EJDM Europäische Vereinigung von Juristinnen und Juristen für Demokratie und Menschenrechte in der Welt e.V.

EALDH European Association of Lawyers for Democracy and World Human Rights

AEJDH Asociación Europea de los Juristas por la Democracia y los Derechos Humanos en el Mundo

AEJDH Association Européenne des Juristes pour la Démocratie et les Droits de l'Homme dans le Monde

AEGDU Associazione Europea delle Giuriste e dei Giuristi per la Democrazia e i Diritti dell'Uomo nel Mondo

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Europäisches Kolloquium der EJDM
Dokumentation

GESETZE UND VERFAHREN GEGEN RASSISMUS IN EUROPA ERFAHRUNGEN UND RECHTLICHE FORDERUNGEN

8. und 9. November 1997
im Palais de l'Europe
Avenue de l'Europe, Straßburg

Colloque Européen de l'AEJDH
Documentation

LÈGISLATION ET RECOURS CONTRE LE RACISME EN EUROPE QUELLES EXPÉRIENCES? QUELLES REVENDICATIONS?

8 et 9 novembre 1997
au Palais de l'Europe
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European Colloquy of the EALDH
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SAMSTAG 8. NOVEMBER1997 SAMEDI 8 NOVEMBRE 1997
SATURDAY 8 NOVEMBER 1997

ERÖFFNUNG DURCH DIE PRÄSIDENTIN DER EJDM
OUVERTURE PAR LA PRÉSIDENTE DE L'AEJDH
OPENING BY THE PRESIDENT OF THE EALDH
Prof. Dr. MONIQUE CHEMILLIER-GENDREAU, Paris

BEGRÜSSUNG – BIENVENUE – WELCOME
Dr. SÉVINE ERCMANN
Principal Legal Officer at the Council of Europe

Short Introduction to the Action Plan Against Intolerance and Racism of the Council of Europe

GRUNDSATZREFERAT – RAPPORT PRINCIPAL – PRINCIPAL REPORT
Professeur de Philosophie JACQUES FREDJ, Port-Marly, Frankreich / France

Rassismus – philosophische Einordnung
Le racisme – classification philosophique
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Racial Discrimination – Forms and Legal Restriction

REGULA BÄHLER, Rechtsanwältin / avocate / barrister, Zürich, Schweiz / Suisse / Switzerland
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Prof. Dtt. FULVIO VASSALLO PALEOLOGO, Palermo, Italien / Italie / Italy

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Prof. Dr. SEVALDINE BIJIKOV, Sofia, Bulgarien / Bulgarie / Bulgaria
SIEGFRIED BRATKE, Rechtsanwalt / avocat / barrister, Düsseldorf,
Deutschland / Allemagne / Germany
FERNNE BRENNAN, LL.M., University of Essex, Großbritannien / Grande-Bretagne / Great Britain
Prof. Dr. DIEGO LÓPEZ GARRIDO, Madrid, Spanien / Espagne / Spain
Prof. Dr. Prof. MEHMET SEMIH GEMALMAZ, University of Istanbul,
Human Rights Centre Istanbul, Türkei / Turquie / Turkey
Prof. Dr. MARCEL ALEXANDER NIGGLI, Universität Freiburg, Schweiz / Suisse / Switzerland

SONNTAG 9. NOVEMBER 1997 DIMANCE 9 NOVEMBRE 1997
SUNDAY 9 NOVEMBER 1997

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Elements of a Directive of the European Union Against Racism

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Großbritannien / Grande Bretagne / Great Britain
Dr. FREDI HÄNNI, Rechtsanwalt / avocat / barrister, Bern, Schweiz / Suisse / Switzerland
Dr. PAOLO ODDI, Milano, Italien / Italie / Italy
Dr. ROBIN SCHNEIDER, Europareferent der Ausländerbeauftragten des Senats von Berlin,
Deutschland / Allemagne / Germany

I. ORIENTATION

1.

EU-Vertrag von Amsterdam, Artikel 6 A

„Unbeschadet der sonstigen Bestimmungen dieses Vertrages kann der Rat im Rahmen der durch den Vertrag gegebenen Zuständigkeiten der Gemeinschaft auf Vorschlag der Kommission und nach Anhörung des Europäischen Parlaments einstimmig geeignete Vorkehrungen treffen, um Diskriminierungen aus Gründen des Geschlechts, der Rasse, der ethnischen Zugehörigkeit, der Religion oder des Glaubens, einer Behinderung, des Alters oder der sexuellen Ausrichtung zu bekämpfen."

EU-Treaty of Amsterdam, Article 6 A

"Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

2.

EU-VERTRAG VON MAASTRICHT, ARTIKEL F (2)

„Die Union achtet die Grundrechte, wie sie in der am 4. November 1950 in Rom unterzeichneten Europäischen Konvention zum Schutze der Menschenrechte und Grundfreiheiten gewährleistet sind und wie sie sich aus den gemeinsamen Verfassungsüberlieferungen der Mitgliedstaaten als allgemeine Grundsätze des Gemeinschaftsrechts ergeben."

EU-TREATY OF MAASTRICHT, ARTICLE F (2)

"The Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to member-States as general principles of Community law."

3.

KONVENTION ZUM SCHUTZE DER MENSCHENRECHTE UND GRUNDFREIHEITEN (EUROPÄISCHE MENSCHENRECHTSKONVENTION), ARTIKEL 14

„Der Genuß der in der vorliegenden Konvention festgelegten Rechte und Freiheiten muß ohne Unterschied des Geschlechts, der Rasse, Hautfarbe, Sprache, Religion, politischen oder sonstigen Anschauungen, nationaler oder sozialer Herkunft, Zugehörigkeit zu einer nationalen Minderheit, des Vermögens, der Geburt oder des sonstigen Status gewährleistet werden."

CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (EUROPEAN CONVENTION ON HUMAN RIGHTS), ARTICLE 14

"The enjoyment of the rights and freedom set forth in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

4.

Internationaler Pakt über bürgerliche und politische Rechte, Artikel 26

> „Alle Menschen sind vor dem Gesetz gleich und haben ohne Diskriminierung Anspruch auf gleichen Schutz durch das Gesetz. In dieser Hinsicht hat das Gesetz jede Diskriminierung zu verbieten und allen Menschen gegen jede Diskriminierung, wie insbesondere wegen der Rasse, der Hautfarbe, des Geschlechts, der Sprache, der Religion, der politischen oder sonstigen Anschauung, der nationalen oder sozialen Herkunft, des Vermögens, der Geburt oder des sonstigen Status, gleichen und wirksamen Schutz zu gewährleisten."

International Convenant on Civil and Political Rights, Article 26

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

5.

INTERNATIONALES ÜBEREINKOMMEN ZUR BESEITIGUNG JEDER FORM VON RASSENDISKRIMINIERUNG,

Artikel 1 (1)

> „In diesem Übereinkommen bezeichnet der Ausdruck ‚Rassendiskriminierung' jede auf der Rasse, der Hautfarbe, der Abstammung, dem nationalen Ursprung oder dem Volkstum beruhende Unterscheidung, Ausschließung, Beschränkung oder Bevorzugung, die zum Ziel oder zur Folge hat, daß dadurch ein gleichberechtigtes Anerkennen, Genießen oder Ausüben von Menschenrechten und Grundfreiheiten im politischen, wirtschaftlichen, sozialen, kulturellen oder jedem sonstigen Bereich des öffentlichen Lebens vereitelt oder beeinträchtigt wird."

Artikel 2 (1)

> „Die Vertragsstaaten verurteilen die Rassendiskriminierung und verpflichten sich, mit allen geeigneten Mitteln unverzüglich eine Politik der Beseitigung der Rassendiskriminierung in jeder Form und der Förderung des Verständnisses unter allen Rassen zu verfolgen; zu diesem Zweck
>
> a) verpflichtet sich jeder Vertragsstaat, Handlungen oder Praktiken der Rassendiskriminierung gegenüber Personen, Personengruppen oder Einrichtungen zu unterlassen und dafür zu sorgen, da0ß alle staatlichen und örtlichen Behörden und öffentlichen Einrichtungen im Einklang mit dieser Verpflichtung handeln,
> b) verpflichtet sich jeder Vertragsstaat, eine Rassendiskriminierung durch Personen oder Organisationen weder zu fördern noch zu schützen noch zu unterstützen,
> c) trifft jeder Vertragsstaat wirksame Maßnahmen, um das Vorgehen seiner staatlichen und örtlichen Behörden zu überprüfen und alle Gesetze und sonstigen Vorschriften zu ändern, aufzuheben oder für nichtig zu erklären, die eine Rassendiskriminierung – oder dort , wo eine solche bereits besteht, ihre Fortsetzung – bewirken,
> d) verbietet oder beendigt jeder Vertragsstaat jede durch Personen, Gruppen oder Organisationen ausgeübte Rassendiskriminierung mit allen geeigneten Mitteln einschließlich der durch die Umstände erforderlichen Rechtsvorschriften,
> e) verpflichtet sich jeder Vertragsstaat, wo immer es angebracht ist, alle eine Rassenintegrierung anstrebenden vielrassigen Organisationen und Bewegungen zu unterstützen, sonstige Mittel zur Beseitigung der Rassenschranken zu fördern und allem entgegenzuwirken, was zur Rassentrennung beiträgt."

INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION,

Article 1 (1)

> "In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

Article 2 (1)

> "States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:
>
> a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
> b) Each State Party undertakes mot to sponsor, defend or support racial discrimination by any persons or organisations;
> c) Each State Party shall take effective measures to review governmental, national, and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
> d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organisation;
>
> e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organisations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division."

II. Introduction:

1. Communique de presse de l'AEJDH

Communiqué

Les difficultés économiques, la montée continue du chômage, l'affaiblissement des valeurs remplacées partout par l'inquiétude matérielle, ont conduit l'Europe à une analyse absurde et démagogique aux terme de laquelle les étrangers seraient responsables de la crise. Les législations nationales se font restrictives à leur entrée et la politique communautaire renforce la fermeture de l'ensemble de l'Union.

Cette politique dénoncée par l'AEJDH lors d'un précédent colloque tenu à Berlin en 1994, conduit immanquablement à une montée du racisme. Hésitant à s'attaquer aux causes, les législateurs nationaux tentent seulement de prendre des mesure pour endiguer les manifestation de ce racisme.

Y a-t-il dans ce domaine des expériences plus concluantes que d'autres ?Quelles sont les revendications des citoyens en termes de protection contre les violences racistes et en termes de nouvelles mesures gouvernementales ? Que doit-on interdire ? Que faut-il punir ? L'Europe doit-elle et peut-elle proposer des mesures communes plus efficaces ?

Telles sont quelques unes des question qui seront débattues le 8 et le 9 novembre 1997 à Strasbourg avec l'aide de spécialistes. Les juristes des huit pays européens qui forment l'AEJDH, attachent une grande importance à cette rencontre car ils sont conscients que l'avenir démocratique de l'Europe est lié à son aptitude à faire reculer le racisme.

Prof. Monique Chemillier-Gendreau Thomas Schmidt
Présidente de l'AEJDH Secrétaire Général de l'AEJDH

2. Ouverture du colloque: Législation et recours contre le racisme en Europe

Prof. Dr. Monique Chemiller-Gendreau, Présidente de l'AEJDH, France

L'Association Européenne des Juristes pour la Démocratie et les Droits de l'Homme dans le Monde ne peut rester indifférente à l'évolution du racisme en Europe. Mais il semble utile en ouverture à cette rencontre de préciser quel est le sens de notre démarche.

Nous voulons nous situer par rapport aux pratiques sociales telles qu'elles se développent dans l'Europe en voie d'unification. Ces pratiques ne peuvent pas être analysées seulement par rapport à un encadrement juridique qui détermine ce qui est toléré et ce qui est réprimé. Elles prospèrent dans un certain contexte, sous l'effet de causes précises qui recouvrent à la fois des causes directes et des déterminants plus profonds.

Nous voulons mener ici une comparaison qui a nécessairement des aspects techniques entre les législations de nos pays respectifs et les possibilités d'action répressive offertes par les unes et par les autres. Nous allons donc nous interroger sur ce qu'il y a derrière l'unanimité de principe contre le racisme. En effet celle-ci recouvre une disparité encore très grande entre les dispositions législatives des différents pays d'Europe. Certains États comme le Royaume-Uni ou la France sont armés de législations très fortes et sont dotés d'institutions de contrôle. D'autres ont hésité à entrer dans cette voie et comme l'Allemagne se situent dans le cadre du respect de la dignité humaine.

À partir de ces différences, il faut donc examiner dans une optique comparatiste une série de questions juridiques et les solutions ou les impasses des différents systèmes de droit. On est ainsi conduit à se demander si le fait d'inscrire la prohibition du racisme dans la constitution comme l'ont fait l'Allemagne ou l'Espagne est de nature à faire reculer le phénomène.

Il y a dans tout cela une difficulté centrale : celle de la dialectique entre l'indivisibilité de la liberté et l'interdiction de certaines pratiques ou de certains discours qui sont eux-mêmes attentatoires aux libertés. Pour ce qui est des pratiques et des actes, l'État dispose du droit de limiter certaines libertés. Il peut prononcer des interdictions si l'usage de ces libertés conduit à porter atteinte aux valeurs défendues par le groupe dans son ensemble et qui ont pour but de le protéger. Mais pour ce qui est des propos, des discours, le débat reste ouvert (par exemple en France). Faut-il interdire et réprimer les propos racistes généraux, ceux qui ne sont pas en eux-mêmes des incitations directes à l'action ? Dans ce cas peut-on se satisfaire de l'idée que faces à l'expression de la haine, d'autres voix s'élèveront pour imposer d'autres valeurs par les vertus du débat démocratique ?

La lutte contre la discrimination raciale suppose que soient surmontées d'autres difficultés. Nous les retrouvons dans la problématique d'un projet de législation européenne. Est-ce que ce sont des groupes en tant que tels qu'il faut protéger des formes de discrimination, notamment les minorités (dans ce cas tout dépend de la reconnaissance du sous-groupe en tant que tel comme le montre le cas des « rastas » en Grande-Bretagne), ou faut-il lutter contre le racisme à partir d'une conception unique et universelle de l'être humain ? Les conceptions britannique et française sont dans ce domaine assez éloignées l'une de l'autre. Ce sont pour les juristes de réels enjeux qu'il faut impérativement régler si l'on veut avancer dans la voie d'un système judiciaire efficace.

De même il faut bien, dans une Europe immanquablement de plus en plus solidaire, qu'une réglementation unifiée témoigne de la mise en commun des valeurs.

Mais, nous devons avoir présents à l'esprit des enjeux plus importants que ceux qui sont exposés à travers les textes de droits. C'est ici que je voudrais expliquer la continuité de notre action. Lorsque nous nous sommes regroupés il y a un peu plus de quatre ans, c'est

parce que certains d'entre nous avaient commencé à s'inquiéter de la tournure que prenait dans nos différents pays la question des relations avec les étranger : grèves de la faim dans des églises, foyers de travailleurs immigrés incendiés ou attaqués, reconduites à la frontière par la force, emplois de narcotiques pour faciliter les voyages contraints, développements des centres de rétention, etc. En sommes nous étions face à une longue litanie de violations graves des droits de l'homme. Nous demandons dans chacun de nos pays des changements substantiels de la législation à l'égard des étrangers. Nous demandons ensemble que l'Europe se dote d'une politique et d'une réglementation honorables et ouvertes. Nous avons dans ce but organisé à Berlin il y a trois ans une conférence qui a été suivie d'un long travail de réflexion. Nous disposons depuis d'un texte qui est l'instrument de notre lutte, ce Manifeste que nous avons rédigé ensemble sur ce que devrait être une Europe ouverte aux étrangers. Pour l'instant, nous n'avons guère été entendus. Il était tout naturellement dans la continuité de ce travail, de nous retrouver maintenant face à la question du racisme. Je tiens à insister sur la liaison fondamentale qui relie entre elles la question de l'immigration et celle du racisme. Tous les États disent vouloir lutter contre le fléau du racisme et de la xénophobie. Chacun réfléchit à la panoplie de moyens qui seraient les mieux adaptés à faire reculer cette forme de haine irraisonnée entre les humains. Je dis avec force et solennité qu'il ne sert à rien de développer des lois contre certaines pratiques si ces pratiques sont implicitement encouragées par d'autres lois. L'Europe est sur une mauvaise pente. Elle a restreint les conditions d'entrée et de séjour des étrangers non communautaires sous le prétexte de la protection des emplois. Il ne découle de cette politique aucun effet positif sur le chômage qui continue de croître car il tient à des causes totalement différentes. Et partout, le travail illégal prospère. Il encourage et accompagne la dégradation des droits sociaux. Ce travail illégal ne concerne pas que les étrangers. Ils ne sont même concernés que pour une faible part (moins de 10 %). Mais le cumul de l'irrégularité du séjour et de l'illégalité de l'emploi les mettent au bas de l'échelle de la précarisation. Les États de l'Europe sont indulgents à l'égard des employeurs de ces personnes. En revanche ils durcissent considérablement le discours et les mesures à l'encontre des étrangers placés bien malgré eux dans ces situations. Alors que ceux-ci préféraient bien évidemment bénéficier de situation régulières, on les fait glisser de plus en plus nombreux dans l'irrégularité. Refus du droit d'asile, restrictions au regroupement familial, refus de renouvellement de titres de séjour à de nombreux étudiants, offres d'employeurs sans scrupules, telles sont les principales causes qui produisent des situations d'irrégularité. Alors les politiques menacent : « Nous ne tolérerons pas plus longtemps leur présence sur notre sol ». Et le peuple des nationaux, angoissé par la crise et encouragé par l'attitude des responsables politiques, développe un racisme de proximité dans les moindres rencontre de la vie quotidienne. Il le développe en aveugle et frappe en réalité d'autres nationaux, sous le prétexte qu'ils seraient d'origine étrangère. Car le racisme n'est pas dirigé seulement contre les étrangers. Il est une gangrène qui ronge la société de l'intérieur.

Voilà ce qu'il m'apparaît indispensable de rappeler à l'entrée de ces moments de réflexion, afin que celle-ci ne se situe pas dans un cadre étroit, mais en liaison avec l'ensemble des phénomènes ou des tendances que nous devons nous employer à combattre dans notre recherche d'une démocratie européenne renouvelée.

3. THE WORK CARRIED OUT BY THE COUNCIL OF EUROPE ON MEASURES AGAINST RACISM, XENOPHOBIA AND INTOLERANCE

Dr. Sévine Ercmann, LL.M, Principal Legal Officer at the Council of Europe, Strasbourg, France

I. INTRODUCTION: INTOLERANCE AND XENOPHOBIA

The activities or action plans undertaken by the Council of Europe over the years being manifold comprising political, educational, cultural, social, youth and HRs fields only a brief survey can be given on these activities or action plans.

As the Council of Europe's main objective has been to promote the principles of the rule of law in a democratic society and the protection of human rights throughout Europe. Therefore, it has undertaken many activities in combating against racism and intolerance in all its forms. The rebirth and persistence of xenophobia and racism in Europe in the last 10 years has motivated the Heads of Governments of the Council of Europe's member States to take urgent measures against these trends.

The first Summit of the Heads of States, which met in Vienna in October 1993, adopted a Declaration and an Action Plan on combating racism, xenophobia, antisemitism and intolerance which is comprised of a three-fold strategy: «the launching of a wide-ranging European Youth Campaign against Racism, Xenophobia, Anti-semitism and Intolerance, the creation of the European Commission against Racism and Intolerance (ECRI), and the stepping-up intergovernmental co-operation within the Council of Europe for combating racism, xenophobia, antisemitism and intolerance.»

II. CREATION OF A EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE (ECRI)

Established by the Vienna Summit's decision, this institution has been empowered for working out safeguards against all forms of racism and intolerance. The Committee of Ministers is empowered to instruct the Commission on tackling with other measures in the attainment of its objectives.

According to the Committee of Ministers' decision, ECRI's members are to be chosen for their moral authority and their expertise in their countries when dealing with xenophobia, intolerance and racism.

The broad scope of activities comprise both legal and policy aspects and it aims at seeking a balanced combination of the two components and pursuing a comprehensive and multidisciplinary approach covering both legal and non-legal issues.

The Commission determined its work first of all by evaluating the scope of the situation in Europe and compiled a survey of relevant legislation currently in force in the member States of the Council of Europe. The survey drawn up by the Swiss Institute of Comparative Law in Lausanne enabled the ECRI to draw up an inventory of specifically anti-racist , anti-discriminatory legislation in all fields of law for the member States.

A further valuable basic source for ECRI's work has been the Report drawn up in 1991 by the European Committee on Migration (CDGM) entitled «Community and Ethnic Relations in Europe», as well as various other work carried out and published by this Committee, such as «The Integration of Immigrants: Towards Equal Opportunities.»

Moreover, ECRI co-operated closely with other Council of Europe committees working in this field, such as the Steering Committee on the Mass Media and the Steering Committee for Equality between Men and Women.

On the basis of an analysis made on different relevant measures in force and the survey of the situation in Europe in regard to racism and intolerance, at its third meeting of December 1994, the ECRI drew up its work programme which was grouped under three working methods:

1. Country by country approach

2. International legal instruments

3. Combating racism and intolerance at an international level

Furthermore, ECRI has been elaborating a series of general policy recommendations and establishing a database and internet site on racism and intolerance in 1997. Moreover, ECRI closely works with NGO's in this field. It has significant publications and fact sheets on good practices existing throughout Europe which set up guidelines for behaviour in combating racism and intolerance.

III. European Youth Campaign Against Racism, Xenophobia, Antisemitism, and Intolerance

The European Youth Campaign launched on 10 December 1994 under the logo "All different, all equal" is conducted in the majority of Council of Europe member States. Formally, the campaign ended on 30 June 1996; however, many activities at the national level are still continuing.

Over 2 000 national and local activities in different forms and surveys were carried out: information programmes in schools, projects for peer group education, production of educational materials, youth camps, pilot projects, social work in difficult urban and suburban areas, festivals, exhibitions, plays, a media campaign, newspaper articles, games and information centres during the campaign.

At the European level, the programme - implemented under the direction of the European Organising Committee - was made up of government and NGO representatives, it comprised:

- Training courses for representatives of minority groups. These courses facilitated contact with groups which are often isolated, not integrated into any international co-operation networks.

- One-hundred pilot projects which succeeded in involving local people in a variety of themes, using some highly original approaches.

- Production of educational material and tools, which should be further developed and tailored to a variety of target groups.

The major events of the European programme, such as the Action Week against Racism, the European Trains and European Youth Week, mobilised huge numbers of young people and attracted considerable media attention.

The official closure of the Campaign was followed by an evaluation stage, during which all the partners in the Campaign attended a conference in Budapest and produced a series of recommendations relating to national and European follow-up. See information document prepared by the Directorate of Human Rights [CRI (96) 40 rev p.3].

IV. Intergovernmental Activities

1. The European Committee on Migration (CDMG)

The above-mentioned Committee, set up to establish European co-operation in the field of migration and community relations, has also been responsible for several significant projects in this field. It particularly stressed practical and local level initiatives.

Amongst these, particular mention should be made of:

- The Committee of Ministers on Community Relations' Recommendation N° R (92)12;
- A project on "the integration of immigrants: towards equal opportunities", realised as a follow-up to the publication "Racial violence and harassment in Europe";
- A study and publication on "Police training concerning immigrants and ethnic relations"; and
- A study and publication on "Tackling racism and xenophobia: practical action at local level."

At its 6th Conference of European Ministers responsible for Migration Affairs held in Warsaw in June 1996, the Ministers reviewed the implementation of community relations policies in Europe and launched a new project entitled "Tension and tolerance: building better integrated communities across Europe".

2. The Steering Committee on Mass Media (CDMM)

As part of the Plan of Action on combating racism, xenophobia, antisemitism and intolerance, a Group of Specialists on Media and Intolerance (MM-S-IN) was set up with the terms of reference of drafting two Recommendations. One on "hate speech," and the other on "the media and the promotion of a culture of tolerance". Furthermore, work is currently being carried out on new information and communication technologies. It takes into consideration the problem of racist materials transmitted via Internet.

The Council of Europe has also organised consultations with professionals from the broadcasting, press and journalism training sectors. A Prize of the International Federation of Journalists for journalists particularly active in combating racism is awarded at the annual Media Forum co-organised by the Council of Europe.

3. The Council for Cultural Co-operation (CDCC)

The concept of intercultural education as a key factor in combating intolerance was particularly underlined by the Council. It developed a number of specific initiatives in this field, including a recent project on "Democracy, Human Rights and Minorities: Educational and Cultural Aspects".

In the context of the Plan of Action on combating racism, xenophobia, antisemitism and intolerance, a project on history teaching has been developed . It aims at identifying innovatory approaches to teaching the history of Europe and to provide teachers and curriculum developers with practical advice.

An intersectoral project was set up in 1993 under the auspices of the Council for Cultural Co-operation and its specialised committees pursuant to the European Cultural Convention. This project led to the organisation of a Final conference on Democracy, Human Rights and Minorities: Educational and Cultural Aspects in Strasbourg from 21-23 May 1997; at the end of which a very comprehensive and significant Declaration was adopted [see DECS/SE/DHR (97) 13].

4. National Minorities

A Framework Convention for the Protection of National Minorities was adopted on 10 November 1994 as a direct result of the Vienna Summit. A programme of awareness-raising activities as measures for implementing the Framework Convention has been drafted. Also of relevance in this area is the European Charter for Regional or Minority Languages which was adopted on 5 November 1992 (see below).

5. Roma / Gypsies

Owing to their particularly disadvantaged situation, several organs of the Council of Europe such as the Culture and Education Departments, Social (migration) sectors and the Congress of Local and Regional Authorities of Europe have worked on the improvement of Europe's Roma Gypsies' situation. Recently, a coordinator has been appointed to co-ordinate these various activities and to liaise with other international organisations, NGOs and Roma/Gypsy representatives. ECRI is also engaged in work on the situation of Roma/Gypsies.

V. Activities of the Committee of Ministers, Parliamentary Assembly and the Congress of Local and Regional Authorities of Europe

- Committee of Ministers

The Committee of Ministers has adopted a number of Recommendations and Resolutions related to combating racism and intolerance, the latest being the adoption of the Parliamentary Assembly's Recommendation of 1275 (1995) on the Fight against Racism, Xenophobia, Antisemitism and Intolerance [CM/DEL/ Dec (96) 560]. These texts highlight the member States' will to co-operate in the fight against racism and intolerance, and give a political weight to the activities being carried out within the Council of Europe in this field.

- Parliamentary Assembly

The Parliamentary Assembly of the Council of Europe has initiated frequent debates on racism and intolerance, and has adopted a series of Recommendations and Resolutions on the subject.

- Local and regional authorities

In addition to its Recommendations and Resolutions on the subject of combating racism and intolerance, the Congress of Local and Regional Authorities has made an active contribution to the Council of Europe's Campaign on Combating Racism, Xenophobia, Antisemitism and Intolerance. In particular, it has recently organised hearings entitled "Local Democracy, Citizenship and Tolerance" and "Towards a Tolerant Europe: the Contribution of Gypsies" and has set up networks of cities on "Provision for Gypsies in Municipalities" and on " Citizenship and Extreme Poverty", which aim to promote the full participation of all groups in society in civic life.

The most important contributions of the Congress to the field are the European Charter for Regional or Minority Languages of 5 November 1992 and the Convention on the Participation of Foreigners in Public Life at Local Level of 5 February 1992 which entered into force on 1 May 1997.

Further important Resolutions or Recommendations are

- Resolution 236 (1992) on "A new municipal policy for multicultural integration in Europe and the Frankfurt Declaration",
- Resolution 15 (1995) and Rec 10 (1995) on "Local Democracy: a civic project"
- Resolution 17 (1995) on "The Charter of Cities of Asylum"
- Conclusions of the Budapest Conference "Europe 2000 - Young people and their towns: What involvement?" (Budapest, 23-25 October 1997)

Reference should also be made to the Study (Series 53) of the 9th Seminar of the European Network of Training Organisations for Local and Regional Authorities on "Migrant and Minorities in the Community: a Challenge for Local and Regional Government and Training Organisations held in Budapest from 10 to 12 November in 1996.

4. Rapport principal : Le racisme – classification philosophique

Jacques Fredj, professeur de la philosophie, Port-Marly, France

"Le racisme devant la science"

Ce titre réel est en même temps un programme : on aperçoit d'un côté la doctrine de l'inégalité des races humaines et, en regard, son invalidation par les réponses scientifiques.

Mais après tout des recherches sérieuses en anthropologie physique sont légitimes. Si la science se dresse si volontiers contre le racisme, c'est parce que le racisme lui emprunte volontiers son masque.

Posons donc que le racisme est une représentation. C'est à ce titre que nous le considérerons et que nous essayerons d'en repérer les traits essentiels :

- Quel est le propre de la pensée raciste ?
- Quelle configuration du savoir lui confère ses caractéristiques ?
- En quoi les conditions de sa théorisation lui imposent-elles une implication politique dans la société ?

Selon le Vocabulaire de la Philosophie de Lalande, le racisme est défini comme une "doctrine qui admet dans l'espèce humaine l'existence de races définies comme des groupes d'individus ... chez lesquels se perpétue par hérédité et indépendamment de l'action actuelle du milieu un ensemble de caractères biologiques, psychologiques ou sociaux qui les distinguent d'individus appartenant à d'autres groupes ... et surtout
1. qui considère ces différences comme les facteurs essentiels de l'histoire ;
2. qui fonde sur elle un droit pour les races supérieures de se subordonner les autres et même de les éliminer".

De fait le racisme se présente à la fois comme une série de comportements que l'on qualifiera d'actes racistes, mais constitue aussi une vision du monde et de l'histoire. Selon une remarque de P.A. Taguieff le terme de racisme, par sa formation même, indique qu'il se place parmi les conceptions du monde et les programmes, avec les caractères d'une théorie générale de l'histoire humaine.

Comme explication systématique, il ramène l'histoire humaine et son état actuel à un principe qui lui permet également de présager de son état futur et des corrections programmatiques qui permettront d'y remédier.

Qu'il se fasse darwinien ou manichéen, le principe s'enracine dans l'ordre biologique et l'histoire devient un ordre bio-historique qui rend compte dans l'humanité des différences observables : elles renvoient au double registre de l'anthropologie physique et de l'histoire (culture, économie...) ; s'y rattache également la psychologie qui reste une branche de la biologie à travers l'anthropologie physique. Le racisme est donc un monisme explicatif qui repose sur la supposition d'une continuité entre race, culture, économie, langue, psychologie, politique ... Le racisme emprunte donc le masque de la science en construisant un déterminisme strict à partir du biologique.

Le propre de la démarche raciste consiste sans doute dans cette nécessité de lier la notion biologique de race et autre chose qui appartient à un autre ordre que le biologique pour que la notion de race soit significative, c'est-à-dire à la fois explicative et représentative de l'inégalité.

Mais ce propre a une conséquence : la pensée raciste, quel que soit le caractère spéculatif de la démarche, ne peut être une pensée spéculative : c'est une pensée politique car il s'agit des rapports entre les groupes humains.

Toute recherche sur les races, qui conclut à une inégalité ou à des différences d'aptitude propose, en effet, une connaissance de l'histoire, c'est-à-dire de l'état présent d'une société et de ses communautés : pour spéculative qu'elle puisse se croire, elle trace implicitement mais immédiatement la direction d'une action. Ainsi établir une liaison entre une race et une aptitude musicale par exemple suggère d'augmenter dans ce cas la part des études musicales ou de réduire celle des études mathématiques.

En face du racisme, l'antiracisme occupe une position de réponse et d'opposition : attitude de négation qui se développe sur le terrain assigné par le racisme, l'antiracisme au plan théorique est une entreprise de démontage point par point de l'erreur raciste et lorsqu'il se situe au plan de l'action, il est nécessairement encore une réponse qui tente de faire valoir la valeur morale de l'égalité, condition sous laquelle se réaliseront les bénéfices de contact et de l'échange. A chaque fois sa position est donc seconde, dictée par le discours raciste. Il est clair, en effet, qu'une position d'affirmation non-raciste, consisterait à ne pas se préoccuper des races et à les ignorer. Le problème ne se pose que par le racisme, quel que soit le mode de ses manifestations et de ses interventions. La position antiraciste, comme position première, n'a pas à se manifester. Cette indifférence en matière de races comme position naturelle est-elle possible ? Il peut bien n'y avoir aucune réponse de fait dans l'histoire sans que pour autant la question soit invalidée : son absence de fait ne serait pas probante car elle ne prouve pas une impossibilité de droit.

L'antiracisme donc, tel qu'il nous apparaît, est une position de réplique, une position seconde, mais aussi une position secondaire, au sens freudien, c'est-à-dire qui appartient, en définitive, à l'ordre de la rationalité. On peut penser, en effet, que dans des sociétés complexes, existent des cercles d'appartenance différents : tel qui appartient à un groupe régional, professionnel, appartient aussi à un regroupement religieux ou politique ... qui implique, à la façon dont s'établit une morale, un renoncement à une position xénophobe ou raciste, par l'effet d'une condamnation morale (ou politique ce qui, ici, revient au même), en tout cas une interdiction intériorisée. L'antiracisme s'établit donc comme une position secondaire et rationnelle. C'est ainsi que l'on peut comprendre les indications données par une enquête de MRAP auprès de ses adhérents : le dépouillement révéla les signes d'un racisme refoulé chez les militants antiracistes, mais les "aveux" étaient repris et annulés par une parole de désaveu : l'antiracisme est donc le refus conscient et volontaire du point de vue raciste, éventuellement le produit d'un travail sur soi. L'antiracisme ne serait donc pas tout à fait spontané : c'est une réaction, affective ou non, mais qui s'exprime dans le registre de la rationalité, laquelle peut être indignée contre quelque chose qui heurte affectivement ou moralement. La formule selon laquelle "un raciste sommeille en chacun" reste néanmoins sujette à caution, car il ne s'agit sans doute pas de racisme à proprement parler, puisque l'exprimé n'est pas élaboré et ne constitue pas non plus une virtualité en raison de la puissance de l'interdiction : la manifestation est donc de l'ordre du lapsus. En revanche, cela permet de comprendre comment peut se constituer l'exigence antiraciste en moi : ce n'est pas une affirmation, mais une réaction à une blessure qui nourrit un refus de la raison et qui se développe sur le terrain de l'éthique. L'indifférence vis-à-vis des groupes différents est affirmée au nom des droits de l'homme ou de l'humanité. Or, cette indifférence n'est jamais tout à fait réelle dans la structure de mon expérience. C'est une situation connue des ethnologues qui ne peuvent aimer ni comprendre toutes les cultures également. Or il y a toujours et nécessairement des groupes dont je me sens plus proche, quelles que soient les raisons, des sympathies ou des antipathies, des connaissances que j'ai acquises tandis que d'autres me sont restées fermées ... Or combattre le racisme se fait à travers la défense d'une "race" calomniée ou blessée : il faut que cette blessure soit mienne, sinon où pourrait s'enraciner l'affirmation générale de ma solidarité ? Dans certains cas j'aurai l'expérience affective qui dictera une solidarité. Cette expérience affective n'a pas besoin d'être réelle. Elle peut-être un transfert historique, l'émotion ressentie devant la traite des esclaves ou à la lecture de "La Case de l'Oncle Tom" ... Qu'en sera-t-il des autres "races" ? A quel titre ou pour quelles raisons défendrai-je une

"race" étrangère à mon univers affectif et mental, sans réalité affective pour moi ? Il n'y a guère qu'un principe intellectuel et moral pour tenir ce rôle : une race qui m'est indifférente me laisserait indifférent en face des manifestations racistes à son encontre. L'indignation contre le racisme à partir d'une expérience de solidarité me conduit à une solidarité dont j'entreprendrai la justification intellectuelle et morale.

Le registre de cette réponse passe pour inefficace et inadapté au discours raciste qui ne se laisse pas réduire par le rationnel. P.A. Taguieff met en lumière l'inefficacité et l'inadaptation de ce qu'il appelle la vulgate antiraciste fondée sur la dénonciation du biologisme auquel on oppose la connaissance scientifique, la raison et l'universalisme. Il suggère des distinctions utiles : il y aurait ainsi un racisme de domination qui justifierait des situations d'assimilation ou d'exploitation et un racisme différentialiste pour lequel l'autre, ni assimilable ni infériorisable, doit être éliminé. L'analyse est assez convaincante en ce qu'elle rend compte de la différence entre le nazisme et le racisme colonial ; mais cette distinction invalide-t-elle l'antiracisme unique qui se serait constitué, selon P.A. Taguieff sur le modèle traumatisant et obsolète, donc devenu imaginaire, du nazisme ? Ainsi la pensée de Gobineau ne serait pas raciste mais "racialiste", dans le sens où Gobineau ne propose pas un programme politique mais seulement une analyse pessimiste de l'histoire ; "l'Essai sur l'inégalité des races humaines" constitue seulement une philosophie de l'histoire tout entière animée par la notion de race. Et sans doute ces remarques sont-elles exactes au plan intellectuel. Il reste que Gobineau, pensant le monde en termes de races, se rattache à un courant de pensée qu'il contribue d'ailleurs fortement à constituer et qui naturalise l'humanité. L'absence de programme politique chez Gobineau et sa conclusion pessimiste d'une dégénérescence inéluctable par les métissages n'empêchent pas et, au contraire, rendent possible l'idée de race et de défense de la race comme programme politique. Enfin, l'absence de fait de l'antisémitisme chez Gobineau n'exclut pas qu'il puisse figurer parmi les inspirateurs du nazisme quand il crée les cadres et les conditions d'une pensée raciste et antisémite et d'une politique raciste et antisémite.

En d'autres termes, l'absence de continuité, possible en fait, entre racismes différents - mais ne faut-il pas dire entre différentes manifestations empiriques du racisme ? - ne signifie pas pour autant une discontinuité absolue.

Comme le montre le cas de Gobineau l'aryaniste qui n'était pas antisémite, dans un cadre classificateur et hiérarchique qui comporte l'idée de race et dénonce le mal du métissage, il suffit de changer les signes ou les places respectives. Est-il possible de considérer que le seul racisme à combattre est celui qui s'exerce contre moi ? Cela reviendrait, en autorisant implicitement le racisme contre d'autres, à autoriser qu'un jour il s'exerce contre moi. Injustifiable moralement, la différence entre les racismes l'est aussi en fait. L'antiracisme est donc nécessairement universaliste. Sa condition d'existence intellectuelle en fait une position morale en face du racisme, posé dans sa totalité, car il est un mode de pensée. Quel que soit l'intérêt intellectuel des distinctions de P.A. Taguieff, que le racisme trouve son inspiration dans l'idée de l'inégalité et de la domination ou dans celle de la différence, il y a une unité de la pensée raciste qui contient la possibilité même de racisme, de ses remplissements et de ses avatars et c'est l'idée de race comme fondement des faits humains.

Toutefois force est de reconnaître les limites et l'inefficacité de l'argumentation antiraciste. Mais cela est dû peut-être au fait qu'il ne constitue pas une pensée autonome puisqu'il doit développer ses réponses sur le terrain assigné par le racisme :

- à une pensée biologique il va objecter la négation de l'argument biologique par des arguments biologiques,

- l'argument des différences, il ne peut répondre que sur le même terrain, en valorisant l'idée même de différence sous l'unité de l'espèce.

Si le tour de ce débat ne nourrit pas le racisme, il ne le fait pas non plus disparaître.

Cette difficulté provient peut-être des insuffisances et des difficultés de l'idée de l'unité de l'humanité, c'est-à-dire de l'idée d'humanité universelle. Car c'est une idée. Dans "Race et histoire", Lévi-Strauss souligne à quel point l'idée d'un homme universel est une abstraction empreinte d'irréalité, puisque dans la réalité de mon expérience je ne rencontre d'hommes que porteurs de particularités. Mais sa nécessité comme idée directrice a sans doute contribué à une méconnaissance de l'humanité réelle. Au lieu de se situer au plan de l'humanité universelle, ce qui est une abstraction, le travail des ethnologues - et celui des "victimes" - a été de faire connaître ces médiations, de les expliquer, c'est-à-dire de les rendre à la fois présentes et compréhensibles. L'humanité, en effet, ne se réalise que dans des particularités effectives. Richard Marienstras avance, à propos du génocide nazi et de la notion de crime contre l'humanité, la différence entre appartenance à l'espèce humaine qui est immédiate et appartenance au genre humain qui se réalise par la médiation de collectivités. Ces médiations sont le terrain véritable du racisme car elles se présentent avec la force de l'évidence dans l'évidence de la différence.

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Le racisme pourrait donc, dans cette perspective, être défini comme une biologisation, une naturalisation de ces médiations qui constituent le genre humain. En ce sens, il est bien une tentative d'explication systématique. Il faut donc le considérer sur le plan philosophique et à travers ses manifestations historiques. Le mode d'exposition conceptuel peut s'éclairer de l'hypothèse qu'une approche historique nous livrera les conditions de sa constitution. Il ne s'agit pas tant de chercher les origines et les manifestations du racisme dans l'histoire que de mettre au jour ce qui le rend possible et le structure comme pensée. Il s'agit donc d'avancer une périodisation qui permettrait de définir moins la naissance historique que les conditions de possibilité de sa théorisation.

Lorsque nous rencontrons le racisme constitué, il indique son lieu de naissance dans l'histoire de l'Occident où il se théorise à partir du XVIIIe siècle.

Le terme de race, d'un usage un peu plus ancien, dans ses premières acceptions ne désigne pas tant des peuples que des communautés familiales qui unissent des générations. Le mot a sans doute d'emblée un contenu biologico-social, encore que l'aspect biologique, au sens où nous l'entendons, ne semble pas nécessairement prégnant. La race serait l'ensemble de l'héritage agissant comme différenciation ; il s'agit plutôt d'un lien de type "familial" par lequel se transmettent ou se maintiennent des aptitudes qui peuvent être des capacités juridiques. L'usage du mot n'est donc pas nécessairement raciste. Cependant son évolution lui a donné une charge telle qu'il indique aujourd'hui une notion biologique qui se rattache à la pensée raciste comme son fondement. Cette attraction nous renvoie donc à un champ historique et à un champ du savoir, à la liaison du racisme avec l'histoire de l'Occident et à la pensée scientifique. Car si le racisme appartient à l'histoire de l'Occident, s'il en est un produit, cela ne signifie pas qu'il y soit présent dès l'origine. C'est donc au repérage des coupures qu'il convient de s'attacher. L'usage du mot indique deux périodes : l'application à l'humanité du mot race dans son sens actuel se forme entre le XVe et le XVIIIe siècles. Le terme de racisme apparaît au début du XXe siècle.

On peut discuter, en effet, la vision du monde et des autres peuples qu'eurent les Grecs, y discerner des essais de typologie et l'imaginaire de l'étrange à mesure qu'on s'éloigne du centre du monde. Toutefois, pour l'essentiel, l'effort de théorisation dans les limites du connu est accompli par Aristote à propos de l'esclavage et de la question politique. Bien qu'elle soit à la fin de son règne historique, la cité est encore le cadre de référence et la pensée grecque reste commandée par le particularisme de la cité et l'ethnocentrisme de l'hellénisme.

"La nature tend à faire les corps d'esclaves différents de ceux des hommes libres... pourtant le contraire arrive fréquemment aussi : des esclaves ont des corps d'hommes libres, et des hommes libres des âmes d'esclaves". (Polit I, 5 - 1254 b 30). Le principe suivant lequel il y a d'une part, les

esclaves par nature et, d'autre part, les hommes libres par nature, n'est pas absolu" (Polit I,6 , 1255 b 5).

De la sorte, si l'esclavage est justifié par la nature, par une différence de nature qui rend certains inaptes à la liberté parce qu'il leur manque l'aptitude à obéir à la loi, il reste que l'esclavage demeure un statut individuel, à preuve que l'esclave est susceptible d'affranchissement et que des Grecs peuvent être esclaves à la fois dans la réalité et dans la théorie d'Aristote.

Au contraire d'une vue communément reçue la christianisation n'a pas aboli l'esclavage. Le problème de la différence entre les hommes a bien été posé en termes nouveaux en ce sens que l'égalité, qui se trouvait en Dieu, n'était plus une notion juridique ni politique. Le passage d'une pensée politique ou philosophique de l'humanité (ce qu'incarne la pensée stoïcienne dans la cosmopolis romaine) à un contexte religieux impose, dans un cadre théologique, la pensée universaliste du christianisme. Pour le christianisme la reconnaissance de chacun comme le prochain en Dieu entraîne la reconnaissance de son humanité. L'universalisme chrétien, qui vaut d'abord pour tout chrétien à son entrée dans le christianisme, vaut aussi droit d'entrée dans le christianisme pour tout homme. Par là même il contient, bien qu'il y soit déjà répondu, la question des limites effectives de l'humanité. Dire que tout homme est virtuellement chrétien entraîne la question de savoir à quoi on reconnaîtra un homme tandis que cette universalité sépare l'humanité universelle mais virtuelle et celle des types humains qui ne sont pas intégrés réellement dans la catholicité actuelle. Si l'humanité chrétienne est la catholicité, alors la possession de l'humanité dépend de la participation à l'amour de Dieu ou de la virtualité à cette participation. La ligne de partage est donc celle de la participation effective à un moment qui reste à déterminer, qu'il s'agisse de la Création, d'un moment de la vie du Christ ou d'un moment de la diffusion du christianisme, certains en ont-ils été exclus ? C'est en ces termes que se pose la question de ceux qui sont éloignés de Dieu : elle est posée par l'universalité même qui contient en contrecoup la question des limites de l'humanité, c'est-à-dire des signes de sa reconnaissance.

La première manifestation de racisme explicite se repère dans les statuts de pureté de sang qui établissent dans l'Espagne reconquise une ségrégation des nouveaux chrétiens frappés d'une série d'incapacités : une culpabilité théologique est transformée en une tare ineffaçable même par la conversion. Faut-il y voir la matrice du racisme qui s'enracinerait dans un antijudaïsme qui s'est mué en antisémitisme ? On peut avancer l'hypothèse que le racisme colonial, qui suit la Reconquista et naturellement la découverte de l'Amérique, trouve les voies de son expression dans les contradictions de l'universalisme chrétien, mais qu'il est un fait nouveau comme racisme de domination, lui-même enraciné dans un racisme différentialiste :

- de l'antijudaïsme à la pureté de sang, nous assistons à l'attraction d'un vieux problème du monde chrétien dans un cadre redéfini dans le contexte de la Reconquista,

- la question des Indiens, de l'esclavage des peuples nouvellement soumis - le racisme colonial - s'inscrit dans le cadre différentialiste de la pureté de sang qui est pensée dans le cadre théologique qui posait l'universalisme. Le racisme de domination, dont la cause serait hors de soi, trouverait sa légitimation dans le racisme différentialiste logiquement premier.

- l'unification et la systématisation de la pensée raciste en une théorie générale de l'homme s'opère au XVIIIè siècle entre la rupture de ce cadre théologique, un contexte philosophique qui reconnaît l'idée d'humanité et le contexte épistémologique de la constitution d'une science du vivant.

Nous nous trouvons donc devant un paradoxe de la pensée : la pensée raciste a partie liée avec l'universalisme comme un couple d'opposés. Il ne s'agit pas d'une complicité mais d'une "fourche de la pensée", parce que l'universalisme pose la question de l'humanité quand il croit y répondre. La question centrale demeure dans les deux cas "qu'est-ce que l'homme ?", version laïque de "qui est mon prochain ?". La question est cette fois posée en termes de connaissance, ce qui renvoie

apparemment à un problème scientifique. Mais il suffit de penser à la place que lui fait Rousseau pour concevoir la portée et même la nature politiques de la question anthropologique. Le contact avec des populations inconnues ou imprévues impose une interrogation sur les différences et donc sur la notion de l'humanité ; la question de sa définition fait surgir celle de ses limites. Le racisme est donc inséparable d'une interrogation de l'humanité sur elle-même à travers l'idée d'humanité universelle : toute affirmation qui pose l'humanité contient la possibilité d'une thèse raciste qui est aussi une position restrictive de l'humanité. L'idée générale d'une humanité universelle entraîne l'idée d'un classement des différences, c'est-à-dire des humanités empiriques et réelles et de leur écart par rapport au modèle. Ce dernier point implique par lui-même la possibilité de deux formes de racisme :

- un racisme universaliste dont l'idéal est la suppression des différences dans la réalisation d'un type unique d'humanité,

- un racisme différentialiste qui peut être aussi racisme de domination.

Or aux XVIIIe et XIXe siècles nous assistons à la convergence de problèmes sous quatre séries de phénomènes qui se rencontrent dans l'élaboration théorique du racisme,

- le registre social, constitué dans l'esclavage colonial, a fait mûrir la contradiction de l'universalisme déjà mise au jour dans la controverse qui opposait l'universalisme évangélique à l'esclavage naturel des Indiens par incapacité théologique,

- le registre politique apporte son renfort en constituant le modèle d'États nationaux qui systématisent l'idée qu'États et peuples doivent coïncider en des populations homogènes,

- le registre anthropologique, lui-même fortement politique, tente de penser la question de l'homme et y retrouve les contradictions ou les difficultés de l'universalité : comment définir l'universel et expliquer le particulier ?

- le registre scientifique propose de réaliser des classifications et d'expliquer de vastes phénomènes divers par un principe unique et objectif.

Au XIXe siècle le déclin de l'esclavage est relayé par les autres registres dont il est historiquement et méthodologiquement trop proche pour ne pas les avoir informés de ses controverses. La théologie perd de son efficace alors que la science devient opératoire. Le moment où se théorise la pensée raciste correspond à la formation de la pensée moderne qui propose en modèle les sciences de la nature. La totalisation qui donne à la pensée raciste ses caractères tient au moins autant à l'ampleur des contacts et donc des différences qu'à sa formation dans le contexte de la constitution des sciences de la nature. Celles-ci, en effet, se fixent pour but de classer et d'expliquer ; de la physique à l'histoire naturelle, on passe de l'inerte au vivant : dans ce champ s'inscrit la notion de race qui contient celle de peuple et partant, de civilisation : l'histoire est naturalisée en une bio-histoire. Mais cette apparence d'objectivité dissimule une intervention de plus en plus vive du narcissisme à mesure que les bases objectives s'amenuisent. Dans la liaison entre race et civilisation, le biologique sert de principe objectif d'unification et de classification à des phénomènes de diversité et de différences qui lui échappent : par cette liaison illégitime, le racisme ne se développe pas sur le terrain de l'objectivité scientifique, mais il reste dans la dépendance de l'idée d'humanité universelle : la question "qui est mon prochain ?" n'est plus une question commandée par la théologie, mais posée par la politique dans les termes de la science, en l'occurrence ceux des sciences naturelles. L'idée d'humanité universelle, à laquelle son caractère abstrait ne peut laisser qu'un statut régulateur, entre en contradiction avec l'effectivité des humanités diverses. puisque l'idée d'humanité universelle ne peut répondre directement à aucune question de fait, le statut régulateur cède le pas à un emplissement par la constitution d'un modèle emprunté à l'humanité réelle. Dès lors l'acquisition de l'idée d'humanité est susceptible d'effondrement par la confusion de l'idée d'humanité avec un type d'humanité tandis que les exclus sont répartis selon des assignations imaginaires. Ainsi, l'effondrement le plus spectaculaire se produit vers 1930 dans une culture qui avait depuis le XVIIIe siècle porté cette idée à son

achèvement philosophique et qui en avait en même temps réuni les éléments d'une interrogation et d'une contestation.

Ainsi, la généralisation de la pensée raciste au XIXe siècle traduit le double mouvement qui totalise à la fois des mouvements de colonisation et les recherches scientifiques dans une synthèse d'un degré supérieur qui se présente comme un savoir spéculatif. La modification de la perspective politique par l'histoire du nazisme, la modification du champ des connaissances anthropologiques par la constitution des sciences humaines entraînent une modification des énoncés racistes. Le racisme s'exprime désormais plus volontiers en termes de cultures et de différences culturelles, de défense des identités culturelles ; mais en énonçant ou en dénonçant les différences irréductibles, en prônant les différences, il essentialise toujours ses objets et reproduit ses positions naturalistes.

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On évoque souvent - et les thèses racistes ne manquent pas de le rappeler pour se légitimer - l'universalité du phénomène raciste. "Tout le monde est raciste : vous l'êtes au fond de vous, quand bien même vous vous prétendez antiraciste.

Tout le monde est raciste : les autres peuples, groupes, communautés ... le sont aussi".

Cela rappelle de très près "que les assassins commencent ..." qui autorise la peine de mort. Pourtant ce jugement a une apparence de vérité. Mais sous le terme de racisme, parle-t-on bien toujours du même phénomène ?

Depuis 1945, la racisme est moralement condamné et l'antiracisme est en position moralement dominante, ce qui signifie aussi que le racisme fait partie de notre monde ambiant, au moins parce qu'il constitue une expérience fondatrice de notre univers mental. Mais ici comme ailleurs il faut admettre le principe selon lequel notre compréhension d'un phénomène est commandée par ce qui est advenu postérieurement au fait que nous comprenons aujourd'hui et que notre compréhension est une sédimentation de l'histoire et de notre vécu présent. Le racisme est-il bien universel ou bien n'y a-t-il pas assimilation de l'ethnocentrisme par une compréhension commandée par le modèle raciste ?

L'ethnocentrisme est considéré par Lévi-Strauss comme un phénomène quasi naturel, inévitable et universel. La distinction des deux notions est quelque peu floue et d'autant plus difficile à établir que la parenté est évidente et que l'ethnocentrisme est à l'œuvre dans nombre de comportements et d'énoncés racistes, s'il n'a pas servi de base au racisme même, ce qui est pour le moins probable. Pourtant on peut, à titre méthodologique, différencier ethnocentrisme et racisme.

Qu'il s'agisse d'ethnocentrisme ou de particularisme, les deux notions s'appliquent à la rencontre d'humanités concrètes et particulières et se passent aisément de l'idée d'humanité universelle dont nous avons fait l'hypothèse qu'elle était indispensable à la structuration du racisme qui confond humanité universelle et humanité réduite et construit des classements et des hiérarchies même en l'absence de contacts réels, ce qui est rendu possible par sa forme spéculative. C'est dire que l'une est plutôt une conduite et l'autre une théorie. L'ethnocentrisme, en effet, est produit par la différenciation de l'humanité en groupes culturels ; il est lié à ces identités qui impliquent l'autre comme non-moi. Illégitime dans les sciences humaines qui ont pour but de comprendre, il est, selon Lévi-Strauss dans "Le regard éloigné", inévitable et spontané comme attitude psychologique du groupe : c'est la tendance de tout groupe humain à juger par lui-même et par rapport à lui et, pourrait-on dire, à se contempler dans son œuvre. L'idée d'une humanité abstraite (universelle) est une idée de la philosophie ou de la science et c'est une idée impossible à remplir. Comportement d'affirmation de soi qui s'étend de la satisfaction de soi à la volonté de survivre, du plaisir d'être entre soi et du plaisir d'être soi à la contemplation de son image, l'ethnocentrisme serait ce regard qui ne chausse pas les lunettes de la science, mais celles de la Weltanschauung, un mode de compréhension non réfléchie dans lequel un groupe se penserait lui-même et penserait l'autre par rapport à lui-même, seule référence possible.

Mais est-ce dire pour autant qu'il est une vision innocente ou légitime ?

On comprend bien l'indulgence évidente de Lévi-Strauss devant l'ethnocentrisme de tribus amazoniennes : ce sont elles qui sont victimes. Ce sont ces peuples là qui, victimes du racisme sous toutes ses formes, disparaissent. Et de fait, on peut aussi considérer que ces ethnocentrismes ne sont pas dangereux pour la survie d'aucun groupe :

· ils ne se théorisent pas en racisme,

· ils ne font guère de victimes,

· ils contribuent à la défense de ces identités fragiles et menacées,

mais c'est que sans doute il leur manque deux éléments essentiels pour se totaliser en racisme : la science sans doute, mais aussi la puissance totalisatrice de l'État pour en faire un discours politique (même s'il est tenu par des opposants). Car, et c'est peut-être la différence centrale, le racisme est une notion politique. Inséparable, disions-nous d'une interrogation d'humanité, de l'interrogation d'une humanité particulière sur l'humanité, le racisme appartient fondamentalement au domaine des sciences humaines, même s'il en présente une naturalisation. La notion est d'emblée politique : cette liaison au politique n'est pas l'accident d'une histoire empirique, elle contribue à la constitution fondamentale du phénomène car le racisme n'est pas la pensée et moins encore l'acte d'un individu isolé : c'est nécessairement un fait collectif qui appartient au domaine social. Lorsqu'il se manifeste dans des comportements spontanés et individuels, il s'inscrit dans les actes de la société civile ; Lorsqu'il est élaboré, il appartient soit au domaine spéculatif de l'histoire et des sciences humaines, soit au domaine politico juridique, c'est-à-dire à l'œuvre institutionnelle qui se développe sur la société civile, mais avec l'écart nécessaire à l'élaboration réflexive de lois. Cet écart, qui assure l'emprise de l'État sur la société civile, est aussi la possibilité d'un désaccord entre le législateur et la société sur laquelle il légifère. L'œuvre de l'État est de régir politiquement la société civile. Il est possible que la législation contre le racisme soit par nature inefficace à épuiser le phénomène, mais le vide juridique signifierait quasiment l'accord du législateur : il est donc du devoir de l'État d'exprimer son désaveu car il est de son rôle de légiférer.

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S'il y a bien une relation cachée entre racisme et humanité universelle, si le racisme est l'autre de l'humanité universelle, le conflit ne peut-il que se reproduire et s'éterniser ? L'autre revient toujours.

De fait, cette lutte est toujours à reprendre et l'histoire, au lieu de dessiner un progrès univoque et linéaire, semble bien parfois évoquer des pulsations de sens contraires : à l'un des pôles recule ou s'effondre la rationalité.

Mais l'idée d'humanité universelle, quand bien même elle n'est pas une idée éternelle, n'est pas non plus une figure historique parmi d'autres ; elle ne peut, en effet, être relativisée. C'est sans doute pourquoi elle a la capacité d'incarner le devoir moral et de se présenter en fondement ultime du droit.

III. ROUND TABLE I: RACIAL DISCRIMINATION – FORMS AND LEGAL RESTRICTION

1. SWITZERLAND: ABSTRACT BY BARRISTER REGULA BÄHLER, ZURICH

Forms of Racial Discrimination

Typical examples of discrimination with a racial background:
- Violent attacks on people of colour, on transit camps of persons seeking asylum, shops run by immigrants, members of the Jewish and Islamic religion, Jewish cemeteries, exponents of the political left, homosexuals
- Privately and publicly expressed verbal attacks on the above mentioned groups
- Spreading of xenophobic, anti-Semitic and revisionist publications (books, leaflets, internet) and music
- Refusal of admission to restaurants and discotheques of people of colour and persons obviously belonging to a group of immigrants, refusal to let holiday dwellings or hotel rooms to Jewish people
- Discrimination of immigrants when searching flats or jobs, or in case of dismissal
- No equality of opportunity for immigrants regarding education and professional career
- Discrimination of immigrants when dealing with representatives of authorities; e.g. police and public transport; refusal of temporary residence permit for itinerants
- Legal discriminatory restriction of admission to the labour market for immigrants, according to the “three-circle-model”; i.e.
- preferential admission for citizens of EC- and EFTA-members (1st circle);
- admission in second order for citizens of the United States and Canada (2nd circle);
- very restrictive admission policy for citizens of other nations (3rd circle)

The number of admissions is at the same time linked to a restriction of the total number of immigrants.
- Legal discrimination when local authorities make use of their possibility to deny naturalization without giving any reasons and any means of legal redress for the applicants. Furthermore no independent residence permit for married immigrant women in case of separation or divorce during one and a half (when husband is foreigner) till five years (when husband is Swiss) after entering Switzerland

The most discriminated population groups are:
- People of colour
- Immigrants, particularly from former Yugoslavia, Turkey and Curdistan, Sri Lanka
- Members of the Jewish community
- In general: persons deviating from the so-called traditional average of Swiss characteristics

Offenders are:
- Radical right-winged individuals or politicians, self defined patriots
- Representatives of authorities
- Ordinary people

The Legal System of Anti-Discrimination Policy

Apart from penal law (see Round Table II) there are no special legal requirements of fundamental consequences on discrimination with a racial background.
The principal item of prevention of discrimination is found in the Swiss Constitution’s stipulation of equality of treatment of all Swiss citizens by law and authorities (art. 4 par. 1 Swiss Const.). Through jurisdiction this principle has become applicable to foreigners as well. Although unequal treatment is allowed, this is only on condition that there be a relevant objective reason. Nationality may represent such a reason.

In principle – apart from some special cases – equality of rights and treatment are only valid in relations of private persons to official acts, but not between private persons. Jurisdictional authorities, Civil as Administrative Courts, have nevertheless to consider the constitutional ant-discrimination act when interpreting vague legal standards, above all concerning the following civil law rules:
- Protection of personality (art. 27 and 28 civil law, part one)
- Ban of legal abuse (art. 2 civil law, part two)
- Invalidity of contracts offending rights of personality or of immoral or unlawful character (ant. 19 and 20 civil law, part two)
- Protection against unlawful denunciation of lease of renting housing or premises for commercial purpose (art. 271 civil law, part two)
- Protection of employee's personality (art. 328 civil law, part two)
- Protection against unlawful dismissal of employees (art. 336 civil law, part two)

It must be emphasized that Swiss law does not know any obligation to conclude contracts. As long as lessors or employers e.g. do not offend penal law (see Round Table II), they are free to choose their contracting parties.

The legal consequences of the named infringements of law are as a rule:
- Suit to ascertainment of unlawful action
- Paying compensation for financial or moral damage and / or
- Report to the prosecution authorities (see Round Table II).

Allowed to start legal civil proceedings are the individuals concerned.

Cases regarding tenant-rights at first instance, cases of labour law to an amount in dispute of ECU 15.000 are free of charge. In case of (partially) losing legal civil proceedings the plaintiffs have to pay the proceeding costs and a compensation to the opponent party. If they are unable to pay these costs, the state will assume them.

The Legal Proceedings Against Discrimination With a Racial Background

After exhausting the regional and cantonal instances, the individual concerned still has the possibility of a constitutional appeal to the Federal Supreme Court for offence of constitutional rights. Discrimination with racial background contains always offending of human dignity, equality of rights and sometimes of other fundamental rights such as freedom of religion. Roughly one tenth of all constitutional appeals are successful.

In relation to the number of inhabitants, appeals against Switzerland at the European Rights Commission are amongst the most frequent. But only about six per cent come to judgement by the European Court of Human Rights. Of these cases about a quarter or 1.6 per cent of all complaints raised are successful. A racial component may sometimes be noticed in cases of foreigners in the Swiss penal system.

The mass media report on cases of discrimination with a racial background mostly when they are evident and during criminal proceedings. Their influence on prosecution authorities should not be underestimated, especially when it is at their discretion to become active or not.
Judgements by the Swiss Federal Supreme Court or the European Court of Human Rights do practically not appear in the electronic media and only selectively in major newspapers.

2. United Kingdom: Abstract by Barbara Cohen, Principal Legal Officer of the Commission for Racial Equality, London

Forms of Racial Discrimination

A) Examples of forms of racial discrimination

Racial discrimination in the United Kingdom occurs in a wide range of settings and in the context of many different activities in both the public and private spheres.

Manifestations of racial discrimination include:

•**exclusion** - refusal of membership of a club, non-admission to leisure facilities, disentitlement to certain benefits, refusal to consider black job applicants
•**rejection** - refusing to sell house to Asian purchaser, selecting black staff for dismissal first where employer needs to reduce staff numbers
•**less favourable conditions** - insurance companies charging higher premiums to ethnic minority drivers, workplace segregation
•**harsher treatment** - police disproportionately stopping and searching black men, ethnic minority staff disciplined in circumstances where white staff are not
•**racial harassment and abuse** - racist name-calling, insulting remarks, display of racially offensive material, various forms of physical abuse or assault.

It is recognised that racial discrimination may take the form of notionally "colour blind" barriers. This occurs where the discriminator applies equally to everyone a requirement which persons of a particular racial group are less able to meet. An example would be where an employer required job applicants to have high levels of fluency in English although the job was a manual one involving very little oral or written communication. The employer would, of course, apply this requirement to everyone who might be interested in the job, but it would serve to exclude disproportionately - and unjustifiably - job seekers from certain ethnic minorities who are less likely to be able to meet the required level of English fluency.

B) Groups subject to racial discrimination

Racial discrimination affects people who are UK citizens as well as those who are citizens of other countries. In Britain the main groups who experience racial discrimination are, very simply, those who do not look or sound like white British persons and others who are identified as being associated with them. Thus discrimination affects persons who can be distinguished by colour, by their ethnic or national origins (often identified by style of dress, hairstyle or accent) or by their nationality. People of Irish ethnic origin suffer racial discrimination as do gypsies, whom the courts have held constitute an ethnic group for purposes of English law.

C) Who are the perpetrators?

The perpetrators of racial discrimination include those who control or regulate access or conditions in each of the areas in which discrimination occurs. Thus there can be racial discrimination by employers (in relation to their employees and to workers supplied under contract) in both the public and private sectors and in establishments of every size. There is also discrimination by bodies which bestow qualifications or otherwise regulate access to professions or trades and by trade unions.

In relation to areas other than employment then both public and private organisations may commit acts of discrimination, for example, banks, insurance companies, shops, night-clubs, estate agents, individuals selling/renting housing, schools, colleges, hospitals, social security offices, licensing authorities, clubs and associations etc. Certain public agencies who in respect of their enforcement or

regulatory functions are not currently subject to race relations legislation are widely believed to discriminate, including the police, the prison service, immigration service, etc. Research has identified areas where disparate treatment occurs along racial lines, including sentencing by the criminal courts and the treatment of mental patients.

THE LEGAL SYSTEM OF ANTI-DISCRIMINATION POLICY

A) Legislation to prevent racial discrimination

The main legislation which prohibits racial discrimination is the Race Relations Act 1976. This Act applies only in Great Britain (England, Wales and Scotland). For Northern Ireland there has recently been approved the first Race Relations (Northern Ireland) Order 1997, the provisions of which are almost identical to the Race Relations Act. [NOTE: As the Northern Ireland Order only came into force in August 1997, the rest of this paper will refer to the 1976 Race Relations Act only.]

Under the 1976 Act it is unlawful to discriminate on racial grounds in:
employment (including also employment agencies and contract work)
trade union membership

•conferring qualifications for access to a profession or trade
•partnerships
•education
•housing
•the provision of goods, facilities and services
•membership of clubs and associations
•planning
•opportunities for training and work as a barrister/advocate.

It should be noted that there are some carefully defined exceptions specified in the Act.

The Act also makes it unlawful to discriminate by way of victimisation, that is by treating a person less favourably because s/he either brought a complaint or proceedings alleging discrimination or gave evidence in support of a racial discrimination complaint by another.

The Act imposes few requirements for positive steps to prevent discrimination. Local authorities have a duty under the Act to make arrangements to ensure that in the carrying out of their regular functions due regard is given to the need to eliminate unlawful racial discrimination and promote equality of opportunity and good race relations. There is no similar obligation on central government nor on organisations within the private sector.

Under the Race Relations Act, Parliament has approved codes of practice relating to employment and to housing which provide practical guidance for employers/housing providers. The codes do not impose legal obligations, but the provisions of the codes are admissible in evidence before a court or tribunal, and are to be taken into account where they would be relevant in determining any questions of discrimination.

B) Legal definition of racial discrimination

Racial discrimination is defined by the Race Relations Act as follows:

(1) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if:

(a) on racial grounds he treats that other less favourably than he treats or would treat other persons; or

(b) he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but -

(i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it: and

(ii) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and

(iii) which is to the detriment of that other because he cannot comply with it.

(2) It is hereby declared that, for the purposes of this Act, segregating a person from other persons on racial grounds is treating him less favourably than they are treated.

For purposes of the Act "racial grounds" means on grounds of race, colour, nationality (including citizenship) or ethnic or national origins.

C) Legal consequences and / or remedies

Individual complaints of racial discrimination are considered by industrial tribunals (employment cases), and by the lowest tier civil courts, the county court in England and Wales and the sheriff court in Scotland (non-employment cases).

The Race Relations Act specifically provides that damages for unlawful racial discrimination may include compensation for injury to feelings, whether or not there is any other head of compensation.

In an industrial tribunal the remedies which are available include any of the following:

i) an order declaring the rights of the party in relation to the act of discrimination;
ii) an order for compensation; and
iii) a recommendation that certain action be taken within a specified period to obviate or reduce the impact on the complainant of the discrimination.

In most cases compensation will be ordered; since 1994 there has been no upper financial limit. The amount will normally include compensation for any financial loss which has occurred or is likely to occur as a result of the discrimination and may include compensation for injury to feelings. In cases where the respondent has acted in a cavalier manner or has failed to take seriously the allegations of discrimination, the tribunal can add award aggravated damages. To date the highest total award by an industrial tribunal on a complaint of racial discrimination is £ 358,289. The highest award in respect of injury to feelings is £ 28,500.

Where racial discrimination cases are heard in the county court or sheriff court the remedies are the same as would be available in any other civil proceedings, and include an award of damages, an injunction, a declaration, etc.

D) Who is allowed to start proceedings for racial discrimination?

Where a person believes that she or he has been discriminated against on racial grounds then proceedings in either the industrial tribunal or the county court/sheriff court must be brought by that person. Where a group of individuals believe that they are jointly the victims of racial discrimination then proceedings must be brought by each one of those individuals.

The Race Relations Act provides for certain types of discriminatory conduct to be the subject of litigation by the Commission for Racial Equality, the statutory body established under that Act. The Commission is empowered to bring proceedings in either the industrial tribunal or the county court / sheriff court to challenge an advertisement which indicates an intention to discriminate, or conduct constituting
a) an instruction to another to discriminate or *b)* inducement or attempted inducement of discrimination by another. In such cases brought by the Commission, where there is not an identifiable victim, the available remedies include an injunction, a declaration and recommendations for future conduct.

E) Who pays for legal proceedings for racial discrimination?

Currently, but under review, there is in the UK a legal aid scheme for civil proceedings. The scheme does not include cases in the industrial tribunal, and therefore legal representation in cases concerning racial discrimination in employment cannot be supported by legal aid. Legal aid is available for complaints to the county court or sheriff court. The grant of legal aid is subject both to a test of the applicants means and an assessment of the merits of the case.

The Commission for Racial Equality has powers to provide assistance to individuals who believe they have been discriminated against on racial grounds. Assistance can include advice, attempting to secure a settlement, arranging for legal representation. In 1996 the Commission received 1,750 applications for assistance and offered advice and assistance to 1,220. Legal representation was offered in 222 cases. The Commission also provides funds to enable other agencies in different parts of the country to provide legal representation to victims of racial discrimination.

Many cases in the industrial tribunal are brought by the individual him / herself without representation or with representation by a non-lawyer.

F) Who judges cases of racial discrimination?

Cases in the industrial tribunal are heard by a panel of three persons. The chair person is legally qualified. The panel also includes one member nominated by an employers' organisation and one by the Trades Union Congress. Where the case includes a complaint under the Race Relations Act the tribunal should include at least one person who has knowledge and experience of race relations issues, although in practice this does not always occur.

Where a case under the Race Relations Act is heard in the county court or sheriff court the judge is meant to be assisted by two lay assessors chosen from a central list of persons with knowledge and experience of race relations matters.

LEGAL PROCEEDINGS IN RESPECT OF DISCRIMINATION ON RACIAL GROUNDS

A) Access to legal proceedings and prospects of success

Employment cases

Access to adjudication of complaints of racial discrimination in employment is relatively straightforward. Industrial tribunals were established with the intention that they should be informal; whilst the complexity of employment and discrimination law has resulted increasingly in parties being legally represented, there is no requirement to do so. There is no fee to commence proceedings in the industrial tribunal. A tribunal can order a party to pay a deposit (up to £ 150) where, at a pre-hearing review it appears that the case or some part of it has no reasonable prospect of success. Costs are awarded very exceptionally and only where it is shown that one party in bringing or conducting the proceedings had acted "frivolously, vexatiously, abusively disruptively or otherwise unreasonably".

The Race Relations Act requires that a complaint must be lodged in the industrial tribunal within three months from the date of the act of discrimination. Lodging a case within this period has proved to be

an obstacle in some cases, especially where the victim was not aware for some time of his / her right to bring proceedings. The Tribunal may hear a case brought outside the 3-month period where they are satisfied that in all the circumstances it would be just and equitable to do so.

Non-employment cases

Access to the county court and sheriff court has more obstacles. There is a fee (currently £ 80) to commence proceedings, and each interlocutory application to the court is also subject to payment of a fee. The procedures are more formal, and at each stage there is a risk of a cost order being made. Whilst legal aid is potentially available for cases in the county court or sheriff court, in practice it is not often granted.

There is a statutory time limit of six months from the alleged act of discrimination within which proceedings must be commenced. Where a complaint relates to education in the public sector, then it must first be submitted to the Secretary of State for Education and Employment, and a two month additional period is added to the time limit to allow for this.

All cases

In any type of case a complainant may be assisted by a pre-hearing questionnaire procedure which enables him/her to receive from the alleged discriminator information relating to their own treatment, the organisation's treatment of ethnic minorities generally, ethnic monitoring statistics, copies of equal opportunity and racial harassment policies and procedures, etc. Where the court or tribunal finds that the respondent / defendant has deliberately and without reasonable excuse omitted to reply to the questionnaire within a reasonable period or that the reply is evasive or equivocal, the court or tribunal may draw any inference from that fact which it considers just and equitable, including an inference of racial discrimination.

The prospects of succeeding in a complaint of racial discrimination remain relatively low. The burden of proof is on the complainant, whilst the respondent / defendant normally holds the relevant evidence. It is not a simple task to assess the success of past cases since many are resolved to the satisfaction of the complainant without a formal adjudication by a tribunal or a court. Many employment related cases are settled with the assistance of the Advisory Conciliation and Arbitration Service.

Looking at the cases which were approved on their merits for legal representation by the Commission for Racial Equality in 1996:1
101 cases (83 employment and 18 non-employment) were settled on terms
41 cases (all concerning employment) were successful after industrial tribunal hearing
39 cases (36 employment and 3 non-employment) were dismissed after hearing in a tribunal or court.

An analysis of 607 cases concluded in 1995 where the outcome was notified to the Commission showed:

74 successful after hearing
190 settled
273 unsuccessful after hearing
70 other.

B) Do human rights organisations, Ombudsmen / women and public institutions play a role in these proceedings?

The Commission for Racial Equality is the main public body which is directly involved in legal proceedings for racial discrimination. Other human rights and civil liberty organisations have, from time to time been involved in selected cases, but not on a regular basis. Trades unions to varying extent represent their members in discrimination cases.

The Parliamentary Ombudsman, the Local Government Ombudsman, Insurance Ombudsman, etc may receive complaints involving an allegation of racial discrimination. They act under different legislation, applying criteria different from that of the Race Relations Act; in a number of cases there has been liaison between an Ombudsman and the Commission for Racial Equality in order to ascertain which organisation is better placed to deal with the complaint.

C) Public reports / statistics about the number and nature and results of such proceedings

The numbers of cases under the Race Relations Act heard by industrial tribunals are collated by central Government and available to the public. In the financial year 1995-96 the tribunals recorded 1,737 claims under the Act. In the calendar year 1996 ACAS recorded 2,711 Race Relations Act claims.

Based on information supplied to the Commission for Racial Equality, a total of 2,081 cases were disposed of by industrial tribunals during 1996; disposals could include settlement outside the tribunal, withdrawal by the applicant or cases which due to exceeding the time limits or for other reasons were held to be outside the scope of the tribunal's jurisdiction, as well as cases which were successful or unsuccessful after hearing.

County courts and sheriff courts do not maintain separate records of cases under the Race Relations Act, and there is no reliable documentation of the total number of such cases. It is unlikely that the total per year would exceed 100.

There are specialist publications concerned with equal opportunities and discrimination which not only publish case results but also collate and publicise statistics relating to numbers, outcomes and levels of awards in racial discrimination cases.

Cases of racial discrimination which are of legal significance are reported in the law reports.

D) Are there examples of such proceedings that ended at the European Court of Human Rights?

Proceedings in Britain under the Race Relations Act protect individuals from discrimination with respect to their economic and social rights such as employment or housing. The protection provided under Article 14 of the European Convention on Human Rights, which must be read with another article of the Convention, is concerned to protect person from discrimination in the exercise of their civil and political rights. As a consequence, to the knowledge of the writer, cases brought under the Race Relations Act have not been referred to the European Court of Human Rights. This is not to say that in the future this should not occur; one possibility could be a case within the area of education.

E) How are such proceedings noticed and discussed in the press and public life?

In general, and with some exceptions, the British press has a record of doing very little to improve race relations. Where a case of racial discrimination involves a respondent who is well known, or where the level of award is exceptionally high, or the discriminatory conduct especially salacious, the case is likely to receive press coverage. The manner in which the case will be reported will normally reflect the general attitude of the editor or proprietor. Thus a major award to an Irish college lecturer was ridiculed in all of the press, but cases which succeed against organisations such as the Army, the police or Labour-controlled local authorities are often widely publicised consistent with a paper’s general hostility to such bodies. There have been occasions, however, where, possibly because the facts of a case have some human interest, a racial discrimination case has received very detailed (and unbiased) coverage in a national paper,

As part of its educational and promotional work, the Commission for Racial Equality regularly seeks to draw public attention to important cases and those where discrimination has been proven against organisations whose activities had not previously been subject to legal complaints of racial discrimination.

3. Denmark: Abstract by Eric Tinor-Centi, Director of the Dokumentations- og Radgivningscenteret om Racediskrimination DRC , Copenhagen

DRC

Established at the end of 1993 as an independent organisation, led by a board.
The main goals of DRC are:

(a) to document incidents of racial discrimination primarily on the basis of the experience of ethnic minorities themselves.

(b) to give guidance and legal assistance for victims of racial discrimination or for persons who have been witnesses to such incidents.

(c) to develop policies and provide training, as well as arranging conferences, publishing information material and rendering consultative assistance.

3.000 complaints from the end of 1993, 20% related to the labour market, 20% to the police, 15% to the consumer areas, 10% housing and the rest covers a wide range of areas in society

DRC based on projects, 95% of funding comes from government.

At present, DRC has 7 full-time employees.

The target group of DRC are Danish majority, since they are the causes of racial discrimination as well as the ones that exercise racial discrimination.

DEMOGRAPHY

In January 1997, the number of non-Danish citizens living in Denmark was 240,000, and this amounts to 4,5% of the total population of Denmark.

About 22% of these non-Danish citizens live in the community of Copenhagen, which in turn make up 11 % of the total population of Copenhagen. The number of Danish citizens with non-Danish ethnic origin amount to about 150,000, and this number is not included in the above figures.

In regards to unemployment, it is more comprehensive and longer duration among ethnic minorities than ethnic Danes. While it is 8% for Danish, it is approximately 40% for Turkish and Pakistani.

RACIAL DISCRIMINATION AND THE JURIDICAL ENVIRONMENT IN DENMARK

Although Denmark ratified the Convention on Elimination of Racial Discrimination in 1971, the existence of racial discrimination has, until very recently, been seen as a problem for "the so called third world". The existence of racial discrimination has for a long time been denied on the assumption that the Danes are not racists.

This insufficient acknowledgement is also caused by a restricted interpretation of the term "discrimination." The assumption is that an act cannot be regarded as discrimination as long as it is not prohibited or punishable according to the Danish law. Moreover, discrimination is, by and large, reduced to a cultural phenomenon, which is the reason why every endeavour to combat racial discrimination and create equal opportunity often is limited to promoting cultural understanding and tolerance.

Nevertheless it should be mentioned, that Denmark partly has met the obligations of article 4 of ICERD by adopting the penal sanction code ¤ 266 in 1971, revised in 87 and 95. Furthermore Denmark has partly met the obligations of article 5 in the convention by the Racial Discrimination Act, which covers entrance and equal treatment in public areas as schools, parks, banks and disco's. The Act only covers intentional discrimination, and is exclusively subject to public prosecution. This act was also adopted in 1971, and was subject to revision in 1987.

It was first in the early 1990s that racial discrimination was placed on the political agenda, by, among others, DRC. It was for instance because of a complaint from DRC to the Parliamentary Ombudsman, that a prohibition against racial discrimination on the labour market was adopted in July, 1, 1996. This act only contains a prohibition against discrimination, and contains no obligations for employers to promote equal opportunities. The prohibition has gone so far, that the Act prevents positive measures (affirmative action), e.g. the possibility to encourage ethnic minorities in a job advertisement to apply, or the possibility for a municipality to make a declaration, which says that a certain percentage of the employees should have a minority-background.

To give you some examples of the juridical environment in Denmark, I draw your attention to the statement from the Minister of Labour, that the new act on the labour market should be seen as an act to fulfil the conventional obligations according to ICERD and ILO nr. 111. As a subordinate clause mentioned for not provoking, the minister stated, that the act also should be seen as "a result of burgeoning tendencies" for unequal treatment in the Danish labour market.

Furthermore the former Minister of Labour from the Conservative Party, stated when the discussion on the adoption of the Act on the prohibition against racial discrimination on the labour market was going on, that; "It does not require a vivid fantasy to imagine the reactions that such legislation might lead to. The Minister of Labour is simply igniting powder-keg and unintentionally motivates to xenophobia and racism in Denmark to such an extent that we have been spared for in the past."

When the Danish government was examined on the 13th periodic report to the Committee on Elimination of Racial Discrimination, the governmental delegation started their presentation of the Danish report asking; "is legislation the right means in the fight against racial discrimination?". The reason for asking this question was to explain to the committee, why it is seldom, that legislative measures are taken in Denmark.

In this environment it is not surprising, that the accused of racial discrimination is not motivated to go into a dialogue or mediation with the victim, because there are no motivating legal remedies, which can push on. Furthermore there is no effective enforcement of legislation, and the police is mostly not aware of the existence of the Racial Discrimination Act.

Consequently, DRC has been able to realise only 5 successful mediation meetings out of the total 3000 complaints since 1993. The act on the prohibition of differential treatment, has been applied only app. 10 times since its adoption in 71. The Penal Code, para. 266 b has been applied only app. 15 times since its adoption in 1971.

I would like to point out, though, that the statistical data in this regard is extremely inadequate. Furthermore the act on prohibition against racial discrimination in the labour market, has not been applied yet. There is no reliable data as regards to racist-motivated damage or assault. It should be pointed out, however, that the problem is far less in Denmark in relation to other European countries, at least in relation to racially-motivated assault.

1. The central acts on the provision of racial discrimination in Denmark are exclusively subject to public prosecution and based on penal sanctions, and there are no other practical possibilities to start civil proceedings. In my view, penal sanctions are not always suitable means to combat racial discrimination.

2. There is significant apprehension in Denmark against relying on legislation to combat racial discrimination. The second and third largest parties in Denmark have, for instance, voted against an act that only contained a cautious prohibition against racial discrimination in the labour market, but which doesn't contain any positive obligations. Moreover, many politicians in Parliament have remarked that DRC was pitting the "Danes against foreigners" simply because we have reported a certain school for racial discrimination in February this year.

3. Ethnic minorities are socially, economically and politically more marginalized in Denmark than in, for example, Holland or England, both in terms of their proportion in the society, as well as their participation, for instance, in the labour market. This means that politicians and other decision-makers can, without any significant consequence, ignore the interests and requirements of ethnic minorities, and a dialogue and mediation is in practice almost impossible.

4. Under a parliamentary debate in April 1997, politicians from different parties have expressed the view that Denmark has never been, and should not be, a multicultural society. This view not only leads to ignoring the existence of ethnic minorities in Denmark, but also gives ground for public institutions and private business organisations not to be motivated in building up multicultural organisations. As a result, there are no administrative institutions or private organisations that have worked out complaint procedures.

5. If an act of discrimination is not illegal or punishable according to the Danish law, then this act of discrimination is considered as non-existent, which gives the accused grounds not to participate in a constructive dialogue for structural changes.

It is not surprising, therefore, that out of the 3000 persons that have put their petition to DRC since 1993, only extremely few of them have been able to receive compensation for the discrimination that they have been victims of. In the rest of incidents of discrimination, the experiences of discrimination have been rejected by the accused or the investigations have, for various reasons, been terminated by the police or legal authorities. This makes it very difficult to motivate ethnic minorities to put forward their petitions against racial discrimination as it often leads to deep frustration, psychological problems and even very concrete problems in the form of victimisation.

4. France: Abstract by Maître Stéphane Meyer, Paris

Forms of Racial Discrimination

The fields where racial discrimination usually take place in France are:

- Housing, for instance:

- Individuals answering an advert and who are told the flat has been rent when they show the colour of their skin.
- Social housing commissions applying an unofficial and forbidden "quota" in some suburbs where many migrant workers live

- Employment:

It happened few times that public employment agencies ("Job Centres") passed on discriminating notices which had been sent to them by employers. However, these openly discriminatory job offers are quite unusual.
Most of the time, employers put forward various pretexts when they want to discriminate.

- School:

Few years ago, the borough council of a town in the suburb of Paris refused to enrol new foreign pupils in a school, putting forward the number of foreign pupils enrolled before.

- Offer to goods and services:

Cases of cafes or discotheques where black, or North-African persons have been refused because of their origins have not been reported for years.
Nevertheless, the cases probably still exist, for the problem is the lack of evidences.
The case of a so-called charitable organisation sharing out some food only in aid of French persons has been reported.

The population groups discriminated with a racial background are most of the time the migrant workers from North-Africa or Africa.
Of course discrimination against the Jews also exists, but in a more hypocritical way.

The offenders can be classified in two kinds:

- More or less openly racist persons (many of them voting for the National Front)
- People who say they are not racist, but who put forward the racism of their customers.

The French Legal System of Anti-Discrimination Policy, and Proceedings

The French "anti-racist" Act has been enacted the 1st of July 1972, and then, completed several times. It's now part of the Penal Code.

The legal definition of "discrimination" is:

"All kinds of discriminations made between individual entities because of their opinions, sex, marital status, health situation, handicap, customs, political opinions, trade union activities, and because of the fact of actual or alleged belonging (or not belonging) to a determined ethny, nation, race or religion."

Discrimination is punished when it affects the offer of goods or services, and all kinds of economical activities, and also engaging, dismissal and punishment of wage earners.
The penalty provides by the law is up to two years of prison and/or a 200.000 FF fine.

The tribunal can also pronounce temporarily the interaction of some civil rights; it can also order the publication or bill posting of the sentence, and the closing of the business.
The penalties are harsher when the offender is a civil servant.
Some of these penalties concern individuals as well as legal entities.
Of course, the victim can also ask money damages.
Although the French legal system of anti-discrimination policy is based upon the penal law, any contract containing a discriminatory provision would be cancelled.

The following entities are entitled to start legal proceeding:

- The victim itself
- Anti-racist organisations (which must have existed for five years)
- The public prosecutor (who could have been referred by the formers or by the police).

Most of the time the victim calls an anti-racist organisation who then starts the proceeding, though some of the victims apply to the police.
Finally, the case will be heard by the "Tribunal Correctionnel", which is the court which has jurisdiction over all kinds of misdemeanours.

THE PRACTICE

Actually, the attitude of public prosecutors and especially of police towards racial discrimination is very changeable and depends on their personal awareness.
For instance, the public prosecutor who is in charge of these cases in Paris is very attentive to these problems, whereas his colleague of Nanterre, a town in the suburb of Paris, will never prosecute in this matter.
Consequently, the legal strategy will be chosen by the organisation or/and the lawyer in accordance with these human factors.
Therefore, it's sometimes preferable to summon directly the offender before the court.
Nevertheless, the search of evidences requires sometimes some inquiries; in this case, it is necessary to trust the police officers...
As a matter of fact the main impediments against the legal proceedings in our matter are the discouragement of the victims and the lack of evidences (for the simple reason that few offenders would be proud of their behaviour).
Therefore, the existing statistics do not accord at all to the reality, a very few cases (probably less than 10 per cent) are hear by courts in France.
In addition, the penalties and remedies passed by the courts are not very harsh; I do not know any case where a jail sentence has been pronounced; the civil rights interdictions are very unusual and the remedies are most of the time token payments.
In actual fact, the best remedy one can expect is the publication of the decision, situation which happens sometimes.

The repercussion of these proceedings upon the press and public life varies a lot and depends in the personal convictions of the newspapers and of the public.
As a matter of fact, the growing popularity in France of the "national preference" slogan praised by the French "National Front" hat to be taken into account.
It can be said that most of the time, the offenders would not act openly, because they know it is forbidden. This situation is better than nothing, but it is not satisfactory at all.

In other respects, very few things has been made in France by the state to prevent racial abuse.
It seems to me that the "observation posts against racism", which have been settled in each French district, are more gimmicks than useful institutions.
Some anti-racist organisation suggested to the government that some copies of the French anti-racist act should be stuck up in the police stations.
This idea, which is undoubtedly good, has made a lot of police officers laughing...

In fact, most of the work of prevention and heightening of public awareness is made by the anti-racist organisations, sometimes in collaboration with public institutions, but it is rarely made by the state itself.

France still has a long way to go.

5. GERMANY: ABSTRACT BY PETER RÄDLER, LL.M., MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT, HEIDELBERG

FORMS OF RACIAL DISCRIMINATION

The forms of racial discrimination (in the sense of Art. 1 CERD) depend on the feature of each population. Germany has only a relatively small proportion of traditional (autochtonous) ethnic minorities. The Federal Government restricts the application of the European Framework Convention on Minorities to the Danish (70.000) and Sorbian (60.000) national minorities as well as to "other ethnic groups traditionally resident in Germany" like the Sinti and Romany (150.000) and the Friesians (400.000) together with the Jewish Community (about 40.000). However, not covered by this approach are persons from Italy (580.000), Turkey (2 mio), Yugoslavia (660.000) and other countries the majority of which or their ancestors followed the incentive labour market policy during the 1960ies. S9ome of them meanwhile obtained German citizenship but the majority did not (e.g. only 6 % of persons with Turkish origin in Germany).

Notwithstanding their citizenship, persons with a visible non-German origin are quite commonly named "Ausländer" (foreigners) or "Gastarbeiter" (guestworkers). Hand in hand with that terminology goes racial discrimination against these new minorities. The areas of discrimination by private persons – employment, housing, restaurants and amusement places – meet with experiences in other countries and amount to a self-increasing lack of social integration. In general, state schools try to offer equal opportunities but predominantly due to language problems (and may be the lacking support by their families) the majority of the children with a non-German origin do not achieve higher education.

THE LEGAL SYSTEM OF ANTI-DISCRIMINATION POLICY

The German Constitution (Grundgesetz) provides that nobody may be disadvantaged or favoured because of – inter alia – his or her race, national or social origin, language or religion (Art. 3 Section 3). However, this provision binds public bodies only. In addition, there are stipulations for public bodies (mainly in the civil service laws) that expressly prohibit racially discriminating decisions.

The German Penal Code lacks an explicit prohibition of racial discrimination. Yet, racially discriminating conduct that openly shows personal disrespect because of someone's race amounts to insult in the sense of the relevant section of the Penal Code (Section 185). In severe cases racial discrimination can amount to incitement to hatred against an ethnic group (Section 130) but without further qualification discriminatory acts will not fulfil this Section's requirement of an attack against human dignity.

German public law also lacks specific provisions against racial discrimination (there is one exception: a provision in the Insurance Supervision Act by which the Government in 1994 reacted to a policy of car insurance companies to differentiate because of the car-owner's origin). The same is true for the German Civil Law which similarly misses explicit provisions against discrimination (the Worker's Council Act, however, requires employers and workers' councils to ensure a non-discriminatory treatment of employees).

According to the case law of the Federal Constitutional Court, the prohibition of racial discrimination in the Constitution influences, however, the way in which administrative and ordinary civil law courts have to interpret provisions in the public and civil law. As explicit provisions against racial discrimination do not exist, the courts are obliged to apply the "objective value" of Art. 3 Section 3 of the Constitution to those norms which are open for interpretation (e.g. the "reliability" of an applicant for a public law license, "good morals" in civil law). This being

established in legal doctrine, the current state of German law almost totally lacks any case law on this indirect influence of Art. 3 Section 3 (as to the criterion of race) of the Constitution. Thus there is little, if any, clarification what the ambit and limits of the prohibition of racial discrimination are in relation to e.g. smaller companies, employees in private households, access to private clubs and the question of bona-fide justification of discrimination.

The Legal Proceedings against Discrimination

In case of discriminatory acts there is no claim to contract or fulfilment. However, discriminatory acts are invalid under civil law; thus e.g. an employee who is dismissed because of his or her non-German origin can sue for a declaration that the contract is not terminated. Under tort law discriminatory acts that openly despised because of someone's non-German origin entail damages for breach of the rights of personality.

Only the victim can start civil proceedings. Human rights organisations have no standing before civil courts and they are not allowed to bring their own suits in favour of the victim. Moreover, only before lower courts they can plead the case for the victim. Both on the level of the Federal Government and of the various Länder (states) as well as in major cities there are "Ausländerbeauftragte" (Commissioners for Foreigners). They have only a consultative function and can not bring suits before civil courts.

Criminal proceedings because of insult depend on a formal complaint of the victim (ex officio the public prosecutor will start proceedings only in case of a reasonable cause of incitement to hatred because of race). However, if a victim makes a complaint of insult, the public prosecutor will normally not take over the case; instead, minor offences such as insult are first submitted to a conciliation board and, if conciliation fails, the victim him- or herself will have to start criminal proceedings in their own name.

6. ITALY: ABSTRACT BY PROF. DOTT. FULVIO VASSALLO PALEOLOGO, PALERMO

Until 1986 there was not a specific immigration law in Italy. They referred to the 1930' Sole Text of public safety.
In 1986 they issued a law that acknowledged the immigrants their right to work, but several provisions of this law were never enforced.
In 1989 a further law (Martelli's law) provided for a deed of indemnity for illegal immigrants and a new regulation for political asylum. Most of the immigrants without a residence permit (illegal immigrants) were allowed to rectify their status by means of this law. Furthermore, with regard to political asylum, the law was rarely enforced.
At the end of 1995, Dini's government issued a decree in order to regulate illegal immigrants living in Italy at that time. Furthermore, it regulated deportations strictly for illegal immigrants, making for legal immigrants family-reunions easier.
The ministerial decree was reiterated many times and, owing to several suspects of unconstitutionality, it was brought to the examination of the Constitutional Court.
After further reiterations, Dini's decree felt into decay, owing to the intervention of the Constitutional Court. Its legitimacy was not refused on the basis of its contents, but because of the many reiterations it had undergone.
The regularisation and the family-reunions stayed operative in accordance with Dini's decree.The previous Martelli's law regulated other matters. The government Dini and the government Prodi continued to set a maximum limit to entry flows, reducing it form year to year: in 1997 it was only 20.000.
In February, 1997 the new Centre-Left government Prodi submitted an immigration law, which was intended to regulate all the problems of the immigration. It proposed an even stricter regulation of entries and deportations, introducing internment without trial while waiting for the deportation.
The project acknowledged legal immigrants the fundamental rights and the right to vote at municipal elections.
However, after few weeks the political asylum was removed .
Immigrant questions are still dealt with as problems of public order. Today we cannot foresee times and contents of the new regulations.
This situation implies an endless increase of illegal situation. This datum has often been used by the press, contributing to the increase of xenophobia. In the meanwhile, crime organisations find it easier to hire illegal foreigners with no possibility of a legal survival. This creates a spiral that makes the immigrant's control and integration more difficult, contributing also to the increase of racism in a part of the population.

Forms of Racial Discrimination

- The immigrants are not in position to refuse an illegal job or jobs without contract.
- Particularly Tamils, Kurds and black immigrants from Centre Africa (Ghana, Nigeria) are discriminated.

People who are seeking asylum as political refugees have no chance to enter in Italy (only 5oo in 1996). Many refugees have to cross the Italian border in ways which would normally be illegal. Many person claiming refugee status are returned to country of origin without a right to a judicial hearing.

- Institutional discrimination is the most significant manifestation of racism. Economic and political interests have benefit from racism. The press have often using datum of illegal immigrants to increase of xenophobia.

The Legal System of Anti-Discrimination Policy

- Today In Italy we have today few regulations to prevent discrimination with a racial background (legge n.943/86) and this law is rarely enforced.
- In Italy there is no definition of "discrimination with a racial background" in the legislation.
- The discriminating parts of the contract is consequence of the discrimination with a racial background.
- Only the victims and Human Rights Organizations are allowed to begin legal proceedings against concrete cases of discrimination.
- The victim must pay legal proceeding against discrimination.
- Only the ordinary jurisprudence judge in the case of suit against discrimination with a racial background. However, we see the general inadequacy of appeal. The appeal system and the courts are only imperfect protectors of the rights of people against executive interference with their freedom.

The Legal Proceedings Against Discrimination With a Racial Background

- The access to legal proceedings is very difficult and the prospects of success are limited. Particularly the deportee's family are split up, with the breach of the right to respect for family life under article 8 of the European Convention on Human Rights.
- Human Rights Organisations play a limited function. Obmudsmen /-woman does not yet exist. Public institutions are often against immigrants (particularly illegal immigrants). Only in few "consigli comunali" exist one legal immigrant as "consigliere comunale aggiunto" with consulting power.
- We have no statistics about number, nature and results of proceeding at the European Court of Human Rights.

In the press and in the public life such a proceedings are not in discussion. A great difficulty lies in the sharp differences between criminal justice agencies and voluntary organizations, relations between whom may be vitiated by suspicions.

RACIAL DISCRIMINATION AND CIVIL PROTECTION OF THE IMMIGRANTS IN ITALY

There are many examples of racial discrimination against immigrants as in other Western European countries. They are to be found, surprisingly, in the central-north areas, particularly in the urban areas, while in the south of the country, despite more poverty and higher disoccupation, they are rarer and with different connotations. In the southern regions, in fact, the main spread of illegal work and the current level of inefficiency and of persisting patronage system of many public administrations, constitute less evident but nonetheless widespread forms of discrimination against the immigrants.
A strong institutional discrimination is, however, present all over the country with regard to the immigrants. Often, the public official or person holding a public office carries out acts late or refuses to carry out acts requested by the immigrant without objective justification, profiting from the less information and the lesser ability of the latter in asserting their rights.

Many situations of discrimination owing to irregular immigration, particularly widespread in our country, are to be found in the job market, because of the impossibility of drawing up a job contract without a valid visitor's permit.
As for the immigrants in possession of a regular visitor's permit, it is noted that employees have scarce respect for collective contracts with regard to the minimum salary, hours of work, for holidays, and absences for illness or maternity. Even in this case weakness of the immigrants in knowing and asserting their rights induces employees to exploit their employers.
The gaps in the regulations in force and restrictive administrative procedures of many offices, then, make self-employed work particularly arduous, however eased by very strongly discretional evaluations.

Other situations of discrimination are confirmed in the access to goods and services essential to the life of the immigrants. For example, as far as the housing market is concerned, it is not rare for the immigrants to pay site rent much more elevated or at equal rent get much less prized apartments.

The area of legal assistance does not lack discrimination either, places of not very serious professionals, who ask immigrants for sums of money without documenting the activity carried out or the real possibilities of success of the legal defence.

In Health and at school, thanks to personal availability of many workers the situation is, instead, better and even the irregular immigrants can receive urgent medical care, finding a welcome often at the risk of the health workers in the public structures. Relatively rare, instead, are the situations of exclusion from free time activities and in this case the main discriminating factor remains the earning and spending capacity.

In general it is notices that the populations who are principally discriminated against are those who have the most difficulty learning the Italian language and those towards whom greatly widespread prejudices are aimed at a particular criminal propensity: for example North Africans for the traffic of drugs and the women of Central Africa, particularly Ghana and Nigeria, with regard to prostitution.

In Italy, up to now, there does not exist an organised system of civil protection of the immigrants against acts of racial discrimination nor organisms specifically available for the control and the sanctions of future acts of discrimination, as, for example, the Ombudsman of the Nordic countries. There is still no legal definition of “racial discrimination”.
Despite the fact that Article 2 of the Constitution recognises Man’s inviolable rights, the principal of formal and substantial equality confirmed by Article 3 without distinction of race remains limited, indeed, to those who are in possession of citizenship.
For the purpose of eliminating all forms of racial discrimination it is possible to recall, however, only the Convention signed in New York on 7th March 1966 (Law number 654, 13th October 1975), in force since 5th January 1976, and the D.L. number 122 of April 26th 1993, made into law number 205 on 25th June 1993, with urgent measures on racial, ethnic and religious discrimination.

With regard to work, one must also remember the Workers Statute of 1970 which in Article 15.2 prohibits “pacts or acts of discrimination in politics, religion, race, language, or sex”. A relative function of protection of immigrants against acts of discrimination is carried out, within the limits of their organisational ability, by the unions as regards discrimination in working relationships, by the voluntary associations who help immigrants, and more rarely by organisms or by subjects instituted by local bodies (e.g. local immigrant consultations or immigrant counsellors added to the local council). In practice, however, the incidence of these instruments of defence remain rather modest.

Only with the plan of the law that Parliament should approve in the next weeks (a project which contains, amongst others, very negative aspects for the condition of the immigrants, considered as a problem of public and private order of adequate jurisdictional protection in the case of expulsion), is there introduced a specific rule for vases of “discrimination for racial, ethnic, national or religious motives” (see the attached), providing for the specific type of act of discrimination and a civil action against discrimination “when the behaviour of a private individual or of the public administration produces discrimination for racial, ethnic, national or religious motives”.

The new law introduces indemnifiable sanctions of a pecuniary nature also in the order of non-property damages. Inhibitory remedies will also be foreseen, to assert in front of the ordinary judicial authority (the magistrate of the place of residence of the immigrant) who must impede the protraction of the racial discrimination.
According to this projected law, it should be possible to test even true “class action”, with active legitimisation attributed to a representative body of workers, when the employer puts into being an act or discriminatory behaviour of a collective nature. Even in cases in which they are not immediately and directly evident, the workers impeded by acts of racial discrimination, the complaint can be presented by the unions mainly representative at national level.

The judge, in the sentence confirming the discrimination on the basis of the complaint adopts the measures requested, immediately executable, and, in the case of “discriminatory behaviour of collective nature” can order the employer to define given the aforementioned subjects and organisms, a plan of removal of the discriminations confirmed. In case of a lack of observance of the order of removal of the discriminatory behaviour, imposed by the judge, the employer may be sentenced to prison under Article 338, first comma of the penal code. Any act of discrimination obliges whoever has committed it to the compensation of damages even non-property damages.
On the basis of the rule still to be approved, the discriminatory discrimination by the businessman can be sanctioned beyond that of the magistrate by administrations of public bodies who have conceded financial and credit reductions. Where racial discriminatory behaviour is confirmed on the part of the businessman who is the receiver of public funds, the administrations that have distributed the capital can order the exclusion of the person responsible of racist behaviour “from any other concession of distribution of funds or credit, or from any contract”.

Until the approbation of the new law can be therefore noted as racial discrimination it can be achieved, in Italy, without adequate instruments of contrast. But also when the new rule on immigration is approved by Parliament it will be necessary to control its concrete activation.
At the moment in fact it does not seem probable that the immigrant victim of acts of discrimination will succeed in turning to the Law, for three fundamental reasons:

1. The cost of the procedure and the difficulty of being allowed free hearings. There is no specific rule that establishes who must support the costs of processes against racial discrimination.
2. The uncertainty of the outcome of the complaint and the risk, therefore, of further expenses. In the case of not granting the complaint the plaintiff could be made to pay the expenses of the defendant.
3. The length of hearing in Italy (not less than tree to five years) and the scarce spread of inhibitory measures to impede the prolonging of discriminatory acts.

The widespread condition of irregularity (two hundred thousand irregular immigrants compared to a million regularised immigrants), incentivated by restrictive and excessively discretional rules, which negate the recognition of the humanitarian asylum and reduce the flow of arrivals in search of work into insignificant figures, exclude from any type of protection precisely those immigrants who are daily submitted to the more serious forms of discrimination.

A civil protection does not appear sufficient for an effective protection against acts of racial discrimination, but a guarantee of rights of citizenship and effective possibilities of entry and legal stay is needed, together with a rule controlling the migratory flows, without creating indefensible barriers in the new laws at the ethical and judicial levels, other than, at ground level, closing the frontiers.
Meanwhile an effective protection of the immigrants against acts of racial discrimination seems possible only on the part of the voluntary associations and of non-governmental organisations. The immigrant often turns to the public structure to assert their rights coming in this direction to the voluntary associations.

The European perspective remains, therefore, essential even with respect to the principles of a subsidiary character and proportionality, both under the profile of a uniform legislation and rules of entry, the stay and the right of asylum and regarding the jurisdictional seats of protection.
Of particular importance to trace the lines of a future European rule against racial discrimination, is the role of the European Community against racism and intolerance in the heart of the Council of Europe. Among the proposals of legal instruments to contrast behaviour of racial discrimination, already elaborated here in December 1995, the requests of “provisions intended to prevent the spread of racial hatred and discrimination in the supply of goods and services to the public” are indicated.

The possibility of an appeal to the European Court for Human Rights appears particularly interesting in the future, even if until now, in Italy, this type of complaint has been used only by

citizens with a large income, involved in processes for criminal deeds (and in many cases for Mafia deeds) who complained of the excessive imprisonment of the whole judicial proceedings. Complaints such as those often presented against other European states, like France and Great Britain, on the part of foreigners resident in our country, are lacking; on the part of immigrants who complain of the lesion of fundamental rights for private or institutional behaviour leading again to racial prejudice. It is necessary, therefore, to create also in the sphere of the voluntary associations, legal assistance services to make the right of action a defence of the immigrants effective, creating links at national and international level to propose, if necessary, in front of international tribunals, the instances and actions that will be useful for combating any form of racial discrimination.

IV. ROUND TABLE II: RACIST OFFENCE – FORMS AND PENAL RESTRICTION

1. BULGARIA: ABSTRACT BY PROF. DR. SEVDALINE BOJIKOV, UNION OF BULGARIAN LAWYERS, SOFIA

Tous les hommes sont égaux devant
la loi et ont droit a une égale
protection de la loi , contre toute
discrimination et contre toute
incitation a la discrimination.

Jamais on n'a autant parle des libertés. Jamais on n'a voulu autant sensibiliser l'opinion aux dangers qui les menacent.
Y a-t-il aujourd'hui une seule organisation - État, parti politique, syndicat - qui ne se prévaut de son souci de voir se réaliser pleinement les droits de l'homme ? Et pourtant, jamais les libertés n'ont été a ce point bafouées !
Dans un monde incertain ou se surexcite la violence, l'instinct primitif de l'ordre joue également contre la liberté.
Qui n'est prêt a supporter quelque gêne ou quelque contrôle si ce doit être le prix a payer pour enrayer la montée d'une criminalité inquiétante ? Dans la dialectique éternelle de l'ordre et de la liberté, c'est souvent l'ordre qui triomphe, au lâche et irresponsable soulagement de beaucoup...
En Bulgarie, comme en Europe de l'Est , le système politique n'a pas été historiquement conçu pour assurer la défense des citoyens contre l'État. Il n'est plutôt que pour affirmer la souveraine puissance du pouvoir central (d'une partie politique) sur ses sujets. L'ordre prime la liberté.
En ajoutant que sans un minimum de moyens économiques et sociaux, l'homme ne peut jouir pleinement de ses libertés et qu'une des façons de violer les droits de l'homme est, pour l'État, de laisser une trop grande partie de la population dans une situation de pauvreté, voire de misère - voilà la situation réelle en Bulgarie (totalitaire). Les citoyens ont été laisser croire qu'ils jouissent toujours d'une liberté devenue pourtant illusoire. Ils ont été maintenu volontairement dans l'inconscience d'une dépendance politique, économique et sociale qui un jour devient irréversible.
Les droits de l'homme et libertés fondamentales sont le carrefour , ils touchent a toutes les branches du droit. C'est ce qui fait sans aucun doute l'intérêt, mais aussi la complexité du problème.
Une des manières de promouvoir le respect des droits de l'homme consiste a en favoriser une meilleure connaissance. C'est le but principal de l'Union des juristes bulgares.
Comme la fort bien dit Federico Major - Directeur Général de l'UNESCO: "Connaître les droits de l'homme, les faire connaître, est l'une des voies qui mènent a les faire reconnaître. Pour que chaque individu qui en est le dépositaire, en soit aussi le bénéficiaire. Pour que l'universalité des faits s'accorde a l'universalité des principes. Pour que la conquête continue".
Les plus grandes vices de l'histoire humaine ce sont le racisme et la discrimination raciale. Malheureusement, des années entières, ces deux vices restent "inaperçues" et a l'écart des législations nationales d'une grande partie des pays de l'Europe et du monde, et, ne sont pas sujet de la pratique judiciaire.
Depuis la fin de la Seconde Guerre mondiale, la communauté internationale a multiplie les déclarations, les résolutions, les recommandations et les conventions tendant a interdire d'une manière générale toute forme de discrimination raciale , ethnique ou religieuse et a combattre le racisme et la xénophobie.
Les leçons graves de la Deuxième Guerre Mondiale imposent une conclusion définitive: la lutte contre le racisme est une préoccupation a vocation internationale.
Des 1945 , les Nations Unies adoptent la Charte, se fixant comme but l'interdiction de toute discrimination et la coopération internationale en encourageant "le respect des droits de l'homme

et des libertés fondamentales pour tous, sans distinction de race, de langues ou de religion". Le 7 mars 1966, les Nations Unies adoptent la Convention relative a l'élimination de toute forme de discrimination raciale.
L'Europe, profondément marquée par les événements de la dernière guerre mondiale, s'est elle-même dotée d'un arsenal juridique de lutte contre les phénomènes discriminatoires.
La Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, signée a Rome énonce en son article 14 que "la jouissance des droits et des libertés reconnus dans la présente convention doit être assurée, sans aucune distinction fondée notamment sur le sexe, la race, la couleur, la langue, la religion, les opinions politiques ou toute autres opinions, l'origine nationale ou sociale, l'appartenance a une minorité nationale, les biens, la naissance ou toute autre situation".
Ces dernières années, face a la renaissance et au développement des idéologies et des mouvements qui encouragent les idées et les pratiques discriminatoires ou raciales, les institutions du Conseil de l'Europe et de la Communauté Européenne rappellent, d'une façon constante, l'idéal commun de parvenir a une société juste et égalitaire, et mettent l'accent sur la nécessité pour chaque pays membre de prévenir et de réprimer les comportements empreints d'intolérance, de violence ou de haine.
Les Etats européens disposent pour la plupart non seulement de principes figurant dans leurs Constitutions mais également de textes législatifs, de nature pénale, visant a prévenir ou a réprimer de diverses formes de racisme, d'antisémitisme ou de xénophobie.
Quelle est la législation bulgare sur les problèmes du racisme ?
L'analyse du problème du racisme, de la discrimination raciale en Bulgarie et du système juridique de protection qui existe dans ce domaine ne peut pas être explique correctement et exactement sans avoir en vue les circonstances historiques suivantes:
1. La Bulgarie a été 500 ans sous le joug ottomane, et, comme une minorité dans cette empire, sa population cherchait contacte et entraide avec les autres minorités dedans - Arméniens, Juifs, Serbes, Valaques et d'autres.
L'ennemie commun, réel et religieux, a unifie les minorités durant des siècles, a surmonte et règle les divergences entre eux dues a la race, la couleur et l'origine nationale. Il était naturel de collaborer comme dans la lutte pour la liberté et l'indépendance, aussi pour la reconnaissance des principes fondamentaux de l'époque - les hommes naissent et demeurent libres et égaux en droit.
Le résultat, c'est le respect historique et développe du peuple bulgare envers les autres êtres humains, n'importe leur couleur, race ou origine ethnique.
La confirmation du susdit sont les actes et l'apport historique du Roi bulgare Boris III, du gouvernement et de tout le peuple bulgare pour sauver les Juifs en Bulgarie. On n'a pas admis l'anéantissement des Juifs a la territoire de notre pays malgré l'appartenance de la Bulgarie au pacte tripartite "Rome-Berlin-Tokio".
2. L'un des principes de base de l'idéologie marxiste-leniniste qui était fondamental pour la République de Bulgarie pendant les derniers 45 ans est celui de l'internationalisme socialiste.
Le principe du programme du gouvernant parti communiste, ainsi que de l'ancienne Constitution de la République de la Bulgarie est le soutient "de la lutte juste des peuples coloniaux en esclavage pour l'indépendance et pour le progrès social". Dans le Code pénal du 1951 en vigueur de ce temps-là, pour des crimes contre le régime et ses principes proclames, de graves peines, y compris la peine capital étaient prévus.
Dans les budgets de l'Assemblée nationale étaient prévus des moyens importants pour "aider la lutte des autres peuples pour la liberté, l'indépendance, contre l'oppression coloniale".
Des milliers des étrangers, surtout de l'Afrique, de l'Asie et de l'Amérique Latine ont reçu leur éducation et acquis des connaissances dans notre pays.
Le résultat est qu'en Bulgarie une attitude positive est conçue et imposée envers les représentants des autres races et couleurs. La discrimination raciale était pratiquement inadmissible ayant en vue les graves sanctions de poursuite et de punition.
La peur de l'individu de la machine répressive de la société totalitaire a joue un rôle positif dans la formation de ses idées envers les représentants d'autres groupes ethniques, d'autres races ou couleurs.
Les pareilles conditions économiques de la vie en République de Bulgarie et dans les pays du Tiers monde pendant les années 50-70 du XX-ième siècle, d'une part, et d'autre part, les barrières artificielles dressées entre les populations résidentielles en Europe durant la guerre froide, ont

élaborées dans le peuple bulgare le sentiment d'intimité plutôt avec les gens d'autres races, origine ethnique ou couleur de la peau, qu'avec ceux des pays européens.
Dans ce sens il faut avoir aussi en vue le fait qu'a la différence des certains pays européens qui pendant de longues années ont eu des colonies en Afrique et en Asie et de la un flux et un accroissement naturel de gens d'autres origine ethnique, races et couleur de la peau, en République de Bulgarie ces gens la sont une partie minimale de sa population.
Le résultat est qu'il manque des conditions objectives d'une tension et d'une discrimination raciale dans ses formes différentes - de l'insulte au génocide, en passant par l'exploitation économique.
D'après moi, il est obligatoire de faire les remarques précédantes pour comprendre ce qui suit et surtout a cause du manque de toute pratique judiciaire sur ce problème jusqu'à ce moment la.
Ainsi que pour les autres pays de l'Europe, en République de Bulgarie, c'est la première fois, après la Deuxième Guerre mondiale, que le problème du racisme et de la discrimination raciale se pose de point de vue la législation.
La Constitution de Tarnovo, première constitution pour la Bulgarie et votée en 1879 qui existait jusqu'à la Deuxième Guerre mondiale, reprend et approfondit les droits et les libertés fondamentaux, développes dans les législations européennes mais ne traite de tout le problème de la discrimination de la personnalité humaine, fonde sur la différence des couleurs, des races et de l'origine ethnique.
La Constitution de la République de Bulgarie du 1947 proclame le principe de l'égalité. L'art. 71 souligne de ne pas reconnaître aucun privilège fonde sur la nationalité, l'origine, la foi ou la situation matérielle. Il est inadmissible “toute propagande de haine raciale, nationale ou religieuse”, en punissant les infractions par la loi.
Il est intéressant de savoir que les décisions législatives de la Constitution du 1947 dépassent celles de la Déclaration universelle des droits de l'homme qui dit: “Chaque personne a vocation a être protégée contre toute forme de discrimination fondée sur l'origine, la race ou la religion, ou l'appartenance (ou non) a une nation ou une ethnie”.
La protection des personnes aux différentes couleurs, races ou origines ethniques est développée dans d'autres textes de la Constitution du 1947, qui donne droit au refuge des étrangers “qui sont poursuivis a cause de la protection des principes démocratiques, de la libération nationale, des droits de l'homme et de la liberté de la science et de la culture”.
D'une cote, les textes sont une conséquence directe et immédiate du développement de la pensée européenne juridique menée par les événements de la dernière guerre mondiale et les phénomènes discriminatoires du nazisme, et d'autre, de l'idéologie communiste dominante a cet époque, qui a pour but la victoire mondiale et qui, dans cette lutte a comme allie naturel les peuples sous la domination coloniale.
La deuxième loi, ou on trouve des textes sur ce problème est le Code pénale du 1951 de la République de Bulgarie.
Le Code pénal punit un certain nombre d'actes ou de comportements discriminatoires ou racistes, de la vie courante.
Ainsi pénalement incriminées sont les infractions suivantes :
- propagande ou incitation aux hostilités ou haine raciales ou nationales;
- violence contre autrui ou dommages des biens a cause de la nationalité, race, religion ou les convictions politiques progressistes;
- participation a une foule a fin d'attaquer des différents groupes de la population, des différentes nationalités, des sociétés religieuses, des personnes ou des biens unanimes.
Outre le caractère sérieux des crimes, fondes sur la race, la religion, l'origine ethnique ceux-là ne trouvent pas un développement supplémentaire et restent au coeur des déclarations. Il manque des mécanismes efficaces de contrôle et d'application des textes d'ou il manque toute pratique judiciaire.
La Constitution du 1971 déclare de nouveau dans son art. 35 que “il n'est pas admissible aucunes privilèges ou restrictions dans les droits fondes sur la nationalité, l'origine, la religion, le sexe, la race, l'éducation et la situation sociale et matérielle. Toute propagande d'hostilité ou d'humiliation de l'homme a cause de sa race, origine nationale ou religieuse est défendu et puni.
Le texte a un caractère plutôt déclaratif car il n'y a pas de système de lois et de dispositions législatives qui met en détails et garantie le respect du principe précis.

Le Code pénal, qui est en vigueur pendant ce temps-là et toujours maintenant, contient des textes dans son chapitre “Crimes contre les droits des citoyens” interprétant le problème de la discrimination raciale.
Les actes liés a:
- la propagande et l'incitation aux hostilités raciales ou nationales, ou discrimination raciales;
- la violence sur autrui ou dommage de ses biens a cause de sa nationalité, sa race, sa religion et ses convictions politiques
- la participation a une foule a fin d'attaquer des groupes de la population, des individus ou leur biens a cause de leur appartenance nationale ou raciale.

Par comparaison du Code pénal de 1951, celui de 1968 a une meilleure et plus riche codification pour la lutte contre le racisme. C'est un résultat de la Convention internationale sur l'élimination de toutes formes de discrimination raciale adoptées par l'Assemblée générale de l'ONU en 1956, signée et ratifiée par la République de Bulgarie.
Dans ce sens le Code pénale de la République de Bulgarie a un développement bien intéressant.
En résultat des conventions, pactes et protocoles, liés a la protection des droits et des libertés fondamentaux de la personnalité humaine et en particulier a la lutte contre la discrimination raciale, signes et ratifies, ainsi qu'en résultat des changements démocratiques après 1989 dans notre société, des textes, qui préviennent une responsabilité pénale dans des cas suivants ont été adoptes:
- créer des obstacles de s'engager au travail, respectivement de démissionner par force a cause de sa nationalité, race , religion, origine sociale et conviction politique;
- refus d'un fonctionnaire d'exécuter un ordre ou une décision entrée en vigueur, de réhabiliter une personne congédie illégalement a cause de sa nationalité, race, religion, origine sociale ou convictions politiques.

Quelle est la réglementation normative a présent et quels sont les problèmes qu'elle pose?
Le actes normatifs qui contiennent des dispositions liées a la lutte contre le racisme et la discrimination raciale sont adoptes après 10.11.1989, la date du relance démocratique en République de Bulgarie. Au point de leur élaboration on a utilise largement les conquêtes des pays européens, dans le domaine des droits de l'hommes et des libertés fondamentaux, leurs normes conformes aux actes internationaux signes et ratifies par le pays.
Le document principal normatif est la Constitution de la République de Bulgarie de 1991.
La Constitution reproduit les droits et les libertés fondamentaux déposés dans la Déclaration universelle des droits de l'homme, le pacte international relatif aux droits civils et politiques et la Convention européenne des sauvegarde des droits de l'homme et des libertés fondamentales.
L'art. 6 proclame que tous êtres humains naissent libres et égaux en dignité et en droit.
Tous les êtres sont égaux devant la loi et on n'admet pas aucune restriction des droits ou privilèges fondes a la race, la nationalité, l'origine ethnique, le sexe, l'origine, la religion, l'éducation, les convictions, l'appartenance politique, la situation personnelle et sociale ou situation matérielle.
Une nouveauté intéressante est l'élaboration d'un texte constitutionnel qui prévient l'introduction immédiate des normes des traites internationaux comme partie du droit interne de la République de Bulgarie et leur essentiel aux normes de la législation internes qui les contredisent.
L'application de ce texte a pose un grand nombre de problèmes pratiques devant le système judiciaire d'ou s'est impose l'interprétation devant la Cour Constitutionnelle de la République de Bulgarie.
La Cour Constitutionnelle a admis que les contrats internationaux d'après son caractère sont des accords internationaux bilatéraux et multilatéraux entre les états avec la participation de la République de Bulgarie, et règles par le droit international, en outre leur forme et nom (traites, pactes, accords, protocoles).
Pour être part du droit interne du pays et assurer leurs application durant la validité de la présente Constitution , il est nécessaire que les traites internationaux soient:
- ratifies selon l'ordre constitutionnel, c.-a.-d. avec une loi, votée par l'Assemblée Nationale;
- publies dans le “Journal officiel”,
- entres en vigueur en République de Bulgarie, et ce moment doit être détermine par les traites internationaux eux-mêmes.

Apres avoir accompli ces exigences constitutionnelles, les traites internationaux deviennent part du droit interne du pays, leurs normes sont une source de droits et d'obligations pour les individus du droit interne.

Les traites internationaux n'arrivent pas d'être part du droit interne quand ils ne sont pas publies ou quelques unes des exigences manquent, alors les individus judiciaires ne sont pas obliges de les observer. L'État et ses institutions ne sont pas libérés de l'obligation de faire tout le nécessaire pour que les traites internationaux soient introduits dans le droit interne et que leurs normes judiciaires soient exécutés.
La question de la situation des existants traites internationaux, déjà ratifies en Bulgarie avant la mise en vigueur de la Constitution de 1991, pose des problèmes intéressants.
La position de la Cour Constitutionnelle est que, dans la présente Constitution, l'acte judiciaire des traites internationaux existants se détermine avec l'obligation de la nécessite de leur publication ou non. Quand les traites internationaux sont conclus d'après la législation de ce temps et d'après son ordre de ratification ils deviennent partie du droit interne, dans le cas ou ils sont publies, et pour leur publication n'existe pas aucune exigence. Quand les traites internationaux ne sont pas publies ils n'ont pas la priorité d'après l'art.5 al.4 de la Constitution devant les normes de la législation interne. Ils obtiennent cette priorité des leur publication.
Pour garantir l'inversalité des procédures démocratiques et la formation d'une institution qui surveille la constitualité des lois existantes et nouvellement votées, comme est l'exemple avec plusieurs pays européens, la nouvelle Constitution de la Bulgarie a fonde une institution spéciale qui donne des interprétations obligatoires - la Cour Constitutionnelle.
Ses droits sont (sans énumération détaillée):
- donner une interprétation obligatoire de la Constitution;
- se prononcer sur demande pour établir une anticonstitualité des lois;
- se prononcer sur la conformité des traites internationaux, signes par la République de Bulgarie avec la Constitution, avant leur ratification, ainsi que la conformité des lois avec les normes générales du droit international et des traites internationaux dont la Bulgarie fait partie.
La Cour Constitutionnelle peut être saisit a l'initiative au moins d'une 1/5 des députés, du Président de la République, du Conseil des Ministres, de la Cour Suprême de cassation, de la Cour Suprême administrative et de l'accusateur de la République.
En liaison avec un problème pose devant la Cour Constitutionnelle- est-ce que les traites internationaux ratifies, publies et entres en vigueur font part du droit interne pénal et est-ce qu'ils y ont priorité, la cour donne sa motivation. Il s'agit de phrases utilisées comme éléments de crimes et actions, respectivement inactions qui ne sont pas annoncées dans le Code pénal comme crimes pour lesquelles il n'y pas de validité et quand ils ont une action inverse.
" La Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants a détermine le contenu du terme "torture" en obligeant les pays de déclarer comme crime toutes manifestations de tortures. La Convention internationale sur l'élimination de toutes formes de discrimination raciale a explique le terme "discrimination raciale" sans déterminé les crimes et leurs peines."

La décision est la suivante:
"Les traites internationaux, ratifies, publies et entrés en vigueur dont certains activités (actions ou inactions) sont énoncés comme crimes, sans être crimes selon l'interne législation pénale de la République de Bulgarie, font part du droit interne du pays seulement pour expliquer le sens du contenu des crimes ou leurs éléments figurant dans le Code pénal ou pour créer des obligations d'un changement de la législation." (Décision Nr.7 de 2.7.92 sur un procès const. Nr.6/92) .

Les problèmes que j'ai mentionnes visent dans un aspect historique le règlement de la législation sur les problèmes du racisme et de la discrimination dans la présente réglementation normative.
Qu'est ce qu'il faut entreprendre, d'après moi, en République de Bulgarie contre le racisme et la discrimination raciale?
1. Créer une définition officiel du terme "discrimination raciale" car dans notre droit il manque telle.
A présent par analogie on accepte la définition de l'art 1 de la Convention internationale sur l'élimination de toutes formes de discrimination raciale;
2. Introduire dans le Code pénal de nouveaux textes, qui se basent sur les motivations, liées a la violation des droits de l'homme et libertés fondamentales aux différences de la couleur, de la race, de l'origine ethnique, c-a.-d. a la discrimination raciale.
On peut créer des textes lies a:
- le génocide - la destruction totale ou partielle d'un groupe national ,ethnique, racial ou religieux;

- la déportation; enlèvement de personnes suivis de leur disparition; de la torture ou d'actes inhumains inspirées par des motifs politique, raciaux ou religieux;
- la diffamation et l'injure a raison de l'origine ou de l'appartenance raciale, ethnique, nationale ou religieuse;
- la diffamation et l'injure publiques a raison de l'origine ou de l'appartenance raciale ou religieuse- la profanation
- la profanation des sépultures - quand est commise pour des motifs racistes;

3. Introduire les traites internationaux, lies aux problèmes du racisme et de la discrimination raciale dans le droit interne de la République de Bulgarie et créer des conditions pour appliquer leurs normes judiciaires;
4. Publication des traites internationaux qui sont signes avant la mise en vigueur de la présente Constitution visant leur incorporation dans le droit interne;.
5.Developper le système de contrôle et sanctionner les personnes coupables qui n'observent pas leurs obligations imposées. Dans ce sens il faut développer surtout les droits de la Cour administrative et de la Cour suprême administrative.

Par exemple dans la Loi du Ministère de l'intérieur il y a un texte qui déclare "Il est interdit de recueillir des renseignements sur les citoyens a cause de leur race, leur religion, leurs convictions politiques..." mais il n'est pas prévu du mécanisme de contrôle, ni des sanctions pour sa violation.

6. Outre les infractions pénales il faut autoriser le pouvoir administratif a prendre certains mesures d'interdiction pour prévenir des comportements racistes.
7. Enfin il faut protéger les libertés contre l'État. L'État, ce peut être, en premier lieu, le législateur. Deux moyens sont alors concevables:

- le premier consiste a conférer aux Déclarations de droits une valeur supérieure aux lois ordinaires;
- le second se trouve dans le contrôle efficace de la constitutionalité des lois.

Les deux moyens - nous aurons l'occasion de le constater - font tendance aujourd'hui a se renforcer. Et, c'est une bonne chose !
Je finis par les mots de Louis Veuillot :

" QUAND JE SUIS LE PLUS FAIBLE , JE VOUS DEMANDE LA LIBERTE PARCE QUE TEL EST VOTRE PRINCIPE. MAIS QUAND JE SUIS LE PLUS FORT, JE VOUS L'OTE PARCE QUE TEL EST LE MIEN".

2. Denmark: Abstract by Niels-Eric Hansen, Legal Counsellor of the Dokumentations- og Radgivningscenteret om Racediskrimination (DRC), Copenhagen

The Prohibition Against Racial Discrimination in Denmark – Criminal law

Introduction.
This presentation is going to focus on two issues:
1) The existing anti-discrimination legislation in Denmark as this provisions are primarily criminal law.
2) Criminal acts with a racist motive, like violence etc., which are not covered by specific anti-discrimination legislation.

1. Danish anti-discrimination legislation / criminal law:

A) The Racial Discrimination Act (Criminal law).

This Act covers racial discrimination in connection to the denial of access to restaurants and shops, as well as asses to all other kinds of services and goods, like public education and housing. This Act, however, does not cover the private area, like for example the renting of a room in a private house. It must be the intention of the perpetrator to reject the a person because of this persons race, colour, national or ethnic origin. It goes without saying, that the burden of proof is a major problem in this respect. Further more it is a problem that indirect racial discrimination is not covered.

If the prosecutor starts proceedings the perpetrator may be sentenced to a fine or jail for up till 6 months. So fare the sanction has only been fines.
If the public prosecutor decides not to start proceedings, this decision can be appealed to the General Prosecutor and / or the Ministry of Justice. If this appeal is rejected as well, it may be possible to start civil proceedings according to section 26 of the "Liability for Damage Act".

The Danish authorities can not provide any statistical information about cases concerning the Racial Discrimination Act as these cases are not registered by the police.

B. Penal Sanction Code section 266 b (Criminal law)

This provision covers hate speech in a public forum, directed against a groups of people caracterised by their race, colour, national or ethnic origin. Hate speech against individual members of these groups, however, is not covered by this provision. Further more any "private" statement, which is not said in a public meeting, or spread by a newspaper, television and the like, is not covered by this provision. It must be the intention of the perpetrator that the statement is spread in public, if accusation should take place.

If the prosecutor starts proceedings the perpetrator may be sentenced to a fine or jail for up till two years. The most common sanction is a fine.
If the public prosecutor decides not to start proceedings, this decision can be appealed to the General Prosecutor and / or the Ministry of Justice. If this appeal is rejected as well, it is not possible to start any proceeding according to section 266 b. of the Penal code.

C. Act on prohibition of Labour market discrimination (Civil and Criminal Law)

The prohibition in the labour market area is based on civil law, however, one exemption exists. If the employer is using a discriminatory advertising in order to recruit "Danes" or "no Pakistanis", it is up to the police to prosecute this violation of the Act. The employers, however, are more

sophisticated and advertise for "100% Danish speaking" applicants for a job as driver or cleaning assistant. In these cases of indirect racial discrimination, the police rejects to take any action.

As these provisions (mentioned above) are criminal law, neither the Ombudsman nor Human rights organisations play any formal role. It is solely the decision of the police / public prosecutor whether a case is raised or not. If the prosecutor decides not to prosecute, no other measure exists.

On the informal level, however, DRC plays a role in connection to receiving and clearing up cases, that may end up as criminal cases later on. As DRC is a private organisation, this role is very limited, as we have no power to get information from the offender, whether this is a private person or business.

2. Criminal acts not covered by anti-discrimination legislation:

Danish penal legislation do not specifically address the issue of racist motivated violence etc. For this reasons, racist motivated crimes of violence etc. is prosecuted and judged like ordinary cases of violence.

Last year, however, the Metropolitan Copenhagen Police issued an instruction, that the prosecutors in the Copenhagen Police should use Section 80 of the Penal Code, stating that the motive of the perpetrator may constitute an aggravating circumstance with respect to the punishment. Due to this new instruction
(PD no. 32, May 10, 1996) the Police prosecutor is obliged to plea for longer sentences, if the motive of the perpetrator is of a racist character.

On September 16, 1996 a young man of Moroccan origin was attacked by to skinheads, while he was waiting for a bus in Copenhagen. He was beaten and kicked several times, and when he took refuge in a taxi, the driver refused to help him. Furthermore the driver asked the two perpetrators to remove the victim from his taxi and the young man was heavily beaten up again. On December 3, 1996 the two perpetrators were sentenced imprisonment for 1 year and 1 year and
3 months respectively. The Court stated, due to the plea from the prosecutor, that it constituted an aggravating circumstance that the victim was attacked solely because of his foreign origin.

It is our hope that other police districts are going to follow this example, however, no centralised policy exists on this issue.

The policy of the Metropolitan Copenhagen Police also includes registration based on the victims consideration of whether the criminal act was racist motivated or not. It goes without saying that this is the case in relation to reports about violations of the Racial Discrimination Act (see above), however, it also includes reports concerning violence, threats etc. In the future it may be a very important tool in order to map out racial discrimination in a number of areas related to criminal offences.

3. United Kingdom: Abstract by Fernne Brennan, LL.M., Lecturer in Criminal Law and European Community Law, University of Essex

Race, Crime, Order, Disorder

"For some ethnic groups the general level of abuse is so high that it becomes part of their everyday reality and background noise."[1]

In the UK there are approximately 400 racist incidents daily[2] and 130,000 such incidents every year which range from verbal abuse to killings, however, there are few offences designed to deal with racial incidents[3] Great concern has been expressed from many quarters regarding both the alarming increase in racial incidents and the apparent inability of the police and prosecuting authorities to deal with these incidents in an effective manner. The British Government wishes to wipe out racist violence and to this end has opened this area to consultation[4] with the public as to the suitability of the provisions for a Crime and Disorder Bill. The aim of the bill is to create new offences of racially-motivated violence and racial harassment.[5] The fact that British politicians have made this moves signals the growing concern that racism and xenophobia has not been sufficiently minimised by educative and other means. However racism and xenophobia is not only a domestic concern. There is well documented evidence of the growth of this phenomenon in a number of European countries, and some support for the view that a European response is a necessary step in dealing with this. This paper is an attempt to throw some light on this context from a British perspective.

Background

A number of governmental and non-governmental organisations have raised the issue of race and its relevance to crime. Statistics show an alarming increase in racial incidents but there has not been the political will to look at the causes of this - and the possible remedies - in a consistent and concerted manner. The Government has now provided a possible statutory framework in response to this phenomenon and this response has no doubt been spurred on by cases such as the murder of Afro-Caribbean teenager Stephen Lawrence (22. April 1993).[6] Cases such as the Stephen Lawrence case have received much publicity and demonstrate the more violent end of a spectrum of racial incidents which largely remain outside the reach of the law. More typical cases are those where people face assaults and serious injury, for example the case of an Afro-Caribbean man who was beaten and permanently disfigured by 20 white men encouraged by the leader of the British National Party (BNP), Richard Edmonds, and the case of Vincent Ribbans who, along with two colleagues, seriously injured an Afro-Caribbean for being in the company of a white woman - his girlfriend. Mike O'Brien, a government Minister, recently met with a number of people who had suffered racial harassment over long periods. They reported several incidents of racial abuse which included the posting of fireworks and excrement through a letter box, broken windows and

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[1] See C. M. V. Clarkson, and H.M. Keating, (1994), Criminal Law: Text and Materials, p.550.
[2] See Elizabeth Davidson, Will the new racist crime proposals work?, The Lawyer, 4 November 1997, p.7.
[3] See Commission For Racial Equality , Annual Report, (1993), p.25. The police record racial incidents as all incidents reported to them where any party suspects or alleges racial motivation in accordance with the 1985 Association of Chief Police Officers (ACPO) definition of racial incident:
any incident in which it appears to the reporting or investigating officer that the complaint involves an element of racial motivation, or any incident which includes an allegation of racial motivation made by any person; see Racial Violence and Harassment: A Consultation Document, September 1997, p.7.
[4] See Racial Violence and Harassment: A Consultation Document. Home Office, September 1997:at web site:http://www.homeoffice.gov.uk/rvah.htm
[5] See Racial Violence and Harassment: A Consultation Document, September 1997, p.1.
[6] The killers of Stephen Lawrence remain at large.

other serious damage to property, assaults resulting in serious injury, and assaults on children.[7] The Minister pledged that "ethnic" minorities are entitled to the same safe and decent community that we all want ... the Government intends to deliver it".[8] Why should the Government have to make a special case for the protection of ethnic minorities? Aren't there sufficient legal mechanisms to cope with racist harassment and violence?

OFFENCES OF A RACIAL BACKGROUND

There are relatively few offences whose composition comprise a racial element. The tendency has been to charge the defendant with an offence, without reference to racial motivation, and to look at the question of race as an aggravating factor at the sentencing stage.[9] However, it is at the discretion of the sentencing judge whether, and to what extent, racial-motivation is a factor to be reflected in the sentence a convicted defendant will eventually receive. The offences which are clearly aimed, in part or in whole, at racial incidents are: incitement to racial hatred contained in Part III of the Public Order Act 1986 (ss.18-22) and the Football (Offences) Act 1991. Proceedings under the Part III of the Public Order Act 1986 may not be instituted without the consent of the Attorney General. The common theme with the offences under the 1986 Act is that the defendant's conduct involve the use of threatening, abusive or insulting words, behaviour or material and either he or she intends thereby to stir up racial hatred or, having regard to all the circumstances racial hatred is likely to be stirred up.[10] The offences focus on conduct (words or behaviour); display and publication; the presentation or direction of a public performance; recording of visual images or sounds; the provision of a programme of service and possessing written material, amongst other things. According to the Football (Offences) Act it is an offence to take part in racist chants or sounds at a designated football match (s.3(1)). The chanting must be by way of repeated utterances of any words or sounds in concert with one or more others (s.3(2)(a)), and must be of a racialist nature consisting of or including matter which is threatening, abusive or insulting to a person by reason of his or her colour, race, nationality (including citizenship) or ethnic or national origins (s.3(2)(b)).

It is important to note that relatively few prosecutions are brought under these Acts. Under the 1986 Act 8 cases were brought by the Prosecution Service but only 3 consents were granted by the Attorney General in 1991[11], in the same year whilst there were 76 arrests under the Football (Offences) Act there were only 6 prosecutions and 5 convictions.[12] Clearly there is some discrepancy between the ratio of charges to convictions, which perhaps explains, in part, the willingness of the British Government to seek to widen the ambit of the criminal law to encompass other forms of racist behaviour.

Many racial incidents do not involve incitement to racial hatred nor do they occur on the football terraces, by far the majority of such incidents take place on a daily basis as low level harassment-type incidents which are often not reported and thus not reflected in official statistics. The Government has responded to the increase in racial incidents with a proposal for a number of crimes which, mirror to a large extent, offences already in existence, however, the focus of these new provisions is on racial motivation or evidence of racial motive. These offences include racial violence and racial harassment[13]. According to the Government the changes in the law will be part of an overall package to tackle racial crime. One glaring anomaly is how people obtain access to the law in order to ensure that incidents of racism and xenophobia are properly recorded and

[7] One of the worst cases recorded in recent press was that of Mal Hussein and his white partner, Linda Livingstone, who have been victims of 1,500 documented racial incidents since they moved to the Ryelands estate in Lancaster in 1991, see The Guardian, 22 October 1997, pp.2-3.
[8] See url:www.coi.depts.GHO/coi3076d.ok
[9] R v. Ribbans, Duggan and Ridley [1995] 16 C App R (S) 698.
[10] J C Smith, (1996), Criminal Law, Butterworths, p.770.
[11] See Commission for Racial Equality, (1993), Annual Report, pp.23-27.
[12] Ibid.
[13] See Racial Violence and Harassment: A Consultation Document, September 1997, Annex A p.6, url:http://www.homeoffice.gov.uk/rvah.htm

processed, and that people are made fully aware of the help they can expect to obtain from legal advisors and public authorities. One of the problems with the existing criminal justice system is lack of confidence in the process. This problem of access to information and transparency of the system is particularly acute for those people whose native language is not English and who do not have access to translation facilities.

VICTIMS

The definition of a victim of a racial incident is not an exact science. There are many factors to be considered not least that of how the person perceives an incident. There are also other factors such as the person's willingness to report the incident, and the way in which the incident is subsequently recorded by the police and legal advisers and then processed by the prosecuting authorities. Given that there is little in the way of racial categories within which to fit racial incidents it is difficult to talk about victims of racial crimes, however, the need to recognise and deal with racial incidents as criminal behaviour has spurred public authorities to try to provide more effective ways of recording information. In 1993 the Crown Prosecution Service initiated a monitoring system designed to assess the number of cases identified by the police as containing an element of racial motivation,[14] further, the Metropolitan police reported that allegations of racial incidents had increased in 1994-95 by 8 per cent, from 5,060 to 5,480. This increase in the reporting of racial incidents to the Metropolitan police may be put down, in part, to an increased willingness on the part of the public to report and an increased confidence in their system[15] but this is not reproduced nationally. In spite of weaknesses it is still possible to identify certain victims in broad terms.
According to Clarkson and Keating[16], 27 per cent of Afro-Caribbean and 37 per cent of Asian respondents felt that there was a racial motive to attacks. Statistics from the British Crime Survey on racial attacks and incidents in 1988 and 1992 suggest that of the 130,00 crimes committed against Afro-Caribbean's and Asian peoples which involved a racial element, 89,000 were committed against Asian people and 41,000 committed against Afro-Caribbean, a number of these incidents involved racially-motivated assaults, vandalism and threats, however the vast majority of lower-level incidents are not reported.[17] The Home Affairs Committee heard evidence that Black people in various parts of the UK are increasingly likely to experience racist attacks. In a West Lothian study 56 per cent of Black women reported experiencing racial harassment.

The Anglo-Jewish community have also suffered from racist and xenophobic incidents which take the form of anti-Semitic violence which is reported to be on the increase. Such conduct includes criminal damage in the form of desecration of religious buildings, holocaust memorials and graves and the production of violent and anti-Semitic literature which has included incitement to racial hatred.

There are a number of other peoples for whom it is difficult to obtain statistics not least because of communication problems. These peoples include those of the Chinese and Irish communities. There are also the 'new arrivals' to the UK as a result of the opening up of Eastern Europe for which there are no statistics regarding racial incidents, but recent press coverage suggests growing hostility on the part of some people and right wing groups which may very well spill over to such peoples.

There has been movement to develop the 'victim' perspective in the development of the criminal law process, for instance, the Crown Prosecution Service has stated that it is fully committed to taking all practicable steps to help victims through the often difficult experience of becoming

[14] According to B Gibson and P Cavadino data from this proved disappointing. See Gibson and Cavadino, (1995), Introduction to the Criminal Justice Process, p.146.
[15] Metropolitan Police Service Review of the year 1994/5, url:http://www.open.gov.uk/police/mps/mps/report/mps-re4f.htm
[16] C Clarkson and H Keating, (1994), Criminal Law: Text, Cases and Materials, p.550.
[17] See Commission For Racial Equality Annual Report, (1993), p.25

involved in the criminal justice system.[18] This perspective, however, focuses on domestic violence rather than racially-motivated crime, thus, whilst there has been some recognition of the difficulties involved in domestic violence, which may involve members of 'ethnic minorities'[19], there is no sense in which the service has made a concerted effort to face some of the obstacles which prohibit people from complaining to the authorities about their experience of racial incidents.

OFFENDERS

Information on offenders is patchy for a number of reasons. As has already been pointed out the vast majority of low-level racial incidents remain unreported, and a number of wrongdoers remain at large. There is the added problem that it is not always clear as to the racial background of offenders because of the lack of effective monitoring systems. Further, where incidents are reported to the prosecuting authorities what is not immediately transparent is whether the crime is one which is racially motivated, not least because there are very few offences defined in that way, together with the added problem that those who process may not report an incident as racial. According to the Association of Chief Police Officers (ACPO) a racial incident is one which appears to the reporting or investigating officer as one which involves an element of racial motivation. The investigator has to be satisfied that a racial incident has taken place. This raises the question of the ability of officers to effectively carry out such a task. Alternatively, the officer can rely on the allegation made by the complainant but this provision leaves a lot of discretion in the hands of the police, many of whom remain largely inexperienced and unwilling - some of whom still indulge in racist banter and racist behaviour. [20] If this occurs there can not be a clear picture of offenders. In spite of these obstacles there are certain types of offenders who can be identified: i) Members of extreme right-wing groups, ii) individuals and
iii) public servants.

i) Members of extreme right-wing groups:

There are a number of such groups who are organised and tap into international networks. They use media such as magazines and the Internet to promote race hate and the preservation of their 'race'. Until recently these groups have tended to be home grown such as the British National Party (BNP), Combat 18, Blood and Honour and the British National Socialist Movement, however, there is some evidence that revolutionary Islamic Fundamentalist have also begun to develop in the UK.[21] The latter confine themselves to targeting the Anglo-Jewish community and there activities are largely confined to xenophobic literature, however there is no evidence, according to government sources, of racial violence and Britain's Jews and Muslims generally enjoy harmonious co-existence. The neo-nazi groups, on the other hand, are openly violent and it is Black and Asian Communities which bear the brunt of actual physical attacks.[22]

Roland Adams was killed in February 1991, the killers were congratulated by the BNP for "defending their estate". In Cardiff the BNP and National Front were both actively engaged in disturbances in Ely in 1991, where a number of racially-motivated incidents were recorded by police and an Asian shopkeeper was driven out of the city as a result. In R v. Edmonds, the defendant was the organiser of the BNP and was found guilty of having been the ringleader of a

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[18] Crown Prosecution Service, (1997), Victims and Witnesses, see url:http://www.cps.gov.uk/cps-d/victims.htm#help-victims

[19] Ibid, p.5.

[20] Her Majesty's Inspectorate into police, community and race relations found that whilst much had been achieved by the police in the last decade, some forces and officers are still failing to combat racism as effectively as they could., even more worrying is the lack of intervention by
management, The Guardian, Campaign to Fight Racism in the Police, 29 October 1997, p.6.

[21] Minutes of evidence taken before the Home Affairs Committee (inquiry into racial violence), 1993,1994, p98,appendices.

[22] Ibid, p.98, appendices.

racist attack against a Black youth by 20 members. The victim was seriously injured and disfigured for being in the company of his white girlfriend.[23]

ii) Individuals:

The majority of cases of racial incidents involve individuals who do not necessarily set out to commit a racial incident but, nevertheless, do so. An example is that of R v. Ribbans, Duggan and Ridley.[24] The defendants been drinking and taking drugs and had eventually arrived at a petrol station late at night. There they came across a Black Barbadian, Kenneth Harris who had gone to the garage with his white partner. The three defendants hurled abuse at the girlfriend and seriously injured Harris. Unknown to the defendants the incident had been recorded by security cameras at the time and there was clear evidence that the defendants were outraged because Harris was Black and had a white girlfriend. The majority of cases which involve individuals are perhaps not as extreme as Harris, but they do involve racist verbal abuse and racist harassment on a regular, sometimes daily basis in some communities.[25]

iii) Public servants:

There have been a number of deaths in police custody of people from various racial minorities, and this has caused immense public disquiet. These incidents have been compounded by the reluctance of the prosecuting authorities to prosecute the alleged offenders. This is particularly problematic where the public Coroners court has returned a verdict of unlawful killing. A number of cases have received a lot of media attention such as the case of Joy Gardner who was killed during a forcible attempt to deport her to Jamaica in 1994. Three officers involved were acquitted of manslaughter. Richard O'Brien, an Irish man, was found to have 31 separate injuries on his body after he had been arrested for allegedly being drunk and disorderly. O'Brien died of postural asphyxia after officers held him down with their body weight. In a similar case Shiji Lapite was found to have suffered 36 - 45 separate injuries by a pathologist during an incident with tow police officers, one held Lapite in a neck-hold that fractured his larynx, causing him to die of suffocation. In both cases the Crown Prosecution failed to prosecute the officers concerned and the families of both victims successfully sought judicial review of the decision of the Director of Pubic Prosecution not to bring a case against the officers. In the latest of a series of such cases, Ibrahima Sey was killed when sprayed with CS gas. Sey, an asylum seeker from the African continent, died two weeks after the force began testing the spray. The Coroner, Harold Price, called for an urgent review of the use of the gas by the police,[26] however, the Home Secretary, Jack Straw, said that there was nothing in the evidence to suggest that CS gas was a significant threat to human health.[27] Perhaps the question is whether there are sufficient safeguards in place to ensure such an instrument is not deployed in a racist context.

There is no suggestion that these incidents are the result of racist police practices because there is no evidence to support that contention, however, there is a growing body of evidence that racism has some part to play in the way racial minorities are treated by the police and that treatment tends to be based on negative stereotypes. Black deaths in police custody, argues Ryan[28], are a small part of the pattern of institutional racism. As the police begin to record the ethnic composition of those who die in their custody it may be easier to draw conclusions as to the relationship between racism in the police force and such deaths.

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[23] See Migrant News Sheet, May 1997, No.170/97-05, p.15.
[24] Attorney General's Reference (nos. 29,30 and 31 of 1994) 1995 16 Cr. App R (S).
[25] The Case of Mal Hussein and his white girlfriend, Linda Livingstone, who experienced 1500 racial incidents on the housing estate in Lancaster. These involved stonings, obscene graffiti and death threats, The Guardian, 29 October 1997, p.2-3.
[26] Guardian 3 October 1997.
[27] Home Office 281/97, Home Secretary backs police use of CS spay, 16 October 1997, url:www.coi.gov.uk/coi/deots/GHO/coi3529d.ok
[28] M Ryan, Lobbying form Below, (1996),pp.125-131.

The police force is not the only public body where there are suspicions regarding the treatment of racial minorities, these questions have also arisen in the context of the Armed Forces. From 1992-1996 there were 38 recorded cases of alleged racial harassment. Of these 25 were found to have been unsubstantiated, seven were still under investigation and 6 substantiated, leading to 4 disciplinary hearings.[29]

PENALTY SYSTEM TO REPRESS OFFENCES

There are two areas where the legislature has been active in focusing on racial incidents: incitement to racial hatred under the Public Order Act 1986, and racist chanting under the Football (Offences) Act 1991. These offences contain inherent limitations.

In the case of the Public Order Act, to bring a prosecution under this provision requires the consent of the Attorney General. A government working party recommended that this requirement should be repealed.[30] There was a four year gap in racial incitement prosecutions from 1987 - 1991 and the decision not to prosecute the distributors of "Holocaust News", and other such literature, in 1987-88 undoubtedly gave encouragement to those involved.[31] There are a number of other problems identified with this provision; the term "racial hatred" is a strongly emotive term which may be difficult to prove and even harder for the Crown Prosecution service and juries to deal with. The Football (Offences) Act does contain some difficulty. In December 1991 Paul Philip was arrested and charged under the Act for grunting making ape gestures at two black Watford players, but when the case came to court the charges were dismissed because Philip had acted alone and not "in concert with one or more others". Football organisations want the loophole plugged.[32] A government working party recommended that this Section be amended to include in the offence an individual who engages in the chanting of an indecent or racialist nature.[33]

These provisions demonstrate that more thought needs to be taken in the construction of offences which are aimed at punishing racial incidents. Unfortunately it does not appear as though that lesson has been learnt with the current proposals for a new Crime and Disorder Bill aimed at the prevention and punishment of Racial Violence and Racial Harassment. The offences mirror those already in existence which do not focus on racial motivation. These provisions will cover racial common assault; racial assault occasioning actual bodily harm; racial malicious wounding and racial harassment. The mens rea for these offences would have to satisfy one of two tests: that the intention to commit an offence was racially motivate or, alternatively, that there is evidence of racial motivation. The maximum penalty to be imposed for these offences is at a higher level than the substantive offence-for common assault, for example, 6 months and / or £ 5,000 fine, for the racial equivalent the maximum sentence would be 2 years and / or an unlimited fine. The Government also proposes that if the question of racial motivation cannot be satisfied then there should be the possibility of conviction of the defendant in the alternative (with the substantive offence). Further the government requires that statutory force be given to the Ribbans judgment which requires that sentencing judges take into account racial motivation as an aggravating factor when sentencing defendants.

There have been a number of criticisms of these provisions. The Scottish Office[34] argues that the incorporation of the concept of motivation into the definition of offences as necessary elements might result in offences which could rarely, if ever, be proved, and to incorporate this racial element by reference to evidence of racial hatred or prejudice could be as difficult. Should the evidence be contemporaneous with the evidence of harassment or violence given that it may be problematic to demonstrate the relevance of evidence of racial hatred or prejudice at another time

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[29] Url:www.open.gov.uk/
[30] See p.101 of Appendices of Minutes of Evidence taken before the Home Affairs Committee, 1993/94.
[31] See p.98 ibid.
[32] Police and the Law, Law with a Flaw, url:http://www.open.gov.uk/cre/kickit/pc&law.htm
[33] See p.102 of Appendices of Minutes of Evidence taken before the Home Affairs Committee, 1993/94.
[34] The Scottish Office Home Department, New offences of Racial Harassment and Racial Violence, (September 1997), url:http://www.open.gov.uk/scotoff/cons-doc.htm

when none actually manifested itself on the occasion in question? What is the proper boundary to be maintained between harassment and violence? Neither of these vital questions have been adequately addressed:
a necessary step if these proposed new crimes are to prove effective in combating racist and xenophobic conduct.

Some British lawyers have been especially critical about these reforms.[35] The reforms are seen as lacking teeth. In particular, that defendants charged with racial common assault will be able to go to the Crown Court where they will stand an 80 per cent chance of acquittal (as opposed to a 10 per cent chance of acquittal in a magistrates court), that in a climate which automatically identifies blacks, rather than whites, as the aggressor, the creation of these offences will enable police officers to get convictions by, for example, claiming that they have had racist taunts hurled at them during an arrest. Further, that whilst the maximum sentencing has been increased, the decision on sentencing is still at the discretion of the judge. Should judges still retain this discretion?

PRIVATE PROSECUTIONS

In Gouriet v Union of Post Office Workers [1978],[36] Lord Diplock said that every citizen has the right to invoke the aid of the courts of criminal jurisdiction for the enforcement of criminal law. It is a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of authorities to prosecute offenders against the criminal law. The family of Stephen Lawrence exercised this right although the case was unsuccessful. Whilst this constitutional right exists at common law there are a number of constraints, not least the fact that under one of the few provisions that exist to prevent and punish racist offences the consent of the Attorney General is required.

There remain other constraints to the exercise of this right such as the possibility that if an aggrieved person brings a case they could leave themselves open to an action against them in tort for malicious prosecution and false imprisonment. Further, the costs of bringing a case are not covered by legal aid. The Lawrence's had to sell their home in order to pursue an unsuccessful private prosecution. Sometimes a claim for costs may be recoverable out of central funds but it is unlikely that full costs will be recovered. Added to this is the difficulty in obtaining information. Since so much depends on relevant evidence a case is unlikely to be successful if insufficient evidence is brought. It is possible to obtain help - indirectly - from voluntary organisations but these are usually too under-resourced to sustain a case.

CONCLUSION: EUROPEAN MEASURES IN THE DOMESTIC CONTEXT

The British Government has recently announced the incorporation of the European Convention of Human Rights into British Law. However, the usefulness of the provisions contained in the Convention in the context under discussion remain to be seen. It is well documented that the provision in the European Convention on Human Rights which deals with racism is weak.[37] Article 14 of the Convention relates to rights and freedoms listed in the Convention and states that such rights shall be secured without discrimination on particular grounds, those grounds include 'race'. Spencer argues, however, that there are a number of problems associated with this provision such as its non-availability in the context of infringement of rights between individuals or between the individual and private institutions, it is a provision which only applies in actions by an individual against the State. Further, Article 14 is not a provision which provides general protection against discrimination, but rather one which only applies to certain rights. In general applications brought under the Convention based on Article 14 are unsuccessful in the European Court of Human Rights. As an effective mechanism to promote and protect rights in the context of racism and xenophobia there is no doubt that the Convention is wanting. The incorporation of the Convention into British domestic has not filled this lacuna.

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[35] E Davidson, Will new racist crime proposals work?, The Lawyer, 4 November 1997, p.7.
[36] AC 435.
[37] See M. Spencer (1995), States of Injustice, Pluto Press, p.129.

A number of commentators have argued that what is needed is a stronger European mechanism to fill this gap.

This yawning gap in the European Convention of Human Rights brings into play the question of whether the European Community should bring provide a Community measure for dealing with racism and xenophobia? There are at least two questions to address here, whether it is desirable that the Community legislate in this context? If so, what provisions should be contained in the measure?

As to the question whether the Community should legislate in this area that is a difficult question. This very much depends on what the European Community would hope to achieve. Window dressing or something which has effect at the level of those who suffer from racist and xenophobic conduct. The Community has gone some way towards this venture in making 1997 the European Year Against Racism and in the adoption by the European Council of Ministers of a Regulation[38] to establish a European Monitoring Center on Racism and Xenophobia.[39] Further, according to the draft Treaty of Amsterdam (1997) there is now express provision for the Community to take appropriate measures to combat discrimination on the grounds of racial or ethnic origin.[40]

It is important to note that arguments about the competence of the European Community to provide mechanisms for dealing with racism and xenophobia have been aired over a long time span and that it has been accepted, at least amongst those in academic and legal circles in various Member States,[41] that Community movement in this area would be positive and is necessary. The adoption of a Directive aimed at combating racism and xenophobia has been mooted[42] at the Community level and this would provide an opportunity to focus on a number of things. A Directive could address the concerns of Community citizens who are discriminated against on the grounds of racism and xenophobia, and also provide for minimum standards as regards protection of such citizens in the context of racial violence and harassment.

A Directive however, would not necessarily be prescriptive as to the method by which Member States would seek to achieve the objectives, since by the very nature of a Directive it does not perform this function. By the nature of such an instrument the concerns of Member States to ensure that such a Community measure is relevant to particular, regional and local circumstances, could be addressed. As to the development potential of such a Directive it could offer the potential in the hands of the aggrieved Community citizen to bring an action against a Member State in damages.[43] In addition, a Directive could also provide the focal point for the enlightenment of judges, an educative tool. This is where the Directive might have its most potential for the development of Community law in the context of domestic courts, with some success judging by the development of sexual equality issues at the Community level in work, pay and related conditions.

[38] Council Regulation (EC) No 1035/97.
[39] According to Community sources this Center will be based in Vienna.
[40] See discussion of this provision in an article by Fernne Brennan, (1997) Can the Institutions of the European Community Transcend Liberal Limitations in the Pursuit of Racial Equality? A paper awaiting publication.
[41] See A Dummett (1994), Citizens, Minorities and Foreigners, Commission for Racial Equality (UK).
[42] Ibid p.14.
[43] See Joined Cases C-6/90 and C-9/90, [1991] ECR I-5357.

4. Turkey: Abstract by Prof. Dr. Mehmet Semih Gemalmaz, Director of the Human Rights Centre of the Istanbul University, Istanbul

Racist Offence – Forms and Penal Restrictions in Turkey

I. 1982 Constitution

1982 Constitution was promulgated in the period following the 12 September 1980 coup d'état in Turkey. After the military intervention, the National Security Council (NSC / Milli Güvenlik Konseyi) was established as the new military political power. The parliament and government formed in accordance with the 1961 Constitution were dissolved and the legislative and constituent powers were transferred to the NSC.
In the mid 1981, the Consultative Assembly (Danisma Meclisi) was formed as a part of Constituent Assembly (the second organ of the NSC) by the Consultative Assembly Act No. 2485 of 29 June 1981. All 160 members of the Consultative Assembly were directly or indirectly appointed by the NSC. It started to function on 23 October 1981 and its first task was to prepare a draft constitution. The draft text was then approved by the NSC with some certain amendments and following the result of the Constitutional Referendum on the final text on 7 October 1982, by a majority vote of 91 % favour to 9 % against, it entered into force as the third Constitution of the Turkish Republic.
In May 1983, the NSC decided to permit the creation of new political parties. The NSC also directly intervened in the process of determining election candidates. The period of election campaign was limited and was obviously affected by the continuance of military rule. Martial Law was also in force during the election itself on 6 November 1983. The Turkish Parliament of 1983 can not be considered as an origin of a fully representative and democratic nature.
During the de facto regime period (12/09/1980-06/12/1983), more than 900 legal texts in the form of codes, decrees having force of law or the NSC Decisions and the 1982 Constitution that were entirely anti-democratic character were promulgated.
It is important to note that, the anti-democratic politico-juridical system formed by the military power during the de facto regime, almost entirely is still in force in Turkey. The so called "12 September regime" is still applied in the country.
The 1982 Constitution that covers a total number of 177 Articles and 16 Provisional Articles, on one hand regulated a considerable list of rights and freedoms and on the second hand provides broad and vague limitation clauses for human rights.
Article 13 of the 1982 Constitution provide a "general limitation clause" that has an effect on all rights and freedoms, and also "special limitation clauses" particularly for various human rights within the each concerning Article. In this context, evidently, present Constitutional text is not in conformity with the European Convention on Human Rights of which Turkey is a State Party since 1054.
It is important to note that, according to Provisional Article 15, parag. 3 of the 1982 Constitution, "no allegation of unconstitutionality shall be made in respect of decisions or measures taken under laws or decrees having force of law enacted during" the period from 12 September 1980 to the date of the formation of the Bureau of the Turkish Grand National Assembly which is to convene following the first general elections, which was on 06/12/1983.
In the Convention, there is no specific norm concerning discrimination in general. Regarding to racism, one may refer two Articles in the Constitution:

"Article 10 – Equality before law
All individuals are equal without any discrimination before law, irrespective of language, race, colour, sex political opinion, philosophical belief, religion and sect, or any such considerations.
No privilege shall be granted to any individual, family, group or class.
State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings."

"Article 14 – Prohibition of abuse of fundamental rights and freedoms

None of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the State with its territory and nation, of endangering the existence of the Turkish State and republic, of destroying fundamental rights and freedoms, of placing the government of the State under control of an individual or a group of a people, or establishing the hegemony one social class over others, or creating discrimination on the basis of language, race, religion or sect, or of establishing by any other means a system of government based on these concepts or ideas.
The sanctions to be applied against those who violate these prohibitions, and those who incite and provoke others to the same end shall be determined by law.
No provision of this Constitution shall be interpreted in a manner that would grant the right of destroying the rights and freedoms embodied in the Constitution."

Also two other Articles may be underlined in relation with the subject of racism:

"B. Principles to be observed by political parties
Article 69 – Political parties shall not engage in activities outside the lines of their statutes and programs, and shall not contravene the restrictions set forth in Article 14 of the Constitution; those that contravene them shall be dissolved permanently..."

"IV. Right to Enter to Public Service
A. Entry into the Public Service
B. Article 70 – Every Turk has the right to enter the public service.
C. No criteria other than the qualification for the office concerned shall be taken into consideration for recruitment into the public service."

II. Other legislation related to prohibition of racism and discrimination

A) Law on Associations (Law No. 2908, adoption date: 06/10/1983)[44]

The Law on Associations was promulgated during the de facto regime by the military power.
The related provisions to the issue within the Law on Associations are as follows:

"Section II: Right to form Associations and Associations that their Formation are Prohibited:
Right to Form Association:
Article 4 – Everyone who is competent to exercise civil rights and being over 18 years old may form associations without providing a prior permission.

But;
2. Even if they are pardoned, the following shall not form association,
c) Persons who are convicted in accordance with second paragraph of Article 312 of the Turkish Penal Code provided crime to openly provoke feelings of hatred and enmity among the people by putting distinction on the grounds of social class, race, language [45], sect or region ..." [46]

"Associations that their Formation are Prohibited:
Article 5 – Associations contrary within the fundamental principles set forth in the Preamble [47] of the Constitution shall not be established;
The formation of association by the following purposes shall be prohibited:

[44] Law on Associations (Official Gazzette/OG, 07/10/1983, no: 18184)
[45] The Turkish Penal Code, Article 312 is not containing the word of "language". Instead of "language", the concept "religion" is taking place in Article 312 of TPC, So, the word of "language" in Article 4/2,c of Law on Associations, in this context, is contrary to the referred Article 312 of the TPC.
[46] Article 4 of the Law No. 2908 was amended by the Law No. 4279 of 03/07/1997; see (OG, 03/07/1997, no. 23043).
[47] Article 176 of the 1982 Constitution provides this rule: "Article 176 – The Preamble, which states the basic views and principles underlying the Constitution, shall form an integral part of the Constitution..."

2. To form an association based on a distinction of language, race, social class, religion and sect...;
5. In order to carry out activities based on the principle/substance or name of region, race, social class, religion and sect;
6. In order to claim that, within the territory of the Turkish Republic, there exist minorities based on the distinction of race, religion, sect, culture or language; or create minorities by protecting, advancing or spreading languages and cultures other than Turkish language and culture; or to provide that a region or race or social class or a those of certain religion or sect will prevail over the others or will become more privileged than others."

"Rights of the members:

Article 18, parag. 2 – Members of the association shall have equal rights. In the statutes of the associations, no provisions that put distinction among members basing on language, race, colour, gender, religion and sect, family, group and social call shall take place, and in the statues any provision prejudice to equality or provide a more privileged statutes to certain members shall not be placed." [48]

"Article 37 – Prohibited activities:
Associations,
2. shall not carry out activities for the purposes et forth for the associations in accordance with Article 5 of this Law."

B) Law on Political Parties (Law No. 2820, adoption date: 22/04/1983)[49]

"The right to form political parties:
Article 5/III – The right to form political parties shall not be used with the aim of ... destroying the indivisible integrity of the Turkish State with its country and nation, ... creating discrimination in language, race, religion, sect or distinction of regions or by any other means to establish a state order based on these concepts or views, or any type of dictatorship."

"Conditions for admittance as member:
Article 12/I – (...) Party regulations shall not contain provisions observing language, race, sex, religion, sect, family, group, social class and professional differences between those who apply for membership."

"Prohibitions regarding the protection of Democratic State order:
Article 78 – Political parties hall not aim, or be involved in any activity aiming, to change:
a) (...) The provisions as prescribed by Article 3 of the Constitution, concerning the indivisible integrity of the Turkish State with its country and nation, its language, its flag, its national anthem and its capital, ...;
(...) To crate language, race, colour, religion and sect discrimination, or, by any other means, to establish a state order based on these concepts and views;
they shall not provoke and encourage others to this end.
b) Political parties shall not be based on principles of region, race, particular person, group, or community, religion, sect or religious group or use the names of these."

"Prevention of creation of minorities:
Article 81 – Political parties shall not
a) claim that there are minorities within the territory of the Turkish Republic, based on differences of national or religious culture or sect or race or language."

"Prohibition of regionalism and racism:
Article 82 – Political parties shall not have as an aim, in the country which is an indivisible unity, regionalism or racism, and involve in activities to this end."

"Protection of the principle of equality:

[48] Article 18 of the Law No. 2908 was amended by the Law No. 3415 of 02/03/1988; see (OG, 11/03/1988, no. 19751).
[49] Law on Political Parties (OG, 24/04/1983, no: 18027)

Article 83 – Political parties shall not have as an aim and involve in activities which offend against the principle that everyone is equal before the law, regardless of language, race, colour, sex, political opinion, philosophical belief, religion, sect, and similar grounds."

"Party names and signs not to be used:
Article 96/III – No party can be formed with or use in its name, the names communist, anarchist, fascist, theocratic, national socialist, religion, language race, sect and region or also names with similar meaning."[50]

C) National Education Fundamental Act (Law No. 1739, adoption date: 14/06/1973)[51]

"Section Two: Fundamental Principles of Turkish National Education

I – Generality and Equality:
Article 4 – Educational institutions shall be open to everyone, irrespective of language, race, gender and religion. In education, no privileges shall be granted to any person, family, group or class."

D) Foundation and Broadcasting of Radio and Television Stations Act (Law No. 3984, adoption date: 13/04/1994)[52]

"Section Two: Principles of Broadcasting:
Article 4 – Radio and television broadcasting shall be made within the concept of a public utility according to the following principles:
f) the principle that people shall not be offended/condemned because of their race, gender, social class or religious beliefs;
g) the principle of no endurance of broadcasting which leads the community to violence, terror and ethnic discrimination and cause malicious within the community."

The sanction for the violation of Article 4 is regulated in Article 33 of the Foundation and Broadcasting of Radio and Television Stations Act.

"Article 33 – The high Board of Radio and Television, shall warn private radio and TV corporations who broadcast against the broadcasting principles. Should the infringement be reiterated, the broadcasting permission shall either be suspended up to one year or revoked, depending upon the weight of the infringement."

E) Public Servants Act (Law No. 657, adoption date: 14/07/1965)[53]

"Section Two: Duties and Responsibilities
Impartiality and Loyalty to the State
Article 7 –
Public Servants shall not be a member of the political party...; in carrying out their duties they shall not make any distinction such as on the basis of language, race, gender, political opinion, philosophical belief, religion and sect..."[54]

The violation of Article 7 is sanctioned by the Article 125 of the Public Servants Act.

"Article 125 –

[50] Article 96 of the Law on Political Parties was subjected amendment by Law No. 3821 of 19/06/1992 (OG, 03/07/1992, no. 21273). But this amendment was concerning with the first paragraph of the Article 96. So, the above given parag. 3 of Article 96 is still in force as it was originally promulgated.
[51] National Education Fundamental Act (OG, 24/06/1973, no. 14574).
[52] Foundation and Broadcasting of Radio and Television Stations Act (OG, 20/04/1994, no.21911).
[53] Public Servants Act (OG, 23/07/1965, no. 12056).
[54] Article 7 of Law No. 657 was amended by Law No. 2670/Art. 2 of 12/05/1982 (OG, 16/05/1982, no. 17696).

D) To stop the improvement of promotion: Depending upon the weight of degree of the action, the promotional progress of public servants shall be stopped one to three years.
i) in carrying out their duties if they shall make any distinction on the basis of language, race, political opinion, philosophical belief, religion or sect..."[55]

Article 7 and Article 125 were subjected an amendment made by Law No. 2670 of 12/05/1982. So, in accordance with the (Provisional Art. 15) of the 1982 Constitution, no allegation of unconstitutionality shall be made in respect of Law No. 2670.

F) Turkish Penal Code (Law No. 765, adoption date: 01/03/1926)[56]

"Article 312, parag. 2 and parag. 3-15
It shall be an offence punishable by not less than one and not more than three years' imprisonment, and by a fine of not less than three thousand and not more than twelve thousand Turkish lira[57], to openly provoke feelings of hatred and enmity among the people by putting distinction on the grounds of social class, race, religion, sect or region. If such provocation imperils public safety, the punishment shall be increased by one third to one half of the sentence.
The punishment for the acts defined in the preceding paragraphs shall be doubled where they have been committed by the means enumerated in paragraph 2 of Article 311."[58]

It may be added that, if the crime regulated in the Article 312 of the TPC is committed by a member of a political party, convicts shall not be registered as members of political parties (see Political Parties Act, Law No. 2820, Art. 11).

Furthermore, the convicts of the Article 312 of the TPC shall also not permitted to from associations (see Law on Associations, Law No. 2908, Art. 4).

G) Law on the Struggle Against Terrorism (Law No. 3713, adoption date: 12/04/1991)[59]

"Article 6 – Those who announce that a crime will be committed by terrorist organizations against certain persons either expressly or without mentioning their names, or who disseminate or disclose to the public the identity of officials appointed to fight terrorism, or who render such officials targets, shall be subject to a fine of between 5 and 10 million Turkish liras.
Those who print or publish the leaflets of terrorist organizations shall be subject to a fine of between 5 and 10 million Turkish liras.
Those who, contrary to Article 14 of this Law, disclose or publish the identity of informants shall be subject to a fine of between 5 and 10 million Turkish liras.
If one of the crimes defined above is committed by means of periodicals, as defined in Article 3 of the Press Law, the owners of such periodicals shall be punished by a fine to be determined in accordance with the following provisions:
- for periodicals published at less than monthly intervals, the fine shall be ninety per cent of the average real sales of the previous month;
- for periodicals published monthly or at more than monthly intervals, the fine shall be ninety per cent of the average real sales of the previous issue;
- (for printed works that are not periodicals or for periodicals that have recently started business, the fine shall be ninety per cent of the monthly sales of the highest circulating daily periodical).

[55] Article 125 of Law No. 657 was amended by Law No. 2670/Art. 31 of 12/05/1982 (OG, 16/05/1982, no. 17696).
[56] Turkish Penal Code (OG, 13/03/1926, no. 320).
[57] By Law No. 3506, dated 1982, "a fine of not less than three thousand and not more than twelve thousand Turkish lira" was increased to "a fine of not less than nine thousand and not more than thirtysix thousand Turkish lira".
[58] Article 311, parag. 2 of the Turkish Penal Code provides as follows:
"Article 311/II – Where the provocation is made through all kind of mass media, tapis used in the registration of sound, records, films, newspapers, magazines or other means of publication or through disseminated writings reproduced from hand written originals, placards and posters put up in public places, the duration of heavy imprisonment or of imprisonment prescribed in the preceding paragraphs for the offender shall be doubled."
[59] Law on the Struggle Against Terrorism (OG, 12/04/1991, no. 20843).

In any case, the fine may not be less than 100 million Turkish liras.
Responsible editors of these periodicals shall be given half the sentences of the publishers."

"Article 8 –No one shall make written and oral propaganda or hold assemblies, demonstrations and manifestations against the invisible integrity of the State of the Turkish Republic with its land and nation. Those carrying out such an activity shall be sentenced to imprisonment between one and three years and a fine of between 100 and 300 million Turkish lira. In case of reoccurrence of this offence, sentences shall not be commuted to fines.[60]
If the offence of propaganda referred to in the preceding paragraph is committed by means of periodicals, as defined in Article 3 of the Press Law No. 5680, the owners of such periodicals shall also be punished by a fine, to be determined in accordance with the following provisions:
- for periodical published at less than monthly intervals, the fine shall be ninety per cent of the average real sales of the previous month;
- (for printed works that are not periodicals or for periodicals that have recently started business, the fine shall be ninety per cent of the average monthly sales of the highest circulating daily periodical).
In any case, the fine may not be less than 100 million Turkish liras.
Responsible editors of these periodicals shall be sentenced to between six months and two years' imprisonment and to half of the fine determined in accordance with the foregoing provisions."

The Constitutional Court of Turkey in its judgement dated 31 March 1992 held that the clauses in brackets in the text of Article 6 and Article 8 of the Law on the Struggle Against Terrorism to be contrary to the 1982 Constitution and annulled them. The Court decided that the annulled text would cease to have effect six months after the date of publication of the annulment decision in the Official Gazzette. The decision was published on 27/01/1993 and therefore these clauses ceased to have effect as of 27/07/1993.

III. General Evaluation of the Legislation and its Application

Although according to the legislation in force in Turkey discrimination in general and racism in particular are considered as an illegal idea and action and various norms related to the prohibition of such actions accompanied with harsh sanctions are placed in different legal texts, a special diligence could be necessary in order to understand the true picture of the issue.

Racist offences in Turkey are committed in various ways. It may be committed either by the use of language (written or spoken) or of illegal force against the victims or in some relatively rare cases by the discriminative application of rules. In the last case, it is much more difficult to establish the discriminative nature of the action, because legislation do not provide a clear legal base for such actions, the offenders are generally public authorities who may have opportunity to darken the possibility of verifying these actions or to threaten the victims not to refer remedies against them. But if these offences are committed by citizens against others, it is much more easy to prove them.

Victims are generally Turkish citizens rather than foreigners or refugees or asylum seekers.

Historically, asylum seekers or refugees are well received by Turkish people; but within the official perspective, legally only asylum seekers coming from European countries are recognized and accepted as refugees. Nevertheless, hundred thousands of Iraq citizens having Kurdish and in less number Turkish ethnicity repressed by the Saddam regime, in early 1990's passed the border between Turkey and Iraq and they were accepted. Also thousands of asylum seekers from Iran following the Islamic revolution in this country and from Bulgaria who were discriminated because of their ethnic and religious origin by the Jivkov regime in this country were granted refugee statutes by the Turkish Republic. So, Turkey's record in granting refugee statutes to asylum seekers is considerably positive.

[60] The Article 8, parag. 1 of the Law on the Struggle Against Terrorism was amended by Law No. 4126 of 27 October 1995 (OG, 30/10/1995, no. 22448). Before this amendment, the text of Article 8, parag. 1 was as follows: "Article 8/I – No one shall, by any means or with any intention or idea, make written and oral propaganda or hold assemblies, demonstrations or manifestations against the indivisible integrity if the State of the Turkish Republic with its land and nation. Those carrying out such an activity shall be sentenced to imprisonment between two and five years and to a fine of between 50 and 100 million Turkish lira."

Within the above mentioned context and legal perspective, Turkey may be criticized because of her policy in ratification of related international instruments. For instance, Turkey is still not a State Party to the Protocol No. 4 of the European Convention on Human Rights. Article 4 of the Protocol No. 4 provides important provision in relation with the subject. Despite Turkey in fact took some steps in order to ratify this Protocol by promulgating "Law on the Approval of the Ratification of Protocol No. 4" within the domestic level, it is now more than four years has been passed from the enactment of this Law and Turkey has not deposited the instrument of ratification of the Protocol No. 4 to the Council of Europe. Therefore this Protocol has not entered into force for Turkey.

It may be added that, among Turkish citizens, such offences are generally committed against people having particular ethnicity. Kurdish ethnic origin people might be the victim of such practices.

On the other hand, some certain sect groups of the Muslims population are generally faced with discriminative actions. For instance, in late 1970's there were murders of a considerable number of Turkish citizens living in some provinces of the country. In the time of the event, it was reported that the houses of such people belong to certain sect groups were previously marked with special colour by unknown people. It was an action to fix the targets. So the attacks against them were in fact a planned and organized action. Short before the 1980 coup d'état, because of such events, the Government declared martial law in 1978.

Victims of the racist and discriminative offences are not only real persons. Legal persons, such as associations, NGOs, etc. whose activities mainly focused on the subject of human rights may also be listed among the victims. In general terms, either real or legal persons who carry out activities in relation with the democratic rights, minority rights, or on the subject of the existence of ethnic or linguistic plurality might be catagorized as the potential and actual victims of discrimination.

Mostly the offenders are private persons. There is no clear information whether or not private business is the offenders of such crimes.

Within the technical legal perspective, public institutions shall not be permitted to produce any discriminative or racist policy. However, from time to time it is claimed that particular professions are de facto close to people belonging to particular ethnic groups. In order to provide a response to such claims, the authorities tend to give examples of high ranking officials who are the members of the various professional circles, including military, judiciary and parliament.

In order to understand the situation concerning the problem of discrimination in Turkey, it is not sufficient to make a pure observation on the legislation. The normative standards concerning with the issue referred by the judicial authorities are also time to time applied in a discriminative spirit.

For instance, many of the legal texts are used against democratic opposition circles. In such cases, judiciary has no difficulty in establishing the offending acts; because they simply refer written documents (such as published books, articles, etc.), the witnesses and also statements from suspects during their police custody or as it is the case for the last decade, information obtained from unknown or in some rare declared confessors or informants by the authorities.

It is also important to note that racial abuse could be punished only in the case of the establishment of the offenders' intent. The case law shows that the judiciary tends to produce the factor of "intent" from the presumption.

According to the existing Turkish Penal Procedure Law (TPPL; Article 148)[61], the Public Prosecutor is under obligation to carry out an investigation against the accused in case of he is directly or indirectly

[61] Turkish Penal Procedure Law, Article 148 provides as follows:
"Article 148 – The duty of initiating public prosecutions lies with the Public Prosecutor.
Except as otherwise provided by law, the Public Prosecutor shall be required to initiate a public prosecution whenever there are sufficient evidences requiring a prosecution.

informed that a crime is committed. Within the Turkish legal system, these legal actions are catagorized as "public prosecution". The prosecutor has not granted a margin of appreciation not to carry out an investigation. Following the investigation if the prosecutor may consider that it is not necessary to open a legal suit, he declares his decision (TPPL, Art. 164).[62] This decision will be appealed before the nearest Assize Court (TPPL, Art. 165).[63]

The concerning third person may intervene the public prosecution (TPPL, Art. 365).[64] Such intervention is limited to the person who is injured by the alleged crime within the particular case. Human rights organizations are not entitled to intervene the public prosecution unless they are a direct relationship with the case. Furthermore, the present legal system in Turkey does not recognize an institution of Ombuds-person.

The penalties provided in the Turkish Penal Code, in general terms, have enough severity. According to Article 11 of the Turkish Penal Code, the punishments are as follows:

"Article 11 – Punishments for felonies are:

1. Death,
2. Heavy imprisonment,
3. Banishment (abolished)[65],
4. Heavy fine,
5. Disqualification to hold public office.

Punishments for misdemeanors are:

1. Light imprisonment,
2. Light fine,
3. Disqualification to perform certain profession or trade.

The term 'punishment restricting personal liberty' as used in this Code, denotes heavy imprisonment, imprisonment and light imprisonment."
In my opinion the problem of discriminative actions could not be isolated from the general problem of human rights violations within the country. So the process of clearing up the discriminative or racist abuse shall be an integral part of a full democracy restoration process. In this context, one of the urgent and key elements in order to cope with the problem is to provide all necessary safeguards for the right to freedom of thought, conscience and religion and right to freedom of expression and right to freedom of association.

Furthermore, the prosecution entities are not very keen to investigate the alleged abuse of power committed by other public institutions. It may be added that, according to the 1982 Constitution, the actions of some certain public entities or authorities are immune from judicial control. For instance,

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A public prosecution may also be initiated by an order of the Minister of Justice directed to the Public Prosecutor.
A Provincial Governor may request the Public Prosecutor within the Provincial Governor's province to initiate a public prosecution. If the Public Prosecution declines to act by submitting compelling reasons for this refusal, the Provincial Governor may, in the event of such a refusal, nevertheless request the Minister of Justice to order the initiation of the prosecution pursuant to the authority granted by this Article."

[62] Turkish Penal Procedure Law, Article 164 provides as follows:
"Article 164 – At the end of the preliminary investigation, if no sufficient evidence could be found or the issue could be considered necessary for such a prosecution, the Public Prosecutor decides not to prosecute..."

[63] Turkish Penal Procedure Law, Article 165 provides as follows:
"Article 165 – If the complaint is, at the same time, the aggrieved, he may within fifteen days after notice, object the Chief Justice of the nearest court which sees the Aggravated Felony cases and with which the Public Prosecutor is connected..."

[64] Turkish Penal Procedure Law, Article 365 provides as follows:
"Article 365 – Any person who is injured by the offence may, at any phase of the investigation, intervene i the public prosecution.
Those intervening in a public prosecution may also adjudicate their personal claims."

[65] The punishment of "banishment" was cancelled by the "Law on the Execution of Penalties" (Provisional Art. 2). For this Law, see Law No. 647, dated 13/07/1965.

Article 125 of the Constitution provides as follows:

> "B. Recourse to Judicial Review
> Article 125 – Recourse to judicial review shall be open against all actions and acts of the administration.
> The acts of the President of the Republic in his own competence, and the decisions of the Supreme Military Council are outside the scope of judicial review..."

Moreover, according to another Code[66] that is still in force, if the alleged author of a crime is a State official or civil servant, permission to prosecute must be obtained from local administrative councils. Even the local administrative council decisions may be appealed to the State Council (Supreme Administrative Court / Conseil d'État), in practice, the obligatory procedure to seek for a permission to prosecute from the administrative council is a concrete obstacle or at least a factor for the delay in bringing the accused before the courts.

[66] This code is the "Provisional Law on the Prosecution of State Officials". This Law was promulgated during the late Ottoman State period and still kept in force.

5. Switzerland: Abstract by Prof. Dr. Marcel Alexander Niggli, Fribourg

RACIST OFFENCE - FORMS AND PENAL RESTRICTIONS IN SWITZERLAND

Racist offences in Switzerland typically are committed by language either spoken or written, occasionally by the refusal to serve somebody on grounds of their race, ethnicity or religion. Usually these offences deny the victims either equal rights or equal worth expressly or implicitly.

The victims are primarily people of non-Swiss nationality, especially refugees and people seeking asylum in Switzerland (e.g. from ex-Yugoslavia, Turkey or Sri Lanka). Among Swiss citizens offences are directed mostly against Jewish people.
Mostly, the offenders are private persons, sometimes private businesses, especially restaurants, coffee shops and discotheques.

The Swiss penal norms against racism consist of one article of the Swiss Penal Code, article 261bis. There are no other penal regulations and no special penalties apart from the one stated in article 261bis. Especially, there is no particular qualification or punishment of a criminal act when the act is committed with a racist aim or motivation. Although, of course, the aim and motivation of any criminal act are taken into account when it comes to questions of guilt and severity of punishment.

The said regulation, article 261bis tries to repress six types of behaviour:

- public incitement to hate or discrimination against an individual or a group of individuals because of their racial, ethnic or religious affiliation,
- public distribution of ideologies which aim at the systematic degradation or defamation of a racial, ethnic or religious group,
- organisation, assistance and participation in propaganda activities with the same goal,
- public degradation or discrimination of an individual or a group of individuals because of their racial, ethnic or religious affiliation by means of spoken or written words, gestures or other ways of expression in a manner which disrespects human dignity,
- denial, belittlement or justification of genocide or other crimes against humanity,
- refusal to offer a service destined for the general public's use on grounds of an individual's or a group of individuals' race, ethnicity or religion.

All the mentioned offences can be punished with imprisonment up to three years and/or with a fine. All the offences require the wrongdoer to act with intent.

Generally, the investigation of the offending acts can be quite difficult and the establishment of facts quite hard, especially so with regard to the presence of intent but also regarding the question whether the concerned group is protected by the penal code. The Swiss penal regulation covers only offences targeted at racial, ethnic and religious groups, but not e.g. national groups or legally constituted groups such as refugees. Hence, many expressions of racial abuse can be alternatively interpreted as being targeted at national groups (which is of no relevance to criminal law) or at ethnic groups (which is repressed and sanctioned by the penal code).

Human rights organisations or Ombuds-men and women cannot either enter the trial or force it to happen. Only the offended individual and (as is not yet completely clear) the representatives of his or her racial, ethnic or religious group can do so.

Imprisonment up to three years is the standard penalty in Swiss penal law. Hence, to my mind, the penalties provided by the penal code for racist offences can be regarded as sufficient.

To my knowledge, racial abuse is cleared up, prosecuted and punished as are other offences. Procedures seem to lie within the national average of other offences. If there seems to exist a certain leniency, the differences to other offences might be explained with the relative recent

coming into force of the regulation against racism (since January 1, 1995) and, hence, the criminal justice institutions' still incomplete information and lack of practice.

What concerns racial abuse by public institutions the main problem of clearing up, prosecution and punishment lies – as mostly is the case – in the fact that institutions or companies cannot be punished according to Swiss penal law, only individuals can. Yet, often the specific responsible perpetrators are difficult to individualise. Moreover, criminal justice institutions are rather cautious in the investigation concerning other public institutions.
In these cases as well as in cases against private individuals or private businesses Human Rights organisations can play an important role. But their role is a rather informal one since, generally, no formal participation in the proceedings and trials themselves is provided. However, their status alone and their capacity and policy of informing the public generally creates important pressures and endows them with a substantial position. Moreover, if these organisations lay the information with the police, the police and criminal justice institutions usually grant them a right of information regarding the advancement of prosecution, although this is not compulsory.

Finally, no public reports or statistics concerning the number, nature and results of such trials exist. However, the Federal Commission Against Racism publishes a general report concerning its activity as well as general questions of racial abuse twice a year.

V. Round Table III: Elements of a Directive of the European Union Against Racism

1. United Kingdom: Abstract by Christopher Boothman, Head of Law and Administration of the Commission for Racial Equality, London

A) Principal Questions

1. Considering, that there are racist politics in European countries, what about the possible effects of an anti-racist European Community Directive?

    - The potential impact of a European Community Directive on Racial Discrimination should not be inhibited by the fact that there will be political extremists who oppose it.

      Racist political beliefs in Europe are based on the myth that nation states emerged from the occupation of particular geographical regions by single pure racial groups. In fact most European states were created by the merger of a number of ethnic and cultural minorities. Those who believe in racial supremacy are extremists and should be regarded as such.

    - There is a pressing need for a directive because there is no effective international mechanism for combating racism or protecting its victims.

2. Should the joining of new member states to the EU depend on the acceptance of such a Community Directive?

    - There is no reason why membership of the European Union should not be conditional on the acceptance of all Community Directives.

3. Is the term of racism / racial abuse sufficiently cleared up (e.g. in the context of asylum rights) and sufficiently consensual to fix it up in a Community Directive?

    - There are terms like “equal treatment” and “racial discrimination” that have been used in international and European instruments for many years. Any continuing difficulties with definitions should be capable of resolution by lawyers. However politicians may have difficulties.

    - There is no reason why asylum seekers should not have the same rights as other citizens.

B) Elements of a Directive

1. Which rights should be protected?

    - All human rights and fundamental freedoms and participation in the fields of political, economic, social, cultural and public life.

    - There should also be a duty on all member states to equality proof new legislation, regulations and administrative provisions.

2. Which forms of discrimination/behaviour should be covered?

- direct racial discrimination
- indirect racial discrimination
- victimisation
- pressure to discriminate
- discriminatory instructions
- discriminatory advertisements
- persistent discrimination.

3. Who should be protected?

- Anyone who has been treated less favourably on the ground of their race, colour, descent, nationality, national or ethnic origin;

- Anyone who has suffered a detriment as a consequence of an unjustified condition, requirement or practice that disproportionately adverse impact on people of their “racial group”;

- Anyone who has been “victimised” as a consequence of making a complaint of racial discrimination or assisting another to make a complaint of racial discrimination.

4. Should the Directive enumerate special fields?

- Yes. The Directive should particularise protection in the following fields:

  - employment or related contractual relationships
  - education
  - vocational guidance & training
  - housing
  - goods, facilities and services
  - entry and membership of Clubs etc.
  - professional activity
  - social security, health & welfare benefits
  - Governmental activities e.g. policing, prisons
  - participation in social, cultural, religious and public life.

5. Should the Directive cover both public and private situations?

- Generally yes. However there may be a need to look closely at the impact on “personal relationship” situations e.g. advertisements relating to personal relationships.

6. How can a Directive offer protection from racial abuse for which a public institution should take responsibility e.g. police or prison service?

- It should impose an obligation on all member states to introduce legislative measures to impose a statutory duty on all public bodies:

“to take action to ensure that their various functions are carried out with due regard to the need: (a) to eliminate unlawful racial discrimination; (b) to promote equality of opportunity, and good relations, between persons of different racial groups; and (c) to publish a report of such action annually”.

- It should impose an obligation on all member states to introduce legislative measures to render unlawful any actions on the part of public servants which are racially discriminatory.

7. Which legal and penal consequences should racial discrimination and racist offence have?

- Unlawful racial discrimination should in general be a civil law offence. Ordinarily the penalties should include:

    - declaration
    - injunction
    - damages, including general and special and recognising injury to feeling;
    - including aggravated damages and or exemplary damages where appropriate
    - the imposition of positive action directions and or an action plan.

- Some racially discriminatory acts should be criminalised on grounds of public policy e.g. incitement to racial hatred more importantly the directive should encourage member states to consider the introduction of specific aggravated crimes which involve a racial motivation e.g. threats / acts of violence / damage to property.

8. Should the directive include the right for associations or only for individuals to bring an action?

- Every individual victim should have a right to bring an action.

- Every organisations with "a legitimate interest" should be able to support an individual or initiate their own legal action.

- It should be possible to initiate "group" or "class" actions.

9. Should the directive include Ombudspersons?

Every member state should be obliged to establish a national statutory body with powers and resources to:

- work towards the elimination of unlawful racial discrimination
- promote equality of opportunity and good race relations between different groups
- consider complaints of racial discrimination
- provide legal and other support to victims
- investigate complaints of institutional discrimination
- produce codes of practice
- encourage or conduct relevant research

10. How should access to proceedings be made easier?

- A duty on all organisations providing employment or supplying goods, services or facilities to collect information that will enable them to monitor whether or not they are providing equal treatment.

- The benefits of legal aid and free legal consultation must be extended to proceedings in disputes relating to racial discrimination.

- A duty on all organisations providing employment or supplying goods, services to disclose equal treatment monitoring information if they receive a reasoned suspicion or complaint of discrimination.

- A presumption of discrimination will be raised where a complainant shows a series of facts or a series of facts which would if not rebutted amount to direct or indirect discrimination.

- Those charged with the job of adjudication to receive adequate training to understand and deal effectively with the issues.

- Hearings to be listed within a reasonable time of the complaint.

11. Who should exhibit the evidence - burden of proof?

- In general the onus should be on the complainant to establish his or her case.

- However as stated above there should be a duty on all organisations providing employment or supplying goods, services to disclose relevant equal treatment information if they receive a reasoned suspicion or complaint of discrimination.

- Further a presumption of discrimination should be raised where a complainant can show there is a fact or series of facts which would if not rebutted amount to direct or indirect discrimination.

12. Should there be institutions for pre judicial agreements?

- Yes, it should be possible to encourage institutions to enter into legally binding undertakings without the need to institute legal proceedings or go forward to a court hearing.

13. Should the directive include promotion plans and quota regulations for minorities?

- No. The directive should be flexible and politically sensitive. In certain limited circumstances it could make provision for "lawful positive action" in respect of any "racial group" where appropriate e.g. where there are documented significant special needs or significant under representation.

- The directive should also address the issue of racial equality in relation to the awarding of public contracts.

14. Should governments and private business be obliged by the directive to promote certain minorities?

- No. To adopt such a specific inflexible approach would be dangerous. However it may be possible to frame a more general approach based on a notion of "members of those racial groups who are most disadvantaged". This would enable priorities to change as and when necessary.

15. How should compliance with the directive be monitored / enforced?

- Member states should be obliged to adopt and comply with the directive within a fixed time.

- Member states should be obliged to submit periodic reports to the European Commission who should report to the Parliament & Council every 2 years.

2. SWITZERLAND: ABSTRACT BY BARRISTER DR. JUR. FREDI HÄNNI, BERN

VIEW OF SWITZERLAND

1. Grundsätzliches

Im Kampf gegen Rassismus und Rassendiskriminierung darf der Beitrag, den die Juristinnen und Juristen leisten können, nicht überschätzt werden: Es geht um sozialpsychologische Phänomene, die sich der Justiziabilität weitgehend entziehen. Der „alltägliche" Rassismus bleibt – jedenfalls im Bereich des Strafrechts – zwangsläufig in vielen Fällen ungeahndet.

Besser als eine Richtlinie der EU wäre eine Konvention aller europäischen Staaten, unter Einbeziehung der Nicht-EU-Länder, beispielsweise im Rahmen des Europarates.

Die Richtlinie bzw. Konvention müßte für alle Mitglieder der EU bzw. des Europarates verpflichtend sein.

Der Begriff des Rassismus bzw. der Rassendiskriminierung kann wohl nicht generell auf den Punkt gebracht werden, sondern muß im jeweiligen Kontext (Verwaltungsrecht, Zivilrecht, Strafrecht) definiert werden.

Mit Strafrecht können nur die ganz krassen Fälle von Rassendiskriminierungen erfaßt werden, beispielsweise Antisemitismus in Form der Leugnung des Holocaust.

Das Strafrecht hat eine wichtige symbolische Funktion; gleichzeitig besteht aber die Gefahr, daß von – unvermeidlichen – Freisprüchen oder Verfahrenseinstellungen falsche Signale ausgehen.

2. Elemente einer Richtlinie bzw. einer Konvention

Die schweizerische Strafnorm betreffend Rassendiskriminierung (Art. 261bis SchwStGB) verbietet Diskriminierungen aufgrund der „Rasse, Ethnie oder Religion" und geht damit („Religion") über die Anforderungen der Uno-Konvention hinaus; das Problem beim Begriff der „Religion" besteht darin, daß sich grundsätzlich auch Pseudo-Religionen wie „Scientology" darauf berufen können (die Gerichtspraxis hat bisher allerdings solchem Bemühen einen Riegel geschoben).

Vereinigungen sollten m. E. keine Legitimation haben, im Strafverfahren Parteirechte auszuüben, da es Sache der staatlichen Strafverfolgungsbehörden, also der Staatsanwaltschaften und Untersuchungsrichter, ist, von Amtes wegen Rassendiskriminierung zu verfolgen. Das geschützte Rechtsgut ist m. E. ein überindividuelles (der „öffentliche Friede"), nicht ein individuelles (die „Menschenwürde"). Mehrere unterinstanzliche Gerichte und auch das höchste schweizerische Gericht (Bundesgericht) haben freilich anders entschieden.

Statt die Strafverfolgung im Bereich der Rassendiskriminierung zu intensivieren, sollten andere staatliche Mechanismen und Institutionen geschaffen werden, wie
– staatliche Ombudsstellen gegen Rassismus, die auf individuelle Beschwerden/Klagen hin aktiv werden können und ihre Schlußfolgerungen in Form von Feststellungsurteilen veröffentlichen können;
- Pflicht der Staaten zur finanziellen Unterstützung von Informationskampagnen gegen Rassismus;
- Pflicht der Staaten zur finanziellen Unterstützung privater Anti-Rassismus-Organisationen
– Pflicht der Staaten zur periodischen Berichterstattung über die getroffenen Maßnahmen.
Beispiele dafür sind in der Schweiz die „Eidgenössische Kommission gegen Rassismus" (EKR, Kontaktadresse: Sekretariat EKR, Generalsekretariat EDI, CH – 3003 Bern) und das von ihr herausgegebene Magazin „Tangram" (Musterexemplare liegen auf).

3. Italy: Abstract by dott. Paolo Oddi, Milano

E' di estrema importanza che questo convegno chieda ai partecipanti di interrogarsi sulla legislazione e sulle procedure contro il razzismo in Europa e che stimoli il dibattito su questi temi anche all'interno dei vari paesi membri. E' infatti dalla presa di coscienza da parte dei singoli Stati su come ed in quali modi intervenire con politiche adeguate nel delicato campo delle discriminazioni razziali che può maturare quella volontà comune in sede europea di giungere finalmente ad una direttiva UE antirazzista.

Dico finalmente perché mi sembra lo sbocco naturale di un percorso che ha visto negli ultimi anni le istituzioni comunitarie, ed in particolare la Commissione e il Parlamento, impegnarsi seriamente sul terreno delle politiche di non discriminazione. Nella "Risoluzione sul razzismo, la xenofobia e l'antisemitismo" del 27 ottobre 1994 il Parlamento europeo, prendendo le distanze dal Consiglio che aveva dettato nuove disposizioni volte a limitare ulteriormente l'impiego di lavoratori extracomunitari per fronteggiare un generalizzato aumento dei tassi di disoccupazione nei paesi membri, ravvisava in quelle disposizioni la traccia di "un collegamento tra il tasso di disoccupazione e la presenza di cittadini di paesi terzi" e riteneva che una tale decisione non potesse che ravvivare i sentimenti xenofobi e di estrema destra nell'UE.

Con tale risoluzione il Parlamento europeo toccò nel vivo il problema della profonda connessione tra politiche sull'immigrazione e politiche finalizzate a combattere le discriminazioni razziali. Infatti, mentre le prime sono ancora di competenza esclusiva dei singoli Stati membri, le seconde - direttamente ed indirettamente influenzate dalle prime - possono trovare su iniziativa delle Istituzioni comunitarie forti stimoli e slanci in avanti.

E' anche vero che il Trattato sull'Unione Europea , con il suo Titolo VI, sancisce per gli Stati membri l'obbligo di cooperare nei settori dell'immigrazione e dell'asilo, definendo tali questioni "di interesse comune", e che dunque in tale modo consolida e codifica una cooperazione già operante da molti anni tra i vari paesi, portandola su un piano più "costituzionale" e più consono a raggiungere una maggiore omogeneità. Inoltre l'art. K. 9 consente che si possa arrivare ad ulteriori sviluppi sul piano istituzionale, disponendo che il Consiglio deliberando all'unanimità su iniziativa della Commissione o di uno Stato membro possa trasferire nel campo delle competenze comunitarie alcuni settori contemplati dall'art. K. 1, tra cui la politica in materia d'asilo e d'immigrazione. Se ad oggi appare ancora piuttosto controversa la possibilità che l'Unione assuma una competenza diretta in materia d'asilo e d'immigrazione - viste le forti disparità tra le legislazioni nazionali in queste aree -, sicuramente una spinta propulsiva ad un'effettivo avvicinamento ed armonizzazione di tali politiche è venuta dalla Commissione con la sua completa Risoluzione del 23 febbraio 1994. In quest'ultima infatti la Commissione, sulla base delle nuove possibilità offerte dal TUE, rilancia un ampio dibattito, ponendo l'attenzione sulla necesità sia di apprestare una politica europea in materia di immigrazione e asilo creando le condizioni economiche e socio-culturali che assicurino il successo dell'integrazione, sia di lottare contro la discriminazione razziale ed affrontare il problema del razzismo e della xenofobia.

Il nuovo Trattato sull'Unione Europea rinegoziato ad Amsterdam introduce l'importante art. 6 A, secondo cui "Senza pregiudizio per le altre previsioni di questo Trattato e dentro i limiti dei poteri conferiti da esso alla Comunità, il Consiglio all'unanimità, su proposta della Commissione e dopo aver consultato il Parlamento europeo, può prendere l'azione adeguata per combattere le discriminazioni fondate sul sesso, l'origine razziale o etnica, il credo o la religione, l'handicap, l'età o l'orientamento sessuale". Tale norma, pur mantenendo la regola dell'unanimità, segna una svolta nella direzione auspicata, introducendo la base giuridica affinchè le istituzioni europee possano prendere "un'azione adeguata" nel campo delle discriminazioni. Naturalmente vi è ancora molta strada da compiere nella definizione di quale debba essere tale "azione". A tutt'oggi non è riscontrabile una linea precisa in ordine al possibile contenuto di un' azione sulla base dell'art. 6 A. Tale articolo è il risultato di un compromesso e il mantenimento della regola dell'unanimità lascia intravedere le resistenze da parte di alcuni Stati ad accettare l'attribuzione di competenze all'Unione in questa materia. Come per tutto l'ambito della libera circolazione delle persone e della politica su immigrazione ed asilo, anche la tematica delle discriminazioni e delle

procedure per combatterle solleva dei conflitti interni ai vari Stati membri che hanno natura essenzialmente politica ed ai quali i giuristi devono prestare la dovuta attenzione. Un dato confortante è la graduale e costante crescita di interesse per la materia proprio da parte dei giuristi. Il loro impegno per cercare gli strumenti tecnici opportuni può spingere le istituzioni ad andare nella giusta direzione.

Lo strumento della direttiva, del quale stiamo discutendo, appare adeguato, anche per le caratteristiche di recepimento della stessa. Il coinvolgimento dei parlamenti nazionali su un tema delicato quale le discriminazioni potrebbe infatti essere molto utile e ricco di spunti di riflessione per le società civili dei vari paesi membri (penso ad una crescita di coscienza collettiva in occasione dei dibattiti parlamentari). L'ingresso dei nuovi Stati in seno all'Unione Europea potrebbe essere senz'altro condizionato dall'acccettazione di una direttiva in materia: va ricordato che alcuni dei paesi in lista d'attesa presentano situazioni non positive circa il rispetto dei diritti umani e dei diritti delle minoranze (si veda il caso della Turchia).

Il termine razzismo - abuso razziale mi sembra molto generico, anche alla luce delle molteplici interpretazioni che illustri studiosi propongono (si veda ad esempio Taguieff e Wieviorka). D'altra parte un elenco dettagliato delle possibili forme di razzismo rischia di essere estremamente rigido e magari non esaustivo. Il diritto comunitario già conosce alcune definizioni comuni: principio di "eguale trattamento", principio di "non discrimazione". Tali definizioni si prestano a svariate letture e traduzioni: importante è sottolineare la "vis" che le sottende. Un ruolo importante nella specificazione del loro contenuto è venuto dall'interpretazione rigorosa della Corte di Giustizia. Sarebbe auspicabile che anche in materia di discriminazione ai sensi dell'art. 6 A del Trattato di Amsterdam si riconosca competente la Corte di Giustizia ...

E' opportuno che la direttiva copra e protegga tutto lo spettro dei diritti umani, delle libertà fondamentali in campo politico, economico, sociale e culturale.

Da considerare sono inoltre non solo le discriminazioni dirette ma anche quelle indirette, i diritti delle vittime delle discriminazioni e le normative amministrative velatamente discriminatorie (discriminazioni mascherate). Se una lista molto dettagliata dei campi i cui si possano verificare le discriminazioni potrebbe rivelarsi un'arma a doppio taglio, senz'altro la direttiva, a titolo d'elenco, dovrebbe ricomprendere: il campo del lavoro (assunzioni, diritti sindacali, ecc.), quello dei rapporti contrattualistici interprivati, l'area dell'educazione, della formazione professionale, del commercio (vendita di prodotti al pubblico), dell'ingresso o adesione a clubs, associazioni ecc., della sicurezza sociale (diritto alle prestazioni sanitarie ad esempio), della partecipazione alla vita pubblica, della condizione dei detenuti (possibilità di godere della misure premiali) e della posizione degli imputati nei procedimenti giudiziari ...

La direttiva dovrebbe imporre gli Stati membri di dotarsi di misure legislative efficaci relativamente a possibili abusi perpetrati dalle loro istituzioni pubbliche. Sarebbe auspicabile che le amministrazioni avessero un codice di condotta statutario in materia di discriminazioni che prevedesse sanzioni disciplinari a carico dei pubblici ufficiali responsabili di abusi. Le normative statuali potrebbero prevedere anche la possibiltà di vere e proprie azioni civili contro i responsabili della discriminazione.

In campo civile (se la discriminazione viene ricondotta, come appare generalmente riconosciuto, al campo degli illeciti civili) le conseguenze di una condanna potrebbero essere: risarcimento del danno (diretto ed indiretto) ed imposizione di azioni positive. In campo penale è possile prevedere specifiche aggravanti per i reati commessi con il movente della discriminazione razziale.

A quest'ultimo proposito ricordo che in Italia è stata recentemente introdotta una disciplina penalistica ad hoc con il D. L. 122 del 1993 "Misure urgenti in materia di discriminazione razziale, etnica, religiosa" (convertito in L. 209 / 93). Tale normativa, inasprendo le pene per le manifestazioni che incitano alla discriminazione e all'odio per motivi razziali, etnici, nazionali o religiosi (è prevista anche la sanzione accessoria dell'obbligo di prestare un'attività non retribuita a favore della collettività per finalità sociali o di pubblica utilità), ha contribuito ad esempio ad uno scompaginamento dei gruppi naziskin. Un intervento limitato al solo inasprimento dell'azione repressiva e delle sanzioni penali non appare comunque sufficiente, soprattutto in relazione alle discriminazioni più mascherate. La legge sull'immigrazione in discussione attualmente al Parlamento italiano introduce per altro (si vedano artt. 39 - 42) sia una definizione ampia e completa di discriminazione (art. 40), sia la possibilità di esperire un'azione civile contro la discriminazione (art. 41) ed infine la previsione di misure di integrazione sociale e di un fondo

nazionale per le politiche migratorie (arttt. 39 e 42), che potrebbero più efficacemente contrastare - con azioni positive e preventive - la commissione di discriminazioni ed abusi.

Andrebbe sicuramente nella direzione preventiva la definizione, da parte della direttiva, di un obbligo per gli Stati membri di dotarsi di una figura istituzionale del tipo dell'ombudsman. A tale figura si dovrebbe però dare risorse e strumenti per agire sia nel campo della sensibilizzazione, sia in quello dell'attivazione di meccanismi di supporto e difesa delle vittime delle discriminazioni. L'ombudsperson potrebbe inoltre promuovere la conduzione di ricerche in materia e la predisposizione di codici di condotta adeguati. La facilitazione nell'accesso alle procedure contro la discriminazione dovrebbe essere potenziata attraverso continui monitoraggi e soprattutto garantendo un aiuto legale gratuito alle vittime delle discriminazioni.

Ribadendo la logica della flessibilità della direttiva, ritengo invece inadeguata la previsione di "quote" per le minoranze nei vari campi della società civile. La previsione di azioni positive relativamente alla promozione di alcune minoranze potrebbe invece rivelarsi utile, ma anche in tal caso è opportuno procedere con la necessaria cautela.

Infine credo doveroso l'inserimento di un obbligo per gli Stati membri di redigere rapporti - indirizzati alla Commissione europea - sull'applicazione della direttiva entro un tempo prefissato dal suo recepimento. La Commissione dovrebbe poi riferire sia al Parlamento sia al Consiglio.

4. Germany: Abstract by Dr. phil. Robin Schneider, European Lecturer and Head of the Arbeitsgruppe Antidiskriminierung und Gewaltprävention of the Ausländerbeauftrage des Berliner Senats

(Die Stellungnahmen in diesem Text erfolgen im Namen des Autors.)

INTERNATIONALE UND NATIONALE SCHUTZRECHTE GEGEN DISKRIMINIERUNG UND FREMDENFEINDLICHKEIT – PROBLEME UND CHANCEN IHRER UMSETZUNG IN DEUTSCHLAND

1. Ausgangslage

1.1 Die Bundesrepublik Deutschland hat sich bereits vor drei Jahrzehnten verpflichtet, Diskriminierungen, Rassismus und Fremdenfeindlichkeit zu ächten. Insbesondere hat die Bundesregierung mit der Ratifizierung des sogenannten CERD-Übereinkommens der Vereinten Nationen, des Internationalen Übereinkommens zur Beseitigung jeder Form von Rassendiskriminierung - International Convention on the Elimination of All Forms of Racial Discrimination (CERD) - vom 7. März 1966 erklärt, Rassendiskriminierung aktiv zu bekämpfen. "Rassendiskriminierung" bedeutet demnach

"jede auf der Rasse, der Hautfarbe, der Abstammung, dem nationalen Ursprung oder dem Volkstum beruhende Unterscheidung, Ausschließung, Beschränkung oder Bevorzugung, die zum Ziel oder zur Folge hat, daß dadurch ein gleichberechtigtes Anerkennen, Genießen oder Ausüben von Menschenrechten und Grundfreiheiten im politischen, wirtschaftlichen, sozialen, kulturellen oder jedem sonstigen Bereich des öffentlichen Lebens vereitelt oder beeinträchtigt wird" (CERD, Artikel 1 (1)).

1.2 Und auch nach der deutschen Verfassung, nach Artikel 3 (3) des Grundgesetzes darf niemand

"wegen seines Geschlechts, seiner Abstammung, seiner Rasse, seiner Sprache, seiner Heimat und Herkunft, seines Glaubens, seiner religiösen oder politischen Anschauungen benachteiligt oder bevorzugt werden".

Allerdings wird dieser Grundgesetzartikel bislang juristisch zumeist allein als ein Abwehrrecht des Bürgers gegen den Staat verstanden, nicht aber auch als ein auch mittelbar geltendes Schutzrecht auch gegen Diskriminierungen in privatrechtlichen Beziehungen. Dies bedeutet, daß dieses Gleichstellungsgebot ausdrücklich nicht aufgrund der Staatsangehörigkeit gilt.

1.3 Diesen Mißstand der unzureichenden gesetzlichen Umsetzungen des CERD-Übereinkommens in nationales Recht in Deutschland und des Grundgesetzartikels 3 (3) zu ändern und eine wirksame Bekämpfung von Diskriminierungen, Fremdenfeindlichkeit und Rassismus in Deutschland zu ermöglichen, ist seit mehreren Jahren das Anliegen zahlreicher Initiativen von Menschenrechtsorganisationen, Gewerkschaften, Kirchen, Parteien, Wohlfahrtsverbänden und Ausländerbeauftragten.

Die Haltung der Bundesregierung ist demgegenüber kategorisch: "In der Bundesrepublik Deutschland existieren keine Formen des institutionellen Rassismus" (BMJ 1994: 40). Daher gelten ihr eine Umsetzung des CERD-Übereinkommens in nationales Recht und Ausführungsgesetze des zitierten Grundgesetzartikels als unangemessen. Und soweit es "in letzter Zeit zu Diskriminierungen von Minderheiten und fremdenfeindlichen Handlungen in Deutschland gekommen ist, gingen diese sämtlich nicht von Staatsorganen aus und können auch nicht deutschen staatlichen Stellen zugerechnet werden" (BMJ 1994: 66). Dies ist unbestritten. In Frage steht allerdings, ob staatliche Institutionen Opfern von Rassismus und Fremdenfeindlichkeit in

jedem Fall hinreichend Schutz und Hilfen gewährt haben und ob zureichend, d.h. überhaupt, rechtzeitig oder umfassend sowohl präventiv wie konfliktregulierend eingegriffen wurde.

Bundesweit gibt es, worauf die Bundesregierung hinweist (BMJ 1994: 86), allerdings erst eine staatliche Arbeitsgruppe (bei der Ausländerbeauftragten des Berliner Senats), die Beschwerden über individuelle und strukturelle ethnische Diskriminierung aufnimmt, ihnen nachgeht und, wo das möglich ist, Abhilfe sucht. Gleichwohl haben mehr und mehr Ausländerbeauftragte auf Landes- und kommunaler Ebene ebenfalls begonnen, solche Ombudsfunktionen zu übernehmen. Die Bundesregierung (hier das Bundesministerium des Innern und das Presse- und Informationsamt) konzentrieren sich insbesondere auf öffentlichkeitswirksame Programme für Multiplikatoren (BMJ 1994: 106, Presse- und Informationsamt der Bundesregierung 1993). Mit dem Aktionsprogramm der Bundesregierung gegen Aggression und Gewalt, welches nach dem massiven Auftreten von manifester Fremdenfeindlichkeit 1991 für Projekte der Jugendarbeit aufgelegt wurde, standen von 1992 bis 1994 jährlich 20 Millionen DM, seit 1995 und 1996 stehen jährlich ca. 10 Millionen DM zur Verfügung (Presse- und Informationsamt der Bundesregierung 1994).

1.4 Im folgenden soll gefragt werden, welche internationalen und nationalen Schutzrechte gegen Rassismus und Fremdenfeindlichkeit kodifiziert oder wirksam sind, unter welchen ausländer- (sowie staatsangehörigkeits-) und asylrechtlichen Bedingungen institutionelle oder strukturelle Diskriminierungen in Deutschland auftreten können und aufgrund welcher Prinzipien der deutschen Ausländerpolitik diese beruhen.

2. Internationale Schutzrechte

2.1 Deutschland hat sich auf internationaler Ebene mit dem CERD-Übereinkommen vom 7. März 1966 und auf europäischer Ebene mit der Ratifizierung der Europäischen Menschenrechtskonvention (Konvention zum Schutze der Menschenrechte und Grundfreiheiten) vom 4. November 1950 und zuletzt im Europarat mit der Erklärung des Wiener Gipfels vom 9. Oktober 1993 und in der Europäischen Union mit der Deutsch-französischen Initiative vom 30. Mai 1994 für eine umfassende Strategie zur Bekämpfung von rassistischen und fremdenfeindlichen Gewalttaten ausgesprochen. Möglichkeiten für eine Harmonisierung des Vorgehens der Mitgliedsstaaten der Europäischen Union gegen Rassismus und Fremdenfeindlichkeit sollen insbesondere in den Bereichen rechtliche Vorschriften und Trainings für Beamte erarbeitet werden. Inzwischen hat die vom Europäischen Rat am im Juni 1994 in Korfu eingesetzte Beratende Kommission gegen Rassismus und Fremdenfeindlichkeit ihre Arbeit mit ihrem Bericht vom Mai 1995 abgeschlossen. Die Handlungsvorschläge sind auf dem Europäischen Rat in Cannes Ende Juni 1995 begrüßt worden. Der Rat hat der Kommission den Prüfauftrag gegeben, in Zusammenarbeit mit dem Europarat die Realisierbarkeit einer Europäischen Beobachtungsstelle gegen Rassismus und Fremdenfeindlichkeit zu untersuchen. Diese ist 1997 beschlossen worden.

Diese Initiativen sind ein erfreuliches Zeichen. Allerdings sollte sichergestellt werden, daß nicht erneut unverbindlich bleibende Konventionen verfaßt und kompetenzlose Institutionen etabliert werden, sondern daß wirksame Instrumente zum Schutz vor Diskriminierungen und zur Hilfe für die Gleichstellung von Ausländern und ethnischen Minderheiten gefunden werden.

2.2 Große Hoffnungen werden auf den neuen Amsterdamer Vertrag von 1997 gesetzt. Dieser wurde in einer Regierungskonferenz zur Ergänzung der Römischen Gründungsverträge und der Überarbeitung des Maastrichter Vertrages (Vertrag über die Europäische Union sowie die Novelle des Vertrages zur Gründung der Europäischen Gemeinschaft) vom 7. Februar 1992 durch eine Antidiskriminierungsbestimmung ergänzt. Dieser Artikel 6A ermöglicht es, in der Europäischen Union nach seiner Ratifizierung (in frühestens zwei Jahren) eine in den Mitgliedsstaaten mit Gesetzeskraft wirksame Richtlinie zur Bekämpfung der Rassendiskriminierung vorzulegen.

Vorschläge hierzu sind im Rahmen des Maastrichter Vertrages von der sogenannten Starting Line-Gruppe unter Federführung der Kommission der Kirchen für Migranten in Europa (CCME) in Brüssel unter Beteiligung der Europäischen Kommission bereits ausgearbeitet worden (Ausländerbeauftragte des Senats 1994: 61-71). Die Gründungsmitglieder der Starting Line-Gruppe sind neben der CCME, die britische Commission for Racial Equality, das niederländische Nationale Büro gegen Rassismus und die Ausländerbeauftragte des Senats von Berlin. Die Starting Line-Gruppe erarbeitet zur Zeit Vorschläge auf der Grundlage des neuen Vertrages.

2.3 Eine wichtige internationale Schutzkonvention ist von der Bundesrepublik Deutschland, ebenso wie von den meisten Industrieländern, nicht ratifiziert worden: das Europäische Übereinkommen über die Rechtsstellung der Wanderarbeitnehmer vom Mai 1977. Die Bundesregierung verweist darauf, daß der seit November 1973 bestehende Anwerbestopp für Arbeitsmigranten (der erst im neuen Ausländerrecht auch gesetzlich verankert wurde) wegen fehlender positiven Entwicklung auf dem deutschen Arbeitsmarkt dies nicht zulasse. Tatsächlich sichert diese Konvention Schutzrechte auch für Illegale, was von der Bundesregierung nicht erwünscht ist.

2.4 Andere wichtige Menschenrechtsübereinkommen sind von der Bundesrepublik nur mit erheblichen Einschränkungen ratifiziert worden. Dies betrifft unter anderem insbesondere den Internationalen Pakt über bürgerliche und politische Rechte vom 19. Dezember 1966, bei dem die Bundesrepublik Deutschland

- die Nicht-Beschränkung der politischen Tätigkeit von Ausländern und
- die persönliche Anwesenheit von Angeklagten in Revisionsinstanzen

nicht akzeptiert hat, sowie das Fakultativprotokoll zum Internationalen Pakt über die bürgerlichen und politischen Rechte vom 19. Dezember 1966, bei dem

- Doppelprüfungen durch internationale Kontrollgremien abgewehrt werden und
- das allgemeine Diskriminierungsverbot im Artikel 26 des Internationalen Paktes über die bürgerlichen und politischen Rechte vom 19. Dezember 1966 (mit Verweis auf Artikel 14 der Europäischen Menschenrechtskonvention) auf ein Verbot einer Ungleichbehandlung ausschließlich bezüglich eines in der Konvention geschützten Rechtes begrenzt wird.

Übrigens erklärt die Bundesregierung, daß es Kritik an ihren Vorbehalten, "soweit ersichtlich" (BMJ 1994: 52), nicht gegeben habe. Festzuhalten ist, daß es der Bundesregierung jederzeit freistünde, ihre Vorbehalte nicht länger aufrecht zu erhalten.

2.5 Während die Bundesregierung Indivdualbeschwerden gemäß der Europäischen Menschenrechtskonvention gegenüber dem Europäischen Gerichtshof für Menschenrechte und gemäß dem Fakultativprotokoll zum Internationalen Pakt über bürgerliche und politische Rechte anerkennt, werden Indivdualbeschwerden noch immer gegenüber dem UN-Ausschuß zur Beseitigung der Rassendiskriminierung gemäß Artikel 14 (1) CERD verweigert. Begründet wird dies mit drohender Unübersichtlichkeit der Verfahren des internationalen Rechtsschutzes: "Eine solche weitere Beschwerdemöglichkeit würde ... kaum zu einer wesentlichen Verbesserung des Menschenrechtsschutzes führen, im Gegenteil, wegen der Vielfalt der verschiedenen internationalen Beschwerdewege die Gefahr mit sich bringen, daß der internationale Rechtsschutz unübersichtlich wird. Dabei ist in Erwägung zu ziehen, daß das Kontrollsystem nach dem Übereinkommen gegen Rassendiskriminierung verhältnismäßig schwach ist und das Verfahren Besonderheiten aufweist." (Funke 1994: 14).

Nach dem CERD-Übereinkommen sind zudem explizit Schutzvorschriften im innerstaatlichen Recht vorzusehen. Eine solche Umsetzung in innerstaatliches Recht durch ein Antidiskriminierungsgesetz ist von den Vereinten Nationen immer wieder gegenüber der Bundesregierung angemahnt worden. Die Bundesregierung entgegnet, daß die Beschwerdemöglichkeiten gegenüber dem Europäischen Gerichtshof für Menschenrechte ausreichend seien.

3. Nationale Schutzrechte

3.1 Die Bundesregierung leitet ein umfassendes Diskriminierungsverbot - genau genommen handelt es sich um ein Gleichstellungsgebot - aus dem Grundgesetz, Artikel 1 bis 3 sowie insbesondere aus dem oben zitierten
Artikel 3 (3) ab. Jegliche staatliche Diskriminierung aufgrund von Herkunft oder Rasse ist demnach in Deutschland unzulässig. Artikel 3 des Grundgesetzes verbietet allen staatlichen Stellen - abweichend von der bisherigen nur auf "Ausländer" bezogenen Terminologie - "eine Diskriminierung von Ausländern und ethnischen Minderheiten" (BMJ 1994: 37). Diese ausweitende Interpretation des staatlichen Diskriminierungsverbotes auch auf ethnische Minderheiten durch die Bundesregierung ist eine positive Entwicklung. Sie kann insbesondere deswegen folgenreich werden, weil sie nicht auf die anerkannten nationalen Minderheiten, das heißt die ethnischen (und religiösen) Minderheiten deutscher Staatsangehörigkeit (Dänen, deutsche Aussiedler, Friesen, Juden, Niederdeutsche, Sorben sowie die gegenüber dem Europarat voraussichtlich erst 1998 offiziell anerkannten deutschen Sinti und Roma) beschränkt bleibt, sondern auch für zugewanderte Minderheiten Geltung hat.

"Die Bundesrepublik Deutschland betrachtet es als eine wichtige Aufgabe, die Gesetze so auszugestalten, daß sie bestmöglichen Schutz gegen Diskriminierung bieten. Alle staatlichen Stellen sind verpflichtet, diesen Gesetzen Geltung zu verschaffen" (BMJ 1994: 11). Diese Maxime gilt jedoch nicht unmittelbar für den privaten Rechtsverkehr. Hierzu zählen in Deutschland insbesondere auch das Miet-, Gaststätten-, Versicherungs- und Gesundheitsrecht. Gerichte haben seit einigen Jahren jedoch damit begonnen, bei der Auslegung von Gesetzen und Verträgen die grundgesetzlichen Normen des Grundrechtekataloges hinzuzuziehen. Der in der juristischen Literatur zumeist als Abwehrrecht des Bürgers gegen staatliche Maßnahmen beschriebene Grundgesetzartikel 3 (3) bietet sich zur Ausweitung auf das Privatrecht, also auf die Beziehungen zwischen Bürgern und Bürgern, an. Daher ist ein umfassendes Antidiskriminierungs- bzw. Gleichstellungsgesetz einzufordern, welches als Rahmengesetz Individualrechtsschutz bietet und Fördermöglichkeiten erlaubt. Noch bevor politische Mehrheiten hierfür gefunden werden können, ist die systematische Ergänzung bestehender Gesetze und Verordnungen durch Antidiskriminierungsklauseln nötig. Und zwar nicht nur symbolisch als Zeichen zur Bekämpfung von Fremdenfeindlichkeit ist auch die Aufnahme von Hinweisen auf den Gleichstellungsgrundsatz des Grundgesetzes - beispielsweise im Mietrecht in Mustermietverträgen oder Hausordnungen - wichtig.

3.2 Vereinzelt sind in Einzelgesetzen spezielle Antidiskriminierungs- beziehungsweise Gleichstellungsbestimmungen aufgenommen worden. Bislang wird das Gleichstellungsgebot des Grundgesetzes jedoch nur im Ausnahmefall in wichtige Gesetze aufgenommen.

3.2.1 Zu den positiven Ausnahmen gehört insbesondere das Betriebsverfassungsgesetz. Danach haben Ausländer das aktive und passive Wahlrecht im Rahmen der Betriebsverfassung und der Unternehmensmitbestimmung. Nach Paragraph 75 ist der Betriebsrat verpflichtet, keine unterschiedliche Behandlung der Betriebsangehörigen (vor allem bei Einstellungen und Entlassungen) wegen ihrer Abstammung, Religion, Nationalität, Herkunft, politischen oder gewerkschaftlichen Tätigkeit zuzulassen. Kündigungsschutzgesetze und die Gewährung von Leistungen nach dem Arbeitsförderungsgesetz (AFG) vom 26. Juli 1994 sind für Deutsche und Ausländer gleich; unter Umständen kann es sogar zu positiven Diskriminierungen kommen, etwa wenn Ausländer in einem Arbeitsamtsbezirk zu den besonders betroffenen Gruppen zählen und daher bevorzugten Zugang zu Arbeitsbeschaffungsmaßnahmen, Fortbildungen und Umschulungen haben. Gegenüber der Europäischen Kommission erwähnt die Bundesregierung jedoch nicht die sozialpolitisch problematische Rolle des Paragraphen 19 AFG, nach der eine offene Stelle zunächst Deutschen sowie Bürgern der Europäischen Union angeboten werden muß, bevor ein Ausländer sich bewerben kann.

3.2.2 Bei den Wahlen für die Selbstverwaltung der Sozialversicherungen haben Ausländer ebenfalls Wahlrecht; das passive Wahlrecht ist allerdings auf Ausländer beschränkt, die bereits sechs Jahre in der Bundesrepublik leben.

3.2.3 In der Novellierung des Versicherungsaufsichtsgesetzes vom 21. Juli 1994 wurde mit Paragraph 81e die Bekämpfung der Diskriminierung von Ausländern und ethnischen Minderheiten im Versicherungsrecht verankert. Danach hat das Bundesaufsichtsamt für das Versicherungswesen die Aufgabe, auch gegen Diskriminierungen aufgrund der Staatsangehörigkeit und der Zugehörigkeit zu einer ethnischen Gruppe einzuschreiten. Dies wird jedoch nicht prinzipiell begründet , sondern es wird vorgebracht, daß diese Merkmale "für sich allein kein Risikomerkmal sein können" (BMJ 1994: 59).

3.2.4 1984 wurden die Verwaltungsvorschriften der Länder zum Gaststättengesetz ergänzt, um Diskriminierungen beim Besuch von Gaststätten und Diskotheken verhindern zu können. Danach ergibt sich die den Widerruf der Gewerbeerlaubnis nach sich ziehende "Unzuverlässigkeit eines Gastwirtes" dann, wenn er "willkürlich Personen lediglich wegen ihrer Hautfarbe, Rasse, Herkunft oder Nationalität vom Besuch seiner Gaststätte ausschließt." Die Bundesregierung schlug den Ländern jedoch eine unspezifische Einschränkung vor, wenn der Gastwirt befürchten muß, „daß sonst sein Betrieb gestört oder seine Beschäftigten oder Gäste beeinträchtigt werden" (zit. nach BMJ 1994: 60); eine juristisch eindeutige Definition von Willkür ist zudem schwer vorzunehmen.

3.2.5 Aufenthaltsberechtigte Ausländer haben gleichen Zugang zu Sozialwohnungen und gleichen Anspruch auf Wohngeld wie Deutsche. Darüber hinaus gelten für Ausländer die gleichen steuerliche Erleichterungen zum Erwerb von Wohneigentum, wie für Deutsche.

3.3 Der Ausländeranteil in Deutschland liegt bei 8,5 Prozent der Gesamtbevölkerung (6,9 Millionen, davon 1,9 Millionen Türken und 1,2 Millionen ehemalige Jugoslawen, von 81,3 Millionen am 30. Juni 1994). 47 Prozent der Ausländer in Deutschland leben hier bereits länger als zehn Jahre; zwei Drittel der ausländischen Kinder und Jugendlichen sind hier geboren. Für die 1,5 Millionen Staatsangehörigen aus EU-Mitgliedstaaten in Deutschland hat zuletzt der Maastrichter Vertrag vom 7. Februar 1992 mit Artikel 6 des neuen EG-Vertrages ein Diskriminierungsverbot aufgrund der Staatsangehörigkeit verbindlich gemacht:

"Unbeschadet besonderer Bestimmungen dieses Vertrages ist in seinem Anwendungsbereich jede Diskriminierung aus Gründen der Staatsangehörigkeit verboten. Der Rat kann nach dem Verfahren des Artikels 189c Regelungen für das Verbot solcher Diskriminierungen treffen."

Dies führt inzwischen unter anderem zur Einführung einer Unionsbürgerschaft (Artikel 8), zu weitgehender Freizügigkeit (Artikel 8a (1), 48 - 51), zum Abbau von Niederlassungsbeschränkungen (Artikel 52 - 58), zum kommunalen und europäischen Wahlrecht (nicht aber zum entscheidenden Wahlrecht auf nationaler und Länderebene) und zu einer Gleichstellung von Unionsbürgern mit Deutschen im Arbeitsrecht (mit Ausnahme des Beamtenrechts bei Aufgaben, "die wegen ihres sachlichen Gehalts von Deutschen wahrgenommen werden müssen" (BMJ 1994: 64). So läßt sich sinnvollerweise inzwischen bereits eher von "EU-Inländern", denn von "EU-Ausländern" sprechen. Eine solche Verwischung der Grenzen zwischen Deutschen und Ausländern durch eine in Aussicht gestellte EU-Staatsbürgerschaft wird auch für sogenannte "Drittstaatler" positive Auswirkungen haben. So ist die Visumspflicht für diese Personen innerhalb der Unterzeichnerstaaten des Schengener Abkommens aufgehoben worden.

3.4 Das deutsche Strafrecht enthält besondere Vorschriften zur Bekämpfung von Fremdenfeindlichkeit. Die Paragraphen 86 und 86 a des Strafgesetzbuches verbieten die Propaganda für verfassungswidrige Organisationen und Paragraph 130 stellt Volksverhetzung und Paragraph 131 die Aufstachelung zum Rassenhaß unter Strafe. Festzustellen ist allerdings, das längst nicht alle offen fremdenfeindlich auftretenden rechtsextremen Organisationen verboten werden und daß die Gerichte bislang die Paragraphen 130 und 131 nur äußerst selten anwenden. Zwar geht die Bundesregierung davon aus, daß dieses strafrechtliche Instrumentarium zur

Bekämpfung der Fremdenfeindlichkeit im wesentlichen ausreiche (BMJ 1994: 56), dennoch wurden mit dem Verbrechensbekämpfungsgesetz vom 1. Dezember 1994 die erwähnten Paragraphen verschärft, um "rechtsextremistischen und ausländerfeindlichen Bestrebungen nachdrücklich und entschlossen entgegenzutreten" (BMJ 1994. 59).

4. Diskriminierungen aufgrund der Staatsangehörigkeit

4.1 Legale Diskriminierungen aufgrund der Staatsangehörigkeit, sogenannte institutionelle oder strukturelle Diskriminierungen, ziehen sich durch das gesamte deutsche Rechtssystem. Dies ist allerdings überhaupt keine Besonderheit, da alle Staaten universell geltende Menschenrechte von allein Staatsbürgern vorbehaltenen Bürgerrechten unterscheiden.

Neben dem Grundgesetz und den zahlreichen nur für Ausländer geltenden Gesetzen und Verordnungen zählen hierzu das erwähnte Arbeitsförderungsgesetz und weitere Bundes- und Ländergesetze, die zumeist den Zugang zu Hilfen oder Leistungen einschränken: Von Bedeutung sind insbesondere der Paragraph 120 des Bundessozialhilfegesetz und Paragraph 8 (2) des Bundesausbildungsförderungsgesetzes und zieht sich bis zum Schornsteinfegergesetz und der Bundes-Tierärzteordnung, wo jeweils der Zugang zum Beruf restringiert wird. Eine vollständige Liste der unterschiedlichen rechtlichen Einschränkungen wird derzeit vom Bundesministerium der Justiz im Zuge der verpflichtend gewordenen Entdiskriminierung von Unionsbürgern vorbereitet.

4.2 Wie in anderen Staaten auch, betrifft das explizite Gleichstellungsgebot des Grundgesetzes jedoch nicht die in Ausländer- und Asylverfahrensgesetzen juristisch kodifizierten legalen Diskriminierungen aufgrund der Staatsangehörigkeit. Da in Deutschland jedoch der Anteil der Nationalisierungen von Ausländern (beziehungsweise der Hinnahme doppelter Staatsangehörigkeit) weitaus geringer als in vergleichbaren Industriestaaten ist, ergeben sich besondere Probleme. Dies gilt insbesondere für die Angehörigen der zweiten und dritten Generation der Zuwanderer aus der Türkei und dem ehemaligen Jugoslawien.

4.3 Die Bundesregierung geht davon aus, daß das deutsche Staatsangehörigkeitsrecht den Anforderungen des CERD-Übereinkommens vom 7. März 1966 entspricht. "Es stellt für Erwerb und Verlust der Staatsangehörigkeit an keiner Stelle auf Rasse, Herkunft usw. der Betroffenen ab." Im Artikel 116 (1) des Grundgesetzes heißt es aber:

"Deutscher im Sinne dieses Grundgesetzes ist vorbehaltlich anderweitiger gesetzlicher Regelung, wer die deutsche Staatsangehörigkeit besitzt, oder als Flüchtling oder Vertriebener deutscher Volkszugehörigkeit oder als dessen Ehegatte oder Abkömmling in dem Gebiete des Deutschen Reiches nach dem Stande vom 31. Dezember 1937 Aufnahme gefunden hat."

4.4 Damit ist in Deutschland ein um die Möglichkeit des Erwerbs der Staatsangehörigkeit erweitertes, *ius sanguinis* wirksam. In der laufenden Legislaturperiode sollte eigentlich das noch immer geltende Reichs- und Staatsangehörigkeitsrecht vom 22. Juli 1913 (zuletzt geändert am 30. Juni 1993) grundlegend reformiert werden und die umstrittene Institution einer Kinderstaatszugehörigkeit für die Angehörigen der zweiten und dritten Generation der Arbeitsmigranten geschaffen werden.

Die Hürde für eine Einbürgerung ist in Deutschland (sowie in der Schweiz) im internationalen Vergleich äußerst hoch und zu Recht an Verfassungstreue, ähnlich wie beim Zugang zum öffentlichen Dienst, gebunden. In den Einbürgerungsrichtlinien (Nr. 3.1.2) vom 15 Dezember 1977 (zuletzt geändert am 20. Januar 1987) heißt es:

"Der Einbürgerungsbewerber ... muß nach seinem Verhalten in Vergangenheit und Gegenwart Gewähr dafür bieten, daß er sich zur freiheitlichen demokratischen Grundordnung bekennt und für ihre Einhaltung eintreten wird. Personen, die in innerer Abhängigkeit zu totalitären Ideologien stehen, ist die Einbürgerung zu versagen.

Gibt die Einstellung eines Familienangehörigen zur freiheitlichen demokratischen Grundordnung Anlaß zu Bedenken, so sind die staatsbürgerlichen Voraussetzungen einer Einbürgerung der übrigen Familienangehörigen sorgfältig zu prüfen."

Mit diesem Nachsatz wird eine aus menschenrechtlicher Sicht problematische Familienbindung politischer Zuverlässigkeit erhoben. Gefordert wird eine "Hinwendung zu Deutschland", deren Nachprüfbarkeit jedoch nicht möglich ist. Hierdurch ergibt sich ein hoher Ermessensspielraum seitens der zu entscheidenden Ausländerbehörden.

4.5 Empirisch sind nach Ansicht der Bundesregierung Diskriminierungen im Bereich des Strafrechts nicht festzustellen. Eine statistische und qualitative Untersuchung über die Fragen erhöhter Verfolgungsintensität der Polizei, unterschiedlichen Sanktionsverhaltens der Gerichte und diskriminierender Behandlung von Ausländern bei Haftvollzugslockerungen wäre nötig.

4.6 Die Bundesregierung erklärt, daß die Sozialgesetzgebung keine diskriminierenden Regelungen enthält. Sie stellten "im wesentlichen Ausländer, die sich rechtmäßig und dauerhaft in Deutschland aufhalten, Deutschen gleich" (BMJ 1994: 36). Eine Andersbehandlung von Ausländern ist allerdings mit dem Asylbewerberleistungsgesetz vom 30. Juni 1993 legalisiert worden. Danach gilt für Personen, die nach diesem Gesetz Hilfen zum Lebensunterhalt erhalten, ein um 20 Prozent abgesenkter Leistungssatz. Weitere Restriktionen werden derzeit debattiert.

Dennoch ist eine rechtliche Gleichstellung nach Ansicht der Bundesregierung aufgrund des Sozialstaatsprinzips im Sozial- und Gesundheitsrecht weitgehend erfüllt. Allerdings wäre die apodiktische Schlußfolgerung, "damit scheidet eine Diskriminierung in der Praxis weitgehend aus" (BMJ 1994: 75), empirisch zu überprüfen.

4.7 Diskriminierungen im privaten Rechtsverkehr werden auch von der Bundesregierung trotz bestehender Antidiskriminierungsbestimmungen in Einzelgesetzen berichtet. Genannt werden gegenüber der Europäischen Kommission Diskriminierungen bei der Wohnungssuche, beim Zugang zu Gaststätten und Diskotheken und im Versicherungs- und im Gesundheitsrecht. Darüber hinaus treten alltägliche Diskriminierungen insbesondere im Umgang von Behörden (und insbesondere der Polizei) gegenüber Ausländern und ethnischen Minderheiten sowie beim Zugang zum deutschen Arbeitsmarkt auf.

4.8 Neben dem Versagen des aktiven und passiven Wahlrechts für Ausländer (mit Ausnahme der Beteiligung an Kommunalwahlen durch Unionsbürger seit 1995) unterliegen Ausländer weiteren politischen Beschränkungen. Die Versammlungs- (GG Artikel 8 (1)) und Vereinigungsfreiheit (GG Artikel 9 (1)) stehen zwar nach dem Grundgesetz nur Deutschen zu, sie werden jedoch durch das jedem zustehende Recht auf öffentliche Versammlung nach dem (einfachgesetzlichen) Versammlungsgesetz teilweise relativiert. Daher gilt nicht der Umkehrschluß, daß Versammlungs- und Vereinigungsfreiheit Ausländern prinzipiell nicht zustünden. Das Vereinsgesetz allerdings restringiert "Ausländervereine", wenn sie durch ihre politische Betätigung die innere oder äußere Sicherheit und Ordnung "oder sonstige erheblichen Belange der Bundesrepublik Deutschland" (BMJ 1994: 63) verletzen oder gefährden. Zudem liegen die mehrheitlich von Ausländern betriebenen Vereine strengen Anmelde- und Auskunftspflichten. Die Bundesregierung hält diese Differenzierung zwischen deutschen und Ausländervereinen aus Gründen der inneren Sicherheit für unverzichtbar.

4.9 Nach dem deutschen Beamtenrecht können grundsätzlich nur Deutsche Beamte (sowie Berufssoldaten) werden. Jedoch können bei dringendem dienstlichen Bedürfnis auch Ausländer zu Beamten ernannt werden. Dies gilt regelmäßig für Hochschullehrer. Die Bundesregierung hält dies inzwischen (im Unterschied zu den meisten Bundesländern) auch für den Polizeidienst gegeben: "Dort eingesetzte ausländische Polizisten sollen Ansprechpartner insbesondere in Gegenden mit einem hohen Anteil geschlossener ausländischer Wohnbereiche sein und sowohl zur Bekämpfung und Verhinderung der Kriminalität als auch zur Stärkung der Integration beitragen“ (BMJ 1994: 65; zur Notwendigkeit von Trainings für Polizeibeamte siehe auch BMJ 1994: 100 f.).

5. Ausländerrechtliche und -politische Voraussetzungen

5.1 Die deutsche Ausländerpolitik hat zwei Gesichter. Einerseits werden der Grundsatz der Integration der ausländischen Wohnbevölkerung, das heißt der legal in Deutschland lebenden Ausländer anerkannt und besondere Integrationsmaßnahmen gefördert. Dies gilt bis heute insbesondere für die als sogenannte "Gastarbeiter" angeworbenen ausländischen Arbeitnehmer und ihre Familien. Anderseits wird die Begrenzung des weiteren Zuzugs aus Staaten außerhalb der europäischen Union zum Primat erhoben:

"Integration ist nur möglich, wenn der weitere Zuzug aus den Staaten außerhalb der EU konsequent begrenzt und gesteuert wird" (BMJ 1994: 68).

Diese hier implizierte Kausalverknüpfung zwischen Integration und Begrenzung wird jedoch nicht weiter begründet. Mit der von zahlreichen Politikern immer wieder populistisch aufgegriffenen Maxime der Einbürgerungsrichtlinien
(Nr. 2.3.) vom 15. Dezember 1977 (zuletzt geändert am 20. Januar 1987) werden reale Zuwanderungen kontrafaktisch negiert:

"Die Bundesrepublik Deutschland ist kein Einwanderungsland; sie strebt nicht an, die Anzahl der deutschen Staatsangehörigen durch Einbürgerung zu vermehren."

Allerdings ist dieser Grundsatz auch in Erwägung der Vertreibungs- und Vernichtungspolitik der Nazis zu lesen. Demnach können Zuwanderungen aus demographischen Gründen in Deutschland nicht gewollt werden; selbst wenn mit dem Asyl für Hugenotten Preußen auch einst ein positives Beispiel gegeben hatte.

5.2 Insbesondere durch die Zugangstore, der *gates of entry,* des Familiennachzuges und des politischen Asyls (sowie in kleinerem Umfang der Werkvertragsarbeitnehmer und sogar erneuter Anwerberegelungen) nahm die Nettozuwanderung in die Bundesrepublik Deutschland seit dem Anwerbestopp von 1973 nicht ab, sondern stetig zu. Seit den Novellierungen des Ausländergesetzes vom 9. Juli 1990 und des Grundrechts auf Asyl vom 28. Juni 1993 und des Asylverfahrensgesetzes vom 27. Juni 1993 nahm die Migration von Illegalen, von Personen ohne legalem Aufenthaltsstatus, erheblich zu. Seriöse Schätzungen über die Anzahl dieser Personen sind nicht möglich. Es ist jedoch davon auszugehen, daß die Mehrzahl von ihnen zunächst legal, zumeist mit einem Touristenvisum einreist, illegal hier arbeitet und das befristete Aufenthaltsrecht damit verwirkt. Die Bundesregierung beteiligt sich im Rahmen des Schengener Abkommens (sowie des Bundesgrenzschutzgesetzes) an Zuwanderungskontrollen vor allem an den Außengrenzen zu den mittelosteuropäischen Ländern Polen und Tschechei.

Die deutschen Ausländer- und Asylgesetze sind als ein striktes Zuwanderungsbegrenzungsrecht angelegt. Ein wie vielfach gefordertes "Zuwanderungsgesetz" würde an der Maxime der Zuwanderungsbegrenzung scheitern und wäre für die Exekutive weitaus inflexibler als der status quo.

5.3 Eine für effizientes Verwaltungshandeln hinderliche Besonderheit liegt in Deutschland in einer komplizierten Kompetenzaufspaltung in Migrationsfragen auf zahlreiche Institutionen in mehreren Ebenen. Dies führt zu einer unübersichtlichen und schwerfälligen Bürokratisierung dieses Politikbereichs. Allein im Bund sind neben dem federführenden Bundesministerium des Innern (BMI) zuständig vor allem das Auswärtige Amt (AA), das Bundeskanzleramt, die Bundesministerien für Arbeit und Sozialordnung (BMA), für entwicklungspolitische Zusammenarbeit (BMZ) und für Justiz (BMJ) und nachgeordnet der Bundesgrenzschutz, die Beauftragte der Bundesregierung für die Belange der Ausländer, das Bundesamt für die Anerkennung ausländischer Flüchtlinge (BAFl), die Bundesanstalt für Arbeit (BfA) und die Zentralstelle für Arbeitsvermittlung (ZAV). Eine solche Aufteilung findet sich ebenfalls in den für das Verwaltungshandeln entscheidenden Ländern, sowie erneut in den Kommunen. Im Sozialbereich kommt hinzu, daß durch das korporativistische deutsche System

zahlreiche private und kirchliche Wohlfahrtsverbände sowie freie Träger (in großer Zahl auch Selbsthilfeorganisationen) Integrationsmaßnahmen durchführen.

5.4 Integration wird von der Bundesregierung als "Eingliederung in das wirtschaftliche, soziale und kulturelle Leben in der Bundesrepublik Deutschland" (BMI 1993: 5) bestimmt. Die Eingliederung in das politische Leben ist bei dieser engen Definition ausdrücklich ausgenommen, was zu einer "Sollbruchstelle" der erreichbaren Integrationsziele durch eine solche inkonsequente Integrationsstrategie führt. Mit dem hier positiv besetzten Begriff der Integration wird ausgedrückt, daß den seit 1955 angeworbenen ausländischen Arbeitnehmern und ihren Familien "eine gleichberechtigte Teilhabe am wirtschaftlichen und gesellschaftlichen Leben" (BMJ 1994; 13) ermöglicht werden soll. Als Ziel der Integration gilt "nachbarschaftliches und kollegiales Miteinander, als Leben in beiderseitigem Respekt vor der jeweiligen Eigenart des anderen" (BMJ 1994: 13).

Diese Integrationspolitik unterscheidet sich von Assimilation, wie sie gegenüber Aussiedlern, zugewanderten Diaspora-Deutschen *(ethnic Germans)* aus den mittel- osteuropäischen und den GUS-Ländern weitgehend erfolgreich praktiziert wird, vor allem in ihrer Verknüpfung mit einer strikten Begrenzung der Zugangstore der Migration.

Integration soll "unter Wahrung der kulturellen Identität" (BMJ 1994: 69) erfolgen. Gemeint sind besondere Fördermaßnahmen im Bildungsbereich. Doch geht es der Bundesregierung bei der Bekämpfung der Fremdenfeindlichkeit in der Erziehung explizit weniger um die materiellen Ursachen von Gewalttätigkeit. Genannt werden: "Arbeitslosigkeit, Wohnungsnot, gesellschaftliche Desintegration, als beunruhigend empfundene, zeitweise sprunghaft angestiegene Zuwanderung von Asylbewerbern u.a.)". Es gehe eher um die geistigen und moralischen Voraussetzungen, die zu ihrer Überwindung [der Fremdenfeindlichkeit] angesprochen werden können" (BMJ 1994: 69).

Zu den wichtigsten Maßnahmen zur Integration zählen neben der schulischen Bildung die Programme des Bundesministeriums für Arbeit und Sozialordnung. Dieses finanziert zum Beispiel deutsche Sprachkurse und Maßnahmen zur Berufsvorbereitung und sozialen Eingliederung junger Ausländer (MBSE) - und insbesondere von jungen Frauen - in Höhe von insgesamt 92 Millionen DM (1993) - bei jährlich 86.000 jugendlichen Ausländern, die ins erwerbsfähige Alter kommen. Die Projekte werden seit 1995 unter dem Stichwort "Bekämpfung der Fremdenfeindlichkeit" verhandelt.

5.5 Tatsächlich gibt es durch die unzureichende Gewährung rechtlicher Gleichstellung - was insbesondere durch die Hinnahme von doppelter Staatsangehörigkeit relativiert werden könnte - eine Hierarchisierung von Aufenthaltstiteln nach dem Ausländergesetz, die seit den Zeiten der Anwerbung bis heute weitgehend mit sozialer Teilung einhergeht. Diese ausdifferenzierte Hierarchie von gewährten, teilweise gewährten und nicht gewährten Rechten von Deutschen über Unionsbürgern bis hin zu Gastarbeitern und ihren Nachkommen und Ausländern mit unterschiedlich begrenzten Aufenthaltstiteln macht den Kern der institutionellen, d.h. legalen Diskriminierung in Deutschland aus. Durch diese Hierarchie nämlich wird es in Deutschland zu einem Privileg, ein Deutscher zu sein, wie es umgekehrt zu einem Stigma werden kann, ein Ausländer zu sein.

Prekär ist diese Differenzierung insbesondere durch das durch die Novellierungen laufend bestätigte Definitionsmonopol der Legislative und das Interpretationsmonopol der Exekutive (das im Asylrecht sogar mit Begrenzungen der Appellationsmöglichkeiten vor der Verwaltungsgerichtsbarkeit einhergeht), die keiner mittelbaren Kontrolle durch Wahlen unterliegen. Da die ausländische Wohnbevölkerung nicht über die explizit Deutschen vorbehaltenenen Grundrechte verfügt und daher u.a. kein Wahlrecht besitzt, ist es um so wichtiger, daß der entscheidende Artikel 3 (3) des Grundgesetzes nicht mehr weitgehend deklaratorischen Charakter erhält.

Ausländer sind gerade nicht Teil der Volkssouveränität (der Wahlbürger) und haben als Rechtsobjekte nur marginale politische Einflußmöglichkeiten, ihre Interessen selbst

wahrzunehmen. Sie sind vielmehr auf die notwendigerweise paternalistische Solidarität von Ausländerbeauftragten und -beiräten, Kirchen und Gewerkschaften, diplomatischen Vertretungen und Nichtregierungsorganisationen angewiesen.

5.6 Mit dem Ausländergesetz vom Januar 1991 ist die Differenzierung zwischen bleibeberechtigten und befristet bleibeberechtigten Ausländern ausgeweitet worden. Allerdings soll die "Erwartenssicherheit" (BMJ 1994: 14) der ausländischen Wohnbevölkerung im Hinblick auf eine Verbesserung ihres Aufenthaltstitels - bis hin zum Anspruch auf Einbürgerung - dadurch gestärkt werden, daß der Ermessensspielraum der Ausländerbehörden durch gesetzliche Ansprüche auf Erteilung oder Verlängerung einer Aufenthaltserlaubnis reduziert worden ist.

Auch sind die Kriterien für Anspruchs- zu Lasten von Ermessenseinbürgerungen erweitert worden, was allerdings allein in Berlin zu einem Stau von 40.000 unbearbeiteteten Anträgen durch die Behörden geführt hat. Aus Gleichstellungsgesichtspunkten problematisch ist dies aufgrund der noch immer bestehenden großen Ermessensspielräume der Ausländerbehörden bei der Gewährung oder Versagung der zahlreichen unterschiedlichen Rechtstitel auf Aufenthalt nach dem Ausländergesetz.

5.7 Die Bundesregierung geht zu Recht davon aus, daß das Ausländer- und das Asylverfahrensgesetz "von ihrem Regelungsgehalt her eine Differenzierung [im Hinblick auf die Staatsangehörigkeit] zwingend erfordern" (BMJ 1994: 36). Zu fragen ist allerdings, ob der restriktionistische Regelungsgehalt dieser tatsächlichen Zuwanderungsbegrenzungsgesetze den grundgesetzlichen, wie den internationalen Normen zur Bekämpfung der Fremdenfeindlichkeit sowie der in Deutschland anerkannten internationalen Asyl- und Menschenrechte zwingend so entspricht. So wird diskutiert, ob das erklärte Ziel der deutschen Migrationssteuerung, der "Abwehr" von Zuwanderung, nicht implizit auch Fremdenfeindlichkeit beförderte. Diese beiden Ebenen der Zuwanderungsbegrenzung, wie der menschenrechtlichen Regelungen zur Bekämpfung der Fremdenfeindlichkeit stehen in keinem unmittelbaren kausalen Zusammenhang. Gerade darum ist es geboten, daß mit Hilfe einer Anwendung der menschenrechtlichen Normen die restriktionistischen Regelungen überprüfbar bleiben.

Das benannte Ziel der Integration von Ausländern kann letztlich nur in der "Aufhebung" des Rechtsstatus des Ausländers liegen; es kann ohne die tatsächliche rechtliche Gleichstellung nicht erreicht werden. Zwar ist auch rechtliche Gleichstellung eine notwendige, aber keine hinreichende Voraussetzung zur Integration. Denn wie sich Schutz und Hilfe z.B. für politisch Verfolgte menschenrechtlich wechselseitig bedingen, müssen auch Gleichstellung (oder Antidiskriminierung) und Förderung (*positive action)* von Ausländern und ethnischen Minderheiten zusammengesehen werden.

Quotenregelungen *(affirmatitve action, equal opportunities)* zur positiven Diskriminierung von Ausländern und ethnischen Minderheiten gegenüber Deutschen haben aufgrund der individualrechtlichen Menschenrechtstradition in Deutschland (gegenüber einer auch Gruppenrechte berücksichtigenden Tradition wie in den U.S.A. oder in Großbritannien) keine verfassungsrechtliche Chance. Allerdings wurden in mehreren Bundesländern inzwischen Gleichstellungsgesetze für Frauen mit Bezug auf den Grundgesetzartikel 3 (3) wirksam, die Förderpläne und indirekte Quotierungen durch die bevorzugte Einstellung von Frauen im öffentlichen Dienst verbindlich gemacht haben. Frauen können gegen Diskriminierungen zudem inzwischen durch Paragraphen 611a des Bürgerlichen Gesetzbuches auch klagen. In der Rechtspraxis hat sich jedoch gezeigt, daß diese Regelung nicht greift. Es fehlen zudem wirksame Sanktions- und Schadensersatzregelungen. Denkbar ist durchaus, daß in den kommenden Jahren auch im Bereich der fehlenden Schutzrechte für Ausländer und ethnischen Minderheiten ähnliche positive Entwicklungen, wie sie von Frauen erreicht wurden, durchsetzbar werden.

Diskutiert wird auch ein Bündnis der ethnischen und sozialen Gruppen, die unter dem besonderen Schutz und besonderer Hilfen des Staates stehen: Ältere, Behinderte, Homosexuelle, Familien, Kinder und Jugendliche, Obdachlose, politisch Verfolgte sowie nationale Minderheiten und Religionsgemeinschaften. Dies könnte jedoch zur Gefahr einer nicht intendierten Polarisierung

zwischen "Benachteiligten" und Nicht-Benachteiligten führen. Ein richtiger Grundsatz ist es daher, die Integration von Ausländern und ethnischen Minderheiten durch weitgehende rechtliche und tatsächliche Gleichstellung zu ermöglichen. Allerdings sollte nicht übersehen werden, daß eine solche Gleichstellung wirksame Integrationsmaßnahmen (v.a. für Zugänge zum Arbeitsmarkt z.B. durch die Förderung schulischer und beruflicher Qualifizierung) nicht ersetzen kann.

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VI. CONCLUSIONS:

NECESSARY ELEMENTS OF A EUROPEAN DIRECTIVE AGAINST RACISM

1 .PAPER OF THE SECRETARIAT GENERAL OF THE EALDH (OUTLINE JANUARY 1998),

Peter Kratz, Assistant of Secretary General of the EALDH:

Die Richtlinie soll Artikel 6 A des Amsterdamer Vertrages ausfüllen:

„Unbeschadet der sonstigen Bestimmungen dieses Vertrages kann der Rat im Rahmen der durch den Vertrag gegebenen Zuständigkeiten der Gemeinschaft auf Vorschlag der Kommission und nach Anhörung der Europäischen Parlaments einstimmig geeignete Vorkehrungen treffen, um Diskriminierungen aus Grünen des Geschlechts, der Rasse, der ethnischen Zugehörigkeit, der Religion oder des Glaubens, einer Behinderung, des Alters oder der sexuellen Ausrichtung zu bekämpfen."

Im folgenden geht es nur um Diskriminierungen aus Gründen der Rasse und der ethnischen Zugehörigkeit.

Nachdem der Vertrag von Maastricht in Säule III, Artikel K: Zusammenarbeit in den Bereichen Justiz und Inneres, die justitielle Zusammenarbeit in Zivil- und in Strafsachen zur „Angelegenheit von gemeinsamem Interesse“ erklärte, kann die Zuständigkeit der EU prinzipiell bejaht werden. Um so mehr, als die Erfahrung zeigt, daß rassistische Diskriminierungen und Straftaten oftmals die EU-Binnengrenzen überschreitend vorbereitet und begangen werden (vgl. Art. K.3 (2) b) Vertrag von Maastricht).

Die Zuständigkeit im Bereich der Migration inklusive Asylgewährung (Vertrag von Maastricht, Artikel K) und in den Bereichen des Zugangs zu Kapital, Waren und Dienstleistungen sowie der Arbeits- und Wohnmöglichkeiten (freier Waren-, Dienstleistungs- und Kapitalverkehr, Freizügigkeit, Niederlassungsfreiheit) ist ohnehin gegeben (vgl. EG-Vertrag, III. Teil).

I. Definition

Die Richtlinie muß eine Definition von „Diskriminierung“ bzw. „Gleichbehandlung“ beinhalten, wie sie z. B. das „Internationale Übereinkommen zur Beseitigung jeder Form von Rassendiskriminierung“ in Artikel 1 (1) enthält:

„In diesem Übereinkommen bezeichnet der Ausdruck ‚Rassendiskriminierung‘ jede auf der Rasse, der Hautfarbe, der Abstammung, dem nationalen Ursprung oder dem Volkstum beruhende Unterscheidung, Ausschließung, Beschränkung oder Bevorzugung, die zum Ziel oder zur Folge hat, daß dadurch ein gleichberechtigtes Anerkennen, Genießen oder Ausüben von Menschenrechten und Grundfreiheiten im politischen, wirtschaftlichen, sozialen, kulturellen oder jedem sonstigen Bereich des öffentlichen Lebens vereitelt oder beeinträchtigt wird.“

Die Definition der „Starting Line“ ist weitergehend, indem sie die Staatsangehörigkeit als Diskriminandum hinzusetzt:

„In dieser Richtlinie bedeutet der Begriff ‚Rassendiskriminierung‘ jegliche Unterscheidung, Ausgrenzung, Einschränkung oder Bevorzugung aufgrund von Rasse, Hautfarbe, Abstammung, Staatsangehörigkeit oder nationaler bzw. ethnischer Herkunft mit dem Ziel bzw. der Folge, die Anerkennung, Inanspruchnahme oder Achtung der Menschenrechte und Grundfreiheiten oder die

Beteiligung am politischen, wirtschaftlichen, sozialen, kulturellen Leben oder in jedem sonstigen Bereich des öffentlichen Lebens zu verbieten oder zu beeinträchtigen.“

Die European Commission Against Racism and Intolerance des Europarates (ECRI; „Guiding Principles“, Kap. II. 11.) verlangt, daß Ausnahmen von einem generellen Diskriminierungsverbot auf der Basis des Staatsangehörigkeitsrechts sehr selten sein sollen und nur auf objektiven, klar definierten und nicht-rasstistischen Kriterien beruhen dürfen.

II. Katalog der Lebensbereiche

Als Ergänzung und Verdeutlichung der allgemeinen Definition muß die Richtlinie einen Katalog der Lebensbereiche enthalten, in denen es besonders häufig zu Diskriminierungen kommt und in denen demzufolge besondere Aktivitäten gegen Diskriminierungen nötig sind. Die „Starting Line“ nennt (Art. 1):

„- Ausübung einer beruflichen Tätigkeit, ob als Angestellter oder als Selbständiger;
- Zugang zu jeder Tätigkeit bzw. jedem Posten, Entlassungen und sonstige Arbeitsbedingungen;
- soziale Sicherheit;
- Leistungen im Bereich des Gesundheitswesens und der Fürsorge;
- Ausbildung;
- berufliche Orientierung und Fortbildung;
- Wohnungswesen;
- Bereitstellung von Waren, Einrichtungen und Dienstleistungen;
- Beteiligung am gesellschaftlichen, kulturellen und öffentlichen Leben.“

Boothman ergänzt (4.):

- Mitgliedschaft in Organisationen
- Behandlung durch staatliche Institutionen wie Polizei oder Gefängnisse

Hierbei tritt u. U. das Problem der EU-Zuständigkeit wieder auf; vgl. aber EG-Vertrag III. Teil, Titel VIII: Zuständigkeit auch für (berufliche) Bildung; und EG-Vertrag III. Teil, Titel IX: Zuständigkeit auch für die Pflege der Kultur und des gemeinsamen kulturellen Erbes, einschließlich des audiovisuellen Bereichs, allerdings „unter Ausschluß jeglicher Harmonisierung der Rechts- und Verwaltungsvorschriften der Mitgliedstaaten“.

III. Ziviles Klagerecht, Zuständigkeit des EuGH

Um zu verhindern, daß die Richtlinie das Schicksal des „Internationalen Übereinkommens zur Beseitigung jeder Form von Rassendiskriminierung“ – insbesondere von dessen Artikel 2 (1) – ereilt, muß die Richtlinie die Einklagbarkeit des Diskriminierungsverbotes in den nationalen Rechtssystemen fordern und die Zuständigkeit des Gerichtshofs der Europäischen Gemeinschaften bei Diskriminierungen durch EU-Recht vorsehen.

Vor der Anrufung des Gerichts ist eine Schlichtungsinstanz einzuschalten (Boothman 12.).

Der Zugang zur Zivilklage gegen Diskriminierungsfälle muß sowohl betroffenen einzelnen Individuen als auch für diese stellvertretend in bestimmter Weise zu registrierenden antirassistischen Organisationen bzw. Interessenvertretungen der Diskriminierungsopfer und antirassistischen staatlichen Institutionen (Ausländerbeauftragte, Ombudsleute usw.) offenstehen (Boothman 8., Starting Line Art. 3, 4. d).

Die Beweislast sollte grundsätzlich den Klägern obliegen (Boothman 11.), jedoch sollte eine Mutmaßung für eine Diskriminierung gelten, wenn der Kläger einen Tatbestand oder eine Reihe von Fakten desselben Täters aufzeigen kann, die eine Diskriminierung darstellen würden; der Täter sollte in diesem Falle die Nichtdiskriminierung beweisen müssen (Boothman 11.; Starting Line Art. 4).

Dem Kläger muß es möglich sein, sich ausreichender Hilfestellung vor Gericht bzw. vor der Schlichtungsinstanz zu bedienen, um seine Klage durchzubringen (ECRI II., 13.)

Die Zivilklage muß entweder abgewiesen werden oder als Ergebnis die Nichtigkeit der diskriminierenden Handlung feststellen und gegebenenfalls Schadensersatz und/oder Schmerzensgeld sowie gegebenenfalls positive Handlungen des Täters (wie z. B. Teilnahme an antirassistischen Fortbildungsveranstaltungen; Durchführung eines antirassistischen Programms im Betrieb, Boothman 7.) festlegen.

IV. Strafbarkeit

Das Diskriminierungsverbot muß (bei absichtsvoller Diskriminierung) strafbewehrt sein (ECRI II. 7.; Starting Line Art. 3, 1.; Boothman 7.).

Die Strafbewehrung muß das rassistische Motiv einer Diskriminierung strafverschärfend wirken lassen (ECRI, II. 7.).

Die absichtsvolle Diskriminierung aus rassistischem Motiv muß Offizialdelikt sein (ECRI, II. 13.)

Die Beweislast obliegt dem Ankläger (Starting Line, Art. 4 c)).

Die Strafbarkeit muß auch für die Verantwortlichen staatlicher Handlungen mit diskriminierenden Folgen gelten.

V. Gesetzesdurchforstung

Die Richtlinie muß die Forderung enthalten, daß die einzelstaatlichen Gesetze und staatlich legitimierten Texte wie z. B. Lehrpläne, Lehrmaterialien und Schulbücher nach möglichen Diskriminierungen durchforstet und gegebenenfalls entsprechend dem Diskriminierungsverbot geändert werden, weil sie ansonsten dem Gemeinschaftsrecht widersprächen (Starting Line, Art. 2; Boothman 6.; ECRI, II. 59.).

VI. Statistiken, Berichte

Es sollen staatlicherseits von den Mitgliedstaaten öffentliche Statistiken erhoben und geführt werden:

- über Verteilungen der Vertretung von Minderheiten in gesellschaftlichen Feldern, um Diskriminierungen oder die Gefahren von Diskriminierung feststellen zu können (Boothman 15.; ECRI, II. Teil D.)
- über Fälle von Diskriminierung im zivil- und strafrechtlichen Bereich.

Solche Statistiken und Informationen sollen auch von Einzelpersonen, Organisationen und Betrieben, die Personen beschäftigen bzw. am Waren-, Kapital- und Dienstleistungsverkehr und am sonstigen gesellschaftlichen Verkehr teilhaben, erhoben und gesammelt werden, um gegebenenfalls die Erfüllung der Verpflichtung zur Gleichbehandlung nachweisen zu können (Selbstbeobachtungsverpflichtung) (Boothman 10.). Eine Verpflichtung zur regelmäßigen Offenlegung dieser Informationen und/oder zur Offenlegung im Konfliktsfalle muß enthalten sein (Boothman 10.).

Die Regierungen der Mitgliedsstaaten müssen in zweijährigem Turnus der Europäischen Stelle zu Beobachtung von Rassismus und Fremdenfeindlichkeit in Wien öffentlich Bericht erstatten, inwieweit es Verstöße gegen das Diskriminierungsverbot gegeben hat; die Beobachtungsstelle faßt die Länderberichte zu einem öffentlichen Bericht zusammen (Boothman 15.; Starting Line, Art. 9).

VII. Beschäftigungsprogramme

Die Richtlinie muß den freien und gleichen Zugang aller Qualifizierten zu allen Teilen des öffentlichen Dienstes fordern und gegebenenfalls Förderprogramme zur Beschäftigung unterrepräsentierter Bevölkerungsgruppen vorsehen (ECRI, II. 22., 23., 45.; Boothman 13., 14. nur im Ausnahmefall dafür). Problem mit dem deutschen Beamtenrecht.

Dasselbe gilt für alle anderen Berufssparten.

Durch entsprechende Förderungsprogramme der beruflichen und gesellschaftspolitischen Aus- und Fortbildung muß bei diskriminierten Minderheiten die objektive Basis zur gleichberechtigten Teilnahme in allen gesellschaftlichen Bereichen geschaffen werden (ECRI, II. 26., 27., 65.).

VIII. Institutionen als Unterstützung, Ombudsleute

Die Richtlinie soll die Verpflichtung zur Einrichtung von unabhängigen, staatlichen Ombudsstellen für Personen enthalten, die sich rassisch diskriminiert fühlen (Starting Line, Art. 3, 4. e); Boothman 9.; ECRI, II. 14.).

Die Ombudsstellen müssen das Recht zur selbständigen Untersuchung von Beschwerden über Diskriminierungsfälle, zur umfassenden rechtlichen Beratung und Unterstützung von Diskriminierungsopfern und zur eigenen Klage gegen Diskriminierungstäter haben und personell und finanziell diesen Erfordernissen entsprechend ausgestattet sein (Boothman 9.; ECRI, II. 15.; Starting Line,
Art. 3, 4.e)).

Die Ombudsstellen müssen auch Öffentlichkeitskampagnen gegen rassistische Diskriminierung und Kampagnen zur Bekanntmachung der Antidiskriminierungs-Richtlinie und der rechtlichen Möglichkeiten, sich Diskriminierungen zu erwehren, durchführen können und finanziell und personell entsprechend ausgestattet sein (ECRI, II. 16., 17., 38., 39.).

Die Ombudsstellen sollten auch spezielle Aufklärungs- und Trainingskurse für bestimmte exponierte Berufsgruppen, z. B. bei Polizei und Justizvollzug, machen können (ECRI, II. 41. – 44.).

Auch die Arbeit antirassistischer Nichtregierungsorganisationen soll in der Richtlinie gewürdigt werden. Die NGO's sollen für ihre Arbeit gegen Diskriminierung und zur Bekanntmachung der Antidiskriminierungsrichtlinie staatliche Gelder erhalten (ECRI, II. 79.)

IX. Bildungsprogramme zur Richtlinie

Die Richtlinie muß neben der Möglichkeit zur Öffentlichkeitsarbeit der Ombudsstellen auch die Verpflichtung vorsehen, daß die Mitgliedstaaten Informationskampagnen durch öffentliche Bildungseinrichtungen oder durch Nichtregierungsorganisationen durchführen bzw. finanzieren, die sowohl die Fähigkeit zum Ziel haben, rassistische Diskriminierungen zu erkennen, als auch das Wissen um die rechtlichen Möglichkeiten, rassistische Diskriminierungen zu bekämpfen (ECRI, II. 56., 57.; Starting Line, Art. 3, 2.).

Solche Bildungsprogramme sollen auch und in besonderer Weise für solche Personengruppen durchgeführt werden, die als Angehörige des Staatsdienstes oder als Verantwortliche von Organisationen und Betrieben, die Personen beschäftigen bzw. am Waren-, Kapital- und Dienstleistungsverkehr und am sonstigen gesellschaftlichen Verkehr teilhaben und durch die Natur ihrer Entscheidungen in besonderer Weise der Gefahr ausgesetzt sind, zu diskriminieren.

Die freiwillige Selbstkontrolle der Medien, eine Berichterstattung, die rassistische Diskriminierung zur Folge haben kann, zu unterlassen, soll ermuntert werden (ECRI, II. 69., 71., 72.; Starting Line, Art. 3, 3.).

X. Elements of a European Directive Against Racism (Outline)

The Directive shall complete Art. 6 A of the Amsterdam Treaty:

"Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

Following only discrimination based on racial or ethnic origin is considered.

The responsibility of the EU follows from pillar III, Art. K of the Maastricht Treaty (cooperation in the fields of justice and the interior), that declared the judicial cooperation in civil and penal law a matter of common interest. The responsibility for migration, asylum, business, labour, housing is given by the EC Treaty.

1. Definition

The Directive has to include a definition of "discrimination" and/or "equality / equal treatment", as in the "International Convention on the Elimination of All Forms of Racial Discrimination", Art. 1 (1):

"In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

The definition of the "Starting Line" also includes nationality as a discriminating item.

The European Commission Against Racism and Intolerance of the European Council demands to "pay special attention to achieving equal treatment for foreigners in civil and administrative law by limiting differences in treatment as far as possible and ensuring that exceptions on grounds of nationality are very few and far between and are based on objective, clearly defined and non-racist criteria".

2. Enumeration of special fields

The Directive should enumerate special fields of life where racial discrimination appears increased, as:

- employment or related contractual relationship
- education, including vocational guidance and training
- housing
- goods, facilities and services
- entry and membership of Clubs etc.
- professional activity
- social security, health and welfare benefits
- governmental activities e.g. policing, prisons
- participation in social, cultural, religious and public life

3. Civil Rights: Right to Bring an Action, Responsibility of the European Court

The Directive has to include the right for the discriminated individuals as well as for organisations "with a legitimate interest" (Boothman) and for Ombudspersons to bring an action against

discrimination, at national courts and at the Court of the European Communities, if it is a discrimination by the EU or if the discrimination offends European law.

There should be institutions for pre-judicial agreements.

The evidence should be exhibited by the complainant. A presumption of discrimination should be raised where a complainant can show there is a fact or series of facts which would if not rebutted amount to direct or indirect discrimination; in that case the accused should proof the equal treatment.

It has to be ensured that victims of discrimination can receive assistance tailored to their needs before the courts or pre-judicial institutions.

The reasoned suit should end up as declaration of the invalidation of the discriminating act, injunction, damage, imposition of positive action directions and / or an action plan against discrimination.

4. Penalty

Unlawful racial discrimination – private and official / governmental - should in general be a punishable law offence.

The intention of stringently punishing racist offence should be demonstrated by enabling the offender’s racist motives to be directly targeted and aggravating the penalty.

Racist offences have to be regarded as breaches of the peace for which the offender can be prosecuted ex officio.

The evidence has to be exhibited by the prosecutor.

5. Revising Legislation

Legislation and governmental acting and also school textbooks have to be revised, expurgating items which could convey hatred and generate racist and ethnic hostility or even discrimination and therefore could offend against European law.

6. Statistics, Reports

There should be officially collected and published data which will assist in assessing and evaluating the situation and experiences of groups which are particularly vulnerable to racism, xenophobia, intolerance and discrimination.

It have to be collected and published data on discrimination acts and racist offences.

It has to be a duty on all organisations providing employment or supplying goods, services or facilities to collect information that will enable them to monitor whether or not they are providing equal treatment and a duty on these organisations to disclose this information if they receive a reasoned suspicion or complaint of discrimination.

Member states have to be obliged to submit periodic and public reports to the European office to regard racial abuse in Europe that has been established in Vienna which summarises and publishes the national reports every two years.

7. Promotion Programs

The Directive has to guarantee that recruitment and promotion in public service and in private business are demonstrably based on equality of opportunity and that the recruitment from minority groups is encouraged.

The Directive has to encourage promotion programs to increase genuine equality of opportunity by introducing special training measures to help people from minority groups to enter all levels of social life, especially to enter the labour market, to enter higher education, and measures to support and encourage them for business development by entrepreneurs.

8. Ombudspersons, NGOs

Every member state should be obliged to establish a national statutory body with powers and resources to:

- work towards the elimination of unlawful racial discrimination and promote equality of opportunity and good race relations between different groups by public campaigns and special campaigns for special social groups
- produce codes of practice
- consider complaints of racial discrimination
- investigate complaints of institutional discrimination
- provide legal and other supports to victims
- encourage or conduct relevant research

The Directive has to demand national and European support of voluntary organisations which combat racial discrimination and assist the integration of immigrants, as well as organisations defending human rights in general.

9. Anti-racist Education, Publishing the Directive's demands

The Directive has to demand governmental and NGOs promotion programs to develop the ability to identify racial abuse, prejudice and discrimination as well as to increase the knowledge about the possibilities of fighting racism by legal measures.

Promotion program for special social groups (as police, prison etc.) shall be set up.

Self-regulation by the media, not to report in a way that might increase racial prejudice, abuse and discrimination, has to be encouraged.

XI. QUELLEN:

European Commission Against Racism and Intolerance (ECRI):
ECRI's Guiding Principles and Future Role
Council of Europe, CRI (95) 26 Addendum (11 December 1995)

Starting Line. Vorschlag an das Europäische Parlament, den Rat, die Kommission und die Mitgliedstaaten der Europäischen Gemeinschaft für eine Richtlinie des Rates zur Beseitigung der Rassendiskriminierung (Von einer Gruppe unabhängiger Sachverständiger ausgearbeiteter Text), Februar 1993

Chris Boothman, Commission for Racial Equality, U. K.: Paper at Round Table III „Elements of a Directive Against Racial Discrimination in Europe“ of the European Colloquy of the EALDH „Legislation and Procedures Against Racism in Europe“, Strasbourg, 9 November 1997

2. Synopsis: Results of the Strasbourg Colloquy of the EALDH

Thomas Schmidt, Secretary General of the EALDH,
and Peter Kratz, Assistant of Secretary General

Sources of the following synopsis are:

Chris Boothman, Commission for Racial Equality, U. K.: Paper at Round
Table III „Elements of a Directive Against Racial Discrimination in Europe“
of the European Colloquy of the EALDH „Legislation and Procedures Against Racism in Europe“,
Strasbourg, 9 November 1997

European Commission Against Racism and Intolerance (ECRI):
ECRI’s Guiding Principles and Future Role
Council of Europe, CRI (95) 26 Addendum (11 December 1995)

Starting Line. Vorschlag an das Europäische Parlament, den Rat, die Kommission und die Mitgliedstaaten der Europäischen Gemeinschaft für eine Richtlinie des Rates zur Beseitigung der Rassendiskriminierung (Von einer Gruppe unabhängiger Sachverständiger ausgearbeiteter Text), Februar 1993

The New Starting Line: Proposal for a Draft Council Directive concerning the Elimination of Racial Discrimination (Text prepared by the Starting Line Group), March 1998

EJDM Elements of a Directive against Racial Discrimination in Europe: Results of the Colloquy in Strasbourg

problem	solution	remarks
1. Should we propose a Directive to fill the Art. 6 A of the Amsterdam Treaty, or a Regulation or a Convention against racism for more than the EU member states?	A Directive would state definite goals to be achieved but allow the flexibility different Member States would need to achieve them, for example, in differing systems of administrative law. Second, a Directive is also politically the most realistic option. The Protocol to the Amsterdam Treaty on "The application of the principles of subsidiarity and proportionality" states that Directives will be preferred to Regulations and framework Directives to detailed measures. Third, a Directive will involve the national Parliaments in framing the Directive's principles in national measures. This would promote political and public debates on combating racism. (source: Starting Line)	
2. Should it cover violations only of civil law or of penal law or both?		
3. Considering, that parts of the politics of the European countries are racist themselves, what about the possible effects of an anti-racist European Community Directive?	The potential impact of a European Community Directive on Racial Discrimination should not be inhibited by the fact that there will be political extremists who oppose it. There is a pressing need for a directive because there is no effective international mechanism for combating racism or protecting its victims. (source: Boothman)	
4. Should the joining of new member states to the EU depend on the acceptance of such a Community Directive?	There is no reason why membership of the European Union should not be conditional on the acceptance of all Community Directives. (source: Boothman)	

problem	**solution**	**remarks**
5. Is the term of racism / racial abuse sufficiently cleared up (e.g. in the context of asylum rights) and sufficiently consensual to fix it up in a Community Directive?	There are terms like “equal treatment” and “racial discrimination” that have been used in international and European instruments for many years. Any continuing difficulties with definitions should be capable of resolution by lawyers. There is no reason why asylum seekers should not have the same rights as other citizens. (source: Boothman)	
6. Should there be a definition - of discrimination? or - of equal treatment?	The Starting Line gives both: - the term “equal treatment” signifies the absence of any discrimination, direct or indirect, based on racial or ethnic origin, or religion and belief - the term “racial or religious discrimination” shall mean any distinction, exclusion, restriction or preference based on racial or ethnic origin, or religion and belief which has the purpose or the effect of nullifying or impairing the recognition, enjoyment or exercise of human rights and fundamental freedoms or participation in the political, economic, social, cultural, religious life or any other public field (source: Starting Line)	

problem	solution	remarks
7. Which rights should be protected against discrimination?	• all human rights an fundamental freedoms and participation in the fields of political, economic, social, cultural and public life (source: Boothman) • human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life (source: CERD) • recognition, enjoyment or exercise of human rights and fundamental freedoms or participation in the political, economic, social cultural, religious life or any other public field (source: Starting Line)	
8. Which forms of discrimination / discriminating behaviour should be covered?	• direct racial discrimination, indirect racial discrimination, victimisation, pressure to discriminate, discriminatory instructions, discriminatory advertisements, persistent discrimination (source: Boothman) • any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life (source: CERD) • any distinction, exclusion, restriction or preference based on racial or ethnic origin, or religion and belief which has the purpose or the effect of nullifying or impairing the recognition, enjoyment or exercise of human rights and fundamental	

problem	solution	remarks
	freedoms or participation in the political, economic, social, cultural, religious fife or any other public field (source: Starting Line) • making it a criminal offence to use expressions inciting to hatred, discrimination or violence against racial, ethnic, national or religious groups or against their members on the grounds that they belong to such a group (source: ECRI)	
9. Which personal ethnic characteristics should be mentioned as objects of protection? What means 'race', what means 'racism'?"		Not answered. (In the discussion of the colloquy, the attention was drawn to the U.K. judgement that members of the Sikh religion have to be considered as an ethnic group.)
10. Who should be protected	• - anyone who has been treated less favourably on the ground of their race, colour, descent, nationality, national or ethnic origin; - anyone who has suffered a detriment as a consequence of an unjustified condition, requirement or practice that disproportionately adverse impact on people of their 'racial group'; - anyone who has been victimised as a consequence of making a complaint of racial discrimination or assisting another to make a complaint of racial discrimination (source: Boothman) • racial, ethnic, national or religious groups or their members on the grounds that they belong to such a group (source: ECRI)	

problem	solution	remarks
11. Should nationality / citizenship be accepted as a discriminating item?	The first version of the Stating Line (1993) says yes, the New Starting Line (1998) does not mention "nationality" or "citizenship" any more	
12. Should "religion" and "belief" be mentioned in the Directive as possible origins of discrimination?	The first version of the Starting Line (1993) does not, the New Starting Line (1998) does mention "religion" and "belief". Also ECRI does mention "religion" as a possible origin of discrimination	What about discriminating "religions" and "beliefs"?
13. Should the directive enumerate special fields of possible discrimination?	• the Directive should particularise protection in the following fields: employment or related contractual relationships; education; vocational guidance and training; housing; goods, facilities and services; entry and membership of Clubs etc.; professional activity; social security, health and welfare benefits; governmental activities e.g. policing, prisons; participation in social, cultural, religious and public life (source: Boothman) • in particular in the following areas: the exercise of a professional activity, whether salaried or self-employed; access to any job or post, dismissals and other working conditions; social security; health and welfare benefits; education; vocational guidance and vocational training; housing; provision of goods, facilities and services; participation in political, economic, social, cultural, religious fife or any other public field (source: Starting Line) • in the political, economic, social, cultural or any other field of	

problem	solution	remarks
	public life (source: CERD)	
14. Should the Directive cover both public and private situations?	generally yes, however there may be a need to look closely at the impact on ‘personal relationship’ situations e.g. advertisements relating to personal relationships (source: Boothman)	
15. How can a Directive offer protection from racial abuse for which a public institution should take responsibility e.g. police or prison service?	- impose an obligation on all member states to introduce legislative measures to impose a statutory duty on all public bodies to take action to ensure that their various functions are carried out with due regard to the need - (a) to eliminate unlawful racial discrimination, - and (b) to promote equality of opportunity, and good relations, between persons of different racial groups, and to publish a report of such action annually - impose an obligation on all member states to introduce legislative measures to render unlawful any actions on the part of public servants which are racially discriminatory (source: Boothman)	
16. Which legal and penal consequences should racial discrimination and racist offence have?	• - discrimination should in general be a civil law offence with the penalties: declaration; injunction; damages, including general and special and recognising injury to feelings; including aggravated damages and / or exemplary damages where appropriate; the imposition of positive action directions and / or an action plan; - encourage member states to consider the introduction of specific aggravated crimes which involve a racial motivation (source: Boothman) • - enabling the offender’s racist motives to be directly targeted and aggravating the penalty	

problem	solution	remarks
	- racist offences have to be regarded as breaches of the peace for which the offender can be prosecuted ex officio (source: ECRI)	
17. Should the directive include the right for associations or only for individuals to bring an action?	• to bring an action ex officio by the prosecutor (source: ECRI) • the right of organisations concerned with the defence of human rights and in particular with the struggle against racism and xenophobia to institute or support legal actions in civil, administrative and criminal courts enforcing the rights granted under this Directive and provisions in national law granting protection against racial and religious discrimination (source: Starting Line) • - every individual victim should have the right to bring an action - every organisation with a legitimate interest should be able to support an individual or initiate their own legal action - it should be possible to initiate group or class actions (source: Boothman)	
18. Have associations to be authorised, when they want to bring an action, and by whom have they to be authorised?		
19. Should the Directive include Ombuds-persons?	• - obligation to establish a national statutory body with powers and resources to: - work towards the elimination of unlawful racial discrimination; - promote equality of opportunity and good race	

problem	solution	remarks
	relations between different groups; - consider complaints of racial discrimination; - provide legal and other support to victims; - investigate complaints of institutional discrimination - produce codes of practise; - encourage or conduct relevant research (source: Boothman) • - setting up bodies (e.g. Ombudsman / Mediator or Commission) whose role will include monitoring and facilitating the effective implementation of any anti-racist legislation; - give this body independent status, specific responsibilities and a remit covering all aspects of community life at national, regional or local level; - expressly acknowledge the important role played by this body specialising in action against racism and intolerance by providing it with sufficient staff and funds to extend it s activities to all areas of community life (e.g. by launching information, awareness-raising and education campaigns, holding conferences and seminars, working with non-governmental organisations, publishing reports and giving interviews); (source: ECRI) • appropriate bodies shall be established to which complaints of any activities which are contrary to the principles set out in this Directive may be submitted; such bodies shall be required to investigate all complaints made to them and shall be granted all necessary powers to investigate any complaint; such bodies shall reach conclusions on all complaints, which conclusions shall be public unless otherwise requested by the victim	

problem	solution	remarks
	(source: Starting Line)	
20. How should access to proceedings be made easier?	• - a duty on all organisations providing employment or supplying goods, services or facilities to collect information that will enable them to monitor whether or not they are providing equal treatment; - the benefits of legal aid and free legal consultation must be extended to proceedings in disputes relating to racial discrimination; - a duty on all organisations providing employment or supplying goods, services to disclose equal treatment monitoring information if they receive a reasoned suspicion or complaint of discrimination; - a presumption of discrimination will be raised where a complainant shows a series of facts which would if not rebutted amount to direct or indirect discrimination; - those charged with the job of adjudication to receive adequate training to understand and deal effectively with the issues; - hearing to be listed within a reasonable time of the complaint (source: Boothman) • ensure that victims can receive assistance tailored to their needs before the courts (source: ECRI) • appropriate and effective measures whereby every person who considers himself to haven been the object of discrimination contrary to the principles set out in this Directive may have recourse to a legal remedy, in accordance with the most	

problem	solution	remarks
	effective national procedures (source: Starting Line)	
21. Who should exhibit the evidence / burden of proof?	• - in general, the onus should be on the complainant to establish his or her case, however there should be a duty on all organisations providing employment or supplying goods, services to disclose relevant equal treatment information if they receive a reasoned suspicion or complaint of discrimination; - further a presumption of discrimination should be raised where a complainant can show there is a fact or series of facts which would if not rebutted amount to direct or indirect discrimination (source: Boothman) • Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged, because discrimination of the kind referred to ... has occurred, establish, before a court ot other competent authority, facts from which may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that no such discrimination has occurred. The plaintiff shall benefit from any doubt that may remain. (source: Starting Line)	
22. Should there be institutions for pre-judicial agreements?	encourage institutions to enter into legally binding undertakings without the need to institute legal proceedings or go forward to a court hearing (source: Boothman)	

problem	solution	remarks
23. Should the Directive demand the review of legal norms in national constitutions and laws with regard to discrimination?		
24. Should the directive include promotion plans and quota regulations for minorities? 25. Should governments and private business be obliged by the Directive to promote certain minorities?	• - No. In certain limited circumstances it could make provision for lawful positive action, where there are documented significant special needs or significant under-representation or where there are members of those racial groups who are most disadvantaged. - The Directive should also address the issue of racial equality in relation to the awarding of public contracts (source: Boothman) • - to collect data which will assist in assessing and evaluating the situation and experiences of groups which are particularly vulnerable to racism, xenophobia, anti-semitism and intolerance - undertake national and local surveys on experience of racial / ethnic violence and harassment and experience of discrimination - collect data on service provision by and access to employment in public and government departments and agencies for the different groups which are particularly vulnerable to racism, xenophobia, anti-semitism and intolerance - set up procedures for using these data systematically to monitor the impact of existing policies, evaluate the effectiveness of new policies, and inform future policy developments - introduce measures to ensure that recruitment and promotion in government service are demonstrably based on equality of	

problem	solution	remarks
	opportunity and adopt objective and specified criteria for each recruitment and promotion decision; - encourage the recruitment of police and support staff from minority groups; - actively and by appropriate means, encourage employers to show sensitivity to and respect for cultural differences; - support training courses in cultural sensitivity, awareness of prejudice and knowledge of anti-discriminatory legislation targeted at personnel staff responsible for recruitment, staff who come directly into contact with members from ethnic minorities or may be faced with conflicts between different groups, and staff with line management responsibilities for ensuring non-discriminating behaviour in their organisation; - introduce special training measures to help people from minority groups to enter the labour market; - provide support and encouragement for business development by entrepreneurs from minority groups, which may include special advice to ensure equal access to finance, business advice, training in business skills such as management techniques and planning, and knowledge of the relevant regulations and how to comply with them; - review different ethnic groups' educational performance and their patterns of entry to and performance in higher education and, if necessary, intervene at early stages in the education process (source: ECRI)	
26. How should compliance with the directive be monitored / enforced?	• - collect data which will assist in assessing and evaluating the situation and experiences of groups which are particularly vulnerable to racism, xenophobia, anti-semitism and	

problem	**solution**	**remarks**
	intolerance; - undertake national and local surveys on experience of racial / ethnic violence and harassment and experience of discrimination; - collect data on service provision by and access to employment in public and government departments and agencies for the different groups which are particularly vulnerable to racism, xenophobia, anti-semitism and intolerance (source: ECRI) • - obligation to adopt and comply with the directive within a fixed time; - obligation to submit periodic reports to the European Commission who should report to the European Parliament and European Council every two years (source: Boothman) • - Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive no later than two years after the adoption of the Directive. They shall forthwith inform the Commission thereof. - Every two years following the expiration of the period of two years ..., Member States shall transmit to the Commission all information concerning progress made in the application of this Directive and trends in the use of provisions contained therein, to enable the Commission to draw up a report for the Council and the European Parliament. (source: Starting Line)	

problem	solution	remarks
27. Should there be more European charges for governmental and private anti-racism activities?	- support voluntary organisations which combat racial discrimination and assist the integration of immigrants, as well as organisations defending human rights in general; - set up forums for dialogue between the authorities and organisations representing minorities and human rights organisations (source: ECRI)	