

## The concept of non-discrimination: an introductory comment

Morawa, Alexander H. E.

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## **The Concept of Non-Discrimination: An Introductory Comment**

ALEXANDER H. E. MORAWA

*European Centre for Minority Issues,  
Flensburg, Germany*

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## The Concept of Non-Discrimination

ALEXANDER H. E. MORAWA

European Centre for Minority Issues, Flensburg, Germany

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*“Ovo ovum simile.”*

International law, such as Article 26 of the United Nations Covenant on Civil and Political Rights provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>1</sup>

‘Absence of discrimination’, on the one hand, and ‘equal protection of the law’, or the ‘prohibition of discrimination’, on the other hand are distinct manifestations of the principle of equality. The former is mostly negative, the traditional ‘shall not ...’-approach in international human rights law. The latter terms describe the *positive* aspect of equality, requiring affirmative legislative, administrative and/or judicial action.



Let us first examine the negative elements of non-discrimination which in essence require states “not to discriminate in their laws.”<sup>2</sup> Depending on the status of the norm in the framework of a treaty and its language, ‘non-discrimination’ may be an *accessory right* – that is, equality is safeguarded merely with respect to the other substantive rights enumerated in the treaty, such as Article 14 of the European Convention on Human Rights<sup>3</sup> – or an *independent right* to equality demanding

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<sup>1</sup> UN G.A. Resolution 2200A (XXI), 999 U.N.T.S. 171, entered into force 23 March 1976 (hereinafter ‘CCPR’).

<sup>2</sup> Manfred Nowak, *U.N. Covenant of Civil and Political Rights. CCPR Commentary* (Kehl am Rhein, 1993) 469, MN 19.

<sup>3</sup> Dated 4 November 1950, E. T.S. No. 5 (hereinafter ‘ECHR’).

material justice, like Article 26 of the Covenant<sup>4</sup> and the new 12th Additional Protocol to the ECHR.<sup>5</sup>

The right to equality before the law does not render all differences of treatment discriminatory.<sup>6</sup> Indeed, at the core of the concept is a rule so fundamental that it is hardly ever mentioned: equal situations are to be treated equally and unequal situations differently.<sup>7</sup> “A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination.”<sup>8</sup> Or, as the European Court of Human Rights phrased it in its June 2002 judgment in *Willis v. the United Kingdom*: “... [A] difference of treatment is discriminatory if it ‘has no objective and reasonable justification’, that is, if it does not pursue a ‘legitimate aim’ or if there is not a ‘reasonable relationship of proportionality between the means employed and the aims sought to be realised’.”<sup>9</sup> States will enjoy a certain margin of appreciation when adopting measures they deem necessary;<sup>10</sup> however, that margin will be quite narrow or, in other words, states would have to advance “very weighty reasons”<sup>11</sup> for their measures to survive judicial scrutiny, when a differentiation is based solely on what may be called a ‘suspect criterion’, such as race or sex.<sup>12</sup>

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<sup>4</sup> Cf. Human Rights Committee (hereinafter: ‘HRC’), Communications Nos. 172/1984, *S.W.M. Broeks v. the Netherlands*, views of 9 April 1987, CCPR/C/29/D/172/1984, paras. 12.1 *et seq.*, and 182/1984, *F. H. Zwaan-de Vries v. the Netherlands*, views of 9 April 1987, CCPR/C/29/D/182/1984, paras. 12.1 *et seq.*, emphasized also in General Comment No. 18/37 on Non-Discrimination, dated 9 November 1989, para. 12. See also Torkel Opsahl, “Equality in Human Rights Law, with Particular Reference to Article 26 of the International Covenant on Civil and Political Rights”, in Manfred Nowak (ed.), *Fortschritt im Bewußtsein der Grund- und Menschenrechte: Festschrift für Felix Ermacora* (Kehl am Rhein 1988), 51, 61.

<sup>5</sup> Protocol No. 12 to the European Convention on Human Rights and Fundamental Freedoms, adopted on 4 November 2000, E.T.S No. 177, Article 1.

<sup>6</sup> For a thorough discussion of recent international practice in this field see: Alexander H.E. Morawa, “The Evolving Right to Equality”, 1 *European Yearbook of Minority Issues* (2001/02), forthcoming.

<sup>7</sup> The drafters of Protocol No. 12 to the ECHR, however, mention it: Explanatory Report, para. 15.

<sup>8</sup> HRC, *Broeks v. the Netherlands*, at para. 13.

<sup>9</sup> Eur. Ct. H.R., Appl. 36042/97, *Willis v. the United Kingdom*, judgment of 11 June 2002, para. 39, summarizing its constant jurisprudence.

<sup>10</sup> The ‘margin of appreciation’ doctrine stems from the Court’s case-law relating to the restriction clauses contained, for instance, in Article 10 (2) of the Convention permitting states to restrict rights for certain enumerated reasons, but only as far as such limitations are “necessary in a democratic society.” Necessity implies that the interference corresponds to a “pressing social need” and, in particular, that it is proportionate to the legitimate aim pursued. “The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a ‘restriction’ is reconcilable with the rights protected by the Convention ...”. Eur. Ct. H.R., Appl. 29221,29225/95, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, judgment of 2 October 2001, at para. 87.

<sup>11</sup> *Willis v. the United Kingdom*, para. 39, with reference to *Van Raalte v. the Netherlands*, judgment of 21 February 1997, Reports 1997-I, para. 39.

<sup>12</sup> The ‘suspect criteria’ are discussed in Morawa, “The Evolving Right to Equality”, chapter D.

Let us take a look at free speech. ‘Equality’ may not be the first issue that comes to mind when considering the question of what ‘contents’ is protected by free speech clauses. But if one focuses on the speakers and the recipients, things are different: *everyone* enjoys the “freedom to hold opinions and to receive and impart information and ideas without interference by public authority ...”.<sup>13</sup> But does *everyone* enjoy that freedom to the same extent?

True, *everyone* has the right to demonstrate against the policies of a foreign government during a state visit, for instance,<sup>14</sup> or against the purchase of fighter planes by his or her own government.<sup>15</sup> *Everyone* may distribute leaflets without first having to overcome excessive administrative burdens.<sup>16</sup> And *everyone* faces limits which are spelled out in the very provisions safeguarding the right to free speech, such as “the rights and reputation of others.”

Along comes a journalist, Mr *Lingens*. He criticizes certain statements of a leading politician as “immoral, undignified”, adds that “had they been made by someone else this would probably have been described as the basest opportunism.”<sup>17</sup> He is sued by the politician and convicted by the courts for defamation. Before the European Court of Human Rights he argues: I am *not* everyone, I am a “political journalist.”<sup>18</sup> It is my duty in a pluralist society to criticize politicians. I must be permitted to go further in my criticism than the average citizen. The Court agrees:

[F]reedom of expression ... constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. ... [I]t is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’. These principles *are of particular importance as far as the press is concerned*.<sup>19</sup>

The Court goes further:

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<sup>13</sup> Article 10 (1) ECHR.

<sup>14</sup> HRC, Communication No. 412/1990, *Auli Kivenmaa v. Finland*, views of 31 March 1994, CCPR/C/50/D/412/1990.

<sup>15</sup> Eur. Ct. H.R., *Chorherr v. Austria*, judgment of 25 August 1993, Series A, No. 266-B.

<sup>16</sup> HRC, Communication No. 780/1997, *Vladimir Petrovich Laptsevich v. Belarus*, views of 20 March 2000, CCPR/C/68/D/780/1997.

<sup>17</sup> Eur. Ct. H.R., *Lingens v. Austria*, judgment of June 24, 1986, Series A, No. 103, paras. 12 and 15.

<sup>18</sup> *Ibid.*, at para. 37.

<sup>19</sup> *Ibid.*, para. 41 (emphasis added).

The limits of acceptable criticism are ... *wider as regards a politician* as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.<sup>20</sup>

In this there lie already two substantive distinctions: journalists enjoy a somewhat higher level of ‘freedom to criticize’ than ordinary people. Plus, on the receiving end, politicians must ‘tolerate’ more criticism than others. Mind that we still speak of the same right: freedom of expression.

Along comes another applicant who was sanctioned for writing a critical political article in a Spanish magazine, *Mr Castells*. He is also a senator and member of a political group supporting independence for the Basque Country. He has this to say about those who, in his opinion, wage war against the Basques: “Frankly, I do not believe that the fascist associations which I cited earlier have any independent existence, outside the State apparatus. In other words I do not believe that they actually exist. Despite all these different badges, it is always the same people. Behind these acts there can only be the Government, the party of the Government and their personnel.”<sup>21</sup>

A journalist *and* politician. A man who criticizes not merely a politician, but the entire government. What level of protection does that situation trigger? The Court’s solution is this:

While freedom of expression is important for everybody, *it is especially so for an elected representative of the people*. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for *the closest scrutiny* on the part of the Court.<sup>22</sup>

And the court adds:

The limits of permissible criticism are *wider* with regard to the Government than in relation to a private citizen, or even a politician.<sup>23</sup>

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<sup>20</sup> *Ibid.*, para. 42 (emphasis added).

<sup>21</sup> Eur. Ct. H.R., *Castells v. Spain*, judgment of 23 April 1992, Series A, No. 236, para. 7.

<sup>22</sup> *Ibid.*, para. 42 (emphasis added).

<sup>23</sup> *Ibid.*, para. 46 (emphasis added).

Thus, politicians may be seen as those who (a) enjoy more ‘liberty’ when speaking and (b) must also ‘tolerate’ more criticism. It seems arguable that in certain situations, such as during election campaigns, at least the ‘tolerance’ level required of them will increase even further, particularly in their dealings with other politicians.<sup>24</sup> They are indeed a special class when it comes to freedom of speech. Journalists are, too, in that they enjoy the same ‘liberty’ as elected representatives, or at least a higher level than ordinary people, especially when criticizing political figures or the entire government. The remaining group of people – *everyone* – are nevertheless still free to voice their opinion, and may enjoy considerably more ‘liberty’ when making political statements than when insulting their next-door neighbours, but restrictions will more readily be accepted than when a member of a special class speaks.

What is the rationale of that differentiation in treatment or, in other words, the different levels of protection of those affected by another’s speech through restrictive national legislation permitted by Article 10 of the Convention? Of course, the particular importance of the press in a free and democratic society has continually been emphasized by the Court. But does that explain the differentiations made with respect to those being criticized? Could ‘vulnerability’<sup>25</sup> be a factor, or the lack of means to defend oneself as an object of public debate?

The politicians-cases seem to point in that direction. Politicians not only lay themselves open to close public scrutiny,<sup>26</sup> they also have every possibility to publicly react even to harsh criticism, tools not available to *everyone*. The defencelessness-argument has also been developed in cases concerning the judiciary, which is explicitly mentioned as an entity that can legitimately be protected against speech in paragraph 2 of Article 10. Whether judges should enjoy greater protection against criticism due to their essential function in a functioning democracy or be open to as much scrutiny by the general public and, in particular, the press as the other branches

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<sup>24</sup> See Eur. Ct. H.R., Appl. 42409/98, *Wolfgang Schüssel v. Austria*, decision on the admissibility of 21 February 2002, para. 2 (accepting that “in the context of political battle in general and against the background of an electoral campaign in particular” members of a political party and a trade union may distribute stickers showing a politician’s face half overlapped by the picture of another politician to indicate that they believe that their views on certain subjects are similar).

<sup>25</sup> See Alexander H.E. Morawa, “‘Vulnerability’ as a Concept of International Human Rights Law”, 10 *Journal of International Relations and Development* (No. 1, 2003) (forthcoming)

<sup>26</sup> Cf. Eur. Ct. H.R., *Lingens v. Austria*, para. 42, and *Oberschlick (No. 2) v. Austria*, judgment of 1 July 1997, Reports 1997-IV, at para. 29.

of government is open for debate.<sup>27</sup> The Court, however, has said that the courts must “...be protected from destructive attacks that are unfounded, especially in view of the fact that judges are subject to a duty of discretion that precludes them from replying to criticism.”<sup>28</sup>

It all boils down to the ‘proportionality’ and ‘reasonableness’ standards the Court speaks of in *Willis*, and to the extent of the ‘margin of appreciation’ a state may claim. Not every distinction is prohibited, not absolute equality is required, but relative equality, or proportionality. What is proportionate depends, as always, on the particular circumstances of the case. Thus, the very same journalist may in one case be the victim of an unjustified interference with his freedom of speech<sup>29</sup> while in another case he may have overstepped his boundaries.<sup>30</sup> There are no general rules on ‘proportionality’, merely compendiums of practice.

The Court, like all human rights tribunals, not only scrutinizes state action in light of these standards, it employs them in its own jurisprudence. In other words, the Court *creates* special classes of individuals and redefines the general standards of protection for them. ‘Journalists’, ‘politicians’, and ‘the judiciary’ are examples of such classes in the area of free speech. But they are not unique: torture and inhuman and degrading treatment, for instance, are prohibited in absolute terms irrespective of who the victim is; whether a certain treatment is severe enough to be qualified as inhuman, however, may depend in part on the mental and physical state of the person concerned.<sup>31</sup>

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<sup>27</sup> Cf. Raimo Pekkanen, “Criticism of the Judiciary by the Media”, in: Paul Mahoney *et al.* (eds.), *Protecting Human Rights: The European Perspective*, Studies in memory of Rolv Ryssdal (Köln, Berlin, Bonn, München, 2000), 1079-85.

<sup>28</sup> Eur. Ct. H.R., *De Haes and Gijssels v. Belgium*, judgment of 24 February 1997, Reports 1997-I, at para. 37.

<sup>29</sup> Eur. Ct. H.R., *Oberschlick v. Austria*, judgment of 23 May 1991, Series A, No. 204, at paras. 61 *et seq.* (holding that the journalist’s conviction for having reproduced in a journal the text of a criminal complaint which he and other persons had laid against a politician breached Article 10 of the Convention. During an election campaign, this politician had made certain public statements on TV concerning foreigners’ family allowances, and proposed that such persons should receive less favourable treatment than Austrians. The applicant had expressed the opinion that this proposal corresponded to the philosophy and the aims of National Socialism). *See also Oberschlick (No. 2) v. Austria*, at paras. 31 *et seq.* (holding that the use of the word “Trottel” (idiot) when commenting on a politician’s provocative speech about the role of the German army in World War II was justified).

<sup>30</sup> Eur. Ct. H.R., *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A, No. 313, paras. 32 *et seq.* (holding that allegations of improper behaviour of judges of a particular court were neither shown to be true nor a fair comment).

<sup>31</sup> Cf. Eur. Ct. H.R., *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A, No. 161, para. 109 (holding that “... the applicant’s youth at the time of the offence and his then mental state, on the psychiatric evidence as it stands, are ... to be taken into consideration as contributory factors tending, in his case, to bring the treatment on death row within the terms of Article 3 ...”).

From both the case law and the court's own *classes*-approach one may conclude that 'proportionality' is significantly influenced by 'vulnerability' or defencelessness. Unequal treatment appears to be justified in particular when one party – non-technically speaking – to the case is placed at a disadvantage compared to either the other parties or a *class*. Ordinary people cannot convene press-conferences when criticized in public, politicians can, and must accordingly tolerate more.



Let us now turn to the positive aspects of non-discrimination or as we initially called it: 'equal protection of the law'. The 12th Additional Protocol to the European Convention adopted in 2000 elevates the 'European' right to non-discrimination firstly to an independent – no longer accessory – right and, secondly, to an at least somewhat positive obligation of states by stipulating that "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."<sup>32</sup> Thus, although it is "not intended to impose a general positive obligation on the Parties to take measures to prevent or remedy all instances of discrimination in relations between private persons,"<sup>33</sup> it may nevertheless under certain circumstances engage the responsibility of a state if it fails to provide adequate protection against discrimination stemming from non-state actors.<sup>34</sup>

What protection is adequate depends in many ways on a factor that was introduced earlier when discussing negative obligations: 'vulnerability'. Active implementation of equality, and in particular affirmative measures to foster material equality, are intertwined with the need for support because the people concerned have no or

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<sup>32</sup> Article 1 of Protocol No. 12.

<sup>33</sup> Explanatory Report, para. 25.

<sup>34</sup> Cf. *ibid.*, para. 26. Mark Bell, "Combating Racism Through European Laws: A Comparison of the Racial Equality Directive and Protocol 12", in: Isabelle Chopin and Jan Niessen (eds.), *Combating Racial and Ethnic Discrimination: Taking the European Legislative Agenda Further* (Brussels/London, 2002), 7–34, 23–24, while agreeing that in particular a clear lacuna in domestic laws arbitrarily depriving someone of protection, the failure of state organs to intervene in case of grave discrimination originating from private sources or a private actor taking over state responsibilities (such as privately-run prison facilities) could trigger a state's responsibility under Protocol No. 12, concludes that the protection afforded to individuals under EU Council Directive 2000/43/EC of 29 June 2000, Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, Official Journal L 180 (19 July 2000), 22, is more effective.

insufficient tools available to remedy a situation themselves – remember the limited possibility *everyone* but a politician has to defend himself against public criticism. The case of *X and Y v. the Netherlands*<sup>35</sup> which the drafters of Protocol No. 12 make reference to in this respect is another example: a mentally handicapped sixteen-year-old girl was sexually assaulted in a privately-run home for handicapped children, but neither she nor her father could press criminal charges against the perpetrator because a lacuna in domestic law prevented both the victim (who was not capable of signing a complaint herself) and her father (whose signature could not validly replace that of the victim) from formally initiating the proceedings. They could have sued the attacker in civil court. Before the European Court of Human Rights they complained about the absence of protection of the girl's right to privacy. To resolve the case the Court had to assess whether criminal charges were the only appropriate tool to remedy infringements upon one's personal integrity. It found that recourse to criminal law was "not necessarily the only answer,"<sup>36</sup> but in the case of sexual assault it was, and indeed that was what Dutch law provided for in general. While the *vulnerable* group – victims of sexual assault – could file criminal charges, the gap in the law prevented members of the *most vulnerable* group, handicapped minors, from resorting to that remedy.

The question remained whether the general provision providing for criminal sanctions against perpetrators should be considered as sufficient for the *most vulnerable* group. "The applicants contended that the difference of treatment established by the legislature between the various categories of persons deserving of special protection against sexual assaults amounted to discrimination ...".<sup>37</sup> The Court did not "deem it necessary"<sup>38</sup> to answer that question, and might not have been able to resolve it merely on the basis of Article 14.

But affirmative action to protect the rights of the particularly vulnerable is not alien to other, in particular specialized international conventions. The International Convention on the Elimination of All Forms of Racial Discrimination, for instance, provides:

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<sup>35</sup> Eur. Ct. H.R., judgment of 26 March 1985, Series A, no. 91.

<sup>36</sup> *Ibid.*, para. 24.

<sup>37</sup> *Ibid.*, para. 31.

<sup>38</sup> *Ibid.*, para. 32.

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.<sup>39</sup>

To that end, states "... shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization."<sup>40</sup> *Bossuyt* defines affirmative action as "a coherent packet of measures ... aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality."<sup>41</sup>

We are facing the same terms again: appropriate, adequate, proportionality; 'special measures' are furthermore reigned in by a regime involving specificity, temporariness, and coherence.<sup>42</sup> Of course we cannot categorize what is appropriate and adequate in the field of positive measures to ensure non-discrimination, maybe even less than with respect to the negative aspects of the right to equality. But we can assess specific scenarios, such as the situation in which handicapped minors who are at risk of being assaulted find themselves. Not only is it a breach of their right to have their personal integrity safeguarded if a gap in the law prevents them from having a perpetrator prosecuted after the fact, a state is also required to take the measures needed to prevent such acts from occurring.

Members of minorities, too, frequently find themselves confronted with problems that differ from those the majority population faces. "They are often in a vulnerable position and have, in the past, often been subjected to discrimination."<sup>43</sup> That, in turn, may not only justify, but require states to "take transitional affirmative action."<sup>44</sup> That

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<sup>39</sup> General Assembly Resolution 2106 (XX) of 21 December 1965, Article 1 (4).

<sup>40</sup> *Ibid.*, Article 2 (1) (d) (emphasis added).

<sup>41</sup> Prevention of Discrimination: The Concept and Practice of Affirmative Action, final report submitted by Mr Marc Bossuyt, Special Rapporteur, in accordance with Sub-Commission Resolution 1998/5, dated 17 June 2002, E/CN.4/Sub.2/2002/21, para. 6 (hereinafter '*Bossuyt, Final Report*').

<sup>42</sup> See Anne F. Bayefsky, "The Principle of Equality or Non-Discrimination in International Law", 11 *Hum.Rts.L.J.* (1990), 1-34, 26-7.

<sup>43</sup> Asbjørn Eide, Final Text of the Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UN Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Minorities, E/CN.4/Sub.2/AC.5/2001/2, dated 2 April 2001, 12, para. 55.

<sup>44</sup> *Ibid.*

a conflict might arise between the proposed principle permitting newly independent states in the course of nation building to take action to “create a more egalitarian society and a common nationality to strengthen [their] sovereignty”<sup>45</sup> and the right of minorities to have their identity preserved, if need be by affirmative measures, shall only be noted here, but cannot be explored any further.

What measures are adequate in this respect depends on a broad range of factors. The Committee on the Elimination of Racial Discrimination, for instance, recently recommended that states “take special measures to promote the employment of Roma in the public administration and institutions, as well as in private companies”<sup>46</sup> to combat discrimination against Roma. How far can states go? When does action to end existing inequality become a new form of discrimination? Even action taken with the legitimate intent to remedy existing inequality adversely affecting one particular group may have an “unjustifiable disparate impact”<sup>47</sup> upon, or “disproportionately affect”<sup>48</sup> the rights of another distinguishable group.



In sum, we may speak of three legal responses to different treatment: (a) where it is *prohibited*, (b) where it is *permitted* and, (c) where it is *mandated*.

(a) Where situations are objectively equal, unequal treatment is prohibited, and so is equal treatment of situations that are different. For instance, men and women in Austria have “equal rights and duties [as] spouses, with regard to their income and mutual maintenance.”<sup>49</sup> They both are eligible for (widow’s or widower’s) pensions after the death of their spouses. If widowers receive their pension payments only if they have no other source of income, while widows receive them irrespective of that, they are being discriminated against.<sup>50</sup> By the same token, both nationals and foreigners lawfully working in Austria contribute equally to the public social security

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<sup>45</sup> Bossuyt, Final Report, para. 29.

<sup>46</sup> Committee on the Elimination of Racial Discrimination (CERD), General Recommendation 27: Discrimination against Roma, dated 16 August 2000, at para. 28.

<sup>47</sup> CERD, General Recommendation 14: Definition of Discrimination, dated 19 March 1993, at para. 2.

<sup>48</sup> Eide, Commentary ... , E/CN.4/Sub.2/AC.5/2001/2, 12, para. 55.

<sup>49</sup> HRC, Communication No. 415/1990, *Dietmar Pauger v. Austria*, views of 26 March 1992, CCPR/C/44/D/415/1990, para. 7.4.

<sup>50</sup> *Ibid.*, affirmed in Communication No. 716/1996, *Dietmar Pauger (No. 2) v. Austria*, views of 25 March 1999, CCPR/C/65/D/716/1996, para. 10.2.

schemes. If under such circumstances certain benefits are reserved for nationals, that amounts to discrimination.<sup>51</sup> In both cases, no reasonable and objective criteria exist that would justify a differentiation in treatment.

(b) In many instances different treatment will be permitted. But even permissible differentiation faces its boundaries. It is, for instance, permissible to prescribe “differences between military and national alternative service and that such differences may, in a particular case, justify a longer period of service.”<sup>52</sup> But doubling the duration of the alternative service from 12 to 24 months solely to “test the sincerity of an individual’s convictions”<sup>53</sup> is not based on objective and reasonable criteria.

(c) Finally, international law may mandate different treatment. That is the tricky part. The contributions in this special focus section will explore these issues further, especially those related to positive discrimination, affirmative action, and the protection of members of minority groups.

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<sup>51</sup> See Eur. Ct. H.R., *Gaygusuz v. Austria*, judgment of 16 September 1996, Reports 1996-IV.

<sup>52</sup> HRC, Communication No. 689/1996, *Richard Maille v. France*, views of 10 July 2000, CCPR/C/69/D/689/1996, para. 10.4, and others.

<sup>53</sup> *Ibid.*

## Biographical Note

Alexander H. E. Morawa, Mag.iur. (University of Salzburg), LL.M. and S.J.D. (The George Washington University). In addition to his affiliation with ECMI he serves as a non-resident Visiting Professor of International Law at Arcadia University (Philadelphia) and as legal counsel in proceedings before the European Court of Human Rights and the UN Human Rights Committee. Dr. Morawa has previously been a Fellow at the International Rule of Law Center of George Washington University, and has held faculty positions at the University of Salzburg, Arcadia University, and Central European University (Budapest). He has repeatedly been of counsel to IGOs, including the UN High Commissioner for Refugees and the OSCE-ODIHR. He has published extensively, primarily in the areas of public international law, human rights, comparative constitutional law, and refugee law.