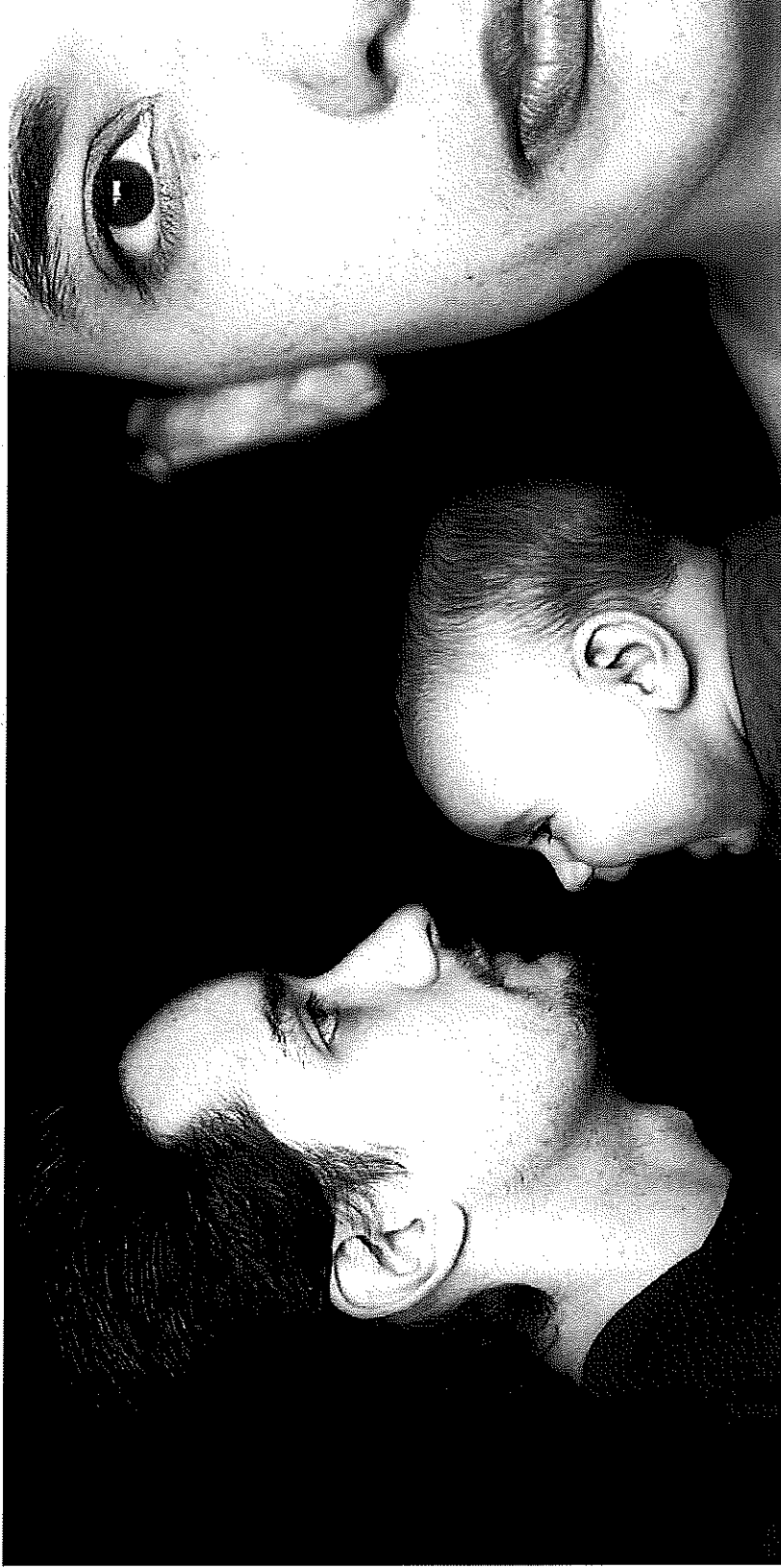


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THE EUROPEAN NETWORK OF LEGAL EXPERTS IN THE NON-DISCRIMINATION FIELD

Situation tests in Europe: myths and realities⁶⁶

Isabelle Rorive, Professor at the Faculty of Law, Free University of Brussels

Proof is often an insurmountable obstacle in cases of discrimination. Justice often fails to be done as, in most instances, the victim cannot prove the discrimination in question. It is rare to find a perpetrator who will admit the facts. This could become even less common as recent anti-discrimination campaigns, mainly launched following the European Commission's implementation of the Racial and Employment Equality Directives⁷⁶ have drawn widespread public attention to the reprehensible nature of these practices. Perpetrators of discrimination are not inclined to confess, and they are equally careful to leave no traces in writing. The presence of witnesses is often the determining factor in the outcome of a complaint. However, in numerous cases, there is no witness willing to testify, or no witness at all. Even when witnesses are available, their testimony is often vague, incomplete or contradictory. As classic means of proof (confession, documentation and testimony) are insufficient, mechanisms have had to be created in order to try to help victims.

Shifting the burden of proof

This problem is not new. It faced the Court of Justice of the European Communities for many years when applying the principal of equal treatment between men and women in employment.⁷⁶ The Court explicitly recognised the considerable obstacles confronting women who attempt to prove that they face discrimination as compared with men, mainly in the form of lower pay for identical work. Women found they had no effective legal remedy open to them because of a lack of information which could be used to establish discrimination. As a reaction to this, the Court of Justice developed a body of case law which introduced a shift in the burden of proof: if a woman can show that a significant group of women is on average less well paid than a group of men performing similar work, the responsibility for demonstrating that this difference is not based on considerations of gender reverts to the employer.⁷⁷ This jurisprudence was subsequently enshrined in a Directive which was transposed into the law of Member States.⁷⁸

Other jurisdictions have followed the same path in the area of ethnic discrimination. In the United Kingdom for example, where the Race Relations Act has been in force since 1976, a Court of Appeal Judge declared that "it is unusual to find direct evidence of racial discrimination. Few employers will be prepared to admit such discrimination

⁷⁶ This article is based on a study of Belgian law undertaken in collaboration with P.A. Perrouy, "Réflexions sur les difficultés de preuve en matière de discriminations" in *Revue du droit des étrangers*, 2005, no.133, pp. 161-175.

⁷⁷ Directive 2000/43/CE of 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (known as the Racial Equality Directive) and Directive 2000/78/EC of 27 November 2000, on equal treatment in employment and occupation (known as the Employment Equality Directive).

⁷⁸ The Court of Justice of the European Communities has had jurisdiction in cases of discrimination between men and women since 1957 (Article 119 of the Treaty of Rome, followed by Council Directive 76/207/CEE of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, *Official Journal* L039, 14 February 1976).

⁷⁹ CJEC, 30 June 1988, *Commission v France*; CJEC, 17 October 1989, case C-109/88, *Danfoss* [1989] ECR 3199; CJEC, 27 October 1993, case C-127/92, *Enderby v Fenchay Health Authority* [1993] ECR I-5535; CJEC, 31 May 1995, case C-400/93, *Royal Copenhagen* [1995] ECR I-1275.

⁸⁰ Council Directive 97/80/CE of 15 December 1997 on the burden of proof in cases of discrimination based on sex.

even to themselves. In some cases the discrimination will not be ill-intentioned but merely based on an assumption that 'he or she would not have fitted in'. And in conclusion: "a finding of a difference in treatment and a finding of a difference in race will often point to the possibility of racial discrimination. In such circumstances the tribunal will look to the employer for an explanation. If no explanation is then put forward or if the tribunal considers the explanation to be inadequate or unsatisfactory it will be legitimate for the tribunal to infer that the discrimination was on racial grounds. This is not a matter of law but (...) almost common sense."⁶¹ However, this case law did not solve all the problems. Research carried out in April 2002 showed that only 16% of cases of racial discrimination are successful in British courts and tribunals.⁶² The latter have often been hesitant to infer discrimination from the respondent's inadequate explanations. A ruling by the Court of Appeal in February 2005 could reverse this tendency. This was the first opportunity for this Court to make a pronouncement on the shift in the burden of proof as transposed by the new European Directives. In a didactic ruling, the Court emphasised that, in order to benefit from this shift, the claimant must establish facts which could lead to the conclusion that the principle of equal treatment had been breached. The onus is on the respondent to show that his/her behaviour was not discriminatory.⁶³

The Racial and Employment Equality Directives are based on these experiences, and have drawn lessons from them. In civil law, they each envisage a shift in the burden of proof by encouraging Member States to take the measures necessary to "ensure that, when persons who consider themselves wronged (...) 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."⁶⁴ The burden of proof is therefore shifted – and not reversed, as has often been said – as, firstly, it is for the victim to bring evidence which points to the possibility of discrimination. It is only when a *prima facie* case of discrimination⁶⁵ has actually been established that the burden of proof reverts to the respondent, who must show that his/her behaviour was not discriminatory.

The difficulty of establishing the facts

In order to be applicable, the mechanism for shifting the burden of proof presupposes that the person who feels they have been wronged can bring evidence which points to the possibility of discrimination. The European Directives state that "The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law."⁶⁶ It is therefore up to the national legislator to define the types of fact which may lead to a lightening of the burden of proof, and, in the end, up to the (civil) judge to weigh their evidential value. Furthermore, the Directives stipulate that discrimination can be "established by any means including on the basis

⁶¹ *King v Great Britain-China Centre* [1992] ICR 516, CA (Lord Justice Neill); This reasoning was followed by the House of Lords in *Glasgow CC v Zafer* [1998] ICR 12.

⁶² "Claims of race bias fall by the wayside", Labour Research, April 2002.

⁶³ *Igen Ltd and Others v Wong, Chamberlin & Another v Brunel University* [2005] EWCA Civ 142.

⁶⁴ Article 8 of the Racial Equality Directive 2000/43/CE cited above and Article 10 of the Employment Equality Directive 2002/78/CE cited above.

⁶⁵ Recital 21 of the Racial Equality Directive 2000/43/CE cited above and Recital 31 of the Employment Equality Directive 2000/78/CE as cited above.

⁶⁶ Recital 15 of the Preamble to Directives 2000/43/CE and 2000/78/CE.

of statistical evidence.⁸⁷ They make no specific mention of situation testing, even if this means of proof was discussed during preparative work on the Directives. However, there are some instances (isolated, it is true) of national legislators referring explicitly to situation testing.⁸⁸

The use of situation testing

Situation tests aim to bring to light practices whereby a person who possesses a particular characteristic is treated less favourably than another person who does not possess this characteristic in a comparable situation. It means setting up a situation, a sort of role play, where a person is placed in a position to commit discrimination without suspecting that he or she is being observed. This person is presented with fictional "candidates", some of whom possess a characteristic which may incite discriminatory behaviour. Observers aim to compare his or her attitude towards people bearing this characteristic compared to others without it. Situation testing allows direct discrimination, which is frequently hidden behind pretexts (such as the property has already been let, the job vacancy has already been filled, entrance is restricted to members), to be unmasked.

The most well-known example of situation testing is that of different couples arriving at the entrance to a night club: if mixed couples or couples of foreign origin are systematically refused entry, yet "native" couples who arrive before and after are admitted without difficulty, discrimination can be inferred. Similar experiments have been carried out with estate agencies or even with employers who are suspected of discriminatory recruitment practices.

A means for measuring and providing evidence of discrimination

In Europe, situation testing was devised in the 1970s by black Americans stationed in the Netherlands,⁸⁹ and was then further developed in the United Kingdom by the Commission for Racial Equality.⁹⁰ It was also at the heart of a huge study of ethnic discrimination in recruitment co-ordinated by the International Labour Organisation⁹¹ in the 1990s. It now constitutes an essential tool for sociologists measuring discrimination. In some European countries, it is also used as part of discrimination awareness-raising campaigns, carried out by non-governmental organisations (NGOs), bodies promoting equality and journalists.

⁸⁷ *Ibid.*

⁸⁸ Thus, as an example of factors leading to a shift of the burden of proof, Belgian legislation refers to "facts, such as statistical evidence or situation testing" (Law of 25 February 2003 on the opposition to discrimination and modifying the Law of 15 February 1993 creating a Centre for Equal Opportunities and Opposition to Racism, *Moniteur belge*, 17 March 2003, article 19, paragraph 3). In Hungary, a government decree allows the Equal Treatment Authority recourse to situation tests and the use of the results in court (Government Decree 362/2004 on the Equal Treatment Authority and on its procedural rules (ETAD), adopted in December 2004). In France, Article 21 of the Equal Opportunities Bill (no.2787) presented by the government on 11 January 2006 to the National Assembly legalises situation testing (also called "improvised verification" in the Preamble) in criminal law. Following a declaration of urgency by the government, the text was passed by the National Assembly, in a first reading, on 10 February 2006 as no.534.

⁸⁹ Centre for Equal Opportunities and Opposition to Racism, "Le test de situation en pratique", in *Un combat pour les droits - Rapport annuel 2000*, p.119.

⁹⁰ It should be noted that situation testing is now rarely used in the United Kingdom as the forms of direct discrimination that it detects are less common. However, this does not prevent NGOs and communities from using this method to apply pressure on bars and night clubs whom they judge to be practicing ethnic segregation. This type of action very often leads to a change in practices without the need to go to court.

⁹¹ See the methodologies outlined by Fr. Bovenkerk, *A manual for international comparative research on discrimination on the ground of race and ethnic origin*, Geneva, International Labour Organisation, 1992.

Today, it is as a means of proof, or more exactly, as a type of evidence allowing a shift in the burden of proof, that situation testing gives rise to perplexity, tension and controversy. It involves setting up an identical situation to the one experienced by the person who considers themselves the victim of discrimination as a result of a particular characteristic, and observing if people placed in the same situation who do not possess the given characteristic are treated differently. If so, the results of the test are produced as evidence in court, most often in the form of testimony, sometimes as a report by a bailiff (a public officer) who is supervising undertakings.

Most European countries are not very familiar with the technique. It is not used in Austria, Cyprus, Spain, Italy, Ireland, Lithuania, Luxembourg, Malta, Portugal or Slovenia. In other countries, there is a distinct tendency towards its recognition. In Belgium, the use of situation testing is expressly recognised by law,⁹⁷ even if its implementation by executive decree is currently dividing the political classes. In Hungary, thanks to the persistence of NGOs, in particular the Legal Defence Bureau for National and Ethnic Minorities (NEK), the Supreme Court has accepted testimony drawn from situation testing in order to establish discrimination against Roma at the entrance to a disco.⁹⁸ In light of this, a government decree has expressly recognised the Equal Treatment Authority's right to use situation testing in its investigations and, if appropriate, to make use of these findings in court.⁹⁹ In France, the crisis that rocked the suburbs in autumn 2005 has led the government to introduce measures to strengthen equal opportunities. The use of situation testing in criminal law, which had already been recognised by the Court of Cassation for a number of years¹⁰⁰, has also recently been sanctioned by the National Assembly.¹⁰¹ In the Czech Republic, situation testing is accepted as evidence in court and discrimination towards Roma has been punished thanks to the resulting evidence provided.¹⁰² In Slovakia, the first cases based on situation testing were referred to court in 2005.¹⁰³ In Sweden, situation tests organised in 2004 by some in the media in order to expose ethnic discrimination during recruitment re-opened the issue of using this type of evidence in court. Whilst the DO - the ethnic discrimination ombudsman - seemed still to be reticent, the law students who were barred from entering certain establishments because of their ethnic origin decided to move matters forward. In 2005, on the basis of situation testing in several clubs in Stockholm, Gothenburg and Malmö, nine lawsuits were initiated. Some of these have been settled out of court.

⁹⁷ Law of 25 February 2003 previously cited in footnote 88, above. For examples of simplified forms of situation testing used *stricto sensu* to provide testimony, see the rulings of the Court of Appeal of Liège of 11 March 1998 and of the Correctional Tribunal of Brussels of 31 March 2004 (available on the web site of the Centre for Equal Opportunities and Opposition to Racism: www.antiracisme.be) as well as the summary ruling by the Civil Tribunal of Brussels on 3 June 2005 (reported on the web site of the Movement Against Racism Anti-Semitism and Xenophobia: www.mrax.be).

⁹⁸ This case was published as number EBH 2002.625 in the Supreme Court's official journal, which details rulings of special importance. For a description of this case, see the White Booklet 2000 on NEK's website, under "Discotheque in D" (<http://www.nek.hu/indexeng.htm>).

⁹⁹ Government Decree 362/2004 previously cited in footnote 88, above.

¹⁰⁰ See the rulings of 12 September 2000, 11 June 2002, and 27 June 2005, as detailed in footnotes 107 and 108 below.

¹⁰¹ Bill no.534 previously cited in footnote 88, above.

¹⁰² See, for example, the ruling of the Municipal Court of Prague of 31 March 2004; that of the High Court of Prague of 22 March 2005 and that of the Regional Court of Ostrava of 24 March 2005. For a commentary on these decisions, see the *European Anti-Discrimination Law Review*, 2005, issue nr 2, p.50.

¹⁰³ These cases were brought by an NGO in eastern Slovakia, the Centre for Civil and Human Rights.

A vilified instrument

The debates, at times stormy, which have surrounded the use of situation testing in court cases, are much based on alarmist, if not to say absurd, concerns. In Belgium, where the use of situation testing needs to be regulated by an executive decree, the VLD (the Flemish right-wing party which is part of the coalition government) recently publicised criticism by employers' organisations and the Office national des propriétaires (National Office for Landlords). In a major daily newspaper, the party declared it refused "to set up a team of spies, send moles to infiltrate companies, open informer hotlines and sanction Big Brother."⁹⁹ The Prime Minister himself did not shrink from calling the testers "infiltrators" and "informers", adding, "you do not send a naked woman to a man to see if he is adulterous."¹⁰⁰ In France, during debates in the National Assembly on the bill whose legalise situation testing¹⁰¹ the Union nationale de la propriété immobilière (National Union for Property Ownership) behaved in a threatening manner. Asserting the right of private landlords to choose their tenants, the Union stated that general implementation of situation testing "could only have negative results, and flies in the face of government policy, especially as regards placing empty accommodation on the market."¹⁰² Political manipulation aside, it is indisputable that situation testing is not without certain difficulties relating both to methodology and legal ethics.

Methodological rigour

The methodology to be used in situation testing should be rigorously specified in order to neutralise variables that could falsify the analysis. When running its "Management reserves the right to refuse entry" campaign¹⁰³ (targeting certain Brussels night clubs), the Mouvement contre le racisme, l'antisémitisme et la xénophobie (Movement Against Racism Anti-Semitism and Xenophobia) took care to make sure that the couples of testers had the "correct" kind of clothing and hairstyle, and that these were similar in each case, that they were in the same age range, that they were not under the influence of alcohol or drugs, that they adopted a courteous and reasonable manner with the establishment's door keeper and so on.¹⁰⁴ Similarly, "situation testing based on CVs" - a survey which was carried out by the Observatoire des discriminations (Observatory for Discriminations) of the University of Paris I - followed meticulously detailed procedures.¹⁰⁵ This survey aimed to measure discrimination in employment by testing several variables: gender (male/female), ethnic origin (North Africa/France), place of residence, physical appearance (good-looking/ugly), age (greater or less than 50) and disability. Two CVs were sent in response to a job advert, differing only by one characteristic, the variable to be tested. The CVs and covering letters were edited so that they did not seem too similar; different envelopes were used; they were posted on different days and from different places; ID photographs were digitally retouched and so on.

⁹⁹ *Le Soir*, 26, 27 and 28 March 2005.

¹⁰⁰ *De Standard*, 25 March 2005.

¹⁰¹ See footnote 88 above.

¹⁰² UNPI press release, 2 December 2005.

¹⁰³ This campaign took place in 2000 and 2001 (see www.mrac.be/article.php3?id_article=194).

¹⁰⁴ See also "Le Testing: méthode et exemples"; a practical guide by GELD (Groupe d'étude et de lutte contre les discriminations). This NGO stopped its activities on 30 June 2005 and is now part of the Haute autorité de lutte contre les discriminations (High Authority Against Discrimination).

¹⁰⁵ J-Fr Amadieu, "Enquête testing sur CV", *Adia/Paris I* - Observatoire des discriminations, May 2004. See also the follow-up to this survey, "Discriminations à l'embauche - De l'envoi du CV à l'entretien" April 2005. These surveys are available on the Observatoire's web site (<http://cegars.univ-paris1.fr/observatoiredesdiscriminations/d.htm>).

To be convincing, situation testing requires as high a degree of similarity as possible between the group who are likely to be the victims of discrimination and the control group, which resembles the first group in all respects apart from the characteristic to be tested.

Fairness of evidence

Another ethical and legal criticism has been levelled at situation testing: it does not correspond to the principle of fairness of evidence, an issue that the French Court of Cassation has tackled on several occasions. In one case, the NGO SOS Racisme had carried out situation tests at the entrance to several night clubs in the Montpellier region. The doorkeepers accused were acquitted on appeal on the grounds that the testing had been carried out in a biased, unfair manner. According to the Court of Appeal, the testing had been implemented "in a one-sided fashion by the NGO, which was appealing to its members only (...) who were duly informed that the aim of the operation was (...) to show that segregation was in force at the entrance to these night clubs". This Court also ruled that the situation testing had taken place "without any participation from an officer of the court or a court bailiff", had "no transparency", did not "bear the hallmark of fairness which is essential when providing evidence in criminal proceedings" and "undermined the rights of the respondents."¹⁶⁶ The French Court of Cassation, however, clearly and concisely rejected this point of view. After recalling that offences can be established using any means of proof in criminal cases, the Court emphasised that "there is no legal provision allowing repressive judges to exclude proof presented by the parties merely because it was obtained in an illicit or unfair manner."¹⁶⁷ The Judge should "weigh the value of the evidence after having heard both parties."¹⁶⁸ According to the French Court of Cassation's case law, a criminal judge cannot arbitrarily reject the results of situation testing. Their evidential value must be weighed in each case.¹⁶⁹

Incitement

Another fear has at times reinforced magistrates' cautious approach – is situation testing a form of incitement? The Belgian Council of State, which has to give an opinion on all bills, shares this fear and considers that testing could result in an infringement of the privacy of the person being tested.¹⁶⁹ The European Court of Human Rights has however dealt with this issue in its rulings on the police technique of infiltrating groups of criminals with informers, or in the fight against drug trafficking, staging deals to unmask dealers. According to the Court, as long as these agents – and by analogy, the testers – do not create criminal intent in the people being tested, the

¹⁶⁶ Court of Appeal of Montpellier (Correctional Division), 5 June 2001.

¹⁶⁷ Court of Cassation (Criminal Division), 11 June 2002, no. 01-85.5559, available on the Légifrance web site.

¹⁶⁸ See also the Court of Cassation's ruling of 12 September 2000, no. 99-87251, which is available on the Légifrance web site. In this case, which also concerned testing at the entrance to a disco, a bailiff was present throughout the operations and reported that the group of North African young people was refused entry on the grounds that the establishment was private, whereas groups of European young people entered with no difficulty.

See also the Court's ruling of 7 June 2005, no. 04-8735, available on the Légifrance web site. In this case, a victim who had been discriminated against in obtaining accommodation had telephoned the estate agency from the premises of the NGO, SOS Racisme. A recording of this conversation was admitted as evidence in court.

¹⁶⁹ Conseil d'État (CE), opinion no. 32.967/2 of February 2002, given at the request of the President of the Chamber of Representatives, during an examination of the text which led to the previously cited Law of 25 February 2003 on the opposition to discrimination.

procedure is admissible.¹¹⁰ In other words, if the testers limit themselves to setting up the conditions for an offence to be committed, and observe it as passive bystanders, this is not incitement and the procedure is acceptable. For a good situation test, testers must be given very clear instructions so that they cannot later be accused of encouraging the person under observation to behave in a discriminatory fashion.

The need to go further

It is time to leave these knee-jerk reactions behind and to see situation testing for what it really is: A simple tool for victims of direct discrimination to provide evidence in court. At present, there appears to be a need for this tool in many European countries in order to prove and put a stop to blatant forms of discrimination by instituting legal proceedings. The implementation of anti-discrimination legislation will only be successful by using non-traditional methods of proof, in such a manner that ensures the correct procedures and methodology are followed and that ensures respect for the rights of all. Otherwise, the legal principle of equal treatment risks being reduced to a declaration of good intent that exists only on paper, with no connection to social reality.

¹¹⁰ ECHR 9 June 1998, *Teixeira de Castro v Portugal*. See also Dutch case law, which has refused to recognise situation testing as a form of incitement (for criminal law: HR 18 October 1988, NJ 1989; for civil law: HR 24 November 1981, RV 1981, 115).