



TATJANA EVAS

Ethnic origin and language:

Applying international and EU quality standards
on the Estonian labour market

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This is the publication of the author’s distinction-awarded Master’s Thesis defended at the Riga Graduate School of Law on November, 2004 and presented at the international conference “Enlarging Social Europe: The Open Method of Coordination and the EU’s New Member States” at the European Union Center at the University of Wisconsin-Madison.

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RGSL Working Papers aim to introduce current research at RGSL by faculty and students. The present publication introduces the work of Tatjana Evas. This is based on her Master Thesis entitled “Ethnic Origin and Language: Applying International and EU equality standards on the Estonian labor market” submitted in fulfillment of requirements of the Masters’ Degree in International and European Law at RGSL in 2003/2004.

Tatjana Evas has chosen to look at the issue of non-discrimination and equal rights in the Estonian labour market, with particular focus on two target groups identified based on their ethnic origin and language. The approach of the study is comprehensive since the author examines the applicable standards of international human rights law and EU/EC law. This approach is not very common. On the contrary, in Europe we see that often either international law or EU law aspects are taken into consideration. At the same time, it has to be emphasized that the European States are bound by extensive lists of international human rights treaties and the EC law and that lawyers and others have to be able to apply this wide range of rules.

Admittedly, this comprehensive approach is more difficult. It not only requires a good knowledge of the two legal systems but it also requires a critical mind and the ability to compare the two systems and detect the existing shortcomings possibly in both of them. By adopting this comprehensive approach to the topic the author shows an excellent research and the ability to be to the point despite the broad and complicated topic.

RGSL is pleased to present this academic contribution on a particularly relevant and challenging issue of non-discrimination of ethnic and linguistic minorities under international and European Union law.

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I. Introduction

Human rights are no longer a matter of purely domestic State jurisdiction. The ‘traditional’ attitude of a sovereign state, expressed through the conviction that how a nation treats its own inhabitants is its own affair, not a subject of international politics, but decidedly not of international law, is long outdated. Although now it is well-recognized by the majority of democratic states that adoption of legal acts is necessary to safeguard human rights, it is not yet well understood in practice by some states that outcomes of adopted legislation and policies may equally result in violation of international law.

The purpose of the present research is to analyze compatibility of *practical outcomes* of Estonian legislation and policies resulting in ethnic differences on the labour market with *international and European standards on equality and non-discrimination on the basis of ethnic origin and language*.

The issue of discrimination in employment based on ethnic origin and language in the Estonian context has a practical meaning. The existence of discrimination as such and the understanding of what constitutes prohibited discrimination are highly controversial topics in Estonian society, politics, and law. National academic legal writings on the issue of discrimination on the basis of ethnic origin and language in employment are lacking and socio-economic inquiries are very limited.

Thus, analysis of the issue of discrimination on the basis of ethnic origin and language in the Estonian labour market required, first of all, collection of statistical data and research on ethnic differences on the labour market. Statistical data, economic and social research studies on ethnic differences as well as national employment policy choices were analyzed by the author within the framework the International Policy Fellowship at the Center for Policy Studies of the Open Society Institute in Budapest. The main findings of the first phase of research, on which the present inquiry is based, may be summarized as follows.¹

First, the Estonian labour force is ethnically diverse, with a large proportion (34%) of ethnic minorities. Ethnic minorities are not concentrated in only one region, but live all around the country.

Second, the *educational attainment* of the economically active population does not vary considerably across ethnic groups. 27,4% of Estonians and 27,9% of the Russian ethnic minority have general secondary education. Higher education

¹ T. Evas, *Influence of Ethnicity on Labour Market Opportunities in Estonia*, International Policy Fellowship 2003-2004, available at www.policy.hu/evas (last accessed on 2 October 2004). The statistical data is based on C. Kroncke and K. Smith “The wage effects of ethnicity in Estonia” (1999) *The Economics of Transition Vol.7 (1)*; M. Hazans and R. Eamets “Determinants of Earning in Estonia, Latvia and Lithuania” (2003) in *Labour Market and Social Policies in the Baltic Countries*, OECD; M. Pavelson and M. Luuk “*Non-Estonians on the Labour Market*”, Tartu University Press, 2002. The Estonian Labour Force Surveys of the Statistical Office of Estonia, The Population Census 2002 and Integration Monitoring Reports 2000 and 2002 of the Integration Foundation.

is obtained by 19,33% of Estonians and 18,02% of people belonging to ethnic minorities.

Third, the level of *unemployment* on average is significantly higher among ethnic minorities. The average unemployment rate among ethnic minorities is 14.9% as compared to 7.9% for ethnic Estonians. Unemployment differences are especially striking among some groups, for example, minority women. The unemployment rate of ethnic Estonian women with higher education is 2,15%. The same indicator for ethnic Russian women is 10,79%.

In terms of *occupational distribution*, ethnic minorities are strongly underrepresented - less than 4% among senior governmental officials, the judiciary, and legislators. Less than 10% of those working in research and development, advertising, public relations, as well as departmental managers, sociologists, anthropologists and related professionals, public service administrative professionals, college, university and higher education teaching professionals, social work professionals, legal and related business associate professionals are not native speakers of Estonian.

The most alarming tendency identified during the first phase of the research is that, in spite of overall improvement on the Estonian labour market in terms of unemployment and remuneration levels, ethnic differences are steadily growing. Thus, if in 1997 ethnic point differences in the unemployment rate of ethnic groups amounted to 5.4% then by 2002 this difference had reached 7%. The 'unjustified ethnic wage gap' follows the same tendency. According to a recent OECD study, the ethnic wage gap in Estonia from 1994 increased by 4 percentage points and in 2001 reached 18%.

Consequently, the first phase of research identified the urgency and the scope of problems leading to discrimination as well as reluctance of national authorities to take steps to remedy the existing situation. The statistical data also called under question the effectiveness of the national legal system in addressing the issue of ethnic inequalities on the labour market as well as compatibility of the existing situation with international and European law.

Thus, building conceptually upon the findings of statistical inequalities as identified during the first phase, the present academic inquiry provides for an answer based on international and European law on the compatibility of the existing situation with obligations undertaken by the Estonian state at the international and European Community level. Therefore, the challenge of the present research is an examination of practical outcomes existing on the Estonian labour market against International and European legal standards on discrimination and equality. The research aims to identify the legal standards available at international and EU levels in relation to discrimination on the basis of ethnic origin and language in employment, and to conclude whether the existing situation in Estonia complies with standards identified.

The present research is organized according to the following structure. Following the Introduction, Chapter II provides an analysis of International (United Nations) and European (Council of Europe) standards in relation to

protection from discrimination on the basis of language and ethnic origin in employment. The analysis is built on country-specific recommendations by monitoring bodies on Estonia, general comments, and jurisprudence of relevant international organs as well as commentaries of legal scholars.

The second stage of analysis (Chapter III) then addresses the scope of protection from discrimination on the basis of ethnic origin and language in employment at the level of the EU. More specifically, Chapter III addresses in detail the compatibility of recent amendments to the Employment Contracts Act with minimum requirements of protection from discrimination as provided in the European Community Race Directive. Following analysis of the Race Directive, Chapter III discusses the role of the European Employment Strategy and the European Social Fund in promoting change on the Estonian labour market. The research concludes with a clear statement on compatibility of the situation existing on the Estonian labour market with international and EU standards on equality and non-discrimination on the basis of ethnic origin and language.

II. International obligations

As early as in 1935, the Permanent Court of International Justice, in its advisory opinion *Minority Schools in Albania*, distinguished between equality in law, which it interpreted as formal equality or non-discrimination, and equality in fact (or substantive equality).² The subsequently-adopted international conventions, as discussed below, adopt the similar approach to the principle of equality by protecting both formal and substantive equality.³

The present chapter provides an overview of international instruments addressing the issue of discrimination based on race, ethnic origin, and language on the labour market. The discussion is based on a review of comments, general recommendations and jurisprudence of international monitoring bodies. The chapter begins with analysis of universal instruments - the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and the International Labour Organisation Discrimination (Employment and Occupation) Convention. Next, relevant Council of Europe instruments are analysed. These include the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Social Charter, The European Commission against Racism and Intolerance and the Framework Convention for the Protection of National Minorities.

II.1. International Covenant on Economic, Social and Cultural Rights - violation of Articles 2, 6 and 7 of the Covenant?!

The fundamental international convention primarily addressing economic, social and cultural rights is the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴ The initial Estonian report to the Committee of the ICESCR was submitted in October 2001.⁵ In its concluding observations on the report, the Committee expressed concern that the “*unemployment rate for ethnic minorities* is ... well above the national average...”.⁶ Thus, the Committee considers that substantial differences in the unemployment rate between ethnic groups are problematic within the meaning of the Covenant. The ICESCR Committee’s attention to the differences in unemployment rate among ethnic

² *Minority Schools in Albania*, 1935 P.C.I.J. (ser. A-B) No.64 (Advisory Opinion).

³ The principle of equality is recognized in the United Nations Charter, 1945, Article 1(3), Article 13 (b) and 55 (c)), Universal Declaration of Human Rights 1948, Article 2 and in all comprehensive human rights conventions.

⁴ The International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3. The ICESCR prohibits discrimination, *inter alia*, on the basis of language and national or origin.

⁵ International Covenant on Economic, Social and Cultural Rights, Initial Periodic Country Report, E/1990/5/Add.51, examined on 19 November 2002.

⁶ Conclusions and recommendations of the Committee on Economic, Social and Cultural Rights, Estonia, U.N. Doc. E/C.12/1/Add.85 (2002), paragraph 12.

groups is in accordance with its jurisprudence on Article 6 of the Covenant. The Committee examining implementation of policies and measures aimed at securing work for all who are available to work pointed out that Article 6 covers both the right to enter into employment and the right not to be unjustly deprived of work.⁷

The national country report that Estonia submitted to the ICESCR Committee provides an overview of the legislative measures taken to prohibit discrimination, to guarantee rights to work, and favourable conditions of employment. The report provides, however, only limited statistical data on ethnic differences in the unemployment level.⁸ Additionally, the national report contains very limited information on practical measures taken by the state to make a reality of the principle of non-discrimination in relation to the right to work (Article 6 ICESCR) and favourable conditions of work (Article 7 ICESCR).⁹ Therefore, the national report is limited to statements on the legislation adopted.

According to General Comment 3 of the Committee and its jurisprudence, adoption of necessary legislation by a state in relation to non-discrimination, although essential, does not *per se* mean that the state fulfils obligations as to the rights guaranteed by the Covenant.¹⁰ General Comment 3 of the Committee provides States parties to the Covenant have “**obligations of conduct and obligations of result**”.¹¹ Consequently, adoption of necessary legislation by the state without additional state measures supporting achievement of rights protected by the Covenant may result in failure to meet the ‘obligation of result’.¹² Furthermore, in relation to the obligation of State parties, the Committee emphasises that “the adoption of legislative measures ... is by no means exhaustive ... Among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies ... administrative, financial, educational and social measures.”¹³

Therefore, if - in spite of adopted legislative measures - substantial statistical differences in the unemployment rate of ethnic groups on the Estonian labour market continue to exist, then it falls on the State to take additional measures, beyond the legislative, to remedy existing differences. Likewise, in practice the obligation to ensure equality in exercise of other rights protected by the Covenant extends beyond unemployment differences. As pointed out above,

⁷ United Nations Center for Human Rights, Human Rights Fact Sheet No. 16 (Rev.1), The Committee on Economic, Social and Cultural Rights, 1996.

⁸ Ethnically differentiated data are available (see, e.g., introduction) but this is not included in the report.

⁹ The ICESCR in relation to discrimination in employment based on language and national origin provides for realization of the following rights: the right not to be discriminated against in relation to the right to work (Art.2 & 6); the right not to be discriminated against in remuneration (equal pay for equal work) (Art. 2 & 7); the right not to be discriminated against in work-related promotion (Art. 2 & 7).

¹⁰ General Comment 3, Committee on Economic, Social and Cultural Rights, U.N. Doc. E/1991/23, annex III at 86 (1990), “The nature of States parties obligations”, Art. 2, par.1.

¹¹ See also *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, (1998) 20 Human Rights Quarterly 691, paragraph 7.

¹² *Supra* n.10, General Comment 3, paragraph 1.

¹³ *Supra* n.10, General Comment 3, paragraphs 4-7.

the statistical data (not included in the initial state report) indicate that - in addition to differences among ethnic groups in the unemployment rate - differences also exist, for example, in relation to remuneration and occupational distribution of work.

The ‘programmatic character’ of the ICESCR does not affect member state obligation ‘to guarantee’ that relevant rights of the Covenant are ‘exercised without discrimination’.¹⁴ The Committee specifically commenting on the general nature of state obligations arising under Article 2 paragraph 1 of the Covenant stated that the Covenant imposes at least two obligations of *immediate effect*: one of these is the obligation of a MS to guarantee exercise of the Covenant’s rights without discrimination. Additionally, the Maastricht Guidelines provide that “any discrimination on grounds of ... language, ..., national or social origin ... with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant.”¹⁵ Moreover, in relation to Article 2 paragraph 2, the United Nations Centre for Human Rights states that “this provision not only obliges Governments to desist from discriminatory behaviour and to alter laws and practices which allow discrimination, it also applies to the duty of States parties to prohibit private persons and bodies (third parties) from practising discrimination in any field of public life.”¹⁶ Consequently, although Covenant provides that ‘full realisation of the relevant rights may be achieved progressively’ it nevertheless imposes on a state ‘an obligation of immediate effect’ not to discriminate on the way of achieving rights guaranteed.

In conclusion, the ICESCR provides an obligation of immediate effect on member states not to discriminate based on language and national origin in relation to the right to work, remuneration, and work-related promotion.¹⁷ Rights guaranteed by the Covenant must be insured to all legally residing on the territory of the state. In achieving the guarantees provided by the Covenant, States have both an ‘obligation of conduct’ and an ‘obligation of result’. *Thus, in*

¹⁴ *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN doc. E/CN.4/1987/17, Annex. Para 22; General Comment 3, paragraph 1; General Comment 9, Committee on Economic, Social and Cultural Rights, U.N. Doc. E/C.12/1998/24 (1998)., paragraph 9; United Nations Center for Human Rights, Human Rights Fact Sheet No. 16 (Rev.1), The Committee on Economic, Social and Cultural Rights, 1996.

¹⁵ *Supra* n. 11, Maastricht Guidelines, paragraph 11.

¹⁶ *Supra* n. 14, Fact Sheet No.16.

¹⁷ The accessory character of Article 2 paragraph 2 (general principle of non-discrimination in relation to economic, social, and cultural rights) is under discussion in the Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights. The Commission requested a study on non-discrimination as enshrined in Article 2 paragraph 2 of the ICESCR, E/CN.4/Sub.2/2004/24, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-sixth Session. In relation to the requested study, a working paper was prepared by Professor Emmanuel Decaux. On the basis of the completed study, it is expected that the ICESCR Committee will adopt a general comment on Article 2 paragraph 2. Moreover the Committee is expected to adopt General Comment 17 on Article 6 (right to work). Discussions in the Committee on draft General Comment 17 indicate that the issue of discrimination is under discussion by the Committee. A number of the members of the Committee consider it particularly important to include comment on discrimination in general comments of the Committee on the right to work.

accordance with the Committee's comments and jurisprudence, Estonia violates its obligations under Articles 2, 6, and 7 ICESCR by taking no measures in addition to the adoption of legislation to combat ethnic differences on the labour market.

II.2. International Covenant on Civil and Political Rights - violation of Article 26 of the ICCPR?!

In addition to obligations arising from the ICESCR, the discriminatory effects of national laws are within the scope of protection provided by Article 26 of the International Covenant on Civil and Political Rights.¹⁸ The guarantees enshrined in Article 26 ICCPR derive from Article 7 of the Universal Declaration of Human Rights, which prohibits discrimination in law or in practice in any field regulated and protected by public authorities.¹⁹

The concluding observations by the Human Rights Committee (HRC) in relation to the second periodic report submitted by Estonia²⁰ discuss the labour market situation in Estonia in detail.²¹ The two main concerns expressed by the HRC include: the effect of a language requirement on the availability of linguistic minorities, and availability of national institutions dealing with individual complains in discrimination cases.

II.2.1. Equal protection of the law - effects of the legislation

In relation to the practical implementation of Estonian language proficiency requirements, the Committee expressed its concerns regarding the *effect of language requirements* on the “*availability of employment* to the Russian-speaking minority.”²² In this relation, the Committee invited the Estonian authorities “to ensure that legislation related to the use of languages does not lead to discrimination contrary to Article 26 of the Covenant”.²³ Thus, the HRC in its Comments on Estonia indicates that the effect of national legislation regulating Estonian language proficiency in employment may be contrary to Article 26 ICCPR.²⁴

¹⁸ See for example, Concluding Observations of the Human Rights Committee, Czech Republic, U.N. Doc. CCPR/CO/72/CZE (2001), para.9; Concluding Observations of the Human Rights Committee, Croatia, U.N. Doc. CCPR/CO/71/HRV (2001), para.19; Concluding Observations of the Human Rights Committee, Venezuela, U.N. Doc. CCPR/CO/71/VEN/Add.1 (2002)., para.23, Concluding Observations of the Human Rights Committee, Netherlands, U.N. Doc. CCPR/CO/72/NET/Add.1 (2003)., paras.14 and 23.

¹⁹ F. H. Zwaan-de Vries v. the Netherlands, Communication No. 182/1984 (9 April 1987), U.N. Doc. Supp. No. 40 (A/42/40) at 160 (1987), paragraph 12.3.

²⁰ International Covenant on Civil and Political Rights, Second Periodic Report, CCPR/C/EST/2002/2, examined on 20 March 2003. The initial periodic report, CCPR/C/81/Add.5, was examined on 23 October 1995, the third periodic report is due on 1 April 2007.

²¹ Concluding Observations of the Human Rights Committee, Estonia, U.N. Doc. CCPR/CO/77/EST (2003).

²² Ibid, paragraph 16.

²³ Ibid, paragraph 16.

²⁴ General Comment 18, Human Rights Committee, (1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at

It must be noted that the HRC in its Comment on Estonia refers to the “Russian-speaking minority”, thus underlying the linguistic basis of discrimination. Under Article 26 ICCPR, language is one of the explicitly provided prohibited grounds of discrimination. As pointed above, the ICESCR Committee was concerned with differences based on ethnicity, whereas the HRC defines the ground of discrimination in terms of language, i.e. referring to the linguistic minority.

HRC attention to the discriminatory effect of legislation is in accordance with the Committee’s jurisprudence.²⁵ General Comment 18 states that indirect discrimination occurs when the ‘effect’ of a law is to discriminate. Importantly, in order to establish a violation of Article 26, intent to discriminate is irrelevant.²⁶ Therefore, discriminatory effect of legislation unintended by the State could, nevertheless, amount to discrimination prohibited under Article 26 ICCPR.²⁷

Consequently, by means of Article 26, in the area of employment,²⁸ States parties have an obligation to:

- (1) adopt legislation that is non-discriminatory (negative obligation),
- (2) ensure that adopted legislation does not lead to substantive inequalities, and
- (3) ensure protection against arbitrary decisions by any public authority *inter alia*, based on language or national origin.

Thus, any public authority, including for example an official of the Language Inspectorate carrying out a language proficiency raid on a place of employment, or a Labour Dispute Committee official, is subject to the obligation stemming from Article 26 ICCPR.²⁹ Taking into consideration the three elements

26 (1994), Non-discrimination, paragraph 1. According to the jurisprudence of the Committee, the scope of protection provided by Article 26 covers three elements: first, a right to equality before the law; secondly, equal protection of the law; and thirdly, prohibition of any discrimination under the law and a guarantee to all persons of equal and effective protection against discrimination on any prohibited grounds.

²⁵ For discussion, see for example M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, N.P. Engel Publishers, Kehl am Rhein, 1993, p. 468.

²⁶ *Supra*, n. 24, General Comment 18; See also e.g. *S.W.M. Broeks v. The Netherlands*, Communication No. 172/1984, U.N. Doc. CCPR/C/OP2 at 196 (1990), paragraph 16; *Simunek, Hastings, Tuzilova and Prochazka v. The Czech Republic*, Communication No. 516/1992, U.N. Doc. CCPR/C/54/D/516/1992 (1995), paragraph 11.7.

²⁷ S. Joseph, J. Schultz, and M. Castan, *The International Covenant on Civil and Political Rights. Cases, Materials and Commentary*, 2nd ed., Oxford University Press, 2004, paragraphs 23.10 and 23.31.

²⁸ The scope of the principles of equality and non-discrimination as protected by Article 26 ICCPR is not limited to rights covered by the substantive provisions of the ICCPR. See, for example, *supra* n. 19 *Zwaan-de Vries*; *supra* n. 26 *Broeks*; *Ibrahima Gueye et al. v. France*, Communication No. 196/1983 (3 April 1989), U.N. Doc. Supp. No. 40 (A/44/40) at 189 (1989); *L. G. Danning v. the Netherlands*, Communication No. 180/1984 (9 April 1987), U.N. Doc. Supp. No. 40 (A/42/40) at 151 (1987); *Aapo Järvinen v. Finland*, Communication No. 295/1988, U.N. Doc. CCPR/C/39/D/295/1988 (1990); *Lindgren et al. v. Sweden*, Communications Nos. 298/1988 and 299/1988 (9 November 1990), U.N. Doc. Supp. No. 40 (A/46/40) at 253 (1991). In *Zwaan-De Vries*, paragraph 12.1. the HRC stated that “the provision of Article 2 of the ICESCR does not detract from the full application of Article 26 of the ICCPR.”

²⁹ The principle of ‘equality before the law’ relates to the enforcement of state measures. This principle requires judges and administrative officials to enforce laws in a non-arbitrary manner. Arbitrary conduct includes both different treatment of similarly situated individuals under equal

of Article 26 as well as comments by the HRC on the effects of legislation related to the use of languages in Estonia, the institutional arrangement of the Estonian language supervision system deserves special attention.

The issue of language is of particular significance in Estonia. The Estonian language is considered to be an essential part of the Estonian national identity, thus deserving the highest degree of promotion and protection.³⁰ Both the Constitution of the Estonian Republic as well as numerous legal acts provide a solid basis for normative protection of the Estonian language.³¹ Therefore, the Comment by the Committee in relation to the possible discriminatory effect of legal norms regulating linguistic requirements is noticeable.

Official Estonian language policy is based on Article 6 of the Constitution. This provision stipulates that “the state language of Estonia shall be the Estonian Language”.³² The subsequently adopted Language Act regulates the requirements for proficiency in the Estonian language and use of the Estonian and foreign languages in the public and private spheres.³³ In order to supervise the implementation of requirements stemming from the Language Act, two administrative agencies - the Language Inspectorate³⁴ and the State Examination and Qualification Center (EQC)³⁵ - are established under direct supervision of the

fact patterns, as well as equal treatment of differently situated individuals. Importantly, Article 26 provides for protection against arbitrary decisions not only by courts, but also by any public authority, thus opening far-reaching possibilities for application. See e.g. C. Edelenbos, “*International Human Rights Monitoring Mechanisms, Article 26, the Human Rights Committee’s Views and Decisions: the way of the future?*,” in G. Alfredsson et al. (eds.), p. 123-127, Kluwer Law International, 2001.

³⁰ Fears for the use and survival of the Estonian language are justified by the following: the relatively small number of native speakers, the consequences of the historical past, globalization, and the immediate neighbourhood of a substantial geographic region where the Russian language plays the major role.

³¹ Constitution of the Estonian Republic, RT 1992, 26, 349, Article 6; Language Act, RT I 1995, 23, 334.

³² Ibid, Constitution, Article 6.

³³ Supra, n. 31, Language Act, Article 2 (1). The Law, *inter alia*, requires a particular level of proficiency in the Estonian language for certain types of employment. For further discussion see, e.g. supra n. 1, T.Evas.

³⁴ The primary task of the Language Inspectorate is to ensure that the Language Act and other legal acts regulating the use of the Estonian language are observed. The functions and organization of the Inspectorate are regulated by Statutes, RTL 2002, 68, 1971. The Statutes are approved by decree of the Minister of Education. The Statutes provide an extensive list of tasks (all together 23 tasks) that the Language Inspectorate has to fulfil. These include, e.g.: monitoring adherence to the requirements of Estonian language use prescribed by law in state institutions, in local municipalities and institutions of a public law character, notaries, the offices of law enforcement officers and sworn translators, commercial entities, non-profit associations and foundations as well as public law legal persons and sole proprietors; monitoring employer observance of the obligation to ensure that public servants as well as other employees have attained a certain proficiency in the Estonian language as required by law. Thus, the Language Inspectorate has authority to monitor proficiency in the Estonian language in both the public and private spheres by conducting inspections of the employees of the organizations and entities mentioned above. The Language Inspectorate may issue warnings or written orders for non-observance of the Language Act. Depending on the supervisory actions and the extent of non-observance, the Inspectorate may also impose fines based on legal acts establishing Administrative and Misdemeanour Procedures. For additional information, see The Brief History of the Language Inspectorate, <http://www.keeleinsp.ee/index.php3?lng=1>

³⁵ The tasks of the EQC are regulated by Statute, State Examination and Qualification Center Regulation (Riikliku Eksami- ja Kvalifikatsioonikeskuse põhimäärus), RTL 2003, 28, 411. Among the tasks of the EQC is a duty to ensure implementation of an effective system of Estonian language

Ministry of Education and Science. The institutional arrangement of the Estonian language supervision system, where these two administrative agencies share overall competence, is not without controversy.

The essence of the controversy between the authority of the two institutions lies in the fact that on the one hand the EQC has the right to grant a certificate to an individual in return for successful fulfilment of the state-established language exam.³⁶ This certificate is necessary for an employee to obtain employment in the public or private sphere regulated by law.³⁷ At the same time, the holder of a valid certificate obtained from the state EQC is subject to continuous linguistic inspections by the Language Inspectorate.

The Language Inspectorate has authority to monitor “actual knowledge” of the Estonian language by the employee and - if it finds that the employee does not have a proficiency level prescribed by law - may issue a warrant or fine to the employer.³⁸ Consequently, the employee may end up in a situation where one state agency ascertains by certificate the language proficiency level, whereas another agency subsequently finds that the Estonian language knowledge of the employee is not sufficient.

Consequently the main question to determine the respective competencies of the EQC and Language Inspectorate is whether obtaining a language certificate in accordance with the procedure established by law serves as an effective guarantee that this employee satisfies the conditions established by law. In other words, does an individual who holds a position, which under the law requires an intermediate level of proficiency in the Estonian language, automatically fulfil the legal requirement by obtaining the appropriate language certificate from EQC? And is the authority of the Language Inspectorate in this case limited to mere assurance of the existence of such certificate?

The jurisprudence of the Estonian courts suggests that possession of a language certificate in itself does not ‘protect’ an employee from inspections assessing linguistic abilities of the individual by the Language Inspectorate.³⁹ The Inspectorate has authority to monitor the ‘actual linguistic ability’ of the employee. The language inspector may issue a warrant to the employer if as a result of linguistic inspection of the employee the inspector finds that the level of the certificate does not in fact correspond to the actual knowledge of the

proficiency, determination and administration of Estonian language proficiency exams. Therefore, the EQC, *inter alia*, organizes and supervises Estonian language exams and issues certificates for individuals successfully fulfilling the requirements established by law.

³⁶ The State Examination and Qualification Committee consists of philologists with higher education. The examination committee must consist of at least two individuals.

³⁷ The categories of individuals in the public and in private spheres that are required to obtain a language proficiency certificate are provided under Article 5 of the Language Act. The requirements for proficiency in the Estonian language do not apply to persons who work in Estonia temporarily as foreign experts or foreign specialists. Likewise, persons who have acquired basic, secondary, vocational secondary or higher education in Estonian are not required to take an Estonian language proficiency examination.

³⁸ *Supra*, n. 31, Article 26⁴ “Failure by an employer to apply the requirements for language proficiency in respect of an employee and violation of the requirements for language proficiency by a public servant or employee is punishable by a fine of up to 200 fine units.”

³⁹ Supreme Court of Estonia, Decision of 7 March 2003, Case 3-1-20-03 (Brezgunova), paragraph 15.

employee. The employer in turn has the right to dismiss an employee for not fulfilling requirements established by law.

In other words, the employee must complete the examination procedure established by law and obtain from the EQC a certificate of the level necessary for the position. On the other hand, the EQC certificate in itself does not guarantee that this particular employee will not be dismissed by the employer if the Language Inspectorate finds that the actual knowledge of the employee does not correspond to the level stipulated by law.⁴⁰ Indeed, determining the linguistic abilities of employees is subject to two authorities, which may come to different conclusions.⁴¹

In court cases in Estonia, issues related to the possibly disproportionate burden of language proficiency have usually been set aside as breaching the fundamental aim of protecting the Estonian language as required by the Constitution.⁴² Notably, in assessing proportionality, the head of the Language Inspectorate stated that “We have a right and obligation to protect our language. With this our Constitution must be above the interests of the EU as well as other countries and international organizations.”⁴³

The Language Inspectorate exercises the given public authority to supervise fulfilment of language policy, and indeed does so very actively.⁴⁴ The

⁴⁰ Ibid, paragraph 15. The Supreme Court stated that possession of a language certificate is formal proof of the linguistic competences on one of the level provided in the Language Act. The Court however found that “the possession of the language certificate ... does not exclude the dismissal from employment due to insufficient language knowledge.”

⁴¹ The Brezgunova case raised many important issues in relation to linguistic requirements. One of the issues, *inter alia*, addressed by the Court, is whether the Language Act may impose linguistic proficiency requirements on whole groups of employees, for example higher officials/middle officials and entrance level officials. The Court found that there might be a need to consider not only formal classification of the position held (i.e. belong to a higher officials’ group) but also to consider the actual tasks duties fulfilled by an individual. In the light of those considerations in the case of Nelli Brezgunova the Supreme Court sent the case back for reconsideration to the Administrative Court.

⁴² For example, in Supreme Court of Estonia, Decision of 5 February 1998, Case 3-4-1-1-98, the Constitutional Review Chamber of the Supreme Court of Estonia stated that, “Protection and use of the Estonian language is established as a constitutional aim and the state authorities must ensure the achievement of this aim. With this, taking the steps supporting the use of Estonian language is constitutionally justified”. Thus the Constitutional Review Chamber made any argument contesting the proportionality and requirements of the “double security” of the Estonian language requirement in relation to the “constitutional aim” very difficult. This statement was re-emphasized in the Brezgunova Case. However, in Brezgunova for the first time the Court took an additional step and evaluated whether the linguistic requirements imposed are necessary for fulfilment of particular tasks an employee has.

⁴³ I. Tomusk, About Estonian language policy yesterday, today and tomorrow, speech on 14.03.2003 at the conference of the mother tongue held in Tartu University Library Conference Room. Available at www.keeleinsp.ee/index.php3?lng=0&s=menu&ss=content&news=141&id=34 (last accessed on 12 September 2004).

⁴⁴ The findings of supervisory ‘raids’ may be found on the web page of the Language Inspectorate available at www.keeleinsp.ee/index.php3?lng=0&s=menu&ss=content&news=220&id=31 (last accessed on 12 September 2004). On average, the language inspectorate inspects 25-30 organizations per week. For example, between March 8 to 12 of 2004 the Inspectorate monitored fulfilment of requirements of the Language Act in 34 agencies and organizations. All together, 72 acts have been issued, 59 in the public and 13 in the private sector. On the ground of insufficient language knowledge, employment relations have been terminated with 9 individuals (3 employees working in the service area, 5 guards and 1 nurse). In the first half of 2003, the Inspectorate made 1165 administrative acts as supervisory controls of employees in the public and private sectors.

case law suggests that a warning by the Inspectorate is not compulsory, but rather a recommendation. But an employer can expect further inspections and therefore may be tempted to dismiss an employee based on the evaluation of the Language Inspectorate.

One possible solution to the problem of overlapping competencies between the Language Inspectorate and the EQC is to limit the authority of the Language Inspectorate in relation to inspections of non-native Estonian speakers to mere monitoring the existence of a language certificate. If a person does not have a language certificate as required by law, then the Language Inspectorate should instruct the employee to obtain a certificate from the EQC. Alternatively, the certification system by the EQC should be abolished and the Language Inspectorate given full authority to determine the linguistic abilities of employees as required by law.

The discussion above indicates a strong need for a more definite borderline between the authority of the EQC and the Language Inspectorate. The existing practice when the linguistic abilities of the employee are assessed by two governmental agencies goes beyond what is necessary and contributes to frustration among employees. Moreover, the lack of legal certainty, accompanying the existing system of language requirement supervision, may lead to the discriminatory effect of the Language Act (and implementing acts), which may be contrary to Article 26 ICCPR.⁴⁵

Taking into consideration the discussion above, the protection provided by Article 26 does not, however, entail that every difference is discriminatory.⁴⁶ The test adopted by the HRC to evaluate whether differences in treatment amount to *prohibited* discrimination includes three elements: first, reasonableness; secondly, objectivity of the differentiation in treatment; and finally, the pursuance of an aim which is legitimate under the Covenant. Consequently, in the opinion of the Committee a difference in treatment that is reasonable, objective and adopted with a legitimate aim is not discrimination covered by the ICCPR.⁴⁷ Instructively, the case of *Vos v. Netherlands* shows that it is not always possible

Among the 1165 administrative acts, 923 were related to non-observance of the Language Act. During the same period, 43 misdemeanour procedures were initiated.

⁴⁵ Although statistical data and academic studies related to the topic are almost non-existent, the present situation with assessment of the linguistic abilities of employees leads to the reality when employers are unwilling to be subject to constant inspections by the Language Inspectorate, and hence prefer to fill vacant positions with native Estonian speakers.

⁴⁶ General Comment 18 (supra n. 24) as well as jurisprudence of the HRC in relation to Article 26 indicates that there are limits to what the Committee is willing to consider prohibited discrimination. General Comment 18, in paragraph 13 provides that a difference in treatment does not amount to discrimination "if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant".

⁴⁷ The 'three elements' line of inquiry is followed by the Committee in its jurisprudence under Article 26, see e.g. Hendrika S. Vos v. Netherlands, Communication No. 218/1986, U.N. Doc. Supp. No. 40 (A/44/40) at 232 (1989), paragraph 9; Rawle Kennedy v. Trinidad and Tobago, Communication No. 845, U.N. Doc. CCPR/C/67/D/845/1999 (31 December 1999), paragraph 11.3.; Ameeruddy-Cziffra et.al. v Mauritius, Communication No. 35/1978, UN Doc. A/36/40 (1981), paragraph 9.2; Josef Frank Adam v. The Czech Republic, Communication No. 586/1994, U.N. Doc. CCPR/C/57/D/586/1994 (1996), paragraphs 2.1, 2.2., 3, 9.1, 9.2, 12.5., 12.6; supra n. 28, Gueye, paragraphs 9.2-9.5.

clearly to determine whether the national rule is based on objective and reasonable criteria.⁴⁸ In practice, the HRC proceeds on a case-by-case basis in order to determine the ‘reasonableness and objectivity’ of a national measure.⁴⁹ The point of importance, however, is that the test applied by the HRC in order to determine the ‘status’ of the differentiated treatment is the one developed by the Committee. Thus, the test of objectivity, reasonableness and legitimate aim adopted by the State is not necessarily the same as will be adopted by the Committee.

Additionally, the jurisprudence of the HRC suggests that discrimination in employment in the private sector on grounds prohibited by the Covenant including race, language, and national origin falls within the scope of protection provided by Article 26.⁵⁰ In *Nahlik v. Australia*, the Committee stated that “the State party is under an obligation to ensure that all individuals within its territory and subject to its jurisdiction are free from discrimination, and consequently the courts of State parties are under an obligation to protect individuals against discrimination, whether this occurs within the public sphere or among private parties in the quasi-public sector of, for example, employment”.⁵¹ Therefore, it is a violation of Article 26 by the State if, due to requirements imposed by the Language Act, private employers become involved in discriminatory practice by not hiring linguistic minorities for positions.

II.2.2. Availability of national institutions

The second comment by the HRC in relation to the Estonian labour market concerns availability of national institutions with authority to review individual complaints in employment matters. The HRC “regrets the lack of detailed information about the actual results of the activities of the Legal Chancellor and other bodies, such as the Labour Inspectorate, in relation to their competence to receive and deal with individual complaints.”⁵² In this relation, Estonia is invited

⁴⁸ Ibid, Hendrika S. Vos. The majority of the Committee in its conclusion found that the national rule under investigation is based on objective and reasonable criteria and applied uniformly. Consequently, the rule does not contribute to discrimination within the meaning of Article 26 ICCPR. The two members of the Committee submitting individual opinions disagreed and came to the opposite conclusion. Messrs. Urbina and Wennergren found that differentiation provided under national law is not based on reasonable and objective criteria, therefore constitutes prohibited discrimination within the meaning of Article 26.

⁴⁹ Despite the overreaching scope of application of Article 26 as well as the broad definition of discrimination adopted by the Committee, the Committee in practice is reluctant to find discrimination where the state’s actions involve economic issues or where removing differential treatment has significant cost implications. See e.g. individual opinion submitted by Committee members Kurt Herndl, Rein Müllerson, Birame N’Diaye and Waleed Sadi in *Oulajin & Kaiss v. The Netherlands*, Communications Nos. 406/1990 and 426/1990, U.N. Doc. CCPR/C/46/D/406/1990 and 426/1990 (1992). An individual opinion by Ando in *Adam*, supra n. 47, urges the Committee to “exercise the utmost caution in dealing with questions of discrimination in the economic field”.

⁵⁰ See e.g., *Franz Nahlik v. Austria*, Communication No. 608/1995, U.N. Doc. CCPR/C/57/D/608/1995 (1996); *F.G.G. v. The Netherlands*, Communication No. 209/1986, U.N. Doc. CCPR/C/OP/1 at 68 (1984); *B. d. B. et al. v. The Netherlands*, Communication No. 273/1988, U.N. Doc. CCPR/C/35/D/273/1988 (1989).

⁵¹ Ibid, *Nahlik*, paragraph 8.2.

⁵² *Supra*, n. 21, Concluding Observations, paragraph 18.

to provide “detailed information on the number, nature and outcome, as well as concrete examples, of individual cases submitted to the Office of the Legal Chancellor and other bodies empowered to deal with individual complaints.”⁵³

The comment by the Committee on the activities of national agencies competent to deal with individual complaints is based on the obligation of “equal and effective protection against discrimination” stipulated in Article 26. This obligation requires that states insure the existence and effective functioning of institutions competent to deal with discrimination issues. Thus, institutions must be not only established under the law, but function effectively in fact, treat all individuals equally, and provide remedies to the victims of alleged discrimination.

In conclusion, the review of Comments on Estonia as well as jurisprudence of the Human Rights Committee indicate that linguistic requirements provided under Estonian national law that lead to discriminatory effect in availability of employment to the Russian-speaking minority is a violation of Article 26 ICCPR unless those requirements may be justified on the basis of the objectivity/reasonableness/legitimate aim test developed by the Committee. Moreover, the current system of Estonian language supervision system where two administrative agencies determine proficiency in the language may be contrary to Article 26. In addition, ineffective functioning of national institutions dealing with issues of discrimination may also lead to violation of Article 26 ICCPR.

II.3. International Convention on the Elimination of All Forms of Racial Discrimination - violation of Article 5?!

Another United Nations treaty specifically adopted to target racial discrimination is the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The Convention addresses in detail the scope of non-discrimination obligations in the area of race.⁵⁴ The jurisprudence of ICERD and ICCPR indicate that both Committees heavily influence each other.⁵⁵

During review of the last periodic report by Estonia in relation to Article 5⁵⁶ ICERD, the Committee on the Elimination of Racial Discrimination expressed a number of concerns in relation to the situation of ethnic minorities in Estonia.

⁵³ Id, Concluding Observations.

⁵⁴ Racial discrimination, as provided in Article 1 ICERD and interpreted by the Committee on the Elimination of Racial Discrimination, should be understood broadly as including any distinction which has the purpose or effect of impairing the enjoyment of human rights.

⁵⁵ “Indeed, it is arguable that the ICCPR obligations essentially subsume those of the ICERD ... and go substantially further by prohibiting discrimination on more grounds.” S. Joseph, J. Schultz and M. Castan, *The International Covenant on Civil and Political Rights. Cases, Materials and Commentary*, 2nd ed., Oxford University Press, 2004.

⁵⁶ Among the economic rights protected by Article 5 (e) (i) ICERD is the right to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration. The ICERD does not in itself though Article 5 creates the guarantee of the above-mentioned rights. Article 5 of the ICERD requires a guarantee that the exercise of rights elaborated in Article 5 shall be free from racial discrimination. Additionally, Article 5(a) provides a guarantee of equality before the law, in particular the right to equal treatment before tribunals and all other organs administering justice. The state's obligations under Article 6 are to provide effective protection and remedies against

First, the Committee expressed concerns regarding “the *scope of language requirements* in the Language Law in relation to employment, particularly in the private sector.”⁵⁷ Furthermore, the Committee pointed out that language requirements “could lead to discrimination against minorities in violation of article 5 of the Convention.”⁵⁸ Additionally, the Committee expressed the wish to “receive specific information explaining the relationship between language skills, ethnic background, and employment, as well as information on the wage levels of different ethnic groups.”⁵⁹

The Committee’s request for additional information is explained by lack of information on practical realization and current statistical data, *inter alia*, in relation to Article 5 included in the Fifth State Periodic report.⁶⁰ The national report submitted to the ICERD Committee, similarly to national reports submitted under other international treaties, provides an extensive overview of legal provisions guaranteeing protection from discrimination in the economic, social, and political spheres. The state report, however, fails to indicate how provisions prohibiting discrimination are applied in practice and what impact such provisions has on the situation on the labour market. Thus, the first comment by the Committee - similarly to the comment by the HRC - relates to the possible discriminatory effect of linguistic requirements and consequently addresses discrimination based on language.

Second, in the following paragraph, the Committee expressed continuous concern by “the *situation of the Russian minority* residing in Estonia, *inter alia*, in relation to issues under Article 5 of the Convention, especially economic,... rights, including *the right to employment*”.⁶¹ Consequently, the emphasis of this observation of the Committee is on ethnic origin, i.e., the Russian minority. Thus, the ICERD Committee’s comments acknowledge and distinguish that discrimination on the basis of both language and ethnic origin may take place on the Estonian labour market, contrary to Article 5 of the Convention.

Third, in addition to the Committee’s concerns expressed in relation to Article 5, it also stressed that “the *limited access to remedies* hinders the bringing of complaints of discrimination in relation to, *inter alia*, the labour market ...”.⁶² Further, the Committee recommends the establishment of an equality council, “as a human rights institution with the mandate to advise and to monitor relevant legislation and practice and with competence to deal with

acts of racial discrimination, as well as to provide a right to just and adequate reparation or satisfaction for any damage suffered as a result of discrimination.

⁵⁷ Concluding Observations of the Committee on the Elimination of Racial Discrimination, A/57/18 (2002), paragraphs 356 - 357. Emphasis added.

⁵⁸ Ibid, Concluding Observations, paragraph 356.

⁵⁹ Id.

⁶⁰ International Convention on the Elimination of All Forms of Racial Discrimination, The fifth periodic report CERD/C/373/Add.2., examined on 16 August 2002.

⁶¹ Supra, n. 57, paragraph 357. Emphasis added.

⁶² Supra, n. 57, paragraph 358.

individual complaints against acts of discrimination in the public or private sector.”⁶³

Thus, similarly to the HRC, the ICERD Committee is also concerned with the existence of national institutions providing remedies to the victims of discrimination as well as remedies provided by those institutions. The ICERD Committee additionally calls for the establishment of an equality council.⁶⁴

Following debates in the Parliament, an equality council was not established in Estonia but rather the mandate of the *Chancellor of Justice/Ombudsman* was extended to cover individual complaints against acts of discrimination in the private sphere. As a result of rapid legislative reforms, three main national agencies may currently address and provide remedies in cases of alleged discrimination. These are the Chancellor of Justice, the Labour Inspectorate Labour Disputes Committees, and courts. Labour Disputes Committees and the Chancellor of Justice are extra-judicial institutions that provide out of court settlements. Administrative, civil and criminal courts provide for a judicial settlement of issues.

The authority of the Chancellor of Justice as provided in the Constitution⁶⁵ has been significantly broadened by the Chancellor of Justice Act. As of 1 June 1999, in addition to the primary function of constitutional review, the Legal Chancellor has been empowered by the Parliament to fulfil the functions of an ombudsman. Therefore, from 1 June 1999 “Everyone has a right of recourse to the Chancellor of Justice to review the conformity of an Act or other legislation of general application with the Constitution or the law.”⁶⁶ Thus, private individuals received a legal opportunity to turn to the ombudsman if an action of a state institution has violated their constitutional rights and freedoms.⁶⁷

With the most recent amendments to the Chancellor of Justice Act, which entered into force on 1 January 2004, the Chancellor of Justice has authority to resolve “discrimination disputes which arise between persons in private law on the basis of the Constitution and other Acts.”⁶⁸ Therefore, the Chancellor is

⁶³ Id.

⁶⁴ Establishment of the Equality Council is also a requirement of the EU Race Directive

⁶⁵ Supra, n. 31, Constitution, Chapter XII. Article 139 of the Constitution provides for three main duties of the Chancellor: first, to supervise the accordance with the Constitution and legislation of legal acts issued by the state legislature and executive, as well as by local government bodies; second, to analyze proposals received for amending legislation and adopting new laws, as well as for the work of government institutions, and, if necessary, to present a report to the Parliament; third, to propose to the Parliament to bring criminal charges against a member of the Parliament, the President of the Republic, a member of the Government of the Republic, the Auditor-General, the Chairman of the National Court, or a member of the National Court.

⁶⁶ Chancellor of Justice Act, RT I 1999, 29, 406, Article 15.

⁶⁷ Prior to amendments to the Chancellor of Justice Act that entered into force on 1 January 2004, the law applied a narrow and formalistic approach to the definition of ‘state institution’. With the entry into force of new amendments, the following fall within the scope of Chancellor jurisdiction: state agency, local government agency or body, legal person in public law, natural person or legal persons in private law performing public duties.

⁶⁸ Supra, n. 66, Chancellor of Justice Act, Article 1 subsection 5. A non-exhaustive list of grounds of discrimination prohibited by law is provided in Article 19 paragraph 2 of the Chancellor of Justice Act. Grounds of discrimination as provided by Article 19 are comparable to Article 12 of the Constitution. Thus, the grounds of discrimination prohibited by law include nationality (ethnic origin) and language.

authorised to review discrimination disputes between state entities and private individuals as well as to resolve discrimination disputes between persons in private law.

The most recent amendments not only significantly broadened the authority of the Chancellor of Justice but also introduced a conciliation procedure for resolution of discrimination disputes.⁶⁹ The essence of conciliation proceedings is to initiate a dialogue between the parties to the dispute. The role of the Chancellor is of a mediator who tries to lead the parties to an agreement that would be acceptable to them and in accordance with the law.⁷⁰

Conciliation proceedings culminate with a formal proposal from the Chancellor to the parties concerned to resolve the dispute and enter into an agreement.⁷¹ In the proposal, the Chancellor states a substantiated opinion on the discrimination allegations. Additionally, the Chancellor may suggest that the respondent perform appropriate acts, pay compensation, and restore the petitioner's rights. Moreover, the Chancellor "may propose to the respondent to compensate reasonable expenses which the petitioner has borne or will bear for the services of specialists, interpreters, translators or witnesses."⁷²

After the Chancellor approves an agreement, i.e. both parties have consented to the proposal, performance is mandatory for the parties.⁷³ If an agreement is not performed within 30 days, then the petitioner or responded may submit an agreement to a bailiff for enforcement in accordance with the procedure established by the Code of Enforcement Procedure.

Importantly, the Chancellor's authority in the area of discrimination is not limited by the conciliation proceedings. In addition to the authority to settle discrimination disputes through conciliation, the Chancellor as of 1 January 2004 has a positive obligation to promote application of principles of equality and equal treatment. Article 3516 provides a list of duties that the Chancellor of

⁶⁹ Supra, n.66, Chancellor of Justice Act, Article 35⁵ paragraph 2. A petition in an alleged case of discrimination may concern any activities of natural persons or legal persons in private law. Issues within the competence of the Chancellor are very broad. The law limits the competence of the Chancellor to conduct conciliation proceedings only in three instances. First, if issues concern discrimination in relation to professing and practising faith or working as a minister of religion in religious associations with registered articles of association; second, relations in family or private life; third, performing right of succession.

⁷⁰ Supra, n.66, Chancellor of Justice Act, Article 35¹⁵. The agreement may be contested in a court only if the Chancellor of Justice has materially violated a provision of the conciliation procedure and such violation affects or may affect the content of the agreement. An action may be filed with an administrative court for establishment of the Chancellor of Justice's material violation of a provision of the conciliation procedure within thirty days after the date on which approval of an agreement is communicated. If a court establishes material violation by the Chancellor of Justice of a provision of the conciliation procedure that affects or may affect the content of the agreement, then the agreement approved by the Chancellor of Justice shall be deemed to be null and void and the person has the right of recourse to the court for the protection of his or her rights within thirty days as of the entry into force of the court judgment.

⁷¹ Supra, n.66, Chancellor of Justice Act, Article 35¹².

⁷² Id.

⁷³ Supra, n.66, Chancellor of Justice Act, Article 35¹⁴.

Justice should perform in applying the principles of equality and equal treatment.⁷⁴

Unfortunately, regardless of the positive obligation to promote the principles of equality and equal treatment established in law, for example, the official Internet web page of the Chancellor of Justice lacks information devoted to discrimination issues. The Estonian language version of the web site only briefly mentions that one of the competences of the Chancellor of Justice is to conduct conciliation proceedings in discrimination cases. The Russian and English language versions lack even this limited information. Consequently, the legal duty of the Chancellor to, *inter alia*, ‘inform ... interested persons and the public on the application of the principle of equality and equal treatment’ for nine months at least had not found any visible realization.

Another national institution⁷⁵ with authority to address issues of discrimination and provide remedies in employment relations, is the **Labour Inspectorate**.⁷⁶ The authority of the Labour Inspectorate according to the Labour Inspectorate Regulation is limited to resolving individual labour disputes⁷⁷ pursuant to the procedure prescribed by law.⁷⁸ Thus, the subject matter jurisdiction of the Labour Dispute Committees (LDC) similarly to the Employment Contract Act⁷⁹ is limited to employment relationships that arise between ‘employer’ and ‘employee’.⁸⁰ Therefore, discrimination disputes in relation to access to occupation, self-employment or pre-employment relations fall outside the scope of the LDC’s authority. The time limit for submitting a claim to the Committee is between one month and four years, depending on the nature of the claim. The reversed burden of proof is not provided for under the procedure

⁷⁴ Supra, n.66, Chancellor of Justice Act, Article 35¹⁶. The duties include: analyse the effect of implementing legislation on the condition of members of society; inform the Riigikogu, the Government of the Republic, governmental agencies, local government agencies and bodies, other interested persons and the public of application of the principles of equality and equal treatment; make proposals to the Riigikogu for amending legislation, the Government of the Republic, governmental agencies, local government agencies, local government bodies and employers; promote, development of national and international co-operation between individuals, legal persons and agencies in the interests of adherence to the principles of equality and equal treatment; promote the principles of equality and equal treatment in co-operation with other persons.

⁷⁵ Individual Labour Dispute Resolution Act, RT1 I 1996, 3, 57, Article 4. Individual dispute resolution bodies are labour dispute committees and courts.

⁷⁶ Labour Inspectorate Regulation, RTL 2003, 45, 663, Article 9 subsection 10. The Labour Inspectorate is a governmental agency under supervision of the Ministry of Social Affairs

⁷⁷ Supra, n. 75, Individual Labour Market Dispute Resolution Act, Article 1. A labour dispute includes a disagreement between one or several employees and an employer which arises in the application of an Act, administrative legislation, or rules established by an employer regulating employment relations in the performance of a collective agreement or employment contract which the parties are not able to resolve by agreement

⁷⁸ Supra, n.75, Individual Labour Market Dispute Resolution Act (ILDR). The ILDR provides that the Labour Inspectorate exercises its authority to resolve individual labour disputes through Individual Labour Disputes Committees. The Committees are structurally a part of the local branches of the Labour Inspectorate.

⁷⁹ See discussion under the EU Race Directive.

⁸⁰ Supra, n. 75, Individual Labour Market Dispute Resolution Act, Article 1. Thus, for example a dispute involving a person discriminated against in access to employment or in access to occupation is outside the legal scope of the ILDR. Therefore the *ratione personae* scope of the ILDR is limited to disputes between employers and employees.

established by the Individual Labour Dispute Resolution Act.⁸¹ However, the claimant may, through application of Article 5 of the ILDR, request to shift the burden of proof in a discrimination case to the respondent.⁸² The decision of the LDC is supported by strong enforcement guarantees including compensation for delayed fulfilment of the decision.⁸³

In addition to extra-judicial institutions providing for settlement of disputes involving discrimination in employment, the *courts* provide for judicial resolution of disputes. Therefore, courts are judicial avenues for settlement of disagreements, including in the employment area. The resolution of a dispute in employment relations between two private parties would fall under the jurisdiction of the Civil courts. The resolution of a dispute between a state institution and private party would be under the jurisdiction of Administrative courts.⁸⁴

The question remains open-ended whether the current amendments to the Chancellor of Justice Act and Individual Labour Disputes Resolution Act are capable of addressing the institutional/remedies concerns raised by the HRC and ICERD Committee, due to the lack of jurisprudence of those two institutions. Multiple factors - the most important of which are dependence of the Chancellor of Justice on the political process and the lack of financial and human resources - put under the question the effectiveness of the Chancellor in resolving discrimination disputes. Proceedings under the LDC exclude pre-employment relationships, including access to employment, as well as failing to provide for a reverse burden of proof in discrimination cases. Thus, regardless of the positive developments on the national level, the concerns expressed by the HRC and

⁸¹ In relation to burden of proof, the IDLR states that “An applicant shall present his or her claims and proof thereof.” This provision is contrary to Article 8 of the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ [2000], L180/22 (The Race Directive).

⁸² For further discussion, please see section under EU Race Directive. Upon accession to the European Union, the Estonian state undertook an obligation to follow all Community legal acts. The Race Directive is one of the Community legal acts binding on Estonia. Therefore, following the obligations of application and supremacy of international law (Constitution, Article 5 of the IDLR) a labour dispute resolution body must set aside Article 20 of the IDLR and apply Article 8 of the Race Directive in disagreements arising from alleged discriminatory behaviour. Article 5 prescribes two guidelines for labour dispute resolution bodies in considering individual labour disputes. First, to apply rules of international agreements binding on Estonia even if there is no Estonian legislation passed to implement the provisions concerned. Second, provisions of international law are to be applied in case of conflict between international law provisions and Estonian laws, regulations, or employer regulations.

⁸³ The remedies that an applicant has a right to request and the Committee an obligation to provide are regulated by individual legal provisions (for example Article 10³ of the Employment Contract Act) as well as ILDR. The ILDR provides in detail only legal consequences and compensation procedures for unlawful termination of an employment contract and suspension from work. If a decision of the labour dispute committee is not fulfilled by the employer, then an employee has a right to submit the decision to an enforcement office for compulsory execution, recourse to a court to obtain an order for payment of average wages for delay in executing the court order (Article 240 of the Code of Civil Procedure), and compensation for resulting damage by filing a separate claim pursuant to general procedure.

⁸⁴ The number of cases brought to the courts of first and second instance as well as the Supreme Court of Estonia indicate that the principle of discrimination has not yet found its permanent place in the Estonian legal system. It is not common for Estonian lawyer to challenge alleged discriminatory practices, nor is it common for Estonian courts to adjudicate on the matter.

ICERD as regarding the existence of institutions/remedies in discrimination disputes remain very much alive until the system established by legislative amendments is fully functional in practice.⁸⁵

In conclusion, observations by the ICERD Committee address issues also acknowledged as problematic to the HRC and the ICESCR. Issues of concern under the ICERD include discrimination in employment based on ethnicity, discriminatory effects of language requirements, and the role of state institutions in providing remedies for alleged victims of discrimination.⁸⁶ Based on a review of comments expressed by the Committee in the Concluding Observations, the situation on the Estonian labour market may raise the issue of discrimination in relation to Articles 5 and 6 ICERD.

II.4. International Labour Organisation Convention on Discrimination in Employment and Occupation is not ratified

The International Labour Organisation (ILO), a UN specialised agency of the United Nations, was created to adopt international standards to improve the situation of working people. In the field of economic rights it is “the most important human rights organisation.”⁸⁷ The ILO Discrimination (Employment and Occupation) Convention 111 provides a broad guarantee of non-discrimination and equality in employment and occupation. The 111 Convention is one of the most widely ratified ILO Conventions, with current status of ratification of 160 countries out of 175.

Estonia is one of the 15 state members of the ILO that have not ratified the 111 ILO Conventions. Various international monitoring bodies, for example, the ICESCR Committee in its last Observations on Estonia, recommended Estonia to ratify the 111 Convention.⁸⁸

II.5. Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Protocol 12

Unfortunately, in relation to discrimination in employment the ECHR does not provide recourse to alleged victims of discrimination. The proposed Protocol 12 will substantially widen the principle of non-discrimination and open up the

⁸⁵ The insignificant number of cases brought to institutions with authority to settle discrimination disputes also indicates that the general public is not well informed on the rights and procedures available for protection of violated rights. In this relation, the positive obligation of a Chancellor of Justice to inform the public and promote the principle of equality is crucial.

⁸⁶ Interestingly, there is a one-year difference in submission of the State report to the HRC and ICERD Committee. Failure to provide additional information to the HRC as outlined in the Comments by the ICERD, indicates continuous failure by the State to take action in relation to problems persisting on the Estonian labour market.

⁸⁷ M. Nowak, Introduction to the International Human Rights Regime, Martinus Nijhoff, 2003, p.141.

⁸⁸ Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination, Estonia, A/57/18, paragraphs 344-366 (2002).

possibility to address discrimination issues *inter alia* in employment-related matters. Article 1 of Protocol 12 provides a general non-discrimination clause and thereby affords a scope of protection extending beyond “enjoyment of the rights and freedoms set forth in the Convention”.⁸⁹

The Explanatory Note to Protocol 12 explains that the additional scope of protection under Article 1 of Protocol 12 “concerns cases where a person is discriminated against:

- i. in the enjoyment of any right specifically granted to an individual under national law;
- ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
- iii. by a public authority in the exercise of discretionary power (for example, granting certain subsidies);
- iv. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).⁹⁰

Article 1 ECHR protects against discrimination by public authorities.⁹¹ Protocol 12 is not intended to impose a general positive obligation on the state parties to take measures to prevent or remedy all instances of discrimination in relations between private persons.⁹² Furthermore in relation to the possible ‘positive obligation’ of States in the area of relations between private persons, the Explanatory Note states that “the extent of any positive obligations flowing from Article 1 is likely to be limited.”⁹³

Nevertheless, following discussion on the limited application of Article 1 ECHR between private persons, the Explanatory Note continues by stating that “any positive obligation in the area of relations between private persons would concern, at the most, relations in the public sphere normally regulated by law, for which the state has a certain responsibility (for example, arbitrary denial of access to work, ...”⁹⁴

Additionally the ECHR and Protocol deserve special attention in the context of the increasing interplay and reliance of the European Court of Justice (ECJ) on the jurisprudence of the European Court of Human Rights. With ongoing developments in the jurisprudence of the ECJ, which increasingly relies on the ECHR, and adoption of the new Constitutional Treaty of the EU reinforcing the role of the ECHR in the context of the EU, Protocol 12, when adopted will have an impact on the interpretation of the Race Directive.⁹⁵

⁸⁹ Explanatory Report to Protocol No. 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms, paragraph 21.

⁹⁰ Id, Explanatory Report, paragraph 22.

⁹¹ Id, Explanatory Report, paragraphs 25 and 30. The term “public authority” in paragraph 2 has been borrowed from Article 8, paragraph 2, and Article 10, paragraph 1, of the Convention and is intended to have the same meaning as in those provisions. It covers not only administrative authorities but also the courts and legislative bodies.

⁹² Id, Explanatory Report, paragraph 25.

⁹³ Id, Explanatory Report, paragraph 27.

⁹⁴ Id, Explanatory Report, paragraph 28.

⁹⁵ For further discussion, see for example U. O’Hare, “Enhancing European Equality Rights: a New Regional Framework”, (2001) 8 Maastricht Journal of European and Comparative Law 133, p. 160.

In conclusion, the European Convention on Human Rights and Fundamental Freedoms currently provides for no guarantees of non-discrimination in employment. The adoption of Protocol 12 will substantially widen the scope of protection provided by the ECHR, making it possible for victims of discrimination to complain to the European Court of Human Rights.

II.6. European Social Charter - state compliance is not possible to analyse

The European Social Charter, ‘little sister’ of the ECHR,⁹⁶ sets out rights and freedoms in relation to economic, social and cultural rights. Estonia is among the 17 countries of the Council of Europe that have ratified the revised European Social Charter.⁹⁷

Estonia submitted two country reports on implementation of the Revised Social Charter (RESC).⁹⁸ In relation to the First country report, the Committee reviewed 37 provisions in rendering conclusions.⁹⁹ Among the issues upon which the Committee was unable to render its conclusion is Article 1 paragraphs 1, 2 and 3.

Article 1 of the RESC covers the right to work. Under Article 1 paragraph 2, the Committee addressed the issue of prohibition of discrimination in employment. The Committee *inter alia* in relation to discrimination in employment requested additional information on the burden of proof in discrimination cases as well as procedural guarantees/remedies available to victims of discrimination.

Further, under Article 19 RESC the Committee addressed issues relevant to migrant workers.¹⁰⁰ In reply to the comments included in the first country report on the availability and accessibility of language courses to all interested, the Committee referred to European Commission against Racism and Intolerance (ECRI) reports indicating that not all interested individuals have enough financial resources to cover the substantial costs related to language learning. The Committee deferred its conclusion on the subject matter pending receipt of additional information.¹⁰¹

⁹⁶ Supra, n.87, Nowak, p.173.

⁹⁷ The revised ESC was opened for signature on 3 May 1996 and entered into force on 1st July 1999. It contains in a single instrument the right guaranteed by the 1961 Charter with certain amendments, the rights guaranteed in the Additional Protocol of 1988 as well as new rights.

⁹⁸ First report on the implementation of the Revised European Social Charter, RAP/RChA/ES/I(2003). The first report (on ‘hard core’ provisions of the Charter) covered Articles 1, 5, 6, 7, 12, 13, 16, 19 and 20. Second report on the implementation of the Revised European Social Charter RAP/RChA/ES/II(2004). The second report was submitted on 1 June 2004 and covered Articles 2, 3, 4, 8, 9, 10, 11, 14, 15, 17,21, 22, 24, 25, 27, 28 and 29 of the Revised Social Charter.

⁹⁹ The Committee found 10 provisions in accordance with the Charter, 8 provisions not in conformity and in relation to 19 provisions the Committee did not render any conclusion due to the need for more information.

¹⁰⁰ Article 19 paragraph 11 address teaching the language of a host state to migrant workers.

¹⁰¹ European Committee of Social Rights, Conclusions 2004 (Estonia), p.28.

In conclusion, in relation to the Estonian country report the Committee on RESC was unable to render conclusions on the fulfilment of state obligations *inter alia* on Articles 1 and 19 RESC relating to employment rights. The Committee indicated that the information submitted by Estonia was insufficient for the Committee to establish fulfilment of obligations in relation to the respective Articles of the RESC.

II.7. The Framework Convention for the Protection of National Minorities - violation of Article 15?!

The Framework Convention for the Protection of National Minorities (FCNM) and the European Charter for Regional or Minority Languages are the two international conventions on the question of minorities and of regional or minority languages elaborated by the Council of Europe.¹⁰² The FCNM is the most comprehensive document in this area.¹⁰³

In providing comments to the Estonian report, the Advisory Committee considered a wide range of issues under this provision. In the Estonian report,¹⁰⁴ under Article 15 FCNM, the Advisory Committee addresses *inter alia* shortcomings concerning effective participation of persons belonging to national minorities in economic life, in particular with respect to access to the labour market.¹⁰⁵

Therefore, the monitoring body under the FCNM also expressed its concerns over access to the labour market of persons belonging to national minorities. The Advisory Committee found the current labour market situation to be problematic in relation to the rights guaranteed under Article 15 FCNM.

II.8. The European Commission against Racism and Intolerance - comprehensive criticism

According to the Statute of the European Commission against Racism and Intolerance - ECRI is a body of the Council of Europe “entrusted with the task of combating racism, racial discrimination, xenophobia, anti-Semitism and intolerance in greater Europe from the perspective of the protection of human

¹⁰² Estonia has not acceded to the Charter for Regional or Minority Languages.

¹⁰³ The Framework Convention sets out principles to be respected as well as goals to be achieved by the Contracting Parties, to ensure the protection of persons belonging to national minorities, whilst fully respecting the principles of territorial integrity and political independence of States. The principles contained in the Framework Convention have to be implemented through national legislation and appropriate governmental policies. It is also envisaged that these provisions can be implemented through bilateral and multilateral treaties. Rights covered by the Convention go beyond those traditionally considered as belonging to minority groups, e.g., rights to cultural integrity and education. The Convention also covers issues related to equality before the law and economic rights, i.e., labour market discrimination.

¹⁰⁴ Opinion, Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Estonia, ACFC/INF/OP/I(2002)005.

¹⁰⁵ Id, Article 15 of the FCNM provides that “The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them.”

rights, in the light of the European Convention on Human Rights, its additional protocols and related case-law.”¹⁰⁶

Reports prepared by ECRI are considered “highly professional and independent”.¹⁰⁷ The recommendation by ECRI in relation to Estonia is an example of this professionalism and independence. The report comprehensively covers many issues related to enjoyment of human rights by minority representatives that are not addressed by other human rights monitoring agencies.

Section II of the ECRI report “Issues of particular concern” covers the situation of Russian-speaking minorities. ECRI starts its evaluation of the situation in Estonia by stating that it is “concerned that there is still a lack of a sense of Estonia as a multicultural society of which minority groups form an integral part.”¹⁰⁸ The report continues with even more direct statements:

“Russian-speaking minorities are seriously under-represented in the various structures of society, such as its political life and its administrative structures, including the civil service, the judiciary and in state enterprises ... are under-represented in private businesses and among other elite groups in society. Moreover, social problems such as unemployment have tended to impact disproportionately upon certain minority groups and certain regions in which minority groups are concentrated. ... Moreover, it has been reported that the economic and social situation of these persons is steadily deteriorating relative to that of ethnic Estonians.”

Specifically in relation to employment, the report acknowledges unavailability of detailed analytical information on differences in employment patterns of various groups living in Estonia. Due to lack of information, it is “not clear to what extent discrimination may exist within the labour market.” However, the ECRI is “concerned that the above mentioned pattern may lead to the development of an underclass composed primarily of members of minority groups, which in turn may lead to a rise in tensions between the majority and minority communities.”¹⁰⁹ Following analysis of the situation, the ECRI calls for close monitoring of the situation regarding the economic and employment situation of minority groups as well as steps to be taken to address any problems of disadvantage.¹¹⁰

In relation to substantive under-representation of Russian-speaking minorities in the public service, ECRI calls for “proactive steps ... to address this situation and to encourage recruitment at all levels of public service for members of minority groups”.¹¹¹ Consequently, ECRI recommends not only promoting the principle of non-discrimination (negative obligation) but also taking positive

¹⁰⁶ Statute of the European Commission against Racism and Intolerance, Appendix to Council of Europe Resolution (2002)8, Article 1. The ECRI’s activities include examining country reports, preparing reports on general themes relevant to the issues of racism and racial discrimination, as well as adopting general recommendations.

¹⁰⁷ *Supra*, n.87, Nowak, p. 185.

¹⁰⁸ Second Report on Estonia by the European Commission against Racism and Intolerance, CRI (2002) 1, paragraph 58.

¹⁰⁹ *Id.*, Second Report, paragraph 49.

¹¹⁰ *Id.*, Second Report, paragraph 49.

¹¹¹ *Id.*, Second Report, paragraph 50.

action by ensuring that in practice Russian-speaking minorities have access to work in the public service.

Thus, in relation to the comments of other monitoring bodies, ECRI provides the strongest statement and concerns over the situation of Russian-speaking minorities on the labour market and more broadly in society. Importantly, ECRI calls for positive action by the State to remedy the existing situation.

In conclusion, the comments/messages by all international monitoring bodies are the same - the situation on the labour market in Estonia in relation to the exercise of the right of non-discrimination based on language and national origin is problematic. Existing differences on the labour market raise legitimate concerns on the part of monitoring bodies on Estonian compliance with norms protected by the respective international instruments. Issues of particular concern as repeatedly expressed by a number of monitoring bodies include:

- unemployment rate differences,
- access to employment, and
- linguistic requirements and institutions established by the state to address discrimination cases.

The commentaries of the monitoring bodies reviewed under this Chapter noted that the adoption of legislative acts by a state providing for equal treatment is not sufficient, so that Estonia must ensure that the principle of non-discrimination is guaranteed in practice.

III. EU law

Evaluation of international law standards indicates that the labour market situation in Estonia is a matter of concern to International monitoring bodies. What is the standing of the EU as to inequalities on the labour market? What guarantees are provided under EU law of non-discrimination in employment on the basis of ethnic origin and language? Does Estonian legislation comply with EU law? Is accession of Estonia to the EU likely to improve the ethnic situation on the labour market in Estonia?

Analysis of the present chapter is divided into two main sections. The first section provides a discussion on the European Race Directive and evaluates compliance of national legislation with requirements of the Directive. The section concludes with a comparative discussion on the standards of equality on the basis of ethnic origin and language as available on the international and EU level. The second section addresses the role of the European Employment Strategy in bringing change to the Estonian labour market. The chapter concludes with the statement on compliance of Estonia with the EU standards and discussion on the possible impact of the European Employment Strategy (EES).

III.1. The Race Directive

III.1.1. Prohibition of discrimination in employment in the EU context

The two major Community instruments that address the issue of discrimination in employment on the basis of race and ethnic origin are the Race Directive and the European Employment Strategy.¹¹²

The development of European Community law suggests that originally the principle of non-discrimination in employment was based on nationality and connected to basic community freedoms.¹¹³ Provisions in this field essentially related to ensuring the free movement of workers¹¹⁴ and freedom of establishment¹¹⁵ in the context of the common market. The Single European Act added to social policy provisions but it was not until the new Article 13 EC Treaty¹¹⁶, introduced by the Treaty of Amsterdam, when explicit provision related to the adoption of provisions on non-discrimination was adopted.¹¹⁷

Article 13 provided the EU with a legal basis to combat all forms of discrimination *inter alia* on grounds of racial or ethnic origin.¹¹⁸ The adoption of the Directives based on Article 13 signified the new Community approach to the issue of discrimination in employment.¹¹⁹ The Race Directive went beyond 'traditional' prohibition of discrimination in employment based on nationality and addressed discrimination based on the more narrowly defined notions of ethnicity and race.¹²⁰

¹¹² For discussion on the principle of equality in EU law, see G. Barrett "Re-examining the Concept and Principle of Equality in EC law", 22 *Yearbook of European Law* 2003, pp.117-153.

¹¹³ Consolidated Version of the Treaty Establishing the European Community, OJ 2002 C325/1-184. Article 12 of the EC Treaty (formerly Article 7 of the EEC Treaty) prohibits 'any discrimination on the grounds of nationality' within the scope of application of the Treaty, subject to any special provisions set out in the Treaty.

¹¹⁴ Id, EC Treaty, Articles 39 to 42.

¹¹⁵ Id, EC Treaty, Articles 43 to 48.

¹¹⁶ Id. Article 13 of the EC Treaty authorizes the Council, acting unanimously, to take appropriate action to combat any discrimination based on sex, race, ethnic origin, religion or belief, disability, age, or sexual orientation.

¹¹⁷ Moreover, the Amsterdam Treaty has added the promotion of employment to Community objectives and a new Title VII on employment. The new objective consists in reaching a "high level of employment" without undermining competitiveness.

¹¹⁸ This allowed the Commission to propose two directives to ensure equal treatment, one irrespective of racial or ethnic origin (Council Directive 2000/43) and a general framework for equal treatments in employment and occupation (Council Directive 2000/78).

¹¹⁹ Supra, n. 113, Article 13 had provided a basis for a broad extension of equalities protection and intensified the Community role in anti-discrimination matters. For analysis see, L Waddington and M. Bell, 'More Equal than Others: Distinguishing European Union Equality Directives'(2001) 38 *Common Market Law Review* 587; J. Kenner 'EU Employment Law: From Rome to Amsterdam and beyond' Oxford and Portland, Oregon 2003 pp.393-427; M. Bell 'Equality and Diversity: Anti-discrimination Law after Amsterdam.' in J. Shaw ed. 'Social Law and Policy in an evolving European Union', Hart Publishing, Oxford -Portland, 2000.; C. Brown, "The Race Directive: Towards Equality for All the People of Europe?" in 21 *Yearbook of European Law Review* 2002, pp. 195-227, Clarendon Press, Oxford, 2002.

¹²⁰ The Race Directive covers 6 grounds of discrimination - language is not included.

The primary aim of the Directive is not to promote free movement but rather to contribute to attainment of a high level of employment and social protection in member states.¹²¹ Moreover, protection from discrimination covered by the Directive extends not only to individuals with legal community status (i.e. worker, self-employed, student, retired) but also to such groups as ethnic minorities residing in member states.

Therefore there are two 'stages' of levels in realizing the principle of non-discrimination in employment as to nationality and ethnicity or race. The first, as pointed out above, relates to the principle of *non-discrimination based on nationality* attached to basic community freedoms.¹²² The second generation of non-discrimination principles in employment is based on Article 13, covering *discrimination on the grounds of ethnic and racial origin* and aiming to complement national employment policies on discrimination.

The rationale for increasing attention to employment discrimination is clear. That is, attaining the economic goals set up by the Lisbon Summit as the "world's most competitive and dynamic knowledge-based economy" vitally requires co-ordination of employment policy at the European level and involves all (including minorities and other disadvantaged groups) in achieving this target.¹²³ This required the Community to go beyond existing protection from discrimination, based on nationality, and to adopt the Race Directive.

The Race Directive addresses discrimination based on *racial or ethnic origin*.¹²⁴ The Directive aims to implement the principle of equal treatment between persons irrespective of racial or ethnic origin, thus going beyond the traditional or common prohibition of discrimination based on nationality. The explicit protection from discrimination based on ethnic and racial origin is of particular significance in some new Member States where first, the notions of citizenship, ethnicity and nationality are fused and secondly, large ethnic minority groups exist.

In inter-Community relations, practical considerations may arise. For example, if a person of Russian ethnicity but of Latvian nationality (citizenship) were to seek employment in Estonia. The Estonian labour market, due to historical circumstances, is ethnically polarized so that ethnic Russians find themselves in a disadvantageous position.¹²⁵ Thus, a person from Latvia may be

¹²¹ Although the preamble to the Directive refers, *inter alia*, to the fundamental principle of equality, the drafting history suggests that adoption of the Directive first of all was driven by an economic rationale. Brown has identified four rationales for EU level action 1) protection of fundamental rights; 2) free movement of persons; 3) education, and 4) employment policy.

¹²² Protection from discrimination based on nationality is well established in ECJ case law. See e.g., Case 186/87 Cowan v. Tresor public [1989] ECR 195 (recipient of services); 293/83 Gravier v City of Liege [1985] ECR 593 (vocational training).

¹²³ Documents on the Lisbon European Council (March 2000) available at http://ue.eu.int/cms3_applications/applications/newsroom/loadBook.asp?BID=76&lang=1&cmsid=347 (last accessed on 12.06.2004).

¹²⁴ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000, L180/22.

¹²⁵ See for example M. Pavelson & M. Luuk, "Non-Estonian on the Labour Market" in *The Challenge of the Russian Minority*, ed. M. Lauristin and M. Heidmets, Tartu University Press 2002.

subject to discrimination not on the grounds of his/her Latvian nationality but on the grounds of his/her ethnicity. Consequently, the Race Directive has the potential to contribute to increased protection of both Community freedoms in inter-Community relations and in purely domestic situations where ethnic minorities find themselves disadvantaged.

According to the provisions of the Directive, equal treatment must be guaranteed in terms of access to employment or self-employment, training, education, working conditions, involvement in a professional organization, social protection and social security, social advantages, and access to and the supply of goods and services.¹²⁶ The only possible exception is where race or ethnic origin constitutes a *fundamental professional requirement*. However, the exception must have a legitimate objective and be proportional to the aims to be achieved.

III.1.2. Compliance of Estonian national law with the minimum requirements of the Race Directive

Discussion on compliance of national legislation with the requirements of the Race Directive is based on analysis of the Employment Contracts Act (ECA).¹²⁷ According to the verbatim report¹²⁸ of the Riigikogu (Parliament), the 1 May 2004 amendments to the ECA were necessitated by EU Directives, including the Race Directive.¹²⁹ Thus, the Employment Contracts Act is a national measure implementing the provisions of the Race Directive.¹³⁰

The ECA, similarly to the structure of the Race Directive, includes a list of various areas of employment relations where unequal treatment is prohibited,¹³¹ provides for a list of derogations from the principle of equal treatment,¹³² a

¹²⁶ Supra, n.124, the Race Directive, Article 3.

¹²⁷ Legislative developments in relation to protection from discrimination in employment based on ethnic origin and language are relatively recent. The Chancellor of Justice has authority to conduct conciliation proceedings between private parties in discrimination disputes from 1 January 2004. The amended provisions of the Employment Contract Act regulating exercise of the right to non-discrimination entered into force on 1 May 2004. Consequently, secondary law regulating exercise of the right of non-discrimination in employment based on race is relatively 'fresh'. Therefore, the subsequent discussion is compelled to be limited to analysis of the wording of legislative provision without discussing practical implementation of the relative provisions of secondary legislation.

¹²⁸ Amazingly, the whole cycle of Riigikogu adoption of legislative amendments in relation to the Employment Contracts Act took only fourteen days. Riigikogu Social Committee Protocol No.77 and 80, X Riigikogu Verbatim Report, III Session.

¹²⁹ Supra, n.124, the Race Directive.

¹³⁰ Unfortunately, in spite of long discussions on the necessity to adopt a law on equal treatment and non-discrimination, implementing Constitutional Article 12, the law was never adopted by the Parliament (Draft Law 1198 SE II). Thus, at present there is no general law on equality in Estonia, but rather separated legal acts that include some provisions considered by the legislator as providing for practical implementation of the constitutional right to equality.

¹³¹ Employment Contracts Act, RT 1992, 15/16, 241, Article 10. An employer is prohibited from treating unequally on the basis, *inter alia*, of race, language and ethnicity persons: looking for employment; in the process of entering into an employment contract; (in employment) in relation to work pay; (in employment) in relation to job or position promotion; (in employment) in relation to provision of orders; (in employment) undergoing the dismissal process; (in employment) in relation to opportunities for additional skills and retraining; by other means in employment relations.

¹³² Id, Employment Contracts Act, Article 10¹.

definition of direct and indirect discrimination and of harassment¹³³ as well as a 'shared burden of proof' provision¹³⁴ in unequal treatment cases.

a) The scope of prohibited discrimination

Scope ratione materiae

Article 3 Race Directive broadly defines employment-related relationships in the public and private spheres where discrimination on the grounds of ethnic origin is prohibited. Article 3 paragraph 1 Race Directive in subsection (a) specifically provides that "conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion" are within the scope of the protection provided by the Directive.¹³⁵

The corresponding provision of the ECA, Article 10 paragraph 3 in relation to pre-employment relations states that discrimination against individuals in search of employment is prohibited in hiring and in the process of entering into an employment contract.¹³⁶ Thus, the wording of Article 10 is confusing as it is not clear whether the scope of prohibited discrimination, for example, includes access to self-employment and occupation, as specifically provided in the Race Directive.

Scope ratione personae

In addition to considerations as to pre-employment relationships, Article 10 ECA raises concerns as to definition of the 'agent' of possible discrimination. Article 3 paragraph 1 Race Directive imposes a general prohibition of discrimination in both public and private sectors, including public bodies, without specifically specifying that an employment relationship must exist.

However, Article 10 ECA reads: "An employer can not treat unequally on the grounds specified in paragraph 3 persons looking for employment in hiring and at the time of entering into an employment contract."¹³⁷ Thus Article 10 ECA specifically refers to an employer as the only agent prohibited from discriminating in the process of access to employment and employment-related activities. Specific reference to the employer significantly narrows the scope of protection provided by Article 3 Race Directive.

The jurisprudence of the ECJ in relation to discrimination on the ground of nationality in free movement of persons cases suggests that discriminatory situations are not limited to the employer/employee relationship. They may arise, for example, in the relationship between private persons and a professional body organization.¹³⁸ At the same time, professional associations are not in a

¹³³ Id, Employment Contracts Act, Article 10².

¹³⁴ Id, Employment Contracts Act, Article 144¹.

¹³⁵ This provision intends to prohibit discrimination in pre-employment relationships.

¹³⁶ Supra, n.131, Employment Contracts Act, Article 10.

¹³⁷ In Estonian "Tööandja ei või töölesoovijaid töölevõtmise ja töölepingu sõlmimisel käesoleva paragrahvi 3. lõikes nimetatud põhjusel ebavõrdselt kohelda."

¹³⁸ See for example, cases C-415/93 Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des

legal sense ‘employers’, so that within the meaning of the ECA discrimination by a professional body organization is not covered.

b) Derogations from prohibition of unequal treatment allowed by law

The provision on genuine and determining occupational requirements in the Race Directive Article 4 provides that a

“... member state may provide that a difference of treatment which is based on characteristics related to racial or ethnic origin shall not constitute discrimination ... where such a characteristic constitutes a genuine and determining occupational requirement ... provided that the objective of a [differentiated treatment] is legitimate and the requirement is proportionate.”

Therefore, while the Race Directive recognises that certain differentiation in treatment on characteristics related to racial or ethnic origin is acceptable, it nevertheless also provides for two important restraints: the legitimate objective and proportionality requirements.

The restraints within the context of Article 4 of the Directive are intended to ensure that derogations from the general prohibition of non-discrimination are restrictively construed. Thus, not every exception to the general rule of non-discrimination would be acceptable. The only exceptions allowed, according to the Race Directive, are those that not only may be considered as ‘genuine and determining occupational requirements’ but that also pursue a legitimate objective and are proportionate.

The corresponding article in the ECA, Article 10¹, provides for five grounds for derogation from the general obligation of equal treatment. Article 10¹ paragraph 4 states that within the meaning of the Act “consideration of gender, language proficiency, age or disability in hiring, assignment of work duties, providing opportunities for retraining or additional training of a person” is not considered to constitute unequal treatment if it “is an essential and determining occupational requirement which comes from the nature of an occupational activity or conditions related to that.”¹³⁹ Contrary to Article 4 Race Directive, the national provision does not include any limiting provision to the derogation.

Consequently, Article 10¹ ECA transposes Article 4 Race Directive only in part. The part of Article 4 Race Directive, allowing for derogation from the principle of non-discrimination if differentiated treatment may be considered as a ‘genuine and determining occupational requirement’, is transposed into national law in full. The second part of Article 4 of the Directive establishing the important limiting conditions on the permitted derogations, i.e. conditions of legitimate objective and proportionality, are not transposed into Article 10¹, or any other provision of the ECA.

associations européennes de football (UEFA) v Jean-Marc Bosman (Bosman) [1995] ECR I-4921 and C-438/00 Deutscher Handballbund v Maros Kolpak [2003] ECR-4135.

¹³⁹ In Estonian “Käesoleva seaduse tähenduses ei loeta ebavõrdseks kohtlemiseks: isiku soo, keeleoskuse, vanuse või puude arvestamist töölevõtmisel, tööülesannete andmisel või ümber- ja täiendõppe võimaldamisel, kui see on oluline ja määrav kutsenõue, mis tuleneb kutsetegevuse laadist või sellega seotud tingimustest.”

Consider the case where, e.g., language knowledge is stated as a ‘genuine and determining occupational requirement’, whereas in fact the level of knowledge required by the employer is specifically used with the aim of discriminating against ethnic minorities (not a legitimate objective) and is excessive in relation to the duties fulfilled by the employee (it is not proportionate). If this example is addressed through the wording of Article 10¹ ECA, then such situation is acceptable as long as employer could justify language proficiency as a ‘genuine and determining occupational requirement’. But addressing the same hypothetical situation through the wording of Directive 2000/43 compels us to take an additional step and analyse both the legitimate objectivity and the proportionality of imposing language proficiency for the particular position. Thus, if imposing the language proficiency requirement does not have a legitimate aim and/or it is not proportionate, then it will fall outside the scope of acceptable derogation as provided by Article 4 of the Directive.

c) Definition of Direct and Indirect Discrimination

In relation to the definition of direct and indirect unequal treatment as well as harassment, the provisions of the ECA fully correspond to the requirements imposed by the Race Directive. Article 102 ECA provides importantly for the first time in Estonian secondary legislation for the definition of direct and indirect unequal treatment. The wording of Article 102 corresponds to Article 2 Race Directive and provides that direct and indirect discrimination is prohibited.¹⁴⁰ Moreover, in line with the Race Directive, Article 102 paragraph 5 provides that an instruction to discriminate given to other individuals is deemed to be discrimination.¹⁴¹

d) Burden of proof

The significant contribution of the Race Directive to the promotion of equality lies in institutionalizing the notion of reversed burden of proof.¹⁴² Article 8 Race Directive states that

“when persons who consider themselves wronged because principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.”

The corresponding provision on burden of proof in the ECA, Article 1441, is entitled ‘divided burden of proof in unequal treatment disputes’.¹⁴³ Article 1441 first provides that an employee or a person in search of employment who faces unequal treatment by an employer on grounds prohibited by law may submit an application with the factual circumstances on the unequal treatment to the

¹⁴⁰ Supra, n.131, Employment Contract Act, Article 10².

¹⁴¹ Supra, n.131, Employment Contract Act, Article 10², paragraph 5.

¹⁴² Supra, n. 124, The Race Directive, Article 8.

¹⁴³ In the initial draft proposal for amendments of the Employment Contract Act, the provision on the burden of proof directly followed the article in the act on unequal treatment. However, during discussions on amendments in the second reading at the Riigikogu, it was decided to include the burden of proof provision at the end of the Act under the section on dispute resolution.

employment dispute resolution bodies or Chancellor of Justice. Second, Article 1441 provides that if, on the basis of an application submitted by the employee or person in search of employment, it may be presumed that direct or indirect discrimination took place, then at the request of an employment dispute resolution body or Chancellor of Justice the employer *must explain their own behaviour or reasons* for the decision reached. Intriguingly, the wording used by the legislator - an employer 'must explain'. Instead of imposing an obligation to prove, the ECA suggests that an employer must explain his or her act or decision. Consequently, the wording of Article 1441 is weaker as it does not impose a legal obligation of the 'reversed burden of proof' as provided in the Directive but merely suggests that an employer should provide explanations.¹⁴⁴

Another linguistic discrepancy between Article 8 Race Directive and Article 144¹ ECA is a word used to refer to the respondent in an alleged discrimination dispute. The Race Directive imposes the obligation of 'reversed burden of proof' on a *respondent*. The ECA imposes the obligation to provide for explanations on the *employer* only. As argued above under the section on 'the scope of prohibited discrimination', a person breaching the principle of equal treatment is not limited to an employer. Indeed, an individual may be discriminated against by a professional association in access to the exercise of a professional activity. The wording of Article 144¹ ECA suggests that professional associations do fall under the provision on the 'shared burden of proof' since an association is not an employer within the meaning of Article 3 ECA.¹⁴⁵

Consequently in relation to the defence of rights and burden of proof provision of the Race Directive, the Employment Contract Act has two substantial discrepancies. First, the ECA does not impose an obligation of the 'reverse burden of proof' within the meaning of the Race Directive and second, the ECA limits the scope of possible respondents in discrimination cases to employers only.

Analysis of compatibility of the ECA with the Race Directive indicates a number of substantial shortcomings in implementation of the Directive. The ECA narrowly defines a person that may commit a breach of the principle of equal treatment, lacks limitations to the principle of permitted derogations as well as failing to establish an obligation of reversed burden of proof. Thus, notwithstanding the generally positive step of adopting long needed amendments to the ECA, national law fails fully to comply with the requirements of the Race Directive. Inadequate state implementation of the Directive triggers state liability in the context of EU law.¹⁴⁶

¹⁴⁴ While practical implementation and interpretation of this provision may in fact impose an obligation of proof, this, however, is not evident from the linguistic interpretation of the provision.

¹⁴⁵ *Supra*, n.131, Employment Contract Act, Article 3. The Article provides for a list of persons considered to be as employers within the meaning of the Act.

¹⁴⁶ For comprehensive overview of the liability of the State in cases of inadequate Implementation of Directives, see for example, S. Prechal, *Directives in European Community Law: A Study of Directives and their Enforcement in National Courts*, pp 306-346, Clarendon Press, Oxford, 1995.

III.1.3. European Union minimum harmonization and International law standards

Analysis of the standards on equality in international and EU law indicates that international instruments cover wider grounds of discrimination and include both language and ethnic origin as prohibited grounds of discrimination. EU law - Article 13 EC Treaty and the Race Directive - does not include language as a prohibited ground of discrimination and is limited only to ethnic origin. Thus, under EU law the right of an individual not to be discriminated against on the basis of language is not a fundamental right protected by law. Adoption of the new EU Constitutional Treaty will widen the scope of prohibited grounds of discrimination.

Additionally, Article 13 EC Treaty does not set out a substantive norm in relation to discrimination, only providing for a competence ground of EU institutions “to take appropriate action to combat discrimination”. Thus, primary EU law contains no statement of principle of equality that could be seen as implicitly addressing an obligation on a member state. However, the Race Directive, secondary EU legislation adopted on the basis of Article 13, imposes an obligation on member states to guarantee equal treatment. In this relation, international law contains stronger substantive language, specifically prohibiting (i.e. imposing an obligation) on member states not to discriminate on the grounds of language and ethnic origin both in law and in practice.

Moreover, in spite of differences in scope of protection provided under international and EU law, states-parties to the ICCPR such as Estonia must ensure that all legislation adopted in national law complies with obligations arising from Article 26 ICCPR. As discussed above, under Article 26 ICCPR member states are legally obligated to ensure that legislation adopted is not discriminatory, that it does not lead to substantive inequalities, and ensures protection against arbitrary decisions by public authorities on all grounds of prohibited discrimination, including language. Thus, in implementing minimum standards established under EU law,¹⁴⁷ such as the Race Directive, Member States must ensure that transposed legislation also conforms with the international standard.

Finally, in case of violation of international law by EU Member States, the ECJ was reluctant to find a legally binding obligation on European Community institution to act to protect fundamental rights of individuals.¹⁴⁸ In its famous Opinion 2/94, the ECJ states that respect for human rights constitutes a ‘condition of lawfulness of Community acts’. At the same time, institutions do not have a general power to enact rules on human rights or to conclude international conventions.¹⁴⁹

¹⁴⁷ This relates only to Community instruments that require national implementation.

¹⁴⁸ For discussion see for example, N. Bernard, ‘A New Governance’ Approach to Economic, Social and Cultural Rights in the EU, in T.K. Hervey and J. Kenner, *Economic and Social Rights under the Charter of Fundamental Rights of the European Union*, Hart Publishing: Oxford - Portland Oregon, 2003, 247-268.

¹⁴⁹ European Court of Justice Opinion 2/94 [1996] ECR I-1759.

III.1.4. The Charter of Fundamental Rights and the European Constitution

The Charter of Fundamental Rights approved in December 2000 sets out a general principle of equality before the law and the principle of non-discrimination.¹⁵⁰ Article 21 of the Charter covers, *inter alia*, language as one of the grounds of prohibited discrimination, thus going beyond what is currently included in Article 13 EC Treaty and the Race Directive. Additionally, Article 51 of the Charter provides that principles set out in the Charter should guide development of EU policy and implementation of these policies by national authorities.¹⁵¹ The European Convention has proposed integrating the Charter of Fundamental Rights into a new Constitutional Treaty for the EU.¹⁵²

III.2. European Employment Policy

III.2.1. European Employment Policy in the context of EU governance

European Employment Policy is based on Title VIII EC Treaty.¹⁵³ The issue of discrimination based on ethnicity or race is not a central focus of EU employment policy; it is not, however, totally outside the scope of regulation.¹⁵⁴ One of the objectives of EU employment policy, as provided by the EC Treaty, is a high level of employment.¹⁵⁵ Moreover, the EC Treaty provides that Member States and the Community should work towards developing labour markets responsive to economic change with a view to achieving harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, and economic and social cohesion.¹⁵⁶

¹⁵⁰ European Union Charter of Fundamental Rights, [2000] OJ C 364/1, Article 20 and 21; For discussion on the Charter see for example, O'Hare, "Enhancing European Equality Rights: a New Regional Framework", (2001) 8 *Maastricht Journal of European and Comparative Law* 133; B. De Witte, "The Legal Status of the Charter: Vital Question or Non-Issue?" (2001) 8 *Maastricht Journal of European and Comparative Law* 81.

¹⁵¹ See also case law of the ECJ on the importance of fundamental human rights in the EU context, e.g. cases 29/69 *Erich Stauder v City of Ulm - Sozialamt* [1969] ECR 419, 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR I-491, and C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279.

¹⁵² For discussion see for example, S. Douglas-Scott, *Constitutional Law of the European Union*, Longman, London, 2002.

¹⁵³ The new Title VIII establishes a coordinated employment strategy designed to encourage a skilled and adaptable labour force and promotes labour markets responsive to economic change. Although direct responsibility for employment policy remains with the Member States, post-Amsterdam developments progressively increase the role of the Community in employment policies of Member States. As a consequence, EU policy on employment becomes an essential element of the national policy of MS. Estonia did not request any transitional period or derogation with respect to employment policy and declared that on accession to the EU, it is prepared to adopt and implement the *acquis* in this chapter in full.

¹⁵⁴ The historical overview indicates that in fact EU employment policy is increasingly becoming concerned with issues such as equality and non-discrimination.

¹⁵⁵ *Supra*, n. 113, EC Treaty, Article 127.

¹⁵⁶ *Supra*, n. 113, EC Treaty, Articles 2 and 125.

Unequal treatment of particular groups of the population, such as women, ethnic minorities, and immigrants in Member States may lead to loss of economic efficiency, loss of alleviation of social exclusion, and instability in the Community. Thus, the Community addresses the issue of unequal treatment - if not directly through instruments traditionally classified as 'hard law' (i.e. directives, regulations, recommendations and opinions) but through guidelines and most importantly the European Employment Strategy. Additionally, the point of significance is strong financial support provided to Member States in realising the Employment Policy through European Structural Funds, in particular the European Social Fund.

The European Social Fund (ESF) is a financial instrument of the European Employment Strategy. Through the ESF Member States have access to substantial financial assistance to support activities in the area of employment. Recourse to financial assistance in the employment policy field may play a major role in the possibility of new Member States to carry out employment policy reforms. Generally, spending from national budgets in the new Member States on employment policy prior to the EU accession was rather low.¹⁵⁷

The European Employment Strategy is based on the Open Method of Coordination. The EES is an innovative method of Community governance that is primarily based on a commitment by Member States to establish a set of common objectives and targets for employment policy. The new model of EU governance insists on power-sharing, diversity, and decentralisation, flexible instruments and re-assertion of the primacy of political processes over legal ones.¹⁵⁸ Thus, the EES is based on political commitment and principles of reciprocity rather than on formal legislative mechanisms such as regulations, directives, and decisions. Thus the enforcement of the EES substantially differs from the case of unimplemented regulations or directives. However, as pointed by Bernard, "lack of binding effect does not necessarily mean lack of legal effect".¹⁵⁹

The European Employment Guidelines are a joint commitment of Member States with quantitative and qualitative measurement criteria on progress. Monitoring implementation of achievement of common goals is subject to regular reporting (National Action Plans), peer review, as well as evaluation by the Council and the Commission. The Council has power by qualified majority to issue country-specific Recommendations upon a proposal by the Commission. Thus, the main enforcement mechanism of the EES is political pressure through annual peer reviews.

Since the EES is not a 'hard law' community instrument, *it is not limited to formal grounds* of discrimination on which the Community has competence to act, i.e. grounds provided in Article 13 EC Treaty, *or specific rights* guaranteed, such

¹⁵⁷ Under international law instruments, availability of EU funding will make it even more difficult for Estonia to justify lack of programmes targeting the substantially high unemployment rate among ethnic minorities.

¹⁵⁸ J. Scott and DM Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' (2002) 8 *European Law Journal* 1, pp. 5-6.

¹⁵⁹ *Supra*, n.148, Bernard.

as access to employment, conditions of employment. The broad scope of manoeuvre provided by the EES allows in practice to target discrimination on grounds not covered by hard law instruments. Thus, for example, if within the meaning of the EES ethnic minorities are disadvantaged due to linguistic discrimination in a MS, nothing in the nature of the EES precludes adoption of measures specifically targeting discrimination on the basis of language, even though language is not a formal ground of discrimination recognized by Article 13 or the Race Directive. As pointed by *Borras* and *Jacobsson*, the OMC is a convenient formula for placing issues high on the EU agenda whilst preserving national autonomy.¹⁶⁰

III.2.2. Influence of EES on Estonian employment policy prior to accession

Prior to Estonia's accession to the EU, the position of ethnic minorities on the labour market was assessed through legally non-binding communications. First, joint evaluation of the position of ethnic minority groups on the labour market was assessed in the Joint Assessment Paper¹⁶¹ and Communication "Progress in the implementation of the Joint Assessment Papers on employment policies in candidate countries".¹⁶² The Supporting Document to the Communication on the position of ethnic minorities on the Estonian labour market points out that "belonging to an ethnic minority and lack of national language skills is among the risk factors for unemployment."¹⁶³ In this respect, the Commission indicates that for Estonia to develop appropriate policy measures, a review of the relationship between ethnic origin, language skills, regional disparities and sectoral concentration and labour market outcomes is needed.¹⁶⁴ In the same document, the Commission urged the national authorities to pay special attention to risk groups, including ethnic minorities.¹⁶⁵ Moreover, the Commission stressed that "Estonia needs to monitor the efficiency of employment programmes targeted at

¹⁶⁰ Borras, S. and Jacobsson, K., "The Open Method of Co-ordination and new Governance patterns in the EU", *Journal of European Public Policy* 11:2, (2004), pp. 185-208.

¹⁶¹ Joint Assessment of Employment Priorities in Estonia available at http://europa.eu.int/comm/employment_social/employment_analysis/japs/estonia_en.pdf (last accessed on 15.08.2004).

¹⁶² Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: "Progress on the implementation of the Joint Assessment Papers on employment policies in candidate countries", COM (2003) 37 final of 30/01/2003. The Communication provides a general overview of issues related to employment policy in all accession countries. The Supporting Document to the Communication provides a review of current labour market performance, a general assessment of employment policies for each area identified in the Joint Assessment Paper, as well as key issues for the future for each specific country.

¹⁶³ Commission staff working paper, Supporting document to the communication on "Progress in implementing the Joint Assessment Papers on employment policies in acceding countries", SEC (2003) 1361 of 24/11/2003, was published in early 2003; the updated Supporting Document at the end of 2003, p. 13.

¹⁶⁴ Ibid, Supporting Document, p.13.

¹⁶⁵ Commission staff working paper, Supporting document to the communication on "Progress in implementing the Joint Assessment Papers on employment policies in acceding countries", SEC (2003) 1361 of 24/11/2003, pp. 10-11.

the disadvantaged regions in which the non-Estonian population are concentrated”.¹⁶⁶

Thus, before Estonia’s accession, the EU identified in employment policy monitoring documents a need in Estonia for additional studies, specific action programmes as well as a properly implemented anti-discrimination law. The issue of discrimination against ethnic minorities on the labour market, *per se*, is not discussed in the employment monitoring documents.

III.2.3. Impact of the EES after accession

An interesting observation may be made in relation to the impact of the EES and European Social Fund (ESF) on policy consideration in Estonia. The initially adopted state National Development Plan for the implementation of European Structural funds - a Single Programming document in relation to the Russian-speaking minorities living in Estonia referred in the Estonian language version to ‘non-Estonians’, whereas in the English version the group was referred to as ‘ethnic minorities’. Interestingly, this is unlikely to be simply a linguistic deficiency but rather a reflection of a deeply rooted double system of classification of the Russian ethnic/linguistic group adopted by the Estonian state. Within Estonian national policy, ethnic/linguistic minority groups are traditionally referred to as non-Estonians (presupposing an exclusionary attitude towards the group) and including individuals with ethnic/linguistic background other than Estonian regardless of their citizenship. Thus in the national context an individual with an Estonian citizenship but with Russian mother tongue is defined as non-Estonian.

In the international arena, the definition of non-Estonians would not be acceptable, as it provides no clear reference to who the non-Estonians are. Thus, in international documents the most commonly used reference to identify people with an ethnic background other than Estonian is ‘ethnic minorities’.

Following an official inquiry made by the author on 14 April, 2004 to find out the reasons for such a linguistic difference in the Estonian and English languages, a letter of reply from the Ministry of Social Affairs indicated that on 27 April 2004 the Programme supplement was adopted, *inter alia*, changing the wording used in the Estonian version. Now the updated Programming document as of 27 April no longer refers in the Estonian version to non-Estonians but address the group as ‘ethnic minorities.’

In conclusion, the flexibility of the EES coupled with strong financial support provided through ESF indicate that the EES has the potential effectively to contribute to practical improvements on the labour market in Estonia. Further research is necessary to analyse the potential of the EES and ESF to contribute to practical changes in Estonia.¹⁶⁷

¹⁶⁶ Id, Working paper, p 8.

¹⁶⁷ For analysis of Employment Action Plans 2000-2003, see Evas, T. “*Influence of Ethnicity on Labour Market Opportunities in Estonia*”. The author sent a request by registered mail to the Ministry of Social Affairs for statements on national employment policy regarding measures

IV. Conclusion

The principle of equality is recognized by all comprehensive human rights conventions. Analysis of the comments/general obligations and jurisprudence of international conventions discussed in this research indicates that provisions of the conventions impose legal obligations on MS to guarantee formal equality (i.e. equality in law) and equality in fact (i.e. substantive equality). Thus, failure by a State to guarantee substantive equality may result in violation of international law obligations.

The review of state reports submitted by Estonia to the international monitoring bodies points to persistent misunderstanding by the State of the scope of principles of equality protected by international law. The state's comments are limited to observations on legislation adopted but fail to address and acknowledge the consequences of adopted legislation. Comments by the international monitoring bodies, however, indicate that the ethnic statistical inequalities on the Estonian labour market raise legitimate concerns under the provisions of international law.

The *ICESR Committee* is concerned with discrimination on the basis of *ethnic origin*. Specifically the Committee points out that the substantial statistical differences in the *unemployment level of ethnic groups* may lead to violation of Articles 2 and 6 of the Covenant.

The *Human Rights Committee*, in the light of obligations stemming from Article 26 ICCPR, is alarmed, first by discrimination based on *language*, in particular the effect of language requirements on the *availability of employment* to Russian speaking minorities, and secondly by the *availability of institutions* adjudicating individual complaints.

The *Committee on the Elimination of Racial* discrimination, in considering the situation on the Estonian labour market in the light of Article 5 obligations of the ICERD, is concerned with discrimination on the basis both of language and ethnic origin. The Committee firstly points out that the scope of language requirements, particularly in the private sector, could lead to discrimination against minorities in violation of Article 5. Moreover, the Committee finds that the obligation to guarantee to ethnic minorities exercise of the right to employment free from discrimination and to provide access to remedies for alleged victims of discrimination may be violated within the meaning of the ICERD.

The *European Committee of Social Rights* was unable to conclude, in relation to the right to work, that the State is fulfilling its obligations originating from the Charter. The Committee did not find a violation but due to lack of information refrained from concluding on compliance.

adopted to improve the situation of ethnic minority groups to be included in 2004 National Employment Action Plan. In violation of the provisions of the Public Information Act, the Ministry failed to deliver a reply in time prescribed by law.

The *Advisory Committee to the Framework Convention for the Protection of National Minorities* addresses discrimination based on ethnic origin. Considering the situation on the labour market under Article 15 of the Convention, the Committee expressed concerns in relation to access by ethnic minorities to the labour market and their participation in economic life.

Finally, the *European Commission against Racism and Intolerance*, under the section on issues of particular concern, analyses the situation of Russian-speaking minorities, thus addressing linguistic discrimination. The Committee finds problematic the lack of a multicultural society in Estonia, the marked under-representation of minorities in all politically and economically significant structures of society, and the disproportionately high unemployment rate. Moreover, the Committee is particularly alarmed by the steady social and economic deterioration of the situation of ethnic minorities as compared to ethnic Estonians.

Thus, all international monitoring bodies in one voice express strong concern in relation to the situation on the Estonian labour market. Importantly, the international organizations address discrimination on the labour market both on the basis of ethnic origin and language. Estonia is urged to comply with the provisions of international law and take proactive steps to remedy the existing situation, thus ensuring not only formal but also substantive equality protected by international law.

Analysis of compliance of the Estonian Employment Contracts Act with the EU *Race Directive* indicates that Estonia has failed properly to implement the minimum requirement established by the Directive. First, the wording of the Employment Contracts Act is more narrowly construed and does not cover discrimination in access to self-employment and occupation. Second, national law only prohibits discrimination by the employer, and thus excludes other 'agents' of discrimination such as collective bodies. This is contrary to the more widely-defined notion of 'responded' as provided in Article 3 of the Directive. Third, contrary to Article 4 of the Directive, the Employment Contracts Act provides no limitations on the scope of permitted derogation to the principle of non-discrimination. Finally, Article 8 of the Directive, establishing an obligation of a revised burden of proof in national legislation, is limited to the duty of the employer to provide explanations. Thus, even the minimum requirements of the Race Directive are not fully implemented into national law, raising legitimate concerns on state responsibility under EU law.

In addition to protection from discrimination on the ground of ethnic origin provided by the Race Directive, the role of the European Employment Strategy coupled with the European Social Fund should not be underestimated. Since EES is not a 'hard law' community instrument but is based on the new method of Community governance - the Open Method of Coordination - it is not limited to formal grounds of discrimination such as ethnic origin and language or specific rights guaranteed. Thus, flexibility of the EES coupled with strong political enforcement/compliance mechanisms, inherited into the OMC structure as well as

emphasis on 'economic rationale' indicate that the EES has potential effectively to contribute to practical improvements on the labour market in Estonia. However, effectiveness of the EES depends heavily on the political will of Estonia as well as other members of the European Community.

Likewise, analysis of standards on equality at international and EU level indicates that currently international conventions cover wider grounds of discrimination and include both language and ethnic origin as prohibited grounds of discrimination. EU law is limited to protection from discrimination on the ground of ethnic origin only. At the same time, the legal obligation of the 'reversed burden of proof' now institutionalized at the EU level in the Race Directive has not yet found formal inclusion in international conventions.

Finally, in spite of differences in the scope and level of protection provided by international and EU law, EU Member States have obligations both under EU and international law. Thus, all EU Member States including Estonia must not only comply with the minimum standards established at the EU level but also with international obligations. In this respect, the obligation arising from Article 26 ICCPR to insure that all nationally adopted legislation complies with the formal and substantive equality standard on the grounds of ethnic origin and language also applies to EU legislative acts adopted at national level. Therefore, in transposing the Race Directive at the national level, the State must take into consideration the obligations of Article 26 ICCPR.

In conclusion, analysis of international and EU law indicates that Estonia violates international law provisions by taking no effective steps to ensure substantive equality on grounds of ethnic origin and language on the Estonian labour market. Equally, failing to properly implement the minimum requirements of the Race Directive Estonia is in breach of EU obligations.