Article 6.1, the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions. Pursuant to Article 6.3., fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's' law.

56 RED indent (3) of the Preamble states: 'The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations

which form part of their common constitutional traditions, and shall thus be taken into account when interpreting the scope and the meaning of the term racial or ethnic origin.[57] The EU also adopted a Framework Decision on combating racism and xenophobia by means of criminal law.[58] A comparison between the grounds enumerated in the Framework Decision and ICERD Article 1 shows an important difference: the insertion of religion in the former.

Other than in the RED, these instruments include characteristics that constitute the composite ground of racial or ethnic origin either by analogy with the ICERD definition of racial discrimination or by virtue of definitions of national minorities in international/national minority rights regimes. Regardless of the size of the catalogue of characteristics otherwise constituting racial or ethnic origin, potential differences and overlaps beg interpretation. Given the historical antecedents of nationalism and racism in Europe, these interpretations must be uniquely European and must strive to bridge potential gaps between the status of traditional national minorities on the one hand and cultural minorities on the other.

The Preamble to the RED clarifies that groups and individuals affected by racism, xenophobia or anti-Semitism are covered by the directive.[59] It tracks the actions of EU institutions, spanning from the Commission to the Council, and focuses on combating racism, xenophobia and anti-Semitism.[60] It highlights the political context in which the RED was adopted, indicating a grudging acquiescence to using the term racial in light of growing racial violence and discrimination, as well as the realisation of the damage it may cause to social cohesion.[61] The 'r' word is used in response, or rather in stark opposition, to racism and for want of a better term. According to indent (6), 'The European Union rejects theories which attempt to determine the existence of separate human races. The use of the term 'racial origin' in this Directive does not imply an acceptance of such theories'.

1.3 A note on minorities protected under the Racial Equality Directive

In a concise analysis of racial discrimination in EU law, the near impossibility of cataloguing groups and individuals to whom the RED's personal scope extends is noted. This is because 'no single definition of racism can be provided, instead it is essential to recognise the multiple forms that racism takes, varying over time and place'.[62] Racial discrimination can equally stem from scientific, cultural and institutional/structural racism. It is considered that by focusing on individual victims, the RED is not well-equipped to recognise the collective nature of racial stereotypes. The thematic report seeks to overcome this dilemma by focusing on racialisation, the process that transforms social signifiers into racial differences.

Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories'.

57 Case C-4/73, *J. Nold, Kohlen- Und Baustoffgrosshandlung* v *Commission of the European Communities* it was held that "international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law", para. 13. With regard to the ECHR, see Article 52(3) of the Charter.

58 Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (OJ L 328 of 6 December 2008).

59 Indent (7) asserts that 'The European Council in Tampere, on 15 and 16 October 1999, invited the Commission to come forward as soon as possible with proposals implementing Article 13 of the EC Treaty as regards the fight against racism and xenophobia'.

60 According to indent (10), 'The Commission presented a communication on racism, xenophobia and anti-Semitism in December 1995', while according to indent (11), 'The Council adopted on 15 July 1996 Joint Action (96/443/JHA) concerning action to combat racism and xenophobia under which the Member States undertake to ensure effective judicial cooperation in respect of offences based on racist or xenophobic behaviour'.

61 Pursuant to indent (5), 'The European Parliament has adopted a number of Resolutions on the fight against racism in the European Union'. Under indent (9) it is observed that 'Discrimination based on racial or ethnic origin may undermine the achievement of the objectives of the EC Treaty'. Therefore, as stipulated under indent (12), 'specific action in the field of discrimination based on racial or ethnic origin' must go beyond the field of employment in order to 'ensure the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin'.

62 Bell, M., *Racism and equality in the European Union*, OUP 2009, p. 23.

The Committee on the Elimination of all Forms of Racial Discrimination (CERD) interprets racial origin broadly, including national and ethnic minority groups, indigenous groups and minority groups not recognised by states. It has issued general recommendations on the Roma, people of African descent, descent, citizenship and migrants. The European Commission against Racism and Intolerance (ECRI) and the Advisory Committee of the Framework Convention on National Minorities maintain similarly broad interpretations of racial discrimination and national minorities, which includes groups targeted by Islamophobia and the ground of nationality/citizenship. FRA deals with anti-Semitism, Islamophobia, and discrimination against the Roma and Europeans of African descent. Recently, two groups have been the focus of attention: the Roma and European Muslims.

Given data collection shortcomings in the EU, the exact number of individuals belonging to or perceived as members of racial or ethnic minority groups is not known. The number of the most sizable communities can only be estimated as follows: 19 million European Muslims, 8 million Black Europeans and 7 million Roma.[63] The racial minorities in Europe have diverse historical roots, which has led to differences between Member States that have been receiving immigrants in greater numbers over the past decades and those that have not. Immigrants and descendants of immigrants are counted on the basis of categories that speak to their status as immigrants – such as citizenship, country of origin (of parents) and language spoken at home – even if they have acquired citizenship or their descendants have been born in the EU. Roma, on the other hand, have been present across Europe for centuries, which rules out data collection on the basis of migration experience – thus, they are often counted according to their social status, traditions and language. The discrepancies between the number of racial or ethnic minorities and the estimates – at times generated on the basis of proxy data – are not known, but evidence collected by ENAR and through the EDI Project suggests that discrepancies are significant for Afro-Europeans and European Muslims.[64]

1.3.1 The Roma

Prior to the adoption of the FCNM, the Roma did not fall under the purview of the Council of Europe, although the Parliamentary Assembly paid some attention to their fate as early as 1967. In 1995, in a publication dedicated to Roma, Minority Rights Group International acknowledged that 'Up until recently, there has been little recognition of the Roma/Gypsy as a distinct ethnic, linguistic and cultural group and hence a lack of recognition that many of the problems they encounter result from the violation of their rights as a minority.'[65] Roma as a phrase has been used since around this time to denote various groups, including Gypsies, Travellers, Sinti, Manush, Egyptians and Ashkalia.[66]

A leading Roma intellectual coined this process the Roma 'ethnogenesis', the recognition of so far scattered, marginalised communities as an ethnic group.[67] In his view, anti-Romani prejudices were rooted in the histories of CEE countries and their more recent communist pasts. Roma existed in a caste-like status, a juridically enforced dependency, which in **Romania** for instance entailed slavery until the mid-19th century. Roma identity was interpreted in a racial context that attributed to them an inherited and inferior social status based on their assumed cultural traditions, and portrayed them as deviant, leading to the extermination of hundreds of thousands in the concentration camps of the Third Reich (*Pharrajimos*).[68]

63 Supra, footnote 16.

64 See Ibid. and in Policy Report, Chopin, I., Farkas, L. and Germaine, C., *Equality Data Initiative. Ethnic origin and disability data collection in Europe: Measuring inequality – Combating discrimination*, Open Society Foundations, November 2014, pp. 11-13. Hereinafter: EDI Report.

65 Alan Philips' Preface in Liegeois, J.-P. and Gheorghe, N., *Roma/Gypsies: A European minority*, Minority Rights Group International, 1995, p. 5.

66 *The situation of Roma in an enlarged European Union*, European Commission Directorate-General for Employment and Social Affairs Unit D3, European Communities, 2004, report produced by a consortium comprising Focus Consultancy Ltd., the European Roma Rights Centre, and the European Roma Information Office.

67 Gheorghe, N., 'Roma-Gypsy ethnicity in Eastern Europe', *Social research*, Vol. 58, No. 4, Nationalism in Central and Eastern Europe, 1991, pp. 829-844.

68 Bársony, J. and Daróczi, Á. (eds.), *Pharrajimos: The fate of the Roma during the Holocaust*, IDEA, 2008.

Recently, criticism has been levelled at the imposition of external frames on Roma ethnicity by political institutions, an activist elite, and academics.[69]

Recognition and redistribution, segregation/social exclusion and anti-Gypsyism are the most common frames used to describe the Roma in today's Europe.[70] Still, neither the RED nor the ECHR define or specifically prohibit segregation.[71] Dozens of Roma rights cases litigated before the ECtHR have shone light on the plight of the Roma, but they have not resulted in meaningful change so far. The Roma issue is seen by many as typically Eastern European, but the status of Travellers, *gens du voyage* or English Gypsies also remains precarious, despite the decades-long fight for the accommodation of their Travelling way of life and the recognition of, for instance, the **Irish** Travellers as an ethnic group – which finally bore fruit in November 2016. As discussed below in detail, the ECtHR conceives of the Roma and Travellers as a specific ethnic group, while recognising that racial discrimination includes ethnic discrimination. Anti-Romani hate speech is a truly European phenomenon, practiced without public condemnation or outcry by people ranging from laymen to leading politicians.[72] Given the rather low number of Roma migrants, populist views on Roma must be seen in the wider context of fears of 'non-European' cultural invasion and welfare chauvinism.[73]

In 2000, CERD described 'the place of the Roma communities among those most disadvantaged and most subject to discrimination in the contemporary world'.[74] The plight of the Roma quickly became a European issue championed first by the Council of Europe and later by the EU. The Roma have been labelled as a 'European minority', indicating that they were present in almost all European countries. However, being European this way did not necessarily play to their advantage, because the national anti-Roma agenda often relies on this 'Europeanness' to 'exclude them symbolically from their own national space and frame them not only as 'Europeans' but also as 'outsiders' and 'cultural deviants'.[75]

There is an abundance of reports, policy recommendations, action plans, judgments – including over 70 judgments from the ECtHR and two from the CJEU, as well as four pending (pilot) infringement proceedings relating to anti-Gypsyism, discrimination against the Roma and Roma rights violations. It is important to note that the RED was adopted prior to the accession of CEE Member States, where the majority of European Roma live, and efforts to adopt a Roma-specific directive or to complement the RED with Roma-specific provisions – for instance on segregation – were not successful. The most significant policy and legal measures targeting the Roma at the EU level are the EU Framework for National Roma Integration Strategies up to 2020 and the 2013 European Council Recommendation on effective Roma integration measures in the Member States.[76]

69 Surdu, M., *Expert frames: Scientific and policy practices of Roma classification*, Central European University Press, 2015.

70 See, for instance, Ladányi, J., and Szelényi, I., *Patterns of exclusion: Constructing Gypsy ethnicity and the making of an underclass in transitional societies of Europe*. No. 676. Columbia University Press, 2006 and as recently as 2016: Brüggemann, C., and D'Arcy, K., 'Contexts that discriminate: international perspectives on the education of Roma students,' *Race Ethnicity and Education*, 2016: 1-4.

71 Farkas, L., *Segregation of Roma children in education. Addressing structural discrimination through the Race Equality Directive*, European Commission, 2007.

72 Stewart, M. (ed.), The Gypsy 'menace': Populism and the new anti-Gypsy politics, London, Hurst, 2012, and van Baar, H., *The emergence of a reasonable anti-Gypsyism in Europe. When stereotype meets prejudice: Antiziganism in European societies*, 2014, pp. 27-44 He notes that Roma who have been criminalised through racial stereotypes to such an extent become securities through the prism of migration. Michael Stewart calls Anti-Gypsyism the 'Gypsy Menace' and portrays it as a pan-European phenomenon. The Roma have become the 'other' not only for East Europeans but also for many Westerners after the enlargement of the European Union.

73 Toma, S., Tesăr, C. and Fosztó, L., *The immigration of Romanian Roma to Western Europe: Causes, effects, and future engagement strategies (MigRom): Report on the extended survey*, 2014.

74 General Recommendation No. 27: Discrimination against Roma, 16 August 2000, Gen. Rec. No. 27. (General Comments).

75 Vermeersch, P., 'Reframing the Roma: EU initiatives and the politics of reinterpretation', *Journal of Ethnic and Migration Studies*, Vol. 38, No. 8, September 2012, pp. 1195-1212.

76 Council Recommendation of 9 December 2013 on effective Roma integration measures in the Member States, OJ C 378, 24 December 2013.

1.3.2 Ethno-religious minorities

Following centuries of well documented anti-Semitism in Europe, culminating in the Holocaust, there is a consensus that persecution, hatred and discrimination directed at a minority self-identifying as a (primarily) religious minority – whose perceived, but assimilated members may not identify with that minority trait – can take on a racial character. This racialisation does not necessarily trigger a shift in minority identity from chiefly religious to ethnic or racial. The synergies between ethnic origin and religion have been borne out by the systematic ethnic cleansing of Muslim men and raping Muslim women in what is today **Bosnia and Herzegovina**, where Bosnians are the most sizeable of the three constituent peoples. Moreover, in the **Northern Irish** context, sectarian discrimination between Catholics and Protestants has been argued to constitute racial discrimination, where the religious element is 'much less definitive' than it is in anti-Semitism or Islamophobia.[77] According to this account, the Catholic Irish were racialised by the Protestant **British** colonisers on the basis of their religion, because 'colonialism made sense of the colonised peoples through the prism of their own religious beliefs' by pointing to their 'moral, intellectual or other failings'.[78]

Racialisation takes the agency away from individuals and groups targeted by majority bias, seeking to reconfigure their identities. It places a burden on law to avoid further reification. Conversely, a focus on identity – instead of the stereotype and its function in the process of race making – may be counter-productive. Distinction should be made between discrimination that stems from a manifested identity facet on the one hand and an ascribed identity on the other. For instance, the difference between the failure to provide reasonable accommodation to practicing Jews in a work place on the one hand and anti-Semitic hate speech involving references to the Holocaust by colleagues on the other seems rather straightforward if the analysis is conducted from the perspective of the discriminator. Then, the former scenario amounts to discrimination based on religion, because this personal identity facet is disregarded by the employer, while the latter to racial discrimination based on prejudice and stereotypes held by the perpetrators. However, viewed from the victim's perspective, both cases can be experienced as religious discrimination. Moreover, individuals who are not in fact Jewish may also fall victims of anti-Semitic hate speech and harassment, if they are mistaken by the perpetrators as being Jewish. Given that in their case their Jewish religious beliefs cannot be accosted, the central place of the bias and stereotypes held by the perpetrators when qualifying the unlawful act becomes more apparent. By recognising the process of racialisation, law can address both the damage done to the dignity of the individual victim, as well as that intended by the perpetrator.

ECRI, the CERD and NGOs, such as ENAR consider certain discriminatory acts fuelled by Islamophobia – including Islamophobic hate speech, the profiling of Muslims and discrimination in employment – as racial discrimination.[79] It has been argued persuasively that the grounds of racial or ethnic origin under the RED should be interpreted as covering discrimination based on religion – giving rise to a finding of indirect discrimination in the least.[80] Political scientists have also widely discussed the racialisation of Muslims in the contemporary Western World, highlighting the lack of accommodation of cultural/religious practices, as well as the profiling of Muslim men, allegedly for public security purposes.

The issue of whether ethno-religious or rather, racialised religious groups are covered by the RED has not yet been raised before the CJEU. On the contrary, at the regional level Muslim female applicants have framed their claims primarily as a violation of their right to religion and secondarily as a matter of

77 McVeigh R. and Rolston B., From Good Friday to Good Relations: sectarianism, racism and the Northern-Ireland state, Race and Class 2007: 48:1.

78 Ibid, pp. 3-4.

79 See for instance, *TBB-Turkish Union in Berlin/Brandenburg* v *Germany*, Communication No. 48/2010, U.N. Doc. CERD/C/82/D/48/2010 (2013). See also, Annual Report on ECRI activities 2014, CRI(2015)26 at p. 11: 'Populist movements claiming to protest against the alleged Islamisation of Europe mixed various aspects of Islamophobia with general xenophobic sentiments. It is frequently reported that women wearing a headscarf were sometimes subjected to verbal abuse and harassment in public'. ENAR report on Islamophobia, supra.

80 Howard, 2009, pp. 89-103.

religious discrimination. The freedom of religion is guaranteed in national law, as well as under Article 9 of the ECHR, which provides an attractive frame for challenges, particularly in relation to the manifestation of religion, an aspect that is expressly protected.[81] However, this strategy has so far been unsuccessful – most recently in *S.A.S. v France*.[82] In a rather different social, political, historic and religious context, the judgment *Refah Partisi (The Welfare Party) and Others v Turkey* focused on the applicant's advocacy for a plurality of legal systems in **Turkey**, claiming a recognition for Sharia law to enter certain fields of private life. Commentators noted the harsh, critical tone of the Court's majority to the values advocated by the applicant organisation, namely its reliance on Sharia law, particularly its approach to criminal law, the status of women and the intrusion of religion into all walks of life.[83] In his dissent, judge Kovler warned against the negative consequences of such generalised views.[84] Where claims regarding the applicability of Sharia law have been more subtle, criticism has been more accommodating – such as in the **UK** and **Greece**, where the uneven application of Sharia law against women by Islamic elders and/or religious leaders has been the subject of debate.[85]

It is important to note that not all instances of discrimination suffered by European Muslims can fall under the RED, a point borne out by the two cases alleging religious discrimination and awaiting judgment from the CJEU.[86] Both *Achbita* and *Asma Bougnaoui*, originate from Member States – **Belgium** and **France** – where national laws transposing the RED and EED would have enabled the applicants to claim religious, racial, as well as multiple or cumulative discrimination.[87] However, the applicants – assisted by the equality body UNIA in the first case and by an NGO working against Islamophobia in the second – chose to claim religious discrimination only. Both cases concern dismissal by private employers of an employee who decided to wear the Islamic headscarf after a period of time spent without it at the workplace. In *Achbita*, the employer relies on a general company rule prohibiting the manifestation of any religious or other beliefs to justify the dismissal, while in *Bougnaoui*, it invokes the aversion of the defendant company's major customer. Two analogies appear helpful in determining the ground of discrimination in these cases. The 'archetypical' racialisation of Jews, the anti-Semitic violence and profiling based on ascriptions pertaining chiefly to their names and physical appearance provides one limb of the analogy, while the reasonable accommodation of Sikhs, Jews and other minorities wishing to observe their religious customs the second. It appears rather straightforward that by analogy, violence and profiling against Muslim men based on their name and physical appearance, as well as against Muslim women wearing the headscarf amounts to racial discrimination. On the other hand, it also appears straightforward that the dismissal of Ms Achbita and Ms Bougnaoui is based on their claim to tolerate the manifestation of their religious

81 Article 9 ECHR governs Freedom of thought, conscience and religion: 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

82 *S.A.S v France*, Application No. 43835/11, Grand Chamber, judgment of 1 July 2014.

83 Thornberry, P. and Estebanez, M. A. (eds.), *Minority rights in Europe*, Council of Europe, 2004.

84 *Refah Partisi (the Welfare Party) and Others v Turkey*, Grand Chamber, Applications Nos. 41340/98, 41342/98, 41343/98, judgment of 13 February 2003.

85 See, supra fn 38. See also, Kofinis, S. The Status of Muslim Minority Women in Greece: Second Class European Citizens? In Schiek, D., & Lawson, A. (eds.), *European Union non-discrimination law and intersection-nality: investigating the triangle of racial, gender and disability discrimination*. Ashgate Publishing, 2013.

86 Opinion of Advocate General Kokott delivered on 31 May 2016 (1), Case C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* (Request for a preliminary ruling from the Hof van Cassatie (Court of Cassation), Belgium) and Opinion of Advocate General Sharpston delivered on 13 July 2016 in Case C-188/15, *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA*. Request for a preliminary ruling from the Cour de cassation (France) lodged on 24 April 2015.

87 The French Report 2015 on the non-discrimination directives recalls that although the 'prohibition of multiple discrimination is not included in the law, courts have allowed claims of cumulative discrimination', p. 17. The Belgian Report 2015 notes that while multiple discrimination cannot be claimed at the federal level, given that separate acts govern these grounds, such 'legal impediment does not exist at the regional level where most of the Communities/Regions have made the choice of adopting a framework equality Decree including all the prohibited criteria. According to the French Community or the Flemish Community/Region,36 such a legislative framework was chosen, to a certain extent, because it is better suited to tackle multiple discrimination', p. 20.

belief – which is not yet asking for the reasonable accommodation of religious practices on a wider scale that would include the adjustment of working time or rules on work and safety (such as in the case of Sikh turbans). Had the two applicants been denied employment based on their names and physical appearance – including the Islamic headscarf – their claims would fall squarely into the category of ascription based grievances, in which the conduct of the individual perpetrators of discriminatory acts is in accordance with general anti-Semitic or Islamophobic stereotypes. Given that they had been employed, doubts arise as to the racial motive of the employers' actions. Therefore, religious belief as a ground on which to argue that discrimination had taken place is the most reasonable and viable choice.

The clear contours of legal analysis may be blurred and upset by competing political claims superimposed on Muslim women who seek to observe religious practices or express a political opinion by their choice of religious garment. The political forcefield is shaped by majority and minority communities and leaders, as well as by feminist and nationalist discourses. As Advocate General Kokott warns in *Achbita*, "the legal issues surrounding the Islamic headscarf are symbolic of the more fundamental question of how much difference and diversity an open and pluralistic European society must tolerate within its borders and, conversely, how much assimilation it is permitted to require from certain minorities."[88] Her opinion echoes the concerns relating to the choices available to Muslim women who wish to observe religious practices, which, in comparison to other minority religions appear particularly wide, thus meriting further legal analysis. On the other hand, awareness of the controversies arising from wider political claims should not prevent judicial interpretation of a squarely legal dispute. As argued by others, there may, however, be instances in which the complexity of the underlying struggles and debates necessarily highlight the inadequacy of legal tools in resolving disputes of a fundamentally political nature.[89] The significantly different character and size of Muslim communities on the two shores of the Atlantic needs also to be taken into account when contemplating legislative or jurisprudential borrowing.

The RED's drafting history detailed above reveals that the need to counter racially motivated attacks on religious groups, such as Jews and Muslims in a uniform fashion triggered legislative change at the EU level. This is an important legacy not only for the Framework Decision, but also for the RED, when interpreting discrimination fuelled by anti-Semitism or Islamophobia.

In comparison to the national or ethnic minorities in Europe, the ethnic backgrounds of European Muslims are diverse, encompassing Turkish, Maghrebi, sub-Saharan African, Iranian, Arab, Pakistani, Indian, etc. The term Islamophobia was probably used first in 1918 in a French-language biography of the Prophet Muhammad.[90] In 1985, a more popular account of Islamophobia was published, in which it was compared to anti-Semitism.[91] It unravelled Islamophobia by relying on 'the rhetorical strength and accusatory power of the more established pathology of anti-Semitism.'[92] The Runnymede Trust introduced the term into contemporary European discourse through its report 'Islamophobia: A Challenge for Us All', which resulted from an investigation into discrimination against British Muslims.[93] The report describes Islamophobia as 'unfounded hostility towards Islam' and tracks eight stigmatising characterisations of Islam, including being viewed (2) as separate and 'other', not sharing the values of other cultures; (3) as irrational, primitive and inferior to the West and (4) as aggressive, violent and implicated in a clash of civilizations.[94]

Political scientists stress that 'cultural racism draws on physical appearance as one marker among others, but is not solely premised on conceptions of biology in a way that ignores religion, culture and so

88 Para. 3. *Achbita*.
89 McCrea, R. (2016). Rights, Recourse to the Courts and the Relationship between Religion, Law and State in Europe and the United States. *Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS, 9*.
90 In Taras, R. '"Islamophobia never stands still": race, religion and culture', *Ethnic and Racial Studies* 36.3,2013, pp. 417-433. Taras refers to Sliman ben Ibrahim, 1918, La Vie de Mohammed Prophète d'Allah, Paris: Piazza, which portrayed Islamophobia as a negative phenomenon.
91 Said, E. W., 'Orientalism reconsidered', *Race & Class*, vol. 27, no. 2, 1985, pp. 1-15.
92 Taras, 2013, p. 419.
93 Runnymede Trust, *Islamophobia: A challenge for us all*, Runnymede Trust, London, 1997.
94 Ibid, pp. 1-4.

forth.'[95] On the surface, a comparative view of the racialisation of Jews and Muslims shows that they are incommensurable, because the accounts concerning the two groups starkly differ (global conspiracy to grasp economic power and media influence versus international terrorism and violent threats to security). Still, the underlying logic of racialisation is analogous: a threat to the majority. Indeed, in order to understand Islamophobia, the usual frames of securitisation and the legacies of Orientalism and imperialism are not sufficient. Islamophobia 'simultaneously draws upon signs of race, culture and belonging in a way that is by no means reducible to hostility toward a religion alone, and it compels [one] to consider how religion has a new sociological relevance because of the ways it is tied up with issues of community identity, stereotyping, socio-economic location, political conflict and so on.'[96] In Western societies, there is a tendency to target religious groups instead of religious beliefs. Therefore, religious discrimination proceeds on the basis of perceived membership of ethno-religious groups, such as Catholics in **Northern Ireland**, Muslims in the countries of the **former Yugoslavia** and Jews in general. The racialisation of ethno-religious groups reveals that race is not merely about colour, just as cultural racism is not simply a proxy for racism, but a form of racism.[97] Race and racism play a central role in Islamophobia, because people, groups and minorities are the 'sites of racialisation'. Language also plays constitutive as well as reflexive roles in racialisation, which is a process with a historical 'pedigree'. Meer observes that 'the category of race was co-constituted with religion, and [the] resurrection of this genealogy implicates the formation of race in the racialisation of religious subjects.'[98] Non-Christian religious minorities in Europe can undergo processes of racialisation, where the groups perceived by Europeans as non-European may be othered as racially and culturally different. This othering is connected to perceived racial hierarchies in European empires, as well as to Christian Islamophobia in earlier centuries. 'For while it is true that 'Muslim' is not a (putative) biological category in the way that 'black' or 'south Asian', aka 'Paki', or Chinese is, neither was 'Jew.' It took a long, non-linear history of racialisation to turn an ethno-religious group into a race.'[99]

Furthermore, it is argued that Islam has been simultaneously culturalised and racialised by Muslims and its critics alike, thus cautioning against narrow definitions of the term as centred around religion, because 'religions are increasingly disconnected from the cultures in which they have been embedded'.[100] As much as Islamophobia is anchored in a fear of a clash of civilisations, its threat to secularism, not to Christianity, is central to Islamophobic prejudice. Islam threatens to upset the delicate European balance between secular and religious, whereas secularism is only 'a way to transcend squabbling between religions.' The EU discourse is criticised for treating religions as 'appendages of cultures and ethnicities' in order to diminish their importance, as are Member States' policies aimed at 'domesticating' Islam 'by putting pressure on Muslims to give up their core beliefs in return for fuller participation in the receiving society.'[101] Starting with the position of minority religions regarding stereotyping, grouping and othering, the critique returns to religion as a basic tenet of individual identity, pondering whether assimilationist policies targeting religious practices on the basis of a racialised view of Islam are justifiable.

While the interrogation of historical sources brings to the fore the *unstable meaning* of the word race, it simultaneously depicts racism as a global phenomenon that is motivated by deliberate political projects and results in often violent discriminatory action fuelled by ethnic prejudice.[102] It shows variance in the trajectories of racism in different geographic locations – including differences between **Britain** and continental Europe, as well as Europe and the United States. Racism itself is a contested concept, taken

95 Meer, N. and Modood, T., 'Refutations of racism in the "Muslim Question"', *Patterns of Prejudice*, vol. 43, no. 3/4, 2009, p. 344.
96 Meer, N. and Modood, T., 'The racialisation of Muslims', Sayyid, S. and Vakil, A. (eds), *Thinking through Islamophobia*, Columbia University Press, New York, 2010, pp. 70-71.
97 Ibid, p. 79.
98 Meer, 2013, p. 389.
99 Meer, N. and Modood, T., 'For "Jewish" read "Muslim"? Islamophobia as a form of racialisation of ethno-religious groups in Britain today', *Islamophobia Studies Journal* 1:1, 2012, pp. 39-40.
100 Taras, 2013, pp. 417-419.
101 Taras, 2013, p. 423.
102 Bethencourt, F., Racisms: From the Crusades to the Twentieth Century, Princeton University press, Princeton and Oxford, 2015, pp. 1-7.

to denote an ideology, as well as intentional practices.[103] On the other hand, the analysis of historical data from a behavioural perspective suggests variance in racist attitudes across localities – often in close vicinity of each other – that psychosocial research echoes by showing that perceptions of the others are created with an emphasis on the family and geographic locations.[104] A comparison of contemporary social movements indicates differences in the approaches of groups targeted by racism: few appropriate race for the purposes of political and legal struggle, whereas in general, they anchor their identity in categorically rejecting such labels. Still, racialisation as 'a process that ascribes physical and cultural differences to individuals and groups' is striving.[105]

Given the foregoing, this report approaches the definition of the grounds contained in the RED as comprising not only the classic characteristics explicitly spelt out in ICERD and the ECHR, but also religious minorities that fit the categorization of ethno-religious or racialised religious groups. Moreover, it is cognizant of minority language as an essential feature of racial or ethnic origin.

The necessity to include racial origin in legislation in order to ensure its comprehensive nature has been noted but, recognising the ideological baggage accompanying race, the use of the term ethnicity and ethnic origin has been proposed, given that these two terms resonate more broadly in Europe.[106] The next chapter will investigate the proposition that portrays ethnicity as a central category.

103 Miles, R., Racism as a Concept, in Bulmer M. and Solomos J. (eds) Racism, OUP, 1999, pp. 345-355.

104 Voigtländer, N., & Voth, H. J. (2012). Persecution perpetuated: the medieval origins of anti-Semitic violence in Nazi Germany. *Quarterly Journal of Economics*, *127*(3), 1339-1392. It is important to note that the research results are not conclusive, only suggestive in relation to children's acquired preferences through adaptation and imitation and parental attempt to socialise children according to their ow preference trait. Indeed, various questions arise in relation to research methodology pertaining to an overemphasis on societal groups such as merchants and lack of evidence in the analysed data concerning complementary institutions. Clarke, S., Racism: psychoanalytic and psychosocial approaches in Murji K. and Solomos J. (eds), *Theories of Race and Ethnicity*, Cambridge University Press, 2915, pp. 198-211, particularly at p. 210.

105 Barot R. and Bird J., Racialisation: the genealogy and critique of a concept, Ethnic and Racial Studies, Vol. 24 No. 4 July 2001, p. 601.

106 Bell, M., *Racism and equality in the European Union*, OUP 2009, p. 23.

2 The definition in national law of racial or ethnic origin[107]

The abundance of terms and concepts marking individuals and groups eligible for protection under the RED is overwhelming. Some of these terms reinforce canonised knowledge or shed new light on aspects so far overlooked, while others further obfuscate meaning. The task undertaken in this thematic report is daunting. Instead of cataloguing or classifying minorities as national, ethnic, racial, cultural, historic, territorial, linguistic, religious, ethno-religious, indigenous, cultural, the report describes the ways in which one can identify discrimination that occurs on the grounds of racial or ethnic origin. It posits that racial or ethnic origin is a composite and transversal ground and offers tools to manoeuvre one's way through the concepts. Composite means that, as a rule, racial or ethnic origin is comprised of characteristics that are protected separately 'in their own right', such as language, religion, skin colour or descent. Transversal speaks to the changes of the terms' meaning over time.

The historical overview shows that, prior to World War II, race was synonymous with national groups, while the term ethnic origin was not used in law and legal interpretation. National origin had already acquired a meaning, which – given the special rights of national minorities in Europe – could not apply to minorities universally. Ethnic origin, not yet having acquired a meaning in law, seemed capable of accommodating all types of minorities, but it also overlapped with the previous European conceptualization of race. While in Article 1 ICERD racial purports to include national and ethnic, the preparatory works of the ICCPR posit that ethnic was the broadest term available at the time. However, ethnic origin is not included in Article 26 of the ICCPR, which ensures equal treatment, nor is it included in the text of Article 14 ECHR, the European provision prohibiting discrimination.

The traumatic experiences of the Holocaust and the urge to respond to apartheid provoked the scientification of race in legal terminology, which trapped racial in the confines of biological racism – the essence of the ideologies it originally set out to combat. Scientification disassociated racial from nation (al minority) and consequently severed cultural, religious and linguistic from it. Reducing the meaning of racial to 'biological' inevitably paved the way to essentialisation, while insulating it from the influence of social sciences. In light of the putative sources of racial differences it is perhaps more accurate to say that a focus on labels simplifies, inevitably limiting the meaning of the concept, and ultimately the scope of protection.

The invention of a supercategory with the intention of ensuring terminological unity and dispelling scientific misconceptions of race and racial origin at the international level had an unintended side effect in Europe. Here, the prism of nationalism resists the smooth transfer of terminological reform that followed WWII. While in **France**, ethnic origin is perceived as equivalent to race, in the **UK** it is separately defined in case law. In the rest of the EU, correlations between ethnic and racial occupy a central place in academic discussions and judicial interpretation. An exception to the rule is **Polish** legislation, where the difference between national and ethnic minorities signifies the existence or absence of ties between a minority group and a state. Consequently, in Poland the Jews are recognised as a national minority, and the Roma as an ethnic minority. Prior to recent reform, **Hungarian** law also followed this logic, but presently it recognises only national minorities, including the Roma.

In Europe, ethnic origin stirred up the terminological field populated by national minorities, hitherto signifying cultural, religious and linguistic origins. Importantly, ethnic did not penetrate the pre-existing field of (national, linguistic and religious) minority rights. Here, ethnic does not have the overarching function envisaged in the UN of the 1950s. Indeed, it plays a secondary role in regional standard setting, as borne out by the terminology in the ECHR and the FCNM. The relevant domestic legislation canvassed

107 For the purpose of this report, the non-discrimination experts of the European network of legal experts in gender equality and non-discrimination have provided targeted information on national law in the EU Member States. Chapters 2 and 3 are largely based on that information.

below shows that, in the majority of Member States, ethnic remains an amorphous concept, rather than a tool bridging divisions between national and racial minorities.

Defining ethnic in the European context is as challenging as defining racial origin. In cases where a definition is attempted, racial and ethnic origins are joined, compared and juxtaposed, as in *Timishev v Russia*, analysed in Chapter 3. Interpretations seeking to highlight overlaps and differences between racial and ethnic origin have been advanced in several countries. For instance, according to the **Greek** Ombudsman, ethnic origin is usually connected to nationality/citizenship and is broader than the term ethnicity, which denotes the cultural characteristics of a certain group. The term racial origin refers to the categorisation of people into distinct groups according to biological classifications. Therefore, people are categorised into subspecies according to morphological features such as skin colour or facial characteristics. The Ombudsman relies on Timishev in drawing conclusions on similarities and differences, including racial differences based on anatomical, genetic or natural characteristics. In her view, this does not exclude a sense of racial bonds between the members of a certain group based on common cultural, ethnic, linguistic, religious or social characteristics. Categorisation based on natural anthropological criteria has been the underlying reason for the social segregation and enslavement of specific groups; this shows that race is used in a negative way, leading to racism. The Ombudsman refers to historical examples of racism: the Nazi theory of the Arian race and apartheid in South Africa. Today, according to the Ombudsman, racism, based on the notion of race, targets black people, Asians and the Roma.

The EU Charter, the RED and the Framework Decision on combating racism and xenophobia by means of criminal law do not define racial or ethnic origin, but the latter defines descent and religion for the purposes of combating racism through criminal law. According to indent (7) of the Preamble, in 'this Framework Decision "descent" should be understood as referring mainly to persons or groups of persons who descend from persons who could be identified by certain characteristics (such as race or colour), but not necessarily all of these characteristics still exist. In spite of that, because of their descent, such persons or groups of persons may be subject to hatred or violence'. According to indent (8) '"Religion", should be understood as broadly referring to persons defined by reference to their religious convictions or beliefs'. Article 1 of the Framework Decision enumerates offences concerning racism and xenophobia. Article 1.1. (a) prescribes that 'Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable: publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin'.

National origin forms part of racial or ethnic origin, without being mentioned in the RED. It is a missing third pillar of the composite ground on the basis of which discrimination is prohibited. To define racial, ethnic and national minorities is to recognise their existence, but definition also signifies the level of inclusion and exclusion. It posits distinctions between citizens by ranking minority status vis-à-vis other minority groups, as well as the racial, ethnic and national majority. 'Many EU Member States have ethnic minority groups who are not migrants or descendants of recent migrant populations, but are either indigenous or have settled in the countries a long time ago. At times these groups are referred to as national minorities, at other times as autochthonous minorities, as linguistic minorities, or simply as ethnic minorities. ... The status of these groups varies. Some are officially recognised minority groups with special rights and privileges, some have particular language rights and others do not have special group rights at all. The same minority might officially be recognised in some countries but not in others (e.g. the Roma).' Following the interpretation established by the PCIJ and shared by various European monitoring bodies, the UN Human Rights Committee (HRC) states: '[t]he existence of an ethnic, religious or linguistic minority in a given state party does not depend upon a decision by that State party but requires to be established by objective criteria.'

The law is deeply embedded in the relevant social and political context that determines definitional choices. Thus, prior to assessing the definition of racial or ethnic origin in the Member States, the report looks at relevant national debates.

2.1 National debates on racial and ethnic origin

It is notable that important academic and/or parliamentary debates on racial and ethnic origin have not taken place in **Austria**, **Bulgaria**, the **Czech Republic**, **Denmark**, **Estonia**, **Finland, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Slovakia** or **Spain**. Where debates have taken place, they have focused on (1) distinction between the positive and negative aspects of terms such as race, racial or racist in legislation, such as in **Belgium** and **Germany**, (2) the political consequences of defining groups as racial, ethnic or national minorities, such as in **Croatia**, **Cyprus**, **Estonia**, **Ireland**, the **Netherlands, Romania,** and **Slovenia**, (3) distinctions between racial and ethnic origin, such as in the **Czech Republic** and the **Netherlands**, or (4) definitional puzzles concerning ethnic data collection, such as in **Belgium**, **France** and **Italy**. (5) Comments and recommendations from monitoring bodies highlight the shortcomings that such contestations embody in relation to the interpretation of the ground under international and regional treaties.

(1) distinction between the positive and negative aspects of terms such as race, racial or racist in legislation

In **Belgium**, during the preparatory works of the Racial Equality Federal Act, the use of the term race was discussed. In order to leave no doubt that the legislator rejects theories which determine the existences of separate human races but that it is a social construct, the expression 'alleged race' was used. A similar path was adopted at the regional level. In **Germany**, alternative terms have been suggested as a replacement to race. The German Institute for Human Rights has taken a stand against the use of the term race in legal texts. On the other hand, it has been argued that the removal of the term would create a gap when it comes to protection. The Federal German Constitutional Court uses the term racial ('rassisch') only in quotation marks.[108]

(2) the political consequences of recognising groups as racial, ethnic or national minorities

In several countries, insiders and outsiders are marked according to descent. In **Croatia**, in the 1990s the definition of ethnic origin represented an important legal issue in the citizenship cases. After independence, persons who did not possess the Croatian republican citizenship – only the federal Yugoslav – became aliens and only ethnic Croats were granted automatic citizenship. In practice, applicants had to establish that they had previously declared their identity as an ethnic Croat. A point of interest in the Netherlands concerns the term 'allochtoon', which is frequently used by the Government and academic researchers as well as in the public debate. Netherlands Statistics (CBS) defines an 'autochtoon' as someone of whom both parents were born in The Netherlands.[109] Anyone who does not meet that definition is an allochtoon. A further distinction within the category 'allochtoon' is made by numbering the generations. It has often been argued that the frequent reference to the origin of people, or their parents' origin, perpetuates stereotypes and hinders integration, but the terms remain in vogue. In **Belgium**, the Flemish Government abandoned the terms allochtoon and autochtoon, but the distinction referring to foreign descent remains. Unlike the Executive Regulation of 30 January 2004, the Executive Regulation of 7 June 2013 does not use the word 'allochtonen' (foreign-born people) anymore, but refers to 'people who have foreign roots'.[110] In **Estonian** academia and politics there is a focus on 'Estonianness' based on a common culture, whose most important element is a common language. This portrays Estonians as a group with clear borders, separated from the external world, to which the minorities also belong. The preamble of the Estonian Constitution stipulates that the people of Estonia founded the Estonian state with the aim of preserving ethnic Estonians and Estonian culture through the ages.[111] The most important debate in **Slovenia**

108 See in this regard, Federal German Constitutional Court, BVerfGE 23, 98, 105 et seq.

109 For further information and the official definitions, see the website of Netherlands Statistics: https://www.cbs.nl/nl-nl/onze-diensten/methoden/begrippen#id=allochtoon.

110 Belgium, Article 1, 8° of the Executive Regulation of the Flemish Government of 7 June 2013.

111 Estonia, Constitution of the Republic of Estonia, 28 June 1992, RT 1992, 26, 349.; available at: https://www.riigiteataja.ee/en/eli/521052015001/consolide (English).

concerns the difference between 'autochthonous' (indigenous) and 'non-autochthonous' (non-indigenous) Roma, which indicates a difference between Roma who have lived in Slovenia for decades or centuries as compared with the 'newly arrived'. This is also reflected in the legislation: the Local Self-Government Act which provides for the right of the Roma community to have a representative in the municipal council, differentiates between autochthonous (indigenous) and non-autochthonous (non-indigenous) Roma. This differentiation has been challenged before the Constitutional Court, although it decided that the differentiation between autochthonous (indigenous) and non-autochthonous (non-indigenous) Roma is reasonable and does not constitute discrimination.[112]

In **Poland**, there are differences between the definitions of ethnic minority and national minority, although these do not result in material differences of status. According to the Minorities Act, 'A national minority is a group of Polish citizens fulfilling the following conditions: 1. is less numerous than the rest of the Polish population; 2. differs in a significant manner from other citizens by way of language, culture or tradition; 3. aspires to preserve its own language, culture or tradition; 4. has awareness of its historic national community and is focused on its expression and protection; 5. has inhabited the territory of the Republic of Poland for at least 100 years; and 6. identifies itself with a nation organised in its own state.' An ethnic minority differs in two important respects: it 'has awareness of a historic ethnic community, but it does not identify itself with a nation organised in its own state.' These definitions are criticised for two reasons: (i) excluding groups of so-called 'new immigrants', such as the Vietnamese and (ii) being restricted to Polish citizens, thus excluding migrant workers, for instance Ukrainians.[113]

Elsewhere, the legacy of colonisation drives debates in relation to the status of the former 'colonisers'. In **Cyprus**, more recent academic writings pivot around the question of 'minority' and 'minority rights' and the manner in which this is historically submerged into the broader question of the Cyprus conflict, which imposes a focus on consociational power-sharing arrangement between Greek Cypriots and Turkish Cypriots. There is a shift towards a rights-based perspective, arguing that protection under minority-based instruments should be extended not only to the three recognised religious groups but also to smaller groups as well as to migrants. Panayi argues that 'the Turkish population, as elsewhere in the Balkans, represents a legacy of imperial control'.[114] The conclusion emerging is that whilst language, culture, religion and ethnicity may operate as indicators, the crucial element is political affiliation, bearing in mind the context in which these groups are localised. In **Greece**, the Muslim religious minority in fact comprises three distinct ethnic groups – Turkish, Pomak (Slavs) and Roma. While the younger generation is critical of minority politics dependent on the 'patronage of Turkey', it simultaneously supports 'the right to self-determination as an ethnic Turkish minority'.[115] In **Romania**, heated political debates took place on the rights of national minorities – hence the reluctance to adopt legislation.

In **Ireland**, following decades of campaigns, in November 2016 Irish Travellers were recognised as a separate ethnic group. Membership of the Traveller Community is a separate ground under the Irish anti-discrimination legislation. The claim that Irish Travellers are ethnically Irish may have been an underlying reason for the official refusal of recognition. In the **UK**, there is some academic debate surrounding the question of whether caste should be covered.[116]

112 Slovenia, decision of the Constitutional Court, No. U-I-176/08-10 of 7 October 2010, http://odlocitve.us-rs.si/sl/odlocitev/US29256.

113 Poland, Article 2 of the Act on National and Ethnic Minorities and Regional Languages of 6 January 2005.

114 Panayi, P., 'Ethnic minority creation in modern Europe: Cyprus in context', in Varnava, A., Koureas, N. and Elia, M. (eds.), *The minorities of Cyprus*, Cambridge Scholars Publishing, 2009 pp. 1-25.

115 Anagnostou, D., & Triandafyllidou, A. (2007). Regions, minorities and European integration: A case study on Muslims in Western Thrace, Greece. *Romanian Journal of Political Sciences*, (01), pp. 100-125.

116 See for instance Shah, P., *Against caste in British law: A critical perspective on the caste discrimination provision in the Equality Act 2010*, Palgrave, 2015.

(3) distinctions between racial and ethnic origin

In **Czech** academia, several authors have taken the position that the relationship between race and ethnicity is such that race is a collection of biological signs, whereas ethnicity comprises other aspects, such as language, culture, descent, history, appearance or a combination of those. Roma are considered to be an ethnic minority, and discrimination towards them is considered to be both racial and ethnic. The discussion whether Roma will remain an ethnic minority despite the weakening distinction in the area of culture and language has not been properly addressed.[117] In the **Netherlands**, the exact borderline between race, ethnicity and nationality has been a subject of discussion.[118]

(4) definitional puzzles concerning ethnic data collection

In **Belgium**, the second socio-economic Monitoring (2015) aims to highlight the stratification of the labour market according to origin and migration history. Origin combines nationality of the person, nationality at birth of the person and nationality at birth of the person's parents. Migration history combines nationality of the person, nationality at birth of the person, nationality at birth of the person's parents, country of birth, country of birth of the person's grand-parents (only when the persons are of Belgian nationality and were born in Belgium from parents who were Belgian at the moment of their birth), date of registering at the national register and date of acquisition of nationality.[119] In **France**, ethnic data collection is also a subject of constant discussion, considering the impossibility of creating ethno-racial categories. In **Italy**, the only point that has been debated is the lack of collection of ethnic data, in particular regarding people belonging to Roma, Gypsy and Traveller communities.[120]

(5) comments and recommendations from monitoring bodies

In **Austria**, **Belgium**, **Cyprus**, **Finland**, **Hungary**, **Lithuania**, **Malta** and **Romania**, CERD, ECRI and the FCNM Advisory Committee have not made recommendations on the recognition of national minorities or the legal definition of racial discrimination. In the majority of Member States, concerns persist in relation to the recognition in domestic law of groups that can reasonably aspire to be protected as national or ethnic minorities and/or the availability of grounds in anti-discrimination legislation that imply racial discrimination.

Recognition is a concern in **Bulgaria**, **Denmark**, **France**, **Greece**, **Ireland**, **Latvia**, the **Netherlands**, **Romania** and **Slovenia**. In **Bulgaria**, the Advisory Committee expressed its concern that the authorities continue not to recognise the existence of the Pomak and Macedonian minorities. Representatives of the Pomak community indicated that labels such as 'Bulgarian Muslims' or 'Bulgarian-speaking Muslims' do not adequately reflect their identity.[121] In **Denmark**, the CERD questioned "why the Roma do not enjoy the status of national minority."[122] In **France**, the CERD underlined that the status of Travellers has not been properly considered.[123] In **Greece**, ECRI noted the lack of special measures for the Muslim

117 See Průcha, J., *Multikulturní výchova*. 1. vyd. Praha, ISV, 2001, p. 18; Gabal, I. 'Etnické klima české společnosti' Gabal, I. et al., *Etnické menšiny ve střední Evropě*. 1. vyd. Praha, G plus G, 1999, pp. 70-95.

118 See, for example, Equal Treatment Commission (now NIHR) 2011-97 and 2011-98, especially the note to both cases by A. Böcker and S. Dursum-Aksel, to be found in Foster, C. J. et al. (eds.), Oordelenbundel 2011 ('NIHR Opinions 2011'). Nijmegen, Wolf Legal Publishers, 2012, pp. 453-464.

119 The report is available on the website of the Centre (www.UNIA.be/en).

120 See, for instance, the Final report on the conditions of Roma, Sinti and Travellers in Italy, adopted by the Extraordinary Commission for the Protection and Promotion of Human Rights on 9 February 2011, available at http://www.senato.it/documenti/repository/commissioni/dirittiumani16/RAPPORTO%20ROM%20.pdf.

121 Third Opinion on Bulgaria adopted on 11 February 2014, Advisory Committee on the Framework Convention for the Protection of National Minorities.

122 Concluding observations of the Committee on the Elimination of Racial Discrimination, Denmark, 19 October 2006, UN Doc. CERD/C/DEN/CO/17, par. 12.

123 Final Observations of the Committee on the Elimination of Racial Discrimination, France, 27 August 2010, CERD/C/FRA/CO/17-19.

minority of Western Thrace.[124] In **Latvia**, the Advisory Committee remains concerned that Latgalians are not protected and that access to protection is not available to non-citizens belonging to national minorities.[125] In the **Netherlands**, the Committee of Ministers remarked that the Roma and Sinti are not considered as a national minority under the FCNM.[126] In **Romania**, the Advisory Committee recommended that the authorities consider the application of Article 3 to the Csango community.[127] In its 2014 report, ECRI recommended that **Slovenia** take measures so that individuals from other successor states of the former Yugoslavia may enjoy the protection of the FCNM.[128] There is an on-going discussion in **Poland** regarding the Silesian national minority.[129]

In the **Czech Republic**, **Estonia**, **Germany**, **Luxembourg** and **Poland**, the domestic legal provisions and/or case law improperly reflect the definition of racial discrimination in Article 1 ICERD. In the **Czech Republic**, ECRI emphasised that the grounds of colour and language are not covered by the Anti-discrimination Law, whereas the Czech Government stated that those are included in the grounds of race and ethnic origin. The Government also considers citizenship to be covered by nationality, but neither the law nor jurisprudence explicitly confirms this.[130] In **Estonia**, the Advisory Committee recommended that the legal definition of national origin be extended to long-term residents without Estonian citizenship.[131]

2.2 The definition of racial origin in Member States

The claims racism makes on the body and soul of 'peoples of colour' – are eloquently described by intellectuals, community leaders and academics. "When people like me, they like me 'in spite of my color.' When they dislike me; they point out that it isn't because of my color. Either way, I am locked in to the infernal circle." – writes Fannon in Black Skin, White Masks. "Between me and the other world there is ever an unasked question … All, nevertheless, flutter around it. They approach me in a half-hesitant sort of way: eye me curiously or compassionately and then, instead of saying directly: How does it feel to be a problem? They say, I know an excellent colored man in my town." – recounts Du Bois in The Souls of Black Folk.

In light of the national debates, it is perhaps not surprising that, in general, domestic laws do not provide an explicit statutory definition of racial or ethnic origin. In the **UK**, according to Section 9 of the Equality Act 2010, 'Race includes (a) colour; (b) nationality; and (c) ethnic or national origins'. UK law does not distinguish between national and ethnic minorities. There is no explicit statutory definition of racial or ethnic origin in the other Member States. However, a more in-depth assessment reveals that, owing to the impact that the definition of racial discrimination in Article 1 ICERD has on relevant constitutional and statutory provisions in continental Europe, with few notable exceptions, racial or ethnic origin is or can be defined in a manner similar to that in the UK. As mentioned in relation to national debates, Member States often grapple with the use of the 'r' word, because of the difficulty of distinguishing between the descriptive and moral aspects of terms such as race, racial or racist in legislation. However, this moral dilemma often provides a comfortable shield for political choices – seeking to maintain status differences across racial, ethnic or national minorities on the one hand, and between them and the majority racial,

124 Committee on the Elimination of Racial Discrimination, Reports Submitted by States Parties Under Article 9 of the Convention: Greece (27 March 2008), CCPR/C/GRC/CO/2, p. 2.
125 Advisory Committee on the Framework Convention for the Protection of National Minorities, Second Opinion on Latvia, adopted on 18 June 2013, Strasbourg, 3 January 2014, pp. 8-9.
126 Resolution CM/ResCMN(2011)3 on the implementation of the Framework Convention for the Protection of National Minorities by the Netherlands, adopted by the Committee of Ministers on 12 January 2011 at the 1102nd meeting of the Ministers' Deputies.
127 Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities, First Opinion on Romania, ACFC/INF/OP/I(2002)001 adopted on 6 April 2001.
128 ECRI Report on Slovenia, 2014, para. 134.
129 See, most recently, Supreme Court decision No III SK 10/13 of 5 December 2013, available at http://www.sn.pl/sites/orzecznictwo/Orzeczenia2/III%20SK%2010-13-1.pdf.
130 ECRI conclusions for the Czech Republic (2015), CRI(2015)35.
131 Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities (2015), Fourth Opinion on Estonia, adopted on 19 March 2015, ACFC/OP/IV(2015)002, Section 18.

ethnic or national group on the other. Efforts at identifying differences between racial, ethnic and national origin reflect, but also reinforce, variation in meaning.

Except for **Estonia**, **Portugal** and **Spain**, the majority of national laws prohibit discrimination on a wide range of grounds or else provide for an open list of grounds – many of which constitute the composite ground of racial or ethnic origin. An abundance of grounds may, however, also have its disadvantages, as is the case in **Romania** and **Hungary**. In general, simplification is not the route taken, although clear and modern interpretation may equally well facilitate implementation. This is the case in **Austria**, owing to the national courts' rather broad and seemingly effortless interpretation of ethnic affiliation as an umbrella term[132] and a very broad and modern approach in the preparatory works. Interpretation using racial and ethnic origin interchangeably can be observed in the **Czech Republic**.[133] Not naming racial or ethnic origin as a protected ground may complicate things but does not necessarily pose insurmountable difficulties in practice, as is demonstrated by the example of **France**.[134] Criminal cases relating to racial hatred have triggered definitional developments in **Malta**[135] and **Slovakia**.[136]

In the overwhelming majority of Member States, national law, case law, preparatory works and legal commentary use the definition of racial discrimination under Article 1 ICERD as a reference point. The nuance in Article 1 ICERD is often overlooked, and it is taken as inspiration for defining racial or ethnic origin, whereas taken literally it purports to define racial discrimination. In a few countries, the terms acquire a meaning 'in their usual sense', which may ultimately acquire a meaning compliant with Article 1 ICERD. The formulation of Article 1 ICERD and the use of 'or' between racial and ethnic origin in the RED are taken as a distinction between racial and ethnic origin, which has unintended consequences in creating potentially artificial frictions when interpreting these terms. At times, interpretation may create artificial distinctions or, in a worst-case scenario, essentialise racial or ethnic origin, which in turn generates risks of under-inclusion. The lacuna left by the lack of statutory definition may be filled with progressive interpretation inspired by other international legal standards – for instance by EU asylum law.

In **Estonia**, the Equal Treatment Act prohibits discrimination on the grounds of ethnic origin, race, and colour. In **Finland**, the Non-Discrimination Act prohibits discrimination on the basis of an open-ended list of grounds. First, it explicitly lists 13 grounds (including origin, religion or belief, nationality and language), and it then refers to 'other personal characteristics' as prohibited grounds of discrimination. Therefore, it has not been crucial to define the prohibited grounds of discrimination in a precise way, as any 'personal characteristic' is thought to cover any residual ground. In **Belgium**, the Racial Equality Federal Act prohibits discrimination on a wide range of grounds, including alleged race, colour, national or ethnic origin, and nationality. The General Anti-discrimination Federal Act covers religion and belief, language (due to the historical division of the country between French-speaking and Dutch-speaking people), and social origin. In the regional anti-discrimination legislation, the grounds covered are mostly identical, apart from ancestry which is sometimes added. In **Slovenia**, the Protection Against Discrimination Act (PADA) adopted on 21 June 2016 mentions race and ethnicity, language and religion as protected grounds. Colour and other grounds are covered by the general clause 'any other personal ground'. The **German** Constitution prohibits discrimination on a broad range of grounds, including language, or on the basis of national or social origin (Article 3 paragraph 3 sentence 1 of the Basic Law), binding legislation and administration at all levels of government and the judiciary.

An abundance of grounds may have its disadvantages. In **Romania**, racial or ethnic origin are among the protected grounds under the Anti-discrimination Law. A third, distinct category is also used: national

132 Austria, Supreme Court, Case No 9ObA40/13t, decision of 24 July 2013.

133 See for instance, Constitutional Court of the Czech Republic, decision No I. ÚS 1891/13, of 11 August 2015, available at: http://www.usoud.cz/fileadmin/user_upload/Tiskova_mluvci/Publikovane_nalezy/I._US_1891_13_an.pdf.

134 See for instance, Court of Cassation, decision No K 10-15873 of 15 December 2011, available at: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024993730&fastReqId=35872396&fastPos=1.

135 Malta, Court of Magistrates (Criminal Judicature); The Police v Norman Lowell, decision No 518/2006, of 27 March 2008.

136 Slovakia, Supreme Court of the Slovak Republic, decision No 4 Tdo 49/2012 of 19 March 2013.

minority. As language and religion are also expressly provided protected grounds, discrimination on these grounds would be sanctioned as such, and they would not be interpreted as proxies for race/ethnic origin. In **Hungary**, terminology used in the Equal Treatment Act (ETA) and in other relevant legal norms is very diverse. Race (*faj*) and colour (*szín*) are mentioned by the Fundamental Law, whereas the ETA uses colour of skin (*bőrszín*), racial affiliation (*faji hovatartozás*), belonging to a national minority (*nemzeti kisebbséghez való tartozás*) and nationality (*nemzetiség*) (not in the sense of citizenship). There is a statutory definition of nationality (*nemzetiség*) only, which is set forth in Article 1 of the Act on Nationalities.

Notably, in a few countries, domestic provisions do not distinguish between racial and ethnic origin or related grounds, relying instead on a single term: origin. The benefits of the 'origin approach' can be clearly observed in Finland, where, following the reform of anti-discrimination legislation, the term origin was chosen to signify not only racial or ethnic origin, but also overlapping grounds. In the preparatory works of the **Finnish** Non-Discrimination Act, origin is defined as including ethnic origin, national origin, societal origin, race and colour of skin.[137] In the course of its constitutional reform, the **German** state of Brandenburg removed the concept of *Rasse* from the constitutional principle of non-discrimination, so that Article 12 paragraph 2 now reads as follows: 'No one may be favoured or disfavoured because of origin, nationality, language, ... or on racist grounds.' Furthermore, the constitutionally defined objectives of the State of Brandenburg have been expanded correspondingly, so that Article 12 paragraph 1 now reads, 'The state protects the peaceful coexistence of people and counters the dissemination of racist and xenophobic ideas and views.'

Not naming racial or ethnic origin as a protected ground may complicate things but does not necessarily pose insurmountable difficulties in practice. The key to the traditional **French** legal approach to racism and discrimination is a characteristic interpretation of the principle of equality with reference to an abstract universalistic framework, based on the philosophical principles envisaged as an aspect of statehood, nationhood, and citizenship. The French approach has developed along two complementary lines: the condemnation of any reference to concepts, such as origin, ethnicity or race and the refusal to use criteria of origin, ethnicity or race for policy and administrative purposes. Ethnic origin is deemed to be a euphemism for race. Given that the law covers appearance of origin and that direct discrimination essentially addresses assumptions made by the discriminator, evidence of direct discrimination can be based on foreign physical appearance or attributed origin related to a person's appearance or last name. A bill, registered on 26 September 2012 and discussed in committee on 24 April 2013, proposed to suppress the reference to the word race from the Constitution. It was adopted at first reading at the National Assembly on 16 May 2013, but remains pending before the Senate.[138] Even though it generated consensus and was a campaign undertaking, it was not pushed further because of the possible negative impact on the conformity of national legislation with international Conventions ratified by France.

In the overwhelming majority of Member States, national law, case law, *travaux préparatoires* and legal commentary use the definition of racial discrimination under Article 1 ICERD as a reference point. In **Italy**, according to Article 43 of the 1998 Immigration Decree, which was mainly inspired by the ICERD, discrimination on the ground of national origin is prohibited and interpreted as covering nationality (as in citizenship). In the **Netherlands**, in the explanatory memorandum to the General Equal Treatment Act, it is stressed that race must be interpreted in line with the definition given in the ICERD.[139] In the Netherlands, the ICERD definition is also followed by the Courts and the Dutch equality body, the Netherlands Institute for Human Rights (NIHR).[140] In **Cyprus**, by virtue of the Law Ratifying ICERD N.12/1967, adopted on 30 March 1967, the definition contained in Article 1 applies. Similarly, in **Greece**, the ICERD definition of racial discrimination prevails. In **Malta**, in *The Police v Norman Lowell*, as in other cases which have dealt

137 Finland, Government's Proposal on Non-Discrimination Act 19/2014, p. 66, available at: http://www.finlex.fi/fi/esitykset/he/2014/20140019.

138 France, Bill No 218, adopted at first reading by the National Assembly on 16 May 2013, available at: http://www.assemblee-nationale.fr/14/ta/ta0139.asp.

139 Netherlands, Explanatory Memorandum to the GETA, Tweede Kamer, 1990-1991, 22 014, no. 3, p. 13.

140 See for instance, Dutch Supreme Court, decision No NJ 1996, 527, of 16 April 1996.

with racial hatred, the courts sought a definition of 'racial hatred'. In so doing, reference was made to ICERD and to the definitions of racial discrimination and racism found therein.[141] Slovakia ratified ICERD and, pursuant to Article 7(5) of the Slovak Constitution, it takes precedence over Slovak laws.

In a few countries, such as **Belgium** and **Denmark**, the terms are used 'in their usual sense', in effect acquiring a meaning compliant with Article 1 ICERD. In **Belgian** law, a definition was considered unnecessary, as the concepts were seen as self-explanatory. The Inter-federal Centre for Equal Opportunities relies on broad definitions based on the usual sense of the discrimination grounds. However, as the **Danish** example underscores, in practice 'self-explanatory' implies reliance on the most easily accessible explanation – that found in Article 1 ICERD. Two Danish preparatory works to the Act on Ethnic Equal Treatment and the Act on the Prohibition of Discrimination in the Labour Market state that the "terms shall be understood in accordance with usual terminology, as specified in national and international law, as well as case law from the CJEU in relation to the directive. Race is understood as a general characteristic belonging to a group of people, defined on the basis of physical criteria, including colour. Ethnic origin is generally understood as the belonging to a group of people, who are defined on the basis of shared history, traditions, culture or cultural background, language, geographical origin etc.[142]

Czech law does not clearly distinguish between the terms race and ethnic origin. However, the widely used Commentary on Anti-discrimination Law does, as follows: 'Race refers to physiological signs, whereas ethnicity also involves signs such as nationality, language, culture, history or religious tradition.'[143] In **Estonia**, the explanatory note to the draft Equal Treatment Act included the following clarifications: race (*rass*) is a group of people with certain hereditary features; while ethnicity (*rahvus*) – ethnic origin (*etniline kuuluvus*) –is not to be mixed with nationality/citizenship (*kodakondsus*).[144] In practice, race is normally associated with a particular skin colour (nevertheless, 'colour' was added as a separate ground of prohibited discrimination to the Equal Treatment Act).

At times, interpretation may create artificial distinctions or even essentialise racial or ethnic origin. The ICERD definition of racial discrimination is valid law in **Germany**, but the persistent use of race taken from English terminology and its counterpart in the Basic Law leads to criticism, which impacts on the legal terminology used in relevant (draft) legislation. The explanatory report to the AGG, the General Act on Equal Treatment, explains that the term race does not imply the acceptance of racist theories. Race is defined in legal doctrine as actual or alleged characteristics which are biologically inherited.[145] Anti-Semitism is regarded as discrimination on the ground of race, not religion, because of the historic context of Nazi ideology. Ethnic origin is covered by race. Ethnic origin is to be understood in the light of Article 1 ICERD, including race, colour, parentage (sic!), national origin or ethnicity, without clarifying the exact delineation of these terms. In Germany, ethnic origin is thus a more capacious term than race.

Criminal cases relating to racial hatred have triggered definitional developments in **Malta** and **Slovakia**. In Slovakia, criminal law literature states that a race is a 'group of people characterised by biological differences of individuals', while an 'ethnic group' is a 'historically formed group of people connected by common history, distinct cultural features (mainly language) and common mentality, traditions, and possibly a distinct way of life. Representatives of a given ethnic group have their own name (...) and have an understanding of mutual belonging and at the same time distinctiveness from other communities. An ethnic group usually exists beyond the borders of one state, such as for instance the Roma'.[146]

141 Malta, Court of Magistrates (Criminal Judicature); The Police v Norman Lowell, decision No 518/2006, of 27 March 2008.
142 Ministry of the Interior, Committee on implementation in Danish law of Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Report No. 1455 (2002), page 264.
143 Boučková, P., Havelková, B., Koldinská, K., Kühn, Z., Kühnová, E., Whelanová, M., *Antidiskriminační zákon. Komentář*, Praha, C. H. Beck, 2010, pp. 44-45.
144 Estonia, Explanatory note attached to the Draft no. 384 SE (11th Riigikogu), available at: http://www.riigikogu.ee.
145 See Osterloh in M. Sachs, 7th ed. 2014, GG, Art.3, para. 293.
146 Samaš, O., Stiffel, H., Toman, P. *Trestný zákon – Stručný komentár* (The Criminal Code: a brief commentary), Bratislava, IURA EDITION, spol. s r. o., 2006, p 302.

Article 14 of the Act on granting protection to aliens on the territory of the Republic of **Poland**, which transposed the EU asylum acquis, prescribes that, in the context of refugee status determination, 'the concept of race includes in particular colour of skin, descent, or membership of a particular ethnic group' and 'the concept of nationality is not limited to a citizenship or its absence, but shall in particular include membership of a group defined by: a) cultural, ethnic or linguistic identity or b) common geographical or political origin or c) linkage with the population of another country'.[147]

2.3 The definition of national origin in Member States

National origin is not defined in the FCNM, which leaves the term open to interpretation by the Advisory Committee. Its interpretation is broad, extending to religious and linguistic minorities, indigenous people and foreigners with residence permits. Even though national origin is not spelt out in the title, nor is protection from discrimination on this ground stipulated as a purpose, the RED covers national minorities. It is implied in the CJEU's approach in *Runevic-Vardyn*.

In **Belgium**, **Bulgaria**, **Cyprus**, **France**, **Greece**, **Ireland**, **Italy**, **Lithuania**, **Luxembourg**, **Malta**, the **Netherlands**, **Portugal**, **Romania**, **Slovakia**, **Spain** and the **UK** there is no specific legislation governing the status of national or ethnic minorities. Domestic legislation on national minorities has been enacted in over half of the Member States. The most common conditions of recognition are citizenship of the country, long-term presence on its territory – for generations or at least 100 years – and having/speaking the minority language. All the 13 Member States where national minority rights are recognised in the constitution or statutory law require the fulfilment of these requirements. The existence of a common culture (6) and ethnic origin/descent (5) defines a national minority in half of the countries, while traditions are mentioned in four and religion is mentioned in three. Four countries specifically provide protection from discrimination in relation to minority rights. In **France**, **Greece**, **Italy**, the **Netherlands**, **Romania** and **Slovakia**, even without specific legislation recognising or defining national minorities, certain minority languages are protected in (constitutional) law and are subject to special measures. The federal organisation of the **Belgian** State partly relies on linguistic communities (French, Dutch and German speaking).

National minorities are not recognised in **Greece** and **Cyprus**, but Muslim communities enjoy special rights on the basis of religion. The Roma are included in the Muslim communities in both countries. However, elsewhere minority protection rarely addresses ethno-religious minorities, such as Jews. In **Polish** law, distinction between national and ethnic minorities is also reflected in the statutory definition of these groups. The Polish Minorities Act recognises Jews as a national minority and the Roma as an ethnic minority.[148]

The national minority rights regime emanates from Treaty ratification in **Austria**, **Greece**, **Latvia** and the **Netherlands**. Reciprocity is essential in various countries, including **Denmark** and **Germany**. The majority of the Member States that recognise national minorities provide special rights in acts on national minorities. A minority of the Member States, including **Finland**, **Romania**, **Slovakia** and **Slovenia**, provide protection through the constitution. However, constitutional protection does not lead to recognition in every instance. Minority rights may be partly regulated through acts on minority languages – such as in **Slovakia**[149] – or based on representation and participation in public life – such as in **Romania**.[150]

147 Poland, Act of 18 March 2008 on the amendment of the Act on granting protection to aliens on the territory of Poland and other Acts of Parliament, in force since 29 May 2008, Journal of Laws 2008, no 70, item 416.
148 Poland, Act on National and Ethnic Minorities and Regional Languages, adopted on 6 January 2005 in force as of 1 May 2005.
149 Slovakia, Act No 184/1999 Coll. on the use of languages of national minorities, of 10 July 1999, as amended.
150 Romania, Law 35/2008 for the election of the Chamber of Deputies and of the Senate and for the amendment of Law 67/2004 on the election of local public administration authorities, of Law 215/2001 on local public administration and of Law 393/2004 on the Statute of officials elected in local elections, 13 March 2008, Art. 2 (29).

There are notable differences in the status of minorities in **Cyprus**, **Greece**, **Italy**, **Poland**, **Romania**, and **Slovenia**. Sometimes, status is withdrawn. For instance, in **Lithuania**, as of 1 January 2010, the 1989 Law on National Minorities, which previously regulated minority rights, is no longer in force, and no law has been adopted to fill the legal vacuum. However, the former law did not provide definitions of minorities either.

In general, recognition is based on the minority community's expression of a common identity and a need for protection. This is not always the case for the Roma, who may be protected without consultation, based on an assumed identity, such as for instance, in **Cyprus**. In **Greece**, Roma are not considered a minority, but a vulnerable group. In other instances, a minority is protected notwithstanding the lack of recognition. For instance, the term national minority does not exist in the **Portuguese** legal system. However, this does not prevent Portugal from implementing specific policies regarding Roma communities, bearing in mind their specific traditions and cultural identity.

In **Austria**, the Federal Act on the legal status of the ethnic groups covers ethnic minorities, such as Croats, Slovenes, Hungarians, Czechs, Slovaks and Roma.[151] In the **Czech Republic**, Law no. 273/2001 on the rights of members of national minorities recognises the Slovak, Ukrainian, Serbian, Croatian, Bulgarian, German, Polish, Russian, Roma, Greek, Ruthenian, Hungarian, Vietnamese and Belorussian national minorities.[152] In **Croatia**, the Constitutional Act on the Rights of National Minorities protects, but does not list national minorities.[153] The list of recognised national minorities is contained in the Preamble of the Croatian Constitution and includes Serbs, Czechs, Slovaks, Italians, Hungarians, Jews, Germans, Austrians, Ukrainians, Rusyns, Bosniaks, Slovenians, Montenegrins, Macedonians, Russians, Bulgarians, Poles, the Roma, Romanians, Turks, Vlachs and Albanians. In **Denmark**, the Regulation on the general rights of the German minority covers the German minority in the Southern Jutlandic parts of Denmark.[154] In **Estonia**, the National Minorities Cultural Autonomy Act regulates the cultural autonomies of national minorities. It recognises the German, Russian, Swedish and Jewish national minorities and other groups with a population of over 3,000 citizens in Estonia who correspond to a special definition.[155] **Germany** recognises the following national or ethnic minorities: Danish minority, Sorbian people, Frisians in Germany, German Sinti and Roma. Membership of these indigenous minorities is determined in Land law with reference to subjective standards such as self-definition and other indicators like language. In **Hungary**, the Act on the Rights of Nationalities guarantees rights to citizens.[156] It lists and recognises the Armenian, Bulgarian, Croatian, German, Greek, Polish, Roma, Romanian, Ruthenian, Serbian, Slovakian, Slovenian and Ukrainian national minorities. In **Poland**, the Minorities Act provides mostly linguistic and cultural rights.[157] The Act distinguishes between recognised national and ethnic minorities. The national minorities are Belarusian, Czech, Lithuanian, German, Armenian, Russian, Slovak, Ukrainian and Jewish. The ethnic minorities are Karaimi, Lemk, Roma and Tatar.

The **Finnish** Constitution lists the recognised national or ethnic minorities: the Sami and the Roma.[158] In the **Slovenian** Constitution of 1991, Hungarian and Italian are recognised as national minorities, while Roma are recognised as a special ethnic community.[159] The Self-Governing Ethnic Communities Act of

151 Austria, 'Ethnic Groups Act', Federal Act on the legal status of the ethnic groups in Austria, BGBl Nr. 396/1976 ala BGBl I Nr. 84/2003, 5 August 1976, available at: https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1976_396/ERV_1976_396.pdf.

152 Czech Republic, Law no. 273/2001 Coll., on the rights of members of national minorities, of 10 July 2001.

153 Croatia: Constitutional Act on the Rights of National Minorities does not list national minorities, 13 December 2002, Official Gazette 155/2002, 47/2010, 80/2010, 93/2011.

154 Denmark, Regulation No. 24 of 7 June 1955 on the general rights of the German minority.

155 Estonia, National Minorities Cultural Autonomy Act, of 26 October 1993, RT I 1993, 71, 1001; available at: https://www.riigiteataja.ee/en/eli/519112013004/consolide (English).

156 Hungary, Act CLXXIX of 2011 on the Rights of Nationalities, 20 December 2011, available at: http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100179.TV.

157 Poland, Act on National and Ethnic Minorities and Regional Languages, adopted on 6 January 2005 in force as of 1 May 2005.

158 Finland, the Constitution (731/1999) of 1 March 2000.

159 Slovenia, Constitution of the Republic of Slovenia, adopted on 23 December 1991.

1994 covers Italians and Hungarians,[160] while the Roma community in Slovenia is covered by a separate Roma Community Act, adopted in 2007.[161] In **Romania**, according to Article 6 of the Constitution, 'the State recognises and guarantees the right of persons belonging to national minorities to the preservation, development and expression of their ethnic, cultural, linguistic and religious identity.' Given the fierce opposition to various drafts of statutes regulating national minorities, the intermediary solution was to define a national minority as an 'ethnicity which is represented in the Council of National Minorities' and to list the 19 'organisations of citizens belonging to national minorities'.[162] The preferential treatment of organisations of national minorities mentioned in the list to the disadvantage of other organisations of national minorities had been discussed at length by the ECtHR in *Danis and the Association of Persons of Turk Origin v. Romania* in 2015. According to a report submitted under the FCNM, 'on the basis of the 1992 census, the Romanian Government considers that the following minorities are covered by the Framework Convention: Magyars/Szeklers, Gypsies, Germans/Swabians/Saxons, Ukrainians, Russians/Lipoveni, Turks, Serbs, Tatars, Slovaks, Bulgarians, Jews, Croats, Czechs, Poles, Greeks, Armenians.'[163] In **Slovakia**, a framework regulation of the rights of national minorities and ethnic groups is contained in Articles 33 and 34 of the Slovak Constitution, but there is no specific law on ethnic and national minorities. The Act on the use of languages of national minorities only defines a language of a national minority as a 'codified or a standardised language that is traditionally used on the territory of the Slovak Republic by its citizens belonging to a national minority and that is different from the state language. National minority languages are: the Bulgarian, the Czech, the Croatian, the Hungarian, the German, the Polish, the Roma, the Ruthenian, and the Ukrainian language'.[164] The undefined concepts of ethnicity, religion, language and affiliation to a nation (*národnosť*) are to a very large extent officially unified in the concept of 'affiliation to a nation/nationality' (*národnosť*), in the sense of a constitutionally guaranteed right to national affiliation that everyone has a right to choose – as compared with citizenship. For example, the Jews are often considered to be a national minority. So are the Roma, who are sometimes also considered to be an ethnic group, while no other minority group in Slovakia is considered as an ethnic group).

In **Germany**, there is no federal law on ethnic and national minorities, although there are provisions in the laws of the Länder. Regarding education there are special regulations for indigenous minorities in Germany, which provide special protection for cultural identity, including the use of language in schools.

In 1992, the **French** Constitutional Council refused the ratification of the European Charter of regional and minority languages.[165] However, in 2008, the Government passed a Constitutional reform that could result in change, since it provides, at article 40 of the law, for the introduction of Article 75-1 into the Constitution of 1958, recognising that French regional languages form part of French heritage – without, however, listing such minority languages.[166] In **Italy**, only linguistic minorities are recognised. Some enjoy special protection in the charters of regions with a special constitutional status. In the case of the German-speaking minority of Trentino Alto Adige (South Tyrol), this entails an extremely complex system of quotas for public employment and for the enjoyment of certain rights. Much weaker protection is granted at the national level to other, 'historic' linguistic minorities– 'the Albanian, Catalan, Germanic, Greek, Slovenian and Croatian populations and of those speaking French, Franco-Provençal, Friulan, Ladin,

160 Slovenia, Self-Governing Ethnic Communities Act, adopted on 5 October 1994.

161 Slovenia, Roma Community Act, adopted on 30 March 2007, available at: http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO899.

162 Romania, Decree Law 92 for the election of the Parliament and of the Romanian President, 14 March 1990.

163 Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities, First Opinion on Romania, ACFC/INF/OP/I(2002)001 adopted on 6 April 2001.

164 Slovakia, Section 1(2) of the Act No 184/1999 Coll. on the use of languages of national minorities, as amended, available at https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1999/184/20121001.

165 France, Constitutional Council decision No 99-412 DC of 15 June 1992, available at: https://www.legifrance.gouv.fr/affichJuriConst.do?oldAction=rechJuriConst&idTexte=CONSTEXT000017667958&fastReqId=1605355888&fastPos=1.

166 France, Constitutional Law Modernising the Rules of Parliament and of the State of 23 July 2008, available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000019237256&fastPos=1&fastReqId%20=1494829775&categorieLien=cid&oldAction=rechTexte.

Occitan and Sardinian'.[167] In the **Netherlands**, the Act on the use of the Frisian Language regulates the use of Frisian in relations with public administration and the judiciary.[168] In **Slovakia**, the Act on the use of languages of national minorities, as amended, sets the rules for the use of national minority languages in communication with public authorities and in other fields, such as healthcare or social care. It does not contain a list of recognised national/ethnic minorities, although it does list the national minority languages.[169]

The term 'community' in the **Cypriot** context acquires a special meaning. It is the term used in the Constitution to describe the Turkish Cypriots and the Greek Cypriots, and should be seen as interacting with ethnicity.[170] Even though, numerically, the Turkish Cypriot community is far smaller than the Greek Cypriot community, the term 'minority' with reference to the Turkish Cypriots is, for historical reasons, considered to be politically unacceptable. The Constitution uses 'community' with reference to the collective rights of Greek Cypriots and Turkish Cypriots. The Constitution recognises two 'communities' and three 'religious groups' (the Maronites, the Armenians and the Latins). All of these groups could, in essence, be described as national and/or ethnic minorities, but for political and historical reasons the official denominations do not use these terms. For the purposes of extending protection under the FCNM, the state recognises all these groups as 'minorities'. The Advisory Committee considers that the Cypriot authorities have recently extended recognition and protection under the FCNM to the Roma. A law regulates the representation of the three recognised religious groups, defining the term 'religious group' as 'the religious group of the Armenians, the Latins and the Maronites'.[171]

Greece has only recognised the Muslim minority in Thrace, under the Treaty of Lausanne of 1923.[172] They consist of three distinct groups, whose members are of Turkish, Pomak and Roma origin. Each has its own spoken language, cultural traditions and heritage. Legal literature identifies religious and linguistic minorities in Greece.[173] Greece provides for Muslim minority education. In **Latvia**, the law defines national minorities for the purposes of ratifying the FCNM.[174] The **Austrian** Minorities Act is mainly based on the Treaty of Vienna of 1955.[175]

167 Italy, Law No 482 of 15 December 1999, Measures on protection of historical and linguistic minorities, OJ no. 297 of 20 December 1999.
168 Netherlands, Act on the use of the Frisian Language, of 2 October 2013 (Law Gazette 2013, 382).
169 Slovakia, Act No 184/1999 Coll. on the use of languages of national minorities, as amended.
170 Cyprus, Constitution of the Republic of Cyprus.
171 Council of Europe (2015), Advisory Committee on the Framework Convention for the Protection of National Minorities, Fourth Opinion on Cyprus, 2 November 2015.
172 Greece, Treaty of Peace with Turkey Signed at Lausanne (Lausanne Treaty), 24 July 1923, 18 L.N.T.S. 11 (1924), reprinted in 18 Am. J. Int'l L. 4 (Supp. 1924).
173 See, for instance, Divani, L., 'The impact of the minority system of the League of Nations in Greece: A perspective of the Ministry of Foreign Affairs', in Tsitselikis, K. and Christopoulos, D., *The minority phenomenon in Greece*, Kritiki Publishers, 1997.
174 Latvia, Law on Framework Convention for the Protection of National Minorities, adopted on 26 May 2005.
175 Ethnic Groups Act, BGBl Nr. 396/1976 ala BGBl I Nr. 84/2003, 5 August 1976 (new official translation into English), mainly based on the Treaty of Vienna (1955), BGBl Nr. 152/1955 of 27 July 1955.

3 The definition of discrimination on the grounds of racial or ethnic origin

This chapter examines the definition of discrimination on the grounds of racial or ethnic origin in EU and international law, domestic statutory provisions and case law.

3.1 Definition in EU and international law as transposed into national law

The RED uses diverse formulae for defining the scope, the specific forms of discrimination and justifications. The purpose is to combat discrimination on the grounds of racial or ethnic origin. The prohibition covers direct and indirect discrimination based on racial or ethnic origin, but direct discrimination is deemed unlawful on grounds of racial or ethnic origin, whereas indirect discrimination occurs once persons of a racial or ethnic origin are disproportionately affected. Harassment, on the other hand, is defined as unwanted conduct related to racial or ethnic origin, while instruction to discriminate is again prohibited on the grounds of racial or ethnic origin. The RED provides two exceptions from the prohibition of discrimination on the ground of racial or ethnic origin: genuine and determining occupational requirements and positive action. The former may justify discrimination if it is based on a characteristic related to racial or ethnic origin, while the latter may justify it if positive action compensates for disadvantages linked to racial or ethnic origin.

The difference in the formulation of these provisions may diminish once one focuses on Article 1, which defines the purpose of the RED. Clearly, if the purpose is to prohibit discrimination on the grounds of racial or ethnic origin, this should form the basis of interpretation. The CJEU has interpreted the RED purposively in *Feryn*, which enabled it to provide protection to apparently 'hypothetical victims'. In *CHEZ*, purposive interpretation brought 'associative' or – as argued below – assumption based discrimination' under the RED. The report revisits these concerns in Chapter 4.

The terms 'characteristic related to' and 'disadvantage linked to' racial or ethnic origin provide room for a wide range of justification defences under Articles 4 and 5 RED. As long as the characteristic related or linked to racial or ethnic origin is a composite element – such as minority language, religion, culture or traditions – the test should be relatively straightforward: if the exception is genuine, the justification should succeed. Concerning poverty, migration status and citizenship, the link is less direct, but that should not reduce the level of scrutiny. The definition of racial or ethnic origin is relevant for the implementation of the RED through dialogue with non-governmental organisations and the activities of bodies for the promotion of equal treatment. However, interpretation here seems rather straightforward as the formula used is 'on the ground of'.

Information collected from the Member States for the purpose of this report shows that **Sweden** and the **United Kingdom** are the only Member States where national anti-discrimination legislation provides an explicit definition of the grounds of racial or ethnic origin. In addition, explanatory notes or preparatory works provide such a definition in **Denmark**, **Estonia**, **Finland**, **Germany** and the **Netherlands**, while they provide important elements to be taken into account when interpreting the ground in **Austria**.

ICERD defines racial discrimination with reference to treatment based on race, colour, descent, or national or ethnic origin. All the Member States have signed and ratified ICERD and some – **Germany** and **Slovakia** for instance – ensure its direct application in domestic law. The definition of racial discrimination contained in ICERD complements the definition of discrimination provided under national laws transposing the EU anti-discrimination directives. **Portuguese** legislation is a pertinent example of the historic development of domestic legislation inspired by international and EU standards. Law 134/99 was adopted on 28 August 1999 with the purpose of preventing and prohibiting discrimination in the exercise of rights based on race, skin colour, nationality or ethnic origin. Under Article 3, 'any distinction, exclusion, restriction or preference on the grounds of race, colour, ancestry, national or ethnic origin, which has the objective of,

or results in, invalidation or restriction of the recognition, enjoyment or exercise, in equal conditions, of rights, freedoms or guarantees, or of economic, social or cultural rights' is prohibited. Law 18/2004 was adopted on 11 May 2004 with the purposes of transposing the RED into the domestic legal order by establishing the principle of equality of treatment between persons irrespective of racial or ethnic origin and of setting up a legal framework to combat discrimination on the grounds of racial or ethnic origin. According to Article 3(1), equal treatment presupposes the absence of any direct or indirect discrimination based on racial or ethnic origin.

In contrast, in a handful of Member States, CERD has noted shortcomings in domestic legislation as concerns the personal scope of the prohibition of racial discrimination. In **Latvia**, CERD voiced concern over the absence of a legal provision explicitly defining racial discrimination. CERD highlighted the narrow definition of racism and racial discrimination in **German** law. The absence of a statutory definition of racial discrimination compliant with Article 1 ICERD indicates a failure to adequately address racial discrimination against all groups requiring protection. In lieu of a statutory definition, judges are reluctant to invoke ICERD. CERD is concerned about the persistent use of the term xenophobia to denote racial discrimination and the use of the term cultural differences to signify ethnic diversity. As regards **Luxembourg**, CERD is concerned about the definition of racial discrimination contained in article 1, paragraph 1 of the Act on equal treatment, as it does not include the criteria of national origin, colour or descent. The most recent ECRI report on **Poland** recommended that citizenship, language and religion be included among the prohibited grounds in all fields in which protection against discrimination is guaranteed. ECRI recommends that **Cypriot** law be extended to cover the grounds of colour, language and citizenship.

On the other hand, the drafting history of ICERD and the formulation 'in this Convention' should be seen as limiting the application of this definition, which is 'stipulative', rather than 'flowing from the usual meaning of "race"'.[176] The usual meaning of racial is of course disputed, and what is taken as its usual meaning today does not necessarily reflect the complexity it has obtained over time, and may be subject to change tomorrow. In fact, the formulation of the ground in the RED as 'racial or ethnic origin' not only relies on but also reinforces the usefulness of the ICERD definition, while resolving the dilemma of interpretation by contrast. This is the optimal way of expressing the relationship between racial and ethnic, which at times overlap to the extent of becoming interchangeable, but at other times demonstrate enough difference to necessitate the distinction in terminology.

Cultural minorities are protected under the RED and national case law pinpoints how widespread the interpretation of racial or ethnic origin as covering 'foreignness' is. By adopting an ICERD compatible formula, the RED ensures a balanced approach to protecting traditional, as well as cultural minorities, but there is a caveat relating to the applicability of the RED to the special rights of minorities. Potential synergies and overlaps between minority rights regimes and EU anti-discrimination law are extremely limited and do not as a rule extend to core minority rights issues. Notably, however, challenges to inter-group equality of status are conceivable under the RED in relation to employment by national minority institutions, national minority quota and education in minority schools.

The RED's potential to ensure substantive equality is limited, which is partly due to procedural issues, such as standing. In the majority of Member States, collective claims are not available. A more important limitation derives from the optional character of positive action measures under Article 5 and the CJEU's rather restrictive view on what the principle of non-discrimination requires in asymmetrical situations, such as would arise, for instance, between a recognised national minority with state-funded minority institutions and a non-recognised cultural minority without such institutions. Suppose that, in relation to racial or ethnic origin, the CJEU adopted a more generous approach than it has done in relation to sex, recognising power imbalances reflected in the actual situation of minorities. Even in such a scenario, the optional nature of positive action under Article 5 RED could arguably hamper remedies to less favourable treatment through levelling up, i.e. prescribing that similar positive action measures be provided to the

176 Thornberry, 1991, p. 225.

minority discriminated against as has been provided to the 'preferred' minority. On the other hand, the judgment in *Jonkman* suggests that as long as preferential treatment of the latter minority continues, levelling up would be feasible.[177]

Differences may also arise within one minority group, part of which may be recognised as a national minority, while the other remains a cultural minority – such as in the case of the **German** Sinti and other Roma settled in Germany. In cases where the non-German Roma are EU citizens, they can rely on EU law prohibiting discrimination based on nationality in order to seek access to the special rights that German Sinti and Roma enjoy. However, third-country national Roma cannot seek access to special rights, unless national law prohibiting discrimination on the grounds of racial or ethnic origin extends to the ground of nationality.

Cultural minorities can be recognised as national minorities and access minority rights, as is shown by the example of the Vietnamese community in the **Czech Republic**. However, this route has not been taken in other countries. On the contrary, not only national minority status but more importantly also citizenship is denied to a few minorities. The overwhelming majority of cultural minorities are racialised. Predominantly in Western Europe, many cultural minorities originate from former colonies, but colonisation has significant consequences in a strictly European context as well. While in the Baltic states the anti-colonial approach disadvantages ethnic Russians, in countries once under Ottoman rule it negatively impacts not only – and not primarily – on ethnic Turks, but also on other minorities who had converted to Islam, such as Pomaks, ethnic Bosniaks, ethnic Albanians and Muslim Roma, Ashkalia and Egyptians (RAE). Notably, even though not all the RAE are Muslim in the Balkans, in several countries they are assumed to be, dependent also on the language they speak. For instance, in **Greece** and **Cyprus** they are protected as part of the Muslim minority.

3.2 Interpretation by national courts

Citizens, residents and all types of migrants are protected under the RED, and national case law demonstrates how widespread the interpretation is of racial or ethnic origin as covering 'foreignness'. National courts and equality bodies have addressed this and several other thorny issues. Courts have grappled with (1) the distinctions between racial and ethnic origin, (2) the essential elements of the definition of racial or ethnic origin, (3) language – direct or indirect discrimination based on racial or ethnic origin, (4) descent, (5) 'foreignness' and nationality-based discrimination and (6) a profusion of grounds.

(1) Distinctions between racial and ethnic origin: complications and simplifications

Belgian case law does not interpret the terms alleged race and ethnic origin separately. Belgian courts do not draw a clear difference between the two terms: sometimes they use both; at other times only one, and without real consistency.[178] They also occasionally just refer to the pertinent legal provisions without quoting the grounds themselves.[179] The boundaries between discrimination on the ground of nationality and ethnic origin are sometimes blurred, for instance in *Feryn*.[180] In **Cyprus**, the Equality Body has used the term race/ethnic origin interchangeably with national origin and considers the term to be 'complemented' by the terms language, race, colour and national origin.[181]

177 Joined Cases C-231/06 to C-233/06, *National Pensions Office v Emilienne Jonkman* (C-231/06), *Hélène Vercheval* (C-232/06), and *Noëlle Permesaen* (C-233/06) *v National Pensions Office*.

178 See Judgment no. 2009/4737 of 22 October 2009 of the Court of First instance (*Correctionele rechtbank*) of Antwerp; Judgment no. 2009/1837 of 25 February 2009 of the Court of Appeals (*Hof van Beroep*) of Antwerp; Judgment of 13 January 2010 of the Court of Appeals (*Cour d'appel*) of Mons; Judgment no. F.D. 35.98.16/05 AF of 7 February 2014 of the Criminal Court (*Tribunal correctionnel/Correctionele rechtbank*) Dendermonde; Judgement of 10 February 2015 of the Court of Appeals (*Hof van Beroep*) of Brussels.

179 See Judgment no. BR 43.IN.101194/06 of 26 February 2014 of the Court of First Instance of Brussels (Criminal section) (*Tribunal correctionnel de Bruxelles*).

180 Judgment of 28 August 2009 by the Labour Appeal Court (*Cour du travail*) of Brussels.

181 Cyprus Equality Authority (2016), Report of the regrading discrimination prohibited by law on the ground of national origin in the field of access to occupation and specifically in the profession of assistant estate agent, 15 April 2016, File number A.K.I.22/2016.

In the **Czech Republic**, jurisprudence regarding racial and ethnic discrimination chiefly concerns the Roma, who are considered to be both an ethnic and a national minority.[182] The Supreme Court stated that discrimination can also be found in cases where the act is directed not towards the claimants themselves, but towards a group of which the claimant is a member.[183]

In 2013, the **Slovak** Supreme Court confirmed that the Roma represent an ethnic group.[184] The Slovak courts have a strong tendency to interpret the concept of (Roma) ethnicity, in the context of hate speech and hate crimes, narrowly. In 2013, for instance, the Supreme Court argued, *inter alia*, that the word 'Gypsy' (both as a noun and as an adjective) is frequently used as a part of the codified state language, and that uttering this word alone cannot indicate that a crime of defamation of nation, race and conviction pursuant to Section 423(1) of the Criminal Code had been committed.[185] Ethnicity as an explicit ground constituting hate crimes was added to the Criminal Code in June 2001, upon the initiative of the Ministry of Justice and after a number of problems in judicial practice of qualifying racially motivated crimes (before 2001, the hate crime provisions contained in the Criminal Code referred only to national origin and race). The criminal case that led to this amendment was launched before the District Court in Banská Bystrica.[186] The victim was a Roma student attacked because of his Roma ethnicity. The court of first instance used a literal and very restrictive interpretation of the word race. It ruled that the Roma belonged to the same race as Slovaks and that they are not to be considered as a different national minority or race, but rather as a different ethnic group. According to the trial court, there was no reason to qualify the criminal act as constituting a racially motivated hate crime, since this provision did not contain the term ethnic group. The court of appeal recognised the racial motivation of the attack. It reversed the decision of the first instance court, pointing out that 'the legislator purposely endeavoured neither to restrictively stipulate any general definition, nor to provide a list of nations, national groups, races or ethnic groups, being fully aware that the specification of some may artificially exclude the others.[187] Therefore, the issue should be understood in a wider context'. Now, the Criminal Code as well as the Anti-discrimination Act explicitly list race, national origin and affiliation with an ethnic group. The latter also lists colour and language as prohibited grounds of discrimination.

In **Slovenia**, in 2011 the Higher Court in Ljubljana provided guidance on how 'ethnicity' (*narodnost*) should be understood in the context of prohibition of incitement to racial or ethnic hatred in the Penal Code.[188] The court stated that all ethnicities enjoy the protection of the law, regardless of whether they are recognised as national minorities or not. The term 'ethnicity' should therefore be interpreted in line with Articles 63 and 14 of the Constitution, international instruments and recommendations on Roma which are binding on Slovenia. The court stated that protection must also be provided to groups that perhaps may not yet be considered as 'nations', but are understood to be 'ethnic groups'. In its judgment, the Court specifically referred to the ICERD and found that legal protection is also accorded to an ethnic group such as the Roma which does not have the official status of a national minority. The case related to a large family with some family members causing crime-related problems. The defendant stated that his claims were made against criminals, not against Roma as members of an ethnic group. The court did not accept this argument and stated that he had called for the eviction of the family as a whole, including children who had not committed any crimes.

182 Public Defender of Rights (2012), Survey of the Public Defender of Rights into the Ethnic Composition of Pupils of Former Special Schools Final Report (Výzkum ethnického složení žáků bývalých zvláštních škol), Brno, Public Defender of Rights. Available at: http://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Vyzkum/Survey_Ethnic_Special-schools.pdf, last accessed 16 June 2016.

183 Supreme Court of the Czech Republic (Nejvyšší soud), decision No. 28 Cdo 416/2002, 22 May 2002, available at: http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/D84F1F21B8F423D1C1257A4E00652569?openDocument&Highlight=0, last accessed 16 June 2016.

184 Decision of the Supreme Court of the Slovak Republic of 19 March 2013, ref. No 4 Tdo 49/2012, pp. 7-8.

185 Decision of the Supreme Court of the Slovak Republic of 19 March 2013, ref. No 4 Tdo 49/2012.

186 Decision of the District Court in Banská Bystrica No. 3T 52/98 of 1 July 1999, Decision of the Regional Court in Banská Bystrica No. 6 To 594/99 of 29 September 1999.

187 Decision of the Regional Court in Banská Bystrica No. 6 To 594/99 of 29 September 1999.

188 Slovenia, Case no. II Kp 24633/2010 of 13 September 2011.

In the **UK**, in *BBC v Souster*, the Scottish Court of Session decided that the English have separate 'national origins' to the Scots.[189] Mr Souster claimed that he had lost his job as a presenter for BBC Scotland because he was English. The Employment Appeal Tribunal held that 'national origins' was broader than citizenship and could cover discrimination against the Scots or the English.

(2) Essential elements of the definition of racial or ethnic origin

In the **UK**, the definition of ethnic origins was discussed in *Mandla and another v Dowell Lee*,[190] and was summarised thus: 'For a group to constitute an ethnic group in the sense of the 1976 Act [precursor to the Equality Act 2010], it must… regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: (1) a long-shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant; (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion, different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community….'

In **Germany**, ethnic origin is widely interpreted in accordance with ICERD. Interpretation includes race, skin colour, parentage (descent), national origin and ethnicity. The common origin of persons, a long common history, shared culture or a feeling of belonging together are held to be further relevant criteria of ethnic origin.[191] In the **Netherlands**, the NIHR considered in 2014 that a policy implemented by a local authority that would eventually put an end to 'trailer parks' amounted to discrimination on the ground of race (ethnic identity), and confirmed this finding in an Opinion in 2015.[192] An important consideration in this regard is that Roma have a specific culture, which, *inter alia*, includes living on trailer parks.

Domination and subjugation may coincide with essential elements of racial or ethnic origin.

In the **UK**, in *Chandhok v Tirkey*, the Employment Appeal Tribunal accepted that discrimination on the basis of caste could fall within discrimination on the basis of ethnic origin.[193] The claimant was a domestic servant who complained, *inter alia*, that she had been discriminated against because of her race, religion and caste (she was of the 'Adavasi' or servant caste) by her employers, who had subjected her to harassment, failed to pay her the national minimum wage and unfairly dismissed her. It was unclear whether the Equality Act 2010, which prohibits discrimination *inter alia* because of national or ethnic origins, colour or nationality, prohibited such discrimination. The Act was amended in 2013 to require the prohibition of caste discrimination by regulation, but those regulations are still awaited. In December 2015, the Employment Appeal Tribunal (EAT) confirmed that, although caste discrimination was not yet regulated as such by the Act, many aspects of caste might fall within it, particularly because ethnic origins has a wide and flexible ambit and included characteristics determined by descent.

The tribunal subsequently found – *inter alia* – that the claimant had been subject to discrimination because of religion and race. She had been paid radically less than the statutory minimum wage and had been denied the holidays and other rest periods to which she was lawfully entitled. She had

189 [2001] IRLR 150 http://www.bailii.org/scot/cases/ScotCS/2000/308.html.
190 *Mandla v Dowell Lee* [1983] 2 AC 548 http://www.bailii.org/uk/cases/UKHL/1982/7.html accessed 8 April 2016.
191 BAG, 21. June 2012 -8 AZR 364/11, Sect. 30,31.
192 NIHR 2014-165, 2014-166 and 2014-167, available at https://www.mensenrechten.nl/publicaties/oordelen/2014-165/detail.
193 *Chandhok v Tirkey,* [2015] IRLR 195 http://www.bailii.org/uk/cases/UKEAT/2014/0190_14_1912.html accessed 8 April 2016.

worked at least 18 hours a day, 7 days a week, and had often been denied a bed to sleep in. Her passport had been removed from her and she did not have access to the bank account into which her employers purported to pay her wages. She was not permitted to leave the house in which she worked except with the children for whom she was responsible.

The tribunal accepted that the claimant had been treated in the manner in which she was treated by the respondents in part because of her caste position: they had recruited her 'not because of her skills but because she was by birth, by virtue of her inherited position in society, and by virtue of her upbringing – i.e. because of her ethnic origins – a person whose expectations in life were no higher than to be a domestic servant ... The treatment afforded to the Claimant ... was because she was a low caste, Indian national, who could not speak English [sic] and by upbringing and by her inherited position in Indian society expected and was expected by others to do no more than serve others. 'Thus, the EAT found that aspects of caste overlapped with aspects of race and so the facts of a particular caste-related case may be caught within the act. The tribunal accepted that the ill-treatment to which she had been subjected amounted to harassment on grounds of race without specifically addressing the relationship between caste and race.

In **France**, Ms Dos Santos, originating from the Cape Verde Islands and illegally residing on French territory, was hired by a couple as an in-house employee during a nine-year period to take care of the house and children.[194] The Court of Appeal established discrimination on the ground of origin. The Court of Cassation reiterated that the disadvantage related to the exploitation of the claimant's predicament in connection with her status on French territory, which resulted in a negation of her legal and contractual rights in comparison with the employees benefiting from the protection of labour law, thus resulting in indirect discrimination on the ground of origin.

(3) Language: direct or indirect discrimination based on racial or ethnic origin

In **Austria**, the Viennese Independent Administrative Senate (UVS-Wien) decided in its judgment 06/42/318/2008 dated 11 March 2008 that a placement company was liable for discrimination, because it placed a job advertisement for an unskilled kitchen assistant and demanded 'excellent proficiency in German' as well as EU-citizenship. The Senate found that both requirements were racially discriminatory (not stating whether directly or indirectly).

In **Estonia**, more than 80 % of ethnic minority people are ethnic Russians, who speak Russian as their first language.[195] Difference in treatment on the grounds of mother tongue and proficiency in Estonian is quite widespread. Therefore, many cases concern the 'linguistic component' of ethnic discrimination. 'Language proficiency' used to be a protected ground in some (now repealed) legal acts. The equality body demonstrates a more progressive understanding of linguistic discrimination as compared with the courts.

The Commissioner for Gender Equality and Equal Treatment examined the employment contracts of two teachers at a Russian-language kindergarten, cancelled 'for long-term inability to perform duties' resulting from insufficient proficiency in **Estonian**.[196] Both teachers were native speakers of Russian and of Russian ethnic origin. Two positions of teachers' assistants were available at the kindergarten, which should have been offered to the women. Contrary to legal requirements, the relevant job advertisement stated that candidates must speak Estonian as a mother tongue. The commissioner concluded that both teachers were discriminated due to their ethnicity in so far as they had not been offered another position at the kindergarten. Their proficiency in Estonian at level A2 was not properly tested. Furthermore, a requirement to speak Estonian as a mother tongue discriminated against jobseekers of a minority ethnic origin. The Commissioner explicitly linked ethnic origin, mother tongue

194 Court of cassation, Dos Santos, n° 10-20765, 03/11/2011. available at https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024764368&fastReqId=1975217984&fastPos=1, verified 29 May 2016.

195 Statistical Office of Estonia; public database available at: http://www.stat.ee.

196 Estonia, Opinion of the Commissioner for Gender Equality and Equal Treatment of 22 July 2015 on the dispute of A & B v C.

and language proficiency in the context of discrimination and clearly stated that language requirement may discriminate against ethnic minority jobseekers, unless constituting a genuine occupational requirement.

Tallinn District Court, in the dispute *TV v Tallinn Prison*, examined a complaint filed by a former prison doctor claiming *inter alia* (indirect) ethnic discrimination on the ground of language as her level of proficiency affected her remuneration in 2006 and 2007.[197] The claimant also referred to the RED. Tallinn District Court did not find discrimination. According to the court, the RED is irrelevant inasmuch as it deals with ethnic and racial discrimination and not language. The court argued that 'ethnic origin cannot be altered but a person can develop better language proficiency'.

In **Germany**, in a recent exemplary decision, the Frankfurt Land Labour Court ruled that it constitutes direct discrimination because of ethnic origin (Sect. 7.1, Sect. 1 AGG) if an employer requires 'German as native language' for a job.[198] The court quoted from a decision of the Federal Labour Court: 'It is irrelevant whether the ethnic discrimination is defined positively or negatively. It covers both cases: where discrimination concerns a specific origin, as well as those in which the discrimination is linked only to the fact that the person concerned is not of German origin. Nationals of a foreign nation or a foreign culture are captured by the feature ethnic origin, even if the group of foreigners living in Germany is not characterised by common uniform features.'[199]

In **Latvia**, most cases that have reached the court have challenged fines imposed by language inspectors for the failure to use Latvian at the required proficiency level.[200] In the **UK**, the use of languages other than English can lead to discrimination, and this may amount to race/ethnic origin/nationality discrimination. Case law has established that it may be direct discrimination for an employer to instruct an employee not to use their own language at work, or to use this as a reason to discipline or dismiss someone.[201]

In **Romania**, the NCCD established ethnic discrimination in relation to differences of treatment on account of language, for example in a 2016 decision issued against the Clinical Emergency Hospital for Children in Cluj Napoca.[202] The case referred to the failure to communicate the medical diagnosis in Hungarian to a teenager, and the NCCD underlined that 'the criterion for the differentiation is not knowing the medical language in Romanian. Ethnic Hungarians, coming from areas in which Romanian is studied mostly through school manuals focusing on literary language, are clearly in the category of disadvantaged persons.' In **Slovenia**, there are many cases in which the courts have issued decisions related to language in the bilingual areas of Slovenia where Italian and Hungarian minorities live. However, in general these decisions are related, for example, to the right to a salary supplement for working in a bilingual environment.

(4) Descent

In the **UK**, in *R (E) v Governing Body of JFS & Ors*, the Supreme Court held by majority decision that discrimination based on the religious rules of matrilineal descent would amount to discrimination on grounds of race.[203] 'But one thing is clear about the matrilineal test; it is a test of ethnic origin. By definition,

197 Judgment of 30 November 2009, administrative case 3-08-2604, available at https://www.riigiteataja.ee/ kohtulahendid/koik_menetlused.html.

198 Cf.: Frankfurt Land Labour Court, 15 June 2015, 17 Ca 967/14. The decision is pending before the BAG under the reference number: 8 AZR 402/15.

199 Germany, BAG, 21 June 2012 -8 AZR 364/11, Sect. 30,31.

200 E.g. Latvia, Administrative District Court Riga Court House, Case Nr. 142284111 (1-0528-13/45), 28 March 2013. The court cancelled a fine imposed by the State Language Centre against a board member of a small enterprise for not speaking Latvian at the required level, because it found that no legitimate public interest had suffered given the language proficiency of other employees.

201 *Dziedziak v Future Electronics Limited* Appeal No. UKEAT/0270/11/ZT, available at http://www.bailii.org/uk/cases/UKEAT/2012/0270_11_2802.html.

202 Romania, National Council for Combating Discrimination, Decision 292 file 125/2016 from 6 April 2016.

203 [2009] UKSC 15 https://www.supremecourt.uk/decided-cases/docs/UKSC_2009_0136_Judgment.pdf accessed 22 May 2016.

discrimination that is based upon that test is discrimination on racial grounds under the Act'. The question for the Supreme Court was whether a policy which restricted admission to a Jewish school to those recognised as 'Jewish' by the Chief Rabbi, who applied a test based on maternal descent, amounted to direct race discrimination, in respect of which no justification or defence was available to the school under the Race Relations Act, or merely to direct religious discrimination in respect of which a specific defence would have applied. The claimant was a boy who practised as an Orthodox Jew but was not recognised as such by the Chief Rabbi or the school, because his mother (who had not been born Jewish) had converted to Judaism in a ceremony not recognised by the Chief Rabbi. It was found that, notwithstanding the fact that the school was not motivated by racism, the approach it took to the recognition of Jewishness crossed the line into impermissible race discrimination. The claimant had been treated less favourably in relation to admission to the school on the basis that he was not recognised as 'Jewish', and this was a test which turned on ethnicity and therefore on race for the purposes of the Race Relations Act 1976. No relevant defence was available to the school.

(5) 'Foreignness' and nationality-based discrimination

In **Austria**, courts generally developed a rather broad scope of protection by interpreting the most frequently invoked ground of ethnic affiliation to include citizenship, migration experience or general perceived foreignness, which seems a very appropriate approach to deal with the actual discourse and perception among the general public. Reflecting on the mainstream discourse that relies on terms such as foreigners, aliens and asylum seekers, the courts have frequently dealt with the scope of protection of the term ethnic affiliation. They have settled on a very broad interpretation without going into deep discussions on the existence of ethnic/racial groups. In a landmark case the Court of Appeal ruled in the case of a woman of Tunisian origin who had been physically kicked out of a fashion store with the words 'we do not sell to foreigners' in Vienna.[204] The court held that this constituted discrimination and harassment on the ground of ethnic affiliation, regardless of the claimant's citizenship. In another case, a Turkish national working and residing in Austria for more than 20 years was held to be entitled to 'commuters' aid' – a social benefit provided by the province of Lower Austria.[205] The court stated that the sole reference to his Turkish citizenship as a ground for excluding him from this benefit clearly constituted discrimination on the basis of ethic affiliation.

There are only a few cases in **Belgium** where nationality discrimination constitutes ethnic discrimination as well. This could be due to the fact that, since 1981, the Racial Equality Federal Act also prohibits discrimination based on nationality. In a ruling of 26 March 2007 in the case of *Caliskan Murat and the Centre for Equal Opportunities and Opposition to Racism v Delgou e Yves and Euro-Lock*, the First Instance Labour Court of Ghent found that the defendant had violated the Federal Anti-discrimination Act on the ground that he refused to hire someone because of his ethnic origin and/or nationality (Turkish).[206] This was held to be directly discriminatory in an injunction procedure (*action en cessation*).

In **France**, according to the Constitutional Council, national origin, meaning nationality at birth, conceived as objective information on a person's ancestry, is the only admissible objective reference to origin.[207] Nationality is often associated with origin when the law does not authorise restrictions based on nationality. Courts have held that discrimination on the ground of nationality constitutes direct discrimination on the ground of origin. Moreover, the scope of protection against discrimination on the ground of origin in

204 Viennese Regional Court for Civil Cases (Landesgericht für Zivilrechtssachen Wien) 35R68/07w; 35R104/07i, Hayet B. vs. Ferdinand S., 30 March 2007.

205 Judgment No. 21R16/13f-13 from 31 January 2013, the provincial court of St. Pölten [Landesgericht St. Pölten] See [Ger] http://www.klagsverband.at/dev/wp-content/uploads/2008/06/LG-St.-Pölten-21R16_13f.pdf.

206 Labour Court of Ghent, *Caliskan Murat and Centre for Equal Opportunities and Opposition to Racism v. Delgou e Yves and Euro-Lock,* 26 March 2007, available on the following link: http://unia.be/fr/jurisprudence-alternatives/jurisprudence/tribunal-du-travail-de-gand-selon-les-formes-du-refere-26-mars-2007.

207 Constitutional Council, no 2007-557 DC, 15 November 2007, available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2007/2007-557-dc/decision-n-2007-557-dc-du-15-novembre-2007.1183.html, verified 2 June 2016.

Article 2 of Law No. 2008-496, as integrated in the Labour Code and Law No. 89-462 of 6 July 1989 on relations between landlords and tenants, has been interpreted by courts to cover citizenship and specific requirements illegally imposed on third-country nationals.[208]

In **Greece**, in Decision 5251/2004, the First Instance Court of Thessaloniki declared that Article 25 of the Constitution entitles foreigners to equal treatment, since 'human rights' are addressed to all people residing within Greek territory, including foreigners. In relation to the principle of equal treatment, the Court clarified that it should not be based on the reciprocal recognition by the foreigner's State of origin. This was reiterated in Decision 332/2006 of the First Instance Court of Athens, which held that equality in the enjoyment of human rights for all is a consequence of the ratification and adoption of human rights treaties by Greece (particularly the ECHR and the ICCPR).

In **Italy**, the majority of judgments concern discrimination on ground of citizenship, as prohibited by the Immigration Decree 286/1998, articles 43 and 44. In particular, Article 43 covers the following grounds: race and colour, ethnic origin, religious beliefs and practices, and national origin, which is broadly interpreted. This broad interpretation has never been debated or questioned. Since 1998 several actions have been brought before the courts contesting discrimination against third-country nationals on the basis of nationality. The courts have applied the 1998 Immigration Decree and Legislative Decree 215/2003 to every case of racial or nationality discrimination.

In the **Spanish** case of Williams, racial discrimination was based on the applicant's skin colour, which was taken to signify her foreign nationality.[209] Rosalind Williams, an Afro-American originally from the United States, acquired Spanish nationality in 1969. On 6 December 1992, at Valladolid railway station, a National Police officer asked to see her national identity card. She asked the officer to explain the reasons for the identity check. The officer replied that he was obliged to check the identity of people 'like her', since many of them were illegal immigrants. the Spanish Constitutional Court, in a judgment of 29 January 2001, justified the police action because it 'applied the racial criterion merely as indicating a greater likelihood that the person concerned was not Spanish', and because 'what might have been discriminatory would have been the use of a criterion [in this case a racial one] with no relation to the identification of persons for whom the law stipulates this administrative measure, in this case foreign citizens'. Mrs Williams complained to the UN Human Rights Committee, which established discrimination, because 'the criteria of reasonableness and objectivity were not met'.[210]

In **Portugal**, a Constitutional Court judgment declares unconstitutional two norms that formed part of the legal regime governing the social insertion income (RSI), a social benefit included in the welfare subsystem designed to support people experiencing serious economic hardship.[211] A condition for RSI is legal residence in Portugal for the last three years if the applicant is not an EU citizen or analogous. Although the Court refused to acknowledge a breach of equality and non-discrimination, it established a breach of the principle of proportionality. It held that the Constitution requires an attitude of openness towards foreign citizens, and as a rule grants them the same rights and subjects them to the same duties as to Portuguese citizens. Over the years, the Constitutional Court has recognised the principle of equivalence as a general principle applicable to the status of foreigners. Where a core set of universal rights with constitutional or international origins is concerned, this principle is valid for every foreigner, and not just those whose presence in Portugal complies with all the applicable rules. The legislature can establish exceptions to this principle, subjecting the enjoyment of certain rights to the possession of Portuguese nationality, but only if the restriction is constitutionally legitimate. The Court considered

208 France, District Court of Montpellier, n° 11-07-001540, 3 April 2008.

209 Constitutional Court Decision, 13/2001, 29 January 2001, http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/4309.

210 A/64/40, vol. II (2009) Annex VII.FF., page 295 FF. Communication No. 1493/2006, *Williams Lecraft v. Spain* (Views adopted on 27 July 2009, Ninety-sixth session), Ms. Rosalind Williams Lecraft (represented by Open Society Justice Initiative, Women's Link Worldwide and SOS Racismo-Madrid).

211 Ruling No. 296/15 of 25 May 2015 of the Portuguese Constitutional Court, available at: http://www.tribunalconstitucional.pt/tc/en/acordaos/20150296s.html.

that the imposition of a three-year requirement was excessive and conflicted with the right to a welfare benefit whose purpose was to ensure the most basic means of subsistence. It found the provision unconstitutional, because it breached the principle of proportionality.

(6) Profusion of grounds relating to racial or ethnic origin

In **Bulgaria**, under the Protection Against Discrimination Act, the list of grounds is extensive and open-ended. In addition to race and ethnic appurtenance, it expressly includes national origin, nationality, origin, personal or public status and property status, as well as other specific grounds. The provision also includes all other non-specific grounds provided for by law or international treaty. Therefore, the equality body and the courts have not needed to evolve the scope of racial and ethnic origin in order to take account of social status, citizenship or immigrant status. The personal status ground has been actively used by the equality body, which recently found that xenophobic, racist and Islamophobic hate speech targeting Syrian refugees by an ultranationalist MP constituted harassment of Syrians having or seeking asylum on grounds of their personal status.[212] In a similar earlier case, where an ultranationalist activist engaged in mediatised hate speech against refugees from North Africa, the equality body found, and the Supreme Administrative Court confirmed its finding of, harassment and incitement to discrimination on the ground of race signifying skin colour and African origin.[213]

In **Hungary**, the uncertainty concerning terms is reflected in case law. For instance, in two identical cases (concerning denial of access to bars by Roma) in 2012, the Equal Treatment Authority established discrimination on two different grounds: the colour of skin in one case and belonging to the Roma national minority in the other.[214] (From 2013 on, the authority has consistently been using the term 'belonging to a national minority' in Roma discrimination cases.) Courts have found it unnecessary to draw clear distinctions between the different grounds listed in the ETA. For instance, in a case launched by the Chance for Children Foundation into school segregation in Jászladány, the first instance court stated that CFCF had had the right to initiate an actio popularis claim on the basis of belonging to an ethnic minority (*etnikai kisebbség*), the colour of skin (*bőrszín*) and race (*faj*).[215] While, in the same case, the Supreme Court stated that the ground of discrimination was 'belonging to the Gypsy ethnic minority' (*cigány etnikai kisebbséghez tartozás*), without clarifying difference as to the other two grounds.[216] Due to the open-ended nature of the list of protected grounds, no pressing need for providing definitions or interpreting the differences in these terms arises.

In **Hungary**, certain authorities prefer to use indigence (disadvantaged social status) when dealing with discrimination against the Roma. In May 2014, the Municipal Council of Miskolc (North-East Hungary) amended its Decree No. 25/2006. (VII.12.) on Social Housing, introducing a limitation on receiving financial compensation for the termination of social housing for those who live in 'low comfort' social housing. Unlike low comfort housing tenants, tenants of higher-quality social housing are provided with the possibility of being relocated within Miskolc. Therefore, this is differential treatment of low comfort as compared with ordinary social-housing tenants, which in practice allows the authorities to 'expel' tenants living in low comfort social housing from the territory of Miskolc. Tenants of low comfort housing are almost exclusively Roma, who thus would no longer be able to access social services in Miskolc due to their change of address. The Borsod-Abaúj-Zemplén County Government Office requested the Municipal Council to amend the decree, but the council refused to do so. The Government Office filed a motion with the Curia for the quashing of the decree. The Curia established

212 Decision No 163 of 22 April 2016, case No 352/2013, Protection Against Discrimination Commission.

213 Decision No 14653 of 10 November 2011, case No 4855/2011, Supreme Administrative Court (on appeal). Decision No 11259 of 14 September 2012, case No 1916/2012, Supreme Administrative Court (as trial court).

214 Equal Treatment Authority, case no. EBH/50/2012, 5 January 2012, http://egyenlobanasmod.hu/article/view/ebh-50-2012 and case no. EBH/117/2012, 22 May 2012, http://egyenlobanasmod.hu/article/view/ebh-117-2012 (accessed on 2 June 2016).

215 Jász-Nagykun-Szolnok County Court, case no. 16.P.20.812/2007/70, 9 December 2009 (p. 29), http://cfcf.hu/sites/default/files/Gal%C3%A9ria/Jaszladany_elsofok.pdf (accessed on 2 June 2016).

216 Supreme Court, case no. Pfv.IV.20.037/2011/4, 19 June 2011 (p. 16), http://cfcf.hu/sites/default/files/Gal%C3%A9ria/CFCF_J%C3%A1szlad%C3%A1ny_LB%20%C3%ADt%C3%A9let.pdf (accessed on 2 June 2016).

that Article 23(3) of the decree was discriminatory on the ground of financial situation and an 'other characteristic' (more precisely: social status).[217] While it is common knowledge that the large majority of the tenants concerned are of Roma origin, the Curia did not deal with this aspect, but restricted itself to approaching the case from the point of view of social and financial status, which are protected grounds under the ETA in their own right. Thus, although this case would properly fit the personal scope of the RED, given its framing by the Government Office and the Curia, the RED is not applicable.

3.3 Analysis of national case law

While only a negligible minority of Member States avoid the terms racial or ethnic origin in their domestic laws, there is a widespread reluctance across national courts to use these terms or to explicate their meaning. However, 'No Comment' often says more than an intricate statement. First and foremost, it reiterates the *status quo* and allows generally held societal views to invade the realm of judicial decision making. Secondly, it disables the important educational function of judgments, while at the same time leaving room for a backlash, the reinforcement of racial stereotypes and the consequent further essentialising of racial and ethnic origin. Last but not least, judicial silence may be taken to support narratives that blame the victims of racial discrimination or portray them as notorious 'whingers and whiners'.

Profound psychological processes underlying such reluctance cannot be remedied, although semantic misgivings can be addressed through law. The evolution of legal terms indicates that ethnic rather than racial discrimination has been intended to serve as a supercategory capable of bridging cleavages between traditional national minorities and racial groups. This view resonates in some Member States. For instance, more recently, the **Czech** Public Defender of Rights shifted to using ethnic origin-based discrimination only, encompassing both physiological and sociological identifiers, such as language, culture, colour and socio-economic status. However, ethnic origin has also been instrumental in limiting racial origin to signify 'the biological', at the same time colonising the realm so far occupied by national origin.

The **UK** has been the forerunner in providing protection in its domestic law years before the RED was adopted and, for various structural reasons – including relatively easy access to legal aid in the past and a strong anti-racist movement – and despite the initial hurdles, legal challenges have been extensive in this country. Some of the issues resolved through litigation in the UK have been resolved by legislation in other Member States. Case law in which courts or equality bodies have considered the personal scope of the national non-discrimination legislation in relation to racial and ethnic origin, particularly that taking into account social exclusion or marginalisation, social status, citizenship or immigrant status, emerges in the overwhelming majority of Member States. Furthermore, several cases dealing with the qualification of minority language-based discrimination as direct or indirect have been reported. On the other hand, colour and descent remain underutilised, being substituted by ethnic origin.

Some outstanding issues require fine-tuning, in particular the distinctions and synergies between grounds that may be protected of themselves but that may also jointly constitute the composite ground, such as minority religion, language and descent. Owing to differences in domestic legislation, histories and policy responses to claims of multicultural accommodation, challenges more specific to national or regional contexts will arise. The most immediate challenge is to provide protection to racialised minorities. The careful analysis of existing case law – at both the regional and national level – can helpfully guide this process through the deconstruction of 'common sense' concepts in order to address issues concerning the securitisation of racial or ethnic minorities or their subjection to welfare chauvinism. In various respects, national case law is as progressive or more progressive than that of the ECtHR and the CJEU, which necessitates the intensification of judicial exchange both vertically and horizontally.

217 Curia, case no. Köf.5003/2015/4, 13 May 2015, http://www.lb.hu/hu/onkugy/kof500320154-szamu-hatarozat (accessed on 3 June 2016).

It is notable that judicial reluctance to explicitly refer to the term racism cuts both ways: at times, it leads to overinclusion, at other times to underinclusion. Overinclusion opens the RED to characteristics linked to racial or ethnic origin, such as nationality, foreignness (often treated as equivalent to colour) or the status of third-country national, migrant domestic worker or speaker of a foreign language. Alternatively, it is manifested in the finding of direct, rather than indirect, racial discrimination. Overinclusion occurs in three ways: (i) predominantly in Western European countries that have a history of immigration from former colonies or third countries, (ii) mostly in Western European countries where nationality is a specifically protected ground in the Constitution or in anti-discrimination legislation, and/or (iii) in countries with closed lists of grounds that are interpreted broadly. Examples of the first type include *Feryn* from **Belgium** and *Dos Santos* from **France**. **Portugal** and **Italy** provide examples for the second type. **Austrian**, **UK** and recent **German** case law finding direct ethnic origin-based discrimination in relation to the requirement of proficiency in the national language are examples of the third type. Underinclusion occurs in two ways: (i) when constitutive characteristics are severed from racial or ethnic origin, or (ii) when concealment strategy is successful. Underinclusion does not necessarily prevent victims from remaining unprotected, particularly in countries with a wide/open list of grounds, such as **Bulgaria**, **Hungary** and **Romania**. Underinclusion runs counter to the relevant treaty provisions discussed in this report and jeopardises access to the RED. **Estonian** and **Latvian** cases relating to proficiency in the official language provide examples of the first type, while **Hungarian** judicial interpretation relating to the concealment of the Roma as socially impoverished and decisions by the **Bulgarian** equality body on Islamophobic hate speech directed against Syrian asylum seekers provide examples of the second type.

Recourse to international courts and treaty bodies, as well as their case law, can help explore the full potential of the prohibition of racial discrimination. For instance, the **Spanish** Constitutional Court has addressed the issue of racial or ethnic origin in three cases, out of which the first two have also been adjudicated at the international level – *Williams, Muñoz Díaz* and *García López*.[218] In the latest decision on indirect discrimination in access to education, the **Czech** Constitutional Court stressed the particular vulnerability of Roma children and the need for special attention to their needs, which often stems from their social exclusion or marginalisation. The court cited relevant passages of the ECtHR judgments in *D.H. and others v the Czech Republic* and *Horváth and Kiss v Hungary*. In **Finland**, the Discrimination Tribunal has in several cases decided that discrimination based on nationality is included in the wide formulation of ethnicity under the repealed Non-Discrimination Act. The Tribunal referred to *Timishev*. In **Romania**, the decisions in several NCCD cases specified that 'racial (ethnic) discrimination must be considered as being a very serious deed; the ECtHR in its decisions stated that this type of discrimination is so serious that it amounts to degrading treatment under Article 3 of the European Convention.'

218 Constitutional Court Decision, 69/2007, 16 April 2007, http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/6036 and Constitutional Court Decision, 136/1990, 19 July 1990, http://hj.tribunalconstitucional.es/HJ/docs/BOE/BOE-T-1990-18330.pdf.

4 Legal interpretation at the European level: establishing and qualifying discrimination

This chapter assesses the legal interpretations of discrimination on the grounds of racial or ethnic origin by the European Court of Human Rights, the Court of Justice of the European Union and the Committee on the Elimination of All Forms of Racial Discrimination, seeking convergences and divergences in case law. It offers a short comparison between emerging international and national trends. The focus of the analysis will be on the definition and the finding, as well as the qualification of discrimination as (covert) direct or indirect discrimination and harassment. The issue of real, assumed, multiple or associated racial or ethnic origin will be revisited.

4.1 Interpretation of racial discrimination at the regional level

The thematic report investigates the interpretation of the CERD, the ECtHR and the CJEU, because of their relevance or the relevance of the treaty they oversee at both the regional and national levels.

4.1.1 The Committee on the Elimination of All Forms of Racial Discrimination

CERD has issued opinions on individual communications, many of which come from EU Member States. Two opinions stand out concerning their significance in the interpretation of personal scope. In *TBB-Turkish Union in Berlin/Brandenburg v Germany,* CERD found racial discrimination in relation to the state authorities' failure to adequately investigate Islamophobic hate speech against German Muslims.[219] In its friend of the court brief, the German Institute for Human Rights (GIHR) notes that, in **Germany** 'the term "racism" is often used in the context of organised right-wing extremism only. ... The labels "Turks" or "Arabs" are applied as synonyms for Muslims.' In his dissenting opinion, judge Vazquez noted a lack of even-handedness in the approach of the Committee to minority groups targeted by hate speech not adequately investigated by domestic authorities. In his view, German Sinti and Roma would have deserved the same level of protection in *Zentralrat Deutscher Sinti und Roma v. Germany* as was accorded to the BTT in the present case.[220]

Ziad Ben Ahmed Habassi v. Denmark is relevant, because it extends protection to persons treated less favorably allegedly on the basis of nationality.[221] The applicant was refused a loan by a **Danish** bank on the sole ground of his non-Danish nationality. CERD notes that 'nationality is not the most appropriate requisite when investigating a person's will or capacity to reimburse a loan'. It needs to be ascertained whether or not criteria involving racial discrimination, within the meaning of article 1 ICERD are being applied.

CERD general recommendations have dealt with the definition of the grounds. General Recommendation VIII interprets Article 1(1) and (4) as requiring that identification shall, if no justification exists to the

219 *TBB-Turkish Union in Berlin/Brandenburg* v *Germany*, Communication No. 48/2010, U.N. Doc. CERD/C/82/D/48/2010 (2013). The impugned statements are summarised at 2.1: The German cultural journal Lettre International (2009 autumn edition, No. 86) published an interview with Mr. Thilo Sarrazin, the former Finance Senator of the Berlin Senate and member of the Board of Directors of the German Central Bank, entitled 'Class instead of Mass: from the Capital City of Social Services to the Metropolis of the Elite'. He stated, *inter alia*: '… I don't have to accept anyone who doesn't do anything. I don't have to accept anyone who lives off the State and rejects this very State, who doesn't make an effort to reasonably educate their children and constantly produces new little headscarf girls. That is true for 70 % of the Turkish and for 90 % of the Arab population in Berlin. Many of them don't want any integration, they want to live according to their own rules. Furthermore, they encourage a collective mentality that is aggressive and ancestral … The Turks are conquering Germany just like the Kosovars conquered Kosovo: through a higher birth rate. I wouldn't mind if they were East European Jews with about a 15 % higher IQ than the one of Germans'.

220 CERD, *Zentralrat Deutscher Sinti und Roma* v *Germany*, communication No 38/2006, issued on 22 February 2008.

221 CERD, *Ziad Ben Ahmed Habassi* v *Denmark*, Communication No. 10/1997, U.N. Doc. CERD/C/54/D/10/1997.

contrary, be based upon self-identification by the individual concerned.[222] General Recommendation XI on non-citizens implied that Article 1 shall not be interpreted as an indication that ICERD does not apply to foreigners.[223] In General Recommendation XIV on article 1, paragraph 1, of the Convention, CERD drew attention to certain features of the definition of racial discrimination in Article 1(1) ICERD, underlining that the words 'based on' do not bear any meaning different from 'on the grounds of' in preambular paragraph 7. When examining justification defences, the Committee 'will acknowledge that particular actions may have varied purposes. In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.'[224] In General Recommendation XXIV the Committee stressed that, according to the definition given in Article 1(1), ICERD relates to all persons who belong to different races or national or ethnic groups and to indigenous peoples.[225] In General Recommendation XXV on gender-related dimensions of racial discrimination, CERD noted that "racial discrimination does not always affect women and men equally or in the same way" and also that "certain forms of racial discrimination may be directed towards women specifically because of their gender".[226]

CERD has adopted general recommendations concerning two specific racial groups, the Roma and people of African descent. In General Recommendation XXVII on discrimination against Roma the CERD called on states parties to 'respect the wishes of Roma as to the designation they want to be given and the group to which they want to belong'.[227] According to General Recommendation No. 34, people of African descent are those referred to as such by the Durban Declaration and Programme of Action and who identify themselves as people of African descent.[228] CERD calls on states to ensure their right to their cultural identity and to keep, maintain and foster their mode of life and forms of organisation, culture, languages and religious expressions.[229]

In General Recommendation XXIX on Descent, CERD[230] reaffirmed its consistent view that the term descent in Article 1(1) ICERD does not solely refer to race and has a meaning that complements the other prohibited grounds of discrimination. Consequently, discrimination based on descent includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights. CERD proposes the following set of criteria that, taken alone or in conjunction, help identify descent-based groups: inability or restricted ability to alter inherited status; socially enforced restrictions on marriage outside the community; private and public segregation, including in housing and education, access to public spaces, places of worship and public sources of food and water; limitation of freedom to renounce inherited occupations or degrading or hazardous work; subjection to debt bondage; subjection to dehumanising discourses referring to pollution or untouchability; and a generalised lack of respect for their human dignity and equality. It recommends that descent-based discrimination be explicitly prohibited in national constitutions. Notably, in the **UK**, in *Tirkey v Chandok* discussed above the Employment Appeals Tribunal found caste to correspond to elements of ethnic origin.

222 Thirty-eighth session (1990), General Recommendation VIII concerning the interpretation and application of article 1, paragraphs 1 and 4 of the Convention, CERD.
223 Forty-second session (1993) General Recommendation XI on non-citizens, CERD.
224 Forty-second session (1993) General Recommendation XIV on article 1, paragraph 1, of the Convention, CERD.
225 General Recommendation XXIV concerning article 1 of the Convention, adopted in 1999 at the 55th session, A/54/18, annex V, para. 1.
226 Fifty-sixth session (2000) General Recommendation XXV on gender-related dimensions of racial discrimination, CERD.
227 Fifty-seventh session (2000) General Recommendation XXVII on discrimination against Roma, CERD.
228 CERD General Recommendation No. 34 Racial discrimination against people of African descent CERD/C/GC/34. The Durban Declaration does not contain a normative definition of people of African descent, but notes enslavement and colonisation as factors contributing to the racism and discrimination that they experience today.
229 Ibid. 4. (b).
230 Sixty-first session (2002) General Recommendation XXIX on article 1, paragraph 1, of the Convention (Descent), CERD.

4.1.2 The European Court of Human Rights

For decades, the Strasbourg Court's case law on Article 14 was negligible. Initially, it applied a unified concept of discrimination across all fields and grounds, whereby 'discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations'.[231] Under this definition a protected ground, less favourable treatment and a comparator (in a relevantly similar situation) need to be shown to trigger a justification defence. Different treatment for the purposes of correcting 'factual inequalities' is allowed where a failure to treat differently would breach the principle of non-discrimination.[232] Since *Hoogendijk*, the Court has dealt with indirect discrimination, that is 'a general policy or measure which is apparently neutral [and which] has disproportionately prejudicial effects on persons or groups of persons', notwithstanding that such a policy or measure 'is not specifically aimed at that group'.[233] Discrimination 'potentially contrary to the Convention may also result from a *de facto* situation', but it is not clear whether the latter consideration pertains to cases of indirect discrimination only, such as in *Zarb Adami*, which challenged the overrepresentation of men among jury members based on the stereotypical understanding of gender roles, or to structural discrimination that may amount to direct discrimination in certain instances.[234]

Discrimination based on language – as no other ground was invoked – was established in the *Belgian Linguistic case*.[235] In *Cyprus v Turkey*, it was found unnecessary to examine whether there had been a breach of Article 14 of the Convention taken in conjunction with the other relevant Articles in relation to the living conditions of Greek Cypriots in Northern **Cyprus**.[236] Violation of Article 2 of Protocol No. 1 was found in so far as no appropriate secondary-school facilities were available. The Kurdish cases concerning the right to life, the prohibition of torture, election campaigns and the registration of names have not necessarily been examined in the context of discrimination based on racial or ethnic origin or, if they have been, discrimination has not consistently been found.[237]

In the seminal *Timishev v Russia* judgment the Strasbourg Court held that *ethnicity*-based discrimination is a form of racial discrimination.[238] The Court stated the following:

> '55. Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of the biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds.
>
> 56. ... Discrimination on account of one's actual or perceived ethnicity is a form of racial discrimination ... Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment ...'

231 *Okpisz* v *Germany*, judgment of 25 October 2005.
232 *Thlimmenos* v *Greece*, judgment of 6 April 2000.
233 First discussed in *Hoogendijk* v *the Netherlands*, Application no. 58641/00, decision as to admissibility, 6 January 2005.
234 *Zarb Adami* v *Malta*, judgment of 20 June 2006.
235 *Belgian Linguistic case* (No. 2) (1968) 1 EHRR 252.
236 *Cyprus* v *Turkey*, Application no. 25781/94, judgment of 10 May 2001.
237 In the cases relating to the use of Kurdish in Turkey, discrimination has not been established, even though in *Şükran Aydin and Others* v *Turkey*, the ECtHR examined the application of Article 14 ECHR on its own initiative. Applications nos. 49197/06, 23196/07, 50242/08, 60912/08 and 14871/09, judgment of 22 January 2013, *Kemal Taşkin and Others* v *Turkey*, Applications nos 30206/04, 37038/04, 43681/04, 45376/04, 12881/05, 28697/05, 32797/05 et 45609/05, judgment of 2 February 2010.
238 *Timishev* v *Russia*, Applications nos. 55762/00 and 55974/00, judgment of 13 December 2005.

This interpretation is apparently based on Article 1 ICERD, which is described in the judgment along with the ECRI GPR No. 7, but analysis shows that this is not the case.[239] As we have seen in relation to UN standard setting, under Article 1 ICERD racial discrimination subsumes discrimination based on colour, descent, or ethnic or national origin, which suggest that, for the purposes of the Convention – or judicial interpretation in cases where it relies on the Convention – racial origin is the 'super category'. We have also seen the European tendency of limiting the 'cultural stuff' to national origin and the physical attributes to racial origin. In cases where racial is the overarching conceptual category, it must by definition cover both. An interpretation that subsumes national origin, minority language, religion, culture and tradition under ethnic origin is congruent not with Article 1 ICERD or Article 14 ECHR, rather with Article 27 ICCPR, whose purpose, however, is to protect minorities – including from discrimination – not to provide a general prohibition of racial discrimination.

In this light, the Strasbourg Court's initial approach is correct: under ICERD racial origin is the overarching conceptual category and should include ethnic origin. Its subsequent analysis is, however, flawed and runs the risk of essentialising race, because its portrayal of racial origin as chiefly or solely denoting biological and physical differences reinforces its reductive conceptualisation. The Court highlights that ethnicity and race are overlapping concepts. If this is the case, then the 'cultural stuff' could not be covered by either, due to the earlier proposition that race essentially marks physical features. If this is not the case, then the explication of the meaning of ethnicity upsets the logic of the premise that discrimination based on ethnicity is a form of racial discrimination. There are further inconsistencies. For instance, the reference to 'actual or perceived ethnicity' in paragraph 56 is perplexing, because it follows a distinction in paragraph 55 that seeks to conceptualise ethnicity with reference to the 'cultural stuff' as opposed to physical features. Clearly, perception more readily attaches to physical differences than to 'tribal affiliations, religious faith, language or culture traditions' – especially in the context of identity checks, as was the case in *Timishev*.

Furthermore, the Court introduced the concept of *ethnicity*, instead of referring to race, colour, national or social origin or association with a national minority, namely grounds explicitly protected under Article 14 ECHR. According to the judgment, the applicant was of Chechen ethnic origin, born in the Chechen Republic as a Russian citizen and at the time living as a forced migrant in Nalchik.[240] The FCNM Advisory Committee has consistently held that Chechens constitute a national minority group.[241] In essence, therefore, he qualified for protection under race and national origin. Given that ethnicity is not explicitly protected in the ECHR and given also the Court's starting point – namely that it was subsumed under race anyway – it is curious why it was at all introduced in the analysis. Furthermore, if *Timishev* had indeed been inspired by ICERD and ECRI GPR No. 7, then the term ethnic origin should have been applied as in all other judgments, including the most recent, *Biao v Denmark*.[242] Importantly, in *Biao*, ethnic origin as a protected ground was applied to an applicant of non-European origin.

A seminal judgment, nonetheless the definition of the ground in *Timishev* suffers from normative inconsistencies. Epitomising European ambivalence to race, it renders real the inherent risk of essentialising. The reference to 'colour and descent' in Article 1 offers an escape route from the depiction of racial origin reminiscent of biological racism, but *Timishev* does not take inspiration from ICERD in this respect. The judgment evidences the failure to properly transfer ethnic origin into the European context and its complacency in a reductive reading of race. It demonstrates the potential danger in the binary opposition of racial and ethnic origin to cancel out national origin as a protected ground – particularly in instances where the protection of national minorities in national legislation is problematic. The judgment

239 *Timishev* v *Russia*, paras 33-34.

240 *Timishev* paras. 9-10. 9. The applicant is a lawyer, who worked on human rights cases himself, in collaboration with INTERIGHTS, the International Center for the Legal Protection of Human Rights and OSJI, the Open Society Justice Initiative http://www.srji.org/en/legal/cases/?set_filter=Show&PAGEN_1=27&SIZEN_1=20&cn_filter=&f_42_1420989090=Y.

241 Most recently in Advisory Committee on The Framework Convention for the Protection of National Minorities, Third Opinion on the Russian Federation, adopted on 24 November 2011, p. 17.

242 *Biao v Denmark*, Application no. 38590/10, Grand Chamber judgment of 24 May 2016. para. 131.

remains wanting even in respect of ethnic discrimination. Given the historic roots of the animosities at hand, a more in-depth analysis of cultural, religious and other differences should have highlighted why this ground, over any other, was chosen by the Court as the basis of discrimination.

The ECtHR has approached the Roma and Travellers distinctly from other racial or ethnic groups, pursuing three mutually reinforcing angles: (i) the necessity to accommodate their minority identity as prevalent, for instance, in their itinerant lifestyle, (ii) the emerging regional consensus as to their vulnerability/disadvantaged status and (iii) the necessity of a chiefly historical and contextual analysis that takes into account the long-standing, collective and structural nature of discrimination in the adjudication of individual applications.

(1) In *Beard v the United Kingdom*, the ECtHR made the following observation. 'The Court considers that the applicants' occupation of their caravan is an integral part of their ethnic identity as gypsies, reflecting the long tradition of that minority of following a travelling lifestyle. ... Measures ... affected their ability to *maintain their identity as gypsies* and to lead their private and family life in accordance with that tradition'.[243] (emphasis added) Most forcefully, in *Yordanova*, the ECtHR interpreted the duty to accommodate the special needs of the Roma as a duty to implement positive action measures adopted by a state party. Otherwise, 'there would appear to be a contradiction between, on the one hand, adopting national and regional programmes on Roma inclusion, based on the understanding that the applicants are part of an underprivileged community whose problems are specific and must be addressed accordingly, and, on the other hand, maintaining, in submissions to the Court ... that so doing would amount to "privileged" treatment and would discriminate against the majority population'.[244] While this finding corresponds to the Court's positive duty doctrine designed to ensure domestic compliance with Convention obligations, it also represents an important development by grounding that duty in the principle of equality, rather than in minority rights.

(2) The ECtHR has repeatedly held that 'the vulnerable position of Roma/Gypsies means that special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases'.[245] In *Chapman*, the Court also observed an emerging international consensus amongst the Member States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.[246]

(3) In *Orsus*, the Court stated that, despite a focus on the individual applicants, it 'nevertheless cannot ignore that the applicants are members of the Roma minority. Therefore, in its further analysis the Court shall take into account the *specific position of the Roma population*. As the Court has noted in previous cases that *as a result of their history*, the Roma have become a specific type of disadvantaged and vulnerable minority....'[247] (emphasis added)

The Strasbourg Court's compassionate attitude to the Roma and Travellers is seldom met with rigour in judicial interpretation, as the Court has established discrimination only in a fraction of Roma rights cases. Often, it either a, fails to establish discrimination (*Yordanova*, the Roma sterilisation cases and *Winterstein*); b, establishes discrimination only in relation to the procedural aspects of the case (*Nachova*); c, establishes indirect, rather than direct, discrimination (*D.H.*, *Orsus,* and *Horváth and Kiss*); or d, non-qualifies discrimination (in the Greek Roma education cases).[248]

243 *Beard v. the United Kingdom*, Application No. 24882/94, para 84.
244 *Yordanova*, para. 128.
245 See *Chapman* v *the United Kingdom* [GC], no. 27238/95, § 96, ECHR 2001-I, and *Connors v. the United Kingdom*, no. 66746/01, § 84, 27 May 2004.
246 Ibid.
247 Orsus, para. 147.
248 Nachova and Others v Bulgaria, Applications Nos. 43577/98 And 43579/98, Judgment Of 26 February 2004.

The ECtHR's difficulty with distinguishing between direct and indirect discrimination may stem from the evolution from a unified concept in its case law to one comprising direct as well as indirect discrimination. A criticism levelled against the ECtHR is that it has not been principled enough when applying its own test of discrimination – especially in relation to indirect discrimination.[249] In theory, the Court's definition of discrimination allows for a wide range of justifications, regardless of whether direct or indirect discrimination applies, but practice shows variations.

4.1.3 The Court of Justice of the EU

Eight cases have so far been referred to the CJEU seeking the interpretation of the RED: *Vajnai, Runevič-Vardyn, Feryn, Galina Meister, Belov, CHEZ*, *Kamberaj* and *Jyske Finans*.[250] Discrimination on the grounds of racial or ethnic origin was interpreted in *CHEZ* and *Feryn*. The interpretation was teleological, broad and dynamic. Even though the other cases either did not fall within the RED's scope or dealt with procedural issues, they are relevant as they reaffirm the contours of the protected ground. In *Vajnai*, political opinion was the basis of the alleged discrimination and the case was found to fall outside scope. In *Runevič-Vardyn,* membership of the Polish minority in **Lithuania** was the ground that brought the applicant under the directive, however his claim did not fall under its material scope.

In *Kamberaj,* the third country national plaintiff failed to establish facts from which it may be presumed that the discrimination he suffered in access to housing benefit amounted to indirect discrimination on the grounds of racial or ethnic origin. It was in this context that the CJEU found his claim based on (Albanian) nationality alone insufficient to come under the RED's personal scope. In *Jyske Finans*, Advocate General Wahl suggests not only that place of birth cannot be taken as a proxy of discrimination based on racial or ethnic origin, but also that defining the latter grounds is controversial and should not be attempted in law. This stands in stark contrast with the legal issue at hand, which, in his words is 'to provide guidance on the *relationship* between discrimination on grounds of ethnic origin, nationality and place of birth' (emphasis added).[251] The facts of the case are analysed below, in the subsection dealing with apparent intersections between nationality and racial or ethnic origin, highlighting analogies between *Jyske Finans* and *Biao*.

Galina Meister complained of her lack of access to a job interview and ultimately to employment on the grounds of sex, age and racial or ethnic origin, without specifying whether the grounds should be taken alone or in conjunction – and if the latter, whether in her view this amounted to intersectional discrimination.[252] This aspect was not subject to a referral, which sought clarification on evidence and the burden of proof. At the national level, access to evidence was trumped with reference to data protection rules.[253] That the CJEU examined the procedural issues indicates that it did not find the case wanting with respect to personal scope. Given that the claim emanated from her foreign-sounding name, *Meister* indicates that a perception of 'foreignness' is sufficient for bringing a case under the RED, just as it would be in various national contexts.

249 Van den Bogaert 2011 supra 8 and more recently, Besson, S., Evolutions in antidiscrimination law in Europe and North America: Evolutions in non-discrimination law within the ECtHR and the ESC systems: it takes two to tango in the Council of Europe, *The American Journal of Comparative Law*, Winter 2012, pp. 147-180, especially at pp. 168-169, and most recently Etinski, Rodoljub. 'Emerging indirect discrimination under Article 14 of the ECtHR.' *Noua Revistă de Drepturile Omului* 1 (2013), pp. 26-34.

250 Case C-668/15 *Jyske Finans A/S v Ligebehandlingsnævnet, acting on behalf of Ismar Huskic;* Case C-83/14 *CHEZ Razpredelenie Bulgaria AD* v *Komisia za zashtita ot diskiminatsia;* Case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia sociale della provincial autonoma di Bolzano (IPES) et al*; Case C-394/11 *Valeri Hariev Belov* v *CHEZ Elektro Balgaria AD and others;* Case C-415/10 *Galina Meister;* Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding* v *Firma Feryn NV;* Case C-391/09 *Runevič-Vardyn* v *Vilniaus miesto savivaldybės administracija;* Case C-328/04 *Vajnai*.

251 AG Opinion, *Jyske Finans*, para. 5.

252 This point is made by Jaime Cabeza Pereiro in 'The ECJ doctrine on racial discrimination', *E-Journal of International and Comparative Labour Studies*, Volume 3, No. 1 January 2014, pp. 14-16.

253 Farkas, L., 'Getting it right the wrong way? The consequences of a summary judgment: the Meister case', *European Anti-discrimination Law Review* 15 (2012): 23-33.

Similarly, in *Belov*, the procedural angle overshadowed considerations concerning the protected ground on the basis of which the case was primarily referred by the **Bulgarian** equality body, but admissibility did not turn on personal scope. Thus, if referred by a domestic judicial instance – as was the case in *CHEZ*, which also concerned the issue raised in *Belov* – with discrimination emanating from general practice targeting Roma settlements, the case is then considered under the RED.

In *Feryn*, the **Belgian** equality body challenged the recruitment policy of a well-known employer who publicly stated that he would not and has not hired 'immigrants'. Advocate General Maduro argued not only that the facts revealed a potential threat of discrimination, but that such statements amounted to a 'speech act', which constituted direct discrimination based on ethnic origin. Notably, the 'speech act' revealed actual discrimination, because in it the employer admitted to having refused to hire applicants of Moroccan origin, albeit not stating their exact number and identity.[254]

The CJEU found that the absence of an identifiable complainant does not mean that there is no direct discrimination based on ethnic origin and that the 'speech act' in and of itself was a fact on the basis of which it could be presumed that such discrimination in respect of recruitment had occurred. Although there was no question addressed to the Court on the ground of discrimination, – particularly the relations between immigrant status and nationality with racial or ethnic origin – the finding implies that discrimination against 'Moroccans' and 'immigrants' amounts to direct discrimination on the grounds of racial or ethnic origin. Furthermore, it implies that direct discrimination based on assumed or perceived racial or ethnic origin is covered by the RED, given that the speech act implied that discrimination was based on these factors.

Commentators point out that the speech act was not only taken into account as evidence but also amounted to direct discrimination based on racial or ethnic origin.[255] Others note that, by going beyond the definition of direct discrimination under Article 2.2.(a) RED, the **Luxembourg** Court provided protection to hypothetical victims against a wrong not yet inflicted. These observations are partly correct. They overlook the fact that, firstly, there was evidence of past discrimination, but even if this had not been the case, the **Belgian** legislation transposing the RED provided a higher level of protection than the directive by levelling up the mandate and status of the equality body – the Centre for Equal Opportunities and Opposition to Racism and Discrimination – including the right to launch *actio popularis* claims on behalf of unidentifiable victims. Rightly, the CJEU interpreted the RED in light of the domestic procedural provisions, and by so doing ensured the protection of past and potential future victims. There is a difference between hypothetical and potential that stems from the expression of intent to discriminate as evidenced by the defendant's public statement in this case. Mr Feryn left no doubt as to his intention to discriminate against all foreign/Moroccan applicants. As to evidence and act, a public speech act as was evident in *Feryn* amounts to the admission of liability – in particular because no convincing evidence to the contrary was submitted. Thus, in the circumstances that obtained, public speech announcing a refusal to hire amounted to evidence and actual discriminatory conduct.[256]

In *CHEZ*, the CJEU was called upon to define the ground of discrimination. More precisely, it was called on to determine whether a person of a racial or ethnic majority could rely on the RED in relation to discrimination targeting a segregated Roma settlement, where the electricity company CHEZ had installed

254 Mr Feryn was reported to say that '[*a*]*part from these Moroccans, no one else has responded* to our notice in two weeks … but we are not looking for Moroccans.' (emphasis added) Cited in the Opinion of Advocate General Poiares Maduro, Case C-54/07, 1.3.

255 Ambrus, M., Busstra, M. and Henrard, K., 'Racial Equality Directive and effective protection against discrimination: Mismatches between the substantive law and its application, *Erasmus L. Rev.* 3 (2010): 167-169.

256 Opinion of Advocate General Poiares Maduro, Case C-54/07, 1.3., paras 15-17. He underlined that a 'simple' speech act such as that committed in *Feryn* may have graver consequences, because '[n]obody can reasonably be expected to apply for a position if they know in advance that, because of their racial or ethnic origin, they stand no chance of being hired.' That speech conveys a message of exclusion from the labour market and it 'would lead to awkward results if discrimination of this type were for some reason to be excluded altogether from the scope of the Directive'. Had that been the case, the 'most blatant strategy of employment discrimination might also turn out to be the most "rewarding"'.

electricity meters on pylons located 6m to 7m above the ground, which put the claimant, Ms Nikolova, a local shop owner, at a disadvantage when it came to controlling her consumption of electricity. This individual complaint can only be understood in the context of widely held stereotypes concerning segregated Roma districts, i.e. 'neighbourhoods lived in by a disproportionately high number of Roma'.[257] It is common knowledge that a Roma district is segregated, has deplorable living conditions and is cut off from main roads and services. Hence, the assumption is that 'no person of a reasonable mind' would want to live there. Being racially segregated, its inhabitants must by definition be Roma or 'assimilated to the Roma' – unwilling or 'unable' to integrate, otherwise they would have moved out. For more compassionate spectators, 'unable' to integrate may signify extreme poverty. Thus, discrimination in *CHEZ* is grounded in a racial stereotype: the electricity company's conduct is entirely based on this stereotype, regardless of the actual racial or ethnic origin of the district's inhabitants.

Discrimination against the inhabitants of a Roma district is based on perceptions, or more accurately, assumptions. Individuals do not matter; ghetto dwellers are the faceless, 'othered' group – a mass. As such, less favourable treatment towards them does not assume an individual character. Therefore, Ms Nikolova may not suffer discrimination based on her association with the Roma 'by reason of their ethnic origin', because that would presume that CHEZ identifies the Roma individuals she is associated with. This is the construction in *Coleman*, where the CJEU held that discrimination on the grounds of disability covered the mother of a disabled child.[258] Ms Coleman's employers were aware of the existence of her disabled son and, in association with him, 'by reason' of his condition, they treated her less favourably. Ms Coleman's son was recognised as a disabled individual, named as the person with the protected ground.

No such conduct is discernible in *CHEZ*, because of the collective nature of anti-Roma discrimination, which stems from the unwillingness to revisit anti-Roma stereotypes. As the CJEU noted, Ms Nikolova suffered less favourable treatment 'together with the Roma', in other words as part of a collective formed by stereotype as much as by geographic proximity.[259] There is a difference in the degree of social distance between the minority and the majority in *CHEZ* that can be teased out through a careful distinction between perception and assumption – the former presupposing the consideration of individuals, the latter not. In conclusion, this report supports the view that the judgment must not be interpreted as establishing associative discrimination – either direct or indirect, because an interpretation of the facts as revealing perception-based discrimination may be more adequate.[260]

The CJEU supports a finding of direct discrimination through its analysis of the facts, emphasising that CHEZ placed electric meters at a height of 6m to 7m *only* in Roma districts – apparently to prevent fraud. It recalls the difficulties that the **Bulgarian** equality body encountered when qualifying the ground and the form of discrimination applied. First, it found *indirect* nationality discrimination – as that was named in the original claim – but after the Supreme Administrative Court remitted the case pinpointing shortcomings concerning the ground, it concluded that *direct* discrimination on grounds of personal situation applied. Notably, this underinclusive interpretation – highlighted in Chapter 3 – was remedied by the referring Administrative Court of Sofia, which opined that the relevant ground was ethnic origin, because the practice targeted 'the common Roma "ethnic origin" of most of the inhabitants of the "Gizdova mahala" district'.[261]

257 In the US context, Kenneth B. Clark describes the internal and external dynamics of ghetto life in *Dark ghetto: Dilemmas of social power*, Wesleyan University Press, 1989. Social science research offers a detailed description of ghettos as spaces of exclusion – see recently Wilson, W. J., *The truly disadvantaged: The inner city, the underclass, and public policy*, University of Chicago Press, 2012.

258 Case C 303/06, S. Coleman v Attridge Law and Steve Law, para. 50.

259 *CHEZ*, paras. 50. and 60.

260 Lahuerta, S. B., 'Ethnic discrimination, discrimination by association and the Roma community: *CHEZ*', *Common Market Law Review* 53: 797–818, 2016, *Case note on* Case C-83/14, *CHEZ Razpredeleine Bulgaria AD v. Komisia za zashtita ot discriminatsia*, Judgment of the Court (Grand Chamber) of 16 July 2015, EU:C:2015:480.

261 The reference to a 'common' Roma ethnic origin is intriguing, but what the referring court may have meant by it remains a mystery.

The referring court's characterisation of the Roma district is important, albeit it is not thoroughly addressed in the judgment. It is important because it is based on objective facts as opposed to the stereotype concerning Roma districts, whereas important differences between the two 'descriptions' exist. Two questions are asked regarding the ground: 1. whether ethnic origin covered 'a compact group of **Bulgarian** citizens of Roma origin' like those living in 'Roma districts' and 2. whether citizens living in 'Roma districts' and 'non-Roma districts' are in comparable situations for the purposes of establishing direct discrimination. Whether or not non-Roma also live in the Roma district has no bearing on stereotypes, therefore the actual non-homogeneity of the group suffering less favourable treatment should not invalidate a finding on the basis of assumed or perceived homogeneity. The CJEU notes this at paragraphs 46 and 47, when interpreting the 'ethnic origin question' referred by the Administrative Court of Sofia, and returns to it in its analysis of direct discrimination, but stops short of distinguishing between *real* and *assumed* racial or ethnic origin, which is the key to tackling concerns of homogeneity:

> ' … it is apparent that the referring court's doubts do not relate to whether Roma origin may be classified as 'ethnic origin' within the meaning of Directive 2000/43 and, more generally, of EU law, a matter which that court, correctly, tends to consider to be established. Indeed, the concept of ethnicity, which has its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds, applies to the Roma community'. …
>
> On the other hand, as is apparent from paragraphs 31 and 32 of the present judgment, the decisive factor that appears to have prompted the referring court to ask its first question is that the practice at issue is carried out *in the whole of a district lived in mainly, but not exclusively*, by persons of Roma origin.'[262] (emphasis added)

This conception of ethnic origin is of course correct, but there is no evidence suggesting that CHEZ targeted the Roma district with a less favourable practice for almost 25 years on account of the religious faith, language and cultural traditions of its inhabitants. It is rather more likely that widely held, racial stereotypes of Roma criminality as a cultural practice were relevant in triggering the less favourable treatment. On this account, the CJEU's reference to Article 1 ICERD is significant, but not sufficiently succinct in showing how, in the material case 'discrimination based on a person's ethnic origin constitutes a form of racial discrimination'.[263] The mismatch between the identification of the Roma as a type of minority group and the ground on which they – and 'together with' them Ms Nikolova – suffered discrimination calls for an exploration of the racialisation of Roma ethnic origin. The self-identification of the community in the Gizdova mahala district is quite different from the way CHEZ employees reading the electro meters identify them. In order to describe the discriminator's conduct, reference to ethnicity or ethnic origin only is not sufficient.

The CJEU's choice of reference to Strasbourg case law is interesting as it strays from the canon: rather than citing the leading cases (*Timishev* and *DH*), the judgment relies on *Nachova* and *Sejdić and Finci.* Given the doctrinal opacity of the Strasbourg case law discussed above, this is excellent tactics, particularly from a perspective of supporting a finding of (intentional) direct discrimination. While *Nachova* deals with racially motivated murder and finds discrimination in relation to its procedural aspect (lack of effective investigation), *Sejdić and Finc*i displays normative strength in laying bare discrimination in law, which is the most explicit form of direct discrimination. The fact that in these two cases the ECtHR did not specify the form of discrimination is beneficial here, because it leaves room for manoeuvre rather than burdening the CJEU with the necessity of explaining divergence. The reference to *Nachova* offered the **Luxembourg** Court an opportunity to reflect on assumed and perceived grounds, which provide the central tenet of disputes regarding racially motivated crimes – but this was left unutilised.

262 *CHEZ*, Paras 46-47.
263 *CHEZ*, Para 73.

The Court's indications as to the desirability of establishing direct discrimination in the case is noted, while it is criticised as 'not brave enough' to go all the way.[264] This of course created difficulties in relation to 'associative indirect discrimination', which, although heralded by some commentators as a ground-breaking element of the case, led to a flawed analysis, as was pointed out by others.[265] Indisputably, the CJEU was cornered by the preliminary questions, which rightly implied non-compliance of **Bulgarian** legislation with the RED's definition of indirect discrimination, but *CHEZ* was not the right case to raise, nor to answer those questions, because the facts quite simply revealed intentional direct discrimination.

The indications of direct discrimination are the following: (i) that ethnic origin as a trigger factor is sufficient to establish a *prima facie* case of direct discrimination; (ii) that the apparently neutral practice affected only one group (covert direct discrimination); (iii) that CHEZ had prior knowledge of the Roma origin of those committing alleged criminal activity, which were in any case not proven by CHEZ (racial stereotype); and (iv) that the practice was wholesale and was applied indiscriminately for almost 25 years to anyone living in the Roma settlement. In these circumstances, the appropriate comparators are consumers in non-Roma districts.

CHEZ is about racial stereotypes, stigmatisation and structural discrimination, which persisted for a long period before being challenged by an ethnically non-Roma individual who herself did not live in the segregated Roma settlement but who, by way of her business there, was assumed to be Roma herself. Interestingly, the issue of her being assumed to be Roma by reason of her shop's location did not receive attention, although it could have prompted the Court to rule on other facets of personal scope: natural and legal persons. While commentaries have focused on the form of discrimination and the associative ground on which the racial majority applicant was protected, it is important to note that a more pronounced historical and contextual analysis of the disadvantages suffered by the Roma could have improved the analysis and facilitated a bolder stance on direct discrimination. In order to perform such an analysis, the CJEU needs to move away from the focus on individual harm and venture further into the realm of not only harm suffered by groups but long-standing structural issues that can only be remedied in a substantive equality frame. Whereas doubts have been expressed whether so broad an interpretation can transfer to other grounds or even other racial or ethnic groups, this report supports views that call for a more robust analysis of stereotypes underlying discrimination at hand, given its congruence with the dignity and autonomy based approach taken since *Coleman*.[266]

As for the correct interpretation of the ground in *CHEZ*, the focus on the racial majority applicant under the ambit of the RED necessitated an anti-stereotyping angle, while to some extent it also took the limelight away from the primary victims of racial stereotypes, the Roma. The function of anti-Romani stereotypes in this judgment left little room to explicate the real nature of such stereotypes against the Roma themselves. These have far more to do with cultural racism than Roma culture, a gnawing gap remaining in the judgment that even reference to Strasbourg case law could not adequately fill – because no *constructionist analysis*, which would be necessary to lay bare cultural racism, has yet been conducted.

While borrowing from the ECtHR is welcome, it should be done cautiously, both in relation to the ground and the form of discrimination, due to doctrinal opacity. Indeed, in theory the stipulation under Article

264 Lahuerta, supra.

265 See Oliveira, Á. and King, S.-J., *A good chess opening: Luxembourg's first Roma case consolidates its role as a fundamental rights court*, Case C-83/14 – CHEZ Razpredelenie (Nikolova), Judgment of the Court of Justice of the European Union (Grand Chamber) of 16 July 2015, ECLI:EU:C:2013:48, in European Law Review, (2016) 41, p.865-899, Rachel Crasnow QC and Siân McKinley, The CJEU Judgment in CHEZ: Indirect discrimination by association, Monday 27 July 2015, Cloisters – Discrimination and Equality, available at http://www.cloisters.com/blogs/the-cjeu-judgment-in-chez-indirect-discrimination-by-association, and Braier, J., *Indirect discrimination by association – the problems with CHEZ*, 26 Jan 2016, available at http://fieldcourt.co.uk/publication/indirect-discrimination-by-association-the-problems-with-chez/ – who notes the 'proximity of relationship between the complainant and the disadvantaged group' but from an angle opposite to that suggested in this report; all last accessed on 20 August 2016.

266 McCrudden C.. "The New Architecture of EU Equality Law after CHEZ: Did the Court of Justice Reconceptualise Direct and Indirect Discrimination?." *European Equality Law Review, 1/2016*.

53 of the EU Charter requires that flawed interpretation by the Strasbourg Court is not automatically followed by the Court in Luxembourg, insofar as this guarantees that Convention rights are 'not restricted or adversely affected'.[267] *CHEZ* flags the difficulties the CJEU may encounter in the future, but the extent of these will only become apparent once cases analogous to those already decided in Strasbourg come before it.

4.2 Analysis of regional case law

The RED, the ICERD and the ECHR show variance in their ability to accommodate interpretive frames other than or beyond the scope of racial discrimination.[268] A common critique of the ECtHR's case law is that it fails to analyse or establish discrimination in cases where such a frame clearly offers itself, in general being content to find a violation of a substantive right. Moreover, the open list of protected grounds in the Convention disfavours composite grounds. National legal systems are similarly open to such deviation from discrimination frames, therefore this chapter will examine the relevant Strasbourg case law. The RED and ICERD are, on the other hand, discrimination and ground-specific instruments. This bounds their interpretation, even though both the CJEU and the CERD are open to adjudicating claims of intersectional discrimination. Both the ICERD and the RED can be subject to claims seeking to broaden the personal scope, which, to date, has mainly remained a theoretical proposition.[269]

The number of cases in which the regional courts have established racial discrimination is rather low in comparison with national figures. While there is a burgeoning debate on procedural aspects that facilitate or trump legal challenges under fundamental rights provisions, this chapter only notes four interesting trends: (i) in comparison with other Member States, a strikingly high number of individual communications from **Denmark** have been submitted to the CERD – as compared with the ECtHR (one) or the CJEU (none);[270] (ii) there is an imbalance in the number of legal challenges across the diverse racial and ethnic groups, leading to the gross overrepresentation of the Roma; (iii) imbalance is also observable in the intensity of Roma rights litigation before the ECtHR (approximately 70 judgments), the CERD (5)[271] and the CJEU (2); and (iv) the equality bodies have so far played a significant role in initiating referrals to the CJEU as compared with the NGO activism that has been noticeable in relation to the CERD and the ECtHR. Clearly, legal challenges before CERD and the ECtHR are facilitated by direct access through individual petitions, while preliminary referrals to the CJEU are dependent on the attitudes of national

267 Article 52(3) is also relevant, insofar as it permits more beneficial interpretation under EU law. 52(3) In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection. According to Article 53 Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and inter- national law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Funda- mental Freedoms, and by the Member States' constitutions.

268 A comparative analysis of frames under EU law and the ECHR is provided in Tobler, C., 'Equality and non-discrimination under the ECHR and EU law. A comparison focusing on discrimination against LGBTI persons', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2014, pp. 521-561.

269 See Vajnai before the CJEU and CERD individual communications from Australia on the basis of citizenship before CERD: D.F. v Australia, communication no. 039/2006, CERD/C/72/D/79/2006 and Z.U.B.S. communication no. 006/1995, CERD/C/390, CERD/C/35/D/61/1995. In contrast, see, CERD, Ziad Ben Ahmed Habassi v Denmark, Communication No. 10/1997, U.N. Doc. CERD/C/54/D/10/1997.

270 It is important to note that activist lawyers and the Documentation and Advisory Centre on Racial Discrimination were key to initiating these legal challenges and thus to framing claims and forum shopping. Up to May 2014, 21 individual communications had been filed from Denmark: nine were found inadmissible, in five no violation was established, while in seven a violation was found. Among the EU Member States, Slovakia ranked second with a total of four individual communications filed – violation was established in two. In Statistical survey on individual complaints, CERD, May 2014. The Danish cases are available at http://www.bayefsky.com/docs.php/area/jurisprudence/treaty/cerd/opt/0/state/49/node/5/type/all, last accessed on 20 August 2016.

271 Ibid. Four communications from Slovakia and one from Germany.

courts. However, in the fields of employment, housing, education and health the CERD and the RED have an undisputed competitive advantage, given the ECHR's overwhelming focus on civil and political rights.[272]

4.2.1 Framing the discrimination claim

In order to succeed as a racial discrimination claim at the regional level, a case must already be framed as such in the domestic proceedings. There are various ways in which the original discrimination frame can be handled at the regional level, including (i) adequate judicial response: examining the case within the petitioner's frame, (ii) beneficial judicial response: extending the petitioner's frame, (iii) downgrading: diminishing the petitioner's frame and (iv) deviation : avoiding the petitioner's frame.

A typical example of deviation is when a violation of substantive rights is established without much analysis of potential discrimination, while it is deemed unnecessary to consider a discrimination claim – for instance in cases under Article 2 and 3 submitted by Kurdish minority applicants, such as *Süheyla Aydin v. Turkey.*[273] Examples of downgrading are provided by judgments that establish a violation of substantive rights with a thorough, contextual analysis of discrimination, but it is deemed unnecessary to consider a discrimination claim – for instance in *Yordanova and Others v Bulgaria, Winterstein et autres c France* and the Roma sterilisation cases.[274] The best examples of adequate judicial response are provided in the Roma education judgments brought against **Greece**. In *DH, Orsus and Kiss* and *Horváth*, however, the Strasbourg Court downgraded the frames finding indirect, rather than direct, discrimination.

Much depends on the original frame, but in general, the Court is not inhibited by limitations inherent in the applications themselves. There are a few notorious cases in which the Strasbourg Court failed to establish discrimination after a long-winded but ultimately flawed analysis, such as the chambers in *DH, Orsus, Kemal Taskin v Turkey* and *Biao*.[275] The Grand Chamber found indirect discrimination in *DH, Orsus* and *Biao*, giving rise to concerns that an appeal against a judgment that did not find discrimination cannot lead to full victory, i.e. a finding of direct discrimination, which was the original claim in all three cases.

There is indisputable merit in the view that establishing violations of substantive rights provides as sound, or at times even more robust protection, than a finding of discrimination on the basis of racial or ethnic origin. This appears to be the essence of the ECtHR's approach, which has been subjected to criticism. Initially, the Strasbourg Court was criticised for the non-examination of claims under the non-discrimination clause. In defence of the Court, it was noted that Article 14 is not a free-standing provision and judicial economy may have driven the Court to applying it sparingly once a violation of a substantive right – in conjunction with which discrimination was claimed – had already been established. Following the mid-1990s, when Article 14 jurisprudence began to grow – owing chiefly to Roma rights litigation – criticism was levelled against the Court for being haphazard in whether or not it examined or found discrimination. In relation to the Roma education cases,[276] concerns were summarised as follows:

272 The ECHR prohibits discrimination in relation to other Convention rights. While mainly guaranteeing civil and political rights, it explicitly ensures that the right to education and the right to private and family life under Article 8 have been interpreted broadly to cover certain aspects of the right to housing, while certain aspects of the right to health may also be covered. Protocol 12 contains a general prohibition of discrimination but, as noted in Chapter 1, is rather underutilised.

273 Süheyla Aydin v Turkey, Application No. 25660/94, Judgment of 24 May 2005, Strasbourg. In Civek v Turkey, the court did not find it necessary to examine Article 14 in relation to a failure to provide protection against domestic violence, which had previously given ground for a finding of discrimination based on sex in Okpuz v Turkey. Moreover, it held that domestic violence also affects men and children. Affaire Civek C. Turquie, Requête no 55354/11, judgment of 23 February 2016. In April 2016, the Court was again 'back on track', recognising the gendered nature of violence. See, Fleur van Leeuwen, Back on track! Court acknowledges gendered nature of domestic violence in M.G. v Turkey, at https://strasbourgobservers.com/2016/04/14/back-on-track-court-acknowledges-gendered-nature-of-domestic-violence-in-m-g-v-turkey/, last accessed on 20 August 2016.

274 *V.C. v. Slovakia*, App. no 18968/07, judgment of 8 November 2011 §§ 106-107; *N.B. v. Slovakia*, App. no 29518/10, § 80, Judgment of 12 June 2012.

275 Kemal Taskin v Turkey, judgment of 2 February 2010. For an analysis, see Peroni, L., 'Erasing Q, W and X, erasing cultural differences', Brems, E. (ed.), *Diversity and European human rights*, 2013.

276 The Roma education cases decided by the European Court of Human Rights over the last 10 years include D.H. and Others v the Czech Republic, Grand Chamber judgment of 13 November 2007, Sampanis and Others v Greece, judgment of 5 June

'Should the ECtHR continue its incorrect qualification of cases of direct discrimination, this can either lead to inconsistencies between the jurisprudence of [its own and of the CJEU] or – should the CJEU be inspired by the incorrect qualification of the ECtHR in [the Roma education cases] – to a lower degree of victim protection for the Roma children.'[277]

External criticism has now been echoed within the Court. For instance, the chamber judgment did not find discrimination of any kind in *Biao*, but three out of the seven judges authored a remarkable dissenting opinion, laying bare the shortcomings of the chamber's analysis. The Grand Chamber established indirect discrimination based on ethnic origin, and the concurring judge Albuquerque criticised his colleagues for not persevering in their logic, which, in his view, could only have led them to conclude that there had been direct discrimination. In another recent case, *Garib v The Netherlands*, dissenting judges laid bare the discriminatory nature of the so called Rotterdam wet, a local decree aimed at regenerating the city centre but having a disproportionately negative impact on the freedom of movement and residence –and consequently access to housing – of certain groups, including racial minorities. Importantly, both *Biao and Garib* focused on controversial national legislation whose discriminatory impact had already been pointed out by judges and/or equality bodies in domestic proceedings.

It has also been claimed that, while the ECtHR has significantly strengthened its Article 14 jurisprudence, including ethnic segregation in education and gender violence, it has so far failed to adequately respond to complaints relating to physical violence against racial minorities.[278] The so called 'Holocaust Prism' – through which the Holocaust has become the litmus test for adjudicating racial violence – can potentially explain this judicial reluctance. This not only raises the threshold for a finding of violation, but renders it difficult to adjudicate intersectional cases, such as forced sterilisation of Roma women, and endangers internal consistency. There are, however, significant exceptions to the trend subjected to criticism. For instance, in *Stoica v Romania*, the ECtHR established discrimination in relation to both the substantive and procedural limbs of Article 3.[279] In this case, the applicant, a disabled Roma boy, was ill-treated by Romanian police during a raid that was effectively ordered and led by a mayor against the local Roma settlement. Anti-Gypsyism so deeply permeated the case that not only had the policemen talked openly in these terms during the investigation waged against them, but the prosecution found it acceptable to record an anti-Gypsy slur in the minutes and decisions. Moreover, case law on gender violence suffers from inconsistencies as well.[280]

In EU Member States, the RED has a pulling effect in various respects. Given that they are not defined in the directive, the grounds of racial or ethnic origin may be considered to extend to groups that are not recognised under national law. Being protected as a racial group carries advantages under EU anti-discrimination law as compared with religion, for instance. Indeed, a hierarchy is perceived by commentators, playing in favour of nationality and racial or ethnic origin.[281] The RED's material scope can also attract more challenges because, compared with the ECHR (minus Protocol 12), it covers a wide range of economic and social rights relevant to racial or ethnic minorities who experience discrimination in these fields.

2008, Orsus and Others v Croatia, Grand Chamber judgment of 16 March 2010, Sampani and Others v Greece, judgment of 11 December 2012, Horváth and Kiss v Hungary, judgment of 29 January 2013, and Lavida and Others v Greece, 30 May 2013.

277 Van den Bogaert, S., *Roma segregation in education: Direct or indirect discrimination? An analysis of the parallels and differences between Council Directive 2000/43/EC and recent ECtHR case law on Roma educational matters*, Max-Planck-Institut für auslandisches öffentlisches Recht und Völkerrecht, 2011, p. 720.

278 Rubio-Marín, R. and Möschel, M., 'Anti-discrimination exceptionalism: racist violence before the ECtHR and the Holocaust prism', *The European Journal of International Law* Vol. 26 no. 4, 2015.

279 *Stoica v Romania*, Application no. 42722/02, judgment of 4 March 2008.

280 See, *Civek v Turkey*, supra.

281 Waddington, L., and Bell, M., 'More equal than others: Distinguishing European Union equality directives', *Common Market Law Review* 38.3, 2001, pp. 587-611.

4.2.2 Convergence and divergence in regional case law

Interpretations show convergence in respect of the definition of discrimination, including a broad interpretation of discrimination based on real, assumed, multiple or associated racial or ethnic origin. CERD has a broad and well-defined understanding of the protected ground, but its views on descent have not yet reverberated at the European level. Rather, both regional and domestic courts rely simply on Article 1 ICERD in order to distinguish the grounds enumerated therein.[282] In *CHEZ*, constrained by the referring court's question the CJEU conceptualised the Roma as an ethnic group, which – as the report argues – was somewhat beside the point, given that the case turned on racial stereotyping. The report critically assesses *Timishev v Russia*, in which the Strasbourg Court held that ethnicity-based discrimination is a form of racial discrimination. A seminal judgment, *Timishev* falls victim of reifying race by adamantly seeking distinctions between racial and ethnic origin.

Convergence between the regional courts can be observed in their reluctance to discuss or establish intentional direct racial discrimination. This fits neatly into the continental European tradition of *silence about race*, which is based on a European self-identification with anti-racism.[283] Thus, racism is discarded as irrational – an intellectual legacy of making sense of the Holocaust. At the same time, alongside the 'appearance of non-whites in the European midst' triggered by decolonisation, culture, ethnicity or background come to occupy its place as social signifiers.[284] Even though this approach is criticised as culturally racist, the belief that racism seeks to 'maintain certain ill-begotten stereotypes' based on proxies such as a person's place of birth, while the exercise of defining race 'has become increasingly unacceptable in modern societies', and the definition of ethnic origin is not a lawyer's task holds ground even in the CJEU.[285]

As a rule, intent has not been addressed in CJEU case law because under sex discrimination case law emerging through the teleological reading of the Treaty provision regulating equal pay, no intention or subjective motivation has needed to be shown, given that what has mattered is that employers' practices have not had an effect that would disadvantage one sex.[286] Secondly, it was recognised early on that the intent-based distinction is not that straightforward at all.[287] In contrast, the ECtHR regularly deals with intent in its judgments and with the same regularity fails to establish racial intent, despite mounting evidence to the contrary.[288] In 'principle, the ECtHR requires proof of discriminatory intent', while in 'certain exceptional cases the Court is satisfied with mere evidence of practical discrimination'.[289]

These trends reveal a uniquely *European intent doctrine* that at times downgrades and at others deviates judicial decision making – certainly before the ECtHR and often in national courts as shown in Chapter 3. *CHEZ* indicates that, although the CJEU has so far resisted it, judicial silence on intent may also give rise to the skewed reception of judgments, with dangerous consequences at the national level. The European intent doctrine has so far not prevented the CJEU from adequately qualifying racial discrimination, in a

282 *Timishev v Russia*, Applications nos. 55762/00 and 55974/00, judgment of 13 December 2005.
283 Lentin 2008, see also Balibar 1991 supra.
284 Ibid, p. 496. Lentin reminds the reader of the influence of Claude Levi-Strauss' book Race and History, published in 1975 on this paradigm shift.
285 Opinion of Advocate General Wahl, Jyske Finans AS, paras. 3. and 30-33.
286 Ellis, E. and Watson, P., *EU anti-discrimination law*, Oxford University Press, Oxford, 2012, p. 163.
287 'Forms of direct sex discrimination are quite conceivable without sex being expressly mentioned in the contract of employment, pay scales or collective agreement as the criterion for the higher or lower pay. The conceptual scheme of that category makes it clear that discrimination does not even have to have been intentional.' Opinion of Advocate General Lenz of 14 July 1993 in case C-127/92, Enderby, quoted Ibid.
288 For instance, in *Orsus* the Court found that, while the Croatian authorities *cannot be held to be the only ones responsible for the fact* that so many pupils failed to complete primary education (emphasis added, para. 177.), in *Horváth and Kiss* it noted that 'the policy and the testing in question have not been argued *to aim specifically at' the Roma* (emphasis added, para. 111.). In *Lavida* it found discrimination '*in the absence of any discriminatory intent on the part of the State*' (emphasis added, para. 73.).
289 Besson, 2012, p. 168.

disproportionately high number of cases it impedes on finding or properly qualifying discrimination by the ECtHR.

Divergence is observable in approaches to covert direct discrimination. While the ECtHR tends to establish indirect discrimination when faced with covert discrimination, the CJEU has taken a different approach. First on the ground of gender, and then under the EED, the CJEU has identified direct discrimination in relation to a formally neutral rule (internal or legal) that affects only one group. In *Nikoloudi*, the CJEU examined a rule that reserved established staff positions to persons with full-time jobs.[290] However, not only were all the part-time workers women, but the staff regulations made it possible only for women to obtain a part-time contract for the particular job category. *Maruko* pertained to German law that permits life partnership to same-sex couples, who, however, cannot marry.[291]

The common feature of covert direct discrimination based on practice and of direct discrimination based on exclusive effect emanating from a formal rule is that the groups suffering the less favourable treatment – like their comparator groups – are homogeneous. This sets these dispositions apart from indirect discrimination, where both groups are heterogeneous, even though in the one suffering the particular disadvantage, persons with a protected ground are overrepresented. Conversely, they are underrepresented in the comparator group.

In *Biao*, the **Danish** legislator in essence continued amending family reunification rules – whose necessity remained under dispute – as long as in practice this could only disadvantage Danish citizens of non-Danish ethnicity and more particularly Muslims taking foreign spouses through arranged marriage.[292] This is a typical example of covert direct discrimination, when a neutral rule is invented – in this case chiselled over a period of time – until the intended racial impact is achieved. The cover-up may render total racial disparity invisible or blur disparity by leaving open the theoretical opportunity that the disparity is in effect not total. The scenarios in *Biao, D.H.* and *Horváth and Kiss* are examples of the latter, fuzzy covert discrimination. As the Strasbourg Court said in *Horváth and Kiss*, there was no proof that only Roma were misdiagnosed. However, there was no proof to the contrary either and none was advanced by the respondent state over a historically relevant period of time – i.e. since the 1970s.[293]

In the context of racial discrimination, commentators call attention to a 'mismatch' that follows from the focus on the allocation of the burden of proof without paying due respect to the substantive concepts of direct and indirect discrimination.[294] They argue against the simplified understanding of direct race discrimination as resulting from a direct link between the ground of race and the conduct on the one hand and the ground of race and the harm on the other. Such a reading in their view would run the risk of classifying all instances of race discrimination where evidence pertains to the effect and not necessarily to the motive – including those of covert race discrimination – as indirect discrimination. In particular, when the focus is on the failure to accommodate the special needs of an ethnic group, the finding could only be indirect discrimination. They propose that the proper design of comparisons can alleviate

290 Case C-196/02, *Nikoloudi* v *Organismos Tilepikinonion Ellados AE*, paras. 31-36.

291 Case, C-267/06, *Tadao Maruko* v *Versorgungsanstalt der deutschen Bühnen*.

292 Despite the thorough analysis of the Grand Chamber and judge Albeguergue's concurring opinion, this aspect of the case has not been extrapolated by the ECtHR. It is described by Eva Ersboll in *Biao v Denmark – Discrimination among citizens?*, EUI Working Papers, RSCAS 2014/79. She observes that the 28-year rule makes sense when examined in light of the Danish legislator's objective to deter Danish citizens from arranged marriages to foreign spouses. In fact, the 28-year rule does not make sense in any other context.

293 At para. 110. the Court observes: 'It must thus be observed that a general policy or measure exerted a disproportionately prejudicial effect on the Roma, a particularly vulnerable group. For the Court, this disproportionate effect is noticeable even if the policy or the testing in question may have similar effect on other socially disadvantaged groups as well. The Court cannot accept the applicants' argument that the different treatment as such resulted from a de facto situation that affected only the Roma. However, it is uncontested – and the Court sees no reason to hold otherwise – that the different, and potentially disadvantageous, treatment applied much more often in the case of Roma than for others.' However, none of the parties argued that the policy had a disproportionate effect on other groups.

294 Ambrus, M., Busstra, M. and Henrard, K. 'Racial Equality Directive and effective protection against discrimination: Mismatches between the substantive law and its application, *Erasmus L. Rev.* 3 (2010): 165-180.

such difficulties and argue that, once a comparison is made between homogenous groups, only direct discrimination can be established. Notably, however, homogeneity must exist in respect of all the relevant constitutive characteristics.

ICERD and the RED contain separate concepts of direct and indirect discrimination, which was initially not true for the ECtHR's Article 14 case law. Significantly, in EU law the concept of indirect discrimination emerged through the CJEU's response to sex discrimination with a view to providing effective judicial protection through the reversal of the burden of proof.[295] Indirect discrimination has slowly gained traction in ECtHR case law, due to the influenced of ECRI GPR No. 7 on national legislation to combat racism and racial discrimination – which in turn relies on the ICERD and the RED.

Whether owing to political sensitivities to the shaming effect of *direct racial discrimination* or doctrinal opacity, the ECtHR has often established indirect discrimination in cases that could or should otherwise qualify as direct racial discrimination. The CJEU has been conceptually well-grounded in comparison. On the other hand, the ECtHR has dealt with a much higher number of applications alleging racial discrimination on the basis of a highly varied material scope. So far, the CJEU has only once examined indirect racial discrimination with a debated outcome in *CHEZ*.

Harassment on the grounds of racial or ethnic origin is explicitly defined and prohibited in the RED only. It is a specific type of discrimination that does not turn on the showing of comparison. Harassment has been adjudicated by the ECtHR in *Aksu v Turkey* – concerning anti-Romani content in academic publications – and the CERD – in relation to anti-Romani and Islamophobic hate speech.[296] The results are mixed. In *Aksu*, both the chamber and Grand Chamber judgments contain serious flaws, while the CERD decisions are somewhat beside the point, as both dealt with the lack of effective domestic investigation. Bearing in mind the CJEU's judgment in *Coleman*, the definition of harassment under EU law seem to facilitate an adequate judicial response.

The definition of racial or ethnic origin impacts on the identification of comparators as well. The composite nature of the ground has consequences for the qualification of discrimination. The issue then becomes: if only one or two aspects of such complex definitions are implicated by an apparently neutral practice, then one may be led to consider the case as indirect, rather than direct, discrimination. This may be the case, for instance, in relation to minority language. The CJEU has so far examined only one case that raised this connection. In *Runevic-Vardyn* the refusal by the **Lithuanian** authorities to use the claimant's Polish national language of origin in documents of civil status was challenged as a form of indirect discrimination based on ethnic origin. The CJEU held that the recording of names on documents of civil status did not fall within the substantive scope of the RED because it did not constitute a 'service'.[297] In *Oršuš and Others v Croatia* the Strasbourg Court found that less favourable treatment based on proficiency in the official language constituted indirect discrimination based on ethnic origin, even though the language requirements in the context of compulsory public education impacted solely on Roma minority children.[298] As noted in Chapter 3, national courts regularly establish direct discrimination in relation to language requirements.

Various authors have noted the RED's shortcomings in respect of accommodating group claims and providing protection from structural or institutional discrimination – or 'the collective nature' of the case.[299] Both *Feryn* and *CHEZ* prove such predictions unsubstantiated in the sense that the RED can accommodate

295 Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex.
296 Supra, TBB-Turkish Union and Zentralrat Deutscher Sinti und Roma.
297 Case C-391/09, *Malgožata Runevič-Vardyn, Łukasz Paweł Wardyn* v *Vilniaus, miesto savivaldybės administracija, Lietuvos Respublikos teisingumo ministerija, Valstybinė lietuvių kalbos komisija, Vilniaus miesto savivaldybės administracijos Teisės departamento Civilinės metrikacijos skyrius*.
298 In Oršuš, a reference to indirect discrimination is made at paras. 153 (statistical evidence) and 191 (just satisfaction).
299 McCrudden, C., 'National legal remedies for racial inequality' and Chalmers, D., 'The mistakes of the good European?', Fredman, S. and Alston, P. (eds.), *Discrimination and human rights: The Case of Racism*, Oxford University Press, 2001, pp. 253-259 and 193-249, Bell, M., 2008.

group needs and address structural discrimination if domestic procedural rules facilitate collective action. In *Feryn*, the **Belgian** equality body challenged discrimination directed against the group of immigrants/ Moroccans. The judgment has been criticised for providing protection to 'hypothetical victims', a scenario not covered by the definition of direct discrimination in the RED.[300] On the other hand, the equality body's collective (*actio popularis)* standing under Belgian law entitled it to seek protection from impending discrimination, which is the classic function of such standing and results in nothing more than a court order prohibiting discrimination. As noted above, while individual victims were not named in the case, individual applicants had already been turned down by *Feryn*.

Even though in *CHEZ* the **Bulgarian** equality body proceeded upon an individual complaint, in the closely linked *Belov* case, it acted *ex officio*. This line of litigation therefore arose from a procedural levelling up during the transposition of the RED into Bulgarian law that not only grants collective standing to the equality body – the *Komisia za zashtita ot diskriminatsia* – but also enables it to investigate on its own motion.

With these caveats, the CJEU's interpretation appears not only doctrinally principled, but also dynamic in the sense that it is now squarely grounded in the fundamental rights tradition by protecting applicants from assault on their human dignity. Providing protection in a way that extends to all the potential job seekers and a whole Roma community reaffirms the CJEU's *engagement* in effective judicial protection. It is due to the activism of equality bodies in bringing cases before the CJEU and their selection of issues that discrimination against immigrants and the Roma – perhaps the two most pressing issues in the EU – has been highlighted.

300 The German critiques are summarised in Krause, R., 'Case note on Feryn', *Common Market Law Review* 47: 917–931, 2010.

5 Critical views on judicial interpretation

Academic debates and theoretical work provide critical insights into the interpretation of discrimination on the grounds of racial or ethnic origin. This report focuses on vulnerability and anti-stereotyping as discussed in relation to the ECtHR and intersectionality as discussed in relation to the case law of both regional courts. The central preoccupations of equality and diversity/multiculturalism remain largely external to the RED's material scope.

The Marxist critique sought to highlight capitalism's role in creating and upholding racism. It positioned race as a category within class and acknowledged the role of sex discrimination within these schemes of domination and exploitation.[301] The racial contract theory highlights the central role of racism in the American social contract and the deliberate exclusion of non-Europeans and their descendants from its scope, as well as the power imbalances and structural injustices that are entrenched through domination. 'White supremacy' is a belief in the superiority of intellectual fitness and a higher social standing in comparison with 'peoples of race'.[302] Domination is inherent not only in the racial construction of societies, but also in the racial construction of legal definitions, such as origin. The 'inextricable connection between the concept of race and structures of domination is particularly clear in the use of ethnicity as exclusively attached to minorities. The dominant group does not see itself as an ethnic group, but as the embodiment of universal values. All other groups can therefore be described as different, where different means deviant and therefore justifies inferior treatment.'[303]

More recently, attention has been drawn to the role of domination in the adjudication of discrimination claims and the negative impact that the failure to notice asymmetries when interpreting protected grounds may produce. Overly broad approaches to protected grounds dilute the level of protection and create tension between equality claims, even though the aim of equality law ought to be the eradication of oppression. Therefore, grounds congruent with status hierarchies should be protected without a requirement that they be immutable, as that runs the risk of essentialising.[304] The report has reflected on these propositions through its understanding of racial or ethnic origin as a composite ground, as well as its promotion of a constructionist analytical frame.

Most of the important critical work has focused on sex and disability, leaving racial or ethnic origin unexplored. The critical approaches vary in where they strike a balance between present and historical as well as group and individual harm. Further theoretical work is necessary on situating poverty in relation to racial or ethnic origin within the intersectional frame.[305] Rather than exploring intersectionality, recent ECtHR judgments in *Garib v The Netherlands* and *Soares de Melo v Portugal* tell a cautionary tale of competing frames, i.e. frames in which not only protected grounds compete for recognition, but more importantly, potential claims of discrimination are subdued under the poverty frame. Given the lack of critical insights in the original petitions, their transformation at the regional level would be necessary, requiring unprecedented judicial activism.

5.1 Vulnerability and anti-stereotyping

In Europe, it was pointed out early on that 'discrimination is fundamentally a group wrong: a person is badly treated because he is, involuntarily, a member of a group' disliked by the respondent or by society

301 Balibar 1991, p. 49.
302 Mills, 1997.
303 Fredman, S., 'Combating racism with human rights', Fredman, S. and Alston, P. (eds.), *Discrimination and human rights: The case of racism*, Oxford University Press, 2001, p. 11.
304 McColgan, A., *Discrimination, equality and the law*, Bloomsbury Publishing, 2014.
305 See, for instance, Goodwin, M., 'Multi-dimensional exclusion: viewing Romani marginalization through the nexus of race and poverty', Schiek, D. (ed.), *European Union discrimination law: Comparative perspectives on multidimensional equality law*, Routledge, 2008. Alesina, A. and Glaeser, E. L., Oxford University Press, 2004. Wilson, W. J., *The declining significance of race: Blacks and changing American institutions*, University of Chicago Press, Chicago, 1978.

at large.[306] There is no better way to capture the essence of discrimination and the importance of the role stereotypes play in generating, maintaining and legitimising it. In the *Prague Airport Case*, which concerned racial profiling of Roma air passengers for the purposes of immigration control, the **UK** House of Lords held that acting or stereotyping on racial grounds is wrong, not only if it is untrue – otherwise it would imply that direct discrimination can be justified.[307]

Recently, authors have highlighted the importance of arranging judicial arguments around stereotypes – widely held (negative) generalisations relating to groups designated on the basis of protected grounds or roles expected to be played by members of such groups. An anti-stereotyping approach can facilitate the identification of vulnerability, a recent trend in the Strasbourg Court's analysis. The label vulnerable designates a certain group or applicant for a higher level of scrutiny.[308]

Vulnerability has functioned as a test for applying a higher level of scrutiny and has been applied to the ground of racial or ethnic origin. In the mid-1990s, it was formulated in the Traveller cases.[309] Since then, it has been automatically applied even if discrimination is not established. For instance, the ECtHR held in *Winterstein* that given the particular vulnerability of Travellers and Roma, a specific treatment, distinct from that of usual situations of illegal occupancy of land, must be provided if the State is to enforce a decision to evict.[310] Vulnerability indicates a high level of scrutiny, such as in *Biao*. However, it is not a discrimination-specific category, being applied in cases where the applicants' circumstances expose extreme social exclusion or personal disadvantage.

It is proposed that the Strasbourg Court should borrow a refined anti-stereotyping approach from the US and Canadian Supreme Courts.[311] The ECtHR has only recently referred to stereotypes in its case law on racial or ethnic origin and gender, whereas anti-stereotyping has long been a central feature of both American and Canadian equal protection law. Through a transatlantic comparison, a wider use of stereotypes is proposed, which would facilitate transformative equality. It is noted that stereotypes, as generalisations, play an essential role in legislation and that not all stereotypes are bad. However, as a minimum, courts should properly identify and name them in order to improve their analysis of the harm caused by less favourable treatment. By so doing, they can optimally serve their educational functions and lay bare the vicious circle through which stereotyping and discrimination are reproduced: the manifestation, rationalisation and cause of discrimination is stereotype. Admittedly, however, reliance on stereotypes does not preclude narrow interpretations.

In the taxonomy of stereotypes, invidious and role-typing stereotypes are paid particular attention, because they have most clearly attached to a finding of discrimination in the Canadian and US contexts. In the US, the approach is critiqued on account of, firstly, the opacity of the concept. 'Much of the confusion stems from the fact that the Supreme Court often conflates the meaning of the term stereotype with the harms associated with the concept' – which does indeed have the potential to severely impede the exercising of this approach in practice.[312] Secondly, the impact of anti-stereotyping has been curtailed

306 Lustgarten, L., 'Problems of proof in employment discrimination cases', *Industrial Law Journal* 6, 1977, p. 216.

307 R v Immigration Officer at Prague Airport and Anor ex parte ERRC and others, [2004] UKHL 55.

308 Peroni, L. and Timmer, A., 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law, *International Journal of Constitutional Law* 11.4, 2013, pp. 1056-1085; and Timmer, A., 'A quiet revolution: vulnerability in the European Court of Human Rights' Fineman, M. A. and Grear, M., *Vulnerability: reflections on a new ethical foundation for law and politics,* Routledge, 2013, pp. 147-170.

309 Developed in UK Traveller cases: *Beard* v *The United Kingdom*, Application No. 24882/94; *Buckley* v *The United Kingdom*, judgment of 25 September 1996; *Chapman* v *The United Kingdom*, judgment of 18 January 2001; *Connors* v *The United Kingdom*, judgment of 27 May 2004. It was also applied in the context of education, for instance in DH at para. 201.

310 ECtHR application no 27013/07, judgment of 17 October 2013, available at http://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-126910%22]}, verified 29 May 2016. Petitioners are French Travellers who lived for many years on private pieces of land, of which most were the owners. This land was occupied in contravention of the local urban plan which provided that the area was a 'nature protection zone'. The ECtHR held that the constraint imposed on the petitioners to leave their caravan sites and all their possessions infringed their right to respect for their private and family life.

311 More recently in Timmer, A., 'Judging stereotypes: What the European Court of Human Rights can borrow from American and Canadian equal protection law', *American Journal of Comparative Law* 63.1, 2015, pp. 239-284.

312 Timmer, 2015, p. 263

by a narrow reading in cases concerning positive action measures on race. Moreover, the Supreme Court 'declined to apply the anti-stereotyping principle in domains where it had identified "real" differences between the sexes,' such as pregnancy and abortion.[313] Another pitfall of stereotypes is that at times it may be difficult to prove that a rule was based on a stereotype, a critique the Canadian Supreme Court has acknowledged.[314]

The Canadian Supreme Court's four-step test in law relies on stereotypes: 1. Is there disadvantage? (in a historical context, taking account of past domination), 2. Has the applicant suffered disadvantage typical to the group of which she is a member? 3. Can this treatment be justified by reliance on the positive action measure justification? 4. Does the field in question call for strict or loose justification? Timmer critiques the Canadian approach thus: 1. characterising stereotypes as misconceptions softens the edges of potential discriminatory intentions. 2. focusing on whether a member of the group shares the group's fate limits the potential of stereotypes. 3. a general arbitrariness test may suffice instead of an analysis of the group/individual harm. 4. it may be difficult to recognise stereotypes, when they appear to be common sense.

It is difficult to maintain a balanced inquiry into the impact of stereotypes on a group as compared with individual group members. This being the case, the anti-stereotyping approach would nuance but not resolve the dilemmas that contextual analysis faces: the difficulties in striking a balance between the cumulative effects of past discrimination and the individual cases. The Strasbourg Court's experimental judgment in D.H. illustrates the pitfalls of overemphasising the group harm that stereotypes bring to the fore. Here, individual harm was not at all assessed, which compromised the crafting of comparators and consequently the identification of the relevant type of discrimination. Examining the circumstances of each individual applicant could have revealed that there was no other reason for their less favourable treatment than their racial or ethnic origin.

Caution concerning the anti-stereotyping approach is advisable, because of its rigidity in navigating between group and individual harm. Its ability to indicate *prima faciae* cases is questionable, unless complemented by a constructionist approach. In Europe, group harms are identified through contextual analysis, which looks at the historical, social, political and legislative contexts, in a framework broader than that of anti-stereotyping.

5.2 Intersectional discrimination[315]

Originally, intersectionality is concerned with the marginalisation of minorities within minorities, such as minority women, within single-ground approaches. Proponents of this approach stress that personal identities are not formed around a single axis, such as race, sex, disability, age or sexual orientation, but emerge at the intersection of such grounds and may change over time.[316] Significantly, those at the intersections of grounds tend to experience particularly severe forms of discrimination, which may not be captured through a single-ground approach, leaving these vulnerable groups without protection. Intersectionality also seeks to forge coalitions across supressed groups by emphasising commonalities and synergies.[317]

313 Ibid, p. 264.

314 In Quebec (Atty Gen.) v. A. (2013), which concerned the question of whether it is valid to exclude de facto spouses from the patrimonial and support rights granted to married and civil union spouses.' pp. 266-267.

315 I would like to thank Raphaële Xenidis, my fellow PhD candidate at the EUI, for her insights on intersectionality and for discussing competing interpretive frames over the last two years.

316 Crenshaw, K., 'Mapping the margins: Intersectionality, identity politics, and violence against women of color.' *Stanford law review*, 1991, pp. 1241-1299.

317 Collins, P. H. (1993). Toward a new vision: Race, class, and gender as categories of analysis and connection. *Race, Sex & Class*, 25-45. Collins asks: 'How can we transcend the barriers created by our experiences with race, class and gender oppression in order to build the types of coalitions essential for social change? Reconceptualizing oppression and seeing the barriers created by race, class and gender as interlocking categories of analysis is a vital first step. But we must transcend these barriers by moving toward race, class and gender as categories of connection, by building relationships and coalitions that will bring about social change. What are some of the issues involved in doing this?' p. 36.

In Europe, intersectionality has been portrayed as adequately capturing the structural nature of discrimination and the various social processes that produce and reproduce it. He stressed that intersectional discrimination is a conceptual category that refers to various forms of discrimination.[318] Multiple discrimination recognises the accumulation of distinct discrimination experiences that take place over an extended period on the basis of a single ground at a time. Compound discrimination denotes situations in which less favourable treatment is meted out on one ground, which creates an added burden to already existing single-axis discrimination. Intersectional discrimination in the narrow sense refers to less favourable treatment on several grounds that interact simultaneously. However, conceptual disorganisation is noted and using intersectionality too broadly, both as a term and as an analytical frame is not advised. Intersectionality facilitates identification during a contextual analysis of structural factors that contribute to multiple, compound and intersectional discrimination, such as poverty-related, cultural and linguistic barriers. Indeed, contextual analysis of structural factors is a prerequisite of policies addressing inequalities. Intersectionality guards against the single-axis approach, whose shortcomings concerning the exclusion of marginalised group interest were prevalent in political agendas such as the feminist and anti-racism movements. It addresses less favourable treatment not only on the part of the majority, but also within the minority racial or ethnic group.

Recently, intersectionality has been described as a capacious approach to grounds that can provide an overarching interpretive frame in Europe, capable of accommodating concerns arising in relation to identity-based as well as structural discrimination, with a view to guaranteeing substantive equality.[319] This general theory of intersectionality extends well beyond the application of the RED, while its primary focus on sex and gender facilitates insights into the fate of ethnic minority women. Relying on recent research results, it shows a complex pattern of intersectional discrimination that ethnic minority women sometimes share with ethnic minority men, and at others suffer within the ethnic minority community:[320]

> 'ethnic minority women experience discrimination specific to their social location, in a way not shared by ethnic majority women. Such disadvantage is shared with men in their communities. … stereotyping within the community of women as primarily child-bearers and home-makers is overlaid by stigma and prejudice experienced as ethnic minority women in the wider society. Cultural stereotypes and prejudice, for example in relation to dress, might be specific to women in these communities.'

The nodes approach builds a general interpretive frame taking disability as an exemplary ground to demonstrate the shortcomings of the single-axis approach. It perceives the single-ground approach within EU law and the lack of provisions that would facilitate an intersectional analysis as leading to a compartmentalisation on distinct grounds.[321] In contrast, the nodes approach 'demands that courts, in defining discrimination grounds, avoid exclusion across grounds, for example by failing to recognise the disabling effect of impairments typically suffered by women or ethnic minorities.'[322]

The proposition is that discrimination can best be captured through the reorganised and intersecting nodes of sex/gender, race/ethnicity and disability/impairment. These conceptual categories are complex and multi-faceted, which indicates a willingness to reconstruct and compress intersectional claims. This marks the theory out from the general trend. Furthermore, the focus on ascribed grounds moves the

318 Makkonen, T., *Multiple, compound and intersectional discrimination: Bringing the experiences of the most marginalized to the fore*, Institute for Human Rights, Åbo Akademi University, 2002, pp. 10-11 and 56-57.

319 Fredman, May 2016.

320 Ibid, pp. 40-41. Fredman relies on results from FRA, *Multiple discrimination in healthcare*, 2013, March and EGGSI, *Ethnic minority and Roma women in Europe: A case for gender equality*, 2008.

321 Schiek, D. and Lawson, A. (eds.), *European Union non-discrimination law and intersectionality: investigating the triangle of racial, gender and disability discrimination*, Ashgate Publishing Ltd, 2013.

322 Schiek, D., 'Intersectionality and the notion of disability in EU discrimination law', *Common Market Law Review* 53: 35–64, 2016, p. 39. It must be recalled that a major obstacle to overcome at the EU level stems from the difference in the scope of protection across the diverse grounds, but the single-ground approach does not present a real threat in the majority of domestic legal regimes.

nodes away from identity-based approaches. Thus, race subsumes ethnicity, language and religion, while the other two grounds also become composite conceptual categories, which can neatly align with what is proposed in the present thematic report.

It is underlined that, as opposed to sex/gender and similar to disability, race/ethnicity have not yet been defined in case law, while there is a risk of defining grounds in a discriminatory fashion. The definitional risk has so far been avoided in the context of racial or ethnic origin, where the CJEU has pursued a purposive, broad interpretation. It is certainly too early to estimate the future path, but, there are indications that, as far as racial or ethnic origin is concerned, discriminatory definitions will not be applied.

Three observations are due in relation to intersectionality from the perspective of the RED. First and foremost, as a general rule, intersectionality is accommodated at the national level, which will obviously have an impact on referrals to the CJEU. The overwhelming majority of Member States prohibit discrimination in a single act and/or have constitutional equality provisions that contain a(n open) list of grounds, which should in theory enable judicial review in an intersectional frame. Petitioners and national courts referring questions to the CJEU can follow the *Meister route*.

Secondly, judges are endowed with various interpretive techniques that are amenable to intersectionality. A well-known example is the contextual analysis that the ECtHR follows in its jurisprudence, which has already reverberated in the CJEU's judgment in *CHEZ*. Thirdly, it is plausible that the equivalent of structural discrimination as observed by social science and befitting social policy is not congruent with the intersectionality of grounds, rather with contextual analysis. Many examples used by the promoters of the intersectional frame reveal intricate patterns of domination and structural disadvantages accumulated over time, which would almost inevitably exceed the rather strict and rigid contours of statutory law. Moreover, it is not enough to ensure that intersectional claims can formally be adjudicated. If the aim is to open up EU anti-discrimination law to challenges against structural discrimination, collective standing must be available and adequate remedies – such as mandatory positive action – need to be imposed to make collective action worthwhile. The issue has been discussed by practitioners for some time and is also giving rise to an academic debate.[323]

However, even if the concerns relating to collective standing are resolved, others remain. Statutes of limitations must be observed and the liability of each individual defendant established. Also, what may be seen as interlinking elements of structural or intersectional discrimination in social policy may need to be dissected into protected ground, field and harm/disadvantage in judicial decision making. For instance, if the less favourable treatment is lack of access to a widower's pension and the field is employment, then a protected ground cannot be sexual orientation in conjunction with pensionable age, because the ground would then overlap with the field subjected to inquiry.

Deconstructionist intersectionality can have an unintended and unfavourable impact on litigation against racial discrimination. In various national constitutions and international treaties, (minority) language, national or social origin, religion and socio-economic status are protected separately from racial or ethnic origin, whereas in others some of these grounds are not protected. Indeed, even though they are listed in Article 21 of the EU Charter, (minority) language, religion and national origin are not explicitly covered by the RED. Religious or other belief is severed from racial or ethnic origin and is situated in the EED, being limited to the field of employment – reflecting a hierarchy of grounds in EU anti-discrimination.[324] The presence of these characteristics in a particular case shall be taken to signal a danger of unduly

323 Farkas, L., 'The scene after battle: What is the victory in *D.H.* worth and where to go from here?', *Roma rights* 1/2008; Farkas, L., 'Limited enforcement possibilities under European anti-discrimination legislation – A case study of procedural novelties: Actio popularis action in Hungary', *Erasmus L. Rev.* 3, 2010,: p. 181; Dawson, M., and Muir, E., 'Individual, institutional and collective vigilance in protecting fundamental rights in the EU: Lessons from the Roma', *Common Market Law Review* 48.3, 2011; Dawson, M., Muir, E. and Claes, M., 'Enforcing the EU's rights revolution: the case of equality', *European Human Rights Law Review* 3, 2012.

324 Bell and Waddington, 2007.

dissecting racial or ethnic origin as much as highlighting an opportunity to identify intersections. Whereas intersectionality between ethnic origin and religion in the case of ethno-religious minorities is considered plausible by commentators who also project a higher level of protection in these instances – on account of the RED's wide material scope as compared with the EED – such qualifications may also run the risk of hiding the racial dynamics at play and dissecting an organically layered, composite ground.[325] In order to avoid such a fiasco, it is desirable to inquire into the construction of racism in the context of individual cases, as suggested in relation to *Achbita* and *Bougnaoui* above.

5.2.1 Racial or ethnic origin and religion

Intersectionality may represent a false frame in the case of ethno-religious minorities, i.e. when 'a religious group is considered to have an ethnic character, or because members of a religion belong predominantly to particular ethnic groups'.[326] Even though both grounds are protected under EU non-discrimination law, the scope of protection is much wider for racial or ethnic origin than it is for religion. Intersectionality is considered to open the way to a higher level of protection, but this has not been tested yet.[327] Academics argue that employees wearing a headscarf are eligible for protection on the ground of religion or belief under the EED, while students could be covered by the RED.[328]

In the subsection on ethno-religious minorities, this paper provided an analytical frame that can facilitate the identification of the ground concerning diverse discriminatory acts stemming from Islamophobia by analogy with other (ethno-)religious minorities, with regard to whom jurisprudence is already settled. It is important to note that Islamophobia is manifested in singular ways in relation to both sexes, which could equally give rise to intersectional claims by Muslim men, who are over-represented among those targeted by security measures – particularly police and airport profiling.[329] Consequently, their claims of discrimination are as precarious in relation to comparators as are the claims of Muslim women. As far as racial discrimination is concerned, however, constructionist analysis can help overcome evidentiary hurdles that arise in relation to the fact that the apparently legitimate aims pursued by the measures in question map out differently for Muslim men and Muslim women, while both the suspect practices and legislation are subject to diverse concealment techniques. In practice, legal challenges continue to be based on religious belief, therefore neither the intersectional frame, nor the constructionist analysis have been tested yet.

Intersectionality may deviate legal analysis of discrimination against racialised religious minorities, because a focus on religious identity and practices can conceal racism and the racially constructed nature of religious and cultural characteristics. A case pending before the ECtHR provides a unique opportunity to examine the issue outside of the debate that has been occupying centre place in the majority of Member States.[330]

325 Pentassuglia et al, MRG Report 2011, p. 19. "However, the Directives could be used as a fertile ground for developing the concept of 'intersectional' discrimination in practice, particularly where a group may share a common ethnic origin and a common religion."

326 Commission (EC) Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Non- discrimination and equal opportunities: a renewed commitment', COM(2008) 420 final, 2.

327 Pentassuglia et al, MRG Report 2011, p. 17.

328 Loenen, T., 'The headscarf debate: Approaching the intersection of sex, religion, and race under the European Convention on Human Rights and EC equality law', Schiek, D. and Chege, V., *European Union non-discrimination law: Comparative perspectives on multidimensional equality law*, 2009, pp. 313-327.

329 Reports on Anti-Islamic reactions within the European Union after the acts of terror against the USA, May 2002, The European Union's Agency for Fundamental Rights. The report explains backlash on Muslim women as well, following the terrorist attacks, from pp. 33-45. Cesari, J., 'The securitisation of Islam in Europe', Vol. 15. *CEPS*, 2009.

330 *Rizo Alković* v *Montenegro*, Application no. 66895/10, lodged on 9 November 2010, communicated on 14 December 2015.

The applicant, Mr Rizo Alković, is a **Montenegrin** national, who is a Roma and a Muslim. On an unspecified date in 2006 he and his family moved into an apartment in a building constructed for socially -disadvantaged families. Due to constant attacks, in some of which his car and the apartment were damaged, the applicant installed a camera outside his apartment. Attacks that were threatened or carried out by the neighbours included gunshots fired in the direction of his terrace. The comments made included: 'so, you've gone to bed, you Muslim motherfucker'. On another occasion, another neighbour said that she was fighting 'cockroaches, frogs, nits and lice, and all sorts of other things', which were brought by 'those dirty gipsies'. The verbal slur continued with a discussion of possible methods of killing the applicant and his family. It was suggested that using a sword would be appropriate, because 'her lot wore swords' – 'No, no, he is a Muslim, I have a sword'. 'An axe, neighbour, an axe, a sledgehammer, like it is used for pigs'. On the day of Ramadan Bayram, a religious holiday celebrated by the applicant and his family, a large cross was drawn across the applicant's apartment door, and a large message was written on the wall next to it: 'move out or you'll regret it bitterly'.

Part of the criminal investigations initiated by the applicant were discontinued, while in the ones that led to indictment the perpetrators were acquitted. In contrast, the applicant was found guilty of unauthorised recording and eavesdropping on a neighbour and was sentenced to 40 days' imprisonment, suspended for a period of one year. Furthermore, he was fined EUR 800 under minor offence proceedings for threatening a neighbour. In the end, the applicant and his family moved out of their apartment.

The applicant complains under Articles 8, 9, 13 and 14 of the Convention about the failure of the authorities to effectively investigate a series of ethnically and/or religiously motivated attacks against him perpetrated by private parties. The ECtHR has asked the parties to respond to four questions, of which two relate to discrimination: one on the ground of racial or ethnic origin (failure to investigate potential racist motive) and the other on the ground of religion taken alone or in conjunction with 'being a Roma' (discrimination in the enjoyment of Convention rights).

The European Roma Rights Centre has submitted an *amicus curiae* brief that invites the Strasbourg Court to address intersectional discrimination in this case on the basis of racial and religious grounds.[331] However, examining the case on the basis of the composite ground could perhaps better explain the intricate relationship between minority religion and (racial/ethnic/national) origin – particularly in the regional context. In the Balkans, religion, language, national origin and political opinion are inextricably interlinked due to various historical events, which include past experiences of colonization under Ottoman rule, but more recently also domination in the former Yugoslavia.[332] While being a Muslim indicates past allegiance to Islam, it is still a relevant factor in attributing insider and outsider status in the context of recent nationalism fuelled by the dissolution of Yugoslavia, in which the Roma are relegated to a 'post-Yugoslav subaltern' status.[333] Recent nationalistic conflicts have stirred up historic grievances, in which Islamophobia played a part. On the other hand, even though the Roma as a 'European minority' do not practice a single religion as do Jews or Muslims, in regional contexts – where religion is the main identifier of *origin* – they may be perceived as an ethno-religious minority. The stereotype attached to the Muslim Roma in the Balkans would then be that of outsiders, past and potentially future traitors to the national cause, who embody past domination over the now dominant and majority ethnic group. The case is best interpreted in a constructionist frame that can usefully demonstrate the shifting identities and status of

331 Available at http://www.errc.org/cms/upload/file/alkovic-v-montenegro-third-party-intervention-23-may-2016.pdf, last accessed on 14 August 2016. 'The ERRC went on to describe the particular situation of Roma in South East Europe in general and in Montenegro in particular. The ERRC stressed the widespread nature of negative attitudes towards Roma in Montenegro, which were much more common than such attitudes in neighbouring Serbia, for example. The ERRC set out the evidence concerning the situation of Roma Muslims in South East Europe, including their historical presence in the region and negative attitudes towards them.'

332 See, Crowe, D. M. 'Muslim Roma in the Balkans', *Nationalities Papers* 28.1, 2000, pp. 93-128. Marushiakova, E., and Popov, V., *Gypsies in the Ottoman Empire: A contribution to the history of the Balkans*, Vol. 22. Univ of Hertfordshire Press, 2001.

333 See, Sardelic, J. *Romani minorities on the margins of Post-Yugoslav citizenship regimes*, CITSEE, 2013, and Barany, Z., *The East European gypsies: regime change, marginality, and ethnopolitics*, Cambridge University Press, 2002, pp. 89-93.

Muslim Roma in **Montenegro**. Clearly, in other parts of Europe, where nationalism and racism do not organise around religion in this manner, constructionism will lead to different conclusions.

5.2.2 Racial or ethnic origin and intellectual disability

In the European context, intersectionality between racial or ethnic origin on the one hand and disability on the other is typically demonstrated with the example of *DH*, perhaps the best-known Roma rights case.[334] What is consistently overlooked in the intersectional analysis is the *legacy of race and degeneration* – an attribution of further meanings, including intellectual inferiority or mental disability, to racial or ethnic minorities.

The original intersectional paradigm focused on racial minority women, a marginalised group treated less favourably at an intersection of *identities*. Racial minority women suffer less favourable treatment in comparison to both women who belong to the majority racial group and men who belong to the minority racial group. There is a single source of intersectional discrimination: a colleague or an employer, because the less favourable treatment in the classic example is harassment at the workplace. Importantly, though, under EU anti-discrimination law, harassment does not require a comparison.

The misdiagnosis of Roma children does not align with this pattern, and not only because the form of discrimination is in/direct discrimination. The very essence of these cases is that the victims are Roma children who are not mentally disabled, *nor do they identify as such*, i.e. they do not have an intersectional identity. They are treated as if they were mentally disabled, which is not the ground; rather, it is the disadvantage/less favourable treatment. They simultaneously suffer discrimination in comparison to ethnic majority children, Roma children and disabled children. They are treated less favourably than ethnic majority children and Roma children educated in mainstream schools, because they are treated as if they were mentally disabled, even though they are not. They are treated less favourably than mentally disabled children (educated in special schools), because they are labelled as mentally disabled, even though they are not. In other words, in comparison with 'similars' they are treated differently whereas, in comparison with 'differents', they are treated similarly.

There is no single source for this less favourable treatment, but there are at least three layers to it. First, eugenics that portrayed certain minorities – including the Roma – as mentally inferior. Secondly, a legislative decision that was taken to provide schooling to mentally disabled children separately. Thirdly, the tests sieving out mentally disabled children produce an overrepresentation of Roma children in the 'mild mental disability' category but not in other categories of mental disability. In sum, the victims themselves do not embody two intersecting grounds – quite the contrary: because they possess one, they are also ascribed another. This, however, means that, if misdiagnosed Roma children claimed discrimination on the grounds of disability in conjunction with racial or ethnic origin, they would certainly fail. They would fail because they could not show less favourable treatment. The original example requires that they should be treated less favourably in comparison to both disabled non-Roma and non-disabled Roma. However, they themselves constitute the group of non-disabled Roma and are treated identically in comparison with disabled non-Roma: they are stigmatised in segregated special schools.

What causes controversy is that the claim made on the ground of racial origin brings into play the deplorable prejudices advocated by eugenics in respect of both race and disability. This frame precludes claims of racial discrimination that would not at the same time appear reinforcing or insensitive to disability discrimination. The source of this controversy is eugenics and its legacy in today's Europe, but the criticism has been directed at the racial focus, its failure to challenge disability discrimination and, by way of such failure, its reinforcement of disability stereotypes.[335] A different reading to this moral dilemma

334 For instance, Lawson, A., 'Disadvantage at the intersection of race and disability: Key challenges for EU non-discrimination law', Schiek, D. and Lawson, A., 2013.

335 As noted in 'Challenging discrimination at the expense of promoting equality', Index News, 14 February 2013, statement by Inclusion International, Inclusion Europe and the Mental Disability Advocacy Centre

is also available. The misdiagnosed Roma children can win only one battle: they can put an end to racial discrimination. Their standing is secured as long as they stay within the racial context. They cannot at the same time take on a disability battle, because that would defeat both causes. The misdiagnosed Roma children can and have claimed that education in special schools is of an inferior quality. This indirectly brings into play disability discrimination and challenges the belief that segregated education is beneficial in this context. On the other hand, if no segregated education existed for disabled children and everyone received education of equal curricular content in integrated schools, the misdiagnosed Roma would not be treated less favourably either. In other words, a disability challenge against segregated special schools could, collaterally, put an end to the segregation of all – not only misdiagnosed – Roma children.

While at first glance it may appear that this analysis supports the multidimensional nature of intersectionality, when focusing on the individual child(ren), it becomes clear that misdiagnosis can best be understood through a constructionist analysis, rather than an intersectional one. This analysis encompasses an examination of the histories and the social construction of groups subjected to stereotypes, as well as the complex societal evasion techniques at play, culminating in the widely-held belief that segregation serves the interests of mentally disabled children.

5.2.3 Racial or ethnic origin and poverty

The need to redress poverty as disadvantage is part of the four-dimensional concept of substantive equality recently proposed.[336] The intersection of racial origin and socio-economic status has been specifically explored and suggested as a useful frame in relation to the Roma, noting that they suffer intersectional discrimination on account of the combined grounds of racial or ethnic origin and poverty.[337] However, the recommendation that the racial frame should at times be superseded by the poverty frame could, on the other hand, defeat the purpose of intersectionality in judicial challenges. The racial contract theory explains the low socio-economic status of racial minorities as a function of racial domination that – again – can be critiqued from a structural perspective. The classic Marxist approach sees race as a category within class.

Socio-economic status is not covered by EU anti-discrimination law, where the catalogue of protected grounds limits the scope of protection. The ECtHR, however, has dealt with this intersection in three cases: *Yordanova* concerned ethnic origin and socio-economic status, while *Garib* and *de Melo* related to sex, racial origin and socio-economic status.

In *Yordanova*, the ECtHR did not establish discrimination on either ground.[338] Nonetheless, its contextual analysis has been welcomed and celebrated as a useful approach. The Strasbourg Court emphasised the 'applicants' situation as an outcast community and one of the socially disadvantaged groups', underlining that 'regardless of the ethnic origin of their members, such social groups may need assistance in order to be able effectively to enjoy the same rights as the majority population.'[339] Not on account of their ethnic origin, but due to 'the applicants' specificity as a social group and their needs', as vulnerable individuals an obligation to secure shelter for them may arise.[340]

In light of the facts, particularly those relating to apparent racial animosity evidenced by submissions of the state agent representing **Bulgaria** before the Strasbourg Court, it is highly controversial that in *Yordanova* the ECtHR did not establish discrimination on the ground of racial or ethnic origin.[341] The above considerations suggest that it approached the case from a standpoint of vulnerability composed of ethnic

336 Fredman, 2016, p. 37.
337 Goodwin, M., 'Multi-dimensional exclusion: viewing Romani marginalization through the nexus of race and poverty', Schiek, D. (ed.), *European Union discrimination law: Comparative perspectives on multidimensional equality law*, Routledge, 2008.
338 Peroni and Timmer, 2013.
339 *Yordanova*, para. 129.
340 *Yordanova*, para. 130.
341 *Yordanova*, para. 93.

origin and socio-economic status, where the latter functioned as a source or ground of disadvantage 'regardless of ethnic origin'. This view of vulnerability implies that the Court had in mind a priority order of grounds, in which ethnic origin was subsumed under socio-economic status. While this may explain the ECtHR's decision not to establish discrimination on the ground of ethnic origin[342] it does not explain why discrimination on the ground of social origin, property status or any other ground protected under Article 14 was not established, given its central place in the analysis.

Two recent Strasbourg cases, *Soares de Melo v Portugal* and *Garib v The Netherlands*, have offered an opportunity to revisit the dynamics between racial discrimination and social marginalisation. In the former, the Court established a violation of the right to private and family life, but skated over potential discrimination, which may be defensible in the actual context, because the claimant herself did not raise a discrimination complaint. However, concurring judges and commentators pointed to a missed opportunity. In *Garib*, the chamber did not establish discrimination even though it was specifically petitioned to do so, and dissenters disagreed on the narrow reading of the case.

In *Garib* and *de Melo* the applicants were vulnerable women of minority racial origin, who raised their children in precarious material conditions while functioning as heads of households.[343] In *de Melo* discrimination based on racial origin and/or religion was not discussed, even though the applicant was a Muslim Cape Verdean national living in **Portugal**, whose husband practised polygamy.[344] The case was framed by Ms Melo's legal representatives as that of a family (a female-led household) living in poverty, and sought to establish that children should not be 'rescued' from parents living in destitution; rather, states should provide (material) assistance to make family life possible.[345] Condemning the social services' pressure on the applicant to undergo sterilisation, the Court found that there had been a violation of her family life.

The removal of children from families stricken by poverty has been a recurring theme over the last decade before the Strasbourg Court, while in all these cases, 'the disadvantage suffered by parents and children was compounded by their socio-economic status and their ethnic origin or race, gender and/or disability' in a climate characterised by the 'privatisation' of child-care services.[346] The Strasbourg Court acknowledges the vulnerability of the applicant and her family but stops short of discussing the details, even though the facts necessitate an exploration of stereotypes attached to poverty, racial or ethnic origin and sex. The judgment makes reference to cases on the coercive sterilisation of Roma women, but given that no discrimination had been established with respect to those earlier cases, no analogies offer themselves in this regard.[347]

342 Although the reason given related to the lack of its imminent danger. See, *Yordanova* para. 150.

343 *Soares de Melo* judgment, paragraph 106 of the judgment: 'Dans le cas des personnes vulnérables, les autorités doivent faire preuve d'une attention particulière et doivent leur assurer une protection accrue.'

344 Affaire *Soares De Melo c Portugal*, Requête n° 72850/14, judgment of 16 February 2016, final, Cape Verdian national, paragraph 110 on sterilisation without consent

345 Valeska David's description of the facts commenced as follows: 'The applicant is a Muslim Cape Verdean national living in Portugal'. In 'ECtHR condemns the punishment of women living in poverty and the 'rescuing' of their children', 17 March 2016; Comments pointed to racism and Islamophobia being manifest in the official attitudes vis-à-vis religious/cultural customs such as polygamy. Available at https://strasbourgobservers.com/2016/03/17/ecthr-condemns-the-punishment-of-women-living-in-poverty-and-the-rescuing-of-their-children/#comments.

346 And 'at least seven other judgments from the Court dealt with child removals from families living in poverty'. *Moser* v *Austria*, App. no. 12643/02, Judgment of 21 September 2006; *Wallová and Walla* v *The Czech Republic*, App. no. 23848/04, Judgment of 26 October 2006; *Havelka and Others* v *the Czech Republic*, App. no. 23499/06, Judgment of 21 June 2007; *Saviny* v *Ukraine*, App. no. 39948/06, Judgment of 18 December 2008; *A.K. and L. v. Croatia* App. no. 37956/11, Judgment of 08 January 2013; *R.M.S. v. Spain*, App. no. 28775/12, Judgment of 18 June 2013; *N.P. v. the Republic of Moldova*, App. no. 58455/13, Judgment of 6 October 2015. In David, V., supra.

347 Ibid. He notes that 'the removal of children from poor or otherwise 'deviant' families is frequently the result of decisions based on stereotypes constitutive of discrimination' gender and poverty related stereotypes. 'In practice, stereotyped views on unfitness to childrearing based on gender roles, economic situation, disability and other social traits usually intersect, as demonstrated by most of the poverty-related child removal cases submitted to the Court.'

In *Garib,* given the domestic proceedings, the linkages between racial or ethnic origin and poverty were prominently expressed, even though the majority of the Chamber did not engage in a contextual analysis of the housing policy that curtailed the applicant and her two children's freedom of movement within Rotterdam. The so called Rotterdam-wet has been the subject of controversy within the **Netherlands** for some time, because by seeking to gentrify neighbourhoods in danger of becoming impoverished, it disproportionately disadvantages families and individuals of lower economic status and of minority racial or ethnic origin. The discriminatory impact prompted the Council of State and the Dutch equality body to criticise the policy unless measures mitigating against it were introduced. Similar to *de Melo, Garib* was not framed as a discrimination claim before the Strasbourg Court, but rather as one with a focus on the freedom of movement. However, by virtue of the legislative history, indirect discrimination based on racial or ethnic origin provided the context. The Chamber President's dissenting opinion pointed to the discriminatory impact of measures that 'rely on or entrench the social stigma attached to poverty'.

The severity of the substantive right violation or its discursive force of the underlying social issue may not only overshadow a discrimination claim, but it can also more broadly capture the diverse and profound structural concerns intersectionality seeks to bring to the fore. *Yordanova, Garib* and *de Melo* flag the difficulties courts may encounter when seeking a complex analytical frame that not only addresses structural discrimination but at the same time does justice to the diverse normative frames the apparently intersecting grounds implicate.

It is clear from these cases that if socio-economic status is a protected ground, it alone is sufficient to find direct discrimination, but this route has not yet been taken by the ECtHR and cannot be taken by the CJEU. The domestic proceedings in *Garib* demonstrate a second trend, whereby poverty is taken as a proxy for racial or ethnic origin to argue that indirect discrimination has taken place.[348] Whether a provision, criterion or practice targeting poverty is really neutral *vis-à-vis* racial or ethnic minorities is far from straightforward, given the widely documented and foreseeable intersections between the two grounds. Thirdly, poverty may be taken as a complex phenomenon that guides judicial analysis, without even considering discrimination, as in *de Melo*. Alternatively, it may be viewed as the sum of group harm that arises from the amalgamation of past discrimination against ethnic minorities, as implied in *Yordanova*.

Intersectionality functions differently in the three scenarios. While in the first, arguing discrimination based on the intersection of socio-economic status and racial origin may enable standing under the RED, it does not alter standing under the ECHR. In the second scenario, intersectionality between poverty and racial or ethnic origin (sex, etc.) does not arise in a strict, procedural sense, because poverty is not the ground the claim is based on – given that indirect racial (and sex) discrimination is at hand. In the third scenario, intersectional discrimination gives rise to contextual analysis of poverty and race.

Less favourable treatment does not always target the intersecting grounds and not all intersections call for an intersectional frame. For instance, *Yordanova*, where the whole Roma community suffered – to borrow a description from *CHEZ* – 'wholesale and systemic' discrimination, did not call for an intersectional frame, even though the less favourable treatment was apparently based on ethnic origin and socio-economic status – but women and children may also have been overrepresented within the community. Still, the threat of homelessness hung over the heads of the whole community, regardless of their socio-economic status, sex, age, etc. A 'simple', single-axis claim based either on ethnic origin or socio-economic status, but also a 'substantive right' claim concerning the violation of Article 8 ('community life'), could provide protection. Similarly, in *de Melo*, a finding of substantive right violation put an end to the applicant's and her children's ordeal. The substantive right claim was not sufficient to sustain *Garib*'s complaint, but no indication is given in the dissent of whether intersectionality of sex and race and/or socio-economic status is seen as a *sine qua non* for a finding of discrimination, or of whether either of them is sufficient. In

348 Lavrysen, L., 'Strasbourg Court fails to acknowledge discrimination and stigmatization of persons living in poverty', 10 March 2016, https://strasbourgobservers.com/2016/03/10/strasbourg-court-fails-to-acknowledge-discrimination-and-stigmatization-of-persons-living-in-poverty/#comments.

summary, a contextual analysis can adequately address concerns raised by intersectionality, regardless of whether or not a ground other than racial or ethnic origin is penned on the case file.

5.2.4 Racial or ethnic origin and sex

The original theory focused on the particularly vulnerable status of racial minority women. In Europe, the sterilisation of Roma women has served as a case exemplifying intersectional discrimination.[349] Sterilisation was also an aspect in *de Melo*, where the applicant did not agree to undergo treatment. The case highlights poverty-related stereotypes that breed paternalistic attitudes. Both *de Melo* and the Roma sterilisation cases emerged from stereotypes concerning 'cultural practices of child bearing' among the poor and racial minorities, but show different trajectories. In *de Melo*, the stereotype attaches to a Muslim immigrant woman from Africa who is living in poverty, therefore the 'cultural practice' may be pinned down to either her Muslim faith, her African descent, her socio-economic status or an intersection of grounds — depending on the stereotypes held by decision makers.

The Roma sterilisation cases concern the legacy of an official government policy prevalent in the second half of the communist era in Czechoslovakia, which targeted women living in poverty, particularly Roma women.[350] The attorney who designed the litigation and conducted the initial fact finding for the Roma sterilisation cases, notes that, during state socialism, the Regulation targeted 'planned parenthood and unhealthy populations', specifically addressing women who had had a certain number of children by a certain age.[351] While sterilisation had originally been accompanied by financial incentives under the Rules on awarding social benefits to families with children in special circumstances, later application assumed a coercive character at the hands of social workers who made access to housing permits and other social services contingent on sterilisation. The first study published in a Czech medical journal documented cases of sterilisation not only among Roma women, but also among Roma men, but later research focused only on Roma women.[352]

In the **Czechoslovak** context, the purpose was to control the birth rates of the entire Roma population, therefore discrimination assumed a collective character and was in turn based on the grounds of racial or ethnic origin.[353] As the official policy subsided, the residual practice became more individualised and conditioned on the fact that through public health and social assistance rules Roma women can be compelled to give birth in hospitals, where the surgical interventions are performed.[354] Even though the intersectional frame is obvious at this junction, the broader context shows that forced sterilisation

349 In the Roma sterilization cases the ECtHR found violations of Articles 3 and 8, but no discrimination, even though the issue was discussed in the comparative material presented in the judgment. Peroni, L. and Timmer, A., 'Court condemns forced sterilisation of Roma woman', *Strasbourg Observer* blog, 17 November 2011. Peroni welcomed the ECtHR's condemnation of paternalistic state practice and the anti-Romani stereotype underpinning such practice. Available at https://strasbourgobservers.com/2011/11/17/court-condemns-forced-sterilization-of-roma-woman/#more-1280, last accessed on 20 August 2016.

350 'Throughout the latter part of the communist era in Czechoslovakia, the authorities used the law, health care services, and social assistance systems to encourage Romani women to undergo sterilization operations with the intent of reducing the size of the Romani population. … Although the government made financial incentives available to everyone throughout Czechoslovakia, the widespread poverty among the Roma made Romani women particularly vulnerable to these inducements. In the 1980s, women subjected to sterilization in Czechoslovakia could receive the equivalent of a year's salary.' in Zoon, I., *On the margins: Roma and public services in Slovakia*, Open Society Institute, 2001, p. 62.

351 Author's interview with Barbora Bukovska, London, 15 May 2016.

352 MUDr. Posluch a MUDr. Posluchová, „Problémy plánovaného rodičovstva u cigánskych spoluobčanov vo Východoslovenskom kraji", In: Zdravotnícka pracovníčka č. 39/1989, s. 220 – 223., Poslu and Posluchova, Problems of planned parenthood among Gypsy fellow citizens in Eastern Slovakia in Medical Worker, No 39/1989. And Ruben Pellar a Zbyněk Andrš: „Štatistické hodnotenie prípadov pohlavnej sterilizácie rómskych žien vo východnej Európe, príloha k Správe o posúdení problematických pohlavných sterilizácií Rómok v Československu, 1990 (Statistical evaluation in cases of sterilisation on Romani women in Eastern Slovakia).

353 As opposed to suggestions that sterilization exclusively targeted Roma women. Koldinska, K., 'EU non-discrimination law and policies in reaction to intersectional discrimination against Roma Women in Central and Eastern Europe', Schiek and Lawson 2011, p. 244.

354 Legalnet report on Slovakia, 2013.

continues to disadvantage the entire community, including the mothers who cannot conceive and the fathers who cannot father a child.

5.2.5 Racial or ethnic origin and nationality

Nationalism and racism are uniquely intertwined in Europe as demonstrated in Chapter 1, apexing in the category of 'foreignness', that cuts across nationality on the one hand and racial or ethnic origin on the other. According to the thematic report Links between migration and discrimination, seven Member States explicitly prohibit discrimination based on nationality, while it may be a protected ground under the open ended list in an additional four.[355] In EU law, Article 18 TFEU prohibits discrimination based on nationality in general, while Article 45(2) prohibits it in the context of the freedom of movement of workers and Article 49 in relation to the freedom of establishment, but these prohibitions do not extend to third country nationals.

Experts argue that nationality is a proxy of racial or ethnic origin and hold that as a minimum, discrimination based on nationality should amount to indirect discrimination under the RED.[356] Quite apart from the hierarchy between EU citizens and third country nationals regarding the protection available against discrimination based on nationality, the legal sources of such protection – a treaty provision and a complex web of directives and other sources – seem to hamper simultaneous challenges of discrimination on the grounds of racial or ethnic origin under the RED. Another important aspect to consider is that under the RED, no cross-border element is needed to trigger protection. It is reasonable to expect that recourse to the RED will be sought once challenges under specific nationality based provisions fail, or in case they appear futile on closer examination. *Kamberaj* shows that direct nationality discrimination, as well as indirect racial discrimination based on the apparently neutral criterion of nationality can be constructed under EU law. Whether the RED can be put to strategic use in order to challenge the hierarchy between EU citizens and third country nationals remains to be seen. Recently, it was suggested that in relation to accessing employment, etc., even discrimination concerning the granting and administration of nationality may be indirectly challenged under the directive.[357]

The purpose of the RED is to combat racism, xenophobia and anti-Semitism, without limiting protection against these repulsive acts to citizens. According to Article 3.2, the RED does not cover difference of treatment based on nationality and is without prejudice to immigration provisions.[358] Clearly, this provision does not seek to annul existing protection under EU law against discrimination based on nationality, nor does it purport to foreclose protection from discrimination based on racial or ethnic origin that nationals, non-nationals or stateless persons suffer in a Member State. The second half of the provision is limited to immigration law, more specifically to entry and residence. According to this qualification of the exception, third-country nationals and stateless persons are covered by the RED in all the fields the directive extends to.

Domestic case law discussed in Chapter 3 shows that, in the fields covered, not only nationals but also foreigners will be protected – whether regularised or not. Indeed, protection is not dependent on immigration status: (ir)regular migrants, third-country nationals and stateless persons are equally protected, if they suffer discrimination based on 'foreignness'. The identification of the ground may be more challenging in countries, where anti-discrimination law provides protection on the basis of an open-ended list of grounds. Importantly, case law goes beyond academic forecasts insofar as it establishes direct discrimination in relation to 'foreignness'.

355 De Schutter, 2016, Chapter IV.
356 Bell, 2009 and 2011.
357 De Schutter, July 2016, p. 39.
358 Article 3.2, the RED does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry and residence of third-country nationals and stateless persons onto the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

Similarly, in *Feryn*, the CJEU found that direct discrimination based on racial or ethnic origin arose from the less favourable treatment of Moroccans/immigrants. Even though the nationality of potential victims was not discussed in the judgment, given the lack of explicit limitation of its scope to **Belgian** nationals, protection is extended to the racially targeted groups regardless of the immigration status of their individual members. In *Meister*, racial or ethnic origin was signified by a foreign (Russian)-sounding name and a foreign diploma. In *Kamberaj,* more evidence would have been necessary to bring the RED into play, other than an assertion of its applicability to the individual claim, primarily seeking to establish direct nationality based discrimination, and secondarily, indirect discrimination on the grounds of racial or ethnic origin as prohibited under the RED.

In *Jyske Finans*, as Advocate General Wahl notes the legal issue is 'to provide guidance on the *relationship* between discrimination on grounds of ethnic origin, nationality and place of birth' (emphasis added).[359] Clearly, no exact definition of the terms race, ethnicity or even nationality or national origin needs to be provided if the task is to identify whether the less favourable treatment at hand occurred *on the grounds of racial or ethnic origin* – protecting from which is the purpose of the RED. It is enough to provide a tentative, flexible definition, akin to that given by the CJEU in *CHEZ* for the purposes of interpreting discrimination against the Roma, or by the ECtHR in *Biao* against **Danish** citizens of non-Danish ethnicity. Nor is it necessary to establish that the aggrieved person actually identifies with *a certain ethnic origin* such as Moroccan, Russian or Roma, if the less favourable treatment is based on perception or assumption, such as in *Feryn, Meister* and *CHEZ*. Indeed, as in these cases, it suffices to establish that the aggrieved person was perceived as *not of the majority ethnic origin*, that is as foreign or an immigrant. Labels such as Roma, Moroccan and Russian signify non-majority ethnicity. Moreover, if the question pertains to the relationship of constitutive characteristics within the category of racial or ethnic origin, then it is imperative to interrogate synergies, as well as discrepancies. In any case, legal analysis shall take stock of relevant international and domestic sources referenced in the Preamble of the RED and the EU Charter. Thus, the analysis may extend to the relevant provisions of the ICERD and the ECHR, the general recommendations of CERD and the Strasbourg Court's case law.

The facts as presented in the Opinion reveal that not only the place of birth, but also other factors are relevant in determining the ground of discrimination. Moreover, a suitable comparison can be constructed between Mr Ismar Huskic and his wife. Mr Huskic was less favourably treated than his wife in relation to accessing a loan from a credit institution necessary for the purchasing of a motor vehicle. Mr Huskic was born in Bosnia and Herzegovina in 1975. He and his family 'moved to' **Denmark** in 1993, where he has lived ever since, becoming a Danish citizen in 2000. In short, he is a Danish citizen of foreign, or rather *non-Danish ethnic origin*, whereas his wife is a Danish citizen of Danish ethnic origin, which transpires from her place of birth (in Denmark). Two proxies were available to any third party in possession of his driving licence to presume or establish that he was not an ethnic Danish citizen: his name – both his family and given names – and his place of birth. Based on these proxies, Mr Huskic's geographic origin could be ascertained as falling squarely in Bosnia and Herzegovina, a country commonly known as the location of the most recent ethnic cleansing in European history – which provides a plausible explanation as to why he and his family 'moved to' Denmark exactly in 1993. From *Sejdic and Finci* – referenced in the Opinion – Bosnia and Herzegovina is also known to have three constituent peoples: Bosniaks, Croats and Serbs. The fact that no additional documentation was required from the wife who, on the other hand, was born in Denmark is also a relevant factor, because it reveals status difference between Danish citizens. The basis of this status difference is geographic origin, which constructs insiders and outsiders in this case: those born outside of the EU and EEA countries are treated as foreigners for the purposes of acquiring a loan in Denmark. In summary, on a closer examination, a complex set of personal signifiers can be identified, on the basis of which racial or ethnic origin is generally constructed. Even though when taken alone, perhaps none of the signifiers appear strong enough to denote racial or ethnic origin, when combined, they add up to signify foreignness, in other words non-Danish ethnic origin.

359 AG Opinion, Jyske Finans, para. 5.

In summary, the relationship between discrimination on grounds of ethnic origin, nationality and place of birth in *Jyske Finans* can be characterised as follows: when comparing the treatment of Danish nationals who objectively differ in relation to their place of birth (within or outside the borders of EU or EEA countries), account being taken of other proxies, such as their names and nationality at birth, it may be assumed that direct or indirect discrimination has taken place on the basis of racial or ethnic origin.

Jyske Finans and the Danish government argue that the less favourable treatment can be justified by reference to Directive 2005/60/EC that prohibits money laundering and terrorist financing. It is important to note that that directive does not purport to introduce specific rules of identification for non EU/EEA nationals, let alone differences between EU nationals with reference to their country of birth. In fact, the directive does not use nationality – or its proxy, place of birth – as selection criteria for simplified or enhanced review (customer due diligence). In any case, reference to this directive cannot explain less favourable treatment in *Jyske Finans*, because any doubt arising in relation to the involvement of either husband or wife in money laundering or terrorist financing should have automatically affected the severity of the review of their spouse's eligibility for a loan – which was clearly not the case here.

Overlaps between nationality and racial or ethnic origin have not yet been explicitly dealt with by the CJEU. Nor have they been the focus of intersectional analysis. In relation to incidents against new EU citizens – that have been fuelled by post-enlargement migration – to which may be added more recent incidents, for instance in the wake of the Brexit referendum – academics warn of the complexity of the relationship between nationality and racial or ethnic origin-based discrimination, calling attention to the diverse rationales EU legislation pursues in the respective fields and the imminent necessity for the CJEU to 'consider whether discrimination between EU citizens can also overlap with the scope of discrimination on the ground of ethnic origin'.[360] As suggested in relation to other racialised groups, this would ensure a wider scope of protection to EU citizen migrants.

5.3 Multiculturalism and equality

Multiculturalism is not widely discussed in law, but it continues to occupy a central tenet of political theory in Europe. The original proposition for rethinking minority rights came two decades ago from political theorists. Some propose a distinction between minorities in Europe: historic national minorities and migrant communities – referred to as ethnic groups – the major difference between the two being the historic presence in functioning societies contained within Europe.[361] Concerns persist in relation to categories, particularly of 'ethnic groups formed by immigration'.[362]

European multiculturalism, somewhat differently, relates to claims of 'post-immigration groups' and has come to mean 'the political accommodation by the state and/or a dominant group of all minority cultures defined first and foremost by reference to race, ethnicity or religion, and additionally, but more controversially by reference to other group-defining characteristics such as nationality and aboriginality'.[363] Indeed, citizenship is not the major source of difference between national and cultural minorities. Diversity and the Roma is an under-theorised topic, and their conception as a cultural minority is far from straightforward.

British academics seek the accommodation of cultural identities, relying mainly on the example of European Muslims.[364] They note that equality must apply to groups, which engages legal theory on

360 Bell, M., The principle of equal treatment: widening and deepening. in *The evolution of EU law, Paul Craig and Grainne de Búrca (eds),* 2011, 611-639.
361 Kimlicka, W., *Multicultural citizenship*, OUP 1995, p. 10.
362 Kimlicka, W., 'Multicultural odysseys', *Ethnopolitics* 6:4, 2007, p. 591.
363 Tryandafyllidou, A., Modood, T. and Meer, N., *Introduction: Diversity, integration, secularism and multiculturalism in European multiculturalisms: Cultural, religious and ethnic challenges*, Edinburgh University Press, 2012, p. 7.
364 Parekh, B., Equality in a multicultural society, *Citizenship Studies* 2.3,1998 pp. 397-411, and Modood, T., *Multiculturalism: A civic ildea*, Polity Press, 2007, pp. 34-53.

substantive equality and the asymmetries of grounds, i.e. that less favourable treatment arises not only when similars are treated differently, but also when differents are treated similarly.[365] The hierarchy between the protected grounds under EU law gives rise to concerns in relation to the protection of cultural minorities under EU anti-discrimination law.[366] At the same time hierarchy may exist among racial and ethnic groups, because racism functions in different ways and creates diverse discriminatory patterns across the various groups that may be eligible for protection on these grounds.[367]

At the heart of the controversy lies legal pluralism, a collision of statutory law with social or religious laws governing private and family matters within minority groups.[368] Disputes analogous to *Munoz Diaz v Spain*, in which the Strasbourg Court established discrimination against a Roma woman in relation to her access to survivor's pension by nature of her 'traditional Roma marriage', given that eligibility was conditioned on marriage under civil law may be easier to resolve than others where minority norms show greater variance with statutory law – including on gender or racial equality – and/or are applied in a social context where power asymmetries persist within minority groups – including on the basis of gender.[369]

The RED has the potential to ensure a balanced approach to protecting traditional, as well as cultural, minorities, but there is a caveat relating to its grasp on minority rights. Challenges to hierarchy of minority status are conceivable under the RED in relation to minority quotas and access to minority institutions in the fields covered. Interestingly, neither the optional character of positive action measures under Article 5, nor the CJEU's so far restrictive approach to substantive equality (based on sex) in asymmetrical situations carry the risk of hampering the equal treatment of non-recognised or less privileged minority groups under the directive. This is because once a positive action measure is in place its discriminatory nature may be subject to review, which in turn will rely on case law apparently oblivious to asymmetries.

Multiculturalism has evoked critical insights from the perspective of minority rights as well.[370] It is observed that citizenship as a condition for access to minority rights has long been debated, but the classic definition of minorities does not accommodate non-citizens. Thus, protection should be extended not only to migrants who could become eligible but for the citizenship requirement – for instance in former Soviet and Yugoslav states after the dissolution of the Soviet Union and Yugoslavia – but also to cultural minorities who are citizens of Member States without being recognised as national minorities. Claims for such extensive interpretations of provisions on material scope focus on identity recognition and participation in public life, issues that do not fall under the RED. Others voice a common concern, namely that oppressive strands are inherent in every culture – particularly against women.[371]

In the EU, minority rights are not ensured per se, but the EU Charter of Fundamental Rights, anti-discrimination legislation and instruments of external relations apply to some of the thorny issues.[372]

365 McColgan, 2014.

366 Bell and Waddington, supra.

367 In *Multiculturalism* he notes the relative differences between Bangladeshi and African Asian immigrants due partly to the class background of the first generation.

368 Davies, M. Legal pluralism in Cane, Peter, and Herbert Kritzer, eds. *The Oxford handbook of empirical legal research*. OUP Oxford, 2012, pp. 805-828.

369 Case of *Muñoz Díaz* v *Spain*, Application No. 49151/07, judgment of 8 December 2009. This is considered to be the case with some aspects of Sharia law as applied in certain communities in the UK and Greece. For details see, A Parallel World: Confronting the abuse of many Muslim women in Britain today, a report by Baroness Cox, March 2015, the Arbitration and Mediation Services (Equality) Bill (HL 2015-2016, Tsitselikis, K. (2004). Personal status of Greece's Muslims: a legal anachronism or an example of applied multiculturalism. *Aluffi B.-P. and R. and Zincone G.(eds), The Legal Treatment of Islamic Minorities in Europe, Peeters, Leuven*, 109-132. In the UK, in R (E) v Governing Body of JFS & Ors, concerning admission to a Jewish faith school, the Supreme Court held by majority decision that discrimination based on the religious rules of matrilineal descent would amount to discrimination on grounds of race.

370 Ringelheim, J., 'Minority rights in a time of multiculturalism – The evolving scope of the Framework Convention on the Protection of National Minorities', *Human Rights Law Review*, 10:1, 2010, pp. 99-128.

371 Makkonen, T., 'Minorities' right to maintain and develop their cultures: Legal implications of social science research', Francioni, F. and Scheinin, M. (eds.), *Cultural human rights*. Vol. 95. BRILL, 2008.

372 De Witte, B., *Politics versus law in the EU's approach to ethnic minorities*, EUI Working Papers, Robert Schuman Centre for Advanced Studies, RSC No. 2000/4. De Witte notes an 'apparent absence, so far, of any *internal* European Union policy on

Under the RED, one case has so far been referred to the CJEU seeking interpretation concerning a typical minority right: in *Runevic-Wardyn* the Court was called upon to rule on **Lithuanian** legislation that prevented the applicants from registering their identities (names) according to the Polish alphabet. The ECtHR's approach to minority rights is complex, but in the field relevant for comparison – namely education and aspects of housing covered under Article 8 ECHR – rather progressive case law is available through the Roma education cases, *Yordanova* and *Winterstein*, with the usual caveat that discrimination was not found in these last two.[373]

Differences in the relative status of minority groups will not be relevant from the perspective of the RED's personal scope, because the concept of racial or ethnic origin is broad enough to accommodate every individual and group: from historic through ethno-religious to cultural minorities, and from indigenous groups to migrant workers, stateless persons and asylum seekers. As argued in Chapter IV, differences may arise in relation to justification defences and remedies. As to positive action measures, a substantive equality-friendly approach is forecasted on the part of the CJEU.[374]

ethnic minorities' that is 'somewhat hypocritical' p. 3-5.

373 See, supra, the analysis in Thornberry and Estebanez. See also, supra, the critical analysis of the Kurdish name cases by Lourdes Peroni, the Romanian case and the Polish case on Salesians and the analysis of the Roma education cases.

374 Henrard, K., *Equal rights versus special rights: Minority protection and the prohibition of discrimination*, European Commission, Brussels, 2007, p. 5.

6 Positive action measures and ethnic data

This chapter looks at the significance of the definition of racial or ethnic origin in relation to positive action measures. It highlights once again the need for ethnic data, i.e. data pertaining to racial and ethnic origin in planning positive action and policy measures, while describes different methods of identifying racial or ethnic origin, including self- and third-party identification, as well as the benefits and constraints of these methods.

Evidence of discrimination includes statistical evidence, which is specifically mentioned in preambular indent (15) of the RED. Access to statistical evidence is limited by the lack of ethnic data, therefore victims who wish to establish facts from which it may be presumed that discrimination on the grounds of racial or ethnic origin has taken place have to depend on the available proxy data, data obtained through social science research or collect data themselves. The chapter illustrates synergies between data collection and evidentiary efforts in the French context.

The RED permits positive action measures based on grounds linked to racial or ethnic origin. From this perspective, there remains no doubt whether minority language, religion, cultural traditions, nationality, migration status or poverty are constitutive or related characteristics, because hardly one example can be found in which such measures would not be based on these proxies.[375]

6.1 Positive action

The definition of the grounds is relevant for designing measures aimed at diminishing 'disadvantage linked to' racial or ethnic origin as permissible under Article 5 RED, which states that 'with a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.'

Positive action measures under Article 5 RED must target disadvantages *linked to* racial or ethnic origin, not the ground itself. Parallel to positive action measures designed to accommodate minority language, culture and religion, those targeting migrants and people living in poverty in general will also be admissible, as long as the targeted disadvantage is shown to be linked to racial or ethnic origin. The significant difference between the two types of positive action measures is that, for the first, ethnic self-identification is needed, whereas this is not necessary in order to design general social policies targeting migrants and the poor. However, in order to qualify as a permissible exception under the RED, links between racial or ethnic origin and the disadvantage must be shown, which ultimately requires some sort of data collection on the proportion of people within the target group who are of a real or assumed racial or ethnic minority origin. Otherwise, if racial or ethnic origin – either in the sense of identity or as a ground of discrimination – is not targeted by the positive action measures, the measures must be deemed improper and fall without further scrutiny, for want of a *link* to disadvantage on the grounds of racial or ethnic origin.

In cases where Article 5 is advanced as a justification for indirect discrimination, logically the impugned measures must be ground-neutral, for otherwise indirect discrimination could not be argued. However, it is highly unlikely that during the design or the implementation of such measures the racial or ethnic origin of the target group would remain unnoticed. In a case where there is a bundle of positive action measures and at least one is based on racial or ethnic origin, the argument of indirect discrimination must fail.

375 A comparative analysis of non-discrimination law in Europe 2015: A comparative analysis of the implementation of EU non-discrimination law in the EU Member States, the former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia and Turkey, Prepared by Isabelle Chopin and Catharina Germaine for the European network of legal experts in gender equality and non-discrimination, January 2016, pp. 73-78.

Naturally, if otherwise unresolved, racial or ethnic origin needs to be defined in the context of positive action measures. For instance, in **Belgium**, in order to find a definition of the ground, one has to look at the positive action measures. The Flemish Decree of 8 May 2002 was the primary piece of legislation organising positive actions (preparation of diversity plans and annual reports on progress made) to encourage the integration in the labour market of 'target groups'. These target groups were identified in 2004 by the Flemish Government as 'all categories of persons whose level of employment, defined as the percentage of the active population of that category who effectively work, are under the average level of employment for the total Flemish population'.[376] The Executive Regulation adopted on 30 January 2004 by the Flemish Government implementing the Decree of 8 May 2002[377] identifies certain groups which, 'in particular', fall under that definition: these groups include persons of non-EU origin and persons with a foreign background ('allochtonen') or persons who have not completed their secondary education (Article 2(2), al. 2).

6.2 Ethnic data

Following the adoption and transposition of the RED, the focus has turned to implementation and monitoring and the need has arisen for data on (in)equalities based on racial or ethnic origin. Such data is essential to measure the level of implementation and monitor the impact of policies, but there are serious shortcomings as to data regarding the situation of racial and ethnic minorities. In general, data is not collected on colour.

Diverse statistical and legal categories are used to mark racial and ethnic origin. Marking does not equal naming, however. Marking along the citizen-non-citizen or majority-non-majority nationality binary may entrench social exclusion. Indeed, a major difference between racial and ethnic/national minorities is that while the latter have their own names – often equivalent to the name of neighbouring countries' ethnic/national majorities – racial minorities do not. EU citizens 'of migrant background', 'new – or non-majority ethnicities' or 'allochthones' share one characteristic: they are named in binary opposition to a Member State or the ethnic origin of the majority population of that Member State.[378] These categories are also misleading, because they lump minorities in one category without investigating whether they indeed belong together.

Naming certain minority groups may be easier, because they more neatly fit the broad definition of racial or ethnic origin – such as Afro/Black-Europeans. Naming may be more challenging in the case of ethno-religious groups. The example of the **UK** is illustrative. While few debates preceded the naming of racial and ethnic categories in the 1991 census, this was not the case for the religion question.[379] 'The religion

376 Article 2(2), al. 1, of the Regulation [of 30 January 2004] of the Flemish Government concerning the execution of the Decree of 8 May 2002 on equitable participation in the employment market concerning professional orientation, vocational training, career counselling and the action of intermediaries on the labour market, OJ (*Moniteur belge*), 4 March 2004, p. 12050. Example and reference from Vermaut, H., *National report on Belgium in the framework of the EU study Analysis and comparative review of equality data collection practices in the European Union*, JUST/2014/RDIS/PR/EQUA/110/A4 (unpublished).

377 Executive Regulation of 30 January 2004 of the Flemish Government concerning the execution of the Decree of 8 May 2002 on proportionate participation in the employment market concerning professional orientation, vocational training, career guidance and the action of intermediaries on the labour market, OJ (*Moniteur belge*), 4 March 2004, p. 12050. Example and reference ibid.

378 An example is the following. In Denmark, 'New-Danes is not an official statistical category but used synonymously for ethnic minorities and descendants. It has been used since at least 1992 where Den Danske Ordbog [The Danish Dictionary] included the term. It basically refers to people living in Denmark originating from another country. It is controversial as it also includes descendants who are born in the country Example and reference from Bak Jörgensen, M. and Emerek, R., *National report on Denmark in the framework of the EU study Analysis and comparative review of equality data collection practices in the European Union*, JUST/2014/RDIS/PR/EQUA/110/A4 (unpublished).

379 'The collection of disaggregated data has been an issue of debate in the UK in the past, however, it is not currently a topic of controversy. In the parliamentary debates surrounding the 2010 Equality Act there was no direct discussion of disaggregated data, as its necessity was assumed'. Example and reference from Khan, O., *National report on the United Kingdom in the framework of the EU study Analysis and comparative review of equality data collection practices in the European Union*, JUST/2014/RDIS/PR/EQUA/110/A4 (unpublished).

question was not added in 2001 to ensure religion was protected as an equality characteristic, but rather because both Jews and Sikhs are defined as "racial groups" for the purposes of anti-discrimination legislation. In many ways, the controversy is more around *how* the question(s) is asked rather than that such data are collected.'[380]

The Member States that recognise national minorities collect data using the categories of recognised national minorities. Except for **Cyprus**, **Greece**, **Ireland** and **Luxembourg**, data is collected on the Roma and Travellers as an ethnic group. In the first two countries Roma are subsumed under the religious category of Turkish Muslim, while in Ireland the Irish Travellers form a particular group, recently recognised as an ethnic minority. Ethnic categories and the questions pertaining to them may be problematic.[381] In **Slovakia**, it has been noted that conceptual and definitional clarity would be needed on the concept of ethnicity, nationality and religion to guide data collection. Here, 'the legal definitions of ethnicity, religion and national origin overlap as they are to a very large extent officially unified in the concept of nationality.'[382] Geographic origin is used as a category in a few Member States. In **Ireland** and the **UK**, geographic origin has served as the basis of developing racial and ethnic categories.

The integration of racial or ethnic minorities in European societies is not measured as such, rather, the integration of immigrants has been assessed for over a decade.[383] The measurement of Roma integration is less developed. The FRA-Member States Ad-hoc Working Party develops indicators on Roma Integration.[384]

ECRI was the first regional body that advocated for the collection of ethnic data in a coherent and comprehensive manner.[385] It defines equality data as 'statistics broken down by citizenship, national/ethnic origin, language and religion' in order to assess the effectiveness of policies targeting ethnic minority groups. The European Committee of Social Rights has identified a duty on national authorities to collect equality data in order to inform policies.[386] The UN Special Rapporteur on Extreme Poverty and Human Rights opined that the European Commission should start an infringement procedure if a Member State continues to misinterpret the EU Data Protection [provisions] as not permitting data collection on the basis of racial or ethnic origin.[387]

Currently, domestic law permits the collection of data on racial and ethnic origin through a 'prohibition with exceptions'. The focus on 'objective' criteria such as citizenship and migration background may supersede

380 Ibid.

381 In relation to the amendment of the Public Education Act, in order to permit ethnic data collection, the Chance for Children Foundation tested self-identification questions among Roma parents (wording, order of the questions, etc.). Unfortunately, the legislator in Hungary did not take on board CFCF's recommendation.

382 See Pufflerová, Š., *Slovakia Country Report No.1*, Network of socio-economic experts in the anti-discrimination Field, Bratislava, 2009.

383 The EU's 11th Common Basic Principles on Immigrant Integration Policy, adopted in 2004, states that the development of clear goals, indicators and evaluation mechanisms is necessary to adjust policy, to evaluate progress on integration and to make the exchange of information more effective. Council Document 14615/04 – Common Basic Principles for Immigrant Integration Policy in the EU.

384 In Italy, a working group devoted to bridge the gaps on data is foreseen, involving among others institutions and representative of Roma, Sinti and Traveller (RSC) communities, as well as the National Statistical Office, ISTAT. A project with the FRA is foreseen in order to carry out research on the situation of the RSC communities. 'National Strategy for the Inclusion of Roma, Sinti and Caminanti Communities.

385 See e.g. ECRI General Policy Recommendation No 4 on national surveys on the experience and perception of discrimination and racism from the point of view of potential victims, adopted on 6 March 1998.

386 The Committee said that 'where it is known that a certain category of persons is, or might be, discriminated against, it is the national authorities' duty to collect data to assess the extent of the problem (European Roma Rights Centre v. Greece, Complaint No. 15/2003, decision on the merits of 8 December 2004, §27). The gathering and analysis of such data (with due safeguards for privacy and against other abuses) is indispensable to the formulation of rational policy (European Roma Rights Centre v. Italy, Complaint No. 27/2004, decision on the merits of 7 December 2005, §23).'

387 United Nations, End-of-mission statement on Romania, by Professor Philip Alston, United Nations Human Rights Council Special Rapporteur on extreme poverty and human rights, available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16737&LangID=E#sthash.42v5AefT.dpuf.

the self-identification of racial minorities, while the lack of consent forms enabling the processing of data may prevent data collection.[388]

Data is collected for diverse purposes and pursues varied methodologies, which renders existing data unreliable in the majority of Member States, while comparison over time and across the states is difficult. According to the Special Eurobarometer 437, in 2015 ethnic origin-based discrimination continues to be perceived as the most widespread in the EU (64 %). The European Network Against Racism (ENAR) notes that the groups suffering the highest level of discrimination in Europe in employment and as victims of hate crimes are the Roma, people of African Descent and Black Europeans, Muslims, Jews and migrants.[389]

A broad concept of racial or ethnic origin should inform the monitoring of the RED's implementation. In order to measure (in)equality, it may be as important to identify the perceived racial or ethnic origin as the one that is self-identified. Racialisation through perceived and attributed racial origin is an important element of discrimination experiences. In the CEE region, poverty is often racialised, which in practice disproportionately affects the Roma. Here, poverty/income data are used as a proxy, especially when combined with geographic location – given the highly segregated living conditions of the Roma across the CEE.

Some argue that data collection essentialises ethnic groups or contributes to racial discrimination. Others are concerned that migration, language, education levels and poverty data are not effective proxies for measuring discrimination based on racial or ethnic origin. Abusive practices usually involve law enforcement agencies. Recently, ethnic profiling has become a central issue of contestation.[390]

Within the United Nations, statisticians have made progressive recommendations to promote data collection based on racial or ethnic origin, but their holistic approach has not yet reverberated at the domestic level. Nor have regional stakeholders taken them on board.[391] Statistical data collection on national minorities is to a considerable extent compliant with these recommendations, but statistical data collection on racial minorities – with very few exceptions – and other types of data collection methods are not. The latter are performed with the assumption that the objective proxy data that does not directly interrogate respondents about their racial origin – being recorded by third parties, usually public officials – yields more reliable results.

Third party identification (TPI) being considered more reliable,[392] self-identification is limited to areas where it cannot be avoided, such as the collection of complaints or demographic data. However, these data are not used for planning equality policies. The collection of data on discrimination experience relies on self-identification, but is often received with reservations, particularly in relation to its 'objectivity'. Data collection on hate crimes is undertaken in the great majority of Member States, but categorisation as racially motivated may be problematic. A distinction can be drawn between the collection of data on discrimination experiences and the general collection of data on population characteristics. The latter may

388 In this context, it is interesting to note that, prior to 1991, a limited public debate preceded the decision to introduce racial categories in the UK census, and that since then the response rates have been very high. On the other hand, both the Office of National Statistics and the equality body promote data collection on racial and ethnic minorities – for instance by making the data collection principles public. The equality duty completes the legislative and policy context, which is conducive to data collection.

389 ENAR, *Racism and discrimination in employment in Europe, ENAR Shadow Report 2012-2013*, p. 3 and ENAR, *Racist crime in Europe, ENAR Shadow Report 2013-2014*, p. 3.

390 European Union Agency for Fundamental Rights, *Towards more effective policing, Understanding and preventing discriminatory ethnic profiling: A guide*, October 2010.

391 Department of Economic and Social Affairs Statistics Division, *Principles and recommendations for population and housing censuses*, Revision 2, Draft, United Nations, New York, 2006, para. 2.156-162. Principles and Recommendations on statistical data collection regarding language and ethnicity.

392 Even though the use of the most common proxies for the collection of data that may reveal racial or ethnic origin without the data subjects' consent is in violation of data protection provisions, few legal challenges have so far been mounted against abusive practices. In certain instances, without consultation, data protection agencies have permitted public authorities to collect ethnic data based on TPI – on Antillean youth in the Netherlands and on Roma in Slovenia. In Hungary, the data protection agency permitted TPI-based ethnic data collection in order to protect Roma rights and fight discrimination.

provide insights into the quantitative presence of recognised national minorities and migrants. Census data does not necessarily reveal discrimination, nor has it been reported to be used for designing equality policies, even though it could be used to reveal inequalities between groups.

Several examples emerge of classifications of 'more recent immigrants' on the basis of geographic origin. The commonly used proxies for this standardisation are citizenship and country of origin. In this operationalisation, racial origin is understood as descent linked to immigration and geographic origin. Descent in the sense of geographic origin not only fits an immigration-centred approach but also sits comfortably with the minority rights regimes dominant in the majority of Member States. Seemingly, racial origin in the sense of colour cannot be accommodated in either framework. The latter requires categorisation according to colour and its reconciliation with descent. Research has not assessed the extent to which colour, descent, language, religion and cultural tradition should inform classification.

At the European level, legal and statistical instruments use different categories to denote racial and ethnic origin. The following table demonstrates the difference between the RED and ICERD, as well as the Labour Force Survey, the European Social Survey, European Statistics of Income and Living Condition (SILC), Eurobarometer (EB) and EU-MIDIS. The European Health Interview Survey (EHIS) maps the health conditions of the population.

Comparative table on legal and statistical categories denoting racial and ethnic origin in European surveys

Characteristic/ source	RED	ICERD	LFS	SILC	ESS	EHIS	EB	EU-MIDIS
Racial origin	x	x			x			
Ethnic origin	x	x			x		x	x (Roma in 2015)
Colour		x			x			
Descent		x						Descendants of immigrants
Citizenship			x	x		x	x	
Place of birth			x	x		x		Immigrants
Place of birth (of parents)				x (2008, 2014)				
Nationality					x			
Religion					x			
Language					x			
Discrimination experience					x		x	
Geographic origin								x (2008)

The concepts of nationality and citizenship create synergies as well as discrepancies. In **Estonia**, the term *nationality* has clear ethnic connotations. It is why country of birth and citizenship are less informative and rarely used proxies for ethnic origin, although they are widely available (Census, Estonian LFS, EU-SILC). In several surveys proxies for ethnic origin are also available and are widely used in the data analysis and assessment of the comparative situation of minority groups. Most often these proxies refer to the use of language. Thus, *language most often spoken at home* is available in PISA, ESS, but also in the Estonian LFS. *Mother tongue* is identified in the Estonian Educational Information System, but also in the Census. With regard to assessment of the relative situation of ethnic groups in education, language of instruction (mainly Estonian versus Russian) is a widely used proxy for ethnic origin.[393]

393 Analysis and assessment from Helemae, J., *National report on Estonia in the framework of the EU study Analysis and comparative review of equality data collection practices in the European Union*, JUST/2014/RDIS/PR/EQUA/110/A4 (unpublished).

In **France**, data on *migration background* (country of birth and citizenship of individuals and of parents, including citizenship prior to French citizenship by acquisition) are collected within statistical surveys, which also include questions on the diploma level and socio-professional status of the respondents. Geographical origins are generally indicated by nationality or grouped by geographical area ('sub-Saharan Africa', 'other Asian countries' for example). It is the country of birth, and not the citizenship at birth that defines the geographical origin of an immigrant. An *immigrant* is a person who is born a foreigner and abroad, and resides in France. The category of *descendants of immigrants* involves several limitations. This definition does not include the third generation or French overseas populations, creating an inevitable link with the countries or cultures of the parents.[394]

In **Germany**, data on racial and ethnic origin is operationalised as *migration background* and other proxies. Educational research formed and informed later discussions on this category, whose broadest definition can be found in the micro-census, while other specific statistics use diverging definitions, which creates problems of comparability.[395] The Third integration report of the Länder of 2013, because of practical reasons, reverts to the *German and non-German nationality* category in cases when the new definitions of *migration background* in the Länder are not available. The Länder developed a separate system. Following the adoption of the new citizenship law in 2000, the old *foreigner – 'German' divide* did not reflect the composition of the German population and the numbers produced were not useful for administrative planning. In 2005, this was solved by the political decision to introduce the categories of *migration background* and *migration experience*. The *German–foreigner nationality* binary has been replaced by a variety of other categories, which function as ethnic markers. Categories such as *migration background, birth place of parents, language spoken at home or non-German language of origin mark, rather than name racial or ethnic origin*. Other surveys use *names (onomastic procedures*[396] *and ethno-variables*) to identify origins. *Religion and belief* were used for the first time in the census in 2011 to identify Muslims. Categories have been developed without any consultation or participation of minority groups.[397]

Synergies of migration background, migration experience, nationality and/citizenship relevant for ethnic origin in Germany

	German	Foreigner
Without migration background	'native' Germans	x
With migration background	Born into a family which came to Germany after 1955	Holding foreign nationality.
With migration experience	Germans who migrated themselves (e.g. Germans from former Soviet Union)	Foreigner born outside of Germany.
Without migration experience	Born in Germany	Born in Germany

In **Slovakia**, 'The legal definitions of … *ethnicity* [etnicita], *religion* [náboženstvo], *language* [jazyk] and *national origin* [národnostný pôvod] overlap as they are to a very large extent officially unified in the concept of *nationality* [národnos] (in the sense of a constitutionally guaranteed individual right to choose national affiliation)'.[398] Thus, *nationality* is distinguished from *citizenship* [občianstvo]. A person who is

394 Analysis and assessment from lément, M. and Kirszbaum, T., *National report on France in the framework of the EU study Analysis and comparative review of equality data collection practices in the European Union*, JUST/2014/RDIS/PR/EQUA/110/A4 (unpublished).

395 Third integration report of the Länder, 2011-2013, https://www.bundesregierung.de/Content/DE/Publikation/IB/2009-07-07-indikatorenbericht.html, accessed 24 January 2016.

396 The SOEP describes the use of so-called 'onomastic procedures' as follows: 'First and last names of individuals without an unequivocal migration background need to be pre-processed and then compared to large databases containing lists of names specific to country and ethnic origin'.

397 Analysis and assessment from Hieronymus, A. and Egenberger, V., *National report on Germany in the framework of the EU study Analysis and comparative review of equality data collection practices in the European Union*, JUST/2014/RDIS/PR/EQUA/110/A4 (unpublished).

398 Affiliation to the Roma community, for example, is perceived as 'nationality'. The Slovak Government also regards the Jewish minority as a 'national minority' (see, for example, the composition of the Council of the Government for National

a Slovak citizen can belong to one of the 13 recognised national minorities.[399] Criteria clearly defining concepts of ethnic groups and national minorities are not contained in any national law.[400]

In **Sweden**, *race* is not used, as the term is considered to be closely linked to racism. *Ethnic origin* (etniskt ursprung) is more accepted, and is used predominantly within the anti-discrimination area. The politically correct term used in public documents is *foreign origin* as opposed to *Swedish origin*. These two terms are officially defined by Statistics Sweden as follows:[401] persons of Swedish origin are persons born in Sweden both of whose parents were born in Sweden or persons born in Sweden one of whose parents was born in Sweden with one born outside of Sweden. Persons of foreign origin are persons born outside of Sweden or persons born in Sweden both of whose parents were born outside of Sweden.[402]

Governmental ambivalence concerning ethnic data collection is widespread and unyielding. A pertinent example of its implications on social research and the implementation of the RED is provided by **France**, where the Government introduced legislation to regulate data collection in research relating to measuring discrimination on the ground of origin. Article 63 of the law amended article 8 section II and article 25 section I of the Law of 6 January 1978 on Data Collection in order to allow the collection of personal data 'showing, directly or indirectly, the racial or ethnic origin' of persons, for the purpose of studies under the supervision of the Commission on Data Collection and the Protection of Personal Data. This provision was challenged before the Constitutional Council.[403] The Council annulled the provision on the technical ground that it is a legislative rider, i.e. an amendment unrelated to the subject matter of the legislation under discussion. However, it further declared that statistical studies concerning diversity, discrimination and integration could only be based on objective information such as nationality. On the contrary, ethnic origin and race are not objective concepts, and reliance on them would violate Article 1 of the Constitution, which forbids distinction on the ground of race and origin. This judgment is considered instructive on the subjectivity of the concept of ethnic origin. In this context of nationality, parents' nationality and native language, as well as last name (forbidden ground of discrimination), are regarded as objective indicators that can be taken into account in research.

Simultaneously, social research has proposed to use the prohibited ground of 'last name' as an objective indication of the origin of French nationals that can provide evidence of discrimination. Researchers have invested in the development of documentation on the origin of last names in order to support the codification of lists of employees and to support quantitative studies to produce statistics that could be used by research.

La Halde, the previous **French** equality body, worked on methods that would permit the use of this approach in evidencing differential treatment and discriminatory practices. This endeavour resulted in the following judgment of the French Supreme Court. A candidate of North African descent is hired a number of times as a short-term employee with very favourable evaluations. When he applies for an indefinite-term contract, the application of a short-term employee with less favourable evaluations and

Minorities and Ethnic Groups), available at http://www.mensiny.vlada.gov.sk/data/files/4491.pdf. See Pufflerová, Š., *Slovakia Country Report No.1*, Network of Socio-economic Experts in the Non-discrimination Field, Bratislava, 2009.

399 Úrad slnomocnenca vlády SR pre národnostné menšiny (2014), Národnostné menšiny a etnické skupiny žijúce v Slovenskej republike, Bratislava. Available at http://www.narodnostnemensiny.gov.sk/data/files/5126_narodnostne-mensiny-a-etnicke-skupiny-zijuce-na-uzemi-slovenskej-republiky.pdf Affiliation to the Roma community is perceived as 'nationality'.

400 Analysis and assessment from Pufflerová, Š., *National report on Slovakia in the framework of the EU study Analysis and comparative review of equality data collection practices in the European Union*, JUST/2014/RDIS/PR/EQUA/110/A4 (unpublished).

401 Statistics on persons with foreign background: guidelines and recommendations. Reports on Statistical Co-ordination for the Official Statistics of Sweden 2002:3. Available with an English summary at: http://www.scb.se/Statistik/OV/AA9999/2003M00/X11OP0203.pdf.

402 Analysis and assessment from Al-Zubaidi, Y., *National report on Sweden in the framework of the EU study Analysis and comparative review of equality data collection practices in the European Union* JUST/2014/RDIS/PR/EQUA/110/A4 (unpublished).

403 Constitutional Council, no 2007-557 DC, 15 November 2007, available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2007/2007-557-dc/decision-n-2007-557-dc-du-15-novembre-2007.1183.html, verified 2 June 2016.

less experience, but of French descent, is chosen. La Halde's enquiries as regards the list of persons employed indicated that, among staff recruited between 2000 and 2006, all were of French citizenship, and only two had a last name of North African origin.[404] Moreover, for the period between January 2005 and July 2006, of the 43 employees hired under indefinite-term contracts, none had a last name of North African origin, whereas 30 % of fixed-term contract employees were of North African origin, based on a patronymic study of lists of employees. The Court of Cassation explicitly referred to La Halde's conclusions and found that the sole fact that the hired employee had a higher degree was insufficient to provide a satisfactory justification, given Airbus's non-transparent hiring practices.

6.3 Assessment

Positive action contained in Article 5 RED comprises policies aimed at diminishing 'disadvantage linked to' racial or ethnic origin, therefore measures dealing with migrants and the poor qualify as adequate responses under the RED. In order to assess needs and plan positive action measures, states need ethnic data that targets racial or ethnic minorities or that can at least clarify the proportion of such minorities within the target groups. In other words, even though the intensity of the link to racial or ethnic origin under Article 5 RED is not specified, the positive action measures are permissible only as long as their impact on minority groups is substantial. Otherwise, the impact, and with it the link, become negligible.

Positive action measures imply that ethnic data collection is undertaken. In general, the data on racial or ethnic origin necessary for planning social policies is not available. Instead, data collection relies on constitutive and related characteristics, such as migration status, citizenship and poverty. This sheds doubt on the adequacy of the policy measures, which in turn raises concerns as to racial discrimination, because even though positive action is permissible rather than compulsory under Article 5 RED, if it is undertaken it must comply with the test therein.

404 Court of Cassation, n° 10-15873, 15 December 2011, available at https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024993730&fastReqId=946410880&fastPos=1, verified 29 May 2016.

7 Conclusions

The Racial Equality Directive prohibits discrimination on the grounds of racial or ethnic origin without defining them. However, their broad or narrow interpretation impacts on a wide array of issues ranging from material scope and the qualification of claims to data collection and positive action measures. Definitional puzzles and complexities, synergies and differences between the key terms await the clarification of these autonomous concepts in context, which necessitates an inquiry into how such processes continuously reshape the meaning of legal terms.

The thematic report on 'The meaning of racial or ethnic origin in EU law: between stereotypes and identities' conceives of the grounds as a single, composite and transversal conceptual category for the purposes of implementing European law. Composite means that, as a rule, racial or ethnic origin is comprised of constitutive characteristics that are at times protected separately 'in their own right'. Transversal speaks to temporal and geographic contingency, thus focusing on the changes in the terms' meaning over time and space. While historical sources bring to the fore the *unstable meaning* of the word race, they depict racism as a global phenomenon motivated by deliberate political projects and resulting in discriminatory action fuelled by ethnic prejudice. Racism itself is a contested concept, taken to denote an ideology, as well as intentional practices. On the other hand, racist attitudes across localities differ. In Europe, most groups targeted by racism categorically reject race as a label. Still, racialisation as 'a process that ascribes physical and cultural differences to individuals and groups' is striving.

The abundance of terms and concepts applied to individuals and groups eligible for protection under the RED is overwhelming. Rather than cataloguing or classifying minorities as national, ethnic, racial, cultural, historic, territorial, linguistic, religious, ethno-religious, indigenous, cultural or *racialised*, the report takes a constructionist approach to describing the ways in which one can identify that less favourable treatment has been meted out on the grounds of racial or ethnic origin. This constructionist approach is process oriented: it relies on historical insights to interrogate the obscure *language pack* and borrows heavily from social and political sciences that have tracked *race making* and appropriation. Race is a social construct and cultural racism is far from being a new phenomenon. Race is a myth, a phantasy or an imagination projected *into the outsider*. Still, race and racial stereotypes are real in the sense that they produce inequalities.

The understanding of race as a social construct, a perception or a stereotype directed against groups creates difficulties in legal interpretation. First, stereotypes and perceptions are difficult to interpret in law, particularly because they are by definition directed at groups, not individuals. Second, if the groups targeted by perceptions and stereotypes are not recognised or do not identify with racial or ethnic signifier, the law will have to grapple with status recognition and identity formation, which is particularly problematic if it is geared to deal with individual complaints as opposed to group claims – an oft-repeated characterisation of European anti-discrimination law.

The field of minority protection is fragmented, revealing an internal hierarchy among minority groups in domestic law, mirrored at the European level. The legal framework established for religious, linguistic and national minorities after World War I and resurrected in the framework of shifting hierarchies between minority groups after the fall of communism locks recognised minorities eligible for special rights in identity quarantines. Being based on the reciprocity principle, it favours national minorities, is resilient to the fluidity of identities, minority coalitions and the accommodation of new groups, while being unchallenging of terminological confusion. The thematic report argues that in order to achieve the purpose of European legislation, the hierarchy internal to racial or ethnic origins needs to be counterbalanced by interpretation that seeks to tease out commonalities and synergies across the constitutive characteristics.

The report concludes that in Europe the term *racial or ethnic origin* shall be applied as a 'supercategory', rather than race or ethnicity alone. It purports to show that the quest for identifying differences between

racial and ethnic origin has been futile and urges the legal profession to refrain from further pursuing such endeavours. This quest has overshadowed the fact that in Europe, national origin is an inherent part of the composite category, while simultaneously producing interpretations of racial origin as synonymous to colour and physical appearance in contrast to ethnic origin as signifying the 'cultural stuff'. The report warns that this view risks reifying groups perceived as racial.

In Europe, historically, protection from discrimination on the grounds of religious, linguistic and later national origin preceded protection on the grounds of racial or ethnic origin. While all can serve as grounds of preferential treatment, today national origin is singled out for protection under the Framework Convention for the Protection of National Minorities (FCNM), while linguistic origin is promoted under the European Charter of Regional and Minority Languages. However, the FCNM does not define national minorities, due to a lacking European consensus and the Charter provides a lower level of protection for linguistic minorities than does the FCNM for national minorities, while leaving room for a lower level of protection for certain languages, for instance Romanes.

Ethnic origin as a term promised to amend the loopholes left by the minority rights regime. Even though in Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) racial discrimination purports to cover distinctions based on race, colour descent, *or* national *or* ethnic origin, the preparatory works of the International Covenant on Civil and Political Rights (ICCPR) posit that 'ethnic' was the broadest term available at the time. Still, national, rather than ethnic, origin is included in Article 26 of the ICCPR, which ensures equal treatment, and ethnic origin is the umbrella term that unites diverse national, linguistic, religious, etc. minorities in Article 27. Nor was ethnic origin included in the text of Article 14 of the European Convention on Human Rights and Fundamental Freedoms – the provision prohibiting discrimination – which instead refers to race, colour, language, religion, national or social origin, as well as association with a national minority.

Ethnic origin is not an organic legal concept in Europe. In the **UK**, ethnicity is defined in case law, while in **France**, it is perceived as equivalent to race and elsewhere synergies between ethnic and racial origin continue to be contested. Domestic legislation canvassed in the report shows that in the majority of Member States, ethnic origin remains an amorphous concept. At the domestic level, protection from discrimination stems from legislation transposing or ratifying regional instruments, such as the RED and the ECHR. Furthermore, ICERD and ICCPR have also been ratified by all the Member States. In general, domestic laws governing equality and non-discrimination rely on the catalogue provided in Article 1 ICERD, without mirroring the distinction inherent in Articles 26 and 27 of the ICCPR. Where they exist, special minority rights remain removed from the anti-discrimination regime.

Originally, the EU prohibited discrimination in relation to nationality (of a Member State), because equal treatment on this ground was essential for the establishment of the single market. Intensifying in the early 1990s, initiatives to pursue racial equality and protection from racial violence emerged within the Council of Europe and the 'old EU', which led to institutional as well as legal changes, cross-fertilisation and cross-referencing. ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial intolerance broadly defines racial discrimination. It has impacted on the ECtHR's interpretation of discrimination based on racial or ethnic origin.

The main legal instruments dealing with racial discrimination at the EU level are the RED and the EU Charter of Fundamental Rights – both prohibiting discrimination based on race and/, racial or/ ethnic origin. The Charter also explicitly prohibits discrimination based on national origin and colour. The EU's Framework Decision on combating racism and xenophobia by means of criminal law extends to the ground of religion. During the drafting of the RED, the unclear boundaries between racial or ethnic origin on the one hand and religion on the other resulted in the severance of the latter from the final text. Religion – complemented with belief – transferred to the Employment Equality Directive. Neither during the drafting, nor at the time of adoption were suggestions made that, with the ground of religion, ethno-religious minorities would also 'transfer' to the EED.

The majority of national laws prohibit discrimination on a wide range of grounds or else provide for an open list of grounds – many of which are constitutive of racial or ethnic origin. Terminological fragmentation is present both at the international, as well as the national level. Origins as a supercategory has been introduced during the recent reforms of anti-discrimination legislation in **Finland** and Brandenburg (**Germany**), where origin(s) include racial, ethnic, national or social origin. The term origin is also central in **French** and **Belgian** legal doctrine. Domestic laws do not provide an explicit statutory definition of racial origin except in the **UK**, where, according to Section 9 of the Equality Act 2010, 'Race includes (a) colour; (b) nationality; (c) ethnic or national origins'. UK law does not distinguish between national and ethnic minorities. The CJEU has established that the prohibition of *discrimination on the grounds of racial or ethnic origin* is the operative term under the RED

Domestic courts grapple with: (1) distinctions between racial and ethnic origin; (2) essential elements; (3) language; (4) descent; (5) 'foreignness'; and (6) a profusion of grounds. There is widespread reluctance across national courts to use these terms or to explicate their meaning. Judicial reluctance to explicitly refer to the term racism at times leads to overinclusion, at other times to underinclusion. Overinclusion opens the RED to constitutive characteristics, such as nationality marked as 'foreignness', migrant status or a foreign language. Alternatively, it is manifested in the finding of direct, rather than indirect, racial discrimination. Overinclusion occurs in three ways: (i) predominantly in countries with a history of immigration (from former colonies), (ii) mostly in countries where nationality is a specifically protected ground, and (iii) in countries with closed lists of grounds interpreted broadly. Underinclusion occurs in two ways: (i) when constitutive characteristics are separately considered, or (ii) when concealment strategies are successful. Underinclusion does not necessarily leave victims unprotected, particularly in countries with a wide or open list of grounds, but it jeopardises access to justice under the RED. In various respects, national case law is as or more progressive than that of the ECtHR and more extensive than that of the CJEU. The number of cases in which the latter two courts have established racial discrimination is rather low in comparison with gross national figures.

In order to succeed as a racial discrimination claim in regional courts, a case must from its inception be framed as such at the domestic level, but there are various ways in which the original frame can be handled, including (i) adequate judicial response, (ii) beneficial judicial response, (iii) downgrading and, (iv) deviation. The definitions and interpretations of the grounds are the key to judicial responses.

The interpretations of the ECtHR, CERD and the CJEU show convergence towards a broad interpretation of the ground. CERD has a broad and well-defined understanding of the protected ground, but its general recommendations have not been taken into account by European courts, as a result of which the applicability in Europe of its conception of descent – focusing on caste, rather than (geographic) origins – cannot be forecast. Rather, both regional and domestic courts rely simply on Article 1 ICERD in order to distinguish the grounds enumerated therein. In *CHEZ*, constrained by the referring court's question the CJEU conceptualised the Roma as an ethnic group, which – as the report argues – was somewhat beside the point, given that the case turned on racial stereotyping. The report critically assesses *Timishev v Russia*, in which the Strasbourg Court held that ethnicity-based discrimination is a form of racial discrimination. A seminal judgment, *Timishev* falls victim of reifying race by adamantly seeking distinctions between racial and ethnic origin.

The ECtHR has approached the Roma and Travellers distinctly from other racial or ethnic groups, pursuing three mutually reinforcing perspectives: (i) the necessity to accommodate minority identity as prevalent, for instance, in itinerant lifestyle; (ii) the emerging regional consensus as to vulnerability/disadvantaged status and (iii) the necessity of a chiefly historical and contextual analysis that takes into account the long-standing, collective and structural nature of discrimination in the adjudication of individual applications. The Court's compassionate attitude is seldom met with rigour in judicial interpretation, resulting instead in either a, failing to establish discrimination; b, establishing discrimination only in relation to procedural aspects; c, establishing indirect, rather than direct, discrimination; or d, non-qualifying discrimination. The

contours of a Roma specific approach under EU law have also been noted, but the report does not share this view.

Eight cases have so far been referred to the CJEU seeking the interpretation of the RED: *Vajnai, Runevič-Vardyn*, *Feryn, Meister, Belov, Kamberaj, CHEZ* and *Jyske Finans*. In *Feryn*, the CJEU established that discrimination against 'Moroccans' and 'immigrants' amounts to direct discrimination on the grounds of racial or ethnic origin. The finding also implies that direct discrimination based on assumed or perceived racial or ethnic origin is covered by the RED. In *CHEZ*, the CJEU holds that 'the concept of ethnicity, which has its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds, applies to the Roma community'. However, there is no evidence suggesting that *CHEZ* targeted the Roma district on account of ethnic origin in the sense of the 'cultural stuff'. It is rather more likely that widely held, stereotypes of Roma criminality as an attributed 'cultural' practice were relevant in triggering less favourable treatment. Given the doctrinal opacity of Strasbourg case law, the report characterises the CJEU's choice of reference to Strasbourg case law as tactical, particularly from a perspective that seeks to support a finding of (intentional) direct discrimination. *CHEZ* flags the difficulties the CJEU may encounter in borrowing from the ECtHR, which will increase once cases analogous to those already decided in Strasbourg come before it.

Convergence between the regional courts can be observed in their reluctance to discuss or establish intentional direct racial discrimination. This fits neatly into the continental European tradition of *silence about race*, which is based on a European self-identification with anti-racism. While this approach is criticised as culturally racist, the belief that racism seeks to 'maintain certain ill-begotten stereotypes' based on proxies such as a person's place of birth, while the exercise of defining race 'has become increasingly unacceptable in modern societies', and defining ethnic origin is not a task for lawyers holds ground even in the CJEU.

As a rule, racial intent is not addressed in CJEU case law. In contrast, the ECtHR regularly deals with intent, but on the whole fails to establish intentional direct discrimination. These trends reveal a uniquely *European intent doctrine* that at times downgrades and at others deviates judicial decision making. It leads to diverging results: while so far not inhibiting the CJEU's adequate judicial response, it impedes on the finding/qualifying of discrimination by the ECtHR.

Divergence is notable in approaches to covert direct discrimination. Whereas the ECtHR tends to establish indirect discrimination when faced with covert discrimination, the CJEU has taken a different approach, finding direct discrimination in relation to a formally neutral rule that affects only one group. The common feature of covert direct discrimination based on practice and of direct discrimination based on exclusive effect emanating from a formal rule is that the groups suffering the less favourable treatment, as well as their comparators, are homogeneous. This also sets these dispositions apart from indirect discrimination, where both groups are heterogeneous, even though in the one suffering the particular disadvantage, persons with a protected ground are overrepresented. The report presents *Biao v Denmark* as a typical example of covert direct discrimination.

Academic debates provide critical insights into the interpretation of discrimination on the grounds of racial or ethnic origin. This report discusses the dominant frame, intersectionality that has not been fully explored from the perspective of racial or ethnic origin. In theory, intersectional analysis has the potential to facilitate a 'capacious approach to protected grounds', particularly in policy making. In practice, it poses various challenges that appear to hamper as much as to facilitate legal interpretation. The report finds that identifying intersecting characteristics as the protected grounds as well as the harm risks collapsing the legal argument. It cautions against excessive deconstruction, pointing to instances of false intersectionality and frames competing with discrimination. ECtHR judgments in *Garib v The Netherlands and Soares de Melo v Portugal* tell a cautionary tale of competing frames – frames in which not only protected grounds compete for recognition, but more importantly, potential claims of discrimination are subdued by the poverty centred individual vulnerability frame.

European multiculturalism focuses on claims of 'post-immigration groups' and seeks the accommodation of cultural identities, relying mainly on the example of European Muslims, but to a smaller extent, also of the Roma. At the heart of the controversy lies legal pluralism, a collision of statutory law with social or religious laws governing private and family matters within minority groups. Disputes analogous to *Munoz Diaz v Spain* may be easier to resolve than others where minority norms show greater variance with statutory law – including on gender or racial equality – and/or are applied in a social context where power asymmetries persist within minority groups – including on the basis of gender. Challenges to the hierarchy of minorities are conceivable under the RED in relation to minority quotas and access to minority institutions in the fields covered. Interestingly, neither the optional character of positive action measures under Article 5, nor the CJEU's so far restrictive approach to substantive equality (based on sex) in asymmetrical situations carry the risk of hampering the equal treatment of non-recognised or less privileged minority groups under the directive. This is because once a positive action measure is in place its discriminatory nature may be subject to review, which in turn will benefit from case law apparently oblivious to asymmetries. Moreover, as long as the measures challenged continue, levelling up must be ensured.

Shortcomings in judicial practice not addressed by critical theories pose important challenges. The reluctance to properly address and expose intentional or direct discrimination reverberate in the analysis and verdicts primarily of the ECtHR and threaten to erode normative differences between direct and indirect discrimination by effectively emptying the former, while simultaneously over-expanding the latter concept. Recently, in *Biao*, the Strasbourg Court's high threshold cancelled any meaningful opportunity to justify alleged indirect discrimination. Over-expansion is liable to mute the original function of the proportionality test and pave the way to imageries of racial and ethnic origin as a trump card against government policies and practices. The report agrees with the view that the CJEU has not been brave enough to interpret *CHEZ* as giving rise to direct discrimination only and notes that although the definition of indirect discrimination in **Bulgarian** law was problematic, *CHEZ* was not the right case to ask, nor to answer preliminary questions in this regard.

Judicial reluctance to acknowledge racial discrimination in all its forms rearranges and upsets the non-discrimination framework under the ECHR. It often downgrades or deviates claims of discrimination. Notably, however, under the surface of the ECtHR's persistent inconsistencies as well as a recurrent and inexplicable reluctance to forcefully tackle racial discrimination, there lies a rich layer of sensitivity and appreciation of the meaning of what it is to belong to a racial minority in today's Europe. Still, it is rather telling that perhaps the most significant insights into the composite nature of racial discrimination emerge in judgments limited to finding 'only' substantive violations, such as *Yordanova and Others v Bulgaria* and *de Melo*.

The CJEU has so far applied a broad and purposive interpretation to racial discrimination. While a higher level of scrutiny is observed in its case law on nationality and age as compared with gender, this does not apply to racial or ethnic origin, ostensibly because cases have dealt with fields congruent with market integration and remained in the formal equality frame. In contrast with its ancillary nature subject to a certain margin of appreciation under the ECHR, non-discrimination is a fundamental principle of EU law whose justification is narrowly confined, which may at times necessitate the levelling up of protection from discrimination available under the Convention.

The critical frames cannot materialise in practice, unless courts seriously engage in understanding racism, which is as much a political and psychological hurdle as a matter of informed and logical legal analysis. In theory, regional courts are capable of accommodating critical propositions, unless trumped by the lack of legislative will – as is the case with the proposed new Equal Treatment Directive. The report concludes that constructionist analysis can best address the shortcomings of judicial interpretation, being complementary to the dominant methods of interpretation. It is insightful in revealing covert discrimination, as well as racialisation.

The definition of racial or ethnic origin is significant in relation to positive action measures that comprise policies aimed at diminishing 'disadvantage linked to' racial or ethnic origin. In order to assess needs and plan positive action measures, states should collect ethnic data that counts racial or ethnic minorities or that can at least clarify the proportion of such minorities within target groups. Even though the intensity of the link to racial or ethnic origin under Article 5 RED is unspecified, the positive action measures are permissible only as long as their impact on minority groups is substantial. The lack of data on racial or ethnic origin sheds doubt on the adequacy of the policy measures, which in turn raises concerns as to perpetual racial discrimination, because even though positive action is permissible rather than compulsory under the RED, if it is undertaken it must comply with the test therein.

The definition of the grounds has been most widely addressed in the context of ethnic data collection. Available data is collected on the basis of constitutive or related grounds, which reaffirms the approach taken in this report. The integration of racial or ethnic minorities in European societies is not measured as such. Instead, the integration of immigrants and recently of the Roma has been assessed. In order to measure (in)equality, it is as or more important to identify ascribed racial or ethnic origin as the one that is self-identified. While some argue that data collection essentialises ethnic groups or contributes to racial discrimination, others are concerned that migration, language, education levels and poverty data are not effective proxies for measuring it. The major difference between racial, ethnic and national minorities in data collection is that the former are not named. EU citizens 'of migrant background', 'new- or non-(majority) ethnicities' or 'allochthones' share one characteristic: they are categorised in binary opposition to the Member State's majority population. These categories are also misleading, because they lump minorities in one category without investigating whether they indeed belong together. Progressive recommendations to promote data collection based on racial or ethnic origin have not yet reverberated at the domestic or EU level. Moreover, categorisation is not standardised across legal and statistical instruments.

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Annex
Country fiches collected for the purpose of the report

AUSTRIA

1. Definition of racial/ethnic origin explicitly covered in national law

Name of the law: -
Date of adoption: -
Purpose of the law: -
Article: -
Definition: No explicit definition.

2. This definition covers...*

Discrimination by assumption/ perception of racial or ethnic origin	Discrimination in association with racial or ethnic origin	Descent or (geographic) origin	Minority language	Minority religion	Cultural traditions	Colour	Other (specify)
N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

(*) The following codes are used in the table:
Yes = Explicitly covered in the law.
Jurisprudence = Not explicitly but interpreted as such by Courts/Equality.
TP = Not explicitly but covered by explanatory notes/ travaux préparatoires.
No = Neither explicitly nor interpreted as such.
N/A = Not applicable.

3. In addition to the information provided under questions 1 and 2, please provide any information you think is relevant regarding the definition of discrimination on the ground of racial/ethnic origin – for instance interpretation by national courts and international monitoring bodies.

There is no legal definition of racial/ethnic origin. Most laws use the term *ethnic affiliation* (ethnische Zugehörigkeit), though there is no legal definition of that term either. There are some important hints about the interpretation of the term in the explanatory notes to the Equal Treatment Act.[1] Courts have so far interpreted the term very broadly, especially covering diffuse concepts like *foreignness* and clarifying that the characteristic of *ethnic affiliation* is not depending on the existence of real differences – that an attribution by the harasser is enough.[2]

It can be regarded as a general observation, that the courts developed a rather broad scope of protection by interpreting the ground of ethnic affiliation in a way to include even reasons of citizenship, migration experience or general perceived *foreignness*. It seems a very appropriate approach to deal with the actual discourse and perception in the general public.

1 Austria, Parliamentary materials Nr 307 XXII GP, 26 November 2003, (Explanatory notes to the Equal Treatment Act) (TP), p. 14, https://www.parlament.gv.at/PAKT/VHG/XXII/I/I_00307/fname_010536.pdf.
2 Austria, Supreme Court (Oberster Gerichtshof), 9ObA40/13t, 24 July 2013.

4. Legislation covering national and/or ethnic minorities

Name of the law: Ethnic Groups Act; Federal Act on the legal status of the ethnic groups in Austria (Volksgruppengesetz; Bundesgesetz über die Rechtsstellung der Volksgruppen in Österreich), BGBl Nr. 396/1976 ala BGBl I Nr. 84/2003[3]
Date of adoption: 5 August 1976
Purpose of the law: Define legal status of recognised national minorities, protect their language, traditions and cultural heritage; establish and regulate ethnic group advisory boards (Volksgruppenbeiräte).
List of recognised national/ethnic minorities (if applicable): Croats, Slovenes, Hungarians, Czechs, Slovaks and Roma[4]

BELGIUM

1. Definition of racial/ethnic origin explicitly covered in national law

Name of the law: -
Date of adoption: -
Purpose of the law: -
Article: -
Definition: No explicit definition.

2. This definition covers...*

Discrimination by assumption/ perception of racial or ethnic origin	Discrimination in association with racial or ethnic origin	Descent or (geographic) origin	Minority language	Minority religion	Cultural traditions	Colour	Other (specify)
N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

(*) The following codes are used in the table:
Yes = Explicitly covered in the law.
Jurisprudence = Not explicitly but interpreted as such by Courts/Equality.
TP = Not explicitly but covered by explanatory notes/ travaux préparatoires.
No = Neither explicitly nor interpreted as such.
N/A = Not applicable.

3. In addition to the information provided under questions 1 and 2, please provide any information you think is relevant regarding the definition of discrimination on the ground of racial/ethnic origin – for instance interpretation by national courts and international monitoring bodies.

There is no definition of racial/ethnic origin in Belgian law. A definition was considered unnecessary, as these concepts – in the context at least of an Act prohibiting discrimination – were seen as self-explanatory. The website of the Inter-federal Centre for Equal Opportunities (hereafter UNIA or 'the Centre') also provides some indication but chiefly rely on broad definitions based on the usual sense of the discrimination grounds.[5] In its 2013 annual report, UNIA also made a focus on racism and on its various approaches (historical, legal, socio-scientific).[6]

3 English version: https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1976_396/ERV_1976_396.pdf.
4 In December 1993 Austrian Roma and Sinti were recognised as an ethnic minority (autochthonous Roma), but there is an undefined number of immigrant Roma mostly from ex-Yugoslavia.
5 http://www.UNIA.be/en accessed on 24 March 2016.
6 Annual report of UNIA 2013 (*Discrimination – Diversité*), p. 14-31, available on its website (www.UNIA.be/en).

The Racial Equality Federal Act of 10 May 2007[7] prohibits discrimination on grounds of alleged race, colour, national or ethnic origin, and nationality.

In addition, the General Anti-discrimination Federal Act of 10 May 2007[8] covers some grounds that could, in one way or another, relate to racial/ethnic origin, chiefly:
- religion and belief
- language (due to the historical division of the country between French-speaking and Dutch-speaking people),
- social origin.

No reference was made to membership of a national minority in the Federal antidiscrimination legislation, although it would have been justified by reference to the list of prohibited grounds of discrimination in Article 21 of the EU Charter of Fundamental Rights, because distinct legal regimes should have applied to such membership whether it is defined for instance on the basis of ethnicity, language or religion.

In the Regional antidiscrimination pieces of legislation, the grounds covered are mostly identical, apart from "ancestry" which is added in some of them.

4. Legislation covering national and/or ethnic minorities

Name of the law: -
Date of adoption: -
Purpose of the law: -
List of recognised national/ethnic minorities (if applicable): -

BULGARIA

1. Definition of racial/ethnic origin explicitly covered in national law

Name of the law: - Date of adoption: - Purpose of the law: - Article: - Definition: No explicit definition.

2. This definition covers...*

Discrimination by assumption/ perception of racial or ethnic origin	Discrimination in association with racial or ethnic origin	Descent or (geographic) origin	Minority language	Minority religion	Cultural traditions	Colour	Other (specify)
N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

(*) The following codes are used in the table:
Yes = Explicitly covered in the law.
Jurisprudence = Not explicitly but interpreted as such by Courts/Equality.
TP = Not explicitly but covered by explanatory notes/ travaux préparatoires.
No = Neither explicitly nor interpreted as such.
N/A = Not applicable.

7 Act criminalising certain acts inspired by racism or xenophobia (Racial Equality Federal Act), Date of adoption: 30 July 1981, Entry into force: 9 June 2007 (entry into force of the Federal Act of 10 May 2007 amending the Act of 30 July 1981), Available on the following website: http://www.ejustice.just.fgov.be/loi/loi.htm.

8 Act pertaining to fight against certain forms of discrimination (General Antidiscrimination Federal Act), Date of adoption: 10 May 2007, Entry into force: 9 June 2007, available on the following website: http://www.ejustice.just.fgov.be/loi/loi.htm.

3. In addition to the information provided under questions 1 and 2, please provide any information you think is relevant regarding the definition of discrimination on the ground of racial/ethnic origin – for instance interpretation by national courts and international monitoring bodies.

N/A

4. Legislation covering national and/or ethnic minorities.

Name of the law: -
Date of adoption: -
Purpose of the law: -
List of recognised national/ethnic minorities (if applicable): -

CYPRUS

1. Definition of racial/ethnic origin explicitly covered in national law

Name of the law: - Date of adoption: - Purpose of the law:- Article:- Definition: No explicit definition.

2. This definition covers...*

Discrimination by assumption/ perception of racial or ethnic origin	Discrimination in association with racial or ethnic origin	Descent or (geographic) origin	Minority language	Minority religion	Cultural traditions	Colour	Other (specify)
N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

(*) The following codes are used in the table:
Yes = Explicitly covered in the law.
Jurisprudence = Not explicitly but interpreted as such by Courts/Equality.
TP = Not explicitly but covered by explanatory notes/ travaux préparatoires.
No = Neither explicitly nor interpreted as such.
N/A = Not applicable.

3. In addition to the information provided under questions 1 and 2, please provide any information you think is relevant regarding the definition of discrimination on the ground of racial/ethnic origin – for instance interpretation by national courts and international monitoring bodies.

The Law Ratifying the International Convention for the Elimination of All forms of Racial Discrimination[9] does not define the ground per se but defines 'racial discrimination' as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.'

9 Cyprus, Law Ratifying the International Convention for the Elimination of All forms of Racial Discrimination N.12/1967 (Ο περί της Συμβάσεως περί της Εξαλείψεως Πάσης Μορφής Φυλετικής Διακρίσεως (Κυρωτικός) Νόμος 1967), Date of adoption: 30 March 1967, available at http://cylaw.org/nomoi/arith/1967_1_012.pdf.

The term 'community' in the Cypriot context:

In the context of Cyprus, the term 'community' acquires a special meaning. It is the term used in the Constitution to describe the Turkish Cypriots and the Greek Cypriots and should be seen as interacting with ethnicity. Even though numerically the Turkish Cypriot community is far smaller than the Greek Cypriot community, the term 'minority' with reference to the Turkish Cypriots is, for historical reasons, considered to be politically unacceptable. The Constitution uses 'community' with reference to the collective rights of Greek Cypriots and Turkish Cypriots and to prohibit discrimination by reason of belonging to one of the two communities.[10] Article 28(2) of the Constitution guarantees the enjoyment of economic, social and cultural rights by all persons without discrimination on the grounds of: community; race; religion; language; sex; political or other conviction; national or social descent; birth; colour; wealth; social class; or any ground whatsoever. Article 6 provides that no law or decision of the House of Representatives or of any of the Communal Chambers (no longer active), and no act or decision of any organ, authority or person exercising executive power or administrative functions, shall discriminate against any of the two 'Communities' or any person by virtue of being a member of a 'Community'. All constitutional rights are directly applicable and can be enforced against the state as well as against private individuals.[11]

4. Legislation covering national and/or ethnic minorities.

Name of the law: The Constitution of the Republic of Cyprus
Date of adoption: 1959
Purpose of the law: To regulate collective and individual rights of the various groups comprising the Cypriot population.
List of recognised national/ethnic minorities (if applicable): The Constitution recognises specific 'communities' (the Greek Cypriots and the Turkish Cypriots) and 'religious groups' (the Maronites, the Armenians and the Latins). All of these groups could, in essence, be described as national and or ethnic minorities, except the Greek Cypriots who outnumber all other communities (around 80%) but for political and historical reasons the official denominations do not use these terms. For the purposes of extending protection under the FCNM, the state recognises all these groups (except the Greek Cypriots) as 'minorities'. The Advisory Committee on the Framework Convention also considers that the Cypriot authorities have recently extended recognition and protection under the Convention to the Roma and examines the situation of the Roma separately, despite official policy from the Cypriot government that the Roma form an inseparable part of the Turkish Cypriot community.[12]

A law regulates the representation of the three recognised religious groups, defining the term 'religious group' as 'the religious group of the Armenians, the Latins and the Maronites'; the law does not extend to any religious groups beyond these three. The definition of the religious group in the Constitution is also phrased in such a way which essentially restricts the scope only to the three recognised groups, i.e. the Armenians, the Latins and the Maronites.[13]

10 Cyprus, Constitution of the Republic of Cyprus (Σύνταγμα της Κυπριακής Δημοκρατίας), article 6, available at http://cylaw.org/nomoi/enop/non-ind/syntagma/full.html.

11 Cyprus, Supreme Court, Yiallourou v. Evgenios Nicolaou (Τάκη Γιάλλουρου *v* Ευγένιου Νικολάου) No. 9331, 08 May 2001. Available at http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_1/2001/1-200105-9931.htm&qstring=%E3%E9%E1%EB%EB%EF%F5%F1%EF*%20and%20%E5%F5%E3%E5%ED*%20and%20%ED%E9%EA%EF%EB%E1%EF*.

12 Council of Europe (2015), Advisory Committee on the Framework Convention for the Protection of National Minorities, *Fourth Opinion on Cyprus*, 2 November 2015. Available at http://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680483b48.

13 Cyprus, Law on the representation of the religious groups of Armenians, Latins and Maronites *(Νόμος προνοων περί εκπροσωπήσεως των θρησκευτικών ομάδων των Αρμενίων, των Λατίνων και των Μαρονιτών)* available at http://cylaw.org/nomoi/arith/1970_1_058.pdf, amended in 2011 by the Law amending the law on religious groups (representation) [Νόμος *που τροποποιεί τον περί* θρησκευτικών ομάδων *(εκπροσώπησις)* Νόμο*]* N. 66(I)/2011, 21 April 2011, available at http://cylaw.org/nomoi/arith/2011_1_066.pdf.

CZECH REPUBLIC

1. Definition of racial/ethnic origin explicitly covered in national law

Name of the law: -
Date of adoption: -
Purpose of the law: -
Article: -
Definition: No explicit definition.

2. This definition covers...*

Discrimination by assumption/ perception of racial or ethnic origin	Discrimination in association with racial or ethnic origin	Descent or (geographic) origin	Minority language	Minority religion	Cultural traditions	Colour	Other (specify)
N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

(*) The following codes are used in the table:
Yes = Explicitly covered in the law.
Jurisprudence = Not explicitly but interpreted as such by Courts/Equality.
TP = Not explicitly but covered by explanatory notes/ travaux préparatoires.
No = Neither explicitly nor interpreted as such.
N/A = Not applicable.

3. In addition to the information provided under questions 1 and 2, please provide any information you think is relevant regarding the definition of discrimination on the ground of racial/ethnic origin – for instance interpretation by national courts and international monitoring bodies.

The Section 2(3) of the Anti-discrimination Law[14] covers prohibition of discrimination based on racial and ethnic origin. There is, however, no normative definition of racial or ethnic origin in Czech national law and the Czech law does not clearly distinguish between the terms race and ethnic origin.

The definition is not included in the law or the explanatory notes to the law, however, the widely used Commentary on Anti-discrimination Law distinguishes race and ethnicity in the following manner: '*Race refers to physiological signs, whereas ethnicity also involves sighs such as nationality, language, culture, history or religious tradition.*'[15]

According to the Public Defender of Rights (Ombudsman),[16] discrimination can also occur by association with person or group of people of distinct race or ethnicity. Although the court jurisprudence is not explicit in this manner, decision of the Supreme Administrative Court of 2002[17] can also be interpreted as allowing for recognition of discrimination by association.

The author is not aware of any court decisions providing comprehensive definitions of racial or ethnic origin. For the purpose of research carried out in 2012, the Czech Ombudsman used an approach which

14 Czech Republic, Law No. 198/2009 Coll., Anti-discrimination Law *(Zákon č. 198/2009 Sb., antidiskriminační zákon)*, Date of adoption: 23 April 2009, Entry into force: 1 September 2009 / 1 December 2009, Available in Czech: http://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/pravni_predpisy/Antidiskriminacni_zakon.pdf. Available in English: http://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Antidiscrimination_Act.pdf.

15 Boučková, P., Havelková, B., Koldinská, K., Kühn, Z., Kühnová, E., Whelanová, M. (2010). Antidiskriminační zákon. Komentář. Praha, C. H. Beck, p. 44-45.

16 Public Defender of Rights (2015), *Zpráva o zjištění diskriminace sp. zn. 788/2015/VOP* (Report on discrimination No. 788/2015/VOP), Brno, Veřejný ochránce práv. Available (after providing the case no.) at: http://eso.ochrance.cz.

17 Supreme Court of the Czech Republic (Nejvyšší soud), decision No. 28 Cdo 416/2002, 22. 5. 2002, available at: http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/D84F1F21B8F423D1C1257A4E00652569?openDocument&Highlight=0.

considered as Roma those persons (pupils) who were perceived as Roma by third parties, i.e. equality body employees and teachers.[18]

The Constitutional Court, Supreme Administrative Court as well as the Supreme Court employ the terms ethnic or racial discrimination interchangeably, usually employing both terms at the same time. No definition or distinction of those terms has been employed by the courts.[19]

In 2015, the Czech Ombudsman stated that ethnic origin is the strongest discriminatory reason and the law considers it as especially unacceptable. Later in the statement, the Ombudsman continues using both terms racial or ethnic origin.[20] In the latest jurisprudence, however, the Ombudsman (the Czech equality body) shifted into using the term "ethnic origin" only, as a term encompassing both physiological and sociological identifiers, such as language, culture, colour and socio-economic status.[21] The Ombudsman also refers to the concept of relationship between race and ethnicity used by the European Court of Human Rights in case *Timishev v. Russia,*[22] in which the European Court of Human Rights stated that race and ethnicity are connected and intertwined concepts.[23]

4. Legislation covering national and/or ethnic minorities.

Name of the law: Law no. 273/2001 Coll., on the rights of members of national minorities
Date of adoption: 10 July 2001
Purpose of the law: Protection of national minorities
List of recognised national/ethnic minorities (if applicable): Slovak, Ukrainian, Serbian, Croatian, Bulgarian, German, Polish, Russian, Roma, Greek, Ruthenian, Hungarian, Vietnamese, Belorussian.

DENMARK

1. Definition of racial/ethnic origin explicitly covered in national law

Name of the law: -
Date of adoption: -
Purpose of the law: -
Article: -
Definition: No explicit definition.

18 Public Defender of Rights (2012), Survey of the Public Defender of Rights into the Ethnic Composition of Pupils of Former Special Schools Final Report (Výzkum ethnického složení žáků bývalých zvláštních škol), Brno, Public Defender of Rights. Available at: http://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Vyzkum/Survey_Ethnic_Special-schools.pdf.

19 Constitutional Court of the Czech Republic (Ústavní soud), decision no. I. ÚS 1891/13, 11 August 2015, available at: http://www.usoud.cz/fileadmin/user_upload/Tiskova_mluvci/Publikovane_nalezy/I._US_1891_13_an.pdf. Constitutional Court decision no. III. ÚS 1213/13, 22 September 2015, available at: http://www.usoud.cz/fileadmin/user_upload/Tiskova_mluvci/Publikovane_nalezy/III._US_1213_13_an.pdf; Constitutional Court decision no. Pl. ÚS 37/04, 26 April 2006, available at: http://nalus.usoud.cz/Search/GetText.aspx?sz=Pl-37-04. Supreme Administrative Court of the Czech Republic (Nejvyšší správní soud), decision no. 1 As 46/2013, 15 October 2013, available at: http://www.nssoud.cz/files/SOUDNI_VYKON/2013/0046_1As__130_20131031163253_prevedeno.pdf; Supreme Court of the Czech Republic (Nejvyšší soud), decision no. 28 Cdo 416/2002,21 May 2002, available at: http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/D84F1F21B8F423D1C1257A4E00652569?openDocument&Highlight=0. All accessed 16 June 2016.

20 Public Defender of Rights (2015), *Zpráva o nezjištění diskriminace sp. zn. 788/2015/VOP* (Report on discrimination No. 788/2015/VOP), Brno, Veřejný ochránce práv. Available (after providing the case no.) at: http://eso.ochrance.cz.

21 Public Defender of Rights (2015), *Zpráva o zjištění diskriminace sp. zn. 788/2015/VOP* (Report on discrimination No. 788/2015/VOP), Brno, Veřejný ochránce práv; Public Defender of Rights (2015), *Zpráva o zjištění diskriminace sp. zn. 107/2013/DIS/EN* (Report on discrimination No. 107/2013/DIS/EN), Brno, Veřejný ochránce práv; Public Defender of Rights (2015), *Zpráva o zjištění diskriminace sp. zn. 5202/2014/VOP/BN* (Report on discrimination No. 5202/2014/VOP/BN), Brno, Veřejný ochránce práv. All available (after providing the case no.) at: http://eso.ochrance.cz.

22 European Court of Human Rights, *Timishev v. Russia*, applications nos. 55762/00 and 55974/00, 31 December 2005.

23 Public Defender of Rights (2015), *Zpráva o zjištění diskriminace sp. zn. 67/2012/DIS/JKV* (Report on discrimination No. 67/2012/DIS/JKV), Brno, Veřejný ochránce práv. Available (after providing the case no.) at: http://eso.ochrance.cz.

2. This definition covers...*

Discrimination by assumption/ perception of racial or ethnic origin	Discrimination in association with racial or ethnic origin	Descent or (geographic) origin	Minority language	Minority religion	Cultural traditions	Colour	Other (specify)
N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

(*) The following codes are used in the table:
Yes = Explicitly covered in the law.
Jurisprudence = Not explicitly but interpreted as such by Courts/Equality.
TP = Not explicitly but covered by explanatory notes/ travaux préparatoires.
No = Neither explicitly nor interpreted as such.
N/A = Not applicable.

3. In addition to the information provided under questions 1 and 2, please provide any information you think is relevant regarding the definition of discrimination on the ground of racial/ethnic origin – for instance interpretation by national courts and international monitoring bodies.

Two Danish acts implement the Race Directive:

- Act on Ethnic Equal Treatment [*Lov om etnisk ligebehandling*][24]
- Act on the Prohibition of Discrimination in the Labour Market etc. [*Lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.*][25]

There is no definition of race or ethnic origin in these two acts (or in any other Danish non-discrimination acts).

The explanatory notes / travaux préparatoires to the above acts describe race and ethnic origin the following way: The terms shall be understood in accordance with usual terminology, as specified in national and international law, as well as case law from the CJEU in relation to the Directive. Race is understood as a general belonging to a group of people being defined on the basis of physical criteria, including colour. Ethnic origin is generally understood as the belonging to a group of people, who are defined on the basis of shared history, traditions, culture or cultural background, language, geographical origin etc.[26] A person who is being discriminated against on grounds of a third person's racial or ethnic origin is also covered by the acts.

4. Legislation covering national and/or ethnic minorities.

Name of the regulation: Regulation No. 24 of 7 June 1955 on the general rights of the German minority (Bekendtgørelse nr. 24 af 7/6/1955 angående det tyske mindretals almindelige rettigheder).[27]
Date of adoption: 7 June 1955
Purpose of the regulation: To further the friendly co-existence between the populations on both sides of the Danish-German border and the friendly relationship between the two countries.
List of recognised national/ethnic minorities (if applicable): German minority in the Southern Jutlandic parts of Denmark

24 Consolidated Act No. 438 of 16 May 2012 with later amendments.
25 Consolidated Act No. 1349 of 16 December 2008 with later amendments.
26 Ministry of the Interior, Committee on implementation in Danish law of Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Report No. 1455 (2002), page 264.
27 See: https://www.retsinformation.dk/Forms/R0710.aspx?id=70571.

ESTONIA

1. Definition of racial/ethnic origin explicitly covered in national law

Name of the law: -   Date of adoption: -   Purpose of the law: -   Article: -   Definition: No explicit definition.

2. This definition covers...*

Discrimination by assumption/ perception of racial or ethnic origin	Discrimination in association with racial or ethnic origin	Descent or (geographic) origin	Minority language	Minority religion	Cultural traditions	Colour	Other (specify)
N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

(*) The following codes are used in the table:
Yes = Explicitly covered in the law.
Jurisprudence = Not explicitly but interpreted as such by Courts/Equality.
TP = Not explicitly but covered by explanatory notes/ travaux préparatoires.
No = Neither explicitly nor interpreted as such.
N/A = Not applicable.

3. In addition to the information provided under questions 1 and 2, please provide any information you think is relevant regarding the definition of discrimination on the ground of racial/ethnic origin – for instance interpretation by national courts and international monitoring bodies.

The relevant domestic legislation implementing the Racial Equality Directive – the Equal Treatment Act[28] – prohibits discrimination on the grounds of inter alia ethnicity (ethnic origin), race, and colour. Material scope in this regard is almost identical to that in the Directive 2000/43.

There is no definition of ethnicity, racial origin or colour in the text of the law.

The explanatory note that was attached to the draft Equal Treatment Act included the following clarifications regarding the protected grounds:[29]

- race *(rass)* – a group of people with certain hereditary features;
- ethnicity *(rahvus)* – ethnic origin (*etniline kuuluvus*); not to be mixed with *nationality/citizenship ('kodakondsus')*.

In practice, 'race' is normally associated with a particular skin colour (nevertheless, 'colour' was added as a separate ground of prohibited discrimination to the Equal Treatment Act).

There is no case law to highlight differences between 'race' and 'ethnicity'.

4. Legislation covering national and/or ethnic minorities.

Name of the law: National Minorities Cultural Autonomy Act[30]
Date of adoption: 26 October 1993

28 Estonia, Equal Treatment Act (*Võrdse kohtlemise seadus*), 11 December 2008, RT I 2008, 56, 315, available at: https://www.riigiteataja.ee/akt/106072012022 (Estonian); https://www.riigiteataja.ee/en/eli/530102013066/consolide (English).
29 See explanatory note attached to the Draft no. 384 SE (11th *Riigikogu*); available at: http://www.riigikogu.ee.
30 Estonia, National Minorities Cultural Autonomy Act (*Vähemusrahvuse kultuuriautonoomia seadus*) 26 October 1993, RT I 1993, 71, 1001; available at: https://www.riigiteataja.ee/akt/182796?leiaKehtiv (Estonian); https://www.riigiteataja.ee/en/eli/519112013004/consolide (English).

Purpose of the law: non-territorial cultural autonomies of national minorities
List of recognised national minorities: German, Russian, Swedish and Jewish national minorities and other groups with a population of over 3,000 citizens of Estonia and who correspond to a special definition.[31]

Note: The Law does not play any particular role in the context of anti-discrimination law. National minority is in fact a privileged ethnic group.

FINLAND

1. Definition of racial/ethnic origin explicitly covered in national law

Name of the law: -
Date of adoption: -
Purpose of the law: -
Article: -
Definition: No explicit definition.

2. This definition covers...*

Discrimination by assumption/ perception of racial or ethnic origin	Discrimination in association with racial or ethnic origin	Descent or (geographic) origin	Minority language	Minority religion	Cultural traditions	Colour	Other (specify)
N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

(*) The following codes are used in the table:
Yes = Explicitly covered in the law.
Jurisprudence = Not explicitly but interpreted as such by Courts/Equality bodies.
TP = Not explicitly but covered by explanatory notes/ travaux préparatoires.
No = Neither explicitly nor interpreted as such.
N/A = Not applicable.

3. In addition to the information provided under questions 1 and 2, please provide any information you think is relevant regarding the definition of discrimination on the ground of racial/ethnic origin – for instance interpretation by national courts and international monitoring bodies.

The law itself does not provide any definition of origin, but according to government proposal[32] (pertinent preparatory works or the travaux préparatoires) it is defined to include ethnic origin, national origin, societal origin,[33] race and colour of skin.

In the Non-Discrimination Act[34] discrimination is prohibited by an open-ended list of grounds, firstly listing explicitly 13 grounds (origin, age, disability, religion or belief, sexual orientation, nationality, language,

31 The National Minorities Cultural Autonomy Act (Article 1) provides the following definition of 'a national minority': they are citizens of Estonia who
– reside in the territory of Estonia;
– have long-term, sound and permanent ties with Estonia;
– differ from Estonians by their ethnic belonging, cultural characteristics, religion or language;
– are led by their wish to collectively maintain their cultural customs, religion or language which are the basis for their common identity.

32 Page 66 in Government's Proposal on Non-Discrimination Act 19/2014.

33 The term societal origin [yhteiskunnallinen alkuperä] is also used in the government proposition for the Constitution (HE309/1993). The government proposition for the Constitution refers with the term to the International Covenant on Civil and Political Rights where societal origin is used in Article 2.

34 Finland, Non-Discrimination Act (1325/2014), Date of adoption: 30 December 2014 [Yhdenvertaisuuslaki], http://www.finlex.fi/fi/laki/ajantasa/2014/20141325, Section 8.

opinion, political activity, trade union activity, family relationships, state of health) and then referring to 'other personal characteristics' as prohibited grounds of discrimination. Therefore, it has not been crucial to define the prohibited grounds of discrimination in a precise way as any 'personal characteristic' is thought to cover the situation anyway.

4. Legislation covering national and/or ethnic minorities.

Name of the law: The Constitution (731/1999) (*Perustuslaki)* [35]
Date of adoption: 1 March 2000
Purpose of the law: The Constitution
List of recognised national/ethnic minorities (if applicable): The Sami and the Roma

FRANCE

1. Definition of racial/ethnic origin explicitly covered in national law

Name of the law: -
Date of adoption: -
Purpose of the law: -
Article: -
Definition: No explicit definition.

2. This definition covers...*

Discrimination by assumption/ perception of racial or ethnic origin	Discrimination in association with racial or ethnic origin	Descent or (geographic) origin	Minority language	Minority religion	Cultural traditions	Colour	Other (specify)
N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

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No = Neither explicitly nor interpreted as such.
N/A = Not applicable.

3. In addition to the information provided under questions 1 and 2, please provide any information you think is relevant regarding the definition of discrimination on the ground of racial/ethnic origin – for instance interpretation by national courts and international monitoring bodies.

The key to the traditional French legal approach to racism and discrimination is a characteristic interpretation of the principle of equality in reference to an abstract universalistic framework, based on the philosophical principles envisaged as an aspect of statehood, nationhood, and citizenship.[36] The resulting French approach has developed along two complementary lines: the condemnation of any reference to any concept of "origin", "ethnicity" or "race" and the refusal to use criteria of "origin", "ethnicity" or "race" for policy and administrative purposes. The refusal to use the criteria of "origin" for legal purposes, on the basis of a "universalistic" conception of equality, will only allow policies to target people as poor, young or old people, as women, as inhabitants of socially deprived areas, and so on, so that the victims of racism

35 The Constitution (731/1999) [perustuslaki] http://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf.
36 As in other European countries, exceptions to this general principle can however be found in the former legal framework of colonialism. Cf. the 1996 Report of the Conseil d'État, *Sur le principe d'égalité*, (On the Principle of Equality) La documentation Française, 1998, p. 15. Only available at Internet link: https://docs.school/droit-public-et-prive/droit-administratif/dissertation/rapport-public-conseil-etat-principe-egalite-1996-7866.html, verified 29 May 2016.

and discrimination may only benefit indirectly from programs that will, indeed, have been defined with their specific concerns in mind. What is both legally impossible and socially unacceptable, on the other hand, is to design policies that explicitly target beneficiaries in terms of their "origin", their "identity" or their "ethnic group".

Since the law prohibits taking these concepts into consideration to create legal categories, they are not defined.[37] The concept of race is interpreted as being referred to in the Constitution as a prohibited concept. Ethnic origin is not interpreted either, as it is deemed to be a euphemism for race. According to the Constitutional Council, 'national origin', conceived as objective information on a person's ancestry, seems to be the only objective reference to origin admissible as per French reservations.[38]

The case law does not discuss whether a person or a group meets this category. Given that the law covers appearance of origin and that direct discrimination essentially addresses assumptions made by the discriminating party, evidence of direct discrimination based on origin can be based on foreign physical appearance or attributed origin related to a person's external appearance or characteristics, such as their last name.[39]

4. Legislation covering national and/or ethnic minorities.

Name of the law: Constitution of 1958
Date of adoption: 21 July 2008
Purpose of the law: Protection of national minority languages
List of recognised national/ethnic minorities (if applicable): No list of languages but "minority Language of the French heritage".

France rejects the concept of minority protected by law, the principle of equality being interpreted to forbid the construction of subcategory within the national community. Therefore, considering International Conventions ratified by France can be directly invoked before the courts who have the duty to control the conformity of national legislation, France systematically refuses to ratify International Conventions protecting the rights of minorities and it has not ratified the Framework Convention for the Protection of National Minorities. The *Conseil d'État* considered, in its advice to the government of 6 July 1995, that the Convention was incompatible with the Constitution.[40]

It is important to note that the Constitutional Council had refused in 1992 the ratification by France of the European Charter of regional and minority languages.[41] However, on 21 July, 2008, Government has passed a Constitutional reform[42] that could lead to evolutions, since it provides at article 40 of the Law for the introduction in the Constitution of 1958 of an article 75-1 recognizing that French Regional languages form part of French heritage.

37 Constitutional Council, no. 91-290 DC, 9 May 1991. Internet link: https://www.legifrance.gouv.fr/affichJuriConst.do?oldAction=rechJuriConst&idTexte=CONSTEXT000017667837&fastReqId=151108002&fastPos=1, verified 2 June 2016.
38 Constitutional Council, no 2007-557 DC, 15 November 2007. Internet link: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2007/2007-557-dc/decision-n-2007-557-dc-du-15-novembre-2007.1183.html, verified 27 May 2016.
39 Court of Cassation, 15 December 2011, No. K 10-15873. Internet link: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024993730&fastReqId=35872396&fastPos=1, verified 2 June 2016.
40 Conseil d'Etat, Gen. Ass, 6. July, 1995, no. 357 466. Internet link: http://www.conseil-etat.fr/content/download/832/2524/version/1/file/357466.pdf, verified 2 June 2016.
41 Constitutional Council, no 99-412 DC, 15 June, 1992. Internet link: https://www.legifrance.gouv.fr/affichJuriConst.do?oldAction=rechJuriConst&idTexte=CONSTEXT000017667958&fastReqId=1605355888&fastPos=1, verified 2 June 2016.
42 France, Loi constitutionnelle de modernisation des institutions de la Ve République (Constitutional Law Modernizing Rules of Parliament and the State), 23 July 2008. Internet link: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000019237256&fastPos=1&fastReqId=1494829775&categorieLien=cid&oldAction=rechTexte, verified 2 June 2016.

GERMANY

1. Definition of racial/ethnic origin explicitly covered in national law

Name of the law: -   Date of adoption: -   Purpose of the law: -   Article: -   Definition: No explicit definition.

2. This definition covers...*

Discrimination by assumption/ perception of racial or ethnic origin	Discrimination in association with racial or ethnic origin	Descent or (geographic) origin	Minority language	Minority religion	Cultural traditions	Colour	Other (specify)
N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

(*) The following codes are used in the table:
Yes = Explicitly covered in the law.
Jurisprudence = Not explicitly but interpreted as such by Courts/Equality.
TP = Not explicitly but covered by explanatory notes/ travaux préparatoires.
No = Neither explicitly nor interpreted as such.
N/A = Not applicable.

3. In addition to the information provided under questions 1 and 2, please provide any information you think is relevant regarding the definition of discrimination on the ground of racial/ethnic origin – for instance interpretation by national courts and international monitoring bodies.

The German Constitution prohibits any form of discrimination based on language or on the basis of national or social origin (Article 3 paragraph 3 sentence 1 of the Basic Law), binding the legislation, the administration at all levels of government and the judiciary.

In German law there is no explicit definition of racial/ethnic origin. The guarantee of equality in the Basic Law lists "race" (Rasse) among the characteristics on the ground of which discrimination is prohibited. It is commonly held that this term does not refer to any real difference between human beings as, from an anthropological point of view, different human races do not exist. The persistent use of "race" in English terminology and its counterpart in the Basic Law leads therefore to discussion and criticism which has an impact on the legal terminology used in (draft) legislation dealing with the matter. In the explanatory report to the General Act on Equal Treatment (German abbreviation: AGG),[43] it is explained that the term "race" does not imply the acceptance of racist theories.

Race is defined in legal doctrine as actual or alleged characteristics which are biologically inherited.[44] It is noteworthy that anti-Semitism is regarded as discrimination on the ground of race, not of religion, because of the historic background of Nazi ideology. Ethnic origin is covered by the term "race".

Apart from constitutional law, there are various special laws which refer to race, for example the law on residence,[45] or the law on restitution for victims of persecution during the period of Nazi government.[46] In

43 Germany, General Act on Equal Treatment (Allgemeines Gleichbehandlungsrecht, AGG) of 14 August 2006 (BGBl. I, 1897), last amended on 03 April 2013 (BGBl. I, 610).
44 See Osterloh in M. Sachs, 7th ed. 2014, GG, Art.3, para. 293.
45 E.g. Section 60.1 Residence Law (Aufenthaltsgesetz, AufenthG), of 25.02.2008 (BGBl. I, 162), last amended on 22 December 2015 (BGBl. I, 255): residence rights in the case of persecution on the grounds of race in a person's country of origin.
46 E.g. Section 1.6 Property Law (Vermögensgesetz, VermG), of 09.02.2005 (BGBl. I, 205), last amended on 31 August 2015 (BGBl.I,1474).

criminal law, there are provisions penalising incitement to racial hatred.[47] In these contexts race is defined by legal opinion along the lines of constitutional law.

It is stated in the explanatory report to the AGG that in German law "ethnic origin" is to be understood according to the definitions of the Committee on the Elimination of Racial Discrimination (CERD), including race, colour, parentage, national origin or ethnicity, without clarifying the exact delineation of these terms.[48] Ethnic origin is thus the more capacious term than race.

The AGG which came into force on 18 August 2006, is supposed to prevent or stop any discrimination on grounds of racism or ethnic origin.

The above provisions provide a legal framework in which to take a broad approach in combating racial discrimination in all its forms. In addition, Article 1 para. 1 of ICERD already contains a definition which is valid law in Germany.

In Germany, the so-called Anti-Racism Directive is not only implemented by the General Act on Equal Treatment, but also by a large number of measures of the Federal Government and the Länder to combat right-wing extremism, racism, anti-Semitism as well as violence which has occurred on grounds of racism or of right-wing extremism.

It is only with reference to this ground for discrimination that the German legislator has extended the prohibition of discrimination under civil law. It applies to all contracts regulating the access to goods and services, e.g. also to leasing agreements.

4. Legislation covering national and/or ethnic minorities.

Name of the law: No federal law, for Land law, please see explanation hereunder.
Date of adoption: -
Purpose of the law: -
List of recognised national/ethnic minorities (if applicable): In Land law: Danish minority, Sorbian people, Frisians in Germany, German Sinti and Roma

Membership of indigenous minorities (i.e. the Danish minority, the Sorbian people, the Frisians in Germany and the German Sinti and Roma) is determined in Land law with reference to subjective standards such as self-definition and other indicators like language.[49]

There are provisions on positive action, including institutional arrangements, for indigenous minorities, the promotion of their language, the protection of their territory, etc., preferential rules for political representation and so on, constitutionally buttressed by basic policy clauses of the Länder constitutions.[50] The so-called five-percent clause stating that in federal elections only the parties are taken into account, which received at least five percent of the second votes or who won a direct mandate in at least three constituencies (Section 6 para. 6 sentence 2 Federal Election Law) does not apply to the parties of

47 Section 130 Penal Code (Strafgesetzbuch, StGB), of 13.11.1998 (BGBl. I, 3322), last amended on 10 December 2015 (BGBl. I, 2218).

48 This interpretation is in line with the concept of race in Article 3 para. 3 Basic Law (GG).

49 The German Home Office (*Innenministerium*) has published a brochure "National Minorities in Germany" on the four national minorities recognised in Germany: the Danes, the Frisian ethnic group, the German Sinti and Roma and the Sorbian People. Available at: http://www.bmi.bund.de/SharedDocs/Downloads/DE/Broschueren/2014/Minderheiten_Minderheitensprachen.html.

50 Brandenburg: Constitution of Brandenburg (Verfassung von Brandenburg): Article 25: Rights of the Sorbs (Wends) (Rechte der Sorben [Wenden]). Law on the Definition of the Rights of the Sorbs in the Land of Brandenburg (Gesetz zur Ausgestaltung der Rechte der Sorben (Wenden) im Land Brandenburg, SWG (GVBl 1994, 294)): Section 1: Right to national identity; Section 2, Sent. 3: no disadvantage because of commitment to ethnic group; Section 5: Council for Sorbian Affairs; Section 10: Education, see 3.2.8; Schleswig-Holstein: Danes, Frisians: Article 5 Constitution of Schleswig-Holstein (Verfassung des Landes Schleswig-Holstein): minorities and ethnic groups (Minderheiten und Volksgruppen).

national minorities. In the Federal Election Law special arrangements for the county and proposals for the regional lists were made (Section 20 para. 2 sentence 3, Section 27 para. 1 sentence 4).

According to the federal law on political parties, the parties of national minorities are privileged in official financing and in collecting foreign donations (§ 2 Clause 18 par. 3 and 4, § 25 para. 1 no. 1b Party Law).

GREECE

1. Definition of racial/ethnic origin explicitly covered in national law

Name of the law: -
Date of adoption: -
Purpose of the law: -
Article: -
Definition: No explicit definition.

2. This definition covers...*

Discrimination by assumption/ perception of racial or ethnic origin	Discrimination in association with racial or ethnic origin	Descent or (geographic) origin	Minority language	Minority religion	Cultural traditions	Colour	Other (specify)
N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

(*) The following codes are used in the table:
Yes = Explicitly covered in the law.
Jurisprudence = Not explicitly but interpreted as such by Courts/Equality.
TP = Not explicitly but covered by explanatory notes/ travaux préparatoires.
No = Neither explicitly nor interpreted as such.
N/A = Not applicable.

3. In addition to the information provided under questions 1 and 2, please provide any information you think is relevant regarding the definition of discrimination on the ground of racial/ethnic origin – for instance interpretation by national courts and international monitoring bodies.

The Greek Ombudsman, as an equality body has provided clarification on these two terms. The term "ethnic origin" is usually connected to nationality/citizenship and is broader than the term "ethnicity" which connected to the cultural characteristics of certain group.[51] The term "racial origin" refers to the categorisation of people into distinct groups according to biological classifications.[52] Therefore people are categorised into subspecies according to morphological features such as skin colour or facial characteristics (here the Ombudsman adopts the definition provided by the ECtHR, in the *Timishev v Russia* case),[53] in other words, based on anatomical, genetic or natural characteristics.

51 Greek Ombudsman, 'Who do I have across me': A Diveristy Guide for Public Officers for combatting discrimination, 2014, p. 41, (hereinafter 'Ombudsman Diversity Guide') (Συνήγορος του Πολίτη, Ποιον έχω απέναντί μου: Οδηγός διαφορετικότητας για δημοσίους υπαλλήλους με σκοπό την καταπολέμηση των διακρίσεων, *2014*), available in Greek at: http://www.synigoros.gr/resources/toolip/doc/2014/03/21/web.pdf, last accessed 2 June 2016.

52 *Ibid.*, p. 33.

53 European Court of Human Rights, *Timishev v Russia*, Judgement of 13.12.2005, Application Nos. 55762/00 and 55974/00, at para 55, available at: http://hudoc.echr.coe.int/eng?i=001-71627, last accessed 2 June 2016.

4. Legislation covering national and/or ethnic minorities.

Name of the law: Treaty of Lausanne of 1923[54]
Date of adoption: 24 July 1923
Purpose of the law: Peace Treaty with Turkey
List of recognised national/ethnic minorities (if applicable): Muslim minority in Thrace which consists of three distinct groups whose members are of Turkish, Pomak and Roma origin.

HUNGARY

1. Definition of racial/ethnic origin explicitly covered in national law

Name of the law: -
Date of adoption: -
Purpose of the law: -
Article: -
Definition: There is no explicit definition.

2. This definition covers...*

Discrimination by assumption/ perception of racial or ethnic origin	Discrimination in association with racial or ethnic origin	Descent or (geographic) origin	Minority language	Minority religion	Cultural traditions	Colour	Other (specify)
N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

(*) The following codes are used in the table:
Yes = Explicitly covered in the law.
Jurisprudence = Not explicitly but interpreted as such by Courts/Equality bodies.
TP = Not explicitly but covered by explanatory notes/ travaux préparatoires.
No = Neither explicitly nor interpreted as such.
N/A = Not applicable.

3. In addition to the information provided under questions 1 and 2, please provide any information you think is relevant regarding the definition of discrimination on the ground of racial/ethnic origin – for instance interpretation by national courts and international monitoring bodies.

N/A

4. Legislation covering national and/or ethnic minorities.

Name of the law: Act CLXXIX of 2011 on the Rights of Nationalities (*2011.* évi *CLXXIX. törvény a nemzetiségek jogairól*)
Date of adoption: 20 December 2011
Purpose of the law: to guarantee the citizen's right to choose and preserve their national identity; to preserve cultural and linguistic multiplicity; to provide national minority groups with the possibility of cultivating their traditions and culture, using their mother tongue and receiving education in their mother tongue; participating in public life as a collective group, etc.
List of recognised national/ethnic minorities (if applicable): Armenian, Bulgarian, Croatian, German, Greek, Polish, Roma, Romanian, Ruthenian, Serbian, Slovakian, Slovenian, Ukrainian.

54 Treaty of Peace with Turkey Signed at Lausanne (Lausanne Treaty), July 24, 1923, 18 L.N.T.S. 11 (1924), reprinted in 18 Am. J. Int'l L. 4 (Supp. 1924), available at http://wwi.lib.byu.edu/index.php/Treaty_of_Lausanne, last accessed 2 June 2016.

IRELAND

1. Definition of racial/ethnic origin explicitly covered in national law

Name of the law: -
Date of adoption: -
Purpose of the law: -
Article: -
Definition: No explicit definition.

2. This definition covers...*

Discrimination by assumption/ perception of racial or ethnic origin	Discrimination in association with racial or ethnic origin	Descent or (geographic) origin	Minority language	Minority religion	Cultural traditions	Colour	Other (specify)
N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

(*) The following codes are used in the table:
Yes = Explicitly covered in the law.
Jurisprudence = Not explicitly but interpreted as such by Courts/Equality bodies.
TP = Not explicitly but covered by explanatory notes/ travaux préparatoires.
No = Neither explicitly nor interpreted as such.
N/A = Not applicable.

3. In addition to the information provided under questions 1 and 2, please provide any information you think is relevant regarding the definition of discrimination on the ground of racial/ethnic origin – for instance interpretation by national courts and international monitoring bodies.

Recommendations of international bodies to Ireland have long included calls for ethnicity of Travellers to be recognised. (CERD, ICCPR, FCNM, UPR etc.)

4. Legislation covering national and/or ethnic minorities.

Name of the law: -
Date of adoption: -
Purpose of the law: -
List of recognised national/ethnic minorities (if applicable): -

ITALY

1. Definition of racial/ethnic origin explicitly covered in national law

Name of the law: -
Date of adoption: -
Purpose of the law: -
Article: -
Definition: No explicit definition.

2. This definition covers...*

Discrimination by assumption/ perception of racial or ethnic origin	Discrimination in association with racial or ethnic origin	Descent or (geographic) origin	Minority language	Minority religion	Cultural traditions	Colour	Other (specify)
N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

(*) The following codes are used in the table:
Yes = Explicitly covered in the law.
Jurisprudence = Not explicitly but interpreted as such by Courts/Equality bodies.
TP = Not explicitly but covered by explanatory notes/ travaux préparatoires.
No = Neither explicitly nor interpreted as such.
N/A = Not applicable.

3. In addition to the information provided under questions 1 and 2, please provide any information you think is relevant regarding the definition of discrimination on the ground of racial/ethnic origin – for instance interpretation by national courts and international monitoring bodies.

No definition is provided in national law for both the two elements of this ground. It is worth mentioning that, according to Article 43 of the 1998 Immigration Decree, mainly inspired by the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), discrimination on the ground of national origin is prohibited and interpreted as covering nationality (as in citizenship).

No definition is given even in the field of equality data collection. For instance within the framework of the first survey on discrimination, carried on during 2011-2012 by the National Office of Statistics,[55] ethnic origin was one of the grounds taken into consideration but without giving any definitions and taking migrants as a proxy.

The only minorities that are recognised as such are linguistic minorities. Some linguistic minorities enjoy special protection in the charters of regions with a special constitutional status. In the case of the German-speaking minority of Trentino Alto Adige (South Tyrol), this entails an extremely complex system of quotas for public employment and for the enjoyment of certain rights.[56]

Much weaker protection is granted at the national level to other linguistic minorities[57] defined as 'historic' by a law of 1999, i.e. the languages 'of the Albanian, Catalan, Germanic, Greek, Slovenian and Croatian populations and of those speaking French, Franco-Provençal, Friulan, Ladin, Occitan and Sardinian'.

4. Legislation covering national and/or ethnic minorities.

Name of the law: -
Date of adoption: -
Purpose of the law: -
List of recognised national/ethnic minorities (if applicable): -

55 The survey was promoted and funded by the Department of Equal Opportunity of the Government, within which the National Equality Body, UNAR, is based. "Survey on discriminations on grounds of gender, sexual orientation and ethnic origin" (*IST-02258 Indagine sulle discriminazioni in base al genere, all'orientamento sessuale, alla appartenenza etnica*), in National Statistical Programme 2011-2013, at 90-91, http://www.sistan.it/index.php?id=52.

56 http://www.regione.taa.it/biblioteca/minoranze/tn_bz.aspx.

57 Law on the national linguistic minorities is Law 15 December 1999, no. 482, Measures on protection of historical and linguistic minorities (*Norme in materia di minoranze linguistiche storiche*), *OJ* no. 297 of 20 December 1999, http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1999-12-15;482!vig.

LATVIA

1. Definition of racial/ethnic origin explicitly covered in national law

Name of the law: -
Date of adoption: -
Purpose of the law: -
Article: -
Definition: No explicit definition.

2. This definition covers...*

Discrimination by assumption/ perception of racial or ethnic origin	Discrimination in association with racial or ethnic origin	Descent or (geographic) origin	Minority language	Minority religion	Cultural traditions	Colour	Other (specify)
N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

(*) The following codes are used in the table:
Yes = Explicitly covered in the law.
Jurisprudence = Not explicitly but interpreted as such by Courts/Equality bodies.
TP = Not explicitly but covered by explanatory notes/ travaux préparatoires.
No = Neither explicitly nor interpreted as such.
N/A = Not applicable.

3. In addition to the information provided under questions 1 and 2, please provide any information you think is relevant regarding the definition of discrimination on the ground of racial/ethnic origin – for instance interpretation by national courts and international monitoring bodies.

CERD provided its last recommendations to Latvia in 2001. Among the other issues, CERD voiced concern on the absence of a legal provision explicitly defining racial discrimination.[58]

4. Legislation covering national and/or ethnic minorities.

Name of the law: Law on the Framework Convention for the Protection of National Minorities
Date of adoption: 26 May 2005
Purpose of the law: define national minorities for the purpose of the ratification of the Council of Europe Framework Convention for the Protection of National Minorities; adopt two declarations.
List of recognised national/ethnic minorities (if applicable): -

LITHUANIA

1. Definition of racial/ethnic origin explicitly covered in national law

Name of the law: -
Date of adoption: -
Purpose of the law: -
Article: -
Definition: No explicit definition.

58 CERD, Concluding observations of the Committee on the Elimination of Racial Discrimination, Latvia, 12 April 2001, p. 2.

2. This definition covers...*

Discrimination by assumption/ perception of racial or ethnic origin	Discrimination in association with racial or ethnic origin	Descent or (geographic) origin	Minority language	Minority religion	Cultural traditions	Colour	Other (specify)
N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

(*) The following codes are used in the table:
Yes = Explicitly covered in the law.
Jurisprudence = Not explicitly but interpreted as such by Courts/Equality.
TP = Not explicitly but covered by explanatory notes/ travaux préparatoires.
No = Neither explicitly nor interpreted as such.
N/A = Not applicable.

3. In addition to the information provided under questions 1 and 2, please provide any information you think is relevant regarding the definition of discrimination on the ground of racial/ethnic origin – for instance interpretation by national courts and international monitoring bodies.

N/A

4. Legislation covering national and/or ethnic minorities.

Name of the law: -
Date of adoption: -
Purpose of the law: -
List of recognised national/ethnic minorities (if applicable): -

LUXEMBOURG

1. Definition of racial/ethnic origin explicitly covered in national law

Name of the law: - Date of adoption: - Purpose of the law: - Article: - Definition: No explicit definition.

2. This definition covers...*

Discrimination by assumption/ perception of racial or ethnic origin	Discrimination in association with racial or ethnic origin	Descent or (geographic) origin	Minority language	Minority religion	Cultural traditions	Colour	Other (specify)
N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

(*) The following codes are used in the table:
Yes = Explicitly covered in the law.
Jurisprudence = Not explicitly but interpreted as such by Courts/Equality bodies.
TP = Not explicitly but covered by explanatory notes/ travaux préparatoires.
No = Neither explicitly nor interpreted as such.
N/A = Not applicable.

3. In addition to the information provided under questions 1 and 2, please provide any information you think is relevant regarding the definition of discrimination on the ground of racial/ethnic origin – for instance interpretation by national courts and international monitoring bodies.

There is no interpretation made by national courts or international monitoring bodies.

4. Legislation covering national and/or ethnic minorities.

Name of the law: -
Date of adoption: -
Purpose of the law: -
List of recognised national/ethnic minorities (if applicable): -

MALTA

1. Definition of racial/ethnic origin explicitly covered in national law

Name of the law: - Date of adoption: - Purpose of the law: - Article: - Definition: No explicit definition.

2. This definition covers...*

Discrimination by assumption/ perception of racial or ethnic origin	Discrimination in association with racial or ethnic origin	Descent or (geographic) origin	Minority language	Minority religion	Cultural traditions	Colour	Other (specify)
N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

(*) The following codes are used in the table:
Yes = Explicitly covered in the law.
Jurisprudence = Not explicitly but interpreted as such by Courts/Equality bodies (please provide the reference of the most relevant case in a footnote).
TP = Not explicitly but covered by explanatory notes/ travaux préparatoires.
No = Neither explicitly nor interpreted as such.
N/A = Not applicable.

3. In addition to the information provided under questions 1 and 2, please provide any information you think is relevant regarding the definition of discrimination on the ground of racial/ethnic origin – for instance interpretation by national courts and international monitoring bodies.

The Equal Treatment of Persons Order, 2007 implements the provisions of the Race Directive and prohibits both direct and indirect discrimination based on racial and ethnic origin. In addition, the law provides that harassment shall be deemed to be discrimination when it is related to racial or ethnic origin. In terms of Article 4 of the Equal Treatment of Persons Order, which prohibits discrimination on the grounds of racial and ethnic origin, no person, establishment or entity, whether in the private or public sector and including public bodies, shall discriminate against any other person in relation to: (a) social protection, including social security and healthcare; (b) social advantages; (c) education; (d) access to and supply of goods and services which are available to the public, including housing; (e) access to any other service as may be designated by law for the purposes of this regulation. Local law, as the Directive, provides no definition of racial and ethnic origin.

To date, the local courts have not had occasion to define the term 'racial/ethnic' origin. In the case The Police vs Norman Lowell[59] as in other cases which have dealt with racial hatred, the courts sought a definition of 'racial hatred'. In so doing reference was made to the International Convention on the Elimination of all forms of Racial Discrimination and to the definitions of racial discrimination and racism found therein.

4. Legislation covering national and/or ethnic minorities.

Name of the law: -
Date of adoption: -
Purpose of the law: -
List of recognised national/ethnic minorities (if applicable): -

THE NETHERLANDS

1. Definition of racial/ethnic origin explicitly covered in national law

Name of the law: - Date of adoption: - Purpose of the law: - Article: - Definition: No explicit definition.

2. This definition covers...*

Discrimination by assumption/ perception of racial or ethnic origin	Discrimination in association with racial or ethnic origin	Descent or (geographic) origin	Minority language	Minority religion	Cultural traditions	Colour	Other (specify)
N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

(*) The following codes are used in the table:
Yes = Explicitly covered in the law.
Jurisprudence = Not explicitly but interpreted as such by Courts/Equality bodies (please provide the reference of the most relevant case in a footnote).
TP = Not explicitly but covered by explanatory notes/ travaux préparatoires.
No = Neither explicitly nor interpreted as such.
N/A = Not applicable.

3. In addition to the information provided under questions 1 and 2, please provide any information you think is relevant regarding the definition of discrimination on the ground of racial/ethnic origin – for instance interpretation by national courts and international monitoring bodies.

Racial/ethnic origin is not defined in national law, but in the explanatory memorandum to the Dutch General Equal Treatment Act (GETA), it is stressed that 'race' must be interpreted in line with the definition given in the UN International Convention on the Elimination of Racial Discrimination (ICERD). Article 1(1) ICERD provides: "In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

59 27 March 2008, Court of Magistrates (Criminal Judicature); reference number 518/2006.

The GETA prohibits direct or indirect discrimination on the ground of race. The explanatory memorandum to the GETA stresses that 'race' is a broad concept, which must be interpreted in line with the UN International Convention on the Elimination of Racial Discrimination (ICERD, see definition above).[60] The concept embraces race, colour, descent and national or ethnic origin.[61] This definition is also followed by the Courts and the Dutch equality body Netherlands Institute for Human Rights (NIHR).[62]

4. Legislation covering national and/or ethnic minorities.

Name of the law: Act on the use of the Frisian Language (Wet Gebruik Friese Taal)
Date of adoption: 2 October 2013 (Law Gazette (Staatsblad) 2013, 382).
Purpose of the law: Regulating the use of Frisian in relations with public administration and the judiciary.
List of recognised national/ethnic minorities (if applicable): Frisians.

POLAND

1. Definition of racial/ethnic origin explicitly covered in national law

Name of the law: -
Date of adoption: -
Purpose of the law: -
Article: -
Definition: No explicit definition.

2. This definition covers...*

Discrimination by assumption/ perception of racial or ethnic origin	Discrimination in association with racial or ethnic origin	Descent or (geographic) origin	Minority language	Minority religion	Cultural traditions	Colour	Other (specify)
N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

(*) The following codes are used in the table:
Yes = Explicitly covered in the law.
Jurisprudence = Not explicitly but interpreted as such by Courts/Equality bodies (please provide the reference of the most relevant case in a footnote).
TP = Not explicitly but covered by explanatory notes/ travaux préparatoires.
No = Neither explicitly nor interpreted as such.
N/A = Not applicable.

3. In addition to the information provided under questions 1 and 2, please provide any information you think is relevant regarding the definition of discrimination on the ground of racial/ethnic origin – for instance interpretation by national courts and international monitoring bodies.

There is no law on discrimination, including the 2010 Equal Treatment Act, which defines grounds of discrimination. There are no definitions related to racial or ethnic origin, religion or belief, disability, age or sexual orientation in Polish anti-discrimination legislation.

60 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) of 21 December 1965.
61 Netherlands, Explanatory Memorandum to the GETA (*Memorie van Toelichting Algemene Wet Gelijke Behandeling*), Tweede Kamer, 1990-1991, 22 014, no. 3, p. 13.
62 See for a recent example NIHR 2016-14, https://www.mensenrechten.nl/publicaties/oordelen/2016-14.

The 2008 amendment to the Act on granting protection to aliens on the territory of the Republic of Poland,[63] which transposed the Qualification Directive[64] and the Asylum Procedures Directive,[65] is not part of anti-discrimination legislation, but it also includes some definitions new to the Polish legal order (although their usage in anti-discrimination law is only theoretical since no cases using these definitions have been identified). Article 14 of the Act includes some definitions useful in 'assessing the grounds of persecution' of people who apply for refugee status:

> 'the concept of *race* includes in particular colour of skin, descent, or membership of a particular ethnic group' and 'the concept of *nationality* is not limited to a citizenship or its absence, but shall in particular include membership of a group defined by: a) cultural, ethnic or linguistic identity or b) common geographical or political origin or c) linkage with the population of another country [...]'.

4. Legislation covering national and/or ethnic minorities.

Name of the law: Act on National and Ethnic Minorities and Regional Languages (*Ustawa z 6 stycznia 2005 r. o mniejszościach narodowych i etnicznych oraz o języku regionalnym*), [hereafter 'Minorities Act'].
Date of adoption: passed on 6 January 2005 and entered into force on 1 May 2005
Purpose of the law: The aim of the Act on National and Ethnic Minorities and Regional Languages is to provide certain rights, mostly linguistic and cultural rights, to national and ethnic minorities, as well as to protect them through state action (in 2014 social integration was added as a goal). Article 6 of the Act on National and Ethnic Minorities and Regional Languages prohibits discrimination based on membership of a minority. This provision clearly refers only to the national and ethnic minorities provided for in the law.
List of recognised national/ethnic minorities (if applicable):

- National minorities: Belarusian, Czech, Lithuanian, German, Armenian, Russian, Slovak, Ukrainian and Jewish
- Ethnic minorities: Karaimi, Lemk, Roma and Tatar.

PORTUGAL

1. Definition of racial/ethnic origin explicitly covered in national law

Name of the law: -
Date of adoption: -
Purpose of the law: -
Article: -
Definition: No explicit definition.

2. This definition covers...*

Discrimination by assumption/ perception of racial or ethnic origin	Discrimination in association with racial or ethnic origin	Descent or (geographic) origin	Minority language	Minority religion	Cultural traditions	Colour	Other (specify)
N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

63 Poland, Act of 18 March 2008 on the amendment of the Act on granting protection to aliens on the territory of Poland and other Acts of Parliament, in force since 29 May 2008, Journal of Laws 2008, no 70, item 416 (*Ustawa z dnia 18 marca 2008 r. o zmianie ustawy o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej oraz niektórych innych ustaw*).
64 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.
65 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

(*) The following codes are used in the table:
Yes = Explicitly covered in the law.
Jurisprudence = Not explicitly but interpreted as such by Courts/Equality bodies (please provide the reference of the most relevant case in a footnote).
TP = Not explicitly but covered by explanatory notes/ travaux préparatoires.
No = Neither explicitly nor interpreted as such.
N/A = Not applicable.

3. In addition to the information provided under questions 1 and 2, please provide any information you think is relevant regarding the definition of discrimination on the ground of racial/ethnic origin – for instance interpretation by national courts and international monitoring bodies.

Although there is no legal definition for the notion of 'race', Article 4 of the Law 134/99 above-mentioned exemplifies a large number of discriminatory practices that are forbidden as well as Article 3(2) of the Law 18/2004

Discrimination on grounds of racial origin is also defined in Article 240 of the Criminal Code[66] and Article 24(1) of the Labour Code.[67]

The definition of 'ethnic origin' is not provided for the legislation. However, the same provisions that refer to "race" or "racial origin" also mention "ethnic origin".

In Portugal, assumed discrimination as such is not explicitly prohibited by the law. However, assumed discrimination can be inferred from the general principles of law, including cases where discrimination is based on an incorrect assumption or perception of the reality. An incorrect assumption or perception by the perpetrator of the offence (discrimination) cannot be considered as a justification (Article 16 of the Criminal Code).

The national law does not explicitly refer to discrimination by association but the definition of racial discrimination and the general principles laid down by constitutional, criminal and administrative law require that discrimination by association should be treated as direct discrimination.

In Portugal, the culture of acting judicially against anti-discrimination practices is almost inexistent. Therefore, there are so few judicial decisions concerning racial discrimination.

In spite of the exhaustive research of the author of this report, in 2015 only one judicial decision was found in the database www.dgsi.pt concerning discrimination on grounds of "ethnic origin". This is the Appeal No. 589/11.9TVPRT.P1 – 3.ª from 26 March 2015 of the Oporto Court of Appeal,[68] but this does not concern the definitions of racial/ethnic discrimination.

4. Legislation covering national and/or ethnic minorities.

Name of the law: -
Date of adoption: -
Purpose of the law: -
List of recognised national/ethnic minorities (if applicable): -

66 The Criminal Code was approved by the Decree-Law 48/95, last amended by the Law 110/2015 of 26 August 2015 (available at https://dre.pt/application/dir/pdf1s/2011/02/03200/0080900811.pdf.

67 Law 7/2009 of 12 February 2009 approves the Labour Code (available at: http://www.dgaep.gov.pt/upload/Legis/2009_l_07_12_02.pdf), transposing, among many others, Directive 2000/43/EC (the Racial Equality Directive) and Directive 2000/78/EC (the Employment Equality Directive) and amended in 2015 by Law 28/2015 of 14 April (Available at: http://www.cite.gov.pt/asstscite/downloads/legislacao/Lei_28_2015.pdf).

68 Available at http://www.trp.pt/jurispitij.html.

ROMANIA

1. Definition of racial/ethnic origin explicitly covered in national law

Name of the law: -
Date of adoption: -
Purpose of the law: -
Article: -
Definition: No explicit definition

2. This definition covers...*

Discrimination by assumption/ perception of racial or ethnic origin	Discrimination in association with racial or ethnic origin	Descent or (geographic) origin	Minority language	Minority religion	Cultural traditions	Colour	Other (specify)
N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

(*) The following codes are used in the table:
Yes = Explicitly covered in the law.
Jurisprudence = Not explicitly but interpreted as such by Courts/Equality bodies (please provide the reference of the most relevant case in a footnote).
TP = Not explicitly but covered by explanatory notes/ travaux préparatoires.
No = Neither explicitly nor interpreted as such.
N/A = Not applicable.

3. In addition to the information provided under questions 1 and 2, please provide any information you think is relevant regarding the definition of discrimination on the ground of racial/ethnic origin – for instance interpretation by national courts and international monitoring bodies.

No definition of racial/ethnic origin is expressly provided in the national legislation.

The Manual for the persons carrying out the survey for the 2011 census defined ethnicity as 'the option of a person to belong to a human group with common elements of civilization and culture, through one or more characteristics regarding language, religion, common traditions and customs, life style and other specific characteristics.'[69] In the same guidelines, mother tongue is defined as: 'the first language used regularly in the family of the family of the person interviewed, during his or her early childhood.'[70]

While there is no legal definition in the Romanian legislation for race or ethnic origin, both grounds are explicitly listed in the non-discrimination clause from Article 4 of the Romanian Constitution[71] and among the protected grounds provided by the Anti-discrimination Law.[72] A third, distinct category is also used in the Romanian legislation - 'national minority.' A definition of national minority as 'the ethnicity which is represented in the Council of National Minorities' is included in the electoral legislation without further

69 Manual available in Romanian on the website of the 2011 census, in Part 3: http://www.recensamantromania.ro/instrumentar/. Definition available on page 73.
70 Manual available in Romanian on the website of the 2011 census, in Part 3: http://www.recensamantromania.ro/instrumentar/. Definition available on page 73.
71 Romania, Constitution of Romania of 1991, amended by the Law 429/2003 on the revision of the Constitution of Romania, 29 October 2003, available at http://www.cdep.ro/pls/dic/site.page?id=371.
72 Romania, Governmental Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination *(Ordonanța de Guvern 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), 30 August 2000.

details.[73] When ratifying the European Charter for Regional or Minority Languages, the Parliament chose not to define minority languages but to list them.[74]

In their jurisprudence the national equality body and the courts applied the principle of non-discrimination on grounds of race or ethnic origin in cases of discrimination by association with racial or ethnic origin. As language and religion are also expressly provided protected grounds, discrimination on these grounds would be sanctioned as such and not interpreted as proxies for race/ethnic origin.

4. Legislation covering national and/or ethnic minorities.

Name of the law: -
Date of adoption: -
Purpose of the law: -
List of recognised national/ethnic minorities (if applicable): -

In Romania, there is no specific legislation defining national or ethnic minorities in spite of a constitutional provision stating in Article 6 that 'the State recognises and guarantees the right of persons belonging to national minorities to the preservation, development and expression of their ethnic, cultural, linguistic and religious identity.' An older draft on the Statute of National Minorities was rejected in 2005.[75] Given the fierce opposition to various drafts of statutes regulating the situation of national minorities, the intermediary solution was to define national minority as 'the ethnicity which is represented in the Council of National Minorities' and list the national minorities. The list of 19 'organizations of citizens belonging to national minorities' is the result of the political arrangements from 1990 when political representation of national minorities was discussed for the first time.[76] The preferential treatment of organizations of national minorities mentioned in the list to the disadvantage of other organizations of national minorities had been discussed at length by the ECtHR in *Danis and the Association of Persons of Turk Origin v. Romania* in 2015.[77]

In its report addressed to the ACFC for the first round of review under the FCNM are listed only 16 groups under Article 3: 'on the basis of the 1992 census, the Romanian Government considers that the following minorities are covered by the Framework Convention (the names are those used in the State Report): Magyars/Szeklers, Gypsies, Germans/Swabians/Saxons, Ukrainians, Russians/Lipoveni, Turks, Serbs, Tatars, Slovaks, Bulgarians, Jews, Croats, Czechs, Poles, Greeks, Armenians.'[78] In this context the ACFC recommended to the Romanian authorities to consider the application of Article 3 to the Csango community and 'as concerns the situation of other groups, the Advisory Committee is also of the opinion that it would be possible to consider inclusion of persons belonging to them in the application of the

73 Romania, Law 35/2008 for the election of the Chamber of Deputies and of the Senate and for the amendment of Law 67/2004 on the election of local public administration authorities, of Law 215/2001 on local public administration and of Law 393/2004 on the Statute of officials elected in local elections (*Lege pentru alegerea Camerei Deputaţilor şi a Senatului şi pentru modificarea şi completarea Legii nr. 67/2004 pentru alegerea autorităţilor administraţiei publice locale, a Legii administraţiei publice locale nr. 215/2001 şi a Legii nr. 393/2004 privind Statutul aleşilor locali*) 13 March 2008, Art. 2 (29).

74 Romania, Law 282/2007 for the ratification of the European Charter of Regional and Minority Languages (*Lege 282/2007 pentu ratificarea Cartei europene a limbilor regionale sau minoritare)*, 6 November 2007. Article 2 of the Law lists the following minority languages: Albanian, Armenian, Bulgarian, Czech, Croatian, German, Greek, Italian, Hebrew, Hungarian, Macedonian, Polish, Romani, Russian, Rutenian, Serbian, Slovak, Tatar, Turkish, Ukrainian.

75 ACFC, Issues of Concern in Resolution CM/ResCMN(2013)7 on the implementation of the Framework Convention for the Protection of National Minorities by Romania.

76 Romania, Decree Law 92 for the election of the Parliament and of the Romanian President, 14 March 1990, *Decret-lege nr. 92 din 14 martie 1990 pentru alegerea Parlamentului* și *a Preşedintelui României*.

77 ECtHR, *AFFAIRE DANIS ET L'ASSOCIATION DES PERSONNES D'ORIGINE TURQUE c. Roumanie*, application no. *16632/09, 2*1 Aprill 2015.

78 Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities, First Opinion on Romania, ACFC/INF/OP/I(2002)001 adopted on 6 April 2001, available at http://www.coe.int/en/web/minorities/country-specific-monitoring-2016#Romania.

Framework Convention on an article-by-article basis and takes the view that the Romanian authorities should consider this issue in consultation with those concerned.'[79]

SLOVAKIA

1. Definition of racial/ethnic origin explicitly covered in national law

Name of the law: - Date of adoption: - Purpose of the law: - Article: - Definition: No explicit definition.

2. This definition covers...*

Discrimination by assumption/ perception of racial or ethnic origin	Discrimination in association with racial or ethnic origin	Descent or (geographic) origin	Minority language	Minority religion	Cultural traditions	Colour	Other (specify)
N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

(*) The following codes are used in the table:
Yes = Explicitly covered in the law.
Jurisprudence = Not explicitly but interpreted as such by Courts/Equality bodies (please provide the reference of the most relevant case in a footnote).
TP = Not explicitly but covered by explanatory notes/ travaux préparatoires.
No = Neither explicitly nor interpreted as such.
N/A = Not applicable.

3. In addition to the information provided under questions 1 and 2, please provide any information you think is relevant regarding the definition of discrimination on the ground of racial/ethnic origin – for instance interpretation by national courts and international monitoring bodies.

Slovak law provides no definition of racial and ethnic origin. However, these terms are used in the provisions of many laws, especially of anti-discrimination law and criminal law.

Criminal law literature states that a 'race' is a 'group of people characterised by biological differences of individuals'.[80] It also characterises an 'ethnic group' as a 'historically formed group of people connected by common history, distinct cultural features (mainly language) and common mentality,[81] traditions, and possibly a distinct way of life. Representatives of a given ethnic group have their own name (...) and have an understanding of mutual belonging and at the same time distinctiveness from other communities. An ethnic group usually exists beyond the borders of one state. In Slovakia an example would be the Roma'.[82]

79 Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities, First Opinion on Romania, ACFC/INF/OP/I(2002)001 adopted on 6 April 2001, available at http://www.coe.int/en/web/minorities/country-specific-monitoring-2016#Romania.

80 Samaš, O., Stiffel, H., Toman, P. (2006) *Trestný zákon – Stručný komentár (The Criminal Code: a brief commentary)*, Bratislava, IURA EDITION, spol. s r. o., p. 302.

81 Although the question is raised of whether referring to common 'mentality' does not perpetuate stereotypes about ethnic groups instead of combatting them in the context of racism and racial and ethnic discrimination.

82 Samaš, O., Stiffel, H., Toman, P. (2006) *Trestný zákon – Stručný komentár (The Criminal Code: a brief commentary)*, Bratislava, IURA EDITION, spol. s r. o., p. 302.

In addition, Slovakia ratified the International Convention on the Elimination of all Forms of Racial Discrimination (CERD),[83] which provides an extensive definition of race. Pursuant to Article 7(5) of the Slovak Constitution,[84] CERD takes precedence over Slovak laws.

The Supreme Court confirmed in 2013 that the Roma represent an ethnic group.[85]

The Slovak courts have a strong tendency to interpret the concept of (Roma) ethnicity, in the context of hate speech and hate crimes, narrowly. Evidence of this can also be found in the decision of the Supreme Court of 2013.[86] The Supreme Court argued, *inter alia*, that the word 'Gypsy' (both as a noun and as an adjective) belongs to a group of words that are frequently used as a part of the codified state language, and that the usage of this word alone cannot indicate that a crime of defamation of nation, race and conviction pursuant to Section 423(1) of the Criminal Code has been committed.[87]
Ethnicity as an explicit ground constituting hate crimes was added to the Criminal Code in June 2001,[88] upon the initiative of the Ministry of Justice and after a number of problems that had occurred in judicial practice in the qualifying of racially motivated crimes (which contained an explicit reference to 'race' and 'national origin' only, and not also to ethnicity; before 2001, the hate crime provisions contained in the Criminal Code were only referring to 'national origin' and 'race').

The criminal case that lead to this change was the case of IP (the accused), heard by the District Court in Banská Bystrica and by the Regional Court in Banská Bystrica in 1998-2000.[89] The aggrieved party in this case was a Roma student attacked because of his Roma ethnicity. The court of first instance (the District Court in Banská Bystrica) used a literal and very restrictive interpretation of the word 'race'. It ruled that the Roma belonged to the same race as Slovaks and that they are not to be considered as a different national minority or race, but rather as a different ethnic group.[90] So, according to the first instance court, there was no reason to qualify the criminal act as falling under the relevant provision of the Criminal Code constituting a racially, nationally or religiously motivated hate crime,[91] since this provision does not contain the term 'ethnic group'.

However, the court of appeal – the Regional Court in Banská Bystrica – did not agree with this interpretation and finally recognised the racial motivation of the attack which was eventually included in the legal qualification of the offence.

The court of appeal reversed the decision of the first instance court stating in its reasoning that 'the law makers purposely endeavoured neither to restrictively stipulate any general definition, nor to provide a list of nations, national groups, races or ethnic groups as they were probably fully aware of the fact that the specification of some of them may artificially exclude the others. Therefore, according to the opinion of the Regional Court, the evaluated issue really should not be reduced, but understood in a wider interpretation'.[92]

83 Oznámenie Federálneho Ministerstva zahraničných vecí. č. 95/1974 (*Announcement of the Federal Ministry of Foreign Affairs No. 95/1974 Coll.*).
84 The Constitution of the Slovak Republic No. 460/1992 Coll. as amended (Ústava *Slovenskej republiky č. 460/1992 Zb. v znení neskorších predpisov*). The English text of the Constitution can be found at https://www.ustavnysud.sk/ustava-slovenskej-republiky (accessed 26 May 2016).
85 Decision of the Supreme Court of the Slovak Republic of 19 March 2013, ref. No 4 Tdo 49/2012, pp. 7-8.
86 Decision of the Supreme Court of the Slovak Republic of 19 March 2013, ref. No 4 Tdo 49/2012.
87 Decision of the Supreme Court of the Slovak Republic of 19 March 2013, ref. No 4 Tdo 49/2012, pp. 6-7.
88 Trestný zákon č. 140/1961 Z. z. v znení zákona č. 399/2000 Z. z. (*Criminal Code No. 140/1961 Coll. as amended by Act No 399/2000 Coll.*). The amendment was carried out by Act No 253/2001 Coll. The current Criminal Code adopted in 2006 (Act No 300/2005 Coll.) uses both terms 'race' and 'ethnic group'.
89 Decision of the District Court in Banská Bystrica No. 3T 52/98 of 1 July 1999, Decision of the Regional Court in Banská Bystrica No. 6 To 594/99 of 29 September 1999.
90 Decision of the District Court in Banská Bystrica No. 3T 52/98 of 1 July 1999.
91 Section 221, paragraphs 1 and 2(b) of the Criminal Code (Act No 140/1961, as amended by Act No 399/2000 Coll.) which stated that injury to one's health inflicted on account of political conviction, national origin, race, religious or other beliefs carries a higher criminal charge.
92 Decision of the Regional Court in Banská Bystrica No. 6 To 594/99 of 29 September 1999.

Consequently, the existing Criminal Code as well as the Anti-discrimination Act explicitly list race, national origin and affiliation with an ethnic group as specific and prohibited grounds. The Anti-discrimination Act also lists colour of skin and language as prohibited grounds of discrimination.

4. Legislation covering national and/or ethnic minorities.

Name of the law: Constitution of the Slovak Republic No. 460/1992 Coll. as amended (Ústava *Slovenskej republiky č. 460/1992 Zb. v znení neskorších predpisov*)
Date of adoption: 1 September 1992
Purpose of the law: The basic law of the Slovak Republic
List of recognised national/ethnic minorities (if applicable): N/A

Name of the law: Act No 184/1999 Coll. on the use of languages of national minorities, as amended (*zákon č. 184/1999 Z. z. o používaní jazykov národnostných menšín v znení neskorších predpisov*)
Date of adoption: 10 July 1999
Purpose of the law: To set the rules for the use of languages of national minorities in communication with public authorities and other official communication and in other fields set by the act (e. g. in the field of healthcare or social care)
List of recognised national/ethnic minorities (if applicable): No[93]

SLOVENIA

1. Definition of racial/ethnic origin explicitly covered in national law

Name of the law: -
Date of adoption: -
Purpose of the law: -
Article: -
Definition: No explicit definition.

2. This definition covers...*

Discrimination by assumption/ perception of racial or ethnic origin	Discrimination in association with racial or ethnic origin	Descent or (geographic) origin	Minority language	Minority religion	Cultural traditions	Colour	Other (specify)
N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

(*) The following codes are used in the table:
Yes = Explicitly covered in the law.
Jurisprudence = Not explicitly but interpreted as such by Courts/Equality bodies (please provide the reference of the most relevant case in a footnote).
TP = Not explicitly but covered by explanatory notes/ travaux préparatoires.
No = Neither explicitly nor interpreted as such.
N/A = Not applicable.

93 However, the act is listing the officially recognised languages of national minorities (the Bulgarian language, the Czech language, the Croatian language, the Hungarian language, the German language, the Polish language, the Roma language, the Ruthenian language, and the Ukrainian language), which is an indirect indication of the minorities that the State officially recognises.

3. In addition to the information provided under questions 1 and 2, please provide any information you think is relevant regarding the definition of discrimination on the ground of racial/ethnic origin – for instance interpretation by national courts and international monitoring bodies.

In Slovenia, the newly adopted Protection Against Discrimination Act does not contain definitions of personal grounds, but only includes an open-ended list of protected personal grounds. Among them, race, ethnicity, language and religion are mentioned as protected grounds (Article 1). The law does not explicitly mention minority language and minority religion as protected grounds, however, they would be covered by language and religion. Decent, cultural tradition, colour are covered by the general clause "any other personal ground".

Discrimination by assumption and discrimination by association (for all grounds, not just race and ethnicity) are now explicitly mentioned in Article 5, paragraph 2, which states, that equal treatment is also guaranteed to a person who is factually or legally associated with the person who actually has the protected ground, and to a person who is discriminated against due to "erroneous conclusion on the existance of the personal ground", which in fact means that the personal ground, which does not exist, is assumed by the actor of discrimination.

4. Legislation covering national and/or ethnic minorities.

Name of the law: Constitution of the Republic of Slovenia
Date of adoption: 23 December 1991
Purpose of the law: Basic law
List of recognised national/ethnic minorities (if applicable): Hungarian and Italian minority are recognised as national minorities, while Roma are recognised as "special ethnic community".

Name of the law: Self-Governing Ethnic Communities Act
Date of adoption: 5 October 1994
Purpose of the law: implementation of specific rights of Italian and Hungarian national minorities.
List of recognised national/ethnic minorities (if applicable): Italian and Hungarian national minority.

Name of the law: The Roma Community Act
Date of adoption: 30 March 2007
Purpose of the law: regulation of special position and special rights of the Roma community in Slovenia.
List of recognised national/ethnic minorities (if applicable): Roma as a special ethnic community.

Name of the law: Local Self-Government Act
Date of adoption: 21 12. 1993
Purpose of the law: regulation of the organisation of municipalities and municipal councils where national minorities and Roma community may have their special representatives.
List of recognised national/ethnic minorities (if applicable): Italian and Hungarian national minority and Roma as a special ethnic community.

SPAIN

1. Definition of racial/ethnic origin explicitly covered in national law

Name of the law: -
Date of adoption: -
Purpose of the law: -
Article: -
Definition: No explicit definition

2. This definition covers...*

Discrimination by assumption/ perception of racial or ethnic origin	Discrimination in association with racial or ethnic origin	Descent or (geographic) origin	Minority language	Minority religion	Cultural traditions	Colour	Other (specify)
N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

(*) The following codes are used in the table:
Yes = Explicitly covered in the law.
Jurisprudence = Not explicitly but interpreted as such by Courts/Equality bodies.
TP = Not explicitly but covered by explanatory notes/ travaux préparatoires.
No = Neither explicitly nor interpreted as such.

3. In addition to the information provided under questions 1 and 2, please provide any information you think is relevant regarding the definition of discrimination on the ground of racial/ethnic origin – for instance interpretation by national courts and international monitoring bodies.

The judgments of the Constitutional Court which have addressed the issue of racial or ethnic origin do not provide a definition of 'racial/ethnic origin' (STC 136/1990, Case García López;[94] STC 13/2001, Case of Williams;[95] and STC 69/2007, Case of Muñoz Díaz).[96] The court refers to 'Romani ethnic origin' (étnia *gitana*) but without defining traits that might characterise it.

4. Legislation covering national and/or ethnic minorities.

Name of the law: -
Date of adoption: -
Purpose of the law: -
List of recognised national/ethnic minorities (if applicable): -

SWEDEN

1. Definition of racial/ethnic origin explicitly covered in national law

Name of the law: Discrimination Act (2008:567)
Date of adoption: 1 January 2009
Purpose of the law: Prohibit discrimination and promote active measures to counteract discrimination.
Article: Chapter One Section 5 point 3
Definition: The protected ground is ethnicity in the Discrimination Act and it is defined as "national or ethnic origin, skin colour or similar circumstance".

94 Constitutional Court Decision, 136/1990, 19 July 1990, http://hj.tribunalconstitucional.es/HJ/docs/BOE/BOE-T-1990-18330.pdf.
95 Constitutional Court Decision, 13/2001, 29 January 2001, http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/4309.
96 Constitutional Court Decision, 69/2007, 16 April 2007, http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/6036.

2. This definition covers...*

Discrimination by assumption/ perception of racial or ethnic origin	Discrimination in association with racial or ethnic origin	Descent or (geographic) origin	Minority language	Minority religion	Cultural traditions	Colour	Other (specify)
Yes	Yes	No	Yes	TP	TP	Yes	N/A

(*) The following codes are used in the table:
Yes = Explicitly covered in the law.
Jurisprudence = Not explicitly but interpreted as such by Courts/Equality bodies (please provide the reference of the most relevant case in a footnote).
TP = Not explicitly but covered by explanatory notes/ travaux préparatoires.
No = Neither explicitly nor interpreted as such.
N/A = Not applicable.

3. In addition to the information provided under questions 1 and 2, please provide any information you think is relevant regarding the definition of discrimination on the ground of racial/ethnic origin – for instance interpretation by national courts and international monitoring bodies.

The definition of ethnicity must be read in conjunction with the definition of discrimination in Chapter 1 Section 4 points 1 and 2 of the Discrimination Act. There direct and indirect discrimination is defined as acts which are disfavourable to an individual and are connected (har samband) to a *ground* (not an individual person). Adding this information, it becomes obvious that treating somebody disfavourable based on a mistaken assumption about ethnicity is an act connected to the *ground* of ethnicity. The same applies to treating somebody disfavourable because they have a spouse or a friend of a different ethnic background or because they speak a minority language. These acts are connected to the ground of ethnicity. According to the Swedish national expert, the wording of the Discrimination Act contains sufficient information to draw these conclusions.[97] The alternative classification is Jurisprudence or TP in all three cases.

Descent is not protected in itself. It is perfectly legal to discriminate against the Swedish nobility or other groups a person dislikes which are not covered by the seven grounds of the Discrimination Act. Descent will however often be connected to ethnicity or other grounds if one for instance dislikes a person because their parents are Arabs or Muslims. A landlord taking higher rent from refugees was in 2010 convicted of ethnic discrimination.[98] Discrimination of refugees, foreigners, immigrants or any other mixed group defined by being "non-Swedish" in the eyes of the discriminator is regarded as ethnic discrimination.

Geographic origin is not protected in itself either. It is perfectly legal to discriminate people from a particular Swedish region. However, any discrimination of people from a region abroad, whether it is bigger than a country like north Africa or smaller like Punjab, will be discrimination which has a connection to national origin or at least the absence of a Swedish national origin.

Religion is not enumerated as a ground in Chapter 1 Section 5 of the Discrimination Act. It is subsumed under "other similar circumstances". However, with regard to active duties in Chapter 3 of the Discrimination Act, religion and belief is treated as a separate ground.

There is no case law on the definition of religion or belief as opposed to private moral convictions. In the case of a woman wearing a burqa or a niqab the court would typically say that it is not important to investigate whether this practice in the particular case is rooted in religion or ethnicity (as it is obviously

97 There can be two opinions. The committee of ministers criticises Sweden because minority language is not expressly protected by the Discrimination Act. Resolution CM/ResCMN(2013)2 on the implementation of the Framework Convention for the Protection of National Minorities by Sweden (11 June 2013).

98 Göta Court of Appeal, Judgment 25 Februari 2010, case T 1666-09, Equality Ombudsman v. Skärets fastigheter AB.

rooted in either of the two or both), because the same rules apply to both grounds.[99] It will not be regarded as a private moral conviction.

If there is a minority within a religious belief that choses veganism but remains within the larger group, the connection to the religious belief may be problematic. There is however no case law in Sweden on such matters. If the majority in a small group like Jehova's Witnesses holds a moral conviction (like gambling is sin), this conviction will be regarded as connected to religion even if most Christians believe otherwise.[100] In this sense minority religious belief are certainly protected in Sweden.

4. Legislation covering national and/or ethnic minorities.

Name of the law: Act (2009:724) on national minorities and national minority languages
Date of adoption: 11 June 2009
Purpose of the law: Regulation of national minority rights
List of recognised national/ethnic minorities (if applicable): Jew, Roma, Sami, Swedish Finns and Tornedalers.

UNITED KINGDOM

1. Definition of racial/ethnic origin explicitly covered in national law

Name of the law: Equality Act 2010
Date of adoption: 8 April 2010
Purpose of the law: Protection against discrimination
Article: Section 9
Definition:
The protected ground is race and it is defined as "Race includes— (a)colour; (b)nationality; (c)ethnic or national origins".

2. This definition covers...*

Discrimination by assumption/ perception of racial or ethnic origin	Discrimination in association with racial or ethnic origin	Descent or (geographic) origin	Minority language	Minority religion	Cultural traditions	Colour	Other (specify)
Yes	Jurispru-dence[101]	Jurispru-dence[102]	Jurispru-dence[103]	Jurispru-dence[104]	Jurispru-dence[105]	Yes	Jurispru-dence[106]

(*) The following codes are used in the table:

99 The Court would normally see it as the plaintiff sees it. If the plaintiff believes that she wears the burqa for religious reasons, than it is treated as the religion ground. Compare Hässleholm Municipal Court, case T-1370-13, Equality Ombudsman v Polop AB, (judgement (8 April 2015) (the case regards refusal to shake hand).
100 Stockholm Municipal Court, case T-10264-14, Equality Ombudsman v. Swedish state through the National Employment Agency (judgement 28 December 2015).
101 *Mandla v Dowell Lee* [1983] 2 AC 548 http://www.bailii.org/uk/cases/UKHL/1982/7.html accessed 8 April 2016.
102 *Mandla v Dowell Lee* [1983] 2 AC 548 http://www.bailii.org/uk/cases/UKHL/1982/7.html; see also R (E) v Governing Body of JFS & Ors [2009] UKSC 15 https://www.supremecourt.uk/decided-cases/docs/UKSC_2009_0136_Judgment.pdf accessed 22 May 2016. "the relevant characteristics of the relative to whom the maternal line leads are not simply religious. The origin to which the line leads can be racial and is, in any event, ethnic" at para 42.
103 *Mandla v Dowell Lee* [1983] 2 AC 548 http://www.bailii.org/uk/cases/UKHL/1982/7.html accessed 8 April 2016.
104 *Mandla v Dowell Lee* [1983] 2 AC 548 http://www.bailii.org/uk/cases/UKHL/1982/7.html accessed 8 April 2016.
105 *Mandla v Dowell Lee* [1983] 2 AC 548 http://www.bailii.org/uk/cases/UKHL/1982/7.html accessed 8 April 2016.
106 *Chandhok v Tirkey* [2015] IRLR 195 http://www.bailii.org/uk/cases/UKEAT/2014/0190_14_1912.html accessed 8 April 2016 the Employment Appeal Tribunal accepted that discrimination on the basis of caste could fall within discrimination on the basis of ethnic origin.

Yes = Explicitly covered in the law.
Jurisprudence = Not explicitly but interpreted as such by Courts/Equality bodies.
TP = Not explicitly but covered by explanatory notes/ travaux préparatoires.
No = Neither explicitly nor interpreted as such.
N/A= Not applicable.

3. In addition to the information provided under questions 1 and 2, please provide any information you think is relevant regarding the definition of discrimination on the ground of racial/ethnic origin – for instance interpretation by national courts and international monitoring bodies.

The definition of ethnic origins was discussed in *Mandla and another v Dowell Lee,*[107] and summarised thus: "For a group to constitute an ethnic group in the sense of the 1976 Act [precursor to the Equality Act 2010], it must…regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant; (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion, different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community…."[108]

In *Chandhok v Tirkey*[109] the Employment Appeal Tribunal accepted that discrimination on the basis of caste could fall within discrimination on the basis of ethnic origin.
In *R (E) v Governing Body of JFS & Ors*[110] the majority of the Supreme Court held that discrimination based on the religious rules of matrilineal decent would amount to discrimination on grounds of race. "But one thing is clear about the matrilineal test; it is a test of ethnic origin. By definition, discrimination that is based upon that test is discrimination on racial grounds under the Act"[111]

4. Legislation covering national and/or ethnic minorities.

Name of the law: -
Date of adoption: -
Purpose of the law: -
List of recognised national/ethnic minorities (if applicable): -

107 *Mandla v Dowell Lee* [1983] 2 AC 548 http://www.bailii.org/uk/cases/UKHL/1982/7.html accessed 8 April 2016.
108 Per Lord Fraser in *Mandla v Dowell Lee.*
109 *Chandhok v Tirkey,* [2015] IRLR 195 http://www.bailii.org/uk/cases/UKEAT/2014/0190_14_1912.html accessed 8 April 2016.
110 [2009] UKSC 15 https://www.supremecourt.uk/decided-cases/docs/UKSC_2009_0136_Judgment.pdf accessed 22 May 2016.
111 JFS case at Para 45.

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DS-01-16-914-3A-N

Publications Office

ISBN 978-92-79-62624-1 doi:10.2838/83148